



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.

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Attachments

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**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 <i>EquipmentWatch</i> with 16-hour workdays	\$23,620,789
Montana DEQ, <i>EquipmentWatch</i> 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 <i>EquipmentWatch</i> with 16-hour workdays	\$23,620,789
Montana DEQ using <i>Costmine Intelligence</i>	\$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:

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

<input type="checkbox"/> U.S. Mail	Sam King, Chief Legal Counsel
<input type="checkbox"/> FedEx	Montana Department of Environmental
<input type="checkbox"/> Hand-Delivery	Quality
<input checked="" type="checkbox"/> Email	1520 East Sixth Avenue
<input checked="" type="checkbox"/> State File Transfer	P.O. Box 200901 Helena, MT 59620-0901 sking@mt.gov

/s/ Victoria A. Marquis

VICTORIA A. MARQUIS

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.

2025 WL 263462

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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

1

Signed January 22, 2025

Attorneys and Law Firms

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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.)

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,

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. Intervenor's 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 Intervenor's 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 Intervenor, 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



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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, Intervenor 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, Intervenor 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 or 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.

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August 29, 2025

Sent electronically and via ePermit system

Westmoreland Absaloka Mining LLC
10375 Park Meadows Drive, Suite 400
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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 ¶15); (3) claim the reclamation bond cannot be increased through a minor revision (id. at ¶16); 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 bond 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. OSMRE'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, 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
<i>Major Earthmoving Volumes:</i>				
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	Facilities 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
Mobilization/Demobilization	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 1
Bond Calculation Summary**

		Dozer Volume LCY	Truck/Loader Volume LCY	Total Yards LCY
<i>Major Earthmoving Volumes:</i>				
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	Facilities 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
Mobilization/Demobilization	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



EXHIBIT
E

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, 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

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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 week². **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 SPSP states "a thorough understanding of the requirements and industry standards is needed by [Contract Officers] to develop appropriate payment and pricing terms." SPSP 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 Manual, 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.

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



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)



- 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

	Op Hrs (Multiple Shifts)	A 8/16/2023	Op Hrs (40 hrs / week)	B 8/16/2023	C MDEQ 5/26/23 Letter	A - C	B - C
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



- 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

Equipment	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	Op Hrs (Multiple Shifts)	C	% of C		Op Hrs (40 hrs / week)	D	% of D			
	5 Year	2022		8/16/2023	5 Year	2022		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 hours** 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

Bond Discussion Points



- 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

March 8, 2024

George Harris
Executive Director
Montana Coal Council
PO Box 5508
Helena, MT 59604

Sent by email to: gharris@montanacoalouncil.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.

Multiple Shift Reclamation Operations

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.

Single Industry Provided Letter for Equipment Availability

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



"For All Your Earth Moving Needs"

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

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:

January 24, 2025

Page 2 of 2

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

0884

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 waste³ 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 trust¹² 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.montanacoalouncil.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 in 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](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.

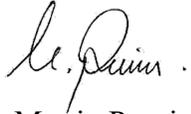
Montana needs a more tailored, transparent, predictable, and locally informed bonding methodology that accurately reflects reclamation costs. An accurate bonding guidance document will mitigate the risk of both under- and over-bonding, protect the long-term viability of coal operations in the state, 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

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	
YAdministrative YAir Resource Protection YMBackfill & GradingBlasting YCoal Conservation YMContaminant ControlCultural ResourcesDrilling YExcavation YFacilities YFish & Wildlife	Y Hydrology Mine Plan Y Off-Site Impact Other Permit Stipulations Processing Waste Y Rail Loops and Roads Subsidence Sediment Control Y Signs & Markers Y Soils Y Vegetation

Inspection Topic Observations
<p>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.</p> <p>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.</p> <p>Air Resource Protection: The ground was relatively damp and no fugitive dust issues were noted. Water trucks were active on roads.</p> <p>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.</p> <p>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</p>

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.		9. Permit Number C-1985-005	10. Permit Type PP
2. Address P.O. BOX 449		11. Field Visit Date 3/5/2019	12. Purpose FP
3. City HARDIN		13. Field Office Use 126909	
4. State MT		14. Permit Status A	15. Site Status AP
5. Zip Code 59034	6. Phone Number (406) 342-5241	16. Facility Type ADFGHI	
7. Operator Name, if Different than Permittee		17. OSM Office # 010	18. CCID #
8. Mine Name ABSALOKA NORTH MINE		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. <u>1</u> Mining within Valid Permit 2. <u>1</u> Mining within Bonded Area 3. <u>1</u> Terms & Conditions of Permit 4. <u> </u> Liability Insurance 5. <u> </u> Ownership and Control 6. <u>1</u> Temporary Cessation 7. <u> </u> AML Rec. Fees - Non-Respondent 8. <u> </u> AML Rec. Fees - Failure to Pay B. Hydrologic Balance 1. <u> </u> Drainage Control 2. <u> </u> Inspections & Certifications 3. <u>1</u> Siltation Structures 4. <u>1</u> Discharge Structures 5. <u> </u> Diversions 6. <u> </u> Effluent Limits 7. <u> </u> Ground Water Monitoring 8. <u> </u> Surface Water Monitoring 9. <u> </u> Drainage - Acid-Toxic Materials 10. <u>1</u> Impoundments 11. <u> </u> Stream Buffer Zones C. Topsoil & Subsoil 1. <u>1</u> Removal 2. <u>1</u> Substitute Materials 3. <u>1</u> Storage and Protection 4. <u>1</u> Redistribution	D. Backfilling & Grading 1. <u> </u> Exposed Openings 2. <u>1</u> Contemporaneous Reclamation 3. <u>1</u> Approximate Original Contour 4. <u>1</u> Highwall Elimination 5. <u> </u> Steep Slopes (includes downslope) 6. <u> </u> Handling of Acid and Toxic Materials 7. <u>1</u> Stabilization (rills and gullies) E. Excess Spoil Disposal 1. <u> </u> Placement 2. <u> </u> Drainage Control 3. <u> </u> Surface Stabilization 4. <u> </u> Inspections & Certifications F. Coal Mine Waste (Refuse Piles/Impoundments) 1. <u> </u> Drainage Control 2. <u> </u> Surface Stabilization 3. <u> </u> Placement 4. <u> </u> Inspections & Certifications 5. <u> </u> Impounding Structures G. Use of Explosives 1. <u> </u> Blaster Certification 2. <u> </u> Distance Prohibitions 3. <u> </u> Blast Survey/Schedule 4. <u> </u> Warnings & Records 5. <u>1</u> Control of Adverse Effects	H. <u> </u> Subsidence Control Plan I. Roads 1. <u>1</u> Road Construction 2. <u> </u> Certification 3. <u>1</u> Drainage 4. <u>1</u> Surfacing and Maintenance 5. <u> </u> Reclamation J. Signs & Markers 1. <u> </u> Signs 2. <u> </u> Markers K. <u> </u> Distance Prohibitions L. Revegetation 1. <u> </u> Vegetative Cover 2. <u> </u> Timing M. <u>1</u> Postmining Land Use N. Other General Performance Category _____ _____ _____
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26. Permitted Acres <u>7110.0</u> a Permitted <u>6575.0</u> b Disturbed (est)	27. Frequency for previous 4 Calendar Qtrs. a Required Completes <u>4</u> c Completes Conducted <u>4</u> b Required Partials <u>8</u> d Partials Conducted <u>8</u>	28. Total Bonded Acres <u>7110.0</u> a. Total Bonded <u>3101.5</u> b. Phase I Release <u>2703.0</u> c. Phase II Release <u>298.0</u> d. Phase III Release	29. Inspection Hours <u>4.0</u> a. Permit Review <u>3.0</u> b. Site Visit Time <u>6.0</u> c. Travel Time <u>2.0</u> d. Report Writing	30. Signature Block Inspector's Signature. <u>John Ahlbrandt</u> <u>164</u> Printed Name and Inspector ID # Date: <u>3/15/2019</u> Review Date: <u>3-15-19</u>
Reviewing Official:				

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.

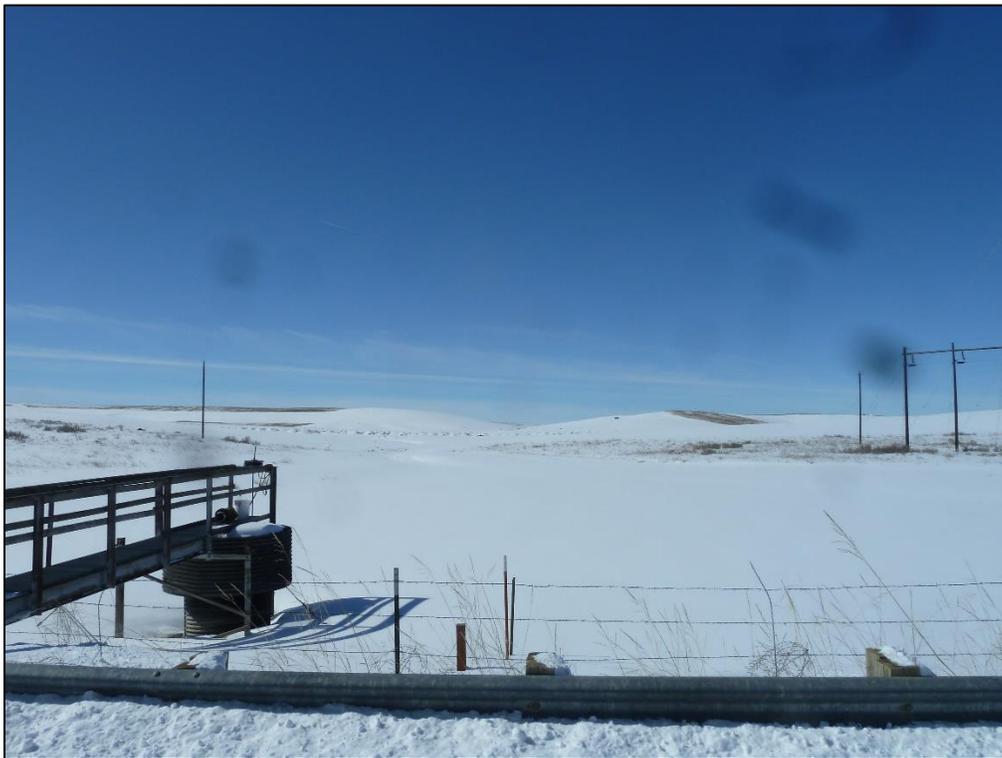
We were unable to get to Pond 28, however Ponds 22, 23, and 24 along the County road were observed. Pond 24 will need to be monitored more closely for adequate storage capacity since its drainage is no longer cut off by the pit and consequently will receive more runoff than it previously did.

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
<p>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</p>	<p>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)</p>

Inspection Topic Summary	
NOTE: Y =Observed, F =Follow-Up Item, M =Maintenance Item, N =Non-Compliance, Blank =Not Observed	
<p>YAdministrative YAir Resource Protection YBackfill & Grading Blasting Coal Conservation Contaminant Control Cultural Resources Drilling Excavation YFacilities Fish & Wildlife</p>	<p>Y Hydrology Mine Plan Y Off-Site Impact Other Permit Stipulations Processing Waste Y Rail Loops and Roads Subsidence Y Sediment Control Signs & Markers Soils Y Vegetation</p>

Inspection Topic Observations
<p>Administrative: An aerial inspection was conducted on June 20, 2019.</p> <p>Air Resource Protection: No fugitive dust issues were observed.</p> <p>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).</p> <p>Hydrology: Dry Coulee Dam, Dam 24, Sump 5 and Pond 28 appeared to be holding water.</p> <p>Off-Site Impact: No off-site impacts were observed.</p> <p>Sediment Control: The trap above Dam 24 was full.</p> <p>Substantial sediment build up was observed in the west end of Pond 28.</p> <p>Vegetation:</p>

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 excerpted 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.		9. Permit Number C-1985-005	10. Permit Type PP
2. Address P.O. BOX 449		11. Field Visit Date 9/25/2019 <small>mm - dd - yyyy</small>	12. Purpose FC
3. City HARDIN		13. Field Office Use 128164	
4. State MT		14. Permit Status A	15. Site Status AP
5. Zip Code 59034	6. Phone Number (406) 342-5241	16. Facility Type ADFGHI	
7. Operator Name, if Different than Permittee WESTMORELAND ABSALOKA MINING, LLC		17. OSM Office # 010	18. CCID #
8. Mine Name ABSALOKA NORTH MINE		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. <u>1</u> Mining within Valid Permit 2. <u>1</u> Mining within Bonded Area 3. <u>1</u> Terms & Conditions of Permit 4. <u>1</u> Liability Insurance 5. <u>1</u> Ownership and Control 6. <u>1</u> Temporary Cessation 7. <u> </u> AML Rec. Fees - Non-Respondent 8. <u> </u> AML Rec. Fees - Failure to Pay B. Hydrologic Balance 1. <u>1</u> Drainage Control 2. <u>1</u> Inspections & Certifications 3. <u>1</u> Siltation Structures 4. <u>1</u> Discharge Structures 5. <u>1</u> Diversions 6. <u>1</u> Effluent Limits 7. <u>1</u> Ground Water Monitoring 8. <u>1</u> Surface Water Monitoring 9. <u>3</u> Drainage - Acid-Toxic Materials 10. <u>1</u> Impoundments 11. <u>3</u> Stream Buffer Zones C. Topsoil & Subsoil 1. <u>1</u> Removal 2. <u>1</u> Substitute Materials 3. <u>1</u> Storage and Protection 4. <u>1</u> Redistribution	D. Backfilling & Grading 1. <u>3</u> Exposed Openings 2. <u>1</u> Contemporaneous Reclamation 3. <u>1</u> Approximate Original Contour 4. <u>1</u> Highwall Elimination 5. <u>3</u> Steep Slopes (includes downslope) 6. <u>3</u> Handling of Acid and Toxic Materials 7. <u>1</u> Stabilization (rills and gullies) E. Excess Spoil Disposal 1. <u>3</u> Placement 2. <u>3</u> Drainage Control 3. <u>3</u> Surface Stabilization 4. <u>3</u> Inspections & Certifications F. Coal Mine Waste (Refuse Piles/Impoundments) 1. <u>3</u> Drainage Control 2. <u>3</u> Surface Stabilization 3. <u>3</u> Placement 4. <u>3</u> Inspections & Certifications 5. <u>3</u> Impounding Structures G. Use of Explosives 1. <u>1</u> Blaster Certification 2. <u>1</u> Distance Prohibitions 3. <u>1</u> Blast Survey/Schedule 4. <u>1</u> Warnings & Records 5. <u>1</u> Control of Adverse Effects	H. <u>3</u> Subsidence Control Plan I. Roads 1. <u>1</u> Road Construction 2. <u>1</u> Certification 3. <u>1</u> Drainage 4. <u>1</u> Surfacing and Maintenance 5. <u>1</u> Reclamation J. Signs & Markers 1. <u>1</u> Signs 2. <u>1</u> Markers K. <u>3</u> Distance Prohibitions L. Revegetation 1. <u>1</u> Vegetative Cover 2. <u>1</u> Timing M. <u>1</u> Postmining Land Use N. Other General Performance Category _____ _____ _____
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26. Permitted Acres

<u>7110.0</u> a. Permitted	
<u>6580.0</u> b. Disturbed (est.)	

27. Frequency for previous 4 Calendar Qtrs.

a. Required Completes	<u>4</u>	c. Completes Conducted	<u>4</u>
b. Required Partials	<u>7</u>	d. Partials Conducted	<u>7</u>

28. Total Bonded Acres

<u>7110.0</u> a. Total Bonded	
<u>3101.5</u> b. Phase I Release	
<u>2703.0</u> c. Phase II Release	
<u>298.0</u> d. Phase III Release	

Reviewing Official:

29. Inspection Hours

<u>12.0</u> a. Permit Review	
<u>8.0</u> b. Site Visit Time	
<u>7.0</u> c. Travel Time	
<u>6.0</u> d. Report Writing	

30. Signature Block

Inspector's Signature:

<u>Gene Robinson</u>	<u>108</u>
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Printed Name and Inspector ID #:

Date: 10/10/2019

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

<i>RECORDS</i>	<i>COMMENTS</i>
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.

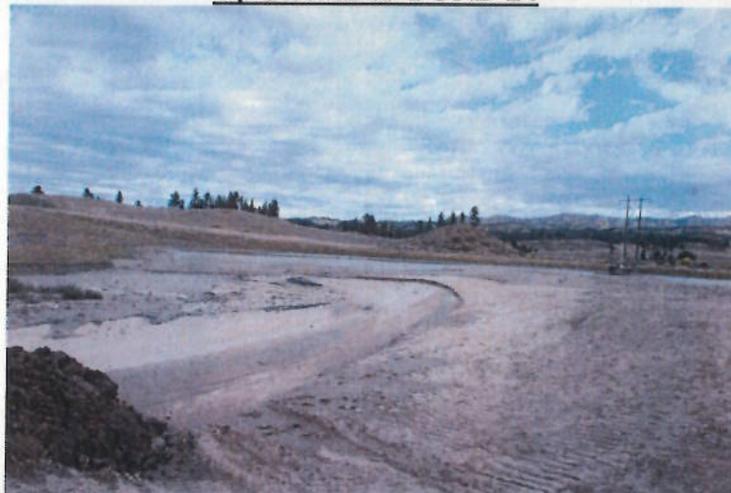
Blasting records	No records since February, 2019 have been furnished to CFO. Casper Office has questions about predicted levels at nearest structure. Company is now monitoring all blasts as required by OSMRE. Company will make all records available for inspection prior to or during next inspection.
New 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.

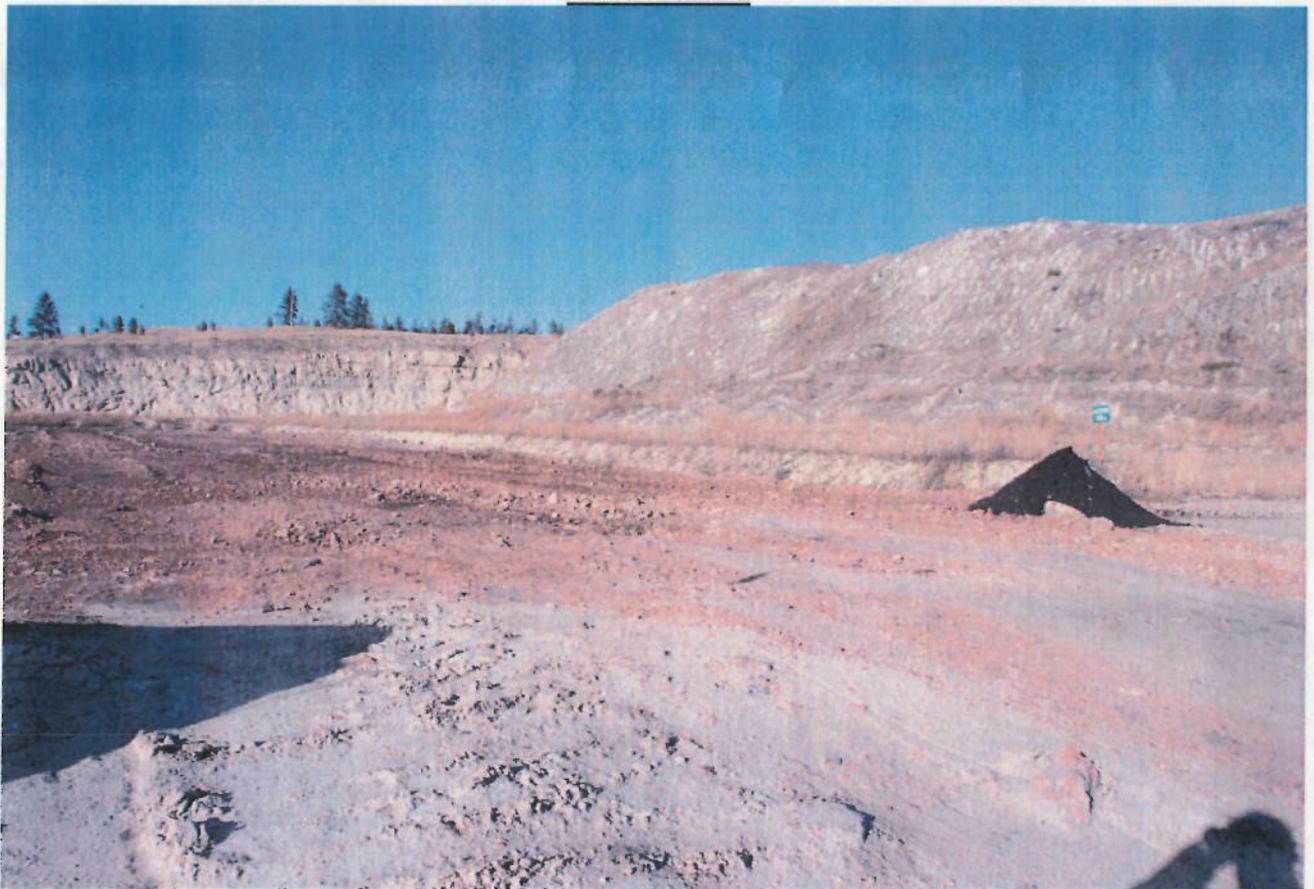


Company has failed to re-soil the entire width of Ramp 2





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

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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

Attorneys for Respondent DEQ

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

<p>IN THE MATTER OF: NOTICE OF APPEAL AND REQUEST FOR HEARING BY WESTMORELAND ABSALOKA MINING LLC REGARDING MR 311, SURFACE MINE PERMIT C1985005</p>	<p>Case No. <u>BER 2025-04 SM</u></p> <p>DEQ'S MOTION TO DISMISS WESTMORELAND'S REQUEST FOR HEARING AND PETITION FOR DECLARATORY RULING</p>
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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. Env’tl. 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 Env’tl. 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
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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, 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

VICTORIA A. MARQUIS
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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 week². **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 SPSP states "a thorough understanding of the requirements and industry standards is needed by [Contract Officers] to develop appropriate payment and pricing terms." SPSP 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 Manual, 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



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:

January 24, 2025

Page 2 of 2

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

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 completed 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	
<i>Major Earthmoving Volumes:</i>		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	Facilities 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
Mobilization/Demobilization		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, 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

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 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 ¶15); (3) claim the reclamation bond cannot be increased through a minor revision (id. at ¶16); 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 bond 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. OSMRE'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, 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 Mining 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**

<i>Major Earthmoving Volumes:</i>		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	Facilities 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
Mobilization/Demobilization	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 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

<i>Haul Road</i>	<i>Length</i>	<i>Width</i>	<i>Passes</i>	<i>Acres</i>	<i>Travel Time, sec</i>	<i>Turn Around, sec</i>	<i>Minutes/Pass</i>	<i>Adjusted Minutes Per Acre</i>
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		<i>3200 sq. ft.</i>					
	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		<i>13125 sq. ft.</i>					
	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		<i>27666 sq. ft.</i>					
	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		<i>21600 sq. ft.</i>					
	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		<i>1764 sq. ft.</i>					
	Structure	Steel Structure	44,100	C.F.	\$ 0.34	\$15,206	
Sub-Total:						\$15,206	
MCC Building (1)		<i>640 sq. ft.</i>					
	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)		<i>827 sq. ft.</i>					
	Structure	Steel Structure?	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)		<i>827 sq. ft.</i>					
	Structure	Steel Structure?	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		<i>2370 sq. ft.</i>					
	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		<i>54963 sq. ft.</i>					
	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		<i>1224 sq. ft.</i>					
	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		<i>1224 sq. ft.</i>					
	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' x 3')+(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		COMMENTS
						COST		
	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 removal	Plastic liner	11,000	S.F.	\$ 0.39	\$4,290		8,872 sf pond surface area
	Reserve-Fire Water Pond - liner removal	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 - backfill	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		COMMENTS
						COST		
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		COMMENTS
						COST		
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 H (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

*RS Means Unit Cost 2024, includes trenching

Units	0	6249
Unit Cost	\$0.00	\$18.35
Sub Total	\$0	\$114,669
TOTAL:		\$114,669

**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 Hours/episode 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 \$
 \$3.080
 MDEQ

Wage \$
 \$52.93

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 HD785-7	91 mt	60.1-78.6 cu yd	1178 hp	260.49	Costmine Reclamation Cost Guide 2024 Lease Rate
Matchto Cat 777D				313.42	HD785-7 101.6 st (92.2 mt), 78.5 cu yd (60.0 cu m), mechanical drive 14 ft 1 in (4.3 m) empty loading height
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 Water Truck (12,000 gal)			450 hp	210.37	WT 12,000 51.6 st (46.8 mt), 40.8 cu yd (31.2 cu m), mechanical drive 11 ft 7 in (3.5 m) empty loading height, 12,000 gal tank
Scraper 657 G P-P		44 cu yd (heaped) 40 cy production EROPS	410/451 hp	357.01	Costmine Reclamation Cost Guide 2024 Lease Rate
				409.94	44 cu yd (33.6 cu m), 52.0 st (47.2 mt) capacity, 26.0 in (66.0 cm) 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 LCY/HR	818.1	LCY/hr

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		\$	\$63.42

Factor	Value	Source
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	1.02	CAT Handbook ED 49 p. 19-63
**Sloped Dozing	1.20	CAT Handbook ED 49 p. 19-63
Adjusted Productivity	1.335	LCY/hr

Table 13
SOIL CALCULATIONS AND ASSUMPTIONS

- Assumes Caterpillar 777D class end dump trucks with 78.6 yard box at 2:1 heap
- Assumptions for standard spot and dump times:
- Assumes a Caterpillar 992G with 16.0 cubic yard bucket.
- Assumes maximum load in trucks with gate is 100.0 tons.
- 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:

	Haul	
(a) Truck Spot	0.60 minutes	from bottom of sheet
(b) Load	2.48 minutes	above minus spot
(c) Maneuver 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
Weight per truck:	100.4	tons (a) * (b)
(c) % Payload by Weight	100.4%	(b) / (a)

Gross machine weight: 363,000 lbs
Material weight: 200,880 lbs
563,880 lbs

Machine Productivity:		
Maneuver	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. 45, 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 (yards)	74.4	Separate loader/truck matching calculation
Truck LCY/HR	540.4	50min/cycle time x LCY per truck
Trucks Assigned	2.23	load/cycle/load time
Actual Trucks Assigned	1.00	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 LCY/HR	1,488.0	50min/load time x LCY per truck
Efficiency	0.95	
Actual Fleet LCY/HR	1,423.1	LCY/hr

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

Factor	Value	Source
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
**Sloped Dozing	1.20	CAT Handbook Ed. 43, page 18-55
Adjusted Productivity	824	LCY/hr

Job Condition Correction Factors
Estimating Production Off-the-Job
● Example Problem

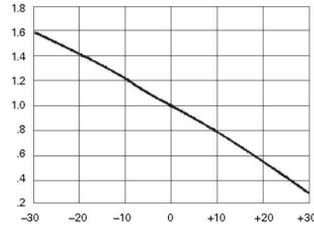
Bulldozers

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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.	

% Grade vs. Dozing Factor
(-) Downhill
(+) Uphill



ESTIMATING DOZER PRODUCTION OFF-THE-JOB

Example problem:

Determine average hourly production of a D8T/SSU (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

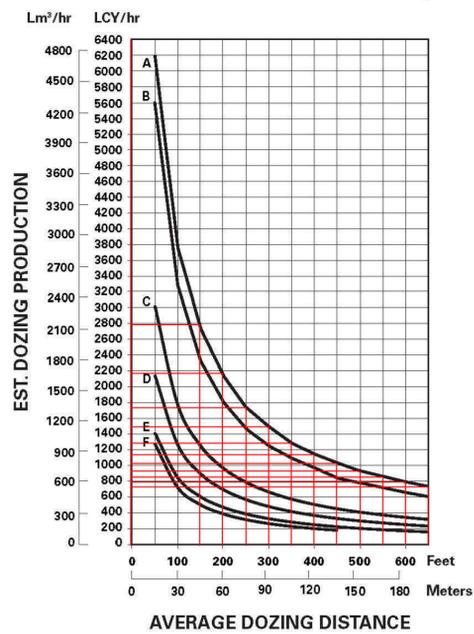
Grade	Factor
-20	1.42
-15.12	1.32
-10	1.22

Estimating Production Off-the-Job
● U-Blades

Bulldozers

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ESTIMATED DOZING PRODUCTION • Universal Blades • D7E through D11 CD



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

19-59

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

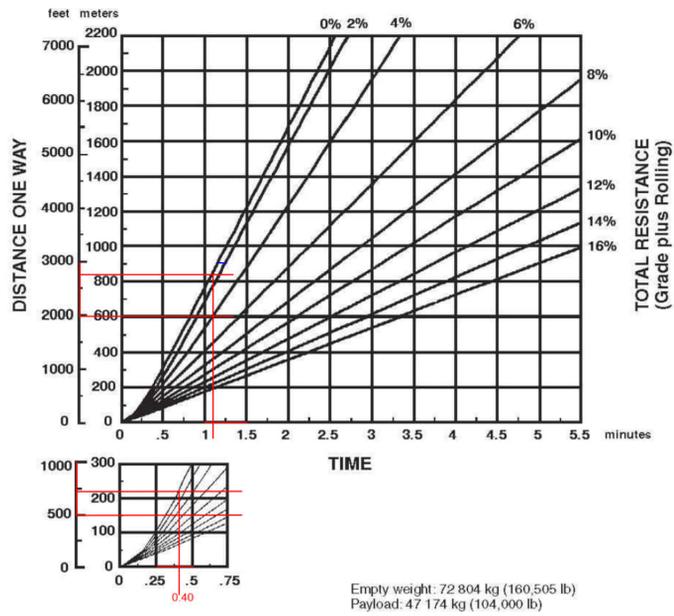
Wheel Tractor-Scrapers

657G Travel Time — Loaded
 ● 40.5/75R39 Tires
 ● Standard and Push-Pull

657G Travel Time — Empty
 ● 40.5/75R39 Tires
 ● Standard and Push-Pull

Wheel Tractor-Scrapers

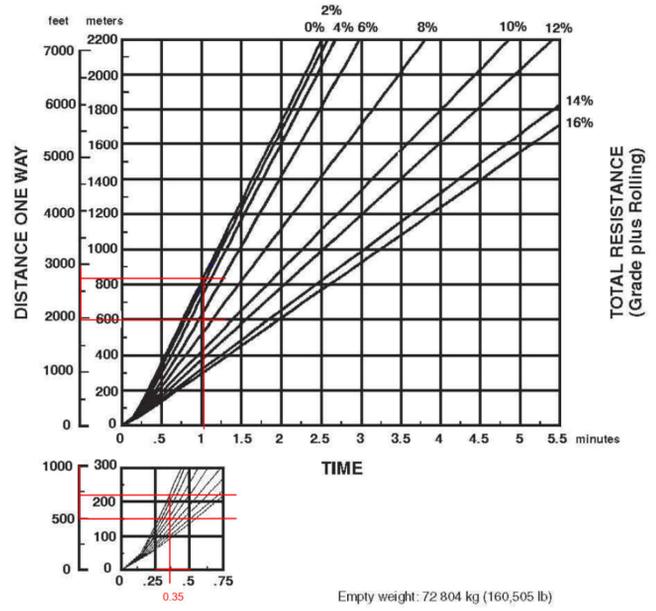
LOADED



Empty weight: 72 804 kg (160,505 lb)
Payload: 47 174 kg (104,000 lb)

8-48 Edition 40

EMPTY

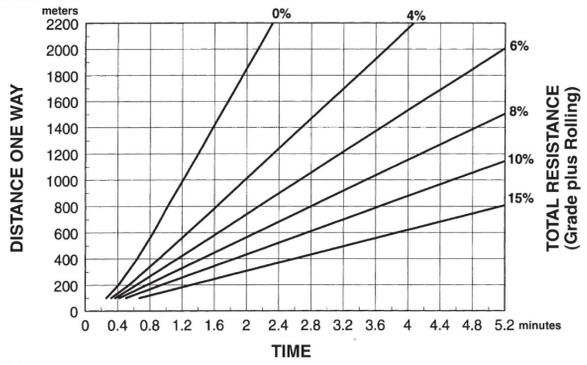


Empty weight: 72 804 kg (160,505 lb)

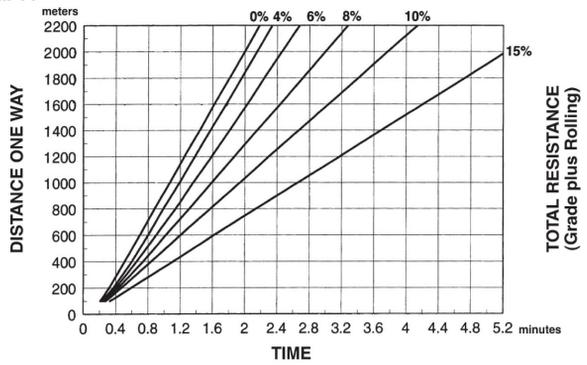
8-49 Edition 40

Construction & Mining Trucks | 777D Travel Time
• 27.00R49 Tires

LOADED



EMPTY



9-38 Edition 40

**Table 1
Bond Calculation Summary**

		Dozer Volume LCY	Truck/Loader Volume LCY	Total Yards LCY
<i>Major Earthmoving Volumes:</i>				
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
 <u>Direct Costs:</u>				
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	Facilities 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
 <u>Indirect Costs</u>				
		Percent		
	Contingency	3.0%		\$734,526
	Mobilization/Demobilization	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				\$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

<i>Haul Road</i>	<i>Length</i>	<i>Width</i>	<i>Passes</i>	<i>Acres</i>	<i>Travel Time, sec</i>	<i>Turn Around, sec</i>	<i>Minutes/Pass</i>	<i>Adjusted Minutes Per Acre</i>
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**

<i>Item</i>	<i>Demolition Cost (\$)</i>
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
 <i>Miscellaneous:</i>	
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 Structure?	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 Structure?	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' x 3')+(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		COMMENTS
						COST		
	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 removal	Plastic liner	11,000	S.F.	\$ 0.39	\$4,290		8,872 sf pond surface area
	Reserve-Fire Water Pond - liner removal	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 - backfill	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		COMMENTS
						COST		
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		COMMENTS
						COST		
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 H (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

*RS Means Unit Cost 2024, includes trenching

Units	0	6249
Unit Cost	\$0.00	\$18.35
Sub Total	\$0	\$114,669
TOTAL:		\$114,669

**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 Hours/episode 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 \$
 \$3.080
 MDEQ

Wage \$
 \$52.93

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	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 HD785-7	91 mt	60.1-78.6 cu yd	1178 hp	414.59 Equipment Watch Rates (1st half, Jan-June) 467.52 HD785-7
Matchto Cat 777D				
Komatsu Loader WA900-3	190 in	17 cu yd	856 hp	470.04 Equipment Watch Rates (1st half, Jan-June) 522.97 WA900-3
Match to Cat 992G loader				
Diesel Power Water Truck (12,000 gal)			450 hp	242.24 Equipment Watch Rates (1st half, Jan-June) 295.17 WT 12,000
Scraper 657 G P-P		44 cu yd (heaped) 40 cy production EROPS	410/451 hp	870.85 Equipment Watch Rates (1st half, Jan-June) 923.78

