DEQ Montana Department of Environmental Quality

BOARD OF ENVIRONMENTAL REVIEW
OCTOBER 24, 2025

AGENDA TABLE OF CONTENTS

AGENDA

ADMINISTRATIVE ITEMS

I.A.1. AUGUST 22 MEETING MINUTES pg 0001
I.B.1. 2026 BOARD CALENDAR pg 0005

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. Decisions on how to proceed with active cases

1. BER 2015-06 WQ, Westmoreland Absaloka Mine pg 0006
2. BER 2019-05 OC, Western Energy Area F
3. BER 2019-06 WQ, Alpine Pacific Utilities pg 0010
4. BER 2022-04 OC, Valley Garden Land & Cattle LLC pg 0015

III.b. BER 2022-05 SM pg 0027
In the Matter of: Appeal and Request for Hearing Regarding Rosebud Mine Area B Amendment 5 Permit Number C1984003B

III.c. BER 2025-02 SM pg 0254
In Matter of: Decker Coal Company's Request for Hearing Regarding Permit C1983007 (East Decker Mine)

NEW CONTESTED CASE

IV.a. BER 2025-04 SM pg 0262
In the Matter of: The Notice of Appeal and Request for Hearing by Westmoreland Absaloka Mining LLC for Coal Surface Mine Permit C1985005

GENERAL PUBLIC COMMENT

BOARD CHAIR UPDATE

V.a. Board discussion regarding managing new cases going forward

V.b. Update standard prehearing order pg 0461

BOARD OF ENVIRONMENTAL REVIEW
MEETING MINUTES

AUGUST 22, 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 Julia Altemus, Jennifer Rankosky and Joe Smith.

Vice Chair Stacy Aguirre and Board member Allan Payne were not present.

Roll was called and a quorum was present.

Board Attorney Present
None

DEQ Personnel Present

Board Secretary: Sandy Moisey Scherer
Board Liaison: Deputy Director James Fehr
DEQ Director: Sonja Nowakowski
DEQ Legal: Catherine Armstrong, Kirsten Bowers, Sam King, Lee McKenna, and Isabelle Nebel
DEQ Air, Energy and Mining: Emily Lodman
DEQ Enforcement: Chad Anderson

Other Parties Present
Laurie Crutcher — Crutcher Court Reporting
Dana Hupp – Worden Thane, P.C.
Vicki Marquis – Crowley Fleck
Samuel Yemington – Holland & Hart
Diane Conradi – Conradi Law Office
Todd Briggs and David Kuzara, Westmoreland

I. ADMINISTRATIVE MATERIALS

A. **Review and Approve Minutes**

A.1. **The Board will vote on adopting the June 20, 2025, Meeting Minutes.**

Board member Smith moved to APPROVE the June 20, 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 asked if the Board had any comments regarding cases. The Board did not have any questions.

III. ACTION ITEMS

a. **Retain Dana Hupp as Interim Counsel.**

In the last meeting, Board Counsel Oomens announced she was leaving ALS and moving to the Public Service Commission. The Board did not know at that time that ALS would be closed by the Department of Justice, effective August 22, 2025. The Board has two needs with respect to Legal Counsel - one is General Counsel for the Board, and second is for Hearing Examiners. Chair Simpson said that he had received approval from the Governor's Office to retain Interim Counsel, for a period of one year. Chair Simpson introduced Dana Hupp, and she gave a short introduction.

Board member Smith moved to RETAIN Dana Hupp as Interim Counsel for the Board. Board member Rankosky SECONDED. Discussion ensued.

The motion PASSED unanimously.

In light of recent Hearing Examiner changes, Chair Simpson will be reviewing indexes for BER cases with Dana Hupp, to get a better understanding of where cases stand procedurally.

b. **In the Matter of Appeal and Request for Hearing by Alpine Pacific Utilities regarding Issuance of MPDES Permit No. MtX000164, BER 2019-06 WQ.**

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

Chair Simpson noted that ALS was the Hearing Examiner for both cases. ALS will close August 22, 2025.

Board member Smith moved to have the Board ASSUME jurisdiction of both Alpine Pacific Utilities, BER 2019-06 WQ, and Westmoreland Resources, Inc. Absaloka Mine, BER 2015-06 WQ, until the next Board meeting. Board member Rankosky SECONDED. Discussion ensued.

Kirsten Bowers of DEQ and Vicki Marquis of Crowley Fleck gave a short update for the Absaloka case (BER 2015-06 WQ). No new action is necessary to accept the new petition filed.

The motion PASSED unanimously.

IV. GENERAL PUBLIC COMMENT

No public comment was given.

V. BOARD CHAIR UPDATE

a. **FY25 Legal Cost Summary Update**

Chair Simpson spoke about the FY25 legal cost summary. The Board did not have any questions.

b. **Hearing Examiner Status**

The Board has need for Hearing Examiners. Chair Simpson said there is a completed and signed MOU between DEQ and DLI Office of Administrative Hearings for Hearing Examiners. Deputy Director Fehr spoke in greater detail about the MOU. Dana Hupp will work in coordination with Judy Bovington of DLI as the liaison with the Office of Administrative Hearings when the Board would like to assign cases to Hearing Examiners.

Chair Simpson asked for a motion to affirm that the Chair assume authority for duties for routine and non-substantive issues, until the next Board meeting.

Board member Rankosky motioned to AFFIRM that Chair Simpson assume authority for duties for routine and non-substantive issues, until the next Board meeting. Board member Smith SECONDED. Discussion ensued.

The motion PASSED unanimously.

VI. ADJOURNMENT

Board member Rankosky MOVED to adjourn the Board Meeting; Board member Smith SECONDED. The motion PASSED unanimously. The meeting was adjourned at 9:53 A.M.

Board of Environmental Review August 22, 2025, minutes approved:

_____
DAVID SIMPSON
CHAIR
BOARD OF ENVIRONMENTAL REVIEW

_____
DATE

DEQ Montana Department of Environmental Quality

Board of Environmental Review 1520 East 6 Avenue P.O. Box 200901 Helena, MT 59601 (406) 444-5225

2026 MEETING SCHEDULE

Dates subject to change.

January								February								March								April						
Su	Mo	Tu	We	Th	Fr	Sa		Su	Mo	Tu	We	Th	Fr	Sa		Su	Mo	Tu	We	Th	Fr	Sa		Su	Mo	Tu	We	Th	Fr	Sa
				1	2	3		1	2	3	4	5	6	7		1	2	3	4	5	6	7					1	2	3	4
4	5	6	7	8	9	10		8	9	10	11	12	13	14		8	9	10	11	12	13	14		5	6	7	8	9	10	11
11	12	13	14	15	16	17		15	16	17	18	19	20	21		15	16	17	18	19	20	21		12	13	14	15	16	17	18
18	19	20	21	22	23	24		22	23	24	25	26	27	28		22	23	24	25	26	27	28		19	20	21	22	23	24	25
25	26	27	28	29	30	31										29	30	31						26	27	28	29	30		

May								June								July								August						
Su	Mo	Tu	We	Th	Fr	Sa		Su	Mo	Tu	We	Th	Fr	Sa		Su	Mo	Tu	We	Th	Fr	Sa		Su	Mo	Tu	We	Th	Fr	Sa
					1	2			1	2	3	4	5	6					1	2	3	4								1
3	4	5	6	7	8	9		7	8	9	10	11	12	13		5	6	7	8	9	10	11		2	3	4	5	6	7	8
10	11	12	13	14	15	16		14	15	16	17	18	19	20		12	13	14	15	16	17	18		9	10	11	12	13	14	15
17	18	19	20	21	22	23		21	22	23	24	25	26	27		19	20	21	22	23	24	25		16	17	18	19	20	21	22
24	25	26	27	28	29	30		28	29	30						26	27	28	29	30	31			23	24	25	26	27	28	29
31																								30	31					

September								October								November								December						
Su	Mo	Tu	We	Th	Fr	Sa		Su	Mo	Tu	We	Th	Fr	Sa		Su	Mo	Tu	We	Th	Fr	Sa		Su	Mo	Tu	We	Th	Fr	Sa
		1	2	3	4	5						1	2	3		1	2	3	4	5	6	7				1	2	3	4	5
6	7	8	9	10	11	12		4	5	6	7	8	9	10		8	9	10	11	12	13	14		6	7	8	9	10	11	12
13	14	15	16	17	18	19		11	12	13	14	15	16	17		15	16	17	18	19	20	21		13	14	15	16	17	18	19
20	21	22	23	24	25	26		18	19	20	21	22	23	24		22	23	24	25	26	27	28		20	21	22	23	24	25	26
27	28	29	30					25	26	27	28	29	30	31		29	30							27	28	29	30	31		

LEGEND

00	DOCUMENT SUBMITTAL DEADLINE DATES – ALL DOCUMENTS DUE TO BOARD SECRETARY BY NOON
00	BOARD PACKET POSTED TO WEB
00	BOARD MEETING DATES

Revised 9/22/25

Kirsten H. Bowers
Montana Department of
Environmental Quality
P.O. Box 200901
Helena, MT 59620-0901
Ph: (406) 444-4222
kbowers@mt.gov

Attorney for Montana Department of Environmental Quality

Victoria A. Marquis
Luke P. Poteat
CROWLEY FLECK PLLP
500 Transwestern Plaza II
P. O. Box 2529
Billings, MT 59103-2529
Ph: 406-252-3441
vmarquis@crowleyfleck.com
lpoteat@crowleyfleck.com

Attorneys for Westmoreland Absaloka Mining, LLC

Electronically Filed with the
Montana Board of Environmental Review
10/10/25 at 2:03 PM
By: *Sandy Moisey Scherer*
Docket No: BER 2015-06 WQ

BEFORE THE BOARD OF ENVIRONMENTAL REVIEW
OF THE STATE OF MONTANA

IN THE MATTER OF: WESTMORELAND ABSALOKA MINING, LLC's APPEAL AND REQUEST FOR HEARING REGARDING RENEWAL OF MPDES PERMIT NO. MT0021229.	CASE NO. BER 2015-06 WQ **JOINT MOTION FOR STAY**

The Montana Department of Environmental Quality ("DEQ") and Westmoreland Absaloka Mining, LLC ("Westmoreland") (collectively "the Parties"), through counsel, have consulted and jointly move for an order staying the above-captioned matter until June 1, 2026, to allow the Parties time to evaluate and propose a resolution of the matter. The Parties agree to consult and submit a joint status update on or before June 1, 2026. The Parties may mutually agree to request that the Board extend the June 1, 2026, deadline for good cause. If the parties cannot agree to an extended deadline or a proposed resolution of this matter on or before June 1, 2026, the Parties' joint status update will include a stipulated proposed scheduling order that includes deadlines for:

a. Submission by DEQ of its decisional record for the MPDES permit at issue in this matter. The decisional record must include all documents and other materials consulted and relied upon by DEQ when drafting and finalizing the MPDES permit. DEQ's decisional record will become a part of the Administrative Record for this contested case.

b. Disclosure of individuals with discoverable information that the disclosing party may use to support its claims or defenses and a copy of, or a description by category and location of, all documents and tangible things that are in the possession, custody, or control of the disclosing party and that the disclosing party may use to support its claims or defenses.

c. Disclosure of any expert and rebuttal expert witnesses and exchange of associated expert reports and curriculum vitae.

d. Completion of discovery. Discovery requests should be served at least 30 days prior to that date in order to allow time for responses to be served by the date for completion of discovery.

e. Preliminary motions including motions for summary judgment and motions *in limine,* with schedules for response and reply briefs, and requests for oral argument.

g. Exchange of lists of lay witnesses and copies of documents each party intends to offer at the hearing.

The BER, or its appointed Hearing Examiner, will set dates, locations, and times for prehearing conference and hearing.

Respectfully submitted this 10th day of October, 2025.

Montana Department of Environmental Quality

/s/ *Kirsten H. Bowers*
By /s/ Kirsten H. Bowers
Kirsten H. Bowers
Attorney for DEQ
Mont. Dept. of Environmental Quality
P.O. Box 200901
Helena, MT 59620-0901
(406) 444-4222

Westmoreland Absaloka Mining, LLC

/s/ *Victoria A. Marquis*
By /s/ Victoria A. Marquis
Victoria A. Marquis
Luke P. Poteat
CROWLEY FLECK PLLP
Attorneys for Westmoreland
500 Transwestern Plaza II
P. O. Box 2529
Billings, MT 59103-2529
406-252-3441
vmarquis@crowleyfleck.com
lpoteat@crowleyfleck.com

CERTIFICATE OF SERVICE

I hereby certify that on this 10th day of October, 2025, I caused to be served a true and correct copy of the foregoing document to all parties or their counsel of record as set forth below:

Dana L. Hupp, Board Attorney
Sandy Moisey Scherer, Board Secretary
Board of Environmental Review
1520 E Sixth Avenue
P.O. Box 200901
Helena, MT 59620-0901
dhupp@wordenthane.com
deqbersecretary@mt.gov

Victoria A. Marquis
Luke P. Poteat
CROWLEY FLECK PLLP
500 Transwestern Plaza II
P. O. Box 2529
Billings, MT 59103-2529
vmarquis@crowleyfleck.com
lpoteat@crowleyfleck.com

/s/ Loryn Johnson
Loryn Johnson, Paralegal
Montana Department of
Environmental Quality

Electronically Filed with the
Montana Board of Environmental Review
9/19/25 at 3:55 PM
By: *Sandy Moisey Scherer*
Docket No: BER 2019-06 WQ

Kirsten H. Bowers
Montana Department of
Environmental Quality
P.O. Box 200901
Helena, MT 59620-0901
Telephone: (406) 444-4222
kbowers@mt.gov

ATTORNEY FOR DEQ

Rick C. Tappan
Connlan W. Whyte
TAPPAN LAW FIRM, PLLC
7 West 6th Ave., Ste. 516
Helena, MT 59772
(406) 449-3383
rctappan@tappanlawfirm.com
cwhyte@tappanlawfirm.com

ATTORNEYS FOR ALPINE

BEFORE THE BOARD OF ENVIRONMENTAL REVIEW
OF THE STATE OF MONTANA

IN THE MATTER OF: THE NOTICE OF APPEAL AND REQUEST FOR HEARING BY ALPINE PACIFIC UTILITIES REGARDING ISSUANCE OF MGWPCS PERMIT NO. MTX000164	CAUSE NO. BER 2019-06 WQ **JOINT STATUS REPORT**

On December 19, 2024, Appellant Alpine Pacific Utilities, LLC ("Alpine") and the Montana Department of Environmental Quality ("DEQ") entered a Second Stipulation and Request for Retention of Board Jurisdiction ("Second Stipulation") to revise and update the Stipulation and Request for Retention of Board Jurisdiction dated September 14, 2020 ("First Stipulation"). On March 21, 2025, Alpine and DEQ jointly filed the First Amendment of the Second Stipulation and Request for Retention of Board Jurisdiction to modify Alpine's application for renewal and major modification of MTX000164 to maintain the daily flow limit of

52,000 gpd at existing Outfall 001 and to seek a daily flow limit of 100,000 gpd at proposed Outfall 002. *See* Document Sequence No. 49, electronically filed herein on March 21, 2025. Hereinafter, Alpine and DEQ are referred to collectively as "the Parties." The Parties are proceeding to renew and modify Montana Ground Water Pollution Control System (MGWPCS) Permit No. MTX000164 ("the Permit") to maintain the permitted discharge at Outfall 001 at 52,000 gallons per day (gpd) and permit new outfall (002), within the Glacier Park International Airport ("GPIA") property, at up to 100,000 gpd. Pursuant to Paragraph 13 of the First Amendment of the Second Stipulation and the Board of Environmental Review's ("BER") Order Requesting Status Report, the Parties file this Joint Status Report.

1. DEQ made a tentative determination to renew and modify MTX000164 in accordance with the Montana Water Quality Act (MWQA), Title 75, chapter 5, MCA, administrative rules adopted to implement the MWQA at ARM Title 17, chapter 30 including Administrative Rules of Montana (ARM) 17.30.1024(3) and (4), and Paragraph 6 of the First Amendment of the Second Stipulation. DEQ's tentative permit decision resulted in preparation of a draft MGWPCS permit, a fact sheet (briefly setting forth the factual and legal bases of the draft permit), and an environmental assessment (EA).

2. On August 18, 2025, DEQ initiated public notice of the tentative determination to renew and modify MTX000164 including draft permit,

supporting fact sheet, and EA. The draft permit, fact sheet, and EA were available for public comment for 30 days after the date of public notice. A public hearing was not requested, therefore, the public comment period closed on September 18, 2025.

3. As of this date, DEQ received no public comments on the tentative permit. DEQ will allow three business days for any comments sent via the United States Postal Service that are postmarked on or before September 18, 2025. DEQ expects to make a final determination to renew and modify MGWPCS Permit No. MTX000164 before October 20, 2025. All substantive public comments will be retained by the department and considered in the final determination in accordance with ARM 17.30.1024(8) through (10).

4. Pursuant to Paragraph 11 of the First Amendment of the Second Stipulation, Alpine will move to dismiss this Appeal with prejudice within 30 days of DEQ's final permit decision.

5. Under § 75-5-403, MCA and ARM 17.30.subchapter 10, Alpine may request a new contested case hearing before the BER to appeal DEQ's final permit decision regarding renewal and modification of MGWPCS Permit No. MTX000164 based on any reasonably ascertainable issues and reasonably available arguments that were raised by the close of the public comment period.

6. Alpine may also seek further modification of MTX000164 to increase the

maximum permitted total discharge at Outfall 001 from 52,000 gpd to 100,000 gpd subject to Alpine's submission of updated fate and transport modeling utilizing the QUAL2K water quality model, characterization of the existing water quality in Trumbull Creek, and characterization of the connectivity of Trumbull Creek to the receiving groundwater and the facility's effluent discharge.

Dated this 19th day of September, 2025.

Montana Department of Environmental Quality

By: */s/ Kirsten H. Bowers*
Kirsten H. Bowers
Attorney for DEQ

By: */s/ Rick C. Tappan*
Alpine Pacific Utilities, LLC.

CERTIFICATE OF SERVICE

I hereby certify that on this 19thday of September, 2025, I caused to be served a true and correct copy of the foregoing document to all parties or their counsel of record as set forth below:

Sandy Moisey Scherer Secretary, Board of Environmental Review Montana Department of Environmental Review P.O. Box 200901 Helena, MT 59620-0901 deqbersecretary@mt.gov	[ ] U.S. Mail [ ] Overnight Mail [ ] Hand Delivery [ ] Facsimile [X] E-Mail
Dana Hupp Legal Counsel, Board of Environmental Review WORDEN THANE P.C. 321 West Broadway, Suite 300 P.O. Box 4747 Missoula, MT 59806-4747 dhupp@wordenthane.com	[ ] U.S. Mail [ ] Overnight Mail [ ] Hand Delivery [ ] Facsimile [X] E-Mail
Tatiana Davila, Bureau Chief Montana Department of Environmental Quality Water Protection Bureau P.O. Box 200901 Helena, MT 59620-0901 Tatiana.Davila@mt.gov	[ ] Hand Delivery [ ] Facsimile [X] E-Mail

/s/ Catherine Armstrong
Catherine Armstrong, Paralegal
Montana Dept. of Environmental Quality

LEE M. McKENNA
Department of Environmental Quality
Legal Unit, Metcalf Building
P.O. Box 200901
1520 East Sixth Avenue
Helena, Montana 59620-0901
(406) 444-6559
lee.mckenna@mt.gov

Attorney for Respondent Montana Department of Environmental Quality

Electronically Filed with the
Montana Board of Environmental Review
10/1/25 at 2:15 PM
By: *Sandy Moisey Scherer*
Docket No: BER 2022-04 OC

BEFORE THE BOARD OF ENVIRONMENTAL REVIEW OF THE STATE OF MONTANA

IN THE MATTER OF: APPEAL AND REQUEST FOR HEARING BY VALLEY GARDEN LAND & CATTLE LLC REGARDING ISSUANCE OF OPENCUT MINING PERMIT #674, AMENDMENT #3	CASE NO. BER 2022-04 OC **Second Status Update**

Pending Motions:

1. **Motion for Judicial Notice of HB 599** (amending the Opencut Act) filed September 25, 2023.
2. **Cross Motions for Summary Judgment** (stayed over DEQ's objection).
    a. Opening Summary Judgment Briefs were filed. (Plaintiff's original filings failed to follow the requirements of the Initial Procedural Order.

Over DEQ's objection, the Hearing Examiner granted Plaintiff leave to re-file, which it did.)

b. Summary judgment briefing was stayed at Plaintiff's request (October 20, 2023), over DEQ's objection.

c. The stay on summary judgment briefing should be lifted and a deadline set for Response and Reply Briefs. DEQ's summary judgment motion presents and dispatches each legal issue raised by VGLLC in this contested case. Furthermore, standing, subject matter, jurisdiction, and other threshold justiciability requirements must be decided as a matter of law before any other matters. *Larson v. State,* 2019 MT 28, ¶ 45. Because this case can, and should, be decided in favor of DEQ and A.M. Welles on summary judgment and dismissed — thereby making the remaining motions moot — in the interests of judicial economy, *DEQ's summary judgment motion should be decided before the motions in limine*.

d. Even if the Hearing Examiner chooses to consider all motions concurrently, DEQ's Motion for Summary Judgment, Brief in Support, Statement of Undisputed Facts, and the supporting Affidavits of DEQ Scientist Bryan Allison and A.M. Welles Employee Ben Kaluza provide critical information and context which would allow the Hearing

Examiner to utilize DEQ's "experience, technical competence, and specialized knowledge," § 2-4-612(7), MCA, in deciding the issues and without which it would not be possible to accurately rule on other motions in this case. If DEQ's motion for summary judgment is not decided before the motions in limine, at a minimum, it should be reviewed first and then decided concurrently with the motions in limine.

e. Oral argument for summary judgment motions should be scheduled.

f. A decision on summary judgment motions will govern next steps.

3. **Motions in Limine:** After DEQ's motion for summary judgment is decided, if any issues remain for a contested case hearing under MAPA provision § 2-4-612, MCA, all motions in limine can be decided together. A hearing on motions in limine was held on April 26, 2025. The Board Secretary has a copy of the audio and video recordings.

   a. The remaining motions in limine are:

      i. DEQ's motion in limine for an order prohibiting VGLLC from referring to filed discovery, AR-000001 to AR000247, as "the administrative record" in the contested case process because only § 2-4-614, MCA creates the administrative record after the BER issues final written findings.

ii. DEQ's motion in limine for an order prohibiting Valley Garden Land & Cattle LLC (VGLLC) from offering testimony, evidence, argument, or in any way referring to, or making a claim under, any constitutional provision, statute, rule, or law other than the Montana Opencut Act during the Contested Process, under Title 2, ch. 4, part 6.

iii. VGLLC's motion in limine to limit scope of hearing. VGLLC's motion requests that the hearing officer exclude all fact and expert witnesses from DEQ and A.M. Welles, in favor of only allowing VGLLC's witnesses to testify. This motion is directly contrary to the requirements of § 2-4-612(1) and (7), MCA, which requires that opportunities be afforded *to all parties* to testify and present evidence and that the agency's experience, technical competence, and specialized knowledge may be used in evaluating evidence. VGLLC's incorrectly attempts to apply the standard for judicial review set forth in § 2-4-702, MCA, instead of the contested case process before the Board of Environmental Review as required by § 2-4-612, MCA.

Primary issues for Board action:

1. Assign this case to Ms. Dana Hupp as Hearing Examiner.
2. Schedule a visit to the DSL Site for Ms. Hupp (per Order dated April 11, 2024).
3. After the Site visit, Ms. Hupp will be in the best position to:
    a. decide motions, and, if the case is not resolved on summary judgment,
    b. preside over a contested case hearing and prepare proposed findings of fact and conclusions of law for Board review.

Other action item:

Review and issue a full opinion for DEQ's motion for reconsideration (filed December 21, 2023) of the former Hearing Examiner's October 20, 2023 Order (staying summary judgment briefing). On April 26, 2024, the former Hearing Examiner issued a memo order denying reconsideration stating that a full opinion with reasons and rationale would issue. It has not. The new Hearing Examiner should decide whether she elects to hear and decide DEQ's motion for reconsideration of the order suspending summary judgment briefing.

Status of Orders filed to date:

Order	Date filed	Status	Board Action Needed
Initial Procedural Order	August 18, 2022	Issued Order	None
Order (Declining to Remove Documents Improperly Named Administrative Record at This Time)	January 20, 2023	Issued Order	None.
Scheduling Order	February 24, 2023	Issued Order	None
Amended Scheduling Order	April 11, 2023	Issued Order	None
Order Extending Discovery Timeline	June 6, 2023	Issued Order	None
Order Amending Pre-Hearing Schedule	August 9, 2023	Issued Order	None
Order Granting DEQ's Motion for an Extension of the Deadline to File Motions	September 12, 2023	Issued Order	None
Order Suspending Summary Judgment Briefing	October 20, 2023	Issued Order	See "Other action item."
Order Setting Hearing	November 6, 2023	Issued Order. (Vacated by December 11, 2023 Order.)	None.
Order: Re Hearing (Zoom link)	December 1, 2023	Issued Order	None

Order Continuing Hearing	December 11, 2023	Issued Order	None
Order for Status Report	March 21, 2024	Issued Order	None
Order to file Expedited Response	April 11, 2024	Issued Order	None
Order for View of DSL Site	April 11, 2024	Issued Order	Schedule date for New Hearing Examiner to Visit DSL Site.
Memo Order Re: DEQ's Motion for Reconsideration	April 26, 2024	No formal order issued	Further action needed.
Order Requesting Status Report and Setting Conference	September 25, 2025	Issued Order	Board to assign case to new Hearing Examiner for site visit, determination of outstanding issues, motions, and next steps.

Respectfully submitted this 1st day of October, 2025.

MONTANA DEPARTMENT OF ENVIRONMENTAL QUALITY

By: */s/ Lee M. McKenna*
LEE M. McKENNA

Attorney for DEQ

CERTIFICATE OF SERVICE

I hereby certify that on the 1st day of October, 2025, a true and accurate copy of the foregoing document for BER 2022-04 OC was served by e-mail only, as follows:

David K. W. Wilson, Jr.
Anne Sherwood
Morrison, Sherwood, Wilson & Deola, PLLP
401 North Last Chance gulch
Helena, MT 59601
kwilson@mswdlaw.com
anne@mswdlaw.com

Dana Hupp
Legal Counsel, Board of Environmental Review
WORDEN THANE P.C.
P.O. Box 4747
Missoula, MT 59806-4747
dhupp@wordenthane.com
lhanson@wordenthane.com
dave.simpson375@gmail.com

Diane Conradi
Conradi Law Office
P.O. Box 4585
Whitefish, MT 59937
diane@landwaterlaw.com

Matthew Sack
Sack Law
1700 W. Koch, Suite 4
Bozeman, Montana 59718
matt@sacklawpllc.com

Sandy Moisey Scherer
Secretary, Board of Environmental Review
Montana Department of Environmental Quality
P.O. Box 200901
Helena, MT 59620-0901
deqbersecretary@mt.gov

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

DAVID K. W. WILSON, JR.
ANNE SHERWOOD
MORRISON SHERWOOD WILSON & DEOLA, PLLP
401 North Last Chance Gulch
Helena, MT 59601
(406) 442-3261 Phone
(406) 443-7294 Fax
kwilson@mswdlaw.com

DIANE CONRADI
CONRADI LAW OFFICE
P.O. Box 4585
Whitefish, MT 59937
(406) 471-5817 Phone
(888) 809-1474 Fax
diane@landwaterlaw.com

Attorneys for Petitioner
Valley Garden Land & Cattle LLC

Electronically Filed with the
Montana Board of Environmental Review
10/1/25 at 2:36 PM
By: *Sandy Moisey Scherer*
Docket No: BER 2022-04 OC

BEFORE THE BOARD OF ENVIRONMENTAL REVIEW OF THE STATE OF MONTANA

IN THE MATTER OF: APPEAL AND REQUEST FOR HEARING BY VALLEY GARDEN LAND & CATTLE LLC REGARDING ISSUANCE OF OPENCUT MINING PERMIT #674, AMENDMENT #3	CASE NO. BER 2022-04-OC **PETITIONER VALLEY GARDEN'S MOTIONS STATUS REPORT**

In response to the Board's September 24, 2025, Order, Valley Garden files its Motions Status Report.

By way of summary background, the last substantive activity in this case was the Hearing Examiner holding a hearing on outstanding motions *in limine* and DEQ's motion for a site visit on April 26, 2024. Prior to that, as the BER can see, this case had significant motions practice. In a March 21, 2024, Order, the Hearing Examiner requested the parties file status reports on the pending motions, which both parties did on March 29,

0023

2024, prior to the April 26, 2024 hearing. Valley Garden has used those status reports to update this status report.

Following that hearing, the motions *in limine* are still pending; the Hearing Examiner ruled in favor of DEQ's motion for a site visit and did conduct a site visit on May 15, 2024. Below is a list of the motions that Valley Garden believes remain outstanding.

Outstanding Motions

1. Valley Garden's Motion *in limine* and to limit hearing scope, filed September 8, 2023. This has been fully briefed and was heard by the Hearing Examiner on April 26, 2024 (following his denial the same day of DEQ's motion to reconsider hearing this motion before summary judgment was completed,) and is therefore **fully submitted and awaiting determination.**
2. DEQ's Motion for Judicial Notice of HB 599, filed September 25, 2023, fully briefed, heard by Hearing Examiner on April 26, 2024, therefore **fully submitted and awaiting determination**.
3. DEQ's Motion for Summary Judgment, October 3, 2023. Briefing paused by Hearing Examiner's October 30, 2023, Order and April 26, 2024, Memorandum. Prior to the pause, the parties had filed cross-motions for summary judgment, and briefs, on October 3, 2023. **Valley Garden believes that once the BER resolves the motions *in limine*, then briefing can recommence (responses and replies) and be completed on the summary judgment motions.**
4. DEQ's Motion *in limine* to Prohibit Reference to Administrative Record, October 3, 2023, fully briefed, heard by Hearing Examiner on April 26, 2024, therefore **fully submitted and awaiting determination.**

0024

5. DEQ's Motion *in limine* to Prohibit Referencing or Claiming Other Laws, October 3, 2023, fully briefed, heard by Hearing Examiner on April 26, 2024, therefore **fully submitted and awaiting determination**.
6. Valley Garden's Motion for Summary Judgment, filed October 3, 2023. Briefing paused by Hearing Examiner's October 30, 2023 Order. **Valley Garden believes that once the BER resolves the motions *in limine*, then briefing can recommence (responses and replies) and be completed on the summary judgment motions.**
7. Subsequently, DEQ filed a Notice of Supplemental Authority on May 7, 2024, to which Valley Garden responded and filed a related Motion to Strike, on May 10, 2024. DEQ filed its Response/Reply on May 24, 2024. This matter is also **fully submitted on briefs and awaiting determination.**

Valley Garden requests that the BER rule on the outstanding motions *in limine*, and subsequent motion to strike, *based on the briefing without a hearing*. Then the parties can complete summary judgment briefing and get the matter fully and finally submitted to the BER.

Dated this 1st day of October 2025.

MORRISON SHERWOOD WILSON & DEOLA

David K. W. Wilson, Jr.
Attorney for Plaintiff

CERTIFICATE OF SERVICE

The undersigned hereby certifies that on this 1st day of October 2025, a true and correct copy of the foregoing document was duly served by *electronic mail* upon the following:

Board of Environmental Review
Attn: Sandy Scherer
P.O. Box 200901
Helena, MT 59620
deqbersecretary@mt.gov
(mailed and emailed)

Dana Hupp
dhupp@wordenthane.com

Lane Hanson
lhanson@wordenthane.com

Lee McKenna
lee.mckenna@mt.gov

Matt Sack
matt@sacklawpllc.com

Diane Conradi
diane@landwaterlaw.com

Elena Hagen
ehagen2@mt.gov

/s/ Christian J. Gaub

BEFORE THE BOARD OF ENVIRONMENTAL REVIEW
OF THE STATE OF MONTANA

In re: Appeal and Request for Hearing Regarding Rosebud Mine Area B Amendment 5 Permit Number C1984003B	No. BER 2022-05 SM **ORDER ON MOTIONS FOR SUMMARY JUDGMENT**

I. INTRODUCTION

This matter is before Rob Cameron, Hearing Examiner for the Board of Environmental Review of the State of Montana on cross-motions for summary judgment relating to the issuance of Amendment 5 Permit No. C1984003B for the Rosebud Mine Area B. The Conservation Groups, the Montana Environmental Information Center and the Sierra Club (collectively referred to as "Conservation Groups"), appear through counsel Shiloh S. Hernandez and Derf Johnson. The Montana Department of Environmental Quality ("DEQ") is represented by Samuel J. King and Jeremiah R. Langston. Intervenor-Respondents Westmoreland Rosebud Mining, LLC, and the International Union of Operating Engineers, Local 400 (hereinafter "Westmoreland/Local 400"), are represented by Samuel R. Yemington, Sarah C. Bordelon, and William W. Mercer.

The parties have fully briefed their respective motions, oral argument has been heard, and the matter is now submitted for decision. Upon consideration of

the record, applicable law, and the arguments presented, the Hearing Examiner recommends the following ruling:

II. OPINION

The Conservation Groups challenge the issuance of the permit, asserting that DEQ failed to comply with statutory and regulatory requirements in its approval of Amendment 5. To succeed at summary judgment, a party must demonstrate that there are no genuine issues of material fact and that it is entitled to judgment as a matter of law.

As the parties seeking to overturn agency action, the Conservation Groups bear the burden of proving that DEQ's decision was arbitrary, capricious, an abuse of discretion, or otherwise contrary to law.

Upon thorough review of the record, the Hearing Examiner finds that the Conservation Groups have not met this burden. The evidence fails to show that DEQ's permitting decision was unlawful or unsupported by the record. In contrast, the evidence and legal arguments submitted by DEQ and Westmoreland/Local 400 (collectively referred to as "Respondents") demonstrate that the agency's actions were supported by substantial evidence, including detailed technical and scientific analysis, and were consistent with the applicable legal framework.

There is no dispute of material fact requiring an evidentiary hearing. The Conservation Groups have not presented evidence sufficient to rebut the presumption of regularity that attaches to agency decision-making. Accordingly, summary judgment in favor of DEQ and Westmoreland/Local 400 is appropriate. The Conservation Groups' motion for summary judgment is denied. The issuance of Permit No. C1984003B, Amendment 5, is affirmed as lawful and proper.

III. FINDINGS OF FACT

Having considered the full record, including the evidence submitted and the arguments advanced by all parties, the Hearing Examiner proposes the following:

A. The Rosebud Mine

1. Westmoreland Rosebud Mining, LLC ("Westmoreland") is the current operator and successor-in-interest of the Rosebud Mine, a long-established surface coal mine situated near Colstrip, Montana. JSUF at ¶ 1.[1]

2. The Rosebud Mine encompasses over 30,000 acres and, in 2020, supplied approximately 5.3 million tons of coal to the Colstrip Power Plant. AM5

[1] Respondents' Joint Statement of Undisputed Facts (Aug. 23, 2023), Joint Statement of Disputed Facts (Oct. 18, 2023), and Joint Supplement Statement of Undisputed Facts (Oct. 18, 2023) are cited as "JSUF", "JSDF", and "JSSUF", respectively, and exhibits cited therein are incorporated herein by reference. Supporting joint exhibits are cited here as "DEQ Ex."; Westmoreland's non-joint exhibits are cited as "WRM App. Ex." (Aug. 23, 2023).

Cumulative Hydrologic Impact Assessment (CHIA) at 14–15 (Pet'rs' SUF Exhibit 2). A smaller quantity of lower-grade coal is provided to the nearby Rosebud Power Plant. The mine operates across multiple permitted areas, designated as Areas A, B, C, D, and F. *Id.* at 14.

3. Coal mining in the Colstrip region dates to the 1920s. Commercial operations ceased mid-century following the transition of railroads to diesel engines but resumed in 1968 when the Montana Power Company reactivated the Rosebud Mine to support emerging energy needs. *Id.* at 13-14.

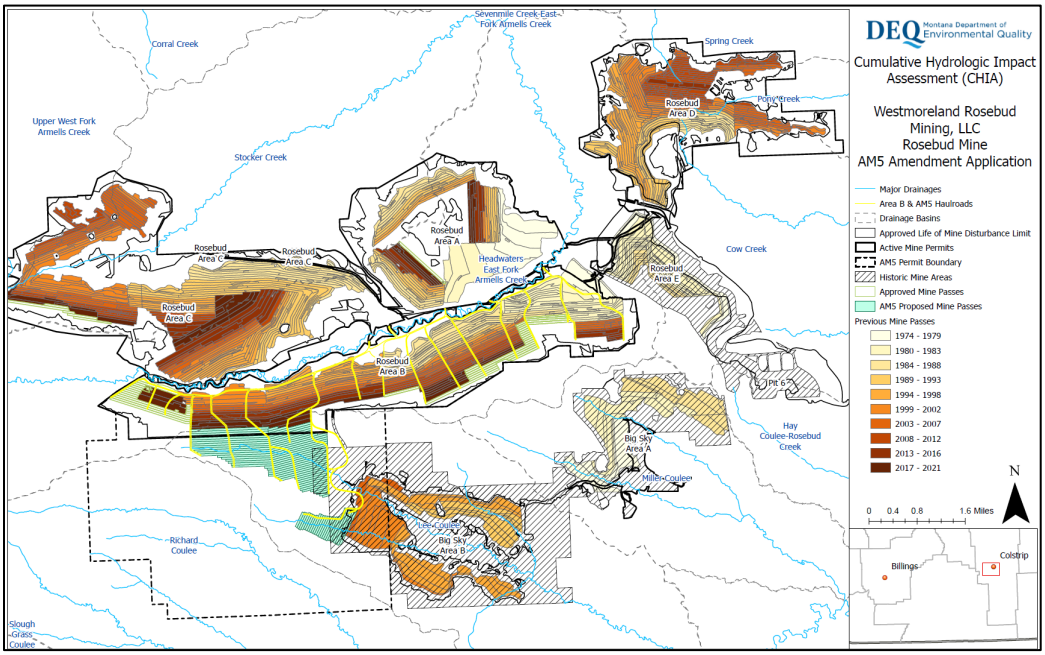
4. The mine's footprint spans the county line between Rosebud and Treasure Counties. JSUF at ¶ 6.

B. Amendment 5 to Area B Permit

5. On February 17, 2017, Westmoreland's predecessor-in-interest submitted an application to the Montana Department of Environmental Quality ("DEQ") seeking approval of Amendment 5 ("AM5") which serves to extend the footprint of the Rosebud Mine to the south and southwest and increase the Area B permit area by 9,108 acres. JSUF at ¶¶ 2, 4. AM5 Written Findings (Written Findings) at 1.

6. Specifically, AM5 authorizes strip mining of approximately 62.3 million tons of coal from 2,539 acres in the headwaters of Lee Coulee over a 21-year period. *Id.* at 11.

7. AM5 lies adjacent to active coal mining operations with the Rosebud Mine to the north, and the historic coal mining of the Big Sky Mine, which concluded in 2003, to the east and southeast (JSSUF at ¶ 10.) as illustrated below:



CHIA FIGURE 3-1: MINE PLAN (DEQ Ex. A (Attachment 1 (CHIA)) at 214)

8. The permit application submitted by Westmoreland includes voluminous documentation—spanning tens of thousands of pages—addressing hydrology, geology, climatology, vegetation, wetlands, soils, wildlife, and other environmental factors relevant to the expansion. JSUF at ¶ 7.

9. DEQ undertook an independent and comprehensive review of the probable hydrologic impacts of the proposed mining activities, relying on its internal team of technical and scientific experts. JSUF at ¶ 8.

10. In response to the AM5 proposal, the Conservation Groups submitted public comments raising concerns regarding the potential environmental effects of

the expansion, including impacts related to climate change, greenhouse gas emissions, hydrology, and local ecosystems. These concerns were supported by scientific studies and reports, including materials published by the United States Geological Survey and the Montana Institute on Ecosystems. (Pet'rs' SUF Exhibit 9, 10, and 13).

11. DEQ responded in detail to each of the comments raised by the Conservation Groups, addressing both legal and scientific objections. JSUF at ¶¶ 24-27.

12. On May 27, 2022, following its review, DEQ issued a decision approving a reduced version of AM5. DEQ concluded that the amendment, as approved, would not cause material damage to the hydrologic balance beyond the permit boundary. *Id*. at ¶¶ 16 and 28. DEQ deferred approving mining operations in the Richard Coulee drainage pending additional baseline data. *Id*. at ¶ 4.

13. DEQ's decision was documented through a series of formal decision documents, including the Cumulative Hydrologic Impact Assessment (CHIA), Response to Comments, and a detailed Written Findings and Record of Decision. These materials contain hundreds of pages of scientific and regulatory analysis. *Id*. at ¶ 17.

C. The Contested Case

15. On June 27, 2022, the Conservation Groups initiated a contested case proceeding under the Montana Administrative Procedure Act ("MAPA") by filing a Notice of Appeal with the Board of Environmental Review ("BER"). JSUF at ¶ 29.

16. In an Amended Notice of Appeal filed November 11, 2022, the Conservation Groups alleged three primary legal deficiencies in DEQ's approval of AM5:

> **Claim One:** That DEQ failed to include adjacent existing and historic mine sites in its cumulative impact assessment of the Lee Coulee alluvium violating ARM 17.24.314(5) and (32);
>
> **Claim Two:** That DEQ improperly authorized disturbance of an intermittent or perennial stream reach—specifically Wetland 4-2/2—in violation of ARM 17.24.651(1)-(2); and
>
> **Claim Three:** That DEQ failed to meaningfully consider global climate trends when evaluating reclamation viability, in violation of § 82-4-231(10)(q), MCA and ARM 17.24.405(6)(a).

JSUF at ¶¶ 30-34; DEQ Ex. C (Notice of Appeal); DEQ Ex. F (Amended Notice of Appeal).

17. BER subsequently delegated the contested case proceeding to a Hearing Examiner for adjudication. JSUF at ¶ 37.

18. Westmoreland/Local 400 were granted leave to intervene as Intervenor-Respondents in support of DEQ's decision.

D. Discovery

19. Discovery was conducted in accordance with the Montana Rules of Civil Procedure and pursuant to the Scheduling Order, as amended. See JSUF ¶ 43; Initial Procedural Order.

20. On January 25, 2023, the parties exchanged expert disclosures in accordance with the applicable procedural schedule. JSUF ¶ 53; Scheduling Order ¶ 5.

21. Rebuttal expert disclosures were exchanged on February 8, 2023. JSUF ¶¶ 57–58; Amended Scheduling Order ¶ 1.

22. The Conservation Groups identified Bruce Anderson as their sole expert in the field of hydrology. Mr. Anderson offered three principal opinions:

> As to **Claim 1**, Mr. Anderson opined that the Montana Department of Environmental Quality (DEQ) failed to consider cumulative impacts from ongoing and historical mining—including operations at the Rosebud Mine and the Big Sky Mine—in its material damage determination for the Lee Coulee alluvium.
>
> As to **Claim 2**, he asserted that the reach of Lee Coulee encompassing Wetland 4-2/2 constitutes an intermittent-to-perennial stream, receiving input from groundwater and lying below the local water table part of the year. He contended that the AM5 expansion would allow mining in this sensitive reach.
>
> As to **Claim 3**, Mr. Anderson asserted that climate change was aggravating both surface and groundwater conditions in the mine vicinity and that DEQ's cumulative hydrologic impact assessment omitted any analysis of such effects.

JSUF at ¶¶ 53-56; *see also* DEQ Ex. J; *see also* Order on Joint Motion to Strike Declaration of Bruce Anderson (Sept. 11, 2024) at 2–3.

23. DEQ designated Dr. Emily Lodman and Mr. Martin Van Oort, both hydrologists, to provide rebuttal expert testimony on all three claims. See DEQ's Expert Disclosure; Pet'rs' MSJ Reply (Dec. 21, 2023), Ex. 2.

24. Westmoreland/Local 400 designated four expert witnesses: Dr. Michael Nicklin and Mr. John Carstensen (hydrology), Ms. Penny Hunter (biota), and Mr. Steven Viert (wetlands), each offering rebuttal opinions to the Conservation Groups' claims. See Westmoreland/Local 400 Expert Disclosure; Pet'rs' SSDF (Dec. 21, 2023), Ex. 1.

25. In discovery responses dated March 9, 2023, the Conservation Groups identified Mr. Anderson as the individual knowledgeable regarding the factual and legal bases for all three claims, and directed Respondents to his previously disclosed opinions. JSUF ¶¶ 44–52.

26. The Conservation Groups did not supplement their discovery responses or disclosures thereafter. See Order on Mot. to Strike at 3.

27. On March 10, 2023, The Conservation Groups requested a site inspection of Lee Coulee, including Wetland 4-2/2, for the stated purpose of supporting Mr. Anderson's expert analysis and evaluating the opinions of Respondents' experts. See Pet'rs' Resp. to Mot. for Protective Order at 12 (May 4,

2023); see also Order re: Site Inspection and Anderson Deposition at 1 (June 28, 2023) (noting counsel's representation that Mr. Anderson could not testify without first visiting the site).

28. The Conservation Groups subsequently deposed Mr. Van Oort (May 24, 2023), Dr. Lodman (June 9, 2023), and Dr. Nicklin (June 29, 2023). JSUF ¶¶ 59, 104, 62.

29. A joint site inspection of the Lee Coulee drainage, including Wetland 4-2/2, occurred on July 12, 2023, with participation from the Hearing Examiner, counsel for all parties, and expert witnesses Mr. Anderson, Mr. Carstensen, and Dr. Lodman. JSUF ¶ 71.

30. Mr. Anderson was deposed on July 13, 2023. JSUF ¶ 71.

31. During his deposition, Mr. Anderson testified that his opinions were formulated with the assistance of the Conservation Groups' counsel and relied on documents provided by them. DEQ Ex. O (Anderson Dep. Tr.) at 61.

32. He further admitted that he conducted no independent hydrologic analysis and prepared no written expert report in support of his disclosed opinions. See Order on Mot. to Strike at 3.

33. Discovery concluded upon the completion of Mr. Anderson's deposition. See Order re: Site Inspection and Anderson Deposition.

E. Summary Judgment

34. On August 23, 2023, the parties submitted cross-motions for summary judgment, accompanied by Statements of Undisputed Facts. The motions sought summary judgment on Claims 1, 2, and 3.

35. Westmoreland/ Local 400 further moved for dismissal of the action on the grounds of lack of associational standing. See Westmoreland/Local 400's Motion for Summary Judgment at 9–10.

36. On October 18, 2023, the parties filed responsive pleadings, including Statements of Disputed Facts. Additionally, Respondents submitted Supplemental Statements of Undisputed Facts.

37. Summary judgment briefing concluded on December 21, 2023, with the submission of reply briefs by the parties and the filing of Conservation Groups' Supplemental Statements of Disputed Facts.

F. Motion to Strike the Declaration of Mr. Anderson

38. In support of their motion for summary judgment, Conservation Groups submitted a declaration from Mr. Anderson. See Order on Motion to Strike at 3.

39. The declaration contained significant information and analysis not previously disclosed during discovery and, by all indications, was developed after

Mr. Anderson's deposition and the close of the discovery period. See Order on Motion to Strike at 3–5.

40. Conservation Groups cited Mr. Anderson's declaration approximately eighty times in support of their claims and in opposition to the summary judgment briefs filed by the Respondents. See, e.g., Conservation Groups' Statement of Undisputed Facts, August 23, 2023; Conservation Groups' Statement of Disputed Facts, October 18, 2023; Conservation Groups' Supplemental Statement of Undisputed Facts, December 21, 2023.

41. Respondents jointly moved before the Hearing Examiner to strike Mr. Anderson's declaration from the record and to preclude Conservation Groups from relying on the information and analysis therein. See Joint Motion to Strike Declaration of Bruce Anderson, October 18, 2023.

42. The Hearing Examiner granted the motion, striking Mr. Anderson's undisclosed declaration from the record, and further prohibited Conservation Groups from relying on the contents of the declaration in their summary judgment filings. See Order on Motion to Strike at 5–6.

43. Conservation Groups' proposed undisputed facts, insofar as they relied on Mr. Anderson's declaration, are rejected. Where Conservation Groups' proposed undisputed facts were only partially supported by Mr. Anderson's declaration, such facts were given appropriate weight. See Initial Procedural Order

at 5 (Aug. 18, 2022) ("The Statement of Undisputed Facts must set forth in serial form each fact on which the party relies to support the motion, along with a pinpoint cite to the specific evidence to support each fact").

44. Conservation Groups' proposed disputed facts, to the extent they relied on Mr. Anderson's declaration, are also rejected. The corresponding proposed undisputed facts from Respondents are accepted as undisputed and incorporated herein by reference. Any disputed fact that was not accompanied by a pinpoint citation to specific evidence is treated as undisputed. See Initial Procedural Order at 5 (Aug. 18, 2022) ("Any 'disputed' fact must be accompanied by a pinpoint citation to the specific piece of evidence to oppose the fact. Failure to provide a pinpoint cite for a disputed fact will result in the fact being treated as undisputed").

Claim 1: Cumulative Impact Assessment

45. Conservation Groups assert that DEQ's cumulative impact assessment for the Lee Coulee alluvium unlawfully isolated the evaluation of AM5, omitting the consideration of the existing Rosebud Mine and historic mining activities at the Big Sky Mine. See Conservation Groups' SUF at ¶¶ 30, 46-47; DEQ Ex. C (Notice of Appeal) at ¶ 7; DEQ Ex. F (Amended Notice of Appeal) at ¶ 7.

46. In support of Claim 1, Conservation Groups proposed sixteen facts. See Conservation Groups' SUF at ¶¶ 31-46.

47. However, Conservation Groups' proposed facts in support of Claim 1 consist primarily of legal conclusions and characterizations of DEQ's decision documents, deposition testimony, and discovery responses. Respondents jointly disputed each fact with specific counter-evidence and argument. See JSDF at ¶¶ 31-46.

48. DEQ's expert team conducted a comprehensive, multi-year review of the proposed operation, specifically focusing on the cumulative impacts of mining on the hydrologic balance in the affected area. See JSDF at ¶¶ 7-15.

49. As part of this process, DEQ utilized data, information, and analyses included in the Permit Application Materials to assess the cumulative effects of the proposed operation on the hydrologic balance. See JSDF at ¶¶ 7-15.

50. DEQ's Cumulative Hydrologic Impact Assessment (CHIA), spanning 268 pages, sets forth DEQ's cumulative impact analysis of AM5 and the related conclusions. See DEQ Ex. A (Attachment 1, CHIA); JSUF at ¶¶ 7-12; JSSUF at ¶¶ 4-11.

51. Appendix A to the CHIA documents DEQ's evaluation, conducted between 2020 and February 2021, of the probable impacts on Electrical Conductivity/Total Dissolved Solids (EC/TDS) concentrations in Rosebud Creek resulting from AM5, as well as the cumulative impacts from previous, existing, and

anticipated mining activities contributing to the Rosebud Creek watershed. See JSUF at ¶ 8.

52. Appendix A of the CHIA expressly incorporates and accounts for the cumulative hydrological impacts of existing mining at the Rosebud Mine and historic mining at the Big Sky Mine, detailing the locations and history of prior, ongoing, and anticipated mining near Colstrip. See JSUF at ¶¶ 8–9.

53. The analysis in Appendix A includes monitoring data from the Big Sky Mine, which was used to model groundwater movement through the mine areas, including AM5. To conservatively estimate potential impacts on the Lee Coulee alluvium, the model assumed a steady-state condition in which dissolved solids from all mining areas would reach the alluvium simultaneously. See JSUF at ¶¶ 10–11.

54. Table 4 in Appendix A illustrates the flow path of spoil water for all historic, current, and anticipated mining in the Lee Coulee drainage, including AM5, Area B mining, and the Big Sky Mine. See JSUF at ¶ 60.

55. With respect to the Lee Coulee alluvium, Appendix A confirms that DEQ gathered all readily available data to evaluate flow and water quality in Rosebud Creek, including monitoring data from the Big Sky Mine, and conducted a mass balance evaluation. See JSDF at ¶¶ 10-11, 60.

56. The mass balance evaluation presented in Appendix A confirms that the total dissolved solids in the Lee Coulee alluvium, attributed to existing mining at the Rosebud Mine and historic mining at the Big Sky Mine, exceed the projected loading from AM5. See JSUF at ¶ 12.

57. Based on its cumulative impact assessment, DEQ concluded that AM5, in its reduced form, "will not result in material damage to the hydrologic balance outside the permit area." See JSUF at ¶¶ 12, 28, 60, 61.

58. DEQ's expert witness corroborated the assertion that DEQ's analysis of AM5's cumulative impacts, as outlined in Appendix A of the CHIA, incorporated both existing mining at the Rosebud Mine and historic mining at the Big Sky Mine. See JSUF at ¶ 60.

59. Discovery revealed that Conservation Groups' assertion that DEQ's cumulative impact assessment unlawfully excluded existing mining at the Rosebud Mine and historic mining at the Big Sky Mine stemmed from a factual misunderstanding; Conservation Groups was unaware of DEQ's cumulative impact analysis in Appendix A to the CHIA at the time they initiated the litigation. See Westmoreland/Local 400's Motion for Summary Judgment at 11-13; JSUF at ¶¶ 34, 47, 77.

60. During deposition, Conservation Groups' expert witness, Mr. Anderson, admitted that he had not been aware of DEQ's cumulative impact

analysis in Appendix A of the CHIA prior to offering his opinion that DEQ had neglected to account for existing and historic mining areas in its analysis. See JSUF at ¶ 77; Depo. Tr. of Bruce Anderson at 23:9–18.

61. Upon reviewing Appendix A of the CHIA, Mr. Anderson acknowledged that DEQ did, in fact, consider existing and historic mining areas in its cumulative impact assessment. See JSUF at ¶ 80; Depo. Tr. of Bruce Anderson at 119:14–21.

62. Mr. Anderson further testified that the analysis presented in Appendix A of the CHIA is "representative of the work [DEQ] did" and "quite technical," acknowledging that DEQ made a "good-faith effort" in its cumulative impact analysis. See JSUF at ¶ 81.

63. Mr. Anderson also conceded that Appendix A included "information about Big Sky" and discussed "the routing of water from AM5 into Big Sky." See JSUF at ¶ 80.

64. Nevertheless, Mr. Anderson maintained that DEQ's cumulative impact analysis was incomplete, asserting that some impacts "were addressed, and . . . included cumulative aspects in the area, but not entirely." However, when pressed, Mr. Anderson could not identify which aspects of the analysis he believed were insufficiently evaluated or which specific data or conclusions in Appendix A he disputed. See JSUF at ¶ 81.

65. DEQ presented credible testimony to counter Conservation Groups' assertion that the cumulative impact assessment of the Lee Coulee alluvium unlawfully isolated AM5 from the consideration of existing mining at the Rosebud Mine and historic mining at the Big Sky Mine. See DEQ Ex. L (Van Oort Dep. Tr.); DEQ Ex. M (Nicklin Dep. Tr.).

66. Mr. Van Oort testified that Appendix A of the CHIA contained a thorough cumulative impact analysis, incorporating data from both the Rosebud and Big Sky mines, as well as projected impacts from AM5, and further stated that the projected higher-quality groundwater from AM5 would not increase the concentration of total dissolved solids in the alluvial groundwater downstream from AM5. See JSUF at ¶ 60

67. Mr. Van Oort further testified that Table 4 of Appendix A provides an illustration of the flow path of spoil water for all mining activities in Lee Coulee, accounting for both historic and ongoing mining, including AM5 and Big Sky mining, with the analysis resulting in a net zero effect on the concentration of dissolved solids in the groundwater. See JSUF at ¶ 60.

68. In his testimony, Mr. Van Oort explained that DEQ's conservative analysis assumed that the impact from Big Sky mining would be permanent, not accounting for potential dilution or reduction in concentration over time. See JSUF at ¶ 61.

69. Mr. Van Oort testified that DEQ concluded that the mass from existing mining in Area B was larger than the mass from Big Sky mining, and that both were larger than the mass from AM5. As a result, AM5 mining would have no net effect on the mass loading or concentration of dissolved solids in Lee Coulee. See JSUF at ¶ 61.

70. Mr. Van Oort explained the distinction between a cumulative impact analysis and a material damage determination, clarifying that while the cumulative analysis assesses all past, current, and future mining activities together, the material damage analysis evaluates whether the proposed action, in light of all other activities, could cause material damage to the hydrologic balance. See JSSUF at ¶ 21.

71. Mr. Van Oort further explained the rationale for DEQ's conclusion that when AM5 spoil groundwater mixes with Big Sky Mine spoil groundwater, there would be no net increase in TDS in the Lee Coulee drainage basin. See JSSUF at ¶¶ 24, 26, 28, 32.

72. Mr. Anderson agreed with Mr. Van Oort's principle of mixing, acknowledging, "I'm not going to dispute that at all. I agree with that." See JSSUF at ¶ 27.

H. Claim 2: The Stream Buffer Rule

73. The Conservation Groups next allege that DEQ approved disturbance of an intermittent or perennial stream reach in violation of ARM 17.24.651(1)-(2) on the asserted basis that the Lee Coulee drainage at Wetland 4-2/2 "obtains flow from groundwater and is below the water table for at least a portion of the year and has perennial to near-perennial flow." DEQ Ex. C (Notice of Appeal) at ¶ 8; see also, DEQ Ex. F (Am. Notice of Appeal) at ¶ 8; JSUF at ¶¶ 30, 49-50.

74. Conservation Groups proffered eighteen facts in support of their claim, only five of which do not rely on the struck declaration of their expert witness, Mr. Anderson. See Conservation Groups' SUF at ¶¶ 47-64.

75. The five facts presented by Conservation Groups, independent of Mr. Anderson's excluded testimony, are unsupported by expert analysis or factual evidence. These facts largely consist of legal conclusions and characterizations of DEQ's deposition testimony and responses to public comments. DEQ and Westmoreland/Local 400 contested these facts with specific counter-evidence. See, e.g., SUF at ¶¶ 47, 55, 58, 60, and 62, and compare with JSDF at ¶¶ 25-30, 47, 55, 58, 60, and 62.

76. DEQ's review involved an extensive evaluation of baseline monitoring data, surface and groundwater hydrology, vegetation, soil, and geology within the proposed AM5 permit boundary. JSUF at ¶ 7.

77. In November 2021, a team of hydrologists from DEQ conducted a comprehensive survey of the entire Lee Coulee drainage to examine potential signs of stream intermittency, analyzing geomorphic and hydrologic indicators along the channel to assess whether there was any significant movement of water. *JSSUF at ¶ 3.*

78. Based on its analysis, the Department concluded that the Lee Coulee drainage at Wetland 4-2/2 is an ephemeral drainageway and therefore not subject to the protections of the Stream Buffer Rule. This conclusion was based, in part, on the determination that the local water table lies below the elevation of the drainage and does not intersect it, and that any water feeding the seeps is small, perched, and isolated within the overburden unit—conditions insufficient to generate base flow. *JSUF at ¶¶ 7, 25, 105–106.*

79. Conservation Groups dispute DEQ's classification of the Lee Coulee drainage at Wetland 4-2/2 as ephemeral, asserting that the Cumulative Hydrologic Impact Assessment (CHIA) and permit application acknowledge that this stream reach is groundwater-sourced, thus categorizing it as intermittent or perennial. JSUF at ¶¶ 25, 30, 49-50.

80. However, Conservation Groups failed to provide independent evidence or expert analysis to support their assertion that the Lee Coulee drainage

at Wetland 4-2/2 exists below and intersects the local groundwater table. See Conservation Groups' SUF at ¶¶ 47, 55, 58, 60, and 62.

81. On July 12, 2023, the parties conducted a joint site inspection of the Lee Coulee drainage at Wetland 4-2/2, during which participants walked the drainage from its source to a point below Wetland 4-2/2. JSUF at ¶ *71*.

82. Despite historic June 2023 precipitation and an unusually wet spring, the site inspection revealed a dry, vegetated drainage with no flowing water, seeps, springs, or groundwater expressions. JSUF at ¶¶ 98-99, 119; DEQ Ex. S (June 2023 Weather Summary); DEQ Ex. T (Forsyth Precipitation Data).

83. Subsurface soil observations upgradient of Wetland 4-2/2 confirmed the drainage was unsaturated. JSUF at ¶¶ 115-117; JSSUF at ¶ 42; see also, DEQ Ex. O (Anderson Dep. Tr.) at 152:9-13 (noting the soils were "very dry").

84. The following photograph taken by MEIC/Sierra Club counsel during the site inspection depicts the Lee Coulee drainage at Wetland 4-2/2:



LEE COULEE DRAINAGE AT WETLAND 4-2/2

85. Mr. Bruce Anderson, Conservation Groups' expert, did not conduct any independent analysis or produce expert reports to support Claim 2. Order on Mot. to Strike at 3.

86. During his deposition, Mr. Anderson testified that no primary indicators of a groundwater table, such as springs or seeps, were evident during the site inspection. JSUF at ¶ 98.

87. Mr. Anderson defined a "stream" as a body of flowing water that typically exhibits a linear form and generally flows. While he acknowledged that various indicators—such as debris racking, defined bed and banks, vegetation, sedimentation, and topographical breaks—can help identify a stream, he noted that

none of these indicators were present at the site. He also confirmed that, despite recent significant precipitation and an expectation of observing groundwater or water flow, no such evidence was present during the inspection. JSSUF at ¶¶ 33–34; JSUF at ¶¶ 98–99, 119.

88. Mr. Anderson ultimately admitted that the groundwater table at Wetland 4-2/2 was most likely below the channel's elevation, further complicating the classification of the drainage. JSUF at ¶ 98.

89. Mr. Anderson acknowledged that the site inspection caused him to reconsider his prior assumptions about the drainage's intermittent status. JSUF at ¶ 99; DEQ Ex. O (Anderson Dep. Tr.) at 178:25-179:2.

90. Mr. Anderson refrained from confirming the intermittent status of the drainage, indicating only a "potential" for intermittent flow, and agreed that DEQ's conclusion that the drainage at Wetland 4-2/2 is ephemeral was "reasonable." JSUF at ¶¶ 100–101.

91. Respondents' experts presented credible testimony rebutting Conservation Groups' contention that that "[t]he CHIA and permit application . . . acknowledge that [this portion is of the Lee Coulee drainage] is sourced by groundwater and is therefore not ephemeral, but intermittent or perennial." *See* DEQ Ex. R (Lodman Dep. Tr.); *see also*, DEQ Ex. N (Nicklin Dep. Tr.).

92. Dr. Emily Lodman, DEQ's expert, testified that DEQ's application of the Stream Buffer Rule was conservative and protective of stream ecosystems. She explained that the drainage at Wetland 4-2/2 is hydrologically isolated, showing no connection to upgradient or downgradient surface water and lacking any indicators of intermittent or perennial flow. *JSSUF at ¶¶ 38–39.*

93. Dr. Lodman classified the Lee Coulee drainage at Wetland 4-2/2 as an ephemeral drainageway, based on multiple measurements and a comprehensive review of data, including wetland surveys, geologic maps, and hydrological data. *JSUF at ¶ 105; JSSUF at ¶ 41.*

94. During a 2021 inspection, Dr. Lodman found no seeps or flowing water and observed no geomorphic evidence of surface water, such as sediment transportation, bed and bank features, or high-water marks. JSSUF at ¶ 40.

95. Dr. Lodman concluded that the local groundwater table lies approximately 60-80 feet below the elevation of the drainage at Wetland 4-2/2. JSUF at ¶ 106; JSDF at ¶ 48.

96. Dr. Lodman unequivocally rejected Conservation Groups' assertion that Lee Coulee at Wetland 4-2/2 constitutes an intermittent or perennial stream. JSUF at ¶¶ 104-106; JSDF at ¶ 48; JSSUF at ¶¶ 36-41.

97. Westmoreland/Local 400's expert witness Dr. Michael Nicklin testified that Lee Coulee drainage at Wetland 4-2/2 is an "ephemeral stream reach." JSUF at ¶ 102.

98. Dr. Nicklin testified that, despite the wet conditions in May 2023 and typical higher groundwater levels during spring runoff, no evidence of springs or seeps was observed at Wetland 4-2/2. He suggested that any seeps present are sourced from shallow perched groundwater and contribute minimally to the drainage, with no flowing water observed during his inspection. *JSUF at ¶¶ 102, 107.*

99. Dr. Nicklin further explained that perched groundwater is not indicative of the local water table and does not affect the flow characteristics of the drainage. JSUF at ¶ 107; JSDF at ¶ 27.

100. Based on well log data, Dr. Nicklin estimated the local groundwater table to be 70 feet below the Lee Coulee drainage at Wetland 4-2/2. JSUF at ¶¶ 103, 108.

101. Dr. Nicklin concluded that any groundwater contributions at Wetland 4-2/2 are too minimal to support intermittent flow in the drainage. JSUF at ¶ 102.

102. Steven Viert, an additional expert witness for Westmoreland/Local 400, testified that the local groundwater table is likely not intersected by the Lee

Coulee drainage at Wetland 4-2/2, and, at most, only infinitesimal alluvium exists in the upper reaches of Lee Coulee. JSSUF at ¶¶ 49-50; DEQ Ex. HH (Viert Decl.).

103. Mr. Anderson testified that the experts presented by Respondents are credible scientists. JSUF at ¶ 110.

I. Claim 3: Reclamation

104. Conservation Groups assert that DEQ violated ARM 17.24.405(6)(a) by neglecting to account for global climate trends when evaluating cumulative impacts and the viability of reclamation. DEQ Ex. C (Notice of Appeal) at ¶ 9; DEQ Ex. F (Amended Notice of Appeal) at ¶ 9; see also, JSUF at ¶¶ 30, 51-52.

105. Conservation Groups proposed twenty-four facts in support of Claim 3, four of which (¶¶ 83, 84, 85, and 86) are based on Mr. Anderson's struck declaration. Conservation Groups' SUF at ¶¶ 65-88.

106. The facts presented by Conservation Groups in support of Claim 3, aside from those that rely on Mr. Anderson's struck declaration (¶¶ 65-82, 87, and 88), lack independent analysis, evidence, and expert testimony. Instead, they primarily comprise constitutional arguments, legal conclusions, and Conservation Groups' interpretations of DEQ's Decision Documents, deposition testimonies, and discovery responses. Respondents have specifically disputed each of these proposed facts, except for ¶ 75. JSDF at ¶¶ 65-74, 76-88.

107. Appendix C of the Permit Application Materials included detailed climate-related data, encompassing temperature, precipitation, evaporation, evapotranspiration, and snow sublimation. DEQ considered this data when evaluating the cumulative impacts of mining activities as well as the feasibility of reclamation. JSUF at ¶¶ 13, 18; JSSUF at ¶ 17.

108. After careful review of the materials presented in the application, DEQ concluded that reclamation, as outlined in the proposed reclamation plan, could be successfully carried out. DEQ Ex. A (Written Findings and ROD) at 20 ("The applicant has demonstrated that reclamation, as required by the MSUMRA and implementing rules, can be accomplished under the proposed reclamation plan.").

109. Mr. Anderson contends that global climate trends will lead to increased evapotranspiration, reduced groundwater recharge, and possibly undermine the viability of reclamation. JSUF at ¶¶ 55-56, 58.

110. Mr. Anderson admitted that he did not review the groundwater model in detail nor conduct any site-specific analysis when forming his opinion that global climate trends could potentially render reclamation at AM5 unfeasible. He further conceded that his concerns were based solely on an undisclosed, confidential analysis, regional and global climate change studies, and general assumptions, rather than specific data from the site. JSUF at ¶¶ 83–89.

111. Mr. Anderson testified that he would not provide an expert opinion regarding the impact of climate change on vegetation. JSUF at ¶ 72.

112. Mr. Anderson stated that he would refrain from offering an expert opinion on the overall feasibility of reclamation, acknowledging that reclamation was "a little outside of [his] purview." DEQ Ex. O (Anderson Dep. Tr.) at 42:8–11.

113. Mr. Anderson did not conduct a climate change assessment, nor could he identify how, if at all, DEQ could meaningfully analyze or incorporate global climate trends into the MSUMRA review process. JSUF at ¶ 97.

114. Respondents' experts presented specific evidence countering Conservation Groups' claim that global climate trends would render reclamation unfeasible. DEQ Ex. L (Van Oort Dep. Tr.); DEQ Ex. M (Nicklin Dep. Tr.); WRM App. Ex. B (Nicklin Decl.); WRM App. Ex. C (Carstensen Decl.); JSUF at ¶¶ 62-69; JSSUF at ¶¶ 17, 43-45; JSDF at ¶ 88.

115. Westmoreland/Local 400's expert, Mr. John Carstensen, analyzed precipitation and evaporative deficit data to estimate potential site-specific impacts on groundwater recharge rates due to global climate trends. WRM App. Ex. C (Carstensen Decl.) at ¶¶ 5-6.

116. Mr. Carstensen concluded that the potential changes in groundwater recharge rates due to global climate trends would be minimal and well within the

margin of uncertainty present in the hydrologic evaluations conducted for the permit application. WRM App. Ex. C (Carstensen Decl.) at ¶ 5.

117. Dr. Michael Nicklin, another expert witness for Westmoreland/Local 400, conducted a qualitative evaluation of Mr. Anderson's projections regarding reduced groundwater recharge rates and Mr. Carstensen's calculations. Dr. Nicklin's analysis demonstrated that even the worst-case scenario projected by Mr. Anderson would have no discernible impact on the groundwater model's predictions, nor would it undermine the feasibility of reclamation. WRM App. Ex. B (Nicklin Decl.) at ¶¶ 5-12; WRM App. Ex. C (Carstensen Decl.) at ¶ 6.

118. Dr. Nicklin's analysis further concluded that the projected changes in groundwater recharge rates would not materially affect any of the predictions in the Permit Application Materials, which were relied upon by DEQ in assessing the cumulative impacts of mining and the viability of reclamation. JSUF at ¶ 67; WRM App. Ex. B (Nicklin Decl.) at ¶¶ 11-12.

119. Mr. Anderson himself testified that if his anticipated changes in groundwater recharge rates did not materially alter the groundwater model's forecasts, then DEQ's conclusions regarding the viability of reclamation would remain unchanged, and additional analysis would not provide further value. JSUF at ¶¶ 85, 94.

IV. CONCLUSIONS OF LAW

Having carefully reviewed the evidence and arguments presented by the Parties, the Court offers the following Conclusions of Law:

A. Burden of Proof & Evidentiary Scope

1. Under Mont. Code Ann. § 82-4-427(1)(a), an individual whose interests are or may be adversely affected by a final decision of DEQ to approve a mine permit amendment application may appeal that decision to the Board.

2. The contested case provisions under MAPA govern this appeal, as outlined in Mont. Code Ann. § 82-4-427(4). In this instance, Conservation Groups, the party alleging a violation of the law, bears the evidentiary burden of proof. *Mont. Env't Info. Ctr. v. Westmoreland Rosebud Mining, LLC*, 2023 MT 224, ¶¶ 19-21.

3. To satisfy this burden, the challenging party must establish the facts essential to their claims by a preponderance of the evidence. As held in *Mont. Env't Info. Ctr.*, at ¶ 21, the challenging party must demonstrate, through evidence or argument, that DEQ's decision was erroneous. See also *DEQ Ex. MM*, In the matter of: Appeal Amendment Application AM3, Signal Peak Energy LLC's Bull Mountains Mine No. 1, Permit No. C1993017 (No. BER 2016-07 SM) Findings of Fact, Conclusions of Law, and Order (AM3 Final Order) at 8; § 82-4-206, MCA;

ARM 17.24.425(7); *Mont. Env't Info. Ctr. v. Dep't of Env't Quality*, 2005 MT 96, ¶¶ 14, 16.

4. Evidence of potential contradictions or inconsistencies within the Permit Application Package and Decision Documents alone does not establish the facts necessary to prove that DEQ's decision violated the law. *DEQ Ex. LL*, (Area F Order on MSJ) at 22.

5. The challenging party "cannot sustain [its] burden of proof without expert testimony" when the issues at hand are beyond the scope of a layperson's knowledge and experience. *Seal v. Woodrows Pharmacy*, 1999 MT 247, ¶¶ 36-37; *Newville v. State Dep't. of Fam. Servs.*, 267 Mont. 237, 257 (1994); *Durbin v. Ross*, 276 Mont. 463, 477 (1996); *Hulse v. DOJ, Motor Vehicle Div.*, 1998 MT 108, ¶¶ 48-49; Mont. R. Evid. 702.

6. There exists a rebuttable presumption that DEQ's decision to approve the permit is correct and lawful. Once the applicant has shown compliance during the permitting phase, the applicant "need not re-prove the factual elements of its case before the Board." *Westmoreland Rosebud Mining, LLC*, ¶ 18.

7. Statutory and common law rules of evidence govern the proceedings, and each party is entitled to present and respond to evidence and arguments on all issues at hand. § 2-4-612(1)-(2), MCA.

B. Summary Judgment

8. Summary judgment procedures are applicable in MAPA contested cases when the criteria set forth in Montana Rule of Civil Procedure 56 are satisfied. *Matter of Peila*, 249 Mont. 272, 280–81 (1991).

9. The principal objective of summary judgment is "to isolate and dispose of factually unsupported claims or defenses." *Celotex Corp. v. Catrett*, 477 U.S. 317, 323-24, 106 S. Ct. 2548, 2553 (1986).

10. Summary judgment is appropriate where the record demonstrates that there are "no material facts in dispute" and the moving party is entitled to judgment as a matter of law. *Clark Fork Coal. v. Mont. Dep't of Envt'l Quality*, 2008 MT 407, ¶ 19; Mont. R. Civ. P. 56(c)(3).

11. The party moving for summary judgment bears the initial burden of establishing that no material dispute of fact exists. *Tonner v. Cirian*, 2012 MT 314, ¶ 8.

12. When the nonmoving party bears the burden of proof at trial, the moving party can satisfy its burden by demonstrating an "absence of evidence" supporting the nonmoving party's claims. In such circumstances, summary judgment is appropriate, as the nonmoving party has failed to provide sufficient evidence on an essential element of their case. *Celotex*, 477 U.S. at 322-23.

13. To survive summary judgment, the nonmoving party must present substantial evidence—not mere denial, speculation, or conclusory statements—that raises a genuine issue of material fact. *Peterson v. Eichhorn*, 2008 MT 250, ¶ 13.

14. All reasonable inferences drawn from the evidence presented must be construed in favor of the party opposing summary judgment. *Erker v. Kester*, 1999 MT 231, ¶ 17.

C. Statutory Construction

15. In interpreting a statute, the goal is to give effect to the objectives sought by the legislature. *Mont. Vending, Inc. v. Coca-Cola Bottling Co.*, 2003 MT 282, ¶ 21.

16. The initial step in statutory interpretation is to examine the plain language of the statute. *Consumer Prod. Safety Comm'n v. GTE Sylvania, Inc.*, 447 U.S. 102, 108 (1980).

17. If the legislative intent can be discerned from the plain meaning of the statute's language, that meaning controls, and no further analysis is required. *Mont. Vending, Inc.*, ¶ 21.

18. Where the legislature has not provided a specific definition for a statutory term, the term is understood to carry its plain and ordinary meaning. *State v. Alpine Aviation, Inc.*, 2016 MT 283, ¶ 11.

19. Statutory and regulatory construction is a "'holistic endeavor' and must account for the statute's text, language, structure, and object." *State v. Heath*, 2004 MT 126, ¶ 24.

20. Interpretation of statutes and regulations must avoid results that would render any section of the statute superfluous, ensuring that every word and provision is given effect. *State v. Heath*, 2004 MT 126, ¶ 31.

21. Statutory and regulatory interpretation must also seek to avoid absurd or unreasonable results when a more sensible interpretation is available. *Mont. Sports Shooting Ass'n v. State*, 2008 MT 190, ¶ 11.

D. Standing

22. The Board of Environmental Review and multiple courts have consistently recognized that the Montana Environmental Information Center (MEIC) and Sierra Club have standing to challenge mining operations at the Rosebud strip mine. *In re Notice of Appeal and Request for Hearing Regarding Approval of Permit No. C2011003F* (In re Area F), No. BER 2019-05 OC, at 15–17 (Mont. Bd. of Env't Rev. Nov. 24, 2020) (Order of Hearing Examiner); *In re Western AM4 Appeal*, No. BER 2016-03 SM, at 73–74 (Mont. Bd. of Env't Rev. June 6, 2019), rev'd on other grounds, *Westmoreland*, ¶¶ 121–24.

23. The Board's hearing examiner in the appeal of the Area F permit at the Rosebud Mine explained:

> Mr. Gilbert [MEIC and Sierra Club member] has already been determined by the BER to have standing to challenge actions involving water at the Rosebud mine. *In re Western AM4 Appeal*, BER 2016-03 SM, "Board Order" at 73–74 (June 6, 2019). *This authority is binding and dispositive on this issue. No further analysis is therefore required.* Further, Steve Gilbert has also already been determined to have such standing by a Montana District Court. [*MEIC v. DEQ*], No. CDV-2012-1075, 2016 Mont. Dist. LEXIS 14, at **21–24 (Mont. 1st Jud. Dist., Seeley, J. (Mar. 14, 2016)). *This authority is at least persuasive, if not also binding.*

24. Conservation Groups submitted standing declarations from their members, Steve Gilbert, Anne Hedges, Alexis Bonogofsky, and Mike Scott. *See* Declaration of Anne Hedges; Declaration of Alexis Bonogofsky; Declaration of Steve Gilbert; Declaration of Mike Scott. The declarants attest that the expansion will cause members to suffer injury in fact that is fairly traceable to DEQ's approval of the AM5 expansion, and such injury will be redressable by a favorable decision. Gilbert Decl. ¶¶ 9–17; Hedges Decl. ¶¶ 4–9; Bonogofsky Decl. ¶¶4–16; Scott Decl. ¶¶ 4–7.

E. Request for Spoliation Finding

25. In their summary judgment filings, Conservation Groups made a passing request for the exclusion of evidence submitted by Respondents, arguing that Westmoreland, with DEQ's knowledge and approval, had stripped soil and vegetation from a portion of the Lee Coulee drainage prior to a site inspection, thereby destroying evidence. *Pet'rs' Mot. for Summ. J.*, at 17-18.

26. A party seeking the extreme sanction of spoliation, which involves precluding or truncating litigation, bears the burden of proving: (1) that the item or evidence in question was subject to a duty to preserve; (2) that the other party intentionally, knowingly, or negligently breached that duty; and (3) that the loss of evidence was sufficiently prejudicial to outweigh the public policy in favor of resolving disputes on the merits. *Mont. State Univ.-Bozeman v. Mont. First Jud. Dist. Ct.*, 2018 MT 220, ¶ 25.

27. The imposition of spoliation sanctions is warranted only when there has been a breach of the duty to preserve evidence, and when the party controlling that evidence knew or should have known that the evidence might be relevant to the litigation. This requires an objective, fact-specific analysis, within the discretion of the Hearing Examiner. *Id.* at ¶ 23.

28. Conservation Groups' summary judgment pleadings fail to identify or satisfy any of the prongs necessary to establish spoliation. The evidence provided by DEQ and Westmoreland demonstrates, to the satisfaction of the Hearing Examiner, that no spoliation occurred.

29. First, Westmoreland was under no duty to preserve the Lee Coulee drainage. The duty to preserve evidence only extends to "existing items and information" potentially relevant to litigation (as opposed to undefined swaths of real property), and MEIC/Sierra fail to identify an item or information to which the

duty would attach. *Mont. State Univ.-Bozeman*, at ¶ 23. Moreover, the surface disturbing activities were permitted by the Department and conducted by Westmoreland in compliance with the approved sediment control plan. *See* JSSUF at ¶¶ 46-48; *see also,* DEQ Ex. FF (Lodman Decl.); *see also*, DEQ Ex. JJ (Batie Decl.). Despite these activities being public knowledge and the approved disturbance of the Lee Coulee drainage serving as the basis for Claim 2, MEIC/Sierra Club declined to seek preliminary relief pending the outcome of this litigation (*e.g.*, an injunction) which could have given rise to a duty to preserve.

30. Second, even assuming Westmoreland had a duty to preserve, there is no evidence that Westmoreland intentionally, knowingly, or negligently breached that duty. Conservation Groups has failed to show that the land disturbance was conducted with the intent to conceal evidence. In fact, the disturbance occurred in 2022, months before MEIC/Sierra requested a site inspection, and was carried out in accordance with the approved sediment control plan. See *JSSUF* at ¶¶ 46-48; *DEQ Ex. FF* (Lodman Decl.); *DEQ Ex. JJ* (Batie Decl.).

31. Third, no evidence supports the claim that the removal of soil and vegetation from the drainage prejudiced Conservation Groups. Dr. Lodman determined that the sediment control measures impacted only 22% of the upper fork of Wetland 4-2/2. *JSSUF* at ¶ 46. Earlier investigations found that the alluvium in this section of the Lee Coulee drainage was minimal, and Conservation

Groups's expert, Mr. Anderson, testified that he saw no reason to believe there was any significant difference in the alluvium between disturbed and undisturbed areas. *JSSUF* at ¶¶ 50, 115. Moreover, Mr. Anderson acknowledged that the removal of topsoil and vegetation might have made it easier to identify signs of intermittency, thus benefiting the investigation. *JSDF* at ¶ 59. Additionally, Conservation Groups repeatedly stated throughout discovery that the presence or absence of alluvium near Wetland 4-2/2 was "irrelevant" to Claim 2. *JSUF* at ¶ 50.

32. Having found that Conservation Groups failed to timely raise their spoliation claim, and given the lack of evidence to support a breach of duty, intent to conceal, or prejudice, the Hearing Examiner concludes that a finding of spoliation is unwarranted and denies the request.

F. Claim 1: Cumulative Impact Assessment

33. DEQ's authority to approve an application for a mine permit revision is conditional upon a clear demonstration that the assessment of the cumulative impacts of anticipated mining on the hydrologic balance has been conducted. The application must also show that the proposed operation is designed to avoid material damage to the hydrologic balance outside the permit area. § 82-4-227(3)(a), MCA; ARM 17.24.405(6)(c); ARM 17.24.314(5).

34. “Cumulative hydrologic impacts” means “the expected total qualitative and quantitative, direct and indirect effects of mining and reclamation operations on the hydrologic balance.” ARM 17.24.301(31).

35. "Cumulative hydrologic impact area" means “the area, including, but not limited to, the permit and mine plan area within which impacts to the hydrologic balance resulting from the proposed operation may interact with the impacts of all previous, existing and anticipated mining on surface and ground water systems.” ARM 17.24.301(32).

36. The Department concluded, based on its assessment of the cumulative impacts of mining, that AM5, in a reduced form, “will not result in material damage to the hydrologic balance outside the permit area.” JSUF at ¶ 28; *see also*, DEQ Ex. A (Written Findings and ROD) at 15-17, 21.

37. As the party challenging DEQ’s cumulative impact analysis and its material damage determination, Conservation Groups bore the burden of demonstrating by a preponderance of the evidence that DEQ erred in its assessment by excluding existing and historical mine areas, and that this omission rendered DEQ’s material damage finding unlawful.

38. Conservation Groups failed to establish that DEQ excluded relevant historical mine areas. DEQ’s Cumulative Hydrologic Impact Assessment (CHIA) and Appendix A specifically considered the interactions between the AM5 proposal

and the impacts of existing (Rosebud Mine) and historic (Big Sky Mine) mining operations. This was confirmed by Conservation Groups' own expert witness.

39. Furthermore, Conservation Groups did not provide sufficient evidence to show that DEQ's cumulative impact assessment or material damage determination were substantively flawed. Their challenge relied solely on Mr. Anderson's declaration, which was not disclosed during discovery and was therefore struck from the record, as per the order on the motion to strike.

40. Conservation Groups also asserted that DEQ's cumulative impact analysis failed to account for the cumulative loading of salinity from all mining activities in the area. They contended that this omission would have resulted in a finding of material damage. Pet'rs' Mot. for Summ. J. at 7-14.

41. The Montana Supreme Court, in *Westmoreland Rosebud Mining, LLC*, ¶ 68, set forth the relevant test for material damage: (1) whether cumulative impacts of the proposed mining and all other mining activities in the area would result in a water quality violation, and (2) whether the proposed operation is a contributing cause of that violation. Only if both elements are affirmed does a finding of material damage arise. In evaluating the second criterion, it is necessary to establish that the proposed mining operation is a cause-in-fact of the water quality violation.

42. Conservation Groups have not demonstrated any legal or factual errors in DEQ's assessment of cumulative impacts or material damage. Their challenge primarily questions the methodology employed by DEQ, but such objections, absent evidence of significant error, do not suffice to overturn DEQ's decision. See DEQ Ex. MM (AM3 Final Order) at 65, ¶ 24; DEQ Ex. LL, (Area F Order on MSJ) at 23-38.

43. On the contrary, DEQ, supported by Westmoreland/Local 400, provided credible evidence and legal argument to demonstrate that its cumulative impact analysis and material damage determination were well-founded, consistent with applicable law, and based on sound scientific reasoning.

44. The undisputed facts confirm that DEQ appropriately evaluated both cumulative impacts and material damage. JSUF at ¶¶ 8, 11-12, 14-16, 28, 60-61, 78-81; JSSUF at ¶¶ 21-32.

45. First, Conservation Groups have failed to establish that cumulative mining impacts resulted in a water quality violation. Prior to mining, the Lee Coulee alluvial groundwater quality averaged Class II, which changed to Class III post-mining. This change did not constitute a water quality violation or material damage because it occurred within the Big Sky Mine permit boundary, where material damage is permitted, and because the Big Sky Mine was approved under a

prior regulatory regime that exempted it from current material damage and anti-degradation standards. JSUF at ¶¶ 10-11.

46. Second, Conservation Groups did not prove that AM5 was the cause-in-fact of the water quality violation. The evidence shows, consistent with DEQ's material damage determination, that AM5 will not alter the classification of Lee Coulee alluvial groundwater.

47. Third, since the Big Sky Mine had been fully released and ceased to exist prior to DEQ's approval of AM5, DEQ was not required by law to include Big Sky Mine's impacts in the cumulative impact assessment. However, DEQ chose to include Big Sky Mine in its analysis.

48. For these reasons, summary judgment in favor of DEQ and Westmoreland/Local 400 is appropriate on Claim 1.

G. Claim 2: The Stream Buffer Rule

49. The Stream Buffer Rule generally prohibits disturbance of lands "within 100 feet of a perennial stream or intermittent stream or a stream reach with a [qualifying] biological community" unless specific conditions are met. ARM 17.24.651(1).

50. MSUMRA and its regulations distinguish between intermittent streams and ephemeral drainageways, partially based on the location of the local

groundwater table. § 82-4-203(29), MCA; ARM 17.24.301(24); ARM 17.24.303(39).

51. DEQ, based on multiple sources of evidence, concluded that the Lee Coulee drainage at Wetland 4-2/2 is an ephemeral drainageway, not subject to the Stream Buffer Rule's protections. JSUF at ¶ 30. This conclusion was based in part on evidence that the local groundwater table is approximately 60 to 80 feet below the drainage at Wetland 4-2/2. JSUF at ¶ 106.

52. Conservation Groups challenge this conclusion, asserting that the drainage at Wetland 4-2/2 qualifies as an intermittent or perennial stream because it obtains its flow from groundwater and remains below the water table for part of the year. JSUF at ¶ 49.

53. Conservation Groups bear the burden of proving by a preponderance of evidence that the Lee Coulee drainage at Wetland 4-2/2 is not ephemeral but rather qualifies as an intermittent or perennial stream or stream reach, as defined in § 82-4-203(29), MCA.

54. Respondents interpret the Stream Buffer Rule and related statutory definitions to require the existence of a natural stream, excluding non-stream hydrologic features such as ephemeral drainageways. This interpretation is supported by the plain language of the regulations. JSDF at ¶ 48.

55. Conservation Groups argue that a "stream reach" can exist without a natural stream, so long as the hydrologic feature shows groundwater connectivity and surface flow. However, this interpretation is inconsistent with the legislative intent of the Stream Buffer Rule, which is designed to protect natural streams. Mont. Vending, Inc., ¶ 21. Additionally, it would create an illogical situation where non-stream features such as ponds, seeps, or wetlands might be erroneously protected by the Stream Buffer Rule, even though they lack the characteristics of natural streams. Statutory interpretation should avoid such absurd results. Mont. Sports Shooting Ass'n, ¶ 11.

56. DEQ's interpretation of the Stream Buffer Rule, grounded in the necessity of a natural stream, is consistent with the regulatory scheme and warrants deference. Bluebird Energy LLC v. Dep't of Revenue, 2024 MT 10, ¶ 23; Westmoreland Rosebud Mining, LLC, ¶ 46.

57. Conservation Groups have failed to meet their burden of proving that the Lee Coulee drainage at Wetland 4-2/2 is an intermittent or perennial stream, as defined by law.

58. The Montana Supreme Court has recognized that technical approaches and third-party expertise may be used to assess stream characteristics. Bitterroot River Protective Ass'n, ¶¶ 33, 40, 42; Westmoreland Rosebud Mining, LLC, ¶ 74, n. 16.

59. Mr. Anderson, an expert witness for Conservation Groups, acknowledged that hydrologic and geomorphic factors are critical in determining the nature of a stream. JSUF at ¶¶ 98-99. He testified that, based on site observations, the groundwater table was likely not above the elevation of the drainage channel at Wetland 4-2/2, and he did not observe signs of intermittency or perennial flow. JSUF at ¶¶ 98-100.

60. Furthermore, Mr. Anderson testified that the site inspection "certainly made me question my assumptions about the intermittent status of the channel" and, when pressed, declined to affirm that the Lee Coulee drainage at Wetland 4-2/2 was intermittent, testifying instead that there was a "potential" for "an intermittent section." JSUF at ¶¶ 98-101; DEQ Ex. O (Anderson Dep. Tr.) 178:25-179:2.

61. In contrast, Respondents presented credible evidence from experts who demonstrated that the Lee Coulee drainage at Wetland 4-2/2 is an ephemeral drainageway. The local water table is confirmed to be approximately 70 feet below the channel bottom, which meets the statutory definition of an ephemeral drainageway. JSUF at ¶¶ 103, 108.

62. DEQ's conclusion that the drainage is ephemeral is further supported by the findings from the site inspection, which confirmed the absence of a defined bed and bank typical of intermittent or perennial streams.

63. Accordingly, DEQ reasonably concluded that the Lee Coulee drainage at Wetland 4-2/2 is an ephemeral drainageway and not subject to the protections of the Stream Buffer Rule.

64. Summary judgment in favor of DEQ and Westmoreland/Local 400 is warranted for Claim 2.

H. Claim 3: Reclamation

65. A permit application must contain a reclamation plan. § 82-4-231(3), MCA.

66. Under Montana law, DEQ may only approve a permit application if it finds, based on the materials submitted, that the applicant has *affirmatively demonstrated* that reclamation—specifically topsoiling, revegetation, and other reclamation activities—can be accomplished. This is a condition precedent to approval, as outlined in § 82-4-227(1), MCA, and ARM 17.24.405(6)(a), which emphasizes that the application must provide sufficient evidence that reclamation is feasible.

67. Reclamation, as defined by statute, encompasses a range of activities, including backfilling, stabilization of subsidence, water control, grading, highwall reduction, topsoiling, planting, revegetation, and other actions aimed at returning lands affected by mining to conditions capable of supporting pre-mining or better uses. § 82-4-203(48), MCA.

68. The reclamation plan must also take into account various relevant factors, including the "climatological…characteristics of the site." § 82-4-231(10)(q), MCA.

69. In this case, the permit application submitted by the applicant included a reclamation plan supported by extensive, site-specific climatological data and analysis gathered over decades.

70. Based on the information provided in the application, DEQ concluded that reclamation could indeed be accomplished as required by the Montana Strip and Underground Mine Reclamation Act (MSUMRA). Specifically, DEQ found that the applicant had satisfactorily demonstrated the viability of reclamation in compliance with the law. DEQ Ex. A (Written Findings and ROD) at 20.

71. It is important to note that, as the party challenging DEQ's conclusion, the burden rests with Conservation Groups to prove by a preponderance of the evidence that reclamation is not achievable due to global climate trends.

72. Conservation Groups' challenge to DEQ's decision rests on ARM 17.24.405(6)(a), but they fail to provide substantive support for their argument that, as a matter of law, DEQ is required to incorporate global climate trends when assessing the reclamation plan's viability.

73. MSUMRA directs DEQ to consider the "climatological characteristics of the site" in its evaluation of reclamation feasibility, but it does not mandate the

incorporation of global climate trends. Respondents argue, and we find, that the law specifically calls for the use of site-specific climatological data, such as temperature, precipitation, evaporation, evapotranspiration, and snow sublimation, rather than global climate models or projections.

74. The plain language of § 82-4-231(10)(q), MCA supports DEQ's interpretation. The statute directs DEQ to consider the "climatological characteristics of the site" and does not reference broader global climate trends. This language is clear and unambiguous, and neither the MSUMRA nor its implementing regulations mention climate change or require future-oriented climate analysis.

75. Further, the overall framework of MSUMRA directs that the cumulative impacts of mining and the feasibility of post-mining reclamation be assessed at a hyper-local level. For example, § 82-4-222(1)(m), MCA, emphasizes evaluating the hydrologic balance at the level of the hydrologic unit, focusing on the impacts of the mining operation itself rather than external factors like global climate change.

76. DEQ’s interpretation is reinforced by the legislative intent and the local, site-specific nature of the analysis prescribed by the statute. Including global climate trends would render the qualifying phrase "characteristics of the site" meaningless.

77. DEQ's interpretation is also consistent with the implementing regulations, which emphasize that reclamation efforts must be tailored to the local site conditions and climate. See, e.g., ARM 17.24.717(1) (requiring that trees and shrubs be adapted to local site conditions and climate) and ARM 17.24.634(1)(f) (requiring reclamation to a condition comparable to an unmined landscape with similar climate).

78. Despite the longstanding existence of this statutory and regulatory framework, Conservation Groups have not identified any prior permitting decisions under MSUMRA or its federal counterpart, the Surface Mining Control and Reclamation Act (SMCRA), in which global climate trends were considered in evaluating reclamation viability.

79. For these reasons, we conclude that DEQ's interpretation of § 82-4-231(10)(q), MCA is both reasonable and consistent with the plain language of the statute. As such, DEQ's interpretation is entitled to "respectful consideration" under established case law. See Bluebird Energy LLC, ¶ 23 (affirming deference to longstanding agency interpretations) and Westmoreland Rosebud Mining, LLC, ¶ 46 (emphasizing deference to agency expertise in interpreting its own rules).

80. Additionally, Conservation Groups failed to present any evidence demonstrating that DEQ's cumulative impact analysis, material damage

determination, or reclamation conclusion would have been altered if global climate trends had been factored into the analysis.

81. In contrast, Respondents presented credible expert testimony indicating that global warming trends are likely to increase precipitation and recharge rates at the site. Even assuming Conservation Groups' predictions of diminished recharge rates due to climate change, the adjustments to the groundwater model would not materially affect DEQ's analysis or conclusion.

82. Crucially, Mr. Anderson, Conservation Groups' expert, conceded that if the projected decrease in groundwater recharge rates did not result in a significant change to the groundwater model's forecasts, then DEQ's reclamation and cumulative impact findings would remain unaffected.

83. In light of the above considerations, we find that summary judgment should be granted in favor of DEQ and Westmoreland/Local 400, and against Conservation Groups, on Claim 3.

V. RECOMMENDED DECISION

1. Upon careful consideration of the Findings of Fact and Conclusions of Law, the Court concludes that Conservation Groups have failed to meet the requisite evidentiary burden necessary to demonstrate that DEQ's approval of AM5 violated the law.

2. Alternatively, the Court finds that DEQ and Westmoreland/Local 400 have successfully disproven Conservation Groups' claims by a preponderance of the evidence.

Therefore, **it is recommended** that:

A. Conservation Groups' Motion for Summary Judgment be **DENIED**.

B. DEQ's Motion for Summary Judgment be **GRANTED**.

C. Westmoreland/Local 400's Motion for Summary Judgment be **GRANTED** in part and **DENIED** in part.

D. Judgment be entered in favor of DEQ and Westmoreland/Local 400.

E. Conservation Groups' challenge be **DISMISSED**.

F. DEQ's approval of AM5 be **AFFIRMED**.

G. The Parties may seek judicial review of this Order by filing a petition in District Court within 30 days after service of this final agency action.