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 LCY/HR	818.1	LCY/hr

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

Factor	Value	Source
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	1.02	CAT Handbook ED 49 p. 19-63
**Sloped Dozing	1.20	CAT Handbook ED 49 p. 19-63
Adjusted Productivity	1,335	LCY/hr

Table 13
SOIL CALCULATIONS AND ASSUMPTIONS

- Assumes Caterpillar 777D class end dump trucks with 78.6 yard box at 2:1 heap
- Assumptions for standard spot and dump times:
- Assumes a Caterpillar 992G with 16.0 cubic yard bucket.
- Assumes maximum load in trucks with gate is 100.0 tons.
- Loader cycle time **0.60**

Cycle time for loader:

(a) Truck Spot	0.60 minutes	
(b) Pass Number 1:	0.00 minutes	
(c) Remaining Passes	2.40 minutes	(4)
Total Cycle Time	3.00 minutes	sum (a) through (c)

Cycle time for truck:

(a) Truck Spot	0.60 minutes	from bottom of sheet
(b) Load	2.48 minutes	above minus spot
(c) Maneuver 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) / (a)

Gross machine weight: 363,000 lbs
Material weight: 200,880 lbs
Total weight: 563,880 lbs

Machine Productivity:		
Maneuver	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 (yards)	74.4	Separate loader/truck matching calculation
Truck LCY/HR	540.4	50min/cycle time x LCY per truck
Trucks Assigned	2.23	load cycle/load time
Actual Trucks Assigned	1.00	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 LCY/HR	1,488.0	50min/load time x LCY per truck
Efficiency	0.95	
Actual Fleet LCY/HR	1,423.1	LCY/hr

Equipment	% of Loader Time	\$/hr	\$/hr Total
992G Loader	100%	\$ 522.97	\$ 522.97
777 Truck	300%	\$ 467.52	\$ 1,402.96
D10T Dozer	150%	\$ 530.66	\$ 795.99
Motorgrader	17%	\$ 186.37	\$ 31.68
Watertruck	17%	\$ 295.17	\$ 50.18
Fleet Total		\$	2,803.38

Factor	Value	Source
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
**Sloped Dozing	1.20	CAT Handbook Ed. 43, page 18-55
Adjusted Productivity	824	LCY/hr

Job Condition Correction Factors
Estimating Production Off-the-Job
● Example Problem

Bulldozers

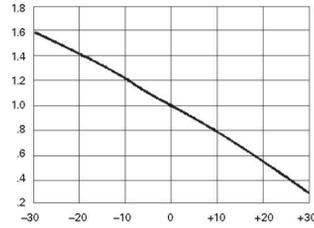
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JOB CONDITION CORRECTION FACTORS

	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/SSU (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

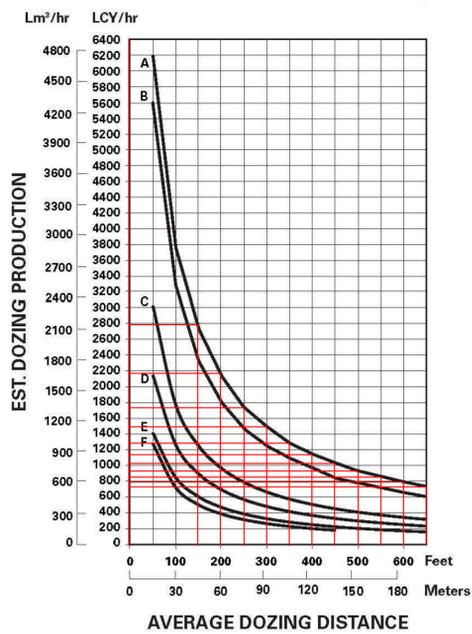
Grade	Factor
-20	1.42
-15.12	1.32
-10	1.22

Estimating Production Off-the-Job
● U-Blades

Bulldozers

19

ESTIMATED DOZING PRODUCTION • Universal Blades • D7E through D11 CD



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

19-59

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

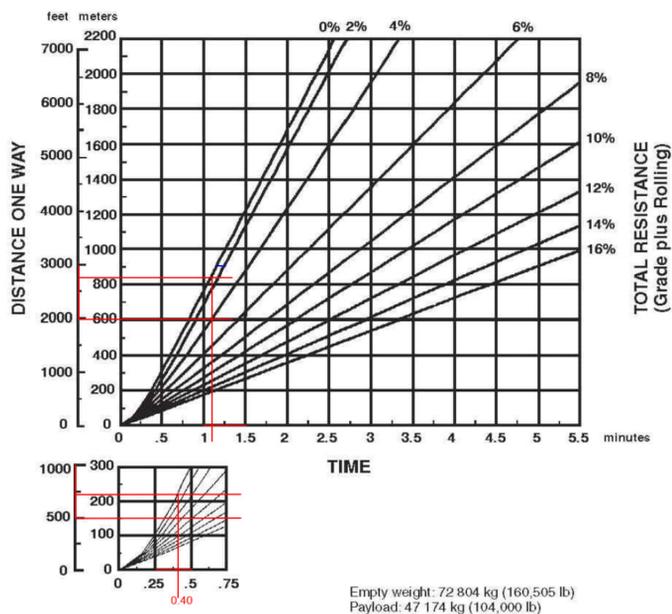
Wheel Tractor-Scrapers

657G Travel Time — Loaded
 ● 40.5/75R39 Tires
 ● Standard and Push-Pull

657G Travel Time — Empty
 ● 40.5/75R39 Tires
 ● Standard and Push-Pull

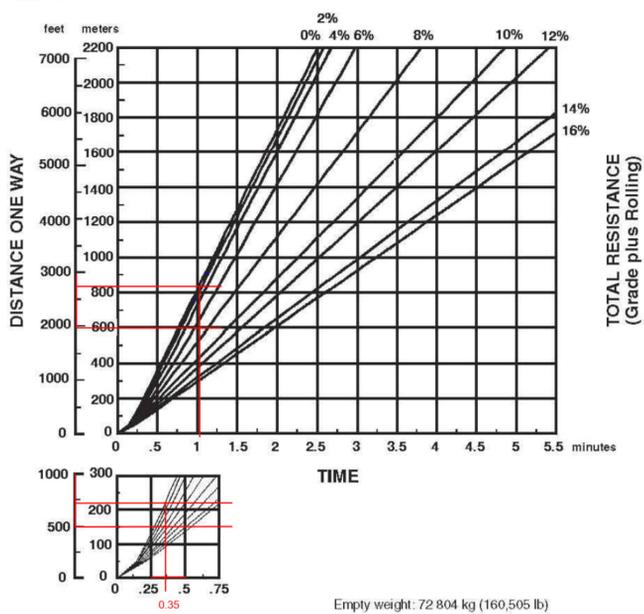
Wheel Tractor-Scrapers

LOADED



8-48 Edition 40

EMPTY

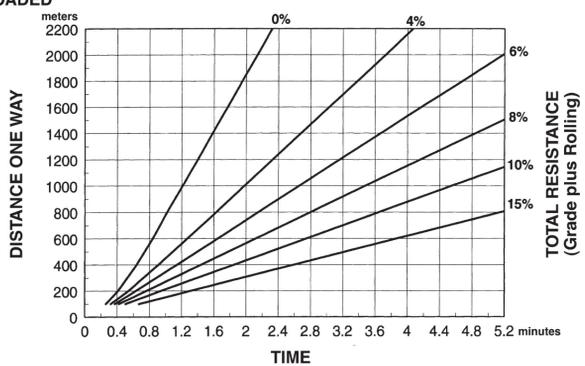


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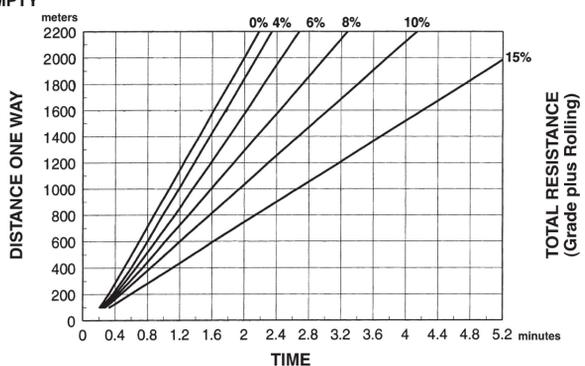
Edition 40 8-49

Construction & Mining Trucks | 777D Travel Time
• 27.00R49 Tires

LOADED



EMPTY



9-38 Edition 40

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**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

**WESTMORELAND'S RESPONSE
OPPOSING DEQ'S MOTION TO
DISMISS**

ORAL ARGUMENT REQUESTED

I. INTRODUCTION

Westmoreland alleged that, by letter dated August 29, 2025, DEQ denied
Minor Revision 311, which triggered Westmoreland's statutory right to appeal to

this Board. Westmoreland, *Appeal and Petition*, pp. 1-3 (citing §§ 82-4-206(1)(d) and 82-4-221, MCA). As evident in DEQ’s Motion to Dismiss, Westmoreland and DEQ engaged in consistent back-and-forth written communications about Minor Revision 311, including Westmoreland’s offer to continue the minor revision process and/or participate in an informal conference (Westmoreland’s July 7, 2025 Letter (DEQ’s Ex. 6)), to which DEQ responded on August 29, 2025:

DEQ does not agree with [Westmoreland’s] assessment that a bond increase is unnecessary and further discussion is needed. DEQ appropriately reviewed [Westmoreland’s] submittals and determined an updated bond amount in accordance with MSUMRA and the rules adopted thereunder. As noticed in the deficiency letter, [Westmoreland] must post an additional \$3,330,000 by December 31, 2025.

Ex. D, pp. 6-7 (emphasis added). Those three sentences conclude DEQ’s letter, making clear that: 1) further deficiency responses and dialogue are futile, 2) DEQ has reached a final decision on the bond amount, and 3) DEQ will not approve Minor Revision 311 as proposed by Westmoreland; therefore, DEQ’s calculated bond amount “**must**” be paid. Ex. D, pp. 6-7. The August 29, 2025, letter speaks for itself and cannot credibly be characterized as anything other than a denial of Minor Revision 311.

Legally and factually, DEQ’s Motion to Dismiss relies on untenable legal arguments and mischaracterizations of the record. DEQ cites the same statutes Westmoreland relies upon (§§ 82-4-206(1)(d) and 82-4-221, MCA) and agrees that

this Board has jurisdiction to review denials of minor revisions. DEQ then contradicts itself and the statutes by arguing the Board lacks authority to adjudicate Westmoreland's Appeal of DEQ's denial of Minor Revision 311. DEQ also agrees the Board has quasi-judicial authority. DEQ then contradicts itself and the statutes again by arguing that since DEQ administratively implements MSUMRA, it is the proper agency to issue a declaratory ruling. But that position ignores the balanced design of MSUMRA, DEQ, and the Board. While DEQ implements MSUMRA and may, as necessary to its implementation of MSUMRA, consider the meaning of MSUMRA, the Legislature specifically empowered this Board with quasi-judicial authority, not DEQ. Therefore, when a question arises about DEQ's interpretation of MSUMRA, the Board answers that question. The Board, not DEQ, is the only agency here with quasi-judicial authority to issue a binding decision declaring what MSUMRA means in this context.

Factually, DEQ adds allegations beyond those raised in Westmoreland's Appeal and Petition, mischaracterizes Minor Revision 311, and implies that Westmoreland is somehow at fault here or that there is some urgent need for additional bonding. All of that is wrong, as evidenced by DEQ's own words.

II. FACTUAL BACKGROUND

There is no factual dispute that requires the Board to consider the factual allegations provided by DEQ. The only fact that matters at this juncture is

undisputed - DEQ does not dispute the existence of, or language in the August 29, 2025 denial letter, which speaks for itself and cannot be read as anything other than a denial of Minor Revision 311. And while DEQ offers a version of events that implies Westmoreland is somehow at fault, the reality is that despite no statutory obligation to do so, Westmoreland voluntarily agreed to provide annual bond calculations to DEQ for its review and approval using the minor revision process. Exhibit T, attached (Minor Revision 304 submittals and approvals). Westmoreland responded to DEQ's deficiencies until DEQ made clear in its August 29, 2025, letter that no further dialogue on the issue would change DEQ's decision that more than \$3,000,000 in additional bond must be posted. Therefore, pursuant to the agreed-upon minor revision process, Westmoreland may appeal DEQ's decision to the Board and the Board has authority to adjudicate the appeal.

DEQ offers piecemeal factual allegations, which mischaracterize the situation and seem to be offered as a red herring to distract from the only fact that matters at this point – that DEQ denied Minor Revision 311. Nonetheless, to clear up any confusion that may have been caused by DEQ, Westmoreland offers the attached timeline of events, Exhibit N, and provides the following responses to DEQ's factual allegations in paragraphs 1 through 12 of its Motion to Dismiss. These and other relevant facts will be proven during an evidentiary hearing in this contested case. These facts are presented for clarification only. No fact-finding is

necessary now and the decision on DEQ's Motion to Dismiss is limited to subject matter jurisdiction and should not stray into fact-finding related to the merits of Westmoreland's claims.

1. Minor Revision 311 does not include “updates to a reclamation plan.” Contrary to the clear language of Minor Revision 311, DEQ now alleges that Minor Revision 311 sought both a bond determination and “updates to the reclamation plan.” DEQ, *Motion to Dismiss*, ¶ 1. But that is contrary to how Minor Revision 311 is characterized in every communication between Westmoreland and DEQ:

- Ex. D, p. 2 (describing the minor revision process as “submittal of a detailed cost estimate” and describing Westmoreland's and DEQ's use of “cost rates” and resulting “cost estimates”);
- Ex. E, p. 1 (“Subject: MR311; Bond Calculation – Round 1 Acceptability Deficiency,” asking Westmoreland to update “costs” and “estimates,” not update the reclamation plan);
- Ex. K (same as DEQ's Ex. 3), p. 1 (“In order to determine an appropriate bond calculation, the following deficiency must be adequately addressed.”);
- DEQ's Ex. 1, p. 1 (“Subject MR311; Bond Calculation- Round 1 Acceptability Deficiency”);
- DEQ's Ex. 4, p. 1 (“DEQ will calculate the bond once the following additional information has been provided” followed by DEQ's request for changes to the “bond calculation narrative,” the use of “Exhibit B16 Bond Calculation Map Plate 3” in “material movement calculations,” use of “polygon area centroids” and “for calculation of distances and slope” used in calculating the bond; and “Soil

redistribution” information “necessary for accurate bond calculation.”);

- DEQ’s Ex. 5, p. 1 (“Subject: MR311; Notice of Bond Calculation” and describing DEQ’s adjustments to “Equipment cost values”).

Nowhere does either party discuss updates to the actual reclamation plan. In fact, Minor Revision 304, which set the annual bond calculation process in motion, refers only to Westmoreland’s annual submittal of a “revised bond estimate” and makes no reference to any reclamation plan updates. Ex. T, p. 4. Minor Revision 311 presented nothing to DEQ that would change or update the reclamation plan. Minor Revision 311 is limited to the bond calculation only. DEQ cannot credibly allege otherwise.

2. Westmoreland submitted Minor Revision 311 on June 27, 2024 “to update the bond calculation,” noting that the revision was “a clerical revision with no changes in the disturbed acres” and “a clerical revision with no impacts to the human environment.” Exhibit O, attached.

3. DEQ’s first response, provided by DEQ as Exhibit 1, confirms that Minor Revision 311 is for a “Bond Calculation” and requests additional information related to costs, timing, and pricing estimates. It does not refer to any updates to the reclamation plan.

4. Westmoreland submitted its response letter to DEQ on December 23, 2024, not January 2, 2025, along with nearly identical letters for Westmoreland

Rosebud Areas B and C. Ex. F (same as DEQ's Ex. 2); *see also* email transmittals attached as Exhibit P.

5. DEQ implies that it committed to using Costmine Intelligence in its January 24, 2025 letter, but by subsequent letter dated March 28, 2025, DEQ confirmed its reliance on Equipment Watch, stating “DEQ will rely on its historic practice of reviewing, calculating, and updating bonds and determining appropriate bonds *using Equipment Watch rates based on a standard 8-hour work shift.*” Exhibit Q, attached (emphasis added).

6. Westmoreland's February 17, 2025 response addressed each of DEQ's deficiencies, as Westmoreland understood them at the time. Exhibit R, attached.

7. DEQ's March 17, 2025 letter requested “additional information” for the bond calculation, not additional information to update the reclamation plan, as DEQ's wrongly inserted text implies. DEQ's Ex. 4, p. 1. While the information may be related to the reclamation plan's requirements, as necessary to ensure “the bond calculation is correctly aligned with the reclamation plan” (DEQ's Ex. 6, p. 1), the information does not update or change the reclamation plan.

8. Westmoreland's April 15, 2025 response updated the “bond narrative,” “updated” a bond calculation, committed to adding “centroids for the cut/fill material movements ... to bond maps for the next bond calculation,” and explained its “calculation for soil distribution.” Exhibit S, attached. The responses are

limited to the bond calculation. None of those responses are “updated information” for the “reclamation plan” as DEQ alleges. The responses explain how the bond calculation aligns with the previously approved reclamation plan, they do not update or change the reclamation plan.

9. DEQ’s June 5, 2025, letter did not approve any changes or updates to the reclamation plan, nor did it indicate that DEQ was poised to approve any changes or updates to the reclamation plan. DEQ’s Ex. 5.

10. DEQ again mischaracterizes the bond calculation information as “information on its reclamation plan” without citing any document in support. DEQ also mischaracterizes Westmoreland’s July 7, 2025, letter as requesting DEQ’s August 29, 2025, decisional letter. *See also*, DEQ, *Motion to Dismiss*, p. 2, 7 (¶ 11), 14. In reality, Westmoreland requested five specific types of information in order “to better understand how our cost estimates were viewed by DEQ and exactly where DEQ found them deficient.” DEQ’s Ex. 6, p. 4. Westmoreland indicated it was willing to continue the minor revision deficiency notice and response process and engage in an informal conference with DEQ, despite Westmoreland’s view that no informal conference process applied during a minor revision. *Id.*, pp. 4, 6.

11. DEQ responded:

DEQ does not agree with [Westmoreland’s] assessment that a bond increase is unnecessary and further discussion is needed. DEQ

appropriately reviewed [Westmoreland's] submittals and determined an updated bond amount in accordance with MSUMRA and the rules adopted thereunder. As noticed in the deficiency letter, [Westmoreland] must post an additional \$3,330,000 by December 31, 2025.

Ex. D, pp. 6-7. Westmoreland appropriately understood DEQ's letter as a denial of Minor Revision 311 and therefore filed this appeal, as necessary to preserve its rights, within the 30-day appeal deadline. § 82-4-206(1), MCA.

There is no factual dispute that warrants fact-finding at this juncture because both parties agree that the last communication on Westmoreland's Minor Revision 311 was DEQ's August 29, 2025 denial letter expressly closing the door on further discussion and requiring payment of DEQ's additional bond demand. The letter is a denial of Minor Revision 311.

III. LEGAL STANDARD

The Board's review of DEQ's Rule 12(b)(1)¹ motion alleging lack of subject matter jurisdiction is decided by considering Westmoreland's Appeal and Petition and whether the factual allegations contained therein support the Board's jurisdiction, as a matter of law. "A district court's decision to grant or deny a motion to dismiss for lack of subject matter jurisdiction is a **question of law** that we review for correctness. The inquiry is **whether the complaint states facts** that,

¹ Board Policy 2002.01.01, B.1. provides that "Hearings and all prehearing matters will be conducted pursuant to ... the Montana Rules of Civil Procedure (Mont. R. Civ. P.)." Montana Rule of Civil Procedure 12(b)(1) allows responding parties, such as DEQ in this matter, to raise lack of subject matter jurisdiction as an affirmative defense through a motion to dismiss.

if true, would grant the district court subject matter jurisdiction.” *Pickett v. Cortese*, 2014 MT 166, ¶ 11, 375 Mont. 320, 321, 328 P.3d 660, 662 (internal citations removed, emphasis added). “Under Rule 12(b)(1), the court must generally take all well-pled factual assertions as true in the light most favorable to the claimant and then dismiss only if the claim, as pled, is not of a type or within a class of claims the court has threshold authority to consider and adjudicate.” *Gottlob v. DesRosier*, 2020 MT 210, ¶ 7, 401 Mont. 50, 470 P.3d 188. Review of a motion to dismiss pursuant to Mont. R. Civ. P. 12(b)(1) is a “narrow” review. *Gottlob*, ¶ 9.

IV. ARGUMENT

A. NO FACT-FINDING IS REQUIRED AT THIS JUNCTURE BECAUSE THE RELEVANT FACTS ARE UNDISPUTED.

“If subject matter jurisdiction turns on disputed facts and adjudication of those facts will not touch on the merits of the claim at issue, the court has discretion to determine jurisdiction based on evidence presented outside the complaint by affidavit or limited evidentiary hearing.” *Gottlob v. DesRosier*, 2020 MT 210, 401 n.3, Mont. 50, 470 P.3d 188 (citing *Harrington v. Energy West, Inc.*, 2015 MT 233, ¶¶ 9-11). DEQ’s motion is based on its factual allegations, which are presented without affidavit and therefore do not meet the threshold for consideration. DEQ, *Mtn. to Dismiss*, pp. 3-8. Additionally, in this case, subject matter jurisdiction does not turn on any disputed fact.

Both DEQ and Westmoreland point to the same August 29, 2025, letter from DEQ to Westmoreland as the culmination of their dialogue on Minor Revision 311. Ex. D (same as DEQ's Ex. 7). The document speaks for itself:

DEQ does not agree with [Westmoreland's] assessment that a bond increase is unnecessary and further discussion is needed. DEQ appropriately reviewed [Westmoreland's] submittals and determined an updated bond amount in accordance with MSUMRA and the rules adopted thereunder. As noticed in the deficiency letter, [Westmoreland] must post an additional \$3,330,000 by December 31, 2025.

Ex. D, pp. 6-7. DEQ "does not agree ... that further discussion is needed," closing the door on further dialogue. DEQ has reached a final decision and "determined" that a bond increase of \$3,330,000 is required. Therefore, "Westmoreland **must** post" the additional bond by December 31, 2025 (emphasis added). That language denies Minor Revision 311. DEQ cannot plausibly maintain that the August 29, 2025 letter was anything other than a denial without contradicting the plain language of its own correspondence. The letter speaks for itself and cannot be read as anything other than a denial of Minor Revision 311.

B. WHEN BOND DETERMINATIONS ARE VOLUNTARILY SOUGHT THROUGH AN ANNUAL MINOR REVISION, THE PERMITTEE'S STATUTORY RIGHT TO APPEAL MUST BE HONORED.

DEQ agrees it committed to consider annual bond calculations through the minor revision process. DEQ, *Motion to Dismiss*, pp. 3, 4-8 (describing the back-and-forth deficiency notice and response process for a minor revision). Annual

bond calculations and adjustments are not required by law or rule and are more frequent than the legally required bond review processes. The law requires bond calculation review and adjustment for specific events and according to specific procedures:

- as part of the permitting process when first issuing a permit (82-4-233(1), MCA);
- through notice and conference when the “permit area increases, methods of mining operation change, standards of reclamation change or when the cost of future reclamation, restoration or abatement work increases” (ARM 17.24.1104(1));
- during the required mid-term permit review (ARM 17.24.1104(1) and 17.24.414);
- during the permit renewal process (ARM 17.24.1104(1) and 17.24.416);
- when subsidence and water supply issues occur due to underground mining (ARM 17.24.1104(2)); and
- when the permittee requests bond reduction (ARM 17.24.1104(2)).

Here, DEQ has not properly invoked any of the above processes, nor do the facts support reliance on any of the above statutory and regulatory processes.

DEQ argues out of both sides of its mouth – first, that the Board *does have* authority to review denials of minor revisions and second, the exact opposite, that the Board *does not have* authority to review the denial of Minor Revision 311.

Because the contradiction is untenable, DEQ first mischaracterizes Minor Revision

311 (DEQ, *Motion to Dismiss*, p. 13), then ignores the very words of its August 29, 2025 denial letter (*Id.*, pp. 14-15), and finally diverts to some other process that is not supported by the facts or the law (*Id.*, p. 15).

1. Minor Revision 311 is a Bond Calculation that Does Not Change or Update the Reclamation Plan.

DEQ first theorizes that it cannot approve or deny the minor revision until Westmoreland submits to DEQ's will and posts the more than \$3,000,000 extra bond. DEQ, *Motion to Dismiss*, pp. 13-14. That makes no sense. DEQ's theory turns the minor revision process into a one-way street ending in DEQ's favor every time and leaving permittees with no opportunity to appeal DEQ's decision on any minor revision. If DEQ cannot approve or deny a minor revision until the applicant does exactly what DEQ demands, then minor revisions would never result in a denial – they would either be abandoned by the applicant or approved only after the applicant submitted to DEQ's demands. There would never be an opportunity to appeal an adverse decision from DEQ and the permittee's right to appeal would become a nullity. But Montana law, which provides the right to an appeal, cannot be ignored or theorized out of existence. § 1-2-101, MCA (“In the construction of a statute, the office of the judge is simply to ascertain and declare what is in terms or in substance contained therein, *not to insert what has been omitted or to omit what has been inserted*” (emphasis added)).

As part of its argument, DEQ tries to portray Minor Revision 311 as something other than just a bond calculation update, as if the bond calculation is secondary to some other changes sought in Minor Revision 311. DEQ, *Motion to Dismiss*, p. 14 (referring to the “proposed updates to the reclamation plan in Minor Revision 311”). But Westmoreland did not seek to revise anything in its reclamation plan, nor has DEQ approved any changes to Westmoreland’s reclamation plan.

As DEQ acknowledges, the reclamation plan is a separate legal requirement (*Id.*, citing ARM 17.24.313), one that is not changed every year. While DEQ may request information related to the reclamation plan to ensure the bond calculation is correctly aligned with the reclamation plan, nothing in the bond calculation itself changes the reclamation plan. Nor should it – if Permittees were allowed to change their reclamation plans each year simply through a minor revision bond calculation, the result would be a patchwork reclamation plan with no public notice and review.

Minor Revision 311 is only about the bond calculation. Therefore, DEQ’s insistence on compliance with its preferred \$3,330,000 bond increase is not some requisite step prior to approval or denial – it is itself denial of Minor Revision 311.

DEQ also wrongly relies on its general enforcement powers provided in section 82-4-205, MCA while ignoring that MSUMRA provides specific processes

for bond review and adjustment. DEQ, *Motion to Dismiss*, p. 14. DEQ may not ignore those specific processes and skip straight to enforcement. The specific statutory and regulatory processes, including those found at section 82-4-223, MCA, and ARM 17.24.1104 provide important sideboards for bond calculations.

For example, the statute directs that the amount of bond must be at least \$200 per acre and must be based on site-specific factual considerations such as “the degree of disturbance,” 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.” § 82-4-223(1) and (2), MCA. ARM 17.24.1104 adds important limitations on when the bond may be increased, tethering such increases to specific events and changes. Here, there is no change or event that supports DEQ’s demanded increase. *See* below, section IV.B.3. Reliance on generic computing software and the use of unrealistic work limitations and cost requirements that do not reflect Montana’s site-specific conditions are not acceptable reasons to demand increased bond. Further, none of the correspondence between DEQ and Westmoreland regarding Minor Revision 311 mention or invoke section 82-4-205, MCA. That statute is not applicable in this case.

2. DEQ Denied Minor Revision 311.

Second, DEQ tries to argue that it has not denied Minor Revision 311, but the words of DEQ's letter could not be clearer:

DEQ does not agree with [Westmoreland's] assessment that a bond increase is unnecessary and further discussion is needed. DEQ appropriately reviewed [Westmoreland's] submittals and determined an updated bond amount in accordance with MSUMRA and the rules adopted thereunder. As noticed in the deficiency letter, [Westmoreland] must post an additional \$3,330,000 by December 31, 2025.

Ex. D, pp. 6-7. DEQ made plain that it was not interested in further dialogue, it had reached a decision and was not going to change that decision. There is no way to interpret that language as anything other than a denial of Westmoreland's application for Minor Revision 311. DEQ's insistence on a different annual bond calculation, which requires an additional \$3,330,000 illustrates DEQ's denial of Minor Revision 311.

3. ARM 17.24.1104(1) is Neither Legally nor Factually Applicable.

Finally, DEQ argues that Westmoreland's sole remedy is through an informal conference pursuant to ARM 17.24.1104(1). Despite DEQ's agreement and participation in the minor revision process and its obvious use of the minor revision process – as noted in every correspondence between DEQ and Westmoreland – DEQ now alleges it proceeded pursuant to ARM 17.24.1104(1), but did so “based on the information submitted **as part of Minor Revision 311.**”

DEQ, *Motion to Dismiss*, p. 6 (emphasis added). Again, the contradiction is untenable. DEQ may not insert the notice and conference process into the minor revision process in a ploy to negate the Westmoreland's statutory right to appeal DEQ's decision. DEQ's own words do not support reliance on ARM 17.24.1104(1); instead, they prove that this matter involves denial of Minor Revision 311.

ARM 17.24.1104(1) can only be invoked to increase a bond when at least one of four threshold requirements is met: "as the acreage in the permit area increases, methods of mining operation change, standards of reclamation change or when the cost of future reclamation, restoration or abatement work increases." DEQ provides no evidence that any of those threshold requirements exist. In fact, none of them exist.

There has been no increase in permit area. There has been no change in the methods of mining. Notably, no additional disturbance occurred in 2024 and reclamation remains ongoing. Exhibit W (2024 Annual Report). The standards of reclamation have not changed because Westmoreland remains subject to the same reclamation plan that was last reviewed and approved by DEQ on March 6, 2023 during permit renewal. Exhibit V. DEQ points to no change in the cost of future reclamation, let alone more than \$3,000,000 worth of changes from the 2023 bond calculation. Where, as here, the actual reclamation requirement is decreasing and

not increasing due to ongoing reclamation without additional disturbance, a more than \$3,000,000 increase is incredibly wrong.

Only two things have changed – neither of which supports DEQ’s alleged reliance on ARM 17.24.1104(1). First, mining has stalled but reclamation has progressed, leaving the state potentially liable for less reclamation. This indicates that the bond amount should actually be decreasing. Second, after Westmoreland and others discovered the wildly inaccurate use of Equipment Watch for reclamation costs, DEQ changed to Costmine Intelligence, which is also inappropriate because it is primarily designed for hard rock mines, it presumes the use of brand-new equipment for reclamation despite the fact that no existing large mine reclamation contractor buys a brand-new fleet of equipment for each reclamation project, and it is wholly out of sync with Montana’s neighboring states, which, like Montana, regulate coal mining pursuant to authority stemming from federal law. Westmoreland, *Appeal and Petition*, ¶¶ 16-18. DEQ now seems to offer two bond calculations, neither of which is grounded in Montana-specific reclamation rates, and both of which require a substantial annual bond increase at a mine where reclamation needs and costs are decreasing. The actual costs have not changed by over \$3,000,000; DEQ has just changed its calculation so it may seek increasingly higher bonds for unrealistic and unsupported costs.

4. The Law of Administrative Exhaustion Requires this Appeal.

If Westmoreland attempted to appeal DEQ's denial of Minor Revision 311 directly to district court, it would be vulnerable to attack for failure to exhaust its administrative remedies. § 2-4-702(1)(a), MCA (limiting judicial review to parties who have "exhausted all administrative remedies" including MAPA contested cases). DEQ acknowledges that the administrative remedy for denial of a minor revision is a contested case appeal to this Board. DEQ, *Motion to Dismiss*, p. 11 ("MAPA contested case hearings are limited to ... approval or denial of an application to renew or revise a permit"), p. 13 ("A party can invoke a contested case under MAPA ... when there has been an **'approval or denial'** of an application to renew or revise a permit" (emphasis in original)). Therefore, Westmoreland's only remedy is through this contested case appeal before the Board.

While DEQ may prefer a process whereby they have unfettered authority to be judge, jury, and executioner on minor revisions, the law simply does not allow it. The law allows Westmoreland to bring DEQ's decision on Minor Revision 311 to this Board and have the Board determine the validity of DEQ's decision. §§ 82-4-206(1)(d) and 82-4-221, MCA.

C. THE BOARD IS THE ONLY QUASI-JUDICIAL AGENCY WITH AUTHORITY TO DECLARE WHAT THE LAW IS IN THIS MATTER.

Westmoreland is not arguing that DEQ lacks authority to implement MSUMRA or that DEQ may not, in the course of implementing MSUMRA, make determinations about what MSUMRA means and requires. The point here is that a person whose legal rights are affected by DEQ's interpretation of MSUMRA then has a right to seek a declaratory ruling from this Board. We already know what DEQ's interpretation is and how it will affect Westmoreland. And we know that DEQ has no judicial authority at all that would allow it to issue a binding, legally enforceable declaratory ruling. The Board does; therefore, this Petition is properly before the Board.

1. Only the Board has Quasi-Judicial Authority.

While both DEQ and the Board are administrative agencies (defined at section 2-15-102, MCA), only the Board has quasi-judicial authority to declare what the law means. § 2-15-3502(4), MCA; *see also* DEQ, Motion to Dismiss, p. 11 (“The Board of Environmental Review is ‘a quasi-judicial administrative body that was ... created by statute in 1995’ “). DEQ is an administrative agency with administrative powers, but no quasi-judicial powers. § 2-15-3501, MCA.

Quasi-judicial functions specifically include “interpreting, applying, and enforcing existing rules and laws,” “granting or denying privileges, rights, or benefits,” and “determining rights and interests of adverse parties.” § 2-15-

102(10), MCA. Quasi-judicial functions also include “evaluating and passing on facts” as well as “holding hearings” and “any other act necessary to the performance of a quasi-judicial function.” *Id.* Only the Board, not DEQ, possesses these powers, which are necessary to issue declaratory rulings.

2. A Declaratory Ruling Requires Quasi-Judicial Authority.

“A party may seek a declaratory ruling from the agency when doubt exists as to how a statute or rule administered by an agency affects the party’s legal rights.”

ARM 1.3.226. The Board must interpret and apply the law in order to make a declaratory ruling. The Board must also determine the parties’ rights, grant or deny those rights, and hold a hearing and find facts in order to issue a declaratory ruling. Only the Board, not DEQ, has the requisite quasi-judicial authority to perform those functions.

DEQ implies that because it has authority to implement MSUMRA, it also has absolute authority to interpret MSUMRA. But the law says otherwise. DEQ may review and approve permit applications, make compliance and enforcement determinations, approve and release performance bonds, determine the amount of bond, and promulgate rules pursuant to MSUMRA. DEQ, *Motion to Dismiss*, p. 9. Those tasks all rely on administrative powers, not quasi-judicial powers. DEQ has no authority to hear a contested case or issue a declaratory ruling, because both require “interpreting, applying, and enforcing existing rules and laws,” “granting or

denying privileges, rights, or benefits,” and “determining rights and interests of adverse parties,” which are quasi-judicial – not administrative – functions. § 2-15-102(10), MCA.

While DEQ has authority to administer MSUMRA and adopt rules pursuant to MSUMRA, it does not have the requisite quasi-judicial authority to issue declaratory rulings. DEQ cites no statute giving it quasi-judicial authority to make any declaratory ruling or to perform any quasi-judicial function at all.