DATED: May 23, 2025

/s/ Rob Cameron
Hearing Examiner Rob Cameron
Montana Board of Environmental Review

Cc: Shiloh Hernandez/Derf Johnson
Samuel J. King/Jeremiah R. Langston
William W. Mercer/Samuel R. Yemington/Sarah C. Bordelon
Elena Hagen

Shiloh S. Hernandez
Earthjustice
Northern Rockies Office
P.O. Box 4743
Bozeman, MT 59772-4743
(406) 426-9649
shernandez@earthjustice.org

Derf Johnson
Montana Environmental Information Center
P.O. Box 1184
Helena, MT 59624
(406) 443-2520
djohnson@meic.org

Attorneys for Petitioners Montana Environmental Information Center and Sierra Club

Electronically Filed with the
Montana Board of Environmental Review
8/29/25 at 11:53 AM
By: *Sandy Moisey Scherer*
Docket No: BER 2022-05 SM

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

In re: Appeal and Request for Hearing Regarding Rosebud Mine Area B Amendment 5 Permit Number C1984003B	**No. BER 2022-05 SM** **EXCEPTIONS TO PROPOSED ORDER ON SUMMARY JUDGMENT**

TABLE OF CONTENTS

TABLE OF CONTENTS ii

TABLE OF AUTHORITIES iv

ABBREVIATIONS vii

INTRODUCTION 1

LEGAL STANDARDS 3

ARGUMENT 5

I. Exceptions on Standard of Review and Burden of Proof 5

II. Exceptions Regarding Petitioners' First Claim: Material Damage 6

A. Exceptions to Conclusions of Law 7

1. Spatial Piecemealing—the Proposed Order (like DEQ) Fails to Assess Material Damage with Respect to the Cumulative Hydrologic Impacts of the Entire Area B Operation. 9

2. Temporal Piecemealing—the Proposed Order (like DEQ) Ignores DEQ's Admission that AM5 Will Extend the Duration of Degraded Water Quality in the Lee Coulee Alluvium. 12

B. Failure to Address Undisputed Contrary Evidence 14

C. Exceptions to Findings of Fact 18

III. Exceptions Regarding Petitioners' Third Claim: Climate Change 20

A. Exceptions to Conclusions of Law 21

1. MSMRA and Its Regulations Provide—and DEQ Admitted It Has—Discretion to Consider Climate Change under MSUMRA. 21

2. WRM's *Post Hoc* Arguments Based on Inexpert Testimony Do Not Establish Harmless Error. 26

B. Failure to Address Undisputed Contrary Evidence.....29

C. Exceptions to Findings of Fact.....31

CONCLUSION AND RECOMMENDATIONS 32

CERTIFICATE OF SERVICE 34

TABLE OF AUTHORITIES

FEDERAL CASES

Diaz v. Chater,
55 F.3d 300 (7th Cir. 1995) 4, 14, 29

Massachusetts v. EPA,
549 U.S. 497 (2007).....23

Mont. Wildlife Fed'n v. Haaland,
127 F.4th 1 (9th Cir. 2025) 26

NLRB v. Jones & Laughlin Steel Corp.,
301 U.S. 1 (1937).....23

Organized Vill. of Kake v. U.S. Dep't of Agric.,
795 F.3d 956 (9th Cir. 2015) 26–27

STATE CASES

Bluebird Energy LLC v. Dep't of Revenue,
2024 MT 10, 415 Mont. 48, 542 P.3d 376 25

Cape v. Crossroads Corr. Ctr.,
2004 MT 265, 323 Mont. 140, 99 P.3d 171 .....16, 30–31

Clark Fork Coal. v. DEQ,
2008 MT 407, 347 Mont. 197, 197 P.3d 482 .....20, 23, 26

DeBuff v. DNRC,
2021 MT 68, 403 Mont. 403, 482 P.3d 1183 .....4, 14, 29

Held v. State,
2024 MT 312, 419 Mont. 403, 560 P.3d 1235 .....22–24, 26, 28

Held v. State,
No. CDV-2020-307, 2023 WL 5229257 (Mont. 1st Jud. Dist. Aug. 14, 2023) 22, 24

Klock v. Town of Cascade,
284 Mont. 167, 943 P.2d 1262 (1997).....16

Montana Environmental Information Center v. DEQ (*MEIC 2005*),
2005 MT 96, 326 Mont. 502, 112 P.3d 964 2–5

Montana Environmental Information Center v. Westmoreland Rosebud Mining, LLC (*MEIC 2023*),
2023 MT 224, 414 Mont. 80, 545 P.3d 623 .....*passim*

Montana Wildlife Fed'n v. Sager,
190 Mont. 247, 620 P.2d 1189 (1980).....25

MTSUN, LLC v. Mont. Dep't of Pub. Serv. Regul.,
2020 MT 238, 401 Mont. 324, 472 P.3d 1154 .....5, 27

N. Plains Res. Council v. Bd. of Nat. Res. & Conservation,
181 Mont. 500, 594 P.2d 297 (1979).....4, 14, 29

CONSTITUTIONAL PROVISIONS

Mont. Const. Article II, § 3.....22
Article IX, § 1(1)-(3).....22

STATUTES AND LEGISLATIVE MATERIALS

30 U.S.C. § 1253(a)–(b).....22

H.R. Rep. No. 95-218 (1977).....22, 29–30

STATE REGULATIONS AND ADMINISTRATIVE MATERIALS

ARM 17.24.301(31).....8–10
17.24.304(1)(h).....21
17.24.314(5).....19
17.24.405(6).....5, 27
17.24.405(6)(a).....21, 25
17.24.405(6)(c).....*passim*
17.24.634(1)(f).....21
17.24.639(26).....21
17.24.713(1).....21
17.24.717(1).....21
17.24.724(3).....21
17.24.1116(6)(d).....21
17.24.1825(5).....21
17.30.1006(3).....13

Mont. Code Ann. § 2-4-621(1) 3
§ 2-4-621(3) .....*passim*
§ 2-4-623(4) 4, 14, 29
§ 82-4-202(2)(a) 22, 26
§ 82-4-202(2)(b) 22, 26
§ 82-4-202(2)(e) 22, 26
§ 82-4-203(32) (2021) 8
§ 82-4-203(36)(a) (2021) 8–10
§ 82-4-205(2)(i) 22
§ 82-4-227(3) 7
§ 82-4-228(2)(b)(iii) 25
§ 82-4-231(10)(q) 21, 24

RULES

Mont. R. Evid. 401–402 19–20
702 28

ABBREVIATIONS

AM5	Amendment 5 of the Rosebud Area B Permit
Board	Montana Board of Environmental Review
CHIA	Cumulative Hydrologic Impact Assessment
COL	Conclusions of Law
Conservation Groups	Montana Environmental Information Center and Sierra Club
DEQ	Montana Department of Environmental Quality
FOF	Findings of Fact
MAPA	Montana Administrative Procedure Act
MEIC	Montana Environmental Information Center
MSUMRA	Montana Strip and Underground Mine Reclamation Act
Pet'rs' SUF	Petitioners' Statement of Undisputed Facts
PHC	Probable Hydrologic Consequences
Resp'ts' JSUF	Respondents' Joint Statement of Undisputed Facts
Resp'ts' JSDF	Respondents' Joint Statement of Disputed Facts
Resp'ts' SSUF	Respondents' Supplemental Statement of Undisputed Facts
SC	Specific conductance
TDS	Total dissolved solids
USGS	United States Geological Survey

WRM	Westmoreland Rosebud Mining

0086

INTRODUCTION

The proposed decision of the Hearing Examiner errs as a matter of law with respect to Petitioners Montana Environmental Information Center and Sierra Club's (together, "Conservation Groups") first (material damage) and third (climate change) claims. The Montana Board of Environmental Review (Board) should reject the proposed decision's conclusions of law and findings of fact on these claims and issue a final order in the Conservation Groups' favor.

The Conservation Groups' first claim challenges Respondent Montana Department of Environmental Quality's (DEQ) "material damage" determination for Intervenor-Respondent Westmoreland Rosebud Mining, LLC's (WRM) Amendment 5 to the Area B permit (AM5) for the Rosebud Mine. The proposed decision's analysis of this claim—like that of DEQ—commits the same two errors recently condemned by the Montana Supreme Court in *Montana Environmental Information Center v. Westmoreland Rosebud Mining, LLC* (*MEIC 2023*), 2023 MT 224, 414 Mont. 80, 545 P.3d 623. First, the proposed decision (like DEQ) piecemeals the material damage determination, failing to lawfully assess whether the "cumulative hydrologic impacts" of the entire "operation" will result in "material damage." *Id.* ¶ 69 (quoting ARM 17.24.405(6)(c)). Second, the proposed decision (like DEQ, again) ignores that extending the "duration" of conditions constituting material damage itself constitutes material damage, even if water

pollution concentrations do not increase. *MEIC 2023*, ¶¶ 57–58. This is legal error. The proposed decision further errs in failing to address undisputed evidence—viz, DEQ's admissions—that the cumulative hydrologic impacts of the Area B permit would cause material damage and that the AM5 expansion would extend the duration of that material damage.

Conservation Groups' third claim challenges DEQ's refusal—based on its supposed lack of legal authority—to consider climate change impacts when assessing hydrology and WRM's ability to ensure reclamation. The proposed decision's assessment of this claim (like DEQ) is incorrect. As DEQ, itself, has previously recognized, the Montana Strip and Underground Mine Reclamation Act (MSUMRA) grants DEQ broad discretion to consider climate when assessing hydrology and future reclamation. The proposed decision's approval of DEQ's refusal to exercise this discretion based on its incorrect interpretation of MSUMRA is error.

The proposed decision further errs in its description of the standard of review and burden of proof. It improperly places a thumb on the sale in favor of DEQ's decision, and it erroneously states that the Conservation Groups have the burden to demonstrate both material damage and that reclamation is not achievable. The Montana Supreme Court rejected these positions in *Montana*

Environmental Information Center v. DEQ (*MEIC 2005*), 2005 MT 96, ¶¶ 24–26, 326 Mont. 502, 112 P.3d 964, and *MEIC 2023*, ¶¶ 19–23.

Conservation Groups do not dispute the proposed decision's correct findings and conclusions with respect to standing, which the Board should adopt. Conservation Groups also do not seek further review of and voluntarily dismiss their second claim—regarding protection of an intermittent stream reach—because WRM recently obliterated the stream reach at issue, precluding the groups' ability to obtain meaningful relief on that claim.

In sum, Conservation Groups request that the Board reject the proposed decision's findings and conclusions with respect to the standard of review and burden of proof and the Conservation Groups' first and third claims. The Board should, accordingly, enter a final order granting Conservation Groups' petition and vacating DEQ's approval of the AM5 expansion.

LEGAL STANDARDS

Under the Montana Administrative Procedure Act (MAPA), a party adversely affected by a proposed decision may submit "exceptions and present briefs and oral argument to the officials who are to render the decision." Mont. Code Ann. § 2-4-621(1).

When a hearing examiner issues a proposed decision, the Board reviews both legal conclusions and findings of fact:

> The agency may adopt the proposal for decision as the agency's final order. The agency in its final order may reject or modify the conclusions of law and interpretation of administrative rules in the proposal for decision but may not reject or modify the findings of fact unless the agency first determines from a review of the complete record and states with particularity in the order that the findings of fact were not based upon competent substantial evidence or that the proceedings on which the findings were based did not comply with essential requirements of law.

Id. § 2-4-621(3).

In resolving exceptions, the Board does not defer to DEQ. *MEIC 2005*, ¶¶ 18–26 (rejecting argument in permit appeal that the Board should review DEQ's decision "with deference"). The Board reviews legal conclusions for correctness. *Id.* ¶ 26. It reviews proposed factual findings to determine if they are supported by "competent substantial evidence." Mont. Code Ann. § 2-4-621(3). It is legal error for the proposed decision, or the Board, to fail to address contrary evidence. *Diaz v. Chater*, 55 F.3d 300, 307 (7th Cir. 1995) (explaining that "failure to consider an entire line of evidence falls below the minimal level of articulation required"); *accord DeBuff v. DNRC*, 2021 MT 68, ¶ 43, 403 Mont. 403, 482 P.3d 1183; *N. Plains Res. Council v. Bd. of Nat. Res. & Conservation*, 181 Mont. 500, 523, 594 P.2d 297, 310 (1979); Mont. Code Ann. § 2-4-623(4) (agency must respond to proposed findings).

Under MSUMRA, the Board's review of DEQ's decision to issue a strip-mining permit is limited to the analysis and information in the agency's permitting

documents: "DEQ's permitting decision [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." *MEIC 2023*, ¶ 46; ARM 17.24.405(6). Stated differently, an agency's "decision must be judged on the grounds and reasons set forth in the challenged" decision documents—"no other grounds should be considered." *MTSUN, LLC v. Mont. Dep't of Pub. Serv. Regul.*, 2020 MT 238, ¶ 51, 401 Mont. 324, 472 P.3d 1154.

ARGUMENT

I. Exceptions on Standard of Review and Burden of Proof

The proposed decision's descriptions of the standard of review and the burden of proof are incorrect.

First, the proposed decision asserts that "[t]here exists a rebuttable presumption that DEQ's decision to approve the permit is correct and lawful," citing *MEIC 2023*, ¶ 18. Conclusion of Law (COL) ¶ 6. This is incorrect. The cited decision does not identify any rebuttable presumption of correctness and does not support the proposed conclusion that thumbs the scale in favor of DEQ. *See MEIC 2023*, ¶ 18; *MEIC 2005*, ¶¶ 24, 26.

The proposed decision states that the burden of proof requires the Conservation Groups to prove material damage. COL ¶¶ 3–5, 45. This too is incorrect. *MEIC 2023*, ¶ 19, articulates the applicable standard: the party

challenging DEQ's decision "has the burden of persuading the Board" that DEQ failed to "apply[] the correct procedural and substantive requirements" of the law in its permitting decision. This burden may be satisfied by "evidence or argument." *Id.* ¶ 21. This does not require the Conservation Groups to "prove that material damage would occur if the mining activity was expanded." *Id.* ¶ 23. It is sufficient to show that DEQ applied an incorrect legal standard to assess material damage when it issued the permit. *Id.* ¶ 57.

The proposed decision also states—with respect to the Conservation Groups' climate claim—that "the burden rests with Conservation Groups to prove by a preponderance of the evidence that reclamation is not achievable due to global climate trends." COL ¶¶ 71, 80. This is also incorrect. Again, Conservation Groups need only show that DEQ failed to follow "the correct procedural … requirements of MSUMRA" when it issued the permit. *MEIC 2023*, ¶ 19.

The Board should reject these incorrect conclusions and employ the correct standards set forth in *MEIC 2005* and *MEIC 2023*.

II. Exceptions Regarding Petitioners' First Claim: Material Damage

The fundamental flaw in the proposed decision (and that of DEQ) is that it piecemeals the material damage determination, both spatially and temporally. This artificially blinkered analysis ignores the big picture—significant degradation of water quality and violation of water quality standards in the alluvium of Lee

Coulee from existing coal mining—by narrowly considering only the most recent contribution to this degradation. This is precisely what the material damage standard of MSUMRA—one of the law's central requirements—is intended to prevent: degradation of Montana's vital water resources by cumulative coal mining activities.

A. Exceptions to Conclusions of Law

The proposed decision (like DEQ) assesses material damage from the additional mining cuts associated with the AM5 expansion of Area B by isolating them from the "existing mining in Area B" of which AM5 is a part. Findings of Fact (FOF), ¶¶ 56–57, 69; COL ¶¶ 36, 46. This is legal error.

Under MSUMRA, DEQ may not approve a permit application unless the applicant affirmatively demonstrates and DEQ finds, based on the permit record, that the "cumulative hydrologic impacts will not result in material damage." ARM 17.24.405(6)(c). This rule is rooted in the statutory command that DEQ must refuse a permit application "unless the application affirmatively demonstrates that: (a) the assessment of the probable cumulative impact of all anticipated mining in the area on the hydrologic balance has been made by the department and the proposed operation of the mining operation has been designed to prevent material damage." Mont. Code Ann. § 82-4-227(3).

The key terms are defined. "'Cumulative hydrologic impacts' means the expected *total* qualitative and quantitative, direct and indirect effects of mining and reclamation operations on the hydrologic balance." ARM 17.24.301(31) (emphasis added). "Operation," in turn, means "*all of the premises*, facilities, railroad loops, road, and equipment used in the process of producing and removing mineral from and reclaiming a designated *strip-mine … area*, including coal preparation plants." Mont. Code Ann. § 82-4-203(36)(a) (2021) (emphasis added). "Material damage" means:

> degradation or reduction by coal mining and reclamation operations of the quality or quantity of water outside of the permit area in a manner or to an extent that land uses or beneficial uses of water are adversely affected, water quality standards are violated, or water rights are impacted. Violation of a water quality standard, whether or not an existing water use is affected, is material damage.

Id. § 82-4-203(32) (2021). The degradation of high quality Class II groundwater to low quality Class III groundwater constitutes material damage. Van Oort Depo. 71:15 to 72:16 ("Q. … [A]s the law stands now, and at the time AM5 was permitted, … changing water quality class from Class II to Class III outside of the permit area was material damage? … A. That was what I have been told by my esteemed legal staff.") (Pet'rs' SUF Exhibit 5); Ltr. from Matt Dorrington, DEQ, to Bryce West, Peabody Energy at 5 (Feb. 3, 2020) (explaining that "change in water quality … from Class II to III … would be defined as 'material damage' under current law") (Pet'rs' Reply Exhibit 1).

Thus, in making a material damage determination, DEQ must assess "whether the cumulative impacts of the permit proposal and all other" mining "would lead to" material damage. *MEIC 2023*, ¶¶ 68–69. If the proposed mining operation is a contributing cause to the material damage, it may not be permitted. *Id.* If the operation has *any* "effect on water quality," including by causing an "increase in duration" (but not magnitude) of conditions that constitute material damage, it is a contributing cause. *Id.* ¶¶ 58, 66. If the cumulative hydrologic impacts cause material damage, an operation may only be approved if it "would have *no impact whatsoever* on water quality." *Id.* ¶ 65 (emphasis in original).

1. Spatial Piecemealing—the Proposed Order (like DEQ) Fails to Assess Material Damage with Respect to the Cumulative Hydrologic Impacts of the Entire Area B Operation.

Here, the proposed decision (and DEQ's analysis) fails to base the material damage determination, as the law requires, on the "cumulative hydrologic impacts," in direct violation of ARM 17.24.405(6)(c) and *MEIC 2023*, ¶¶ 68–69. Specifically, the proposed decision (and DEQ) fails to base the material damage determination on the "total" "cumulative … impacts," ARM 17.24.301(31), of the entire mining "operation" and "all of [its] premises," Mont. Code Ann. § 82-4-203(36)(a) (2021)—namely, the entirety of the Area B operation, including the AM5 amendment of that operation. COL ¶ 36 (affirming assessment of material damage based on "AM5, in a reduced form"); *see also id.* ¶ 46; FOF ¶ 57

(addressing on "AM5, in its reduced form"), *id.* ¶¶ 56, 69 (isolating additional AM5 cuts from and comparing them to "existing mining in Area B"); Van Oort Depo. 158:16 to 159:14 (stating that DEQ never assessed—"didn't actually run that calculation all the way"—whether "AM5 plus existing Area B" would cause material damage); CHIA at 79 (assessing material damage from "AM5 alone") (Pet'rs' SUF Exhibit 2).

This is incorrect as a matter of law. As noted, material damage must be determined based on the "cumulative hydrologic impacts," ARM 17.24.405(6)(c), of the "operation[]," Mont. Code Ann. § 82-4-203(36)(a) (2021). The sweeping language used in MSUMRA and its regulations indicates that the analysis—based on "*total* … effects of … operations," ARM 17.24.301(31) (emphasis added), and "*all of the premises*" of the "strip-mine … *area*," Mont. Code Ann. § 82-4-203(36)(a) (2021) (emphasis added)—is intended to be comprehensive and brooks no parsing beyond the level of the "strip-mine … area." *Id*.

Here, the proposed "operation" and "strip-mine … area" in question is the "Rosebud Mine Area B Amendment 5." AM5 Written Findings at 1 (Pet'rs' SUF Exhibit 1 at 1). As DEQ's Written Findings demonstrate, the "[*t*]*otal proposed permit area*" for this operation is "15,153 acres," embracing the entirety of the Area B operation, including the additional cuts associated with the AM5 expansion (of the Area B operation). AM5 Written Findings at 18 (emphasis added); *see also*

id. at 11–12 & fig. 4 (showing entire operation of Area B with additional AM5 cuts). Thus, MSUMRA required the material damage determination to be based on the totality and all premises of the Area B operation, *including but not limited to* the additional cuts associated with the AM5 expansion (of the Area B operation and mine area).

Yet DEQ *admitted both* (1) that it did not base its material damage determination on the totality of the proposed operation—the AM5 expansion along with the rest of Area B operation—and (2) that "it would be highly likely that Area B existing by itself … would eventually cause" water quality in the Lee Coulee alluvium to degrade from Class II to Class III, Van Oort Depo. 158:20 to 159:12, i.e., it would cause material damage. Van Oort Depo. 71:15 to 72:16 (degradation from Class II to Class III is material damage).

While the proposed decision takes pains to justify exclusion of the *Big Sky Mine* from the material damage determination, COL ¶ 45, it fails entirely to justify its exclusion of the existing Rosebud Area B operations. *See generally id.* Nor could it. The statutory text (shown above) and the purpose of the material damage standard *prohibit* DEQ from permitting an expansion of a mining operation when it is "highly likely," Van Oort Depo. 159:8–12, that the existing operation, on its own, will cause material damage. Speaking on behalf of DEQ, Mr. Van Oort admitted that the "mass" of salinity pollution from the existing Area B operation is

"greater than the [entire] mass for [the] Big Sky [Mine]," *id.* at 159:3–7; FOF ¶ 69, which, as the proposed decision finds, has already degraded Lee Coulee to Class III groundwater. COL ¶ 45. It cannot be said that the totality of this operation will have "*no impact whatsoever*" on water quality. *MEIC 2023*, ¶ 65 (emphasis in original).

In short, the proposed decision (and DEQ) improperly piecemeals the material damage determination by excluding the existing mining operation in the Rosebud Area B mine area, of which the AM5 cuts are only a part. COL ¶¶ 36, 46; FOF ¶¶ 56–57, 69. This was incorrect as a matter of law. *MEIC 2023*, ¶¶ 68–69.

2. Temporal Piecemealing—the Proposed Order (like DEQ) Ignores DEQ's Admission that AM5 Will Extend the Duration of Degraded Water Quality in the Lee Coulee Alluvium.

The proposed decision (and DEQ) further errs by ignoring undisputed evidence that the AM5 expansion of the Area B operation will, even when considered alone (separately from the rest of Rosebud Area B), extend the duration of degraded water quality in the Lee Coulee alluvium (delaying the return to high quality Class II water). Instead, the proposed decision hangs its hat on the proposition that AM5—excluding the existing portion of the Area B operation—"would not increase the concentration" of salts in the alluvium and would not "alter the classification of Lee Coulee alluvial groundwater." FOF ¶ 66; COL ¶ 46. This violates the holding in *MEIC 2023*, ¶ 58, that material damage "may consist

of an increase in duration of an existing violation without requiring an increase of magnitude."

Here, the proposed decision finds that the Big Sky Mine degraded alluvial water quality from Class II to Class III. COL ¶ 45; Ltr. from Matt Dorrington, DEQ, to Bryce West, Peabody Energy at 5 (Feb. 3, 2020); Van Oort Depo. at 143:20 to 144:8. Such degradation constitutes material damage under current law. Ltr. from Matt Dorrington, DEQ, to Bryce West, Peabody Energy at 5 (Feb. 3, 2020). The permitting record shows that AM5 will contribute additional low-quality Class III groundwater to the alluvium. CHIA at 79 (stating that AM5 spoils are "expected to be similar to, or lower in concentration [than] Big Sky Area B spoil"); Van Oort Depo. at 91:6–15, 93:14 to 94:11 (stating that under least conservative prediction and "with a reasonable degree of scientific certainty," total dissolved solids (TDS) of AM5 spoils (2,350) would be 70–90% of specific conductance (SC), yielding SC values of 2,611 to 3,357, which is Class III, ARM 17.30.1006(3)); App. O—Addendum to PHC at 24 (Dr. Nicklin projecting TDS of AM5 spoils between 2,546 mg/L and 3,977 mg/L, which is Class III) (Resp'ts' SSUF Exhibit CC). The CHIA expressly found that the additional salinity from AM5 will extend the duration of the degraded conditions in Lee Coulee: "the additional mining in AM5 *would increase the duration of elevated TDS* [salinity]" in "alluvial water quality" by "increasing the contributing volume of spoil." CHIA

at 61 (emphasis added); *see also* Van Oort Depo. at 115:13–22 (not disputing that additional salts from AM5 will extend duration of degraded conditions in Lee Coulee alluvium). This would delay the recovery of water to "premine water quality," CHIA at 74–75, which was Class II water. COL ¶ 45.

The proposed decision (and DEQ) errs as a matter of law by again failing to acknowledge that extending the duration of degraded water quality conditions constitutes material damage, even if the pollution does not cause an incremental increase in pollution concentration. *MEIC 2023*, ¶¶ 57–58.

B. Failure to Address Undisputed Contrary Evidence

As noted, it is an error of law for an agency to fail to address critical contrary evidence. *Diaz*, 55 F.3d at 307 (explaining that "failure to consider an entire line of evidence falls below the minimal level of articulation required"); *DeBuff*, ¶ 43; *N. Plains Res. Council*, 181 Mont. at 523, 594 P.2d at 310; Mont. Code Ann. § 2-4-623(4) (agency must respond to proposed findings).

Here, the proposed decision fails to address undisputed evidence—DEQ's own findings and admissions—demonstrating that the cumulative effects of the proposed operation will cause material damage. As noted, the proposed decision ignores undisputed testimony by Mr. Van Oort, speaking as DEQ's designated representative, that based on the information in Appendix A of the CHIA, "it would be highly likely" that the existing Area B operation of the Rosebud Mine

"by itself" "would eventually cause" the degradation of the alluvium from Class II to Class III. Van Oort Depo. at 159:3–12. There is no dispute that degradation of groundwater from Class II to Class III constitutes material damage. Van Oort Depo. at 71:25 to 72:16; Ltr. from Matt Dorrington, DEQ, to Bryce West, Peabody Energy at 5 (Feb. 3, 2020). The proposed decision indirectly references this testimony of Mr. Van Oort by asserting generally that Respondents "dispute" Conservation Groups' proposed facts and citing Respondents' Joint Statement of Disputed Facts (JSDF) ¶¶ 31–46. But only paragraph 44 of the Respondents' JSDF addressed Mr. Van Oort's admission and it did not (because it could not) dispute Mr. Van Oort's testimony that the existing Area B operation is "highly likely … by itself" to degrade Lee Coulee alluvium from Class II to Class III groundwater. *Compare* Resp'ts' JSDF ¶ 44, *with* Van Oort Depo. at 159:3–12. DEQ has admitted that such degradation constitutes material damage under current law. Ltr. from Matt Dorrington, DEQ, to Bryce West, Peabody Energy at 5 (Feb. 3, 2020).

The proposed decision further ignores DEQ's own admissions that it did not assess whether AM5, together with the rest of the Area B operation, would cause material damage. When asked if he considered whether AM5 and the rest of Area B would cause groundwater to degrade to Class III, Mr. Van Oort admitted that he "didn't consider that scenario." Van Oort Depo. at 158:16 to 159:3. Similarly, DEQ's material damage assessment in the CHIA failed to assess whether the

totality of the operation—AM5 together with the rest of the Area B operation—would degrade the Lee Coulee alluvium to Class III. CHIA at 79. Instead, the CHIA assessed whether "AM5 alone" would "result in a change in groundwater class." *Id.* This was error because, as noted, the material damage determination must be based on the totality of the entire mining operation, here all of Area B. *See supra* Part II.A. The proposed decision only indirectly references this admission in its general assertion that Respondents "dispute" Conservation Groups' proposed facts, citing Respondents' JSDF ¶¶ 31–46. Only paragraph 45 of the JSDF addressed this point, but it did not dispute Mr. Van Oort's admission. Resp'ts' JSDF ¶ 45. Instead, it evaded the point, stating that DEQ's *cumulative analysis*—not the material damage determination—considered all mining. Resp'ts' JSDF ¶ 45.[1] And the material damage determination in DEQ's CHIA plainly did not assess the entirety of the proposed operation—AM5 together with the rest of the Area B operation, CHIA at 79, as Mr. Van Oort conceded. Van Oort Depo. at 159:3–17.

[1] Such evasion is insufficient to create a genuine issue of disputed fact on summary judgment. "[T]o avoid summary judgment, the opposing party must present more than conclusory allegations, speculation or denial. The opposing party's facts must be material and of a substantial nature, 'not fanciful, frivolous, gauzy, nor merely suspicions.'" *Cape v. Crossroads Corr. Ctr.*, 2004 MT 265, ¶ 12, 323 Mont. 140, 99 P.3d 171 (quoting *Klock v. Town of Cascade*, 284 Mont. 167, 174, 943 P.2d 1262 (1997)).

The proposed decision also ignores the undisputed evidence from DEQ and WRM's expert Michael Nicklin, Ph.D., that post-mining water quality in AM5 will be Class III groundwater. CHIA at 79 (stating that AM5 spoils are "expected to be similar to, or lower in concentration [than] Big Sky Area B spoil"); Van Oort Depo. at 91:6–15, 93:14 to 94:11 (stating that under least conservative prediction and "with a reasonable degree of scientific certainty," total dissolved solids (TDS) of AM5 spoils (2,350) would be 70–90% of SC, yielding SC values of 2,611 to 3,357, which is Class III); App. O—Addendum to PHC at 24 (Dr. Nicklin projecting TDS of AM5 spoils between 2,546 mg/L and 3,977 mg/L, which is Class III) (Resp'ts' SSUF Exhibit CC). The proposed decision indirectly refers to this evidence by citing Respondents JSDF. FOF 47. But the JSDF only addressed this evidence at paragraph 42, which did not contradict the evidence, but instead suggested that Mr. Van Oort's testimony was "off the cuff." JSDF ¶ 42. The proposed order does not address Dr. Nicklin's calculations showing Class III groundwater in AM5. The proposed decision's failure to address this evidence is error because it demonstrated that the additional mining associated with AM5 will be a contributing cause to the ongoing degradation of Lee Coulee from Class II to Class III groundwater. *MEIC 2023*, ¶¶ 68–69.

Finally, the proposed order fails to address undisputed evidence—DEQ's findings and admissions—that the additional Class III groundwater from AM5 will

extend the duration of degraded Class III conditions in Lee Coulee. "[T]he additional mining in AM5 would increase the duration of elevated TDS [salinity]" in "alluvial water quality" "by increasing the contributing volume of spoil." CHIA at 61; *see also* Van Oort Depo. at 115:13–22 (not disputing that additional salts from AM5 will extend duration of degraded conditions in Lee Coulee alluvium). This would delay the recovery of water to "premine water quality," CHIA at 74–75, which, again, was high quality Class II groundwater. COL ¶ 45. It was error for the proposed decision to ignore this undisputed evidence because extending the duration of degraded conditions constitutes material damage. *MEIC 2023*, ¶¶ 57–58.

The proposed decision's failure to address this critical evidence—DEQ's own findings and admissions—is error. The Board should remedy this error by adopting this evidence in findings of fact.

C. Exceptions to Findings of Fact

The proposed decision also makes multiple factual findings that are not supported by any evidence, let alone "competent substantial evidence." Mont. Code Ann. § 2-4-621(3).

First, the proposed decision purports to make findings regarding the details of Conservation Groups' first claim. FOF ¶¶ 16, 45. The findings, however, erroneously omit Conservation Groups' claim that DEQ's *material damage*

determination, required by ARM 17.24.405(6)(c)—as opposed to the cumulative impact assessment, required by ARM 17.24.314(5)—was unlawfully piecemealed. Conservation Groups' Amended Notice of Appeal states the claim correctly:

> In assessing material damage, DEQ erroneously isolates the impacts of the AM5 expansion on the Lee Coulee alluvium from pollution, specifically salinity pollution (as measured by specific conductance and total dissolved solids (including calcium, magnesium, sodium, and sulfate)), from the Rosebud Mine and the Big Sky Mine. DEQ asserts that AM5 will not be any worse than the impacts of the Big Sky Mine. But the material damage determination does not compare the individual impacts of mining operations. Instead, this analysis determines whether the total impact of all mining will cause material damage. The AM5 CHIA thus fails to lawfully assess cumulative hydrologic impacts or material damage.

Amended Notice of Appeal at 3, ¶ 7. Thus, these findings in the proposed decision are not supported by substantial evidence. They should be amended to correctly reflect Conservation Groups' first claim.

Second, the proposed decision makes extensive findings regarding the analysis conducted in Appendix A to DEQ's cumulative hydrologic impact assessment (CHIA). FOF ¶¶ 51–68. Appendix A, however, does not contain any material damage assessment or determination. *See* Appendix A at 1–19 (Resp'ts' JSUF Exhibit A). DEQ's CHIA did not cite Appendix A in making its material damage determination for the Lee Coulee alluvium. CHIA at 79. As such, Appendix A is not relevant to the Conservation Groups' first claim, Mont. R. Evid.

401–402. Thus, the Board should reject these findings, which are incompetent and inadmissible. Mont. Code Ann. § 2-4-621(3).

Third, the proposed decision cites testimony from Mr. Van Oort that the "material damage analysis evaluates whether the proposed action, in light of all other activities, could cause material damage." FOF ¶ 70. This proposed finding asserts a conclusion of law, and the conclusion of law is incorrect. The material damage standard is articulated by ARM 17.24.405(6)(c), which provides that DEQ may not approve a permit application unless the application affirmatively demonstrates and DEQ finds, based on information in the record, that "the hydrologic consequences and cumulative hydrologic impacts will not result in material damage to the hydrologic balance outside the permit area." The Board should reject this finding of fact. Mont. Code Ann. § 2-4-621(3).

III. Exceptions Regarding Petitioners' Third Claim: Climate Change

The proposed decision's conclusion (like that of DEQ)—that MSUMRA *prohibits* DEQ from considering climate change impacts when assessing whether water resources can be reclaimed, COL ¶¶ 72–83; DEQ Response to Comments at pdf. 12–14 (Pet'rs' SUF Exhibit 14)—is incorrect as a matter of law. "[W]hen an agency, because of a misinterpretation of its rule, does not exercise its discretion it abuses its discretion." *Clark Fork Coal. v. DEQ*, 2008 MT 407, ¶ 43, 347 Mont. 197, 197 P.3d 482. In failing to recognize DEQ's discretion to consider climate

change impacts, the proposed decision (and DEQ) errs as a matter of law. The proposed decision further errs in adopting *post hoc* harmless error arguments premised on declarations of unqualified witnesses.

A. Exceptions to Conclusions of Law

1. MSMRA and Its Regulations Provide—and DEQ Admitted It Has—Discretion to Consider Climate Change under MSUMRA.

The proposed decision acknowledges that DEQ may not issue a coal mining permit unless it concludes based on the permitting record that reclamation—including reclamation of water resources—"can be accomplished." ARM 17.24.405(6)(a); ARM 17.24.1116(6)(d) (requiring reclamation of water resources). Thus, MSUMRA requires operators to "meet … criteria that are necessary to achieve reclamation … taking into consideration the … *climatological*, and other characteristics of the site." Mont. Code Ann. § 82-4-231(10)(q) (emphasis added). Implementing regulations further require permit applications to submit "*climatological* information, including" "such additional data *as the department deems necessary*." ARM 17.24.304(1)(h) (emphasis added). Numerous additional regulations require DEQ to address climate issues. *Id.* 17.24.634(1)(f), 639(26), 713(1), 717(1), 724(3), 1825(5).

These provisions are not surprising, in enacting the Surface Mining Control and Reclamation Act (SMCRA)—the federal strip-mining law with which

MSUMRA must comport, 30 U.S.C. § 1253(a)–(b)—Congress specifically warned that reclamation might not be feasible in semi-arid "climate" conditions, especially in the West, with "high evapotranspiration rates." *See* H.R. Rep. No. 95-218 at 59–60 (1977) (quoting Nat'l Academy of Sciences, Rehabilitation Potential of Western Coal Lands (1973)). Climate change is increasing evapotranspiration rates in Montana, increasing the likelihood and severity of summer and fall drought. *Held v. State*, No. CDV-2020-307, 2023 WL 5229257, at *20 (Mont. 1st Jud. Dist. Aug. 14, 2023) ("Increasing temperature will offset small increases in precipitation by increasing rates of evaporation and transpiration and will make late-summer and fall droughts highly likely and increasingly severe.").

DEQ also enjoys broad discretion under MSUMRA to "collect and disseminate information relating to strip mining … and reclamation of lands and waters affected by strip mining." Mont. Code Ann. § 82-4-205(2)(i). It is, further, the policy of MSUMRA to "maintain and improve the state's clean and healthful environment," "protect its environmental life-support system from degradation" and "demand effective reclamation of all lands" impacted by strip-mining. *Id.* § 82-4-202(2)(a), (b), (e); Mont. Const. art. II, § 3, art. IX, § 1(1)–(3). These provisions—which MSUMRA implements—embrace consideration of climate change impacts. *Held v. State*, 2024 MT 312, ¶¶ 29–30, 68, 419 Mont. 403, 560

P.3d 1235. What's more, "the Constitution does not permit the Legislature to prohibit environmental reviews from evaluating GHG emissions." *Id.* ¶ 68.

Thus, contrary to the conclusion of the proposed decision, and consistent with *Held*, ¶ 68, MSUMRA grants DEQ broad discretion to address climatological information—such as climate change—in evaluating whether reclamation can be accomplished. Neither the proposed decision nor DEQ has identified any language in MSUMRA or regulations prohibiting consideration of climate change. If any such limitation existed, its constitutionality would be doubtful. *Held*, ¶ 68.[2] Indeed, Mr. Van Oort previously testified, as DEQ's representative, that the agency does in fact enjoy discretion to consider climate change when assessing hydrology. 2019 Van Oort Depo. at 201:3–19 (Pet'rs' SUF Exhibit 8). As in *Massachusetts v. EPA*, 549 U.S. 497, 534–35 (2007), the unsupported conclusion of the proposed order (and DEQ) that DEQ lacks discretion to consider climate change impacts when assessing reclamation and hydrology is error. Such refusal to exercise discretion based on a misinterpretation of the law is an abuse of discretion and unlawful. *Clark Fork Coal.*, ¶ 43.

[2] The statute must be construed, if possible, to avoid a constitutional conflict. *NLRB v. Jones & Laughlin Steel Corp.*, 301 U.S. 1, 30, (1937) ("[A]s between two possible interpretations of a statute, by one of which it would be unconstitutional and by the other valid, our plain duty is to adopt that which will save the act").

The proposed decision attempts to justify its conclusion on the basis that MSUMRA's provision—requiring applicants to meet criteria for reclamation "taking into consideration the … climatological … characteristics of the site," Mont. Code Ann. § 82-4-231(10)(q)—is "hyper-local" and therefore cannot include consideration of "global climate trends." COL ¶¶ 73–76. This, however, overlooks the multiple climate reports in the record identifying local—state and county level—impacts to hydrology from climate change. United States Geologic Survey: Summary of Treasure County, Montana (Dec. 1, 2016) (USGS Report) (Pet'rs' SUF Exhibit 9); Montana Institute on Ecosystems, Climate Change and Human Health in Montana: A Special Report of the Montana Climate Assessment at XVIII–XIX (Jan. 2021) (Pet'rs' SUF Exhibit 10); *Held*, 2023 WL 5229257, at *20. Indeed, "[o]verwhelming scientific evidence and consensus" shows that

> *Montana* has already seen (and will increasingly see) adverse impacts to its economy, including to recreation, agriculture, and tourism caused by a variety of factors including decreased snowpack and water levels in summer and fall, extreme spring flooding events, accelerating forest mortality, and increased drought, wildfire, water temperatures, and heat waves.
>
> *Held*, 2024 MT 312, ¶¶ 3–4 (emphasis added).

The proposed decision also contends that MSUMRA prohibits consideration of climate change because the law does not "call[] for … projections" or "future-oriented climate analysis." COL ¶¶ 73–74. This is plainly mistaken. MSUMRA specifically *requires* DEQ to make forward-looking projections about reclamation,

including hydrology, when reviewing a permit. *E.g.*, ARM 17.24.405(6)(a). Indeed, MSUMRA authorizes DEQ to prohibit coal mining altogether on lands if the impacts "could result in a substantial loss or reduction of *long-range productivity of water supply*." Mont. Code Ann. § 82-4-228(2)(b)(iii) (emphasis added). Projections about future impacts, including long-term impacts, are central to MSUMRA's program.

Finally, the proposed decision finds that DEQ's interpretation of MSUMRA to prohibit consideration of climate change is "entitled to 'respectful consideration.'" COL ¶ 79 (quoting *Bluebird Energy LLC v. Dep't of Revenue*, 2024 MT 10, ¶ 22, 415 Mont. 48, 542 P.3d 376). But such "respectful consideration" is only appropriate when an agency's interpretation is "[l]ongstanding and consistent." *Bluebird Energy*, ¶ 22. Here, DEQ's interpretation is neither longstanding nor consistent. In 2019, just three years before the decision in this case, Mr. Van Oort, testifying on behalf of DEQ, asserted that DEQ possessed authority under MSUMRA to consider climate change impacts. 2019 Van Oort Depo. at 201:3–19 (Pet'rs' SUF Exhibit 8). Thus, instead of deferring to DEQ, the Board should interpret MSUMRA to further its statutory purposes. *Mont. Wildlife Fed'n v. Sager*, 190 Mont. 247, 264, 620 P.2d 1189, 1199 (1980) ("A statute will not be interpreted to defeat its evident object or purpose; the objects sought to be achieved by the legislation are prime consideration in interpreting

statutes."). MSUMRA's statutory purposes include "maintain[ing] and improv[ing] the state's clean and healthful environment," "protect[ing] [the state's] environmental life-support system from degradation" and "demand[ing] effective reclamation of all lands" impacted by strip-mining. Mont. Code Ann. § 82-4-202(2)(a), (b), (e). These purposes are furthered if DEQ has the authority to consider climate change when assessing impacts of coal mining to hydrology and reclamation. *Held*, ¶¶ 29–30, 68.

In short, the conclusion of the proposed decision (and DEQ) that DEQ lacks discretion to consider climate change impacts when assessing hydrology and reclamation is legally incorrect. Consequently, DEQ's refusal to assess such impacts based on its incorrectly assumed lack of authority was unlawful. *Clark Fork Coal.*, ¶ 43.

2. WRM's *Post Hoc* Arguments Based on Inexpert Testimony Do Not Establish Harmless Error.

The proposed decision further errs in its remaining conclusions related to climate change, which purported harmless error. COL ¶¶ 81–82. An error is prejudicial and not harmless if it forecloses the lawful assessment of an issue. *MEIC 2023*, ¶¶ 121–22. Showing prejudice is not a "particularly onerous requirement" and does not require a showing that the "agency's decision would have been different." *Mont. Wildlife Fed'n v. Haaland*, 127 F.4th 1, 41–42 (9th Cir. 2025) (quoting *Organized Vill. of Kake v. U.S. Dep't of Agric.*, 795 F.3d 956,

969 (9th Cir. 2015)). The proposed decision's conclusions on harmless error are incorrect.

First, the harmless error conclusions are based on improper *post hoc* rationalizations. DEQ's permitting decision may be upheld, if at all, on the basis articulated in the permitting materials. *MEIC 2023*, ¶ 46 (holding that DEQ's decision 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"); ARM 17.24.405(6). The *only* reason offered by DEQ for ignoring climate change in its Response to Comments was its mistaken claim about lacking the authority to consider the issue. Response to Comments at pdf. 12–14. WRM's claims about climate change supposedly "increase[ing] precipitation and recharge rates," COL ¶ 81, are improper *post hoc* rationalizations. The proposed decision errs as a matter of law in relying on such improper *post hoc* rationalizations. *MTSUN*, ¶ 51; *MEIC 2023*, ¶ 46.

Second, and equally important, neither DEQ's nor WRM's witnesses were qualified as experts on climate change and, therefore, could not lawfully opine on the topic. Van Oort Depo. at 201:13–15 (not offering opinions on climate change); Lodman Depo. at 14:3–9 (no expertise in climate change) (Pet'rs' SUF Exhibit 4); Nicklin Depo. at 100:4–16 (June 29, 2023) (Pet'rs' Resp. Exhibit 9) ("Would I want to cast myself as a climate change expert? No, I would not …. Q. (By Ms.

Qiu) So 'no,' you're not a climate change expert …. A. I do not disagree with this statement here. Q. You do not disagree? A. No."); Carstensen Decl. ¶¶ 1–6 (disclosing no education or experience in climate change science). Lacking requisite qualifications, they may not proffer opinions on climate change. Mont. R. Evid. 702. Their inexpert analyses (based on an *ad hoc* and inexpert selection of materials) that climate change will improve hydrology conditions are disproven by the expert conclusions—based on expert review of climate change literature—that increased evaporation and transpiration will "offset" any increases in precipitation and increase the likelihood of "severe summer drought." Montana Institute on Ecosystems, Climate Change and Human Health in Montana: A Special Report of the Montana Climate Assessment at XVIII–XIX (Jan. 2021) (Pet'rs' SUF Exhibit 10); *see also Held*, ¶¶ 3–4. This will, in turn, threaten agriculture "especially for individuals and communities relying on surface water and shallow groundwater." Montana Institute on Ecosystems, Climate Change and Human Health in Montana: A Special Report of the Montana Climate Assessment at XIX (Jan. 2021).

Third, even if it were not error for the proposed decision to consider WRM's *post hoc* and inexpert information, it would still not demonstrate that DEQ's refusal to consider climate change impacts was harmless. That is because the evidence proffered by WRM focused *solely* on groundwater, COL ¶¶ 81–82, but ignored surface water. The undisputed expert evidence shows that higher

temperatures and increased evaporation and transpiration will increase the likelihood of severe summer droughts and reduced surface water availability, harming agriculture. Montana Institute on Ecosystems, Climate Change and Human Health in Montana: A Special Report of the Montana Climate Assessment at XVIII–XIX (Jan. 2021). Congress specifically identified these conditions—arid western lands with high evaporation rates—as major threats to reclamation of coal mining operations when it promulgated SMCRA. H.R. Rep. No. 95-218 at 59–60 (1977). It was not harmless error for DEQ to ignore robust scientific evidence showing that these conditions will worsen in Montana during the time that reclamation of the Rosebud Mine will occur.

In short, the proposed decision errs in concluding that MSUMRA prohibits DEQ from considering climate change when assessing whether reclamation can be accomplished. COL ¶¶ 72–83. The Board should therefore reject this portion of the proposed decision.

B. Failure to Address Undisputed Contrary Evidence

Again, it is error for an agency to fail to address critical contrary evidence. *Diaz*, 55 F.3d at 307 (explaining that "failure to consider an entire line of evidence falls below the minimal level of articulation required"); *DeBuff*, ¶ 43; *N. Plains Res. Council*, 181 Mont. at 523, 594 P.2d at 310; Mont. Code Ann. § 2-4-623(4) (agency must respond to proposed findings).

With respect to Conservation Groups' third claim, the proposed decision fails to address the expert findings of the Montana Climate Assessment and the U.S. Geological Survey (USGS), both of which conclude that climate change will increase evaporation and transpiration in Montana. USGS Report; Montana Institute on Ecosystems, Climate Change and Human Health in Montana: A Special Report of the Montana Climate Assessment at XVIII–XIX (Jan. 2021). This a critical oversight because, as noted, the enactment of SMCRA was driven, in part, by concerns that reclamation may not be achievable in arid and semi-arid climates with high evaporation and transpiration. H.R. Rep. No. 95-218 at 59–60 (1977). The proposed decision only indirectly refers this evidence in a generic reference to Respondents' Joint Statement of Disputed Fact. FOF ¶ 106. But the JSDF only addresses these reports in paragraphs 84 and 85, and it does not dispute the documents with any substantial evidence. *Cape*, ¶ 12. Instead, it only makes conclusory assertions that the analyses are projections, not "facts." JSDF ¶¶ 84–85. Respondents suggest that climate change may cause precipitation to increase, but the Montana Climate Assessment clearly states that any "gains" in precipitation "will be offset by evaporation and transpiration due to higher temperatures" and that the likelihood of severe summer drought will increase. Montana Institute on Ecosystems, Climate Change and Human Health in Montana: A Special Report of

the Montana Climate Assessment at XVIII (Jan. 2021). Respondents' insubstantial objections are insufficient to dispute this evidence. *Cape*, ¶ 12.

The proposed decision's failure to address this critical evidence is error. The Board should remedy this error by adopting this evidence in findings of fact.

C. Exceptions to Findings of Fact

With respect to Conservation Groups' third claim, the proposed decision also made multiple factual findings that are not supported by "competent substantial evidence" or did "not comply with essential requirements of law." Mont. Code Ann. § 2-4-621(3).

First, the proposed decision incorrectly rejects Conservation Groups' proposed findings for supposedly lacking "expert testimony." FOF ¶ 106. But as noted, *supra* Part III.C, the proposed order entirely ignored the expert evidence from the USGS and the Montana Climate Assessment. As such, the proposed finding is not supported by substantial evidence. Mont. Code Ann. § 2-4-621(3).

Second, the proposed decision makes multiple findings about climate change based on Respondents' supposed "experts." FOF ¶¶ 114–19. However, as noted, none of the witnesses cited was qualified as an expert in climate change and the evidence and testimony from WRM's witnesses was *post hoc* and inadmissible. *See supra* Part III.A.2. As such, the proposed findings are not supported by

substantial evidence and do not comply with "essential requirements of law." Mont. Code Ann. § 2-4-621(3).

The Board should reject these proposed findings.

CONCLUSION AND RECOMMENDATIONS

For the foregoing reasons, Conservation Groups respectfully request that the Board:

- reject the proposed decision's findings and conclusions with respect to the standard of review, burden of proof, and the Conservation Groups' first and third claims, as set forth above;
- adopt the proposed decision's findings and conclusions with respect to Conservation Groups' standing; and
- dismiss Conservation Groups' second claim.

The Board should further enter a final order granting Conservation Groups' petition and vacating DEQ's approval of the AM5 expansion.

Respectfully submitted this 29th day of August, 2025.

/s/ Shiloh S. Hernandez
Shiloh S. Hernandez
Earthjustice
Northern Rockies Office
P.O. Box 4743
Bozeman, MT 59772-4743
(406) 426-9649
shernandez@earthjustice.org

Derf Johnson

Montana Environmental Information Center
P.O. Box 1184
Helena, MT 59624
(406) 443-2520
djohnson@meic.org

Counsel for Petitioners

0119

CERTIFICATE OF SERVICE

I hereby certify that on the 29th day of August, 2025, a true and correct copy of the foregoing was served on the following by electronic mail:

Samuel King
Jeremiah Langston
Montana Department of Environmental Quality
P.O. Box 200901
Helena, MT 59620-0901
samuel.king@mt.gov
jeremiah.langston2@mt.gov
ehagen2@mt.gov
sandy.moiseyscherer@mt.gov
Catherine.armstrong2@mt.gov

Samuel R. Yemington
HOLLAND & HART LLP
505 9th Street NW, Suite 700
Washington, DC 20004
sryemington@hollandhart.com

Sarah C. Bordelon
HOLLAND & HART LLP
5441 Kietzke Lane, Second Floor
Reno, NV 89511
scbordelon@hollandhart.com

William W. Mercer
Holland & Hart LLP
401 North 31st Street, Suite 1500
P.O. Box 639
Billings, MT 59103-0639
wwmercer@hollandhart.com

/s/ Shiloh S. Hernandez
Shiloh S. Hernandez

William W. Mercer
Holland & Hart LLP
401 North 31st Street, Suite 1200
Billings, MT 59103-0639
wwmercer@hollandhart.com

Samuel R. Yemington
HOLLAND & HART LLP
505 9th Street NW, Suite 700
Washington, DC 20004
sryemington@hollandhart.com

Sarah C. Bordelon
HOLLAND & HART LLP
5470 Kietzke Lane, Suite 100
Reno, NV 89511
scbordelon@hollandhart.com

Attorneys for Westmoreland Rosebud Mining LLC and International Union of Operating Engineers, Local 400

Electronically Filed with the
Montana Board of Environmental Review
8/29/25 at 1:38 PM
By: *Sandy Moisey Scherer*
Docket No: BER 2022-05 SM

BEFORE THE BOARD OF ENVIRONMENTAL REVIEW
OF THE STATE OF MONTANA

IN THE MATTER OF:	)	
APPEAL AND REQUEST	)	**CASE NO. BER 2022-05 SM**
FOR HEARING	)	
REGARDING ROSEBUD	)	**WESTMORELAND/LOCAL 400'S**
MINE AREA B,	)	**EXCEPTIONS TO RECOMMENDED**
AMENDMENT 5 PERMIT	)	**ORDER ON MOTIONS FOR**
NO. C1984003B	)	**SUMMARY JUDGMENT**
	)	

INTRODUCTION

On June 27, 2022, Montana Environmental Information Center and Sierra Club (together "Conservation Groups") challenged the Department of Environmental Quality's ("DEQ") approval of a fifth amendment to the Rosebud Mine's Permit No. C1984003B ("AM5"). The Board of Environmental Review ("Board") delegated the contested case to a Hearing Examiner, and Westmoreland Rosebud Mining LLC – the operator of the Rosebud Mine – and International Union of Operating Engineers, Local 400 – the workforce at the Rosebud Mine – (together "Westmoreland/Local 400") intervened on behalf of DEQ. As the challengers, Conservation Groups had the evidentiary burden to prove their claims that DEQ's approval of AM5 violated the Montana Strip and Underground Mine Reclamation Act ("MSUMRA") and its implementing rules.

The Parties participated in discovery, disclosed evidence and expert opinions, conducted a site inspection, and deposed witnesses. After the close of discovery, each Party moved for summary judgment. On May 23, 2025, the Hearing Examiner issued an Order on Motions for Summary Judgment ("Order") comprising his Opinion (Section II), Findings of Fact (Section III), Conclusions of Law (Section IV), and Recommended Decision (Section V). The Order rules in favor of DEQ and Westmoreland/Local 400 on every legal and factual issue and rejects Conservation Groups' claims as baseless. As recognized by the Hearing

Examiner, discovery revealed that Conservation Groups' claims were without evidentiary support and premised on mistaken beliefs and factual misapprehensions. Efforts by Conservation Groups to backfill their case and recast their claims on summary judgment – months after the close of discovery – were appropriately rejected by the Hearing Examiner as discovery abuse. Further highlighting Conservation Groups' failure to meet their evidentiary burden, the Hearing Examiner found that DEQ and Westmoreland/Local 400 – despite not having the evidentiary burden – successfully ***disproved*** Conservation Groups' claims with credible evidence and expert opinion.

The Order has been transmitted to the Board for review and consideration. Pursuant to the Montana Administrative Procedure Act ("MAPA"), the Parties may lodge exceptions to the Order and present oral argument before the Board. § 2-4-621(1), MCA. The Board is tasked with considering the Parties' exceptions, and having done so, accepting, modifying, or rejecting the Order and issuing a final decision. Westmoreland/Local 400 respectfully request the Board adopt the Hearing Examiner's Order subject to the minor modifications identified herein.

LEGAL STANDARD OF REVIEW

The Board's authority to reject or modify the Hearing Examiner's Order is statutorily limited. While the Board may reject or modify a proposed ***conclusion of law***, the Board may ***not*** reject or modify a proposed ***finding of fact*** unless, based

on a review of the complete record, the Board states with particularity that the proposed finding of fact is not based on competent substantial evidence or that the contested case proceeding did not comply with law. § 2-4-621(3), MCA. The substantial evidence standard is modest: substantial evidence consists of more than a scintilla of evidence but less than a preponderance. *Petaja v. Mont. Pub. Emp.'s Ass'n,* 2016 MT 143, ¶ 16. Applied here, the Board may not reject, modify, or otherwise disturb a proposed finding of fact supported by evidence that a reasonable mind might accept as adequate, even if the evidence is weak or conflicting. *Id*.

EXCEPTIONS

Based on the evidence presented and the governing law, the Hearing Examiner correctly denied Conservation Groups' claims. Westmoreland/Local 400 request the Board adopt the Hearing Examiner's Findings of Fact (Section III) in their entirety. In the interest of accuracy and consistency, Westmoreland/Local 400 lodge six exceptions to the Hearing Examiner's Opinion (Section II) and Conclusions of Law (Section IV) and respectfully request the Board correct these minor inaccuracies, ambiguities, and typographical errors as allowed by § 2-4-621, MCA.

I. EXCEPTION ONE: BURDEN OF PROOF AND EVIDENTIARY SCOPE

The Hearing Examiner's Conclusions of Law apply the correct burden of proof and evidentiary scope.[1] Order at COL ¶¶ 2, 37, 53, 57, 71; Recommended Decision ¶ 1. However, the Hearing Examiner's Opinion includes three statements that either misstate or invite potential ambiguity with respect to the burden of proof and evidentiary scope applied. In the interest of accuracy and to avoid potential ambiguity, Westmoreland/Local 400 request the Board modify the Order as follows:

First, the second paragraph of the Opinion incorrectly states that "Conservation Groups bear the burden of proving that DEQ's decision was arbitrary, capricious, an abuse of discretion, or otherwise contrary to law." Order at 2. The Montana Supreme Court has held that the "arbitrary and capricious" standard is not applicable to a contested case but rather, reserved for judicial review. *Mont. Env't Info. Ctr. v. Mont. Dep't of Env't Quality*, 2005 MT 96, ¶ 23 ("The standards of clearly erroneous, arbitrary and capricious, and abuse of

[1] The evidentiary burden rested with Conservation Groups to prove a violation of law. Order at COL ¶ 2. To satisfy their burden, Conservation Groups were required to establish the facts essential to their claims by a preponderance of the evidence presented. *Id*. at COL ¶ 3. Ultimately, the Hearing Examiner determined that Conservation Groups failed to meet their burden. *Id*. at Recommended Decision ¶ 1. This is a sufficient basis on which to resolve the contested case. Separately, the Hearing Examiner considered the evidence and expert opinion presented by DEQ and Westmoreland/Local 400 and determined that these parties – while not having the evidentiary burden – successfully disproved Conservation Groups' claims. *Id*. at Recommended Decision ¶ 2. This is a second basis on which to resolve the contested case.

discretion are not available to an agency acting as a factfinder under the contested case provisions contained in part 6 of the MAPA."); § 82-4-206(2), MCA ("The contested case provisions of the [MAPA] apply to a hearing before the board under subsection (1).").

As correctly explained by the Hearing Examiner throughout the Conclusions of Law, the burden rested with Conservation Groups to prove a violation of law. *Compare* Order at COL ¶¶ 2, 37, 53, 57, 71 *with Mont. Env't Info. Ctr.,* at ¶ 16; *see also*, In the matter of: Appeal Amendment Application AM3 Signal Peak Energy LLC's Bull Mountains Mine No. 1, Permit No. C1993017 (No. BER 2016-07-SM), Findings of Fact, Conclusions of Law, and Order ("AM3 Final Order"), at 8–9. To meet this burden, Conservation Groups were required to prove the facts essential to their claims by a preponderance of the evidence. Order at COL ¶¶ 3, 37, 53, and 71; *Mont. Env't Info. Ctr.,* at ¶ 22. Westmoreland/Local 400 request the Board modify the second paragraph of the Opinion Section to comport with this standard by replacing the phrase "arbitrary, capricious, an abuse of discretion, or contrary to law" with the word "unlawful."

Second, the third paragraph of the Opinion invites potential ambiguity with respect to the evidentiary scope of the contested case by suggesting that the matter was confined to an administrative record. Order at 2 ("Upon thorough review of the ***record***, the Hearing Examiner finds that the Conservation Groups have not met

this burden. The evidence fails to show that DEQ's permitting decision was unlawful or ***unsupported by the record***.") (emphasis added). By law, the evidentiary scope of a contested case is not confined to an administrative record prepared by the agency, § 2-4-614, MCA, and consistent with MAPA, the Parties to this contested case were properly afforded the opportunity to present and respond to evidence and argument on all issues involved. § 2-4-612(1), MCA. Westmoreland/Local 400 request the Board revise the text of the Order to remove potential ambiguity and reflect the correct evidentiary scope.

Third, the third paragraph of the Opinion states that DEQ and Westmoreland/Local 400 demonstrated that the agency's actions were supported by ***substantial evidence***. While apparent that the Hearing Examiner is simply communicating that Conservation Groups' claims were defeated by a wealth of evidence presented by DEQ and Westmoreland/Local 400, the phrase "substantial evidence" is a legal term of art that invites potential confusion with respect to the evidentiary standard employed by the Hearing Examiner and the Parties' requisite burdens of proof. As discussed above, Conservation Groups were required to prove the facts essential to their claims by a preponderance of the evidence to prevail. On the other hand, DEQ and Westmoreland/Local 400, as the Parties defending the challenged decision, were not required to disprove Conservation Groups' claims to prevail. To avoid potential confusion, Westmoreland/Local 400 request the Board

substitute the word "considerable" for "substantial" in the third paragraph in the Opinion Section.

Consistent with the above discussion, Westmoreland/Local 400 request the Board revise the second and third paragraphs of the Opinion:

> As to the parties seeking to overturn agency action, the Conservation Groups bear the burden of proving that DEQ's decision ~~was arbitrary, capricious, an abuse of discretion, or otherwise contrary to law~~ **was unlawful**.
>
> Upon thorough review of the ~~record~~ **evidence**, the Hearing Examiner finds that the Conservation Groups have not met this burden. The evidence fails to show that DEQ's permitting decision was unlawful ~~or unsupported by the record~~. In contrast, the evidence and legal arguments submitted by DEQ and Westmoreland/Local 400 (collectively referred to as "Respondents") demonstrate that the agency's actions were supported by ~~substantial~~ **considerable** evidence, including detailed technical and scientific analysis, and were consistent with the applicable legal framework.

II. EXCEPTION TWO: STANDING

A third party (*e.g.*, Conservation Groups) must meet certain statutory prerequisites to challenge a mine permit before the Board. § 82-4-206, MCA; ARM 17.24.425(1). This concept is known as standing.[2] To establish standing under MSUMRA, Conservation Groups must demonstrate that a member uses a

[2] Standing before the Board is set by statute whereas standing in Montana courts and Federal courts is established by the Montana Constitution and the U.S. Constitution, respectively. The requirements for establishing standing in these venues are similar, and the Board has frequently considered standing case law from Montana courts and Federal courts when determining whether a party meets the MSUMRA statutory standing standard. Notwithstanding, MSUMRA's statutory and regulatory text controls.

resource of value that may be adversely affected by the challenged mining operations. § 82-4-206, MCA; ARM 17.24.425(1); ARM 17.24.301(88). Over Westmoreland/Local 400's opposition, the Order concludes that Conservation Groups have standing to challenge AM5. Westmoreland/Local 400 object to the Order's Conclusions of Law addressing Conservation Groups' standing because the Hearing Examiner (1) applied an incorrect legal standard, (2) ignored MSUMRA's requirement that a third-party challenger use a resource of value that may be harmed by the challenged mining operation, and (3) failed to address Westmoreland/Local 400's evidence demonstrating that Conservation Groups' members do not use any resources of value that may be harmed by AM5. Westmoreland/Local 400 request the Board modify the Order to correct these errors and enforce MSUMRA's prohibition against disinterested third parties challenging permits.

First, the Hearing Examiner improperly concluded, as a matter of law, that Conservation Groups have perpetual standing to challenge permits issued to the Rosebud Mine because the Board has previously found Conservation Groups to have standing. Order at COL ¶¶ 22-23 (citing *In re Notice of Appeal and Request for Hearing Regarding Approval of Permit No. C2011003F* (*In re Area F*), No. BER 2019-05 OC, at 15–17 (Mont. Bd. of Env't Rev. Nov. 24, 2020) (Order of Hearing Examiner) and *In re Western AM4 Appeal*, No. BER 2016-03 SM, at 73–

74 (Mont. Bd. of Env't Rev. June 6, 2019)).[3] While the Board's past decisions may provide some persuasive value regarding Conservation Groups' legal standing to challenge permits issued to the Rosebud Mine, perpetual standing has been rejected by the Montana Supreme Court and Federal courts. *Schoof v. Nesbit*, 2014 MT 6, ¶ 12 ("Standing is a threshold requirement that must be decided in every case."); *Plan Helena, Inc. v. Helena Reg'l Airport Auth. Bd.*, 2010 MT 26, ¶ 10 (requisite personal interest "must exist at the commencement of the litigation [and] must continue throughout"); *DaimlerChrysler Corp. v. Cuno*, 547 U.S. 332, 352 (2006) (plaintiff "must demonstrate standing for each claim" and "for each form of relief sought").

Second, and of particular concern, the Hearing Examiner's determination that Conservation Groups have perpetual standing to challenge permits issued to the Rosebud Mine both ignores and contradicts MSUMRA's statutory and regulatory language conferring standing before the Board. *Baxter Homeowners Ass'n v. Angel*, 2013 MT 83, ¶ 16 ("[A] litigant's standing before an administrative

[3] The Hearing Examiner mistakenly cites *In re Area F* as Board precedent. Order at COL ¶ 22. As in the present case, Westmoreland/Local 400 disputed Conservation Groups' standing to challenge the Area F permit. The Area F Hearing Examiner concluded that Conservation Groups had sufficient standing to challenge the permit because one of Conservation Groups' members had once driven past Area F lands on a county road. The Area F contested case remains pending before the Board, and the Board has not yet reviewed or confirmed the Area F Hearing Examiner's standing ruling. As such, Westmoreland/Local 400 request the Board strike the Hearing Examiner's citation to *In Area F* from the Order.

agency depends on the language of the statute and regulations which confer standing before that agency."). MSUMRA expressly requires that a third-party challenger be a "person with an interest that is or may be adversely affected" by the permit being challenged. § 82-4-206, MCA; *see also*, ARM 17.24.425(1). MSURMA's implementing rules narrowly define the phrase "person having an interest which is or may be adversely affected" as someone "who uses any resource of economic, recreational, aesthetic, or environmental value that may be adversely affected by [the] mining operation […]." ARM 17.24.301(88).

Critically, simply asserting a resource use somewhere in the vicinity of the challenged mining operation is not sufficient to establish standing; the claimed resource use must have a "geographic nexus to the site" and not be shared by the general public. *Save Long Beach Island v. U.S. Dept. of Commerce*, No. 23-1886, 2025 U.S. Dist. LEXIS 125929, at *60 (D.N.J. July 2, 2025) ("plaintiff must show that he 'use[s] the area affected by the challenged activity and not an area roughly in the vicinity of it.'"); *Louisiana v. Haaland*, 86 F.4th 663, 667 (5th Cir. 2023) (holding that a "highly attenuated chain of possibilities" is "insufficient to show injury in fact."); *Park Cnty. Env't Council v. Mont. Dep't of Env't Quality,* 2020 MT 303, ¶ 22 (requiring an association clearly allege harm to a member's property, recreational, or aesthetic interests and that such harm be particularized to an individual who lives and recreates in the vicinity of the challenged development).

For a claimed aesthetic interest to qualify, the challenged mining operation must be "visible to at least one of the Plaintiffs from the roads or other locations where they travel, live, or visit." *Ctr. for Biological Diversity v. U.S. Dep't of Interior*, No. 23-5308, 2025 U.S. App. LEXIS 17377, at *22 (D.C. Cir. July 15, 2025). Applied here, Conservation Groups were required to show that a member uses economic, recreational, aesthetic, or environmental resources of value that may be adversely affected by AM5. ARM 17.24.301(88). Absent such demonstration, Conservation Groups lack standing to challenge AM5. *Id*.

Third, the Hearing Examiner failed to respond to Westmoreland/Local 400's evidence demonstrating Conservation Groups lack standing to challenge AM5. Prior to initiating this litigation, Conservation Groups did not know that AM5 lands are privately owned, landlocked, and not visible or accessible from public roads. Westmoreland/Local 400's Proposed COLs at ¶¶ 34, 41-42. Discovery revealed that Conservation Groups' members have never visited or even seen the more than 10,000 acres of land that comprise AM5 (much less the 2,000 acres of land that will be disturbed by mining).[4] *Id*. at ¶¶ 35, 39-41. Discovery further

[4] During discovery, Westmoreland/Local 400 specifically requested Conservation Groups admit that no "member, employee, or officer has visited the lands within the AM5 permit boundary." *Pet'rs' Resp. to Westmoreland/Local 400 Initial Disc. Reqs.* at RFA No. 1. Conservation Groups responded that one member may have hunted the drainage basin "years ago" but that "[h]e does not however recall exactly which sections he hunted on and whether they are among the sections included within the AM5 expansion area boundary." *Id*. Conservation Groups did not supplement their discovery responses thereafter. Order at FOF ¶ 26.

revealed that Conservation Groups' members have never been within even one mile of the AM5 permit boundary. *Id*. at ¶ 35. Further confirming this point, Conservation Groups' declarants Steve Gilbert (~360 miles), Anne Hedges (~360 miles), Alexis Bonogofsky (~120 miles), and Mike Scott (~120 miles) do not live or work anywhere near the Rosebud Mine and claim no unique resource use, let alone a resource use of value that will plausibly be harmed by AM5.[5] *Id*. at ¶¶ 37-39; *see also*, *Pet'rs' Mot. for Summ. J.* at 7.

On summary judgment, Westmoreland/Local 400 proposed conclusions of law – each with pinpoint citations to the evidentiary record – demonstrating that Conservation Groups' members do not use resources of value anywhere in the vicinity of AM5 (much less resources of value that may be adversely affected by AM5 as required to establish standing under MSUMRA). Westmoreland/Local 400's Proposed COLs at ¶¶ 33-42, 45. However, the Hearing Examiner's Order

[5] On summary judgment, Conservation Groups submitted declarations from members Anne Hedges, Alexis Bonogofsky, Steve Gilbert, and Mike Scott. The declarations – which were not disclosed in discovery – allege no harms specific to AM5 but rather, general and unsubstantiated grievances against the Rosebud Mine and coal mining. Such general averments are insufficient to establish standing under MSUMRA; Conservation Groups – though an individual member – must demonstrate actual use of a resource of value that may be adversely affected by AM5. ARM 17.24.301(88). By way of example, the Montana Water Use Act's near-identical statutory requirement was met where the claimant's members were recreational anglers with unique aesthetic and recreational interests in reaches of the Smith River and its tributaries at issue in the litigation and adversely affected by the challenged water appropriation. *Montana Trout Unlimited v. Mont. Dep't of Nat. Res*., 2025 MT 1, ¶ 47 (McGrath, J., concurring). Here, Conservation Groups' members allege no unique resource use of value, much less a unique resource use of value that will be adversely affected by AM5.

does not respond to or otherwise reconcile these undisputed facts (*e.g.*, that Conservation Groups' members cannot claim a resource use within even one mile of the AM5 permit boundary). Instead, Conclusion of Law No. 24 merely states without explanation that Conservation Groups' declarants have attested that AM5 will cause them to suffer an unspecified injury traceable to AM5. The Hearing Examiner's recitation of the standard for *constitutional* standing is not an appropriate conclusion of law because it fails to apply the undisputed facts to MSUMRA's controlling *statutory* standard. By law, the Board must assess these facts under the correct legal standard. § 2-4-623(4), MCA. Once done, the only lawful conclusion is that Conservation Groups lack standing to challenge AM5 because none of their members plausibly claim use of a resource of economic, recreational, aesthetic, or environmental value that may be adversely affected by AM5. ARM 17.24.301(88).

In sum, Westmoreland/Local 400 request the Board replace the incorrect legal standard presented in Conclusions of Law Nos. 22, 23, and 24 with MSUMRA's statutory and regulatory language conferring standing before the Board, acknowledge that a third-party challenger must actually use a resource of value that may be adversely affected by the challenged mining operation to maintain a contested case before the Board, and revise the Order's Conclusions of

Law and Recommended Decision to reflect Conservation Groups' failure to demonstrate standing:

> 22. "[A] litigant's standing before an administrative agency depends on the language of the statute and regulations which confer standing before that agency." *Baxter Homeowners Ass'n v. Angel*, 2013 MT 83, ¶ 16.
>
> 23. Pursuant to MSUMRA and its implementing rules, a person "with an interest that is or may be adversely affected" by a mining operation may challenge the mining operation before the Board. § 82-4-206, MCA; ARM 17.24.425(1).
>
> 24. The statutory phrase "person having an interest which is or may be adversely affected" is narrowly defined as someone who uses a resource of economic, recreational, aesthetic, or environmental value that may be adversely affected by the mining operation. ARM 17.24.301(88).
>
> 25. For a claimed aesthetic interest to qualify, the challenged mining operation must be "visible to at least one of the Plaintiffs from the roads or other locations where they travel, live, or visit." *Ctr. for Biological Diversity v. U.S. Dep't of Interior*, No. 23-5308, 2025 U.S. App. LEXIS 17377, at *22 (D.C. Cir. July 15, 2025).
>
> 26. AM5 is the fifth amendment to Permit No. C1984003B and allows for the continuation of ongoing mining operations at the 30,000-acre Rosebud Mine. Order at FOF ¶¶ 2, 5. AM5 abuts active mine cuts and is surrounded by lands on which coal mining operations have existed continuously for more than five decades. *Id*. at FOF ¶¶ 3, 7.
>
> 27. AM5 mining operations will be conducted on privately owned lands that lack public access and are not accessible or visible from public roads. JSUF at ¶ 5. Even if AM5 mining operations were visible from the most proximate public road, the road is surrounded on all sides by the Rosebud Mine, meaning that the AM5 viewshed is obstructed by the existing operations of the Rosebud Mine. Order at FOF ¶ 7; JSUF at ¶ 5.

28. Discovery revealed that Conservation Groups' members have never visited or seen AM5 lands. JSUF at ¶ 5. In discovery, Conservation Groups could not identify a single member visit to lands within even one mile of the AM5 permit boundary. *Id*. Prior to initiating this challenge, Conservation Groups did not know where AM5 lands were located or if AM5 lands were accessible by public road. *Id*.

29. On summary judgment, Conservation Groups assert "standing to challenge permitting decisions at the Rosebud Mine" based on prior rulings by the Board, organizational opposition to coal mining, and the declarations of Steve Gilbert, Anne Hedges, Alexis Bonogofsky, and Mike Scott. *Pet'rs' Mot. for Summ. J.* at 7.

30. Steve Gilbert (~360 miles), Anne Hedges (~360 miles), Alexis Bonogofsky (~120 miles), and Mike Scott (~120 miles) do not live or work near the Rosebud Mine and claim no injury to a particularized property interest or unique resource use that is traceable to AM5. Westmoreland/Local 400's Proposed COLs at ¶¶ 37-39; ARM 17.24.301(88); *Park Cnty. Env't Council v. Mont. Dep't of Env't Quality,* 2020 MT 303, ¶ 22 (requiring a member clearly allege harm to a property, recreational, or aesthetic interests and that such harm be particularized to an individual who lives and recreates in the vicinity of the challenged development).

31. Steve Gilbert, Anne Hedges, Alexis Bonogofsky, and Mike Scott generally object to the continued operation of the Rosebud Mine. Gilbert Decl. at ¶ 15 ("Continued expansion of the Rosebud Mine harms my appreciation of this area."); Hedges Decl. at ¶ 7 ("If the mine is allowed to expand it will increase the amount of air and water pollution that will cause harm to human health and the environment."); Scott Decl. at ¶ 4 ("I have driven along East Fork Armells Creek and viewed the mine, which I find aesthetically displeasing."); Bonogofsky Decl. at ¶ 12 ("I am concerned about the impact of the mine on water and wildlife.").

32. To the extent Conservation Groups' declarations can be read to assert a qualifying aesthetic, recreational, or environmental resource use in the vicinity of AM5, the Board finds such claims implausible.

AM5 abuts existing mine cuts and is surrounded by active and historic coal mining operations that have existed continuously for more than five decades.

33. The Board concludes that Conservation Groups have failed to show that a member uses a resource of value that is or may be adversely affected by AM5 and thus lack standing to maintain this challenge. Notwithstanding, and in the interest of judicial economy, the Board addresses the merits of Conservation Groups' claims below.

[…]

V. DECISION

1. Upon careful consideration of the Findings of Fact and Conclusions of Law, the Board concludes that Conservation Groups have failed **to establish standing under MSURMA or** to meet the requisite evidentiary burden necessary to demonstrate that DEQ's approval of AM5 violated the law.

[…]

C. Westmoreland/Local 400's Motion for Summary Judgment is **GRANTED** ~~in part and DENIED in part~~.

III. EXCEPTION THREE: PERMIT APPLICATION PHASE BURDEN

Conclusion of Law No. 33 states that "DEQ's authority to approve an application for mine permit revision is conditional upon a ***clear demonstration*** that the assessment of the cumulative impacts of anticipated mining on the hydrologic balance has been conducted." Order at COL ¶ 33 (emphasis added). The Hearing Examiner's use of the phrase "clear demonstration" in this context is potentially inconsistent with application approval standards set by MSUMRA. § 82-4-227,

MCA. MSUMRA provides that DEQ may not approve an application for a permit unless, on the basis of the information set forth in the application, the applicant has ***affirmatively demonstrated*** that the requirements of MSUMRA have been met and the proposed operation is designed to prevent material damage to the hydrologic balance outside the permit area. *Id*. In the interest of accuracy and to avoid potential ambiguity, Westmoreland/Local 400 request the Board modify Conclusion of Law No. 33 as follows:

> 33. ~~DEQ's authority to approve an application for a mine permit revision is conditional upon a clear demonstration that the assessment of the cumulative impacts of anticipated mining on the hydrologic balance has been conducted.~~ **DEQ may not approve a major revision to a mine permit unless the application affirmatively demonstrates compliance with MSUMRA and** ~~The application must also show that~~ the proposed operation is designed to avoid material damage to the hydrologic balance outside the permit area. § 82-4-227(3)(a), MCA; ARM 17.24.405(6)(c); ARM 17.24.314(5).

IV. EXCEPTION FOUR: UNPRESERVED SUBSTANTIVE CLAIM

Conservation Groups' Amended Notice of Appeal asserted that DEQ's cumulative impact assessment was ***procedurally*** deficient on the alleged basis that DEQ omitted certain existing and historic mining from its impact analysis. Order at FOF ¶ 16. Conservation Groups' claim was premised on a misunderstanding; that is, Conservation Groups were unaware of Appendix A to the Cumulative Hydrological Impact Assessment ("CHIA") – the document containing DEQ's cumulative impact assessment – prior to challenging AM5. *Id*. at FOF ¶¶ 58-60.

Confronted with this defeating evidence, Conservation Groups presented new evidence and argument on summary judgement – in the form of an expert declaration – in a belated attempt to recast the disproved process claim into a ***substantive*** claim. *Id*. at FOF ¶¶ 38-44. Finding discovery abuse and the substantive claim unpreserved, the Hearing Examiner struck the undisclosed declaration from the record and prohibited Conservation Groups from relying on the contents of the declaration. *Id*. at FOF ¶¶ 41-42. Despite this, in the interest of judicial economy, DEQ and Westmoreland/Local 400 requested the Hearing Examiner resolve the substantive claim on summary judgment. The Hearing Examiner's Order considers and rejects the substantive claim as baseless. *Id*. at COL ¶¶ 39-57. Westmoreland/Local 400 request the Board modify Conclusion of Law No. 39 to confirm that the substantive claim was not preserved in Conservation Groups' Amended Notice of Appeal but resolved by the Hearing Examiner in the interest of judicial economy:

> 39. ~~Furthermore,~~ **Conservation Groups' Amended Notice of Appeal did not preserve a substantive cumulative impact or material damage claim. FOF ¶ 16. In the interest of judicial economy, DEQ and Westmoreland/Local 400 request the Board resolve the substantive claim. With that understanding,** Conservation Groups did not provide ~~sufficient~~ **any** evidence to show that DEQ's cumulative impact assessment or material damage determination were substantively flawed. Their challenge relied solely on Mr. Anderson's declaration, which was not disclosed during discovery and was therefore struck from the record, as per the order on the motion to strike.

V. EXCEPTION FIVE: HISTORIC BIG SKY MINING

As illustrated in Finding of Fact No. 7, the eastern portion of the AM5 permit boundary encompasses land previously mined and reclaimed by the Big Sky Mine. As noted in the CHIA, Area B of the Big Sky Mine was permitted in 1988, operations began in 1989, mining concluded in 2003, and reclamation was completed in 2007. JSSUF at 10 (citing Written Findings, Attach. 1 (CHIA) at 14). The CHIA further confirms that "[t]he net effect of Big Sky mining on water quality in Lee Coulee has been a change from groundwater that included both Class II and Class III, to nearly exclusively Class III groundwater … [Total Dissolved Solids] concentrations in Big Sky spoil … are expected to remain within this range until flushing of dissolved solids from the Big Sky Area B spoil begins to reduce concentrations." *Id.* at 11 (citing CHIA at 78). In the interest of accuracy and to avoid potential confusion, Westmoreland/Local 400 request the Board modify the Hearing Examiner's proposed Conclusions of Law Nos. 45 and 46 to clarify that the referenced water quality changes in Lee Coulee alluvial groundwater are attributable to historic operations at the Big Sky Mine.

First, the second sentence of Conclusion of Law No. 45 states that "Prior to mining, the Lee Coulee alluvial groundwater quality averaged Class II, which changed to Class III post-mining." Westmoreland/Local 400 request the Board

clarify that the referenced alluvial groundwater quality classification change is attributable to historic mining at the Big Sky Mine (and not the Rosebud Mine):

> 45. First, Conservation Groups have failed to establish that cumulative mining impacts resulted in a water quality violation. Prior to **historic** mining **at the Big Sky Mine**, the Lee Coulee alluvial groundwater quality averaged Class II, which changed to Class III post-mining. This change did not constitute a water quality violation or material damage because it occurred within the Big Sky Mine permit boundary, where material damage is permitted, and because the Big Sky Mine was approved under a prior regulatory regime that exempted it from current material damage and anti-degradation standards. JSSUF at ¶¶ 10-11.

Second, the first sentence in Conclusion of Law No. 46 states that "Conservation Groups did not prove that AM5 was the cause-in-fact of the water quality violation." This sentence improperly implies that (1) Conservation Groups presented evidence of a water quality violation and (2) a water quality violation presently exists. As discussed in Exception IV, Conservation Groups presented ***no*** evidence of a water quality violation because the entirety of the evidence offered by Conservation Groups in support of this substantive claim was contained in the struck declaration. Moreover, as correctly noted by the Hearing Examiner in Conclusion of Law No. 45, the Big Sky Mine's impact on alluvial groundwater was ***within*** the permit boundary and, as such, "did not constitute a water quality violation." Westmoreland/Local 400 request the Board modify Conclusion of Law No. 46 to clarify that a water quality violation does not presently exist:

46. Second, Conservation Groups did not prove ~~that AM5 was the cause in fact of the~~ **a** water quality violation. The evidence shows, consistent with DEQ's material damage determination, that AM5 will not alter the classification of Lee Coulee alluvial groundwater.

VI. EXCEPTION SIX: TYPOGRAPHICAL ERRORS

Westmoreland/Local 400 request the Board correct the following typographical errors:

- Correct the citation in Finding of Fact No. 6 from *Id.* at 11 to DEQ Ex. A (Written Findings and ROD) at 11.
- Correct the citation in Finding of Fact No. 16 from ARM 17.24.314(32) to ARM 17.24.301(32).
- Correct the citation in Finding of Fact No. 45 from Conservation Groups' SUF at ¶¶ 30, 46-47 to Conservation Groups' SUF at ¶¶ 30, 45-46.
- Correct the citations in Findings of Fact Nos. 48-49 and 55 from JSDF to JSUF.
- Correct the citation in Conclusion of Law No. 1 from § 82-4-427(1)(a), MCA to § 82-4-206(1), MCA.
- Correct the citation in Conclusion of Law No. 2 from § 82-4-427(4), MCA to § 82-4-206(2), MCA.
- Correct the citation in Conclusion of Law No. 45 from JSUF at ¶¶ 10-11 to JSSUF at ¶¶ 10-11.
- Correct the citation in Conclusion of Law No. 53 from § 82-4-203(29), MCA to § 82-4-203(31) and (44).
- Replace the word "Court" with the word "Board" in the Order at 31, 51, and 52.

CONCLUSION

For the foregoing reasons, Westmoreland/Local 400 respectfully request the Board adopt the Hearing Examiner's Order subject to the minor modifications identified herein.

Dated: August 29, 2025

/s/ Samuel R. Yemington
Samuel R. Yemington
HOLLAND & HART LLP
505 9th Street NW, Suite 700
Washington, DC 20004
sryemington@hollandhart.com

Sarah C. Bordelon
HOLLAND & HART LLP
5470 Kietzke Lane, Suite 100
Reno, NV 89511
scbordelon@hollandhart.com

William W. Mercer
Holland & Hart LLP
401 North 31st Street, Suite 1200
P.O. Box 639
Billings, MT 59103-0639
wwmercer@hollandhart.com

Attorneys for Westmoreland Rosebud Mining LLC and International Union of Operating Engineers, Local 400

CERTIFICATE OF SERVICE

I hereby certify that on August 29, 2025, a true and accurate copy of the foregoing was served on the following by electronic mail:

Board Secretary
Board of Environmental Review
1520 E. Sixth Ave.
P.O. Box 200901
Helena, MT 59620-0901
Deqbersecretary@mt.gov

Jeremiah Langston
Samuel J. King
Montana Department of Environmental Quality
P.O. Box 200901
Helena, MT 59620-0901
Jeremiah.Langston2@mt.gov
Samuel.King@mt.gov

Catherine Armstrong
Montana Department of Environmental Quality
P.O. Box 200901
Helena, MT 59620-0901
catherine.armstrong2@mt.gov

Dana Hupp
BER Counsel
321 W. Broadway, Suite 300
Missoula, MT 59802
dhupp@wordenthane.com

Shiloh Hernandez
Earthjustice
Northern Rockies Office
313 East Main Street
P.O. Box 4743
Bozeman, MT 59772-4743
shernandez@earthjustice.org

Derf Johnson
Montana Environmental Information Center
P.O. Box 1184
Helena, MT 59624
djohnson@meic.org

/s/ Valerie Arias
Valerie Arias, Legal Assistant
HOLLAND & HART LLP

35072663_v12

Samuel J. King
Jeremiah R. Langston
Montana Department of
Environmental Quality
P.O. Box 200901
Helena, MT 59620-0901
Telephone: (406) 444-4961
Samuel.King@mt.gov
Jeremiah.Langston2@mt.gov

Attorneys for DEQ

Electronically Filed with the
Montana Board of Environmental Review
8/29/25 at 1:51 PM
By: *Sandy Moisey Scherer*
Docket No: BER 2022-05 SM

BEFORE THE BOARD OF ENVIRONMENTAL REVIEW
OF THE STATE OF MONTANA

IN THE MATTER OF: NOTICE OF APPEAL AND REQUEST FOR HEARING ROSEBUD MINE AREA B AMENDMENT 5 PERMIT NUMBER C1984003B	BER 2022-05 SM **DEQ'S EXCEPTIONS TO RECOMMENDED ORDER ON MOTIONS FOR SUMMARY JUDGMENT**

INTRODUCTION

This Montana Administrative Procedure Act ("MAPA") contested case comes before the Board of Environmental Review ("BER") on a challenge by Petitioners Montana Environmental Information Center and Sierra Club (collectively "Conservation Groups") to Respondent Montana Department of Environmental Quality's ("DEQ") approval of the fifth amendment to Rosebud Mine Permit No. C1984003B ("AM5") issued to Intervenor Respondent Westmoreland Rosebud Mining, LLC and International Union of Operating Engineers, Local 400 ("Westmoreland").

In pursuing this challenge, Conservation Groups alleged that DEQ violated the Montana Strip and Underground Mine Reclamation Act ("MSUMRA") in approving AM5 for three reasons: (1) DEQ failed to include existing and historic mining in conducting its cumulative impact assessment; (2) DEQ improperly authorized mining through an intermittent or perennial stream reach; and (3) DEQ failed to consider global climate change in assessing whether reclamation could be accomplished.

The BER delegated this contested case proceeding to a Hearing Examiner, Rob Cameron, for adjudication. Thereafter, the parties engaged in discovery, filed cross motions for summary judgment on all three claims, and had oral argument before the Hearing Examiner on the motions. On May 23, 2025, Hearing Examiner

Cameron issued an Order on Motions for Summary Judgment, recommending that Conservation Groups' Motion for Summary Judgment be denied; DEQ's Motion for Summary Judgment be granted; and Westmoreland's Motion for Summary Judgment be granted as to the merits of Conservation Groups' claims.[1]

Now that a proposed decision has been rendered, and because the full BER has not heard the contested case, the BER sits in an appellate capacity, and must follow the procedure set forth in § 2-4-621, MCA. As part of that procedure, the BER can only reject or modify findings of fact unless the BER "first determines from a review of the complete record and states with particularity in the order that the findings of fact were not based upon competent substantial evidence." *Moran v. Shotgun Willies*, 270 Mont. 47, 51, 889 P.2d 1185, 1187 (1995). The Hearing Examiner's factual findings were, without a doubt, based on competent substantial evidence. Accordingly, subject to the minor modifications requested to legal conclusions and scrivener errors identified in the proposed decision, DEQ asks that the BER adopt the Hearing Examiner's findings and conclusions.

STANDARD OF REVIEW

This case is governed by the MAPA contested case procedures set forth in Title 2, Chapter 4, Part 6 of the Montana Code. When, like here, the BER appoints

[1] The Hearing Examiner's proposed Order did not grant Westmoreland's motion as to its claim that Conservation Groups lacked standing. DEQ did not join Westmoreland's standing argument and takes no position on that argument or the Hearing Examiner's determination.

a Hearing Examiner to decide the case, before the BER renders a final decision the "proposal for decision [must be] served upon the parties and an opportunity is afforded to each party adversely affected to file exceptions and present briefs and oral argument" to the full Board." Section 2-4-621(1), MCA.

The BER "may adopt the proposal for decision as the agency's final order." Section 2-4-621(3), MCA. The BER, in its final order, "may reject or modify the conclusions of law and interpretation of administrative rules in the proposal for decision" but only if it "first determines from a review of the ***complete record*** and ***states with particularity in the order*** that the findings of fact were not based upon ***competent substantial evidence*** or that the proceedings on which the findings were based ***did not comply with the essential requirements of law***." *Id.* (emphasis added); *see also Shotgun Willies*, 270 Mont. at 51, 889 P.2d at 1187 (1995) (quoting same); *Ulrich v. State ex rel. Board of Funeral Serv.*, 1998 MT 196, ¶ 14, 289 Mont. 407, 961 P.2d 126 (concluding agency "may reject the examiner's findings only if they are not based upon competent, substantial evidence" and abuses its discretion pursuant to § 2-4-704(2)(a)(vi), MCA, if it "reject[s] the hearing examiner's findings in violation of § 2-4-621(2), MCA").

EXCEPTIONS

I. Exception No. 1: Legal Standard

Page 2 of the Opinion reads: "[A]s the parties seeking to overturn agency action, the Conservation Groups bear the burden of proving that DEQ's decision was arbitrary, capricious, an abuse of discretion, or otherwise contrary to law." The Montana Supreme Court has rejected the "arbitrary, capricious, abuse of discretion" standard as applied to contested cases operating under Title 2, chapter 4, part 6 of MAPA, finding that standard is "not legally available to it as the finder of fact in a contested case proceeding." *Mont. Envtl. Info. Ctr. v. Mont. Dep't of Envtl. Quality*, 2005 MT 96, ¶ 25, 326 Mont. 502, 112 P.3d 964. Instead, Conservation groups, as the party asserting the claim at issue, had "the burden of presenting," by a "preponderance of the evidence" standard, "the evidence necessary to establish the facts essential to a determination that [DEQ's] decision violated the law." *Id.* at ¶¶ 16, 22.

As the Hearing Examiner correctly noted elsewhere in the proposed Order, Conservation Groups "bear[] the evidentiary burden of proof" to "establish the facts essential to their claims by a preponderance of the evidence." *See* COL ¶¶ 2, 3; *see also* COL ¶ 37 (noting Conservation Groups "bore the burden of demonstrating by a preponderance of the evidence" that DEQ "erred in its assessment"); Recommended Decision ¶ 1 (finding Conservation Groups have

"failed to meet the requisite evidentiary burden necessary to demonstrate that DEQ's approval of AM5 violated the law."). To avoid any confusion or ambiguity, DEQ requests this paragraph be modified, consistent with the controlling legal standard, to read:

> **As the parties challenging DEQ's decision, the Conservation Groups bear the burden of proving, by a preponderance of the evidence, the facts essential to a determination that DEQ's decision violated the law.**

Similarly, the proposed Order reads in the following paragraph (paragraph 3 of page 2): "Upon thorough review of the record, the Hearing Examiner finds that the Conservation Groups have not met this burden. The evidence fails to show that DEQ's permitting decision was unlawful or unsupported by the record."

This is not a record review proceeding, but a trial type proceeding conducted de novo, in which all parties are allowed to present evidence and argument on all issues involved. Section 2-4-612(1), MCA; § 2-4-614(1), MCA; William L. Corbett, *Montana Administrative Law Practice*, 73 Mont. L. Rev. (2013) at 360.

Additionally, this paragraph states that the agency's decision was "supported by substantial evidence." Because the term "substantial evidence" has a specific legal meaning used in a closed evidentiary record before an appellate court, *see, e.g., Blaine Cnty. v. Stricker*, 2017 MT 80, ¶ 26, 387 Mont. 202, 394 P.3d 159, its reference should also be removed from the order.

Accordingly, to avoid any potential ambiguity, DEQ requests that this paragraph be modified to read:

> **Upon thorough review of the evidence, the Hearing Examiner finds that the Conservation Groups have not met this burden. The evidence fails to show that DEQ's permitting decision was unlawful. In contrast, the evidence and legal arguments submitted by DEQ and Westmoreland/Local 400 (collectively referred to as "Respondents") demonstrate the agency's actions were supported by considerable evidence, including detailed technical and scientific analysis, and were consistent with the applicable legal framework.**

II. Exception No. 2: Conclusion of Law Nos. 1 & 2

Conclusions of Law Nos. 1-2, while correct in their recitation of the law, provide an incorrect citation to § 82-4-427 of the Montana Opencut Mining Reclamation Act. The correct statutory citation should be to MSUMRA, which is at § 82-4-206, MCA. DEQ asks that the citation in Conclusion Nos. 1 and 2 be corrected as such.

III. Exception No. 3: Conclusion of Law No. 33

Conclusion of Law No. 33 provides that "DEQ's authority to approve an application for mine permit revision is conditional upon a ***clear demonstration*** that the assessment of the cumulative impacts of anticipated mining on the hydrologic balance has been conducted." (Emphasis added.)

MSUMRA requires that DEQ may not approve an application for a mine permit unless the requirements of MSUMRA have been met and "the application ***affirmatively demonstrates***" that the proposed operation is designed to prevent

material damage to the hydrologic balance outside the permit area. Section 82-4-227, MCA.

DEQ requests that Conclusion No. 33 be modified as follows to avoid any potential ambiguity:

> **DEQ may not approve a major revision to a mine permit unless the application affirmatively demonstrates compliance with MSUMRA and the proposed operation is designed to avoid material damage to the hydrologic balance outside the permit area.**

IV. Exception No. 4: Conclusion of Law No. 39

Conclusion of Law No. 39 reads: "Furthermore, Conservation Groups did not provide sufficient evidence to show that DEQ's cumulative impact assessment or material damage determination were substantively flawed. Their challenge relied solely on Mr. Anderson's declaration, which was not disclosed during discovery and was therefore struck from the record, as per the order on the motion to strike."

While the Hearing Examiner correctly found Conservation Groups failed to present any evidence regarding material damage, the Hearing Examiner didn't explicitly address DEQ's and Westmoreland's first argument, which was that Conservation Groups did not plead or develop a substantive material damage claim. Rather, as the proposed Order notes elsewhere, Conservation Groups' first claim was a *procedural* error, alleging that DEQ failed to "include adjacent

existing and historic mine sites in its cumulative impact assessment of the Lee Coulee alluvium." *See* Order, FOF ¶ 16.

Conservation Groups maintained this position throughout the duration of the proceeding. As the Order notes, Conservation Groups' expert disclosure alleged the same position. Order, FOF ¶ 22. And in discovery, Conservation Groups' position was defeated based on its unawareness of DEQ's analysis conducted in Exhibit A to the CHIA. *See id.*, FOF ¶¶ 59-63. Not until summary judgment did Conservation Groups raise the new substantive claim that material damage would occur, *see* Conservation Groups' BIS MSJ (Doc. 38) at 10, submitting a new and undisclosed expert witness declaration in support, Order, FOF ¶¶ 38-44. The Hearing Examiner properly struck the declaration given that it was undisclosed and the new claim was unpreserved. *Id.* at FOF ¶¶ 41-42. DEQ and Westmoreland nevertheless asked that the Hearing Examiner also find in their favor on summary judgment as to the new, unpreserved substantive claim, which the Hearing Examiner did. *Id.* at COL ¶¶ 39-57.

The notice pleading requirements "are the same whether dealing with an administrative agency or a court," *Klundt v. State*, 219 Mont. 347, 351, 712 P.2d 776, 779 (1986), such that there has been no fair notice of issues to be litigated if the pleadings do not make the charged party "aware of issues which it ha[s] to defend," *Bd. of Trustees of Billings Sch. Dist. No. 2 v. State*, 185 Mont. 104, 107-

108, 604 P.2d 778, 780 (1979). *See also Flowers v. Bd. of Pers. Appeals*, 2020 MT 150, ¶ 8, 400 Mont. 238, 465 P.3d 210 (each individual must be "properly raised" at administrative level to satisfy MAPA exhaustion requirements). And a party cannot move for summary judgment on a claim it failed to plead, *Kostelecky v. Peas in a Pod LLC*, 2022 MT 195, ¶ 4, 410 Mont. 239, 518 P.3d 840, nor use summary judgment as a second chance to flesh out inadequate pleadings, *Wasco Products, Inc. v. Southwall Technologies, Inc.*, 435 F.3d 989, 992 (9th Cir. 2006).

Although the Hearing Examiner correctly determined that even considering Conservation Groups' new substantive material damage claim, Conservation Groups still failed to meet their burden, the Order should also explicitly reflect that Conservation Groups' claim was barred by failing to properly raise the issue in the first instance. *Flowers*, ¶ 8. Accordingly, DEQ requests Conclusion No. 39 be modified as follows:

> **Furthermore, Conservation Groups did not properly raise or develop the substantive material damage claim as necessary to exhaust its administrative remedies, and it is axiomatic that a party cannot move for summary judgment on a claim it failed to plead. But even presuming Conservation Groups had properly preserved its substantive material damage claim, Conservation Groups did not provide sufficient evidence to show that DEQ's cumulative impact assessment or material damage determination were substantively flawed. Their challenge relied solely on Mr. Anderson's declaration, which was not disclosed during discovery and was therefore struck from the record, as per the order on the motion to strike.**

V. Exception No. 5: Conclusion of Law Nos. 45 & 46

Conclusion of Law No. 45 states that "Prior to mining, the Lee Coulee alluvial groundwater quality averaged Class II, which changed to Class III post-mining." While not an incorrect statement, it is ambiguous as to the cause of the groundwater class change.