3. The Rules Require BER Authority Over this Matter.

DEQ misreads ARM 1.3.226 and presumes it refers to just one single agency. DEQ, *Motion to Dismiss*, pp. 15-16. It does not.

A party may seek a declaratory ruling from **the agency** when doubt exists as to how a statute or rule administered by **an agency** affects the party’s legal rights.

ARM 1.3.226 (emphasis added). The first reference to agencies is specific, indicating that the rule applies only to “the agency” that has quasi-judicial authority to issue a declaratory ruling. The second reference is not specific and refers to any agency that administers a statute or rule. If, as DEQ prefers, the intention of the rule was to only refer to one single agency, the second reference would not be so broad; instead of referring to “**an agency**” it would specifically narrow the reference to **that** agency or **the** agency. But the statute does not narrow itself to just one agency. The words of the statute matter and we may not insert

what has been omitted or omit what has been inserted. § 1-2-101, MCA. The words of the statute support Board jurisdiction in this matter, not DEQ jurisdiction.

Further legal support for the Board's authority in this matter is provided by ARM 1.3.229(2) and relevant case law. DEQ uses the rule to argue that contested cases are distinct from declaratory rulings (DEQ, *Motion to Dismiss*, p. 17), but that is not how the Montana Supreme Court views it. The rule makes clear that declaratory rulings are equivalent to orders in contested cases because they are both subject to the same type of judicial review. ARM 1.3.229(2) ("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").

The Montana Supreme Court held that review of declaratory rulings "is guided by the standards of review set forth in § 2-4-704, MCA," which provides the standards of review applicable during judicial review of contested cases.

Bitterroot River Protective Ass'n, Inc. v. Bitterroot Conservation Dist., 2008 MT 377, ¶ 18, 346 Mont. 507, 198 P.3d 219. The Montana Supreme Court makes clear that contested cases and declaratory rulings stem from similar proceedings and therefore warrant the exact same standard of judicial review. The only way that is possible is if the two stem from the same type of administrative process, namely a quasi-judicial process. Said another way, if a declaratory ruling is equivalent to a contested case in terms of judicial review, then the declaratory ruling, like the

contested case, must also be determined by an agency with quasi-judicial authority. Here, that agency is the Board, not DEQ.

4. Section 2-4-501, MCA Does Not Give DEQ Quasi-Judicial Authority.

DEQ's reliance on section 2-4-501, MCA is mistaken. While that statute requires agencies to adopt rules for the process by which a petition for declaratory ruling will be handled, it does not provide authority to handle declaratory rulings. The Montana Supreme Court notes that both are required. *Thompson v. State*, 2007 MT 185, ¶ 25, 338 Mont. 511, 167 P.3d 867 (finding that, in addition to section 2-4-501, MCA the Workers' Compensation Court must have jurisdiction over disputes concerning Workers' Compensation benefits). The Court only found authority to issue declaratory rulings when the two authorities were "[t]aken together." *Id.* Here, absent a statute that gives DEQ quasi-judicial authority to decide disputes, DEQ's reliance on section 2-4-501, MCA does not empower it to issue declaratory rulings.

DEQ may opine on the meaning of the laws and rules, as it has done here, but those are opinions only and, because DEQ has no judicial authority, such opinions lack the force and effect of law. Only the Board has quasi-judicial authority; therefore, only the Board may issue a legally binding declaratory ruling.

V. CONCLUSION

Westmoreland's Appeal and Petition are properly before the Board, which has jurisdiction to render a decision in this matter. DEQ's Motion to Dismiss should be denied. Westmoreland respectfully requests oral argument on DEQ's motion.

Dated this 24th day of October, 2025.

/s/ Victoria A. Marquis

Victoria A. Marquis

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CERTIFICATE OF SERVICE

I hereby certify that the foregoing document was served upon the following counsel of record, by the means designated below, this 24th day of October, 2025:

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

<input type="checkbox"/> U.S. Mail	Sam King, Chief Legal Counsel
<input type="checkbox"/> FedEx	Jeremiah Langston
<input type="checkbox"/> Hand-Delivery	Amanda Galvan
<input checked="" type="checkbox"/> Email	Montana Department of Environmental Quality
<input checked="" type="checkbox"/> State File Transfer	1520 East Sixth Avenue P.O. Box 200901 Helena, MT 59620-0901 samuel.king@mt.gov jeremiah.langston2@mt.gov amanda.galvan@mt.gov

/s/ Victoria A. Marquis

VICTORIA A. MARQUIS

Exhibit N

Westmoreland Minor Revision 311 Timeline of Relevant Communications

June 9, 2022	Westmoreland submitted Minor Revision (“MR”) 304 to implement the annual bonding process. Exhibit T, pp. 1-4.
February 13, 2023	The Office of Surface Mining Reclamation and Enforcement (“OSMRE”) approved MR 304. Exhibit T, pp. 6-9.
February 15, 2023	DEQ approved MR 304 implementing the annual bonding review process. Exhibit T, p. 5.
March 5, 2023	DEQ approved Westmoreland’s application to renew Permit C1985005. Exhibit V.
June 27, 2024	Westmoreland submitted MR 311 to update the Mine’s annual bond calculation. Exhibit O.
August 23, 2024	DEQ sent MR 311 Round 1 deficiency letter to Westmoreland. DEQ Exhibit 1.
October 7, 2024	Westmoreland met with DEQ staff to discuss bond calculations.
November 18, 2024	Westmoreland Corporate Officers and two independent contractors met with DEQ to discuss bond calculations.
December 23, 2024	Westmoreland responded to DEQ by email with a letter addressing DEQ’s MR 311 Round 1 Deficiency letter. Nearly identical letters were submitted on the same day for two other Westmoreland mining operations. Exhibit P; DEQ Exhibit 2.
January 24, 2025	DEQ sent MR 311 Round 2 deficiency letter to Westmoreland. DEQ Exhibit 3.
February 17, 2025	Westmoreland responded to DEQ’s Round 2 deficiency letter. Exhibit R.
March 12, 2025	Westmoreland Mining LLC sent a letter to DEQ regarding the development of bond calculation guidance. Exhibit U.
March 17, 2025	DEQ sent Westmoreland MR 311 Round 3 deficiency letter. DEQ Exhibit 4.
March 28, 2025	DEQ responded to Westmoreland’s March 12, 2025 letter. Exhibit Q.
April 15, 2025	Westmoreland responded to DEQ’s MR 311 Round 3 deficiency letter. Exhibit S.

June 5, 2025 DEQ sent MR 311 Notice of Deficiency for MR 311. DEQ Exhibit 5.

June 25, 2025 Westmoreland CEO, Martin Purvis, met with DEQ Director Nowakowski to discuss bond calculations and provided Director Nowakowski with a letter regarding the same. Exhibit L.

July 7, 2025 Westmoreland responded to DEQ's MR 311 June 5, 2025 Deficiency Letter.

August 29, 2025 DEQ responded to Westmoreland's June 5, 2025 response letter. Exhibit D.

Exhibit O



Coal Section

Surface Mine Permit Minor Revision Form

This application form is pursuant to Title 82, Chapter 4, Part 2, Montana Code Annotated (MCA) requiring permits for mining coal and uranium.

Instructions: Upload this form to the Admin/Application-Verification Form Section of the ePermit

If revision includes new disturbance, the operator will need to include the following to Operations/Fish and Wildlife Plan Section of the ePermit:

1. Official USFWS Species List- <https://ipac.ecosphere.fws.gov/>
2. Montana NHP Species of Concern List- <https://nris.mt.gov/reqapp/userMain.asp>
3. Montana Sage Grouse Habitat Consultation (if applicable)- <https://sagegrouse.mt.gov/ProposedProject/Instructions>

Check boxes if revision contains changes to any of the following:

1. Incidental Boundary Change
2. Ownership and Control

SECTION A – APPLICANT INFORMATION

A1.

1. Mineral to be mined: Coal
Site Name: C1985005
2. Name of Applicant: Westmoreland Absaloka Mining LLC
Address: PO Box 449
City: Hardin State: MT Zip Code: 59034
Office Phone: (406) 342-5241 Fax: _____
3. Summary of proposed changes in sufficient detail for DEQ to determine reclamation required by state and federal law will be accomplished: **This revision is to update the bond calculation in compliance with the requirements of annual bonding. This minor revision is clerical in nature and consists of a revised bond calculation and associated materials demonstrating the worst-case scenario for one year through an administrative exercise.**
4. Evidence that the changes in disturbed acres are insignificant to impact relative to the entire operation: **This is a clerical revision with no changes in the disturbed acres**
5. Identify previous environmental analyses relevant to this revision: **Absaloka Mine Environmental analyses is AM3 revised in June 14, 2006.**
6. Demonstrate that this revision does not significantly change the human environment: **This is a clerical revision with no impacts to the human environment.**

7. Evidence that the affected surface owner has been notified of this revision: N/A

8. If revision makes any changes to Permit Acreage, please fill out below table:

Acreage to be Permitted	Permit Acreage Mineral	Permit Acreage Surface
Federal:	0	0
Tribal:	0	0
State:	0	0
Private:	0	0
County:	0	0
Total:	0	0

**use whole numbers-no decimal points*

SECTION B - CERTIFICATION *MUST BE CONSISTENT WITH DESIGNATION OF PERMIT COORDINATOR

I, the undersigned, hereby certify that the materials and information contained in this application are complete and correct to the best of my knowledge and belief.

Signature: 

Title: Environmental and Engineering Manager

Date: 06/27/2024

Exhibit P

From: Vicki Marquis <vmarquis@crowleyfleck.com>
Sent: Monday, December 23, 2024 2:27 PM
To: edahlgren@mt.gov; King, Samuel
Cc: Briggs, Todd
Subject: Westmoreland Absaloka Mining LLC MR311 Deficiency Response
Attachments: Attachments.txt

ShareFile Attachments

Expires June 24, 2025

2024.12.23 Final Absaloka Deficiency Respo....1).pdf	251.5 KB
Exhibit A_ 2024.02.01 NTEC Coal Slides(192....1).pdf	1 MB
Exhibit B_ 2024.02.01 MCC Tech Committee....2).pdf	640.9 KB
Exhibit C_ 2024.02.26 MCC Request to DEQ1).pdf	555.4 KB
Exhibit D_ Spring Creek Mine Tble B and Kie....1).pdf	1.1 MB
Exhibit E_ 2024.03.08 DEQ Response Coal T....1).pdf	269.2 KB
Exhibit F_ 2024.12.16 Email from Equipment....1).pdf	857.1 KB
Exhibit G_ CAT D10T2 12 vs. 4160 hrs(19198....1).pdf	42 KB
Exhibit H_ Acceptability Deficiency_MR311(....1).pdf	200 KB
Exhibit I_ MR111B Acceptability Deficiency(....1).pdf	329.1 KB
Exhibit J_ Acceptability Deficiency MR170C(....1).pdf	388.2 KB
Exhibit K- C1985005 Bond Calculation(19215....1).pdf	23.1 MB
Exhibit L- Absaloka Gantt Chart(19215957.1).pdf	168.3 KB
Exhibit M - Large Dozer Operating for Slope1).pdf	1.4 MB

[Download Attachments](#)

Vicki Marquis uses ShareFile to share documents securely.

Hello Eric and Sam, attached please find Westmoreland’s response to DEQ’s Round 1 Acceptability Deficiency Letter dated August 23, 2024 for the MR 311 Bond Calculation. The letter is accompanied by Exhibits A through M. Please let me know if you have issues downloading the attached documents or if you have questions or concerns.

Thank you and Happy Holidays,

Vicki

VICKI MARQUIS

Partner

490 North 31st Street, Suite 500

Billings, MT 59101

Main: 406.252.3441

Direct: 406.255.7298 | Mobile: 406.231.5818



WITH OFFICES IN MONTANA, NORTH DAKOTA, AND WYOMING:

BILLINGS BISMARCK BOZEMAN BUTTE CASPER CHEYENNE HELENA KALISPELL MISSOULA SHERIDAN WILLISTON

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From: Vicki Marquis
Sent: Monday, December 23, 2024 2:31 PM
To: edahlgren@mt.gov; samuel.king@mt.gov
Cc: Briggs, Todd
Subject: Westmoreland Rosebud Mining LLC - MR111 Response to Round 1 Acceptability Deficiency
Attachments: 2024.12.23 Final Rosebud Area B Deficiency Response(19224157.1).pdf; Exhibit A_ 2024.02.01 NTEC Coal Slides(19216084.1).pdf; Exhibit B_ 2024.02.01 MCC Tech Committee Agenda 2.1.24 Final(19198077.2).pdf; Exhibit C_ 2024.02.26 MCC Request to DEQ Bond Hrs Change(19198095.1).pdf; Exhibit D_ Spring Creek Mine Tble B and Kiewit Operating Schedules(19198116.1).pdf; Exhibit E_ 2024.03.08 DEQ Response Coal Technical Committee(19198117.1).pdf; Exhibit F_ 2024.12.16 Email from Equipment Watch(19211504.1).pdf; Exhibit G_ CAT D10T2 12 vs. 4160 hrs(19198118.1).pdf; Exhibit H_ Acceptability Deficiency_MR311(19198120.1).pdf; Exhibit I_ MR111B Acceptability Deficiency(19198123.1).pdf; Exhibit J_ Acceptability Deficiency MR170C(19198124.1).pdf; Exhibit K - C1984003B Bond Calculation(19218237.1).pdf; Exhibit L- B Bond Gantt Chart(19214812.1).pdf

Hello Eric and Sam, attached please find Westmoreland’s response to DEQ’s Round 1 Acceptability Deficiency Letter dated August 7, 2024 for the MR 111 Bond Calculation. The letter is accompanied by Exhibits A through L. Please let me know if you have issues downloading the attached documents or if you have questions or concerns.

Thank you and Happy Holidays,

Vicki

VICKI MARQUIS

Partner
490 North 31st Street, Suite 500
Billings, MT 59101
Main: 406.252.3441
Direct: 406.255.7298 | Mobile: 406.231.5818



WITH OFFICES IN MONTANA, NORTH DAKOTA, AND WYOMING:
BILLINGS BISMARCK BOZEMAN BUTTE CASPER CHEYENNE HELENA KALISPELL MISSOULA SHERIDAN WILLISTON

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From: Vicki Marquis
Sent: Monday, December 23, 2024 2:40 PM
To: edahlgren@mt.gov; samuel.king@mt.gov
Cc: Briggs, Todd
Subject: Westmoreland Rosebud Mining LLC - MR170 Round 1 Acceptability Deficiency
Attachments: 2024.12.23 Rosebud Area C Deficiency Response(19224220.1).pdf; Exhibit A_ 2024.02.01 NTEC Coal Slides(19216084.1).pdf; Exhibit B_ 2024.02.01 MCC Tech Committee Agenda 2.1.24 Final(19198077.2).pdf; Exhibit C_ 2024.02.26 MCC Request to DEQ Bond Hrs Change(19198095.1).pdf; Exhibit D_ Spring Creek Mine Tble B and Kiewit Operating Schedules(19198116.1).pdf; Exhibit E_ 2024.03.08 DEQ Response Coal Technical Committee(19198117.1).pdf; Exhibit F_ 2024.12.16 Email from Equipment Watch(19211504.1).pdf; Exhibit G_ CAT D10T2 12 vs. 4160 hrs(19198118.1).pdf; Exhibit H_ Acceptability Deficiency_MR311(19198120.1).pdf; Exhibit I_ MR111B Acceptability Deficiency(19198123.1).pdf; Exhibit J_ Acceptability Deficiency MR170C(19198124.1).pdf; Exhibit K - C1985003C Bond Calculation MR170(19218245.1).pdf; Exhibit L- C Bond Gantt Chart(19214809.1).pdf

Hello Eric and Sam, attached please find Westmoreland's response to DEQ's Round 1 Acceptability Deficiency Letter dated September 20, 2024 for the MR 170 Bond Calculation. The letter is accompanied by Exhibits A through L. Please let me know if you have issues downloading the attached documents or if you have questions or concerns.

Thank you and Happy Holidays,

Vicki

VICKI MARQUIS

Partner
490 North 31st Street, Suite 500
Billings, MT 59101
Main: 406.252.3441
Direct: 406.255.7298 | Mobile: 406.231.5818



WITH OFFICES IN MONTANA, NORTH DAKOTA, AND WYOMING:
BILLINGS BISMARCK BOZEMAN BUTTE CASPER CHEYENNE HELENA KALISPELL MISSOULA SHERIDAN WILLISTON

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Exhibit Q



March 28, 2025

Via email only

Victoria Marquis
Crowley Fleck PLLP
500 Transwestern Plaza II
490 North 31st St., Suite 500
P.O. Box 2529
Billings, MT 59103-2529
vmarquis@crowleyfleck.com

Re: March 12, 2025 Correspondence Concerning Bonding Guidance Document

Dear Vicki:

DEQ is in receipt of your March 12th letter regarding bonding. Thank you for your interest in assisting DEQ with developing a mining bond guidance document. DEQ appreciates Westmoreland Rosebud Mining, LLC's, Westmoreland Absaloka Mining, LLC's, and Westmoreland Savage Mining, LLC's (Collectively "Westmoreland's") desire to create a guidance document that provides greater predictability and transparency for permittees, landowners, and the public.

While DEQ initially contemplated a shorter, streamlined guidance development process, the Westmoreland letter reinforced with DEQ that a more robust, and potentially lengthier, process should be undertaken on this matter. DEQ agrees that the stakeholders identified in your letter, "permittees, landowners, and the public," should be afforded the opportunity to comment on a guidance document in a productive manner that results in a predictable and transparent guidance document for all stakeholders. Generally, DEQ develops guidance documents to assist staff with consistently applying regulations and operators with complying with regulations. Because determining the amount of bond necessary for completing reclamation work is an integral part of a successful mine closure, which may affect many different types of stakeholders, input from a narrow subset of stakeholders isn't appropriate for development of a guidance document related to bond determinations.

DEQ has extensive experience determining reclamation costs across the mining industry and determining appropriate bond amounts. The Agency has done so for decades. DEQ is responsible for determining the amount of reclamation bond necessary for the State to complete

reclamation pursuant to the work described in the reclamation plan as required by § 82-4-223, MCA. DEQ appreciates Westmoreland's offer to assist in developing the draft guidance document, but at this time DEQ will develop the first draft guidance document and then seek input on provisions of the draft guidance. DEQ will also address areas of bonding that are not up for review and revision, so stakeholders can focus their review and input on elements of the guidance that are ripe for discussion.

After the first draft of the document is developed, DEQ will allow for stakeholders to comment and provide feedback. DEQ will tentatively plan for a public workshop in Billings and also plan to post the draft for a comment period. The workshop will focus on discussing the draft guidance document, reviewing bonding requirements, outlining bonding processes, and reviewing expected reclamation outcomes based on the bond review/determination.

DEQ understands its anticipated timeline for implementing its guidance document may need to be extended beyond June 1, 2025, to ensure all stakeholders have an opportunity to provide input. During the interim period while the guidance is developed, DEQ will rely on its historic practice of reviewing, calculating, and updating bonds and determining appropriate bonds using Equipment Watch rates based on a standard 8-hour work shift.

Thank you again for your letter and candid feedback. DEQ looks forward to working with Westmoreland.

Sincerely,

s/Samuel J. King

Samuel J. King

Chief Legal Counsel

Montana Department of

Environmental Quality

Exhibit R

February 17, 2025

Eric Dahlgren
Coal Program, Acting Supervisor
Department of Environmental Quality
1520 East Sixth Ave
PO Box 200901
Helena, MT 59620

Permit ID: C1985005, Absaloka Mine
Revision Type: MR 311
Permitting Action: N/A
Subject: **Annual Bond, Round 2 Acceptability Response**

Dear Mr. Dahlgren:

The following is in response to the Montana Department of Environmental Quality's (DEQ) letter dated January 24, 2025, regarding MR 311 bond calculation 2nd Round Deficiency for the Absaloka Mine:

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.

Response: The backfill cut/fill volume has been increased by 4.3 million cubic yards. Plate 3 has been updated to include the area of the missing volume.

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.

Response: Plate 4 was missing topsoil polygons that were included in the original total of 1,635 acres. Plate 4 has been updated with the polygons that made up this total.

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.

Response: As agreed upon between the DEQ and Westmoreland, the “Current Disturbed Surface” is used as the Final Bond Topography for the bond calculation. Essentially, the Current Disturbed Surface is used annually and will change from year to year as disturbance progresses. Bond credit is given to work completed throughout the year. The Approved PMT is utilized for bond release which differs from annual bonding disturbed surface.

Please let me know if you have any questions or concerns. Also, feel free to contact Noelle Boyer directly at (720) 440-6369 or via email at NBoyer@westmoreland.com with any permitting related questions or concerns.

Sincerely,



Jesse Noel, P.E.
Director, Environmental & Regulatory Affairs
Westmoreland Mining LLC
Phone: (406) 740-0242
Email: jnoel@westmoreland.com

cc: Alex Mackey, MTDEQ
Nettie Ore
Seth Gudgel
Ken Wooley

Exhibit S

Emily Lodman
Coal Program, Acting Supervisor
Department of Environmental Quality
1520 East Sixth Ave
PO Box 200901
Helena, MT 59620

Permit ID: C1985005, Absaloka Mine
Revision Type: MR 311
Permitting Action: N/A
Subject: **Annual Bond, Round 4 Acceptability Response**

Dear Mrs. Lodman:

The following is in response to the Montana Department of Environmental Quality's (DEQ's) letter dated March 17th, 2025, regarding MR 311 bond calculation 4th Round Deficiency for the Absaloka Mine:

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.

Response: The narrative should indicate the worst-case bond topography date of 2025. The bond narrative has been updated.

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.

Response: The information for the CF-37 polygon was inadvertently removed when the additional blocks were added. The calculation has been updated.

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.

Response: The centroids for the cut/fill material movements will be added to the bond maps for the next bond calculation.

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.

Response: The calculation for the soil distribution in this bond calculation depletes all the soil in the stockpiles. Therefore, the cost to place the topsoil is accounted for in the bond calculation. The bond for next year will be updated to indicated that the topsoil replacement depth may vary across the site and that it may not be the permitted depth. The bond will include a map showing the areas for which each of the stockpiles will be used for replacement and the depth that will be accomplished for that area based on the amount of topsoil available in stockpile.

Please let me know if you have any questions or concerns. Also, feel free to contact Noelle Boyer directly at (720) 440-6369 or via email at NBoyer@westmoreland.com with any permitting related questions or concerns.

Sincerely,



Jesse Noel, P.E.
Director, Environmental & Regulatory Affairs
Westmoreland Mining LLC
Phone: (406) 740-0242
Email: jnoel@westmoreland.com

cc: Alex Mackey, MTDEQ
Seth Gudgel
Ken Wooley

Exhibit T



6/9/2022

Robert Smith, Section Supervisor
Mining Bureau
Department of Environmental Quality
P.O. Box 200901
Helena, MT 59620-0901

Permit ID: C1985005
Revision Type: **Minor Revision**
Permitting Action: **Submittal**
Subject: MR 304: ARM 17.24.313(1)(c) Narrative Revision

Dear Bob:

Westmoreland Absaloka would like to implement the annual bonding process in consultation with the Department. Please see the narrative in ARM 17.24.313(1)(c) for WAM's commitment.

If you have any questions, please contact me at (406) 748-5124.

Sincerely,

Dicki Peterson
Planner III - *Permitting*
Westmoreland Rosebud Mining LLC
Absaloka Mine
Phone: (406) 748-5124
Fax: (406) 748-5181
Email: dpeterson@westmoreland.com

- (1) (c) Westmoreland Absaloka will calculate the amount of the reclamation bond on an annual basis. This yearly calculation precludes the need for factoring in inflation or calculating worst case mining liabilities. The revised bond estimate will be submitted for Department approval as a minor revision of the permit on or before June 30 of each year. The bond calculation will be based on the most recent topography available. A new bond will be in place before the end of the year in which the revised calculation was submitted.

WAM commits to submitting a yearly bond release request calculating costs based on work being completed by an independent contractor.

The information in Exhibit B16 addresses the bond status and the performance bond cost estimate for the permitted area.



WESTMORELAND ABSALOKA MINING LLC

A Subsidiary of WESTMORELAND MINING HOLDINGS LLC

P.O. Box 449 • Hardin, MT 59034 • Phone: (406) 342-5401 • www.westmoreland.com

1/5/2023

Mr. Bob Smith, Section Supervisor
Mining Bureau, Coal Section
Department of Environmental Quality
P.O. Box 200901
Helena, MT 59620-0901

Permit ID: C1985005/MT-0007H
Revision Type: **Minor Revision**
Permitting Action: **Concurrence Response**
Subject: MR 304: Annual Bonding

Dear Bob:

In response to the Department's request, WAM has updated the language in ARM 17.24.313(1)(c) pertaining the narrative for annual bonding.

Should you or your staff have any questions or concerns, please do not hesitate to contact me at (406) 748-5124.

Sincerely,

Dicki Peterson
Planner III - *Permitting*
Absaloka Mine
Phone: (406) 748-5124
Fax: (406) 748-5181
Email: dpeterson@westmoreland.com

- (1) (c) Westmoreland Absaloka will calculate the amount of the reclamation bond on an annual basis. This yearly calculation will include an updated annual inflation factor and an updated worst-case scenario projected through the next year for reclamation liabilities. The revised bond estimate will be submitted for Department approval as a minor revision of the permit on or before June 30th of each year. The bond calculation will be based on the most recent topography available. A new bond will be in place before the end of the year in which the revised calculation was submitted.

WAM commits to submitting a yearly bond release request calculating costs based on work being completed by an independent contractor.

The information in Exhibit B16 addresses the bond status and the performance bond cost estimate for the permitted area.



February 15, 2023

Sent via ePermit system

Dicki Peterson
Westmoreland Resources, Inc.
Absaloka Mine
100 Sarpy Creek Rd.
Hardin, MT 59034

Permit ID: C1985005
Revision Type: Minor Revision
Permitting Action: Approval
Subject: Approval of MR304; 17.24.313(1)(c) Revised Narrative

Dear Dicki:

The Department of Environmental Quality (DEQ) has completed its review of Westmoreland Resources, Inc.'s application for Minor Revision MR304. Westmoreland Resources, Inc. has satisfactorily addressed DEQ's concerns; therefore, DEQ approves MR304.

Please feel free to contact me with questions regarding this letter.

Sincerely,

A handwritten signature in blue ink that reads "Robert D. Smith".

Robert D. Smith, Supervisor
Coal Section
Mining Bureau
Phone: 406-444-4967
Fax: 406-444-4988
Email: RSmith2@mt.gov

Cc: Jeff Fleischman, Office of Surface Mining
Erica Trent, Office of Surface Mining

United States Department of the Interior



OFFICE OF SURFACE MINING
Reclamation and Enforcement
Casper Area Office
PO Box 11018
100 East B Street, RM 4100
Casper, WY 82601



February 13, 2023

Robert Smith, Supervisor
Mining Bureau-Coal Section
Montana Department of Environmental Quality
P.O. Box 200901
Helena, MT 59620-0901

RE: Concurrence and Approval of the Permit Revision to Calculate the Reclamation Bond on an Annual Basis (Minor Revision 304), Absaloka State Permit C1985005 / OSMRE Federal Permit MT-0007H

Dear Mr. Smith:

The Office of Surface Mining Reclamation & Enforcement (OSMRE) has completed its review of Westmoreland Absaloka Mining LLC.'s (WAM) June 9, 2022 (and revised on January 5, 2023) submittal of a permit revision proposing to calculate the reclamation bond on an annual basis (Minor Revision 304). As set forth in the enclosed findings, OSMRE finds that the proposed minor permit revision application submittal complies with the requirements of the Surface Mining Control and Reclamation Act of 1977 and the implementing Federal regulations. In accordance with 30 CFR 750.12(c) (1) (ii) and 774.13(c), I approve the minor permit revision application materials applicable to Federal Permit MT-0007H. In addition, OSMRE concurs with the Montana Department of Environmental Quality's decision to approve this revision application dated June 9, 2022 (and revised on January 5, 2023) under Minor Revision 304 for State permit C1985005.

Please forward a copy of this letter and the attached findings necessary for the approval of this minor revision application to WAM for their files/records.

By copy of this letter, I request that the Bureau of Land Management, the Bureau of Indian Affairs, the Crow Tribe of Indians, and the Crow Coal Regulatory Office insert the modifications included within WAM's above cited submittal into their copies of the Absaloka Mine Permit Application Package (PAP).

As set forth in the Indian Lands Program at 30 CFR 750.12(c) (1) (iii), WAM, or any person with an interest which is or could be adversely affected, may appeal this decision under the procedures of 30 CFR Part 775 and 43 CFR Part 4.

Please contact me by e-mail at fbartlett@osmre.gov should you have any questions or need clarification regarding the contents of this letter.

Sincerely,

FRANKLIN
BARTLETT

Digitally signed by
FRANKLIN BARTLETT
Date: 2023.02.13
08:52:31 -07'00'

Franklin P. Bartlett, Permit
Coordinator/Assessor

Cc: Crow Coal Regulatory Office
Crow Tribe of Indians
Bureau of Land Management
Bureau of Indian Affairs – Crow Agency
Bureau of Indian Affairs – Regional Office

**U.S. DEPARTMENT OF THE INTERIOR, OFFICE OF SURFACE MINING
RECLAMATION AND ENFORCEMENT (OSMRE)**

**Approval of an Application for a Minor Permit Revision
Federal Permit MT-0007H
Westmoreland Absaloka Mining, LLC (WAM)
*Absaloka North Mine***

In a submittal dated June 9, 2022 (and revised on January 5, 2023), WAM submitted a permit revision proposing to calculate the reclamation bond on an annual basis. OSMRE has processed the WAM submittal as a Minor Permit Revision Application.

Based on the Technical Review of this permit revision application conducted by the Montana Department of Environmental Quality (MT DEQ), pursuant to the August 1985 Memorandum of Understanding between OSMRE and MT DEQ, OSMRE has determined that:

1. Reclamation as required by the Surface Mining Control and Reclamation Act of 1977 (SMCRA), and the Federal Indian Lands Program at 30 CFR Chapter VII, Subchapter E, can be accomplished under the reclamation plan contained in the permit application, as revised.
2. The revision application is accurate and complete, and the applicant has complied with all requirements of SMCRA and the Federal Indian Lands Program.
3. No other approval requirements at 30 CFR 773.15 are applicable to this permit revision application.
4. Environmental Evaluation and Finding of No Significant Impact under the National Environmental Policy Act.
 - a. The proposed permit revision would not result in additional environmental impacts beyond those identified in the December 1984 Environmental Impact Statement (EIS) prepared for the Absaloka Mine permit approval, the February 1994 EIS prepared for the amended permit area, and the October 2008 EIS prepared for the amended permit area.
 - b. The December 1984 EIS, the February 1994 EIS, and the October 2008 EIS adequately address the impacts of the mine.
 - c. Because the approval of the minor permit revision would not result in additional impacts, the approval would not cause OSMRE to modify its Finding of No Significant Impact (FONSI) for the permit.

- d. The approval of this permit revision application would not significantly impact the quality of the human environment under section 102(2) (C) of the National Environmental Policy Act of 1969, 42 U.S.C. 4332(2) (C). Therefore, an EIS is not required.

The Crow Coal Regulatory Office, the Crow Tribe of Indians, the Bureau of Land Management Montana State Office, and the Bureau of Indian Affairs Crow Agency did not provide comments noting deficiencies within the application, nor did they object to the approval of the application. The Bureau of Indian Affairs Rocky Mountain Regional Office provided an email on February 8, 2023, stating that they had reviewed the permit revision and had no comments.

Please insert MR 304 as submitted on June 9, 2022 (and revised on January 5, 2023), into the Absaloka Mine PAP.

On the basis of the above determinations, I, in accordance with 30 CFR 750.12(c) (1) (ii) and 774.13(c), approve WAM's permit updates pertaining to calculating the reclamation bond on an annual basis for the Absaloka Mine Permit MT-0007H.

**FRANKLIN
BARTLETT** Digitally signed by
FRANKLIN BARTLETT
Date: 2023.02.13
08:54:40 -07'00'

Franklin P. Bartlett, Permit Coordinator/Assessor

Exhibit U

March 12, 2025

VIA EMAIL ONLY

Sam King
Chief Legal Counsel
Montana Department of Environmental Quality
1520 East 6th Avenue
Helena, MT 59601
samuel.king@mt.gov

RE: Bonding Guidance Document
Our File No. 951066-000002

Dear Sam:

Thank you for your time recently to discuss DEQ's efforts to develop a bonding guidance document and for your agreement to meet again this month. Please accept this letter on behalf of Westmoreland Rosebud Mining LLC, Westmoreland Absaloka Mining LLC, and Westmoreland Savage Mining, LLC (collectively, "Westmoreland") in response to DEQ's Acceptability Determination Letters regarding Permits C1985003C (MR170), C1984003B (MR111), and C1985005 (MR 311). Westmoreland appreciates that "DEQ agrees a guidance document is warranted" to provide operators with an industry-specific tool that can be used to accurately estimate the cost of coal mine reclamation in Montana. A guidance document would provide greater predictability and transparency for permittees, landowners, and the public. Westmoreland also appreciates that the Department "is committed to working with stakeholders to develop [the] bond guidance document."

Westmoreland respectfully requests that the Department incorporate stakeholder input early in the planning and drafting process, limited to individuals specifically qualified in the technical aspects of coal mine reclamation. Additionally, the guidance document should be specific to coal mine reclamation and provide an opportunity for public review and comment before finalization. Finally, Westmoreland requests that the Department consider relying on strategies and methodologies that the Office of Surface Mining and Reclamation Enforcement (OSMRE) and neighboring states used to draft their bonding guidance documents. These strategies have proven effective, fair, and resilient—all qualities which Westmoreland hopes the Department's guidance document will also have.

I. Stakeholders Must be Qualified in the Technical Aspects of Coal Mine Reclamation and Should be Involved Early.

Westmoreland encourages the Department to choose and utilize stakeholders with appropriate expertise to ensure drafting of the bonding guidance document is technically grounded. “The level of bonding must be relative to the degree of disturbance projected by the original permit and the annual report.”¹ As contemplated in the original permit and the annual report, a coal mine’s bond amount is set to reflect costs associated with the “character and nature of [its] 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.”² All of those cost considerations require technical and regulatory experience with, training on, and/or expertise in coal mining and reclamation. An appropriate bond amount cannot be calculated without an accurate, realistic understanding of the statutory cost considerations.

To ensure the bond calculations are supported by accurate cost considerations, stakeholders should be involved early and should be qualified by experience, training, and/or expertise in coal mining, coal mine reclamation, and regulatory compliance. Subject matter experts in engineering; equipment and workforce costs; reclamation planning and phasing; large-scale earthmoving work; backfilling, regrading and contouring at a landscape level; water management on a basin- or watershed-scale; and landscape revegetation would add value to the guidance document.