The eastern permit boundary of AM5 encompasses land previously mined and reclaimed by the Big Sky Mine. Area B of the Big Sky Mine was permitted in 1988, mining concluded in 2003, and reclamation completed in 2007. JSSUF at 10 (citing Written Findings, Attach. 1 (CHIA) at 14). The CHIA confirms that the groundwater class change to "nearly exclusively Class III groundwater" is a result of the Big Sky Mine. *Id.* at 78. Indeed, the Order correctly notes elsewhere that the groundwater class change was strictly a result of historic mining from the Big Sky Mine. *See* COL ¶ 7.

Conclusion of Law No. 45 also states that "[t]his change did not constitute a water quality violation or material damage because it occurred within the Big Sky Mine permit boundary, where material damage is permitted, and because the Big Sky Mine was approved under a prior regulatory regime that exempted it from current material damage and anti-degradation standards." Again, while technically correct, the conclusion seems to suggest "material damage" applies at all within a

mine-permit boundary; it doesn't. "Material damage" is only contemplated *outside* of a mine permit boundary. Section 82-4-203(32), MCA (2021).

To avoid any ambiguity, and for consistency with the rest of the Order, Conclusion No. 45 should be modified to read as follows:

> **First, Conservation Groups have failed to establish that cumulative mining impacts resulted in a water quality violation. Prior to historic mining at the Big Sky Mine, the Lee Coulee alluvial groundwater quality averaged Class II, which changed to Class III post-mining. This change did not constitute a water quality violation or material damage because it occurred within the Big Sky Mine permit boundary and because the Big Sky Mine was approved under a prior regulatory regime that exempted it from current material damage and anti-degradation standards.**

Conclusion of Law No. 46, while also technically correct, should also be modified for accuracy. Currently, Conclusion No. 46 states: "Second, Conservation Groups did not prove that AM5 was the cause-in-fact of the water quality violation. The evidence shows, consistent with DEQ's material damage determination, that AM5 will not alter the classification of Lee Coulee alluvial groundwater." While Conservation Groups indeed did not prove that AM5 was the cause-in-fact of the water quality violation, this conclusion seems to improperly suggest that there is *any* water quality violation. There is not, as recognized by Conclusion No. 45 (recognizing that the change in groundwater class from Big Sky "did not constitute a water quality violation."). Accordingly, DEQ requests that Conclusion No. 46 be modified, for consistency and accuracy, to state:

Second, Conservation Groups did not prove a water quality violation. The evidence shows, consistent with DEQ's material damage determination, that AM5 will not alter the classification of Lee Coulee alluvial groundwater.

VI. Scrivener Errors

Finally, there are some minor scrivener errors in the Hearing Examiner's proposed Order that should be modified.

First, correct the citation in Finding of Fact No. 6 to "DEQ Ex. A (Written Findings and ROD) at 11".

Second, correct the citation to Claim One to ARM 17.24.314(5) in Finding of Fact No. 16 to "ARM 17.24.301(32)".

Third, correct the citation in Finding of Fact No. 45 to "Conservation Groups' SUF at ¶¶ 30, 45-46".

Fourth, correct the citations in Findings of Fact Nos. 47-49 and 55 from "JSDF" to "JSUF".

Fifth, correct the citation in Finding of Fact No. 73 to read: "DEQ Ex. I (Conservation Groups' Resp. to WRM/Local 400's Initial Discovery Requests) at Interrogatory No. 7; DEQ Ex. W (Conservation Groups' Resp. to DEQ's Initial Discovery Requests) at Interrogatory No. 7; JSUF at ¶¶ 30, 49-50".

Sixth, correct the citation in Finding of Fact No. 75 from "See, e.g., SUF at ¶¶ 47, 55, 58, 60, and 62" to include "Conservation Groups'" before "SUF".

Seventh, correct the citation in Conclusion of Law No. 45 to read "JSSUF at ¶¶ 10-11".

Eighth, correct the citation in Conclusion of Law No. 50 to read "§§ 82-4-203(18), (29), MCA; ARM 17.24.301(39); ARM 17.24.301(61)".

Finally, change the citation in Conclusion of Law No. 67 to "§ 82-4-203(44), MCA".

CONCLUSION

For the foregoing reasons, the BER should, following exceptions briefing and an opportunity for the parties to be heard, adopt the Hearing Examiner's proposed Order subject to the minor modifications requested herein.

DATED this 29th day of August 2025.

Signed: */s/ Samuel J. King*
Samuel J. King

Counsel for DEQ

Certificate of Service

I hereby certify that on this 29th day of August 2025, I caused to be served a true and correct copy of the foregoing document to all parties or their counsel of record by electronic mail, addressed as follows:

Board Secretary
Board of Environmental Review
1520 E. Sixth Ave.
P.O. Box 200901
Helena, MT 59620-0901
Deqbersecretary@mt.gov

Shiloh Hernandez
Earthjustice
Northern Rockies Office
313 East Main Street
P.O. Box 4743
Bozeman, MT 59772-4743
shernandez@earthjustice.org

Derf Johnson
Montana Environmental Information Center
P.O. Box 1184
Helena, MT 59624
(406) 443-2520
djohnson@earthjustice.org

William B. Mercer
Holland & Hart LLP
401 N. 31st Street, Suite 1500
P.O. Box 639
Billings, MT 59103-0639
wwmercer@hollandhart.com
aforney@hollandhart.com
mmccallum@hollandhart.com
varias@hollandhart.com

Samuel R. Yemington
Holland & Hart LLP
505 9th Street NW, Suite 700
Washington, D.C. 20004
sryemington@hollandhart.com

Sarah C. Bordelon
Holland & Hart LLP
5470 Kietzke Lane, Ste. 100
Reno, NV 89511
scbordelon@hollandhart.com

BY: */s/ Catherine Armstrong*
Catherine Armstrong, Paralegal
Dept. of Environmental Quality

William W. Mercer
Holland & Hart LLP
401 North 31st Street, Suite 1200
Billings, MT 59103-0639
wwmercer@hollandhart.com

Samuel R. Yemington
Holland & Hart LLP
505 9th Street NW, Suite 700
Washington, DC 20004
sryemington@hollandhart.com

Sarah C. Bordelon
Holland & Hart LLP
5470 Kietzke Lane, Suite 100
Reno, NV 89511
scbordelon@hollandhart.com

Attorneys for Westmoreland Rosebud Mining LLC and International Union of Operating Engineers, Local 400

Electronically Filed with the
Montana Board of Environmental Review
10/3/25 at 1:51 PM
By: *Sandy Moisey Scherer*
Docket No: BER 2022-05 SM

BEFORE THE BOARD OF ENVIRONMENTAL REVIEW
OF THE STATE OF MONTANA

IN THE MATTER OF:	)	
APPEAL AND REQUEST	)	**CASE NO. BER 2022-05 SM**
FOR HEARING	)	
REGARDING ROSEBUD	)	**WESTMORELAND/LOCAL 400'S**
MINE AREA B,	)	**RESPONSE IN OPPOSITION TO**
AMENDMENT 5 PERMIT	)	**PETITIONERS' EXCEPTIONS TO**
NO. C1984003B	)	**PROPOSED ORDER ON SUMMARY**
	)	**JUDGMENT**

TABLE OF CONTENTS

INTRODUCTION 3

ARGUMENT 3

I. CONSERVATION GROUPS FAIL TO SPECIFY THE FACTUAL FINDINGS AND LEGAL CONCLUSIONS AGAINST WHICH THEY LODGE EXCEPTIONS.....3

II. THE HEARING EXAMINER CORRECTLY APPLIED THE BURDEN OF PROOF. 4

A. The Burden of Proof is Settled Law.....5

B. The Hearing Examiner Correctly Applied the Burden of Proof. 7

III. THE HEARING EXAMINER CORRECTLY RESOLVED CLAIM 1. 12

A. The Hearing Examiner's Claim 1 Findings of Fact Are Supported by Substantial Evidence. 13

B. The Hearing Examiner's Claim 1 Conclusions of Law Are Correct. 20

IV. CONSERVATION GROUPS ARE PROHIBITED FROM DISMISSING CLAIM 2. 22

A. Conservation Groups are Prohibited From Dismissing Claim 2. 23

B. Conservation Groups' Bad Faith Prosecution of Claim 2 Must Not Be Rewarded with Dismissal. 25

V. THE HEARING EXAMINER CORRECTLY RESOLVED CLAIM 3. 27

A. The Hearing Examiner's Claim 3 Findings of Fact Are Supported by Substantial Evidence. 28

B. The Hearing Examiner's Claim 3 Conclusions of Law Are Correct. 32

VI. THE HEARING EXAMINER ADEQUATELY RESPONDED TO CONSERVATION GROUPS' EVIDENCE AND ARGUMENT. 36

CONCLUSION 38

0161

INTRODUCTION

The Hearing Examiner's Order is comprised of 119 factual findings, 83 legal conclusions, and pages of discussion responding to the Parties' evidence and argument and rejecting Conservation Groups' claims as baseless. At most, Conservation Groups challenge 29 factual findings and 20 legal conclusions. Despite not challenging the vast majority of the Hearing Examiner's Order, Conservation Groups improperly request the Board reject and reverse the entirety of the decision. Because the Hearing Examiner's factual findings and legal conclusions are supported by substantial evidence and correct, the Board must deny Conservation Groups' exceptions and uphold the Hearing Examiner's Order.

ARGUMENT

I. CONSERVATION GROUPS FAIL TO SPECIFY THE FACTUAL FINDINGS AND LEGAL CONCLUSIONS AGAINST WHICH THEY LODGE EXCEPTIONS.

The exceptions process is an opportunity for Conservation Groups to identify—with some measure of specificity—the Hearing Examiner's enumerated factual findings and legal conclusions they assert are not supported by substantial evidence or incorrect.[1] § 2-4-621(3), MCA. Ignoring this requirement, Conservation Groups bury their "exceptions" in sweeping narrative arguments and

[1] As discussed more fully in Westmoreland/Local 400's exceptions, the Board's authority to reject or modify the Hearing Examiner's factual findings and legal conclusions is statutorily limited, and the Board may not reject, modify, or otherwise disturb a proposed finding of fact supported by evidence that a reasonable mind might accept as adequate, even if the evidence is weak or conflicting. *Petaja v. Mont. Pub. Emp.'s Ass'n*, 2016 MT 143, ¶ 16.

opaque string cites. It is not the job of the Board to decipher Conservation Groups' exceptions, and the opposing Parties should not be left guessing to what—and on what basis—Conservation Groups object. *Whitefish Credit Union v. Sherman*, 2012 MT 267, ¶ 16. Consistent with past practice, Westmoreland/Local 400 request the Board adopt each factual finding and legal conclusion to which Conservation Groups did not explicitly lodge an exception based on the substantial evidence or correctness standards.[2]

II. THE HEARING EXAMINER CORRECTLY APPLIED THE BURDEN OF PROOF.

The evidentiary burden rested with Conservation Groups to prove a violation of law. Order at COL ¶ 2. To satisfy their burden, Conservation Groups were required to establish the facts essential to their claims by a preponderance of the evidence. *Id*. at COL ¶ 3. The Hearing Examiner correctly applied this burden, and ultimately, determined that Conservation Groups failed to meet their burden. *Id*. at COL ¶¶ 2, 37, 53, 57, 71, Recommended Decision ¶ 1. Conservation Groups object, claiming that the Hearing Examiner misstated their burden of proof. Pet'rs' Exceptions to Proposed Order on Summ. J. ("Pet'rs' Exceptions") at 5-6.

[2] "[T]he time for any of the parties to bring to [the Board's] attention findings of fact that they believe are either not supported by substantial evidence or are contrary to the law is in their exceptions[.]" *Transcript of Proceedings – Oral Argument*, In the matter of the Appeal Amendment AM4, Western Energy Company Rosebud Strip Mine Area B, BER 2016-03SM Permit No. C1984003B. As such, the Board should adopt unchallenged Findings of Fact Nos. 1-15, 17-44, 46-119 and Conclusions of Law Nos. 1-2, 7-35, 37-44, 47-70.

Conservation Groups are incorrect. The Board should deny this exception and adopt the proposed decision because the Hearing Examiner correctly enunciated and applied Conservation Groups' evidentiary burden.

A. The Burden of Proof is Settled Law.

Conservation Groups have resisted their evidentiary burden of proof in contested cases before the Board *for more than two decades*. Despite their burden of proof being settled law, Conservation Groups' exceptions to the Hearing Examiner's Order continue this effort.

In 2005, the Montana Supreme Court conclusively held that the challenging party in a Montana Administrative Procedure Act ("MAPA") contested case has the burden of proof. *Mont. Env't Info. Ctr. v. Mont. Dep't of Env't Quality*, 2005 MT 96, ¶¶ 10-16 ("*MEIC 2005"*). To meet this burden, the challenging party must prove the facts essential to their claim by a preponderance of the evidence. *Id*. at ¶ 22. In 2023, the Court—positively citing *MEIC 2005* a dozen times—confirmed that this standard applies to a MSURMA contested case such as this. *Mont. Env't Info. Ctr. v. Westmoreland Rosebud Mining, LLC*, 2023 MT 224 ("*AM4*").

In *AM4*, the Court explained that the permit applicant, "having succeeded … before the DEQ's permit issuers, need not re-prove the factual elements of its case a second time before the Board." *AM4*, ¶ 18. The Court further explained that Conservation Groups—as the challengers—are "required to show before the Board

that DEQ's decision violated the law, by methods including evidence or argument sufficient to show that DEQ's conclusion . . . was in error."[3] *Id*. at ¶ 21. The Court concluded by stating that the question of burden of proof was resolved. *Id*. at ¶ 25 ("We anticipate the parties will be clear as to respective burdens of proof required by Montana law.").

Despite the Supreme Court's directive that Conservation Groups accept their burden of proof in future contested cases, Conservation Groups declined to present evidence here in support of their claims and instead argued on summary judgment that the burden should rest with DEQ and Westmoreland/Local 400 to disprove Conservation Groups' unsupported allegations. Pet'rs' Combined Reply to DEQ and WMR's Resp. Briefs in Supp. of Mot. for Summ. J. ("Pet'rs' MSJ Reply"), at 16-17. Now, having lost on summary judgment, Conservation Groups continue to resist their burden of proof. Pet'rs' Exceptions at 5-6. Conservation Groups' persistent refusal to accept this settled law is prejudicial to DEQ and Westmoreland/Local 400 because it forces them to devote resources to repeatedly

[3] Applied here, neither Westmoreland/Local 400 nor DEQ had the burden of proof after the permit issuance. Conservation Groups, as the permit challengers, had the burden of presenting non-speculative evidence sufficient to persuade the Hearing Examiner that DEQ's decision to approve the permit was unlawful. *Nelson v. Mont. Power Co.,* 256 Mont. 409, 412 (1993) ("Unsupported conclusory or speculative statements do not raise a genuine issue of material fact."). Simply questioning DEQ's analysis without evidence—as Conservation Groups did here—does not meet their burden. *Id*.

relitigate settled law. The Board should reject these efforts and discourage this behavior.

B. The Hearing Examiner Correctly Applied the Burden of Proof.

Conservation Groups object to Conclusions of Law Nos. 3, 4, 5, 6, 45, 71, and 80, claiming that the Hearing Examiner misstates their evidentiary burden. Because the Hearing Examiner correctly applied the burden of proof, the exceptions fail.

First, Conservation Groups object to Conclusion of Law No. 6, arguing that it creates a rebuttal presumption where none exists. Pet'rs' Exceptions at 5. To the contrary, the Montana Supreme Court recently clarified that DEQ's decision to approve a permit creates just such a presumption. Conclusion of Law No. 6 states:

> 6. There exists a rebuttal presumption that DEQ's decision to approve the permit is correct and lawful. Once the applicant has shown compliance during the permitting phase, the applicant "need not re-prove the factual elements of its case before the Board." *Westmoreland Rosebud Mining, LLC*, ¶ 18.

The quoted language in Conclusion of Law No. 6 is found in the Montana Supreme Court's decision rejecting Conservation Groups' most recent effort to evade their evidentiary burden in a contested case before the Board:

> MSUMRA requires the applicant, Westmoreland, to bear the evidentiary burden of proving no material damage to be entitled to approval of its permit application. ***However, DEQ is correct that Westmoreland, having succeeded in this showing before the DEQ's permit issuers, need not***

> ***re-prove the factual elements of its case a second time before the Board. Rather, Conservation Groups—as challengers to a DEQ permitting decision—are the party that must bear a burden before the Board***.

AM4, 2023 MT 224, ¶ 18 (emphasis added and internal citations omitted).

The plain language of the Court's decision instructs that a successful permit applicant need not re-prove its permit application a second time before the Board. *Id*. This is an intrinsic recognition that DEQ's decision to approve a permit is ***presumed*** correct and lawful and that the evidentiary burden of proof shifts to the challenger to overcome this presumption. Because Conclusion of Law No. 6 is an accurate presentation of the Court's holding, the Board should reject the exception.

Second, Conservation Groups object to Conclusions of Law Nos. 3, 4, 5, and 45, asserting that they "require[] the Conservation Groups to prove material damage." Pet'rs' Exceptions at 5-6. Conclusions of Law Nos. 3, 4, 5, and 45 state:

> 3. To satisfy this burden, the challenging party must establish the facts essential to their claims by a preponderance of the evidence. As held in *Mont. Env't Info. Ctr.*, at ¶ 21, the challenging party must demonstrate, through evidence or argument, that DEQ's decision was erroneous. See also, *DEQ Ex. MM*, In the matter of: Appeal Amendment Application AM3, Signal Peak Energy LLC's Bull Mountains Mine No. 1, Permit No. C1993017 (No. BER 2016-07 SM) Findings of Fact, Conclusions of Law, and Order (AM3 Final Order) at 8; § 82-4-206, MCA; ARM 17.24.425(7); *Mont. Env't Info. Ctr. Dep't of Env't Quality*, 2005 MT 96, ¶¶ 14, 16.
>
> 4. Evidence of potential contradictions or inconsistencies within the Permit Application Package and

> Decision Documents alone does not establish the facts necessary to prove that DEQ's decision violated the law. DEQ Ex. LL, (Area F Order on MSJ) at 22.
>
> 5. The challenging party "cannot sustain [its] burden of proof without expert testimony" when the issues at hand are beyond the scope of a layperson's knowledge and experience. *Seal v. Woodrows Pharmacy*, 1999 MT 247, ¶¶ 36-37; *Newville v. State Dep't. of Fam. Servs.*, 267 Mont. 237, 257 (1994); *Durbin v. Ross*, 276 Mont. 463, 477 (1996); *Hulse v. DOJ, Motor Vehicle Div.*, 1998 MT 108, ¶¶ 48-49; Mont. R. Evid. 702.
>
> 45. First, Conservation Groups have failed to establish that cumulative mining impacts resulted in a water quality violation. Prior to mining, the Lee Coulee alluvial groundwater quality averaged Class II, which changed to Class III post-mining. This change did not constitute a water quality violation or material damage because it occurred within the Big Sky Mine permit boundary, where material damage is permitted, and because the Big Sky Mine was approved under a prior regulatory regime that exempted it from current material damage and anti-degradation standards. JSUF at ¶¶ 10-11.

Conservation Groups' objection—that these legal conclusions improperly require Conservation Groups prove material damage—is perplexing: Conclusions of Law Nos. 3, 4, and 5 do not mention the term material damage, much less stand for the broader proposition that Conservation Groups must prove material damage to prevail, and Conclusion of Law No. 45 simply confirms that Conservation Groups failed to prove that cumulative impacts of mining caused a water quality

violation.[4] Because the substance of Conclusions of Law Nos. 3, 4, 5, and 45 are correct statements of the law and, to the extent they constitute factual findings, supported by substantial evidence, the Board should reject the exception.

Third, Conservation Groups object to Conclusions of Law Nos. 71 and 80, claiming that the Hearing Examiner applied the incorrect burden of proof with respect to Claim 3. Pet'rs' Exceptions at 6. Conclusions of Law Nos. 71 and 80 state:

> 71. It is important to note that, as the party challenging DEQ's conclusion, the burden rests with Conservation Groups to prove by a preponderance of the evidence that reclamation is not achievable due to global climate trends.
>
> 80. Additionally, Conservation Groups failed to present any evidence demonstrating that DEQ's cumulative impact analysis, material damage determination, or reclamation conclusion would have been altered if global climate trends had been factored into the analysis.

Conservation Groups argue that they need only show that DEQ failed to follow the correct procedural requirements to prevail on Claim 3. Pet'rs' Exceptions at 6. Not so. Claim 3 alleged that DEQ failed to consider global climate trends when evaluating the viability of reclamation. Order at FOF ¶¶ 16, 104. As

[4] Conservation Groups' evidentiary burden of proof with respect to proving material damage is found in Conclusion of Law No. 37, which they do not challenge: "As the party challenging DEQ's cumulative impact analysis and material damage determination, Conservation Groups bore the burden of demonstrating by a preponderance of the evidence that DEQ erred in its assessment by excluding existing and historical mine areas, and that this omission rendered DEQ's material damage unlawful."

discussed above, the burden of proof rested with Conservation Groups to prove Claim 3. While true that a failure to comply with procedure may amount to a reversible error, Conservation Groups proved no such error here. Ultimately, the Hearing Examiner denied Claim 3 as a matter of fact and law.

To the extent Claim 3 is understood to be a factual claim (*i.e.*, climate trends will render reclamation unviable), Conservations Groups had the evidentiary burden of proving the facts essential to the claim by a preponderance of the evidence (*i.e.*, climate trends will render reclamation unviable as a matter of fact and expert opinion).[5] It is undisputed that Conservation Groups presented no factual support for Claim 3.[6] *Id.* at FOF ¶ 106; COL ¶¶ 2, 72, 80. On the other hand, DEQ and Westmoreland/Local 400 presented credible and convincing evidence and argument demonstrating that even worst-case scenario climate trends will not render reclamation unviable. *Id.* at FOF ¶¶ 114-119. Accordingly, the Hearing Examiner properly denied Claim 3 as a matter of fact.

[5] Conclusions of Law No. 71 restates this standard, and Conclusion of Law No. 80 confirms that Conservation Groups failed to meet this standard.

[6] Rather than offer factual support or expert opinion on the viability of reclamation, Conservation Groups forwarded constitutional arguments, legal conclusions, and their counsel's interpretations of decision documents, deposition testimonies, and discovery responses. Order at FOF ¶ 106; COL ¶ 72. On the other hand, Westmoreland/Local 400 and DEQ "presented specific evidence countering Conservation Groups' claim" demonstrating that reclamation is viable. *Id.* at FOF ¶¶ 107-108, 114-118.

To the extent Claim 3 is understood to be a legal claim (*i.e.*, MSURMA requires DEQ consider global climate trends when assessing the viability of reclamation), Conservation Groups had the burden of persuading the Hearing Examiner of the same. *See* §§ 26-1-401, -402, MCA. As recognized by the Hearing Examiner, Conservation Groups failed to provide support for their argument that, as a matter of law, DEQ is required to consider global climate trends when assessing the viability of reclamation. Order at COL ¶ 72. On the other hand, Westmoreland/Local 400 and DEQ presented credible evidence and argument that MSUMRA does not require DEQ to consider global climate trends when assessing the viability of reclamation. *Id.* at COL ¶¶ 73-79. Accordingly, the Hearing Examiner properly denied Claim 3 as a matter of law.

III. THE HEARING EXAMINER CORRECTLY RESOLVED CLAIM 1.

The Hearing Examiner denied Claim 1 because Conservation Groups did not demonstrate error in either the process DEQ used to evaluate material damage and cumulative impacts or DEQ's substantive conclusions on those issues. In support, the Hearing Examiner proposed 28 factual findings and 16 legal conclusions. Because the Hearing Examiner's factual findings and legal conclusions are supported by substantial evidence and are correct, the Board should deny Conservation Groups' exceptions.

A. The Hearing Examiner's Claim 1 Findings of Fact Are Supported by Substantial Evidence.

The Hearing Examiner rejected Claim 1 as a matter of fact. Conservation Groups lodge objections against Findings of Fact Nos. 16, 45, 51-69, and 70.

First, Conservation Groups object to Findings of Fact Nos. 16 and 45, claiming that the Hearing Examiner misunderstood Claim 1. Pet'rs' Exceptions at 18-19. To the contrary, the Hearing Examiner's findings regarding Conservation Groups' claim are appropriate and supported by substantial evidence. Findings of Fact Nos. 16 and 45 state:

> 16. In an Amended Notice of Appeal filed November 11, 2022, the Conservation Groups alleged three primary deficiencies in DEQ's approval of AM5:
>
> > **Claim One:** That DEQ failed to include adjacent existing and historic mine sites in its cumulative impact assessment of the Lee Coulee alluvium violating ARM 17.24.314(5) and (32);
>
> ***
>
> 45. Conservation Groups assert that DEQ's cumulative impact assessment for the Lee Coulee alluvium unlawfully isolated the evaluation of AM5, omitting the consideration of the existing Rosebud Mine and historic mining activities at the Big Sky Mine. See Conservation Groups' SUF at ¶¶ 30, 46-47; DEQ Ex. C (Notice of Appeal) at ¶ 7; DEQ Ex. F (Amended Notice of Appeal) at ¶ 7.

In support, Conservation Groups selectively quote their Amended Notice of Appeal for the proposition that the Hearing Examiner ignored their substantive material damage claim. Am. Pet. ¶ 7; Pet'rs' Exceptions, at 19 (omitting

introductory sentence alleging that DEQ committed a process error by considering the impacts of the AM5 expansion in isolation). A full reading of the cited paragraph contradicts Conservation Groups' assertion that the Hearing Examiner misunderstood Claim 1 and supports the finding that Conservation Groups preserved and prosecuted a procedural material damage claim (as opposed to a substantive claim).

Setting aside Conservation Groups' selective quotation, their preferred reading of Claim 1—even if accepted—does not overcome the substantial evidence standard. As set forth above, the Board may not reject or modify factual findings that a reasonable mind might accept as adequate, even if the evidence is weak or conflicting. § 2-4-621(3), MCA; *Petaja*, 2016 MT 143, ¶ 16. Here, the Hearing Examiner considered the totality of the evidence and argument presented throughout the course of the three-year proceeding—*e.g.*, discovery responses, expert disclosures, pleadings, and oral argument—to inform his understanding of Claim 1. With respect to Findings of Fact Nos. 16 and 45, the Hearing Examiner specifically relied on Conservation Groups' Notice of Appeal, Amended Notice of Appeal, and Conservation Groups' proposed facts. *See* Order at FOF ¶ 45; *see also* FOF ¶ 25 (relying upon JSUF ¶¶ 44–52 stating that Conservation Groups' discovery responses "identified no factual basis or expert opinion supporting Claim 1" but instead "alleged a legal process error"). This evidence must be viewed in the

light most favorable to Westmoreland/Local 400 and DEQ. *See Frost v. Frost*, 2025 MT 210, ¶ 13. Because Findings of Fact Nos. 16 and 45 are supported by substantial evidence, the Board must accept the findings as a matter of law.

Moreover, Conservation Groups' objection ignores the fact that the Hearing Examiner also considered and rejected their unpreserved substantive material damage claim. After their procedural material damage claim was disproven in discovery, Order at FOF ¶¶ 59-63, Conservation Groups presented previously undisclosed evidence and argument on summary judgment in a belated attempt to recast Claim 1 as a ***substantive*** claim. *Id*. at FOF ¶¶ 38-44. Finding discovery abuse and that the substantive claim was not preserved, the Hearing Examiner struck the undisclosed evidence from the record. *Id*. at FOF ¶¶ 41-42. Despite this, in the interest of judicial economy, Westmoreland/Local 400 and DEQ requested the Hearing Examiner resolve the unpreserved substantive claim. The Hearing Examiner's Order accordingly considers the substantive claim and rejects it as baseless. *Id*. at COL ¶¶ 39-47.

In reaching his decision denying the unpreserved substantive claim, the Hearing Examiner specifically found that (1) Conservation Groups provided no evidence to show DEQ's cumulative impact assessment or material damage determination were substantively flawed ***and*** (2) Westmoreland/Local 400 and DEQ "provided credible evidence and legal argument to demonstrate that its

cumulative impact analysis and material damage determination were well-founded, consistent with applicable law, and based on sound scientific reasoning." *Id.* at COL ¶¶ 39, 43.[7] This is an independent basis for rejecting Conservation Groups' exception to Findings of Fact Nos. 16 and 45.

Second, Conservation Groups lodge a blanket objection to Findings of Fact Nos. 51 through 68 on the basis that Appendix A of the CHIA—which is addressed in those Findings of Fact—is not relevant to Conservation Groups' first claim. Pet'rs' Exceptions at 19-20. But relevancy is not a basis for the Board to reject or modify a finding of fact. The Board may only reject or modify a factual finding if, based upon a review of the complete record, it determines that the finding is not supported by substantial evidence. § 2-4-621(3), MCA. Because Findings of Fact Nos. 51 through 68 are supported by substantial evidence (and Conservation Groups do not argue otherwise), the Board must accept the findings as a matter of law.

Regardless, Conservation Groups' assertion that Appendix A is irrelevant to Claim 1 is absurd. The analysis contained in Appendix A—which Conservation Groups initially claimed was missing from DEQ's analysis—was highly relevant to and defeated Conservation Groups' procedural and substantive material damage

[7] Conservation Groups did not lodge exceptions against the factual findings embedded in Conclusions of Law Nos. 39 and 43 which are binding on the Board.

claims. Order at COL ¶¶ 38-39 ("Appendix A specifically considered the interactions between the AM5 proposal and the impacts of existing (Rosebud Mine) and historic (Big Sky Mine) mining operations. This was confirmed by Conservation Groups' own expert witness."); s*ee also id.* at FOF ¶¶ 51-53; s*ee also id.* at ¶ FOF 54 ("Appendix A illustrates the flow path of spoil water for all historic, current, and anticipated mining in the Lee Coulee drainage, including AM5, Area B mining, and the Big Sky Mine."); s*ee also id.* at FOF ¶¶ 55-59; s*ee also id.* at FOF ¶ 60 ("Conservation Groups' expert witness, Mr. Anderson, admitted that he had not been aware of DEQ's cumulative impact analysis in Appendix A of the CHIA prior to offering his opinion that DEQ had neglected to account for existing and historic mining areas in its analysis."); s*ee also id.* at FOF ¶ 61 ("Mr. Anderson acknowledged that DEQ did, in fact, consider existing and historic mining areas"); s*ee also id.* at FOF ¶ 62 ("Mr. Anderson further testified that the analysis presented in Appendix A of the CHIA is … 'quite technical' [and] a 'good-faith effort.'"). Because Findings of Fact Nos. 51 through 68 are highly relevant to and defeat Claim 1, the Board should reject Conservation Groups' blanket exception.

Third, Conservation Groups object to Findings of Fact Nos. 56, 57, 66, and 69, apparently arguing that the findings somehow support Conservation Groups' disproved claim that DEQ unlawfully excluded Area B from its material damage

assessment.[8] Pet'rs' Exceptions at 9-12. Although Conservation Groups' objection (if any) to these Findings of Fact is difficult to understand, the Findings of Fact themselves are supported by substantial evidence and should be upheld. These Findings of Fact state:

> 56. The mass balance evaluation presented in Appendix A confirms that the total dissolved solids in the Lee Coulee alluvium, attributed to existing mining at the Rosebud Mine and historic mining at the Big Sky Mine, exceed the projected loading from AM5. See JSUF at ¶ 12.
>
> 57. Based on its cumulative impact assessment, DEQ concluded that AM5, in its reduced form, "will not result in material damage to the hydrologic balance outside the permit area." See JSUF at ¶¶ 12, 28, 60, 61.
>
> 66. Mr. Van Oort testified that Appendix A of the CHIA contained a thorough cumulative impact analysis, incorporating data from both the Rosebud and Big Sky mines, as well as projected impacts from AM5, and further stated that the projected higher-quality groundwater from AM5 would not increase the concentration of total dissolved solids in the alluvial groundwater downstream from AM5. See JSUF at ¶ 60.
>
> 69. Mr. Van Oort testified that DEQ concluded that the mass from existing mining in Area B was larger than the mass from Big Sky mining, and that both were larger than the mass from AM5. As a result, AM5 mining would have no net effect on the mass loading or concentration of dissolved solids in Lee Coulee. See JSUF at ¶ 61.

[8] As discussed at the outset, Conservation Groups' exceptions are opaque, disjointed, and confusing. Findings of Fact Nos. 56, 57, 66, and 69 appear randomly in Conservation Groups' material damage discussion, and it is unclear whether Conservation Groups lodge exceptions against these findings or offer these findings as support for their broader argument.

Conservation Groups present no evidence—much less evidence sufficient to overcome the substantial evidence standard—to justify the modification or rejection of Findings of Fact Nos. 56, 57, 66, and 69. This is a sufficient basis to deny Conservation Groups' exception. Moreover, Findings of Fact Nos. 56, 57, 66, and 69 accurately summarize DEQ's analysis and conclusions and Mr. Van Oort's deposition testimony (with pinpoint citations to the record). Because Findings of Fact Nos. 56, 57, 66, and 69 are supported by substantial evidence, the Board must accept the findings as a matter of law.

Lastly, Conservation Groups object to Finding of Fact No. 70, claiming that it is not a factual finding, but instead, an incorrect conclusion of law. Pet'rs' Exceptions at 20. Conservation Groups are wrong. Finding of Fact No. 70 states:

> 70. Mr. Van Oort explained the distinction between a cumulative impact analysis and a material damage determination, clarifying that while the cumulative analysis assesses all past, current, and future mining activities together, the material damage analysis evaluates whether the proposed action, in light of all other activities, could cause material damage to the hydrologic balance. See JSSUF at ¶ 21.

Finding of Fact No. 70 presents an accurate summary of Mr. Van Oort's deposition testimony; this is decidedly a question of fact, and there is no indication that the Hearing Examiner is offering a legal conclusion based on Mr. Van Oort's deposition testimony. Because Finding of Fact No. 70 is a factual finding

supported by substantial evidence, the Board must accept the finding as a matter of law.

B. The Hearing Examiner's Claim 1 Conclusions of Law Are Correct.

The Hearing Examiner rejected Claim 1 as a matter of law. Conservation Groups lodge objections against Conclusions of Law Nos. 36 and 46, contending that DEQ unlawfully excluded Area B of the Rosebud Mine from its material damage assessment. Conservation Groups misunderstand the record on which these Conclusions of Law are based, and do not present any error in the Hearing Examiner's conclusions. Conclusion of Law Nos. 36 and 46 state:

> 36. The Department concluded, based on its assessment of the cumulative impacts of mining, that AM5, in a reduced from, "will not result in material damage to the hydrologic balance outside the permit area." JSUF at ¶ 28; *see also*, DEQ Ex. A (Written Findings and ROD) at 15-17, 21.
>
> 46. Second, Conservation Groups did not prove that AM5 was the cause-in-fact of the water quality violation. The evidence shows, consistent with DEQ's material damage determination, that AM5 will not alter the classification of Lee Coulee alluvial groundwater.

As a threshold matter, Conclusion of Law No. 36 is an accurate recitation of DEQ's Written Findings and, to the extent it constitutes a factual finding, is supported by substantial evidence. Conservation Groups do not (and cannot) show otherwise. Instead, Conservation Groups mischaracterize the phrase "in reduced form" to imply that DEQ's material damage determination was conducted in a

"piecemeal" fashion by excluding Area B of the Rosebud Mine. Pet'rs' Exceptions at 9-12. This is a dishonest presentation of basic facts. As set forth in the Written Findings, DEQ considered three alternatives in analyzing Westmoreland's permit application; ultimately, DEQ approved an alternative that excluded proposed mining in the Richard Coulee drainage. DEQ Ex. A at 11. This is the "reduced form" referenced in Conclusion of Law 36 and, contrary to Conservation Groups' false assertion, has no bearing on the scope of DEQ's material damage determination.

With that correction, Conservation Groups' broader assertion fails: the Hearing Examiner expressly rejected their claim that DEQ unlawfully excluded existing or historic mining from the material damage assessment. *See e.g.*, Order at COL ¶ 38 ("Conservation Groups failed to establish that DEQ excluded relevant historical mine areas," and the CHIA "specifically considered the interactions between the AM5 proposal and the impacts of existing (Rosebud Mine) and historic (Big Sky Mine) mining operations."); s*ee also id.* at COL ¶ 43 (DEQ and Westmoreland/Local 400 "provided credible evidence and legal argument to demonstrate that its cumulative impact analysis and material damage determination were well-founded, consistent with applicable law, and based on sound scientific reasoning."); s*ee also id.* at COL ¶ 44 ("The undisputed facts confirm that DEQ appropriately evaluated both cumulative impacts and material damage."); s*ee also id.* at FOF 61 ("Mr. Anderson acknowledged that DEQ did, in fact, consider

existing and historic mining areas"). Because Conclusion of Law Nos. 36 and 46 do not misstate the law, the Board should reject the objection and adopt the Conclusions of Law.[9]

IV. CONSERVATION GROUPS ARE PROHIBITED FROM DISMISSING CLAIM 2.

Conservation Groups' Claim 2 alleged a violation of ARM 17.24.651—the Stream Buffer Rule—arguing that "DEQ improperly authorized disturbance of an intermittent or perennial stream reach" at Wetland 4-2/2. Order at FOF ¶ 16. The Hearing Examiner's Order proposes 31 factual findings and 16 legal conclusions rejecting Claim 2 as factually and legally baseless. Conservation Groups do not dispute these factual findings or legal conclusions; instead, Conservation Groups attempt to voluntarily dismiss Claim 2. Pet'rs' Exceptions at 3. Conservation Groups cannot evade the Hearing Examiner's decision on Claim 2 by procedural sleight of hand at this late stage; after the Hearing Examiner issued the proposed decision, the only way they could challenge it was by lodging exceptions, which they declined to do. The Board must therefore adopt the Hearing Examiner's findings and conclusions on Claim 2 unchanged.

[9] To the extent Conclusion of Law Nos. 36 and 46 can be read to include factual findings (*e.g.*, Conservation Groups did not prove a water quality violation), such findings are supported by substantial evidence and must stand as a matter of law.

A. Conservation Groups are Prohibited From Dismissing Claim 2.

The Montana Rules of Civil Procedure govern this contested case. Initial Procedural Order at 1. The Rules of Civil Procedure provide three avenues by which a party can withdraw a claim or obtain post-judgment relief: Rule 15,[10] Rule 41,[11] and Rule 60.[12] Conservation Groups do not purport to withdraw Claim 2 pursuant to any of these procedural rules, and Conservation Groups identify no alternative legal authority allowing for the voluntary dismissal of Claim 2.

Instead, Conservation Groups assert that voluntary dismissal of Claim 2 is allowed "because [Westmoreland] recently obliterated the stream reach at issue, precluding the groups' ability to obtain meaningful relief on that claim." Pet'rs' Exceptions at 3. Conservation Groups' argument fails as a matter of law because mootness is not a legal basis for post-judgment dismissal or relief. Mont. R. Civ. P.

[10] Rule 15 allows a party to withdraw a claim by amending its Complaint. However, a party may not voluntarily amend its Complaint; rather, the amending party must obtain written consent from the opposing parties or seek leave from the Board to amend the Complaint. Amendments to pleadings after judgment—as is the case here—are not typically allowed because granting such relief undermines the procedural rules designed to ensure cases proceed to final judgment in an orderly manner. *Stanford v. Rosebud Cnty.*, 254 Mont. 474, 477-78. Conservation Groups have not sought relief under Rule 15.

[11] Rule 41 allows a party to dismiss an action. However, Rule 41 does not permit piecemeal dismissals of claims in a multiple-claim lawsuit after a final decision has been rendered; only complete dismissal is contemplated. *Watchtower Bible & Tract Soc'y of N.Y., Inc. v. Mont. Twentieth Judicial Dist. Court*, 2021 MT 13, ¶ 13. Conservation Groups have not sought relief under Rule 41.

[12] Rule 60 provides limited grounds for a party to seek relief from a final judgment such as mistake, inadvertence, surprise, fraud, misrepresentation, or misconduct. Conservation Groups have not sought relief under Rule 60.

15; 41; 60. Moreover, even if mootness were a basis for dismissal, Conservation Groups' assertion for mootness—that the subject reach has been "obliterated"—is false. Westmoreland has ***not*** mined through the subject reach at issue in this contested case, *see* Ex. A, Declaration of Kenneth Wooley at ¶¶ 4-5, and, had Conservation Groups conferred with Westmoreland/Local 400 prior to seeking dismissal—as required by the Rules of Civil Procedure—they would know that the subject reach remains intact.

Setting aside Conservation Groups' failure to comply with the rules of procedure and their misrepresentation regarding the status of the subject reach, the Board's authority to disturb the Hearing Examiner's Order specific to Claim 2 is statutorily limited. Under MAPA, the Board may not reject or modify the Hearing Examiner's findings unless, based on a review of the complete record, the Board states with particularity that the finding is not based on competent substantial evidence or that the contested case proceeding did not comply with law. § 2-4-621(3), MCA. Because Conservation Groups have not challenged the Hearing Examiner's factual findings or legal conclusions specific to Claim 2, much less presented sufficient evidence to justify the modification or rejection of the findings, Claim 2 must stand as a matter of law.

B. Conservation Groups' Bad Faith Prosecution of Claim 2 Must Not Be Rewarded with Dismissal.

It must be emphasized that Conservation Groups' furtive attempt to dismiss Claim 2—after losing on the merits and without regard to the rules of procedure or the facts—is merely the latest bad act in Conservation Groups' prosecution of Claim 2. Throughout the course of this contested case, Conservation Groups' arguments in support of Claim 2 changed materially, and Conservation Groups repeatedly abused process and discovery to the prejudice of Westmoreland/Local 400 and DEQ. The Board must not reward Conservation Groups' behavior with the post-judgment dismissal of Claim 2.

During discovery, Conservation Groups consistently stated that Claim 2 presented a question of law and that factual considerations—*e.g.*, the location of mapped alluvium, flow, soil, bed and bank, vegetation, and the character of the biological community of the subject reach—were irrelevant. *See e.g.*, Pet'rs' Resp. to Westmoreland/Local 400's Initial Disc. Req. at Interrog. Nos. 8-9. On the eve of Mr. Anderson's deposition (and after Westmoreland/Local 400's counsel had traveled thousands of miles to attend the deposition), Conservation Groups filed an "URGENT" request that the deposition be postponed until Mr. Anderson was allowed to inspect the subject reach and develop factual support for Claim 2. Order Re: Site Inspection and Anderson Dep. at 1. The Hearing Examiner granted

Conservation Groups' request and postponed Mr. Anderson's deposition to allow for a site inspection. *Id*. at 1-2.

The site inspection of the subject reach revealed a dry and vegetated drainage with no indicators whatsoever of an intermittent or perennial stream. Order at FOF ¶¶ 81-84. Fatal to Claim 2, Mr. Anderson testified at his deposition the following day that the site inspection had made him reconsider his assumptions regarding the existence of a stream and that "in all probability" the subject reach was an ephemeral drainageway and not subject to the protections of the Stream Buffer Rule, consistent with the position taken by DEQ and Westmoreland/Local 400. DEQ Ex. O (Anderson Dep. Tr.) at 176:2-179:2.

Rather than drop the disproved claim, Conservation Groups pushed a new legal theory on summary judgment. Pet'rs' Br. in Supp. of Mot. for Summ. J. ("Pet'rs' MSJ") at 2, 14-20. In support, Conservation Groups presented undisclosed evidence and analysis that directly contradicted Mr. Anderson's deposition testimony and argued—outrageously—that the defeating evidence developed during the site inspection they went to extreme lengths to obtain was, somehow, not admissible. Order at FOF ¶¶ 38-41; *Compare* DEQ Ex. O (Anderson Dep. Tr.) at 176:2-179:2 *with* Decl. of Bruce Anderson ("Anderson Decl.") at ¶¶ 9-10; Pet'rs' Resp. to Resp'ts' Mot. for Summ. J. ("Pet'rs' MSJ Res.") at 20-22.

Finding clear discovery abuse, the Hearing Examiner struck Conservation Groups' undisclosed and conflicting evidence from the record. Order at FOF ¶ 42.

Ultimately, the Hearing Examiner rejected Claim 2 as factually and legally baseless. *Id*. at FOF ¶¶ 73-103, COL ¶¶ 49-64. The Hearing Examiner further found that DEQ and Westmoreland/Local 400—despite not having the evidentiary burden of proof—successfully disproved Claim 2. *Id*. at Recommended Decision ¶ 2. Notwithstanding these dispositive findings, Conservation Groups still refuse to concede Claim 2 and instead purport to justify dismissal—in a public filing no less—with the gratuitous and false allegation that Westmoreland unlawfully "obliterated the stream reach" and precluded Conservation Groups from obtaining meaningful relief. Pet'rs' Exceptions at 3. This behavior is beyond bad faith; it is defamatory and malicious. The Board must not reward Conservation Groups' behavior with the dismissal of Claim 2.

V. THE HEARING EXAMINER CORRECTLY RESOLVED CLAIM 3.

The Hearing Examiner denied Claim 3 as both a matter of fact and a matter of law. In support, the Hearing Examiner proposed 16 factual findings and 19 legal conclusions. Of these, Conservation Groups lodge exceptions against 7 factual findings and 12 legal conclusions. Because the Hearing Examiner's factual findings are supported by substantial evidence and the legal conclusions are correct, the Board should deny the exceptions.

A. The Hearing Examiner's Claim 3 Findings of Fact Are Supported by Substantial Evidence.

The Hearing Examiner denied Claim 3 as a matter of fact. Conservation Groups lodge objections against Findings of Fact Nos. 106, 114, 115, 116, 117, 118, and 119. All of these Findings of Fact are supported by substantial evidence, and the Conservation Groups do not demonstrate otherwise.

First, Conservation Groups object to Finding of Fact No. 106, arguing that the finding ignores Conservation Groups' "expert evidence" in the form of two climate change studies. The studies are not "expert evidence", and the Hearing Examiner properly struck them from the record. Finding of Fact No. 106 states:

> 106. The facts presented by Conservation Groups in support of Claim 3, aside from those that rely on Mr. Anderson's struck declaration (¶¶ 65-82, 87, and 88), lack independent analysis, evidence, and expert testimony. Instead, they primarily comprise constitutional arguments, legal conclusions, and Conservation Groups' interpretations of DEQ's Decision Documents, deposition testimonies, and discovery responses. Respondents have specifically disputed each of these proposed facts, except for ¶ 75. JSDF at ¶¶ 65-74, 76-88.

Conservation Groups' exception fails for multiple reasons. *First*, Conservation Groups did not rely on the substance of the studies on summary judgment to support Claim 3.[13] While the studies were referenced in Mr.

[13] Despite pushing a substantive claim throughout discovery, Conservation Groups forwarded a straightforward legal claim on summary judgment—that DEQ is required by law to assess climate change impacts under MSUMRA—thereby rendering factual considerations such as those contained in the studies irrelevant to the claim. Pet'rs' MSJ at 20-27; *see also*, Pet'rs' SUF

Anderson's appended declaration (Anderson Decl. ¶¶ 3-4) and Conservation Groups proposed facts (Pet'rs' SUF ¶¶ 84-85), the Hearing Examiner struck the declaration from the record, rejected the proposed facts, and prohibited Conservation Groups from relying on the evidence on summary judgment.[14] Order at FOF ¶¶ 41-43. *Next*, the studies are not "expert evidence" under the Montana Rules of Evidence; only testimony by a qualified expert constitutes expert evidence. Mont. R. Ev. 702. As confirmed by Finding of Fact No. 106, Conservation Groups presented ***no*** expert testimony in support of Claim 3. *Lastly*, even if Conservation Groups had presented expert testimony regarding the studies on summary judgment, the existence of contrary evidence is not a basis to reject or modify the Hearing Examiner's many factual findings rejecting the substantive claim that climate change will render reclamation unviable. Order at FOF ¶¶ 114-118; *Blaine Cnty. v. Stricker*, 2017 MT 80, ¶ 26. To overturn these findings, Conservation Groups must show that the findings are not supported by substantial evidence. § 2-4-621(3), MCA. Because Finding of Fact No. 106 is supported by substantial evidence, the Board must accept the finding as a matter of law.

¶ 12 ("The Conservation Groups' appeal raised three claims: … (3) DEQ unlawfully refused to consider climate change when assessing hydrologic impacts and reclamation.").

[14] Despite MEIC's shifting claims and struck declaration, the Hearing Examiner considered and rejected both the process and the substantive claim. As to the substantive claim, the Hearing Examiner found that even if DEQ had considered the studies and accepted the worst-case scenario reductions in precipitation and groundwater recharge, the groundwater model outputs and reclamation determination would not change. Order at FOF ¶¶ 114-119.

Second, Conservation Groups object to Findings of Fact Nos. 114, 115, 116, 117, 118, and 119, claiming that the findings are premised on inexpert testimony and analysis and, regardless, that such testimony and analysis is inadmissible *post hoc* evidence. Both objections fail.

With respect to witness qualifications, Conservation Groups argue that DEQ and Westmoreland/Local 400's expert witnesses were not "qualified as experts on climate change and, therefore, could not lawfully opine on the topic." Pet'rs' Exceptions at 27. As a threshold matter, the exceptions stage is not the time to lodge evidentiary objections. § 2-4-621(3), MCA. DEQ and Westmoreland/Local 400 disclosed their expert witnesses and their anticipated testimony rebutting Claim 3 at the outset of discovery, and Conservation Groups were afforded full opportunity to investigate the disclosures, depose the experts, and challenge their qualifications. At no point did Conservation Groups dispute their expertise, and Conservation Groups' own expert testified at deposition to the credibility of these experts. Order at FOF ¶ 103.

With that understanding, Conservation Groups' assertion that DEQ and Westmoreland/Local 400's expert witnesses presented opinions on climate change is false. As clearly stated in the challenged findings, the expert opinions concerned the viability of reclamation and site-specific hydrology (matters decidedly within their expertise). Order at FOF ¶¶ 114-118. Ultimately, the Hearing Examiner

credited the "credible expert testimony" offered by these experts.[15] Order at COL ¶ 81. The rules of evidence are construed liberally so as to admit all relevant expert testimony, and evidentiary decisions regarding the admission of expert testimony are reviewed for an abuse of discretion and ordinarily will not be disturbed. *McClue v. Safeco Ins. Co.*, 2015 MT 222, ¶¶ 14, 23; *State v. Larson*, 2004 MT 345, ¶ 29; *Hart-Albin Co. v. McLees, Inc*. 264 Mont. 1, 10 (1994). Because Conservation Groups do not assert (much less demonstrate) an abuse of discretion, the Board should not disturb the findings.

In the alternative, Conservation Groups argue that Findings of Fact Nos. 114, 115, 116, 117, 118, and 119 should be rejected as inadmissible *post hoc* evidence. As Conservation Groups are aware, the Montana Supreme Court recently rejected their *post-hoc* evidence argument. *AM4*, 2023 MT 224, at ¶¶ 40-52. Expert testimony on issues raised in a contested case, such as Conservation Groups' contention that climate change would impede reclamation, is admissible. Because there is no meaningful difference between *AM4* and the present case, the Board must reject Conservation Groups' *post hoc* evidence theory as contrary to law.

[15] Because the Hearing Examiner "is in the unique position of hearing and observing all testimony" in the case, findings regarding witness credibility are entitled to great deference. *KB Enters., LLC v. Mont. Human Rights Comm'n*, 2019 MT 131, ¶ 9 (quoting *Benjamin v. Anderson*, 2005 MT 123, ¶ 37).

B. The Hearing Examiner's Claim 3 Conclusions of Law Are Correct.

The Hearing Examiner denied Claim 3 as a matter of law. Conservation Groups lodge objections against Conclusions of Law Nos. 72-83.

First, Conservation Groups lodge a blanket objection against Conclusions of Law Nos. 72 through 83, claiming that the Hearing Examiner unlawfully concluded "that MSUMRA prohibits consideration of climate change." Pet'rs' Exceptions at 24. This is a blatant misreading of the Hearing Examiners' conclusions. Conclusions of Law Nos. 72 through 83 state:

> 72. Conservation Groups' challenge to DEQ's decision rests on ARM 17.24.405(6)(a), but they fail to provide substantive support for their argument that, as a matter of law, DEQ is required to incorporate global climate trends when assessing the reclamation plan's viability.
>
> 73. MSUMRA directs DEQ to consider the "climatological characteristics of the site" in its evaluation of reclamation feasibility, but it does not mandate the incorporation of global climate trends. Respondents argue, and we find, that the law specifically calls for the use of site-specific climatological data, such as temperature, precipitation, evaporation, evapotranspiration, and snow sublimation, rather than global climate models or projections.
>
> 74. The plain language of § 82-4-231(10)(q), MCA supports DEQ's interpretation. The statute directs DEQ to consider the "climatological characteristics of the site" and does not reference broader global climate trends. This language is clear and unambiguous, and neither the MSUMRA nor its implementing regulations mention climate change or require future-oriented climate analysis.

75. Further, the overall framework of MSUMRA directs that the cumulative impacts of mining and the feasibility of post-mining reclamation be assessed at a hyper-local level. For example, § 82-4-222(1)(m), MCA, emphasizes evaluating the hydrologic balance at the level of the hydrologic unit, focusing on the impacts of the mining operation itself rather than external factors like global climate change.

76. DEQ's interpretation is reinforced by the legislative intent and the local, site-specific nature of the analysis prescribed by the statute. Including global climate trends would render the qualifying phrase "characteristics of the site" meaningless.

77. DEQ's interpretation is also consistent with the implementing regulations, which emphasize that reclamation efforts must be tailored to the local site conditions and climate. See, e.g., ARM 17.24.717(1) (requiring that trees and shrubs be adapted to local site conditions and climate) and ARM 17.24.634(1)(f) (requiring reclamation to a condition comparable to an unmined landscape with similar climate).

78. Despite the longstanding existence of this statutory and regulatory framework, Conservation Groups have not identified any prior permitting decisions under MSUMRA or its federal counterpart, the Surface Mining Control and Reclamation Act (SMCRA), in which global climate trends were considered in evaluating reclamation viability.

79. For these reasons, we conclude that DEQ's interpretation of § 82-4-231(10)(q), MCA is both reasonable and consistent with the plain language of the statute. As such, DEQ's interpretation is entitled to "respectful consideration" under established case law. See Bluebird Energy LLC, ¶ 23 (affirming deference to longstanding agency interpretations) and Westmoreland Rosebud Mining, LLC, ¶ 46 (emphasizing deference to agency expertise in interpreting its own rules).

> 80. Additionally, Conservation Groups failed to present any evidence demonstrating that DEQ's cumulative impact analysis, material damage determination, or reclamation conclusion would have been altered if global climate trends had been factored into the analysis.
>
> 81. In contrast, Respondents presented credible expert testimony indicating that global warming trends are likely to increase precipitation and recharge rates at the site. Even assuming Conservation Groups' predictions of diminished recharge rates due to climate change, the adjustments to the groundwater model would not materially affect DEQ's analysis or conclusion.
>
> 82. Crucially, Mr. Anderson, Conservation Groups' expert, conceded that if the projected decrease in groundwater recharge rates did not result in a significant change to the groundwater model's forecasts, then DEQ's reclamation and cumulative impact findings would remain unaffected.
>
> 83. In light of the above considerations, we find that summary judgment should be granted in favor of DEQ and Westmoreland/Local 400, and against Conservation Groups, on Claim 3.

Contrary to Conservation Groups' assertion, these conclusions do not stand for this proposition "that MSUMRA prohibits consideration of climate change." While the Hearing Examiner rejected Conservation Groups' arguments that MSUMA *requires* DEQ to consider global climate trends, he did not, as Conservation Groups assert, conclude that DEQ *cannot* consider global climate trends. In fact, Conclusions of Law Nos. 72 through 83 place no limits on the climatological factors DEQ may consider. Instead, these legal conclusions detail the Hearing Examiner's interpretation of MSUMRA's statutory and regulatory

requirements, ultimately concluding that DEQ is not compelled by law to consider global climate trends. Conservation Groups fail to explain why such interpretation is incorrect, offering instead their mischaracterization of the Hearing Examiner's legal conclusions. Because Conclusions of Law 72 through 83 are correct and (to the extent they incorporate factual findings) supported by substantial evidence, the Board should reject the exception.

Next, Conservation Groups object to Conclusions of Law Nos. 81 and 82, claiming that the Hearing Examiner relied on *post hoc* and inexpert evidence and "purported harmless error." Pet'rs' Exceptions at 26-28. As discussed above, Conservation Groups' *post hoc* and inexpert evidence arguments fail as a matter of law. *See* Section V.A. Conservation Groups "harmless error" argument is not clear. Conclusions of Law Nos. 81 and 82 state:

> 81. In contrast, Respondents presented credible expert testimony indicating that global warming trends are likely to increase precipitation and recharge rates at the site. Even assuming Conservation Groups' predictions of diminished recharge rates due to climate change, the adjustments to the groundwater model would not materially affect DEQ's analysis or conclusion.
>
> 82. Crucially, Mr. Anderson, Conservation Groups' expert, conceded that if the projected decrease in groundwater recharge rates did not result in a significant change to the groundwater model's forecasts, then DEQ's reclamation and cumulative impact findings would remain unaffected.

Neither conclusion mentions harmless error, and the plain language of the conclusions confirm (1) credible expert testimony and analysis presented by DEQ and Westmoreland/Local 400 rebutted Claim 3 to the satisfaction of the Hearing Examiner, and (2) Conservation Groups' own expert conceded that the analysis—if accepted—would defeat Claim 3. This is not an acknowledgement of harmless error, but an unequivocal conclusion that DEQ and Westmoreland/Local 400's rebuttal evidence defeated Conservation Groups' substantive claim that global climate trends would render reclamation unviable. Because Conclusions of Law Nos. 81 and 82 are correct and (to the extent they incorporate factual findings) supported by substantial evidence, the Board should reject the exception.

VI. THE HEARING EXAMINER ADEQUATELY RESPONDED TO CONSERVATION GROUPS' EVIDENCE AND ARGUMENT.

Conservation Groups complain at length that the Hearing Examiner failed to respond to evidence and argument supporting Claim 1 and Claim 3. Pet'rs' Exceptions at 14-18, 29-31. Conservation Groups argument fails as a matter of law and fact.

It is settled law that the Hearing Examiner was not obligated to respond to each factual finding and legal conclusion proposed by Conservation Groups. *State ex rel. Mont. Wilderness Ass'n v. Bd of Nat. Res. & Conservation*, 200 Mont. 11, 39-40. That is, a separate, express ruling on each proposed finding and conclusion is not required, and the Hearing Examiner's findings and conclusions that

implicitly respond to the proposals submitted by the parties are legally sufficient. *Id*.; *Mont. Consumer Counsel v. Public Serv. Comm'n*, 168 Mont. 180, 192-93. The Hearing Examiner's Order—comprised of 119 factual findings, 83 legal conclusions, and pages of discussion responding to the Parties' evidence and argument and rejecting each of Conservation Groups' claims as factually and legally baseless—easily meets this standard.

Moreover, Conservation Groups' argument that the Hearing Examiner failed to respond to their evidence and argument fails as a matter of fact. With respect to Claim 1, Conservation Groups assert that the Hearing Examiner ignored Mr. Van Oort's "admission" that AM5 will cause material damage.[16] Pet'rs' Exceptions at 14. But the Hearing Examiner did not ignore this point. Rather, and unsurprisingly, the Hearing Examiner simply declined to credit Conservation Groups' conspiracy that Mr. Van Oort admitted material damage, finding instead that Mr. Van Oort "presented credible testimony" countering Claim 1.[17] Order at FOF ¶¶ 65-71. With respect to Claim 3, Conservation Groups assert that the Hearing Examiner ignored

[16] This claim—premised entirely on Conservation Groups' counsel's characterization of Mr. Van Oort's deposition testimony—is nonsensical. Throughout this proceeding, DEQ has steadfastly defended its cumulative impact assessment and material damage determination, and the suggestion that Mr. Van Oort—the hydrologist responsible for reviewing the application materials and drafting the decision documents—walked back his scientific conclusions and conceded material damage is laughable.

[17] This is hardly surprising. Even Conservation Groups' expert Mr. Anderson testified that Mr. Van Oort is a credible scientist. Order at FOF ¶¶ 72, 103.

"expert findings of the Montana Climate Assessment and the U.S. Geological Survey" demonstrating that reclamation will not be achievable.[18] Pet'rs' Exceptions at 30. Again, the Hearing Examiner did not ignore the studies: Findings of Fact Nos. 114, 115, 116, 117, and 118 unambiguously respond to Conservation Groups' claim—premised on the studies—that precipitation and evaporative deficit projections will render reclamation unachievable. The Hearing Examiner found that DEQ and Westmoreland/Local 400 "presented specific evidence" analyzing the studies' worst-case scenario precipitation and evaporative deficit projections and defeating Conservation Groups' claim that such deficits will render reclamation unachievable. Order at FOF ¶¶ 114-118. Because the Hearing Examiner's Order adequately responds to the evidence and argument presented, Conservation Groups' exception fails.

CONCLUSION

For the reasons stated, Westmoreland/Local 400 respectfully request the Board reject Conservation Groups' exceptions and adopt the Hearing Examiner's Order subject to the minor modifications recommended in Westmoreland/Local 400's exceptions brief.

[18] As discussed above, Conservation Groups did not offer the studies or, for that matter, any expert evidence on summary judgment in substantive support of Claim 3. Order at FOF ¶ 106. While the studies were referenced in Mr. Anderson's appended declaration, the Hearing Examiner struck the declaration from the record for discovery abuse and prohibited Conservation Groups from relying on its contents on summary judgment. Order at FOF ¶¶ 41-42.

DATED: October 3, 2025

/s/ *Samuel R. Yemington*

Samuel R. Yemington
Holland & Hart LLP
505 9th Street NW, Suite 700
Washington, DC 20004
sryemington@hollandhart.com

Sarah C. Bordelon
Holland & Hart LLP
5470 Kietzke Lane, Suite 100
Reno, NV 89511
scbordelon@hollandhart.com

William W. Mercer
Holland & Hart LLP
401 North 31st Street, Suite 1200
P.O. Box 639
Billings, MT 59103-0639
wwmercer@hollandhart.com

Attorneys for Westmoreland Rosebud Mining LLC and International Union of Operating Engineers, Local 400

CERTIFICATE OF SERVICE

I hereby certify that on October 3, 2025, a true and accurate copy of the foregoing was served on the following by electronic mail:

Board Secretary
Board of Environmental Review
1520 E. Sixth Ave.
P.O. Box 200901
Helena, MT 59620-0901
Deqbersecretary@mt.gov

Shiloh Hernandez
Earthjustice
Northern Rockies Office
313 East Main Street
P.O. Box 4743
Bozeman, MT 59772-4743
shernandez@earthjustice.org

Jeremiah Langston
Samuel J. King
Montana Department of Environmental Quality
P.O. Box 200901
Helena, MT 59620-0901
Jeremiah.Langston2@mt.gov
Samuel.King@mt.gov

Derf Johnson
Montana Environmental Information Center
P.O. Box 1184
Helena, MT 59624
djohnson@meic.org

Catherine Armstrong
Montana Department of Environmental Quality
P.O. Box 200901
Helena, MT 59620-0901
catherine.armstrong2@mt.gov

Dana Hupp
BER Counsel
321 W. Broadway, Suite 300
Missoula, MT 59802
dhupp@wordenthane.com

/s/*Valerie Arias*
Valerie Arias, Legal Assistant
Holland & Hart LLP

35695946_v10

EXHIBIT A

William W. Mercer
Holland & Hart LLP
401 North 31st Street, Suite 1200
Billings, MT 59103-0639
wwmercer@hollandhart.com

Samuel R. Yemington
HOLLAND & HART LLP
505 9th Street NW, Suite 700
Washington, DC 20004
sryemington@hollandhart.com

Sarah C. Bordelon
HOLLAND & HART LLP
5470 Kietzke Lane, Suite 100
Reno, NV 89511
scbordelon@hollandhart.com

Attorneys for Westmoreland Rosebud Mining LLC and International Union of Operating Engineers, Local 400

BEFORE THE BOARD OF ENVIRONMENTAL REVIEW
OF THE STATE OF MONTANA

IN THE MATTER OF: APPEAL AND REQUEST FOR HEARING REGARDING ROSEBUD MINE AREA B, AMENDMENT 5 PERMIT NO. C1984003B	))))))	**CASE NO. BER 2022-05 SM** **DECLARATION OF KENNETH WOOLEY**

I, Kenneth Wooley, declare under the penalty of perjury as follows:

1. I am the Chief Operating Office for Westmoreland Mining, LLC ("Westmoreland").
2. I offer this Declaration based upon my personal knowledge and upon information provided to me by my colleagues.

3. I am familiar with the above-captioned matter pending before the Board of Environmental Review and Montana Environmental Information Center and Sierra Club's ("Conservation Groups") claims therein.
4. On August 29, 2025, Conservation Groups represented to the Board of Environmental Review that Westmoreland had "obliterated" the reach of the Lee Coulee drainage at issue in this proceeding.
5. Conservation Groups assertion is false; despite having the legal right, Westmoreland has not mined through the reach of the Lee Coulee drainage at issue in this proceeding.

I declare under penalty of perjury that the foregoing is true and correct.

Executed this 30th day of September 2025.

Kenneth Wooley
Chief Operating Officer – US Operations
Westmoreland Mining, LLC

State of Montana
Location

35841005_v1

0202

Shiloh S. Hernandez
Earthjustice
Northern Rockies Office
P.O. Box 4743
Bozeman, MT 59772-4743
(406) 426-9649
shernandez@earthjustice.org

Derf Johnson
Montana Environmental Information Center
P.O. Box 1184
Helena, MT 59624
(406) 443-2520
djohnson@meic.org

Attorneys for Petitioners Montana Environmental Information Center and Sierra Club

Electronically Filed with the
Montana Board of Environmental Review
10/3/25 at 2:01 PM
By: *Sandy Moisey Scherer*
Docket No: BER 2022-05 SM

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

In re: Appeal and Request for Hearing Regarding Rosebud Mine Area B Amendment 5 Permit Number C1984003B	**No. BER 2022-05 SM** **COMBINED RESPONSE TO EXCEPTIONS TO PROPOSED ORDER ON SUMMARY JUDGMENT**

TABLE OF CONTENTS

TABLE OF CONTENTS ii

TABLE OF AUTHORITIES iv

INTRODUCTION 1

ARGUMENT 1

I. DEQ and WRM Ignore Controlling Authority that Establishes the Legal Standard and Scope of Review. 1

A. Arbitrary and Capricious 2

B. Scope of Review 3

II. DEQ and WRM Misstate the Initial Burden of the Permittee and DEQ to Affirmatively Demonstrate that the Cumulative Hydrologic Impacts Will Not Result in Material Damage. 5

III. DEQ's and WRM's Meritless Exhaustion Argument Ignores the Record and Was Rightly Rejected by the Hearing Examiner. 6

IV. WRM's Exceptions to the Conservation Groups' Standing Have No Basis in Law or Fact and Are Without Merit. 7

A. "Perpetual Standing" Straw Man 7

B. Unpreserved Argument About ARM 17.24.301(88) 8

C. Unsupported Factual Argument 10

V. DEQ's and WRM's Exceptions About Pollution from the Big Sky Mine Are Immaterial Because Both DEQ and the Hearing Examiner Ignored the Total Pollution from the Proposed AM5 Operation of the Rosebud Area B Strip-Mine. 11

VI. Hearing Examiners' Typographical Errors. 12

CONCLUSION 12

0204

CERTIFICATE OF SERVICE 14

TABLE OF AUTHORITIES

Cases

Allentown Mack Sales & Serv., Inc. v. NLRB,
522 U.S. 359 (1998) 3

Citizens Awareness Network v. Montana Bd. of Env't Rev.,
2010 MT 10, 355 Mont. 60, 227 P.3d 583 7

Ecological Rights Found. v. P. Lumber Co.,
230 F.3d 1141 (9th Cir. 2000) 11

Michigan v. EPA,
576 U.S. 743 (2015) 3

Mont. Env't Info. Ctr. v. DEQ (*MEIC 2005*), 2005 MT 96, 326 Mont.
502, 112 P.3d 964 2

Mont. Env't Info. Ctr. v. DEQ,
No. DV-2023-14 (Mont. 16th Jud. Dist. Ct. Sept. 5, 2025) 8

Mont. Env't Info. Ctr. v. Westmoreland Rosebud Mining, LLC (*MEIC 2023*),
2023 MT 224, 414 Mont. 80, 545 P.3d 623 ..... 2, 3, 5, 6

Yaffe Iron & Metal Co. v. EPA,
774 F.2d 1008 (10th Cir. 1985) 7

Statutes

30 U.S.C. § 1270 9

Mont. Code Ann. § 2-4-621 ..... 9, 10, 11

Regulations

64 Fed. Reg. 21,560 (Apr. 1, 1980) 9

ARM 17.24.401 5

ARM 17.24.405 ..... 4, 5, 6

Other Authorities

H.R. Rep. No. 95-218 (1977).....9

Lee Modjeska, *Administrative Law Practice and Procedure* (1982).....7

S. Rep. No. 95-128 (1977).....9

0207

INTRODUCTION

The substantive exceptions of Respondents Montana Department of Environmental Quality (DEQ) and Westmoreland Rosebud Mining, LLC (WRM)—which include exceptions about the controlling legal standards, the noticed claims, standing, and various factual findings and legal conclusions—are fundamentally misguided and without merit, as explained below. They should be rejected. Respondents' editorial exceptions—which DEQ calls "scrivener's errors" and WRM labels "typographical errors"—are generally unobjectionable and are not addressed further.

Because Respondents' substantive exceptions are essentially identical, with the exception of WRM's complaint about standing, Petitioners Montana Environmental Information Center and the Sierra Club (together, "Conservation Groups") address these common exceptions together.

ARGUMENT

I. DEQ and WRM Ignore Controlling Authority that Establishes the Legal Standard and Scope of Review.

Respondents misguided objections to the Hearing Examiner's statements about "arbitrary [and] capricious" review and review based on the administrative record, DEQ Exceptions at 5–7; WRM Exceptions at 5–8, fail to cite controlling precedent and, ultimately, miss the mark.

0208

Neither DEQ nor WRM cites *Montana Environmental Information Center v. Westmoreland Rosebud Mining, LLC* (*MEIC 2023*), 2023 MT 224, 414 Mont. 80, 545 P.3d 623, which established the applicable standard under the Montana Strip and Underground Mine Reclamation Act (MSUMRA). There, the Court held that an administrative review of DEQ's permitting decision under MSUMRA is akin to an "appeal[]" from the permitting decision. *Id.* ¶ 20. The party seeking review—here, the Conservation Groups—has the burden to show that DEQ failed to "follow[] the law in appropriately applying the correct procedural and substantive requirements of MSUMRA." *Id.* ¶ 19. The Conservation Groups may meet this burden through "evidence *or* [legal] argument." *Id.* ¶ 21 (emphasis added). However, in no case do the Conservation Groups carry the burden to demonstrate with evidence that the permit applicant (here, WRM) will violate the substantive standards of MSUMRA. *Id.* ¶¶ 22–23.

A. Arbitrary and Capricious

Citing *Montana Environmental Information Center v. DEQ* (*MEIC 2005*), 2005 MT 96, 326 Mont. 502, 112 P.3d 964, DEQ and WRM complain about the Hearing Examiner's statement that the Board reviews DEQ's permitting decision under the arbitrary and capricious standard. DEQ Exceptions at 5; WRM Exceptions at 5. Their arguments, however, misunderstand *MEIC 2005*, which held that "arbitrary and capricious" review was "not available" in a contested case

because it provided unwarranted "deference" to DEQ. *Id.* ¶¶ 18, 23–24. Thus, the point of *MEIC 2005* is that the Board *may not defer* to DEQ in assessing the legality of DEQ's permitting decision. Instead, the Board reviews de novo whether "DEQ followed the law in appropriately applying the correct procedural and substantive requirements of MSUMRA." *MEIC 2023*, ¶ 19. At its most basic level, this requires the Board to assess whether, in issuing WRM's permit, DEQ "engage[d] in 'reasoned decisionmaking.'" *Michigan v. EPA*, 576 U.S. 743, 750 (2015) (Scalia, J.) (quoting *Allentown Mack Sales & Serv., Inc. v. NLRB*, 522 U.S. 359, 374 (1998)). Thus, if DEQ's permitting decision does not demonstrate "reasoned decisionmaking," it is unlawful under the non-deferential standard applicable in a contested case. Respondents' suggestion that review in a contested case is *more deferential* than arbitrary and capricious review is at odds with *MEIC 2023* and *MEIC 2005* and should be rejected. The correct standard of review is best set forth in the Conservation Groups' proposed decision and should be adopted by the Board. MEIC Proposed Order at 29–32.

B. Scope of Review

DEQ and WRM also object to the Hearing Examiner's statements that the proposed decision is based on the record established by DEQ at the time of its decision. DEQ Exceptions at 6–7; WRM Exceptions at 6–7. Respondents again ignore controlling precedent—*MEIC 2023*—and are mistaken. *MEIC 2023* ruled

against DEQ and WRM on this precise issue, explaining that in a contested case, the only relevant evidence is that which is compiled by DEQ at the time of its decision:

> Admin. R. M. 17.24.405(6) (2004) provides that 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.) Likewise, Admin. R. M. 17.24.314(5) (2012) provides that DEQ's CHIA "must be sufficient to determine, for purposes of a permit decision, whether the proposed operation has been designed to prevent material damage ...." In *In re Bull Mountain Mine*, ¶ 66, the Board held that, in a contested case challenging the sufficiency of a CHIA, "the only relevant analysis is that contained within the four corners of the CHIA and the only relevant facts are those concluded by the agency in the permitting process before the agency makes its permitting decision."
>
> On judicial review, we defer to reasonable agency interpretations of its own rules implementing statutes. "[T]his Court affords 'great deference' to agency decisions implicating substantial agency expertise." *MEIC 2019*, ¶ 20 (quoting *Winchell v. Mont. Dep't of Nat. Res. & Conservation*, 1999 MT 11, ¶ 11, 293 Mont. 89, 972 P.2d 1132). *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.

MEIC 2025, ¶¶ 45–46; ARM 17.24.405(6). In other words, under controlling precedent of the Montana Supreme Court and the Board, a permit appeal is based

on the permitting record.[1] As such, DEQ's and WRM's exceptions on this point should be rejected.

II. DEQ and WRM Misstate the Initial Burden of the Permittee and DEQ to Affirmatively Demonstrate that the Cumulative Hydrologic Impacts Will Not Result in Material Damage.

DEQ and WRM further object to the Hearing Examiner's conclusion of law (COL) ¶ 33, which purports to summarize MSUMRA's procedural and substantive hydrology standards. DEQ Exceptions at 7–8; WRM Exceptions at 17–18. Conservation Groups generally agree that the Hearing Examiner's summary of the applicable law is not accurate. *See* MEIC Exceptions at 5–14. However, the attempt by DEQ and WRM to paraphrase the applicable law is also inaccurate. As such, their exceptions should be rejected. Instead, the Board should simply adopt the text of the regulatory standard:

> The department may not approve an application submitted pursuant to ARM 17.24.401(1) unless the application affirmatively demonstrates and the department'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: …

[1] While *MEIC 2023* determined that it was not "reversible error" for a hearing examiner to admit rebuttal testimony in an MSUMRA contested case, the Court was careful to note that the testimony was "drawn from information contained in the [materials] compiled by DEQ during the permit approval process," i.e., the permitting record. *MEIC 2023*, ¶ 50. The Court emphasized: "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.'" *Id.* ¶ 52 (quoting ARM 17.24.405(6) (2004)).¶

> the hydrologic consequences and cumulative hydrologic impacts will not result in material damage to the hydrologic balance outside the permit area ….

ARM 17.24.405(6)(c); *MEIC 2023*, ¶ 69 (quoting ARM 17.24.405(6)(c)).

III. DEQ's and WRM's Meritless Exhaustion Argument Ignores the Record and Was Rightly Rejected by the Hearing Examiner.

Next, DEQ and WRM mistakenly contend that the Hearing Examiner erred in rejecting their argument that the Conservation Groups had, somehow, failed to plead a material damage claim. DEQ Exceptions at 8–9; WRM Exceptions at 18–19. DEQ and WRM fail to cite and, indeed, ignore the Conservation Groups' pleadings, which unambiguously articulate a material damage claim:

> In assessing *material damage*, DEQ erroneously isolates the impacts of the AM5 expansion on the Lee Coulee alluvium from pollution … from the Rosebud Mine and the Big Sky Mine. DEQ asserts that AM5 will not be any worse than the impacts of the Big Sky Mine. But the *material damage determination* does not compare the individual impacts of mining operations. Instead, this analysis determines whether the total impact of all mining will cause *material damage*. The AM5 CHIA thus fails to lawfully assess cumulative hydrologic impacts or *material damage*.

Amended Notice of Appeal at 3, ¶ 7 (emphases added). The Conservation Groups' expert disclosure repeated the same material damage claim, which DEQ and WRM ignore:

> DEQ's material damage assessment and determination for the Lee Coulee alluvium excluded cumulative impacts of existing mining at the Rosebud Mine, including Area B, and the Big Sky Mine, which will contribute additional salinity to the Lee Coulee alluvium.

Resp'ts' JSUF, Ex. J at 2.

This well exceeds the liberal notice pleading requirement for administrative proceedings. *See Citizens Awareness Network v. Mont. Bd. of Env't Rev.*, 2010 MT 10, ¶ 28, 355 Mont. 60, 227 P.3d 583 (noting that pleading in administrative case is "no more onerous … than in civil cases," that administrative pleadings are "liberally construed," and that the "most important characteristic of pleadings in the administrative process is their unimportance," which is a "virtue" (quoting *Yaffe Iron & Metal Co. v. EPA*, 774 F.2d 1008, 1013 (10th Cir. 1985), and Lee Modjeska, *Administrative Law Practice and Procedure* § 4.11, 121 (1982))). DEQ and WRM have long had notice of this claim, though they chose to ignore it. Respondents' exception is without merit and should be rejected.

IV. WRM's Exceptions to the Conservation Groups' Standing Have No Basis in Law or Fact and Are Without Merit.

While DEQ does not dispute the Hearing Examiner's finding that Conservation Groups' have standing, WRM raises three meritless objections to that finding.

A. "Perpetual Standing" Straw Man

WRM first presents a straw man argument, positing that the Hearing Examiner "concluded, as a matter of law, that Conservation Groups have *perpetual standing*" to challenge actions at the Rosebud Mine. WRM Exceptions at 9 (emphasis added). The company then goes on to dispute its imaginary premise of

"perpetual standing." *Id.* at 9–10. The argument fails because it's a straw man and its premise is false: the Hearing Examiner made *no* conclusion of law about "perpetual standing." Instead, the Hearing Examiner simply recognized that "[t]he Board of Environmental Review and multiple courts have consistently recognized that the Montana Environmental Information Center (MEIC) and Sierra Club have standing to challenge mining operations at the Rosebud strip mine." Order on Mots. for Summ. J., COL ¶¶ 22–24. Indeed, extending the wall of decisions against WRM on this issue, just weeks ago, the Montana Sixteenth Judicial District Court rejected similar arguments from WRM and found that Conservation Groups have standing to challenge the water pollution discharge permit for the AM5 expansion. *Mont. Env't Info. Ctr. v. DEQ*, No. DV-2023-14, slip op. at 5, ¶¶ 7–9 (Mont. 16th Jud. Dist. Ct. Sept. 5, 2025) (finding Conservation Groups have standing to challenge water pollution permit for AM5 expansion). It was certainly appropriate, here, for the Hearing Examiner to cite the wall of on-point authority by this tribunal and other courts to support his conclusion that the Conservation Groups have standing. That this large body of caselaw categorically refutes WRM's position is no basis for finding error. WRM's first argument fails.

B. Unpreserved Argument About ARM 17.24.301(88)

Second, WRM devises a new standing argument premised on the Hearing Examiner's supposedly "ignor[ing]" the regulatory definition of a "[p]erson having

an interest which is or may be adversely affected." WRM Exception at 10–11 (citing ARM 17.24.301(88)). This argument fails because WRM failed to present it to the Hearing Examiner. *See* WRM Br. in Supp. of MSJ at 9–10; WRM Resp. at 5; WRM Reply at 5–7; WRM & DEQ Joint Proposed Order at 39–46, ¶¶ 22–46. Thus, the Hearing Examiner did not "ignore" WRM's argument about ARM 17.24.301(88). *Cf.* WRM Exceptions at 10. WRM never presented it. Exceptions provide an opportunity for a party to identify errors in a proposed order, not to raise new arguments. Mont. Code Ann. § 2-4-621(1)–(3).

Moreover, WRM's argument that statutory or regulatory standing under MSUMRA is more stringent that constitutional standing (WRM Exceptions at 10–11) has no merit. The statutory standing requirement of the federal Surface Mining Control and Reclamation Act (SMCRA), 30 U.S.C. § 1270(a), is "*coterminous* with the *broadest* standing requirements enunciated by the United States Supreme Court," i.e., constitutional standing. S. Rep. No. 95-128, at 87 (1977) (emphasis added); *accord* H.R. Rep. No. 95-218, at 90 (1977). The standard under MSUMRA is "clearly intended to be *equivalent* to the Federal provision," i.e., the same as constitutional standing. 45 Fed. Reg. 21,560, 21,575 (Apr. 1, 1980). Thus, WRM's second standing also argument lacks merit.

C. Unsupported Factual Argument

Finally, WRM's allegation that the Hearing Examiner "failed to respond" to some of its proposed findings on standing is immaterial and incorrect. WRM Exceptions at 12–13. This objection is immaterial because WRM fails to show that the Hearing Examiner's dispositive finding—that the expansion will cause "injury in fact" to the Conservation Groups' members, Order on Mots. for Summ. J., COL ¶ 24—is "not based upon competent substantial evidence." Mont. Code Ann. § 2-4-621(3). As such, WRM's argument necessarily fails at the outset.

Furthermore, WRM's principal factual contention—that the proposed AM5 operation is "not visible … from public roads," WRM Exceptions at 12—is unsupported by the record. Rather than citing record evidence, WRM cites its proposed decision, WRM Exceptions at 12–13 (citing WRM & DEQ Joint Proposed Order at 42–46, ¶¶ 33–42, 45), but its only reference to visibility of the strip-mine from public roads is a *proposed conclusion of law*, which conspicuously does *not* include any "pinpoint citation[] to the evidentiary record." *Compare* WRM Exceptions at 13, *with* WRM & DEQ Joint Proposed Order at 44, ¶ 41. WRM's *ipse dixit* statement—which the Hearing Examiner plainly rejected—is not competent evidence. WRM, thus, fails to demonstrate that the Hearing Examiner's finding—which is supported by record evidence—that Conservation Groups have

standing is "not based upon competent substantial evidence." Mont. Code Ann. § 2-4-621(3); Order on Mots. for Summ. J., COL, ¶ 24.[2]

In short, WRM's standing arguments do not fly.

V. DEQ's and WRM's Exceptions About Pollution from the Big Sky Mine Are Immaterial Because Both DEQ and the Hearing Examiner Ignored the Total Pollution from the Proposed AM5 Operation of the Rosebud Area B Strip-Mine.

DEQ and WRM contend that the Hearing Examiner erred in COL ¶¶ 45–46, by failing to attribute the current degradation of water quality in Lee Coulee exclusively to the Big Sky Mine and by recognizing the violation of water quality standards in Lee Coulee. DEQ Exceptions at 11–12; WRM Exceptions 20–22.

Respondents' objections about the Big Sky Mine are immaterial because, the undisputed evidence demonstrates that the totality of the AM5 Amendment of the Rosebud Area B permit—without regard to the Big Sky Mine—will "highly likely" degrade the Lee Coulee alluvium to Class III groundwater, which constitutes material damage. MEIC Exceptions at 9–12.

[2] WRM's complaints about the mine area being privately owned and Conservation Groups' not living in Colstrip are inaccurate and irrelevant, respectively. *See* WRM & DEQ, Joint Statement of Undisputed Facts (JSUF) at 2, ¶ 5 (recognizing private land in AM5); *Ecological Rights Found. v. P. Lumber Co.*, 230 F.3d 1141, 1149–50 (9th Cir. 2000) (explaining "a person who uses an area for recreational purposes does not have to show that he or she lives particularly nearby to establish an injury-in-fact due to possible or feared environmental degradation").

As explained in the Conservation Groups' exceptions, the Hearing Examiner's COL ¶¶ 45–46 erred by (1) requiring the Conservation Groups to prove material damage; (2) omitting pollution from the existing Rosebud Area B operation, and thus failing to base the material damage determination on the totality of impacts from the AM5 Amendment of the Area B permit; and (3) failing to recognize that the AM5 Amendment will also extend the duration of degraded water quality in Lee Coulee. *Id.* at 7–14. DEQ's and WRM's objections do not remedy these fundamental errors and, therefore, should be rejected.

VI. Hearing Examiners' Typographical Errors.

The Conservation Groups take no position with respect to the non-substantive typographical errors identified in Respondents' exceptions. DEQ Exceptions at 7, 13–14; WRM Exceptions at 22.

CONCLUSION

For the foregoing reasons, DEQ's and WRM's substantive exceptions are without merit and should be rejected.

Respectfully submitted this 3rd day of October, 2025.

/s/ Shiloh S. Hernandez
Shiloh S. Hernandez
Earthjustice
Northern Rockies Office
P.O. Box 4743
Bozeman, MT 59772-4743
(406) 426-9649
shernandez@earthjustice.org

Derf Johnson
Montana Environmental Information Center
P.O. Box 1184
Helena, MT 59624
(406) 443-2520
djohnson@meic.org

Counsel for Petitioners

0220

CERTIFICATE OF SERVICE

I hereby certify that on the 3rd day of October, 2025, a true and correct copy of the foregoing was served on the following by electronic mail:

Samuel King
Jeremiah Langston
Montana Department of Environmental Quality
P.O. Box 200901
Helena, MT 59620-0901
samuel.king@mt.gov
jeremiah.langston2@mt.gov
ehagen2@mt.gov
sandy.moiseyscherer@mt.gov
Catherine.armstrong2@mt.gov

Samuel R. Yemington
HOLLAND & HART LLP
505 9th Street NW, Suite 700
Washington, DC 20004
sryemington@hollandhart.com

Sarah C. Bordelon
HOLLAND & HART LLP
5441 Kietzke Lane, Second Floor
Reno, NV 89511
scbordelon@hollandhart.com

William W. Mercer
Holland & Hart LLP
401 North 31st Street, Suite 1500
P.O. Box 639
Billings, MT 59103-0639
wwmercer@hollandhart.com

/s/ Shiloh S. Hernandez
Shiloh S. Hernandez

Samuel J. King
Jeremiah R. Langston
Montana Department of
Environmental Quality
P.O. Box 200901
Helena, MT 59620-0901
Telephone: (406) 444-4961
Samuel.King@mt.gov
Jeremiah.Langston2@mt.gov

Attorneys for Respondent Montana Department of Environmental Quality

Electronically Filed with the
Montana Board of Environmental Review
10/3/25 at 4:53 PM
By: *Sandy Moisey Scherer*
Docket No: BER 2022-05 SM

BEFORE THE BOARD OF ENVIRONMENTAL REVIEW
OF THE STATE OF MONTANA

IN THE MATTER OF: NOTICE OF APPEAL AND REQUEST FOR HEARING ROSEBUD MINE AREA B AMENDMENT 5 PERMIT NUMBER C1984003B	BER 2022-05 SM **DEQ'S RESPONSES TO PETITIONERS' EXCEPTIONS**

TABLE OF CONTENTS

TABLE OF AUTHORITIES iii

INTRODUCTION 1

STANDARD OF REVIEW 2

ARGUMENT 3

I. Conservation Groups' Attempts to Relitigate the Burden of Proof Should Be Rejected: The Hearing Examiner Made No Error. 3

II. Conservation Groups' Exceptions Brief Fails to Comport with MAPA 9

III. Conservation Groups Fail to Show that the Proposed Decision is Not Based on Substantial Evidence. 12

A. Claim 1: Cumulative Impact Analysis 12

B. Conservation Groups cannot unilaterally dismiss Claim 2 after an unfavorable decision. 16

C. Claim 3: Climate Change and Reclamation 18

IV. The Montana Supreme Court Rejected, Fifty Years Ago, Conservation Groups' Arguments that Agency Orders Must Explicitly Respond to Each Proposed Finding and Conclusion. 22

CONCLUSION 26

TABLE OF AUTHORITIES

Montana Cases

Blaine Cnty. v. Stricker, 2017 MT 80, 387 Mont. 202, 394 P.3d 159.....2, 3

Brander v. Director, Dept. of Inst., 247 Mont. 302, 806 P.2d 530, 533 (1991)..1, 10

City of Great Falls v. Int'l Ass'n of Fire Fighters, 2024 MT 302, 419 Mont. 262, 560 P.3d 621 9

Cotton v. Mont. Dep't of Corr, 2024 MT 278, 419 Mont. 167, 559 P.3d 824 11

Debuff v. DNRC, 2021 MT 68, 403 Mont. 403, 482 P.3d 1183 24

Fugate v. Shotgun Willies, Inc., 270 Mont. 47, 889 P.2d 1185 (1995) .. 1, 10, 11, 20

In re Custody of Krause, 2001 MT 37, 304 Mont. 202, 19 P.3d 811 18

Mont. Envtl. Info. Ctr. v. Mont. Dep't of Envtl. Quality, 2005 MT 96, 326 Mont. 502, 112 P.3d 964……...……...4, 5, 6, 7

Mont. Env't Info. Ctr. v. Westmoreland Rosebud Mining, LLC, 2023 MT 224, 414 Mont. 80, 545 P.3d 623..... 3, 7, 15, 16, 20

Montana Consumer Counsel v. Public Service Commission, 168 Mont. 180, 541 P.2d 770 (1975).....23

N. Plains Res. Council v. Bd. Nat Res., 181 Mont. 500, 594 P.2d 297, (1979)..... 21, 24, 25

North Star Dev. LLC v. Mont. Pub. Serv. Comm'n, 2022 MT 103, 408 Mont. 498, 510 P.3d 1232 9

Schmidt v. Cook, 2005 MT 53, 326 Mont. 202, 108 P.3d 511 3

Seal v. Woodrows Pharmacy, 1999 MT 247, 296 Mont. 197, 988 P.2d 1230 5

Stalowy v. Flathead Conservation Dist, 2020 MT 155, 400 Mont. 266,
465 P.3d 1170 2

Stanford v. Rosebud Cnty., 254 Mont. 474, (1992) 17

State ex rel. Mont. Wilderness Ass'n v. Bd. of Nat. Res. & Conserv., 200 Mont. 11,
648 P.2d 734 (1982).....23

State Pers. Div. v. DPHHS, 2002 MT 46, 308 Mont. 365, 43 P.3d 305 ..... 11, 12

Stubblefield v. Town of W. Yellowstone, 2013 MT 78, 369 Mont. 322,
298 P.3d 419 11

Ulrich v. State ex rel. Bd. of Funeral, 1998 MT 196, 961 P.2d 126,
289 Mont. 407 3

Watchtower Bible & Tract Soc'y of NY v. Mont. Twentieth Jud. Dist., 202 MT 13,
403 Mont. 57, 479 P.3d 946.....18

Whitefish Credit Union v. Sherman, 2012 MT 267, 367 Mont. 103, 289 P.3d.....10

Federal Cases

C.f. Vermont Yankee Nuclear Power Corp. v. Nat. Resources Def. Council, Inc.,
435 U.S. 519, 553-54, 98 S. Ct. 1197 (1978) 6, 8

Diaz v. Chater, 55 F.3d 300, 307 (7th Cir. 1995).....24

Nguyen v. United States, 792 F.2d 1500, (9th Cir. 1986).....17

Statutes

§ 2-4-621, MCA 1

§ 2-4-621(3), MCA ..... passim

§ 2-4-623, MCA 24, 25

§ 2-4-702(1)(b), MCA 10

§ 82-4-227, MCA 16

§ 82-4-231(10)(q), MCA 21

§ 2-4-612, MCA 20

Rules

M. R. Civ. P., Rule 15 17

M. R. Civ. P., Rule 41 17

M. R. Civ. P., Rule 60(b)(1) 18

ARM 17.24.314(5) and (32) 13

ARM 17.24.751 16

M. R. Evid., Rule 702 19

INTRODUCTION

On August 29, 2025, Petitioners Montana Environmental Information Center and Sierra Club ("Conservation Groups") filed exceptions to Hearing Examiner Cameron's proposed findings of fact and conclusions of law in the above-referenced case. But rather than identifying with any specificity which factual findings in the Hearing Examiner's Order are not supported by "competent substantial evidence," or which legal conclusions were the subject of "clear error," as required under the Montana Administrative Procedure Act ("MAPA"), § 2-4-621(3), MCA; *Fugate v. Shotgun Willies, Inc.*, 270 Mont. 47, 50-51, 889 P.2d 1185 (1995), Conservation Groups (1) attempt to relitigate the entire case as to its (newly raised) Claim 1 and Claim 3, and (2) ask this Board to "enter a final order granting Conservation Groups' petition and vacating DEQ's approval of the AM5 expansion." Pet'rs Br. at 32.

Put differently, Conservation Groups are asking the Board to reweigh all the evidence (without identifying which factual findings were not supported by "competent substantial evidence"). Because this Board did not hear this proceeding, to do as Conservation Groups request would be an abuse of discretion and reversible error, contravening the scope of the Board's review in § 2-4-621. *Fugate*, 270 Mont. at 50 (citing *Brander v. Director, Dept. of Inst.*, 247 Mont. 302, 307-08, 806 P.2d 530, 533 (1991)); *Stalowy v. Flathead Conservation Dist*, 2020

MT 155, ¶ 20 (recognizing that on review, it is not the court's role to "to reweigh the evidence).

Additionally, Conservation Groups seek to unilaterally dismiss Claim 2 after the Hearing Examiner issued a decision unfavorable to Conservation Groups. No such ability under MAPA exists for the Board to do as Conservation Groups request. The Board should reject Conservation Groups' invitation to abuse its discretion and reconsider this case.

STANDARD OF REVIEW

The Board "may not reject or modify the findings of fact unless the [Board] first determines from a review of the complete record and states with particularity in the order that the findings of fact were not based upon competent substantial evidence or that the proceedings on which the findings were based did not comply with essential elements of law." Section 2-4-621(3), MCA. The standard of review "is not whether there is evidence to support findings different from those made by the trier of fact but whether substantial credible evidence supports the trier's findings." *Blaine Cnty. v. Stricker*, 2017 MT 80, ¶ 26, 387 Mont. 202, 394 P.3d 159. Substantial evidence "consists of more [than] a mere scintilla of evidence but may be less than a preponderance" and the Board must evaluate the evidence "in the light most favorable to the prevailing party"—here, DEQ and WRM. *Id.*

Likewise, the Board may not summarily "reject or modify" conclusions of law, § 2-4-621(3), MCA, but instead must "particularize which of the hearing examiner's findings of fact" support the rejected conclusion and justify rejecting those factual findings based upon a lack of substantial evidence. *Ulrich v. State ex rel. Bd. of Funeral*, 1998 MT 196, ¶¶ 29, 40-42, 961 P.2d 126, 289 Mont. 407. The Board's "rejection or modification of a hearing officer's findings cannot survive judicial review unless the court determines as a matter of law that the hearing examiner's findings are not supported by substantial evidence." *Blaine*, ¶ 25 (cleaned up) (quoting *Schmidt v. Cook*, 2005 MT 53, ¶ 31, 326 Mont. 202, 108 P.3d 511).

ARGUMENT

I. Conservation Groups' Attempts to Relitigate the Burden of Proof Should Be Rejected: The Hearing Examiner Made No Error.

Conservation Groups first claim that Conclusion of Law No. 6 is wrong because there is no "rebuttable presumption" as to DEQ's decision to approve the permit. Pet'rs' Br. at 5. Conclusion of Law No. 6 is not in error. As the Montana Supreme Court recently stated, where, like here, DEQ has issued the permit, Westmoreland "need not re-prove the factual elements of its case a second time before the Board. Rather, Conservation Groups—as challengers to a DEQ permitting decision—are the party that must bear a burden before the Board." *Mont. Env't Info. Ctr. v. Westmoreland Rosebud Mining, LLC*, 2023 MT 224, ¶ 18,

414 Mont. 80, 545 P.3d 623 (citing *Mont. Envtl. Info. Ctr. v. Mont. Dep't of Envtl. Quality*, 2005 MT 96, ¶ 16, 326 Mont. 502, 112 P.3d 964) ("*MEIC 2005*"). Of course, Conservation Groups may rebut that presumption by satisfying its "burden of presenting the evidence necessary to establish the facts essential to a determination that [DEQ's] decision violated the law." *MEIC 2005*, ¶ 16. But if Conservation Groups don't present any evidence "at the contested case hearing establishing that issuance of the permit violated the law, the Board [has] no basis on which to determine [DEQ's] decision was legally invalid." *Id.* The Hearing Examiner's order, accordingly, does not "thumb[] the scale in favor of DEQ," but simply recognizes that Conservation Groups bear the burden to prove its case by "producing evidence in support of its claim." *Id.* ¶ 14.

Conservation Groups also assert that the proposed decision unlawfully requires that Conservation Groups assume the burden to affirmatively prove material damage, citing Conclusion of Law Nos. 3-5 and 45. Pet'rs' Br. at 5. In so arguing, Conservation Groups now retreat from their belated substantive material damage claim raised for the first time on summary judgment to argue their initial claim that DEQ's cumulative hydrologic impacts analysis was procedurally flawed. *Compare*, Am. Notice of Appeal, ¶ 7 (alleging "DEQ's CHIA fails to assess the cumulative hydrologic impacts of all mining on the Lee Coulee alluvium"), *with* Pet'rs' Br. in Supp. MSJ at 10 (arguing that "the cumulative

impacts of all mining would result in material damage"). Conservation Groups' ongoing efforts to move the goalposts should be rejected.

Conservation Groups' objection to Conclusion of Law Nos. 3-5 is also perplexing because legal conclusions do not state that Conservation Groups must prove material damage (even though that's what Conservation Groups are now arguing). Rather, these legal conclusions provide that "the challenging party must establish the facts essential to their claims by a preponderance of the evidence," COL ¶ 3 (citing *MEIC 2005*, ¶¶ 14, 16), that "[e]vidence of potential contradictions or inconsistencies" in application materials and decision documents "alone" is not enough "to prove that DEQ's decision violated the law," COL ¶ 4, and that when the issues are "beyond the scope of a layperson's knowledge and experience," Conservation Groups need expert testimony to sustain their burden, COL ¶ 5 (citing, *inter alia*, *Seal v. Woodrows Pharmacy*, 1999 MT 247, ¶¶ 36-37).

Conservation Groups' objection to Conclusion of Law No. 45 is equally puzzling, which provides that "Conservation Groups have failed to establish that cumulative mining impacts resulted in a water quality violation." Conservation Groups vigorously argued for the first time on summary judgment that material damage would occur due to cumulative hydrologic impacts from all mining (despite not raising the issue in their Notice of Appeal nor disclosing any expert

testimony in support[1]), *see, e.g.,* Pet'rs' Resp. Br. in Supp. MSJ at 8 (alleging that "the cumulative impacts of the AM5 expansion together will all other mining will result in material damage to the Lee Coulee alluvium."). And Conservation Groups continue with those efforts in their exceptions brief while simultaneously faulting the Hearing Examiner for explicitly addressing the precise substantive claim they assert was timely alleged and argued (in addition to also addressing Conservation Groups' timely pled and developed procedural claim regarding DEQ's cumulative impact analysis). Just because Conservation Groups don't like the well-reasoned opinion by the Hearing Examiner in addressing Conservation Groups' very arguments do not permit Conservation Groups to now cry foul.[2] *C.f. Vermont Yankee Nuclear Power Corp. v. Nat. Resources Def. Council, Inc.*, 435 U.S. 519, 553-54, 98 S. Ct. 1197 (1978) ("[A]dministrative proceedings should not be a game or a forum to engage in unjustified obstructionism by making cryptic and obscure reference to matters that 'ought to be' considered and then, after failing to

[1] *See* Pet'rs' Initial Expert Witness Disclosures, Substance of Facts and Opinions to which Expert is Expected to Testify and Grounds for Opinions (claiming "DEQ's material damage assessment and determination for the Lee Coulee alluvium excluded cumulative impacts of existing mining at the Rosebud Mine, including Area B, and the Big Sky Mine").

[2] Conservation Groups objection to the burden of proof is particularly uncredible given that, throughout this contested case, it urged the Hearing Examiner to adopt an "arbitrary and capricious" record review legal standard despite *MEIC 2005* finding this standard inapplicable to a MAPA contested case proceeding twenty years ago. *See, e.g.,* Pet'rs' Br. in Supp. MSJ at 14, 16, 19, 20, 21; Pet'rs' Resp. in Opp. to Resp. MSJ, at 10, 11, 16, 17; Pet'rs' Proposed Order, at 31-32.

do more to bring the matter to the agency's attention, seeking to have that agency determination vacated on the ground that the agency failed to consider matters 'forcibly presented.'").

Conservation Groups' objection to Conclusion of Law Nos. 71 and 80 regarding Conservation Groups' third claim should equally be rejected. While Conservation Groups are correct that they could simply show, in certain instances, that DEQ failed to follow MSUMRA's legal requirements, Conservation Groups neuter the language in *Westmoreland* to support their recent procedural position that they were merely alleging that DEQ failed to follow the law. Pet'rs' Br. at 6. The complete citation provides that "[d]uring a challenge to a DEQ decision pursuant to a MAPA contested case proceeding, the question becomes whether DEQ followed the law in appropriately applying the correct procedural and ***substantive*** requirements of MSUMRA." *Westmoreland*, ¶ 19 (emphasis added). And *MEIC 2005*, which *Westmoreland* relied on with approval, states that a "party asserting a claim for relief bears the burden of producing evidence in support of that claim." *MEIC 2005*, ¶ 14.

Here, Conservation Groups' third claim was not, as they now argue, limited to contending that DEQ failed to consider climate change impacts in assessing the feasibility of reclamation, but included, additionally, that "[c]limate change *is affecting* and *will continue to affect* surface water and groundwater resources in the

general mine area, *aggravating* impacts from the AM5 expansion and the Rosebud Mine." Pet'rs' Initial Expert Witness Disclosures, at 3 (emphasis added); *see also* Pet'rs' Am. Notice of Appeal, ¶ 11 (alleging same); Pet'rs' Br. in Supp. MSJ at 25 ("Conservation Groups submitted detailed studies showing how impacts of climate change . . . will adversely affect hydrology and water users in . . . the area of the Rosebud Mine."); Pet'rs' Proposed Order, at 51 (claiming DEQ's refusal to consider climate impacts "was not harmless. It is clear that climate change will cause significant impacts to water resources" and "[t]hese impacts will interact with the impacts of coal mining."); FOF ¶ 109 ("Mr. Anderson contends that global climate trends will lead to increased evapotranspiration, reduced groundwater recharge, and possibly undermine the viability of reclamation."). Indeed, elsewhere in their exceptions brief, Conservation Groups argue the opposite: that reclamation cannot be accomplished and that the Hearing Examiner got it wrong. Pet'rs' Br. at 28-30.

As with their new material damage claim, Conservation Groups have no basis to now argue that the Hearing Examiner erred in addressing the merits of Conservation Groups' substantive claim simply because they don't like the answer. *Vermont Yankee*, 435 U.S. at 553-54. But in any case, the Hearing Examiner also addressed (and properly rejected) Conservation Groups' procedural claim that DEQ was required to consider prospective global climate change impacts in

determining the feasibility of reclamation. COL ¶¶ 72-79. The Hearing Examiner committed no error, and the Board should dispose of Conservation Groups' belated attempts to modify its claims through exceptions briefing on the controlling burden.

II. Conservation Groups' Exceptions Brief Fails to Comport with MAPA.

After indicating the proper legal standard governing the Board's pending determination at this juncture, Pet'rs' Br. at 3-4 (citing § 2-4-621(3), MCA), Conservation Groups fail to specifically identify which factual findings were not based on "competent, substantial evidence," or identify why specific legal conclusions were incorrect based on the Hearing Examiner's reliance thereon. Instead, Conservation Groups reargue their entire case with respect to (their modified) Claim 1 and Claim 3. This is improper.

"The manifest purpose of the exhaustion requirement is to afford the [Board] an opportunity to correct its own errors before a court interferes." *North Star Dev. LLC v. Mont. Pub. Serv. Comm'n*, 2022 MT 103, ¶ 13, 408 Mont. 498, 510 P.3d 1232 (cleaned up), *partially superseded by City of Great Falls v. Int'l Ass'n of Fire Fighters*, 2024 MT 302, 419 Mont. 262, 560 P.3d 621. Section 2-4-621(3), MCA, is part and parcel of Conservation Groups' exhaustion requirements under MAPA, and is an opportunity to indicate, with some measure of specificity, errors in the proposed decision so that the Board can address those potential errors. And to

satisfy -621(3), just like on judicial review, § 2-4-702(1)(b), MCA, Conservation Groups must identify with precision the factual findings it takes issue with, why those factual findings are not supported by substantial evidence in the whole record, and correspondingly, why these resulted in flawed legal conclusions. *Brander v. Director, Mont. Dep't of Insts.*, 247 Mont. 302, 307-08, 806 P.2d 530, 533 (1991); *Fugate*, 270 Mont. at 50-51. Conservation Groups do not do so. And it is not the Board's job to "guess at [Conservation Groups'] precise position." *Whitefish Credit Union v. Sherman*, 2012 MT 267, ¶ 16, 367 Mont. 103, 289 P.3d at 174.

Conservation Groups additionally err in trying to relitigate their claims and have this Board reweigh the evidence. For example, Conservation Groups dedicate much effort to raising purportedly conflicting evidence regarding factual findings as to DEQ's material damage determination, Pet'rs' Br. at 14-18, lodging untimely evidentiary objections, and arguing about the significance of Appendix A to the CHIA, *id.* at 18-20. Conservation Groups do much of the same regarding their climate claim in asserting the Hearing Examiner "failed to address critical contrary evidence" and lamenting that the Hearing Examiner "incorrectly rejected Conservation Groups' proposed findings." *Id.* at 26-32. Conservation Groups' attempts to now retry their case should be rejected because "it is an abuse of

discretion" for the Board to reweigh the evidence and modify the findings of a hearing examiner in violation of § 2-4-621(3). *Fugate*, 270 Mont. at 50.

The Board cannot "review the record de novo to determine whether [the proposed decision is] supported by substantial evidence." *Id.* Rather, the only question the Board may ask is whether the findings were not based upon competent substantial evidence. *Id.*at 51. And whether findings are supported by substantial evidence is an issue of law. *Id.* This standard of review, further, does not permit the Board to overturn the factual findings simply because the evidence, after reviewing the *entire* record, could be viewed as weak or conflicting. *Stubblefield v. Town of W. Yellowstone*, 2013 MT 78, ¶ 18, 369 Mont. 322, 298 P.3d 419; *State Pers. Div. v. DPHHS*, 2002 MT 46, ¶ 26, 308 Mont. 365, 43 P.3d 305. Conservation Groups, likewise, fail to identify how specific factual findings led to incorrect legal conclusions. *See Cotton v. Mont. Dep't of Corr*, 2024 MT 278, ¶ 26, 419 Mont. 167, 559 P.3d 824.

Put simply, Conservation Groups ask this Board to "substitute[e] its judgment for that of the factfinder" in violation of § 2-4-621(3), MCA, *State Pers. Div.*, ¶ 26, and reject, *in toto*, the proposed decision's "findings and conclusions with respect to . . . Conservation Groups' first and third claims," Pet'rs' Br. at 32. To do as Conservation Groups ask is an abuse of discretion, particularly where, like here, Conservation Groups have failed to object to the majority of the findings

and conclusions. *State Pers. Div.*, ¶ 26. The Board should deny Conservation Groups' exceptions brief for this reason alone.

III. Conservation Groups Fail to Show that the Proposed Decision is Not Based on Substantial Evidence.

As stated *supra* § II, it's improper for the Board to reweigh the evidence and reverse the Hearing Examiner's decision, and Conservation Groups haven't established with particularity which factual findings or legal conclusions they take issue with. But even if the Board could overlook these deficiencies, Conservation Groups' objections to the proposed findings and conclusions regarding Claim 1 and Claim 3 still fail. Additionally, there are no grounds at this late date for Conservation Groups to dismiss Claim 2.

A. Claim 1: Cumulative Impact Analysis

1. The factual findings are supported by substantial evidence.

While difficult to parse which specific factual findings Conservation Groups take issue with, the only factual findings Conservation Groups have identified in their brief with respect to Claim 1 are Finding of Fact Nos. 16, 45, and 51-70. Pet'rs' Br. at 6-20. All these findings are supported by substantial credible evidence in the record.

Finding of Fact No. 16 identifies the legal claim Conservation Groups alleged in the Amended Notice of Appeal. With respect to Claim 1, Finding of Fact No. 16 states that Conservation Groups alleged "[t]hat DEQ failed to include

adjacent existing and historic mine sites in its cumulative impact assessment of the Lee Coulee alluvium in violating ARM 17.24.314(5) and (32)." Indeed, the Hearing Examiner correctly paraphrased Conservation Groups' procedural claim, which provided that "DEQ's CHIA fails to assess the cumulative hydrologic impacts of all mining on the Lee Coulee alluvium." Am. Notice of Appeal, ¶ 7; *id.* ¶ 3. The factual statement in Finding of Fact No. 16 is correct. So too is Finding of Fact No. 45, which provides that Conservation Groups' cumulative impacts procedural claim alleged that DEQ "omit[ted] the consideration of the existing Rosebud Mine and historic mining activities at the Big Sky Mine."

Conservation Groups criticize Finding of Fact Nos. 51-68, claiming that Appendix A of the CHIA is irrelevant. Pet'rs' Br. at 19-20. First, that's not true. Conservation Groups' claim was predicated on its misinformed belief that this information was missing. Am. Notice of Appeal, ¶ 7. Not until their expert's deposition when their expert realized DEQ conducted this analysis did Conservation Groups concede this issue (and when, conveniently, Conservation Groups sought to modify their claim to a substantive material damage claim on summary judgment). FOF ¶¶ 59, 60. Second, even if these factual findings were irrelevant, that is not sufficient grounds to overturn the factual findings. Section 2-4-621(3), MCA.

Conservation Groups, additionally, appear to object to Finding of Fact Nos. 56, 57, 66, and 69, arguing that DEQ failed to include Area B mining from its material damage determination. Pet'rs' Br. at 9-12. It's not clear how Conservation Groups reach such a conclusion, because these factual findings specifically summarize DEQ's analysis and conclusions and the deposition testimony of DEQ's expert regarding its cumulative impact analysis and resultant material damage determination, with citations to the record. Conservation Groups don't present any evidence to justify modification of these factual findings.

Conservation Groups also assert that Finding of Fact No. 70 is not a factual finding but a legal conclusion. The finding merely provides a summary of Mr. Van Oort's deposition testimony—a question of fact. The Hearing Examiner was, appropriately, not citing the statement as a legal conclusion. There was no error.

Finally, the Board should note that Conservation Groups make no objection to Finding of Fact Nos. 46-50 and 71-72.

Because Conservation Groups have failed to demonstrate that the factual findings were not supported by competent substantial evidence, the Board must adopt them.

2. Legal Conclusions

The only legal conclusions Conservation Groups take issue with regard to Claim 1 is Conclusion of Law Nos. 36 and 46. Pet'rs' Br. at 6-20. Here, too, the

legal conclusions are not incorrect, especially because Conservation Groups have failed to demonstrate that the factual findings underpinning these legal conclusions are not supported by competent, substantial evidence.

Conclusion No. 36 provides that DEQ "concluded, based on its assessment of the cumulative impacts of mining, that AM5, in a reduced form, 'will not result in material damage to the hydrologic balance outside the permit area.'" Conclusion No. 46 provides that "Conservation Groups did not prove that AM5 was the cause-in-fact of the water quality violation." Both conclusions are accurate renditions of the law based on the undisputed facts. Conservation Groups claim that the phrase "in a reduced form" in Conclusion No. 36 suggests that DEQ's material damage determination was conducted in "piecemeal" fashion, omitting Area B of the mine. Pet'rs' Br. at 9-12. This argument is disingenuous. The conclusion recognizes that DEQ excluded Richard Coulee from AM5—*i.e.,* the "reduced form" of the approval, DEQ Ex. A at 11—not a reduced form of the cumulative impacts and material damage determinations. Indeed, the Hearing Examiner rejected Conservation Groups' argument, which goes unchallenged, that DEQ unlawfully excluded Area B mining from the material damage assessment. COL ¶ 38.

There is, similarly, no error in Conclusion No. 46, which parrots Conclusion No. 41, relying on the complete and correct test from *Westmoreland*, ¶ 68, regarding material damage. While Conservation Groups provided a truncated

misstatement of the material damage test throughout their brief, avoiding a direct citation to *Westmoreland* and § 82-4-227, MCA, *see, e.g.,* Pet'rs' Br. at 20, Conservation Groups do not object Conclusion No. 41. And Conservation Groups don't challenge Conclusion Nos. 37-40, 42-45, and 47-49. Conservation Groups, therefore, are stuck with these legal conclusions.

Because Conclusion Nos. 36 and 46 do not misstate the law, and Conservation Groups have failed to establish otherwise, the Board must accept them.

B. Conservation Groups cannot unilaterally dismiss Claim 2 after an unfavorable decision.

In the proposed findings and conclusions, the Hearing Examiner resolved Conservation Groups' second claim that the drainage housing Pond 400 and Wetland 4-2/2 was an "intermittent to perennial stream reach" subject to protections under the stream buffer rule at ARM 17.24.751, finding Conservation Groups failed to demonstrate by a preponderance of the evidence that DEQ erred in its assessment of this ephemeral drainage. COL ¶¶ 49-64. Rather than raise objections to any factual findings or legal conclusions, Conservation Groups ask the Board to "voluntarily dismiss" this claim because "WRM recently obliterated the stream reach at issue, precluding the groups' ability to obtain meaningful relief on that claim." Per's Br. at 3; *id.* at 32. Conservation Groups have no such unilateral ability under either MAPA or the Montana Rules of Civil Procedure.

Under MAPA, the Board can *only* review the complete evidence to determine whether the Hearing Examiner's findings as to Claim 2 were not based upon "competent, substantial evidence" or that the proceedings on which the findings were based "did not comply with essential requirements of law." Section 2-4-621(3), MCA. Because it is Conservation Groups' burden to demonstrate which factual findings were not based on substantial evidence or which legal conclusions were in error, and Conservation Groups have declined the opportunity, the Hearing Examiner's proposed decision as to this Claim must stand.

Conservation Groups also haven't raised any request for relief under the Montana Rules of Civil Procedure, which govern this proceeding. Initial Procedural Order at 1. Conservation Groups could have, presumably, sought to withdraw a claim by amending the Complaint under Rule 15, M. R. Civ. P., but first would have to seek leave from the Board and written consent from the opposing parties, and amendments after judgment are not typically allowed. *Stanford v. Rosebud Cnty.*, 254 Mont. 474, 478 (1992) (quoting *Nguyen v. United States*, 792 F.2d 1500, 1503 (9th Cir. 1986) with approval that "a court ordinarily will be reluctant to allow leave to amend to a party against whom summary judgment has been entered[.]"). Conservation Groups, alternatively, could have sought dismissal under Rule 41, M. R. Civ. P., but this rule does not allow dismissals of individual claims, only complete dismissal. *Watchtower Bible &*

Tract Soc'y of NY v. Mont. Twentieth Jud. Dist., 202 MT 13, ¶ 13, 403 Mont. 57, 479 P.3d 946 (stating Rule 41(a) "does not allow for piecemeal dismissals of claims in a multiple claim lawsuit."). Finally, Conservation Groups could have sought Rule 60 relief from a judgment due to "mistake, inadvertence, surprise, or excusable neglect." Rule 60(b)(1), M. R. Civ. P. Conservation Groups have not sought relief under any of these rules.

What's more, Conservation Groups allege that, based on an unsupported statement, that the ephemeral drainage has been "obliterated." *In re Custody of Krause*, 2001 MT 37, ¶ 32, 304 Mont. 202, 19 P.3d 811 (court cannot rely on unsupported issues or arguments). But even if Conservation Groups were correct, an allegation of mootness is not a basis for dismissal under either MAPA or the Montana Rules of Civil Procedure.

Because the Hearing Examiner's findings and conclusions as to Claim 2 are unrebutted the Board is required to adopt these findings and conclusions and enter an Order in favor of DEQ and Westmoreland as to this issue.

C. Claim 3: Climate Change and Reclamation

1. Factual Findings

Conservation Groups appear to take issue with Finding of Fact Nos. 106 and 114-119. Conservations Groups' objections have no merit.

Finding No. 106 provides that the facts presented by Conservation Groups, aside from those facts alleged in their expert's struck declaration, were devoid of "independent analysis, evidence, and expert testimony." Conservation Groups allege error on the basis that Conservation Groups' "expert evidence" based on two climate change studies were not considered." Pet'rs' Br. at 28, 30. Conservation Groups, however, overlook that they did not rely on these studies on summary judgment. *See, e.g.,* Pet'rs' Br. in Supp. MSJ. They were only referenced, instead, in their expert's surprise declaration, which the Hearing Examiner struck. FOF ¶¶ 41-42. And Conservation Groups do not challenge the Hearing Examiner's order striking the declaration and do not challenge Finding Nos. 41-42.

Nor, irrespective of the deferred attempt to now introduce these studies, are these studies independently considered "expert evidence." Only qualified expert testimony constitutes expert testimony. Rule 702, M. R. Evid. And, regardless of these generic studies and their admissibility, existence of contrary evidence is not the standard; the standard is whether the factual findings are not supported by competent substantial evidence. Section 2-4-621(3), MCA. Finding No. 106 is supported by competent substantial evidence, and therefore, must stand.

Conservation Groups also claim that Finding of Fact Nos. 114-119 are predicated on purportedly inexpert testimony that additionally constitutes *post hoc* evidence. Pet'rs' Br. at 28-31. Even if Conservation Groups' arguments had merit

(they don't), Conservation Groups' contentions are founded on discretionary evidentiary considerations by the Hearing Examiner. The Board cannot now reweigh the credibility of DEQ's or Westmoreland's experts. *See Fugate*, 270 Mont. at 51-52 (recognizing "deference properly given to the original finder of fact—in this case, the hearing examiner" and reaffirming "[t]he findings of the hearing examiner, especially as to witness credibility, are therefore entitled to great deference"). The Hearing Examiner credited "the credible expert testimony" offered by these experts, FOF ¶ 81, and this determination is not subject to disturbance on Board review. Notwithstanding, Conservation Groups' assertion that these experts were "not qualified" is not credible. Conservation Groups' expert even admitted at deposition to their credibility, particularly as it relates to impacts on hydrologic resources—the entire basis for Conservation Groups' climate claim and the impacts on the feasibility of reclamation. FOF ¶ 103.

Conservation Groups' *post hoc* argument is equally unmeritorious. The Montana Supreme Court already rejected that argument in *Westmoreland*. 2023 MT 224, ¶¶ 40-52. This case is not a record review proceeding, but an opportunity for all parties to present evidence and argument on all issues involved. Section 2-4-612. DEQ and Westmoreland were certainly entitled to rebut Conservation Groups' sole expert's allegations. The fact that DEQ and Westmoreland credibly did so isn't grounds for concluding the factual findings were not supported by

substantial evidence. If anything, it comports with the true purpose of MAPA contested cases: to encourage "the full presentation of evidence at the initial administrative hearing . . . ." *N. Plains Res. Council v. Bd. Nat Res.*, 181 Mont. 500, 510, 594 P.2d 297, 303 (1979).

2. Legal Conclusions

Conservation Groups challenge Conclusion of Law Nos. 72-83 on the grounds that the Hearing Examiner erred in concluding MSUMRA's reclamation requirements prohibit prospective climate change impacts from being considered. Pet'rs' Br. at 24. Conservation Groups misstate the legal conclusions, which conclude there is no legal obligation in MSUMRA to "incorporate global climate trends when assessing the reclamation plan's viability." COL ¶ 72; COL ¶ 74 (finding § 82-4-231(10)(q) is "clear and unambiguous, and neither MSUMRA nor its implementing regulations mention climate change or require future-oriented climate analysis."). Oddly, Conservation Groups incorporate into their objections Conclusion No. 78, which recognized that "Conservation Groups have not identified any prior permitting decisions under MSUMRA or its federal counterpart, [SMCRA], in which global climate trends were considered in evaluating reclamation viability." But there is no evidence in the record of any prior permitting decision under MSUMRA or SMCRA of such an analysis, and Conservation Groups still fail to identify such a decision now.

Conservation Groups' objections to Conclusion Nos. 81-82 re-raise their *post hoc* arguments and again assert DEQ's and Westmoreland's evidence was not expert evidence and therefore is not harmless error. Pet'rs' Br. at 26. But as discussed *supra*, Conservation Groups' arguments fail as a matter of law. Furthermore, these legal conclusions don't mention "harmless error." That's because the legal conclusions didn't acknowledge that there was an error to begin with; rather, the conclusions reached found that the undisputed evidence (given that the only evidence Conservation Groups presented was the struck declaration) explicitly rebutted Conservation Groups' claims. *See* Recommended Decision, ¶ 2 (finding Respondents have "successfully disproven Conservation Groups' claims by a preponderance of the evidence."). Indeed, Conclusion No. 82 explicitly recognizes Conservation Groups' expert's admission that DEQ's "reclamation and cumulative impact findings" would "remain unaffected."

Conservation Groups have failed to establish that the legal conclusions reached were in error or that the factual findings supporting these conclusions were not supported by substantial evidence.

IV. The Montana Supreme Court Rejected, Fifty Years Ago, Conservation Groups' Arguments that Agency Orders Must Explicitly Respond to Each Proposed Finding and Conclusion.

Conservation Groups claim that the Hearing Examiner "failed to address" purportedly "critical" evidence with respect to Petitioners' first and third claims

Pet'rs Br. at 12-18, 29-31. The Board need not entertain Petitioners' invitation to second guess the Hearing Examiner's findings of this purportedly undisputed evidence. The Montana Supreme Court has already rejected Conservation Groups' argument fifty years ago, and these cases remain good law.

In *Montana Consumer Counsel v. Public Service Commission*, 168 Mont. 180, 541 P.2d 770 (1975), the Montana Supreme Court held that a proposed order does not require a separate, express ruling on each required finding as long as the agency's decision and order in such proposed findings are clear. *Id.* at 193. Later, in *State ex rel. Mont. Wilderness Ass'n v. Bd. of Nat. Res. & Conserv.*, 200 Mont. 11, 648 P.2d 734 (1982), the Montana Supreme Court again rejected appellant Montana Environmental Information Center's arguments that the Boards "did not explicitly rule on each finding and each conclusion" in response to the parties submitted proposed findings of fact and conclusions of law because "[t]his argument exalts form over substance" and the Court "do[es] not construe the statutes so narrowly or technically" because "[t]o do so would place an onerous burden on the Board, especially when it is remembered that usually these types of hearings involve multiple parties representing various interests and each party normally submits its own findings and conclusions." 200 Mont. at 39-40. There, like here, the Hearing Examiner's findings and conclusions "implicitly rule on the

findings and conclusions submitted by the parties" and thus the proposed decision is in conformance with § 2-4-623, MCA. *Id.* at 40.

Furthermore, the cases Conservation Groups rely on, *Diaz v. Chater*, 55 F.3d 300, 307 (7th Cir. 1995), *Debuff v. DNRC*, 2021 MT 68, ¶ 43, 403 Mont. 403, 482 P.3d 1183, and *N. Plains Res. Council v. Bd. of Nat. Res. & Conservation*, 181 Mont. 500, 523, 594 P.2d 297, 310 (1979), are either inapplicable or defeat Conservation Groups' arguments.

Diaz is not a Montana MAPA contested case, but a federal case based on federal precedent for cases tried before an Administrative Law Judge such that it has little, if any, persuasive value. *Id.,* 55 F.3d at 304-305. What's more, Conservation Groups omit that in that case, the Seventh Circuit stated that "an ALJ need not provide a complete written evaluation of every piece of testimony and evidence," and need only "articulate, at some minimum level, his analysis of the evidence to allow the appellate court to trace the path of his reasoning." *Id.* at 307. Finally, in *Diaz*, the Seventh Circuit declined, as the Conservation Groups invite the Board to do here, to "reweigh the evidence." *Id.* Thus, to the extent this case has any persuasive authority, it supports the Hearing Examiners' findings and conclusion.

Debuff also offers no benefit to Conservation Groups' argument because the opinion does not concern what obligations the Board has under § 2-4-623, MCA—

indeed, nowhere does this decision refer to this statute. Further, in that case, the Department of Natural Resources and Conservation entirely failed to make any finings regarding an "evapotranspiration analysis" in its Final Order—a far different scenario than here where the Hearing Examiner considered the relevant evidence and explicitly addressed (and rejected) all Conservation Groups' claims. *See* FOF ¶¶ 45-119, COL ¶¶ 33-83.

N. Plains likewise does no favors for Conservation Groups' arguments. There, the Board of Natural Resources failed to conduct *any* fact finding regarding the location of transmission lines in support of the conclusions reached, contravening the necessary requirement pursuant to the Siting Act and § 2-4-623 that "something more than conclusory findings of fact or conclusions of law was necessary." *N. Plains*, 181 Mont. at 525-526. Here, again, the Hearing Examiner made extensive factual findings in support of the conclusions reached as to each issue raised by the Conservation Groups. FOF ¶¶ 45-119.

At bottom, Conservation Groups' argument is not actually focused on any error with the Hearing Examiner's Order; Conservation Groups fail explain to this Board why the factual findings weren't supported by "competent substantial evidence" or, by extension, that the corresponding legal conclusions were in error. Section 2-4-621(3), MCA. Instead, Conservation Groups' argument is, as discussed *supra* § I, a covert attempt to invite the Board to improperly reweigh

allegedly competing evidence. The Board should decline Conservation Groups' offer.

CONCLUSION

For the reasons stated herein, the Board must reject Conservation Groups' exceptions brief and adopt the Hearing Examiner's proposed decision subject to DEQ's and Westmoreland's minor corrections.

DATED this 3rd day of October 2025.

BY: */s/ Samuel King*
SAMUEL J. KING

Counsel for DEQ

CERTIFICATE OF SERVICE

I hereby certify that on this 3rd day of October 2025, I caused to be served a true and correct copy of the foregoing document to all parties or their counsel of record by electronic mail, addressed as follows:

Board Secretary
Board of Environmental Review
1520 E. Sixth Ave.
P.O. Box 200901
Helena, MT 59620-0901
Deqbersecretary@mt.gov

Shiloh Hernandez
Earthjustice
Northern Rockies Office
313 East Main Street
P.O. Box 4743
Bozeman, MT 59772-4743
shernandez@earthjustice.org

Derf Johnson
Montana Environmental Information Center
P.O. Box 1184
Helena, MT 59624
(406) 443-2520
djohnson@earthjustice.org

Samuel R. Yemington
Holland & Hart LLP
505 9th Street NW, Suite 700
Washington, D.C. 20004
sryemington@hollandhart.com

Sarah C. Bordelon
Holland & Hart LLP
5470 Kietzke Lane, Ste. 100
Reno, NV 89511
scbordelon@hollandhart.com

BY: *<u>/s/ Catherine Armstrong</u>*
Catherine Armstrong, Paralegal
Dept. of Environmental Quality

Victoria A. Marquis
Morgan E. Pettit
CROWLEY FLECK PLLP
500 Transwestern Plaza II
P. O. Box 2529
Billings, MT 59103-2529
(406) 252-3441
vmarquis@crowleyfleck.com

Attorneys for Decker Coal Company

Electronically Filed with the
Montana Board of Environmental Review
9/29/25 at 4:26 PM
By: *Sandy Moisey Scherer*
Docket No: BER 2025-02 SM

BEFORE THE BOARD OF ENVIRONMENTAL REVIEW
OF THE STATE OF MONTANA

IN THE MATTER OF: **DECKER COAL COMPANY'S REQUEST FOR HEARING REGARDING PERMIT C1983007 (EAST DECKER MINE)**	**CAUSE NO. BER 2025-02 SM** **EAST DECKER COAL COMPANY'S NOTICE AND REQUEST FOR DISMISSAL**

On January 29, 2025, the Department of Environmental Quality ("DEQ") issued a Notice of Noncompliance and Order of Abatement ("Notice") to the Decker Coal Company ("Decker") for the East Decker Mine. On February 13, 2025, Decker appealed the Notice to the Board of Environmental Review ("BER" or "Board"). On February 28, 2025, Decker filed an Amended Request for Hearing on the Notice, noting that the Notice was invalid because 1) Decker was in compliance with the approved reclamation plan and 2) DEQ's requested changes were contrary to the Montana Strip and Underground Mine Reclamation Act ("MSUMRA"). On March 28, 2025, in accordance with federal and state law, Decker moved to suspend the abatement requirements during the pendency of this appeal. §§ 82-4-251(2); 82-4-254(1)(c), MCA; 30 U.S.C. §1275(c); 43 C.F.R. § 4.1116. On May 7, 2025, the Board denied that motion.

On August 28, 2025, DEQ formally notified Decker that the Notice had been resolved due to Decker's compliance with DEQ's demands. Exhibit A. Nevertheless, DEQ did not vacate or terminate the Notice in accordance with section 82-4-251(4), MCA. Instead, DEQ issued a Notice of Violation. Exhibit B. DEQ waived any penalty associated with the alleged violation, noting that Decker "has had a dragline and two dozers operating in the permit boundary reclaiming the area," that no "off-site impacts" have been observed, that Decker "continues to operate with best practices to protect the environmental during the reclamation process," that Decker's actions "did not harm or have the potential to harm human health or the environment" and that "reclamation is progressing." *Id*., p. 2.

Decker disputes that any violation occurred in the first instance but recognizes that, due to the denial of Decker's motion to suspend the ordered abatement, Decker has been forced to comply with DEQ's abatement demands regardless of the merits of DEQ's Notice and regardless of the fact that Decker remained in compliance with its reclamation plan. Therefore, Decker chooses not to further litigate the two issues raised on appeal and respectfully requests the Board dismiss this proceeding.

Dated this 29th day of September, 2025.

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

Attorney for Decker Coal Company

CERTIFICATE OF SERVICE

I hereby certify that the foregoing document was served upon the following counsel of record, by the means designated below, this 29th day of September, 2025:

[ ] U.S. Mail [ ] FedEx [x] Email [ ] Sharefile	Sandy Moisey Scherer, Board Secretary Board of Environmental Review 1520 E Sixth Avenue P.O. Box 200901 Helena, MT 59620-0901 deqbersecretary@mt.gov
[ ] U.S. Mail [ ] FedEx [x] Email [ ] Sharefile	Sam King Chief Legal Counsel Jeremiah Langston Department of Environmental Quality P.O. Box 200901 Helena, MT 59620-0901 samuel.king@mt.gov jeremiah.langston2@mt.gov samuel.doxzon2@mt.gov *Attorneys for Montana Department of Environmental Quality*

/s/ Victoria A. Marquis
VICTORIA A. MARQUIS

EXHIBIT
A

DEQ
Montana Department
of Environmental Quality

August 28, 2025

Sent via electronic mail

Decker Coal Company
East Decker Coal Mine
12 Lakeshore Drive
Decker, MT 59025

TERMINATION of ABATEMENT ORDER

Company Name: Decker Coal Company	Date: August 27, 2025
Mine: East Decker Coal Mine	Notice of Noncompliance: CN2025001
Permit No: C1983007	Abatement Deadline: August 29, 2025

Description of Noncompliance:

During a Department of Environmental Quality (DEQ) complete inspection of the East Decker Mine (Permit #C1983007) on December 19, 2024, DEQ documented that permit reclamation commitments for 2024 were not completed.

The Administrative Rules of Montana (ARM) 17.24.501(6)(b) states that, unless otherwise approved by DEQ, backfilling and grading must be completed within two years after coal removal from each pit has been concluded. Attachment 313-1b (Exhibit 1) of the permit lists a general timeline of reclamation. In 2024, the East Decker Mine commitment was for 3 million cubic yards of material to be moved with a truck and shovel fleet. One hundred acres were also supposed to be seeded. DEQ conducted thirteen inspections in 2024, and DEQ recorded that the truck and shovel fleet was never activated and that no soil laydown or seeding had occurred in 2024.

Noncompliance Abated as follows:

The following list of abatement conditions were addressed as follows:

1) DEQ required DCC to revise the reclamation plan to include detailed steps and dates for completion, as required under ARM 17.24.313(1).

   a. Minor revision MR123 was submitted on May 13, 2025, and the revision was approved on June 30, 2025.
2) Plan for permanent mitigation of coal smokers (ARM 17.24.523; ARM 17.24.308(1)(d)).
   a. Minor revision MR125 was submitted on May 19, 2025. On May 22, 2025, Decker sent a letter stating that further work on MR125 was dependent on a joint inspection between DEQ and Decker in June. DEQ and Decker agreed to perform a discipline specific inspection tentatively scheduled for June 17 to assess the state of coal fires at the East Decker Mine where potential mitigation measures will be discussed.
   b. A discipline-specific inspection to look at areas of known coal fires was conducted on June 17, 2025.
   c. Minor revision MR125 was approved on August 26, 2025.
3) Weed management plan during reclamation including commitments for spring and fall spraying (ARM 17.24.308(1)(f)).
   a. Minor revision MR121 was submitted on April 29, 2025, and the revision was approved on May 2, 2025.
4) Timeline for the removal of buildings and other support facilities (ARM 17.24.304(1)(b)).
   a. Minor revision MR124 was submitted on May 13, 2025, and the revision was approved on June 06, 2025.
5) Plan for facilities sampling for hydrocarbons including decommissioned shop areas and ready lines prior to grading work in the area. The plan must include the spacing of samples and the proposed parameter suite (ARM 17.24.308(1)(c)).
   a. Minor revision MR122 was submitted on April 29, 2025, and the revision was approved on June 30, 2025.

The abatement order contained in Notice of Noncompliance No. CN2025001 is hereby terminated.

Since the abatement of NON CN2025001 required permit updates only, DEQ is issuing this termination order digitally.

Sincerely,



Emily Lodman, Acting Section Supervisor
Coal Section
Mining Bureau
Phone: 406-444-2873
Email: Elodman@mt.gov

CC: Jeffrey Fleischman, OSMRE - Casper Office
Eric Dahlgren, Mining Bureau
Ashley Eichhorn, DEQ Coal Section
Sam King, DEQ Legal

EXHIBIT
B

DEQ
Montana Department of Environmental Quality

Air, Energy & Mining Division

August 28, 2025

Sent via electronic mail

Decker Coal Company
East Decker Coal Mine
12 Lakeshore Drive
Decker, MT 59025

Permit ID: C1983007
Noncompliance No: CN2025001
Subject: Notice of Violation (NOV) and Waiver of Penalty

Dear Decker Coal Company:

On January 29, 2025, the Department of Environmental Quality (DEQ) issued a Notice of Noncompliance (NON) and Order of Abatement (Noncompliance No. CN2025001) to Decker Coal Company, LLC (DCC) – East Decker Mine (permit C1983007). The NON related to a failure to follow the approved reclamation plan.

On April 29, 2025, DEQ extended the abatement deadline to June 30, 2025 following the submission of minor revision MR120 as part of compliance with the Order of Abatement. Minor revision MR120 was subsequently withdrawn and replaced with minor revision MR123 on May 13, 2025 which was later approved on June 30, 2025. Minor revisions MR121, MR122, and MR124 were also submitted in May and addressed the Weed Management Plan, Facilities Sampling Plan, and the Facilities Reclamation Plan. These revisions were all approved prior to the June 30, 2025 deadline. Additionally, minor revision MR125 was submitted May 19, 2025 to address the coal fire mitigation plan. DEQ determined an on-site inspection focused on potential coal fires would be required to determine adequate mitigation plans. DEQ conducted the inspection on June 17, 2025. The abatement deadline was again extended until August 29, 2025 based on the ongoing permitting review of the coal fire mitigation plan. Minor Revision MR 125 was approved on August 26, 2025, and the Abatement of NON CN2025001 has been resolved.

Notice of Violation

With this letter, DEQ is notifying DCC of its issuance of a NOV in accordance with the Administrative Rules of Montana (ARM) 17.24.1211. After issuance of a NON and evaluating the circumstances of the violation, DEQ has determined that the NON was appropriate and that a vacatur of that NON is not warranted.

Waiver of Penalty

DEQ staff have reviewed the NON to determine whether the violation is "a minor one for which a civil penalty should be waived or, if not, the amount of the civil penalty" ARM 17.24.1211(1). In completing its assessment of the issue leading to the NON, DEQ has determined that the violation was a minor violation.

For the violation, DEQ staff assessed the penalty factors contained in Section 82-4-1001, Montana Code Annotated (MCA) as required by ARM 17.24.1211(4). In particular, DEQ staff reviewed the nature, extent, and gravity of the violation. DCC has had a dragline and two dozers operating in the permit boundary reclaiming the area. DEQ inspectors have not observed off site impacts, and DCC continues to operate with best practices to protect the environment during the reclamation process. Therefore, the failure to follow the reclamation plan did not harm or have the potential to harm human health or the environment. The nature and gravity of the violation was minor.

Drone flights from DEQ and DCC's as-built topography submitted with the SL8 bond release application demonstrate that reclamation is progressing. The extent of the violation was minor.

DCC staff met regularly with DEQ scientists to discuss how to best address the reclamation plan needs. DCC operated with good faith and cooperation through this process.

DCC has no violation history with this type of issue. DEQ found no pattern of violation related to Noncompliance No. CN2025001, nor did DEQ identify any economic benefit that resulted from the violation.

Upon consideration of the violation, the relevant factors surrounding the violation, the abatement of the violation, and the relevant factors from Section 82-4-1001, MCA, DEQ staff have concluded that the violation is a minor one for which a civil penalty should be waived. As a result, DEQ has determined that a "Notice of Violation and Waiver of Penalty" is the most appropriate response by DEQ.

As provided in ARM 17.24.1211(2), DCC may contest the Notice of Violation and Waiver of Penalty by filing a written request for a hearing to the Board of Environmental Review within 30 days of service of this notice.

Thank you for your efforts in addressing this matter.

Sincerely,

Emily Lodman

Emily Lodman, Acting Section Supervisor
Coal Section

Mining Bureau
Phone: 406-444-2873
Email: Elodman@mt.gov

CC: Jeffrey Fleischman, OSMRE - Casper Office
Eric Dahlgren, Mining Bureau
Ashley Eichhorn, DEQ Coal Section
Sam King, DEQ Legal

DEQ
Montana Department of Environmental Quality

Board of Environmental Review

Memo

TO: Chair David Simpson
Board of Environmental Review

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

DATE: September 29, 2025

SUBJECT: Board of Environmental Review Case No. BER 2025-04 SM

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 Minor Revision 311 for Coal Surface Mine Permit C1985005	Case No. BER 2025-04 SM

On September 26, 2025, the BER received the attached amended request for hearing.

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

Jeremiah Langston Amanda Galvan Legal Counsel Department of Environmental Quality P.O. Box 200901 Helena, MT 59620-0901	Sam King Chief Legal Counsel Department of Environmental Quality P.O. Box 200901 Helena, MT 59620-0901

Attachments

Victoria A. Marquis
CROWLEY FLECK PLLP
500 Transwestern Plaza II
P. O. Box 2529
Billings, MT 59103-2529
406-252-3441
vmarquis@crowleyfleck.com

Morgan E. Pettit
CROWLEY FLECK PLLP
900 N Last Chance Gulch #200
P.O. Box 797
Helena, MT 59624-0797
(406) 499-4165
mpettit@crowleyfleck.com

Attorneys for Westmoreland Absaloka Mining, LLC

Electronically Filed with the
Montana Board of Environmental Review
9/26/25 at 4:51 PM
By: *Sandy Moisey Scherer*
Docket No: BER 2025-04 SM

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 MINOR REVISION 311 FOR COAL SURFACE MINE PERMIT C1985005	Case No.: BER 2025-04 SM **NOTICE OF APPEAL, REQUEST FOR HEARING, AND PETITION FOR DECLARATORY RULING**

I. NOTICE OF APPEAL AND REQUEST FOR HEARING

Pursuant to section 82-4-206(1)(d), MCA, Westmoreland Absaloka Mining LLC ("Westmoreland") appeals the Department of Environmental Quality's

("DEQ" or the "Department") denial of Westmoreland's Minor Revision 311 for Coal Surface Mine Permit C1985005 and requests a hearing before the Board of Environmental Review ("Board").

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. U.S. Dept. of Interior and Montana DEQ, *Final Environmental Impact Statement*, p. ES5 (October 2008).

The Absaloka Mine also benefits the State of Montana by paying Montana severance and gross proceeds taxes. *Id*. Westmoreland holds Surface Coal Mine Permit C1985005, issued by DEQ, which authorizes operation of the Absaloka Mine.

Pursuant to the Montana Strip and Underground Mine Reclamation Act ("MSUMRA"), specifically section 82-4-221(3), MCA,[1] Westmoreland applied for Minor Revision 311 to update the bond calculation for the Absaloka Mine on June 27, 2024. Over the following thirteen months, DEQ issued, and Westmoreland responded to, four deficiency letters. On August 29, 2025, DEQ issued a letter diverting from the normal deficiency notice and response process and apparently denying Westmoreland's application for Minor Revision 311. Exhibit D.

In accordance with section 82-4-206(1)(d), MCA, which provides a right of appeal for an "approval or denial of an application to renew or revise a permit pursuant to 82-4-221," Westmoreland now appeals DEQ's denial of Minor Revision 311 and requests a hearing before the Board.

II. PETITION FOR DECLARATORY RULING

Pursuant to Administrative Rule of Montana 1.3.226,[2] Westmoreland respectfully petitions the Board to declare that DEQ must follow Montana industry standards for coal mine reclamation when determining the amount of performance

[1] Montana Code Annotated § 82-4-221, as it existed *before* amendment by House Bill 656 (2023), governs because HB656 (2023) has not yet been approved by the Department of Interior's Office of Surface Mining Reclamation and Enforcement ("OSMRE"). *See Montana Env't Ctr. v. Montana Dep't of Env't Quality*, No. CV-23-28-BMM, 2025 WL 263462, at *1 (D. Mont. Jan. 22, 2025*), appeal dismissed sub nom. Montana Env't Info. Ctr. v. Montana Dep't of Env't Quality*, No. 25-1234, 2025 WL 2452467 (9th Cir. July 28, 2025), referencing DEQ's Supplemental Brief in Support of Entry of the Consent Decree (November 21, 2024) wherein DEQ states "Before any changes to a federally approved state program like Montana's may take effect, [OSMRE] must review and approve the changes." The governing version of section 82-4-221, MCA (before HB 656) is attached as Exhibit A. The *MEIC v. DEQ* Order and Brief are attached as Exhibits B and C.

[2] The model rules governing Petitions for Declaratory Rulings are found at ARM 1.3.226 through 1.3.229 and have been adopted by ARM 17.4.101(1).

bond required pursuant to MSUMRA. This includes that DEQ must assume at least two shifts per day for reclamation work, totaling a minimum of 16 hours per day or 4,160 annual use hours, while preserving the flexibility to assume longer shifts, including 20- or 24-hour workdays, where consistent with Montana industry standards. This also includes that DEQ cannot require the use of leased or brand-new equipment for coal mine reclamation activities.

The required elements of a Petition for Declaratory Ruling, as specified in Administrative Rule of Montana 1.3.227(2), are provided below:

A. Names and Addresses of Petitioner:

Westmoreland Absaloka Mining, LLC
P.O. Box 449
Hardin, MT 59034

B. A Detailed Statement of the Facts Upon Which Petitioner Requests the Agency to Base its Declaratory Ruling:

Facts Related to Bond Calculations Based on Equipment Watch

1. DEQ has, for many years, applied the computer program *EquipmentWatch* as an acceptable handbook or publication for estimating coal mine reclamation costs.[3] *EquipmentWatch* is a proprietary equipment software platform owned and operated by Fusable and headquartered in Tuscaloosa, AL. It is not designed specifically for coal mine reclamation; instead, it primarily focuses on providing cost estimates for construction, lift/access, and agriculture. *See*

[3] *EquipmentWatch* is also known as "The Rental Rate Blue Book." The Montana Department of Transportation also relies on *EquipmentWatch* rates, after modification, when determining contractor payments and estimates for MDT construction work. *See* https://equipmentwatch.com/specifying/montana-department-transportation-mdt-specifications/ (accessed September 25, 2025) (listing Montana Department of Transportation as an organization that relies on Equipment Watch, as modified for Montana, for ownership and operating rates). *EquipmentWatch* is approved by the Federal Highway Administration for use on federally funded projects, with the condition that the rates "must also be adjusted for age and geographic region." https://equipmentwatch.com/resource/fhwa-rate/ (accessed September 25, 2025).

equipmentwatch.com (accessed September 17, 2025). It allows adjustment of the number of shifts worked each day, which adjusts the number of hours of reclamation work that will be performed each day and each year (the "annual use hours"). DEQ requires performance bond calculations to incorporate DEQ's "standardized costs" which are based on the *EquipmentWatch* default values. Exhibit E. Those values appear to be based on 1,200 annual use hours, which equates to just 23 hours of reclamation work per week, or just 4.6 hours of work per day.

2. By letter date December 23, 2024, Westmoreland explained in writing its concerns with DEQ's use of *EquipmentWatch*. Exhibit F.

3. The *EquipmentWatch* default values used by DEQ are not related to the actual work practices of contractors performing reclamation work within the large mine industry and are inaccurate and unreliable for purposes of coal mine performance bond calculations. *EquipmentWatch* confirms that equipment "[u]sage in [the mine reclamation] field is much higher typically than in other types of construction work" and that "[m]ore utilization of the equipment will lower the hourly cost of using the equipment." Exhibit G. Thus, it recommends that "customers involved in mining" input "their own Annual Usage and Economic Life" measurements into the program. *Id*. *EquipmentWatch* reasons:

> The utilization of an asset has quite possibly the most significant impact on ownership costs due to its effect on annual depreciation and annual cost of facilities capital (an allowance for the cost of money invested in machinery). It also plays a role in determining how quickly an asset can recover its fixed costs. Generally, the more an asset is utilized, the faster its fixed costs are recovered, thus lowering ownership costs.

EquipmentWatch, *"Top 4 Most Important Ownership Cost Factors."* (https://equipmentwatch.com/intel/equipment-costs/top-4-important-ownership-cost-factors/ (accessed December 12, 2024); *see* archival link at https://web.archive.org/web/20241110091650/https://equipmentwatch.com/intel/equipment-costs/top-4-important-ownership-cost-factors/ (accessed September 25, 2025).

4. In early 2024, the Montana Coal Council's Technical Committee met and corresponded with DEQ multiple times regarding Montana industry standards for coal mine reclamation. Specifically, the Technical Committee found that in Montana, reclamation project workdays include multiple shifts and range from 16- to 24-hours per day. All six of the contractors operating in Montana with large

material moving capabilities sufficient to complete coal mine reclamation indicated they perform reclamation work using multiple shifts per day. One contractor indicated a preference for 24-hour workdays, one for 22-hour workdays, three for 20-hour workdays, and one for 16-hour workdays. Aligned with *EquipmentWatch*'s reasoning, the contractors noted their preference for multiple shifts and longer workdays is based on a desire to reduce time-related overhead costs, make equipment more readily available for other jobs, and address workforce considerations. Exhibit H, p. 7.

5. Using 16-hour workdays, which is at the low end of Montana's industry standard, equates to 4,160 annual use hours. Based on the results of the Technical Committee's survey, adjustment of bond calculations to use at least a 16-hour workday accurately reflects the high end of costs for anyone, including the State of Montana, hiring a contractor for reclamation of a surface coal mine in Montana.

6. The Montana Coal Council requested that DEQ adjust bond calculations by using multiple shift operations set at 16-hour workdays, which is the low end of Montana's industry standard and results in the highest costs that would be incurred. Exhibit H. On March 8, 2024, DEQ denied the request, stating that it "determined that the 8-hour shift equipment rates DEQ relies upon to determine the reclamation bond for coal mining disturbances are appropriate and reflect the estimated cost DEQ would expect to incur in the event DEQ is responsible for completing reclamation." Exhibit I, p. 2. Notably, using an 8-hour workday would result in 2,080 annual use hours, which is much higher than the 1,200 annual use hours (or 4.6 hours per day) actually provided in DEQ's "standardized costs."

7. The federal Office of Surface Mining Reclamation and Enforcement (OSMRE) approves using *EquipmentWatch* in bond calculations and instructs that "[t]o determine the hourly cost of equipment during the reclamation operation, adjust the components of the hourly costs found within Equipment Watch (https://EquipmentWatch.com) for the number of shifts, fuel costs, etc., as applicable." OSMRE, Handbook for Calculation of Reclamation Bond Amounts, pp. 1-7, 2-18.[4] Nothing in the OSMRE Handbook supports calculation of a bond amount using work shift and workday criteria contrary to industry standards.

8. On August 8, 2024, OSMRE accepted Westmoreland's bond calculation for that portion of the Absaloka Mine subject to federal jurisdiction. In-line with

[4] Available at https://www.osmre.gov/sites/default/files/pdfs/directive1005_AppendixA.pdf (accessed September 18, 2025).

Montana's industry standards, that bond calculation was completed using *EquipmentWatch* with 16-hour workdays, or 4,160 annual use hours.

9. On December 18, 2024, Westmoreland leadership met with DEQ and representatives from two contractors performing reclamation work in Montana, Oftedal Construction and MK Weeden. Both contractors confirmed the information they provided in the Technical Committee's survey and explained that large reclamation contractors aim for a shortened schedule by working more hours per day in order to maximize equipment usage and minimize time-related overhead costs. Exhibit J.

10. Westmoreland has found no other state that limits annual use hours to 2,080 hours, which DEQ claims it uses based on just one 8-hour shift per day. Nor has Westmoreland found any other state that relies on the *EquipmentWatch* default rate of 1,200 hours, or just 4.6 hours per day, which is what DEQ's "standardized costs" use. For example, North Dakota calculates bonds for large coal mines based on 3,000 hours per year. North Dakota PSC, Reclamation Div., *Policy Memorandum No. 16* (February 2024), p. 5.[5] While that is lower than the Montana industry standard, it is much greater than the 2,080 annual use hours claimed by DEQ and more than double the 1,200 annual use hours actually allowed by DEQ. Similarly, New Mexico allows bonding for earth-moving equipment based on "one or two shifts per day." New Mexico Mining and Minerals Division, Energy Minerals and Natural Resources Department, *Guidelines for Bond Calculation* (September 29, 2000), p. 1.[6]

11. Wyoming presumes older equipment will be used and adjusts owning and operating costs to 65 percent of the *EquipmentWatch* rates based on regional considerations. Wyoming DEQ, Land Quality Division, *Guideline No. 12 Standardized Reclamation Performance Bond Format and Cost Calculation Methods* (last revised December 2, 2024), p. 1, 44.[7] Here again, the result is equipment use rates that are more aligned with local industry standards and dramatically lower than DEQ's "standardized costs," which are imposed absent consideration of industry standards. For comparison, DEQ's "standardized cost" for a D11T CD dozer is $467.71 per hour, Wyoming's rate for a D11R CD dozer is $293.65 per hour. *Id*., Table D-1b.

[5] Available at https://www.psc.nd.gov/public/laws/othercoalmining.php (accessed September 18, 2025).
[6] Available at https://www.emnrd.nm.gov/mmd/wp-content/uploads/sites/5/Bond_Calculation.pdf (accessed September 25, 2025).
[7] Available at https://deq.wyoming.gov/land-quality/coal/ (accessed September 18, 2025).

12. Montana's bond calculations based on *EquipmentWatch* are out of sync with its neighboring states of North Dakota and Wyoming, which are situated similarly to Montana in terms of the coal mine reclamation needs and are subject to the exact same federal coal mining regulatory requirements pursuant to the federal Surface Mining Control and Reclamation Act. Westmoreland's application for Minor Revision 311 is based on the most expensive end of Montana's industry standard. It relies on 4,160 annual use hours, which equates to two shifts totaling 16 hours of work per day, and results in a performance bond amount of **$23,620,789**. Applying North Dakota's Policy Memorandum No. 16 to the Absaloka Mine's reclamation requirements results in a bond calculation totaling **$18,340,153**. Using the same Absaloka reclamation requirements and applying Wyoming's Guideline No. 12 results in a bond calculation of **$20,706,585**. DEQ's bonding rates with *EquipmentWatch* set at the default annual use hours of 1,200 hours, or just 4.6 hours of work per day, results in a bond calculation of **$30,329,550**. (Ex. D, p. 8).

Performance Bond Calculation for MR311	Bond Amount
Using North Dakota Policy	$18,340,153
Using Wyoming Policy	$20,706,585
Using *EquipmentWatch* with 16-hour workdays	$23,620,789
Montana DEQ, *EquipmentWatch* with 4.6-hour workdays	$30,329,550

DEQ's performance bond calculation is more than $7,000,000 higher than the most expensive end of Montana's industry standard, more than $12,000,000 higher than the exact same mine bond calculation would be in North Dakota, and nearly $10,000,000 higher than the exact same mine bond calculation would be in Wyoming. For the exact same reclamation work governed by the same federal regulatory scheme, Montana proposes a bond more than one and a half times (165%) the equivalent North Dakota bond and nearly one and a half times (146%) the equivalent Wyoming bond.

13. In a letter dated January 24, 2025, DEQ admitted it "recognizes the standard rates provided by Equipment Watch do not accurately reflect the equipment rates of a large scale mine reclamation project such as reclamation of a coal mine" but asserted it would not be appropriate to modify the *EquipmentWatch* rates "without a guidance document in place." Exhibit K. No such "guidance document" was put in place, yet DEQ modified its approach to Westmoreland's Minor Revision 311 bond calculation anyway.

Facts Related to Bond Calculations Based on Costmine Intelligence

14. Absent a guidance document, on January 24, 2025, DEQ switched from *EquipmentWatch* to *Costmine Intelligence*[8] software for estimating reclamation costs. Exhibit K.

15. By letter dated June 25, 2025 from Westmoreland Mining LLC's CEO Martin Purvis directly hand delivered to DEQ Director Nowakowski, Westmoreland pointed out numerous concerns with the *Costmine Intelligence* software. Exhibit L.

16. *Costmine Intelligence* is primarily designed for hard rock mines, which differ significantly from surface coal mines in both the scope and nature of reclamation work required. Therefore, equipment operating costs will be different between a hard rock mine and a surface coal mine. DEQ has not indicated it considered *Costmine Intelligence's* "Coal Cost Guide," but even if it had, that software appears to be of limited applicability because it is designed to estimate equipment operating costs at new coal mines for investment purposes, not operating costs for reclamation of coal mines. *See* "Explore the Dataset" at https://www.costmine.com/coal-cost-guide/ (accessed September 18, 2025).

17. *Costmine Intelligence* appears to base its equipment rates on the use of lease equipment or the purchase of brand-new equipment for reclamation, which does not reflect Montana industry standards. The reality is that reclamation contractors, including those who would qualify to bid on reclamation work for DEQ, rarely purchase new equipment for any specific coal mine reclamation project. This reality was confirmed by the two construction contractors who met with DEQ in November 2024 and explained that they would not go out and buy equipment to reclaim a surface coal mine in Montana because they already own that equipment. Exhibit J. Furthermore, DEQ has been on-site at the Absaloka Mine and observed a contractor performing reclamation with its own heavy equipment. Exhibit M. Contrary to its own experience and observations, DEQ now relies on *Costmine Intelligence*, which presumes contractors would not have reclamation equipment and would need to lease or purchase a fleet of brand-new equipment. While *Costmine Intelligence* might be adjustable in terms of fuel and labor costs, there is no indication that it can be or has been adjusted by DEQ to incorporate Montana industry standards related to the source of equipment, how

[8] *Costmine Intelligence* is a proprietary database with a global focus. *See* https://www.costmine.com/ Mine operators must either purchase the software or rely on the rates offered by DEQ.

that equipment will be utilized, including its annual use hours, or other Montana industry standards related to equipment costs. *Costmine Intelligence* does not represent Montana industry standards for coal mine reclamation.

18. Montana's bond calculations based on *Costmine Intelligence* are out of sync with its neighboring states of North Dakota and Wyoming, which are situated similarly to Montana in terms of the coal mine reclamation needs and are subject to the exact same federal coal mining regulatory requirements pursuant to the federal Surface Mining Control and Reclamation Act. Westmoreland's application for Minor Revision 311 is based on the most expensive end of Montana's industry standard. It relies on 4,160 annual use hours, which equates to two shifts totaling 16 hours of work per day, and results in a performance bond amount of **$23,620,789**. Applying North Dakota's Policy Memorandum No. 16 to the Absaloka Mine's reclamation requirements results in a bond calculation totaling **$18,340,153**. Using the same Absaloka reclamation requirements and applying Wyoming's Guideline No. 12 results in a bond calculation of **$20,706,585**. Using DEQ's newly asserted rates based on *Costmine Intelligence*, the bond calculation totals **$27,501,102** (Ex. D, p. 8).

Performance Bond Calculation for MR311	**Bond Amount**
Using North Dakota Policy	$18,340,153
Using Wyoming Policy	$20,706,585
Using *EquipmentWatch* with 16-hour workdays	$23,620,789
Montana DEQ using *Costmine Intelligence*	$27,501,102

DEQ's calculated performance bond is more than $4,000,000 higher than the reasonable 16-hour workday calculation first proposed by Westmoreland, more than $9,000,000 higher than the exact same mine bond calculation would be in North Dakota, and nearly $7,000,000 higher than the exact same mine bond calculation would be in Wyoming. For the exact same reclamation work, Montana proposes a bond roughly one and a half times (150%) the equivalent North Dakota bond and nearly one and a half times (133%) the equivalent Wyoming bond.

C. Facts Showing that Petitioner will be Affected by the Requested Ruling:

19. Westmoreland holds coal mining permit C1985005 issued by DEQ for the Absaloka Mine.

20. Pursuant to MSUMRA, Westmoreland must post and maintain a reclamation bond for the Absaloka Mine.

21. Over-bonding imposes an excessive burden on coal mines, including Westmoreland, that threatens economic viability by tying up substantial capital, discouraging further investment, and reducing the financial resources available to ensure proper and sustainable operations. This concern is particularly acute in the coal mining industry, where the surety market is very limited, with the few remaining surety companies requiring dollar-for-dollar collateral for bonds in addition to an annual premium payment.

22. DEQ's bond calculation using *EquipmentWatch* is $6,708,761 higher than Westmoreland's bond calculation using *EquipmentWatch* tailored to the most expensive end of Montana's industry standards for annual use hours.

23. *EquipmentWatch* is being used by DEQ in a manner that is contrary to Montana industry standards, resulting in a nearly $7,000,000 higher bond calculation for the Absaloka Mine. This results in significantly increased costs for Westmoreland, especially in situations where the surety requires dollar-for-dollar collateral plus an annual premium.

24. DEQ's bond calculation using *Costmine Intelligence* is $3,880,313 higher than Westmoreland's bond calculation using *EquipmentWatch* tailored to the most expensive end of Montana's industry standard for annual use hours.

25. *Costmine Intelligence* is not sufficiently tailored to Montana industry standards, resulting in a nearly $4,000,000 higher bond calculation for the Absaloka Mine. This results in significantly increased costs for Westmoreland, especially in situations where the surety requires dollar-for-dollar collateral plus at least an annual premium.

D. The Rule or Statute for Which Petitioners Seek a Declaratory Ruling:

Westmoreland seeks a declaratory ruling that MSUMRA, including section 82-4-223, MCA and ARM 17.24.1102, requires DEQ to follow Montana industry standards for coal mine reclamation when calculating performance bonds, including Montana industry standards relating to annual use hours and equipment availability.

E. The Question Presented:

When determining performance bond amounts pursuant to MSUMRA, may DEQ use criteria that are inconsistent with and unsupported by Montana industry standards for coal mine reclamation?

F. Propositions of Law Asserted by Petitioners:

1. Section 82-4-223(1), MCA sets a minimum bonding level, then allows additional bonding "relative to the degree of disturbance projected by the original permit and the annual report." The statute does not support imposition of any maximum bond amount, instead it begins at the minimum and allows additions to that minimum, but only as supported by the facts of the permit at issue.

2. DEQ's imposition of the lowest default level of annual use hours available through a particular software platform, irrespective of Montana industry standards, is a blanket addition to all bonds and therefore functions as a uniform bond policy, which is unlawful. § 82-4-223(1), MCA; *see also People United to Save Homes v. Dep't of Env't Prot.*, 789 A.2d 319, 333 (Pa. Commw. Ct. 2001) (holding that agency bond determinations function as an unlawful "uniform bond policy" when they do not consider a case-by-case analysis or "factors specific to each proposed mining area").

3. Likewise, DEQ's imposition of costs based on leasing or purchasing brand-new equipment, irrespective of Montana industry standards, is a blanket addition to all bonds and therefore functions as a uniform bond policy, which is unlawful. *Id.*

4. Section 82-4-223(2), MCA requires consideration of several supporting facts – "the character and nature of the overburden, the future suitable use of the land involved, and the cost of backfilling, grading, highwall reduction, subsidence stabilization, water control, topsoiling, and reclamation to be required" and requires that the bond "may not be less than the total estimated cost to the state of completing the work described in the reclamation plan." The "cost to the state" is determined by following the criteria in ARM 17.24.1102, which requires the bond amount to be "based on" something factual – the permittee's estimated costs (ARM 17.24.1102(1)), current machinery production handbooks and publications (ARM 17.24.1102(1)), documented costs (ARM 17.24.1102(1)), public contracting requirements (ARM 17.24.1102(2)), reclamation requirements (ARM 17.24.1102(3)), cost changes (ARM 17.24.1102(4)), or other cost information

(ARM 17.24.1102(5)). Montana industry standards for coal mine reclamation are facts that ***must*** be considered when determining performance bond amounts.

5. MSUMRA requires rapid, complete, and effective reclamation; therefore, it prohibits reclamation based on operations that are less efficient than industry standards. The policy of Montana and its people, as expressed in statute, is to "demand effective reclamation" and "set effective requirements and standards, especially as to reclamation of disturbed lands." §§ 82-4- 202(2)(e) and (f), MCA. To that end, the law requires operators to complete reclamation "as rapidly, completely, and effectively as the most modern technology and the most advanced state of the art techniques will allow." § 82-4-231(1), MCA. DEQ has a duty to request and select the most responsive bid that allows the department to "perform the reclamation, restoration, and abatement work required of an operator" (ARM 17.24.1102) and therefore the bid that most rapidly and effectively gets the job done. §§ 82-4-202(2); 82-4-231(1), MCA. Montana industry standards align with MSUMRA's requirement for rapid and effective reclamation. Therefore, those industry standards ***must*** be considered when determining performance bond amounts.

6. MSUMRA does not allow DEQ to use criteria contrary to Montana industry standards when determining performance bond amounts.

7. MSUMRA does not allow DEQ to limit the number of shifts or workday hours to one 8-hour shift per workday, or even less than that, when determining performance bond amounts.

8. MSUMRA does not allow DEQ to demand the lease or purchase of brand-new equipment for reclamation.

9. The Montana Procurement Act, which would govern DEQ's contracting process in the unlikely event of bond forfeiture at any coal mine, specifically requires DEQ to accept "the lowest responsible and responsive bidder whose bid meets the requirements and criteria set forth in the invitation for bids." § 18-4-303(6), MCA. Any contract award "must be based on a best value analysis" which, in the case of coal mine reclamation, necessarily requires consideration of how rapidly, completely, and effectively the reclamation will be done. §§ 18-2-503(8); 82-4-231(1), MCA. Therefore, in accordance with the Montana Procurement Act, Montana industry standards ***must*** be considered when determining performance bond amounts that will drive the contracting process.

10. Montana strongly prefers competitive solicitations (Invitations for Bids or Requests for Proposals) to "[a]void putting the State at the mercy of Contractors who could charge almost anything for products or services, knowing it's the only place the State can go to meet its requirements." MT Procurement Manual, p. 40. Montana's State Procurement Services Division's (SPSD) guidelines recommend that contract officers consider any unique aspects of the project when developing the Performance Work Statement, Statement of Objectives, Statement of Work, or Specification. When considering the payment and pricing details to include in an RFP, the SPSD states "a thorough understanding of the requirements and industry standards is needed by [Contract Officers] to develop appropriate payment and pricing terms." SPSD stresses that effective contracts are those where "the pricing terms are consistent with industry standards." MT Procurement Manual, p. 29. Reliance on less efficient annual use hours or more expensive equipment requirements contrary to Montana industry standards subjects the State of Montana and its taxpayers to "the mercy of Contractors," resulting in ineffective contracts and wasted resources. Therefore, Montana industry standards for coal mine reclamation ***must*** be considered when determining performance bond amounts that will drive the contracting process.

G. The Specific Relief Requested:

Westmoreland requests the Board issue a Declaratory Ruling that DEQ must follow Montana industry standards for coal mine reclamation when determining the amount of performance bond required pursuant to MSUMRA. This includes that DEQ must assume at least two shifts per day for reclamation work, totaling a minimum of 16 hours per day or 4,160 annual use hours, while preserving the flexibility to assume longer shifts, including 20- or 24-hour workdays, where consistent with industry practice. This also includes that DEQ cannot require the use of exclusively brand-new or leased equipment for coal mine reclamation activities.

H. The Names and Addresses of Any Person Known by Petitioner to be Interested in the Requested Declaratory Ruling.

1. Montana DEQ
   1520 East Sixth Avenue
   P.O. Box 200901
   Helena, MT 59620-0901

2. The Montana Coal Council
   P.O. Box 5508
   Helena, MT 59604-5508

3. Other Montana permitted coal mines.

Dated this 26th day of September, 2025.

/s/ Victoria A. Marquis
Victoria A. Marquis
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 26th day of September, 2025:

[ ] U.S. Mail	Sandy Moisey Scherer, Board Secretary
[ ] FedEx	Board of Environmental Review
[ ] Hand-Delivery	1520 E. Sixth Avenue
[**x**] Email	P.O. Box 200901
[**x**] State File Transfer	Helena, MT 59620-0901
	deqbersecretary@mt.gov

[ ] U.S. Mail	Sam King, Chief Legal Counsel
[ ] FedEx	Montana Department of Environmental
[ ] Hand-Delivery	Quality
[**x**] Email	1520 East Sixth Avenue
[**x**] State File Transfer	P.O. Box 200901
	Helena, MT 59620-0901
	sking@mt.gov

/s/ Victoria A. Marquis
VICTORIA A. MARQUIS

EXHIBIT
A

Montana Code Annotated 2021

TITLE 82. MINERALS, OIL, AND GAS
CHAPTER 4. RECLAMATION
Part 2. Coal and Uranium Mine Reclamation

Mining Permit Required

82-4-221. Mining permit required. (1) An operator may not engage in strip or underground mining without having first obtained from the department a permit designating the area of land affected by the operation. The designation must include all lands reasonably anticipated to be mined or otherwise affected during the applicable 5-year period. The permit must authorize the operator to engage in strip or underground mining upon the area of land described in the application and designated in the permit for a period of 5 years from the date of its issuance. The permit is renewable upon each 5-year anniversary after issuance upon application to the department at least 240 but not more than 300 days prior to the renewal date so long as the operator is in compliance with the requirements of this part, the rules adopted to implement this part, and the reclamation plan provided for in **82-4-231** and agrees to comply with all applicable laws and rules in effect at the time of renewal. The renewal is further subject to the denial provisions of **82-4-227**, **82-4-234**, and **82-4-251**. On application for renewal, the burden is on the opponents of renewal to demonstrate that the permit should not be renewed. A permit must terminate if the permittee has not commenced strip- or underground-mining operations pursuant to the permit within 3 years of the issuance of the permit. However, the department may grant reasonable extensions of time upon a showing that the extensions are necessary by reason of litigation precluding the commencement or threatening substantial economic loss to the permittee or by reason of conditions beyond the control and without the fault or negligence of the permittee. With respect to coal to be mined for use in a synthetic fuel facility or specific major electric generating facility, the permittee is considered to have commenced strip- or underground-mining operations at the time the construction of the synthetic or generating facility is initiated.

(2) As a condition to the issuance of each permit issued under this part, an authorized representative of the department shall, without advance notice, have the right of entry to, upon, or through a strip- or underground-mining operation or any premises in which any records required to be maintained under this part are located and may, at reasonable times and without delay, have access to copy any records and inspect any monitoring equipment or method of operation required under this part. When an inspection results from information provided to the department by any person, the department shall notify that person when the inspection is proposed to be made and that person must be allowed to accompany the inspector during the inspection.

(3) During the term of the permit, the permittee may submit an application for a revision of the permit, together with a revised reclamation plan, to the department. The department may not approve the application unless it finds that reclamation in accordance with this part would be accomplished. Application for minor revision must be approved or disapproved within a reasonable time, depending on the scope and complexity, but within 60 days, which may be extended by an additional 30 days by mutual agreement of the department and the applicant. Applications for major revisions are subject to all the permit application requirements and procedures.

History: En. Sec. 6, Ch. 325, L. 1973; amd. Sec. 1, Ch. 221, L. 1975; amd. Sec. 19, Ch. 441, L. 1975; amd. Sec. 1, Ch. 352, L. 1977; R.C.M. 1947, 50-1039(1); amd. Sec. 5, Ch. 550, L. 1979; amd. Sec. 2, Ch. 437, L. 1981; amd. Sec. 2, Ch. 159, L. 1995; amd. Sec. 3, Ch. 204, L. 2003.

0279

Created by LAWS II

EXHIBIT
B

2025 WL 263462
Only the Westlaw citation is currently available.
United States District Court, D. Montana,
Great Falls Division.

MONTANA ENVIRONMENTAL CENTER, et al., Plaintiffs,

v.

MONTANA DEPARTMENT OF ENVIRONMENTAL QUALITY, et al., Defendants,

v.

State of Montana, Westmoreland Rosebud Mining LLC, Intervenor Defendants.

CV-23-28-BMM
|
Signed January 22, 2025

Attorneys and Law Firms

Mary Elizabeth Cochenour, Shiloh Silvan Hernandez, Earthjustice, Bozeman, MT, for Plaintiffs.

Jeremiah R. Langston, Samuel James King, Montana Department of Environmental Quality, Helena, MT, for Defendants.

Peter Martin Torstensen Jr., Montana Attorney General's Office, Helena, MT, Drew C. Ensign, Pro Hac Vice, Holtzman Vogel Baran Torchinsky & Josefiak PLLC, Phoenix, AZ, for Intervenor Defendants State of Montana.

Matthew Dolphay, William W. Mercer, Holland & Hart, Billings, MT, Bryson Campbell Smith, Pro Hac Vice, Holland & Hart LLP, Jackson, WY, for Intervenor Defendants Westmoreland Rosebud Mining LLC.

Order

Brian Morris, Chief District Judge United States District Court

BACKGROUND

***1** The Montana State Legislature passed two laws in 2023, House Bill 576 and Senate Bill 392, amending Montana's federally approved coal mine program. (Doc. 74 at 2.) The Surface Mining Control and Reclamation Act ("SMCRA") requires the United States Office of Surface Mining Reclamation and Enforcement ("OSMRE") to review and approve of any changes to Montana's federally approved program before they may take effect. 30 C.F.R. 732.17(g). Both HB 576 and SB 392 contain language making them "immediately effective upon passage and approval." (Doc. 74 at 2.) Plaintiffs ("MEIC"), Defendants ("DEQ"), and OSMRE agree that these provisions in H.B. 576 and S.B. 392 violate federal law. (Doc. 76 at 15; Doc. 74 at 2, 7 n.1; Doc. 54-1 at 10.)

S.B. 392 imposes a "loser-pays" regime in which an unsuccessful party to judicial review stands liable for the prevailing party's attorney's fees. S.B. 392, 68th Leg., Reg. Sess., sec. 1 (Mont. 2023). MEIC alleges that the fee-shifting provision in SB 392 prevented MEIC from challenging a recent mine expansion and would preclude judicial review of two currently pending administrative challenges. (Doc. 76-1 at 4–5.) H.B. 576 modifies the standards for evaluating whether "material damage" has occurred regarding water quality standards. (Doc. 21 at 20–21.) MEIC alleges that H.B. 576 risks significant harm to water users in areas impacted by strip-mining. (Doc. 76-1 at 3.)

 © 2025 Thomson Reuters. No claim to original U.S. Government Works.

MEIC sought a preliminary injunction preventing DEQ from applying, effectuating, or enforcing any provisions of H.B. 576 or S.B. 392 unless and until they are subject to public comment, review of federal agencies, and approved by OSMRE and the United States Environmental Protection Agency ("EPA"). (Doc. 21 at 27.) MEIC and DEQ stipulated to a 210-day stay of the preliminary injunction and agreed not to take any action to apply, effectuate, or enforce H.B. 576 and S.B. 392 for the same 210-day period. (Doc. 9.) The stipulation and stay took effect on June 22, 2023. (Doc. 10.)

MEIC and DEQ later negotiated and moved for entry of a proposed consent decree. (Doc. 24; Doc. 24-1.) The proposed consent decree would ensure that DEQ would not "apply, effectuate, or enforce any provision of HB 576 or SB 392 unless and until it is reviewed and approved by the Director of OSMRE, pursuant to the provisions of 30 C.F.R. § 732.17 and the Montana cooperative agreement." (Doc. 24-1 at 7.) The Parties agreed that the proposed consent decree "is fair, adequate, reasonable, and consistent with the public interest and the purposes of SMCRA." (*Id.*) The State of Montana, through the Attorney General's Office, and Westmoreland Rosebud Mining LLC ("Westmoreland") intervened. (Doc. 37.) Intervenors the State of Montana and Westmoreland opposed entry of the consent decree. (Doc. 33; Doc. 31.)

The Court issued the stay pending OSMRE's review of the amendments to Montana's federally approved program presented by H.B. 576 and S.B. 392 and held in abeyance its consideration of the proposed consent decree. (Doc. 37 at 8.) The Court extended the stay on January 30, 2024 (Doc. 51), April 4, 2024 (Doc. 57), June 6, 2024 (Doc. 60), and August 16, 2024 (Doc. 66). The Court conducted a telephonic status conference on November 12, 2024, to discuss entry of the consent decree because OSMRE had not issued a final decision. (Doc. 71.) The Parties submitted supplemental briefing on their respective positions. MEIC and DEQ supported entry of the consent decree. (Doc. 76; Doc. 74.) Intervenors Westmoreland and the State of Montana opposed entry of the consent decree. (Doc. 77; Doc. 78.)

***2** The State of Montana argues that no justiciable controversy exists between the parties and that even if it does, the proposed consent decree "blesses potentially perpetual injunctive relief against a Montana stage agency." (Doc. 77 at 9–10.) Westmoreland echoes the State of Montana's mootness and standing arguments and adds that the consent decree includes no predicate finding that H.B. 576 and S.B. 392 violate federal law. (Doc. 78.) DEQ and MEIC argue that the lawfulness of the "immediately effective" provisions of the two laws remains properly before the Court (Doc. 74 at 7–8), that the Parties' cooperative negotiation of a consent decree does not obviate the dispute between MEIC and DEQ over the two laws (Doc. 76 at 11), and that the pace of OSMRE's review of the two laws does not render the consent decree indefinite (Doc. 76 at 15). The Court agrees. The Court finds that the "immediately effective" provisions of H.B. 576 and S.B. 392 conflict with the federal review process required by the SMCRA. 30 C.F.R. 732.17(g). The Court will enter the consent decree.

STANDARD OF REVIEW

Approval of a proposed consent decree falls within the sound discretion of the court. *United States v. Oregon,* 913 F.2d 576, 580 (9th Cir.1990); *SEC v. Randolph,* 736 F.2d 525, 529 (9th Cir.1984). In general, "a consent decree reflects the parties' understanding of the best remedy, and, subject to judicial approval, the parties to a consent decree enjoy at least as broad discretion as the District Court in formulating the remedial decree." *Rufo v. Inmates of Suffolk Cnty. Jail*, 502 U.S. 367, 403 (1992) (citations omitted) (JJ. Stevens and Blackmun, dissenting). A court should enter a consent decree if "it is fair, reasonable and equitable and does not violate the law or public policy." *Sierra Club v. Elec. Controls Design, Inc.*, 909 F.2d 1350, 1355 (9th Cir.1990). "If the consent decree 'comes within the general scope of the case made by the pleadings, furthers the objectives upon which the law is based, and does not violate the statute upon which the complaint was based, the agreement should be entered by the court.' " *Turtle Island Restoration Network v. U.S. Dep't of Com.*, 834 F. Supp. 2d 1004, 1008–09 (D. Haw. 2011) (quoting *Sierra Club*, 909 F.2d at 1355).

Article III standing requires a "specific live grievance." *Goosby v. Osser*, 409 U.S. 512, 517 (1973) (quoting *Golden v. Zwickler*, 394 U.S. 103, 110 (1969)). Courts lack jurisdiction to adjudicate cases presenting merely "a friendly, non-adversary,

 © 2025 Thomson Reuters. No claim to original U.S. Government Works.

proceeding ... because to decide such questions is legitimate only in the last resort, and as a necessity in the determination of real, earnest, and vital controversy between individuals." *Ashwander v. Tennessee Valley Auth.*, 297 U.S. 288, 346 (1936) (internal quotations and citations omitted). A court should dismiss a "collusive" suit, one that is "not in any real sense [an] adversary" proceeding. *United States v. Johnson*, 319 U.S. 302, 305 (1943). When a party "has had no active participation, ... exercised no control," bore none of the expense, and had no interaction with counsel, a suit appears "collusive." *Id.*

The parties' eventual agreement on an issue, however, does not remove standing. *Immigr. & Naturalization Serv. v. Chadha*, 462 U.S. 919, 939 (1983) ("[I]t would be a curious result if, in the administration of justice, a person could be denied access to the courts because the Attorney General of the United States agreed with the legal arguments asserted by the individual."). A plaintiff may seek a consent decree notwithstanding the "state's concession" that a provision is unlawful because "that concession is not necessarily binding on future state officials who might choose to attempt to enforce" it. *Nozewski Polish Style Meat Prods. v. Meskill*, 376 F. Supp. 610, 611 (D. Conn. 1974). Even if parties to a consent decree lack the requisite adversarial relationship, an intervenor-defendant who intends to seek enforcement of a law may supply the necessary controversy. *Chadha*, 462 U.S. at 939.

DISCUSSION

The fact that two parties agree to the terms within a consent decree does not moot an action. *Topanga Press, Inc. v. City of Los Angeles*, 409 F. Supp. 2d 1188, 1191 (C.D. Cal. 2005). A consent decree's call for prospective injunctive relief overcomes any argument that a controversy lacks standing "because the parties arrived in court with the proposed judgment in hand." *S.E.C. v. Randolph*, 736 F.2d 525, 528 (9th Cir. 1984). A live controversy exists absent a consent decree when a government entity may attempt to enforce a law, even if the governmental entity so far has chosen not to enforce the law.

***3** The City of Los Angeles entered a consent decree in *Topanga Press, Inc.*, that prevented the City from enforcing unconstitutional provisions of a permit application process for adult arcades. *Topanga Press, Inc.*, 409 F. Supp. 2d at 1189–90. The district court maintained "permanent jurisdiction" to enforce the consent decree until the City amended the permit application process to conform with the terms of the consent decree. *Id.* at 1190. The City declined to amend the permit application process and "simply chose not to enforce its adult arcade provisions." *Id.* Years later, the City amended most aspects of the permit application process, though it did not implement the exact provisions of the consent decree. *Id.* The district court recognized that a case or controversy existed at the time the parties entered the consent decree. The same controversy remained when the parties agreed that the permit application law was unenforceable. The district court further determined that the controversy's justiciability continued after the City had amended the law in question:

> In this case, the parties disagree over the continuing prospective application of the 1991 consent decree. If the City is still bound by the decree, it cannot enforce certain adult arcade regulations against the plaintiffs. *If the City is no longer bound by the decree, it can enforce its arcade regulations against the plaintiffs.* Therefore there is still a live controversy.

Topanga Press, Inc., 409 F. Supp. 2d at 1191 (emphasis added). The city's *ability* to enforce the permit application process, as opposed to its intention to enforce the permit application process, conferred standing.

Intervenors argue that MEIC lacks Article III standing because MEIC and DEQ "*never* had even a *scintilla* of a disagreement as to whether the challenged statutes could go into effect without prior federal approval." (Doc. 77 at 8 (original emphasis).) In support of this proposition, Intervenors point out that DEQ's then-chief legal counsel testified against including the "immediately effective" provisions during a hearing on S.B. 392. (Doc. 78 at 7.) The legislative testimony of DEQ's former legal counsel fails to indicate that DEQ colluded with MEIC to manufacture a future lawsuit invalidating two laws that the legislature had not passed at the time of the testimony. MEIC filed a complaint alleging that DEQ's enforcement of S.B. 392 and H.B. 576 would violate the SMCRA. (Doc. 1.) DEQ answered and denied the allegations. (Doc. 11.) Intervenors fail to show that the Parties lacked a true controversy at the time the complaint or first amended complaint were filed on the basis of a DEQ employee's advice to the legislature regarding one of these laws.

The Parties' efficient negotiation of a consent decree, though it outpaced OSMRE's review of the laws in question, does not prove that MEIC and DEQ "never" had a live disagreement. In fact, as the State of Montana pointed out, the Parties expected OSMRE to have acted on DEQ's application to amend its program by December 6, 2023, and to have issued a published decision by January 5, 2024. (Doc. 33 at 2.) MEIC and DEQ would have anticipated the imminent need to negotiate the consent decree, proposed September 22, 2023, and the likelihood that the consent decree would expire within a few months. OSMRE's failure to process the application within the allocated timeframe does not evidence any collusive intent or feigned controversy by MEIC or DEQ. Intervenors' argument that the Parties lack standing because of the timing of the Parties' stipulation and negotiation of the consent decree also fails.

MEIC has demonstrated that the "immediately effective" provisions of HB 576 and SB 392 affect how it may pursue active and ongoing litigation. DEQ and MEIC agree that the consent decree would protect both Parties while OSMRE's decision remains pending. DEQ so far has not enforced the provisions of HB 576 and SB 392. DEQ may enforce these new laws at any time absent the consent decree. The Court already has recognized that the consent decree will expire once OSMRE has issued its final decision on HB 576 and SB 392. (Doc. 37 at 8; Doc. 24-1 at 9.) Contrary to Intervenors' assertions, the consent decree appears neither "indefinite" nor "potentially perpetual" in nature. (Doc. 77 at 11.) The consent decree will expire as soon as OSMRE issues an official decision on the matter. Binding MEIC and DEQ with the consent decree while OSMRE conducts its review process does not prejudice Intervenors, neither of whom are bound by it.

CONCLUSION

***4** No evidence indicates that MEIC and DEQ colluded to bring a non-adversarial suit before this Court. MEIC had standing to pursue this claim, and the Parties' negotiation of a consent decree does not moot the controversy. The consent decree presents a fair resolution of the issue during the federal review process and protects the public interest by saving the cost of litigating an issue that OSMRE will eventually resolve.

ORDER

Accordingly, **IT IS ORDERED:**

1. Plaintiffs' and Defendants' Joint Motion for Entry of Consent Decree (Doc. 24) is **GRANTED**.

All Citations

Slip Copy, 2025 WL 263462

End of Document

© 2025 Thomson Reuters. No claim to original U.S. Government Works.

EXHIBIT
C

Samuel King
Jeremiah Langston
Montana Department of
Environmental Quality
P.O. Box 200901
1520 East Sixth Avenue
Helena, MT 59620-0901
(406) 444-4961
Samuel.King@mt.gov
Jeremiah.Langston2@mt.gov

Attorneys for Defendants

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MONTANA
GREAT FALLS DIVISION

MONTANA ENVIRONMENTAL INFORMATION CENTER, SIERRA CLUB, WILDEARTH GUARDIANS, and CITIZENS FOR CLEAN ENERGY,

Plaintiffs,

vs.

MONTANA DEPARTMENT OF ENVIRONMENTAL QUALITY, CHRIS DORRINGTON, et al.,

Defendants,

and

WESTMORELAND ROSEBUD MINING LLC and AUSTIN KNUDSEN, in his official capacity as Attorney General of the State of Montana.

Defendant-Intervenors.

Case No. 23-CV-28

DEPARTMENT OF ENVIRONMENTAL QUALITY'S SUPPLEMENTAL BRIEF IN SUPPORT OF ENTRY OF THE CONSENT DECREE

INTRODUCTION

This case concerns two laws passed during the 2023 Montana legislative session, House Bill 576 ("HB 576") and Senate Bill 392 ("SB 392"), amending Montana's federally approved coal mine program. Before any changes to a federally approved state program like Montana's may take effect, the United States Office of Surface Mining Reclamation and Enforcement ("OSMRE") must review and approve of the changes. 30 C.F.R. § 732.17. Both bills, however, contain language that they are "immediately effective upon passage and approval." Plaintiffs allege that these state law provisions violate the federal Surface Mining Control and Reclamation Act ("SMCRA"), 30 U.S.C. §§ 1201-1328 and, accordingly, seek to enjoin DEQ from "applying, effectuating, or enforcing" these bills unless they first receive federal approval. (Doc. 21).

On September 22, 2023, Plaintiffs and DEQ submitted a signed Consent Decree to the Court (Doc. 24-1), stipulating that DEQ would agree not to implement these laws until federal approval is obtained, as required by SMCRA. The Court, so far, has declined to adopt the Consent Decree, extending the temporary stay in anticipation of OSMRE making a final rule determination. But federal review remains dilatory. (*See* Doc. 67, ¶¶ 4-5). Rather than delay this proceeding any longer, for the reasons stated herein and as previously set forth in

DEQ's initial brief (Doc. 32), DEQ believes that entry of the Consent Decree is appropriate.

First, contrary to Intervenor Westmoreland Mining, LLC's ("WRM") and the State of Montana's ("the State") (collectively "Intervenors") arguments, this case presents a live controversy as to whether the "immediately effective" provisions of HB 576 and SB 392 comply with or violate 30 C.F.R. § 732.17. And Plaintiffs need not seek an independent declaratory judgment request to resolve this threshold question, as the Court can and must resolve this predicate legal issue under Plaintiffs' request for injunctive relief.

Second, Intervenors are incorrect that the Court cannot make an independent determination on this threshold issue before entering the Consent Decree. These provisions are the crux of the entire case, and the parties have certainly presented this issue to the Court to decide such that the Court's determination would not contravene the party presentation doctrine.

Finally, Intervenors do not have a basis to preclude entry of the Consent Decree as its entry does not dispose of Intervenors' independent claims nor impose on them legal duties or obligations; rather, it simply binds Plaintiffs and DEQ.

DEQ respectfully asks that the Court make the necessary threshold determination that the "immediately effective" provisions in HB 576 and SB 392 contravene federal law and enter the Consent Decree.

ARGUMENT

I. Whether HB 576 and SB 392's "Immediately Effective" Provisions Comply With Federal Law Presents a Live Controversy.

As a threshold matter, Intervenors claim that there is no longer a live case-or-controversy such that the Court cannot enter the Consent Decree. (*See* Doc. 31 at 8-9; Doc. 33 at 3-8). Not so.

First, Intervenors argue that because Plaintiffs' First Amended Complaint drops the request for Declaratory Relief that HB 576 and SB 392 preempt federal law there is no remaining "Article III case or controversy." (Doc. 33 at 5-6; Doc. 31 at 8-9). This argument, however, ignores the allegations in the Complaint and the relief Plaintiffs seek, and disregards the standard for when a Court may enter a consent decree.

Plaintiffs allege that the "immediately effective" provisions in both HB 576 and SB 392 are "[i]n direct contravention of clear requirements of federal law." (Doc. 21, ¶ 4; *see also id.*, ¶ 23, 46, 54-55, 63, 70, 72, 76, 78). Based on these allegations, Plaintiffs seek injunctive relief against DEQ from "applying, effectuating, or enforcing" these laws until that time. *Id.*, ¶¶ 72, 78. True, Plaintiffs no longer seek declaratory relief. But addressing Plaintiffs' request for injunctive relief still necessarily requires resolving the merits of the predicate legal question placed front and center in this litigation: whether the "immediately effective" state law provisions run afoul of federal law. *See, e.g., eBay Inc. v. MercExch., LLC,*,

547 U.S. 388, 391, 126 S. Ct. 1837 (2006) (reciting factors to demonstrate for permanent injunction, including "actual success on the merits" of the claim) (*superseded on other grounds by statute*). And the terms of the Consent Decree need not mechanically dispose of all allegations or causes of action in the Complaint, but merely come "within the general scope of the case made by the pleadings" and "further the objectives of the law upon which the complaint was based." *Local 93 Int'l Ass'n of Firefighters v. City of Cleveland*, 478 U.S. 501, 525, 106 S. Ct. 3063 (1986). There is, accordingly, no legitimate argument that Plaintiffs are somehow not challenging the lawfulness of the "immediately effective" provisions.

The State further asserts that there is no justiciable controversy because DEQ "agrees" with Plaintiffs that OSMRE approval is required before these laws may take effect. (Doc. 31 at 8-9). But what the parties *think* the law means is of no moment because only the Court can say what the law is. *Cf. Loper v. Bright Enters. v. Raimondo*, 144 S. Ct. 2244, 2257 (2024) (citing *Marbury v. Madison*, 5 U.S. 137 (1803) for legal principle that it is the "province and duty of the judicial department to say what the law is"). Further, by the State's logic, all requests for a court to enter a consent decree would moot a controversy because a consent decree, by its nature, "embodies an agreement of the parties." *Rufo v. Inmates of Suffolk County Jail*, 502 U.S. 367, 378, 112 S. Ct. 748 (1992); *see also Local 93*,

478 U.S. at 525 (stating although "a consent decree must spring from and serve to resolve a dispute within the court's subject matter-jurisdiction," it is premised on the parties' voluntary agreement). "The consensual nature of the resolution," however, "does not render the underlying controversy moot." *Ameriprise Bank, FSB v. PNC Bank, N.A.*, 2012 U.S. Dist LEXIS 166876 (Pa. W. Dist. Ct., 2012) at *32 (citing *League of United Latin Am. Citizens, Dist. 19 v. City of Boerne*, 659 F.3d 421, 435-437 (5th Cir. 2011)).

WRM, similarly, claims there is no live controversy because DEQ has not sought to enforce these laws such that this case is analogous to a "threat of enforcement" case. (Doc. 31 at 8-9, citing *Thomas v. Anchorage Equal Rights Comm'n*, 220 F.3d 1134, 1139 (9th Cir. 2000)). But the three-step ripeness/standing inquiry unique to pre-enforcement challenges—(1) whether plaintiffs articulated a concrete plan to violate the law in question; (2) whether the prosecuting authorities have communicated a specific warning or threat to initiate proceedings; and (3) the history of past prosecution or enforcement under the challenged statute—is inapplicable here. *See San Luis & Delta-Mendota Water Auth. v. Salazar*, 638 F.3d 1163, 1173 (9th Cir. 2011). Rather, the general ripeness standard—(1) the fitness of the issues for judicial decision, and (2) the hardship to the parties of withholding court consideration—controls. *Id.* (citing *Abbott*

Laboratories v. Gardner, 387 U.S. 136, 149, 87 S. Ct. 1507 (1967)). And under that inquiry, the Court has the authority to render a decision.

The legal issue as to whether these "immediately effective" provisions of HB 576 and SB 392 comply with federal law is fit for judicial decision because the issue raised is primarily legal and does not require further factual development. *Stormans, Inc. v. Selecky*, 586 F.3d 1109, 1126 (9th Cir. 2009). And, given the vigorous disagreement among the parties as to this legal question, OSMRE's delay, and the ongoing litigation that implicates these laws (*see* Doc. 19 at 4-5 (WRM listing active litigation it is involved with Plaintiffs that implicates HB 576 and SB 392)), all parties would benefit from a determination as to whether these provisions are in conformance with federal requirements.

II. The Court Can Make the Necessary Predicate Legal Finding.

Intervenors, additionally, argue the Consent Decree cannot be entered because (1) it lacks a predicate finding that the "immediately effective" provisions of HB 576 and SB 392 violate federal law; and (2) the Court cannot make a predicate finding because the issue has not been presented to the Court. (Doc. 31 at 8-13; Doc. 33 at 11 (adopting same)). Both arguments are unavailing.

To Intervenors' first argument, it is the Court, not the parties to the Consent Decree, that is tasked with making the necessary finding. *See, e.g., Overton v. City of Austin*, 748 F.2d 941, 957 (5th Cir. 1984) ("Absent a properly grounded *judicial*

determination that the present charter provisions are illegal, the consent of the parties provides an insufficient basis on which to judicially ordain a different system of council election and composition.") (emphasis added); *League of Residential Neighborhood Advocates*, 498 F.3d 1052, 1058 (9th Cir. 2007) (stating before approving a consent decree that "authorizes a state or municipal entity to disregard its own statutes in the name of federal law, a ***district court*** must find that there has been or will be an actual violation of that federal law) (emphasis added).

Second, and more importantly, the Court can certainly make the predicate finding as to whether these provisions of SB 392 and HB 576 contravene federal law.[1] Intervenors claim that the party presentation doctrine prevents the Court from doing so because neither the Joint Motion nor the Amended Complaint requests a determination on this threshold issue. But as discussed *supra* Part I that's not true. *See, e.g., Doe v. Wasden*, 982 F.3d 784, 792 (9th Cir. 2020) (rejecting party presentation doctrine in considering the effects of whether amended regulatory scheme, amended in its entirety, ran afoul of the Constitution despite Appellants' inartful briefing). Nor is the suggestion that the parties have not presented this issue to the Court to resolve; indeed, the parties *already* briefed this issue (Doc. 31

[1] Based on OSMRE's review of HB 576, it should come as no surprise to this Court that they do. (*See* Doc. 54-1 at 10 (finding "Sections 6 and 7 of HB 576 are inconsistent with the requirements of 30 CFR 732.17(g)" because "no changes to the laws or regulations shall take effect until OSMRE approves the amendment.")).

at 10-13; Doc. 32 at 9-12; Doc. 34) and are now providing supplemental briefing. Notwithstanding, Intervenors misunderstand the party presentation doctrine, which is "supple, not ironclad" and recognizes "circumstances in which a modest initiating role for a court is appropriate." *United States v. Sineneng-Smith*, 590 U.S. 371, 376, 140 S. Ct. 1575 (2020). Plaintiffs' request for injunctive relief is properly before the Court such that, regardless of the particular legal theories advanced by the parties, the Court "retains the *independent power* to identify and apply the proper construction of governing law." *Kamen v. Kemper Fin. Servs., Inc.*, 500 U.S. 90, 99, 111 S. Ct. 1711 (1991) (emphasis added).

The Court can make the necessary predicate finding. DEQ respectfully requests that it do so and adopt the Consent Decree.

III. Entry of the Consent Decree Does Not Impose Legal Duties or Obligations on Intervenors.

Finally, Intervenors claim that entry of the Consent Decree would "potentially relegate[] [HB 576 and SB 392] to indefinite suspension without any determination that they are unlawful." (Doc. 33 at 9; Doc. 31 at 13). This assertion is not a cognizable reason to prevent issuance of the Consent Decree for two reasons.

First, as explained *supra* Part II, the Court can, and should, make a legal determination on the lawfulness of the "immediate effectiveness" provisions.