Westmoreland is concerned that the Department’s ambitious timeline of producing a draft document in early May does not allow sufficient time for stakeholders to engage and provide useful input prior to drafting the substance of the document. To make the most efficient use of the expertise and experience available to the Department from the subject matter experts, Westmoreland asks that the stakeholder group be convened at the early stages of the drafting process. We appreciate that the Department has regulatory and process requirements that necessitate Department work prior to stakeholder involvement, but we hope the Department engages the stakeholders before draft language is crafted for the substance of the bonding guidance, specifically regarding the statutory cost considerations, equipment costs and operational information. Those are areas where the stakeholders can best bring their unique, real-world experience to bear on the questions and issues to be resolved in the guidance document. Quality input at the beginning, before drafting, would reduce the time and financial resources required to produce the guidance document and respond to comments.

Additionally, the recent proposal to consider use of the Costmine Intelligence program presents a new and unknown element for coal mine reclamation in Montana. Westmoreland urges

¹ § 82-4-223(1), MCA.

² § 82-4-223(2), MCA.

the Department to work closely with the 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.

We also encourage the Department to provide public notice and comment opportunities after the Department and stakeholders have developed a draft document. Working with the stakeholders at the front-end is most efficient for all parties and will help ensure that the draft provided to the public meets the statutory and engineering standards proscribed by the Montana Strip and Underground Mine Reclamation Act.

II. The Guidance Document Should be Specific to Coal Mine Reclamation.

Coal mine reclamation in Montana is regulated separately and does not share the same history, reclamation requirements, or practices as hard rock or opencut mine reclamation. Unlike hard rock mines, surface coal mine reclamation does not trigger concerns related to sulfur bearing ores or acid mine drainage.³ Additionally, hard rock mine reclamation requires movement of heavy ore and waste rock, unlike coal mine reclamation which involves moving dirt, overburden, and spoils; therefore, equipment costs substantially differ between the two types of reclamation.

Reclamation of opencut mines is also vastly different than reclamation of coal mines. Most opencut mines are located near populated areas and operate on much smaller scales than coal mines.⁴ Surface coal mines require large landscape-scale reclamation involving more acreage and soil volume than most hard rock and opencut mine reclamation.

These differences are precisely why each type of mine reclamation is dedicated its own part in Montana Code.⁵ Large-scale coal mine reclamation requires extensive backfilling, stabilization, compacting, and grading work, followed by extensive soil laydown, seeding, and revegetation.⁶ This work must be accomplished over large areas, sometimes over entire drainage basins, to achieve pre-approved, landscape scale, postmining topography. *Id.* Surface coal mines also typically rely on numerous sedimentation ponds spaced across a large landscape, some of which are incorporated into the final reclamation.⁷ As recognized within the coal mine reclamation industry and by EquipmentWatch, coal mine reclamation involves higher annual use hours for

³ See, e.g., § 82-4-336(7), MCA; ARM 17.24.169(1)(b) and (d); ARM 17.24.115(1)(d) (requiring specific, additional reclamation where there is potential for acid formation).

⁴ See Montana DEQ's Opencut Mining Web Mapping Application, <https://gis.mtdeq.us/portal/apps/webappviewer/index.html?id=7b60084bc4c444a19c9a7a0867e7635a>.

⁵ § 82-4-201 et seq., MCA (Coal and Uranium Mine Reclamation); § 82-4-301 et seq., MCA (Metal Mine Reclamation); § 82-4-401 et seq., MCA (Opencut Mining Reclamation).

⁶ See, e.g., ARM 17.24.501-524; ARM 17.24.313(d)-(g).

⁷ ARM 17.24.315.

equipment.⁸ Because hard rock and opencut mine reclamation do not involve similar large-scale reclamation, bonding guidance for coal mine reclamation should be separate and distinct from bonding guidance for other types of mines.

We were encouraged to hear that the Department envisions the guidance document having a chapter specific to coal mine reclamation, separate from hard rock mine and opencut mine reclamation. We understood from our recent call that some overlapping administrative issues, such as the type of acceptable bond, might be presented in a common section applicable to all types of reclamation but that the substance of the reclamation bond guidance would be in separate chapters for each type of mine reclamation. We presume that updates to any of the chapters would also subject the other chapters to public review and comment, perhaps with unintended complications and consequences. Having clearly separate documents for each type of mining would avoid complications or confusion over future modifications and public review. Please let me know if we have misunderstood the Department's intentions.

III. Industry Expertise Should be Used and Regional Factors Should be Considered.

The federal government and most other states with established coal mine industries have already drafted resources for operators and agencies to use when calculating reclamation bond amounts. All of these guidance documents were developed with technical input from the mining industry and credible reclamation contractors.

Many of these states, especially those with primacy over their coal programs, rely in part on OSMRE's Handbook for Calculation of Reclamation Bond Amounts ("the Handbook").⁹ The Handbook "establishes a technically sound, consistent methodology to calculate the amount of a performance bond required for surface coal mining and reclamation operations." *Id.* at iv. It has been used as a tool by "[s]everal other Federal agencies, numerous companies in the coal industry, [and] coal-producing states" "as an organized approach to cost estimation." *Id.* In the Handbook, OSMRE requests that "Handbook users" work with Agency staff as necessary to continue developing and improving the Handbook. *Id.* The Handbook emphasizes that because it "relies upon standard engineering cost-estimating procedures to develop site-specific costs for each reclamation activity, users *must* be competent in the subject matter including knowledge of standard engineering principles, equipment productivity guidebooks, and construction cost reference manuals." *Id.* (emphasis added). It also recognizes that "specific regional and local rates" may differ, and actual costs may need to be substituted in some situations. *Id.* Therefore, the Handbook recognizes that competent and qualified persons with industry-specific and localized knowledge are best suited for preparing and maintaining a technically sound guidance document.

⁸ See Westmoreland, Ltrs. to DEQ Re: Annual Bond Calculations for Rosebud Mine Areas B and C (December 23, 2024).

⁹ (Oct. 2020) https://www.osmre.gov/sites/default/files/pdfs/directive1005_AppendixA.pdf.

Coal mining states bordering Montana have also published detailed guidance documents to ensure bonding calculations are realistic and appropriate. For example, Wyoming’s guidance document, Guideline 12, was developed “as a joint project” between the Wyoming Mining Association and Wyoming DEQ’s Land Quality Division.¹⁰ Each year, Wyoming DEQ and the Wyoming Mining Association work together to adjust the owning and operating costs retrieved from Equipment Watch to account for “many factors including digging in favorable conditions.” *Id.* In other words, the Agency works with mine operators located throughout the State to ensure that the data contained in Guideline 12 accurately reflects on-the-ground cost and labor conditions specific to Wyoming. The project was so successful that Guideline 12 is now used in “several states and two provinces in Australia” to estimate reclamation bond amounts.¹¹

North Dakota’s guidance document, Policy No. 16, was developed in 1985 and is periodically updated by the Public Service Commission working in conjunction with “industry and the Lignite Energy Council.”¹² In its 2024 Annual Evaluation Summary Report, OSMRE commended the North Dakota Public Service Commission for its work carrying out the Commission’s objectives in a “professional, cooperative, and fair manner” and labeled Policy No. 16’s updates as a “major accomplishment.”¹³ Policy No. 16 directs Policy users to calculate reclamation costs for large mines by “using the type of equipment used by large mines,” using “standard and variable” hourly rates, and basing total hours of equipment work on “standard and variable production factors.” *Id.* Variable production factors, it noted, are updated annually. *Id.* Because of its esteemed reputation among all stakeholders who use the document, Policy No. 16’s procedures and methodologies should also be used to inform the Department’s guidance document drafting process.

Westmoreland appreciates the Department’s commitment to create a bonding guidance document and hopes it will consider the comments above when designing the process by which the document will be created. Within Montana and nearby, many helpful resources exist. Expertise is available through each of the coal companies currently operating in the state, the Montana Coal Council, and area contractors that provide large-scale reclamation services. Westmoreland appreciates the Department’s willingness to meet with industry and contractors to

¹⁰ 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>.

¹¹ 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>.

¹² See Proposed Changes for Computing Equipment Operating Costs for Policy Memorandum No. 16 to Mine Operators- Reclamation Cost Estimating Guidelines (Nov. 8, 2024) Memorandum from Reclamation Division, 1.

¹³ Annual Evaluation Summary Report For the North Dakota Public Service Commission Regulatory Program, 8 (2024)

<https://www.psc.nd.gov/public/consinfo/Coal%20Mining/ND%20EY2024%20Regulatory%20Annual%20Report%20FINAL.pdf>.

discuss bonding and hopes to continue collaborating on the development of an accurate and appropriate bonding guidance document.

Sincerely,

CROWLEY FLECK PLLP

/s/ Victoria A. Marquis

VICTORIA A. MARQUIS

Exhibit V

SURFACE/UNDERGROUND MINING PERMIT

STATE OF MONTANA
Department of Environmental Quality
PO Box 200901
Helena, Montana 59620-0901
Phone (406) 444-4970

SURFACE MINING PERMIT NO. C1985005
Pursuant to Title 82, Chapter 4, Part 2, Montana Code Annotated
(MCA)

Pursuant to Application for Coal Mine Permit Renewal No. RN8 received by the Department of Environmental Quality (DEQ) on June 3, 2022, Coal Mine Permit No. C1985005 issued to Westmoreland Absaloka Mining, LLC on February 1, 1974 is hereby renewed as follows:

This permit, when executed by the Chief, Mining Bureau, DEQ, shall authorize the operator to commence coal mining activities as specified herein and as shown on maps, plans, specifications and applications submitted by the operator.

Name and Address of Operator:	Mineral to be mined:	County:
Westmoreland Absaloka Mining, LLC P.O. Box 449 100 Sarpy Creek Rd. Hardin, MT 59034-0000	Coal	Big Horn

Total Bond Level: \$ 24,179,997.00

Legal Description:

T1N, R37E Sections: 22, 23, 24, 25, 26, 27, 35, and 36
T1N, R38E Sections: 19, 20, 21, 29, 30, 31, and 32
T1S, R38E Sections: 3, 4, 5, 8, 9 and 10

Acreage Breakdown	Permit Acreage Mineral	Permit Acreage Surface
Federal:	0	0
Tribal:	6,470	0
State:	640	640
Private:	0	6,575
County:	0	0
Total:	7,110	7,215

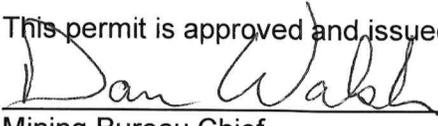
This permit authorizes the permittee to conduct mining activities as specified in:

1. The mining and reclamation permit numbered C1985005 covering this mine or mine complex approved by the Commissioner, Department of State Lands, or Director, DEQ on February 1, 1974, and any approved amendments, revisions, and renewals.
2. The application for renewal of Surface/Underground Coal Mine Permit numbered C1985005, received by DEQ on June 3, 2022, and revised through January 5, 2023.

Stipulations: None

This permit is issued pursuant to and subject to the provisions of Title 82, Chapter 4, Part 2, MCA, and rules adopted pursuant to Title 82, Chapter 4, Part 2, MCA.

This permit is approved and issued by:



Mining Bureau Chief
Department of Environmental Quality

Date: 03/06/2023

Effective Date: March 5, 2023

Expiration Date: February 1, 2027

This permit is valid for 5 years and is subject to renewal, suspension or revocation as deemed necessary by DEQ.

Exhibit W

- ANNUAL MINING REPORT -

MSUMRA

STATE OF MONTANA
DEPARTMENT OF ENVIRONMENTAL QUALITY
AIR, ENERGY, AND MINING DIVISION

PO BOX 200901
HELENA MT 59620-0901
PHONE (406) 444-4970

Permittee Name: Westmoreland Absaloka Mine LLC
Mine Name: Absaloka Coal Mine
P.O. Box 449
Address: 100 Sarpy Creek Rd.
Hardin, MT 590340000
Current Permit # : C1985005
Report Period
 (date - date): January 1, 2024-December 31, 2024
Anniversary Date: February 1, 2028
Report Period
Production (tons): 119,968
Bond Amount for Reporting Year: \$24,180,000

	Coal	Surface
Federal:	<u>0.00</u>	<u>0.00</u>
Indian:	<u>6591.50</u>	<u>0.00</u>
State:	<u>640.00</u>	<u>640.00</u>
Private:	<u>0.00</u>	<u>6591.50</u>
County:	<u>0.00</u>	<u>0.00</u>
Total:	<u>7231.50</u>	<u>7231.50</u>

CATEGORY	Current (1) (acres)	Previous (1) (acres)	Change (2) (acres)
Disturbed	(3) 5154.00	5154.00	0.00
Facilities	(4) 545.00	545.00	0.00
Active Mining	(5) 879.00	879.00	0.00
Complete Backfilled & Graded	(6) 3730.00	3730.00	0.00
Phase I Bond Released	(7) 3101.50	3132.00	0.00
Soiled and Seeded/Planted	(8) 3374.00	3374.00	0.00
Phase II Bond Released	(9) 2703.00	2547.50	0.00
Final Seeded/Planted for 10 Years	(10) 2884.00	2850.00	34.00
Phase III Bond Released	(11) 2237.00	2237.00	0.00
Reclaimed Discrete Drainage Basins	(12) 0.00	0.00	0.00
Phase IV Bond Released	(13) 0.00	0.00	0.00

*See attached footnotes 1 - 14

CERTIFICATION

Signature



3/31/2025
Date

Manager Environmental and Regulatory Affairs

Title

Validity Check:
 Does Active Mining + Complete Backfilled/Regrade +
 Facilities = Disturbed Area ? **YES**

FORM NOTES

Please fill all blank spaces on the above form. Spaces containing "0.0" contain formulas which may be used to auto-calculate the cell value. The Validity Check Above must

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11/7/25 at 12:44 PM
By: Sandy Moisey Scherer
Docket No: BER 2025-04 SM

*Attorneys for Respondent Montana
Department of Environmental Quality*

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

<p>IN THE MATTER OF: NOTICE OF APPEAL AND REQUEST FOR HEARING BY WESTMORELAND ABSALOKA MINING LLC RE: MR 311, SURFACE MINING PERMIT NO. C1985005</p>	<p>Cause No. BER 2025-04 SM</p> <p>DEQ’S REPLY IN SUPPORT OF MOTION TO DISMISS WESTMORELAND’S REQUEST FOR HEARING AND PETITION FOR DECLARATORY RULING</p>
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Respondent Montana Department of Environmental Quality (“DEQ”) files
this Reply Brief in support of its Motion to Dismiss Westmoreland’s Request for
Hearing and Petition for Declaratory Ruling.

The crux of the issue in this matter is whether DEQ's bond increase determination for Westmoreland's Absaloka Mine is reviewable by the Board. As DEQ argued in its opening brief, the answer to that question is no. The Board is not legally authorized to review DEQ's bond increase decision, either through a contested case proceeding or by issuing a declaratory ruling interpreting the Montana Strip and Underground Mine Reclamation Act ("MSUMRA") or its implementing rules.

Notwithstanding the law, or its own best interest to post sufficient bond, Westmoreland has requested a proceeding before this Board. In its Response brief to DEQ's Motion to Dismiss, Westmoreland offers various tortured, and unsupported, legal interpretations in an attempt to justify this request. For the reasons discussed below, Westmoreland's arguments have no basis in law and, if adopted, would require the Board to unilaterally expand its own jurisdiction. The Board should reject this invitation and grant DEQ's Motion to Dismiss.

I. The Board Lacks the Authority to Conduct a Contested Case Procedure to Review DEQ's Bond Determination

The Board lacks the authority under MSUMRA to hold a contested case procedure to review DEQ's bond increase determination for the Absaloka mine as requested by Westmoreland. Nonetheless, in its Response Brief, Westmoreland seeks to circumvent the unavailability of a legal mechanism for challenging DEQ's

bond calculation by attempting to shoehorn its grievance into an appeal of a minor revision. This approach is flawed for several reasons.

First, as DEQ described in its opening brief, DEQ Op. Br. at 15, bond increases under MSUMRA are at the discretion of DEQ and are not appealable to the Board. The sole remedy available to a permittee is to have an informal meeting if the permittee requests. ARM 17.24.1104(1). DEQ has already agreed to participate in such a meeting if Westmoreland so desires. DEQ Brief in Support of Mot. To Dismiss, Ex. 7 (“DEQ Op. Br.”). In contrast, “approval or denial of an application to renew or revise a *permit* pursuant to 82-4-221” can be appealed to the Board as a MAPA contested case proceeding. Section 82-4-206(1)(d), MCA (emphasis added). In other words, denial of a permit revision *can* be appealed to the Board. A determination of the accompanying bond amount cannot.

Westmoreland tries to conflate the accompanying bond determination with the minor revision process to a permit in arguing these processes are one and the same. Westmoreland Resp. Opposing DEQ’s Mot. to Dismiss at 12-14 (“WRM Resp. Br.”). Westmoreland’s argument is disingenuous.¹ While bonding is driven by the proposed operation and any modifications, and DEQ cannot approve the initial permit or any modifications thereto until the bond is posted, the bond

¹ Tellingly, Westmoreland fails to point to one single instance since the Board’s inception in 1995 when the Board has decided a MAPA contested case on the bond amount.

calculation itself is not reviewable by the Board. Indeed, § 82-4-223(1), MCA, makes this distinction clear: “*Before* a permit may be issued, the operator shall file with the department a bond payable to the state of Montana... .” (Emphasis added.) Just like the initial bond determination is informed by the proposed operation, so too are subsequent bond adjustments driven by updates to the reclamation plan. But just like only the initial denial of the permit itself is reviewable, § 82-4-206(1)(a), only a denial of a permit modification is reviewable, § 82-4-206(1)(d).

While Westmoreland may resent that DEQ’s bonding calculation authority is a “one-way street,” WRM Resp. Br. at 13, Westmoreland’s irritation does not allow the company to insert into the law a review mechanism before the Board that simply does not exist. Section 1-2-101, MCA (in statutory interpretation, the Board must not “insert what has been omitted or omit what has been inserted”).

Second, as recognized by § 82-4-223, MCA, DEQ did not deny Westmoreland’s application for Minor Revision 311—opening the door to an appeal under § 82-4-206, MCA—but rather determined that Westmoreland had satisfactorily addressed DEQ’s deficiencies on the Minor Revision except for the deficiency to post additional bond. Therefore, DEQ is waiting on Westmoreland to post the additional bond required to approve that Minor Revision. In an attempt to sidestep the requirement to post adequate bond, Westmoreland’s brief fixates on the cost estimates the company submitted as part of Minor Revision 311, arguing

that Minor Revision 311 was “only about the bond calculation” and, therefore, DEQ’s decision to increase the bond was a functional “denial” of the Minor Revision. WRM Resp. Br. at 14. As discussed above, Westmoreland’s characterization of Minor Revision 311 is incorrect and, more importantly, reflects a wholesale misunderstanding of MSUMRA’s bond calculation process.

Westmoreland’s grievance is not a disagreement over whether the bond calculation and reclamation plan are one and the same; instead, Westmoreland’s protest is to MSUMRA and its implementing rules granting DEQ the authority to determine a bond calculation that differs from the preferred cost estimates submitted by the permittee. That authority, however, is clearly established in the statutory framework of MSUMRA.

Under MSUMRA, DEQ must hold adequate bond at all times. Section 82-4-223, MCA. In determining an appropriate bond amount, DEQ must consider various factors, including “the estimated costs submitted by the permittee” as part of its reclamation plan, which Westmoreland submitted through Minor Revision 311. ARM 17.24.1102. But DEQ is not obligated to rubber stamp the permittee’s cost estimates as the final bond determination. Indeed, DEQ is directed by its implementing rules to also consider additional other factors, beyond the permittee’s cost estimates, when determining the appropriate bond amount, including “additional estimated costs to the department which may arise” in the event that the

permittee abandons the site without fully reclaiming it and “all additional estimated costs necessary, expedient, and incident to the satisfactory completion” of the regulatory requirements for reclamation.” ARM 17.24.1102 (2), (3). In other words, the estimated costs submitted by the permittee, as Westmoreland submitted through Minor Revision 311, are only a part of DEQ’s bond determination calculus. Ultimately, it is DEQ’s authority alone to make the final determination on how much bond is appropriate.

Here, DEQ determined, after considering the cost estimates submitted by Westmoreland and the additional relevant factors, that Westmoreland’s bond was inadequate. Once it made this determination of inadequacy, DEQ could not approve the permit revision until Westmoreland posted adequate bond. Section 82-4-223, MCA. While Westmoreland complains about DEQ’s “insistence on compliance” with the appropriate bond amount before approving Minor Revision 311, WRM Resp. Br. at 14, that “insistence” is not a denial of Minor Revision 311, but a necessary step DEQ must take to satisfy its obligations to hold adequate bond under MSUMRA.

Third, and contrary to Westmoreland’s arguments, WRM Resp. Br. at 16-18, DEQ correctly increased the bond under ARM 17.24.1104(1). Westmoreland takes issue with DEQ’s use of ARM 17.24.1104, as opposed to the minor revision process, to increase the bond, effectively arguing that, once the minor revision

process was underway, DEQ was required to make any bond determinations through that process. WRM Resp. Br. at 11, 16 (describing that DEQ “committed to consider annual bond calculations through the minor revision process” and participated in the minor revision process); *id.* at 14, 16 (arguing that DEQ’s increasing the bond outside of the minor revision process is a denial of Minor Revision 311). Westmoreland’s arguments are beside the point.

The minor revision process provides an avenue for a permittee to submit reclamation plan updates and bond cost estimates as required by ARM 17.24.313, but it does not function as a limitation on DEQ’s mandate to ensure the agency holds adequate bond at all times as required by MSUMRA. Section 82-4-223, MCA. Notably, as Westmoreland concedes, an agency may increase a bond at any time, consistent with ARM 17.24.1104(1), when it determines that “the acreage in the permit area increases, methods of mining operation change, standards of reclamation change or when the cost of future reclamation, restoration or abatement work increases.” WRM Resp. Br. at 17 (quoting ARM 17.24.1104(1)). Westmoreland does not argue that DEQ cannot increase the bond through this regulatory mechanism, but rather takes aim at DEQ’s assessment that such an increase was warranted. WRM Resp. Br. at 16-18. While Westmoreland may

disagree with DEQ's assessment, that disagreement does not create a procedural right in MSUMRA for a permittee to challenge an increase in the bond amount.²

Fourth, Westmoreland's final argument on this issue—that it must exhaust its administrative remedy by appealing to the Board, WRM Resp. at 19—likewise fails. There is no administrative remedy to exhaust because there is no mechanism for Westmoreland to challenge DEQ's bond increase through a contested case in front of the Board.

Ultimately, each of Westmoreland's scattershot arguments in support of its request for the Board to hold a contested case procedure here misses the mark for the same reason: no such authority exists in law for the Board to review DEQ's bond increase under MSUMRA. While Westmoreland frets that denying an appeal here would permanently deny applicants their opportunity to appeal adverse DEQ decisions, WRM Resp. at 13, those fears are unfounded. Applicants are still entitled to appeal minor revision denials. What applicants are not permitted to do is

² Westmoreland provides a disingenuous argument that ARM 17.24.1104(1) doesn't apply because the permit area didn't increase, there has been no change in mining methods, no additional disturbance was created, and the standards of reclamation haven't changed. But when, like here, "the cost of future reclamation, restoration or abatement work increases," ARM 17.24.1104(1), DEQ can increase the bond. While Westmoreland complains that the bond calculation is "incredibly wrong," WRM Resp. Br. at 18, the question isn't whether Westmoreland disagrees with the bond determination. The question is whether the Board has authority to review that determination. Still the answer is no. Section 82-4-206, MCA. Westmoreland's only remedy is to have an informal meeting with DEQ.

what Westmoreland seeks to do here: rewrite the law to obtain Board review of a bond increase determination where such review is unavailable. Because it lacks the subject matter jurisdiction to hold a contested case procedure here, the Board must deny Westmoreland's request.

II. The Board Has No Authority to Issue a Declaratory Ruling

Westmoreland's additional arguments in support of its request that the Board issue a declaratory ruling under MSUMRA, like its arguments related to the Board's authority to hold a contested case in this matter, also fail.

To begin with, and contrary to Westmoreland's assertions, DEQ has authority to issue declaratory rulings under § 2-4-501, MCA and ARM 1.3.229 through 229, which provide for the agency that "administers" a statute or rule that affects a party's legal rights to issue declaratory rulings, ARM 1.2.226. As argued in DEQ's opening brief, Op. Br. 15-17, and conceded by Westmoreland, WRM Resp. Br. at 22, *only* DEQ administers MSUMRA. Section 82-4-205(2)(a), MCA; 30 C.F.R. 926.30. The only authority delegated to the Board under MSUMRA is to "conduct contested case hearings" for instances identified in § 82-4-206(1), MCA. *See City of Billings v. Pub. Serv. Comm'n of Mont.*, 193 Mont. 358, 369, 631 P.2d 1295, 1301 (1981) (administrative agencies hearing contested case appeals "may not assume jurisdiction without express delegation by the legislature"). Therefore, only DEQ can issue a declaratory ruling under § 2-4-501, MCA, or ARM 1.3.226.

DEQ's adoption of administrative rules consistent with this authority, which direct requests for declaratory rulings to be addressed to DEQ's director, ARM 17.1.101(6), further confirm this authority.

Confronted with the absence of any authority whatsoever that would allow the Board to issue a declaratory ruling, Westmoreland, instead, resorts to a tortured reading of the regulations and invents out of whole cloth an unsound legal theory to support its request. The Board should reject these arguments.

Westmoreland's first argument—that, under ARM 1.3.226, administration of a statute is not a prerequisite to issuing a declaratory ruling, WRM Resp. at 22—is nonsensical. In addition to defying the clear text of the rule, under Westmoreland's interpretation, a petitioner could request a declaratory ruling from any agency asking for an interpretation of a statute or rule administered by *a different* agency. This illogical interpretation cannot stand. *Mont. Sports Shooting Ass'n v. State*, 2008 MT 190, ¶ 11. (“Statutory interpretation should not lead to absurd results if a reasonable interpretation is available.”).

Westmoreland's second argument, a wholly novel legal theory which posits that it is not the power to administer the statute, but a “quasi-judicial authority” that gives an agency the power to issue declaratory rulings, is equally dubious. WRM Resp. Br. at 20-24. This requirement is entirely absent from the statute, regulations, or the Montana Supreme Court's decision in *Thompson v. State*, 2007

MT 185, which Westmoreland invokes in support. WRM Resp. Br. at 24. Indeed, Westmoreland’s reliance on *Thompson* is puzzling, not the least because the case does not so much as mention “quasi-judicial power,” much less hold that an agency must hold such authority to issue a declaratory ruling under § 2-4-501, MCA.

Instead, the decision in *Thompson* seems to support the opposite of Westmoreland’s arguments, most notably in its affirmation that a tribunal governed by MAPA, in that case the Worker’s Compensation Court, is limited to issuing a declaratory ruling to only instances where that jurisdiction has been expressly conferred. *Thompson*, ¶¶ 22, 24. Under the logic advanced in *Thompson*, and in direct contrast to Westmoreland’s arguments, the lack of authority conferred in rule or statute to the Board to issue a declaratory ruling in this matter is an unassailable barrier to issuing such a ruling.

Westmoreland’s final argument on this issue—that declaratory rulings are the same as contested cases, WRM Resp. at 23—fares no better than its other assertions. Westmoreland posits that, because declaratory rulings and contested cases are subject to the same standard of judicial review, “declaratory rulings are equivalent to contested cases” and therefore can only be issued by an authority empowered to hear a contested case. WRM Resp. Br. at 23-24.³ This argument is

³ While illustrative only, other provisions of Montana law related to declaratory rulings further rebut this argument, stating explicitly that “a [declaratory ruling] proceeding...is not a contested case proceeding” and “is not subject to the

directly contradicted by the very case that Westmoreland cites, ostensibly in support of its assertions, *Bitterroot River Protective Association v. Bitterroot Conservation District*, 2008 MT 377, 346 Mont. 507, 198 P.3d 219 (cited by WRM Resp. Br. at 23).

The Court held in *Bitterroot River Protective Association* that a political subdivision exempted from MAPA was *not* required to hold a MAPA contested case, but *was* authorized to issue non-MAPA declaratory ruling under § 2-4-501, MCA. *Bitterroot River Protective Ass'n v. Bitterroot Conservation Dist.*, 2008 MT 377, ¶ 25. Put another way: the Montana Supreme Court made clear that MAPA contested cases are not the same as declaratory rulings and that declaratory rulings can be issued by entities that are not empowered to hold contested case procedures under MAPA. This holding directly refutes Westmoreland's arguments.

At bottom, the clear weight of legal authority confirms that the Board has no subject matter jurisdiction or authority to issue a declaratory ruling in this matter.

The Board must dismiss Westmoreland's unlawful request.

CONCLUSION

DEQ is not interested in engaging in an unproductive and unmerited exercise with Westmoreland regarding bonding through this Board. Because the Board lacks

provisions of the Montana Administrative Procedures Act.” ¶ 75-7-125 (3), MCA. (describing standards for a declaratory ruling issued by the supervisors of a conservation district).

the requisite jurisdiction to hold a contested case or issue a declaratory ruling related to DEQ's decision to increase the reclamation bond amount for the Absaloka Mine, should the Board decide to improperly assume jurisdiction over Westmoreland's appeal, it will only operate to waste the parties' and this Board's limited resources as any decision will have no binding legal effect.

Further, because any delay here could result in DEQ holding inadequate bond, contrary to its obligations under MSUMRA, DEQ will immediately seek appropriate relief in Montana district court on these issues should the Board entertain Westmoreland's request. To avoid such needless delay and expense, the Board should decline Westmoreland's invitation to exceed its grant of legislative authority and dismiss Westmoreland's notice for lack of subject matter jurisdiction.

Dated this 7th day of November, 2025.

MONTANA DEPARTMENT OF
ENVIRONMENTAL QUALITY

/s/ Samuel King
SAMUEL KING

Counsel for DEQ

Certificate of Service

I hereby certify that on this 7th day of November, 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:

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BY: /s/ Catherine Armstrong
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Attorneys for Westmoreland Absaloka Mining, LLC

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

IN THE MATTER OF:

THE NOTICE OF APPEAL AND
REQUEST FOR HEARING BY
WESTMORELAND ABSALOKA
MINING LLC REGARDING
MINOR REVISION 311 FOR COAL
SURFACE MINE PERMIT
C1985005

Case No.: BER 2025-04 SM

WESTMORELAND'S NOTICE

Westmoreland Absaloka Mining LLC (“Westmoreland”) submits this Notice to advise the Board of Environmental Review (the “Board”) of recent correspondence issued by the Montana Department of Environmental Quality

(“DEQ”) that is relevant to this pending appeal and to request for declaratory ruling regarding Minor Revision 311 and specifically to DEQ’s pending Motion to Dismiss.

Westmoreland contends on appeal that, by letter dated August 29, 2025, DEQ denied Minor Revision 311, thereby triggering Westmoreland’s statutory right to appeal DEQ’s decision. *See* Westmoreland’s Notice of Appeal, Request for Hearing, and Petition for Declaratory Ruling at 3. DEQ contends that its August 29, 2025 “deficiency response letter was not a ‘denial’ of Minor Revision 311.” *See* DEQ Motion to Dismiss Br. at 2. Instead, DEQ contends that “Minor Revision 311 cannot be approved” yet and that Minor Revision 311 “remains in deficiency.” *Id.* at 14; *see also Id.* at 8 (“there being no denial of MR 311”). DEQ also implied that Minor Revision 311 involved “updates to a reclamation plan.” *Id.* at pp. 3, 4, 6.

On January 8, 2026, DEQ issued a Notice of Noncompliance and Order of Abatement (the “NON”) relating to Westmoreland’s Absaloka Mine and Minor Revision 311. Exhibit X, attached. In the NON, DEQ expressly characterizes its August 29, 2025, correspondence regarding Minor Revision 311 as a “final deficiency notice,” and as a “final letter.” *Id.* at p. 2. Regarding the purpose of Minor Revision 311, DEQ’s NON agrees that “[t]his revision was to calculate bond for the 2025 mining year.” *Id.* at p. 1. The NON relies on the August 29, 2025,

letter as the operative agency action giving rise to enforceable obligations, thereby making it a final agency action.

DEQ's characterization of the August 29, 2025, letter, and its reliance on that letter as the basis for enforcement, bear directly on issues alleged by DEQ in its Motion to Dismiss, including whether the August 29, 2025, letter constituted a final agency decision denying Minor Revision 311, thereby triggering Westmoreland's appeal rights. DEQ's characterization of Minor Revision 311 within the August 29, 2025, letter also bears on issues alleged by DEQ in its Motion to Dismiss, including whether Minor Revision 311 was limited to the 2025 bond calculation.

This Notice is submitted to apprise the Board of DEQ's subsequent correspondence and to direct the Board to language therein bearing on matters already at issue.

Dated this 21st day of January, 2026.

/s/ Victoria A. Marquis

Victoria A. Marquis
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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 21st day of January, 2026:

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

<input type="checkbox"/> U.S. Mail	Samuel J. King, Chief Legal Counsel
<input type="checkbox"/> FedEx	Jeremiah R. Langston
<input type="checkbox"/> Hand-Delivery	Amanda D. Galvan
<input checked="" type="checkbox"/> Email	Montana Department of Environmental Quality
<input checked="" type="checkbox"/> State File Transfer	1520 East Sixth Avenue P.O. Box 200901 Helena, MT 59620-0901 samuel.king@mt.gov jeremiah.langston2@mt.gov amanda.galvan@mt.gov

/s/ Victoria A. Marquis

VICTORIA A. MARQUIS

Exhibit X



January 8, 2026

Sent via certified mail

Also sent via e-mail to: kwooley@westmoreland.com, rsmith@westmoreland.com

Ken Wooley
Chief Operating Officer, US Operations
10375 Park Meadows Drive Suite 400
Lonetree, CO 80124

Permit ID: C1985005
Noncompliance No: CN2026001

NOTICE OF NONCOMPLIANCE AND ORDER OF ABATEMENT

On June 5, 2025, the Department of Environmental Quality (DEQ) notified Westmoreland Absaloka Mining, LLC (WAM) that additional bond was required for the reclamation costs associated with existing disturbance at the Absaloka Coal Mine. DEQ determined that the Absaloka Coal Mine (Permit # C1985005) required an additional \$3,330,000 in bond with DEQ for the 2025 through 2026 bonding period (a total mine bond of \$27,510,000). WAM was required to post the additional bond by December 31, 2025. WAM failed to post the additional bond by the deadline.

Nature of the Violation: Failure to Maintain Adequate Bond

This practice or condition is hereby deemed to be a violation of the following provisions of the Montana Strip and Underground Mine Reclamation Act (the Act), administrative rules adopted pursuant thereto, and the permit:

Administrative Rules of Montana (ARM) 17.24.413(1)(e) states that “the permittee shall maintain in effect at all times a bond in the amount approved by the department and that, upon failure of the permittee to maintain such bond coverage because of expiration or cancellation of bond, the permit is suspended and the permittee shall cease mining operations until substitute bond is filed with and approved by the department.”