Second, Intervenors' objection does not constitute sufficient grounds to preclude entry of the Consent Decree. "While an intervenor is entitled to present evidence and have its objection heard . . . on whether to approve a consent decree," it generally cannot block a decree that would settle the other parties' claims 'merely by withholding consent.'" *Texas v. New Mexico*, 144 S. Ct. 1756, 1764-65 (2024) (quoting *Local 93*, 478 U.S. at 529). Of course, "[a] court's approval of a consent decree between some parties . . . cannot dispose of the valid claims of nonconsenting intervenors." *Local 93*, 478 U.S. 529. But that is not the case here.

The terms of the Consent Decree *only* bind Plaintiffs and DEQ and those with authority to act on their behalf (Doc. 24-1, ¶ 31); it does not dispose of or prejudice either the State's or WRM's legal rights. *See, e.g., Sierra Club v. North Dakota*, 868 F.3d 1062, 1067 (9th Cir. 2017) (finding consent decree between EPA and Sierra Club did not extinguish states' claims are impose legal duties or obligations). In other words, the Consent Decree does not impose any "duties or obligations" on WRM or the State, *Local 93,* 478 U.S. at 529, and both remain free to challenge OSMRE's delay in processing these program amendments, should they desire, *Sierra Club*, 868 F.3d at 1067.

CONCLUSION

As explained herein and in DEQ's initial brief (Doc. 32), the Court can, and should, enter the Consent Decree. The Court can make a predicate finding as to

whether the "immediately effective" provisions of HB 576 and SB 392 violate federal law. And by its terms, the Consent Decree is fair, reasonable, and equitable, and neither violates federal law nor public policy.

Respectfully submitted this 21st day of November 2024.

/s/ Samuel King
Samuel King
Jeremiah Langston
Montana Department of
Environmental Quality
P.O. Box 200901
1520 East Sixth Avenue
Helena, MT 59620-0901
(406) 444-4961
Samuel.King@mt.gov
Jeremiah.Langston2@mt.gov

Attorneys for Defendant

DEQ
Montana Department
of Environmental Quality

EXHIBIT D

August 29, 2025

Sent electronically and via ePermit system

Westmoreland Absaloka Mining LLC
10375 Park Meadows Drive, Suite 400
Lone Tree, CO 80124

Permit ID: C1985005
Revision Type: Minor Revision
Permitting Action: Deficiency
Subject: MR311; DEQ Reply to July 7, 2025 Letter

Dear Westmoreland Absaloka Mining LLC:

The Montana Department of Environmental Quality (DEQ) appreciates the additional comments provided by Westmoreland Absaloka Mining LLC (WAM) related to the bond calculation at the Absaloka Mine. DEQ is required to ensure holders of surface mine permits authorized pursuant to the Montana Strip and Underground Mine Reclamation Act (MSUMRA) submit bond that is not less than the total estimated cost to the state for completing the work described in the reclamation plan (Section 82-4-223, Montana Code Annotated (MCA)). In your letter, you raise many issues related to the process DEQ and operators have utilized for determining updates to the bond amounts as the cost of reclamation changes.

In response, DEQ has summarized the points raised in WAM's letter into the following categories:

- Bond Update Process;
- Equipment Cost Rates;
- DEQ Initiated Bond Adjustments;
- Alignment with Office of Surface Mining Reclamation and Enforcement Guidance;
- Request for Additional Information;
- Informal Conference; and,
- Draft Coal Bond Calculation Guidelines.

The following text addresses WAM's positions in turn.

I. Bond Update Process

With regard to the bond update process, WAM appears to: (1) take issue with a proposed bond increase identified in a deficiency notice (*WAM Response Letter*); (2) assert DEQ never identified a shift to Costmine as a deficiency (id. at ¶*5*); (3) claim the reclamation bond cannot be increased through a minor revision (id. at ¶6); and (4) asks to continue the minor revision process (id. at ¶ 24).

DEQ typically performs bond updates through a permitting process whereby a permittee submits information to DEQ for review to determine the amount of the performance bond. DEQ adopted this process to facilitate communication between permittees and DEQ. WAM committed to implement an annual bonding process in consultation with DEQ through Minor Revision MR304 in 2023. WAM submitted MR304 to comply with the Administrative Rules of Montana (ARM) 17.24.313(1)(c) which specifically requires the submittal of a detailed estimate of the cost of reclamation. WAM's cost estimate submitted as a minor revision, is the detailed cost estimate also required under ARM 17.24.1102(1). ARM 17.24.1102 states the bond amount is based on, but not limited to the estimated costs submitted by the permittee in accordance with ARM 17.24.313 and, if applicable, costs estimated by using current machinery production handbooks and publications or other documented costs acceptable to DEQ.

WAM submitted its updated detailed reclamation cost estimate update on June 27, 2024. DEQ responded to the first deficiency letter directing WAM to update its bond submittal with standardized costs based on publications of equipment cost rates determined to be acceptable to DEQ. WAM responded with updated bond calculations through the e-permit system on January 2, 2025, but WAM did not update the bond calculation to the standardized cost rates provided by DEQ. Instead, WAM argued DEQ should deviate from its long-standing process for determining equipment cost rates rather than WAM update its minor revision application per the identified deficiencies. WAM's bond calculation was not updated to the rates provided by DEQ.

WAM's decision to not update the equipment cost rates to those provided by DEQ as identified in the deficiency letter necessitated a shift in how DEQ reviewed the 2024 performance reclamation bond update.

In its response, WAM appears to take exception to the fact that the reclamation bond increase was provided as a deficiency notice for Minor Revision MR311 rather than WAM updating its submittal. It is important to note that DEQ completed its bond determination pursuant to Section 82-4-223, MCA, and ARM 17.24.1102, identical to how DEQ reviews bond updates submitted as minor revision submittals from permittees. Section 82-4-223, MCA, requires DEQ to adjust the amount of bond required if the cost of reclamation changes. Nothing in rule or statute precludes DEQ from providing WAM a notice of bond increase. Additionally, ARM 17.24.1104(1) states (1) the amount of the performance bond must be increased, as required by DEQ; (2) requires DEQ to notify the permittee of any proposed bond increase; and (3) provides the permittee an opportunity for an informal conference. DEQ's June 5, 2025 deficiency letter followed each of these requirements and provided adequate time for WAM to request an informal conference prior to posting the additional bond. The reclamation bond amount was

properly determined using equipment rates determined by DEQ to be acceptable. Thus, WAM must post the additional bound amount of $3,330,000 by December 31, 2025.

WAM indicated it did not agree with DEQ's use of equipment cost rates derived from Costmine Intelligence when applied to WAM's performance reclamation bond. However, as evidenced by WAM's deficiency response, WAM also did not agree with DEQ using the equipment cost rates determined through DEQ's longstanding reliance on the default EquipmentWatch equipment cost rates. Pursuant to ARM 17.24.1102(5), DEQ established equipment cost rates based on data available to DEQ. As discussed in more detail below, the equipment rates were determined using Costmine Intelligence and addressed WAM's primary concern regarding the applicability of applying the default EquipmentWatch rates to a mining operation. DEQ notes that Westmoreland did not protest the methodology that uses Costmine Intelligence for determining the equipment cost rates for Rosebud Area B and Area C. DEQ notified Westmoreland of its intent to utilize interim equipment rates based on Costmine Intelligence in the January 2025 acceptability letters for Rosebud Area B (MR111) and Rosebud Area C (MR170) and committed to developing a guidance document for future bond calculations.

DEQ appreciates WAM's desire to utilize a minor revision process for performing bond adjustments. However, DEQ is required, at all times, to ensure it holds adequate bond that is not less than the total estimated cost to the state of completing the work described in a permittee's reclamation plan (Section 82-4-223, MCA). DEQ is also required to adjust the amount of bond required if the cost of reclamation changes pursuant to Section 82-4-223, MCA. While WAM may not agree with the equipment rates applied by DEQ for the bond determination, DEQ has found the Costmine Intelligence equipment rates to be reasonable and represent the actual cost of reclamation. DEQ's completion of WAM's 2024 bond review process by utilizing Costmine Intelligence rates is merely the completion of the bond review process required by Section 82-4-223, MCA. DEQ is including the bond calculation spreadsheet it relied upon for the bond determination.

II. Equipment Cost Rates

WAM raises a number of arguments regarding equipment cost rates, claiming: (1) "pitfalls" exist using the default rates in EquipmentWatch (WAM Response Letter, ¶ 4); (2) reliance on CostMine Intelligence rates is inappropriate (*id.* at ¶ 7); (3) DEQ's application of published rates appears to be "arbitrary and capricious" (*id.* at ¶¶ 8, 11); (4) DEQ is not utilizing the expertise of coal mine reclamation specialists (*id.* at ¶ 8); and (5) that the increased bond is a result of switching to Costmine Intelligence rates (*id.* at ¶ 11). DEQ disagrees.

The licensed professional engineers in DEQ's Mining Bureau carefully considered the Montana Coal Council Technical Committee's input and WAM's input regarding equipment costs. DEQ responded to the Montana Coal Council Technical Committee on March 8, 2024. In that response, DEQ stated that modification of the default EquipmentWatch equipment rates was not appropriate for determining acceptable performance reclamation bonds. DEQ reiterated its

position and stated "DEQ does not agree modifications to equipment rates in EquipmentWatch based on anticipated usage is appropriate without a guidance document in place" in the acceptability notices provided to Westmoreland for MR111 (Rosebud Area B) and MR170 (Rosebud Area C). Please note, DEQ did not state changes to equipment rates would be inappropriate without a guidance document in the acceptability letters. Instead, DEQ noted that only modification from the default values provided by EquipmentWatch without a guidance document would be inappropriate.

DEQ has taken and will continue to take a measured approach to determine the equipment cost rates DEQ finds acceptable for determining performance reclamation bonds. WAM's argument that DEQ is acting in an arbitrary manner is false and appears to be based on taking DEQ's statements out of context. Further, Westmoreland did not take exception with DEQ utilizing Costmine Intelligence rates in both Rosebud Area B MR111 and Rosebud Area C MR170 bond determinations.

DEQ has reviewed the CostMine Intelligence rates and found they accurately reflect mine reclamation equipment costs. Costmine Intelligence is another equipment rate provider that is also used by other regulatory jurisdictions. Costmine Intelligence differs from EquipmentWatch as the rates are specific to mining projects rather than the broadly applicable construction industry. Costmine Intelligence data is commonly used for estimating the cost of mining related projects. DEQ isn't required to find the cheapest available options in calculating performance bonds; rather, DEQ must rely on industry standard equipment cost rates to ensure adequate money is available to DEQ to complete reclamation.

WAM's assertion that the use of CostMine Intelligence dataset –which is specific to mining— resulted in the bond increase is false. Costmine Intelligence equipment rates are appropriate, do not include arbitrary adjustments and are specific to mining projects. Based on the industry specific rates obtained from Costmine Intelligence, DEQ determined WAM must post additional bond of $3,330,000 for a total reclamation bond of $27,510,000. Utilizing the rates obtained from EquipmentWatch, on the other hand, would result in a total reclamation bond of $30,330,000 or an increase of $6,150,000. DEQ provided the rates associated with EquipmentWatch in the first deficiency letter to WAM. DEQ is willing to accept WAM using the default settings in EquipmentWatch. DEQ's decision to utilize the CostMine Intelligence rates is in complete alignment with Mr. King's letter to Ms. Marquis in March 2025. The lower bond amount determined through Costmine Intelligence for WAM's 2024 bond determination is a result of utilizing an industry specific dataset. Please note a bond increase resulted from either the CostMine Intelligence or EquipmentWatch calculation method. Additionally, the use of equipment cost data specific to the mining industry is neither arbitrary nor capricious; WAM certainly hasn't pointed DEQ to any evidence of why it would be. Nor does WAM's advocacy for a different approach render the equipment rates DEQ utilized arbitrary. If WAM is concerned about DEQ's bond calculation using Costmine Intelligence, DEQ is amenable to accepting the higher bond amount determined using EquipmentWatch equipment cost rates to ensure WAM is adequately bonded.

III. DEQ Initiated Bond Adjustments

With respect to DEQ's initiation of bond adjustments, WAM states: (1) DEQ is not following the proper process for review and approval of a minor revision (WAM Response Letter, ¶18); and (2) DEQ's reliance on ARM 17.24.1104(1) is unsupported (*id.*).

WAM's assertion that DEQ did not follow the proper process for review and approval of a minor revision to determine the performance reclamation bond necessary for WAM's mine is without merit. As noted above, DEQ is required by MSUMRA to ensure WAM is appropriately bonded at all times, regardless of the process a permittee proposes to update its bond. DEQ appreciates WAM's commitment to provide updated, detailed cost estimates on an annual basis and looks forward to these being provided in future reviews. Please note, however, that in order for the revision process to be effective and result in a timely bond determination, WAM must timely update its bond calculation per the deficiencies identified by DEQ.

IV. Alignment with Office of Surface Mining Reclamation and Enforcement Guidance

WAM asserts DEQ's equipment cost rates improperly diverge from federal precedent (WAM Response Letter, ¶ 13). WAM fails to recognize that DEQ is operating under state authority. *See Bragg v. W. Va. Coal Ass'n*, 248 F.3d 275, 289 (4th Cir. 2001) (recognizing state and federal coal mining programs are mutually exclusive). Further, important constitutional obligations undergird Montana's state program absent from SMCRA, including the obligation that all lands "disturbed by the taking of natural resources [be] reclaimed." Ar. IX, § 2, Mont. Const.; § 82-4-202(3)(b) (incorporating same and recognizing MSUMRA is "an exercise of the authority granted in the Montana constitution and, in particular, a response to the mandate expressed in Article IX of the constitution"). Accordingly, OSMRE's previous guidance has little, if any, precedential value.

Nevertheless, WAM's assertion that DEQ's determination is significantly outside of the approved OSMRE's methodology is false. OSMRE's guidelines are clear that the costs should be determined by the relevant jurisdiction based upon industry standard rates. OSRME's decision regarding the bond calculation at a mine it regulates is not binding precedent and is not meant to be considered precedent for any other jurisdiction. Like DEQ, OSMRE must adopt rates that are appropriate for reclamation of coal mines where OSMRE has independent authority.

V. Request for Additional Information

WAM requested information related to DEQ's bond determination (WAM Response Letter, ¶ 16)

As part of this response, DEQ has provided electronic copies of the bond determination calculations based on equipment cost rates from EquipmentWatch and Costmine Intelligence.

EquipmentWatch rates are based upon the default values with modifications to only the diesel fuel cost and mechanic wage and were derived using DEQ's long established process. The Costmine Intelligence rates were developed based on guidance from Costmine Intelligence. The equipment rates were also confirmed through regional equipment dealers.

VI. Informal Conference

DEQ appropriately identified the method for WAM to appeal its bond determination based on ARM 17.24.1104(1). DEQ is willing to meet with WAM to review DEQ's bond determination. Additionally, DEQ encourages WAM to participate in the public comment period for DEQ's draft Coal Bond Calculation Guidelines to discuss any concerns related to DEQ's approach to bond determinations at coal mines. The participation details are provided in the next section.

VII. Draft Coal Bond Calculation Guidelines

DEQ has drafted Coal Bond Calculation Guidelines for determining the performance reclamation bonds at coal mines regulated by DEQ. DEQ is currently accepting stakeholder input on the guidance. Upon finalization of the document, DEQ will use the guidance to inform feedback to operators to ensure bond review submittals from operators adhere to the adopted guidance document.

DEQ released the draft Coal Bond Calculation Guidelines on August 21, 2025, and is providing a 60-day comment period. Additionally, DEQ has scheduled a public meeting to provide background on the bonding process and provide a forum for receiving stakeholder comment on the guidance. DEQ welcomes the input from WAM's reclamation specialists on the draft guidance.

Conclusion

DEQ welcomes WAM's comments on the draft Coal Bond Calculation Guidelines. Until the guidelines are adopted, however, WAM must still continue to update its bond annually to meet its permit commitments. DEQ will continue to utilize the Costmine Intelligence rates it has determined to be appropriate to ensure reclamation can be completed at coal mine sites if a permittee is unable or unavailable to complete the reclamation work. At WAM's request, DEQ will return to its historical practice of using the EquipmentWatch rates determined by DEQ to be acceptable until the Coal Bond Calculation Guidelines are adopted.

DEQ does not agree with WAM's assessment that a bond increase is unnecessary and further discussion is needed. DEQ appropriately reviewed WAM's submittals and determined an updated bond amount in accordance with MSUMRA and the rules adopted thereunder. As

noticed in the deficiency letter, WAM must post an additional $3,330,000 by December 31, 2025.

Please contact me if you have any additional questions regarding the amount of WAM's performance reclamation bond.

Sincerely,

Eric Dahlgren

Eric Dahlgren, Bureau Chief
Mining Bureau
Department of Environmental Quality
edahlgren@mt.gov
(406) 444-5245

CC: Jeffrey Fleischman, OSMRE - Casper Office
Emily Lodman, DEQ Coal Section
Alex Mackey, DEQ Field Services and Technology Section
Sam King, DEQ Legal

Electronic Attachments

Table 1
Bond Calculation Summary

		Dozer Volume LCY	Truck/Loader Volume LCY	Total Yards LCY			
Major Earthmoving Volumes:							
Table 2	DEQ Area	22,490,800	3,252,200	25,743,000			
Table 9	Soil Replacement	292,824	2,127,091	2,419,915			
		22,783,624	5,379,291	28,162,915			
Direct Costs:							
Table 2	Material movements				$11,630,280	$0.452	$1,942,671.88
Table 3	Drilling & Blasting Costs				$544,008		
Table 4	Dozer Ripping of Borrow and Other Areas				$145,958		
Table 5	Faclities Decommissioning				$5,159,986		
Table 9	Soil Redistribution				$3,260,060		
Table 10	Revegetation				$1,012,416		
Table 11	Long-Term Monitoring				$448,160		
Total Direct Costs:					**$22,200,867**		
Indirect Costs		Percent					
Contingency		3.0%			$666,026		
Mobilzation/Demobilzation		1.0%			$222,009		
Engineering Redesign		2.0%			$444,017		
Profit and Overhead		12.0%			$2,664,104		
Project Management		2.5%			$555,022		
Total Indirect and Contingencies		**20.5%**			**$4,551,178**		
Inflation		**2.8%**			**$ 749,057.26**		
				Total	**$27,501,102**		
Total Bond (round up to nearest $10,000)					**$27,510,000**		

0303

Table 1
Bond Calculation Summary

		Dozer Volume LCY	Truck/Loader Volume LCY	Total Yards LCY
Major Earthmoving Volumes:				
Table 2	DEQ Area	22,490,800	3,252,200	25,743,000
Table 9	Soil Replacement	292,824	2,127,091	2,419,915
		22,783,624	5,379,291	28,162,915

Direct Costs:				
Table 2	Material movements			$13,298,596
Table 3	Drilling & Blasting Costs			$544,008
Table 4	Dozer Ripping of Borrow and Other Areas			$180,001
Table 5	Faclities Decommissioning			$5,159,986
Table 9	Soil Redistribution			$3,841,027
Table 10	Revegetation			$1,012,416
Table 11	Long-Term Monitoring			$448,160
Total Direct Costs:				**$24,484,194**

Indirect Costs	Percent			
Contingency	3.0%			$734,526
Mobilzation/Demobilzation	1.0%			$244,842
Engineering Redesign	2.0%			$489,684
Profit and Overhead	12.0%			$2,938,103
Project Management	2.5%			$612,105
Total Indirect and Contingencies	**20.5%**			**$5,019,260**
Inflation	**2.8%**			**$ 826,096.69**
			Total	**$30,329,550**

Total Bond (round up to nearest $10,000) **$30,330,000**

0304

EXHIBIT
E

DEQ
Montana Department
of Environmental Quality

August 23, 2024

Sent via ePermit system

Garrick Goodheart
Westmoreland Absaloka Mining LLC
Absaloka Mine
100 Sarpy Creek Rd.
Hardin, MT 59034

Permit ID: C1985005
Revision Type: Minor Revision
Permitting Action: Deficiency
Subject: MR311; Bond Calculation-Round 1 Acceptability Deficiency

Dear Garrick:

The Department of Environmental Quality (DEQ) has reviewed your submittal. The following deficiencies must be adequately addressed before DEQ can determine the application acceptable:

ARM 17.24.1102(1): In Tab T12, equipment costs do not align with DEQ standardized costs. Please update with attached pricing listed in 'Equipment First Half 2024.xlsx. If equipment utilized is not listed, provide rate justification (print screen with data inputs). In Tab T13, all productivity rates need updated to most recent industry standards (CAT Handbook).

ARM 17.24.313(1)(b): Please provide a detailed timetable for the estimated completion of each major step in the reclamation plan.

ARM 17.24.313(1)(c): In Tab T2 of 'Exhibit B16 Bond Calculation MR311 2024-06.xlsx', Truck/Loader weighted average for distance is referencing equipment cells labeled 'Dozer' in the table above. Please verify this is correct. RS Means values in Tab T5 and T6 appear to decrease from 2023 values. When checked by DEQ, 2024 values appear to increase from prior estimates; please validate these estimates. When using RS Means for pricing, use the Total O&P cost. Cut/Fill calculations do not appear to include all areas of disturbance between projected end of 2025 topography and PMT. See Exhibit #1. Please revise the cut/fill calculations to include all areas of disturbance within the permit boundary. As proposed in MR311, the pit surface configuration is projected from the end of 2026. According to the permit documents, all coal will be mined by then. Therefore, please use the approved postmining topography as the "Final Bond Topography" in the bond calculation. Please include costs for finish grading, final

drainage design and final drainage establishment for all permit areas that do not have Phase I bond release. Please review and revise (as necessary) the "balance polygons" used in Table 2. The cut and fill volumes in some of these are not balanced. For example, there is an imbalance of 22% in CF-24 and 33% in CF-23. Dozer grades in the CAT Handbook are limited to -30%. Please adjust dozer grades in Table 2 so that none are steeper than -30%.

Please feel free to contact me with questions regarding this letter.

Sincerely,

Eric Dahlgren

Eric Dahlgren, Acting Bureau Chief
Mining Bureau
Phone: 406-444-5245
Email: edahlgren@mt.gov

CC: Jeff Fleischman, Office of Surface Mining
Erica Trent, Office of Surface Mining

EXHIBIT
F

CROWLEY | FLECK PLLP
ATTORNEYS

VICTORIA A. MARQUIS
500 Transwestern Plaza II
490 North 31st Street, Suite 500
P. O. Box 2529
Billings, MT 59103-2529
DIRECT DIAL - 406-255-7298
FACSIMILE - 406-252-8526
vmarquis@crowleyfleck.com

December 23, 2024

Eric Dahlgren
Coal Section Supervisor, Mining Bureau
Montana Department of Environmental Quality
P.O. Box 200901
Helena, MT 59620-0901

RE: Westmoreland Absaloka Mining LLC, Absaloka Mine, Permit C1985005, MR311; Bond Calculation – Round 1 Acceptability Deficiency

Dear Mr. Dahlgren:

Please accept this letter on behalf of Westmoreland Absaloka Mining LLC (Westmoreland) in response to DEQ's Round 1 Acceptability Deficiency referenced above for the Absaloka Mine.

ARM 17.24.1102(1): – 1) In Tab T12, equipment costs do not align with DEQ standardized costs. Please update with attached pricing listed in 'Equipment First Half 2024.xlsx. If equipment utilized is not listed, provide rate justification (print screen with data inputs).

Response: The first deficiency alleged by DEQ, regarding ARM 17.24.1102(1), concerns bond calculations and whether those calculations may be based on industry standards, specifically for the number of hours reclamation equipment is used each year (the "annual use hours"). Unlike other states, Montana does not have a published policy or guideline that provides details about bond calculations for coal mine reclamation. Until recently, the coal mine industry was reliant on DEQ to provide rates and information for the calculations, some of which came from the computer program *Equipment Watch*.[1] Due, in part, to the rising cost of bonding, abbreviated surety

[1] *Equipment Watch* is an equipment software platform owned and operated by Fusable and headquartered in Tuscaloosa, AL.

providers involved in fossil projects, and the ever-widening gap between realistic reclamation costs and Montana DEQ's bond calculations, coal mining companies, including Westmoreland, took a closer look at *Equipment Watch* and how it is utilized in Montana DEQ's bond calculations. When using the *Equipment Watch* program, the program user must select the number of annual use hours for each piece of equipment. Specific equipment and annual use hour selection directly and uniquely impacts the "Total Hourly Costs," which are the "DEQ standardized costs" attached to DEQ's August 7, 2024 Deficiency letter. Lower annual use hours result in higher hourly costs.

The "DEQ standardized costs" appear to be based on 1,200 annual use hours for most equipment, which equates to only 23 hours per week for 52 weeks per year. However, industry research provides broad support for mine remediation contractor operation with significantly higher annual use hours, in part due to the increase in equipment productivity and decrease in time-related overhead. The contractors work multiple crews, and therefore multiple shifts per day, resulting in greater annual use hours.

A. Background

Coal mining companies and the Montana Coal Council have been discussing this issue with DEQ since at least April 2023. When presented with a bond calculation from the Navajo Transitional Energy Company on April 14, 2023 that was based on multiple shift hours per day, DEQ responded that the calculated equipment costs did not match department standards, which DEQ indicated was *Equipment Watch*'s default of a single shift of 40 hours per week[2]. **Exhibit A**, attached, slide 1. On September 1, 2023, DEQ rejected the notion that multiple shifts may be used when estimating equipment costs. *Id*., slide 3.

On September 29, 2023, the Montana Coal Council began investigating the mining industry's standards for annual use hours, specific to large-scale coal mine reclamation projects. Using actual reclamation plans, the Montana Coal Council's Technical Committee reached out to six contractors with large material moving capabilities, provided them with dozer and scraper regrade yards and push distances, truck shovel yards and haul distances, yards of highwall to be blasted, volume of material to be demolished, topsoil volumes, and the total number of acres to be revegetated. *Id*. slide 6. Not a single one of the six contractors proposed to complete the work using just one 8-hour shift per day, which equates to 2,080 annual use hours. Instead, all of the contractors proposed working 16 to 24 hours per day for 5.5 to 7 days per week, resulting in a range of annual use hours between 5,720 and 7,280 hours, with an average of 6,257 annual use hours. *Id*.

On February 1, 2024, the Technical Committee of the Montana Coal Council met with DEQ to discuss bond calculations, focusing on the information acquired from the six large contractors surveyed by the Montana Coal Council. **Exhibit B**, attached. On February 26, 2024, the Montana Coal Council provided copies of the information presented during the February 1, 2024 meeting to DEQ, as well as a bond calculation example. The Montana Coal Council formally requested

[2] Even using a 40-hour per week schedule would result in more annual use hours (2,080) than Equipment Watch's low-end default of 1,200 annual use hours used in "DEQ's standardized costs."

that DEQ "evaluate authorizing equipment operating schedules with greater intensity than the Equipment Watch default," since the operating schedules currently provided by DEQ are not aligned with current industry standards. **Exhibit C**, attached. Specifically, the Montana Coal Council requested consideration of 4,160 annual use hours based on 16-hour workdays, 5 days per week, which is lower and more conservative than the industry standard that ranges from 5,720 to 7,280 annual use hours. The slides presented by NTEC (Exhibit A) were attached to that request, as well as the communications containing the information provided by the six major contractors, supporting an industry standard averaging 6,257 annual use hours. **Exhibit D**, attached.

DEQ denied the request on March 8, 2024, stating "DEQ has adopted the use of industry standard rates based on a standard 8-hour shift."[3] **Exhibit E**, attached, p. 2. DEQ explained it uses the Request for Proposal process when completing reclamation, that it consulted with other programs within DEQ, and that it "based its assessment of multiple shifts on historic contracting practices across DEQ and what it can reasonably expect a contractor would bid." *Id*. Rather than accepting the mining industry standard, supported by evidence from the six major contractors, DEQ characterized that information as "preferred contractor schedules" and implied it did not "reflect the estimated cost DEQ would expect to incur in the event DEQ is responsible for completing reclamation." *Id*. Simply put, DEQ chose to continue relying on *Equipment Watch*'s lowest levels which are not tethered to any realistic estimate of coal mine reclamation. DEQ did not provide any alternative contractor data to refute this industry specific data set.

The number of annual use hours proposed by the Montana Coal Council does not correspond to "preferred contractor schedules," as alleged by DEQ. Contractors clearly prefer a more robust schedule that ranges from 5,720 to 7,280 annual use hours. Instead, the Council proposed a conservative standard of 4,160 annual use hours, which is well below even than the lowest end of the range of values provided by the contractors.

Our recent correspondence with *Equipment Watch* personnel confirms that annual use hours for mine reclamation "is much higher typically than in other types of construction work." **Exhibit F**, attached. *Equipment Watch* personnel verified that its standard annual use rates are based on a national average calculated from surveys of "contractors of various company sizes" and input from contractors across a broad range of enterprises, including "contractors, manufacturers, dealers, rental companies, lenders, and government agencies."[4] *Equipment Watch* does not conduct industry specific surveys. Instead, *Equipment Watch* surveys equipment users nationwide who work in a variety of construction-related industries. Under these parameters, which are not focused on reclamation work, *Equipment Watch* provides "standard values" for annual usage that contemplate only a single shift per day. *Equipment Watch*, *Definition of "Annual Use Hours."*[5]

In many cases, the *Equipment Watch* "standard value" is much lower than a single shift per day, five days per week. For example, the "standard value" for a D10T2 Dozer is based on 1,200 annual

[3] As noted above, *Supra* n. 1, the *Equipment Watch* default is 1,200 annual use hours, which is much lower than the 2,080 annual use hours that would result from using an 8-hour shift.
[4] *Id*.; https://equipmentwatch.com/what-we-do/ (accessed December 18, 2024).
[5] https://equipmentwatch.com/resource/annual-use-hours/ (accessed December 12, 2024).

use hours, which is nearly 1,000 hours less than DEQ's claimed industry standard of 2,080 hours and more than 5,000 hours less than the average industry standard of 6,257 hours. **Exhibit G** attached. *Equipment Watch*'s decision to provide a "standard value" limited to a single shift per day and limited to a fraction of the year does not reflect the reality of coal mine reclamation, even when performed by contractors hired by DEQ.

Equipment Watch agrees that equipment "[u]sage in [the mine reclamation] field is much higher typically than in other types of construction work." **Exhibit F**. Thus, it recommends that its "several customers involved in mining" input "their own Annual Usage and Economic Life" measurements into the program. *Id*. Like the six major reclamation contractors surveyed by the Montana Coal Council, *Equipment Watch* also agrees:

> The utilization of an asset has quite possibly the most significant impact on ownership costs due to its effect on annual depreciation and annual cost of facilities capital (an allowance for the cost of money invested in machinery). It also plays a role in determining how quickly an asset can recover its fixed costs. Generally, the more an asset is utilized, the faster its fixed costs are recovered, thus lowering ownership costs.

Equipment Watch, "Top 4 Most Important Ownership Cost Factors."[6] Therefore, even *Equipment Watch* acknowledges that equipment owners are better served by using equipment for more hours each year to more efficiently recover their ownership costs and increase productivity. This is the same reasoning the six major reclamation contractors gave for their multiple-shifts-per-day operations. The *Equipment Watch* "standard values" are completely unrelated to the actual work practices of contractors performing reclamation, restoration, and abatement work within the large mine industry and are inaccurate and unreliable for purposes of coal mine reclamation bond calculations.

Westmoreland submitted three minor revisions with bond calculations based on 4,160 annual use hours, which represents two 8-hour shifts per day working five days per week.[7] On June 28, 2024, minor revision MR311 for the Absaloka Mine was submitted. The federal Office of Surface Mining Reclamation and Enforcement (OSMRE) accepted the bond calculation on August 8, 2024. However, on August 23, 2024, DEQ issued a deficiency letter requesting use of DEQ's "standardized" equipment costs, which appear to be based on 1,200 annual use hours. **Exhibit H**, attached.

On June 28, 2024, minor revision MR111 was provided for Area B of the Rosebud Mine and on July 31, 2024, minor revision MR170 was submitted for Area C of the Rosebud Mine, both with bond calculations based on 4,160 annual use hours. DEQ again rejected the bond calculations and

[6] https://equipmentwatch.com/intel/equipment-costs/top-4-important-ownership-cost-factors/ (accessed December 12, 2024); *see also* Exhibit F ("More utilization of the equipment will lower the hourly cost of using the equipment.").
[7] Using an availability factor of 92%, the 4,160 annual use hours are discounted to 3,827.

requested updates based on DEQ's "standardized" equipment costs, which appear to be based on 1,200 annual use hours. **Exhibits I and J**, attached.

Westmoreland has since met with DEQ leadership and staff numerous times to discuss bond calculations, including on December 18, 2024 with representatives of Oftedal Construction and MK Weeden, two of the contractors referenced in the Montana Coal Council proposal. The contractors explained again that large reclamation contractors aim for a shortened schedule (*i.e.*: working multiple shifts per day) to maximize equipment usage and minimize time-related overhead costs.

B. The Montana Strip and Underground Mine Reclamation Act Supports Greater Annual Use Hours.

State law requires factual support for bond amounts and does not allow unsupported bond amounts; therefore, it requires use of industry standards and does not allow use of rates contrary to industry standards without factual support. Section 82-4-223(1), MCA sets a minimum bonding level, then allows additional bonding "relative to the degree of disturbance projected by the original permit and the annual report." The statute does not support imposition of any maximum bond amount, instead it begins at the minimum and allows additions to that minimum, but only as supported by the facts of the permit at issue. DEQ's imposition of the lowest level of annual use hours, irrespective of industry standards, is a blanket addition to all bonds and therefore functions as a uniform bond policy, which is unlawful. *Id.*; *see also People United to Save Homes v. Dep't of Env't Prot.*, 789 A.2d 319, 333 (Pa. Commw. Ct. 2001) (holding that agency bond determinations function as an unlawful "uniform bond policy" when they do not consider a case-by-case analysis or "factors specific to each proposed mining area").

Section 82-4-223(2), MCA requires consideration of several supporting facts – "the character and nature of the overburden, the future suitable use of the land involved, and the cost of backfilling, grading, highwall reduction, subsidence stabilization, water control, topsoiling, and reclamation to be required" and requires that the bond "may not be less than the total estimated cost to the state of completing the work described in the reclamation plan." The "cost to the state" is determined by following the criteria in ARM 17.24.1102, which requires the bond amount to be "based on" something factual – the permittee's estimated costs (ARM 17.24.1102(1)), current machinery production handbooks and publications (ARM 17.24.1102(1)), documented costs (ARM 17.24.1102(1)), public contracting requirements (ARM 17.24.1102(2)), reclamation requirements (ARM 17.24.1102(3)), cost changes (ARM 17.24.1102(4)), or other cost information (ARM 17.24.1102(5)).

Thus, the law requires facts to support the bond calculation. It does not allow bond calculations based on unsupported assumptions. Here, input from six major reclamation contractors operating in the region provides factual support for an annual use rate for coal mine reclamation that ranges between 5,720 and 7,280 hours, with an average of 6,257 hours. DEQ is not free to disregard actual market and industry data provided to it by deeming that data as "preferred contractor schedules" while simultaneously failing to determine any market and industry data on its own.

Absent DEQ's independent confirmation to the contrary, these schedules are the industry standard and the standard DEQ can reasonably expect contractors to use when bidding on coal mine reclamation projects. DEQ claims to rely on a single 8-hour shift per day, which equates to 2,080 hours per year, but that is less than one-half of the lowest annual use rate offered by the industry. Worse, DEQ actually uses *Equipment Watch*'s "standard values," which only provide for 1,200 annual use hours – not even close to the 2,080 annual use hours DEQ claims and only a fraction of the industry standard average of 6,257 hours. This provides another unexplained blanket addition to all bonds. There are no facts supporting the use of either 2,080 or 1,200 annual use hours; therefore, DEQ's reliance on either one will result in an unlawful bond calculation.

State law also requires rapid, complete, and effective reclamation; therefore, it prohibits reclamation based on operations that are less efficient than industry standards. The policy of Montana and its people, as expressed in statute, is to "demand effective reclamation" and "set effective requirements and standards, especially as to reclamation of disturbed lands." §§ 82-4-202(2)(e) and (f), MCA. To that end, the law requires operators to complete reclamation "as rapidly, completely, and effectively as the most modern technology and the most advanced state of the art will allow." § 82-4-231(1), MCA. DEQ has a duty to request and select the most responsive bid that allows the department to "perform the reclamation, restoration, and abatement work required of an operator" (ARM 17.24.1102) and therefore the bid that most rapidly and effectively gets the job done. §§ 82-4-202(2); 82-4-231(1), MCA. Nothing in statute or rule provides DEQ with any different standards for reclamation than those applied to mine operators. Therefore, bonding necessarily requires use of the industry standards for coal mine reclamation, anything less is contrary to the laws and rules. *Equipment Watch* is not specific to coal mine reclamation; therefore, for the use of *Equipment Watch* to be valid under state law, the parameters must be adjusted to the industry standard for coal mine reclamation.

C. The Montana Procurement Act Supports Greater Annual Use Hours.

Montana strongly prefers competitive solicitations (Invitations for Bids or Requests for Proposals) to "[a]void putting the State at the mercy of Contractors who could charge almost anything for products or services, knowing it's the only place the State can go to meet its requirements." MT Procurement Manual, p. 40. When using the competitive bidding process, DEQ is mandated to accept "the lowest responsible and responsive bidder whose bid meets the requirements and criteria set forth in the invitation for bids." § 18-4-303(6), MCA.

Montana's State Procurement Services Division's (SPSD) guidelines recommend that contract officers consider any unique aspects of the project when developing the Performance Work Statement, Statement of Objectives, Statement of Work, or Specification. When considering the payment and pricing details to include in an RFP, the SPSD states "a thorough understanding of the requirements and industry standards is needed by [Contract Officers] to develop appropriate payment and pricing terms." SPSD stresses that effective contracts are those where "the pricing terms are consistent with industry standards." MT Procurement Manual, p. 29.

We find nothing in statute, rule, or policy that would prevent DEQ from including criteria in the invitation for bids requiring timely reclamation, a deadline by which reclamation must be completed, and/or the use of industry standards (or better) for annual use hours. In fact, where agencies use an alternate method, like the Lowest Priced Technically Acceptable (LPTA) method that federal agencies use, the agency may include other factors and weigh timeliness of project completion as a criterion for awarding a contract. MT Procurement Manuel, pp. 42-43; §§ 18-2-503(1)(b), (2)(b), MCA. The contract award "must be based on a best value analysis" which, in the case of coal mine reclamation, necessarily requires consideration of how rapidly, completely, and effectively the reclamation will be done. §§ 18-2-503(8); 82-4-231(1), MCA.

Coal mine reclamation bond amounts are open for public inspection and therefore any contractor who would bid on a coal mine reclamation project would be aware of the amount of bond available for the work. By requiring unrealistic, excessive bonds, DEQ is ultimately inviting bids inconsistent with industry standards and encouraging over-priced bids that take advantage of the excessive bond by charging the State far too much for services that can be obtained much more cheaply and efficiently pursuant to industry standards. That is an abuse of the procurement system, which is specifically designed to prevent such gross overpayments.

D. Federal Requirements Support Greater Annual Use Hours.

OSMRE's rapid and unequivocal approval of Minor Revision MR311 for the Absaloka Mine illustrates that OSMRE does not object to use of industry standards for annual use hours greater than the *Equipment Watch* default. The only requirement is that the performance bonds "meet all regulatory program requirements." OSMRE, Handbook for Calculation of Reclamation Bond Amounts (October 2020), p. 6. The Handbook instructs "[t]o determine the hourly cost of equipment during the reclamation operation, adjust the components of the hourly costs found within EquipmentWatch (https://EquipmentWatch.com) for the number of shifts, fuel costs, etc., as applicable." Handbook, p. 2-16. DEQ should follow the Handbook and do just as OSMRE instructs – adjust the annual use hours to the industry standard.

The Handbook also indicates that the bond amount should reflect the "worst-case scenario" limited to "the cost of reclaiming the site if the permittee forfeits the bond at the point of maximum reclamation cost liability, under the reclamation and operation plans approved as part of the permit." Handbook, p. 1-5.

The worst-case scenario occurs whenever there is:

1) the greatest disturbance of prime farmland,
2) the largest open pit,
3) stream reconstruction is required, and
4) the largest acreage of revegetation.

Handbook, App. B4, p. 2.

Consideration of the "worst-case scenario" does not require use of inefficient work practices, it requires consideration of the worst physical state a project could be left in at the time of bond forfeiture, which would leave the most reclamation to be completed. It does not include intangible

factors such as procurement issues or other human or agency-imposed difficulties that may arise. Therefore, DEQ would be wrong to use a "worst-case scenario" analysis as justification for its excessive "standardized costs" that are not tethered to any industry standard.

E. Survey of Other Coal Mining States Supports Greater Annual Use Hours.

Many coal mining states, including Pennsylvania, West Virginia, Kentucky, Illinois, Ohio, and Virginia, provide bonding rates based on acreage or other factors and do not rely upon a specific annual use rate. However, a survey of other states, especially those in the Western coal mining region, supports adjusting the annual use rate or other factors within *Equipment Watch* to reach the more appropriate industry standard for coal mine reclamation.

North Dakota calculates bonds for large coal mines based on 3,000 hours per year. North Dakota PSC, Reclamation Div., *Policy Memorandum No. 16* (February 2024), p. 5. While that is lower than the industry standard, it is much greater than the 2,080 annual use hours claimed by DEQ and more than double the 1,200 annual use hours actually allowed by DEQ. Similarly, New Mexico allows bonding for earth-moving equipment based on "one or two shifts per day." New Mexico Mining and Minerals Division, Energy Minerals and Natural Resources Department, *Guidelines for Bond Calculation* (September 29, 2000). No other state limits annual use hours to 2,080 hours, which DEQ claims it uses based on a standard 8-hour shift. And no other state relies on the *Equipment Watch* standard rate of 1,200 hours, which is what DEQ actually uses. Moreover, every state that utilizes the *Equipment Watch* program does so by inputting a uniform annual use hour rate into the Program. DEQ is the only state agency that not only limits annual use hour rates arbitrarily, but also the only agency that does not utilize a set annual use hours standard.

Wyoming presumes older equipment will be used and adjusts owning and operating costs to 65 percent of the *Equipment Watch* rates because of regional considerations. Wyoming DEQ, Land Quality Division, *Guideline No. 12 Standardized Reclamation Performance Bond Format and Cost Calculation Methods* (December 2, 2024). Here again, the result is equipment use rates that are more aligned with industry standards and dramatically lower than DEQ's "standardized costs." For comparison, DEQ's "standardized cost" for a D11T CD dozer is $467.71 per hour, Wyoming's rate for a D11R CD dozer is $293.65 per hour. *Id.*, Table B-1d.

F. Conclusion

There are no facts to support use of either 2,080 or 1,200 annual use hours. Doing so is not only contrary to state law, but it also sets the State up for gross misuse of the procurement system. The industry standard for coal mine reclamation ranges from 5,720 to 7,280 annual use hours, with an average of 6,257. Even so, taking a conservative approach, Westmoreland herein provides bond calculations based on 4,160 annual use hours, which equates to two 8-hour shifts per day.[8] Applying the 92 percent availability factor results in actual annual use hours of 3,827, as reflected in the attached bond calculation. **Exhibit K**, attached. The bond calculation is fact-based, specific to coal mining, and reflects industry standard, as required by law and approved by OSMRE.

[8] Except for water trucks and farm equipment, which are expected to operate less frequently.

ARM 17.24.1102(1): 2.) In Tab T13, all productivity rates need updated to most recent industry standards (CAT Handbook).

Response: Productivity rates have now been updated to conform with the rates provided in the most recent CAT performance Handbook. Caterpillar Performance Handbook Version 50, 2022, https://www.ringpower.com/media/oujnpuga/caterpillarperfhandbook_ed50.pdf. If a rate appears as though it was not updated, it is because Caterpillar did not update the rate for this year and/or the rate did not change from that in the latest printed Handbook, so the "older" rate is used.

ARM 17.24.313(1)(b): Please provide a detailed timetable for the estimated completion of each major step in the reclamation plan.

Response: The Gantt chart, **Exhibit L**, provides DEQ with Westmoreland's anticipated progression through each reclamation phase. Westmoreland does not know its exact final reclamation start date, but will provide that to DEQ when available. Given the equipment and staff currently on site, however, Westmoreland will continue to concurrently reclaim the Mine and will begin final reclamation of the site when all permitted coal seams have been mined. Final reclamation is expected to last approximately six years. An exact timetable with yardage, acreage and tasks will be developed with the Department prior to the final reclamation phase of work at the mine.

ARM 17.24.313(1)(c): 1.) In Tab T2 of 'Exhibit B16 Bond Calculation MR311 2024-06.xlsx', Truck/Loader weighted average for distance is referencing equipment cells labeled 'Dozer' in the table above. Please verify this is correct.

Response: The Truck/Loader weighted average for distance has been corrected to only average the equipment cells labeled Truck/Loader.

ARM 17.24.313(1)(c): 2.) RS Means values in Tab T5 and T6 appear to decrease from 2023 values. When checked by DEQ, 2024 values appear to increase from prior estimates; please validate these estimates. When using RS Means for pricing, use the Total O&P cost.

Response: Historically, DEQ provided RS Means estimated costs for Westmoreland's use in the bond calculations. Absent that this year, Westmoreland obtained the 2024 RS means values from a third-party contractor in heavy construction and has updated the calculations appropriately. If DEQ prefers different costs from other versions of RS Means, please advise and Westmoreland will respond accordingly.

ARM 17.24.313(1)(c): 3.) Cut/Fill calculations do not appear to include all areas of disturbance between projected end of 2025 topography and PMT. See Exhibit #1. Please revise the cut/fill calculations to include all areas of disturbance within the permit boundary.

Response: Westmorland did not receive the "Exhibit #1" referenced in its letter, but Westmoreland presumes it is a map estimating the location of the final pit layout. The final pit layout will have a higher surface area of disturbance than the surface area disturbance expected at

the end of 2025. If this is incorrect, please provide Westmoreland with Exhibit 1 and/or a more detailed explanation of this matter.

Westmoreland calculated its reclamation costs based on the total disturbed acreage that the mine projects will exist at the end of 2025. Westmoreland concurrently reclaims the Mine site as it mines, so cut/fill calculations do not include those areas that Westmoreland has already reclaimed.

Although Westmoreland has not applied for bond release on this remediated acreage, a field inspection would indicate that soil has been redistributed. See the work remediation section of the bond calculation (**Exhibit K)** on Plate 3. Thus, Westmoreland did not include cut/fill calculations for areas that have already been reclaimed. DEQ previously requested late in the summer of 2024 that Westmoreland not include areas of disturbance in the bond calculation where reclamation has occurred.

ARM 17.24.313(1)(c): 4.) As proposed in MR311, the pit surface configuration is projected from the end of 2026. According to the permit documents, all coal will be mined by then. Therefore, please use the approved postmining topography as the "Final Bond Topography" in the bond calculation.

Response: The bond topography represents the worst-case disturbance scenario up to the end of 2025. See **Exhibit K**, Plate 3.

ARM 17.24.313(1)(c): 5.) Please include costs for finish grading, final drainage design (part of whole grading scheme) and final drainage establishment for all permit areas that do not have Phase I bond release.

Response: Costs have been calculated based on the actual amount of reclamation work that will exist at the end of 2025, according to Westmoreland's mining schedule. In some areas, some of the finish work has already been completed. The bond calculation accurately reflects the reclamation work remaining based on actual, on-the-ground conditions.

Please review and revise (as necessary) the "balance polygons" used in Table 2. The cut and fill volumes in some of these are not balanced. For example, there is an imbalance of 22% in CF-24 and 33% in CF-23.

Response: Cut-fill balances have been verified for blocks CF-24 and CF-23. Westmoreland used the difference between the PMT and the projected 2025 surface disturbances for the analysis. Westmoreland considered and accounted for all surface area disturbances within the pit, including disturbances currently sitting beneath water in the pit.

ARM 17.24.313(1)(c): 6.) Dozer grades in the CAT Handbook are limited to -30%. Please adjust dozer grades in Table 2 so that none are steeper than -30%.

Response: DEQ is referring to the percent Grade v. Dozing Factor chart on page 16 of the CAT Handbook. The chart is truncated to give dozer users a quick reference for flatter operating conditions.

Dozers have consistently been used on grades as high as 1:1, or 100 percent slopes, which is a 45 degree angle. Westmoreland called CAT representatives to discuss this and CAT confirmed that large dozers are typically designed to briefly operate upwards of around 100 percent slopes, and continually on slopes less than 47 percent, which further supports the accuracy of Westmoreland's calculations. **Exhibit M**, attached. Westmoreland's extensive field experience also confirms that the dozer grades used in these calculations are correct and Westmoreland has conducted reclamation using its dozers on slopes of these grades. For example, Westmoreland reclaimed the North side of Area A of its Rosebud mine at a slope of 45 degrees, which equals a 100 percent slope.

Sincerely,

CROWLEY FLECK PLLP

/s/ Victoria A. Marquis

Victoria A. Marquis

VAM:db
Enclosures, Exhibits A-M.

EXHIBIT
G

Morgan E Pettit

From: .
Sent: Monday, December 16, 2024 7:41 AM
To: Morgan E Pettit
Subject: RE: Question RE: Annual Use Hours

This message was received from an external email account. Please use caution when opening messages, attachments or external links from unknown senders.

Hi Morgan,

Thank you for reaching out. In terms of who the equipment owners are, this survey data we use when establishing the cost factors comes primarily from the contractors of various company sizes.

That is a great point on those mining jobs. The Rental Rate Blue Book rates that the standard Internal Charge Rate factors are calculated based on represent a national average of usage for the equipment. The standards vary depending on the equipment type and size class. We do have several customers involved in mining and typically we recommend them inputting their own Annual Usage and Economic Life into the ICR section for the purpose of getting a more accurate look at their rates. Usage in this field is much higher typically than in other types of construction work so the rates would look different given those changes. More utilization of the equipment will lower the hourly cost of using the equipment.

Let me know if I can provide any additional information to you.

Thanks!

Leader, Account Management
770-618-0107 (D)

Fusable | Vital Data for Vital Industries
3200 Rice Mine Rd NE, Tuscaloosa, AL 35406

EXHIBIT
H

MONTANA COAL COUNCIL

P.O. Box 5508
Helena, Montana 59604-5508

February 26, 2024

Mr. Dan Walsh, Mining Bureau Chief
Department of Environmental Quality
1520 East Sixth Ave. PO Box 200901
Helena, MT 59620

Subject: Utilizing an Appropriate Hour Approximation for Coal Bond Calculation

Dear Mr. Walsh (Dan),

Thank you again for meeting with us on February 1st to discuss the methodology for the coal producers and the Department of Environmental Quality (DEQ) to utilize in calculating bonds. I am writing on behalf of the Technical Committee of the Montana Coal Council to formally request that (DEQ) evaluate authorizing equipment operating schedules with greater intensity than the Equipment Watch default which is representative of a 40-hour work week. This request is based on the duration of the resulting project and feedback provided by multiple large earth moving contractors. Intensity of schedule has a significant impact on calculations within the Equipment Watch database, and from our perspective provides a more accurate estimation of expected contractor bids for large reclamation projects at surface coal mines.

During our meeting on February 1, 2024, DEQ expressed an interest in receiving this request directly from the Montana Coal Council to facilitate a comprehensive evaluation and response to all affected coal operators in Montana.

Attached you will find the information presented during our meeting and a Decker applicability example. We trust that this documentation will assist DEQ in conducting a thorough assessment of the proposed change.

We kindly request that DEQ provide a response to this request within 60 days of receiving this letter. Should you have any inquiries or require additional information, please do not hesitate to contact me directly. I will ensure that the Technical Committee promptly addresses any questions or concerns raised.

Thank you for your attention to this matter. We look forward to receiving DEQ's response and working collaboratively to ensure the continued success and efficiency of reclamation efforts in Montana's coal mining industry.

George H. Harris MPA, ARM
Executive Director
Montana Coal Council
Cell 406-422-7724
Gharris@montanacoalcouncil.org

MT Coal Council Bond Calculation Discussion (2/1/24)

Navajo Transitional Energy Company

- 4/14/23 Submitted Bond MR288 using **Multiple Shift** hours in Equipment Watch

- 5/26/23 Round 1 Deficiency Letter
  - Equipment Costs do not match department standards
    - must use default **Single Shift** 40 hrs/week in Equipment Watch

- 8/25/23 SCM Sent updated Equipment Cost Comparison to MDEQ

Equipment Hourly Cost Comparison

Navajo Transitional Energy Company

	A		B	C	A - C	B - C
	Op Hrs (Multiple Shifts)	8/16/2023	Op Hrs (40 hrs / week)	8/16/2023	MDEQ 5/26/23 Letter		
CAT 657 Scraper	4730	$ 486.41	1309	$ 554.05	$ 724.10	$ (237.69)	$ (170.05)
14,000 gal water truck	3480	$ 195.08	727	$ 356.62	$ 352.98	$ (157.90)	$ 3.64
CAT 16 Grader	5235	$ 129.81	820	$ 318.38	$ 314.96	$ (185.15)	$ 3.42
CAT D9 Dozer	1290	$ 264.21	2030	$ 337.74	$ 353.58	$ (89.37)	$ (15.84)
CAT 24 Blade	5320	$ 162.35	820	$ 277.01	$ 285.49	$ (123.14)	$ (8.48)
CAT D10 Dozer	4850	$ 226.47	2030	$ 322.14	$ 349.93	$ (123.46)	$ (27.79)
CAT 844 Rubber Tired Dozer	4430	$ 239.38	910	$ 389.56	$ 380.72	$ (141.34)	$ 8.84
Dump Truck (10 - 12 cy)	1750	$ 63.18	1750	$ 63.18	$ 82.03	$ (18.85)	$ (18.85)

Bond Calculation Correspondence

Navajo Transitional Energy Company

- 9/1/23 MDEQ rejected multiple shift equipment costs
  - When MT has collected on a bond, **Single Shifts** were used
  - OSM requires worst case scenario
  - MDEQ is open to further equipment cost discussions with all MT mines

- 9/29/23 MT Coal Council Technical Committee Meeting
  - Developed Plan to Work Together
    - WWC to collect actual Mine equipment costs as a comparison
    - Provide contractors with large material moving capabilities our bond quantities, asked them to provide their preferred schedule
    - Propose one set of equipment operating hours

	MULTIPLE SHIFT						SINGLE SHIFTS			
	Montana Mine Data		Equip Watch Cost		Compare Actual Mine Costs to Equipment Watch		Equip Watch Cost		Compare Actual Mine Costs to Equipment Watch	
	A	B		C	% of C			D	% of D	
Equipment	5 Year	2022	Op Hrs (Multiple Shifts)	8/16/2023	5 Year	2022	Op Hrs (40 hrs / week)	MDEQ 5/26/23 Letter	5 Year	2022
CAT D11 CD	$ 169	$ 258	4,410	$ 400	42%	64%				
CAT D11T	$ 172	$ 205	4,410	$ 400	43%	51%				
CAT D11R CD	$ 169	$ 258	4,410	$ 307	55%	84%				
CAT D10	$ 132	$ 167	4,850	$ 226	58%	74%	2,030	$ 350	38%	48%
CAT D9			1,290	$ 264			2,030	$ 354		
Rubber Tire Dozer CAT 844	$ 80	$ 93	4,430	$ 239	34%	39%	910	$ 381	21%	24%
Dump Truck 10-12 cy			1,750	$ 63			1,750	$ 82		
200 Ton Class Truck	$ 250	$ 293	5,480	$ 265	94%	110%				
Road Grader CAT 16	$ 83	$ 126	5,235	$ 130	64%	97%	820	$ 315	26%	40%
Road Grader CAT 24	$ 108	$ 146	5,320	$ 162	66%	90%	820	$ 285	38%	51%
Scraper CAT 657	$ 460	$ 492	4,730	$ 486	95%	101%	1,309	$ 724	64%	68%
Water Truck 14,000 Gallon	$ 160	$ 227	3,480	$ 195	82%	116%	727	$ 353	45%	64%
Wheel Loader CAT 980 FEL			1,279	$ 107						
Wheel Loader CAT 430 (4WD)			480	$ 72						
				Overall Average	63%	83%		Overall Average	39%	49%

SCM MR 288 General Bond Quantities	Quantity	Units
Dozer Regrade (0 - 600 feet long)	42,101,490	Cubic Yards
Dozer Cast Dozing (0-200 feet long)	5,508,490	Cubic Yards
Scraper Regrade (250 - 3200 feet long)	3,100,350	Cubic Yards
Truck Shovel (800 - 8200 feet long)	51,404,370	Cubic Yards
Drilling and Blasting Highwall	18,005,734	Cubic Yards
Demolition (Structures)	33	Buildings
Current Demolition Cost	13,576,047	Dollars
Topsoil to Apply in Two Lifts (scrapers)	559,997	cubic yards
Topsoil to be Moved (Truck/Shovel)	9,028,680	cubic yards
Acres to Revegetate	4,448	Acres

Table B Rev 1: Contractors Preferred Operating Schedule

Six contractors with large material moving capabilities were contacted as listed below. They were provided the dozer and scraper regrade yards and push distances, the truck shovel yards and haul distances, the yards of highwall to be blasted, the number and volume of material to be demolished, the topsoil volumes, and the acres to be revegetated as listed below. These are actual quantities required to reclaim the Spring Creek Mine. **They were asked to provide their preferred schedule of operation to reclaim a large coal mine.** The purpose of this exercise was to obtain realistic **annual equipment hour**s for an actual mine closure scenario. All of the contractors, proposed using the equipment multiple shifts per day. All contractors proposed operating the equipment more than five days per week, except for Oftedale Construction. However, they did state a 7 day/week schedule is an option. This shows the single shift per day default equipment hours listed in Equipment Watch are not valid for mine closure bond calculation purposes. The average annual preferred equipment hours is 6,257. This exceeds all of the annual equipment hours proposed in Table A.

Contractor	Location	Preferred Operating Schedule			
		Equipment Operated Hrs./Day	Days/Week	Hrs./Week	Hrs./Yr.
Ames Construction	Aurora CO	20	5.5	110	5,720
McCoy Corporation Inc.	Westlake Village, CA	20	7	140	7,280
Oftedale Construction	Miles City MT	16	5	80	4,160
Turner Mining Group	Bloomington IN	20	7	140	7,280
MK Weeden	Lewistown MT	22	6	121	6,292
Kiewit Mining Group	Englewood CO	24	7	131	6,812
				Average	6,257

0325

Bond Discussion Points

Navajo Transitional Energy Company

- 2.8% Annual Inflation (in addition to the 3.0% contingency)
- Bond calculation increases translates to…
- PMT Detail Level Required Bond Surface
- 1/25/24 Round 2 Deficiency Letter
  - Multiple Shift operational bonding estimates do not comply with 17.24.1102(1)
  - See Decker and other state-lead reclamation as examples
  - MDEQ is receptive to discuss equipment costs with MT Mines

EXHIBIT
I

DEQ
Montana Department of Environmental Quality

Air, Energy & Mining Division

March 8, 2024

George Harris
Executive Director
Montana Coal Council
PO Box 5508
Helena, MT 59604

Sent by email to: gharris@montanacoalcouncil.org

RE: **Bond Calculation Discussion**

Dear Mr. Harris,

The Montana Department of Environmental Quality (DEQ) has reviewed the Montana Coal Council Technical Committee's (MCCTC) bond discussion points provided at our meeting on February 1, 2023, and the corresponding Power Point Presentation provided to DEQ on March 1, 2023. DEQ appreciates the time investment made by the MCCTC to identify potential improvements to DEQ's reclamation bond calculation determinations.

DEQ is required by Section 82-4-223, Montana Code Annotated (MCA), to determine a bond amount to ensure the faithful performance of the requirements contained within the Montana Surface and Underground Mine Reclamation Act (MSUMRA), Sections 82-4-201, *et. seq* MCA. In determining the bond amount, DEQ may not bond for less than the total estimated cost to the state of completing the work described in the reclamation plan. The Administrative Rules of Montana (ARM) 17.24.1101 through 17.24.1122 further define DEQ's procedures for determining, accepting, and potentially forfeiting a performance reclamation bond.

On February 1, 2024, the MCCTC presented its bond discussion points to DEQ. The primary points of discussion were 1) Multiple Shift Reclamation Operations and 2) Single Industry Provided Letter for Equipment Availability. DEQ has carefully considered the MCCTC's discussion points from the meeting and MCCTC's follow-up email on February 26, 2024.

<u>Multiple Shift Reclamation Operations</u>
DEQ readily acknowledges mine operators can complete reclamation at cost rates lower than those available to the state. DEQ is required and obligated to ensure adequate bond is held by the state to ensure that the reclamation pursuant to the provisions in MSUMRA can be performed in the unfortunate event that a permittee is unable to complete the required reclamation.

Although MCCTC does identify important reclamation considerations for such operations as the Decker Coal mine, the response from MCCTC on February 26th lends further evidence that supports the highly variable nature of reclamation costs and schedules when considering the risks bankruptcy poses to the state. DEQ agrees the bond should be based on the cost of reclamation the state would incur pursuant to ARM 17.24.1102. Thus, DEQ has adopted the use of industry standard rates based on a standard 8-hour shift. Further, DEQ does not expect to receive rates more favorable than those offered by Equipment Watch when contracting to complete reclamation work.

When DEQ is tasked with completing reclamation, it releases a Request for Proposals (RFP) to complete specific tasks. DEQ does not specify how a contractor would complete the work, rather DEQ specifies the work that must be completed within a given timeframe and relies on a competitive bidding process to select the proposal that best accomplishes the required reclamation work. Due to the nature of the RFP process, DEQ does not have definitive control over the costs proposed and therefore must determine bonds using industry standard rates to ensure adequate funds are available for contracting reclamation. DEQ is unable to mandate multiple shifts from both a practical and a financial perspective. The Superfund, Abandoned Mine Lands (AML) and Construction Bureau (SACB) of DEQ was consulted regarding its standard contracting practices. SACB, as standard practice, does not specify the number of shifts required for performing contracted work. Generally, reclamation costs increase as RFP requirements increase as contractors work to minimize their financial risks associated with the contract. Further, in the event of a bond forfeiture in combination with bankruptcy or mine operator liquidation, additional funds would likely not be available from a mine operator to complete reclamation if the bond funds are inadequate.

MCCTC presented DEQ equipment rates based on multiple shifts. As part of the presentation, MCCTC justified its multiple shifts on standard mine operator practice and "preferred" contracting schedules. While DEQ appreciates the work invested in examining multiple shifts and the resulting equipment rates, based on the information presented, DEQ does not agree it is prudent to consider multiple shifts for completing reclamation for the bond to be held by DEQ. DEQ based its assessment of multiple shifts on historic contracting practices across DEQ and what it can reasonably expect a contractor would bid. For example, the SACB does not specify multiple shifts due to the uncertainty inherent in the contracting process and in some instances SACB restricts hours of operation to ensure effective project management. DEQ is not persuaded by the "preferred" contractor schedules as the contractors are not legally bound to fulfill or submit RFPs based on the information they provided to MCCTC. Thus, DEQ has determined that the 8-hour shift equipment rates DEQ relies upon to determine the reclamation bond for coal mining disturbances are appropriate and reflect the estimated cost DEQ would expect to incur in the event DEQ is responsible for completing reclamation.

<u>Single Industry Provided Letter for Equipment Availability</u>

DEQ agrees that a single letter from the MCCTC would appropriately provide the necessary justification for nonstandard equipment availability for the operators that are part of the

Montana Coal Council. DEQ agrees a single letter from an industry organization will increase bond determination efficiency for both DEQ and industry. For DEQ to accept a letter regarding the equipment availability, MCCTC needs to:

- submit an annual letter prior to the first bond determination for one of its members for the calendar year;
- specify the quantity of equipment available (per each type of equipment);
- specify the location for which the equipment can be obtained;
- identify any delays or lead time for the equipment to be available; and,
- ensure the equipment availability letter is from an equipment dealer where equipment can be obtained by a general contractor.

DEQ looks forward to ongoing dialogue with MCCTC. Furthermore, DEQ looks forward to improving the bonding process with a single industry letter. However, DEQ will not solicit the letter from MCCTC. Rather, if the MCCTC wishes, it may submit an annual letter containing the information above on behalf of its members. Otherwise, DEQ may need to seek information from each individual permittee.

Please contact me if you have any questions.

Sincerely,



Dan Walsh
Mining Bureau Chief
Montana Department of Environmental Quality
(406) 444-6791 or dwalsh@mt.gov

Cc: Eric Dahlgren (DEQ); edahlgren@mt.gov

EXHIBIT
J

"For All Your Earth Moving Needs"

M K WEEDEN CONSTRUCTION, INC

Main Office:
Hwy 87 West • P.O. Box 1164 • Lewistown, Montana 59457

Office: (406) 538-3726 • Fax: (406) 538-4818

I, Monte Weeden, do hereby declare under penalty of perjury according to the laws of the United States:

1. I am over the age of 18 years, a resident of Fergus County, Montana, and am competent to give the following testimony on personal knowledge.
2. I founded MK Weeden Construction in 1991 ("I" or "Weeden") and serve as Weeden's President. Weeden is now the largest earth moving contractor in Montana and Wyoming.
3. I have over 34 years of experience reclaiming large mines throughout the United States, especially in Montana and Wyoming. I have completed numerous reclamation projects in Montana, including: all types of reclamation projects at Rosebud (since 1998), Montana Tunnels in Jefferson City, MT; Decker Coal Mine in Decker, MT (1998-2018), Spring Creek Mine in Decker, MT (2001, 2021, 2022), among many others. I have also completed a lot of reclamation projects for coal mines all over Wyoming, including through the Wyoming Department of Environmental Quality's Abandoned Mine Lands Program at Rock Spring Mine in Rock Springs, WY, who I have worked with for over 25 years. I have also performed reclamation work for over 20 years in the gas hills of Wyoming.
4. I have personally performed and managed all types of reclamation work, including (but not limited to) removing overburden, reclaiming waste dumps, topsoiling, regrading to permit mine topography using GPS, and revegetating reclaimed areas.

5. Weeden currently runs two shifts of crews (a day and night shift) minimum. Weeden considers this standard. Those two crews work five days a week, 10 hours each day, for a total of 120 hours per week. Weeden does not take holidays or winters off unless weather conditions are too bad to work that day. For night work, Weeden uses a light plan. I provided similar information to members of the Montana Coal Council's technical committee and I understand the information, along with similar information from other reclamation companies, was provided to the Montana Department of Environmental Quality in February 2024.
6. Weeden has never had an issue finding qualified labor to fill out these crews.
7. Weeden owns all of its own equipment and does not have to rent any equipment for large mine reclamation projects. If Weeden were to have to perform reclamation work at a large coal mine in Montana, it would probably take less than a month (depending on weather) to get all of Weeden's equipment to the mine and begin reclamation.
8. Weeden would have available at least 12 CAT 785B 150-ton rock trucks, a CAT 5230 excavator, an X1900-6 Hitachi excavator, a 993k CAT wheel loader, 8 CAT 777D trucks, 7 100-ton rock trucks, 4 D10 Dozers, two 16G motor graders, two 20,000 gallon CAT 777D water trucks and a CAT 773B 10,000 gallon water truck. Weeden would also deploy all maintenance trucks and tools required to support this fleet, which it also owns.
9. If Weeden were to bid on a large reclamation project for a coal mine, I would use the fleet and the crew operating hours listed above to calculate my cost estimate for performing the reclamation. This is the information I have always used to provide cost estimates for reclamation work. Only the amount of equipment needed could change depending on the size of the job.

10. On November 18, 2024, I attended a meeting in Helena with the Montana Department of Environmental Quality and representatives from Westmoreland and we discussed the information presented above.

I declare that the foregoing is true and correct.

DATED THIS 20th Day of May, 2025.

Monte Weeden

EXHIBIT
K

DEQ
Montana Department
of Environmental Quality

January 24, 2025

Sent via ePermit system

Noelle Boyer
Westmoreland Absaloka Mining LLC
Absaloka Mine
100 Sarpy Creek Rd.
Hardin, MT 59034

Permit ID: C1985005
Revision Type: Minor Revision
Permitting Action: Deficiency
Subject: MR311; Bond Release-Round 3 Acceptability Deficiency

Dear Noelle:

The Department of Environmental Quality (DEQ) has reviewed your submittal. DEQ has carefully reviewed the responses regarding equipment rates. DEQ is committed to determining accurate performance reclamation bonds that reflect the total estimated cost to the state of completing the work described in WRM's reclamation plans as required by Section 82-4-223, Montana Code Annotated (MCA).

In its response, WRM identifies the need for a guidance document to provide details about bond calculations and the basis for equipment rates. DEQ agrees a guidance document is warranted and is committed to working with stakeholders to develop a bond guidance document. Further, in its response, WRM stated DEQ should consider multiple shifts when determining equipment rates with Equipment Watch. DEQ does not agree modifications to equipment rates in Equipment Watch based on anticipated usage is appropriate without a guidance document in place. However, DEQ recognizes the standard rates provided by Equipment Watch do not accurately reflect the equipment rates of a large scale mine reclamation project such as reclamation of a coal mine. DEQ has obtained equipment cost rates information through Costmine Intelligence, a data service similar to Equipment Watch that focuses on mine equipment costs. The equipment rates identified in Costmine Intelligence compare favorably with equipment quotes obtained through local equipment dealers and is based on rates applicable to mine scale projects. DEQ will utilize the Costmine Intelligence rates to determine the bond once material movement deficiencies are addressed.

In order to determine an appropriate bond calculation, the following deficiency must be adequately addressed before DEQ can determine the application acceptable:

ARM 17.24.313(1)(c): Cut/Fill calculations do not appear to include all areas of disturbance between the topography provided and PMT. DEQ has calculated 4.99MCY of missing volume shown in Exhibit 1a. The volume addition was calculated from the topography provided in 'Exhibit B16 Bond Calculation Map Plate 1.dwg' and the approved PMT surface. Please add the additional volume to the backfill cut/fill polygons and bond calculations or provide justification why the area shown in 'Exhibit 1a' should remain absent from the bond calculation.

Soil redistribution calculations do not include all areas of disturbance between the topography provided and PMT. DEQ has calculated 224 acres of missing area not included in soil redistribution calculations; see Exhibit 2. With a permitted target soil depth of 18 inches, DEQ has calculated 0.54MCY of soil redistribution is missing from bond calculations. Please add the additional area and volume into the bond calculation or provide justification why the areas shown in Exhibit 2 should remain absent from the bond calculation.

Please use the approved postmining topography as the "Final Bond Topography" in the bond calculation. For areas where the postmining topography cannot be achieved based on mining progress, material volumes based on achieving the approximate postmine topography should be provided. DEQ Coal Section engineers are available to discuss the methodology for estimating approximate volumes.

Please feel free to contact me with questions regarding this letter.

Sincerely,



Emily Lodman, Acting Coal Section Supervisor
Mining Bureau
Phone: 406-444-2873
Fax: 406-444-4988
Email: Elodman@mt.gov

Cc: Jeff Fleischman, Office of Surface Mining
Erica Trent, Office of Surface Mining

WESTMORELAND MINING LLC

EXHIBIT
L

June 25, 2025

Sonja Nowakowski
Director
Montana Department of Environmental Quality
2401 Colonial Drive
Helena, MT 59601

Dear Director Nowakowski:

Thank you for your time and attention during our recent discussions about coal mine bond calculations. Westmoreland appreciates DEQ's commitment to create an accurate bonding guidance document, compliant with the Montana Strip and Underground Mine Reclamation Act ("MSUMRA"), which provides greater transparency and predictability for all interested parties. This effort provides an excellent opportunity for DEQ and the regulated industry to share information, learn together, and further improve our working relationship. It is our understanding that, unlike our neighboring states, Montana DEQ intends to publish its draft bonding guidance document without formal input from Montana's professional mining organizations, permitted coal mine operators, or the reclamation contractors currently operating in Montana. While we value DEQ's expertise as a regulatory agency, reclamation expertise offered by professional mining organizations, coal mine operators, and reclamation contractors is necessary to ensure the bonding guidance document results in accurate bond calculations based on realistic and actual reclamation costs.

Westmoreland offers this letter for DEQ's consideration in the drafting process and again respectfully encourages DEQ to convene a group of technical experts to provide input at the front-end of the bonding guidance document drafting process.[1] Technical experts in the fields of engineering; equipment and workforce costs; reclamation planning and phasing; highwall reduction; large-scale earthmoving work; backfilling, re-grading and contouring at a landscape level; water management on a basin- or watershed-scale; and landscape revegetation would provide valuable experience and insight to ensure the bonding guidance is solidly grounded in facts specific to coal mine operation and reclamation, as required by MSUMRA.[2] We also encourage DEQ to consider and adopt relevant portions of bonding guidance already developed, approved, and proven successful in North Dakota and Wyoming.

Westmoreland

Westmoreland has a long history of productive, responsible, and compliant coal mining and reclamation in Montana. In 2023 alone, its three Montana mines produced more than 8 million

[1] Exhibit A, Westmoreland Ltr. to S. King, *RE: Bonding Guidance Document* (March 12, 2025), p. 2-3.
[2] Exhibit B, Westmoreland Ltr. to E. Dahlgren, *RE: Westmoreland Rosebud Mining LLC Annual Bond Calculations* (three letters all dated December 23, 2024), pp. 5-6.

tons of coal. In accordance with Montana law, Westmoreland simultaneously conducts substantial reclamation activities at all three of these mines while mining continues In fact, Westmoreland currently has a total of eleven applications for bond release pending before DEQ. Additionally, Westmoreland annually updates its bond calculations with DEQ, helping to ensure that all outstanding reclamation is appropriately bonded.

An efficient cycle of bonding, mining, reclamation, and bond release is necessary. The cycle ensures compliance with MSUMRA by enabling "the orderly development" and "wise use of [coal] resources" without waste[3] while incentivizing operators to complete reclamation through accurate bond calculations and timely bond releases. Ultimately, the accuracy and efficiency of this cycle dictates whether operators can optimize mining and reclamation activities through effective allocation of their resources and, in turn, whether Montana can develop its natural resources in a responsible, beneficial manner. This synergistic process is upset when any element of the cycle is disrupted, including when bond calculations become unduly inflated and no longer accurately reflect the real costs of coal mine reclamation.

Westmoreland has participated in several meetings with DEQ regarding bond calculations, including: a February 1, 2024 meeting with the Montana Coal Council Technical Committee,[4] an October 7, 2024 meeting with Westmoreland's executive leadership team, and a November 18, 2024 meeting that again involved Westmoreland's executive leadership team joined by representatives of Oftedal Construction and MK Weeden Construction. Both construction companies have completed extensive reclamation projects in Montana and participated in the survey conducted by the Montana Coal Council in 2023.[5] Based on their experience, both Oftedal Construction and MK Weeden Construction described their standard operations, typical annual equipment use hours, and equipment utilization and deployment practices during large surface mine reclamation projects. They also described, in detail, their approach to staffing at levels that ensure seamless operations and their approach to contract bidding.[6] These meetings have been a good start to the type of information sharing and open dialogue we hope continues. Expanding these technical discussions to all operators and experts within Montana's coal industry would benefit all participants.

Reclamation Bonding

Neither under- nor over-bonding serves the interests of DEQ or any mining company. Under-bonding exposes the State and its taxpayers to undue risk by potentially leaving them financially responsible for reclamation obligations. Conversely, over-bonding imposes an excessive burden on mine operators due to over-taxing that threatens their economic viability by tying up substantial capital, discouraging further investment, and reducing the financial resources available to ensure proper and sustainable operations. This concern is particularly acute in the coal mining industry, where many surety companies require dollar-for-dollar collateral for bonds. Unnecessarily tying up capital in this way undermines both MSUMRA and DEQ's mandate to ensure reclamation is completed "[a]s rapidly, completely, and effectively" as

[3] § 82-4-202(2)(g), MCA.
[4] Exhibit C, Montana Coal Council Bond Calculation Discussion with DEQ (February 1, 2024) (redacted in part).
[5] Exhibit B, p. 2.
[6] Exhibits D.

possible.[7]

The surety market available for coal mining operators is extremely abbreviated, which provides additional challenges based on limited options and heightened financial requirements. Money spent on increased collateral requirements or premiums is money that cannot be spent on the performance of reclamation operations. To that end, the consequence of long-term over-bonding of an operator in an attempt to insure liabilities results in surety companies either refusing to provide additional bonding beyond their authorized mandated maximum capacity, or charging a premium at a punitive rate to cover that "paper risk." These sureties, who often operate in numerous markets, are accustomed to a certain standard of liability coverage based upon predictable and transparent formulas. Covering risks that deviate from these industry norms are scrutinized and charged accordingly. The payment of collateral and policy premiums by operators on overly inflated bond liability removes that same capital from being utilized for actual reclamation work.

Establishing appropriate bonding levels is critical. Bonds must accurately reflect the financial risk to the State in the event a mine operator fails to complete its reclamation obligations, while also avoiding undue financial strain on operators that could jeopardize the viability of Montana's mining industry—an industry that has significantly influenced and supported the State's economy since before statehood. DEQ and mine operators share a mutual interest in achieving this balance. Accordingly, it is imperative that the bonding guidance document supports the establishment of realistic and appropriate bonding levels that reflect both the State's interests and the operational realities of the industry.

Coal Mining in Montana

Coal mining has long been, and remains, a vital component of Montana's history and economy. The State possesses the largest demonstrated coal reserve in the United States, accounting for approximately 25% of the nation's total coal reserves.[8] Montana is also home to three of the country's major coal mines.[9] Despite these numbers, Montana ranks only fifth in coal production, falling more than 200,000 short tons per year behind the number one coal producing state of Wyoming.[10]

Montana law mandates "the orderly development of coal resources through strip or underground mining to ensure the wise use of these resources and prevent the failure to conserve coal."[11] In further recognition of coal's importance, Montana's Constitution establishes both a resource indemnity trust[12] and a coal severance tax, each funded by coal mining.[13] For Fiscal Year 2024, revenue from the coal severance tax and the coal trust interest earnings contributed more than

[7] § 82-4-231(1), MCA.
[8] U.S. Energy Information Administration, Coal explained, https://www.eia.gov/energyexplained/coal/ (follow "How much coal is left" hyperlink).
[9] U.S. Energy Information Administration, *Annual Coal Report 2023* (October 2024), Table 9.
[10] U.S. Energy Information Administration, *Annual Coal Report 2023* (October 2024), Table 1. Wyoming has fifteen surface coal mines, compared to four in Montana.
[11] § 82-4-202(2)(g), MCA.
[12] Mont. Const. art. IX, § 2.
[13] Mont. Const. art. IX, § 5.

$37 million to the State's general fund.[14] Coal provides essential funding that benefits all Montanans, including through the Parks Acquisition Trust, Arts Council Trust/Aesthetics Project, Renewable Resources Loan Debt Service, State Library Commission, Conservation Districts, Water Development, County Land Planning, Highway Reconstruction Trust, State Parks/Historic Sites, Education Trust, Alternative energy Research, and Fish, Wildlife & Parks.[15] No other industry appears to have the constitutionally-mandated, historic, consistent, and wide-spread impact on Montana's economy that coal mining has. Montana's vitality is linked to coal mining's vitality.

In addition, Montana's coal mines pay millions of dollars in property taxes each year, including more than $1 million paid by Westmoreland.[16] Montana's coal mines also provide some of the highest-paying and most stable jobs in areas with few other employment opportunities, including areas adjacent to and within tribal lands. Even some of coal mining's biggest opponents recognize the economic importance of coal mining in Montana, noting that "when mining and plant jobs end, there are often scarce alternatives available in isolated, rural coal towns so the sudden nature of mine layoffs can devastate workers, families, and communities for many years."[17] The synergistic process of bonding, mining, reclamation, and bond release must work in order to support the vitality of coal mining and sustain its important economic contributions at the state, county, and local levels.

Federal Requirements

As recognized by Executive Order,[18] the federal administration has affirmed that "coal is essential to our national and economic security,"[19] and that coal-generated electricity plays a vital role in supporting both "domestic manufacturing and the construction of artificial intelligence data processing centers."[20] Rather than transitioning away from coal, the federal administration has instead prioritized coal for federal permitting actions.[21]

Connection between the agency and the operator and the resulting need to avoid the risks of both under- and over-bonding is evident in federal requirements. Federal law requires bonding to ensure "faithful performance" by the operator while limiting the bond to an amount that reflects "the probable difficulty of reclamation giving consideration to such factors as topography, geology of the site, hydrology, and revegetation potential."[22] The "statutory objective" is "to ensure, to the extent feasible, completion of the reclamation plan in the event that an operator

---

[14] LFD Revenue Team Memo to Select Legislators, *RE: General Revenue Update #4* (April 23, 2025).
[15] *See* compilation by the Montana Coal Council in "Montana Coal 2024," available at https://www.montanacoalcouncil.org/_files/ugd/fcb5da_d423dc66cc254e85bd4c186bf31ce015.pdf.
[16] *Id*.
[17] Western Organization of Resource Councils, *Coal Mine Cleanup Works: A Look at the Potential Employment Needs for Mine Reclamation in the West*, p. 4.
[18] *Reinvigorating America's Beautiful Clean Coal Industry and Amending Executive Order 14241*, 90 Fed. Reg. 15517 (April 14, 2025) (signed April 8, 2025); *see also* Exec. Order No. 13990, *Protecting Public Health and the Environment and Restoring Science to Tackle the Climate Crisis*, 86 Fed. Reg. 7037 (Jan. 25, 2021) (signed Jan. 20, 2021); Exec. Order No. 14260, *Protecting American Energy From State Overreach*, 90 Fed. Reg. 15513 (Apr. 14, 2025) (signed Apr. 8, 2025).
[19] *Id*., § 2.
[20] *Id*., § 1.
[21] *Id*., §§ 4-8.
[22] 30 U.S.C. § 1259(a).

defaults."[23] Bonds based on site-specific facts and costs to the agency are sufficient to ensure faithful performance by the operator—and help insulate both from operator default. Inflated bond calculations over-tax the operator, are contrary to the statutory requirement, and create financial risk to operators that was never contemplated in federal law.

The Office of Surface Mining Reclamation and Enforcement's ("OSMRE") Handbook for bond calculations also clarifies that cost estimates for bond calculation should be adjusted to reflect the realities of actual reclamation work, including consideration of factors such as "the number of shifts, fuel costs, etc." [24] The Handbook is expressly limited to the "national level" and recognizes "that there are specific regional and local rates that may differ."[25] Where actual costs are available, they "may be substituted for cost ranges identified in this Handbook."[26] OSMRE also advocates for the use of "accepted engineering practices."[27] Both the federal requirements and guidance favor use of regional and local data when calculating bond amounts, and neither support inflated bond calculations. In fact, for the Absaloka Mine, OSMRE approved Westmoreland's 2024 bond calculation without finding any deficiencies. In contrast, DEQ recently issued its fourth deficiency for the very same bond calculation, concluding that an additional $3,330,000 is required.[28] This is clear evidence that DEQ's bond calculations are not aligned with criteria used by OSMRE when evaluating bond calculations and wholly out of sync with federal bonding requirements.

State Requirements

Like federal law, Montana law requires that several factual considerations inform the bond amount, including "the character and nature of the overburden, the future suitable use of the land involved, and the cost of backfilling, grading, highwall reduction, subsidence stabilization, water control, topsoiling, and reclamation to be required."[29] The statute sets a minimum bonding level, then allows additional bonding "relative to the degree of disturbance projected by the original permit an the annual report."[30] The statute does not support imposition of any maximum bond amount. Instead it begins at the minimum and allows additions to that minimum, but only as supported by the facts of the permit at issue. Although the bond "may not be less than the total estimated cost to the state of completing the work described in the reclamation plan," the "cost to the state" must be determined in accordance with regulatory criteria, which requires the bond amount to be "based on" factual, verifiable data such as the permittee's estimated costs, current machinery production handbooks and publications, documented costs, public contracting requirements, reclamation requirements, cost changes, or other cost information.[31] Nothing in Montana law supports inflated bonding levels that over-tax or penalize the operator. Montana law, like federal law, requires bond calculations to be grounded in factual, supportable data.

---

[23] *Nat'l Wildlife Fed'n v. Hodel*, 839 F.2d 694, 726 (D.C. Cir. 1988).
[24] OSMRE, *Handbook for Calculation of Reclamation Bond Amounts* (October 2020), available at https://www.osmre.gov/sites/default/files/pdfs/directive1005_AppendixA.pdf, Chapter 2-16.
[25] *Id*., Chapter 1-2.
[26] *Id*.
[27] *Id*.
[28] DEQ Ltr. to Westmoreland Absaloka Mining LLC, *Subject: MR311; Notice of Bond Calculation* (June 5, 2025)
[29] § 82-4-223(2), MCA.
[30] § 82-4-223(1), MCA.
[31] § 82-4-223(2), MCA; ARM 17.24.1102(1), (2), (3), (4), and (5).

Bond Calculations in Montana

Unlike its neighbors, Montana currently relies on generalized or nationally derived cost data rather than state-specific information grounded in regional reclamation practices. An additional difference is that Montana has not developed a formalized program to guide its calculations or to provide a predictable resource for operators. Historically, DEQ has relied on the Equipment Watch program to determine equipment rates used in bond calculations. However, upon closer review by several Montana coal mine operators, it was discovered that reliance on Equipment Watch's default annual use hours produced unrealistically high bond estimates. This concern was first raised to DEQ in April 2023 by another Montana coal mine operator.[32]

In response, the Montana Coal Council's Technical Committee examined the issue and, in September 2023, conducted a survey of six contractors engaged in large-scale reclamation work across Montana. The survey revealed none of the contractors operated with the low annual use hours provided in Equipment Watch's default setting.[33] To address this unrealistic part of the bonding calculation, the Montana Coal Council's Technical Committee met with DEQ in February 2024 to formally request use of 4,160 annual use hours, the equivalent of 16-hour work days, 5 days per week—which is actually lower than the average annual use hours reported in the survey.[34] DEQ denied that request even though it indicated it must base the bond amount on "what it can reasonably expect a contractor would bid."[35] DEQ incorrectly implied that Equipment Watch's default setting was the industry standard.[36]

Westmoreland further reviewed Equipment Watch documentation and engaged directly with Equipment Watch personnel who confirmed that its default setting for annual use hours was not appropriate for large mine reclamation projects, including coal mine reclamation.[37] Equipment Watch personnel agreed that a higher annual use hour value would more accurately reflect actual operating conditions and should be used when calculating reclamation costs for surface coal mines.[38] Moreover, both state and federal regulatory frameworks support the use of higher annual use hours, which are already successfully utilized in other states.[39]

More recently, Westmoreland became aware that DEQ is considering the use of a different program, Cost Mine Intelligence, for bond calculation purposes. Cost Mine Intelligence is primarily designed for hard rock mines.[40] Cost Mine Intelligence does have a "Coal Cost Guide," but it is designed for those seeking to invest in mining operations. It includes operating costs such as supply costs, transportation costs, equipment capital costs, and labor costs for an *operating* coal mine, not for *reclaiming* a coal mine.[41] As the company itself states, Cost Mine's

---

[32] Exhibit C, Slide 1.
[33] *Id*., slide 6.
[34] Exhibit B, pp. 2-3.
[35] DEQ Ltr. to G. Harris, *RE: Bond Calculation Discussion* (March 8, 2024), p. 2.
[36] *Id*.
[37] Exhibit B, pp. 3-5.
[38] *Id*.
[39] *Id*., pp. 5-8.
[40] As Westmoreland has previously emphasized, hard rock and surface coal mine reclamation differ significantly in both scope and nature; therefore, the costs associated with hard rock mine reclamation are generally not useful when estimating costs for surface coal mine reclamation. *See* Exhibit A, pp. 3-4.
[41] *See* "Explore the Dataset" at https://www.costmine.com/coal-cost-guide/.

default values are "for estimating purposes only and should not be considered representative of actual market value."[42]

Cost Mine Intelligence also appears to base its equipment rates on the purchase of brand-new equipment, which does not reflect actual industry practice. The reality is that reclamation contractors, including those who would qualify to bid on reclamation work for DEQ, rarely purchase new equipment specifically for a single coal mine reclamation project. In fact, a contractor lacking the necessary equipment likely also lacks qualified operators and relevant experience, rendering them unfit to perform the work in the first instance. This reality was confirmed by the two construction contractors who met with DEQ in November 2024 and explained that they would not go out and buy equipment to reclaim a surface coal mine in Montana because they already own that equipment.[43] Based on our initial evaluation, Westmoreland does not believe Cost Mine Intelligence, without significant tailoring and adjustment, is an appropriate tool for estimating the costs of reclaiming surface coal mines in Montana.

Bond Calculations in Neighboring States

In contrast to Montana, both North Dakota and Wyoming already have well-developed, comprehensive bonding guidance documents based on regional and state-specific reclamation experience. Given the substantial similarities in terrain, coal deposits, mining, and land uses across Montana, North Dakota, and Wyoming, reclamation in all three states is likewise closely aligned, if not functionally identical. Westmoreland encourages DEQ to adopt, in whole or in part, the guidance by either North Dakota or Wyoming. If DEQ chooses to develop its own bonding guidance, we encourage the use of a similar, data-driven process with operator and expert input at the front-end, which has proven successful for our neighboring states.

North Dakota's bond guidance document, Policy No. 16, was originally developed in 1985. The North Dakota Public Service Commission periodically updates the policy, including through annual updates to the variable costs.[44] Input from the state's coal mining industry, particularly the Lignite Energy Council, has been and continues to be an integral driver in the process and is incorporated in each update.[45] Policy No. 16 addresses several key issues directly relevant to Montana, such as differentiated earth-moving costs for small versus large mines, state-specific fuel and equipment costs, labor costs based on prevailing union rates, revegetation costs, and costs associated with administration, engineering, and mobilization.[46] OSMRE has commended the North Dakota Public Service Commission for executing its responsibilities in a "professional, cooperative, and fair manner," and hailed the Policy No. 16 updates as a "major

[42] *See Cost Parameters and Definitions*: 2024-2025, Cost Mine Intelligence, https://calc2024.costs.infomine.com/costparamdefinitions.aspx (last visited May 28, 2025) (also explaining that "[h]ourly operating costs are considered variable," "are directly related to daily use," and that its program allows for and assists operators with adjusting these costs.

[43] Exhibit D.

[44] Exhibit A, p. 5; ND Public Service Commission Reclamation Division, Policy Memorandum No. 16 to Mine Operators, available at https://www.psc.nd.gov/public/consinfo/Coal%20Mining/PMEMO16%20(DEC%202024%20Changes).pdf.

[45] Exhibit A, p. 5, n. 12.

[46] ND Policy Memo No. 16, pp. 2, 5-6, 12-13, 14, 15.

accomplishment."[47] Given the document's strong reputation among regulators and industry stakeholders alike, Policy No. 16 could serve as a valuable model for DEQ, whether adopted in whole or in part. At a minimum, Westmoreland encourages DEQ to draw from North Dakota's collaborative and transparent bonding guidance development process, which incorporates industry recommendations early in both the drafting and revision process.

Similarly, Wyoming collaborates annually with its coal mining industry, specifically the Wyoming Mining Association, to update the ownership and operating costs from Equipment Watch to ensure those figures reflect the actual conditions relevant to reclamation work in the state. Wyoming's Guideline No. 12 is a well-established and accurate reflection of on-the-ground cost and labor conditions specific to Wyoming's coal mine operations.[48] The guideline specifically considers the "usual types of equipment contractors normally have available for use," labor and benefit costs compiled by the Wyoming Mining Association, fuel prices inclusive of state taxes, and both equipment ownership and leasing costs.[49] Guideline No. 12 is robust and detailed. It protects the state of Wyoming from excessive risk while enabling fifteen surface coal mines to successfully operate and reclaim in compliance with all federal regulations. Guideline No. 12 is also currently relied upon by several other states in America, as well as two provinces in Australia.[50] It comprehensively accounts for current reclamation costs, future projected disturbance, third-party reclamation expenses, and financial contingencies in the event of bond forfeiture.[51] Given the operational and environmental similarities between Wyoming and Montana, here too DEQ could reasonably adopt Guideline No. 12 in whole or in part. Moreover, the demonstrated success of Wyoming's Guideline No. 12 underscores the value of engaging directly with the mining industry prior to drafting a bonding guidance document.

Westmoreland contracted with a consultant who has experience calculating coal mine reclamation bonds in multiple states. The consultant calculated the bond amount for one of Westmoreland's Montana mine areas using North Dakota's Policy No. 16, Wyoming's Guideline No. 12, and Montana DEQ's bonding rates as we understood them in 2024. The North Dakota and Wyoming methods resulted in bond amounts that are commensurate with Westmoreland's reclamation experience, appear accurate, and illustrate the significant disparity between Montana's current bond calculations and those of its neighboring states. Based on DEQ's bonding rates, Westmoreland's bond liability calculates to $97,867,860. In contrast, the same bond calculated pursuant to North Dakota's Policy No. 16 resulted in $60,137,024 and $53,051,657 pursuant to Wyoming's Guideline No. 12. Montana's current bonding rates result in a bond amount that is 63% to 84% higher than North Dakota's and Wyoming's calculated bond amounts. This demonstrates that Montana's current bonding rates, which are based on

[47] OSMRE, *Annual Evaluation Summary Report For the North Dakota Public Service Commission Regulatory Program* (Evaluation Year 2024), available at https://www.psc.nd.gov/public/consinfo/Coal%20Mining/ND%20EY2024%20Regulatory%20Annual%20Report%20FINAL.pdf.

[48] Guideline No. 12: Standardized Reclamation Performance Bond Format and Cost Calculation Methods, Department of Environmental Quality Land Quality Division, at iv (revised Dec. 2, 2024) https://drive.google.com/file/d/1gGD3AT-qNFSbBAEitVqYC9cu2zb2nfTp/view.

[49] Guideline No. 12, pp. 1, 2, 4.

[50] Video by Wyoming Department of Environmental Quality outlining its processes for bonding coal mines in the State (Aug. 8, 2023) https://www.facebook.com/watch/?v=247521091442482.

[51] *Id*.

generic, nationally derived data, are wildly inaccurate, arbitrary, and capricious. The end result is significant—tens of millions of dollars of extra bond liability for Montana coal mine operators, with no apparent basis or demonstrated benefit. Montana's current bond calculations therefore appear arbitrary and capricious. The inflated calculations impermissibly over-tax coal mine operators, create unacceptable risks for coal mine operators, and upend the synergistic process of bonding, mining, reclamation, and bond release necessary for a vital coal mining industry, which is inextricably linked to Montana's economic vitality.

Montana, North Dakota, and Wyoming all regulate coal mining and reclamation in accordance with the same federal standards and all three states share similar geological characteristics, coal deposits, and land uses. Given this regulatory and environmental alignment, there is no reasonable justification for the large disparity between Montana's bond calculations and those derived from North Dakota's and Wyoming's well-established, state-specific methodologies. Furthermore, recognizing the broad adoption of the programs and guidance developed in North Dakota and Wyoming, which incorporate regular adjustments to reflect accurate data, in contrast to the Montana program, which is not in alignment with authoritative industry practice and not adopted anywhere else, Montana's program is an outlier. While minor variations among states may be expected, discrepancies of this scale raise serious concerns.

Conclusion

Montana's current reliance on generic, non-state-specific data—despite the availability of more accurate and tested models from neighboring states—results in inaccurate and over-inflated bond calculations. Such bond calculations undermine the balance that MSUMRA seeks to achieve: ensuring sufficient financial assurance for the State without imposing burdens so excessive that they impair reclamation, discourage investment, or destabilize one of Montana's most critical industries.

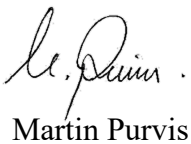
Montana needs a more tailored, transparent, predictable, and locally informed bonding methodology that accurately reflects reclamations costs. An accurate bonding guidance document will mitigate the risk of both under- and over-bonding, protect the long-term viability of coal operations in the state, and position Montana to participate in and benefit from federal programs and priority permitting initiatives that will, in turn, produce additional tax revenues and employment opportunities that benefit the State and its citizens.

Westmoreland respectfully urges DEQ to take this opportunity to capitalize on the good work already done by our neighboring states and develop a bonding guidance document that not only complies with MSUMRA, but also fulfills its spirit by fostering cooperation and building relationships. A robust bonding guidance document, informed from the outset by technical experts and industry professionals with firsthand knowledge of reclamation practices, is essential. As Montana DEQ is aware, coal mine reclamation is a highly technical process and successfully regulating it demands the same level of technical insight and precision. We strongly encourage DEQ to convene a technical working group before any draft is published, and to take full advantage of the expertise, data, and field experience that operators and local contractors are willing to contribute.

Thank you again for your time, attention, and leadership. We remain committed to working in

good faith with DEQ to help craft a durable and defensible bonding guidance document that complies with MSUMRA and serves the public interest by incentivizing reclamation while supporting the continued vitality of Montana's coal industry. We stand ready to support DEQ's efforts in achieving a fair and fact-based approach to coal mine bonding in Montana.

Sincerely,



Martin Purvis

EXHIBIT M

COAL AND OPENCUT MINING BUREAU FIELD INSPECTION REPORT

Coal Section
Department of Environmental Quality
P. O. Box 200901
Helena MT 59620-0901
(406) 444-4970

Permit Information	Inspection Information
Permit Number: C1985005 **Mine Name:** Absaloka Coal Mine **Operator Name:** Westmoreland Resources, Inc. **Operator Address:** P.O. Box 449 100 Sarpy Creek Rd. Hardin, MT 59034	**Inspector(s):** Travis Dunkle, Michael Glenn **Inspection Type:** Complete **Inspection Reason:** Periodic **Inspection Date(s):** January 10, 2019, January 10, 2019 **Other Persons Present:** Dave Kuzara (WRI)

Inspection Topic Summary

NOTE: **Y**=Observed, **F**=Follow-Up Item, **M**=Maintenance Item, **N**=Non-Compliance, **Blank**=Not Observed

Y .....Administrative	**Y** ..... Hydrology
Y .....Air Resource Protection	..... Mine Plan
YM .....Backfill & Grading	**Y** ..... Off-Site Impact
.....Blasting	..... Other
Y .....Coal Conservation	..... Permit Stipulations
YM .....Contaminant Control	..... Processing Waste
.....Cultural Resources	**Y** ..... Rail Loops and Roads
.....Drilling	..... Subsidence
Y .....Excavation	..... Sediment Control
Y .....Facilities	**Y** ..... Signs & Markers
Y .....Fish & Wildlife	**Y** ..... Soils
	Y ..... Vegetation

Inspection Topic Observations

Administrative:
All open MR's were discussed with the operator. MR 291 had been reviewed and determined that a letter from DEQ was still needed for approval. This was sent out Monday, January 7th, 2019. MR 288 was still open. This is an update to the mine plan that is in deficiency review and in the Operator's court in the review process. A response will likely be delayed until after the bankruptcy hearing as this is a corporate decision as to how to move forward.

The blasting notice was discussed with the operator. The concern was that the blasting notice was too general and did not define a period of twelve months for which the blasting notice applied. DEQ did not require the current notice to be republished but requested that future blasting notices include the annual period the notice is applicable for, with a specific start date of the blasting cycle.

Air Resource Protection:
The ground was relatively damp and no fugitive dust issues were noted. Water trucks were active on roads.

Backfilling & Grading:
The contractor MK Weeden was working on building drainages down Ramp 1, ripping the ramp road, and grading adjacent side-slopes. The operator should ensure that these drainages tie-in properly to current drainage plans. Also, as these ramps are wide flat surfaces, the operator must ensure that the reconstructed drainages blend with adjacent topography and provide adequate channel diversity. Straight channels do not fit the PMT. Disturbing existing reclamation may be necessary for proper tie-ins.

The Dam 23 drainage was viewed in relation to leaving wetlands that have established downgradient of Ramp 1, and the newly re-contoured channel between Ramp 2 and Ramp 1. This channel appears to have convexities that need to be addressed. See MI

Number of complete inspections this quarter: 1

below.

The current permit calls for soiling the drainage bottoms. See the Soils section for further discussions.

Coal Conservation:
All coal being hauled from the south permit.

The primary customer in MN is on an outage so not as much coal was required. The Hardin plant was running and coal was being loaded into over-the-road trucks to transport there.

Coal at the end of old ramp 4 has not been hauled.

Contaminant Control:
A contractor has reduced the sidewalls on the used barrel storage area to roughly 4 inches on the loading side. This will allow the operator and folks loading to have a better idea of what all is being stored here and when to call to get it emptied.

The fuel island staining hasn't been fully cleaned up yet, see MI below.

Excavation:
The operator had uncovered some coal in the west pits, but the equipment was breaking down so that has stalled until the dragline can walk back to this area to uncover additional coal at cut W15.

Facilities:
Facilities observed were in good order.

There were drillers on-site to install the new Madison well pump and pipe.

Fish & Wildlife:
Mule deer were observed in reclamation.

Hydrology:
Wetland reclamation was discussed in the Pond 27 drainage. WRI is required to build 6 acres of wetlands above the pond. There were potential options to break this up and make several wetlands that add up to this acreage and utilize existing trap areas for wetland development. These options need to be discussed further prior to implementation.

Pond 28 had plenty of water holding capacity available.

Off-Site Impact:
No off-site impacts were observed.

Rail Loops and Roads:
All roads observed were in good condition.

Soils:
DEQ and the operator talked about ways to roughen the surface near Pond 28 to do a better job prepping the soil surface for seeding.

DEQ recommends halting soil laydown adjacent to drainages until channel profiles are submitted and approved by DEQ. In looking at the Dam 23 drainage, it was noted that drainages were originally specified to have two feet of soil in them. WRI currently has a soil shortage. Once the operator has received approval for the channel profiles, DEQ recommends they limit topsoil laydown adjacent to drainages to blending the edges of the drainages to adjacent fields. Drainage bottoms should not be soiled. Drainage bottom widths should change as appropriate based on landscape and slope conditions.

Vegetation:
Vegetation on the northernmost highwall reduction area hasn't fully established and the operator is looking at potential options for seeding. We discussed using Indian ricegrass, little bluestem, side-oats gramma, and other warm season grasses that may do well in sandy, dry soils. Based on driving around the area, the little bluestem should be the dominant species as this is prevalent in unmined areas adjacent to the mine.

The old Pond 32 spillway was observed to determine if it would contribute excess water flows past the Pond 28 reclamation. This area is densely vegetated and will likely only contribute small amounts of water to the pond 28 spillway reclamation.

Follow-Up Item Summary

Maintenance Item Summary

Date & Sequence Number: January 10, 2019 - 2
Resolution Due Date: February 10, 2019
Rules Citation: 17.24.501
Description: Backfilling & Grading - Submit to the department surveys with drainage profiles of current and PMT elevations for Dam 22 and 23 drainages with 2-foot contours or better along their entire length.
Narrative:

Date & Sequence Number: January 10, 2019 - 1
Resolution Due Date: February 15, 2019
Rules Citation: 17.24.609
Description: Contaminant Control - There is staining at the fuel island that was observed in December and had not yet been addressed. This is general maintenance, that had not been completed. The operator must get all stained materials picked up at the fueling island.
Narrative:

Date & Sequence Number: November 29, 2018 - 2
Resolution Due Date: January 31, 2019
Rules Citation: 17.24.308
Description: Vegetation - Several Tamarisk (salt-cedar) plants were observed in Sump 5. Tamarisk species are a Priority 2B plant in the Montana Noxious Weed list. ARM 17.24.308(1)(f). Cut-stump treatment is appropriate in low-density occurrences, such as what was observed in November (2018) in Sump 5. Follow USFS guidance, including the application methodology, timing, and follow-up to treat this weed. This maintenance should be done prior to spring runoff to facilitate access to the site, and thorough treatment of the area.
Narrative: December 2018: The Tamarisk was not discussed during the inspection. January 2019: The operator was concerned that these were not actually tamarisk plants. DEQ confirmed they were and that they needed to be addressed when weather conditions allowed.

Signature of Inspector(s): Travis Dunkle Michael Glenn	**Date:** January 17, 2019
Reviewed by: Chris Yde	**Date:** January 17, 2019

U.S. DEPT. OF THE INTERIOR
OFFICE OF SURFACE MINING
Mine Site Inspection
Federal Program

1. Permittee/Person: WESTMORELAND RESOURCES, INC.
2. Address: P.O.BOX 449
3. City: HARDIN
4. State: MT
5. Zip Code: 59034
6. Phone Number: (406) 342-5241
7. Operator Name, if Different than Permittee:
8. Mine Name: ABSALOKA NORTH MINE

9. Permit Number: C-1985-005
10. Permit Type: PP
11. Field Visit Date: 3/5/2019 (mm/dd/yyyy)
12. Purpose: FP
13. Field Office Use: 126909
14. Permit Status: A
15. Site Status: AP
16. Facility Type: ADFGHI
17. OSM Office #: 010
18. CCID #:
19. Land Code: SI
20. M.S.H.A. ID #: 24-00910
21. State Abbrev.: CR
22. County/Burrough: BIG HORN
23. AVS Permittee Entity ID Number: 060036
24. Control #:

25. Performance Standard Categories

Codes: 1=Compliance, 2=Noncompliance, 3=Not Planned, 4=Not Started, 5=Noncompliance Identified Elsewhere, 6=Previously Cited, 7=Permit Defect

A. Administrative
1. 1 Mining within Valid Permit
2. 1 Mining within Bonded Area
3. 1 Terms & Conditions of Permit
4. ____ Liability Insurance
5. ____ Ownership and Control
6. 1 Temporary Cessation
7. ____ AML Rec. Fees - Non-Respondent
8. ____ AML Rec. Fees - Failure to Pay

B. Hydrologic Balance
1. ____ Drainage Control
2. ____ Inspections & Certifications
3. 1 Siltation Structures
4. 1 Discharge Structures
5. ____ Diversions
6. ____ Effluent Limits
7. ____ Ground Water Monitoring
8. ____ Surface Water Monitoring
9. ____ Drainage - Acid-Toxic Materials
10. 1 Impoundments
11. ____ Stream Buffer Zones

C. Topsoil & Subsoil
1. 1 Removal
2. 1 Substitute Materials
3. 1 Storage and Protection
4. 1 Redistribution

D. Backfilling & Grading
1. ____ Exposed Openings
2. 1 Contemporaneous Reclamation
3. 1 Approximate Original Contour
4. 1 Highwall Elimination
5. ____ Steep Slopes (includes downslope)
6. ____ Handling of Acid and Toxic Materials
7. 1 Stabilization (rills and gullies)

E. Excess Spoil Disposal
1. ____ Placement
2. ____ Drainage Control
3. ____ Surface Stabilization
4. ____ Inspections & Certifications

F. Coal Mine Waste (Refuse Piles/Impoundments)
1. ____ Drainage Control
2. ____ Surface Stabilization
3. ____ Placement
4. ____ Inspections & Certifications
5. ____ Impounding Structures

G. Use of Explosives
1. ____ Blaster Certification
2. ____ Distance Prohibitions
3. ____ Blast Survey/Schedule
4. ____ Warnings & Records
5. 1 Control of Adverse Effects

H. ____ Subsidence Control Plan

I. Roads
1. 1 Road Construction
2. ____ Certification
3. 1 Drainage
4. 1 Surfacing and Maintenance
5. ____ Reclamation

J. Signs & Markers
1. ____ Signs
2. ____ Markers

K. ____ Distance Prohibitions

L. Revegetation
1. ____ Vegetative Cover
2. ____ Timing

M. 1 Postmining Land Use

N. Other

General Performance Category		

26. Permitted Acres
7110.0 a Permitted
6575.0 b Disturbed (est.)

27. Frequency for previous 4 Calendar Qtrs.
a Required Completes: 4 — c Completes Conducted: 4
b Required Partials: 8 — d Partials Conducted: 8

28. Total Bonded Acres
7110.0 a. Total Bonded
3101.5 b. Phase I Release
2703.0 c. Phase II Release
298.0 d. Phase III Release

29. Inspection Hours
4.0 a. Permit Review
3.0 b. Site Visit Time
6.0 c. Travel Time
2.0 d. Report Writing

30. Signature Block
Inspector's Signature
John Ahlbrandt — 164
Printed Name and Inspector ID #
Date: 3/15/2019

Reviewing Official: _____ Review Date: 3-15-19

Small Business Regulatory Enforcement Fairness Act (SBREFA) Your Comments Are Important

The Small Business and Agriculture Regulatory Enforcement Ombudsman and 10 Regional Fairness Boards were established to receive comments from small businesses about Federal agency enforcement actions. The Ombudsman will annually evaluate the enforcement activities and rate each agency's responsiveness to small business. If you are a small business (a business with 500 or fewer employees including those of affiliates) and wish to comment on the enforcement or compliance activities of OSM, call 1-888-REG-FAIR (1-888-734-3247)

CASPER AREA OFFICE
INSPECTION NARRATIVE

COMPANY:	Westmoreland Resources, Inc. (WRI)
MINE:	Absaloka (North)
PERMIT NO:	C-1985-005 / MT-0007H
DATE OF INSPECTION:	March 5, 2019
WEATHER:	very cold, clear
COMPANY OFFICIAL:	David Kuzara
STATE OFFICIALS (MTDEQ):	Brian Schrage, Julian Calabrese, Ric Casteel
OSMRE OFFICIALS:	John Ahlbrandt JPA
CROW TRIBAL OFFICIALS:	Darrell King, Mike Not Afraid

A monthly, partial inspection was conducted to review the Company's compliance with selected permit and performance standards. The inspection included: a permit review, a discussion of the current mining and reclamation status, a review of previously recorded inspection reports/maintenance items, and a site inspection.

Site conditions at the mine were very cold, with significant snow cover and access around the mine was mostly restricted to active haul roads. There was some surface thawing of the roads later during the inspection, even further limiting access. There were no dust issues observed during the inspection.

The company indicated the Judge in their current bankruptcy proceedings has approved their moving forward with the plan, and that the on-the ground operations will not be affected. The Hardin power plant is still buying/hauling coal from the mine, in addition to their regular production/sales. Mr. Kuzara informed the group that they have installed a new pump in their Madison well and it is again functional. He also indicated that they intend to start doing more of their own water monitoring (in-house), rather than having it contracted.

WRI has contracted topsoil respread work out to MK Weeden Construction, Inc in the North ramp(s) area. There was no active work observed during the inspection, however considerable progress has been made. The commitment of 159 acres by the end of the 2018 was fulfilled, and work is now continuing towards the 2019 commitment of an additional 100 acres. An additional 109 acres are also planned for 2020 (for a total of 368 acres). The Company indicated that they intend to seed the soiled area this spring, as conditions allow.

The remaining coal at Ramp 4 north has been shot and they are hauling it out. Once this coal is removed the ramp/area can be backfilled and recontoured.

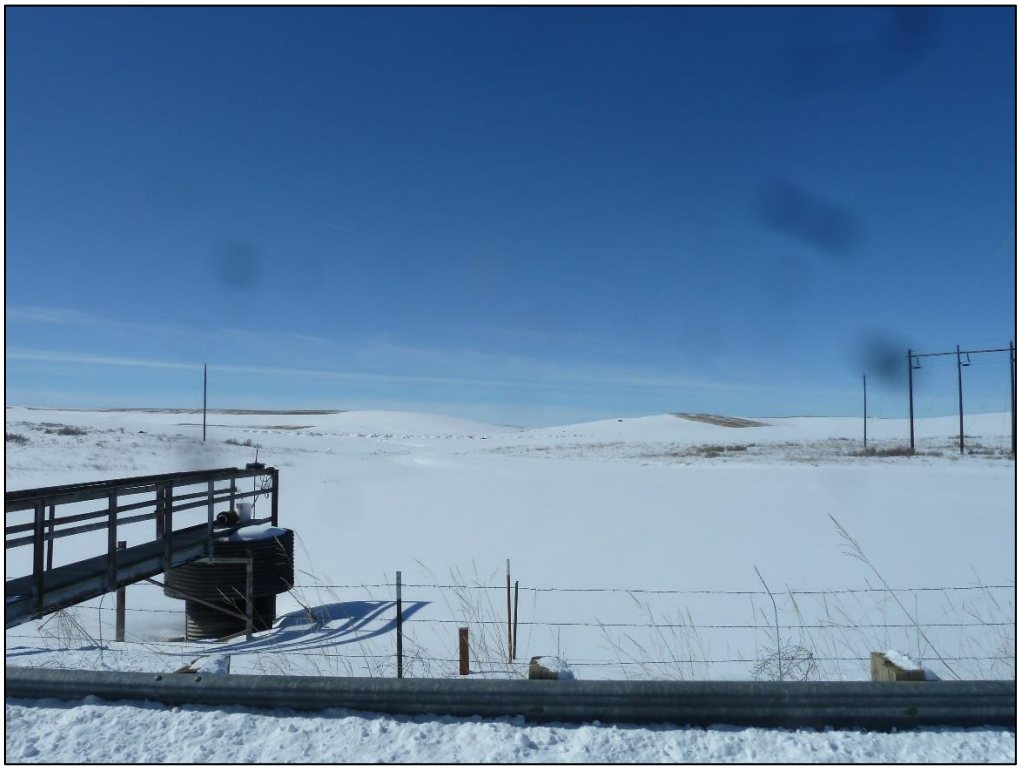
We were unable to get to Pond 28, however Ponds 22, 23, and 24 along the County road were observed. Pond 24 will need to be monitored more closely for adequate storage capacity since its drainage is no longer cut off by the pit and consequently will receive more runoff than it previously did.

At the used lubricant (barrel) storage area, the Company has reconfigured (removed one side of) the concrete containment wall to allow easier access for placement/removal of barrels.

Due to snow melt beginning, there were a few areas on/along the main haul road which were ponding, and may need some temporary drainage relief, although there were no specific compliance issues or concerns noted during field inspection. Photos taken during the inspection are included below.



Reconfigured (opened up) barrel storage pad



Pond 24 along County Road, showing capacity will need to be addressed frequently

CC: Westmoreland Resources Inc.
Montana DEQ, Industrial & Energy Minerals Bureau
Crow Office of Reclamation, Crow Agency, MT
Bureau of Indian Affairs, Crow Agency, MT

COAL AND OPENCUT MINING BUREAU FIELD INSPECTION REPORT

Coal Section
Department of Environmental Quality
P. O. Box 200901
Helena MT 59620-0901
(406) 444-4970

Permit Information	Inspection Information
Permit Number: C1985005 **Mine Name:** Absaloka Coal Mine **Operator Name:** Westmoreland Resources, Inc. **Operator Address:** P.O. Box 449 100 Sarpy Creek Rd. Hardin, MT 59034	**Inspector(s):** Travis Dunkle, Michael Glenn, Kevin Krogstad **Inspection Type:** Aerial **Inspection Reason:** Periodic **Inspection Date(s):** June 20, 2019, June 20, 2019 **Other Persons Present:** Troy (RMR Pilot)

Inspection Topic Summary

NOTE: **Y**=Observed, **F**=Follow-Up Item, **M**=Maintenance Item, **N**=Non-Compliance, **Blank**=Not Observed

Y .....Administrative	**Y** ..... Hydrology
Y .....Air Resource Protection	..... Mine Plan
Y .....Backfill & Grading	**Y** ..... Off-Site Impact
.....Blasting	..... Other
.....Coal Conservation	..... Permit Stipulations
.....Contaminant Control	..... Processing Waste
.....Cultural Resources	**Y** ..... Rail Loops and Roads
.....Drilling	..... Subsidence
.....Excavation	**Y** ..... Sediment Control
Y .....Facilities	..... Signs & Markers
.....Fish & Wildlife	..... Soils
	Y ..... Vegetation

Inspection Topic Observations

Administrative:
An aerial inspection was conducted on June 20, 2019.

Air Resource Protection:
No fugitive dust issues were observed.

Backfilling & Grading:
Ramps 1 and 2 were flown to observe recent grading. Channels were square cut with little diversity (See May 23 Inspection report, Photo 2).

Hydrology:
Dry Coulee Dam, Dam 24, Sump 5 and Pond 28 appeared to be holding water.

Off-Site Impact:
No off-site impacts were observed.

Sediment Control:
The trap above Dam 24 was full.

Substantial sediment build up was observed in the west end of Pond 28.

Vegetation:

Number of complete inspections this quarter: 3

Reclamation was being tilled and a seeder was observed on site.

Follow-Up Item Summary

Maintenance Item Summary

Date & Sequence Number: April 10, 2019 - 2
Resolution Due Date: May 15, 2019
Rules Citation: 17.24.702
Description: Backfilling & Grading - Grading in Ramp 1 and Ramp 2 needs to be compared against the approved PMT using recently collected LIDAR elevation modeling. ARM 17.24.501 provides general backfilling and grading requirements and ARM 17.24.634 outlines requirements for the reclamation of drainage basins.
Narrative: April 25, 2019: The flight data had not been finalized yet.
May 9, 2019. Flight data had not been finalized yet.
June 13, 2019 The flight data had not been finalized yet.

Date & Sequence Number: January 10, 2019 - 2
Resolution Due Date: May 15, 2019
Rules Citation: 17.24.501
Description: Backfilling & Grading - Submit to DEQ surveys with drainage profiles of current and PMT elevations for Dam 22 and 23 drainages with 2-foot contours or better along their entire length.
Narrative: March 5, 2019: The operator stated that this area has been flown with the LIDAR drone and contours will be submitted soon.
March 26, 2019: The operator reported that Ramp 1 and 2 were removed and had been flown but the entire reclamation area had not been surveyed since ramp removal. The operator anticipated submitting surveys to the department within two weeks.
April 10, 2019: Drainage profiles have not been submitted to DEQ. The operator plans a drone-based LIDAR flight in the near future.
April 25, 2019: The drone flight had been carried out; however, results were not finalized.
June 13, 2019: Results have yet to be received.
May 9th, 2019: Same as April 25th, 2019.

Date & Sequence Number: June 13, 2019 - 1
Resolution Due Date: September 30, 2019
Rules Citation: 17.24.609
Description: Contaminant Control - The "Old Y" area at the junction of Ramps 1 and 2 contains numerous pieces of operable and non-operable equipment that are leaking hydrocarbon fluids onto the ground. DEQ observed over 25 separate areas of staining. Photos 1 - 6 are representative of observations. Dave Kuzara was informed that this area must be cleaned up consistent with DEQ regulations.

On 6/20/2019 DEQ received an email from Dave outlining the proposed cleanup activities as exerpted below:
'Fluids have been drained out of the equipment. Drip pans have been ordered and will be installed under the equipment that may still be leaking. Garbage and metal recycle dumpsters have been ordered and are on their way to the site this week. We will begin to pick up garbage this week. We have to lower the mast on the drill which will take some time. We have contacted used equipment dealers to come and bid on the equipment. Anything of value will be hauled off. Equipment will be moved off the pad and all stained areas will be surveyed using GPS. The areas will be excavated and hauled to the land farm. Once the stained material has been removed, we will call your staff and have them bring out the sniffer and spot check the GPS'ed areas. Anything not of value will be cut up for scrap and hauled away. The mine manger put a drop dead date to have everything removed by the end of September. The contractor has also been contacted to remove the 3 D-11 dozers off site as soon as possible.'

The above activities and schedule are acceptable to DEQ with the requirement that WMI provide DEQ with 30-day progress updates on activities on or before July 31, and August 30, 2019, with a final confirmation report by September 30, 2019.

Narrative:

Date & Sequence Number: April 10, 2019 - 3
Resolution Due Date: May 15, 2019
Rules Citation: 17.24.639
Description: Sediment Control - Sediment in Pond 24 was built up to a level that requires maintenance at the head of the reservoir, which diminishes capacity for stormwater, additional sediment loading, and does not provide minimum required detention for adequate treatment prior to discharge.
Narrative: April 18, 2019: A trap has been cut into the channel above the pond. Plans to advance material removal are delayed by moisture content.
May 9, 2019: The trap above Dam 24 was visited. It was holding no water.
June 2019: Absaloka has not completed removing the sediment as the area was still too wet for machinery access.

Signature of Inspector(s): Travis Dunkle Michael Glenn Kevin Krogstad	**Date:** July 17, 2019
Reviewed by: Robert Smith	**Date:** July 17, 2019

U.S. DEPT. OF THE INTERIOR
OFFICE OF SURFACE MINING
Mine Site Inspection
Federal Program

1. Permittee/Person: WESTMORELAND RESOURCES, INC.
2. Address: P.O.BOX 449
3. City: HARDIN
4. State: MT
5. Zip Code: 59034
6. Phone Number: (406) 342-5241
7. Operator Name, if Different than Permittee: WESTMORELAND ABSALOKA MINING, LLC
8. Mine Name: ABSALOKA NORTH MINE

9. Permit Number: C-1985-005
10. Permit Type: PP
11. Field Visit Date: 9/25/2019 (mm - dd - yyyy)
12. Purpose: FC
13. Field Office Use: 128164
14. Permit Status: A
15. Site Status: AP
16. Facility Type: ADFGHI
17. OSM Office #: 010
18. CCID #:
19. Land Code: SI
20. M.S.H.A. ID #: 24-00910
21. State Abbrev.: CR
22. County/Burrough: BIG HORN
23. AVS Permittee Entity ID Number: 060036
24. Control #:

25. Performance Standard Categories

Codes: 1=Compliance, 2=Noncompliance, 3=Not Planned, 4=Not Started, 5=Noncompliance Identified Elsewhere, 6=Previously Cited, 7=Permit Defect

A. Administrative
1. 1 Mining within Valid Permit
2. 1 Mining within Bonded Area
3. 1 Terms & Conditions of Permit
4. 1 Liability Insurance
5. 1 Ownership and Control
6. 1 Temporary Cessation
7. _____ AML Rec. Fees - Non-Respondent
8. _____ AML Rec. Fees - Failure to Pay

B. Hydrologic Balance
1. 1 Drainage Control
2. 1 Inspections & Certifications
3. 1 Siltation Structures
4. 1 Discharge Structures
5. 1 Diversions
6. 1 Effluent Limits
7. 1 Ground Water Monitoring
8. 1 Surface Water Monitoring
9. 3 Drainage - Acid-Toxic Materials
10. 1 Impoundments
11. 3 Stream Buffer Zones

C. Topsoil & Subsoil
1. 1 Removal
2. 1 Substitute Materials
3. 1 Storage and Protection
4. 1 Redistribution

D. Backfilling & Grading
1. 3 Exposed Openings
2. 1 Contemporaneous Reclamation
3. 1 Approximate Original Contour
4. 1 Highwall Elimination
5. 3 Steep Slopes (includes downslope)
6. 3 Handling of Acid and Toxic Materials
7. 1 Stabilization (rills and gullies)

E. Excess Spoil Disposal
1. 3 Placement
2. 3 Drainage Control
3. 3 Surface Stabilization
4. 3 Inspections & Certifications

F. Coal Mine Waste (Refuse Piles/Impoundments)
1. 3 Drainage Control
2. 3 Surface Stabilization
3. 3 Placement
4. 3 Inspections & Certifications
5. 3 Impounding Structures

G. Use of Explosives
1. 1 Blaster Certification
2. 1 Distance Prohibitions
3. 1 Blast Survey/Schedule
4. 1 Warnings & Records
5. 1 Control of Adverse Effects

H. 3 **Subsidence Control Plan**

I. Roads
1. 1 Road Construction
2. 1 Certification
3. 1 Drainage
4. 1 Surfacing and Maintenance
5. 1 Reclamation

J. Signs & Markers
1. 1 Signs
2. 1 Markers

K. 3 **Distance Prohibitions**

L. Revegetation
1. 1 Vegetative Cover
2. 1 Timing

M. 1 **Postmining Land Use**

N. Other

General Performance Category		

26. Permitted Acres
7110.0 a. Permitted
6580.0 b. Disturbed (est.)

27. Frequency for previous 4 Calendar Qtrs.
a. Required Completes: 4 — c. Completes Conducted: 4
b. Requied Partials: 7 — d. Partials Conducted: 7

28. Total Bonded Acres
7110.0 a. Total Bonded
3101.5 b. Phase I Release
2703.0 c. Phase II Release
298.0 d. Phase III Release

29. Inspection Hours
12.0 a. Permit Review
8.0 b. Site Visit Time
7.0 c. Travel Time
6.0 d. Report Writing

30. Signature Block
Inspector's Signature:
Gene Robinson — 108
Printed Name and Inspector ID #:
Date: 10/10/2019

Reviewing Official: _____ Review Date: 10-11-19

Small Business Regulatory Enforcement Fairness Act (SBREFA) Your Comments Are Important

The Small Business and Agriculture Regulatory Enforcement Ombudsman and 10 Regional Fairness Boards were established to receive comments from small businesses about Federal agency enforcement actions. The Ombudsman will annually evaluate the enforcement activities and rate each agency's responsiveness to small business. If you are a small business (a business with 500 or fewer employees including those of affiliates) and wish to comment on the enforcement or compliance activities of OSM, call 1-888-REG-FAIR (1-888-734-3247)

CASPER FIELD OFFICE
INSPECTION NARRATIVE

COMPANY:	Westmoreland Resources, Inc.
MINE:	Absaloka
PERMIT NO:	C-1985-005 / MT-0007H
DATE OF INSPECTION:	September 25, 2019
WEATHER:	Cloudy and Cool
COMPANY OFFICIAL:	Dave Kuzara
STATE OFFICIAL	Michael Glenn, Martin Van Oort
OSMRE OFFICIAL:	Gene Robinson

A quarterly complete inspection was conducted to review the Company's compliance with all permit and performance standards. This inspection included a permit review, review of previously recorded inspection reports/maintenance items, and a site inspection. A review of the following records was conducted

RECORDS	*COMMENTS*
Mining Permit # MT-0007H	Expires February 1, 2023.
Acres Permitted = 7,110	Acres Bonded = 7,110
Reclamation Bond Type Company Number Amount Number Amount Reclamation Bond Type Company Number Amount Reclamation Bond Type Company Number Amount Reclamation Bond Type Company Number Amount Total bond for permit	Surety Travelers Casualty & Surety #64S103974869BCM $10,035,971.00 #64S104737430BCM $8,521,455.00 Surety Lexon Insurance Company #1069661 $2,000,000.00 Letter of Credit First Interstate Bank #1109600389 $1,702,762.00 Surety Fidelity and Deposit Company #9038864 $3,290,415.00 $25,550,593.00
Liability Insurance	Expires July 01, 2020. Copy furnished to Casper Office.
MPDES Permit #MT-0021229	Records up thru August, 2019 sent to MT / DEQ and Casper Field Office (CFO) and placed in inspectors file.
Blasting Certifications	On file and up to date.
Blasting Notice	Expires November 1, 2019. The operator shall republish the blasting schedule in a newspaper of general circulation in the locality of the blasting site and redistribute copies of the schedule to local governments and public utilities and to each local residence within 1/2 mile of the proposed blasting site described in the schedule at least every 12 months at least 10 days, but not more than 30 days.

Blasting records	No records since February, 2019 have been furnished to CFO. Casper Office has questions about predicted levels at nearest structure. Company is now monitoring all blasts as required by OSMRE. Company will make all records available for inspection prior to or during next inspection.
New Sediment Pond Construction Certification	Company has submitted as-built Company certification for Pond #34. No further pond construction is planned.
Annual Pond Recertification	Will be submitted as part of the Annual 2019 Hydrology Report. Report has yet to be filed.
Quarterly Pond Inspections	Inspection reports for April, May and June completed. Reports for July, August and September due end of month.
Haulroad Certification	As built certifications have been furnished to CFO.
Wildlife Monitoring	On file and submitted as required.
Ground & Surface Water Monitoring	On file and submitted as required.

Company has completed the required reclamation (100 acres) in the Ramp 2 area. Company has completed all work for 2019.

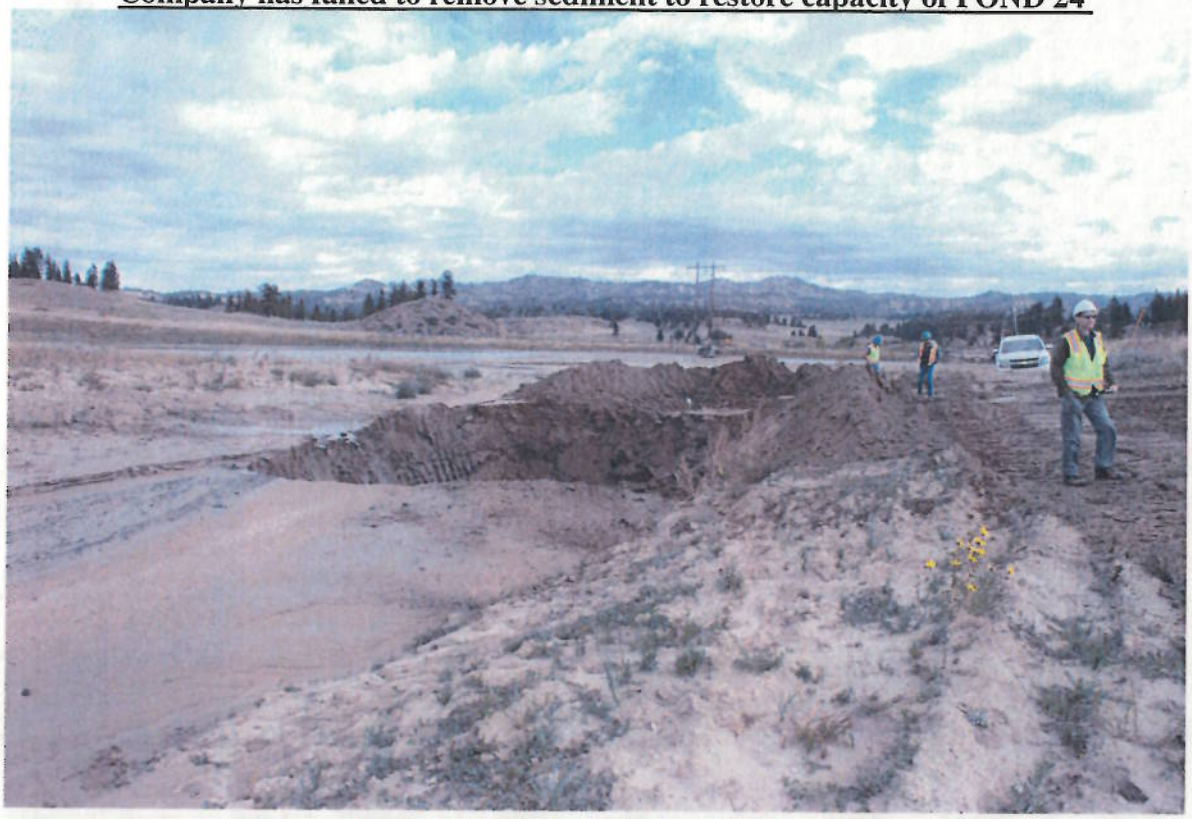
POND 24 filled to capacity with sediment



Up Stream of POND 24



Company has failed to remove sediment to restore capacity of POND 24



Unvegetated reclaimed watershed of POND 24



Erosion of unvegetated reclaimed area above POND 24





All coal has been removed from Ramp 4 area.



Company has failes to resoil the entire width of Ramp 2

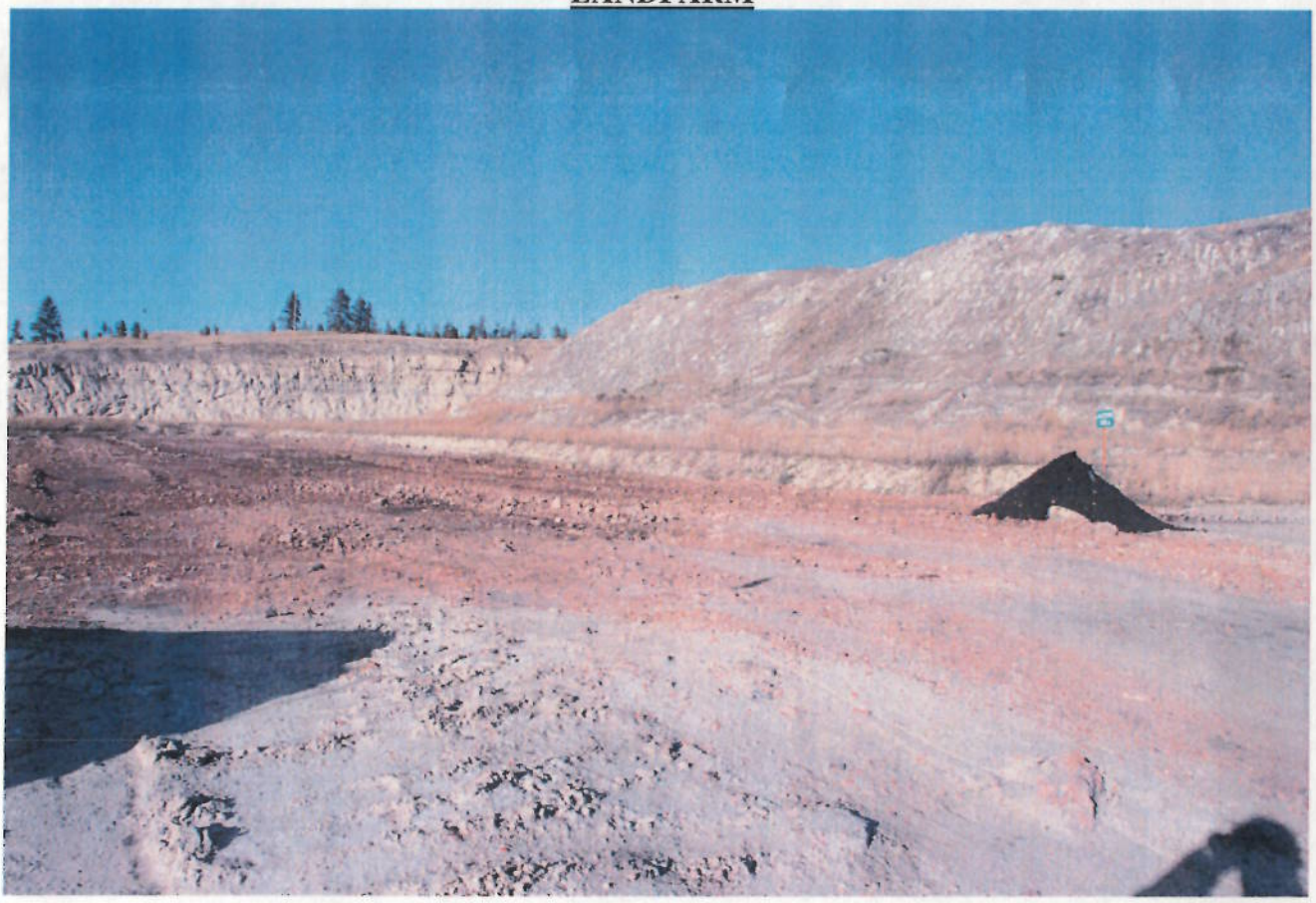








LANDFARM



RAMP 1 regrade, resoil and seeding

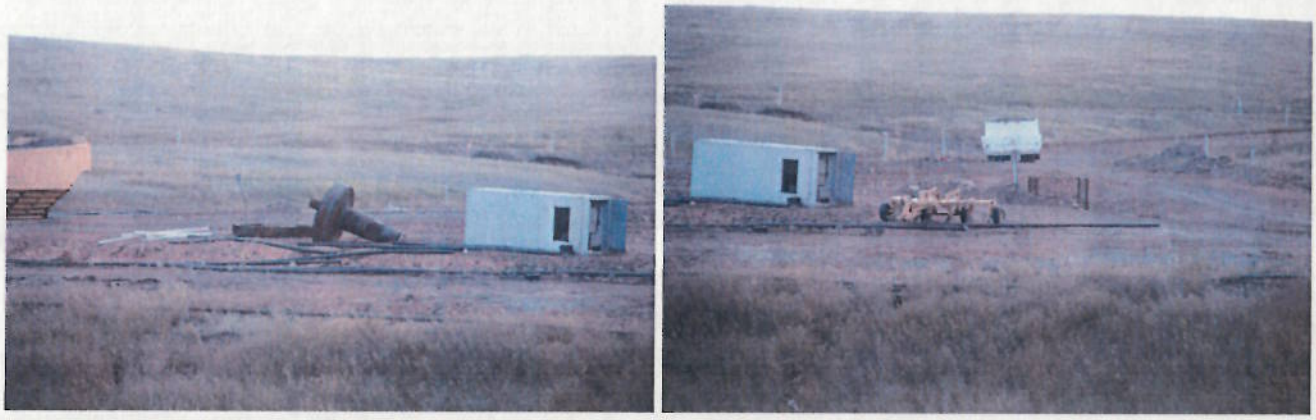




Y area (Ramps 1&2) Equipment Storage

Company has begun removal and clean up.





CC: Westmoreland Resources, Inc.
CCRO
BIA
OSM/WRC/Indian Lands
MT/DEQ

Samuel J. King
Jeremiah R. Langston
Amanda D. Galvan
Montana Department of
Environmental Quality
P.O. Box 200901
Helena, MT 59620-0901
(406) 444-4961
(406) 444-4201
(406) 577-7842
samuel.king@mt.gov
jeremiah.langston2@mt.gov
amanda.galvan@mt.gov

Attorneys for Respondent DEQ

Electronically Filed with the
Montana Board of Environmental Review
10/10/25 at 2:53 PM
By: *Sandy Moisey Scherer*
Docket No: BER 2025-04 SM

BEFORE THE BOARD OF ENVIRONMENTAL REVIEW
OF THE STATE OF MONTANA

IN THE MATTER OF: NOTICE OF APPEAL AND REQUEST FOR HEARING BY WESTMORELAND ABSALOKA MINING LLC REGARDING MR 311, SURFACE MINE PERMIT C1985005	Case No. BER 2025-04 SM **DEQ'S MOTION TO DISMISS WESTMORELAND'S REQUEST FOR HEARING AND PETITION FOR DECLARATORY RULING**

INTRODUCTION

Based on a deficiency response letter sent by DEQ at Westmoreland Absaloka's request ("Westmoreland"), Westmoreland filed a notice of appeal before this Board on September 26, 2025, claiming DEQ's letter constituted a "denial" of Minor Revision 311. Westmoreland claims this purported denial therefore entitles them to a contested case hearing under the Montana Administrative Procedure Act, and further, that this Board should issue a declaratory ruling as to what DEQ's statutes and reclamation rules under the Montana Strip and Underground Mine Reclamation Act ("MSUMRA") mean. The Board has no subject matter jurisdiction over Westmoreland's request.

Contrary to Westmoreland's characterization, DEQ's deficiency response letter was not a "denial" of Minor Revision 311. Indeed, Minor Revision 311 hasn't been denied at all; it just can't be approved until the necessary bond amount is posted. There is, therefore, no grounds for Westmoreland to seek a MAPA contested case under § 82-4-206, MCA.

Westmoreland's petition for the Board to issue a declaratory ruling as to what DEQ's MSUMRA statutes and administrative rules mean is likewise unavailable. Westmoreland must petition the agency that administers the statutes and rules. ARM 1.3.226. That agency is DEQ, not the Board.

Because the Board has no subject matter jurisdiction to exercise over this appeal, it must be dismissed.

FACTUAL BACKGROUND

Before addressing the merits as to why Westmoreland cannot now seek relief from this Board, it's important to provide some context as to the history of Minor Revision 311:

1. DEQ has historically calculated bond increases through minor revisions when updates to a reclamation plan are submitted because the amount of bond held is influenced by the speed and complexity of the proposed reclamation. Thus, for DEQ to hold adequate bond, it must not simply account for present reclamation costs, but future reclamation costs as well. *W. Va. Mining & Reclamation Ass'n v. Babbitt*, 970 F. Supp. 506 (S. Dist. W. Va. 1997) (citing *Cat Run Coal Co. v. Babbitt*, 932 F. Supp. 772, 781 n. 17 (S. Dist. W. Va. 1996)). Accordingly, DEQ considers, among other requirements, "all additional estimated costs necessary, expedient, and incident to the satisfactory completion" of reclamation, projected "cost changes," and "other cost information as may be required by or available to the department." ARM 17.24.1102. In other words, DEQ has broad, and exclusive, discretion to determine the appropriate performance bond.

2. Westmoreland initially submitted to DEQ Minor Revision 311 on June 27, 2024—over fifteen months ago—including an updated Annual Bond Calculation.[1]

3. Because the Minor Revision contained insufficient information regarding Westmoreland's reclamation plan, including equipment costs, timetables for completion, and cut and fill calculations for all disturbances in the permit boundary, DEQ issued a first-round deficiency response on August 23, 2024, requesting additional information. **Ex. 1.** DEQ stated that this information must be provided "before DEQ can determine the application acceptable." *Id.*

4. On January 2, 2025, 132 days after it had received the first deficiency letter and after the calendar deadline to remit any bond increase, Westmoreland finally responded and raised a series of arguments. First, Westmoreland argued that the Equipment Watch platform—a digital platform which provides equipment cost data and which DEQ utilized for years to calculate bond—was unlawful. **Ex. 2.** Specifically, Westmoreland took issue with DEQ's use of Equipment Watch's standardized calculation of equipment costs, which included an assumption that contractors would work single-day shifts, as opposed to multiple shifts per day. *Id.* Westmoreland also declined to provide updated costs for "all permit areas that do

[1] Westmoreland is required to adhere to any increases in bonding at the conclusion of each calendar year as part of their annual bonding obligation. In this case, the bond should have been submitted by December 31, 2024.

not have Phase I bond release," alleging that even though Westmoreland had not applied for Phase I bond release, "[t]he bond calculation accurately reflects the reclamation work remaining based on actual, on-the-ground conditions" such that it was justified in providing a reduction in bond. *Id.* at 10. Finally, Westmoreland argued Montana should "have a published policy or guideline that provides details about bond calculations." *Id.* at 1.

5. DEQ issued a second-round deficiency on January 24, 2025. DEQ responded to Westmoreland's request for a guidance document, agreeing that "a guidance document is warranted" and that DEQ "is committed to working with stakeholders to develop a bond guidance document." DEQ also agreed with Westmoreland that updated equipment rates should be analyzed, thus prompting DEQ to rely on a separate bond calculation platform, Costmine Intelligence, which provided more accurate equipment rates, rather than the historically used platform Equipment Watch. DEQ informed Westmoreland that DEQ "will utilize Costmine Intelligence rates to determine the bond" once Westmoreland provided the necessary information DEQ requested as to how much material needed to be moved for reclamation. **Ex. 3.**

6. Westmoreland submitted a short response on February 17, 2025, without substantively responding to DEQ's deficiency.

7. DEQ issued a third-round deficiency on March 17, 2025. DEQ again notified Westmoreland that it would "calculate the bond once . . . additional [reclamation] information has been provided." **Ex. 4.**

8. On April 15, 2025, Westmoreland responded to the third-round deficiency, providing the necessary updated information in the Minor Revision reclamation plan as necessary for DEQ to calculate the performance bond.

9. DEQ issued a fourth-round deficiency on June 5, 2025. DEQ agreed that all reclamation information was properly submitted for approval of the Minor Revision, but that a bond increase was necessary "based on the information submitted as part of Minor Revision 311." **Ex. 5.** DEQ informed Westmoreland that in such instances when a bond increase is proposed, DEQ is required to notify the permittee of an "opportunity for an informal conference" per ARM 17.24.1104(1*). Id*. DEQ informed Westmoreland that it must post an additional $3.33 million in bond by December 31, 2025, unless an extension is requested and DEQ grants the request. *Id.* And DEQ informed Westmoreland that an informal conference regarding the proposed bond increase could be requested within 30 days pursuant to ARM 17.24.1104. *Id.*

10. Westmoreland responded on July 7, 2025, 32 days after the fourth-round deficiency letter was sent, raising several complaints with DEQ's request for an increased bond amount (despite DEQ previously notifying Westmoreland that it

needed to have the necessary information on its reclamation plan to calculate the bond). *See* **Ex. 6.** Westmoreland, in particular, lamented DEQ's use of Costmine Intelligence to calculate equipment cost values. *Id.*at 2. Westmoreland also indicated that to "appropriately respond to the Deficiency Notice," it requested that DEQ provide a response to certain information. *Id.* at 4. Additionally, Westmoreland indicated that it would like "an informal conference with DEQ be scheduled after the information requested above is provided to Westmoreland." *Id.*at 6. Westmoreland stated that it "find[s] no deadline by which the informal conference must be held, but we desire to have this issue addressed through the deficiency notice process for Minor Revision 311, well in advance of DEQ's bond posting deadline of December 31, 2025." *Id.*

11. DEQ responded, at the request of Westmoreland, on August 29, 2025. **Ex. 7.** DEQ responded to each of Westmoreland's concerns, and specifically, explained that utilizing Costmine rather than Equipment Watch actually *saved* Westmoreland nearly $3 million in additional bonding. *Id.* at 4. DEQ also noted that it was willing to engage with Westmoreland for an informal meeting pursuant to ARM 17.24.1104(1) on the bond increase. *Id.* at 7. And DEQ notified Westmoreland that it was publishing, pursuant to their request, a Coal Bond Calculation Guideline, that it was "accepting stakeholder input," and that there was

a public comment period and public meeting scheduled. *Id.* To date, Westmoreland has not provided any public input on that draft guidance document.

12. Despite DEQ providing, at Westmoreland's request, a response to the deficiency responding to each of Westmoreland's concerns; there being no denial of MR 311; and Westmoreland having made no effort to have an informal meeting—the only remedy available to Westmoreland—Westmoreland filed a Notice of Appeal before this Board, requesting a MAPA contested case and a petition for a declaratory ruling on DEQ's bonding rules. Specifically, Westmoreland asserts, based on DEQ's August 29, 2025, letter, that DEQ "divert[ed] from the normal deficiency notice and response process and apparently den[ied] Westmoreland's application for Minor Revision 311." Br. at 3. No such denial occurred.

LEGAL FRAMEWORKS

I. MSUMRA

The federal government enacted the Surface Mining Control and Reclamation Act ("SMCRA") in 1977. *Mont. Envtl. Info. Ctr. v. Opper*, 2013 U.S. Dist. LEXIS 29184, at *6 (Mont. Dist. 2013); 30 U.S.C. § 1202(a), (d), (f). SMCRA establishes a scheme of "cooperative federalism in which responsibility for the regulation of surface coal mining in the United States is shared between the U.S. Secretary of the Interior and State regulatory authorities." *Bragg v. West*

Virginia Coal Ass'n, 248 F.3d 275, 288 (4th Cir. 2001). A state may "assume" from the federal government "exclusive jurisdiction over the regulation of surface coal mining and reclamation operations," known as "primacy." *Bragg*, 248 F.3d at 288-89; 30 U.S.C. § 1253(a).

"Montana was granted primacy in 1982 after development and federal approval of a comprehensive regulatory program." *Opper,* at *8 (citing C.F.R. §§ 926.10-926.30). Montana's program is known as the Montana Strip and Underground Mine Reclamation Act ("MSUMRA"), §§ 82-4-201, MCA, *et seq.* As part of this cooperative agreement, DEQ is the sole state regulatory agency tasked with implementing MSUMRA. 30 C.F.R. 926.30. This obligation includes, but is not limited to, "review and approval of the [permit application packages]" received by the agency, including reviewing "[i]nformation necessary for DEQ to make a determination of compliance with the State Program"; "[a]naly[zing], review[ing], and approv[ing], conditional[ly] approv[ing], or disapprov[ing] of the permit application component . . . for surface coal mining and reclamation operations"; and "approv[ing] and release[ing] of performance bonds." *Id.*

Unsurprisingly, given that DEQ is the sole state agency tasked with applying, interpreting, and enforcing MSUMRA as part of this federal agreement, MSUMRA exclusively speaks to DEQ's authority throughout. For example, § 82-4-205 provides that "the **department** shall adopt, after an opportunity for a

hearing, general rules pertaining to strip mining and to underground mining to accomplish the purposes of this part." Section 82-4-205(1) (emphasis added). The "department" shall likewise "exercise general supervision, administration and enforcement of this part and **all rules and orders adopted** under this part[.]" Section 82-4-205(2)(a). And "the department" "shall order the suspension of any permit for failure to comply with this part or a rule adopted under this part[.]" *Id.* (2)(d).

Relevant here, it is "the department" that must "determin[e] the amount of the bond," which "may not be less than the total estimated cost to the state of completing the work described in the reclamation plan." Section 82-4-223, MCA; ARM 17.24.1102 (requiring that "the department" calculate the amount of a performance bond based on "the estimated cost to the department if it had to perform the reclamation"). Indeed, the bond calculation must "reflect the 'worst case scenario,' *i.e.,* the cost of reclaiming the site if the permittee forfeits the bond at the point of maximum cost liability, under the reclamation and operation plans approved as part of the permit." *W. Va. Highlands Conservancy v. Norton*, 238 F. Supp. 2d 761, 766 (S. Dist. W. Va. 2003).

When DEQ determines an increase in bond is appropriate when, like here, "the cost of future reclamation . . . increases," then "[t]he department shall notify the permittee of any proposed bond increase and provide the permittee an

opportunity for an informal conference on the proposal." ARM 17.24.1104(1). There is no procedural right in MSUMRA for a permittee to challenge, through a MAPA contested case procedure, an increase in the bond amount. *See* § 82-4-206. Instead, such MAPA contested case hearings are limited to either: (a) approval or denial of an application for a permit under § 82-4-231; (b) approval or denial of an application for a prospecting permit under § 82-4-226; (c) approval or denial of an application to increase or reduce a permit area under § 82-4-225; (d) approval or denial of an application to renew or revise a permit under § 82-4-221; or (e) approval or denial of an application to transfer a permit under either § 82-4-238 or § 82-4-250.

II. The Board of Environmental Review

The Board of Environmental Review is "a quasi-judicial administrative body that was . . . created by statute in 1995." *Mont. Rivers. v. Mont. Dep't of Envtl. Quality*, 2022 MT 132, ¶ 4 n. 1, 409 Mont. 204, 512 P.3d 1193; § 2-14-3502, MCA; 1995 Mont. Laws ch. 418, § 21. In 2021, the Montana Legislature amended MSUMRA to remove all rulemaking authority from the Board. *See, e.g.,* 2021 Mont. Laws ch. 324, § 86 (delineating DEQ and Board functions); § 88 (surety bond). Under MSUMRA, the only authority delegated to the Board is to "conduct contested case hearings" for those instances identified in § 82-4-206(1). Section 82-4-206(3), MCA.

LEGAL STANDARD

Rule 12(b)(1), M. R. Civ. P.,[2] requires dismissal of cases when the adjudicatory body lacks subject matter jurisdiction to decide the dispute.[3] Subject matter jurisdiction "is the threshold power of a court to consider and adjudicate particular types of cases and controversies." *Larson v. State*, 2019 MT 28, ¶ 17, 394 Mont. 167, 434 P.3d 241. The Board of Environmental Review acts in a quasi-judicial capacity when hearing contested case appeals. Section 2-15-3502(4). Unlike a district court, which has original jurisdiction in all civil matters in cases at law and in equity, Mont. Const. art. VII, § 4, an agency's jurisdiction, like that of the Board's, is "strictly limited by statute." *Auto Parts of Bozeman v. Employment Rels. Div. Uninsured Employers' Fund*, 2001 MT 72, ¶ 38, 305 Mont. 40, 23 P.3d 193. Administrative agencies hearing contested case appeals "may not assume jurisdiction *without express delegation* by the legislature." *City of Billings v. Pub. Serv. Comm'n of Mont.*, 193 Mont. 358, 369, 631 P.2d 1295, 1301 (1981) (emphasis added); *see also City of Polson v. Pub. Serv. Comm'n*, 155 Mont. 464, 469, 473 P.2d 508, 511 (1970) (finding "it is a basic rule of law that . . . an

[2] While the Montana Rules of Civil Procedure are not required to govern Board proceedings, "they may still serve as guidance for the agency and the parties." *Citizens Awareness Network v. Mont. Bd. of Entl. Review*, 2010 MT 10, ¶ 20, 355 Mont. 60, 227 P.3d 583.

[3] Under Rule 12(b)(1), the adjudicatory body has discretion to receive and consider evidence outside the pleadings to determine whether it lacks subject matter jurisdiction. *Harrington v. Energy West, Inc.*, 2015 MT 233, ¶¶ 9, 10, 380 Mont. 298, 356 P.3d 441.

administrative agency has only those powers specifically conferred upon it by the legislature.).

ARGUMENT

I. There Is No MAPA Contested Case Procedure Available to Challenge DEQ's Deficiency Letter or Bond Determination.

Westmoreland lacks any ability to initiate, and this Board has no authority to hold, a MAPA contested case hearing—or any hearing—on DEQ's deficiency letter.

In claiming that the Board can hold a MAPA contested case hearing, Westmoreland invokes § 82-4-206(1)(d), MCA, asserting that DEQ, based on the August 29, 2025, deficiency response letter to Westmoreland, "divert[ed] from the normal deficiency notice and response process and apparently den[ied] Westmoreland's application for Minor Revision 311." WRM NOA at 3. Westmoreland's argument fails.

First, Westmoreland conflates the Minor Revision subject to approval with the related bond calculation. A party can only invoke a contested case under MAPA pursuant to § 82-4-206(1)(d) when there has been an "**approval or denial** of an application to renew or revise a permit pursuant to 82-4-221." (Emphasis added.) Section 82-4-221(3)[4] provides for approvals or disapprovals of minor

[4] Westmoreland is correct that § 82-4-221(3) was modified by the legislature in 2023, but the modification has not yet been approved by OSMRE such that the preceding language is still controlling.

revisions. But Westmoreland ignores that Minor Revision 311 cannot be approved until the requisite increase in bond is posted because DEQ must hold adequate bond *before* the revision is approved. § 82-4-223, MCA. The proposed updates to the reclamation plan in Minor Revision 311, while a necessary condition to determine the ultimate bond amount, are separate considerations subject to separate legal requirements. *See, e.g.,* ARM 17.24.313. Further illustrating this point, DEQ can order an increase of bond at any time, and it need not even be tethered to a minor revision. *See, e.g.,* § 82-4-205(c), (d), (e), (f). Nonetheless, DEQ has already determined that Westmoreland satisfied the necessary reclamation criteria for the minor revision; it is simply waiting on Westmoreland to post the additional bond required to approve the Minor Revision.

Second, and relatedly, DEQ didn't deny Westmoreland's application for Minor Revision 311. Again, DEQ sent a deficiency response letter on August 29th informing Westmoreland of why additional bond was necessary and defending its use of Costmine, which saves Westmoreland millions of dollars. More disingenuous, Westmoreland's characterization of this letter as a "diversion" from the "normal deficiency notice and response process" omits that this letter was sent at the request of Westmoreland in the July 7, 2025, letter, *see* **Ex. 6,** which Westmoreland fails to attach to its Notice of Appeal. Because Westmoreland's minor revision hasn't been denied, but remains in deficiency, its appeal is not ripe.

Finally, there is no remedy in MSUMRA for a permittee to invoke a MAPA contested case procedure on bond increases. Rather, the sole remedy, as both DEQ and Westmoreland agreed in correspondence, is to have an informal meeting if the permittee requests. ARM 17.24.1104(1). Westmoreland hasn't sought to schedule an informal meeting.

The Board has no subject matter jurisdiction over this appeal. The Board must dismiss it.

II. The Board has No Authority to Declare what the Law Is.

Westmoreland, additionally, "seeks a declaratory ruling that MSUMRA, including section 82-4-223, MCA and ARM 17.24.1102, requires DEQ to follow Montana industry standards for coal mine reclamation when calculating performance bonds[.]." WRM Notice of Appeal, at 11. Westmoreland's request fails for two reasons.

First, the Board cannot declare what MSUMRA means. Westmoreland cites ARM 1.3.226 through 229 to assert that the Board can make such a determination. But such declaratory rulings may only be sought when a petition is filed with the agency that "administers" the "statute or rule." ARM 1.3.226. Here, the Board, unequivocally, does not administer MSURMA; the scope of that authority lies squarely with DEQ. 30 C.F.R. 926.30; § 82-4-205(2)(a) (stating "[t]he department shall exercise general supervision, administration, and enforcement of this part and

all rules and orders adopted under this part."). And it is DEQ that it tasked with adopting any such rules. Section 82-4-205(1), MCA. The Board has no rulemaking authority. 2021 Mont. Laws ch. 324. The Board's only role is to conduct MAPA contested case procedures where applicable. Section 82-4-205(3), MCA. Said differently, the only agency under MSUMRA that is authorized to declare what a statute or rule means by way of petition is DEQ. Westmoreland is submitting its petition to the wrong agency.[5]

In addition to the clear weight of statutory authority confirming DEQ's role in administering MSUMRA, DEQ has also adopted administrative rules consistent with its authority to issue declaratory rulings. Section 2-4-501, MCA requires that "[e]ach agency shall provide by rule for the filing and prompt disposition of petitions for declaratory rulings as to the applicability of any statutory provision or of any rule or order of the agency." DEQ satisfied this requirement by providing ARM 17.1.101(6), which states "[a]ll requests for . . . declaratory rulings . . . should be addressed to *the director* unless the notice in the Montana Administrative Register makes specific provisions for submissions." (emphasis added). Westmoreland not only ignores the authority confirming DEQ as the appropriate agency to issue a declaratory ruling but fails to identify any specific

[5] And even if Westmoreland submitted a petition to DEQ, then the determination on the petition is subject to district court review, not review before this Board. ARM 1.3.229.

provision that would allow this Board to provide declaratory relief. This failure only underscores the point that such relief lies with DEQ, not the Board.

Second, any petitions for declaratory rulings are not rendered in the context of a MAPA contested case. Indeed, ARM 1.3.229 clarifies this distinction: "A declaratory ruling or notice of refusal to issue a ruling is a final agency decision subject to judicial review **in the same manner as decisions or orders in contested cases.**" ARM 1.3.229(2) (emphasis added).[6]

The Board, in sum, has no subject matter jurisdiction to issue a declaration as to what MSUMRA statutes or rules mean. Any such determination by the Board, therefore, would not have any force or effect of law, and would simply constitute an advisory opinion.

CONCLUSION

There is no procedural avenue for this Board to hold a contested case hearing on DEQ's deficiency notice. There is, likewise, no authority for the Board to issue a declaratory ruling on MSUMRA rules, which are applied and implemented by DEQ.

For the Board to do as Westmoreland asks would circumscribe its legislative grant of authority and be a waste of the parties' time and resources, as any ruling

[6] And again, the only statutory grant of authority the Board has is to issue decisions in MAPA contested cases under MSUMRA. Section 82-4-205(3), further confirming that a petition for declaratory ruling can only be submitted to DEQ.

would amount to, at best, an advisory opinion. Worse, it would put DEQ in the position of being forced to run afoul of ongoing federal oversight central to the cooperative agreement it remains bound by.

Should the Board entertain Westmoreland's request, DEQ asks that it issue a written order so that DEQ may immediately seek appropriate relief.

DATED this 10th day of October 2025.

BY: */s/ Samuel J. King*
Samuel J. King
Jeremiah R. Langston
Amanda D. Galvan
Counsel for DEQ

Certificate of Service

I hereby certify that on this 10th day of October 2025, I served a true and correct copy of the foregoing document to all parties or their counsel of record by electronic mail, addressed as follows:

Board Secretary
Board of Environmental Review
1520 E. Sixth Ave.
P.O. Box 200901
Helena, MT 59620-0901
Deqbersecretary@mt.gov

Victoria Marquis
CROWLEY FLECK PLLP
500 Transwestern Plaza II
P.O. Box 2529
Billings, MT 59103-2529
(406) 252-3441
vmarquis@crowleyfleck.com

Morgan E. Pettit
CROWLEY FLECK PLLP
900 N. Last Chance Gulch #200
P.O. Box 797
Helena, MT 59624-0797
(406) 499-4165
mpettit@crowleyfleck.com

BY: */s/ Samuel J. King*
Attorney
Dept. of Environmental Quality

EXHIBIT NO. 1

August 23, 2024

Sent via ePermit system

Garrick Goodheart
Westmoreland Absaloka Mining LLC
Absaloka Mine
100 Sarpy Creek Rd.
Hardin, MT 59034

Permit ID: C1985005
Revision Type: Minor Revision
Permitting Action: Deficiency
Subject: MR311; Bond Calculation-Round 1 Acceptability Deficiency

Dear Garrick:

The Department of Environmental Quality (DEQ) has reviewed your submittal. The following deficiencies must be adequately addressed before DEQ can determine the application acceptable:

ARM 17.24.1102(1): In Tab T12, equipment costs do not align with DEQ standardized costs. Please update with attached pricing listed in 'Equipment First Half 2024.xlsx. If equipment utilized is not listed, provide rate justification (print screen with data inputs). In Tab T13, all productivity rates need updated to most recent industry standards (CAT Handbook).

ARM 17.24.313(1)(b): Please provide a detailed timetable for the estimated completion of each major step in the reclamation plan.

ARM 17.24.313(1)(c): In Tab T2 of 'Exhibit B16 Bond Calculation MR311 2024-06.xlsx', Truck/Loader weighted average for distance is referencing equipment cells labeled 'Dozer' in the table above. Please verify this is correct. RS Means values in Tab T5 and T6 appear to decrease from 2023 values. When checked by DEQ, 2024 values appear to increase from prior estimates; please validate these estimates. When using RS Means for pricing, use the Total O&P cost. Cut/Fill calculations do not appear to include all areas of disturbance between projected end of 2025 topography and PMT. See Exhibit #1. Please revise the cut/fill calculations to include all areas of disturbance within the permit boundary. As proposed in MR311, the pit surface configuration is projected from the end of 2026. According to the permit documents, all coal will be mined by then. Therefore, please use the approved postmining topography as the "Final Bond Topography" in the bond calculation. Please include costs for finish grading, final

drainage design and final drainage establishment for all permit areas that do not have Phase I bond release. Please review and revise (as necessary) the "balance polygons" used in Table 2. The cut and fill volumes in some of these are not balanced. For example, there is an imbalance of 22% in CF-24 and 33% in CF-23. Dozer grades in the CAT Handbook are limited to -30%. Please adjust dozer grades in Table 2 so that none are steeper than -30%.

Please feel free to contact me with questions regarding this letter.

Sincerely,

Eric Dahlgren

Eric Dahlgren, Acting Bureau Chief
Mining Bureau
Phone: 406-444-5245
Email: edahlgren@mt.gov

CC: Jeff Fleischman, Office of Surface Mining
Erica Trent, Office of Surface Mining

EXHIBIT NO. 2

CROWLEY | FLECK PLLP
ATTORNEYS

VICTORIA A. MARQUIS
500 Transwestern Plaza II
490 North 31st Street, Suite 500
P. O. Box 2529
Billings, MT 59103-2529
DIRECT DIAL - 406-255-7298
FACSIMILE - 406-252-8526
vmarquis@crowleyfleck.com

December 23, 2024

Eric Dahlgren
Coal Section Supervisor, Mining Bureau
Montana Department of Environmental Quality
P.O. Box 200901
Helena, MT 59620-0901

RE: Westmoreland Absaloka Mining LLC, Absaloka Mine, Permit C1985005, MR311; Bond Calculation – Round 1 Acceptability Deficiency

Dear Mr. Dahlgren:

Please accept this letter on behalf of Westmoreland Absaloka Mining LLC (Westmoreland) in response to DEQ's Round 1 Acceptability Deficiency referenced above for the Absaloka Mine.

ARM 17.24.1102(1): – 1) In Tab T12, equipment costs do not align with DEQ standardized costs. Please update with attached pricing listed in 'Equipment First Half 2024.xlsx. If equipment utilized is not listed, provide rate justification (print screen with data inputs).

Response: The first deficiency alleged by DEQ, regarding ARM 17.24.1102(1), concerns bond calculations and whether those calculations may be based on industry standards, specifically for the number of hours reclamation equipment is used each year (the "annual use hours"). Unlike other states, Montana does not have a published policy or guideline that provides details about bond calculations for coal mine reclamation. Until recently, the coal mine industry was reliant on DEQ to provide rates and information for the calculations, some of which came from the computer program *Equipment Watch*.[1] Due, in part, to the rising cost of bonding, abbreviated surety

[1] *Equipment Watch* is an equipment software platform owned and operated by Fusable and headquartered in Tuscaloosa, AL.

providers involved in fossil projects, and the ever-widening gap between realistic reclamation costs and Montana DEQ's bond calculations, coal mining companies, including Westmoreland, took a closer look at *Equipment Watch* and how it is utilized in Montana DEQ's bond calculations. When using the *Equipment Watch* program, the program user must select the number of annual use hours for each piece of equipment. Specific equipment and annual use hour selection directly and uniquely impacts the "Total Hourly Costs," which are the "DEQ standardized costs" attached to DEQ's August 7, 2024 Deficiency letter. Lower annual use hours result in higher hourly costs.

The "DEQ standardized costs" appear to be based on 1,200 annual use hours for most equipment, which equates to only 23 hours per week for 52 weeks per year. However, industry research provides broad support for mine remediation contractor operation with significantly higher annual use hours, in part due to the increase in equipment productivity and decrease in time-related overhead. The contractors work multiple crews, and therefore multiple shifts per day, resulting in greater annual use hours.

A. Background

Coal mining companies and the Montana Coal Council have been discussing this issue with DEQ since at least April 2023. When presented with a bond calculation from the Navajo Transitional Energy Company on April 14, 2023 that was based on multiple shift hours per day, DEQ responded that the calculated equipment costs did not match department standards, which DEQ indicated was *Equipment Watch*'s default of a single shift of 40 hours per week[2]. **Exhibit A**, attached, slide 1. On September 1, 2023, DEQ rejected the notion that multiple shifts may be used when estimating equipment costs. *Id*., slide 3.

On September 29, 2023, the Montana Coal Council began investigating the mining industry's standards for annual use hours, specific to large-scale coal mine reclamation projects. Using actual reclamation plans, the Montana Coal Council's Technical Committee reached out to six contractors with large material moving capabilities, provided them with dozer and scraper regrade yards and push distances, truck shovel yards and haul distances, yards of highwall to be blasted, volume of material to be demolished, topsoil volumes, and the total number of acres to be revegetated. *Id*. slide 6. Not a single one of the six contractors proposed to complete the work using just one 8-hour shift per day, which equates to 2,080 annual use hours. Instead, all of the contractors proposed working 16 to 24 hours per day for 5.5 to 7 days per week, resulting in a range of annual use hours between 5,720 and 7,280 hours, with an average of 6,257 annual use hours. *Id*.

On February 1, 2024, the Technical Committee of the Montana Coal Council met with DEQ to discuss bond calculations, focusing on the information acquired from the six large contractors surveyed by the Montana Coal Council. **Exhibit B**, attached. On February 26, 2024, the Montana Coal Council provided copies of the information presented during the February 1, 2024 meeting to DEQ, as well as a bond calculation example. The Montana Coal Council formally requested

[2] Even using a 40-hour per week schedule would result in more annual use hours (2,080) than Equipment Watch's low-end default of 1,200 annual use hours used in "DEQ's standardized costs."

that DEQ "evaluate authorizing equipment operating schedules with greater intensity than the Equipment Watch default," since the operating schedules currently provided by DEQ are not aligned with current industry standards. **Exhibit C**, attached. Specifically, the Montana Coal Council requested consideration of 4,160 annual use hours based on 16-hour workdays, 5 days per week, which is lower and more conservative than the industry standard that ranges from 5,720 to 7,280 annual use hours. The slides presented by NTEC (Exhibit A) were attached to that request, as well as the communications containing the information provided by the six major contractors, supporting an industry standard averaging 6,257 annual use hours. **Exhibit D**, attached.

DEQ denied the request on March 8, 2024, stating "DEQ has adopted the use of industry standard rates based on a standard 8-hour shift."[3] **Exhibit E**, attached, p. 2. DEQ explained it uses the Request for Proposal process when completing reclamation, that it consulted with other programs within DEQ, and that it "based its assessment of multiple shifts on historic contracting practices across DEQ and what it can reasonably expect a contractor would bid." *Id*. Rather than accepting the mining industry standard, supported by evidence from the six major contractors, DEQ characterized that information as "preferred contractor schedules" and implied it did not "reflect the estimated cost DEQ would expect to incur in the event DEQ is responsible for completing reclamation." *Id*. Simply put, DEQ chose to continue relying on *Equipment Watch*'s lowest levels which are not tethered to any realistic estimate of coal mine reclamation. DEQ did not provide any alternative contractor data to refute this industry specific data set.

The number of annual use hours proposed by the Montana Coal Council does not correspond to "preferred contractor schedules," as alleged by DEQ. Contractors clearly prefer a more robust schedule that ranges from 5,720 to 7,280 annual use hours. Instead, the Council proposed a conservative standard of 4,160 annual use hours, which is well below even than the lowest end of the range of values provided by the contractors.

Our recent correspondence with *Equipment Watch* personnel confirms that annual use hours for mine reclamation "is much higher typically than in other types of construction work." **Exhibit F**, attached. *Equipment Watch* personnel verified that its standard annual use rates are based on a national average calculated from surveys of "contractors of various company sizes" and input from contractors across a broad range of enterprises, including "contractors, manufacturers, dealers, rental companies, lenders, and government agencies."[4] *Equipment Watch* does not conduct industry specific surveys. Instead, *Equipment Watch* surveys equipment users nationwide who work in a variety of construction-related industries. Under these parameters, which are not focused on reclamation work, *Equipment Watch* provides "standard values" for annual usage that contemplate only a single shift per day. *Equipment Watch*, *Definition of "Annual Use Hours."*[5]

In many cases, the *Equipment Watch* "standard value" is much lower than a single shift per day, five days per week. For example, the "standard value" for a D10T2 Dozer is based on 1,200 annual

[3] As noted above, *Supra* n. 1, the *Equipment Watch* default is 1,200 annual use hours, which is much lower than the 2,080 annual use hours that would result from using an 8-hour shift.
[4] *Id*.; https://equipmentwatch.com/what-we-do/ (accessed December 18, 2024).
[5] https://equipmentwatch.com/resource/annual-use-hours/ (accessed December 12, 2024).

use hours, which is nearly 1,000 hours less than DEQ's claimed industry standard of 2,080 hours and more than 5,000 hours less than the average industry standard of 6,257 hours. **Exhibit G** attached. *Equipment Watch*'s decision to provide a "standard value" limited to a single shift per day and limited to a fraction of the year does not reflect the reality of coal mine reclamation, even when performed by contractors hired by DEQ.

Equipment Watch agrees that equipment "[u]sage in [the mine reclamation] field is much higher typically than in other types of construction work." **Exhibit F**. Thus, it recommends that its "several customers involved in mining" input "their own Annual Usage and Economic Life" measurements into the program. *Id*. Like the six major reclamation contractors surveyed by the Montana Coal Council, *Equipment Watch* also agrees:

> The utilization of an asset has quite possibly the most significant impact on ownership costs due to its effect on annual depreciation and annual cost of facilities capital (an allowance for the cost of money invested in machinery). It also plays a role in determining how quickly an asset can recover its fixed costs. Generally, the more an asset is utilized, the faster its fixed costs are recovered, thus lowering ownership costs.

Equipment Watch, "Top 4 Most Important Ownership Cost Factors."[6] Therefore, even *Equipment Watch* acknowledges that equipment owners are better served by using equipment for more hours each year to more efficiently recover their ownership costs and increase productivity. This is the same reasoning the six major reclamation contractors gave for their multiple-shifts-per-day operations. The *Equipment Watch* "standard values" are completely unrelated to the actual work practices of contractors performing reclamation, restoration, and abatement work within the large mine industry and are inaccurate and unreliable for purposes of coal mine reclamation bond calculations.

Westmoreland submitted three minor revisions with bond calculations based on 4,160 annual use hours, which represents two 8-hour shifts per day working five days per week.[7] On June 28, 2024, minor revision MR311 for the Absaloka Mine was submitted. The federal Office of Surface Mining Reclamation and Enforcement (OSMRE) accepted the bond calculation on August 8, 2024. However, on August 23, 2024, DEQ issued a deficiency letter requesting use of DEQ's "standardized" equipment costs, which appear to be based on 1,200 annual use hours. **Exhibit H**, attached.

On June 28, 2024, minor revision MR111 was provided for Area B of the Rosebud Mine and on July 31, 2024, minor revision MR170 was submitted for Area C of the Rosebud Mine, both with bond calculations based on 4,160 annual use hours. DEQ again rejected the bond calculations and

[6] https://equipmentwatch.com/intel/equipment-costs/top-4-important-ownership-cost-factors/ (accessed December 12, 2024); *see also* Exhibit F ("More utilization of the equipment will lower the hourly cost of using the equipment.").
[7] Using an availability factor of 92%, the 4,160 annual use hours are discounted to 3,827.

requested updates based on DEQ's "standardized" equipment costs, which appear to be based on 1,200 annual use hours. **Exhibits I and J**, attached.

Westmoreland has since met with DEQ leadership and staff numerous times to discuss bond calculations, including on December 18, 2024 with representatives of Oftedal Construction and MK Weeden, two of the contractors referenced in the Montana Coal Council proposal. The contractors explained again that large reclamation contractors aim for a shortened schedule (*i.e.*: working multiple shifts per day) to maximize equipment usage and minimize time-related overhead costs.

B. The Montana Strip and Underground Mine Reclamation Act Supports Greater Annual Use Hours.

State law requires factual support for bond amounts and does not allow unsupported bond amounts; therefore, it requires use of industry standards and does not allow use of rates contrary to industry standards without factual support. Section 82-4-223(1), MCA sets a minimum bonding level, then allows additional bonding "relative to the degree of disturbance projected by the original permit and the annual report." The statute does not support imposition of any maximum bond amount, instead it begins at the minimum and allows additions to that minimum, but only as supported by the facts of the permit at issue. DEQ's imposition of the lowest level of annual use hours, irrespective of industry standards, is a blanket addition to all bonds and therefore functions as a uniform bond policy, which is unlawful. *Id.*; *see also People United to Save Homes v. Dep't of Env't Prot.*, 789 A.2d 319, 333 (Pa. Commw. Ct. 2001) (holding that agency bond determinations function as an unlawful "uniform bond policy" when they do not consider a case-by-case analysis or "factors specific to each proposed mining area").

Section 82-4-223(2), MCA requires consideration of several supporting facts – "the character and nature of the overburden, the future suitable use of the land involved, and the cost of backfilling, grading, highwall reduction, subsidence stabilization, water control, topsoiling, and reclamation to be required" and requires that the bond "may not be less than the total estimated cost to the state of completing the work described in the reclamation plan." The "cost to the state" is determined by following the criteria in ARM 17.24.1102, which requires the bond amount to be "based on" something factual – the permittee's estimated costs (ARM 17.24.1102(1)), current machinery production handbooks and publications (ARM 17.24.1102(1)), documented costs (ARM 17.24.1102(1)), public contracting requirements (ARM 17.24.1102(2)), reclamation requirements (ARM 17.24.1102(3)), cost changes (ARM 17.24.1102(4)), or other cost information (ARM 17.24.1102(5)).

Thus, the law requires facts to support the bond calculation. It does not allow bond calculations based on unsupported assumptions. Here, input from six major reclamation contractors operating in the region provides factual support for an annual use rate for coal mine reclamation that ranges between 5,720 and 7,280 hours, with an average of 6,257 hours. DEQ is not free to disregard actual market and industry data provided to it by deeming that data as "preferred contractor schedules" while simultaneously failing to determine any market and industry data on its own.

Absent DEQ's independent confirmation to the contrary, these schedules are the industry standard and the standard DEQ can reasonably expect contractors to use when bidding on coal mine reclamation projects. DEQ claims to rely on a single 8-hour shift per day, which equates to 2,080 hours per year, but that is less than one-half of the lowest annual use rate offered by the industry. Worse, DEQ actually uses *Equipment Watch*'s "standard values," which only provide for 1,200 annual use hours – not even close to the 2,080 annual use hours DEQ claims and only a fraction of the industry standard average of 6,257 hours. This provides another unexplained blanket addition to all bonds. There are no facts supporting the use of either 2,080 or 1,200 annual use hours; therefore, DEQ's reliance on either one will result in an unlawful bond calculation.

State law also requires rapid, complete, and effective reclamation; therefore, it prohibits reclamation based on operations that are less efficient than industry standards. The policy of Montana and its people, as expressed in statute, is to "demand effective reclamation" and "set effective requirements and standards, especially as to reclamation of disturbed lands." §§ 82-4-202(2)(e) and (f), MCA. To that end, the law requires operators to complete reclamation "as rapidly, completely, and effectively as the most modern technology and the most advanced state of the art will allow." § 82-4-231(1), MCA. DEQ has a duty to request and select the most responsive bid that allows the department to "perform the reclamation, restoration, and abatement work required of an operator" (ARM 17.24.1102) and therefore the bid that most rapidly and effectively gets the job done. §§ 82-4-202(2); 82-4-231(1), MCA. Nothing in statute or rule provides DEQ with any different standards for reclamation than those applied to mine operators. Therefore, bonding necessarily requires use of the industry standards for coal mine reclamation, anything less is contrary to the laws and rules. *Equipment Watch* is not specific to coal mine reclamation; therefore, for the use of *Equipment Watch* to be valid under state law, the parameters must be adjusted to the industry standard for coal mine reclamation.

C. The Montana Procurement Act Supports Greater Annual Use Hours.

Montana strongly prefers competitive solicitations (Invitations for Bids or Requests for Proposals) to "[a]void putting the State at the mercy of Contractors who could charge almost anything for products or services, knowing it's the only place the State can go to meet its requirements." MT Procurement Manual, p. 40. When using the competitive bidding process, DEQ is mandated to accept "the lowest responsible and responsive bidder whose bid meets the requirements and criteria set forth in the invitation for bids." § 18-4-303(6), MCA.

Montana's State Procurement Services Division's (SPSD) guidelines recommend that contract officers consider any unique aspects of the project when developing the Performance Work Statement, Statement of Objectives, Statement of Work, or Specification. When considering the payment and pricing details to include in an RFP, the SPSD states "a thorough understanding of the requirements and industry standards is needed by [Contract Officers] to develop appropriate payment and pricing terms." SPSD stresses that effective contracts are those where "the pricing terms are consistent with industry standards." MT Procurement Manual, p. 29.

We find nothing in statute, rule, or policy that would prevent DEQ from including criteria in the invitation for bids requiring timely reclamation, a deadline by which reclamation must be completed, and/or the use of industry standards (or better) for annual use hours. In fact, where agencies use an alternate method, like the Lowest Priced Technically Acceptable (LPTA) method that federal agencies use, the agency may include other factors and weigh timeliness of project completion as a criterion for awarding a contract. MT Procurement Manuel, pp. 42-43; §§ 18-2-503(1)(b), (2)(b), MCA. The contract award "must be based on a best value analysis" which, in the case of coal mine reclamation, necessarily requires consideration of how rapidly, completely, and effectively the reclamation will be done. §§ 18-2-503(8); 82-4-231(1), MCA.

Coal mine reclamation bond amounts are open for public inspection and therefore any contractor who would bid on a coal mine reclamation project would be aware of the amount of bond available for the work. By requiring unrealistic, excessive bonds, DEQ is ultimately inviting bids inconsistent with industry standards and encouraging over-priced bids that take advantage of the excessive bond by charging the State far too much for services that can be obtained much more cheaply and efficiently pursuant to industry standards. That is an abuse of the procurement system, which is specifically designed to prevent such gross overpayments.

D. Federal Requirements Support Greater Annual Use Hours.

OSMRE's rapid and unequivocal approval of Minor Revision MR311 for the Absaloka Mine illustrates that OSMRE does not object to use of industry standards for annual use hours greater than the *Equipment Watch* default. The only requirement is that the performance bonds "meet all regulatory program requirements." OSMRE, Handbook for Calculation of Reclamation Bond Amounts (October 2020), p. 6. The Handbook instructs "[t]o determine the hourly cost of equipment during the reclamation operation, adjust the components of the hourly costs found within EquipmentWatch (https://EquipmentWatch.com) for the number of shifts, fuel costs, etc., as applicable." Handbook, p. 2-16. DEQ should follow the Handbook and do just as OSMRE instructs – adjust the annual use hours to the industry standard.

The Handbook also indicates that the bond amount should reflect the "worst-case scenario" limited to "the cost of reclaiming the site if the permittee forfeits the bond at the point of maximum reclamation cost liability, under the reclamation and operation plans approved as part of the permit." Handbook, p. 1-5.

> The worst-case scenario occurs whenever there is:
> 1) the greatest disturbance of prime farmland,
> 2) the largest open pit,
> 3) stream reconstruction is required, and
> 4) the largest acreage of revegetation.

Handbook, App. B4, p. 2.

Consideration of the "worst-case scenario" does not require use of inefficient work practices, it requires consideration of the worst physical state a project could be left in at the time of bond forfeiture, which would leave the most reclamation to be completed. It does not include intangible

factors such as procurement issues or other human or agency-imposed difficulties that may arise. Therefore, DEQ would be wrong to use a "worst-case scenario" analysis as justification for its excessive "standardized costs" that are not tethered to any industry standard.

E. Survey of Other Coal Mining States Supports Greater Annual Use Hours.

Many coal mining states, including Pennsylvania, West Virginia, Kentucky, Illinois, Ohio, and Virginia, provide bonding rates based on acreage or other factors and do not rely upon a specific annual use rate. However, a survey of other states, especially those in the Western coal mining region, supports adjusting the annual use rate or other factors within *Equipment Watch* to reach the more appropriate industry standard for coal mine reclamation.

North Dakota calculates bonds for large coal mines based on 3,000 hours per year. North Dakota PSC, Reclamation Div., *Policy Memorandum No. 16* (February 2024), p. 5. While that is lower than the industry standard, it is much greater than the 2,080 annual use hours claimed by DEQ and more than double the 1,200 annual use hours actually allowed by DEQ. Similarly, New Mexico allows bonding for earth-moving equipment based on "one or two shifts per day." New Mexico Mining and Minerals Division, Energy Minerals and Natural Resources Department, *Guidelines for Bond Calculation* (September 29, 2000). No other state limits annual use hours to 2,080 hours, which DEQ claims it uses based on a standard 8-hour shift. And no other state relies on the *Equipment Watch* standard rate of 1,200 hours, which is what DEQ actually uses. Moreover, every state that utilizes the *Equipment Watch* program does so by inputting a uniform annual use hour rate into the Program. DEQ is the only state agency that not only limits annual use hour rates arbitrarily, but also the only agency that does not utilize a set annual use hours standard.

Wyoming presumes older equipment will be used and adjusts owning and operating costs to 65 percent of the *Equipment Watch* rates because of regional considerations. Wyoming DEQ, Land Quality Division, *Guideline No. 12 Standardized Reclamation Performance Bond Format and Cost Calculation Methods* (December 2, 2024). Here again, the result is equipment use rates that are more aligned with industry standards and dramatically lower than DEQ's "standardized costs." For comparison, DEQ's "standardized cost" for a D11T CD dozer is $467.71 per hour, Wyoming's rate for a D11R CD dozer is $293.65 per hour. *Id.*, Table B-1d.

F. Conclusion

There are no facts to support use of either 2,080 or 1,200 annual use hours. Doing so is not only contrary to state law, but it also sets the State up for gross misuse of the procurement system. The industry standard for coal mine reclamation ranges from 5,720 to 7,280 annual use hours, with an average of 6,257. Even so, taking a conservative approach, Westmoreland herein provides bond calculations based on 4,160 annual use hours, which equates to two 8-hour shifts per day.[8] Applying the 92 percent availability factor results in actual annual use hours of 3,827, as reflected in the attached bond calculation. **Exhibit K**, attached. The bond calculation is fact-based, specific to coal mining, and reflects industry standard, as required by law and approved by OSMRE.

[8] Except for water trucks and farm equipment, which are expected to operate less frequently.

ARM 17.24.1102(1): 2.) In Tab T13, all productivity rates need updated to most recent industry standards (CAT Handbook).

Response: Productivity rates have now been updated to conform with the rates provided in the most recent CAT performance Handbook. Caterpillar Performance Handbook Version 50, 2022, https://www.ringpower.com/media/oujnpuga/caterpillarperfhandbook_ed50.pdf. If a rate appears as though it was not updated, it is because Caterpillar did not update the rate for this year and/or the rate did not change from that in the latest printed Handbook, so the "older" rate is used.

ARM 17.24.313(1)(b): Please provide a detailed timetable for the estimated completion of each major step in the reclamation plan.

Response: The Gantt chart, **Exhibit L**, provides DEQ with Westmoreland's anticipated progression through each reclamation phase. Westmoreland does not know its exact final reclamation start date, but will provide that to DEQ when available. Given the equipment and staff currently on site, however, Westmoreland will continue to concurrently reclaim the Mine and will begin final reclamation of the site when all permitted coal seams have been mined. Final reclamation is expected to last approximately six years. An exact timetable with yardage, acreage and tasks will be developed with the Department prior to the final reclamation phase of work at the mine.

ARM 17.24.313(1)(c): 1.) In Tab T2 of 'Exhibit B16 Bond Calculation MR311 2024-06.xlsx', Truck/Loader weighted average for distance is referencing equipment cells labeled 'Dozer' in the table above. Please verify this is correct.

Response: The Truck/Loader weighted average for distance has been corrected to only average the equipment cells labeled Truck/Loader.

ARM 17.24.313(1)(c): 2.) RS Means values in Tab T5 and T6 appear to decrease from 2023 values. When checked by DEQ, 2024 values appear to increase from prior estimates; please validate these estimates. When using RS Means for pricing, use the Total O&P cost.

Response: Historically, DEQ provided RS Means estimated costs for Westmoreland's use in the bond calculations. Absent that this year, Westmoreland obtained the 2024 RS means values from a third-party contractor in heavy construction and has updated the calculations appropriately. If DEQ prefers different costs from other versions of RS Means, please advise and Westmoreland will respond accordingly.

ARM 17.24.313(1)(c): 3.) Cut/Fill calculations do not appear to include all areas of disturbance between projected end of 2025 topography and PMT. See Exhibit #1. Please revise the cut/fill calculations to include all areas of disturbance within the permit boundary.

Response: Westmorland did not receive the "Exhibit #1" referenced in its letter, but Westmoreland presumes it is a map estimating the location of the final pit layout. The final pit layout will have a higher surface area of disturbance than the surface area disturbance expected at

the end of 2025. If this is incorrect, please provide Westmoreland with Exhibit 1 and/or a more detailed explanation of this matter.

Westmoreland calculated its reclamation costs based on the total disturbed acreage that the mine projects will exist at the end of 2025. Westmoreland concurrently reclaims the Mine site as it mines, so cut/fill calculations do not include those areas that Westmoreland has already reclaimed.

Although Westmoreland has not applied for bond release on this remediated acreage, a field inspection would indicate that soil has been redistributed. See the work remediation section of the bond calculation (**Exhibit K)** on Plate 3. Thus, Westmoreland did not include cut/fill calculations for areas that have already been reclaimed. DEQ previously requested late in the summer of 2024 that Westmoreland not include areas of disturbance in the bond calculation where reclamation has occurred.

ARM 17.24.313(1)(c): 4.) As proposed in MR311, the pit surface configuration is projected from the end of 2026. According to the permit documents, all coal will be mined by then. Therefore, please use the approved postmining topography as the "Final Bond Topography" in the bond calculation.

Response: The bond topography represents the worst-case disturbance scenario up to the end of 2025. See **Exhibit K**, Plate 3.

ARM 17.24.313(1)(c): 5.) Please include costs for finish grading, final drainage design (part of whole grading scheme) and final drainage establishment for all permit areas that do not have Phase I bond release.

Response: Costs have been calculated based on the actual amount of reclamation work that will exist at the end of 2025, according to Westmoreland's mining schedule. In some areas, some of the finish work has already been completed. The bond calculation accurately reflects the reclamation work remaining based on actual, on-the-ground conditions.

Please review and revise (as necessary) the "balance polygons" used in Table 2. The cut and fill volumes in some of these are not balanced. For example, there is an imbalance of 22% in CF-24 and 33% in CF-23.

Response: Cut-fill balances have been verified for blocks CF-24 and CF-23. Westmoreland used the difference between the PMT and the projected 2025 surface disturbances for the analysis. Westmoreland considered and accounted for all surface area disturbances within the pit, including disturbances currently sitting beneath water in the pit.

ARM 17.24.313(1)(c): 6.) Dozer grades in the CAT Handbook are limited to -30%. Please adjust dozer grades in Table 2 so that none are steeper than -30%.

Response: DEQ is referring to the percent Grade v. Dozing Factor chart on page 16 of the CAT Handbook. The chart is truncated to give dozer users a quick reference for flatter operating conditions.

Dozers have consistently been used on grades as high as 1:1, or 100 percent slopes, which is a 45 degree angle. Westmoreland called CAT representatives to discuss this and CAT confirmed that large dozers are typically designed to briefly operate upwards of around 100 percent slopes, and continually on slopes less than 47 percent, which further supports the accuracy of Westmoreland's calculations. **Exhibit M**, attached. Westmoreland's extensive field experience also confirms that the dozer grades used in these calculations are correct and Westmoreland has conducted reclamation using its dozers on slopes of these grades. For example, Westmoreland reclaimed the North side of Area A of its Rosebud mine at a slope of 45 degrees, which equals a 100 percent slope.

Sincerely,

CROWLEY FLECK PLLP

/s/ Victoria A. Marquis

Victoria A. Marquis

VAM:db
Enclosures, Exhibits A-M.

EXHIBIT NO. 3

DEQ
Montana Department
of Environmental Quality

January 24, 2025

Sent via ePermit system

Noelle Boyer
Westmoreland Absaloka Mining LLC
Absaloka Mine
100 Sarpy Creek Rd.
Hardin, MT 59034

Permit ID: C1985005
Revision Type: Minor Revision
Permitting Action: Deficiency
Subject: MR311; Bond Release-Round 3 Acceptability Deficiency

Dear Noelle:

The Department of Environmental Quality (DEQ) has reviewed your submittal. DEQ has carefully reviewed the responses regarding equipment rates. DEQ is committed to determining accurate performance reclamation bonds that reflect the total estimated cost to the state of completing the work described in WRM's reclamation plans as required by Section 82-4-223, Montana Code Annotated (MCA).

In its response, WRM identifies the need for a guidance document to provide details about bond calculations and the basis for equipment rates. DEQ agrees a guidance document is warranted and is committed to working with stakeholders to develop a bond guidance document. Further, in its response, WRM stated DEQ should consider multiple shifts when determining equipment rates with Equipment Watch. DEQ does not agree modifications to equipment rates in Equipment Watch based on anticipated usage is appropriate without a guidance document in place. However, DEQ recognizes the standard rates provided by Equipment Watch do not accurately reflect the equipment rates of a large scale mine reclamation project such as reclamation of a coal mine. DEQ has obtained equipment cost rates information through Costmine Intelligence, a data service similar to Equipment Watch that focuses on mine equipment costs. The equipment rates identified in Costmine Intelligence compare favorably with equipment quotes obtained through local equipment dealers and is based on rates applicable to mine scale projects. DEQ will utilize the Costmine Intelligence rates to determine the bond once material movement deficiencies are addressed.

In order to determine an appropriate bond calculation, the following deficiency must be adequately addressed before DEQ can determine the application acceptable:

ARM 17.24.313(1)(c): Cut/Fill calculations do not appear to include all areas of disturbance between the topography provided and PMT. DEQ has calculated 4.99MCY of missing volume shown in Exhibit 1a. The volume addition was calculated from the topography provided in 'Exhibit B16 Bond Calculation Map Plate 1.dwg' and the approved PMT surface. Please add the additional volume to the backfill cut/fill polygons and bond calculations or provide justification why the area shown in 'Exhibit 1a' should remain absent from the bond calculation.

Soil redistribution calculations do not include all areas of disturbance between the topography provided and PMT. DEQ has calculated 224 acres of missing area not included in soil redistribution calculations; see Exhibit 2. With a permitted target soil depth of 18 inches, DEQ has calculated 0.54MCY of soil redistribution is missing from bond calculations. Please add the additional area and volume into the bond calculation or provide justification why the areas shown in Exhibit 2 should remain absent from the bond calculation.

Please use the approved postmining topography as the "Final Bond Topography" in the bond calculation. For areas where the postmining topography cannot be achieved based on mining progress, material volumes based on achieving the approximate postmine topography should be provided. DEQ Coal Section engineers are available to discuss the methodology for estimating approximate volumes.

Please feel free to contact me with questions regarding this letter.

Sincerely,

Emily Lodman

Emily Lodman, Acting Coal Section Supervisor
Mining Bureau
Phone: 406-444-2873
Fax: 406-444-4988
Email: Elodman@mt.gov

Cc: Jeff Fleischman, Office of Surface Mining
Erica Trent, Office of Surface Mining

EXHIBIT NO. 4

March 17, 2025

Sent via ePermit system

Noelle Boyer
Westmoreland Absaloka Mining LLC
Absaloka Mine
100 Sarpy Creek Rd.
Hardin, MT 59034

Permit ID: C1985005
Revision Type: Minor Revision
Permitting Action: Deficiency
Subject: MR311; Bond Release-Round 4 Acceptability Deficiency

Dear Noelle:

The Department of Environmental Quality (DEQ) has reviewed your submittal. The following deficiency must be adequately addressed before DEQ can determine the application acceptable. DEQ will calculate the bond once the following additional information has been provided:

ARM 17.24.313(1)(c): The bond calculation narrative "Calculation of Pit Cut and Fill Volumes" states that "A pit shell was constructed based on the proposed mine plan to the end of 2026" while Plate-1, Worst Case Bond Topography indicates the End of 2025. Please clarify the date.

In 'Exhibit B16 Bond Calculation Map Plate 3' CF-37 polygon was noted to be missing from material movement calculations. Please add this polygon area into the table and use in associated calculations.

All cut/fill calculations for dozing and truck/shovel backfill should include polygon area centroids of the initial material movement and final destination for calculation of distances and slope. Please provide additional justification in 'Exhibit B16 Bond Calculation Map Plate 3' showing how the values used for distance and grade were calculated.

Soil redistribution shown in 'Exhibit B16 Bond Calculation Map Plate 4' does not include information necessary for accurate bond calculation. Information missing from these calculations include polygon areas listed for topsoil application, starting topsoil pile, and destination location. Please provide additional justification of how production rates, push/haul distance, and slopes were calculated. Additionally, the total volume of reported topsoil divided

by area of topsoil redistribution listed in 'Exhibit B16 Bond Calculation Map Plate 4' calculates to an average topsoil redistribution depth of 10-11 inches. This does not align with permitted topsoil redistribution depth of '18 inches, plus or minus 6 inches' listed in 'Exhibit B26 Soil Balance Plan' within the permit. If spoil only areas exist, identification of these areas must be listed in 'Exhibit B16 Bond Calculation Map Plate 4' and included in bond calculations. Please address how topsoil redistribution will be completed with additional information listed above.

Please feel free to contact me with questions regarding this letter.

Sincerely,



Emily Lodman, Acting Coal Section Supervisor
Coal Section
Mining Bureau
Phone: 406-444-2873
Fax: 406-444-4988
Email: Elodman@mt.gov

Cc: Jeff Fleischman, Office of Surface Mining
Erica Trent, Office of Surface Mining

EXHIBIT NO. 5

June 5, 2025

Sent via ePermit system

Westmoreland Absaloka Mining LLC
Absaloka Mine
100 Sarpy Creek Rd.
Hardin, MT 59034

Permit ID: C1985005
Revision Type: Minor Revision
Permitting Action: Deficiency
Subject: MR311; Notice of Bond Calculation

Dear Westmoreland Absaloka Mining LLC:

The Department of Environmental Quality (DEQ) has competed its review of Westmoreland Absaloka Mining LLC's application for Minor Revision MR311. DEQ has determined that the determined a bond increase is necessary based on the information submitted as part of Minor Revision 311. The Administrative Rules of Montana (ARM) 17.24.1104(1) requires that DEQ notify the permittee of a proposed bond increase and provide the permittee with an opportunity for an informal conference.