Description of Conditions

WAM initially submitted an updated Annual Bond Calculation to DEQ under Minor Revision 311 on June 27, 2024. This revision was to calculate bond for the 2025 mining year. DEQ issued a

first-round deficiency response on August 23, 2024, and 132 days later, on January 2, 2025, WAM responded to DEQ's August deficiency letter. DEQ issued a second-round deficiency on January 24, 2025, with a response from WAM on February 17, 2025. DEQ issued a third-round deficiency on March 17, 2025. DEQ notified WAM that it would "calculate the bond once the following additional information has been provided." 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. DEQ issued a fourth-round deficiency on June 5, 2025. DEQ agreed that all 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". DEQ informed WAM that it must post an additional \$3.33 million in bond by December 31, 2025. WAM responded on July 7, 2025, raising a number of complaints with DEQ's request for an increased bond amount. DEQ responded with a final deficiency notice, at the request of WAM, on August 29, 2025. In this final letter, DEQ reiterated that WAM must post an additional \$3,330,000 by December 31, 2025.

WAM's Absaloka Coal Mine permit states, in document '17.24.313(1)(c) Bond Calculation MR304.pdf', "A new bond will be in place before the end of the year in which the revised calculation was submitted." This language was added through minor revision MR304 in February 2023 to modify the permit to a yearly bonding calculation. ARM 17.24.1202(2) states, in part, that DEQ shall promptly issue a notice of noncompliance of any condition or practice that exists in violation of any permit condition.

WAM did not post the additional required bond by December 31, 2025.

Conditions to Abate

The permittee is ordered to abate the above referenced violation within **46 days** of the issuance date of this Notice of Noncompliance by:

- 1) Demonstrating the equivalent of \$3,330,000 or more of reclamation liability has been offset through reclamation work. The demonstration of work completed must be to the satisfaction of DEQ and meet the requirements for bond release as described in ARM 17.24.1116.
- 2) Alternatively, WAM may post \$3,330,000 in additional bond.

Extension or Modification of this Order

Upon application by the Permittee, DEQ may, for good cause, extend the period for abatement. The period for abatement, however, may not be extended beyond 90 days unless one of the conditions set forth in ARM 17.24.1206(5)(b) exists. DEQ's decision on an application for extension beyond 90 days may be subject to a contested case hearing before the Board of Environmental Review (BER) if a hearing before the BER is requested, in writing, within 30 days

of such decision by a person with an interest that is or may be adversely affected (ARM 17.24.1206(5)(d)).

This Notice of Noncompliance and Order of Abatement may be modified, vacated, or terminated at any time. The Permittee may submit a letter of mitigating circumstances to DEQ providing information about the violation. DEQ will consider any information submitted in determining the facts surrounding the violation and the amount of penalty.

The letter of mitigating circumstances must be received by the Bureau Chief of the Mining Bureau, Department of Environmental Quality, P.O. Box 200901, Helena, Montana 59620-0901, on or before **February 23, 2026**. Failure to timely submit a letter of mitigating circumstances may result in the issuance of a Notice of Violation and Administrative Penalty Order without input from the Permittee. The failure to raise an issue in the letter of mitigating circumstances will not preclude the Permittee from raising the issue at a contested case hearing as set forth in 82-4-206, Montana Code Annotated (MCA).

Pursuant to Section 82-4-254(1), MCA, a Permittee who violates the Act, rules adopted, or orders issued under the Act, or term or condition of a permit, shall pay an administrative penalty of not less than \$100 and not more than \$5,000 and an additional administrative penalty within the same limits for every day during which the violation continues. In order to institute the penalty assessment process, DEQ will serve the Permittee a Notice of Violation and Administrative Penalty Order within 90 days after issuing the Notice of Noncompliance, unless the penalty is waived pursuant to Section 82-4-254(2), MCA. DEQ will determine the penalty based on the factors and penalty calculation procedures found in Section 82-4-1001, MCA, and ARM 17.4.301-308. Pursuant to 82-4-251(7), MCA, DEQ may also request attorney fees and costs associated with any judicial or administrative proceedings.

Hearing

Pursuant to 82-4-251(5), MCA, the Permittee may request an informal public hearing on this Notice of Noncompliance and Order of Abatement. Pursuant to 82-4-251(6), MCA, a person who has been issued a notice or order of cessation pursuant to subsection (1) or (2) may request a hearing before the BER within 30 days of the issuance of the notice.

Sincerely,



Eric Dahlgren, Chief
Mining Bureau
Department of Environmental Quality
(406) 444-5245
edahlgren@mt.gov

CC: Jeffrey Fleischman, OSMRE - Casper Office
Emily Lodman, DEQ Coal Section
Ashley Eichhorn, DEQ Coal Section
Sam King, DEQ Legal

David Simpson, Chairman
Montana Board of Environmental Review
Department of Environmental Quality Headquarters
2401 Colonial Dr.
Helena, MT 59601

BEFORE THE BOARD OF ENVIRONMENTAL REVIEW
OF THE STATE OF MONTANA

<p>IN THE MATTER OF:</p> <p>THE NOTICE OF APPEAL AND REQUEST FOR HEARING BY WESTMORELAND ABSALOKA MINING LLC REGARDING MINOR REVISION 311 FOR COAL SURFACE MINE PERMIT C1985005</p>	<p>CAUSE NO. BER 2025-04 SM</p> <p>ORDER SETTING ORAL ARGUMENT ON DEQ’S MOTION TO DISMISS</p>
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On September 29, 2025, Westmoreland Absaloka Mining LLC (“Westmoreland”) filed a Notice of Appeal, Request for Hearing, and Petition for Declaratory Ruling with respect to Minor Revision 311 for Coal Surface Mine Permit Number C1984003B.

The Montana Department of Environmental Quality (“DEQ”) filed a Motion to Dismiss Westmoreland’s Request for Hearing and Petition for Declaratory Ruling on October 10, 2025.

Based upon review of the parties’ filings, the Board hereby schedules oral argument on the pending Motion to Dismiss at its February 20, 2026, meeting.

The DEQ will have 20 minutes to present argument in support of its Motion and Westmoreland will have 20 minutes to respond. The DEQ will then have 5 minutes for rebuttal, and Westmoreland will have 5 minutes for surrebuttal.

The Chair prefers that counsel for the parties not raise their hands during Board discussion so as to not interrupt the flow of the Board's conversation. However, if counsel believes that they have information helpful to the Board's deliberation, they can raise their hands, and the Chair anticipates he will call on them towards the end of the discussion.

DATED this 28th day of January 2026.

/s/ David Simpson

David Simpson, Chairman

Montana Board of Environmental Review

CERTIFICATE OF SERVICE

I certify that on January 28, 2026, I served a copy of the preceding document by email on the following:

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/s/ Dana L. Hupp

Dana L. Hupp, Legal Counsel
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**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

**WESTMORELAND'S MOTION
TO CONSOLIDATE CONTESTED
CASES**

Pursuant to Montana Rule of Civil Procedure 42(a), Westmoreland Absaloka Mining LLC ("Westmoreland") respectfully moves the Board of Environmental Review (the "Board") to consolidate this contested case (the "Minor Revision 311

Appeal”) with the new contested case, Westmoreland’s *Notice of Appeal and Request for Contested Case Hearing* filed February 6, 2026 (the “Enforcement Appeal”) for hearing. Both appeals arise from the same course of agency conduct, involve the same parties, and present overlapping questions of fact and law. Neither matter has proceeded to discovery, and no scheduling order has issued in either case. Therefore, consolidation serves the interests of judicial economy and avoids prejudice. A supporting brief is filed concurrently.

Dated this 6th day of February, 2026.

/s/ Victoria A. Marquis
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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 6th day of February, 2026:

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<input checked="" type="checkbox"/> Email	Montana Department of Environmental Quality
<input checked="" type="checkbox"/> State File Transfer	1520 East Sixth Avenue P.O. Box 200901 Helena, MT 59620-0901 samuel.king@mt.gov jeremiah.langston2@mt.gov amanda.galvan@mt.gov

/s/ Victoria A. Marquis

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**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

**WESTMORELAND'S BRIEF IN
SUPPORT OF ITS MOTION TO
CONSOLIDATE CONTESTED
CASES**

Westmoreland Absaloka Mining LLC (“Westmoreland”) respectfully moves the Board of Environmental Review (the “Board”) to consolidate this contested case (the “Minor Revision 311 Appeal”) with the new contested case,

Westmoreland’s *Notice of Appeal and Request for Contested Case Hearing* filed February 6, 2026 (the “Enforcement Appeal”) for hearing.

I. ARGUMENT FOR CONSOLIDATION

“If actions before the court involve a common question of law or fact, the court may ... join for hearing or trial any or all matters at issue in the actions.”

Mont. R. Civ. P. 42(a)(1). Montana courts have long recognized that consolidation rests within the decisionmaker’s discretion and is appropriate where a “common bond” conjoins the proceedings and consolidation will promote judicial economy without unfair prejudice to any party. *In re Estate of McDermott*, 2002 MT 164, ¶¶ 14, 19–20, 310 Mont. 435, 51 P.3d 486 (citing *Tribby v. Nw. Bank of Great Falls*, 217 Mont. 196, 208, 704 P.2d 409, 417 (1985)).

The Board’s Executive Policies and Procedures (July 11, 2025) require that “[h]earings and all pre-hearing matters will be conducted pursuant to the ... Montana Rules of Civil Procedure;” therefore, Montana Rule of Civil Procedure 42(a)(1) is available for use in these contested cases. The Board has previously granted consolidation of cases that involve the same or nearly the same set of facts and legal questions and may do so in these contested cases. See *In the Matter of: Violations of the Water Quality Act by Reflections at Copper Ridge, LLC at Reflections at Copper Ridge...*, Case No. BER 2015-01-WQ and *In the Matter of:*

Violations of the Water Quality Act by Copper Ridge Development Corporation...,
Case No. BER 2015-02-WQ.

Consolidation is for procedural efficiency and does not negate any claim or diminish either contested case. “In a consolidation for trial [or hearing], the pleadings, verdicts, findings and judgments are kept separate; the actions are simply tried together for the sake of convenience and judicial economy.” *Comm. for Responsible Plan. v. City of Indian Wells*, 225 Cal. App. 3d 191, 196–97, 275 Cal. Rptr. 57, 61 (Ct. App. 1990). Consolidation “is a procedural convenience designed to avoid multiplicity of actions and does not cause a case to lose its status as a procedural entity.” *In re Succession of Cannata*, 2014-1546 (La. App. 1 Cir. 7/10/15), 180 So. 3d 355, 364, *writ denied*, 2015-1686 (La. 10/30/15), 180 So. 3d 303.

A. THE APPEALS INVOLVE COMMON FACTS.

The Minor Revision 311 Appeal and the Enforcement Appeal arise from the same course of conduct by DEQ concerning performance bond calculations for Westmoreland’s Absaloka Mine. Both appeals are based on the same underlying factual record. *Compare* Ex. N in the Minor Revision 311 Appeal (attached to Westmoreland’s Response Opposing DEQ’s Motion to Dismiss (October 24, 2025)) *with* Ex. FF in the Enforcement Appeal (attached to Westmoreland’s Enforcement Appeal Notice (February 6, 2026)).

In the Minor Revision 311 Appeal, Westmoreland’s first claim challenges DEQ’s denial of Minor Revision 311 and demand for additional bond based on DEQ’s use of unlawful equipment rates. Westmoreland’s second claim in the Minor Revision 311 Appeal seeks 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 [the Montana Strip and Underground Mine Reclamation Act].” Thus, the Minor Revision 311 Appeal challenges DEQ’s final agency action on the Absaloka bond calculation and seeks a ruling from the Board that will ensure DEQ no longer uses unlawful equipment rates.

In the new Enforcement Appeal, Westmoreland challenges DEQ’s subsequent enforcement action, which stems from DEQ’s denial of Minor Revision 311 based on DEQ’s use of unlawful equipment rates. Thus, the same events that precipitated the Minor Revision 311 Appeal, also precipitated the Enforcement Appeal. DEQ first denied Minor Revision 311, which is subject to its own appeal before the Board. §§ 82-4-206(1)(d); 82-4-221, MCA. Then DEQ escalated that denial into a Notice of Noncompliance (“NON”), which is also subject to its own appeal before the Board. § 82-4-251(6), MCA. In many respects, the Enforcement Appeal is an extension of the Minor Revision 311 Appeal. Both are based on the

same facts, with the Enforcement Appeal adding additional facts specific to DEQ's issuance of the NON.

B. THE APPEALS INVOLVE COMMON QUESTIONS OF LAW.

Both appeals present the same central legal question: whether DEQ may determine performance bond amounts, deny a minor revision, and take enforcement action based on equipment rates and assumptions that are inconsistent with and unsupported by Montana industry standards for coal mine reclamation. In the Minor Revision 311 Appeal, that question is presented directly through Westmoreland's petition for declaratory ruling and through Westmoreland's challenge of DEQ's denial of Minor Revision 311 based on unlawful equipment rates. Minor Revision 311 Notice of Appeal, pp. 3-6.

In the Enforcement Appeal, the same question arises, but in the enforcement context. DEQ relies on its denial of Minor Revision 311 based on unlawful equipment rates to issue a notice of noncompliance and order of abatement requiring additional bond or equivalent reclamation. Ex. X. The appeals therefore raise successive legal questions, all centered on the equipment rates required by DEQ:

- 1) When determining performance bond amounts pursuant to MSUMRA, may DEQ use criteria [equipment rates] that are inconsistent with and unsupported by Montana industry standards for coal mine reclamation?

2) May DEQ deny Westmoreland's application for Minor Revision 311 based on DEQ's use of unlawful equipment rates?

3) May DEQ issue a NON and demand additional bond based on its unlawful denial of Minor Revision 311 due to the use of unlawful equipment rates?

The legal question common to all is whether DEQ's prescribed equipment rates are lawful.

C. CONSOLIDATION OF THE APPEALS WILL PROMOTE JUDICIAL ECONOMY.

Because both appeals involve common facts, the documentary evidence for each appeal will be the same or nearly the same. Likewise, the witnesses to be deposed and testify at the hearing for each appeal will be the same or nearly the same. Rather than duplicate discovery and evidentiary hearings with the same or nearly the same documentary and testimonial evidence, consolidation will speed up both appeals and provide more economical adjudication for the parties as well as for the Board and its Hearing Examiner.

Consolidation will also ensure consistent findings of fact and conclusions of law. Absent consolidation, separate proceedings could require different hearing examiners to address the same bond determination and statutory interpretation, creating an unnecessary risk of inconsistent outcomes. Consolidation eliminates that risk by ensuring that the same factual record and legal issues are resolved in a single proceeding.

D. CONSOLIDATION OF THE APPEALS WILL NOT RESULT IN UNFAIR PREJUDICE.

Consolidation will not result in unfair prejudice to any party. The parties are identical in both cases and both matters are at the earliest procedural stage; no discovery has occurred and no scheduling order has been entered. Where proceedings share a common factual and legal foundation and consolidation does not disrupt established schedules or substantive rights, consolidation is appropriate. *McDermott*, ¶ 20.

II. CONCLUSION

The Minor Revision 311 Appeal and the Enforcement Appeal share common factual and legal questions and may therefore be consolidated. Consolidation will avoid the need for the parties and the Board to contend with duplicative evidentiary and testimonial evidence. Consolidation will also avoid the risk of competing or contrary legal conclusions that might be reached if the appeals are kept separate. No unfair prejudice will result from consolidation because the parties are the same and the contested cases are in their early stages. For these reasons, consolidation of these contested cases is appropriate and warranted.

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Dated this 6th day of February, 2026.

/s/ Victoria A. Marquis

Victoria A. Marquis
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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 6th day of February, 2026:

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

<input type="checkbox"/> U.S. Mail	Sam King, Chief Legal Counsel
<input type="checkbox"/> FedEx	Jeremiah Langston
<input type="checkbox"/> Hand-Delivery	Amanda Galvan
<input checked="" type="checkbox"/> Email	Montana Department of Environmental Quality
<input checked="" type="checkbox"/> State File Transfer	1520 East Sixth Avenue P.O. Box 200901 Helena, MT 59620-0901 samuel.king@mt.gov jeremiah.langston2@mt.gov amanda.galvan@mt.gov

/s/ Victoria A. Marquis

VICTORIA A. MARQUIS

David Simpson, Chairman
Montana Board of Environmental Review
Department of Environmental Quality Headquarters
2401 Colonial Dr.
Helena, MT 59601

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

CAUSE NO. BER 2025-04 SM

**ORDER REQUESTING
SUPPLEMENTAL LEGAL
AUTHORITY**

On September 29, 2025, Westmoreland Absaloka Mining LLC (“Westmoreland”) filed a Notice of Appeal, Request for Hearing, and Petition for Declaratory Ruling with respect to Minor Revision 311 for Coal Surface Mine Permit C1985005. The Montana Department of Environmental Quality (“DEQ”) filed a Motion to Dismiss Westmoreland’s Request for Hearing and Petition for Declaratory Ruling on October 10, 2025. Oral argument on DEQ’s Motion is scheduled for February 20, 2026.

In preparation for the oral argument, the Chair requests supplemental legal authority from the parties on their positions related to the following question:

Whether or not the DEQ’s bonding decision is the “functional equivalent” or otherwise a “denial” of MR 311.

Specifically, the Chair requests the parties provide cites to legal authority supporting their position whether or not the bonding decision is the “functional equivalent” of a denial or otherwise a “denial” of MR 311.

The supplemental briefs should be no more than 5 pages and should be filed with the Board’s secretary and legal counsel no later than **Wednesday, February 11, 2026, at 4 pm to ensure sufficient time for the additional information to be included in the Board meeting packet.**

DATED this 9th day of February, 2026.

/s/ David Simpson

David Simpson, Chairman

Montana Board of Environmental Review

CERTIFICATE OF SERVICE

I certify that on February 9, 2026, I served a copy of the preceding document by email on the following:

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Attorneys for Respondent Montana Department of Environmental Quality

/s/ Dana L. Hupp

Dana L. Hupp, Legal Counsel
Montana Board of Environmental Review

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Docket No: BER 2025-04 SM

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Attorneys for Westmoreland Absaloka Mining LLC

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

IN THE MATTER OF:

THE NOTICE OF APPEAL AND
REQUEST FOR HEARING BY
WESTMORELAND ABSALOKA
MINING LLC REGARDING MR
311 FOR COAL SURFACE MINE
PERMIT C1985005

Case No.: BER 2025-04 SM

**WESTMORELAND'S
SUPPLEMENTAL BRIEFING
ON LEGAL AUTHORITY
REGARDING DEQ'S DENIAL
OF MINOR REVISION 311**

Westmoreland provides the following legal authorities, which support the conclusion that DEQ's decision was a final agency action denying MR 311.

A. DEQ'S AUGUST 29, 2025 LETTER IS DEQ'S FINAL AGENCY ACTION.

The determination of whether an agency decision is a final agency action is not "governed by the administrative agency's characterization of its action, but rather by a realistic assessment of the nature and effect of the order sought to be reviewed." A decision is final if it "impose(s) an obligation" or "den(ies) a right." *N. Plains Res. Council v. Bd. of Nat. Res. & Conservation*, 181 Mont. 500, 518.

In *N. Plains*, the District Court reasoned that a Board of Health Order was not a final decision because it "had no legal effect whatsoever until and unless" a subsequent order was issued by a different agency approving the project. *N. Plains*, at 515. The Montana Supreme Court disagreed, pointing to "the nature of the order rather than its chronology in relation to the whole of the agency proceedings." *N. Plains*, at 516. The Board of Health Order "was not conditioned upon anything yet to be resolved" and "was expected to and did have legal consequences." Thus, the Order was "the consummation of the administrative process within that particular agency." *N. Plains*, 181 Mont. at 517-18.

A fundamental characteristic of a final agency decision is the effect of that decision and whether it causes the recipient of the decision to give up legal rights, including the right of appeal. *Bowen v. Super Valu Stores, Inc.*, 229 Mont. 84, 88,

745 P.2d 330, 333 (1987). In *Bowen*, a Workers' Compensation claimant asserted a physician-patient privilege over his medical records after the insurance carrier requested the medical records. The claimant was ordered to comply with the requests, which would waive his privilege of confidentiality. Even though the order was not a final decision on the claim, the Court recognized that "the effect of the order is to destroy the appellant's right of appeal;" therefore, the Court found it to be a final agency action, subject to appeal. *Bowen*, 229 Mont. at 88.

In contrast, an agency action is not reviewable when its effect is only speculative. *Qwest Corp. v. Montana Dept. of Public Service Regulation*, 2007 MT 350, ¶32. Qwest argued that the Public Service Commission's investigation into Qwest's rates "would eventually" harm Qwest. *Qwest*, ¶ 31. The Court held that "where the only allegation of harm is speculation that further agency action *may* take place, and *if* it takes place, it *may* have legal consequences" there was no final agency action subject to review. *Qwest*, ¶ 32.

Here, just as in *N. Plains*, DEQ admits that there is nothing "yet to be resolved" with respect to MR 311; the only thing remaining is for Westmoreland to pay the additional bond demanded by DEQ. DEQ, Reply Br., p.6. DEQ's decision "was expected to and did have legal consequences" evidenced by DEQ's subsequent enforcement action. Exhibit X. DEQ's enforcement action is a "legal consequence;" therefore, DEQ's August 29, 2025 letter is "the consummation of

the administrative process within that particular agency.” *N. Plains*, at 517-18.

Just as in *Bowen*, here, DEQ sets a condition that effectively negates Westmoreland’s right of appeal. If, as DEQ argues, it cannot issue a final decision on MR 311 until after Westmoreland provides the additional bond, then Westmoreland will have no right of appeal at all. Westmoreland cannot appeal DEQ’s approval of Westmoreland’s own application for MR 311 without arguing against itself. The “effect” of DEQ’s decision destroys Westmoreland’s right of appeal, turning that right into a nonsensical exercise in which DEQ would likely argue that Westmoreland’s application plus its compliance with each of DEQ’s requests without objection or protest negates any later appeal.

Unlike *Qwest*, here, there is no speculation about what will happen if Westmoreland does not abide by DEQ’s final agency action. DEQ has already started and will continue legal enforcement proceedings against Westmoreland. Exhibit X. DEQ’s decision here is more like *N. Plains* and *Bowen* than like *Qwest*, proving it is DEQ’s final agency action for purposes of MAPA review.

B. DEQ’S BOND DECISION DENIES MR 311.

DEQ might argue that its bond decision is somehow not a final decision on MR 311, but that is wrong. MR 311 was only about the bond calculation, nothing else required DEQ’s decision. Reclamation plan updates are not required for minor revisions (§ 82-4-231(3), MCA) and Westmoreland did not apply to change its

reclamation plan. To the extent DEQ claims otherwise, it has not and cannot credibly articulate what reclamation plan changes were made through MR 311. All discussion about reclamation related to MR 311 was limited to ensuring the bond calculation aligned with and did not change the pre-existing reclamation plan. MR 311 was only a bond calculation.

The issue in this appeal is the equipment rates used by DEQ, which are not part of the reclamation plan and only apply to bond calculations. § 82-4-231, MCA. DEQ's denial of Westmoreland's equipment rates is a denial of MR 311.

To the extent DEQ argues its decision stems from ARM 17.24.1104(1) and not MR 311, DEQ's correspondence is all labeled as MR 311, proving that even if DEQ relied on that rule, it still denied MR 311, giving the Board jurisdiction.

Although DEQ may increase bond determinations "when the cost of future reclamation, restoration or abatement work increases," (ARM 17.24.1104(1)), that is not really what happened here. Here, DEQ used unsupported and unvetted equipment rates not informed by Montana industry standards to artificially increase the cost estimate. When estimated accurately, using Montana industry standards, the cost does *not* increase. ARM 17.24.1104(1) does not apply here, but even if it did, it does not negate the fact that DEQ denied MR 311.

DEQ's decision on equipment rates is a decision to deny MR 311, which is DEQ's final agency action on MR 311 that may be appealed to the Board.

Dated this 11th day of February, 2026.

/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 11th day of February, 2026:

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

<input type="checkbox"/> U.S. Mail	Sam King, Chief Legal Counsel
<input type="checkbox"/> FedEx	Jeremiah Langston
<input type="checkbox"/> Hand-Delivery	Amanda Galvan
<input checked="" type="checkbox"/> Email	Montana Department of Environmental Quality
<input checked="" type="checkbox"/> State File Transfer	1520 East Sixth Avenue P.O. Box 200901 Helena, MT 59620-0901 samuel.king@mt.gov jeremiah.langston2@mt.gov amanda.galvan@mt.gov

/s/ Victoria A. Marquis

VICTORIA A. MARQUIS

Exhibit X



January 8, 2026

Sent via certified mail

Also sent via e-mail to: kwooley@westmoreland.com, rsmith@westmoreland.com

Ken Wooley
Chief Operating Officer, US Operations
10375 Park Meadows Drive Suite 400
Lonetree, CO 80124

Permit ID: C1985005
Noncompliance No: CN2026001

NOTICE OF NONCOMPLIANCE AND ORDER OF ABATEMENT

On June 5, 2025, the Department of Environmental Quality (DEQ) notified Westmoreland Absaloka Mining, LLC (WAM) that additional bond was required for the reclamation costs associated with existing disturbance at the Absaloka Coal Mine. DEQ determined that the Absaloka Coal Mine (Permit # C1985005) required an additional \$3,330,000 in bond with DEQ for the 2025 through 2026 bonding period (a total mine bond of \$27,510,000). WAM was required to post the additional bond by December 31, 2025. WAM failed to post the additional bond by the deadline.

Nature of the Violation: Failure to Maintain Adequate Bond

This practice or condition is hereby deemed to be a violation of the following provisions of the Montana Strip and Underground Mine Reclamation Act (the Act), administrative rules adopted pursuant thereto, and the permit:

Administrative Rules of Montana (ARM) 17.24.413(1)(e) states that “the permittee shall maintain in effect at all times a bond in the amount approved by the department and that, upon failure of the permittee to maintain such bond coverage because of expiration or cancellation of bond, the permit is suspended and the permittee shall cease mining operations until substitute bond is filed with and approved by the department.”

Description of Conditions

WAM initially submitted an updated Annual Bond Calculation to DEQ under Minor Revision 311 on June 27, 2024. This revision was to calculate bond for the 2025 mining year. DEQ issued a

first-round deficiency response on August 23, 2024, and 132 days later, on January 2, 2025, WAM responded to DEQ's August deficiency letter. DEQ issued a second-round deficiency on January 24, 2025, with a response from WAM on February 17, 2025. DEQ issued a third-round deficiency on March 17, 2025. DEQ notified WAM that it would "calculate the bond once the following additional information has been provided." 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. DEQ issued a fourth-round deficiency on June 5, 2025. DEQ agreed that all 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". DEQ informed WAM that it must post an additional \$3.33 million in bond by December 31, 2025. WAM responded on July 7, 2025, raising a number of complaints with DEQ's request for an increased bond amount. DEQ responded with a final deficiency notice, at the request of WAM, on August 29, 2025. In this final letter, DEQ reiterated that WAM must post an additional \$3,330,000 by December 31, 2025.

WAM's Absaloka Coal Mine permit states, in document '17.24.313(1)(c) Bond Calculation MR304.pdf', "A new bond will be in place before the end of the year in which the revised calculation was submitted." This language was added through minor revision MR304 in February 2023 to modify the permit to a yearly bonding calculation. ARM 17.24.1202(2) states, in part, that DEQ shall promptly issue a notice of noncompliance of any condition or practice that exists in violation of any permit condition.

WAM did not post the additional required bond by December 31, 2025.

Conditions to Abate

The permittee is ordered to abate the above referenced violation within **46 days** of the issuance date of this Notice of Noncompliance by:

- 1) Demonstrating the equivalent of \$3,330,000 or more of reclamation liability has been offset through reclamation work. The demonstration of work completed must be to the satisfaction of DEQ and meet the requirements for bond release as described in ARM 17.24.1116.
- 2) Alternatively, WAM may post \$3,330,000 in additional bond.

Extension or Modification of this Order

Upon application by the Permittee, DEQ may, for good cause, extend the period for abatement. The period for abatement, however, may not be extended beyond 90 days unless one of the conditions set forth in ARM 17.24.1206(5)(b) exists. DEQ's decision on an application for extension beyond 90 days may be subject to a contested case hearing before the Board of Environmental Review (BER) if a hearing before the BER is requested, in writing, within 30 days

of such decision by a person with an interest that is or may be adversely affected (ARM 17.24.1206(5)(d)).

This Notice of Noncompliance and Order of Abatement may be modified, vacated, or terminated at any time. The Permittee may submit a letter of mitigating circumstances to DEQ providing information about the violation. DEQ will consider any information submitted in determining the facts surrounding the violation and the amount of penalty.

The letter of mitigating circumstances must be received by the Bureau Chief of the Mining Bureau, Department of Environmental Quality, P.O. Box 200901, Helena, Montana 59620-0901, on or before **February 23, 2026**. Failure to timely submit a letter of mitigating circumstances may result in the issuance of a Notice of Violation and Administrative Penalty Order without input from the Permittee. The failure to raise an issue in the letter of mitigating circumstances will not preclude the Permittee from raising the issue at a contested case hearing as set forth in 82-4-206, Montana Code Annotated (MCA).

Pursuant to Section 82-4-254(1), MCA, a Permittee who violates the Act, rules adopted, or orders issued under the Act, or term or condition of a permit, shall pay an administrative penalty of not less than \$100 and not more than \$5,000 and an additional administrative penalty within the same limits for every day during which the violation continues. In order to institute the penalty assessment process, DEQ will serve the Permittee a Notice of Violation and Administrative Penalty Order within 90 days after issuing the Notice of Noncompliance, unless the penalty is waived pursuant to Section 82-4-254(2), MCA. DEQ will determine the penalty based on the factors and penalty calculation procedures found in Section 82-4-1001, MCA, and ARM 17.4.301-308. Pursuant to 82-4-251(7), MCA, DEQ may also request attorney fees and costs associated with any judicial or administrative proceedings.

Hearing

Pursuant to 82-4-251(5), MCA, the Permittee may request an informal public hearing on this Notice of Noncompliance and Order of Abatement. Pursuant to 82-4-251(6), MCA, a person who has been issued a notice or order of cessation pursuant to subsection (1) or (2) may request a hearing before the BER within 30 days of the issuance of the notice.

Sincerely,



Eric Dahlgren, Chief
Mining Bureau
Department of Environmental Quality
(406) 444-5245
edahlgren@mt.gov

CC: Jeffrey Fleischman, OSMRE - Casper Office
Emily Lodman, DEQ Coal Section
Ashley Eichhorn, DEQ Coal Section
Sam King, DEQ Legal

181 Mont. 500
Supreme Court of Montana.

NORTHERN PLAINS RESOURCE
COUNCIL and Northern Cheyenne Tribe,
Inc., Petitioners and Respondents,
v.
BOARD OF NATURAL RESOURCES
AND CONSERVATION et al.,
Respondents and Appellants.

No. 14215.
|
Submitted Oct. 24, 1978.
|
Decided April 10, 1979.

Synopsis

Appeal was taken from Board of Natural Resources and Conservation's grant of certificate of environmental compatibility and public need to electric utilities for construction of generation and transmission facility. The First District Court, Lewis & Clark County, Gordon R. Bennett, J., reversed and remanded, and all parties appealed. The Supreme Court, Harrison, J., held that: (1) certain entities were not "indispensable parties" entitled to individual service of copy of petition for review; (2) Board of Health's decision certifying that proposed facility would not violate state and federally established standards and implementation plans was a "final decision" for appeal purposes; (3) Board of Natural Resources and Conservation acted properly in denying motions to terminate proceedings before Board on ground of alleged invalidity of Board of Health's certification; (4) Board of Natural Resources and Conservation erred in failing to make adequate findings of fact and conclusions of law in regard to environmental impact; (5) Board was required to make more than mere conclusory findings of fact or conclusions of law in regard to location of transmission line corridor; (6) Board's decision that proposed facility represented minimum adverse environmental impact was supported by substantial credible evidence, and (7) the general refusal to permit parties opposing utility's application to cross-examine other party opponent's witnesses in the hearings before such Board and Board of Health was not error.

Affirmed in part, reversed in part, and cause remanded to Board of Natural Resources and Conservation.

Shea, J., concurred in part and dissented in part and filed opinion.

Attorneys and Law Firms

*503 **299 W. H. Bellingham argued, Billings, John L. Peterson argued, Butte, Richard J. Andriolo **300 argued, Bozeman, Maurice F. Hennessey argued, Butte, C. W. Leaphart, Jr., argued, Helena, Neil S. Keefer, Billings, John W. Ross, Butte, for respondents and appellants.

Leo C. Graybill, Jr. and Gregory H. Warner, argued, Great Falls, for petitioners and respondents.

Benjamin W. Hilley argued, Great Falls, D. Patrick McKittrick, Great Falls, for amicus curiae.

Opinion

HARRISON, Justice.

Pursuant to the Montana Major Facility Siting Act, section 70-801 et seq., R.C.M.1947, now section 75-20-101 et seq. MCA (hereinafter "Siting Act"), the Board of Natural Resources and Conservation (hereinafter "Board of Natural Resources"), on July 22, 1976, granted to the Montana Power Company, Puget Sound Power and Light Company, Portland General Electric Company, the Washington Water Power Company, and Pacific Power and Light Company (hereinafter "Utilities"), a certificate of environmental compatibility and public need for the construction of the *504 facility known as Colstrip Units 3 and 4. Respondents and cross-appellants appealed this decision to the First Judicial District Court, Lewis and Clark County, under the provisions of the Montana Administrative Procedure Act, section 82-4201 et seq., R.C.M.1947, now section 2-4-101 et seq. MCA (hereinafter "MAPA"). The District Court reversed and remanded the matter to the Board of Natural Resources for rehearing. From this order both appellants/cross-respondents and respondents/cross-appellants appeal to this Court. The two appeals have been consolidated for hearing and decision.

To properly indicate the monumental proportions this matter has taken, we believe it is necessary to set forth its background in some detail as was done by the Board of

Natural Resources in its findings of fact, conclusions of law, opinion, decision, order and recommendations. This also will help to illuminate the issues on appeal and place this controversy in perspective.

Pursuant to the terms of the Siting Act, on June 6, 1973, the Utilities filed with the Montana Department of Natural Resources and Conservation (hereinafter "Department of Natural Resources") an application for a certificate of environmental compatibility and public need for the proposed Colstrip Units 3 and 4. Filed contemporaneously was a petition for waiver of time requirements as set forth in section 70-806, R.C.M.1947, now section 75-20-211 MCA, and a filing fee of \$1,232,930. The Utilities also filed with the Department of Natural Resources their environmental analysis of the proposed project and related facilities entitled "Colstrip Generation and Transmission Project." This environmental analysis was dated November 1973 and was prepared by the environmental systems department of Westinghouse Electric Corporation.

The Department of Natural Resources, pursuant to sections 70-807 and 70-816, R.C.M.1947, now sections 75-20-216 and 75-20-503 MCA, of the Siting Act, conducted an extensive study over a period of 600 days of the application and issued its draft environmental impact statement in November 1974, recommending against the granting of the application. Subsequent to issuing the *505 draft environmental impact statement, the Department of Natural Resources conducted a series of public meetings to gain input from the public regarding the proposed project and the analysis thereof contained in the draft environmental impact statement. On or about January 21, 1975, the Department of Natural Resources released its final environmental impact statement on the proposed project containing its recommendations against granting the application and transmitted the same to the Board of Natural Resources.

The Board of Natural Resources, on receipt of the recommendations from the Department of Natural Resources and after due and deliberate consideration, issued an order dated January 24, 1975. In its order the Board of Natural Resources deemed that the matter before it, i. e., the application for a certificate of environmental compatibility and public need for the proposed Colstrip Units 3 and 4, would be considered **301 a contested case as defined in MAPA, section 82-4201 et seq., R.C.M.1947, now section 2-4-101 et seq. MCA. Subsequent to issuing this order, the Board of Natural Resources issued orders on February 7, 1975 and February 14, 1975, pertaining to matters of procedure to be followed, particularly referring to the methods of discovery and determining the burden of proof.

The Board of Natural Resources further ordered that the hearing would commence on March 10, 1975, at Bozeman, Montana. Notice of the time and place of the hearing was given to all parties and published in daily newspapers throughout Montana to inform the public. On March 10, 1975, the hearing began, at which time motions were presented to the Board of Natural Resources by the opponents of the application to continue the hearing until May 13, 1975, to afford the parties time to complete discovery procedures. Also, objections were made to a member of the Board of Natural Resources serving as hearings examiner. On April 17, 1975, the Board of Natural Resources continued the hearing until April 21, 1975, and on April 10, 1975, Carl M. Davis was appointed by the Board as hearings examiner to preside over the public hearing phase of the proceedings.

*506 Following a pretrial conference with the parties, the hearings examiner, by order dated April 15, 1975, directed the proceedings to reconvene on April 21, 1975, at Helena, Montana.

By letter dated April 10, 1975, the director of the Department of Health and Environmental Sciences (hereinafter "Department of Health") notified the Board of Natural Resources that the Department of Health certified that the proposed facility will not violate state and federally established water quality standards. It did not certify that the proposed facility will not violate state and federally established air quality standards and implementation plans.

On April 18, 1975, the Northern Plains Resource Council filed Cause No. 38934 in the District Court of Lewis and Clark County. A writ of prohibition was served upon the Board of Natural Resources and the hearings examiner, directing them to desist and refrain from any further proceedings until further order of the court and further directed them to appear in court on April 22, 1975. Following the hearing the court, on April 29, 1975, quashed the writ of prohibition, thereby allowing the hearing to continue. The court further ordered the Board of Health and Environmental Sciences (hereinafter "Board of Health") to hold a hearing to determine whether the certificate required by section 70-810(1)(h), R.C.M.1947, now section 75-20-301(2)(h) MCA, should be issued.

The hearing was reconvened in Helena on May 5, 1975. Motions by the opponents for further continuances were presented and granted by the hearings examiner, continuing the hearings until May 20, 1975.

On May 9, 1975, the Northern Cheyenne Tribe, Inc., filed an application for a writ of prohibition in the District

Court of Lewis and Clark County, Cause No. 39000. This matter was heard by the court on May 19, 1975, and judgment was entered on the same date dismissing the application.

The public hearing before the Board of Natural Resources formally began on May 20, 1975, and continued until June 5, 1975, at which time the hearing before the Board of Health was commenced with Carl M. Davis serving as hearings examiner. The hearing before *507 the Board of Health consumed a total of 53 hearing days and concluded on September 15, 1975 with 53 witnesses having testified. After studying the testimony and exhibits, and the findings of fact submitted by the parties, the Board of Health heard oral arguments by counsel, visited the site of the proposed facilities and rendered its decision on November 21, 1975, issuing its conditional certification, pursuant to section 70-810(1)(h), R.C.M.1947, now section 75-20-301(2)(h) MCA, of the Siting Act.

On July 23, 1975, at the conclusion of Utilities' case-in-chief in the Board of Health hearing, the opponents to the application moved to dismiss the Utilities' proceedings for certification, together with a **302 motion to continue further hearings until the Board of Health ruled upon the motions. The motion to continue the Board of Health hearing was denied on July 24, 1975. The opponents to the application filed in the District Court of the First Judicial District, Cause No. 39228, an application for a writ of prohibition or mandate commanding the Board of Health and the hearings examiner to cease and refrain from further proceedings until further order of the court or to show cause to the court why the Board of Health should not be permanently restrained from further proceedings until the Board had ruled upon opponents' motion to dismiss.

On July 25, 1975, this Court granted the Utilities' application for a writ of supervisory control and directed the District Court to either withdraw its writ of prohibition or, in the alternative, to appear before the Supreme Court on July 28, 1975. On July 28, 1975, this Court heard the matter, and at the conclusion of the hearing directed that the writ of prohibition be set aside and that the hearings proceed.

The hearings examiner for the Board of Natural Resources issued an order dated December 10, 1975, reconvening the Board of Natural Resources' hearing on January 19, 1976, at Helena. In addition he set forth certain procedures to be followed by all parties to the proceedings regarding the presentation of direct testimony and cross-examination. Notice of the time and place of the hearing was *508 served on all parties and published in

daily newspapers throughout the state to inform the public. The Department of Natural Resources and the Northern Plains Resource Council filed motions with the Board of Natural Resources, moving the Board to terminate its hearing on the basis that the Board of Health had not certified, or had miscertified, that the proposed Colstrip Units 3 and 4 would meet applicable air and water quality standards. After a hearing, the motion was denied.

The reconvened hearing commenced on January 19, 1976, and was concluded on March 30, 1976. A total of 255 witnesses testified, including 132 public witnesses. The transcript of the proceedings in both the Board of Health hearing and the Board of Natural Resources hearing, consisting of approximately 17,000 pages, including copies of the exhibits received into evidence, were served upon each member of the Board of Natural Resources together with the parties' proposed findings of fact.

The Board of Natural Resources visited and inspected the proposed facilities on two occasions. After due and timely notice being served and published, it heard oral arguments on May 19 and 20, 1976, by all parties who were present and desired to present arguments.

The Board of Natural Resources having inspected the site, read the record of the proceedings and the proposed findings of fact of the parties, and heard the arguments of counsel and public parties, and having duly considered the same and being fully advised in the premises, announced in a regularly scheduled and noticed meeting on June 24, 1976, that it was ready to act upon the application. A motion to approve the application to construct Colstrip Units 3 and 4 and associated facilities and to grant applicants a certificate of environmental compatibility and public need, subject to certain stated conditions, was seconded and carried with four members voting in favor of the motion and three members voting against the motion.

A majority of the Board having approved granting the application, *509 the Board made its findings of fact and conclusions of law, together with its decision, opinion, order and recommendations. It granted the certificate of environmental compatibility and public need to the Utilities on July 22, 1976.

Respondents/cross-appellants appealed to the District Court of Lewis and Clark County, which reversed and remanded the matter to the Board of Natural Resources. Appeal to this Court from the District Court's opinion is taken by all parties.

Before discussing the many individual issues in this case,

there are several other matters which require emphasis by this Court.

****303** Section 82-4216(7), R.C.M.1947, now section 2-4-704 MCA, enacted in 1971 as a part of MAPA, establishes the standards of judicial review of contested agency decisions. The foregoing subsection commences by stating that the court shall not substitute its judgment for that of the agency as to the weight of the evidence on questions of fact. It continues by providing that the court may reverse or modify the agency decision if substantial rights of the appealing party have been prejudiced because the administrative findings, inferences, conclusions, or decisions are: (a) in violation of constitutional or statutory provisions; (b) in excess of the statutory authority of the agency; (c) made upon unlawful procedure; (d) affected by other error of law; (e) clearly erroneous in view of the reliable, probative and substantial evidence on the whole record; (f) arbitrary or capricious or characterized by abuse of discretion or clearly unwarranted exercise of discretion; or (g) because findings of fact, upon issues essential to the decision, were not made although requested. It is clear from this statute that the burden resting upon an appealing party to a District Court from an agency decision is a substantial one.

This Court recently set forth three basic principles underlying section 82-4216 which a District Court must consider in determining what the scope of review of an administrative decision should be: (1) that limited judicial review of administrative decisions strengthens the administrative process by encouraging the full presentation of evidence at the initial administrative hearing; (2) judicial economy requires court recognition of the expertise of administrative ***510** agencies in the field of their responsibility; and (3) limited judicial review is necessary to determine that a fair procedure was used, that questions of law were properly decided, and that the decision of the administrative body was supported by substantial evidence. *Vita-Rich Dairy, Inc. v. Department of Business Regulation* (1976), 170 Mont. 341, 553 P.2d 980.

A recent United States Supreme Court decision has a great deal to say on the subject of judicial review of agency decisions. The Court expresses its views on the practice of some federal judges in placing themselves in the place of the agency in making the decision, rather than following the correct course and setting aside agency decisions only for substantial procedural or substantive reasons as mandated by statute. In *Vermont Yankee Nuclear Power Corp. v. Natural Resources Defense Council, Inc.* (1978), 435 U.S. 519, 98 S.Ct. 1197, 55 L.Ed.2d 460, the Supreme Court unanimously reversed a

decision of the Court of Appeals for the District of Columbia Circuit which had overturned the Atomic Energy Commission's decision to grant Vermont Yankee a license to operate a nuclear power plant.

The Court of Appeals ruled that the rule-making procedures of the AEC were inadequate despite the fact that the agency had employed all the procedures required by the Federal Administrative Procedure Act and more. The Supreme Court concluded that the Court of Appeals had seriously misapplied statutory and decisional law cautioning reviewing courts against engrafting their own notions of proper procedures upon agencies entrusted with substantive functions by Congress, 435 U.S. at 525, 98 S.Ct. 1197, and that "(a)bsent constitutional constraints or extremely compelling circumstances 'the administrative agencies' should be free to fashion their own rules of procedure and to pursue method of inquiry capable of permitting them to discharge their multitudinous duties." " . . ." *Vermont Yankee*, 435 U.S. at 543, 98 S.Ct. at 1211.

In cautioning the lower court to judge an agency decision by the appropriate standards of review, the Supreme Court noted that the ***511** lower court should "not stray beyond the judicial province to explore the procedural format or to impose upon the agency its own notion of which procedures are 'best' or most likely to further some vague, undefined public good." 435 U.S. at 549, 98 S.Ct. at 1214. The court left little doubt in stating:

****304** ". . . the role of a court in reviewing the sufficiency of an agency's consideration of environmental factors is a limited one, limited both by the time at which the decision was made and by the statute mandating review.

" 'Neither the statute nor its legislative history contemplates that a court should substitute its judgment for that of the agency as to the environmental consequences of its actions.' (Citation omitted.)" *Vermont Yankee*, 435 U.S. at 555, 98 S.Ct. at 1217. (Emphasis supplied.)

As to nuclear energy, the court pointed out that Congress had made a choice to at least try nuclear energy, establishing a reasonable review process in which courts are to play only a limited role. ". . . The fundamental policy questions appropriately resolved in Congress and in the state legislatures are Not subject to reexamination in the federal courts under the guise of judicial review of agency action . . ." 435 U.S. at 558, 98 S.Ct. at 1219. The court concluded with the strong language:

". . . It is to insure a fully informed and well-considered decision, not necessarily a decision the judges of the Court of Appeals or of this Court would have reached had

they been members of the decisionmaking unit of the agency. Administrative decisions should be set aside in this context, as in every other, only for substantial procedural or substantive reasons as mandated by statute, [Consolo v. Fed. Maritime Comm'n](#), 383 U.S. 607, 620, 86 S.Ct. 1018, 16 L.Ed.2d 131 (1966), not simply because the court is unhappy with the result reached . . ." 435 U.S. at 558, 98 S.Ct. at 1219.

Because so many of the issues in this case involve the findings of at least one board below, we review briefly what this Court has stated regarding the rules of construction applied to findings of fact. In *512 [Ballenger v. Tillman](#) (1958), 133 Mont. 369, 324 P.2d 1045, this Court stated that Ultimate facts, as distinguished from Evidentiary ones, are the findings a trial court should make. Findings are to receive such a construction as will uphold, rather than defeat, the judgment. This Court quoted with approval a California case to the effect that there is no error in the failure of a trial court to make an express finding upon an issue if it was implicit in the findings made, and that there is no necessity to negate contradictory allegations.

Ballenger was quoted with approval in [Erickson v. Fisher](#) (1976), 170 Mont. 491, 554 P.2d 1336, where the court rejected a proposed finding of fact offered by the appellant because it was merely an Evidentiary fact as distinguished from an Ultimate fact.

It has been stated another way that findings are sufficient if they dispose of Material issues. 76 [Am.Jur.2d](#), [Trial](#), s 1259; 89 [C.J.S.](#) [Trial](#) s 626. This is applicable to court trials, and it is obvious that stricter rules should not be imposed upon administrative agencies.

This record contains some 17,000 pages of transcript; hundreds of exhibits, including a monumental "environmental analysis"; and hundreds of proposed findings of fact and conclusions of law. The findings of fact and conclusions of law of the Board of Health are 23 pages long, and those of the Board of Natural Resources run 46 pages. Approximately 300 pages of briefs were submitted. Many of the questions involved require first impression decisions as to the requirements of the MAPA and of the Siting Act.

Due to the many issues presented, their complexity, and the voluminous pages of transcript, we find it impractical to set forth the entire statement of facts in a single portion of this opinion. Further necessary and appropriate facts will be discussed with each issue.

The issues presented to this Court, as agreed to by the

parties and addressed by the District Court, are:

1. Whether the District Court's ruling that prohibition of cross-examination of agency witnesses violated constitutional standards, statutes, and regulations, was error?

*513 2. Whether the Board of Health proceedings, record, transcript, exhibits, findings, **305 conclusions and orders in the Board of Natural Resources record is subject to review?

3. Whether the District Court erred in requiring the Board of Health to consider state or federal implementation plans in reaching certification pursuant to section 70-810(1)(h), R.C.M.1947, now section 75-20-301(2)(h) MCA?

4. Whether the District Court erred in requiring the Board of Health to make findings and conclusions as to whether certain air and water quality standards would be complied with, and whether the facilities would have a major impact on ground water quality?

5. Whether the District Court erred in requiring the Board of Natural Resources to consider and make adequate findings of fact and conclusions of law with respect to whether the facilities will result in the minimum adverse environmental impact?

6. Whether the District Court's ruling that the Board of Health is required to certify without condition, compliance with air and water quality standards and state implementation plans, was error?

7. Whether the District Court properly ruled that the Board of Natural Resources be required to consider and make adequate findings as to the siting and location of the transmission corridor for the 430 miles of transmission lines?

8. Whether the District Court erred in holding that there was not substantial credible evidence to support the Board of Natural Resources' findings, conclusions, and decision that the proposed facility represents the minimum adverse environmental impact?

9. Whether the District Court properly accepted and ruled that parties to the petition were adequately served?

10. Whether the Board of Natural Resources properly denied a motion to deny the application based on the Board of Health's miscertification or noncertification of the air and water quality matters required under section 70-810(1)(h), R.C.M.1947, now section 75-20-301(2)(h) MCA?

11. Whether the Board of Natural Resources' refusal to consider the minimum adverse environmental impact as to requiring more *514 efficient technology for the removal of SO 2 and the District Court's opinion affirming that refusal is error under the Siting Act?

12. Whether the refusal of the Board of Natural Resources to allow its members the opportunity to review findings of fact and conclusions of law prior to adoption and the District Court's affirming that decision, was arbitrary and capricious on the part of the agency and a deprivation of petitioners' constitutional rights to due process and a full and fair hearing before the Board?

The first issue to be addressed is Issue No. 9 whether the District Court properly accepted and ruled that parties to the petition were adequately served. We believe that it did. While the District Court did not make a specific ruling as to the effectuation of proper service on all parties, it surely is clearly implied by its various pretrial orders and by its final order reversing and remanding.

Surely neither the Utilities nor the agency appellants/cross-respondents have any standing to complain about service in this matter. Any complaint they might have had was waived by agreeing to the delineation of issues which were finalized by the District Court's order of February 27, 1977. It is contended by the Union and REA, appellants/cross-respondents, that they are each "parties of record" for the purposes of section 82-4216(2)(a), R.C.M.1947, now section 2-4-702 MCA, of the MAPA, and thereby entitled to individual service of a copy of the petition of review. We find that the Union and REA were not indispensable parties under the circumstances entitled to individual service of a copy of the petition of review. Compare, [Cissell v. Colorado State Bd. of Assessment App. \(Colo.1977\)](#), 564 P.2d 124, and [Life of the Land v. Land Use Comm. \(1977\)](#), 58 Haw. 292, 568 P.2d 1189. They were jointly represented by counsel and the International Brotherhood of Electrical Workers, an **306 active participant in the agency proceeding was actually served with a copy of the petition for review. Had these appellants/cross-respondents communicated with one another, they would have had actual knowledge of the petition, if they did not have such knowledge from their counsel or the newspapers.

*515 We do not feel that judicial review of the Board's action should be thwarted by a party not participating in a proceeding, even though it had knowledge of it, and later allowed to complain that the court had no jurisdiction over the matter. The motion of the Union and REA to dismiss this proceeding is hereby denied.

Issue No. 2 will be considered next. This issue could more properly be phrased by asking whether the decision of the

Board of Health was a final decision under the provisions of section 82-4216, R.C.M.1947, now section 2-4-702 MCA, of the MAPA, and, if so, whether an appeal of such order is mandatory or permissive.

On pages 16 and 17 of its order, the District Court held that the granting of the Board of Health certification should properly be viewed as a "preliminary, procedural or intermediate agency action" which is not reviewable because review of the final agency action (i. e., that of the Board of Natural Resources) provides not only an adequate remedy but the only necessary remedy. "The District Court held that the Board of Health certification had no legal effect whatsoever until and unless the Board of Natural Resources granted its certification under section 70-804, R.C.M.1947, now sections 75-20-201 and 75-20-203 MCA. The court concluded that the Board of Health decision could not be appealed until the Board of Natural Resources granted a final certificate of environmental compatibility.

Section 82-4216, R.C.M.1947, now section 2-4-702 MCA, provides:

"(1)(a) A person who has exhausted all administrative remedies available within the agency and who is aggrieved by a final decision in a contested case is entitled to judicial review under this part. This section does not limit utilization of or the scope of judicial review available under other means of review, redress, relief, or trial de novo provided by statute. A preliminary, procedural, or intermediate agency action or ruling is immediately reviewable if *516 review of the final agency decision would not provide an adequate remedy."

The issue then is whether or not the decision of the Board of Health dated November 21, 1975, certifying that Colstrip Units 3 and 4 would not violate state and federally established standards and implementation plans, was a final decision under the provisions of the MAPA and, accordingly, should have been appealed to the District Court by the petitioners at that time.

Section 70-810(1)(h), R.C.M.1947, now section 75-20-301(2)(h) MCA, provides that the Board of Natural Resources may not grant a certificate until it determines that the authorized state air and water quality agencies have certified that the proposed facility will not violate state and federally established standards and implementation plans. There is no question that the Board of Health is the duly authorized state air and water quality agency in this case.

Section 70-810, R.C.M.1947, now section 75-20-301

MCA, further provides that judgments of the authorized air and water quality agencies “are conclusive” on all questions relating to the satisfaction of state and federal air and water quality standards. The Board of Natural Resources had no authority to review the decision of the Board of Health under any circumstances. Accordingly, the Board of Health order was not a preliminary or interlocutory order. It was final for all purposes. Thus, an appeal should have been made by petitioners at that time.

The fact that the Board of Health’s certification was not the final order in point of time in the proceedings is not conclusive on the question of appealability. “. . . For purposes of judicial review the finality of an agency order depends upon the nature of the order rather than its chronology in ****307** relation to the whole of the agency proceedings . . .” [Goodman v. Public Service Commission \(1972\)](#), 151 U.S.App.D.C. 321, 323, 467 F.2d 375, 377, citing [Federal Power Comm’n v. Metropolitan Edison Co. \(1938\)](#), 304 U.S. 375, 384, 58 S.Ct. 963, 82 L.Ed. 1408.

Goodman involved a hearing before the Washington, D.C. Public Service Commission concerning a petition for a rate increase. ***517** The hearing was bifurcated into two “phases.” In its Phase I order, the PSC established the fair rate of return at 7.1 percent. The Power Company was then ordered to submit proposed schedules to increase its revenue accordingly. The PSC Phase II order was an order effectuating the above directive by approving a schedule of rates. Goodman appealed from the Phase I order and not the Phase II order. The federal district court dismissed the appeal holding that the Phase I order was not a final order or decision and that Goodman was not affected until entry of the Phase II order. The Circuit Court of Appeals reversed, holding that the Phase I order was a final order:

“. . . Its final character is in no sense affected by the need for the later Phase II order allocating the increase among the several different categories of customers. The increase in rates, and the findings of the Commission upon the basis of which the increase was allowed, were in no way left for further decision by the Phase II order.

“. . .inc

“While it is true that in our case there was something else for the Commission to do, the validity of the over-all increase (Phase I) was not conditioned upon anything yet to be resolved by the later order authorizing tariff schedules. What remained to be done was not concerned with the validity of the increase in rates which had been granted the action of the Commission which Mr. Goodman took to court. That action ‘was expected to and did have legal consequences’ which were not modified nor intended to be modified by the Phase II order which

followed. (Citing cases.)” [Goodman](#), 151 U.S.App.D.C. at 323-24, 467 F.2d at 377-78.

As with the PSC Phase I order in Goodman, the Board of Health’s certification was not conditioned upon anything yet to be resolved by the later order of the Board of Natural Resources. The remaining administrative procedures were not concerned with air and water quality certification. The Board of Health order in this regard was final and conclusive. The Board of Health’s action “was expected to and did have legal consequences” which were ***518** neither modified nor intended to be modified by the later order of the Board of Natural Resources. The Board of Health’s order of November 21, 1975, marks the consummation of the administrative process within that particular agency. The Board of Health’s decision was final for purposes of judicial review and should have been appealed at that time.

“The principle of finality in administrative law is not, however, governed by the administrative agency’s characterization of its action, but rather by a realistic assessment of the nature and effect of the order sought to be reviewed. Hence, ‘a final order need not necessarily be the very last order’ in an agency proceeding, but rather, is final for purposes of judicial review when it ‘impose(s) an obligation, den(ies) a right, or fix(es) some legal relationship as a consummation of the administrative process.’ . . .” [Fidelity Television, Inc. v. F. C. C. \(1974\)](#), 163 U.S.App.D.C. 441, 446, 502 F.2d 443, 448.

We find that the Board of Health’s order of November 21, 1975, was final on that date. An appeal from that order had to be filed within thirty days thereafter pursuant to the terms of the MAPA. No appeal was timely filed and, therefore, the District Court was without jurisdiction to review the order. The District Court is reversed accordingly.

In view of the fact that this Court has ruled that the District Court was without jurisdiction to review the Board of Health’s ****308** order dated November 21, 1975, the following issues become moot and need not nor can be decided by us: Issue No. 3 involving the alleged failure of the Board of Health to consider state and federal implementation plans; Issue No. 4 concerning the requirement that the Board of Health make additional findings and conclusions concerning certain air and water standards; and Issue No. 6 which raised the question of the validity of the conditional certificate issued by the Board of Health.

Issue Nos. 10, 11 and 12 involve issues wherein respondents/cross-appellants contend the District Court

erred.

Issue No. 10 questions the denial by the Board of Natural Resources and the concurrence of the District Court of respondents/cross-appellants' motion to deny the application because of faulty certification by the Board of Health. We find that the District Court properly concurred in the denial of the motion.

On January 7 and 8, 1976, respondents/cross-appellants filed motions to terminate the proceedings before the Board of Natural Resources on the grounds of the alleged invalidity of the certification of the facility by the Board of Health. The Board of Natural Resources denied the motions.

Under the provisions of section 70-810(1)(h), R.C.M.1947, now section 70-20-301(2)(h) MCA, of the Siting Act, the Board of Health is required to certify to the Board of Natural Resources ". . . that the proposed facility will not violate state and federally established standards and implementation plans . . ." This was done by the Board of Health on November 21, 1975. The grant was called a "conditional certificate," but that qualification has no significance for the purposes of this issue. The above section of the Siting Act provides further that the judgments of the Board of Health ". . . Are conclusive on all questions related to the satisfaction of state and federal air and water quality standards." (Emphasis added.) Therefore, from a statutory standpoint alone, the Board of Natural Resources had no choice but to look upon the certification by the Board of Health as "conclusive" and deny the motions of respondents/cross-appellants.

There is an even more compelling reason why the Board of Natural Resources was justified in denying the motions. The certification and order of the Board of Health was dated November 21, 1975. We held under Issue No. 2 that such certification and order was a "final decision in a contested case" and subject to mandatory judicial review within thirty days after its issue. The motions of respondents/cross-appellants were not filed until January 7 and 8, 1976, well beyond the thirty-day period for judicial review, thus making the certification and order of the Board of Health doubly "conclusive" not only upon the Board of Natural Resources but also upon the District Court. The remedy available to *520 respondents/cross-appellants on this issue of certification by the Board of Health was to institute judicial review within the statutory thirty-day period.

Issue No. 11 concerns the District Court's upholding the refusal of the Board of Natural Resources to require more efficient technology for the removal of SO₂ at the facility in considering minimum adverse environmental impact. This issue solely involves questions of fact thoroughly

reviewed by the Board of Natural Resources before making its findings, conclusions and orders. In their briefs both appellants/cross-respondents and respondents/cross-appellants argue about highly technical matters, which more properly should be presented before the administrative agencies. We believe the District Court decided the matter properly, and its reasons were adequately stated at pages 34 and 35 of its opinion:

" . . . The disagreement seems to arise over the assertion by applicants that BACT can be equated to the highest state of the art or to minimum adverse environmental impact. Petitioners insist the latter sets a higher standard than BACT and that the evidence here shows the pollution removal equipment proposed **309 does not meet that standard. In my opinion, the BACT, or NSPS and PSD, standards are empirical and quantifiable and are set out specifically in the EPA regulations. These should be determined by the Department of Health, as that department attempted to do here. On the other hand, the determination as to whether various aspects of the proposed facility will provide minimum adverse environmental impact (or represent the highest state of the art) is a judgmental matter, requiring comparison, the weighing of several factors and the balancing of pros and cons. This is the business of the Board of Natural Resources. (In this case, Finding of Fact # 79 of the Board of Natural Resources sets forth some, or all of the factors considered.) Here the petitioners argue that the evidence provided by the witness Brink shows clearly that the highest state of the art would provide 90% Removal of SO₂. The applicant points out that Brink's technology applies to a high sulfur coal installation with an open loop settling system. The proposed facility takes advantage of low sulphur coal and a closed loop system that would 'trade off' higher *521 sulfur emission (purportedly within NSPS and PSO standards) for minimization of water pollution. Thus, the type of pollution control equipment proposed by the applicants approved by the Board of Natural Resources may contribute to a Total system that provides minimum adverse environmental impact. Such an express conclusion as applied to the pollution control equipment would have been helpful; but it can be fairly implied from the findings of both Boards. It can certainly be deemed to come under the all-encompassing statement in Finding of Fact # 3 and Conclusion of Law # 4 of the BNR certification. It seems to me the conclusion on this particular aspect of the case has been adequately stated and that it is not 'clearly erroneous', although it would have benefited from more substantial factual findings to support it."

The District Court's holding on this issue was not in error.

Issue No. 12 raises the point as to whether the refusal by the Board of Natural Resources to allow members to review findings and conclusions prior to adoption was a deprivation of respondents/cross-appellants' rights to due process and a full and fair hearing before the Board of Natural Resources. We find no such deprivation.

A review of the District Court opinion indicates that it actually did not make any ruling on this point. And, a review of the record also indicates that respondents/cross-appellants did not raise this issue in the District Court. Therefore, it cannot be raised for the first time on appeal to this Court. We have repeatedly held that we will not consider questions of claimed error not previously raised or presented to the trial court. *Hayes v. J. M. S. Const.* (1978), *Mont.*, 579 P.2d 1225, 35 St.Rep. 722; *Mont. Ass'n of Underwriters v. State, Etc.* (1977), *Mont.*, 563 P.2d 577, 34 St.Rep. 297; *Kearns v. McIntyre Const. Co.* (1977), *Mont.*, 567 P.2d 433, 34 St.Rep. 703.

We point out, however, that in our opinion there was no deprivation of rights or even unfair practices in the adoption of findings and conclusions by the Board of Natural Resources. A reading of the entire separate volume of transcript regarding procedural matters before the Board of Natural Resources dated July 22, 1976, clearly demonstrates this.

*522 The record indicates that prior to the meeting of the Board of Natural Resources in June 1976, each board member prepared his own set of findings and conclusions, after which a vote was taken at the June 1976 meeting "as to which route they would choose." Following the vote, the hearings examiner was requested by the Board to prepare findings of the majority, which had voted to approve the application. On July 8, 1976, two weeks prior to the final meeting of July 22, 1976, a letter was sent to each board member with a copy of the hearings examiner's proposed findings of fact, conclusions of law, opinion, decision, order and recommendations. The hearings examiner requested that he be notified of **310 any changes any member wanted made. The hearings examiner noted that there were some changes to be made such as spelling and typographical errors, and some provisions were changed. These findings and conclusions were adopted by the Board of Natural Resources simultaneously with the granting of the certificate of environmental compatibility and public need. Under these circumstances the Board of Natural Resources' action could not be held to be arbitrary and capricious, or a deprivation of respondents/cross-appellants' constitutional rights to due process and a full and fair hearing.

Issue No. 5 involves the District Court's requirement that the Board of Natural Resources make additional findings

and conclusions regarding the use of Rosebud coal versus McKay coal and the mine-mouth versus load-center generation question. The District Court admits there was ample testimony on both points but insists the statutory findings and conclusions that the facilities will meet the "minimum adverse environmental impact" test of the Siting Act, as required by section 70-810(1)(c), R.C.M.1947, now section 75-20-301(2)(c) MCA, must be accompanied by a "(precise) and explicit statement of the underlying facts supporting the findings" as provided under the terms of the MAPA, section 82-4213, R.C.M.1947, now section 2-4-623 MCA. We agree.

In connection with the Rosebud versus McKay coal point in this issue, the District Court held that the Board of Natural Resources did not make adequate findings of fact and conclusions of law regarding *523 whether the use of only Rosebud coal, without the use of any McKay coal, represented the minimum environmental impact. The testimony indicates there are extensive McKay coal deposits in the same area as the Rosebud coal deposits. The use of one coal seam to the exclusion of the other could, of course, result in an increased effect of the impact of strip mining and reclamation.

The lack of any specific findings in this disputed factual area, directly affecting the environmental impact of the facility, was error on the part of the Board of Natural Resources. The District Court properly held that a concise and explicit statement of the underlying findings of fact was necessary to support the ultimate conclusion.

Regarding the second point in this issue, the District Court held that the Board of Natural Resources be required to make adequate findings of fact and conclusions of law with regard to:

"(b) Whether mine-mouth generation as opposed to load center generation represents minimum environmental impact, and the reasons therefor, including considerations as to relative energy efficiency and the relative impact of electrical transmission versus coal haulage, both as required by Section 70-810(1)(c)."

Appellants/cross-respondents maintain that only ultimate factual conclusions need be drawn by the Board of Natural Resources and underlying supporting findings of fact are not required. Such a position is contrary to the requirements of MAPA. Section 82-4213, R.C.M.1947, now section 2-4-623 MCA.

The issue is primarily one of whether clear-cut alternatives in the evidence need be considered in the findings by the Board of Natural Resources in reaching

the statutory conclusion that the facilities will meet the minimum adverse environmental impact. The Board of Natural Resources made no findings, for example, as to whether the economic detriment, if any, in terms of depreciated land values and effect on business and commerce, caused by the taking of 430 miles of double right-of-way across the State of Montana versus the utilization of existing railroad right-of-way satisfied the minimum impact test.

***524** The District Court ruling that the Board of Natural Resources be required to make findings as to the “nature and economics of the various alternatives,” as set forth in section 70-810(1)(c), R.C.M.1947, now section 75-20-301(2)(c) MCA, was proper and in accordance with applicable law.

Issue No. 7 questions the District Court’s requirement that the Board of Natural ****311** Resources make additional findings as to the siting and the location of the transmission line corridor.

The District Court held that the Board of Natural Resources made inadequate findings as to the environmental criteria and the identification and designation of the transmission line corridor as required by the MAPA in section 82-4213, R.C.M.1947, now section 2-4-623 MCA.

The transmission line, as a part of the facilities, calls for the location of approximately 430 miles of right-of-way for two 500 k.v. transmission lines from Colstrip to the western boundary of the state.

The District Court held that the Board of Natural Resources was required to “clearly designate a transmission line corridor, make findings of fact as to why the Board preferred the chosen corridor to the alternative corridors, and conclusions of law as to what state and local legal requirements must be met, and whether they have in fact been met, in accordance with Section 70-810(1) (f).” We concur.

Appellants/cross-respondents point out the apparent inconsistency of the District Court’s opinion wherein the court refused to consider the lack of findings as to the environmental impact of the alternative corridor segments, and its final ruling set forth above. Although the opinion could be clearer in this regard, it is apparent that the District Court rejected respondent/cross-appellants’ argument on the issue of minimum adverse environmental impact as to the alternative corridors. However, the District Court refused to affirm the granting of a certificate by the Board of Natural Resources, without some actual identification of

the corridors subject to approval.

***525** With respect to the transmission facilities, appellants/cross-respondents’ Exhibit 92 sets forth a number of alternative segments which, in combination, could make up possibly five or six different routings, rather than 54 alternative routes as suggested by appellants/cross-respondents.

Also, respondents/cross-appellants submitted proposed findings on the preferability of alternative corridors, particularly the use of existing railroad right of way over the routes proposed by appellants/cross-respondents. BNR Proposed Findings N.P.R.C. # 13-16, 32, 34-36, 66-69, 104-105, 108, 115. DNRC # 814-820.

The findings of fact touching on this issue were conclusory in nature and presented no basis or underlying supporting facts for the conclusion reached. See Board of Natural Resources Finding of Fact No. 48. Furthermore, in a subsequent finding, No. 74, the Board of Natural Resources found that further meteorological data was necessary for a determination of a Final selection of the “proposed corridor.” (Emphasis supplied.) The conclusions of law go no further than to make a reference in one of the conditions to a “proposed corridor.” Board of Natural Resources Conclusion of Law No. 12(L)(3).

As stated by the District Court, the pertinent findings of fact and conclusions of law with respect to the transmission facilities are totally conclusory in nature with respect to their location. Furthermore, they fail to actually reach the conclusion that a transmission route has been located. This is, of course, the fundamental purpose of the entire agency process. Section 82-4213, R.C.M.1947, now section 2-4-623 MCA, provides in part: “. . . Each conclusion of law shall be supported by authority or by a reasoned opinion.”

Appellants/cross-respondents allude to citations of the record to satisfy the essential fact-finding obligation of the Board of Natural Resources with respect to the requirement that the location conform to state and local laws and regulations (section 70-810(1)(f), R.C.M.1947, now section 75-20-301(2)(f) MCA). The District Court correctly held that the identification of the laws determined to be complied with was necessary to support Conclusion of Law ***526** No. 8. The District Court in this instance could not substitute its judgment for the agency in the absence of any definitive decision by the agency.

****312** Appellants/cross-respondents’ contention that references in the findings to the fact that the transmission lines would be located to avoid population centers as much as possible, without even a consideration of what population centers were involved, the effect of the impact,

or the corresponding benefits, if any, does not satisfy the fact-finding obligation of the Board of Natural Resources.

Finally, subsequent approval of a segment of centerline has no bearing on the validity of the Board of Natural Resources with respect to location of a corridor. The fact that members of the Board of Natural Resources may subsequently identify a centerline location does not aid the incompleteness of the Board of Natural Resources' determination with regard to a corridor location.

The District Court properly found that something more than conclusory findings of fact or conclusions of law was necessary to meet the requirements of the Siting Act with respect to location of transmission line facilities, especially of the magnitude sought by appellants/cross-respondents.

We now turn to Issue No. 8 concerning the District Court's finding as to whether there was substantial credible evidence to support the Board of Natural Resources' findings, conclusions and decision that the proposed facility represents the minimum adverse environmental impact.

The parties in this matter phrased this issue as to whether the District Court erred in holding there was not substantial evidence to support a finding of minimum adverse environmental impact. A careful reading of the District Court opinion indicates that such a statement of the issue is not correct. The District Court in its decision on this issue set forth nine different headings. The District Court on all the headings except possibly number 8 ruled in favor of the utilities. It found there was substantial credible evidence to support the Board of Natural Resources' findings, conclusions and decision that the proposed facility represents the minimum adverse *527 environmental impact. Concerning number 8 the District Court held there is substantial evidence but then beclouds the issue by adding, almost parenthetically, that the Board of Natural Resources did not support its ultimate conclusion with any findings as to underlying facts. We find that the language concerning supporting ultimate facts is surplusage as far as this issue is concerned. We agree with the District Court and find that there is substantial credible evidence in the record to support the Board of Natural Resources' findings, conclusions and decision that the proposed facility represents the minimum adverse environmental impact.

The final issue for this Court to decide and probably the most far-reaching with regard to administrative law in this state, is Issue No. 1 whether the District Court erred in holding that the Board of Natural Resources must provide respondents/cross-appellants the opportunity to

cross-examine witnesses of the Department of Health and the Department of Natural Resources in the hearings before each Board.

The District Court in its decision and order held that the hearings examiner erred in ruling that parties opposing the utilities' application could not cross-examine witnesses called by other party opponents in both the Board of Health and Board of Natural Resources hearings. We disagree. To fully comprehend the nature and reason for the ruling, we examine the background of the proceedings prior to the ruling.

After reading the record and the briefs in this case, the position of the main parties in the two hearings becomes obvious early. On the one side were the proponents consisting of the utilities as applicants. On the other side were the opponents to the application consisting of Northern Plains Resource Council, Northern Cheyenne Tribe, Inc., the Department of Natural Resources and the Department of Health. Each of the above opponents was represented by separate counsel. With interest we note that when it came time to submit to the Board of Health proposed findings of fact and conclusions of law, as well as comments on the utilities' proposed findings of fact **313 and conclusions of law and final *528 memoranda, the four main opponents submitted joint pleadings not separate ones, each pleading being signed by the four separate counsel representing each main opponent. In fact, the title of each pleading designates the four parties as "opponents" to the application. Any attempt to cast doubt upon the division of parties into distinct proponents and opponents, as the District Court attempted to do in its opinion and order of March 3, 1978, is without merit.

No one involved in the proceedings expected an early conclusion, yet it soon became apparent that the proceedings could last for months unless steps were taken to shorten the hearings. For example, the first witnesses called averaged over five days of testimony each, including extensive cross-examination by attorneys for the four main opponents to the application. Extended discussions among the attorneys and the hearings examiner ensued in an effort to break the impasse.

The apprehension of the hearings examiner became more noticeable as the proceedings progressed. Thus, early in the hearings he noted that the Board of Health proceedings were in the second week and the second witness was still on the stand. At the beginning of the second month of hearings, four witnesses had not yet been completed.

Finally, the hearings examiner ruled that all witnesses would thereafter present their testimony in writing, and

that the opponents to any witness would have six hours of cross-examination time, divided among them as they might agree. The hearings examiner further reserved the right to permit additional cross-examination if it was material and if without it prejudice might occur. A limitation was also placed upon redirect and recross examinations.

Approximately a month later, and after the utilities had rested their case-in-chief, objections were made by the opponents to not being allowed to cross-examine witnesses called by other opponents. At that time, the hearings examiner ruled that no party opposing the application would be allowed to cross-examine *529 witnesses presented by any other party opponent. However, there was at least one exception to the rule expressed at the time, and followed thereafter, in that counsel for Northern Plains Resource Council was allowed to cross-examine Department of Health witnesses as to the water aspects of the case because the Department had indicated that it could certify that the project would meet all applicable state and federal water standards. With this position, Northern Plains did not agree.

The comments of the hearings examiner on this subject are most illuminating, including his comments as to who opposed the application. In response to a question as to whether or not the chair had ruled that the Northern Plains Resource Council could not cross-examine a Department of Natural Resources' witness, the hearings examiner stated:

“HEARINGS EXAMINER: That’s correct, except on matters pertaining to water. It’s my understanding at the outset of this thing, we line up on two sides, proponents and opponents. Now, there was some conversation that you weren’t lined up that way, but the chair, the Hearings Examiner, has observed throughout these proceedings that all the attorneys from the opponents’ side have been in and out of the conference room, sharing exhibits, passing notes, conferring between examinations, and if there’s a question one forgot to ask, he confers and the next guy asks it, and I’ve never heard of a proceeding where you take the side of an opponent to an application and you cross-examine the other opponent’s witnesses.”

Could the hearings examiner have made it any clearer as to the division of the parties? We think not.

Justification for the rule was stated by the hearings examiner as follows:

HEARINGS EXAMINER: . . . It seems to me that the only person who has the right to cross-examine is the person who is on the opposite side. I think that’s the function of cross-examination. **314 If it weren’t that

way, this new rule we made could be very nicely abused. In other words, the Applicants take two hours on cross-*530 examination, the other parties, on the other side, we go back on the merry-go-round we’ve been on. You’ll have an adequate opportunity to put in your client’s case in full, with as many witnesses as you choose, and state your position very firmly, and they’ll have a right to cross-examine your witnesses. I don’t contemplate granting the DNR the right to cross-examine your witnesses. When they’re not in an adverse position to them. That’s not cross-examination. It can be called cross, but it can, in effect, be redirect. Unless there’s some particular issue that you want to put on the record, that you have opposite issue as far as granting this application is concerned then, I think you’d be in a position that could legally be called cross, but just to encumber the record and say, ‘I want to cross-examine this witness,’ and then go ahead and try to support the witness, I see where there could be a great deal of abuse and unfairness in that.” (Emphasis added.)

The hearings examiner in the foregoing quotation left the door at least partially open as to opponents cross-examining other opponents’ witnesses when an “opposite issue” was involved, and he further expounded upon this later. His answer to a question as to whether he would permit cross-examination by an opponent of another opponent’s witness if they first stated the areas in which they disagreed was that he would not say that he would permit it but he would listen and see whether there was indeed a valid issue.

It should be noted that thereafter opponents’ counsel rarely requested further permission to cross-examine witnesses called by other opponents. In no case is it apparent that counsel ever informed the hearings examiner that they were opposed to a certain witness’ testimony upon any particular subject, nor did they ever request permission to cross-examine an opponent’s witness on any particular subject. Instead, their objections were general only, based mainly on MAPA and the Constitution.

If the floodgates had been opened by the hearings examiner in allowing unlimited cross-examination, it could have resulted in an avalanche of testimony, making the present 17,000 page transcript look like a summary or condensation. Public witnesses by the *531 dozens turned out to testify both against and in favor of the units. Under section 70-808(1)(c), R.C.M.1947, now section 75-20-221(1)(c) MCA, of the Siting Act, “any other interested person” is a party to the proceeding although he waives his right under subsection (2) if he does not participate orally at the hearing. Any of these “parties”

who testified at the hearing might well have insisted upon their right as a party to the proceeding to cross-examine all the witnesses, something that was not lost upon the hearings examiner as revealed in his various comments. We find the hearings examiner was literally forced to institute a ruling restricting the examination of witnesses, and this he did with fairness and dispatch.

In spite of the background of the hearings and the necessity to restrict examination of witnesses, the District Court held that at least the opponent-petitioners below had the absolute right to “cross-examine” witnesses called by other opponents, Department of Health and Department of Natural Resources.

Having provided the background, our attention is next directed to the statutes and case law.

Section 70-809(1), R.C.M.1947, now section 75-20-222(3) MCA, of the Siting Act provides in part: “. . . the contested case procedures of the Montana Administrative Procedure Act (82-401 to 82-4225) shall apply to the hearing, except that neither common law nor statutory rules of evidence need apply, but the board may make rules designed to exclude repetitive, redundant or irrelevant testimony.”

Section 82-4210, R.C.M.1947, now sections 2-4-612(2) and 2-4-612(5) MCA, of the MAPA provides: ***315** “(1) Except as otherwise provided by statute relating directly to an agency, agencies shall be bound by common law and statutory rules of evidence . . .

“ . . .cep

“(3) A party shall have the right to conduct cross-examinations Required for a full and true disclosure of facts, including the right to cross-examine the author of any document prepared by or on ***532** behalf of or for the use of the agency and offered in evidence.” (Emphasis added.)

It should be noted that [section 556\(d\)](#) of the Federal Administrative Procedure Act (5 U.S.C.A. s 556(d)) is almost identical to the first part of subsection (3) above in providing that “A party is entitled to . . . conduct such cross-examination as may be required for a full and true disclosure of the facts.”

The provision for cross-examination of the authors of agency documents offered in evidence found in the latter part of section 82-4210(3) is not found in the Federal Administrative Procedure Act nor in the Model State Administrative Procedure Act. Rather, the provision was

first proposed in Montana in 1959 in a proposed Administrative Procedure Act which the Montana Legislature did not pass. (Senate Bill 179.) Subsequently, the MAPA passed in 1971 preserved this language. Both proposals were made at times when the courts were concerned with the unfairness that would befall claimants for rights or privileges from governmental agencies if the claimants did not have the opportunity to challenge the factual basis of critical reports prepared for the agencies. [Greene v. McElroy \(1959\)](#), 360 U.S. 474, 79 S.Ct. 1400, 3 L.Ed.2d 1377; [Cedar Rapids Steel Transp. v. Iowa State Com. Comm’n \(Iowa 1968\)](#), 160 N.W.2d 825; [Application of Plainfield-Water Co. \(1953\)](#), 11 N.J. 382, 94 A.2d 673. We find that the inclusion of the foregoing provision in our statute regarding the right to cross-examine the author of agency documents was merely a safeguard to make certain that the existing case law was recognized by statute. Its inclusion does not broaden the scope of the remainder of the statute, and it should not be construed as a separate entity but rather with the statute as a whole.

Although the MAPA does not specifically define cross-examination, resort in this regard can be made to section 93-1901-4, R.C.M.1947, now section 26-1-101(1) MCA, which provides in part:

“Direct and cross-examination defined. The examination of a witness by the party producing him is denominated the direct examination; ***533** the examination of the same witness, upon the same matter, By the adverse party, the cross-examination . . .” (Emphasis added.)

It is obvious that the term “adverse party” was not included in the statute for any other reason but to narrow the scope of cross-examination to the adverse party.

The Montana Supreme Court, like the courts of other jurisdictions and the texts, in enunciating the general rule that cross-examination is a matter of right, limits such cross-examination to witnesses of the opposing party or adverse party. [McGonigle v. Prudential Ins. Co. of America \(1935\)](#), 100 Mont. 203, 46 P.2d 687; [Goldberg v. Kelly \(1970\)](#), 397 U.S. 254, 90 S.Ct. 1011, 25 L.Ed.2d 287; 98 C.J.S. Witnesses s 368; 81 Am.Jur.2d, Witnesses, s 464.

The right to cross-examination is subject to another limitation. The latitude of such examination is largely within the discretion of the trial court, with which the reviewing court will not interfere unless there has been a manifest abuse of discretion. [McGonigle v. Prudential Ins. Co. of America](#), supra; [State v. Carns \(1959\)](#), 136 Mont. 126, 345 P.2d 735. In this connection, section 82-4211(2), R.C.M.1947, now section 2-4-611(2) MCA, provides that

hearings examiners shall be authorized to “regulate the course of hearings.” The Federal Administrative Procedure Act is almost identical to the Montana provision in providing that the presiding party may “regulate the course of the hearing.” 5 U.S.C.A. s 556(c)(5).

We find in view of the statutes and case law that there is really no distinction **316 between a court trial and a contested administrative proceeding insofar as the rules applicable to cross-examination and the discretion of the court or hearings examiner are concerned. Should there be one rule for civil cases and another rule for administrative proceedings? We think not.

It would be difficult to find a case more in point than [National Nutritional Foods Ass’n v. Food & Drug Admin.](#) (2nd Cir. 1974), 504 F.2d 761, cert. denied *534 420 U.S. 946, 95 S.Ct. 1326, 43 L.Ed.2d 424. Because National Nutritional is so close to this case, more space will be devoted to it than ordinarily done. The case involved the review of two final regulations of the United States Food & Drug Administration (FDA). During the presentation of the FDA’s case, all parties were permitted liberal cross-examination pursuant to the hearings examiner’s pretrial order which provided for cross-examination by any participant desiring to do so. The Court of Appeals, Judge Friendly writing for the court, wryly noted that so liberal a rule not unexpectedly had its cost.

After the opposition to the FDA began to offer its evidence, almost 18 months after the hearing commenced, the hearings examiner decided to limit the rights of participants to cross-examine the witnesses called by other participants. In an order the hearings examiner divided the parties into two categories just as was done in this case with the FDA on one side and all other participants on the other. If any participant wished to cross-examine the witness of another participant, he was to serve a notice of intention to do so. The notice had to state that the written direct testimony of the witness was adverse to the interest of the participant, make specific reference to the portion of the testimony considered to be adverse, and state the reasons therefor. The hearings examiner would then determine whether to grant permission to cross-examine in his discretion.

The decision of the Court of Appeals approved the limitation on cross-examination of coparticipants’ witnesses where no adversity existed between them; however, the court did find that in the case of one particularly important witness called by the American Medical Association (Dr. Sebrell), the hearings examiner had incorrectly determined that no adversity existed

between the AMA and the National Health Federation. Accordingly, the court remanded the case to the FDA for the limited purpose of permitting reasonable cross-examination of Dr. Sebrell by the NHF or counsel of some other similarly interested participant.

It appears that the hearings examiner had made his ruling that Dr. Sebrell could not be cross-examined by the NHF even though it *535 was explained to him at the time that the interests of the NHF and AMA were opposite rather than identical. In commenting upon this adversity, the court noted specifically that the two organizations clearly did not have “common interests” and that the NHF was substantially as adverse to the AMA as it was to the FDA.

Judge Friendly predicated the ruling upon subsection (d) of s 556 of the Federal Administrative Procedure Act which provides, almost identically to section 82-4210(3), R.C.M.1947, now section 2-4-612(5) MCA, that a party is entitled to conduct such cross-examination as may be required for a full and true disclosure of the facts. The court pointed out that the foregoing provision does not confer a right of so-called “unlimited” cross-examination and that presiding officers will have to make the necessary initial determination where the cross-examination is pressed to unreasonable lengths.

The court further recognized that a hearings examiner must be allowed, indeed encouraged, to take steps to avoid repetitious or aimless cross-examination, particularly in a proceeding which has become so gargantuan as the one before it.

Of more than passing interest is the court’s terse comment on the point which most trial lawyers have learned through sad experience that early dreams of confounding experts by cross-examination usually are dreams indeed. The court wonders how much more there would have been for the agency to learn but that Dr. Sebrell was no **317 ordinary witness and in fact played a key part in the preparation of the regulation.

One of the most cogent statements by Judge Friendly in [National Nutritional](#) is the following:

“ . . . In the absence of a showing of prejudice, participants with common interests should be grouped by the hearing examiner, and participants in a group should not be permitted to cross-examine witnesses called by other members of the group.” 504 F.2d at 795.

We can identify the situation involving Dr. Sebrell, the key witness involved in [National Nutritional](#), with the situation in this case where Northern Plains Resource Council was opposed to the *536 Department of Health

on water issues. In that case the matter was remanded for cross-examination of Dr. Sebrell; in this case Northern Plains Resource Council was allowed to cross-examine the Department of Health witnesses because of the adversity of interest.

It is true that in this case the procedure was not as structured as in *National Nutritional*. On the other hand, on at least two occasions the hearings examiner here pointed out to counsel the possibility of opening cross-examination in the event of a valid adverse issue. He did in fact allow cross-examination on the water issues, where an adverse position existed. This should have been proof enough that, upon a proper showing of adversity, further cross-examination would be allowed. Furthermore, none of the counsel for the opposing parties, other than on water issues, ever pointed out in what respect his client was in opposition to another opponent. On the contrary all that was ever done was to interpose general objections, and when given the specific opportunity to explain the subjects where adversity existed, opposing counsel did not do so.

The federal courts have in many instances upheld rulings in administrative proceedings which denied completely cross-examination. Thus in *Fried v. United States* (S.D.N.Y.1963), 212 F.Supp. 886, plaintiffs alleged denial of due process of law because the hearings examiner curtailed completely their right to cross-examine an allegedly crucial witness but the court upheld the ruling in view of the cumulative nature of the witness' testimony. And in *American Public Gas Ass'n v. Federal Power Comm'n.* (1974), 162 U.S.App.D.C. 176, 498 F.2d 718, all data upon which the commission relied was tendered to the petitioners for comment, criticism and for the submittal of rebutting material. Petitioners complained that they were denied the right to test through cross-examination the underlying bases for the submitted data but the court rejected the claim in holding that under the Federal Administrative Procedure Act, cross-examination is not always a right and that the petitioners had failed to demonstrate that cross- *537 examination was required for a "full and true disclosure of the facts" under the Act.

The purposes of cross-examination have been stated as follows:

"The office of cross-examination is to test the truth of statements of a witness made on direct examination. Cross-examination serves as a safeguard to combat unreliable testimony, providing a means for discrediting a witness' testimony, and is in the nature of an attack on his truth or accuracy . . . The object of cross-examination, therefore, is to weaken or disprove the case of one's adversary, and break down his testimony in chief, test the

recollection, veracity, accuracy, honesty, and bias or prejudice of the witness, his source of information, his motives, interest, and memory, and exhibit the improbabilities of his testimony." 98 C.J.S. *Witnesses* s 372, pp. 125-26.

Certainly examination by the opponents of other opponents' witnesses would hardly meet the true objectives of cross-examination including the main one, to test the truth of the witness' statements. As revealed by the record, with the exception of the water aspects of the case, the four main opposing parties were united in opposing the application. How examination of each other's witnesses could be termed "cross-examination" under the circumstances is difficult to understand. In fact, any such interrogation **318 would really have amounted to nothing more than direct or redirect examination because the sole aim and purpose would have been to bolster and support the testimony already produced on the direct examination.

The District Court took the position that section 82-4210(3), R.C.M. 1947, now section 2-4-612(5) MCA, imposes a mandatory right in all parties to conduct "cross-examination" of all witnesses including the right to "cross-examine" the author of all agency documents. We find that to construe the statute so literally, without considering in the least other statutes and case law, is to ignore the entire scheme of the MAPA.

The District Court ordered the Board upon rehearing to provide opponents an opportunity to cross-examine agency *538 witnesses. This would involve approximately 30 witnesses who are scattered throughout the United States and the world. The cost involved, not only in money but also in time, would be staggering. We have a serious doubt, as a practical matter, if the main hearings are any criteria (and we believe they are), that the procedure could be accomplished, if at all, in less than six months or more.

Judge Friendly in *National Nutritional*, supra, points out that the reviewing court should not remand when the outcome would clearly be only a repetition of the original decision. There must be, as he states in the main text, "a significant probability" that the proceeding for which the case was remanded would cause the agency to alter its original decision, or a need to create a better record for appellate review of the findings. 504 F.2d at 798.

We find that no Substantial rights of respondents/cross-appellants have been prejudiced. The hearings examiner's decision or procedure was not erroneous or in any manner a violation of constitutional or

statutory provisions.

We do, however, wish to emphasize that this case is unique in both its length and complexity. While we have held that the hearings examiner did not err on this cross-examination issue, the procedures followed in the hearings should not be used as a model for future hearings before various state boards and agencies. We suggest, absent general procedural rules for the conduct of hearings adopted by a board or agency pursuant to the provisions of the MAPA, that prior to any hearing, a state board or agency should issue an order setting the procedural guidelines to be followed rather than delegating the entire responsibility therefor to the hearings examiner.

In summary we hold that the District Court's opinion should be affirmed on Issue Nos. 5, 7, 8, 9, 10, 11 and 12, reversed on Issues 1 and 2, with Issues 3, 4 and 6 being rendered moot.

The opinion of the District Court is affirmed and reversed to the extent set forth herein. The decision of the Board of Natural Resources to grant to appellants/cross-respondents a certificate of environmental compatibility and public need is hereby suspended *539 pending compliance with this order. This cause is hereby remanded to the Board of Natural Resources to cure certain procedural defects found by the District Court and concurred in by us with the order and direction that the Board of Natural Resources do the following:

(1) Make adequate findings of fact and conclusions of law with regard to:

(a) whether using Rosebud coal and not McKay coal represents minimum environmental impact, and the reasons therefor, and

(b) whether mine-mouth generation as opposed to load-center generation represents minimum environmental impact and the reasons therefor, including considerations as to relative energy efficiency and the relative impact of electrical transmission versus coal haulage, as required by section 70-810(1) (c), R.C.M.1947, now section 75-20-301(2)(c) MCA.

(2) Make adequate findings of fact and conclusions of law with regard to:

(a) clearly designating a transmission line corridor;

**319 (b) why the Board of Natural Resources prefers the chosen corridor to the alternative corridors; and

(c) what state and local legal requirements must be met, and whether in fact they have been met as required by section 70-810(1)(f), R.C.M.1947, now section 75-20-201(2)(f) MCA.

Such findings of fact and conclusions of law shall be propounded and entered by the Board of Natural Resources, served on the parties hereto, and returned to us for review and approval within 90 days from the date hereof.

L. C. GULBRANDSON,¹ B. W. THOMAS² and H. WILLIAM CODER,³ District Judges, concur.

SHEA, J., concurs in part and dissents in part.

SHEA, Justice, dissenting:

*540 There are many factors concerning this opinion which bother me deeply, but because of the speed with which it was sent down I have not had time to formulate a dissent. For this reason I must confine my comments at this point to the final paragraph of the majority opinion for which there is no foundation in law. The paragraph states:

“Such findings of fact and conclusions of law shall be propounded and entered by the Board of Natural Resources, served on the parties hereto, and returned to us for review and approval within 90 days from the date hereof.”

Where in the law, may I ask, does it give this Court the power to exercise continuing jurisdiction over governmental agencies once we have remanded the case to them for further determinations? And where in the law do we have the authority without an appropriate petition, after the governmental agency has acted, to completely bypass the Administrative Procedure Act and the District Court, in the event one or more of the aggrieved parties would have chosen to file a petition for review in the District Court?

There is nothing in the Administrative Procedure Act which authorizes this Court to tell any agency how soon it may act after a remand from this Court. There is nothing that I know of in any of the remaining statutes or case law of this State to justify such a result. Once this Court has

acted on an appeal and remanded a case, either to a District Court, or to an administrative agency, we lose jurisdiction. We cannot sit here like a king with strings still attached to the parties and directing them like puppets to comply with our orders. Here we have told the agency to act and get the results back to us within ninety days. This is judicial usurpation at its worst.

All Citations

181 Mont. 500, 594 P.2d 297

Footnotes

1 Sitting for HASWELL, C. J.

2 Sitting for DALY, J.

3 Sitting for SHEEHY, J.

229 Mont. 84
Supreme Court of Montana.

John G. BOWEN, Claimant and
Appellant,
v.
SUPER VALU STORES, INC., Employer,
and
Liberty Mutual Insurance Company,
Defendant and Respondent.

No. 86-253.

Submitted on Briefs Sept. 25, 1986.

Decided Nov. 5, 1987.

Synopsis

Workers' compensation claimant appealed and carrier cross-appealed from order of the Workers' Compensation Court, Timothy Reardon, J., denying reconsideration of orders vacating trial date for further pretrial discovery of medical information and denying dismissal of action. The Supreme Court, Sheehy, J., held that: (1) rules adopted by the Workers' Compensation Division have no application to proceed before Workers' Compensation Court, rather, administrative rules adopted by the Court apply; (2) demand in letter from attorney for carrier to claimant's medical providers for entire file regarding claimant without regard to relevance was overly broad; and (3) claimant waives any privilege of confidentiality in health care information which is relevant to subject matter involved in claim.

Reversed and remanded.

Attorneys and Law Firms

*85 **331 Lawrence A. Anderson, Great Falls, for claimant and appellant.

Larry W. Jones, Garlington, Lohn & Robinson, Missoula, for defendant and respondent.

Opinion

SHEEHY, Justice.

This case concerns a dispute between the employer's insurer and the injured employee over the proper procedure to be pursued by the insurer to obtain pretrial discovery of medical information regarding the compensability of the injured employees claim.

We determine that such pretrial discovery of medical information is governed by applicable statutes and the Rules of the Workers' Compensation Court as herein set forth. We also determine that an injured employee, to sustain a right to Workers' Compensation benefits, must waive any privilege or claim of confidentiality as to medical information relating to the compensability of his claim.

On February 19, 1986, John G. Bowen, through his counsel, filed a petition in the Workers' Compensation Court claiming that he had suffered an industrial injury on January 17, 1985, in the course of his employment with Super Valu Stores, Inc. in Great Falls, Montana; that he had become totally disabled, and that he needed a lump sum award to assist him in retraining and rehabilitation. On *86 February 25, 1986, the Workers' Compensation Court set the case for trial during the week of June 9, 1986, **332 and the pretrial conference on April 21, 1986.

Bowen's claim is based upon [kidney failure](#) which he alleges came from working under extreme mental pressure which caused him a great amount of stress which in turn caused uncontrolled [hypertension](#) resulting in the [renal failure](#).

On March 20, 1986, the attorney for Liberty Mutual wrote to three hospitals, nine doctors, two clinics, and one transplant center similar letters which included the following paragraphs:

I am the attorney representing the workers' compensation insurer carrier against whom John Bowen has filed the enclosed claim for Workers' Compensation benefits. Please note that the form, as indicated in the lower left hand corner, is also an authorization for release of medical records.

Please copy your entire file on Mr. Bowen and send it to me by placing it in the mail no later than April 1, 1986. Delete absolutely no documents from your original file before making the copy of the file I have requested. Included with the copy I have requested any invoice for copying costs.

In the letters which were written to the doctors, the

foregoing paragraphs were repeated, but there was also added in the letters to the doctors the following:

Please answer the following questions, based on your examination, testing and/or treatment of Mr. Bowen so that I and my client can better understand the exact nature of Mr. Bowen's medical condition and associated claim for workers' compensation benefits. Include with your answers any bill for professional services provided in answering these questions:

1. What is the most current diagnosis of medical condition or conditions for which you have treated or examined Mr. Bowen?
2. Is your diagnosis based on a reasonable degree of medical certainty, i.e., more probable than not?
3. What in your opinion is the cause of the condition or conditions you have diagnosed?
4. If in your opinion the claimant's work was in any way causally related to any condition you have diagnosed, then please state (1) the work you believe the claimant was doing that is causally related to a condition you have diagnosed and (2) what that causal relation is.
5. Has each condition reached a point where it will not improve *87 even though Mr. Bowen may continue to have some symptoms resulting from the condition, including pain?
6. What are the symptoms (i.e., subjective complaints) and signs (i.e., objective findings) on which you relied for diagnosing each condition you have diagnosed?

Copies of each of the foregoing noted letters were sent to the attorney for the claimant. On March 21, 1986, counsel for the claimant wrote to each of the medical providers a letter in which the key paragraph follows:

You may have recently received correspondence from opposing counsel requesting medical records and responses to various questions. It is our position that Mr. Bowen does not give you authority to respond to that request. The Montana Rules of Civil Procedure and the Montana Supreme Court prescribe the rules by which medical information is disseminated in litigation. The Rules and the Montana Supreme Court do not authorize the procedure undertaken by opposing counsel. *See, Jaap v. District Court, 191 Mont. 319, 623 P.2d 1389, 38 St.Rep. 280 (1981)*. We have accordingly advised opposing counsel that we object to his correspondence to you.

Also on March 21, 1986, Bowen's counsel wrote to the attorney for Liberty Mutual, advising that on March 20, 1986, Bowen had undergone a [kidney transplant](#), and further advising that he had instructed the treating physicians and health care providers not to respond to the correspondence of the attorney for Liberty Mutual.

Meanwhile, on March 21, 1986, Liberty Mutual filed interrogatories and requests **333 for production of documents. On April 1, 1986, Liberty Mutual filed a motion to vacate the trial setting and a motion to dismiss claimant's petition on the ground that the court lacked jurisdiction because Bowen was asserting his physician-patient privilege.

At least one doctor and one clinic advised Liberty Mutual after receiving the letter from the claimant's attorney that they would not answer questions concerning Bowen's condition without specific written direction from Bowen.

On April 22, 1986, the claims examiner for the Workers' Compensation Court entered an order vacating the trial setting and ruling that the matter would not appear on the court calendar for trial until the court received confirmation that every medical provider contacted by Bowen's counsel had received written instructions to conform to the rulings of the Workers' Compensation Court and that *88 such medical records had been provided to defendant's counsel in sufficient time to prepare for trial. In the same order the hearings examiner denied Liberty Mutual's motion to dismiss.

Bowen moved for reconsideration of the hearings examiner's order. The Workers' Compensation judge, after receiving briefs, denied reconsideration, thus keeping in effect both the examiner's orders vacating the trial date and denying dismissal of the action. This appeal followed from both sides.

Neither side has discussed except incidentally whether this Court has jurisdiction to hear this appeal. [Section 39-71-2904, MCA](#), grants a right of appeal from a "final" decision of the Workers' Compensation judge to the Montana Supreme Court. An order refusing to dismiss a cause is not ordinarily appealable. The order vacating the trial date is not on its face a final order but the effect of the order is: if we were to deny jurisdiction, Bowen would in effect give up his right of appeal in order to get his case tried. When the effect of the order is to destroy the appellant's right of appeal if he complies, the order, even though interlocutory, should be appealable. "... finality of an ... order depends upon the nature of the order rather than its chronology ..." *Northern Plains Resource Council v. Bd. of Natural Resources (1979)*, 181 Mont. 500, 515,

594 P.2d 297, 306.

The critical issue in this appeal arises from the procedure adopted by Liberty Mutual to obtain medical information, and the reaction of Bowen asserting a right of privilege against the procedure. Liberty Mutual claims that when Bowen asserted the physician-patient privilege his action prevented the Workers' Compensation Court from determining his physical condition before and after the industrial accident and that this has the effect of removing his claim from the jurisdiction of the Workers' Compensation Court. Bowen, on the other hand, contends that discovery procedures in the Workers' Compensation Court are controlled by the Montana Rules of Civil Procedure, particularly Rule 35, and that under *Jaap v. District Court* (Mont.1981), 623 P.2d 1389, 1390, 38 St.Rep. 280, private interviews between counsel for one party and possible adversary witnesses may not be granted.

Both parties, it appears, have overlooked the applicable provisions.

First, we examine the basis for the Workers' Compensation Court's decision. It is found in the order of the hearings examiner, which the Workers' Compensation Court refused to reconsider, that "defendant's motion to vacate the trial date is GRANTED on the grounds *89 that the claimant has refused to comply with the free exchange of medical information required under Rule 24.29.1404(3) A.R.M...."

The portion of Rule 24.29.1404, A.R.M. relied on by the hearings examiner follows:

- (3) The rule of privileged communication is waived by the injured worker seeking benefits under the Workers' Compensation or Occupational Disease Acts.

Overlooked in the order was the fact that Rule 24.29.1404 is a rule promulgated by the Workers' Compensation Division and not by the Workers' Compensation Court. The Division and the Court are separate **334 entities. Neither has control of the other, and particularly their rules are separate and stem from different sources of authority.

Section 2-15-1014, MCA, establishes the office of the Workers' Compensation judge. It provides in part:

- (1) There is the office of Workers' Compensation Judge. The office is allocated to the Department of Administration for administrative purposes only as prescribed in 2-15-121.

Under our law, when an agency is allocated to a department for administrative purposes the agency nevertheless acts independently of the department. Section 2-15-121, MCA, states in part:

- (1) An agency allocated to a department for administrative purposes only in this chapter shall:

- (a) exercise its quasi-judicial, quasi-legislative, licensing and policy making functions independently of the department and without approval or control of the department;

- (2) The department to which an agency is allocated for administrative purposes only in this title shall:

- (e) Print and disseminate for the agency any required notices, rules, or orders adopted, amended, or repealed by the agency. (Emphasis added.)

It is clear from § 2-15-121, MCA, that the Workers' Compensation judge as an agency allocated to the Department of Administration for administrative purposes, nonetheless is completely independent of the Department in the exercise of its quasi-judicial functions. The rules adopted by the Department, in this case the Division, have no application to proceedings before the Workers' Compensation Court. We must look to another source for rules to be applied in that court. That source is found in *90 § 39-71-2903, MCA and subsequent administrative rules adopted by the Workers' Compensation Court.

Section 39-71-2903, MCA, provides:

All proceedings and hearings before the workers' compensation judge shall be in accordance with the appropriate provisions of the Montana Administrative Procedure Act. The workers' compensation judge is bound by common law and statutory rules of evidence.

As an administrative agency, the Workers' Compensation Court is given the authority to adopt rules of practice. In § 2-4-201, MCA, we find:

In addition to other rulemaking requirements imposed by law, each agency shall:

(2) *Adopt rules of practice*, not inconsistent with statutory provisions, setting forth the nature and requirements of all formal and informal procedures available, including a description of all forms and instructions used by the agency. (Emphasis added.)

Pursuant to the power of law vested in the Workers' Compensation judge in § 2-4-201, MCA, the Workers' Compensation Court has adopted rules of practice and procedures in matters handled by it. They will be found, beginning at page 245, in the Montana Rules of Court (1987 Desk Copy) published by West Publishing Company. The Workers' Compensation Court has adopted rules of pretrial discovery. They are found in Rule 2.52.322, *Depositions*; Rule 2.52.323, *Interrogatories*; Rules 2.52.324, *Motions to Produce*; Rule 2.52.325, *Limiting Discovery*; and Rule 2.52.326, *Sanctions for Failure to Make Discovery*. The only provision of the Procedural Rules of the Workers' Compensation Court relating specifically to medical records is Rule 2.52.317 which follows:

(1) Prior to any scheduled trial, the parties shall exchange all medical records based upon examination of the claimant. Failure to exchange such materials on a timely basis before trial shall preclude its use at trial. Medical records will only be accepted by the court as evidence if stipulated to by the parties or by the laying of proper foundation.

Aside from the duties of the parties to exchange medical records based upon the **335 examination of the claimant found in Rule 2.52.317 of the Procedural Rules of the Workers' Compensation Court, we find no statement in any of the Rules that a Workers' Compensation claimant by making a claim thereby waives the physician-patient *91 privilege. We turn, therefore, to the statutes adopted by the legislature to determine what they provide on this subject.

The physician-patient privilege itself is found in § 26-1-805, MCA, which provides:

Except as provided in Rule 35, Montana Rules of Civil Procedure, a licensed physician, surgeon, or dentist cannot, without the consent of his patient, be examined in a civil action as to any information acquired in attending the patient which was necessary to enable him to prescribe or act for the patient.

There is no direct statement in the Workers' Compensation Act that a claimant waives the physician-patient privilege. Waiver may be implied,

however, from certain provisions of the statutes which follow:

[Section 39-71-604](#). (1) Where a worker is entitled to benefits under this chapter, the worker shall file with the insurer or the division all reasonable information needed by the insurer to determine compensability. It is the duty of the workers' attending physician to lend all necessary assistance in making application for compensation and such proof of other matters as may be required by the rules of the division without charge to the worker. The filing of forms or other documentation by the attending physician does not constitute a claim for compensation.

[Section 39-71-605](#). (1)(a) Whenever in case of injury the right to compensation under this chapter would exist in favor of any employee, he shall, upon the written request of the insurer submit from time to time to examination by a physician or panel of physicians, who shall be provided and paid by such insurer, and shall likewise submit to examination from time to time by any physician or panel of physicians selected by the division.

(b) ... The employee shall be entitled to have a physician present at any such examination... any physician or panel of physicians employed by the insurer or the division who shall make or be present at any such examination may be required to testify as to the results thereof.

(There is a further provision for examination by a panel of physicians in [§ 39-71-605\(2\), MCA](#).)

At the time that this matter arose in the Workers' Compensation Court, the provision of §§ 50-16-301 to -314 inclusive, were in force and effect. Those statutes have since been repealed by the legislature (Ch. 632, Laws of Montana (1987)) and the Uniform Health Care Information Act was enacted in their place. Sections 50-16-501, *92 et seq. While it could be argued that under former [§ 50-16-311\(e\), MCA](#), an employer or his Workers' Compensation insurer could receive reasonably necessary information from a health care provider, it was equally clear that under former [§ 50-16-314, MCA](#), confidential health information was not subject to compulsory legal process in any type of proceeding, including any pretrial or preliminary proceedings unless required by [Rule 35, Montana Rules of Civil Procedure](#), or otherwise ordered by a court.

Even though the statutes referred to have been repealed, it is now necessary for us to examine the situation under the Uniform Health Care Information Act, since its provisions

will apply to future proceedings in this cause in the Workers' Compensation Court and to other proceedings there.

The pertinent sections of the Uniform Health Care Information Act are:

50-16-525. *Disclosure by health care provider.* (1) Except as authorized in 50-16-529 and 50-16-530 or as otherwise specifically provided by law or the Montana Rules of Civil Procedure, a health care provider, an individual who assists a health care provider in the delivery of health care, or an agent or employee of a health care provider may not disclose health care information about a patient to any other person without the patient's ****336** written authorization. A disclosure made under a patient's written authorization must conform to the authorization.

50-16-535. *When health care information available by compulsory process.* Health care information may not be disclosed by a health care provider pursuant to compulsory legal process or discovery in any judicial, legislative, or administrative proceeding unless:

(3) The patient is a party to the proceeding and has placed his physical or mental condition in issue; ...

50-16-536. *Method of compulsory process.* ...

(2) Service of compulsory process or discovery requests upon a health care provider must be accompanied by a written certification, signed by the person seeking to obtain health care information or his authorized representative, identifying at least one subsection in § 50-16-535 under which compulsory process or discovery is being sought ... a person may sign the certification only if the person reasonably believes that the subsection of 50-16-535 identified in ***93** the certification provides an appropriate basis for the use of discovery or compulsory process ...

What the legislature has given under § 50-16-536(2), MCA, it has apparently taken away under subdivision 3:

(3) Production of health care information under 50-16-535 and this section does not in itself constitute a waiver of any privilege, objection, or defense existing

under other law or rule of evidence or procedure.

It is our duty, from the morass of statutes and rules foregoing, to distill such a construction of the statutes and rules as to give effect to all. Section 1-2-101, MCA.

The statute most clearly authorizing Bowen's health care providers to give confidential health information respecting him to Liberty Mutual's attorney following his letter to them, without Bowen's consent, is § 50-16-535(3), MCA. That information, however, under the terms of that statute and § 50-16-536, MCA, can be obtained only by compulsory process or discovery.

Clearly, the March 20, 1986, letter from the attorney for Liberty Mutual to Bowen's medical providers was too broad. The letter demanded from each provider not just the information relating to the compensability of Bowen's claim, but copies of the "entire file," without regard to relevance. The procedure adopted by Liberty Mutual's attorney for pretrial discovery is not found in any of the rules of practice of the Workers' Compensation Court or other applicable statutes. The best, shortest and cheapest procedure for pretrial medical discovery is for the respective parties to cooperate in the procurement and exchange of relevant medical information relating to compensability. If such cooperation is not possible, then, in Workers' Compensation cases, the rules of pretrial discovery adopted by the Workers' Compensation Court come into play. Under Rule 2.52.323, interrogatories may be served upon the adverse party (not upon a health provider who is not an adverse party). Likewise, under Rule 2.52.324, motions to produce may be served upon the "adverse party." With respect to persons not a party to the action who may also be health care providers, the procedure to be followed is to take depositions upon oral examination. Rule 2.52.322. In this case, subpoenas addressed to the nonparty may be issued under Rule 2.52.331, and materials in the possession of the nonparty can be reached through a subpoena duces tecum. Rule 2.52.322(2).

***94** At all times, the Workers' Compensation Court may limit discovery as provided in Rule 2.52.325.

As we construe the Workers' Compensation statutes, the statutes relating to the patient-physician privilege, the provisions of former §§ 50-16-311 and 50-16-314, and the new Uniform Health Care Information Act, we determine that Liberty Mutual is entitled to confidential health care information from the medical providers relating to the compensability to Bowen's claim. When Bowen's attorney objected and ****337** raised the privilege, he was acting in conformance with former § 50-16-314,

MCA, and new § 50–16–525, MCA.

Under § 39–71–604, MCA, Bowen in this case has a duty to file with the insurer and with the court all reasonable information needed by the insurer and the court to determine compensability. Bowen has a duty therefore through the use of depositions, or medical reports obtained from such health care providers to carry his burden of proof of compensability. Such examination reports which relate to compensability as are in Bowen's possession, or in his attorney's possession are to be freely exchanged with the insurer and his counsel under Rule 2.52.317 of the Procedural Rules of the Workers' Compensation Court. Bowen is likewise entitled to an exchange of reports from Liberty Mutual.

Liberty Mutual has the right to require an examination of Bowen by its own attending physician or physicians under § 39–71–605, MCA.

Rules adopted by the Workers' Compensation *Division* as distinguished from the Workers' Compensation *Court* have no application in the Workers' Compensation Court. Since discovery may be necessary beyond the exchange of exhibits by the parties, it should be governed by the rules of practice adopted by the Workers' Compensation Court, to which rules we have heretofore adverted. Anything in the declaratory ruling filed February 13, 1985 by the Workers' Compensation Court in docket No. 8412—728, entitled *Parker v. Central Montana Hospital and Nursing Home* (unpublished) inconsistent with this opinion is overruled.

In order to clarify the statutes and rules, we hold that a claimant for Workers' Compensation benefits waives any privilege of confidentiality in health care information which is relevant to the subject matter involved in his claim. If as in this case, a Workers' Compensation

benefits claimant exercises his right under §§ 26–1–805 or 50–16–525, MCA, to prevent any medical witness from *95 disclosing confidential health information, and subsequently application is made by the adverse party to the Workers' Compensation Court for an order authorizing such discovery, the Workers' Compensation Court should authorize such discovery as is relevant to the subject involved in the pending action. It should not be a ground for an objection that the information sought will be inadmissible at the trial if the information sought appears reasonably calculated to lead to the discovery of admissible evidence, but the information obtained must be reasonably necessary to determine compensability. The protection for the claimant in such case from too broad discovery lies in the provision of Rule 2.52.317 and Rule 2.52.326 of the Procedural Rules of the Workers' Compensation Court and in our decision in *Hert v. J.J. Newberry* (1978), 179 Mont. 160, 587 P.2d 11.

We find no merit in the cross appeal to the effect that the Workers' Compensation Court has no jurisdiction of this cause.

Accordingly, we reverse the order of the Workers' Compensation Court that no further trial date will be set in this case, and remand for further proceedings in accordance with this Opinion. Costs to Bowen.

TURNAGE, C.J., and HARRISON, WEBER, HUNT, GULBRANDSON and McDONOUGH, JJ., concur.

All Citations

229 Mont. 84, 745 P.2d 330

 KeyCite Yellow Flag
Distinguished by [Montana Democratic Party v. Jacobsen](#), Mont., March 27, 2024

340 Mont. 309
Supreme Court of Montana.

QWEST CORPORATION, Petitioner and
Appellee,
v.
MONTANA DEPARTMENT OF PUBLIC
SERVICE REGULATION, Montana
Public Service Commission, Respondent
and Appellant.

No. 05–035
|
Submitted on Briefs Dec. 29, 2005.
|
Decided Dec. 19, 2007.

Synopsis

Background: Telecommunications utility petitioned for review of orders of the Public Service Commission (PSC) requiring utility to submit information for a PSC investigation of utility's rates. The First Judicial District Court, Lewis and Clark County, [Thomas C. Honzel](#), P.J., vacated the PSC orders, and PSC appealed.

Holdings: The Supreme Court, [James C. Nelson](#), J., held that:

PSC action was not ripe for review by trial court;

PSC investigation was not subject to review under statute governing immediate review of preliminary agency decisions; and

PSC could obtain information in its investigation by requiring utility to provide information in a form that would meet minimum filing requirements for filing a rate case.

Reversed.

Attorneys and Law Firms

****498** For Appellant: [Monica Tranel](#), [Robin A. McHugh](#), Special Assistant Attorneys General, Helena, Montana.

For Appellee: [John Alke](#), Hughes, Kellner, Sullivan & Alke, Helena, Montana.

Opinion

Justice [JAMES C. NELSON](#) delivered the Opinion of the Court.

***310** ¶ 1 Qwest Corporation (Qwest) petitioned the District Court for the First Judicial District, Lewis and Clark County, to review two orders issued by the Montana Public Service Commission (the PSC) requiring Qwest to file information substantiating the accuracy of its rates. The District Court found in Qwest's favor, vacated the PSC's orders and remanded the matter to the PSC. The PSC appeals. We reverse.

¶ 2 The PSC presents the following issues on appeal:

¶ 3 1. Whether the PSC's actions were ripe for review by the District ***311** Court.

¶ 4 2. Whether the investigation undertaken by the PSC in this case was subject to review under [§ 2–4–701, MCA](#).

¶ 5 3. Whether the PSC may investigate utilities in any manner necessary to effectuate its statutory duties.

¶ 6 4. Whether the PSC's investigation of Qwest violated the PSC's administrative rules.

¶ 7 Because we reverse the decision of the District Court and hold that this case is not ripe for judicial review, we do not address Issue 4 as it is now moot.

****499 Factual and Procedural Background**

¶ 8 Qwest is a regulated public utility pursuant to [§ 69–3–101, MCA](#). It offers regulated telecommunications services as defined at [§ 69–3–803, MCA](#). The PSC is the state agency that administers Montana laws governing rates and services of public utilities operating in Montana, such as Qwest. Pursuant to [§ 69–3–203, MCA](#), Qwest must file an annual report with the PSC containing information about Qwest's annual revenues and earnings.

¶ 9 On March 14, 2003, PSC issued a “Notice of Investigation” to determine whether the rates charged by Qwest are “reasonable and just” pursuant to § 69–3–201, MCA. The PSC indicated in the notice that revenues earned by Qwest since 2001 may be in excess of its authorized rate of return. Qwest did not respond to the notice. The PSC issued its “Second Notice of Investigation and Request for Information” on April 24, 2003, directing Qwest to state whether its 2001 annual report contained accurate information, and if it did not, directing Qwest to demonstrate why by providing information in a form that would meet the minimum filing requirements contained in Admin. R.M. 38.5.2803 through 38.5.2820.

¶ 10 Qwest responded to the second notice on May 22, 2003, stating that it could not represent to the PSC that the information contained in its 2001 Annual Report was accurate because Qwest was currently undergoing an external audit. Qwest pointed out that the PSC “seems to seek a specific correlation between [the information in its annual report] and the detailed cost of service information which a party seeking a rate change would file in compliance with the [PSC’s] minimum filing standards.” Qwest also pointed out that using 2001 financial data to prepare a rate case filing for 2003 violated the PSC’s own administrative rules establishing rate case filing requirements.

¶ 11 On June 16, 2003, the PSC issued its Order No. 6493 directing *312 Qwest to submit the information requested for the PSC’s investigation. In response, Qwest filed a Motion for Reconsideration stating that the PSC’s order was unlawful because Qwest’s current rates were established by previous orders of the PSC and were, therefore, prima facie lawful; because the PSC had the burden to prove that Qwest’s rates were unjust and unreasonable and the investigation attempted to shift that burden to Qwest; and because ordering Qwest to use 2001 financial data in a 2003 rate case violated the PSC’s own administrative rules. The PSC denied Qwest’s Motion for Reconsideration in its Order No. 6493a issued July 10, 2003.

¶ 12 On August 6, 2003, Qwest petitioned for judicial review under § 2–4–701, MCA (Cause No. CDV 2003–464). In its petition, Qwest asserted that its current rates had previously been approved by the PSC and that the PSC’s orders unlawfully required Qwest to file a rate case reproving the reasonableness of its existing rates. Qwest also asserted that the PSC’s investigation was an unlawful attempt to shift the burden of proof in the rate case to Qwest. That same day, the PSC filed a complaint in the District Court seeking to compel Qwest’s

compliance and requesting that the court assess civil fines and penalties against Qwest for failing to comply with the PSC’s orders (Cause No. BDV 2003–465).

¶ 13 The PSC moved to consolidate the actions and Qwest moved to stay BDV 2003–465 (the PSC’s complaint proceeding) pending the outcome of CDV 2003–464 (the proceeding on Qwest’s petition for judicial review). The District Court denied the PSC’s motion to consolidate and granted Qwest’s motion for a stay of the PSC’s complaint proceeding pending resolution of Qwest’s petition for judicial review.

¶ 14 In a Memorandum and Order issued October 14, 2004, the District Court determined that the issues presented were ripe for review. The court also determined that the PSC’s orders unlawfully imposed a rate case filing requirement upon Qwest in violation of Montana statute and the PSC’s own administrative rules. The District Court remanded to the PSC and the PSC appeals.

Standard of Review

¶ 15 When reviewing an agency decision, we apply the same standard as did the district court. **500 *Montana Power Co. v. Public Service Com’n*, 2001 MT 102, ¶ 18, 305 Mont. 260, ¶ 18, 26 P.3d 91, ¶ 18 (citing *Synek v. State Compensation Ins. Fund*, 272 Mont. 246, 250, 900 P.2d 884, 886 (1995)). Under § 2–4–704(2), MCA, a reviewing court:

*313 may not substitute its judgment for that of the agency as to the weight of the evidence on questions of fact. The court may affirm the decision of the agency or remand the case for further proceedings. The court may reverse or modify the decision if substantial rights of the appellant have been prejudiced because:

- (a) the administrative findings, inferences, conclusions, or decisions are:
 - (i) in violation of constitutional or statutory provisions;
 - (ii) in excess of the statutory authority of the agency;
 - (iii) made upon unlawful procedure;
 - (iv) affected by other error of law;
 - (v) clearly erroneous in view of the reliable, probative, and substantial evidence on the whole record;

(vi) arbitrary or capricious or characterized by abuse of discretion or clearly unwarranted exercise of discretion....

In addition, questions of law are reviewed to determine if the agency's interpretation of the law is correct. *Ruby Mountain Trust v. DOR*, 2000 MT 166, ¶ 13, 300 Mont. 297, ¶ 13, 3 P.3d 654, ¶ 13 (citing *Steer, Inc. v. Department of Revenue*, 245 Mont. 470, 474, 803 P.2d 601, 603 (1990)).

Issue 1.

¶ 16 *Whether the PSC's actions were ripe for review by the District Court.*

¶ 17 The PSC asserts that the District Court adjudicated issues that the PSC neither decided at the agency level nor argued to the District Court. Hence, the PSC argues that the issues adjudicated by the court were not ripe for review.

¶ 18 Qwest argues on the other hand that the PSC's orders are orders of compulsion, issued in a contested case proceeding which the District Court determined violated Montana law. Qwest asserts that the legal issues raised by the orders are not hypothetical or abstract as the PSC has already filed an original action in the District Court against Qwest seeking to enforce the challenged orders through mandatory injunction and the imposition of civil fines. Consequently, Qwest argues that because it has no other adequate remedy, the PSC's orders are ripe for review.

¶ 19 The ripeness doctrine is "a principle of law, grounded in the federal constitution as well as in judicial prudence, that requires an actual, present controversy, and therefore a court will not act when the legal issue raised is only hypothetical or the existence of a controversy *314 merely speculative." *Montana Power Co.*, ¶ 32 (citing *Pearson v. Virginia City Ranches Ass'n*, 2000 MT 12, ¶ 30, 298 Mont. 52, ¶ 30, 993 P.2d 688, ¶ 30; *Portman v. County of Santa Clara*, 995 F.2d 898, 902-03 (9th Cir.1993)). "[T]he ripeness requirement is designed 'to prevent the courts, through avoidance of premature adjudication, from entangling themselves in abstract disagreements over administrative policies, and also to protect the agencies from judicial interference until an administrative decision has been formalized and its effects felt in a concrete way by the challenging parties.'" *Ohio Forestry Association v. Sierra Club*, 523 U.S. 726, 732-33, 118 S.Ct. 1665, 1670, 140 L.Ed.2d 921 (1998) (quoting *Abbott Laboratories v. Gardner*, 387 U.S. 136, 148-49, 87 S.Ct. 1507, 1515, 18 L.Ed.2d 681 (1967)).

¶ 20 Furthermore, in deciding whether an agency's decision is ripe for judicial review, it is necessary to examine "both the 'fitness of the issues for judicial decision' and the 'hardship to the parties of withholding court consideration.'" *Ohio Forestry*, 523 U.S. at 733, 118 S.Ct. at 1670. Thus, a reviewing court "must consider: (1) whether delayed review would cause hardship to the plaintiffs; (2) whether judicial intervention would inappropriately interfere with further administrative action; and (3) whether the courts would benefit from further factual development of the issues presented." *Ohio Forestry*, 523 U.S. at 733, 118 S.Ct. at 1670.

¶ 21 Applying these three factors from *Ohio Forestry* to the present case, we conclude that the PSC's actions are not ripe **501 for review. First, Qwest would not suffer any hardship if judicial review is not taken at this juncture. Contrary to Qwest's assertions, the PSC did not demand that a rate case be initiated. The PSC was simply seeking information as to the accuracy of Qwest's 2001 annual report. Qwest is obligated to provide the information requested and nothing more. What the PSC might do with the information requested from Qwest is not an appropriate matter for review. An agency's decision is not ripe for review if no legal consequences, rights or duties flow from an agency's actions because those actions are merely a step that could lead to a recommended change of the status quo. *Ecology Center v. United States Forest Service*, 192 F.3d 922, 925 (9th Cir.1999); see also *Western Seafood Co. v. City of Freeport*, 346 F.Supp.2d 892, 902-03 (S.D.Tex.2004) (holding that administrative agency's application for a permit to develop a marina not ripe for review because claim of harm was only speculative that permit might be used in the future to accomplish an unlawful purpose).

¶ 22 Moreover, judicial review of a preliminary step that has no *315 binding legal consequences is not available even where the initiation of proceedings is serious and may have severe consequences. *Ewing v. Mytinger & Casselberry, Inc.*, 339 U.S. 594, 600, 70 S.Ct. 870, 873, 94 L.Ed. 1088 (1950). In order to be final and thereby subject to review, agency action must mark "the consummation" of the agency's decision making process. *Whitman v. American Trucking Associations*, 531 U.S. 457, 478, 121 S.Ct. 903, 915, 149 L.Ed.2d 1 (2001) (citing *Bennett v. Spear*, 520 U.S. 154, 177-78, 117 S.Ct. 1154, 1168, 137 L.Ed.2d 281 (1997)).

¶ 23 In the present case, there are no irremediable adverse consequences that flow from the PSC's investigation, thus we conclude that delayed judicial review will not cause a

hardship to Qwest.

¶ 24 Second, judicial intervention at this juncture would inappropriately interfere with further administrative action by the PSC. One of the basic purposes of the PSC is to investigate public utilities, however, an investigation is not a final agency action. While the PSC could do several things with the information it requested, including negotiating with Qwest to reach a mutually agreeable solution; initiating a contested case proceeding; or simply doing nothing, it is not appropriate for courts to speculate on future actions or to interfere with the process of obtaining the information. When premature review would deny an agency the opportunity to apply its expertise, courts should decline review. *Ohio Forestry*, 523 U.S. at 735, 118 S.Ct. at 1671. Thus, we conclude that judicial interference at this investigatory stage would frustrate the PSC's ability to review the information and to make decisions about the best possible course of action.

¶ 25 Third, there is no specific factual record before this Court. The only action taken by the PSC was an initiation of an investigation, yet the District Court reviewed issues on which the PSC had not rendered any decision. Judicial appraisal of agency action stands on surer footing when it takes place in the context of a specific factual record. *Toilet Goods Association v. Gardner*, 387 U.S. 158, 164, 87 S.Ct. 1520, 1524, 18 L.Ed.2d 697 (1967). Moreover, depending on the PSC's actions, review in this case may turn out to be unnecessary. Certainly both the District Court and this Court would benefit from further factual development of the issues presented.

¶ 26 Accordingly, we hold that the PSC's actions were not ripe for review by the District Court.

Issue 2.

¶ 27 *Whether the investigation undertaken by the PSC in this case was* *316 *subject to review under § 2–4–701, MCA.*

¶ 28 Section 2–4–701, MCA, provides:

Immediate review of agency action. A preliminary, procedural, or intermediate agency action or ruling is immediately reviewable if review of the final agency decision would not provide an adequate remedy.

¶ 29 The PSC argues on appeal that the District Court's review of this action under § 2–4–701, MCA, was erroneous because the PSC's request for information was

*502 not necessarily a prelude to further action by the PSC. In addition, the PSC contends that, even if a final agency action were pending, the District Court erred by not making any findings that review of a final decision would not provide Qwest with an adequate remedy.

¶ 30 Review under § 2–4–701, MCA, is available when a determination is made that a final agency decision will not provide an adequate remedy justifying immediate review. *Shoemaker v. Denke*, 2004 MT 11, ¶ 30, 319 Mont. 238, ¶ 30, 84 P.3d 4, ¶ 30 (citing *Gilpin v. State*, 249 Mont. 37, 39, 812 P.2d 1265, 1266–67 (1991)). When an agency has not adjudicated the issues raised on appeal, there is no final agency action upon which a district court can assume jurisdiction. *Marble v. Dept. of Health & Human Serv.*, 2000 MT 240, ¶ 28, 301 Mont. 373, ¶ 28, 9 P.3d 617, ¶ 28.

¶ 31 Qwest's justification for seeking intermediate review under § 2–4–701, MCA, was that if it did not challenge the lawfulness of the PSC's orders, Qwest would eventually suffer harm. However, Qwest did not allege any concrete harm. Instead, Qwest's allegation of harm presumes a rate case that would reduce Qwest's rates. According to the PSC, this potential financial harm would actually correct a situation in which Qwest is collecting revenues above what it is authorized to collect and would not actually "harm" Qwest.

¶ 32 Judicial review under § 2–4–701, MCA, is not justified where the only allegation of harm is speculation that further agency action *may* take place, and *if* it takes place, it *may* have legal consequences. Courts may intervene in agency process only when a specific final agency action has an actual or immediately threatened effect. *Lujan v. National Wildlife Federation*, 497 U.S. 871, 894, 110 S.Ct. 3177, 3191, 111 L.Ed.2d 695 (1990) (citing *Toilet Goods*, 387 U.S. at 164–66, 87 S.Ct. at 1524–26).

¶ 33 Accordingly, we hold that the investigation undertaken by the PSC in this case was not subject to review under § 2–4–701, MCA.

*317 Issue 3.

¶ 34 *Whether the PSC may investigate utilities in any manner necessary to effectuate its statutory duties.*

¶ 35 The District Court concluded that although the PSC possesses the power to request information from Qwest, it

may not force Qwest to do so “in this manner,” i.e., by requiring Qwest to provide information “in the form that would meet the minimum filing requirements contained in [ARM 38.5.2803](#) through [38.5.2820](#).” The court determined that [§ 69–3–110\(2\), MCA](#), establishes that Qwest’s rates are prima facie lawful and any party that wishes to challenge the existing rates must carry the burden of proof. Here, the court concluded that the PSC’s orders were unlawful because they attempted to reverse the burden of proof. The District Court stated that “[i]f the PSC desires to show Qwest’s rates are unjust and unreasonable, *the PSC may collect the information it needs and carry its burden forward*” (emphasis added). However, that is precisely what the PSC is trying to do in this case, “collect the information it needs.”

¶ 36 The PSC argues that the District Court’s conclusions that the PSC may not ask for information from Qwest “in this manner” is premised on the court’s acceptance of Qwest’s argument that by requiring Qwest to provide the information in the form that would meet the minimum filing requirements contained in Admin. R.M. 38.5.2803 through 38.5.2820, the PSC was forcing Qwest to file a rate case, and that the PSC intended to use the information in a manner that would be unlawful.

¶ 37 Qwest is reading too much into the PSC’s request. While the cited rules are entitled “Minimum Rate Case Filing Requirements for Telephone Utilities,” that does not mean that because the PSC ordered Qwest to file *information* in conformity with those rules, the PSC was forcing Qwest to file a rate case. On the contrary, the PSC’s enabling statutes authorize the PSC to obtain information from utilities in any manner necessary to perform its duties. To that end, [§ 69–3–106\(1\), MCA](#), provides:

The [PSC] shall have authority to inquire into the management of the business ****503** of all public

utilities, shall keep itself informed as to the manner and method in which the same is conducted, and *shall have the right to obtain from any public utility all necessary information to enable the [PSC] to perform its duties.* [Emphasis added.]

And, [§ 69–3–203\(2\), MCA](#), provides:

The [annual] reports must be in the form prescribed by the ***318** [PSC] and must contain all the information that the [PSC] considers necessary for the proper performance of its duties. *The [PSC] may at any time request information omitted from the reports or not provided for in the reports whenever, in the judgment of the [PSC], the information is necessary.* [Emphasis added.]

¶ 38 Moreover, this Court has stated that administrative agencies have broad investigatory power in Montana and an agency should not be denied access to information necessary to perform its statutory investigative duties. [Montana Human Rights Div. v. City of Billings](#), 199 Mont. 434, 444–45, 649 P.2d 1283, 1288–89 (1982).

¶ 39 Accordingly, we hold that the PSC’s statutory duty to investigate utilities may not be hindered by limiting its ability to obtain information in a specific manner.

¶ 40 Reversed.

We Concur: W. WILLIAM LEAPHART, [PATRICIA COTTER](#), [JOHN WARNER](#), and [JIM RICE](#), JJ.

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

IN THE MATTER OF: NOTICE OF APPEAL AND REQUEST FOR HEARING BY WESTMORELAND ABSALOKA MINING LLC RE: MR 311, SURFACE MINING PERMIT NO. C1985005	Cause No. BER 2025-04 SM BRIEF RE: SUPPLEMENTAL LEGAL AUTHORITY
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DEQ appreciates the opportunity to respond to the Board’s request for supplemental authority as to whether DEQ’s bonding decision is the “functional equivalent” or otherwise a “denial” of MR 311. Respectfully, and as a threshold matter, the Montana Strip and Underground Mine Reclamation Act (MSUMRA) forecloses any “functional equivalence” theory. MSUMRA authorizes Board review only upon DEQ’s “approval or denial” of specified applications, nowhere mentioning any “functional equivalent” to those events. Nonetheless, and contrary to

Westmoreland’s factually and legally dubious arguments, DEQ’s bonding decision is neither a denial nor the functional equivalent of a denial of MR 311. And, even if DEQ’s decision was inappropriately deemed to be a denial, the Board would still not have jurisdiction to review DEQ’s underlying bond determination as Westmoreland requests.

At the outset, DEQ has located no authority in any court of competent jurisdiction in Montana that would allow the Board to lower the statutory bar for when it can assume jurisdiction. The Board functions as a quasi-judicial agency and may not assume jurisdiction over any matter without an express delegation by the legislature. *City of Billings v. Pub. Serv. Commn. of Mont.*, 193 Mont. 358, 369, 631 P.2d 1295, 1301 (1981). MSUMRA enumerates five categories of appealable actions, each of which requires an “**approval** or **denial** of an application.” Section 82-4-206(1), MCA (emphasis added). Accordingly, the Board is strictly limited to hearing contested case appeals if—and only if—DEQ approves or denies an application. When neither action has occurred, the Board has no jurisdiction.

To recognize a “functional equivalent” to denial as a triggering event for an MSUMRA appeal would require the Board to rewrite the statute. The Legislature’s choice to omit such a trigger in MSUMRA is dispositive. Courts interpreting Montana statutes must abide by the plain meaning of the words used and “cannot insert what has been omitted or . . . omit what has been inserted.” Section 1-2-101, MCA; *see also Dukes v. City of Missoula*, 2005 MT 196, ¶ 15, 328 Mont. 155, 119 P.3d 61 (Courts must “interpret the expression of one thing in a statute to imply the exclusion of another.”). Where the Legislature has included specific language—in this case, Board review triggered only in discrete instances where DEQ has approved or denied an application—it must be presumed that the Legislature also intentionally omitted other

language—in this case, Board review triggered by a “functional equivalent” to approval or denial.¹

MSUMRA contains no provisions that would provide for the review of a “functional” denial of an application; only an actual approval or denial can trigger a contested case appeal. Under § 82-4-221, MCA and implementing rules such as ARM 17.24.404, DEQ reviews a minor revision application, issues deficiency letters when information is missing, and only after DEQ deems the application and reclamation plan acceptable does DEQ reach an actual approval or denial decision. There are some instances, however, in which DEQ cannot make a final decision on an application because a statutory prerequisite is not met. One such prerequisite: DEQ must always hold adequate bond. Section 82-4-223, MCA.

Accordingly, in this case, DEQ did not deny Westmoreland’s application but, instead, determined, during the application review process and based on information submitted in that process, that Westmoreland’s bond was inadequate. Once it made this inadequacy determination, DEQ could not approve MR 311 until Westmoreland posted adequate bond. Westmoreland complains that DEQ’s requirement that the company post adequate bond—as determined by DEQ—before approving the application constitutes a functional denial of MR 311. Not so. Nothing in MSUMRA’s framework converts a requirement that an applicant comply with the

¹ There is no question that the Legislature knows how to insert functional equivalence when it so desires. For example, the Legislature routinely creates timelines for an agency to act on an application or request, and, where it deems appropriate, includes language that creates constructive approval or denial where those deadlines are not met. *See, e.g.*, § 33-1-501(2)(b)(i), MCA (60-day window for the commissioner’s office to approve or disapprove a form after which time the form is considered approved); ARM 38.5.2740(3) (functional approval of telecom service request if the commission has not acted within 30 days of receiving the request); § 75-5-403(1), MCA (application deemed complete if the department does not notify the applicant of deficiencies within the specified timeframe). By contrast, MSUMRA contains no ‘deemed approved’ or ‘deemed denied’ language for coal permits or revisions.

statute before an application can be approved—including that it must post adequate bond under § 82-4-223, MCA—into a denial or the “functional equivalent” of a denial.

That Westmoreland finds itself in a legal limbo where its permit revision cannot be approved is a problem of its own making: the company has not met, and in fact refuses to meet, the legal prerequisite for approval (posting adequate bond). In other words, any delay in approval of MR 311 is neither a denial nor even attributable to *DEQ’s* action (or inaction) but to *Westmoreland’s* action (and inaction).² At this point, the only thing preventing approval of MR 311 is Westmoreland’s refusal to post the additional bond that DEQ has determined is necessary to satisfy MSUMRA’s mandate that DEQ hold adequate bond at all times. Section 82-4-223, MCA.

Westmoreland’s reasons for pursuing this contested case appeal are transparent—it wants the Board to act outside of its authority and review DEQ’s underlying bond determination. But, as DEQ has argued in briefing, even if the Board were to conclude, incorrectly, that DEQ had denied MR 311, that conclusion would not confer jurisdiction to review the amount of the bond. Section 82-4-206(1)(d), MCA authorizes review only of DEQ’s “approval or denial of an application to renew or revise a permit,” not of DEQ’s separate bond determinations under § 82-4-223, MCA, which are committed to DEQ and subject only to the informal-conference

² To the extent that the Board is concerned that DEQ is the cause of delay on permit approval, which, as stated, is not the case, jurisprudence related to the concept of “constructive denial” under the federal Administrative Procedure Act (APA), while not controlling, is illustrative. In that context, agency inaction on an application, including an agency deciding to neither grant nor deny an application, does not automatically function as a constructive denial of the application. Under the APA, only final agency actions are reviewable by a Court. A final action is one that “marks the consummation of the agency’s decisionmaking process” and “from which legal consequences will flow.” *Bennett v. Spear*, 520 U.S. 154, 157 (1997). Federal courts have held that this finality requirement is not met in “the absence of any decision from [an] agency to ultimately deny or grant the permit, however” because, in that instance the Courts “have nothing to review.” *Marquette Cty. Rd. Comm’n v. United States EPA*, 726 F. App’x 461, 467 (6th Cir. 2018) (affirming lower court granting of motion to dismiss over Plaintiff’s objection that an application was constructively denied). Just as federal courts have ‘nothing to review’ absent an actual grant or denial, so, too, the Board has nothing to review in the absence of a denial or approval of MR 311.

mechanism in ARM 17.24.1104(1). A permit-revision appeal cannot be used to bootstrap a non-appealable bond-amount dispute into Board jurisdiction.

At bottom, it is telling that the Board has never heard a challenge to a bond amount under MSUMRA, further confirming such a determination is beyond the subject matter of the Board. If the Board were to add “functional equivalence” of denial as a triggering event for conferring Board jurisdiction, it would unilaterally and unlawfully expand its jurisdiction beyond what the Legislature has expressly conferred and open the floodgates for further litigation, drowning the Board’s already busy docket. And while DEQ understands that Westmoreland is displeased with MSUMRA’s bonding requirements and the lack of any mechanism to challenge DEQ’s bond determination, that displeasure does not amount to a denial of MR 311, nor does it confer Board jurisdiction in this matter.

Dated this 11th day of February, 2026.

MONTANA DEPARTMENT OF
ENVIRONMENTAL QUALITY

/s/ Amanda D. Galvan
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Certificate of Service

I hereby certify that on this 11th day of February, 2026, 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:

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