Based on the information received from Westmoreland Absaloka Mining (WAM), requirements of the Montana Strip and Underground Mine Reclamation Act (MSUMRA), rules adopted under MSUMRA and the permit conditions, DEQ has determined the required WAM Bond is $27,510,000. DEQ arrived at its determination based on the following adjustments to MR311**.**

- Equipment cost values have updated to align with Costmine lease rates, identical to values used in DEQ bond calculations for Rosebud Area B and Rosebud Area C.

A summary of the bond calculation is provided in Table 1.

Table 1						
Bond Calculation Summary						
		Dozer Volume	Truck/Loader Volume	Total Yards		
Major Earthmoving Volumes:		LCY	LCY	LCY		
Table 2	DEQ Area	22,490,800	3,252,200	25,743,000		
Table 9	Soil Replacement	144,241	1,978,508	2,122,749		
		22,635,041	5,230,708	27,865,749		
Direct Costs:						
Table 2	Material movements					$11,630,280
Table 3	Drilling & Blasting Costs					$544,008
Table 4	Dozer Ripping of Borrow and Other Areas					$145,958
Table 5	Faclities Decommissioning					$5,159,986
Table 9	Soil Redistribution					$3,260,060
Table 10	Revegetation					$1,012,416
Table 11	Long-Term Monitoring					$448,160
Total Direct Costs:						**$22,200,867**
Indirect Costs		Percent				
Contingency		3.0%				$666,026
Mobilzation/Demobilzation		1.0%				$222,009
Engineering Redesign		2.0%				$444,017
Profit and Overhead		12.0%				$2,664,104
Project Management		2.5%				$555,022
Total Indirect and Contingencies		**20.5%**				**$4,551,178**
Inflation		**2.8%**				**$ 749,057.26**
				Total		**$27,501,102**
Total Bond (round up to nearest $10,000)						**$27,510,000**

Based on the current $24,180,000 bond held for the Absaloka mine, WAM must post an additional $3,330,000 in bond by **December 31, 2025**, unless an extension is requested by WAM and granted by DEQ. WAM may request an informal conference regarding the proposed increase pursuant to ARM 17.24.1104. An informal conference would follow the procedures outlined in ARM 17.24.403(2) through ARM 17.24.403(4). The request for an informal conference must be received within 30 days of issuance of this letter. Please feel free to contact me with questions regarding this letter.

Sincerely,

Emily Lodman

Emily Lodman, Acting Section Supervisor
Coal Section
Mining Bureau
Phone: 406-444-2873
Email: Elodman@mt.gov

Cc: Jeff Fleischman, Office of Surface Mining
Erica Trent, Office of Surface Mining

EXHIBIT NO. 6

WESTMORELAND

July 7, 2025

Sent via ePermit system

Emily Lodman, Acting Section Supervisor
Coal Section
Mining Bureau
Montana Department of Environmental Quality
P.O. Box 200901
Helena, MT 59620-0901

RE: Westmoreland Absaloka Mining LLC, Absaloka Mine, Permit C1985005, MR311; Response to June 5, 2025 Deficiency Letter

Westmoreland Absaloka Mining LLC ("Westmoreland") appreciates the opportunity to respond to DEQ's June 5, 2025 Deficiency Notice regarding Minor Revision 311, Notice of Bond Calculation (4th Deficiency Notice).

Minor Revision Process

While styled as a Deficiency Notice for Minor Revision 311, the letter purports to serve as notice of a proposed bond increase of more than $3,000,000 for the Absaloka Mine, with an opportunity for Westmoreland to request an informal conference. Both the text of the letter and its context require continued dialogue through the minor revision process.

Westmoreland first submitted Minor Revision 311 to DEQ in July 2024. Previous deficiency letters from DEQ dated August 23, 2024, January 24, 2025, and March 17, 2025 requested additional information related to the reclamation plan as governed by ARM 17.24.313, including, for example, calculation of cut and fill volumes and information about topsoil redistribution. Since DEQ's 4th Deficiency Notice does not raise any deficiency related to the reclamation plan or the requirements of ARM 17.24.313, we conclude that DEQ agrees the bond calculation is correctly aligned with the reclamation plan and the requirements of ARM 17.24.313.

The only deficiency previously noted by DEQ that was not related to the reclamation plan was raised in the first deficiency letter, dated August 23, 2024. There, DEQ requested use of different equipment costs, specifically, use of "DEQ standardized costs" which appeared to be derived from the Equipment Watch program and CAT Handbook. On December 23, 2024, Westmoreland provided a lengthy response detailing the pitfalls of Equipment Watch and the

need to adjust the default settings in Equipment Watch to ensure reclamation cost estimates are realistic for large surface coal mines in Montana. DEQ did not respond and subsequently issued two additional deficiency letters noting other issues, unrelated to equipment costs.

Now, nearly six months later, DEQ demands over $3,000,000 in additional bond—apparently based on Costmine Intelligence, a wholly new equipment cost program. DEQ never identified its shift to Costmine as a deficiency Westmoreland could address, despite nearly one year of back-and-forth deficiency notices and responses concerning the bond calculation. Equipment costs were first discussed by DEQ in August and apparently resolved upon DEQ's receipt of Westmoreland's December 23, 2024 deficiency response because DEQ did not raise equipment costs in either its January or March deficiency notices. Therefore, DEQ's sudden and costly reliance on a previously undisclosed and fundamentally different cost source is untimely.

DEQ's use of the minor revision process to demand the additional $3,000,000 is also inappropriate. Nothing in the statute or rule governing minor revisions supports DEQ's unilateral demand for a higher bond or the informal conference process described in DEQ's 4th Deficiency Notice. See § 82-4-229, MCA and ARM 17.24.415. The deficiency process for minor revisions provides a structured back-and-forth process of information sharing and communication. DEQ's demand is inconsistent with that process and inappropriate in the context of minor revision review.

Improper Reliance on Costmine Intelligence

DEQ explains the increase is due to increased "[e]quipment cost values" based on "Costmine lease rates." DEQ previously relied on default values within the Equipment Watch program. As explained in detail by the Montana Coal Council's Technical Committee in February 2024, in a November 2024 meeting with Westmoreland and Montana reclamation contractors, and in three separate deficiency responses from Westmoreland dated December 23, 2024, DEQ's reliance on the default settings within Equipment Watch was contrary to standard practices of large reclamation contractors operating in Montana. DEQ seemed to acknowledge that reality in letters dated January 16, 2025 responding to MR170 for the Rosebud Mine Area C and MR111 for the Rosebud Mine Area B, stating "DEQ recognizes the standard rates provided by Equipment Watch do not accurately reflect the equipment rates of a large scale mine reclamation project such as reclamation of a coal mine." In that same communication, DEQ noted that changes to the equipment rates would not be appropriate "without a guidance document in place."

DEQ later backtracked, indicating it would continue to use Equipment Watch as it had before. DEQ, S. King, Ltr. to V. Marquis (March 28, 2025). Now, DEQ does exactly what it said should not be done – it requires use of a wholly new program, Costmine Intelligence, without explanation or any duly vetted guidance. 4th Def. Not., p. 1. This appears arbitrary and capricious: shifting away from Equipment Watch in January, back to Equipment Watch in March, and now to Costmine Intelligence – all without any published or publicly vetted guidance and apparently without incorporating the expertise of coal mine reclamation specialists who are and have been actively reclaiming coal mines in Montana.

In a March 12, 2025 letter, Westmoreland urged DEQ to "work closely with stakeholders to ensure the Costmine Intelligence program meets the engineering standards and reflects realistic and timely regional aspects of coal mine reclamation in Montana prior to any commitment to using the program in Montana." Again, in a June 25, 2025 letter, Westmoreland raised concerns with Costmine Intelligence based on its apparent use as an investment tool for operating mines rather than as an estimation tool for reclaiming mines. Costmine Intelligence also focuses on hard rock mine reclamation, which has different operating costs due to the extra wear and tear on equipment caused by handling heavy ore and rocks instead of the relatively loose overburden and other types of soil present at surface coal mines.

Westmoreland also pointed out that Costmine Intelligence appears to base its equipment rates on the use of brand-new equipment, which is contrary to input from Montana reclamation specialists who informed DEQ that they already own the equipment and would not lease or buy brand-new equipment if contracted to reclaim a Montana coal mine. Additionally, no legal support is found for bond amounts premised on the use of brand-new equipment. While DEQ must ensure the bond amount is "relative to the degree of disturbance" and adjust the bond amount "if the cost of reclamation changes," nothing in MSUMRA allows DEQ to require the use of brand-new equipment when calculating bond amounts. § 82-4-223, MCA. In fact, such a requirement would appear contrary to the Montana Procurement Act which establishes that contracts must "serve the best interest of the state by encouraging effective competition or otherwise promoting economies in state procurement." § 18-4-313(3)(b), MCA. Reliance on Costmine Intelligence, specifically its presumption that brand-new equipment will be used in reclamation, is contrary to reality, lacks legal support, and establishes a very bad precedent for state contracts.

Neither of our neighboring coal mine states relies on Costmine Intelligence without adjustment. Wyoming only uses 65% of the Costmine Intelligence rates for equipment estimates and specifically includes a "Used Shovel Purchase Option." WY LQD, Guideline 12, Table D-1b, D-1d. North Dakota updated its variable cost appendix on July 1, 2024, resulting in an average 4.92% reduction in cost items for equipment used at large mines. ND PSC, Memo to Mine Operators, Revised Policy Memorandum No. 16 and annual update of variable costs (December 30, 2024). Montana's bonding levels are significantly higher than its neighboring coal states, but for no apparent good reason. Purvis Ltr. to Nowakowski, pp. 7-9 (June 25, 2025). Furthermore, the Absaloka bond amount increase of more than $3,000,000 indicates that Costmine Intelligence is a major shift from DEQ's previously accepted bond calculations. Use of Costmine Intelligence, without adjustment, is so at odds with both regional and state precedent that it appears arbitrary and capricious.

DEQ's proposed bond calculation for the Absaloka Mine seems to confirm our early impression of Costmine Intelligence – it is not an appropriate tool for estimating the costs of reclaiming a surface coal mine in Montana.

Divergence from Federal Precedent

Westmoreland followed the same method and used the same rates to calculate the reclamation bonds for both the Montana and the Crow Indian Reservation portions of the Absaloka Mine. Nearly a year ago, on August 8, 2024, the Biden Administration's OSMRE accepted the bond calculation for the portion of the mine within the Crow Indian Reservation, finding that "no additional bond is required." OSMRE, Permit Renewal Decision Document, Finding 5 (August 2024). DEQ's demand for $3,000,000 more in bonding – over and above the bond calculation methods and rates found acceptable for federal regulation of the same mine – is significant. No rationale for DEQ's departure from federally accepted practices is provided and none is apparent.

Information Necessary to Respond to the 4th Deficiency Notice

ARM 17.30.1102(1) requires DEQ to base the bond amount on "estimated costs submitted by the permittee in accordance with ARM 17.24.313." As noted above, Westmoreland has correctly aligned the bond calculation with the reclamation plan pursuant to ARM 17.24.313. To respond to the 4th Deficiency Notice, Westmoreland needs to better understand how our cost estimates were viewed by DEQ and exactly where DEQ found them deficient. While our bond calculation provided the summary and all supporting tables, DEQ has only provided a summary of what it proposes as a wholly new bond calculation.

While ARM 17.30.1102(1) also allows DEQ to base the bond amount on "costs estimated by using current machinery production handbooks and publications or other documented costs acceptable to the department," it may do so only if such cost estimates are "applicable." Absent additional information, we cannot determine which specific costs are at issue, why a wholly new cost estimating program was used, or how that wholly new cost estimating program might or might not be applicable. As noted above, we remain gravely concerned with the applicability of Costmine Intelligence to surface coal mine reclamation in Montana.

To ensure Westmoreland can appropriately respond to the Deficiency Notice, please provide the following information:

1. The lease rates used by DEQ in its proposed bond calculation.
2. Tables 2 through 11 referenced in DEQ's Table 1, Bond Calculation Summary as well as all worksheets and data supporting the proposed bond calculation.
3. Any analysis conducted or relied upon by DEQ regarding the usability or applicability of the lease rates and costs rates used in DEQ's calculation.
4. Any other source or rationale considered or relied upon by DEQ in its bond calculation, including documents, information, data, worksheets, and conversations with other individuals, companies, or agencies.
5. An explanation of DEQ's determination to use lease rates as opposed to ownership rates.

Westmoreland will respond to the 4th Deficiency Notice after it has received and reviewed the information requested from DEQ.

Unilateral Bond Adjustments

Instead of following the proper process for review and approval of a minor revision, DEQ refers to ARM 17.24.1104(1), which governs agency-initiated bond adjustments based on increases in the permit area, changes in mining methods, changes in standards of reclamation, or increases in the cost of future reclamation, restoration, or abatement work. DEQ's reliance on ARM 17.24.1104(1) is unsupported because there have been no increases in the permit area, no changes in mining methods, and no changes in standards of reclamation. And while DEQ vaguely references increased future reclamation costs, it identifies no specific cost increases—and none are apparent. In fact, the exact opposite appears to be the case. DEQ lowered the amount of soil replacement required for reclamation from nearly 300,000 Loose Cubic Yards ("LCY") to less than half that, or just under 150,000 LCY. 4th Def. Not., Table 1 (June 5, 2025). DEQ's calculation is therefore premised on less reclamation than Westmoreland's was, yet inexplicably results in $3,000,000 more in costs.

DEQ offers no reasoned or factually supported explanation for the change; therefore, there is no valid increase in the cost of future reclamation work that would support DEQ's demand for more than $3,000,000 in additional bonding. The criteria for applying ARM 17.24.1104(1) have not been met. Instead, it appears that DEQ has improperly escalated what was a routine, iterative exchange within the minor revision process into the demanding and limited process governing disputes over unilateral bond adjustments.

Informal Conference

DEQ's reliance on ARM 17.24.403 for informal conference procedures is misplaced. As noted above, the minor revision process which has been ongoing for a year provides no statutory or regulatory support for DEQ's unilateral bond increase and offer of an informal conference. To the extent DEQ views its 4th Deficiency Notice as a bond adjustment pursuant to ARM 17.24.1104, the context and text of the 4th Deficiency Notice strongly suggest otherwise.

Even so, ARM 17.24.1104 does not incorporate or refer to the informal conference provisions of ARM 17.24.403. Instead, ARM 17.24.1104(1) independently provides "the permittee an opportunity for an informal conference on the proposal" without requiring that the conference follow the procedures outlined in ARM 17.24.403.

By its own terms, ARM 17.24.403 applies only to DEQ decisions on specific permit actions—applications for an operating permit, a test pit prospecting permit, a renewal of either, a major revision, or an amendment to add acreage to either. ARM 17.24.403(1) (citing ARM 17.24.401(1)). None of those actions are at issue here. No application, renewal, major revision, or amendment to add acreage has been submitted. Therefore, ARM 17.24.403 does not apply.

Nothing links the informal conference provided in ARM 17.24.1104 to the informal conference provided at ARM 17.24.403. The text of each rule illustrates a fundamental difference: where ARM 17.24.403 provides an opportunity for an informal conference to "[a]ny person whose interests are or may be adversely affected…", ARM 17.24.1104 provides the opportunity for an informal conference to "the permittee." That makes sense because a bond increase pursuant

to ARM 17.24.1104(1) provides no operational change or bond release – nothing that would trigger the need for a broader process. See ARM 17.24.403; 17.24.1111. This is not to say that members of the public could not challenge a final agency action following a bond adjustment proceeding conducted under ARM 17.24.1104(1).

Westmoreland does not believe that ARM 17.24.1104(1) applies to this situation. Instead, the minor revision process should continue, and Westmoreland should be provided with the information requested above so it can respond to the 4th Deficiency Notice. However, should DEQ insist on proceeding with its demand and the dispute process provided in ARM 17.24.1104(1), and to ensure our rights, as well as the issues raised in this and all previous communications between Westmoreland and DEQ related to bond calculations and bonding guidance are preserved, please consider this our request that, to the extent ARM 17.24.1104(1) applies, an informal conference with DEQ be scheduled after the information requested above is provided to Westmoreland and sufficient review time has been allowed. We find no deadline by which the informal conference must be held, but we desire to have this issue addressed through the deficiency notice process for Minor Revision 311, well in advance of DEQ's bond posting deadline of December 31, 2025. 4th Def. Not., p. 2.

Conclusion

Westmoreland does not believe that DEQ's demand for more than $3,000,000 in additional bond is timely or appropriate pursuant to the minor revision process and we do not view ARM 17.24.1104(1) as applicable here. Therefore, we propose that DEQ and Westmoreland proceed through the normal deficiency response process governing minor reviews to determine if a resolution can be reached. In the event a bond adjustment in accordance with ARM 17.24.1104(1) is pursued, we propose coordinating the date of the informal conference after Westmoreland has received the information requested above and after the minor revision process has concluded.

Thank you for your time and attention to this matter and for the opportunity to continue this dialogue. We look forward to resolving this issue without elevating it to the demanding, dispute-oriented process provided in ARM 17.24.1104(1). Please let us know if you have questions or concerns with any of the information presented in this letter. If DEQ has questions about Westmoreland's information request or prefers that the request be submitted through DEQ's "Public Records Center" website, please let us know as soon as possible so we can initiate that process.

Sincerely,

Todd R. Briggs

Todd Briggs
Permitting and Regulatory Compliance Counsel

EXHIBIT NO. 7

August 29, 2025

Sent electronically and via ePermit system

Westmoreland Absaloka Mining LLC
10375 Park Meadows Drive, Suite 400
Lone Tree, CO 80124

Permit ID: C1985005
Revision Type: Minor Revision
Permitting Action: Deficiency
Subject: MR311; DEQ Reply to July 7, 2025 Letter

Dear Westmoreland Absaloka Mining LLC:

The Montana Department of Environmental Quality (DEQ) appreciates the additional comments provided by Westmoreland Absaloka Mining LLC (WAM) related to the bond calculation at the Absaloka Mine. DEQ is required to ensure holders of surface mine permits authorized pursuant to the Montana Strip and Underground Mine Reclamation Act (MSUMRA) submit bond that is not less than the total estimated cost to the state for completing the work described in the reclamation plan (Section 82-4-223, Montana Code Annotated (MCA)). In your letter, you raise many issues related to the process DEQ and operators have utilized for determining updates to the bond amounts as the cost of reclamation changes.

In response, DEQ has summarized the points raised in WAM's letter into the following categories:

- Bond Update Process;
- Equipment Cost Rates;
- DEQ Initiated Bond Adjustments;
- Alignment with Office of Surface Mining Reclamation and Enforcement Guidance;
- Request for Additional Information;
- Informal Conference; and,
- Draft Coal Bond Calculation Guidelines.

The following text addresses WAM's positions in turn.

I. Bond Update Process

With regard to the bond update process, WAM appears to: (1) take issue with a proposed bond increase identified in a deficiency notice (*WAM Response Letter*); (2) assert DEQ never identified a shift to Costmine as a deficiency (id. at ¶*5*); (3) claim the reclamation bond cannot be increased through a minor revision (id. at ¶6); and (4) asks to continue the minor revision process (id. at ¶ 24).

DEQ typically performs bond updates through a permitting process whereby a permittee submits information to DEQ for review to determine the amount of the performance bond. DEQ adopted this process to facilitate communication between permittees and DEQ. WAM committed to implement an annual bonding process in consultation with DEQ through Minor Revision MR304 in 2023. WAM submitted MR304 to comply with the Administrative Rules of Montana (ARM) 17.24.313(1)(c) which specifically requires the submittal of a detailed estimate of the cost of reclamation. WAM's cost estimate submitted as a minor revision, is the detailed cost estimate also required under ARM 17.24.1102(1). ARM 17.24.1102 states the bond amount is based on, but not limited to the estimated costs submitted by the permittee in accordance with ARM 17.24.313 and, if applicable, costs estimated by using current machinery production handbooks and publications or other documented costs acceptable to DEQ.

WAM submitted its updated detailed reclamation cost estimate update on June 27, 2024. DEQ responded to the first deficiency letter directing WAM to update its bond submittal with standardized costs based on publications of equipment cost rates determined to be acceptable to DEQ. WAM responded with updated bond calculations through the e-permit system on January 2, 2025, but WAM did not update the bond calculation to the standardized cost rates provided by DEQ. Instead, WAM argued DEQ should deviate from its long-standing process for determining equipment cost rates rather than WAM update its minor revision application per the identified deficiencies. WAM's bond calculation was not updated to the rates provided by DEQ.

WAM's decision to not update the equipment cost rates to those provided by DEQ as identified in the deficiency letter necessitated a shift in how DEQ reviewed the 2024 performance reclamation bond update.

In its response, WAM appears to take exception to the fact that the reclamation bond increase was provided as a deficiency notice for Minor Revision MR311 rather than WAM updating its submittal. It is important to note that DEQ completed its bond determination pursuant to Section 82-4-223, MCA, and ARM 17.24.1102, identical to how DEQ reviews bond updates submitted as minor revision submittals from permittees. Section 82-4-223, MCA, requires DEQ to adjust the amount of bond required if the cost of reclamation changes. Nothing in rule or statute precludes DEQ from providing WAM a notice of bond increase. Additionally, ARM 17.24.1104(1) states (1) the amount of the performance bond must be increased, as required by DEQ; (2) requires DEQ to notify the permittee of any proposed bond increase; and (3) provides the permittee an opportunity for an informal conference. DEQ's June 5, 2025 deficiency letter followed each of these requirements and provided adequate time for WAM to request an informal conference prior to posting the additional bond. The reclamation bond amount was

properly determined using equipment rates determined by DEQ to be acceptable. Thus, WAM must post the additional bound amount of $3,330,000 by December 31, 2025.

WAM indicated it did not agree with DEQ's use of equipment cost rates derived from Costmine Intelligence when applied to WAM's performance reclamation bond. However, as evidenced by WAM's deficiency response, WAM also did not agree with DEQ using the equipment cost rates determined through DEQ's longstanding reliance on the default EquipmentWatch equipment cost rates. Pursuant to ARM 17.24.1102(5), DEQ established equipment cost rates based on data available to DEQ. As discussed in more detail below, the equipment rates were determined using Costmine Intelligence and addressed WAM's primary concern regarding the applicability of applying the default EquipmentWatch rates to a mining operation. DEQ notes that Westmoreland did not protest the methodology that uses Costmine Intelligence for determining the equipment cost rates for Rosebud Area B and Area C. DEQ notified Westmoreland of its intent to utilize interim equipment rates based on Costmine Intelligence in the January 2025 acceptability letters for Rosebud Area B (MR111) and Rosebud Area C (MR170) and committed to developing a guidance document for future bond calculations.

DEQ appreciates WAM's desire to utilize a minor revision process for performing bond adjustments. However, DEQ is required, at all times, to ensure it holds adequate bond that is not less than the total estimated cost to the state of completing the work described in a permittee's reclamation plan (Section 82-4-223, MCA). DEQ is also required to adjust the amount of bond required if the cost of reclamation changes pursuant to Section 82-4-223, MCA. While WAM may not agree with the equipment rates applied by DEQ for the bond determination, DEQ has found the Costmine Intelligence equipment rates to be reasonable and represent the actual cost of reclamation. DEQ's completion of WAM's 2024 bond review process by utilizing Costmine Intelligence rates is merely the completion of the bond review process required by Section 82-4-223, MCA. DEQ is including the bond calculation spreadsheet it relied upon for the bond determination.

II. Equipment Cost Rates

WAM raises a number of arguments regarding equipment cost rates, claiming: (1) "pitfalls" exist using the default rates in EquipmentWatch (WAM Response Letter, ¶ 4); (2) reliance on CostMine Intelligence rates is inappropriate (*id.* at ¶ 7); (3) DEQ's application of published rates appears to be "arbitrary and capricious" (*id.* at ¶¶ 8, 11); (4) DEQ is not utilizing the expertise of coal mine reclamation specialists (*id.* at ¶ 8); and (5) that the increased bond is a result of switching to Costmine Intelligence rates (*id.* at ¶ 11). DEQ disagrees.

The licensed professional engineers in DEQ's Mining Bureau carefully considered the Montana Coal Council Technical Committee's input and WAM's input regarding equipment costs. DEQ responded to the Montana Coal Council Technical Committee on March 8, 2024. In that response, DEQ stated that modification of the default EquipmentWatch equipment rates was not appropriate for determining acceptable performance reclamation bonds. DEQ reiterated its

position and stated "DEQ does not agree modifications to equipment rates in EquipmentWatch based on anticipated usage is appropriate without a guidance document in place" in the acceptability notices provided to Westmoreland for MR111 (Rosebud Area B) and MR170 (Rosebud Area C). Please note, DEQ did not state changes to equipment rates would be inappropriate without a guidance document in the acceptability letters. Instead, DEQ noted that only modification from the default values provided by EquipmentWatch without a guidance document would be inappropriate.

DEQ has taken and will continue to take a measured approach to determine the equipment cost rates DEQ finds acceptable for determining performance reclamation bonds. WAM's argument that DEQ is acting in an arbitrary manner is false and appears to be based on taking DEQ's statements out of context. Further, Westmoreland did not take exception with DEQ utilizing Costmine Intelligence rates in both Rosebud Area B MR111 and Rosebud Area C MR170 bond determinations.

DEQ has reviewed the CostMine Intelligence rates and found they accurately reflect mine reclamation equipment costs. Costmine Intelligence is another equipment rate provider that is also used by other regulatory jurisdictions. Costmine Intelligence differs from EquipmentWatch as the rates are specific to mining projects rather than the broadly applicable construction industry. Costmine Intelligence data is commonly used for estimating the cost of mining related projects. DEQ isn't required to find the cheapest available options in calculating performance bonds; rather, DEQ must rely on industry standard equipment cost rates to ensure adequate money is available to DEQ to complete reclamation.

WAM's assertion that the use of CostMine Intelligence dataset –which is specific to mining— resulted in the bond increase is false. Costmine Intelligence equipment rates are appropriate, do not include arbitrary adjustments and are specific to mining projects. Based on the industry specific rates obtained from Costmine Intelligence, DEQ determined WAM must post additional bond of $3,330,000 for a total reclamation bond of $27,510,000. Utilizing the rates obtained from EquipmentWatch, on the other hand, would result in a total reclamation bond of $30,330,000 or an increase of $6,150,000. DEQ provided the rates associated with EquipmentWatch in the first deficiency letter to WAM. DEQ is willing to accept WAM using the default settings in EquipmentWatch. DEQ's decision to utilize the CostMine Intelligence rates is in complete alignment with Mr. King's letter to Ms. Marquis in March 2025. The lower bond amount determined through Costmine Intelligence for WAM's 2024 bond determination is a result of utilizing an industry specific dataset. Please note a bond increase resulted from either the CostMine Intelligence or EquipmentWatch calculation method. Additionally, the use of equipment cost data specific to the mining industry is neither arbitrary nor capricious; WAM certainly hasn't pointed DEQ to any evidence of why it would be. Nor does WAM's advocacy for a different approach render the equipment rates DEQ utilized arbitrary. If WAM is concerned about DEQ's bond calculation using Costmine Intelligence, DEQ is amenable to accepting the higher bond amount determined using EquipmentWatch equipment cost rates to ensure WAM is adequately bonded.

III. DEQ Initiated Bond Adjustments

With respect to DEQ's initiation of bond adjustments, WAM states: (1) DEQ is not following the proper process for review and approval of a minor revision (WAM Response Letter, ¶18); and (2) DEQ's reliance on ARM 17.24.1104(1) is unsupported (*id.*).

WAM's assertion that DEQ did not follow the proper process for review and approval of a minor revision to determine the performance reclamation bond necessary for WAM's mine is without merit. As noted above, DEQ is required by MSUMRA to ensure WAM is appropriately bonded at all times, regardless of the process a permittee proposes to update its bond. DEQ appreciates WAM's commitment to provide updated, detailed cost estimates on an annual basis and looks forward to these being provided in future reviews. Please note, however, that in order for the revision process to be effective and result in a timely bond determination, WAM must timely update its bond calculation per the deficiencies identified by DEQ.

IV. Alignment with Office of Surface Mining Reclamation and Enforcement Guidance

WAM asserts DEQ's equipment cost rates improperly diverge from federal precedent (WAM Response Letter, ¶ 13). WAM fails to recognize that DEQ is operating under state authority. *See Bragg v. W. Va. Coal Ass'n*, 248 F.3d 275, 289 (4th Cir. 2001) (recognizing state and federal coal mining programs are mutually exclusive). Further, important constitutional obligations undergird Montana's state program absent from SMCRA, including the obligation that all lands "disturbed by the taking of natural resources [be] reclaimed." Ar. IX, § 2, Mont. Const.; § 82-4-202(3)(b) (incorporating same and recognizing MSUMRA is "an exercise of the authority granted in the Montana constitution and, in particular, a response to the mandate expressed in Article IX of the constitution"). Accordingly, OSMRE's previous guidance has little, if any, precedential value.

Nevertheless, WAM's assertion that DEQ's determination is significantly outside of the approved OSMRE's methodology is false. OSMRE's guidelines are clear that the costs should be determined by the relevant jurisdiction based upon industry standard rates. OSRME's decision regarding the bond calculation at a mine it regulates is not binding precedent and is not meant to be considered precedent for any other jurisdiction. Like DEQ, OSMRE must adopt rates that are appropriate for reclamation of coal mines where OSMRE has independent authority.

V. Request for Additional Information

WAM requested information related to DEQ's bond determination (WAM Response Letter, ¶ 16)

As part of this response, DEQ has provided electronic copies of the bond determination calculations based on equipment cost rates from EquipmentWatch and Costmine Intelligence.

EquipmentWatch rates are based upon the default values with modifications to only the diesel fuel cost and mechanic wage and were derived using DEQ's long established process. The Costmine Intelligence rates were developed based on guidance from Costmine Intelligence. The equipment rates were also confirmed through regional equipment dealers.

VI. Informal Conference

DEQ appropriately identified the method for WAM to appeal its bond determination based on ARM 17.24.1104(1). DEQ is willing to meet with WAM to review DEQ's bond determination. Additionally, DEQ encourages WAM to participate in the public comment period for DEQ's draft Coal Bond Calculation Guidelines to discuss any concerns related to DEQ's approach to bond determinations at coal mines. The participation details are provided in the next section.

VII. Draft Coal Bond Calculation Guidelines

DEQ has drafted Coal Bond Calculation Guidelines for determining the performance reclamation bonds at coal mines regulated by DEQ. DEQ is currently accepting stakeholder input on the guidance. Upon finalization of the document, DEQ will use the guidance to inform feedback to operators to ensure bond review submittals from operators adhere to the adopted guidance document.

DEQ released the draft Coal Bond Calculation Guidelines on August 21, 2025, and is providing a 60-day comment period. Additionally, DEQ has scheduled a public meeting to provide background on the bonding process and provide a forum for receiving stakeholder comment on the guidance. DEQ welcomes the input from WAM's reclamation specialists on the draft guidance.

Conclusion

DEQ welcomes WAM's comments on the draft Coal Bond Calculation Guidelines. Until the guidelines are adopted, however, WAM must still continue to update its bond annually to meet its permit commitments. DEQ will continue to utilize the Costmine Intelligence rates it has determined to be appropriate to ensure reclamation can be completed at coal mine sites if a permittee is unable or unavailable to complete the reclamation work. At WAM's request, DEQ will return to its historical practice of using the EquipmentWatch rates determined by DEQ to be acceptable until the Coal Bond Calculation Guidelines are adopted.

DEQ does not agree with WAM's assessment that a bond increase is unnecessary and further discussion is needed. DEQ appropriately reviewed WAM's submittals and determined an updated bond amount in accordance with MSUMRA and the rules adopted thereunder. As

noticed in the deficiency letter, WAM must post an additional $3,330,000 by December 31, 2025.

Please contact me if you have any additional questions regarding the amount of WAM's performance reclamation bond.

Sincerely,

Eric Dahlgren

Eric Dahlgren, Bureau Chief
Mining Bureau
Department of Environmental Quality
edahlgren@mt.gov
(406) 444-5245

CC: Jeffrey Fleischman, OSMRE - Casper Office
Emily Lodman, DEQ Coal Section
Alex Mackey, DEQ Field Services and Technology Section
Sam King, DEQ Legal

Electronic Attachments

Gilbert, Sharona

From: Dahlgren, Eric
Sent: Friday, August 29, 2025 12:06 PM
To: Briggs, Todd
Cc: jfleischman@osmre.gov; Lodman, Emily; Mackey, Alex; King, Samuel; DEQ AEMD Coal
Subject: Westmoreland Absaloka Mining LLC - Permit ID: C1985005 - MR311; DEQ Reply
Attachments: 2025_08_29_WestmorelandAbsaloka_MR311_Reply.pdf

Todd,

See the attached letter for DEQ's reply to Westmoreland Absaloka Minning LLC's (WAM) 4th Deficiency Response. This document will also be sent to via the ePermit system. Two Microsoft Excel Spreadsheets are embedded in the attached PDF file containing the bond calculation using Costmine Intelligence equipment rates and EquipmentWatch equipment rates. Please contact me if you would like to setup a meeting to review DEQ's bond determination or if you are unable to access the Excel spreadsheets.

As you may be aware, DEQ released the draft Coal Bond Calculation Guidelines on August 21, 2025. The public notice can be found via: Draft Coal Bond Calculation Guidelines Public Notice

Sincerely,

ERIC DAHLGREN | Bureau Chief
Mining Bureau
Montana Department of Environmental Quality
DESK: 406-444-5245
Website | **Facebook** | **Twitter** | **YouTube**
How did we do? Let us know here: Feedback Survey

Table 1
Bond Calculation Summary

Major Earthmoving Volumes:		Dozer Volume LCY	Truck/Loader Volume LCY	Total Yards LCY
Table 2	DEQ Area	22,490,800	3,252,200	25,743,000
Table 9	Soil Replacement	292,824	2,127,091	2,419,915
		22,783,624	5,379,291	28,162,915

Direct Costs:		
Table 2	Material movements	$11,630,280
Table 3	Drilling & Blasting Costs	$544,008
Table 4	Dozer Ripping of Borrow and Other Areas	$145,958
Table 5	Faclities Decommissioning	$5,159,986
Table 9	Soil Redistribution	$3,260,060
Table 10	Revegetation	$1,012,416
Table 11	Long-Term Monitoring	$448,160
Total Direct Costs:		**$22,200,867**

Indirect Costs	Percent		
Contingency	3.0%		$666,026
Mobilzation/Demobilzation	1.0%		$222,009
Engineering Redesign	2.0%		$444,017
Profit and Overhead	12.0%		$2,664,104
Project Management	2.5%		$555,022
Total Indirect and Contingencies	**20.5%**		**$4,551,178**
Inflation	**2.8%**		**$ 749,057.26**
		Total	**$27,501,102**

Total Bond (round up to nearest $10,000) **$27,510,000**

Table 2
Westmoreland Absaloka 2024 Haul Data

Area	Volume	Dist	Grade	Equipment	Hours	*Unit Cost	Cost
CF-23	184	179	-32.9	Dozer	137.87	$ 0.419	$ 77,038
CF-20	1,765	205	-25.3	Dozer	1,322.52	$ 0.419	$ 738,983
CF-121	270	207	-55.3	Dozer	202.31	$ 0.419	$ 113,046
CF-2	105	209	-34.3	Dozer	78.68	$ 0.419	$ 43,962
CF- 123	1,273	213	-39.5	Dozer	953.86	$ 0.419	$ 532,989
CF-105	17	246	-9.9	Dozer	12.74	$ 0.419	$ 7,118
CF-17	914	273	-24.9	Dozer	684.86	$ 0.419	$ 382,680
CF-18	1,081	280	-35.2	Dozer	810.00	$ 0.419	$ 452,601
CF-14	90	315	-17.4	Dozer	67.44	$ 0.419	$ 37,682
CF-13	518	342	2.9	Dozer	388.14	$ 0.419	$ 216,880
CF-102N	662	345	-4.0	Dozer	496.04	$ 0.419	$ 277,171
CF-19N	1,440	357	-1.2	Dozer	1,078.99	$ 0.419	$ 602,910
CF-22	985	362	-29.0	Dozer	738.06	$ 0.419	$ 412,407
CF-24	1,577	517	-17.8	Dozer	1,181.65	$ 0.419	$ 660,270
CF-33	3,041	609	-3.9	Dozer	2,278.63	$ 0.419	$ 1,273,229
CF-1	601	620	-16.0	Dozer	450.33	$ 0.419	$ 251,631
CF-21	2,993	600	-10.1	Dozer	2,242.51	$ 0.419	$ 1,253,048
CF-37	670	209	-10.0	Dozer	502.03	$ 0.419	$ 280,521
CF-200	1,557	400	-8.0	Dozer	1,914.98	$ 0.419	$ 651,896
CF-201	-	0	0.0	Dozer	-	$ 0.419	$ -
CF-202	-	0	0.0	Dozer	-	$ 0.419	$ -
CF-203	1,696	300	-10.0	Dozer	2,085.94	$ 0.419	$ 710,094
CF-204	612	200	-20.0	Dozer	752.71	$ 0.419	$ 256,237
CF-205	254	280	0.0	Dozer	312.40	$ 0.419	$ 106,347
CF-206	186	560	9.0	Dozer	228.77	$ 0.419	$ 77,876
CF-21	2,967	846	-10.1	T/L	3,649.42	$ 0.681	$ 2,019,673
CF-16	244	949	5.9	T/L	300.10	$ 0.681	$ 166,083
CF-15	41	1337	1.7	T/L	50.43	$ 0.681	$ 27,907

Total Weighted Averages (Dozer) 400.59 (15.12)
Total Weighted Averages (Truck/Loader) 859.9 (8.7)
Note: Shaded Areas represent Prime (Borrow) Areas which have been swelled. See Text.
*Unit Cost are based on average productivity below multiplied by the equipment cost

Yards 25,743 Cost $ 11,630,280

	LCY			Total Cost		
	T/L	Dozer	Total	T/L	Dozer	Total
DEQ Total	3,252	22,491	25,743	$ 2,213,663	$ 9,416,617	$ 11,630,280

Table 3
Drilling and Blasting Costs for Borrow Areas

Area	Total Volume	Percent >20'	Area, ac.	CY Blasted
CF-121	270	50%	11.4	135
CF-18	1,081	70%	49.9	757
CF-20	1,765	50%	53.1	883
CF-22	985	50%	50.3	493
		Total	**164.6**	**2,267**

D&B cost, $/BCY	$	0.24
Total D&B Cost	**$**	**544,008**

Table 4

Calculation of Ripping Cost And Efficiencies D10 Dozer W/Double-Shank Ripper

Haul Road	*Length*	*Width*	*Passes*	*Acres*	*Travel Time, sec*	*Turn Around, sec*	*Minutes/ Pass*	*Adjusted Minutes Per Acre*
Main Haul Road	20,088	90	8	41.5	340.9	60.0	6.68	64.1
Ramp 5S	12,645	90	8	26.1	340.9	60.0	6.68	64.1
Ramp 0-S	3,260	90	8	6.7	340.9	60.0	6.68	64.1
Ramp 2S	4,591	90	8	9.5	340.9	60.0	6.68	64.1
Ramp 4S	4,243	90	8	8.8	340.9	60.0	6.68	64.1
Ramp 5S	4,605	90	8	9.5	340.9	60.0	6.68	64.1
Ramp 8	1,384	90	8	2.9	340.9	60.0	6.68	64.1
Ramp 10	1,439	90	8	3.0	340.9	60.0	6.68	64.1
Total	52,255	90	8	108.0	108.0			

Ripping hours assume Ripping at 1 mph, depth of 3 feet, 30 seconds each for turn around and drop/lift ripper, depth of 3 feet and ripping spacing of 5.75 feet, and 500 feet per pass.
Hours are based on 50 minute working time/hour.

Other Ripping	***Acres***	
Acres from above	108.0	
Borrow Areas	164.6	(See Table 3)
Rail Loop Area	14.3	
Facilities Area	53.1	
Dry Coulee Dam	2.0	
Dam #5	1.6	
Total	343.6	

Total Hours	367.4	(Total Acres/Adjusted Minutes Per Acre)
Cost per Hour	$ 397.32	(See Equipment Costs)
Total Cost	$ 145,957.70	

Table 5
Facility Decommissioning Summary

Item	*Demolition Cost ($)*
Electrical Shop Building	$52,519
Warehouse/Misc Cold Storage	$161,351
Shop & Warehouse Building	$796,999
Welding Shop Building	$445,237
Dragline Bucket Shop	$15,206
MCC Building (1)	$7,089
MCC Building (2)	$16,112
MCC Building (4)	$16,112
Boiler House	$56,695
Coal Barn	$1,548,676
Secondary Crusher	$137,652
Truck Dump & Primary Crusher	$603,149
Conveyors	$248,968
Water Treatment Building & Lagoons	$116,453
Diesel Fuel Facility	$83,884
Gasoline Fuel Facility	$15,082
Truck Loadout Silo	$84,223
Train Loadout Building (TLO)	$137,513
Powerlines	$106,068
Railroad Loop	$106,068
Miscellaneous:	
Substations	$10,118
McClanahan Sampler	$5,110
Minor Buildings	$12,456
Sewage Lagoon	$18,144
Bridge	$192,125
Equipment Ready-line	$13,128
Wash Bay	$33,851
Hydrants/ Manholes	$5,327
Culvert Removal	$114,669
TOTAL:	$5,159,986

Note: Concrete and buildings demolished and buried on site

Table 6
Building And Facility Removal

ITEM	COMPONENT	DESCRIPTION	QUANTITY	UNITS		COSTS/UNIT	DEMOLITION COST	COMMENTS
Electrical Shop Building	*3200 sq. ft.*							
	Structure	Steel Structure	51,200	C.F.	$	0.34	$17,654	80'x 40'x 16'
	Gutting	Interior Structure	1,200	S.F.	$	9.05	$10,861	Partial area of building interior w/ walls, shelving, etc.
	Floor Slab	Reinforced Concrete	2,133	C.F.	$	9.84	$21,001	Assume 8" slab over entire floor area
	Foundations	Reinforced Concrete	240	L.F.	$	12.52	$3,004	Assume 1'x 2' trench footing (2 sf/L.F.)
Sub-Total:							**$52,519**	
Warehouse/Misc Cold Storage	*13125 sq. ft.*							
	Structure	Steel Structure	436,406	C.F.	$	0.34	$150,473	100'x 125'x 33'
	Foundations	Reinforced Concrete	460	L.F	$	14.98	$6,892	Assume 1'x 3' trench footing (3 sf/L.F.)
	Exterior Sidewalk (Slab)	Reinforced Concrete	25	C.Y.	$	161.63	$3,987	Assume 4" thickness
Sub-Total:							**$161,351**	
Shop & Warehouse Building	*27666 sq. ft.*							
	Structure	Steel Structure	840,578	C.F.	$	0.34	$289,831	Volume computation included in "Cost References" Tab
	Gutting - Supervisors Office	Interior Structure	3,220	S.F.	$	9.05	$29,144	Building interior walls, shelving, etc.
	Floor Slab - 8"	Reinforced Concrete	12,565	S.F.	$	9.84	$123,692	Assumed thickness
	Floor Slab - 12"	Reinforced Concrete	27,890	S.F.	$	10.26	$286,090	Assumed thickness
	Foundations - 1'x 2' footings	Reinforced Concrete	398	L.F	$	12.52	$4,981	Assumed dimensions
	Foundations - 2'x 3' footings	Reinforced Concrete	660	L.F	$	21.43	$14,143	Assumed dimensions
	Foundations - 8" thick stem walls	Reinforced Concrete	1,592	S.F.	$	9.84	$15,672	Assumed dimensions
	Foundations - 12" thick stem walls	Reinforced Concrete	2,640	S.F.	$	10.26	$27,081	Assumed dimensions
	Transformer Slab - 10"	Reinforced Concrete	450	S.F.	$	10.05	$4,523	Assumed thickness
	Exterior Sidewalk (Slab)	Reinforced Concrete	11	C.Y.	$	161.63	$1,842	Assume 4" thickness
Sub-Total:							**$796,999**	
Welding Shop Building	*21600 sq. ft.*							
	Structure	Steel Structure	540,000	C.F.	$	0.34	$186,192	120'x 180'x 25'
	Floor Slab - 12"	Reinforced Concrete	21,600	S.F.	$	10.26	$221,568	Assumed thickness
	Foundations - 2'x 3' footings	Reinforced Concrete	600	L.F	$	21.43	$12,858	Assumed dimensions
	Foundations - 12" thick stem walls	Reinforced Concrete	2,400	S.F.	$	10.26	$24,619	Assumed dimensions
Sub-Total:							**$445,237**	
Dragline Bucket Shop	*1764 sq. ft.*							
	Structure	Steel Structure	44,100	C.F.	$	0.34	$15,206	
Sub-Total:							**$15,206**	
MCC Building (1)	*640 sq. ft.*							
	Structure	Concrete Block	10,240	C.F.	$	0.34	$3,531	16'x 16'x 40'
	Gutting	Interior Structure	320	S.F.	$	9.05	$2,896	Separate materials contained in half the floor space
	Floor Slab/ Foundation	Reinforced Concrete	640	S.F.	$	1.03	$662	Included in truck dump concrete demolition
Sub-Total:							**$7,089**	
MCC Building (2)	*827 sq. ft.*							
	Structure	Steel Stucture?	8,268	C.F.	$	0.34	$2,851	20'-8"x 40'x 10'
	Gutting	Interior Structure	400	S.F.	$	9.05	$3,620	Separate materials contained in half the floor space
	Floor Slab - 8"	Reinforced Concrete	827	S.F.	$	9.84	$8,139	Assumed thickness
	Foundation	Reinforced Concrete	120	L.F.	$	12.52	$1,502	Assume 1'x 2' trench footing (2 sf/L.F.)
Sub-Total:							**$16,112**	
MCC Building (4)	*827 sq. ft.*							
	Structure	Steel Stucture?	8,268	C.F.	$	0.34	$2,851	20'-8"x 40'x 10'
	Gutting	Interior Structure	400	S.F.	$	9.05	$3,620	Separate materials contained in half the floor space
	Floor Slab - 8"	Reinforced Concrete	827	S.F.	$	9.84	$8,139	Assumed thickness
	Foundation	Reinforced Concrete	120	L.F.	$	12.52	$1,502	Assume 1'x 2' trench footing (2 sf/L.F.)
Sub-Total:							**$16,112**	
Boiler House	*2370 sq. ft.*							
	Structure	Concrete Block	52,880	C.F.	$	0.34	$18,233	64'x 34'x 20' plus loading area 30'x 12'x 26'
	Floor Slab - 10"	Reinforced Concrete	2,536	S.F.	$	10.05	$25,489	Assumed thickness
	Foundations - 1'x 2' footings	Reinforced Concrete	250	L.F	$	12.52	$3,129	Assumed dimensions
	Foundations - 8" thick stem walls	Reinforced Concrete	1,000	S.F.	$	9.84	$9,844	Assumed dimensions
Sub-Total:							**$56,695**	
Coal Barn	*54963 sq. ft.*							
	Steel Structure	Steel Structure	1,458,716	C.F.	$	0.37	$540,688	Structure volume above grade (3505 ft MSL)
	Shotcrete Slab Foundation	Reinforced Concrete	73,210	S.F.	$	0.85	$62,476	2 ea - 48'-6"x 700' and 2 ea - 60'x 44'-3", all 4" thick reinforced conc.
	Tunnel Slab and Walls	Reinforced Concrete	117,950	C.F.	$	-	$0	Left in place due to depth below finish grade
	East and West Footings/ Walls	Reinforced Concrete	82,950	S.F.	$	10.26	$850,885	2 ea - (11'x 1' +12'x 3'-6" + 2'-6"x 2'-6") x 700'
	East and West Wall Kickers	Reinforced Concrete	9,225	S.F.	$	10.26	$94,628	72 ea - 8'-3"x 5'x 2'-6" + 10'x 1'x 2'-6"
Sub-Total:							**$1,548,676**	
Secondary Crusher	*1224 sq. ft.*							
	Structure	Steel Structure	103,680	C.F.	$	0.34	$35,749	36' x 30' x 96'
	Stairs	Steel Structure	11,520	C.F.	$	0.34	$3,972	80' x 18' x 8'
	Floor Slab - 8" thick	Reinforced Concrete	952	S.F.	$	9.84	$9,372	(Max) 46' x 46' x 8"
	Slab Foundation	Reinforced Concrete	8,464	S.F.	$	10.26	$86,822	4' x 46' x 46'
	Foundation Pillars	Reinforced Concrete	106	S.F.	$	10.26	$1,091	6 ea - 2'-8" x 2'-8" x 2'-3" and 2 ea - 1'-4" x 1'-4" x 2'-3"
	Chutework	Steel Structure	1,873	C.F.	$	0.34	$646	
Sub-Total:							**$137,652**	
Truck Dump & Primary Crusher								
	Structure	Steel Structure	96,800	C.F.	$	0.34	$33,377	44' x 44' x 50'
	East/ West Abutment Footings	Reinforced Concrete	10,920	S.F.	$	10.26	$112,015	2 ea - 26' x 3' x 70'
	East/ West Abutment Front Walls	Reinforced Concrete	11,515	S.F.	$	10.26	$118,119	2 ea - ((20' x3')+(3' x 4')+(4' x 2')+(1-6" x 1'-6")) x 70'
	East Abutment Side Walls	Reinforced Concrete	1,829	S.F.	$	10.26	$18,756	2 ea - 23' x 26'-6" x 1'-6"
	West Abutment Side Walls	Reinforced Concrete	2,544	S.F.	$	10.26	$26,096	2 ea - 32' x 26'-6" x 1'-6"
	East/ West Approach Slabs	Reinforced Concrete	4,224	S.F.	$	10.26	$43,329	2 ea - 44' x 32' x 1'-6"

Table 6
Building And Facility Removal

ITEM	COMPONENT	DESCRIPTION	QUANTITY	UNITS	COSTS/UNIT	DEMOLITION COST	COMMENTS
	East/ West Bridge Slabs	Reinforced Concrete	8,193	S.F.	$ 10.26	$84,040	2 ea - 44' x 70' x 1'-4"
	Conveyor Tunnel Floor Slab	Reinforced Concrete	4,310	S.F.	$ 10.26	$44,206	(17' x 83' x 2')+(17' x 70' x 1'-3")
	Conveyor Tunnel Walls	Reinforced Concrete	2,085	S.F.	$ 10.26	$21,388	2 ea - (7'-6" x 83' x 1') + (6' x 70' x 1')
	Foundations	Reinforced Concrete	3,214	S.F.	$ 10.26	$32,969	3 ea - F-1, 2 ea - F-2, 1 ea - F-3, 1 ea - F-4, 1 ea - F-5 (2'-10" to 3'-8" thick)
	Outer Floor Slabs	Reinforced Concrete	1,394	S.F.	$ 9.84	$13,725	2 ea - 16'-6" x 84'-6" x 0'-6"
	Outer Slab Foundation Walls	Reinforced Concrete	1,661	S.F.	$ 10.26	$17,038	2 ea - 151' x 1' x 5'-6"
	Crusher Supports	Reinforced Concrete	580	S.F.	$ 10.26	$5,949	2 ea - (2'-9" x 8'-2" x 5') + (2' x 7'-4" x 10') + (1'-9" x 1'-9" x 10')
	Dozer Push-In Slab	Reinforced Concrete	2,851	S.F.	$ 10.26	$29,249	(5' x 1'-8" x 82) + (14'-10" x 5'-8" x 2') + (30' x 30' x 2') + (16'-4" x 2' x 6')
	Substation S-1 Foundation Slab	Reinforced Concrete	294	S.F.	$ 9.84	$2,894	42' x 14' x 0-6"
Sub-Total:						**$603,149**	
Conveyors							
	Conveyor CN5105 (W-105)	60"BW Conveyor	557	L.F.	$ 16.71	$9,305	Truck Dump to Secondary Crusher Building
	W-105 Take-up Structure 11	Steel Structure	2,251	C.F.	$ 0.34	$776	
	Retaining Wall Structure	Reinforced Concrete	3,197	S.F	$ 10.26	$32,789	
	Retaining Wall Floor - 4" Slab	Reinforced Concrete	3,510	S.F	$ 0.85	$2,995	
	Piers (Standard)	Reinforced Concrete	266	S.F	$ 10.26	$2,723	
	Bent #12 Foundation	Reinforced Concrete	135	S.F	$ 10.26	$1,382	
	Bent #12 Piers	Reinforced Concrete	43	S.F	$ 10.26	$439	
	Tower #11 Foundation	Reinforced Concrete	684	S.F	$ 10.26	$7,019	
	Tower #11 Piers	Reinforced Concrete	64	S.F	$ 10.26	$658	
	Bent #10 Foundation	Reinforced Concrete	441	S.F	$ 10.26	$4,524	
	Bent #10 Piers	Reinforced Concrete	25	S.F	$ 10.26	$256	
	Conveyor CN5127 (W-127)	60"BW Conveyor	391	L.F.	$ 16.71	$6,532	Sec. Crusher Building to Rail Loadout Building
	W-127 Take-up Structure 8	Steel Structure	3,635	C.F.	$ 0.34	$1,253	
	Bent #9 Foundation	Reinforced Concrete	189	S.F	$ 10.26	$1,939	
	Bent #9 Piers	Reinforced Concrete	23	S.F	$ 10.26	$231	
	Piers #9 Foundation	Reinforced Concrete	54	S.F	$ 10.26	$554	
	Piers #9 (Rise)	Reinforced Concrete	23	S.F	$ 10.26	$231	
	Tower #8 Foundation	Reinforced Concrete	684	S.F	$ 10.26	$7,019	
	Tower #8 Piers	Reinforced Concrete	64	S.F	$ 10.26	$658	
	Bent #7 Foundation	Reinforced Concrete	525	S.F	$ 10.26	$5,385	
	Bent #7 Piers	Reinforced Concrete	29	S.F	$ 10.26	$292	
	Bent #6 Foundation	Reinforced Concrete	792	S.F	$ 10.26	$8,124	
	Bent #6 Piers	Reinforced Concrete	35	S.F	$ 10.26	$359	
	Conveyor CN5142 (W-142)	60"BW Conveyor	441	L.F.	$ 16.71	$7,367	Rail Loadout Building to Coal Storage Barn
	W-142 Take-up Structure 3	Steel Structure	27,300	C.F.	$ 0.34	$9,413	
	Conveyor CN5160 (W-160)	60"BW Conveyor	605	L.F.	$ 16.71	$10,107	Tripper Conveyor in Coal Storage Barn
	Conveyor CN5165 (W-165)	72"BW Conveyor	730	L.F.	$ 16.71	$12,195	Coal Storage Barn Unloading Conveyor
	W-165 Take-up Structure	Steel Structure	3,360	C.F.	$ 0.34	$1,159	
	Conveyor CN5166 (W-166)	72"BW Conveyor	445	L.F.	$ 16.71	$7,434	Coal Storage Barn to Rail Loadout Building
	Bent #5 Foundation	Reinforced Concrete	1176	S.F	$ 10.26	$12,063	
	Bent #5 Piers	Reinforced Concrete	42	S.F	$ 10.26	$427	
	Bent #4 Foundation	Reinforced Concrete	1176	S.F	$ 10.26	$12,063	
	Bent #4 Piers	Reinforced Concrete	42	S.F	$ 10.26	$427	
	Tower #3 Foundation	Reinforced Concrete	2250	S.F	$ 10.26	$23,080	
	Tower #3 Piers	Reinforced Concrete	68	S.F	$ 10.26	$698	
	Piers #3 Foundation	Reinforced Concrete	75	S.F	$ 10.26	$769	
	Piers #3 (Rise)	Reinforced Concrete	20	S.F	$ 10.26	$208	
	Bent #2 Foundation	Reinforced Concrete	800	S.F	$ 10.26	$8,206	
	Bent #2 Piers	Reinforced Concrete	61	S.F	$ 10.26	$629	
	Piers (Standard)	Reinforced Concrete	106	S.F	$ 10.26	$1,089	
	Bent #1 Foundation	Reinforced Concrete	720	S.F	$ 10.26	$7,386	
	Bent #1 Piers	Reinforced Concrete	119	S.F	$ 10.26	$1,223	
	Piers (Standard)	Reinforced Concrete	18	S.F	$ 10.26	$182	
	Truck Loadout (Stockout) Conveyor	60" BW Conveyor	288	L.F.	$ 16.71	$4,811	Rail Loadout Building to Truck Loadout
	Bent #2 Take-up structure	Steel Structure	11,174	C.F.	$ 0.34	$3,853	
	Bent #1 Foundation	Reinforced Concrete	400	S.F	$ 10.26	$4,101	
	Bent #1 Slab	Reinforced Concrete	360	S.F	$ 10.26	$3,693	
	Bent #2 Foundations	Reinforced Concrete	454	S.F	$ 10.26	$4,654	
	Bent #2 Slab	Reinforced Concrete	1152	S.F	$ 10.26	$11,817	
	Bent #3 Foundation	Reinforced Concrete	220	S.F	$ 10.26	$2,257	
	Bent #3 Slab	Reinforced Concrete	216	S.F	$ 10.26	$2,216	
Sub-Total:						**$248,968**	
Water Treatment Building & Lagoons	*1966 sq. ft.*						
	Water Treatment Building	Structure	44,424	C.F.	$ 0.34	$15,317	62-8" x 31'-4" x 22'-7"
	Gutting	Interior Demolition	1,966	S.F.	$ 9.05	$17,791	Entire interior
	Floor Slab - 8" thick	Reinforced Concrete	1,966	S.F.	$ 9.84	$19,350	62'-8" x 31'-4" (Assumed thickness)
	Foundations - 1'x 2' footings	Reinforced Concrete	188	L.F	$ 12.52	$2,353	Assumed dimensions
	Foundations - 8" thick stem walls	Reinforced Concrete	752	S.F.	$ 9.84	$7,403	Assumed dimensions
	Potable Water Tank	10,000 Gallon	1	Ea	$ 2,295.00	$2,295	10,000 Gallon
	Surge Tank	1,000 Gallon	1	Ea	$ 1,190.00	$1,190	1,000 Gallon
	Water Storage Lagoon - liner remov	Plastic liner	11,000	S.F.	$ 0.39	$4,290	8,872 sf pond surface area
	Reserve-Fire Water Pond - liner ren	Plastic liner	25,500	S.F.	$ 0.39	$9,945	20,440 sf pond surface area
	New Wash Bay Settling Pond - liner	Plastic liner	18,600	S.F.	$ 0.39	$7,254	14,875 sf pond surface area
	Water Storage Lagoon - backfill	Earthwork	1,300	C.Y.	$ 3.60	$4,680	
	Reserve-Fire Water Pond - backfill	Earthwork	3,000	C.Y.	$ 3.60	$10,800	
	New Wash Bay Settling Pond - bac	Earthwork	2,150	C.Y.	$ 3.60	$7,740	
	Lagoon Fencing	Chain link fence	1,550	L.F.	$ 3.90	$6,045	540' + 460' + 550 '
Sub-Total:						**$116,453**	
Diesel Fuel Facility							
	Tank (Main) Slab	Reinforced Concrete	3,684	S.F	$ 10.26	$37,792	76'-8" x 40'-8" x 1.5' to 9"
	Tank Slab Containment Wall	Reinforced Concrete	936	S.F	$ 9.84	$9,214	(2) 40' x 4' x 0'-8" and (2) 78' x 4' x 0'-8"
	Solvent Tank Slab	Reinforced Concrete	78	S.F	$ 10.26	$802	6'-10" x 11'-4" x 1'
	Glycol Tank Slab	Reinforced Concrete	105	S.F	$ 10.26	$1,072	9' x 11' 1'
	Misc. Slab 1	Reinforced Concrete	16	S.F	$ 1.03	$17	4' x 4' x 6"
	Misc. Slab 2	Reinforced Concrete	32	S.F	$ 10.26	$331	4.5' x 16' x 1.5'

Table 6
Building And Facility Removal

ITEM	COMPONENT	DESCRIPTION	QUANTITY	UNITS	COSTS/UNIT	DEMOLITION COST	COMMENTS
	Misc. Slab 3	Reinforced Concrete	200	S.F	$ 10.26	$2,052	
	Misc. Slab 4	Reinforced Concrete	188	S.F	$ 10.05	$1,885	25' x 10' x 9"
	Misc. Slab 5	Reinforced Concrete	1,710	S.F	$ 10.26	$17,541	30' x 30' x 1'-10"
	Fuel Tank	Steel Tank	1	Ea	$ 5,400.00	$5,400	15'dia x 38' Tank (50,000 Gallon)
	Fuel Tank	Steel Tank	1	Ea	$ 5,400.00	$5,400	19'dia x 24' Tank (50,000 Gallon)
	Glycol Tank	Steel Tank	1	Ea	$ 1,190.00	$1,190	5' 4" x 9' 2" Tank (1,500 Gallon)
	Solvent Tank	Steel Tank	1	Ea	$ 1,190.00	$1,190	4' x 11' 2" Tank (1,000 Gallon)
Sub-Total:						**$83,884**	
Gasoline Fuel Facility							
	Tank (Main) Slab - 8"	Reinforced Concrete	513	S.F.	$ 9.84	$5,050	27' x 19'
	Tank Slab Containment Wall - 8" th	Reinforced Concrete	552	S.F	$ 9.84	$5,434	(27*2)+(19*2) x 6
	Containment Foundations	Reinforced Concrete	184	L.F.	$ 12.52	$2,303	2' x 1' footer surrounding containment
	Tank	Steel Tank	1	Ea	$ 2,295.00	$2,295	8' dia x 16' tank (6,000 Gallon)
Sub-Total:						**$15,082**	
Truck Loadout Silo							
	Coal Silo	Steel Structure	1	E.A	$ 22,447.50	$22,448	46' x 26' (d) Cylinder
	Coal Silo Cone	Steel Structure	3,600	C.F.	$ 0.37	$1,334	14.5' x 26' x 8' Truncated Cone
	Silo Support/ Stairs/ Transfer Conve	Steel Structure	9,790	C.F.	$ 0.34	$3,376	18.5' x 18.5' x 26.5'
	Silo Pier Foundations	Reinforced Concrete	552	S.F	$ 10.26	$5,662	2 - 23' x 4' x 2' deep, Reinforced Concrete
	Silo Foundation Slab	Reinforced Concrete	1,800	S.F	$ 10.26	$18,464	2' Thick, 30' x 30'
	Bent #1 Pier Foundation	Reinforced Concrete	400	S.F	$ 10.26	$4,101	3' x 20.5' x 6.5'
	Bent #1 Foundation Slab	Reinforced Concrete	360	S.F	$ 10.26	$3,693	1.5' Thick, 30' x 8'
	Bent #2 Pier Foundations	Reinforced Concrete	454	S.F	$ 10.26	$4,654	(2) 2.5' x 16.5' x 5.5'
	Bent #2 Foundation Slab	Reinforced Concrete	1,152	S.F	$ 10.26	$11,817	2' Thick, 32' x 18'
	Bent #3 Pier Foundation	Reinforced Concrete	220	S.F	$ 10.26	$2,257	2.5' x 16' x 5.5'
	Bent #3 Foundation Slab	Reinforced Concrete	216	S.F	$ 10.26	$2,216	1.5' Thick, 24' x 6'
	Electrical Building	Steel Structure	1,320	C.F.	$ 0.34	$455	10' x 12' x 11'
	Electrical Building-Gutting 1/2 spac	Interior demolition	132	S.F	$ 9.05	$1,195	12' x 11'
	Electical Bulding Slab	Reinforced Concrete	220	S.F	$ 10.26	$2,257	2.5' x 16' x 5.5'
	Electrical Building Foundations	Reinforced Concrete	30	S.F	$ 9.84	$295	(2) 8" x 1.5' x 10'
Sub-Total:						**$84,223**	
Train Loadout Building (TLO)							
	Structure	Steel Structure	119,908	C.F.	$ 0.34	$41,344	(26' x 27' x 110')+(18' x 27' x 72')+(8' x 26' x 37')
	MCC-3	Concrete Structure	3,276	C.F.	$ 0.45	$1,468	18' x 14' x 13'
	Foundation Slab	Reinforced Concrete	8,008	S.F	$ 10.26	$82,144	52' x 44' x 3'-6"
	Foundation Piers	Reinforced Concrete	130	L.F.	$ 21.43	$2,788	(5) 2'-8" x 2'-8" x 3'-2" and (4) 1'-4" x 1'-4" x 1'-10"
	Slab - El. 3482'-6"	Reinforced Concrete	722	S.F	$ 1.03	$746	Slab, 6" Thick (19'-4"' x 37-4"'):
	Slab - El. 3494'-6"	Reinforced Concrete	681	S.F	$ 1.03	$705	Elevated Concrete Floors, 6" Thick, 681.3 sf
	Slab - El. 3507'-0"	Reinforced Concrete	662	S.F	$ 1.03	$685	Elevated Concrete Floors, 6" Thick, 662.3 sf
	Loadout Chute	Steel Structure	76	C.F.	$ 0.34	$26	
	Loadout Hopper	Steel Structure	13,556	C.F.	$ 0.37	$5,025	
	Conveyor Discharge Chute to Hopp	Steel Structure	871	C.F.	$ 0.34	$300	
	Control Room -Gutting	Interior demoliton	252	S.F	$ 9.05	$2,281	
Sub-Total:						**$137,513**	
Miscellaneous							
Substations							
	Truck Dump (TD), Secondary, Barn Transformers		3	EACH	$ 902.00	$2,706	
	TD Substation Circuit Breaker		1	EACH	$ 6,800.00	$6,800	
	TD Substation High-voltage Fuses		1	EACH	$ 340.00	$340	
	TD Substation Lightning Arresters		1	EACH	$ 272.00	$272	
McClanahan Sampler							
	Building Structure	Steel Structure	2,393	C.F.	$ 0.34	$825	
	Access Walkway	Steel Structure	297	C.F.	$ 0.34	$102	
	Primary Sampler	Steel Structure	53	C.F.	$ 0.34	$18	
	Sampling Conveyors	Conveyors	35	L.F.	$ 16.71	$585	
	Bucket Elevator	Steel Structure	288	C.F.	$ 0.34	$99	
	Building Concrete Piers	Reinforced Concrete	302	S.F.	$ 10.26	$3,094	
	Access Walkway Piers	Reinforced Concrete	38	S.F.	$ 10.26	$387	
Minor Buildings							
	Topper Building	Steel Structure	1,920	C.F.	$ 0.34	$662	
	Side Release Building	Steel Structure	11,520	C.F.	$ 0.34	$3,972	
	Equipment Storage Building (near S	Steel Structure	11,520	C.F.	$ 0.34	$3,972	
	Tool Room	Steel Structure	4,150	C.F.	$ 0.34	$1,431	
	Lunch Room	Concrete Block Structu	3,920	C.F.	$ 0.45	$1,757	
	Water Tank Control	Steel Structure	640	C.F.	$ 0.34	$221	
	Scale House - Static Scale	Steel Structure	640	C.F.	$ 0.34	$221	
	Radio Repeater Building	Steel Structure	640	C.F.	$ 0.34	$221	
Sewage Lagoon		Lagoon Backfill	5,040	C.Y,	$ 3.60	$18,144	
Bridge							
	Support piers	Reinforced Concrete	5,337	S.F.	$ 10.26	$54,742	2 ea - 2'-9" x 28'-4" x 34'-3"
	Concrete Deck	Reinforced Concrete	8,320	S.F.	$ 10.26	$85,345	32' x 130' x 2'-0"
	Beam Support Structure	Steel Structure	53	TONS	$ 980.00	$52,038	6 ea - 12"x 36" beam, 8.85 tons ea.
Equipment Ready-line							
	Concrete Slab - 8"	Reinforced Concrete	1,248	S.F.	$ 9.84	$12,285	208' x 6' x 0'-8"
	Power poles	Power poles	2	EACH	$ 325.00	$650	
	Ready-line Building	Steel Structure	560	C.F	$ 0.34	$193	10' x 7' x 8'
Wash Bay		Reinforced Concrete	3,300	C.F.	$ 10.26	$33,851	40' x 55' x 1'-6"

Table 6
Building And Facility Removal

ITEM	COMPONENT	DESCRIPTION	QUANTITY	UNITS	COSTS/UNIT	DEMOLITION COST	COMMENTS
Hydrants/ Manholes		Hydrants	10	EACH	$ 532.72	$5,327	
Hydrants - Water		Hydrants	3	EACH	$ 532.72	$1,598	
Manhole		Concrete	13	EACH	$ 338.77	$4,404	
Powerlines							
	Power poles	Wooden Poles	186	EACH	$ 325.00	$60,450	
	Conductor	Conductor	137,775	L.F.	$ 0.99	$136,992	
Railroad Loop							
	Railroad Loop Rail	Track	9,201	L.F.	$ 8.90	$81,889	
	Railroad Loop Ballast	Ballast	5,100	C.Y.	$ 4.74	$24,179	
Culvert Removal		Installed Length	6,249	L.F.		$114,669	No. of 20' Sections Removed, See Table
Sub-Total:						**$714,441**	

Table 7
Culvert Removal

CULVERT SUMMARY (INSTALLED)

CULVERT	DRAINAGE AREA (ac)	CURVE NUMBER	AVERAGE DRAINAGE SLOPE (%)	GREATEST FLOW LENGTH (ft)	DESIGN DISCHARGE (cfs)	DESIGN CULVERT SIZE (in)	INSTALLED CULVERT DIA. (in)	INSTALLED CULVERT LENGTH (ft)	TRENCHING* (cy)	CULVERT REMOVAL
AR1	5.5	60	7.0	500	0.48	7.2	36	158		158
AR2	173.5	59	4.5	4200	3.64	11.8 x 2	42 x 2	278		278
AR3	13.5	58	10.8	1300	0.30	6.1	36	204		204
AR4	27.0	59	12.0	1000	1.23	10.2	36	264		264
PF1	534.5	60	1.3	7150	9.67	22.0	42	240		240
PF2	3.0	60	3.0	500	0.21	5.3	42	106		106
PF3	21.0	90	0.3	1350	28.61	33.0	36	90		90
PF4	1.7	60	7.5	200	0.14	4.5	42	110		110
PF5	162.4	62	3.3	3600	7.47	20.0	42	170		170
PF6	6.3	58	6.0	1000	0.14	4.5	30	70		70
PF7	3.8	58	16.6	300	0.10	3.9	30	110		110
PF8	14.0	60	0.8	1200	0.50	7.3	24	58		58
PF9	223.0	64	3.5	5400	27.73	34.1	48	215		215
3-1	25.0	63	8.6	1050	4.16	16.1	18	124		124
3-2	57.1	62	0.7	4350	1.76	11.7	30	128		128
3-3	31.4	59	8.0	1600	0.99	9.4	24	150		150
3A-1	195.0	65	5.8	4500	22.64	30.3	30	116		116
3A-2	59.3	76	3.0	2000	34.34	35.4	36	152		152
3C-1	155.0	64	3.5	4000	13.67	25.1	30	100		100
3D-1	85.0	65	8.9	2250	16.89	27.1	30	94		94
1-1	58.7	62	5.8	2400	4.20	17.0	30	116		116
1-2	75.2	62	3.4	4100	3.56	20.0	30	120		120
2-1	102.0	62	3.3	3300	5.31	18.0	18	97		97
2-2	46.2	65	2.5	1700	7.11	30.0	24	117		117
2-3	36.8	78	2.5	2400	22.06	36.0	30	135		135
4-1	25.0	62	4.0	1500	2.12	19.0	18	114		114
4-2	189.0	77	4.9	6000	9.74	30.0	30	120		120
5-1	75.0	62	5.2	2500	5.10	19.0	24	121		121
S-1	206.9	65	7.1	4842	16.70	30.0	30	200		200
S-2	32.8	71	8.1	2525	9.28	18.0	18	340		340
S-3	398.1	73	7.5	4547	106.67	54.0	54	350		350
S-4	56.5	80	8.1	2035	42.22	30.0	30	280		280
S-5	835.0	85	4.0	8594	139.00	66.0	36 x 4	170		170
S-6	13.6	85	1.2	4822	1.33	24		210		210
S-7	3.8	85	1.0	2175	4.53	1-24	24	150		150
M-1	3961.0	73	3.0	18347	583.00	3-72	3-72	350		350
M-2	2500.0	73	3.0	14889	258.00	2-60	2-60	250		250
M-5	2.5	80	2.1	717	3.00	1-24	24	72		72
								Units	0	6249
								Unit Cost	$0.00	$18.35
								Sub Total	$0	$114,669
									TOTAL:	$114,669

*RS Means Unit Cost 2024, includes trenching

Table 8
Facility Removal Unit Cost Support

DEMOLITION COSTS			
DESCRIPTION	**UNIT COST ($)**	**UNITS**	**SOURCE/COMMENTS**
BUILDING/ STRUCTURE DEMOLITION			
Building Demolition--Large urban projects, including 20 mi. haul; No foundation or dump fees.	$ 0.37	cubic feet, C.F.	2024 RS Means 02 41 16.13-0020
Building Demolition--Small bldgs., or single building, no salvage included, steel, masonry or wood.	$ 0.34	cubic feet, C.F.	2024 RS Means 02 41 16.13-0500
Building Demolition--Small bldgs., or single building, no salvage included, concrete	$ 0.45	cubic feet, C.F.	2024 RS Means 02 41 16.13-0600
Selective Demolition - Gutting - Commercial Bldg	$ 9.05	square foot/ floor, S.F.	2024 RSMeans 02 41 19.21-1020
Conveyor Systems	$ 16.71	linear feet, L.F.	Westmoreland Rosebud Mine Estimate
CONCRETE/ PAVEMENT DEMOLITION			
Bldg. Footings and Foundations Demolition--Floors, concrete slab on grade, 4-inch thick, wire mesh reinforced.	$ 0.85	square foot, S.F.	2024 RSMeans 02 41 16. 17-0280
Bldg. Footings and Foundations Demolition--Floors, concrete slab on grade, 6-inch thick, wire mesh reinforced.	$ 1.03	square foot, S.F.	2024 RSMeans 02 41 16. 17-0420
Demolish, Remove Pavement and Curb--Pavement removal, bituminous roads, 3-inches thick.	$ 4.48	square yard, S.Y.	2024 RSMeans 02 41 13.17-5010
Demolish, Remove Pavement and Curb--Pavement removal, bituminous roads, 4-6-inches thick.	$ 7.41	square yard, S.Y.	2024 RSMeans 02 41 13.17-5050
Demolish, Remove Pavement and Curb--Curbs, Bituminous.	$ 2.50	linear feet, L.F.	2024 RSMeans 02 41 13.17-6300
Demolish, Remove Pavement and Curb--Curbs, Plain Concrete or Granite.	$ 3.71	linear feet, L.F.	2024 RSMeans 02 41 13.17-6200
Minor Slab on Grade Removal, Reinforced	$ 161.63	cubic yard, C.Y.	2024 RSMeans 02 41 13. 30-4320
Bldg. Footings and Foundations - Concrete Footings 1' thck x 2' wide (2 sf/L.F) w/ reinforcing	$ 12.52	linear feet, L.F.	2024 RS Means 02 41 16.17-1000
Bldg. Footings and Foundations - Concrete Footings 1'-6" thck x 2' wide (3 sf/L.F) w/ reinforcing	$ 14.98	linear feet, L.F.	2024 RS Means 02 41 16.17-1080
Bldg. Footings and Foundations - Concrete Footings 2' thck x 3' wide (6 sf/L.F.) w/ reinforcing	$ 21.43	linear feet, L.F.	2024 RS Means 02 41 16.17-1140
Selective Demolition - Piles, End-bearing, 14"-18"	$ 11.12	vertical liner feet, VLF	2024 RSMeans 02 41 13. 74-0700
Concrete - 8" thick w/ reinforcing (40.5 sf/CY)	$ 9.84	square foot, S.F.	2024 RSMeans 02 41 16. 17-2420
Concrete - 10" thick w/ reinforcing (32.4 sf/CY)	$ 10.05	square foot, S.F.	2024 RSMeans 02 41 16. 17-2440
Concrete - 12" thick w/ reinforcing (27 sf/CY)	$ 10.26	square foot, S.F.	2024 RSMeans 02 41 16. 17-2500
RAIL FACILITY DEMOLITION			
Railroad ballast removal	$ 4.74	cubic yards, C.Y.	2024 RSMeans 02 41 13. 33-3600
Railroad track removal, ties and track	$ 13.88	linear feet, L.F.	2024 RSMeans 02 41 13. 33-3500
UTILITY LINE DEMOLITION			
Remove existing catch basin or manhole, masonry (w/ excavation included)	$ 338.77	each, Ea.	2024 RSMeans 02 41 13. 23 0020
Minor site demolition--Hydrants, fire, remove only	$ 532.72	each, Ea.	2024 RSMeans 02 41 13. 23-0900
Selective Demolition - Pipe removal, 12" (no excavation)	$ 7.67	linear feet, L.F.	2024 RSMeans 02 41 13. 23-2900
Selective Demolition - 3/4" to 2" piping	$ 1.81	linear feet, L.F.	2024 RSMeans 02 41 13. 38-2300
Selective Demoliton 2"- 3" piping	$ 3.02	linear feet, L.F.	2024 RSMeans 02 41 13. 38-2400
Selective Demolition - Electric Duct Bank			
Trenching (4'w x 6' d) w/ 1/2 cy bucket	$ 18.03	linear feet, L.F.	2024 RSMeans G1030 805-1430
STORAGE TANK DEMOLITION			
Tank Demolition--Steel, 550 to 2,000 gallons	$ 1,190.00	each, Ea.	2024 RSMeans 13 05 05.75-0520
Tank Demolition--Steel, 5,000 to 10,000 gallons	$ 2,295.00	each, Ea.	2024 RSMeans 13 05 05.75-0530
Tank Demolition--Steel, 15,000 to 30,000 gallons	$ 3,600.00	each, Ea.	2024 RSMeans 13 05 05.75-0540
Tank Demolition--Steel, 30,000 gallons	$ 3,075.00	each, Ea.	2024 RSMeans 13 05 05.60-0050
Tank Demolition--Steel, 50,000 gallons	$ 5,400.00	each, Ea.	2024 RSMeans 13 05 05.75-0540 extrapolated to 50,000 gallons
Excavate and load Underground Storage Tank Removal--3000 gal. to 12,000 gal., petroleum storage, non-leaking	$ 0.16	per gallon of capacity	2024 RSMeans 02 65 10.30-0130 Average value by tank volume to obtain cost per gallon
Removal of sludge, water, and product from tank bottom with vacuum truck	$ 0.05	per gallon of capacity	2024 RSMeans 02 65 10.30-0320 Average value by tank volume to obtain cost per gallon
Haul tank to certified dump - 100 miles rt	$ 880.00	each, Ea.	2024 RSMeans 02 65 10.30-1026
Haul tank to certified dump - 100 miles rt Up to 8000 gal +	$ 1,455.00	each, Ea.	2024 RSMeans 02 65 10.30-1213
Disposal of Sludge, off-site	$ 6.20	gallon, Gal	2024 RSMeans 02 65 10.30-0390
Removal and Disposal of Petroleum Contaminated Soil - Average Cost	$ 400.00	cubic yards, C.Y.	2024 RSMeans 02 65 10.30-1111
MISCELLANEOUS DEMOLITION			
Excavation and Fill--Front end loader, wheel mounted, 1.0 C.Y. cap.	$ 24.80	cubic yards, C.Y.	2024 RSMeans 31 23 23.15-4000
Backfill, Structural, Dozer or FEL, 105 HP, 300 ft haul from stockpile, common earth	$ 3.60	cubic yards, C.Y.	2024 RSMeans 31 23 23.14-3320

Table 8
Facility Removal Unit Cost Support

DEMOLITION COSTS			
DESCRIPTION	**UNIT COST ($)**	**UNITS**	**SOURCE/COMMENTS**
Bridge Demolition (steel deck 10'x 160')	$ 12.40	square ft, S.F.	2024 RSMeans 02 41 16.33-0200
Bridge Structural steel, rolled beams (labor and equipment)	$ 980.00	ton	2024 RSMeans 32 34 10.10-0020
Minor Site Demolition--Pipe Removal, sewer/water, no excavation, 12-inch dia.	$ 8.90	linear feet, L.F.	2024 RSMeans 02 41 13.23-2900
Overhead High-Voltage Conductor - Labor and Equipment to Construct (1600 kcmil)	$ 0.99	linear feet, L.F.	2024 RSMeans 33 71 39.13-1460
Utility Poles and Cross-arms (35-45' high)	$ 325.00	each, Ea.	2024 RSMeans 02 41 13.80-0200
Demolish (remove) Substation Transformer - 300 kva, 3-phase, oil-filled, pad-mounted	$ 902.00	each, Ea.	2024 RSMeans 26 05 05.10-1550
Set/ (Remove) High-voltage Vacuum Circuit Breaker - Labor	$ 6,800.00	each, Ea.	2024 RSMeans 33 75 23.13-2300 Only labor
Set/ (Remove) High-voltage Fuses - Labor	$ 340.00	each, Ea.	2024 RSMeans 33 75 36.13-8260 Only labor
Set/ (Remove) High-voltage Surge Arresters - Labor	$ 272.00	each, Ea.	2024 RSMeans 33 75 39. 13-8060 Only Labor
Fencing Demolition--Chain link, posts & fabric, remove only, 8-ft.to 10-ft. high	$ 3.90	linear feet, L.F.	2024 RSMeans 02 41 13.62-0675
Fencing Demolition--Barbed wire, 3 strand	$ 1.80	linear feet, L.F.	2024 RSMeans 02 41 13.60-1600
Surface coat latex rubber	$ 0.39	square ft, S.F.	2024 RSMeans 02 41 13.86-0200

Table 9
Soil Redistribution Costs

Stockpile #	Permit	Type	Soil Type	Volume (cy)	Dist	Grade	Equipment	Unit Cost	Cost
5A	DEQ	Specialty	A	3,402	500	0.0	Dozer	$ 0.68	$ 2,306.20
5B	DEQ	Specialty	B	3,544	500	0.0	Dozer	$ 0.68	$ 2,402.46
22A	DEQ	Specialty	A	384	500	0.0	Dozer	$ 0.68	$ 260.31
22B	DEQ	Specialty	B	1,331	500	0.0	Dozer	$ 0.68	$ 902.28
25A	DEQ	Specialty	A	7,672	500	0.0	Dozer	$ 0.68	$ 5,200.80
25B	DEQ	Specialty	B	17,288	500	0.0	Dozer	$ 0.68	$ 11,719.43
26A	DEQ	Specialty	A	9,203	500	0.0	Dozer	$ 0.68	$ 6,238.66
26B	DEQ	Specialty	B	9,378	500	0.0	Dozer	$ 0.68	$ 6,357.29
27A	DEQ	Specialty	A	27,376	500	0.0	Dozer	$ 0.68	$ 18,558.03
27B	DEQ	Specialty	B	20,226	500	0.0	Dozer	$ 0.68	$ 13,711.08
31B	DEQ	Lift 2	B	49,870	500	0.0	Dozer	$ 0.68	$ 33,806.57
35A	DEQ	Lift 1	A	12,990	500	0.0	Dozer	$ 0.68	$ 8,805.84
41A	DEQ	Lift 1	A	31,105	500	0.0	Dozer	$ 0.68	$ 21,085.89
41B	DEQ	Lift 2	B	32,869	500	0.0	Dozer	$ 0.68	$ 22,281.70
55A	DEQ	Lift 1	A	10,950	500	0.0	Dozer	$ 0.68	$ 7,422.94
55AA	DEQ	Lift 1	A	24,467	500	0.0	Dozer	$ 0.68	$ 16,586.03
55B	DEQ	Lift 2	B	3,243	500	0.0	Dozer	$ 0.68	$ 2,198.41
P33A	DEQ	Lift 1	A	2,492	500	0.0	Dozer	$ 0.68	$ 1,689.31
P33B	DEQ	Lift 2	B	3,574	500	0.0	Dozer	$ 0.68	$ 2,422.79
P34A	DEQ	Lift 1	A	2,597	500	0.0	Dozer	$ 0.68	$ 1,760.49
P34B	DEQ	Lift 2	B	3,460	500	0.0	Dozer	$ 0.68	$ 2,345.51
SC1A	DEQ	Lift 1	A	5,249	500	0.0	Dozer	$ 0.68	$ 3,558.27
SC1B	DEQ	Lift 2	B	8,433	500	0.0	Dozer	$ 0.68	$ 5,716.68
SC1BB	DEQ	Lift 2	B	1,721	500	0.0	Dozer	$ 0.68	$ 1,166.66
1	DEQ	1&2 Mix	A+B Mix	252,705	2072	-5.0	T/L	$ 1.65	$ 417,941.70
2	DEQ	1&2 Mix	A+B Mix	114,222	1323	-5.0	T/L	$ 1.65	$ 188,908.56
3	DEQ	1&2 Mix	A+B Mix	51,892	1500	-5.0	T/L	$ 1.65	$ 85,822.72
8A	DEQ	Lift 1	A	98,565	4235	0.0	T/L	$ 1.65	$ 163,013.88
8B	DEQ	Lift 2	B	176,374	4235	0.0	T/L	$ 1.65	$ 291,700.00
9A	DEQ	Lift 1	A	80,740	2891	0.0	T/L	$ 1.65	$ 133,533.62
9B	DEQ	Lift 2	B	157,752	2891	0.0	T/L	$ 1.65	$ 260,901.60
31A	DEQ	Lift 1	A	107,080	1784	-10.0	T/L	$ 1.65	$ 177,096.60
32A	DEQ	Lift 1	A	120,078	1500	-5.0	T/L	$ 1.65	$ 198,593.63
34A	DEQ	Lift 1	A	64,625	4070	-5.0	T/L	$ 1.65	$ 106,881.47
34B	DEQ	Lift 2	B	123,647	4070	-5.0	T/L	$ 1.65	$ 204,496.30
35B	DEQ	Lift 2	B	81,860	1593	-10.0	T/L	$ 1.65	$ 135,385.95
36A	DEQ	Lift 1	A	119,664	2985	-10.0	T/L	$ 1.65	$ 197,908.93
36B	DEQ	Lift 2	B	266,634	2985	-10.0	T/L	$ 1.65	$ 440,978.48
40A	DEQ	Lift 1	A	91,339	3222	-5.0	T/L	$ 1.65	$ 151,063.00
40B	DEQ	Lift 2	B	83,346	3222	-5.0	T/L	$ 1.65	$ 137,843.61
42A	DEQ	Lift 1	A	65,522	2342	0.0	T/L	$ 1.65	$ 108,364.99
42B	DEQ	Lift 2	B	71,046	2342	0.0	T/L	$ 1.65	$ 117,500.98
			Total	2,419,915				***Total***	$ 3,716,440
				Area-weighted soil distribution cost/Yard:				***Total***	$ 1.54
Total Weighted Averages T/L					2,778	(4.82)			
Minus 2022-2025 Projected Stockpile Redistribution				(297,166)					
			Total	2,122,749				***Total***	$ 3,260,060

Note: Of the combined total of 743,550 cubic yards in Stockpiles 36A and 36B, the volumes shown above for these stockpiles have been proportionally reduced for the 338,800 cubic yards to account for the required volume from the OSM Permit for the Reservation Lands.

Table 10
Revegetation Cost Estimate

	Acres Disturbed	Acres Reclaimed
Permit area (from latest annual report)	5,124	3,327
Phase II Bond Release Area (from latest annual report)		2,703
Phase III Bond Release Area (from latest annual report)		2,237
Reclaimed Acres Without Phase III Release		1,090
Future Reseeding Area, Shown on Plate 4		1,526
10% of Contingency Seeding Previously reseeded		109
Total Area To Be Revegetated		1,635

Task Description:

Revegetation task is divided into two subtasks: Seed bed preparation and Seeding

Subtask 1: Seedbed preparation

Surface area (ac)		1,635			
Tillage rate (ac/hr)		2.0			
Equipment time (hr)		817			
Equipment cost ($/hr)	$	181	Subtotal	$	147,877

Subtask 2: Seeding

Seed and Seeding: subtask includes cost of seed, seedlings (trees and shrubs), and cost of planting.

Equipment:

Seed drill, mechanical seedling planter and 40 horsepower farm tractor.

Surface area (ac)		1,635.0			
Seed rate (lbs/ac)		15			
Seed cost ($/lb)	$	17.50	Subtotal	$	429,177
Seedlings (#/ac)		20			
Seedling cost w/ planting ($/seedling)	$	2.00	Subtotal	$	65,398
Planting rate (ac/hr)		0.8			
Planting time (hr)		2,044			
Equipment cost ($/hr)	$	181	Subtotal	$	369,964
			Revegetation Total	**$**	**1,012,416**
			Cost/Ac	$	619.23

Table 11
Long-Term Monitoring Cost Summary

Description	Episodes	Time/ Episode (weeks)	Number of Crew Members	Report Preparation ks/episod Crew of 1	Labor Cost	Equipment Cost	Number of Samples/ Episode	Current Analytical Cost/Sample	Years	Total Cost
Spoil	1	1.0	1	0.1	$3,124	$710	90	$110.00	1	$13,734
Vegetation	1	1.0	8	2.0	$28,400	$710	0	$0.00	2	$58,220
Wildlife (aerial)	2	0.1	1	0.2	$1,704	$1,420	0	$0.00	10	$31,240
Wildlife (ground)	4	1.0	1	1.0	$22,720	$2,840	0	$0.00	10	$255,600
Groundwater (wells)	1	0.5	1	2.5	$8,520	$355	48	$65.00	10	$119,950
Groundwater (springs)	2	0.2	1	0.2	$2,272	$284	6	$65.00	10	$33,360
Surface Water (observation)	2	0.1	1	0.2	$1,032	$258	0	$0.00	10	$12,900
Surface Water (sample)	2	0.1	1	0.2	$1,032	$258	4	$130.00	10	$23,300
Surface Water (analyze)	2	0.0	0	0.2	$1,136	$0	4	$130.00	10	$21,760
MPDES (sample & analyze)	1	0.2	1	0.4	$1,704	$142	4	$55.00	10	$20,660
TOTAL										$590,724

Percent appropriated to Montana DEQ Permit Area: 76%
Appropriated cost $448,160

Labor Rate = $71.00 /hour 40 Hours/ week
Equipment Cost = 25.0% of labor rate except for wildlife aerial
Wildlife Aerial = 250.0% of labor rate

Table 12

EQUIPMENT WATCH - COST REFERENCE GUIDE
Equipment Discontinued 0-5 Years Ago
JUNE 2023

Diesel $	Wage $
$3.080	$52.93
MDEQ	Montana Prevailing Wage Rates for Heavy Construction, Update January 13, 2024, Group 3

Equipment Specifications				Total Hourly Costs $		
Model (Yr./Description)	Dozer	Operator Protection	HP			
Caterpillar - Dozer						
D10T	Semi-U	EROPS	574.0 hp	344.39	Costmine Reclamation Cost Guide 2024 Lease Rate	
				397.32	D10-U	16.2 ft (4.9 m) blade width
Caterpillar - Dozer						
D11T CD	CD	EROPS	574.0 hp	505.84	Costmine Reclamation Cost Guide 2024 Lease Rate	
				558.77	D11 T CD	21.0 ft (6.4 m) blade width
D11T	U Blade	EROPS	850	505.84	Costmine Reclamation Cost Guide 2024 Lease Rate	
				558.77	D11 U	21.0 ft (6.4 m) blade width
Caterpillar						
16M	EROPS	16'	297.0 hp	183.40	Costmine Reclamation Cost Guide 2024 Lease Rate	
				236.33	16M	16 ft (4.9 m) blade width, all wheel drive
Komatsu				260.49	Costmine Reclamation Cost Guide 2024 Lease Rate	
HD785-7	91 mt	60.1-78.6 cu yd	1178 hp	313.42	HD785-7	101.6 st (92.2 mt), 78.5 cu yd (60.0 cu m), mechanical drive14 ft 1 in (4.3 m) empty loading height
Matchto Cat 777D						
Komatsu						
Loader				446.32	Costmine Reclamation Cost Guide 2024 Lease Rate	
WA900-3	190 in	17 cu yd	856 hp	499.25	WA900-3	17.0 cu yd (13 cu m) bucket, 14 ft 8 in (4.5 m) dump height
Match to Cat 992G loader						
				157.44	Costmine Reclamation Cost Guide 2024 Lease Rate	
Diesel Power				210.37	WT 12,000	51.6 st (46.8 mt), 40.8 cu yd (31.2 cu m), mechanical drive
Water Truck (12,000 gal)			450 hp			11 ft 7 in (3.5 m) empty loading height, 12,000 gal tank
Scraper						
657 G P-P	44 cu yd (heaped)		410/451 hp	357.01	Costmine Reclamation Cost Guide 2024 Lease Rate	
	40 cy production			409.94		44 cu yd (33.6 cu m), 52.0 st (47.2 mt) capacity, 26.0 in (66.0 cm)
	EROPS					cut depth

NOTES:

1 WAM's # - Montana Revailing Wage Rate for Heavy Construction Services 2023 - Construction Equipment Operator - Group 3
https://erd.dli.mt.gov/_docs/labor-standards/Prevailing-Wage/Heavy-Final-2024.pdf

2 Diesel price - MDT Contracting & Bidding Monthly Average Fuel Prices
https://www.mdt.mt.gov/business/contracting/fuel_prices.shtml

Table 13

SPOIL CALCULATIONS AND ASSUMPTIONS

Machine Productivity: 657G P-P

Load Time (min)	1.10	CAT Performance Handbook (Page 24-17, Ed. 48, June 2018)
Loaded Travel Time (min)	0.40	CAT Performance Handbook (Page 8-48, Ed. 40, January 2010)
Man. & Spread Time (min)	0.60	CAT Performance Handbook (Page 24-17, Ed. 48, June 2018)
Empty Travel Time (min)	0.35	CAT Performance Handbook (Page 8-49, Ed. 40, January 2010)
Total Cycle Time (min)	2.45	
Scraper Capacity	40.0	90% of heaped capacity
Efficiency	0.83	
Actual Fleet LCYPOH	**813.1**	**LCY/hr**

Scraper Fleet

Equipment	% of Loader Time	$/hr	$/hr Total
657G P-P Scraper	100%	$ 409.94	$ 409.94
D10T Dozer	17%	$ 397.32	$ 67.54
Motorgrader	17%	$ 236.33	$ 40.18
Watertruck	17%	$ 210.37	$ 35.76
Fleet Total			$ 553.42

Dozer Productivity: D11 CD

	1,139 LCY/hr	Calculated Below
Factors		
Operator	0.88	CAT Handbook ED 49 p. 19-63
*Material	1.13	CAT Handbook ED 49 p. 19-63
Visibility	0.90	CAT Handbook ED 49 p. 19-63
Efficiency	0.83	CAT Handbook ED 49 p. 19-63
Grade	1.32	CAT Handbook ED 49 p. 19-63
**Slot Dozing	1.20	CAT Handbook ED 49 p. 19-63
Adjusted Productio	**1,335**	**LCY/hr**

Table 13

SOIL CALCULATIONS AND ASSUMPTIONS

1 Assumes Caterpillar 777D class end dump trucks with 78.6 yard box at 2:1 heap
2 Assumptions for standard spot and dump times:
3 Assumes a Caterpillar 992G with 16.0 cubic yard bucket.
4 Assumes maximum load in trucks w/tailgate is 100.0 tons.
5 Loader cycle time 0.60

Cycle time for loader:

	Load		
(a) Truck Spot	0.60	minutes	
(b) Pass Number 1:	0.08	minutes	
(c) Remaining Passes	2.40	minutes	(4)
Total Cycle Time	3.08	minutes	sum (a) through (c)

Cycle time for truck: Number of trucks needed 2.23

	Haul		
(a) Truck Spot	0.60	minutes	from bottom of sheet
(b) Load	2.48	minutes	above minus spot
(c) Manuever and Dump Time:	1.00	minutes	from bottom of sheet
(d) Haul Time	2.80	minutes	from bottom of sheet
Total Time	6.88	minutes	sum (a) through (d)

Average volume per swing and per truck:

(a) Bucket Rated Capacity:	16.0	cubic yards	
(b) Bucket Fill Factor:	93%		Normal is <1 for Shovel Configuration
(c) Material Swell Factor:			
(d) Volume Per Swing:	14.9	LCY	(a) * (b) / (c)
(e) Passes Per Truck:	5		
Volume Per Truck:	74.4	LCY	(d) * (e)

Weight per truck load:

(a) Volume Per Truck:	74.4	LCY	
(b) Weight of Material:	1.35	tons/BCY	2700 lbs. per cubic yard in-place (loose)
Weight per truck:	100.4	tons	(a) * (b)
(c) % Payload by Weight	100.4%		(b) / (4)

Gross machine weight	363,000	lbs
Material weight	200,880	lbs
	563,880	lbs

Machine Productivity:

Manuever	0.60	CAT Handbook Ed. 43, page 9-20
992G Loader Load Time	2.48	Separate loader/truck matching calculation
Dump	1.00	CAT Handbook Ed. 43, page 9-20
Haul time- 777D	1.80	CAT Handbook Ed. 40, page 9-38
Return time- 777D	1.00	CAT Handbook Ed. 40, page 9-38
Total Truck Cycle Time(minutes)	6.88	Summation
Truck capacity(yds)	74.4	Separate loader/truck matching calculation
Truck LCYPOH	540.4	50min/cycle time x LCY per truck
Trucks Assigned	2.23	total cycle/load time
Actual Trucks Assigned	3.00	rounded to nearest half truck from F57
Loader bucket capacity (yds)	16.00	
Bucket fill factor	0.93	
LCY/bucket	14.88	
Max 992G Loader LCYPOH	1,498.0	50min/load time x LCY per truck
Efficiency	0.95	
Actual Fleet LCYPOH	**1,423.1**	**LCY/hr**

Truck/Loader Fleet

Equipment	% of Loader Time	$/hr	$/hr Total
992G Loader	100%	$ 499.25	$ 499.25
777 Truck	300%	$ 313.42	$ 940.26
D10T Dozer	150%	$ 558.77	$ 838.16
Motorgrader	17%	$ 236.33	$ 40.18
Watertruck	17%	$ 210.37	$ 35.76
Fleet Total			$ 2,353.60

Dozer Productivity: D11 CD

	930 LCY/hr	Calculated Below
Factors		
Operator	0.88	CAT Handbook Ed. 43, page 18-55
*Material	1.13	CAT Handbook Ed. 43, page 18-55
Visibility	0.90	CAT Handbook Ed. 43, page 18-55
Efficiency	0.83	CAT Handbook Ed. 43, page 18-55
Grade	1.00	CAT Handbook Ed. 43, page 18-55
**Slot Dozing	1.20	CAT Handbook Ed. 43, page 18-55
Adjusted Produc	**824**	**LCY/hr**

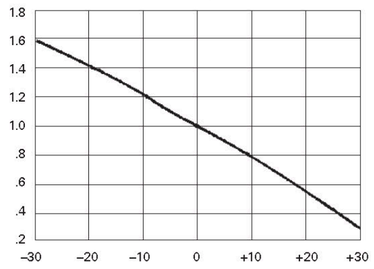
JOB CONDITION CORRECTION FACTORS

	TRACK-TYPE TRACTOR
OPERATOR —	
Excellent	1.00
Average	0.75
Poor	0.60
MATERIAL —	
Loose stockpile	1.20
Hard to cut; frozen —	
with tilt cylinder	0.80
without tilt cylinder	0.70
Hard to drift; "dead" (dry, non-cohesive material) or very sticky material	0.80
Rock, ripped or blasted	0.60-0.80
SLOT DOZING	1.20
SIDE BY SIDE DOZING	1.15-1.25
VISIBILITY —	
Dust, rain, snow, fog or darkness	0.80
JOB EFFICIENCY —	
50 min/hr	0.83
40 min/hr	0.67
BULLDOZER*	
Adjust based on SAE capacity relative to the base blade used in the Estimated Dozing Production graphs.	
GRADES — See following graph.	

***NOTE:** Angling blades and cushion blades are not considered production dozing tools. Depending on job conditions, the A-blade and C-blade will average 50-75% of straight blade production.

% Grade vs. Dozing Factor

(–) Downhill
(+) Uphill



ESTIMATING DOZER PRODUCTION OFF-THE-JOB

Example problem:

Determine average hourly production of a D8T/8SU (with tilt cylinder) moving hard-packed clay an average distance of 45 m (150 feet) down a 15% grade, using a slot dozing technique.

Estimated material weight is 1600 kg/Lm³ (2650 lb/LCY). Operator is average. Job efficiency is estimated at 50 min/hr.

Uncorrected Maximum Production — 458 Lm³/h (600 LCY/hr) (example only)

Applicable Correction Factors:

Hard-packed clay is "hard to cut" material . . .–0.80
Grade correction (from graph) . . . . . .–1.30
Slot dozing . . . . . .–1.20
Average operator . . . . . .–0.75
Job efficiency (50 min/hr) . . . . . .–0.83
Weight correction. . . . . (2300/2650)–0.87

Production = Maximum Production × Correction Factors
= (600 LCY/hr) (0.80) (1.30) (1.20) (0.75) (0.83) (0.87)
= 405.5 LCY/hr

To obtain production in metric units, the same procedure is used substituting maximum uncorrected production in Lm³.

= 458 Lm³/h × Factors
= 309.6 Lm³/h

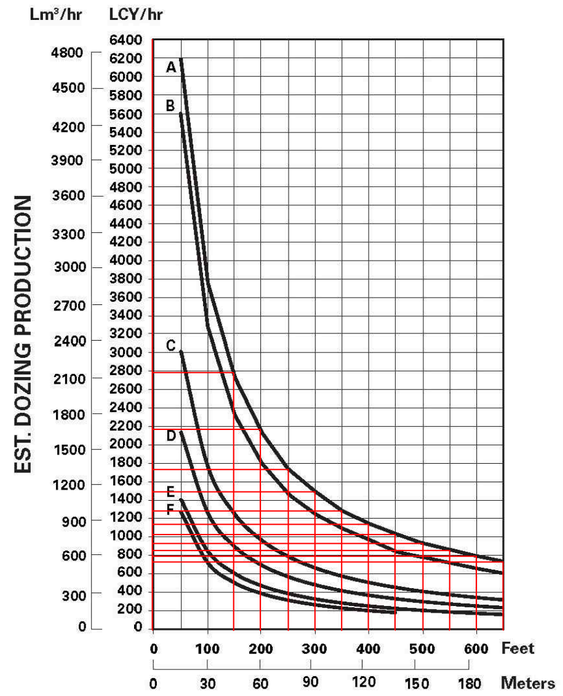
Grade vs Factor
CAT Handbook ED 49 p. 19-63

Grade	Factor
-30	1.59
-20	1.42
-10	1.22
0	1
10	0.79
20	0.55
30	0.3

Interpolations

Grade	Factor
-20	1.42
-15.12	**1.32**
-10	1.22

ESTIMATED DOZING PRODUCTION ● Universal Blades ● D7E through D11 CD



AVERAGE DOZING DISTANCE

KEY

A — D11 CD
B — D11
C — D10T2
D — D9T
E — D8T
F — D7E

NOTE: This chart is based on numerous field studies made under varying job conditions. Refer to correction factors following these charts.

Updated December/2019

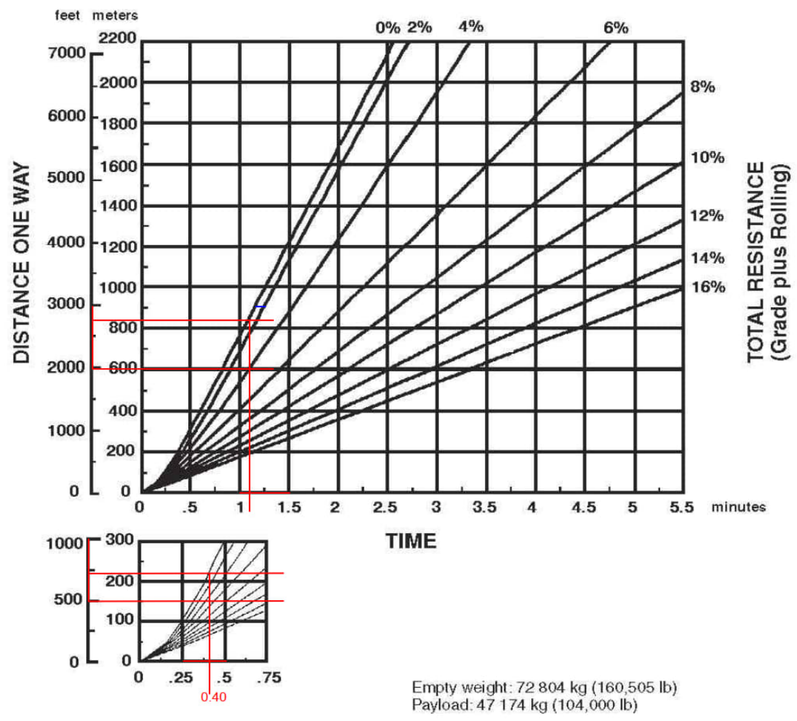
Productivity Vs Distance
CAT D11 CD
CAT Handbook ED 49 p. 19-59

Distance	Production
100	3700
150	2780
200	2170
250	1740
300	1500
350	1290
400	1140
450	1030
500	930
550	860
600	790
650	730

Interpolations

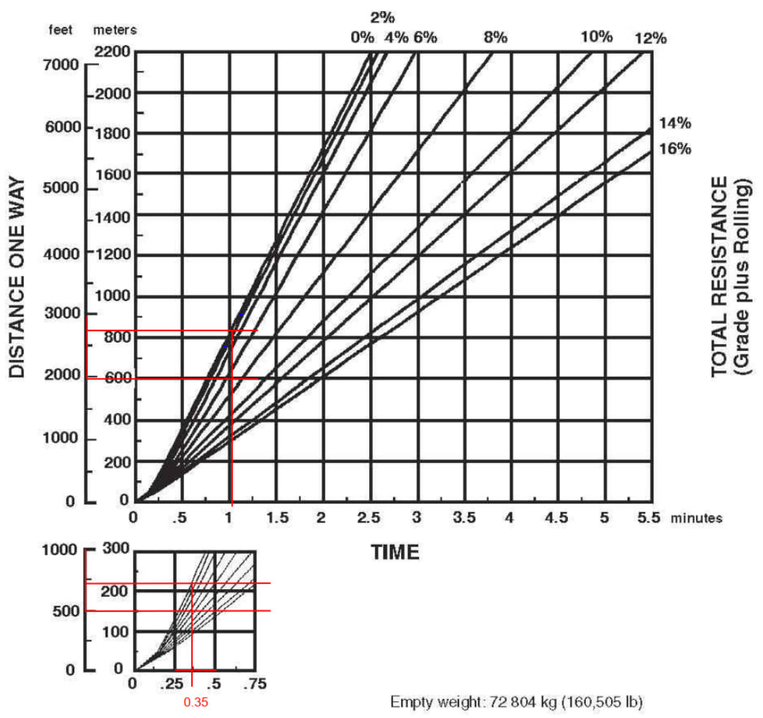
Grade	Factor
400	1140
400.59	**1138.70**
450	1030

LOADED



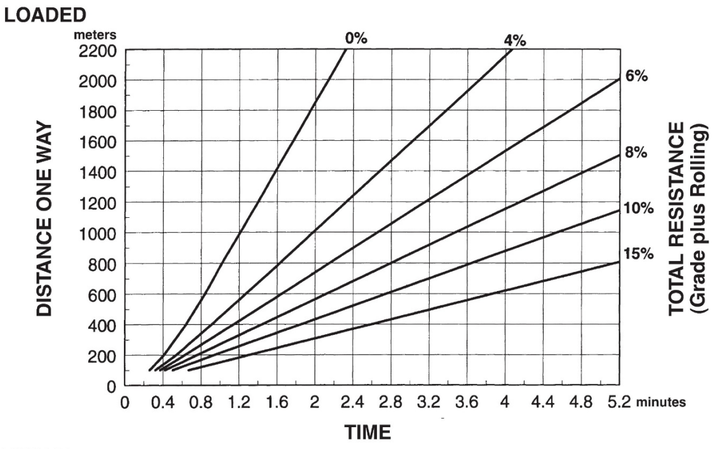
Empty weight: 72 804 kg (160,505 lb)
Payload: 47 174 kg (104,000 lb)

EMPTY



Empty weight: 72 804 kg (160,505 lb)

LOADED



EMPTY

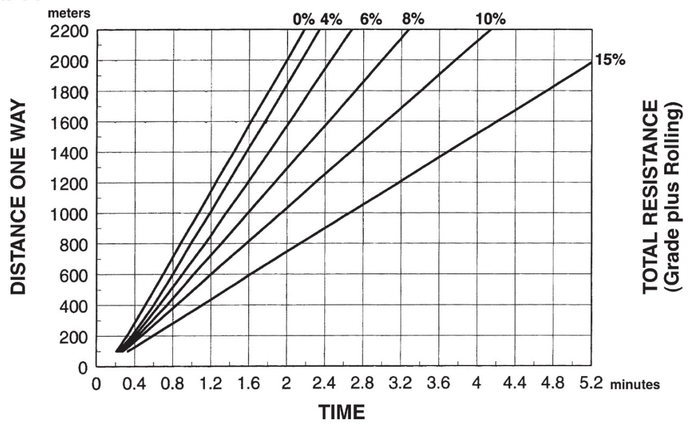


Table 1
Bond Calculation Summary

Major Earthmoving Volumes:		Dozer Volume LCY	Truck/Loader Volume LCY	Total Yards LCY
Table 2	DEQ Area	22,490,800	3,252,200	25,743,000
Table 9	Soil Replacement	292,824	2,127,091	2,419,915
		22,783,624	5,379,291	28,162,915

Direct Costs:		
Table 2	Material movements	$13,298,596
Table 3	Drilling & Blasting Costs	$544,008
Table 4	Dozer Ripping of Borrow and Other Areas	$180,001
Table 5	Faclities Decommissioning	$5,159,986
Table 9	Soil Redistribution	$3,841,027
Table 10	Revegetation	$1,012,416
Table 11	Long-Term Monitoring	$448,160
Total Direct Costs:		**$24,484,194**

Indirect Costs	Percent		
Contingency	3.0%		$734,526
Mobilzation/Demobilzation	1.0%		$244,842
Engineering Redesign	2.0%		$489,684
Profit and Overhead	12.0%		$2,938,103
Project Management	2.5%		$612,105
Total Indirect and Contingencies	**20.5%**		**$5,019,260**
Inflation	**2.8%**		**$ 826,096.69**
		Total	**$30,329,550**

Total Bond (round up to nearest $10,000) **$30,330,000**

Table 2
Westmoreland Absaloka 2024 Haul Data

Area	Volume	Dist	Grade	Equipment	Hours	*Unit Cost	Cost
CF-23	184	179	-32.9	Dozer	137.87	$ 0.398	$ 73,163
CF-20	1,765	205	-25.3	Dozer	1,322.52	$ 0.398	$ 701,807
CF-121	270	207	-55.3	Dozer	202.31	$ 0.398	$ 107,359
CF-2	105	209	-34.3	Dozer	78.68	$ 0.398	$ 41,751
CF- 123	1,273	213	-39.5	Dozer	953.86	$ 0.398	$ 506,176
CF-105	17	246	-9.9	Dozer	12.74	$ 0.398	$ 6,760
CF-17	914	273	-24.9	Dozer	684.86	$ 0.398	$ 363,429
CF-18	1,081	280	-35.2	Dozer	810.00	$ 0.398	$ 429,832
CF-14	90	315	-17.4	Dozer	67.44	$ 0.398	$ 35,786
CF-13	518	342	2.9	Dozer	388.14	$ 0.398	$ 205,970
CF-102N	662	345	-4.0	Dozer	496.04	$ 0.398	$ 263,227
CF-19N	1,440	357	-1.2	Dozer	1,078.99	$ 0.398	$ 572,579
CF-22	985	362	-29.0	Dozer	738.06	$ 0.398	$ 391,660
CF-24	1,577	517	-17.8	Dozer	1,181.65	$ 0.398	$ 627,054
CF-33	3,041	609	-3.9	Dozer	2,278.63	$ 0.398	$ 1,209,176
CF-1	601	620	-16.0	Dozer	450.33	$ 0.398	$ 238,972
CF-21	2,993	600	-10.1	Dozer	2,242.51	$ 0.398	$ 1,190,011
CF-37	670	209	-10.0	Dozer	502.03	$ 0.398	$ 266,408
CF-200	1,557	400	-8.0	Dozer	1,914.98	$ 0.398	$ 619,102
CF-201	-	0	0.0	Dozer	-	$ 0.398	$ -
CF-202	-	0	0.0	Dozer	-	$ 0.398	$ -
CF-203	1,696	300	-10.0	Dozer	2,085.94	$ 0.398	$ 674,371
CF-204	612	200	-20.0	Dozer	752.71	$ 0.398	$ 243,346
CF-205	254	280	0.0	Dozer	312.40	$ 0.398	$ 100,997
CF-206	186	560	9.0	Dozer	228.77	$ 0.398	$ 73,958
CF-21	2,967	846	-10.1	T/L	3,649.42	$ 1.339	$ 3,973,997
CF-16	244	949	5.9	T/L	300.10	$ 1.339	$ 326,791
CF-15	41	1337	1.7	T/L	50.43	$ 1.339	$ 54,912

Total Weighted Averages (Dozer) 400.59 (15.12)
Total Weighted Averages (Truck/Loader) 859.9 (8.7)
Note: Shaded Areas represent Prime (Borrow) Areas which have been swelled. See Text.
*Unit Cost are based on average productivity below multiplied by the equipment cost

Yards 25,743 Cost $ 13,298,596

	LCY			Total Cost		
	T/L	Dozer	Total	T/L	Dozer	Total
DEQ Total	3,252	22,491	25,743	$ 4,355,700	$ 8,942,896	$ 13,298,596

Table 3
Drilling and Blasting Costs for Borrow Areas

Area	Total Volume	Percent >20'	Area, ac.	CY Blasted
CF-121	270	50%	11.4	135
CF-18	1,081	70%	49.9	757
CF-20	1,765	50%	53.1	883
CF-22	985	50%	50.3	493
		Total	**164.6**	**2,267**

D&B cost, $/BCY	$	0.24
Total D&B Cost	**$**	**544,008**

Table 4

Calculation of Ripping Cost And Efficiencies D10 Dozer W/Double-Shank Ripper

Haul Road	*Length*	*Width*	*Passes*	*Acres*	*Travel Time, sec*	*Turn Around, sec*	*Minutes/ Pass*	*Adjusted Minutes Per Acre*
Main Haul Road	20,088	90	8	41.5	340.9	60.0	6.68	64.1
Ramp 5S	12,645	90	8	26.1	340.9	60.0	6.68	64.1
Ramp 0-S	3,260	90	8	6.7	340.9	60.0	6.68	64.1
Ramp 2S	4,591	90	8	9.5	340.9	60.0	6.68	64.1
Ramp 4S	4,243	90	8	8.8	340.9	60.0	6.68	64.1
Ramp 5S	4,605	90	8	9.5	340.9	60.0	6.68	64.1
Ramp 8	1,384	90	8	2.9	340.9	60.0	6.68	64.1
Ramp 10	1,439	90	8	3.0	340.9	60.0	6.68	64.1
Total	52,255	90	8	108.0	108.0			

Ripping hours assume Ripping at 1 mph, depth of 3 feet, 30 seconds each for turn around and drop/lift ripper, depth of 3 feet and ripping spacing of 5.75 feet, and 500 feet per pass.
Hours are based on 50 minute working time/hour.

Other Ripping	***Acres***	
Acres from above	108.0	
Borrow Areas	164.6	(See Table 3)
Rail Loop Area	14.3	
Facilities Area	53.1	
Dry Coulee Dam	2.0	
Dam #5	1.6	
Total	343.6	

Total Hours	367.4	(Total Acres/Adjusted Minutes Per Acre)
Cost per Hour	$ 489.99	(See Equipment Costs)
Total Cost	$ 180,000.54	

Table 5
Facility Decommissioning Summary

Item	*Demolition Cost ($)*
Electrical Shop Building	$52,519
Warehouse/Misc Cold Storage	$161,351
Shop & Warehouse Building	$796,999
Welding Shop Building	$445,237
Dragline Bucket Shop	$15,206
MCC Building (1)	$7,089
MCC Building (2)	$16,112
MCC Building (4)	$16,112
Boiler House	$56,695
Coal Barn	$1,548,676
Secondary Crusher	$137,652
Truck Dump & Primary Crusher	$603,149
Conveyors	$248,968
Water Treatment Building & Lagoons	$116,453
Diesel Fuel Facility	$83,884
Gasoline Fuel Facility	$15,082
Truck Loadout Silo	$84,223
Train Loadout Building (TLO)	$137,513
Powerlines	$106,068
Railroad Loop	$106,068
Miscellaneous:	
Substations	$10,118
McClanahan Sampler	$5,110
Minor Buildings	$12,456
Sewage Lagoon	$18,144
Bridge	$192,125
Equipment Ready-line	$13,128
Wash Bay	$33,851
Hydrants/ Manholes	$5,327
Culvert Removal	$114,669
TOTAL:	$5,159,986

Note: Concrete and buildings demolished and buried on site

Table 6
Building And Facility Removal

ITEM	COMPONENT	DESCRIPTION	QUANTITY	UNITS		COSTS/UNIT	DEMOLITION COST	COMMENTS
Electrical Shop Building	*3200 sq. ft.*							
	Structure	Steel Structure	51,200	C.F.	$	0.34	$17,654	80'x 40'x 16'
	Gutting	Interior Structure	1,200	S.F.	$	9.05	$10,861	Partial area of building interior w/ walls, shelving, etc.
	Floor Slab	Reinforced Concrete	2,133	C.F.	$	9.84	$21,001	Assume 8" slab over entire floor area
	Foundations	Reinforced Concrete	240	L.F.	$	12.52	$3,004	Assume 1'x 2' trench footing (2 sf/L.F.)
Sub-Total:							**$52,519**	
Warehouse/Misc Cold Storage	*13125 sq. ft.*							
	Structure	Steel Structure	436,406	C.F.	$	0.34	$150,473	100'x 125'x 33'
	Foundations	Reinforced Concrete	460	L.F	$	14.98	$6,892	Assume 1'x 3' trench footing (3 sf/L.F.)
	Exterior Sidewalk (Slab)	Reinforced Concrete	25	C.Y.	$	161.63	$3,987	Assume 4" thickness
Sub-Total:							**$161,351**	
Shop & Warehouse Building	*27666 sq. ft.*							
	Structure	Steel Structure	840,578	C.F.	$	0.34	$289,831	Volume computation included in "Cost References" Tab
	Gutting - Supervisors Office	Interior Structure	3,220	S.F.	$	9.05	$29,144	Building interior walls, shelving, etc.
	Floor Slab - 8"	Reinforced Concrete	12,565	S.F.	$	9.84	$123,692	Assumed thickness
	Floor Slab - 12"	Reinforced Concrete	27,890	S.F.	$	10.26	$286,090	Assumed thickness
	Foundations - 1'x 2' footings	Reinforced Concrete	398	L.F	$	12.52	$4,981	Assumed dimensions
	Foundations - 2'x 3' footings	Reinforced Concrete	660	L.F	$	21.43	$14,143	Assumed dimensions
	Foundations - 8" thick stem walls	Reinforced Concrete	1,592	S.F.	$	9.84	$15,672	Assumed dimensions
	Foundations - 12" thick stem walls	Reinforced Concrete	2,640	S.F.	$	10.26	$27,081	Assumed dimensions
	Transformer Slab - 10"	Reinforced Concrete	450	S.F.	$	10.05	$4,523	Assumed thickness
	Exterior Sidewalk (Slab)	Reinforced Concrete	11	C.Y.	$	161.63	$1,842	Assume 4" thickness
Sub-Total:							**$796,999**	
Welding Shop Building	*21600 sq. ft.*							
	Structure	Steel Structure	540,000	C.F.	$	0.34	$186,192	120'x 180'x 25'
	Floor Slab - 12"	Reinforced Concrete	21,600	S.F.	$	10.26	$221,568	Assumed thickness
	Foundations - 2'x 3' footings	Reinforced Concrete	600	L.F	$	21.43	$12,858	Assumed dimensions
	Foundations - 12" thick stem walls	Reinforced Concrete	2,400	S.F.	$	10.26	$24,619	Assumed dimensions
Sub-Total:							**$445,237**	
Dragline Bucket Shop	*1764 sq. ft.*							
	Structure	Steel Structure	44,100	C.F.	$	0.34	$15,206	
Sub-Total:							**$15,206**	
MCC Building (1)	*640 sq. ft.*							
	Structure	Concrete Block	10,240	C.F.	$	0.34	$3,531	16'x 16'x 40'
	Gutting	Interior Structure	320	S.F.	$	9.05	$2,896	Separate materials contained in half the floor space
	Floor Slab/ Foundation	Reinforced Concrete	640	S.F.	$	1.03	$662	Included in truck dump concrete demolition
Sub-Total:							**$7,089**	
MCC Building (2)	*827 sq. ft.*							
	Structure	Steel Stucture?	8,268	C.F.	$	0.34	$2,851	20'-8"x 40'x 10'
	Gutting	Interior Structure	400	S.F.	$	9.05	$3,620	Separate materials contained in half the floor space
	Floor Slab - 8"	Reinforced Concrete	827	S.F.	$	9.84	$8,139	Assumed thickness
	Foundation	Reinforced Concrete	120	L.F.	$	12.52	$1,502	Assume 1'x 2' trench footing (2 sf/L.F.)
Sub-Total:							**$16,112**	
MCC Building (4)	*827 sq. ft.*							
	Structure	Steel Stucture?	8,268	C.F.	$	0.34	$2,851	20'-8"x 40'x 10'
	Gutting	Interior Structure	400	S.F.	$	9.05	$3,620	Separate materials contained in half the floor space
	Floor Slab - 8"	Reinforced Concrete	827	S.F.	$	9.84	$8,139	Assumed thickness
	Foundation	Reinforced Concrete	120	L.F.	$	12.52	$1,502	Assume 1'x 2' trench footing (2 sf/L.F.)
Sub-Total:							**$16,112**	
Boiler House	*2370 sq. ft.*							
	Structure	Concrete Block	52,880	C.F.	$	0.34	$18,233	64'x 34'x 20' plus loading area 30'x 12'x 26'
	Floor Slab - 10"	Reinforced Concrete	2,536	S.F.	$	10.05	$25,489	Assumed thickness
	Foundations - 1'x 2' footings	Reinforced Concrete	250	L.F	$	12.52	$3,129	Assumed dimensions
	Foundations - 8" thick stem walls	Reinforced Concrete	1,000	S.F.	$	9.84	$9,844	Assumed dimensions
Sub-Total:							**$56,695**	
Coal Barn	*54963 sq. ft.*							
	Steel Structure	Steel Structure	1,458,716	C.F.	$	0.37	$540,688	Structure volume above grade (3505 ft MSL)
	Shotcrete Slab Foundation	Reinforced Concrete	73,210	S.F.	$	0.85	$62,476	2 ea - 48'-6"x 700' and 2 ea - 60'x 44'-3", all 4" thick reinforced conc.
	Tunnel Slab and Walls	Reinforced Concrete	117,950	C.F.	$	-	$0	Left in place due to depth below finish grade
	East and West Footings/ Walls	Reinforced Concrete	82,950	S.F.	$	10.26	$850,885	2 ea - (11'x 1' +12'x 3'-6" + 2'-6"x 2'-6") x 700'
	East and West Wall Kickers	Reinforced Concrete	9,225	S.F.	$	10.26	$94,628	72 ea - 8'-3"x 5'x 2'-6" + 10'x 1'x 2'-6"
Sub-Total:							**$1,548,676**	
Secondary Crusher	*1224 sq. ft.*							
	Structure	Steel Structure	103,680	C.F.	$	0.34	$35,749	36' x 30' x 96'
	Stairs	Steel Structure	11,520	C.F.	$	0.34	$3,972	80' x 18' x 8'
	Floor Slab - 8" thick	Reinforced Concrete	952	S.F.	$	9.84	$9,372	(Max) 46' x 46' x 8"
	Slab Foundation	Reinforced Concrete	8,464	S.F.	$	10.26	$86,822	4' x 46' x 46'
	Foundation Pillars	Reinforced Concrete	106	S.F.	$	10.26	$1,091	6 ea - 2'-8" x 2'-8" x 2'-3" and 2 ea - 1'-4" x 1'-4" x 2'-3"
	Chutework	Steel Structure	1,873	C.F.	$	0.34	$646	
Sub-Total:							**$137,652**	
Truck Dump & Primary Crusher								
	Structure	Steel Structure	96,800	C.F.	$	0.34	$33,377	44' x 44' x 50'
	East/ West Abutment Footings	Reinforced Concrete	10,920	S.F.	$	10.26	$112,015	2 ea - 26' x 3' x 70'
	East/ West Abutment Front Walls	Reinforced Concrete	11,515	S.F.	$	10.26	$118,119	2 ea - ((20' x3')+(3' x 4')+(4' x 2')+(1-6" x 1'-6")) x 70'
	East Abutment Side Walls	Reinforced Concrete	1,829	S.F.	$	10.26	$18,756	2 ea - 23' x 26'-6" x 1'-6"
	West Abutment Side Walls	Reinforced Concrete	2,544	S.F.	$	10.26	$26,096	2 ea - 32' x 26'-6" x 1'-6"
	East/ West Approach Slabs	Reinforced Concrete	4,224	S.F.	$	10.26	$43,329	2 ea - 44' x 32' x 1'-6"

Table 6
Building And Facility Removal

ITEM	COMPONENT	DESCRIPTION	QUANTITY	UNITS	COSTS/UNIT	DEMOLITION COST	COMMENTS
	East/ West Bridge Slabs	Reinforced Concrete	8,193	S.F.	$ 10.26	$84,040	2 ea - 44' x 70' x 1'-4"
	Conveyor Tunnel Floor Slab	Reinforced Concrete	4,310	S.F.	$ 10.26	$44,206	(17' x 83' x 2')+(17' x 70' x 1'-3")
	Conveyor Tunnel Walls	Reinforced Concrete	2,085	S.F.	$ 10.26	$21,388	2 ea - (7'-6" x 83' x 1') + (6' x 70' x 1')
	Foundations	Reinforced Concrete	3,214	S.F.	$ 10.26	$32,969	3 ea - F-1, 2 ea - F-2, 1 ea - F-3, 1 ea - F-4, 1 ea - F-5 (2'-10" to 3'-8" thick)
	Outer Floor Slabs	Reinforced Concrete	1,394	S.F.	$ 9.84	$13,725	2 ea - 16'-6" x 84'-6" x 0'-6"
	Outer Slab Foundation Walls	Reinforced Concrete	1,661	S.F.	$ 10.26	$17,038	2 ea - 151' x 1' x 5'-6"
	Crusher Supports	Reinforced Concrete	580	S.F.	$ 10.26	$5,949	2 ea - (2'-9" x 8'-2" x 5') + (2' x 7'-4" x 10') + (1'-9" x 1'-9" x 10')
	Dozer Push-In Slab	Reinforced Concrete	2,851	S.F.	$ 10.26	$29,249	(5' x 1'-8" x 82) + (14'-10" x 5'-8" x 2') + (30' x 30' x 2') + (16'-4" x 2' x 6')
	Substation S-1 Foundation Slab	Reinforced Concrete	294	S.F.	$ 9.84	$2,894	42' x 14' x 0-6"
Sub-Total:						**$603,149**	
Conveyors							
	Conveyor CN5105 (W-105)	60"BW Conveyor	557	L.F.	$ 16.71	$9,305	Truck Dump to Secondary Crusher Building
	W-105 Take-up Structure 11	Steel Structure	2,251	C.F.	$ 0.34	$776	
	Retaining Wall Structure	Reinforced Concrete	3,197	S.F	$ 10.26	$32,789	
	Retaining Wall Floor - 4" Slab	Reinforced Concrete	3,510	S.F	$ 0.85	$2,995	
	Piers (Standard)	Reinforced Concrete	266	S.F	$ 10.26	$2,723	
	Bent #12 Foundation	Reinforced Concrete	135	S.F	$ 10.26	$1,382	
	Bent #12 Piers	Reinforced Concrete	43	S.F	$ 10.26	$439	
	Tower #11 Foundation	Reinforced Concrete	684	S.F	$ 10.26	$7,019	
	Tower #11 Piers	Reinforced Concrete	64	S.F	$ 10.26	$658	
	Bent #10 Foundation	Reinforced Concrete	441	S.F	$ 10.26	$4,524	
	Bent #10 Piers	Reinforced Concrete	25	S.F	$ 10.26	$256	
	Conveyor CN5127 (W-127)	60"BW Conveyor	391	L.F.	$ 16.71	$6,532	Sec. Crusher Building to Rail Loadout Building
	W-127 Take-up Structure 8	Steel Structure	3,635	C.F.	$ 0.34	$1,253	
	Bent #9 Foundation	Reinforced Concrete	189	S.F	$ 10.26	$1,939	
	Bent #9 Piers	Reinforced Concrete	23	S.F	$ 10.26	$231	
	Piers #9 Foundation	Reinforced Concrete	54	S.F	$ 10.26	$554	
	Piers #9 (Rise)	Reinforced Concrete	23	S.F	$ 10.26	$231	
	Tower #8 Foundation	Reinforced Concrete	684	S.F	$ 10.26	$7,019	
	Tower #8 Piers	Reinforced Concrete	64	S.F	$ 10.26	$658	
	Bent #7 Foundation	Reinforced Concrete	525	S.F	$ 10.26	$5,385	
	Bent #7 Piers	Reinforced Concrete	29	S.F	$ 10.26	$292	
	Bent #6 Foundation	Reinforced Concrete	792	S.F	$ 10.26	$8,124	
	Bent #6 Piers	Reinforced Concrete	35	S.F	$ 10.26	$359	
	Conveyor CN5142 (W-142)	60"BW Conveyor	441	L.F.	$ 16.71	$7,367	Rail Loadout Building to Coal Storage Barn
	W-142 Take-up Structure 3	Steel Structure	27,300	C.F.	$ 0.34	$9,413	
	Conveyor CN5160 (W-160)	60"BW Conveyor	605	L.F.	$ 16.71	$10,107	Tripper Conveyor in Coal Storage Barn
	Conveyor CN5165 (W-165)	72"BW Conveyor	730	L.F.	$ 16.71	$12,195	Coal Storage Barn Unloading Conveyor
	W-165 Take-up Structure	Steel Structure	3,360	C.F.	$ 0.34	$1,159	
	Conveyor CN5166 (W-166)	72"BW Conveyor	445	L.F.	$ 16.71	$7,434	Coal Storage Barn to Rail Loadout Building
	Bent #5 Foundation	Reinforced Concrete	1176	S.F	$ 10.26	$12,063	
	Bent #5 Piers	Reinforced Concrete	42	S.F	$ 10.26	$427	
	Bent #4 Foundation	Reinforced Concrete	1176	S.F	$ 10.26	$12,063	
	Bent #4 Piers	Reinforced Concrete	42	S.F	$ 10.26	$427	
	Tower #3 Foundation	Reinforced Concrete	2250	S.F	$ 10.26	$23,080	
	Tower #3 Piers	Reinforced Concrete	68	S.F	$ 10.26	$698	
	Piers #3 Foundation	Reinforced Concrete	75	S.F	$ 10.26	$769	
	Piers #3 (Rise)	Reinforced Concrete	20	S.F	$ 10.26	$208	
	Bent #2 Foundation	Reinforced Concrete	800	S.F	$ 10.26	$8,206	
	Bent #2 Piers	Reinforced Concrete	61	S.F	$ 10.26	$629	
	Piers (Standard)	Reinforced Concrete	106	S.F	$ 10.26	$1,089	
	Bent #1 Foundation	Reinforced Concrete	720	S.F	$ 10.26	$7,386	
	Bent #1 Piers	Reinforced Concrete	119	S.F	$ 10.26	$1,223	
	Piers (Standard)	Reinforced Concrete	18	S.F	$ 10.26	$182	
	Truck Loadout (Stockout) Conveyor	60" BW Conveyor	288	L.F.	$ 16.71	$4,811	Rail Loadout Building to Truck Loadout
	Bent #2 Take-up structure	Steel Structure	11,174	C.F.	$ 0.34	$3,853	
	Bent #1 Foundation	Reinforced Concrete	400	S.F	$ 10.26	$4,101	
	Bent #1 Slab	Reinforced Concrete	360	S.F	$ 10.26	$3,693	
	Bent #2 Foundations	Reinforced Concrete	454	S.F	$ 10.26	$4,654	
	Bent #2 Slab	Reinforced Concrete	1152	S.F	$ 10.26	$11,817	
	Bent #3 Foundation	Reinforced Concrete	220	S.F	$ 10.26	$2,257	
	Bent #3 Slab	Reinforced Concrete	216	S.F	$ 10.26	$2,216	
Sub-Total:						**$248,968**	
Water Treatment Building & Lagoons	*1966 sq. ft.*						
	Water Treatment Building	Structure	44,424	C.F.	$ 0.34	$15,317	62-8" x 31'-4" x 22'-7"
	Gutting	Interior Demolition	1,966	S.F.	$ 9.05	$17,791	Entire interior
	Floor Slab - 8" thick	Reinforced Concrete	1,966	S.F.	$ 9.84	$19,350	62'-8" x 31'-4" (Assumed thickness)
	Foundations - 1'x 2' footings	Reinforced Concrete	188	L.F	$ 12.52	$2,353	Assumed dimensions
	Foundations - 8" thick stem walls	Reinforced Concrete	752	S.F.	$ 9.84	$7,403	Assumed dimensions
	Potable Water Tank	10,000 Gallon	1	Ea	$ 2,295.00	$2,295	10,000 Gallon
	Surge Tank	1,000 Gallon	1	Ea	$ 1,190.00	$1,190	1,000 Gallon
	Water Storage Lagoon - liner remov	Plastic liner	11,000	S.F.	$ 0.39	$4,290	8,872 sf pond surface area
	Reserve-Fire Water Pond - liner ren	Plastic liner	25,500	S.F.	$ 0.39	$9,945	20,440 sf pond surface area
	New Wash Bay Settling Pond - liner	Plastic liner	18,600	S.F.	$ 0.39	$7,254	14,875 sf pond surface area
	Water Storage Lagoon - backfill	Earthwork	1,300	C.Y.	$ 3.60	$4,680	
	Reserve-Fire Water Pond - backfill	Earthwork	3,000	C.Y.	$ 3.60	$10,800	
	New Wash Bay Settling Pond - bac	Earthwork	2,150	C.Y.	$ 3.60	$7,740	
	Lagoon Fencing	Chain link fence	1,550	L.F.	$ 3.90	$6,045	540' + 460' + 550 '
Sub-Total:						**$116,453**	
Diesel Fuel Facility							
	Tank (Main) Slab	Reinforced Concrete	3,684	S.F	$ 10.26	$37,792	76'-8" x 40'-8" x 1.5' to 9"
	Tank Slab Containment Wall	Reinforced Concrete	936	S.F	$ 9.84	$9,214	(2) 40' x 4' x 0'-8" and (2) 78' x 4' x 0'-8"
	Solvent Tank Slab	Reinforced Concrete	78	S.F	$ 10.26	$802	6'-10" x 11'-4" x 1'
	Glycol Tank Slab	Reinforced Concrete	105	S.F	$ 10.26	$1,072	9' x 11' 1'
	Misc. Slab 1	Reinforced Concrete	16	S.F	$ 1.03	$17	4' x 4' x 6"
	Misc. Slab 2	Reinforced Concrete	32	S.F	$ 10.26	$331	4.5' x 16' x 1.5'

Table 6
Building And Facility Removal

ITEM	COMPONENT	DESCRIPTION	QUANTITY	UNITS	COSTS/UNIT	DEMOLITION COST	COMMENTS
	Misc. Slab 3	Reinforced Concrete	200	S.F	$ 10.26	$2,052	
	Misc. Slab 4	Reinforced Concrete	188	S.F	$ 10.05	$1,885	25' x 10' x 9"
	Misc. Slab 5	Reinforced Concrete	1,710	S.F	$ 10.26	$17,541	30' x 30' x 1'-10"
	Fuel Tank	Steel Tank	1	Ea	$ 5,400.00	$5,400	15'dia x 38' Tank (50,000 Gallon)
	Fuel Tank	Steel Tank	1	Ea	$ 5,400.00	$5,400	19'dia x 24' Tank (50,000 Gallon)
	Glycol Tank	Steel Tank	1	Ea	$ 1,190.00	$1,190	5' 4" x 9' 2" Tank (1,500 Gallon)
	Solvent Tank	Steel Tank	1	Ea	$ 1,190.00	$1,190	4' x 11' 2" Tank (1,000 Gallon)
Sub-Total:						**$83,884**	
Gasoline Fuel Facility							
	Tank (Main) Slab - 8"	Reinforced Concrete	513	S.F.	$ 9.84	$5,050	27' x 19'
	Tank Slab Containment Wall - 8" th	Reinforced Concrete	552	S.F	$ 9.84	$5,434	(27*2)+(19*2) x 6
	Containment Foundations	Reinforced Concrete	184	L.F.	$ 12.52	$2,303	2' x 1' footer surrounding containment
	Tank	Steel Tank	1	Ea	$ 2,295.00	$2,295	8' dia x 16' tank (6,000 Gallon)
Sub-Total:						**$15,082**	
Truck Loadout Silo							
	Coal Silo	Steel Structure	1	E.A	$ 22,447.50	$22,448	46' x 26' (d) Cylinder
	Coal Silo Cone	Steel Structure	3,600	C.F.	$ 0.37	$1,334	14.5' x 26' x 8' Truncated Cone
	Silo Support/ Stairs/ Transfer Conve	Steel Structure	9,790	C.F.	$ 0.34	$3,376	18.5' x 18.5' x 26.5'
	Silo Pier Foundations	Reinforced Concrete	552	S.F	$ 10.26	$5,662	2 - 23' x 4' x 2' deep, Reinforced Concrete
	Silo Foundation Slab	Reinforced Concrete	1,800	S.F	$ 10.26	$18,464	2' Thick, 30' x 30'
	Bent #1 Pier Foundation	Reinforced Concrete	400	S.F	$ 10.26	$4,101	3' x 20.5' x 6.5'
	Bent #1 Foundation Slab	Reinforced Concrete	360	S.F	$ 10.26	$3,693	1.5' Thick, 30' x 8'
	Bent #2 Pier Foundations	Reinforced Concrete	454	S.F	$ 10.26	$4,654	(2) 2.5' x 16.5' x 5.5'
	Bent #2 Foundation Slab	Reinforced Concrete	1,152	S.F	$ 10.26	$11,817	2' Thick, 32' x 18'
	Bent #3 Pier Foundation	Reinforced Concrete	220	S.F	$ 10.26	$2,257	2.5' x 16' x 5.5'
	Bent #3 Foundation Slab	Reinforced Concrete	216	S.F	$ 10.26	$2,216	1.5' Thick, 24' x 6'
	Electrical Building	Steel Structure	1,320	C.F.	$ 0.34	$455	10' x 12' x 11'
	Electrical Building-Gutting 1/2 spac	Interior demolition	132	S.F	$ 9.05	$1,195	12' x 11'
	Electical Bulding Slab	Reinforced Concrete	220	S.F	$ 10.26	$2,257	2.5' x 16' x 5.5'
	Electrical Building Foundations	Reinforced Concrete	30	S.F	$ 9.84	$295	(2) 8" x 1.5' x 10'
Sub-Total:						**$84,223**	
Train Loadout Building (TLO)							
	Structure	Steel Structure	119,908	C.F.	$ 0.34	$41,344	(26' x 27' x 110')+(18' x 27' x 72')+(8' x 26' x 37')
	MCC-3	Concrete Structure	3,276	C.F.	$ 0.45	$1,468	18' x 14' x 13'
	Foundation Slab	Reinforced Concrete	8,008	S.F	$ 10.26	$82,144	52' x 44' x 3'-6"
	Foundation Piers	Reinforced Concrete	130	L.F.	$ 21.43	$2,788	(5) 2'-8" x 2'-8" x 3'-2" and (4) 1'-4" x 1'-4" x 1'-10"
	Slab - El. 3482'-6"	Reinforced Concrete	722	S.F	$ 1.03	$746	Slab, 6" Thick (19'-4"' x 37-4"'):
	Slab - El. 3494'-6"	Reinforced Concrete	681	S.F	$ 1.03	$705	Elevated Concrete Floors, 6" Thick, 681.3 sf
	Slab - El. 3507'-0"	Reinforced Concrete	662	S.F	$ 1.03	$685	Elevated Concrete Floors, 6" Thick, 662.3 sf
	Loadout Chute	Steel Structure	76	C.F.	$ 0.34	$26	
	Loadout Hopper	Steel Structure	13,556	C.F.	$ 0.37	$5,025	
	Conveyor Discharge Chute to Hopp	Steel Structure	871	C.F.	$ 0.34	$300	
	Control Room -Gutting	Interior demoliton	252	S.F	$ 9.05	$2,281	
Sub-Total:						**$137,513**	
Miscellaneous							
Substations							
	Truck Dump (TD), Secondary, Barn Transformers		3	EACH	$ 902.00	$2,706	
	TD Substation Circuit Breaker		1	EACH	$ 6,800.00	$6,800	
	TD Substation High-voltage Fuses		1	EACH	$ 340.00	$340	
	TD Substation Lightning Arresters		1	EACH	$ 272.00	$272	
McClanahan Sampler							
	Building Structure	Steel Structure	2,393	C.F.	$ 0.34	$825	
	Access Walkway	Steel Structure	297	C.F.	$ 0.34	$102	
	Primary Sampler	Steel Structure	53	C.F.	$ 0.34	$18	
	Sampling Conveyors	Conveyors	35	L.F.	$ 16.71	$585	
	Bucket Elevator	Steel Structure	288	C.F.	$ 0.34	$99	
	Building Concrete Piers	Reinforced Concrete	302	S.F.	$ 10.26	$3,094	
	Access Walkway Piers	Reinforced Concrete	38	S.F.	$ 10.26	$387	
Minor Buildings							
	Topper Building	Steel Structure	1,920	C.F.	$ 0.34	$662	
	Side Release Building	Steel Structure	11,520	C.F.	$ 0.34	$3,972	
	Equipment Storage Building (near S	Steel Structure	11,520	C.F.	$ 0.34	$3,972	
	Tool Room	Steel Structure	4,150	C.F.	$ 0.34	$1,431	
	Lunch Room	Concrete Block Structu	3,920	C.F.	$ 0.45	$1,757	
	Water Tank Control	Steel Structure	640	C.F.	$ 0.34	$221	
	Scale House - Static Scale	Steel Structure	640	C.F.	$ 0.34	$221	
	Radio Repeater Building	Steel Structure	640	C.F.	$ 0.34	$221	
Sewage Lagoon		Lagoon Backfill	5,040	C.Y,	$ 3.60	$18,144	
Bridge							
	Support piers	Reinforced Concrete	5,337	S.F.	$ 10.26	$54,742	2 ea - 2'-9" x 28'-4" x 34'-3"
	Concrete Deck	Reinforced Concrete	8,320	S.F.	$ 10.26	$85,345	32' x 130' x 2'-0"
	Beam Support Structure	Steel Structure	53	TONS	$ 980.00	$52,038	6 ea - 12"x 36" beam, 8.85 tons ea.
Equipment Ready-line							
	Concrete Slab - 8"	Reinforced Concrete	1,248	S.F.	$ 9.84	$12,285	208' x 6' x 0'-8"
	Power poles	Power poles	2	EACH	$ 325.00	$650	
	Ready-line Building	Steel Structure	560	C.F	$ 0.34	$193	10' x 7' x 8'
Wash Bay		Reinforced Concrete	3,300	C.F.	$ 10.26	$33,851	40' x 55' x 1'-6"

Table 6
Building And Facility Removal

ITEM	COMPONENT	DESCRIPTION	QUANTITY	UNITS	COSTS/UNIT	DEMOLITION COST	COMMENTS
Hydrants/ Manholes		Hydrants	10	EACH	$ 532.72	$5,327	
Hydrants - Water		Hydrants	3	EACH	$ 532.72	$1,598	
Manhole		Concrete	13	EACH	$ 338.77	$4,404	
Powerlines							
	Power poles	Wooden Poles	186	EACH	$ 325.00	$60,450	
	Conductor	Conductor	137,775	L.F.	$ 0.99	$136,992	
Railroad Loop							
	Railroad Loop Rail	Track	9,201	L.F.	$ 8.90	$81,889	
	Railroad Loop Ballast	Ballast	5,100	C.Y.	$ 4.74	$24,179	
Culvert Removal		Installed Length	6,249	L.F.		$114,669	No. of 20' Sections Removed, See Table
Sub-Total:						**$714,441**	

Table 7
Culvert Removal

CULVERT SUMMARY (INSTALLED)

CULVERT	DRAINAGE AREA (ac)	CURVE NUMBER	AVERAGE DRAINAGE SLOPE (%)	GREATEST FLOW LENGTH (ft)	DESIGN DISCHARGE (cfs)	DESIGN CULVERT SIZE (in)	INSTALLED CULVERT DIA. (in)	INSTALLED CULVERT LENGTH (ft)	TRENCHING* (cy)	CULVERT REMOVAL
AR1	5.5	60	7.0	500	0.48	7.2	36	158		158
AR2	173.5	59	4.5	4200	3.64	11.8 x 2	42 x 2	278		278
AR3	13.5	58	10.8	1300	0.30	6.1	36	204		204
AR4	27.0	59	12.0	1000	1.23	10.2	36	264		264
PF1	534.5	60	1.3	7150	9.67	22.0	42	240		240
PF2	3.0	60	3.0	500	0.21	5.3	42	106		106
PF3	21.0	90	0.3	1350	28.61	33.0	36	90		90
PF4	1.7	60	7.5	200	0.14	4.5	42	110		110
PF5	162.4	62	3.3	3600	7.47	20.0	42	170		170
PF6	6.3	58	6.0	1000	0.14	4.5	30	70		70
PF7	3.8	58	16.6	300	0.10	3.9	30	110		110
PF8	14.0	60	0.8	1200	0.50	7.3	24	58		58
PF9	223.0	64	3.5	5400	27.73	34.1	48	215		215
3-1	25.0	63	8.6	1050	4.16	16.1	18	124		124
3-2	57.1	62	0.7	4350	1.76	11.7	30	128		128
3-3	31.4	59	8.0	1600	0.99	9.4	24	150		150
3A-1	195.0	65	5.8	4500	22.64	30.3	30	116		116
3A-2	59.3	76	3.0	2000	34.34	35.4	36	152		152
3C-1	155.0	64	3.5	4000	13.67	25.1	30	100		100
3D-1	85.0	65	8.9	2250	16.89	27.1	30	94		94
1-1	58.7	62	5.8	2400	4.20	17.0	30	116		116
1-2	75.2	62	3.4	4100	3.56	20.0	30	120		120
2-1	102.0	62	3.3	3300	5.31	18.0	18	97		97
2-2	46.2	65	2.5	1700	7.11	30.0	24	117		117
2-3	36.8	78	2.5	2400	22.06	36.0	30	135		135
4-1	25.0	62	4.0	1500	2.12	19.0	18	114		114
4-2	189.0	77	4.9	6000	9.74	30.0	30	120		120
5-1	75.0	62	5.2	2500	5.10	19.0	24	121		121
S-1	206.9	65	7.1	4842	16.70	30.0	30	200		200
S-2	32.8	71	8.1	2525	9.28	18.0	18	340		340
S-3	398.1	73	7.5	4547	106.67	54.0	54	350		350
S-4	56.5	80	8.1	2035	42.22	30.0	30	280		280
S-5	835.0	85	4.0	8594	139.00	66.0	36 x 4	170		170
S-6	13.6	85	1.2	4822	1.33	24		210		210
S-7	3.8	85	1.0	2175	4.53	1-24	24	150		150
M-1	3961.0	73	3.0	18347	583.00	3-72	3-72	350		350
M-2	2500.0	73	3.0	14889	258.00	2-60	2-60	250		250
M-5	2.5	80	2.1	717	3.00	1-24	24	72		72
								Units	0	6249
								Unit Cost	$0.00	$18.35
								Sub Total	$0	$114,669
									TOTAL:	$114,669

*RS Means Unit Cost 2024, includes trenching

Table 8
Facility Removal Unit Cost Support

DEMOLITION COSTS			
DESCRIPTION	**UNIT COST ($)**	**UNITS**	**SOURCE/COMMENTS**
BUILDING/ STRUCTURE DEMOLITION			
Building Demolition--Large urban projects, including 20 mi. haul; No foundation or dump fees.	$ 0.37	cubic feet, C.F.	2024 RS Means 02 41 16.13-0020
Building Demolition--Small bldgs., or single building, no salvage included, steel, masonry or wood.	$ 0.34	cubic feet, C.F.	2024 RS Means 02 41 16.13-0500
Building Demolition--Small bldgs., or single building, no salvage included, concrete	$ 0.45	cubic feet, C.F.	2024 RS Means 02 41 16.13-0600
Selective Demolition - Gutting - Commercial Bldg	$ 9.05	square foot/ floor, S.F.	2024 RSMeans 02 41 19.21-1020
Conveyor Systems	$ 16.71	linear feet, L.F.	Westmoreland Rosebud Mine Estimate
CONCRETE/ PAVEMENT DEMOLITION			
Bldg. Footings and Foundations Demolition--Floors, concrete slab on grade, 4-inch thick, wire mesh reinforced.	$ 0.85	square foot, S.F.	2024 RSMeans 02 41 16. 17-0280
Bldg. Footings and Foundations Demolition--Floors, concrete slab on grade, 6-inch thick, wire mesh reinforced.	$ 1.03	square foot, S.F.	2024 RSMeans 02 41 16. 17-0420
Demolish, Remove Pavement and Curb--Pavement removal, bituminous roads, 3-inches thick.	$ 4.48	square yard, S.Y.	2024 RSMeans 02 41 13.17-5010
Demolish, Remove Pavement and Curb--Pavement removal, bituminous roads, 4-6-inches thick.	$ 7.41	square yard, S.Y.	2024 RSMeans 02 41 13.17-5050
Demolish, Remove Pavement and Curb--Curbs, Bituminous.	$ 2.50	linear feet, L.F.	2024 RSMeans 02 41 13.17-6300
Demolish, Remove Pavement and Curb--Curbs, Plain Concrete or Granite.	$ 3.71	linear feet, L.F.	2024 RSMeans 02 41 13.17-6200
Minor Slab on Grade Removal, Reinforced	$ 161.63	cubic yard, C.Y.	2024 RSMeans 02 41 13. 30-4320
Bldg. Footings and Foundations - Concrete Footings 1' thck x 2' wide (2 sf/L.F) w/ reinforcing	$ 12.52	linear feet, L.F.	2024 RS Means 02 41 16.17-1000
Bldg. Footings and Foundations - Concrete Footings 1'-6" thck x 2' wide (3 sf/L.F) w/ reinforcing	$ 14.98	linear feet, L.F.	2024 RS Means 02 41 16.17-1080
Bldg. Footings and Foundations - Concrete Footings 2' thck x 3' wide (6 sf/L.F.) w/ reinforcing	$ 21.43	linear feet, L.F.	2024 RS Means 02 41 16.17-1140
Selective Demolition - Piles, End-bearing, 14"-18"	$ 11.12	vertical liner feet, VLF	2024 RSMeans 02 41 13. 74-0700
Concrete - 8" thick w/ reinforcing (40.5 sf/CY)	$ 9.84	square foot, S.F.	2024 RSMeans 02 41 16. 17-2420
Concrete - 10" thick w/ reinforcing (32.4 sf/CY)	$ 10.05	square foot, S.F.	2024 RSMeans 02 41 16. 17-2440
Concrete - 12" thick w/ reinforcing (27 sf/CY)	$ 10.26	square foot, S.F.	2024 RSMeans 02 41 16. 17-2500
RAIL FACILITY DEMOLITION			
Railroad ballast removal	$ 4.74	cubic yards, C.Y.	2024 RSMeans 02 41 13. 33-3600
Railroad track removal, ties and track	$ 13.88	linear feet, L.F.	2024 RSMeans 02 41 13. 33-3500
UTILITY LINE DEMOLITION			
Remove existing catch basin or manhole, masonry (w/ excavation included)	$ 338.77	each, Ea.	2024 RSMeans 02 41 13. 23 0020
Minor site demolition--Hydrants, fire, remove only	$ 532.72	each, Ea.	2024 RSMeans 02 41 13. 23-0900
Selective Demolition - Pipe removal, 12" (no excavation)	$ 7.67	linear feet, L.F.	2024 RSMeans 02 41 13. 23-2900
Selective Demolition - 3/4" to 2" piping	$ 1.81	linear feet, L.F.	2024 RSMeans 02 41 13. 38-2300
Selective Demoliton 2"- 3" piping	$ 3.02	linear feet, L.F.	2024 RSMeans 02 41 13. 38-2400
Selective Demolition - Electric Duct Bank			
Trenching (4'w x 6' d) w/ 1/2 cy bucket	$ 18.03	linear feet, L.F.	2024 RSMeans G1030 805-1430
STORAGE TANK DEMOLITION			
Tank Demolition--Steel, 550 to 2,000 gallons	$ 1,190.00	each, Ea.	2024 RSMeans 13 05 05.75-0520
Tank Demolition--Steel, 5,000 to 10,000 gallons	$ 2,295.00	each, Ea.	2024 RSMeans 13 05 05.75-0530
Tank Demolition--Steel, 15,000 to 30,000 gallons	$ 3,600.00	each, Ea.	2024 RSMeans 13 05 05.75-0540
Tank Demolition--Steel, 30,000 gallons	$ 3,075.00	each, Ea.	2024 RSMeans 13 05 05.60-0050
Tank Demolition--Steel, 50,000 gallons	$ 5,400.00	each, Ea.	2024 RSMeans 13 05 05.75-0540 extrapolated to 50,000 gallons
Excavate and load Underground Storage Tank Removal--3000 gal. to 12,000 gal., petroleum storage, non-leaking	$ 0.16	per gallon of capacity	2024 RSMeans 02 65 10.30-0130 Average value by tank volume to obtain cost per gallon
Removal of sludge, water, and product from tank bottom with vacuum truck	$ 0.05	per gallon of capacity	2024 RSMeans 02 65 10.30-0320 Average value by tank volume to obtain cost per gallon
Haul tank to certified dump - 100 miles rt	$ 880.00	each, Ea.	2024 RSMeans 02 65 10.30-1026
Haul tank to certified dump - 100 miles rt Up to 8000 gal +	$ 1,455.00	each, Ea.	2024 RSMeans 02 65 10.30-1213
Disposal of Sludge, off-site	$ 6.20	gallon, Gal	2024 RSMeans 02 65 10.30-0390
Removal and Disposal of Petroleum Contaminated Soil - Average Cost	$ 400.00	cubic yards, C.Y.	2024 RSMeans 02 65 10.30-1111
MISCELLANEOUS DEMOLITION			
Excavation and Fill--Front end loader, wheel mounted, 1.0 C.Y. cap.	$ 24.80	cubic yards, C.Y.	2024 RSMeans 31 23 23.15-4000
Backfill, Structural, Dozer or FEL, 105 HP, 300 ft haul from stockpile, common earth	$ 3.60	cubic yards, C.Y.	2024 RSMeans 31 23 23.14-3320

Table 8
Facility Removal Unit Cost Support

DEMOLITION COSTS			
DESCRIPTION	**UNIT COST ($)**	**UNITS**	**SOURCE/COMMENTS**
Bridge Demolition (steel deck 10'x 160')	$ 12.40	square ft, S.F.	2024 RSMeans 02 41 16.33-0200
Bridge Structural steel, rolled beams (labor and equipment)	$ 980.00	ton	2024 RSMeans 32 34 10.10-0020
Minor Site Demolition--Pipe Removal, sewer/water, no excavation, 12-inch dia.	$ 8.90	linear feet, L.F.	2024 RSMeans 02 41 13.23-2900
Overhead High-Voltage Conductor - Labor and Equipment to Construct (1600 kcmil)	$ 0.99	linear feet, L.F.	2024 RSMeans 33 71 39.13-1460
Utility Poles and Cross-arms (35-45' high)	$ 325.00	each, Ea.	2024 RSMeans 02 41 13.80-0200
Demolish (remove) Substation Transformer - 300 kva, 3-phase, oil-filled, pad-mounted	$ 902.00	each, Ea.	2024 RSMeans 26 05 05.10-1550
Set/ (Remove) High-voltage Vacuum Circuit Breaker - Labor	$ 6,800.00	each, Ea.	2024 RSMeans 33 75 23.13-2300 Only labor
Set/ (Remove) High-voltage Fuses - Labor	$ 340.00	each, Ea.	2024 RSMeans 33 75 36.13-8260 Only labor
Set/ (Remove) High-voltage Surge Arresters - Labor	$ 272.00	each, Ea.	2024 RSMeans 33 75 39. 13-8060 Only Labor
Fencing Demolition--Chain link, posts & fabric, remove only, 8-ft.to 10-ft. high	$ 3.90	linear feet, L.F.	2024 RSMeans 02 41 13.62-0675
Fencing Demolition--Barbed wire, 3 strand	$ 1.80	linear feet, L.F.	2024 RSMeans 02 41 13.60-1600
Surface coat latex rubber	$ 0.39	square ft, S.F.	2024 RSMeans 02 41 13.86-0200

Table 9
Soil Redistribution Costs

Stockpile #	Permit	Type	Soil Type	Volume (cy)	Dist	Grade	Equipment	Unit Cost	Cost
5A	DEQ	Specialty	A	3,402	500	0.0	Dozer	$ 0.64	$ 2,190.18
5B	DEQ	Specialty	B	3,544	500	0.0	Dozer	$ 0.64	$ 2,281.60
22A	DEQ	Specialty	A	384	500	0.0	Dozer	$ 0.64	$ 247.22
22B	DEQ	Specialty	B	1,331	500	0.0	Dozer	$ 0.64	$ 856.89
25A	DEQ	Specialty	A	7,672	500	0.0	Dozer	$ 0.64	$ 4,939.17
25B	DEQ	Specialty	B	17,288	500	0.0	Dozer	$ 0.64	$ 11,129.86
26A	DEQ	Specialty	A	9,203	500	0.0	Dozer	$ 0.64	$ 5,924.81
26B	DEQ	Specialty	B	9,378	500	0.0	Dozer	$ 0.64	$ 6,037.47
27A	DEQ	Specialty	A	27,376	500	0.0	Dozer	$ 0.64	$ 17,624.43
27B	DEQ	Specialty	B	20,226	500	0.0	Dozer	$ 0.64	$ 13,021.32
31B	DEQ	Lift 2	B	49,870	500	0.0	Dozer	$ 0.64	$ 32,105.87
35A	DEQ	Lift 1	A	12,990	500	0.0	Dozer	$ 0.64	$ 8,362.85
41A	DEQ	Lift 1	A	31,105	500	0.0	Dozer	$ 0.64	$ 20,025.13
41B	DEQ	Lift 2	B	32,869	500	0.0	Dozer	$ 0.64	$ 21,160.77
55A	DEQ	Lift 1	A	10,950	500	0.0	Dozer	$ 0.64	$ 7,049.51
55AA	DEQ	Lift 1	A	24,467	500	0.0	Dozer	$ 0.64	$ 15,751.64
55B	DEQ	Lift 2	B	3,243	500	0.0	Dozer	$ 0.64	$ 2,087.81
P33A	DEQ	Lift 1	A	2,492	500	0.0	Dozer	$ 0.64	$ 1,604.33
P33B	DEQ	Lift 2	B	3,574	500	0.0	Dozer	$ 0.64	$ 2,300.91
P34A	DEQ	Lift 1	A	2,597	500	0.0	Dozer	$ 0.64	$ 1,671.93
P34B	DEQ	Lift 2	B	3,460	500	0.0	Dozer	$ 0.64	$ 2,227.52
SC1A	DEQ	Lift 1	A	5,249	500	0.0	Dozer	$ 0.64	$ 3,379.26
SC1B	DEQ	Lift 2	B	8,433	500	0.0	Dozer	$ 0.64	$ 5,429.09
SC1BB	DEQ	Lift 2	B	1,721	500	0.0	Dozer	$ 0.64	$ 1,107.96
1	DEQ	1&2 Mix	A+B Mix	252,705	2072	-5.0	T/L	$ 1.97	$ 497,811.08
2	DEQ	1&2 Mix	A+B Mix	114,222	1323	-5.0	T/L	$ 1.97	$ 225,009.31
3	DEQ	1&2 Mix	A+B Mix	51,892	1500	-5.0	T/L	$ 1.97	$ 102,223.59
8A	DEQ	Lift 1	A	98,565	4235	0.0	T/L	$ 1.97	$ 194,166.12
8B	DEQ	Lift 2	B	176,374	4235	0.0	T/L	$ 1.97	$ 347,444.38
9A	DEQ	Lift 1	A	80,740	2891	0.0	T/L	$ 1.97	$ 159,052.12
9B	DEQ	Lift 2	B	157,752	2891	0.0	T/L	$ 1.97	$ 310,760.35
31A	DEQ	Lift 1	A	107,080	1784	-10.0	T/L	$ 1.97	$ 210,940.07
32A	DEQ	Lift 1	A	120,078	1500	-5.0	T/L	$ 1.97	$ 236,545.22
34A	DEQ	Lift 1	A	64,625	4070	-5.0	T/L	$ 1.97	$ 127,306.71
34B	DEQ	Lift 2	B	123,647	4070	-5.0	T/L	$ 1.97	$ 243,575.89
35B	DEQ	Lift 2	B	81,860	1593	-10.0	T/L	$ 1.97	$ 161,258.44
36A	DEQ	Lift 1	A	119,664	2985	-10.0	T/L	$ 1.97	$ 235,729.66
36B	DEQ	Lift 2	B	266,634	2985	-10.0	T/L	$ 1.97	$ 525,250.23
40A	DEQ	Lift 1	A	91,339	3222	-5.0	T/L	$ 1.97	$ 179,931.41
40B	DEQ	Lift 2	B	83,346	3222	-5.0	T/L	$ 1.97	$ 164,185.76
42A	DEQ	Lift 1	A	65,522	2342	0.0	T/L	$ 1.97	$ 129,073.73
42B	DEQ	Lift 2	B	71,046	2342	0.0	T/L	$ 1.97	$ 139,955.62
			Total	2,419,915				***Total***	$ 4,378,737
				Area-weighted soil distribution cost/Yard:				***Total***	$ 1.81
Total Weighted Averages T/L					2,778	(4.82)			
Minus 2022-2025 Projected Stockpile Redistribution				(297,166)					
			Total	2,122,749				***Total***	$ 3,841,027

Note: Of the combined total of 743,550 cubic yards in Stockpiles 36A and 36B, the volumes shown above for these stockpiles have been proportionally reduced for the 338,800 cubic yards to account for the required volume from the OSM Permit for the Reservation Lands.

Table 10
Revegetation Cost Estimate

	Acres Disturbed	Acres Reclaimed
Permit area (from latest annual report)	5,124	3,327
Phase II Bond Release Area (from latest annual report)		2,703
Phase III Bond Release Area (from latest annual report)		2,237
Reclaimed Acres Without Phase III Release		1,090
Future Reseeding Area, Shown on Plate 4		1,526
10% of Contingency Seeding Previously reseeded		109
Total Area To Be Revegetated		1,635

Task Description:

Revegetation task is divided into two subtasks: Seed bed preparation and Seeding

Subtask 1: Seedbed preparation

Surface area (ac)		1,635			
Tillage rate (ac/hr)		2.0			
Equipment time (hr)		817			
Equipment cost ($/hr)	$	181	Subtotal	$	147,877

Subtask 2: Seeding

Seed and Seeding: subtask includes cost of seed, seedlings (trees and shrubs), and cost of planting.

Equipment:

Seed drill, mechanical seedling planter and 40 horsepower farm tractor.

Surface area (ac)		1,635.0			
Seed rate (lbs/ac)		15			
Seed cost ($/lb)	$	17.50	Subtotal	$	429,177
Seedlings (#/ac)		20			
Seedling cost w/ planting ($/seedling)	$	2.00	Subtotal	$	65,398
Planting rate (ac/hr)		0.8			
Planting time (hr)		2,044			
Equipment cost ($/hr)	$	181	Subtotal	$	369,964
			Revegetation Total	**$**	**1,012,416**
			Cost/Ac	$	619.23

Table 11
Long-Term Monitoring Cost Summary

Description	Episodes	Time/ Episode (weeks)	Number of Crew Members	Report Preparation ks/episod Crew of 1	Labor Cost	Equipment Cost	Number of Samples/ Episode	Current Analytical Cost/Sample	Years	Total Cost
Spoil	1	1.0	1	0.1	$3,124	$710	90	$110.00	1	$13,734
Vegetation	1	1.0	8	2.0	$28,400	$710	0	$0.00	2	$58,220
Wildlife (aerial)	2	0.1	1	0.2	$1,704	$1,420	0	$0.00	10	$31,240
Wildlife (ground)	4	1.0	1	1.0	$22,720	$2,840	0	$0.00	10	$255,600
Groundwater (wells)	1	0.5	1	2.5	$8,520	$355	48	$65.00	10	$119,950
Groundwater (springs)	2	0.2	1	0.2	$2,272	$284	6	$65.00	10	$33,360
Surface Water (observation)	2	0.1	1	0.2	$1,032	$258	0	$0.00	10	$12,900
Surface Water (sample)	2	0.1	1	0.2	$1,032	$258	4	$130.00	10	$23,300
Surface Water (analyze)	2	0.0	0	0.2	$1,136	$0	4	$130.00	10	$21,760
MPDES (sample & analyze)	1	0.2	1	0.4	$1,704	$142	4	$55.00	10	$20,660
TOTAL										$590,724

Percent appropriated to Montana DEQ Permit Area: 76%
Appropriated cost $448,160

Labor Rate = $71.00 /hour 40 Hours/ week
Equipment Cost = 25.0% of labor rate except for wildlife aerial
Wildlife Aerial = 250.0% of labor rate

Table 12

EQUIPMENT WATCH - COST REFERENCE GUIDE
Equipment Discontinued 0-5 Years Ago
JUNE 2023

Diesel $	Wage $
$3.080	$52.93
MDEQ	Montana Prevailing Wage Rates for Heavy Construction, Update January 13, 2024, Group 3

Equipment Specifications					
Model (Yr./Description)	Dozer	Operator Protection	HP	Total Hourly Costs $	
Caterpillar - Dozer					
D10T	Semi-U	EROPS	574.0 hp	437.06	Equipment Watch Rates (1st half, Jan-June)
				489.99	D10-U
Caterpillar - Dozer					
D11T CD	CD	EROPS	574.0 hp	477.73	Equipment Watch Rates (1st half, Jan-June)
				530.66	D11 T CD
D11T	U Blade	EROPS	850	477.73	Equipment Watch Rates (1st half, Jan-June)
				530.66	D11 U
Caterpillar					
16M	EROPS	16'	297.0 hp	133.44	Equipment Watch Rates (1st half, Jan-June)
				186.37	16M
Komatsu				414.59	Equipment Watch Rates (1st half, Jan-June)
HD785-7	91 mt	60.1-78.6 cu yd	1178 hp	467.52	HD785-7
Matchto Cat 777D					
Komatsu					
Loader				470.04	Equipment Watch Rates (1st half, Jan-June)
WA900-3	190 in	17 cu yd	856 hp	522.97	WA900-3
Match to Cat 992G loader					
				242.24	Equipment Watch Rates (1st half, Jan-June)
Diesel Power				295.17	WT 12,000
Water Truck (12,000 gal)			450 hp		
Scraper					
657 G P-P		44 cu yd (heaped)	410/451 hp	870.85	Equipment Watch Rates (1st half, Jan-June)
		40 cy production		923.78	
		EROPS			

NOTES:

1 WAM's # - Montana Revailing Wage Rate for Heavy Construction Services 2023 - Construction Equipment Operator - Group 3
https://erd.dli.mt.gov/_docs/labor-standards/Prevailing-Wage/Heavy-Final-2024.pdf

2 Diesel price - MDT Contracting & Bidding Monthly Average Fuel Prices
https://www.mdt.mt.gov/business/contracting/fuel_prices.shtml

Table 13

SPOIL CALCULATIONS AND ASSUMPTIONS

Machine Productivity: 657G P-P

Load Time (min)	1.10	CAT Performance Handbook (Page 24-17, Ed. 48, June 2018)
Loaded Travel Time (min)	0.40	CAT Performance Handbook (Page 8-48, Ed. 40, January 2010)
Man. & Spread Time (min)	0.60	CAT Performance Handbook (Page 24-17, Ed. 48, June 2018)
Empty Travel Time (min)	0.35	CAT Performance Handbook (Page 8-49, Ed. 40, January 2010)
Total Cycle Time (min)	2.45	
Scraper Capacity	40.0	90% of heaped capacity
Efficiency	0.83	
Actual Fleet LCYPOH	**813.1**	**LCY/hr**

Scraper Fleet

Equipment	% of Loader Time	$/hr	$/hr Total
657G P-P Scraper	100%	$ 923.78	$ 923.78
D10T Dozer	17%	$ 489.99	$ 83.30
Motorgrader	17%	$ 186.37	$ 31.68
Watertruck	17%	$ 295.17	$ 50.18
Fleet Total			$ 1,088.94

Dozer Productivity: D11 CD

	1,139 LCY/hr	Calculated Below
Factors		
Operator	0.88	CAT Handbook ED 49 p. 19-63
*Material	1.13	CAT Handbook ED 49 p. 19-63
Visibility	0.90	CAT Handbook ED 49 p. 19-63
Efficiency	0.83	CAT Handbook ED 49 p. 19-63
Grade	1.32	CAT Handbook ED 49 p. 19-63
**Slot Dozing	1.20	CAT Handbook ED 49 p. 19-63
Adjusted Productio	**1,335**	**LCY/hr**

Table 13

SOIL CALCULATIONS AND ASSUMPTIONS

1 Assumes Caterpillar 777D class end dump trucks with 78.6 yard box at 2:1 heap
2 Assumptions for standard spot and dump times:
3 Assumes a Caterpillar 992G with 16.0 cubic yard bucket.
4 Assumes maximum load in trucks w/tailgate is 100.0 tons.
5 Loader cycle time 0.60

Cycle time for loader:

	Load		
(a) Truck Spot	0.60	minutes	
(b) Pass Number 1:	0.08	minutes	
(c) Remaining Passes	2.40	minutes	(4)
Total Cycle Time	3.08	minutes	sum (a) through (c)

Cycle time for truck: Number of trucks needed 2.23

	Haul		
(a) Truck Spot	0.60	minutes	from bottom of sheet
(b) Load	2.48	minutes	above minus spot
(c) Manuever and Dump Time:	1.00	minutes	from bottom of sheet
(d) Haul Time	2.80	minutes	from bottom of sheet
Total Time	6.88	minutes	sum (a) through (d)

Average volume per swing and per truck:

(a) Bucket Rated Capacity:	16.0	cubic yards	
(b) Bucket Fill Factor:	93%		Normal is <1 for Shovel Configuration
(c) Material Swell Factor:			
(d) Volume Per Swing:	14.9	LCY	(a) * (b) / (c)
(e) Passes Per Truck:	5		
Volume Per Truck:	74.4	LCY	(d) * (e)

Weight per truck load:

(a) Volume Per Truck:	74.4	LCY	
(b) Weight of Material:	1.35	tons/BCY	2700 lbs. per cubic yard in-place (loose)
Weight per truck:	100.4	tons	(a) * (b)
(c) % Payload by Weight	100.4%		(b) / (4)

Gross machine weight	363,000	lbs
Material weight	200,880	lbs
	563,880	lbs

Machine Productivity:

Manuever	0.60	CAT Handbook Ed. 43, page 9-20
992G Loader Load Time	2.48	Separate loader/truck matching calculation
Dump	1.00	CAT Handbook Ed. 43, page 9-20
Haul time- 777D	1.80	CAT Handbook Ed. 40, page 9-38
Return time- 777D	1.00	CAT Handbook Ed. 40, page 9-38
Total Truck Cycle Time(minutes)	6.88	Summation
Truck capacity(yds)	74.4	Separate loader/truck matching calculation
Truck LCYPOH	540.4	50min/cycle time x LCY per truck
Trucks Assigned	2.23	total cycle/load time
Actual Trucks Assigned	3.00	rounded to nearest half truck from F57
Loader bucket capacity (yds)	16.00	
Bucket fill factor	0.93	
LCY/bucket	14.88	
Max 992G Loader LCYPOH	1,498.0	50min/load time x LCY per truck
Efficiency	0.95	
Actual Fleet LCYPOH	**1,423.1**	**LCY/hr**

Truck/Loader Fleet

Equipment	% of Loader Time	$/hr	$/hr Total
992G Loader	100%	$ 522.97	$ 522.97
777 Truck	300%	$ 467.52	$ 1,402.56
D10T Dozer	150%	$ 530.66	$ 795.99
Motorgrader	17%	$ 186.37	$ 31.68
Watertruck	17%	$ 295.17	$ 50.18
Fleet Total			$ 2,803.38

Dozer Productivity: D11 CD

	930 LCY/hr	Calculated Below
Factors		
Operator	0.88	CAT Handbook Ed. 43, page 18-55
*Material	1.13	CAT Handbook Ed. 43, page 18-55
Visibility	0.90	CAT Handbook Ed. 43, page 18-55
Efficiency	0.83	CAT Handbook Ed. 43, page 18-55
Grade	1.00	CAT Handbook Ed. 43, page 18-55
**Slot Dozing	1.20	CAT Handbook Ed. 43, page 18-55
Adjusted Produc	**824**	**LCY/hr**

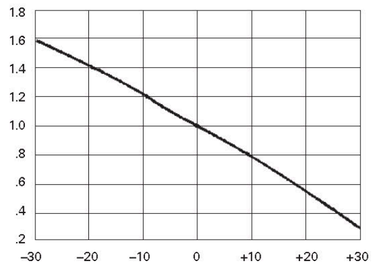
JOB CONDITION CORRECTION FACTORS

	TRACK-TYPE TRACTOR
OPERATOR —	
Excellent	1.00
Average	0.75
Poor	0.60
MATERIAL —	
Loose stockpile	1.20
Hard to cut; frozen —	
with tilt cylinder	0.80
without tilt cylinder	0.70
Hard to drift; "dead" (dry, non-cohesive material) or very sticky material	0.80
Rock, ripped or blasted	0.60-0.80
SLOT DOZING	1.20
SIDE BY SIDE DOZING	1.15-1.25
VISIBILITY —	
Dust, rain, snow, fog or darkness	0.80
JOB EFFICIENCY —	
50 min/hr	0.83
40 min/hr	0.67
BULLDOZER*	
Adjust based on SAE capacity relative to the base blade used in the Estimated Dozing Production graphs.	
GRADES — See following graph.	

***NOTE:** Angling blades and cushion blades are not considered production dozing tools. Depending on job conditions, the A-blade and C-blade will average 50-75% of straight blade production.

% Grade vs. Dozing Factor

(–) Downhill
(+) Uphill



ESTIMATING DOZER PRODUCTION OFF-THE-JOB

Example problem:

Determine average hourly production of a D8T/8SU (with tilt cylinder) moving hard-packed clay an average distance of 45 m (150 feet) down a 15% grade, using a slot dozing technique.

Estimated material weight is 1600 kg/Lm³ (2650 lb/LCY). Operator is average. Job efficiency is estimated at 50 min/hr.

Uncorrected Maximum Production — 458 Lm³/h (600 LCY/hr) (example only)

Applicable Correction Factors:

Hard-packed clay is "hard to cut" material . . .–0.80
Grade correction (from graph) . . . . . .–1.30
Slot dozing . . . . . .–1.20
Average operator . . . . . .–0.75
Job efficiency (50 min/hr) . . . . . .–0.83
Weight correction. . . . . (2300/2650)–0.87

Production = Maximum Production × Correction Factors
= (600 LCY/hr) (0.80) (1.30) (1.20) (0.75) (0.83) (0.87)
= 405.5 LCY/hr

To obtain production in metric units, the same procedure is used substituting maximum uncorrected production in Lm³.

= 458 Lm³/h × Factors
= 309.6 Lm³/h

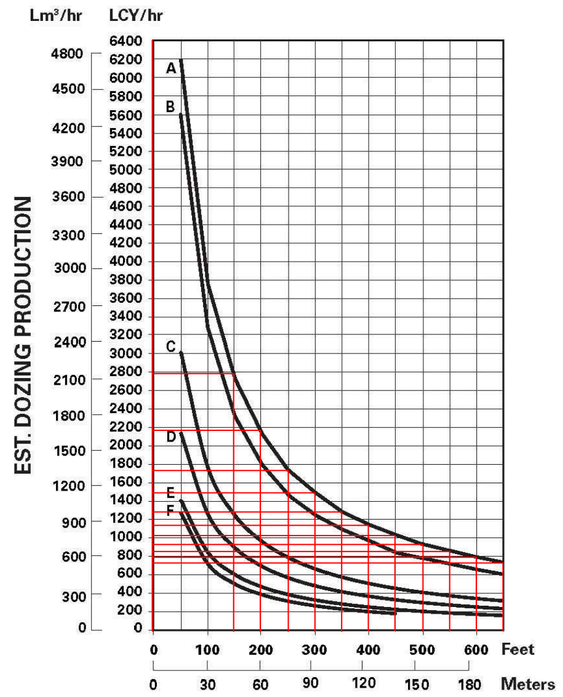
Grade vs Factor
CAT Handbook ED 49 p. 19-63

Grade	Factor
-30	1.59
-20	1.42
-10	1.22
0	1
10	0.79
20	0.55
30	0.3

Interpolations

Grade	Factor
-20	1.42
-15.12	**1.32**
-10	1.22

ESTIMATED DOZING PRODUCTION ● Universal Blades ● D7E through D11 CD



AVERAGE DOZING DISTANCE

KEY

A — D11 CD
B — D11
C — D10T2
D — D9T
E — D8T
F — D7E

NOTE: This chart is based on numerous field studies made under varying job conditions. Refer to correction factors following these charts.

Updated December/2019

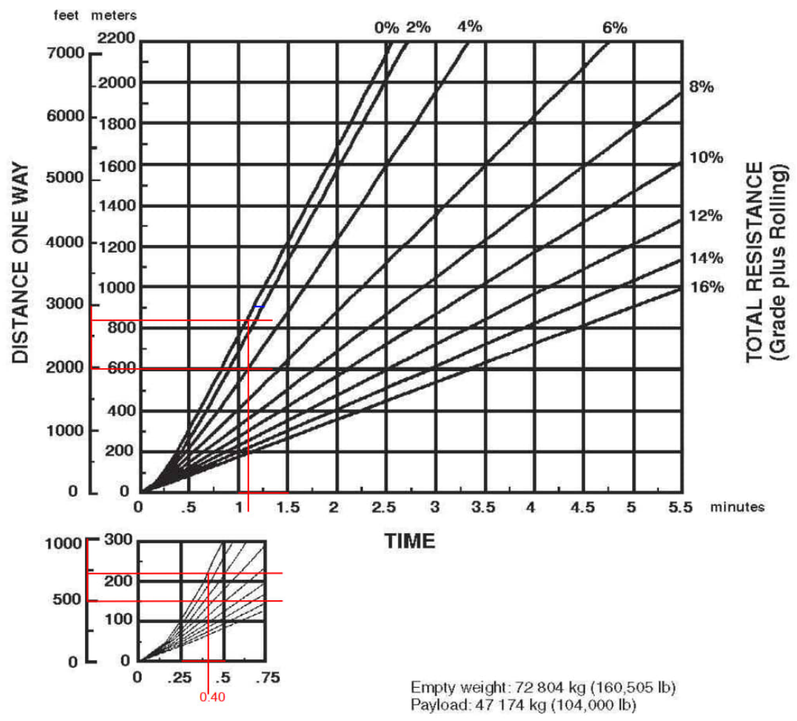
Productivity Vs Distance
CAT D11 CD
CAT Handbook ED 49 p. 19-59

Distance	Production
100	3700
150	2780
200	2170
250	1740
300	1500
350	1290
400	1140
450	1030
500	930
550	860
600	790
650	730

Interpolations

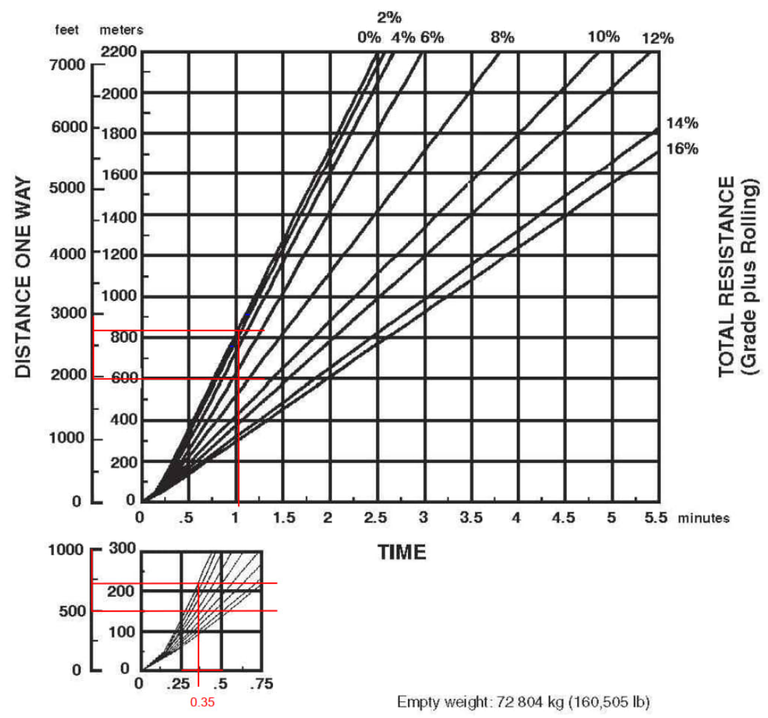
Grade	Factor
400	1140
400.59	**1138.70**
450	1030

LOADED



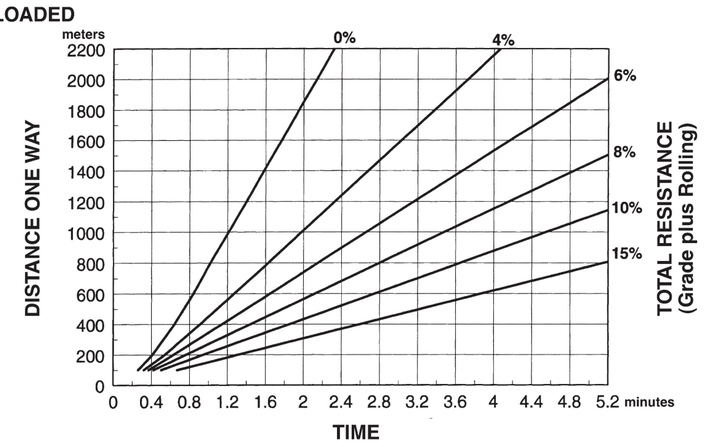
Empty weight: 72 804 kg (160,505 lb)
Payload: 47 174 kg (104,000 lb)

EMPTY

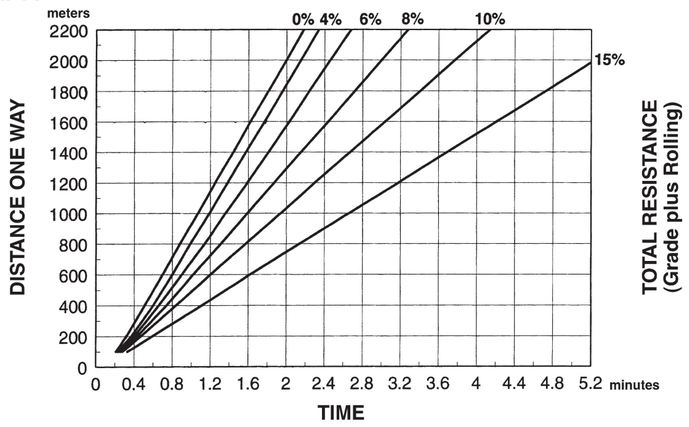


Empty weight: 72 804 kg (160,505 lb)

LOADED



EMPTY



BEFORE THE BOARD OF ENVIRONMENTAL REVIEW
OF THE STATE OF MONTANA

IN THE MATTER OF:	**Case No.** **PREHEARING ORDER**

(First paragraph - Summary of Petition)

This Order sets forth general procedures that will govern this contested case proceeding and sets a scheduling conference. Failure to comply with this Order may result in rejected filings, additional filing requirements, or sanctions.

IT IS HEREBY ORDERED:

1. APPLICABLE RULES: This hearing and all prehearing matters will be conducted pursuant to the Montana Administrative Procedures Act (MAPA), Title 2, Chapter 4, Part 6 of the Montana Code Annotated; the Montana Rules of Civil Procedure; the Montana Rules of Evidence; the Uniform District Court Rules, where referenced; and the Administrative Rules of Montana (ARMS), including but not limited to Admin. R. Mont. 17.4.101, adopting the Attorney General's model procedural rules. All of these procedural rules may be found online, for free, and the parties are expected to know and abide by these rules.

The parties have the right to jointly waive a formal MAPA proceeding pursuant to Mont. Code Ann. § 2-4-603 and are encouraged to consider this option.

Should they wish to do so, they must inform BER by filing a stipulation on or before (**30 days hence?**).

2. BER MEETINGS: Notice is hereby given that the procedural status (only procedure, not the substance) of this case will be discussed at all subsequent BER meetings until a final agency decision is rendered and any appeal is complete. The schedule and agenda for BER meetings are available online and all meetings are open to the public, either by Zoom or in person. Parties are encouraged, although not required, to check the BER website regularly for updates and attend any BER meeting that includes this case on the agenda.

3. APPEARANCES: Any person appearing in the contested case proceeding may be accompanied, represented, and advised by an attorney licensed to practice law in the State of Montana, but is not required to hire an attorney and may represent himself or herself as an individual in the proceeding. Because this action is a civil action (not a criminal action), there is no guaranteed right to representation by an attorney and an attorney will not be provided. Do note that by law, someone who is not an attorney may only represent himself or herself, and not any other person. Additionally, an entity (like a business or a not-for-profit organization) must always be represented by an attorney. Pursuant to Mont. Code Ann. § 37-61-201 any person who appears before a judicial body, referee, commissioner, or other officer appointed to determine any questions of law or fact

by a court or who shall engage in the business and duties and perform such acts, matters, and things are usually done or performed by an attorney at law in the practice of his profession shall be deemed practicing law. Montana Ethics Opinion 000008 provides that an attorney or administrative law judge may not ethically permit a corporation to represent itself *pro se* through an unlicensed individual, stating, "[a] lawyer should assist in preventing unauthorized practice of law." Parties are therefore only allowed to represent their own, individual interest, and cannot litigate for a spouse or other entity's interest without a licensed attorney.

All parties who have not previously done so shall file a Notice of Appearance, indicating the names and contact information for all counsel appearing in the case. In addition to listed counsel, parties may indicate one additional person (e.g., a client or paralegal) to add to the certificate of service. Parties and BER will serve those individuals listed on the Notices of Appearance with every filing, confirmed through certificate of service. **Parties or their counsel are responsible for updating the record of any change in contact information with a formal filing, served on all parties.** Failure to appear or respond to correspondence and filings sent to the contact information on file with the tribunal may result in a default judgment or dismissal.

Application for appearances *pro hac vice*, if necessary, must be filed pursuant to Section VI of the Montana Rules of Admission to the State Bar of Montana.

4. FILING. Filing shall be accomplished by e-mailing the document, in portable data format ("PDF"), to (**Hearing Examiner email and/or DEQBERSecretary@mt.gov**).

5. FORM OF FILING: When **proposed orders** or **proposed findings of fact and conclusions of law** are submitted for filing, such filings must also be provided to BER in Microsoft Word format (in addition to PDF format). Although discovery documents should not be routinely filed, when a motion or brief is filed referring to discovery documents, the party filing the motion or brief must attach the relevant discovery documents.

Electronic filings will be accepted until **11:59 p.m.** of the filing deadline; the document will be deemed "filed" based on the date and time received by BER. All briefs and motions filed electronically **must be in PDF format, in a manner that is searchable by electronic means**. A party may sign the document electronically, rather than a hand signature in the following manner: "/s/ Jane E. Attorney."

A party may request the accommodation of filing and serving documents on paper. If a party files on paper, original documents shall be mailed or hand delivered to the following address:

(Hearing Examiner Address and/or BER Secretary Address)

If allowed, paper filings will be accepted until **5:00 p.m.** on the filing deadline.

Any paper filing that contains more than 100 pages of exhibits must be accompanied by an electronic copy of the exhibits. Any exhibit provided in an electronic format must be its own individual file with the name of the exhibit and a brief description, in the following format: "Exhibit A – Affidavit of John Doe." Single files containing multiple exhibits will be rejected and returned for reformatting. Electronic exhibits that are too large to send via a single e-mail must be provided in PDF form on removable media (thumb drive, CD-ROM, etc.) or through the State of Montana's File Transfer Service for the transmission of larger exhibit files. Parties should not send multiple e-mails with exhibits attached.

Motions will be filed pursuant to Rule 2, Montana Uniform District Court Rules.

6. LENGTH OF FILINGS: **Briefs in support of a motion and response briefs are limited to 6500 words. Reply briefs are limited to 3250 words.** Word limitations are computed to exclude the caption, signature lines, tables, appendices

or certificates of compliance and service. Any motion to file an overlength brief must be presented reasonably in advance of the briefing at issue. Any motion for overlength brief filed contemporaneously with an overlength brief will be denied. Tables of contents and tables of authority are not required but are highly recommended, particularly for those filings over 4,000 words. Any motion or brief with more than three exhibits or affidavits attached should be accompanied by a table of exhibits. Any filings that are deemed illegible by BER will not be considered.

7. SERVICE: Service shall be accomplished via e-mail. Copies of all documents filed must be served electronically upon the opposing party. Each filed document must include a certificate of service. Parties must file a Notice of Appearance indicating their e-mail address for service.

8. *EX PARTE* COMMUNICATIONS: The Montana Administrative Procedure Act (Mont. Code Ann. § 2-4-613) and the Attorney General's Model Rule 18 (Admin. R. Mont. 1.3.222) prohibit *ex parte* communications with BER concerning any issue of fact or law in a contested case. In other words, there will be no communication with BER unless all parties are present. This assures all parties that there is no unknown communication of any kind between BER and a party: anything said to BER is said in front of everyone, all the time. This includes e-mail, telephone, letter, or in-person communication. E-mailing, calling, or

sending letters to BER directly or copying BER on e-mails between the parties is prohibited and such action will result in sanctions.

The only exception to this rule is when parties communicate with BER Counsel (not BER) for purely procedural purposes. For example, a party may call or e-mail BER Counsel to ask a question about how to file something, to confirm receipt of a filing, or (when directed by BER) to discuss dates for scheduling a telephonic conference or hearing. BER Counsel cannot and will not discuss the substance of any matter or provide any legal advice to any party. **BER Counsel, Dana Hupp, may be reached at 406-721-3400 or dhupp@wordenthane.com during normal business hours.**

In addition to observing this rule, a party must contact the other parties before communicating with BER, even on purely procedural matters such as the need for a continuance or extension.

9. BRIEFING SCHEDULE: All motions and briefs will follow the scheduling as set forth in Rule 2 of the Montana Uniform District Court Rules, unless an alternative schedule is ordered.

10. SCHEDULING: **A scheduling conference is set for (Date).** The purpose of this conference is to set a schedule for the preparation and presentation of this case. The scheduling conference will be conducted by Teams. A Teams link

will be sent to the parties following issuance of this order; the call-in details are also stated below.

Microsoft Teams meeting:
Meeting ID: 267 485 020 390
Passcode: hdxpiD

Call in:
Phone: 406-318-5487
Phone Conference ID: 515 949 863#

Join with a video conferencing device:
291818717@t.plcm.vc
Video Conference ID: 111 591 831 5

On or before **(Date)**, the parties shall prepare and file **preliminary prehearing statements which include: 1) a statement of facts; 2) contentions of law; 3) a list of proposed stipulated facts; 4) a preliminary witness list (other than experts); 5) a proposed exhibit list; 6) the party's requested relief; and 7) a list of potential prehearing motions and a list of legal issues capable of prehearing resolution.** Parties do not need to wait until the preliminary prehearing statements are submitted to begin conducting discovery.

In advance of the scheduling conference, the parties may consult with one another and propose to the undersigned a schedule upon which they agree on or before **(Date)**. Any proposed schedule shall be filed in Microsoft Word format (as

well as PDF), via e-mail, to the e-mail addresses set forth in Section 3, above. The parties are free to provide for any case-specific dates but, the schedule should include dates for the following unless the parties agree otherwise or the circumstances of the case do not require one of these deadlines:

a. joinder/intervention of additional parties;

b. initial disclosures by each party to the other party(ies) of:

   i. the name and address of each individual likely to have discoverable facts that the disclosing party may use to support its claims or defenses; and,

   ii. a copy of, or a description by category and location of, all documents and tangible things that are in the possession, custody, or control of the disclosing party and that the disclosing party may use to support its claims or defenses;

c. completion of discovery (if any party wishes to conduct discovery) such that responses to all discovery requests are due by this date, after which discovery will be closed;

d. staggered or simultaneous expert disclosures and rebuttal expert disclosures, as decided by the parties; and

e. dispositive motions deadline.

11. SUMMARY JUDGMENT: A party filing a motion for summary judgment must simultaneously file a separate Statement of Undisputed Facts. The Statement of Undisputed Facts must set forth in serial form each fact on which the party relies to support the motion, along with a pinpoint citation to the specific evidence to support each fact.

A party opposing a motion for summary judgment must file a separate Statement of Disputed Facts simultaneously with (but separate from) their response brief. The Statement of Disputed Facts must set forth whether each fact in the moving party's Statement is "undisputed" or "disputed." Any "disputed" fact must be accompanied by a pinpoint citation to the specific piece of evidence to oppose the fact. Failure to provide a pinpoint cite for a "disputed" fact will result in the fact being treated as "undisputed."

All exhibits should be pre-marked with a letter or number in the lower right-hand corner and either a page or Bates stamp number to delineate multiple pages of the exhibit. The DEQ will mark its exhibits using letters; Petitioners will mark their exhibits using numbers. The parties are encouraged to cooperate to avoid duplicate exhibits.

A party opposing a motion for summary judgment may also add to their Statement of Disputed Facts additional facts to oppose summary judgment. Any additional fact must be set forth in serial form, along with a pinpoint cite to the specific evidence to support the fact.

In lieu of the foregoing, the parties can agree to file a joint statement of stipulated facts. **Failure to file a Statement of Undisputed Facts will result in the motion being refused. Failure to file a Statement of Disputed Facts will be deemed an admission that no material facts are in dispute.**

Parties may want to consider a staggered briefing schedule in which the Petitioner files an Opening briefing, the Respondent files a combined Opening/Response brief, the Petitioner files a Reply/Response brief, and the Respondent files a Reply brief. The BER will consider alterations to the briefing word count in the event the parties proposed to use such as schedule.)

12. ACCOMMODATIONS**:** Individuals with disabilities requiring accommodations to participate in the contested case proceedings should immediately contact the BER Counsel to document the disability involved and the accommodation requested.

DATED_____.

By: _____

CERTIFICATE OF SERVICE

I hereby certify that a true and accurate copy of the foregoing Prehearing Order was emailed to: