

**BOARD OF ENVIRONMENTAL REVIEW
SPECIAL MEETING
MARCH 20, 2026**

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AGENDA

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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>APPEAL AND REQUEST FOR HEARING REGARDING MDEQ'S DECISION ON MAQP #5263-03, CALUMET/MONTANA RENEWABLES</p>	<p>CAUSE NO. BER 2026-01 AQ</p> <p>NOTICE OF INFORMAL CONFERENCE</p>
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Upon consideration of Ms. Otero's January 14, 2026, request for a hearing,
IT IS HEREBY ORDERED THAT an informal conference is scheduled for
Thursday, March 5, 2026, at 10:00 AM (MT).

The conference will be held via Microsoft Teams. The login information is
as follows:

Microsoft Teams meeting

<https://teams.microsoft.com/meet/29404763313920?p=CMkiRzYvpNmsF7WGWu>

Meeting ID: 294 047 633 139 20

Passcode: BX9rK6d6

The purpose of the informal conference is to discuss whether Ms. Otero wants to pursue a contested case hearing with respect to the DEQ's decision to approve Montana Air Quality Permit #5263-03, and next steps related thereto.

DATED this 24th day of February, 2026.

/s/ David Simpson

David Simpson, Chairman

Montana Board of Environmental Review

CERTIFICATE OF SERVICE

I certify that on February 24th, 2026, I served a copy of the preceding document by email on the following:

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

Ms. Angela Otero
queensnecklace@gmail.com

Samuel J. King
Jeremiah R. Langston
Montana Department of Environmental Quality
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Attorneys for DEQ

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

From: [Queen's Necklace](#)
To: [Dana L. Hupp](#)
Cc: [Langston, Jeremiah](#); [King, Samuel](#); [Moisey Scherer, Sandy](#); [Lane Hanson](#)
Subject: Re: Montana Board of Environmental Review: Notice of Informal Conference (BER 2026-01 AQ)
Date: Tuesday, March 3, 2026 9:12:26 AM
Attachments: [image001.png](#)

Dear Dana,

Thank you, and Mr. Simpson, for the invitation to speak with the MDEQ Environmental Review Board regarding the Air Quality Permit recently issued to Montana Renewables.

Apologies, but I am unable to join this call tomorrow. I would appreciate rescheduling for mid-April so I have time to line up my team and legal representation. Given that the MDEQ has already granted the air quality permit to Montana Renewables, and it was five weeks after my comments were submitted before you contacted me on behalf of the Environmental Review Board, then clearly, time is not of the essence in this matter.

In preparing for this call, I would like to invite the Pondera County Commissioners, County Sanitarian, County Attorney, the Environmental Director of the Blackfeet Nation, and legal counsel.

I would appreciate receiving background information on those individuals whose names appear on this email, as well as for you. In particular, I would like information about the nature and extent of each individual's relationship to Montana Renewables, status within the hierarchy of DEQ's legal counsel, and the reason for their inclusion on this call. Please advise whether any members of this legal team currently represent Montana Renewables, or have represented Montana Renewables at any time in the past.

Information regarding the members of my team can be provided to you in advance of this call, as well.

Given that my list of concerns is wide-ranging, I will prepare a summary list to enable all involved to focus on the primary concerns. I would appreciate receiving a list of the most salient issues from Mr. Simpson's viewpoint, as well as yours and the members of your team.

Lastly, can you please provide me with a call-in number?

Respectfully,
A. Otero

On Tue, Feb 24, 2026 at 11:23 AM Dana L. Hupp <dhupp@wordenthane.com> wrote:

Dear Ms. Otero:

I am reaching out to you on behalf of the Montana Board of Environmental

Review. I am the attorney that represents the Board.

The Board received your January 14, 2026, email related to the DEQ's December 15, 2025, decision to approve Montana Air Quality Permit #5263-03.

The Board Chair, Dave Simpson, has scheduled an informal conference with the DEQ's counsel and you to discuss your request for a hearing.

Attached are the details related to the conference. The conference is scheduled to be held via a Teams video call on **Thursday, March 5 at 10 am (MT)**. We do not anticipate that the conference will last more than 15 to 30 minutes.

If that date and time does not work for you, please let me know and we can reschedule. Additionally, if for some reason you cannot participate via Teams, we can send you a call in number instead.

The purpose of the informal conference will be to discuss whether you want to pursue a contested case hearing of the DEQ's decision to approval Montana Air Quality Permit #5263-03, and the procedural process for doing so. The purpose of the conference is not to discuss the substance of your notice, but rather the process, if any, for moving forward.

Please let me know if you have any questions. Copied on this email are legal counsel for the DEQ. I anticipate one or more of them will be participating in the conference on behalf of the DEQ. Please copy them on any communications to me.

Thank you,

Dana Hupp

Legal Counsel for the Montana Board of Environmental Review

Dana Lynn Hupp, Shareholder



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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: APPEAL AND REQUEST FOR HEARING REGARDING MDEQ'S DECISION ON MAQP #5263-03, CALUMET/MONTANA RENEWABLES	CAUSE NO. BER 2026-01 AQ ORDER NOTIFYING PARTIES OF MARCH 20, 2026, MEETING
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The Board of Environmental Review has a special meeting scheduled for March 20, 2026, beginning at 9:00 am. The purpose of this Order is to notify the parties that this case is on the Board's agenda for the March 20, 2026, meeting. The Board will discuss the status of the case and potential next steps at that meeting. The parties and their legal counsel are invited to attend. They can participate online via Zoom. The Zoom link and agenda for the March 20, 2026, meeting will be available on the DEQ website at: <https://deq.mt.gov/about/ber>. The public can also participate via that Zoom link. Information regarding the

Board and the contested case process can also be found at that link.

DATED this 11th day of March, 2026.

/s/ David Simpson
David Simpson, Chairman
Montana Board of Environmental Review

CERTIFICATE OF SERVICE

I certify that on March 11, 2026, I served a copy of the preceding document by email on the following:

Sandy Moisey Scherer, Board Secretary
Board of Environmental Review
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Helena, MT 59620-0901
deqbersecretary@mt.gov

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

David Simpson, Chairman
Montana Board of Environmental Review
Department of Environmental Quality Headquarters
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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

**FINAL AGENCY ACTION AND
ORDER OF THE BOARD OF
ENVIRONMENTAL REVIEW**

**(GRANTING DEQ'S
MOTION TO DISMISS AND
DENYING WESTMORELAND'S
MOTION TO CONSOLIDATE)**

On September 26, 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 (Dkt. #1.). 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. (Dkt. #2.)

Oral argument on the DEQ’s Motion to Dismiss was held on February 20, 2026. The specific questions before the Board were whether it has jurisdiction to hear Westmoreland’s:

- 1) Request for a contested case hearing (Mont. Code Ann. § 82-4-206(1)(d)), and/or
- 2) Petition for a declaratory ruling (ARM 1.3.226).

(Dkt. #2.) After oral argument, the Board deliberated publicly and Vice Chair Aguirre made a motion that the Board did not have jurisdiction. The motion was seconded, and all Board Members voted in favor of the motion.

The following sets forth the Board’s findings of fact and conclusions of law with respect to its decision granting the DEQ’s Motion to Dismiss on the basis that the Board does not have jurisdiction. The Board received a copy of a draft of this order prior to its March 20, 2026, meeting. Board Member ___ made a motion to adopt the language contained herein. The motion was seconded, and _____ Board Members voted in favor of the motion.

I. FINDINGS OF FACT

1. Westmoreland submitted its application for Minor Revision 311 on June 27, 2024. (Ex. O at 2.)¹

¹ The exhibits referenced in this Order are those attached to the parties’ pleadings. The lettered exhibits are attached to Westmoreland’s notice of appeal (Dkt. # 1), response brief (Dkt. #3), and notice of supplemental authority (Dkt. #5). The numbered exhibits are attached to the DEQ’s brief in support of its motion to dismiss (Dkt. #2).

2. The form used for the application is entitled “Coal Section Surface Mine Permit Minor Revision Form.” (*Id.* at 1.)

3. Under Section A – Applicant Information, Westmoreland summarized the proposed changes it was requesting as follows:

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.](#)

(*Id.*)

4. Prior to Westmoreland’s submission of Minor Revision 311, the DEQ previously approved Minor Revision 304 to Westmoreland’s permit. (Ex. T at 5.) Minor Revision 304 requires Westmoreland to submit an application for a minor revision to update its bond before June 30th each year. (*Id.* at 4.)

5. Westmoreland’s June 27, 2024, Minor Revision 311 was its minor revision application to update its bond for the 2025 bond year. (Ex. O.)

6. Subsequent to the DEQ receiving the application, the parties exchanged communications for a little over a year as part of the minor revision application process. (*See generally* Exs. 1, P, 2, 3, R, U, 4, Q, and S; *See* Ex. N for a chronological timeline of the parties’ communications.) The DEQ initially identified deficiencies with the application and Westmoreland and the DEQ exchanged communications back and forth until the DEQ sent Westmoreland a

letter on June 5, 2025, indicating that the DEQ had determined that a bond increase was necessary. (Ex. 5.)

7. In their initial communications, Westmoreland expressed concern regarding the DEQ's use of the *Equipment Watch* software because it argued that the software is not designed specifically for coal mine reclamation. (Ex. 2 at 3.) In particular, Westmoreland was concerned that the annual equipment use hours utilized in *Equipment Watch* deviate significantly from the industry standard, resulting in higher reclamation costs and, consequently, higher bond amounts. (*Id.* at 2-4)

8. Both Westmoreland, the Montana Coal Council, and other members of the industry had previously discussed with, and submitted documentation to, the DEQ that demonstrated contractors were utilizing the equipment for significantly longer hours than the DEQ utilized in calculating equipment use. (*Id.*)

9. Based in part on these concerns, in the spring of 2025, the DEQ committed to developing a mining bond guidance document that “provides greater predictability and transparency for permittees, landowners, and the public.” (Ex. Q at 1.) In its March 28, 2025, letter to Westmoreland regarding developing the guidance document, the DEQ stated that:

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.

(*Id.* at 2.)

10. The DEQ’s June 5, 2025, letter to Westmoreland stated that it had completed its review of Westmoreland’s application for Minor Revision 311. (Ex. 5 at 1.) The letter further provided that the “DEQ has determined that [] 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 the DEQ notify the permittee of a proposed bond increase and provide the permittee with an opportunity for an informal conference.” (*Id.*)

11. Westmoreland met with the DEQ and sent follow-up letters in response to the DEQ’s June 5th letter. (Exs. L and 6.) Westmoreland urged the DEQ to continue the structured back-and-forth process of information sharing and communication. (Ex. 6 at 2.) Westmoreland specifically raised concerns regarding the DEQ’s decision to utilize *Costmine Intelligence* software in calculating the bond because it is primarily designed to be used for operating mines and hard rock reclamation versus reclamation of surface mines. (*Id.* at 3.)

12. On August 29, 2025, the DEQ sent Westmoreland a letter which provides a lengthy discussion of the rules/statutes that allow the DEQ to

unilaterally adjust Westmoreland’s bond pursuant to ARM 17.24.1104. (Ex. D at 2.)

13. The August 29th letter provides that:

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.

(Ex. D at 3.) The letter goes on to state that: “[a]s 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.” (*Id.* at 5.)

14. The DEQ closed the letter by stating that:

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.

(*Id.* at 6-7.)

15. On September 26, 2025, Westmoreland filed the subject Notice of Appeal, Request for Hearing, and Petition for Declaratory Ruling. (Dkt. #1.)

16. On January 8, 2026, the DEQ sent Westmoreland a letter entitled Notice of Noncompliance and Order of Abatement because Westmoreland had failed to pay the additional \$3,300,000 bond. (Ex. X.)

17. The letter states that:

WAM’s Absaloka Coal Mine permit states, in document ‘17.24.313(1)(c) Bond Calculation MR 304.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 MR 304 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.

(Ex. X at 2.)

18. Westmoreland appealed the Notice of Noncompliance and Order of Abatement to the Board on February 6, 2026. (BER 2026-02 SM, Dkt. #1.)

Westmoreland also filed a motion requesting that the Board consolidate the contested case hearings regarding the Notice of Appeal related to the bonding determination (this subject action) with the new Notice of Appeal challenging the Notice of Noncompliance and Order of Abatement. (Dkt. #7.)

II. CONCLUSIONS OF LAW

1. The Board in reviewing the DEQ’s Motion to Dismiss applies the following standard of review: “[A] 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. DeRosier*, 2020 MT 210, ¶ 7, 401 Mont. 50, 470 P.3d 188.

Contested Case Proceeding

2. Westmoreland applied for Minor Revision 311 pursuant to Mont. Code Ann. Title 82, Chapter 4, Part 2. (Ex. O at 1.) Mont. Code Ann. § 82-4-221(3)(2021) provides that a “permittee may submit an application for a revision of the permit, together with a revised reclamation plan, to the department.”

3. The Montana Reclamation Act at Mont. Code Ann. § 82-4-206(1)(d), provides that a permittee that is adversely affected may request a hearing before the board on a decision by the department to approve or deny an application to renew or revise a permit pursuant to Mont. Code Ann. § 82-4-221 [requirement for a permit]. (emphasis added.)

4. Therefore, for the Board to have jurisdiction to hear Westmoreland’s request for a contested case hearing, the DEQ must have approved or denied Westmoreland’s application to revise its permit. Mont. Code Ann. § 82-4-206(1)(d).

5. Westmoreland argues that the DEQ “functionally denied” its application for Minor Revision 311 when deciding that Westmoreland must post an additional bond. It cites to language from the DEQ’s letters dated June 5, 2025 (Ex. 5), August 29, 2025 (Ex. D), and January 8, 2026 (Ex. X) in support of its

argument that the DEQ functionally denied its application when requiring it to post an additional bond.

6. The DEQ argues that Westmoreland must post a bond pursuant to Mont. Code Ann. § 82-4-223 [requiring a bond before a permit can be approved] before it can approve Minor Revision 311 and that DEQ's decision to increase Westmoreland's bond does not equate to a denial of the Minor Revision 311 application.

7. The Board concludes that the DEQ's bonding determination was not a final decision to approve or deny Westmoreland's Minor Revision 311 application, but rather was a bonding decision made pursuant to its authority under Mont. Code Ann. § 82-4-223 and ARM 17.24.1102 and 1104. (Ex. 5 at 1 and D); *N. Plains Res. Council v. Bd. Nat. Res. and Conservation*, 181 Mont. 500, 518, 594 P.2d 297, 307 (1979).

8. The DEQ unilaterally determined as part of its analysis of Westmoreland's bond that future reclamation costs had increased and that, consequently, an increased bond was required. (Ex. 5 at 1 and D at 2-3, 6-7.)

9. Because the DEQ's bonding determination was not a decision by the department to approve or deny an application to revise Westmoreland's permit, the Board does not have jurisdiction to hear Westmoreland's request for a contested case hearing under Mont. Code Ann. § 82-4-206(1)(d).

Request for Declaratory Ruling

10. Westmoreland petitioned the Board pursuant to ARM 1.3.226 for a declaratory ruling that the “DEQ must follow Montana industry standards for coal mine reclamation when determining the amount of performance bond required pursuant to MSUMRA.” (Dkt. 1, Notice of Appeal at 3-4.)

11. In its Motion to Dismiss, the DEQ argues that only the agency charged with “administer[ing]” the statute or rule may issue such a declaratory ruling, and that agency, in this case, is the DEQ. (DEQ’s Mot. to Dismiss Westmoreland’s Notice of Appeal (Dkt. #2) at 15-16.)

12. In response, Westmoreland argues that only the Board has quasi-judicial authority to declare what the law means in this case, noting that the legislature specifically appointed the Board, but not the DEQ, a quasi-judicial agency. (Westmoreland Resp. Brief Opp. DEQ’s Mot. to Dismiss (Dkt. #3) at 20-24.)

13. The issue here is whether the legislature authorized the Board to issue declaratory rulings under ARM 1.3.226 and/or Mont. Code Ann. § 2-4-501 in the context of the Montana Strip Underground Mining Reclamation Act (“MSUMRA”) and, specifically, as requested in Westmoreland’s Notice of Appeal.

14. ARM 1.3.226 provides that:

DECLARATORY RULINGS, INTRODUCTION (1) 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.

15. Mont. Code Ann. § 2-4-501 also provides:

Declaratory rulings by agencies. Each 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. A copy of a declaratory ruling must be filed with the secretary of state for publication in the register. A declaratory ruling or the refusal to issue such a ruling shall be subject to judicial review in the same manner as decisions or orders in contested cases.

16. The Board is an agency as defined in Mont. Code. Ann. § 2-15-102(2) and is designated as a “quasi-judicial board.” Mont. Code Ann. § 2-15-3502(4).

17. Mont. Code Ann. § 2-15-102(10) defines “quasi-judicial function” as “an adjudicatory function exercised by an agency, involving the exercise of judgment and discretion in making determinations in controversies. The term includes but is not limited to the functions of:

- (a) interpreting, applying, and enforcing existing rules and laws;
- (b) granting or denying privileges, rights, or benefits;
- (c) issuing, suspending, or revoking licenses, permits, and certificates;
- (d) determining rights and interests of adverse parties;
- (e) evaluating and passing on facts;
- (f) awarding compensation;
- (g) fixing prices;
- (h) ordering action or abatement of action;
- (i) adopting procedural rules;
- (j) holding hearings; and
- (k) any other act necessary to the performance of a quasi-judicial function.

Id.

18. The Board can make declaratory rulings in carrying out its duties as a quasi-judicial board. Mont. Code Ann. § 2-15-102(10). However, it does not follow that because the Board can make declaratory rulings, that the Board has jurisdiction to hear “petitions for declaratory rulings” in every case. *See generally Thompson v. State*, 2007 MT 185, 338 Mont. 511, 167 P.3d 867, and *Allum v. Mont. State Fund*, 2023 MT 121, 412 Mont. 546, 531 P.3d 560.

19. The Montana Supreme Court has held that it is a basic principle of law that an administrative agency has only those powers specifically conferred upon it by the legislature and that administrative agencies may not assume jurisdiction without express delegation by the legislature. *Polson v. Pub. Serv. Comm’n of Mont.*, 155 Mont 464, 469, 473 P.2d 508, 511 (1970); *Billings v. Pub. Serv. Comm’n of Mont.*, 193 Mont. 358, 369, 631 P.2d 1295, 1301 (1981); *Auto Parts of Bozeman v. Emp. Rels. Div. Uninsured Emps.’ Fund*, 2001 MT 72, ¶ 38, 305 Mont. 40, 23 P.3d 193.

20. Moreover, “[w]hile an administrative body acting as a tribunal has quasi-judicial power, it does not follow that its power is equal to the power of a district court to hear all facets of a case. Jurisdiction in an administrative hearing . . . is strictly limited by statute.” *Id.*

21. The Montana Supreme Court’s decisions in *Thompson v. State*, 2007 MT 185, ¶ 25, 338 Mont. 511, 167 P.3d 867, and *Allum v. Mont. State Fund*, 2023

MT 121, ¶ 8, 412 Mont. 546, 531 P.3d 560, are instructive as to whether the Board has jurisdiction to hear the petition for declaratory ruling here.

22. In *Thompson v. State*, 2007 MT 185, ¶ 4, employees sought a declaratory judgment from the Workers' Compensation Court ("WCC") that the Workers' Compensation Act ("WCA") was unconstitutional. The WCC, a quasi-judicial administrative tribunal, accepted jurisdiction. *Id.* ¶¶ 16, 24. The State appealed that determination, arguing that the WCC lacked jurisdiction to hear disputes that didn't directly involve a benefits determination. *Id.* ¶ 21.

23. The Supreme Court stated that the WCA provides the WCC with jurisdiction over "'disputes concerning any benefits under [the Workers' Compensation Act]'" *Id.* ¶ 25. The Supreme Court also noted that the Montana Administrative Procedure Act only authorizes declaratory rulings "as to the applicability of any statutory provision or of any rule or order of the agency." *Id.*; Mont. Code. Ann. § 2-4-501. Synthesizing the two statutes, the Supreme Court determined that the WCC had jurisdiction to issue declaratory rulings only in the context of a dispute concerning benefits under the WCA, and only as to the applicability of any statutory provision, rule, or order of the agency to that dispute. *Thompson*, ¶ 25.

24. Similarly, in *Allum v. Mont. State Fund*, a petitioner brought claims disputing benefits under the WCA and challenging the constitutionality of the Act

itself. 2023 MT 121, ¶ 4, 412 Mont 546, 531 P.3d 560. The benefits claims were resolved prior to trial, and the WCC determined it no longer had jurisdiction over the constitutional challenges because there was no benefits dispute. *Id.* On appeal, the Montana Supreme Court affirmed the decision to dismiss. It held that “the WCC has the authority to issue rulings regarding constitutional challenges to the WCA or WCC ‘only in the context of a dispute concerning benefits under the Workers’ Compensation Act’” *Id.* ¶ 8.

25. In *Thompson and Allum*, the Workers’ Compensation Court had broad jurisdiction to make determinations concerning disputes involving benefits determinations under the Workers’ Compensation Act. Here, the jurisdiction granted to the Board by the legislature is narrower. The legislature explicitly granted the Board the authority to “conduct contested case hearings” under the MSUMRA (Mont. Code Ann. § 82-4-205(3) and 206) but was silent as to the Board’s authority to hear petitions for declaratory rulings. Consequently, the Board does not have jurisdiction to hear Westmoreland’s request for a declaratory ruling in this appeal.

III. DECISION

1. Based upon the foregoing, the DEQ’s Motion to Dismiss (Dkt. #2) is granted and as a result thereof, Westmoreland’s Motion to Consolidate (Dkt. #7) this matter with BER 2026-02 SM is denied.

2. The BER hereby provides notice to the parties that they may be entitled to judicial review of this Final Agency Action, pursuant to Mont. Code Ann. § 2-4-702 and that, pursuant to Mont. Code Ann. § 2-4-702, proceedings for review must be instituted by filing a petition in District Court within 30 days after service of this Final Agency Action.

DATED this _____ March, 2026.

DRAFT

David Simpson, Chairman
Montana Board of Environmental Review

CERTIFICATE OF SERVICE

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

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BEFORE THE BOARD OF ENVIRONMENTAL REVIEW
OF THE STATE OF MONTANA

IN THE MATTER OF: APPEAL AND REQUEST FOR HEARING BY VALLEY GARDEN LAND & CATTLE LLC REGARDING ISSUANCE OF OPENCUT MINING PERMIT #674, AMENDMENT #3	CAUSE NO. BER 2022-04 OC ORDER REGARDING ORAL ARGUMENT
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Oral argument on the parties’ cross-motions for summary judgment is currently scheduled for March 20, 2026. In addition to oral argument on the cross-motions for summary judgment, the Chair requests that the parties present a short oral argument on Valley Garden’s Motion to Limit the Scope of the Hearing (Dkt. #37). The Chair recognizes the fact that the parties presented oral argument on that Motion on April 26, 2024 (Dkt. #113) but believes that additional argument on that Motion will be beneficial to the Board in reaching its decision.

The Chair requests that the parties present oral arguments in the alternating manner set forth below. For example, on the threshold issues of jurisdiction and

standing the DEQ will have 10 minutes to argue both jurisdiction and standing, Valley Garden will have 10 minutes to respond, and then DEQ will have 5 minutes for rebuttal.

The parties will then move to the arguments under Section II, followed by Section III, and then discussion by the Board on all issues. Board members will have the opportunity to ask questions at the end of each Section of argument.

OUTLINE OF ARGUMENT

I. Threshold Issues:

- A. Board Jurisdiction
- B. Standing

(Order of Argument: DEQ 10 minutes, Valley Garden 10 minutes, DEQ 5 minutes)

II. Motion to Limit Scope of Hearing – Admissibility

(Order of Argument: Valley Garden 10 minutes, DEQ 10 minutes, Valley Garden 5 minutes)

10 MINUTE BREAK

III. Substantive Allegations Regarding Permit Approval

- A. Completeness
 - 1. Legal Right to Mine
 - 2. Valley Garden's Address
- B. Public Notice
 - 1. Description of Activities – Asphalt and Concrete Recycling
 - 2. Public Comment Period
 - 3. Public Meeting Requirements
 - 4. Valley Garden's Address

- C. Acceptability
 - 1. Legal Right to Mine
 - 2. Plan of Operation – Test Holes
 - 3. Offsite Materials – Asphalt and Concrete
 - 4. Groundwater Information

- D. Remaining Issues Parties May Wish to Address

(Order or Argument: Valley Garden 15 minutes, DEQ 15 minutes, Valley Garden 5 minutes, DEQ 5 minutes)

DATED this 11th day of March, 2026.

/s/ David Simpson
David Simpson, Chairman
Montana Board of Environmental Review

CERTIFICATE OF SERVICE

I certify that on March 11, 2026, I served a copy of the preceding document by email on the following:

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MEMORANDUM
(Submitted with March 13, 2026, Board Packet)

To: Chairman Simpson and Board Members,
Montana Board of Environmental Review

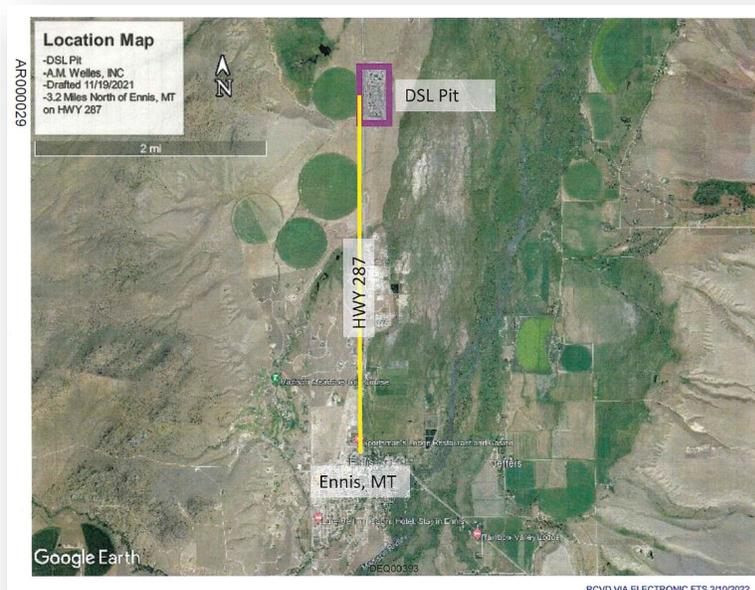
From: Dana Hupp, Legal Counsel

Date: March 11, 2026

Re: BER 2022-04 OC (Appeal and Request for Hearing by Valley Garden Land & Cattle LLC re Issuance of Opencut Mining Permit #674, Amendment #3): Summary of Parties’ Cross-Motions for Summary Judgment and Valley Garden’s Motion to Limit the Scope of the Hearing

On June 22, 2022, Valley Garden Land & Cattle LLC (“Valley Garden”) filed a Notice of Appeal and Request for Hearing related to the DEQ’s decision to approve A.M. Welles’ Application for Amendment #3 to Opencut Mining Permit #674 (“Application”).

The Application is related to A.M. Welles’ sand and gravel mining site located on Montana State Trust Lands between McAllister and Ennis, MT.



(Dkt. # 65, Ex. 1 at AR000029.)

Reclamation of that mine is regulated, in part, by the Opencut Mining Act, Mont. Code Ann. §§ 82-4-401 *et seq.*, and ARM Subchapter 17.24.2.

The parties have filed and fully briefed cross-motions for summary judgment and motions in limine. The prior hearing examiner held oral argument on the pending motions in limine on April 26, 2024. (*See* Tr. of Proc., Dkt. # 113-4.)

The Board will consider the following motions at its March 20, 2026, Special Meeting:

- 1) Valley Garden's Motion to Limit the Scope of Hearing (Dkt. #s 37, 38, 49, 50, 51, 52, 71, and 113);
- 2) The DEQ's Motion for Summary Judgment (Dkt. #s 63, 64, 65, 125, 126, 129, and 131); and
- 3) Valley Garden's Motion for Summary Judgment (Dkt. #s 104, 105, 106, 127, 128, and 130.)

The following Memorandum and its appendices provide:

- 1) The questions presented by the parties' motions;
- 2) A summary of the factual and procedural background;
- 3) The applicable standards of review; and
- 4) A summary of the parties' arguments.

The intent of this Memorandum is to summarize the questions presented, and the parties' arguments, to assist the Board in preparing for the hearing and in its review of the parties' materials. For the Board's convenience, the following appendices provide additional information:

- **Appendix A – Summary of Factual and Procedural Background.** Summarizes relevant facts from the administrative record, including the legislative context surrounding HB 599.
- **Appendix B – Standard of Review.** Summarizes the legal standards governing the pending motions, including the burden of proof in contested case proceedings, principles of statutory construction, and the standards applicable to motions for summary judgment and motions in limine.

QUESTIONS PRESENTED

The parties' cross-motions for summary judgment and Valley Garden's Motion to Limit the Scope of Hearing raise the following questions/issues.

Threshold Issues

The first two issues, jurisdiction and standing, are "threshold" issues and should be addressed by the Board first. If the Board determines it does not have jurisdiction or standing, then the proceeding should be dismissed, and the Board should not rule on the remaining issues.

Issue One (Jurisdiction): Whether the Board has jurisdiction to hear Valley Garden's claims beyond the scope of the Opencut Mining Act, Mont. Code. Ann. § 82-4-401 *et seq.*

Issue Two (Standing): Whether Valley Garden has standing to bring claims under the Opencut Mining Act.

Evidentiary Issues

If the Board determines it has subject matter jurisdiction and Valley Garden has standing, then the Board should next address Valley Garden's Motion to Limit the Scope of Hearing. In that Motion, Valley Garden seeks to limit the evidence the DEQ can present on summary judgment and at the contested case hearing. The Board needs to consider this Motion at this juncture because the DEQ has submitted evidence as part of its summary judgment briefing that Valley Garden seeks to exclude.

Note: The Board has the option of conditionally admitting the evidence and then making determinations with respect to specific pieces of evidence in its findings of fact and/or at the contested case hearing.

Issue Three (Motion to Limit Scope of Hearing): Whether the Board can consider the affidavits, deposition testimony, and other evidence offered by the DEQ that Valley Garden seeks to exclude.

Substantive Disputes

Once the Board has addressed the jurisdiction, standing, and evidentiary issues, the Board should then consider the substantive issues presented by the parties' motions for summary judgment. Those issues are as follows:

Issue Four (Completeness): Whether the DEQ properly determined that A.M. Welles' Application was administratively complete.

Issue Five (Notice): Whether the DEQ and A.M. Welles satisfied the public notice and meeting requirements of the Opencut Mining Act.

Issue Six (Acceptability): Whether alleged deficiencies in the Application including A.M. Welles’s representation that it has a legal right to mine, the number of test holes drilled, the disclosure of offsite materials storage, and hydrological information, rendered the Application “unacceptable” under the Opencut Mining Act.

SUMMARY OF PARTIES’ ARGUMENTS

A. Subject Matter Jurisdiction

As an initial matter, the DEQ argues on summary judgment that the Board “does not have subject matter jurisdiction to hear [Valley Garden’s] claims” that fall outside the scope of the Opencut Mining Act.¹ (Dkt. # 64 at 8.) Such claims include whether the Board adequately investigated potential impacts on, among other things, water quality, [water] quantity, erosion, or life forms. (*Id.* at 9.)

The Opencut Mining Act provides that “a person whose interests are or may be adversely affected by a final decision of the department to approve or disapprove a permit application and accompanying material or a permit amendment application under [the Opencut Mining Act] is entitled to a hearing before the board” Mont. Code. Ann. § 82-4-427(1)(a).

Neither Valley Garden nor the DEQ generally dispute that the Board has jurisdiction to hear a contested case proceeding under the Opencut Mining Act. (*See* Dkt. # 64 at 8; Dkt. # 125 at 9.) Rather, the DEQ’s motion seeks to limit the *scope* of the proceeding to only issues that arise under the Opencut Mining Act. (Dkt. # 64 at 8.) Specifically, the DEQ argues that since it did not have authority under the Opencut Mining Act to obtain “detailed information” for water resources and water quality protection, the Board doesn’t have jurisdiction to hear claims alleging damage based on the DEQ’s lack of such information (*Id.* at 9-10.)

Thus, the central question is not whether the Board has subject-matter jurisdiction in general, but whether any portions of Valley Garden’s substantive claims fall outside the Board’s jurisdiction. Those substantive claims are addressed in detail below.

¹ 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 (2019). Jurisdiction is a threshold requirement that may be raised at any time. *Harris v. Smartt*, 2003 MT 135, ¶ 11, 316 Mont. 132-33. If the adjudicator determines that it lacks subject matter jurisdiction, the adjudicator must dismiss the case. Mont. R. Civ. P. 12(h)(3); *In re Marriage of Miller*, 259 Mont. 424, 427, 856 P.2d 1378, 1380 (1993).

B. Standing

The DEQ argues that Valley Garden lacks “standing” to bring a claim against the DEQ because it did not sustain any *economic* injuries as a result of alleged procedural deficiencies, and deficiencies in A.M. Welles’ Application. (Dkt. # 64 at 28-29). The basis for Valley Garden’s alleged injury is set forth in its Notice of Appeal in the following paragraphs: Dkt. # 11 at ¶¶ 10, 15(h), 20, 23, 25, 26, 36.

Standing is a threshold requirement applicable to all claims for relief. *Larson*, ¶ 45. “Standing narrowly focuses on whether, at the time of assertion of a claim, a particular claimant is the proper party to assert the claim regardless of whether the claim is otherwise cognizable [.]” *Larson*, ¶ 45. Standing is determined as of the time the action is brought. *Heffernan*, ¶ 30; *see also In Re Schering-Plough Corp. Intron/Temodar Consumer Class Action*, 678 F. 3d 235, 243 (3d Cir. 2012).

“[T]here are two strands to standing: the case-or-controversy requirement imposed by the Constitution, and judicially, self-imposed prudential limitations.” *Heffernan v. Missoula City Council*, 2011 MT 91, ¶ 31, 360 Mont. 207, 255 P.3d 80.

Constitutional and prudential standing are conjunctive requirements; a plaintiff must satisfy both in order to proceed with their case. *Id.* ¶ 34. Because each doctrine independently restricts a litigant’s right to pursue claims, failure to satisfy either requirement defeats standing. *Id.* ¶ 34; *In re Vainio*, 284 Mont 229, 235, 943 P.2d 1282, 1286 (1997) (“the mere fact that a person is entitled to bring an action under a given statute is insufficient to establish standing; the party must allege some past, present, or threatened injury which would be alleviated by successfully maintaining the action.”).

Constitutional standing consists of three elements:

- 1) **Injury in fact** – a concrete harm that is actual or imminent, not conjectural or hypothetical;
- 2) **Causation** – a fairly traceable connection between the injury and the conduct complained of; and
- 3) **Redressability** – a likelihood that the requested relief will address the alleged injury.

Heffernan, ¶ 32. Stated differently, a plaintiff’s claim must be based on an alleged wrong or illegality that has in fact caused, or is likely to cause, the plaintiff to suffer specific, definite, and direct harm to person, property, or exercise of right, and the alleged harm is of a type that available legal relief can effectively alleviate, remedy, or prevent. *Schoof v. Nesbit*, 2014 MT 6, ¶15, 373 Mont. 226, 316 P.3d 831.

Prudential standing is a judicial doctrine requiring that a litigant may only assert their own constitutional rights or immunities. *Heffernen*, ¶ 33. The importance of a question to the general public, and whether a statute would effectively be immunized from review if the plaintiff were denied standing, may, in certain circumstances, generally support prudential standing. *Id.* However, the alleged injury must “be distinguishable from injury to the public generally, though not necessarily exclusive to the plaintiff.” *Id.*

Here, the DEQ does not appear to dispute that Valley Garden has prudential standing (See Dkt. # 131 at 8.) Rather, the dispute is whether Valley Garden has alleged constitutional standing and, specifically, whether it has alleged injuries that are caused by the DEQ’s approval of the Application and can be redressed by the Board’s revocation of that approval.

Valley Garden has alleged both procedural and economic injury. The specific questions before the Board related thereto are:

- 1) **Procedural Injury:** Whether Valley Garden’s alleged procedural injuries stemming from alleged deficiencies in the public notice and permitting process grant it standing.
- 2) **Economic Injury:** Whether Valley Garden’s Notice of Appeal alleges economic injury that grants it standing.

Procedural Injury

The parties dispute whether Valley Garden’s alleged procedural injuries—that it did not receive sufficient notice or a public meeting regarding the Application—is sufficient to support standing.

“A general or abstract interest in the constitutionality of a statute or the legality of government action is insufficient for standing absent a direct causal connection between the alleged illegality and specific and definite harm personally suffered.” *Larson*, ¶ 46. However, violations of procedures that ensure adequate notice constitute injury for the purpose of establishing standing. *Schoof*, ¶ 21.

Valley Garden argues that its interests were harmed because it did not properly receive notice, which resulted in the denial of an opportunity for a hearing. (Dkt. # 125 at 8.) The DEQ argues that since Valley Garden is a limited liability company formed for the purpose of owning and operating real estate and other lawful businesses, it must allege concrete *economic* harm, thus mere procedural issues cannot support standing. (Dkt. # 64 at 28-29).

Accordingly, the question is whether Valley Garden's alleged procedural injuries are sufficient to confer constitutional standing under Montana law, or whether the company must demonstrate concrete economic harm to proceed.

Economic Injury

If Valley Garden has not alleged procedural injuries sufficient to grant standing, the next question is whether Valley Garden has sufficiently alleged other injuries that grant standing. The DEQ argues that the only allegation of harm (found in paragraph twenty-six of Valley Garden's Notice of Appeal) fails to establish the specific, definite, and direct harm required by the standing analysis. (*Id.*) The DEQ also argues that to the extent the grazing lease reduction does constitute an economic injury, that injury was caused by the DNRC, not the DEQ. (Dkt. # 131 at 8-9.) In response, Valley Garden argues that it did suffer an economic injury because the DNRC reduced the size of its grazing lease.

The Board's role is not to weigh competing factual explanations but to assess whether the alleged procedural and property-based harms, taken as true, satisfy the constitutional minimum for standing. In addition to allegations of injury, there must be a fairly traceable connection between the approval of the permit amendment and the alleged injury, and the relief requested (setting aside the permit amendment) must address that alleged injury.

C. Admissibility (Motion to Limit Scope of Hearing)

Valley Garden has filed a motion to limit the scope of testimony by A.M. Welles' or the DEQ's witnesses that would bolster the DEQ's permitting rationale beyond what was contained in the permitting record. (Dkt. # 38 at 1-2.) In response, the DEQ argues that MAPA requires that all parties in a contested case hearing be able to respond and present evidence on all issues raised on appeal. (Dkt. # 50 at 2.) The DEQ also argues that case law cited by Valley Garden applies to a court's review of the Board's administrative finding, not to the Board's review of a permitting decision. (*Id.* at 3.) Finally, the DEQ argues that Valley Garden's motion is overbroad, and if granted, would require the exclusion of Valley Garden's own experts and employees who were not involved in the permitting process. (*Id.* at 8.)

Briefing for Valley Garden's Motion to Limit Scope of Hearing was completed before the Montana Supreme Court issued its decision in *Mont. Env't'l Info. Ctr. v. Westmoreland Rosebud Mining, LLC*, 2023 MT 224, 414 Mont. 80, 545 P.3d 623. In *Westmoreland*, Conservation Groups challenged a coal mine permitting decision and filed a motion in limine seeking to bar expert testimony by Westmoreland's or the DEQ's witnesses that would bolster its permitting decision with evidence or reasoning beyond that contained in the DEQ's impact assessment. *Westmoreland*, ¶ 40.

The hearing examiner subsequently issued an order stating that the DEQ's and Westmoreland's evidence "will be limited to evidence that explains and demonstrates the evidence before the agency at the time of its permitting decision and analysis within the [impact assessment] satisfy applicable legal standards." *Id.* The hearing examiner reviewed evidence on a case-by-case basis as it was presented. *Id.*

At the contested case hearing, Westmoreland presented evidence from several experts and stipulated that the evidence was not contained in the impact assessment or Westmoreland's own probable hydrological consequences report included in its application. *Id.* ¶ 43. The hearing examiner's proposed findings of fact and conclusions of law concluded that "the only relevant facts are those concluded by the agency in the permitting process before the agency makes its permitting decision," but nevertheless cited to expert testimony regarding materials not contained in the DEQ's records. *Id.* ¶ 44. On review, the district court determined that allowing the DEQ and Westmoreland to present post-decisional analyses was prejudicial to the Conservation Groups, since the hearing examiner had not allowed the Conservation Groups to present similar testimony. *Id.*

The Montana Supreme Court reversed the holding of the District Court. The Court held that the DEQ's permitting decision must "be supportable before the Board without reference to information that was not available to and relied upon by DEQ at the time of the permitting." *Id.* ¶ 46. However, if testimony is "drawn from information contained in a [permitting record] or otherwise compiled by the DEQ during the permit process," then it is admissible. *Id.* ¶ 50.

In this matter, at the hearing on Valley Garden's Motion to Limit Scope of Hearing, the parties addressed the recent *Westmoreland* holding. Valley Garden's attorney explained that under *Westmoreland*, "expert testimony has to be drawn from information contained in the record during the permitting process." (Dkt. # 113-4, Tr. of Proc. (Apr. 26, 2024) at 12:20-22.) Valley Garden now is seeking to:

- 1) Limit the testimony of Dr. Michael Nicklin (DEQ's expert witness) to opinions regarding information in the record before the agency, and not information he created after the fact. (*Id.* at 15:20-24.)
- 2) Exclude testimony of Zach Winfield (DNRC employee) and Trevor Taylor (DNRC employee) who did not participate in the DEQ's decision to approve the amendment to A.M. Welles' mining permit. (*Id.* at 15:25-16:9.)
- 3) Exclude Alan Ringlein's (A.M. Welles employee) testimony regarding his own observations of the mine site, the Application, and conversations with Valley Garden employees because those were not included in the application materials before the DEQ. (*Id.* at 16:24-17:16.)²

² Valley Garden also raised a hearsay objection to Ringlein's testimony regarding conversations with an A.M. Welles employee. The testimony is likely admissible as a statement of a party opponent under Mont. R. Evid. 801(d)(2).

- 4) Valley Garden withdrew its request to exclude Ben Kaluza's (A.M. Welles employee) testimony. (*Id.* at 17:17-18:1.)
- 5) Limit Bryan Allison's (DEQ employee) and JJ Conner's (DEQ employee) testimony regarding the permitting process and opinions regarding the impact of HB 599 (2021) to the materials contained in the four corners of the permitting documents. (*Id.* at 18:2-16.)

In response, the DEQ's attorney argued that the testimony should be admissible if it is relevant to whether the DEQ followed the law in appropriately applying the correct procedural and substantive requirements of the Opencut Mining Act. (*Id.* at 46:2-9.) The DEQ argued that the testimony Valley Garden seeks to exclude or limit explains the evidence that the DEQ had at the time of its decision, and thus it is admissible. (*Id.* at 54:4-12.)

Valley Garden's Motion presents a focused legal question for the Board: under the standard articulated in *Westmoreland*, what is the permissible scope of testimony in a contested case hearing reviewing an agency decision? More specifically, the Board needs to determine whether the challenged testimony merely explains and contextualizes the information that was before DEQ at the time of its decision, or whether it instead offers new analyses, data, observations, or rationales that were not part of the DEQ's permit application review and therefore constitute impermissible *post hoc* justification.

Based upon our preliminary analysis, it appears the vast majority of the testimony offered (with the exception of the DNRC employees' opinions that "A.M. Welles is a good operator" and testimony drawn from three pits dug by the DEQ's expert after the conclusion of the permitting process) appears to be either drawn from information compiled by the DEQ in the permitting process, or appear to explain the DEQ's interpretations of its own rules implementing statutes. *See Westmoreland*, ¶ 46.

Procedurally, the Board has the option to conditionally admit the evidence at this point, and then later decide whether to exclude portions of the evidence, if appropriate, when making its findings of fact. Corbett, 362 (citing *Peschke v. Carroll Coll.*, 280 Mont. 331, 343, 929 P.2d 874, 881 (1996)). Alternatively, the Board will need to make a decision on the admissibility of each piece of evidence Valley Garden seeks to exclude on summary judgment.

D. Completeness

Valley Garden argues that the Application upon which A.M. Welles' permit is based is legally defective because the Application was not "complete" as required by the Opencut Mining Act. Under the Opencut Mining Act, the sequence of the permitting process starts with a review for "completeness." Mont. Code. Ann. § 82-4-432(4); ARM § 17.24.212. If an application is not complete, then the DEQ is required by law to notify the applicant of the missing information within 5 days. ARM § 17.24.212(2).

During completeness review, the DEQ administrative personnel reviews the application form to ensure it contains:

- (i) the name of the applicant, and if other than the owner of the land, the name and address of the owner;
- (ii) the type of operation to be conducted;
- (iii) the estimated volume of overburden and materials to be removed;
- (iv) the location of the proposed opencut operation by legal description and county accompanied by a map showing the location of the proposed operation sufficient to allow the public to locate the proposed site; and
- (v) a statement that the applicant has the legal right to mine the designated materials in the lands described.

Mont. Code. Ann. § 82-4-432(2)(a) (emphasis added). The application must be accompanied by the following materials:

- (i) a bond or security meeting the requirements as set out in this part;
- (ii) a statement from the local governing body having jurisdiction over the area to be mined certifying the proposed sand and gravel opencut operation complies with the applicable zoning regulations adopted under Title 76, Chapter 2, . . . ;
- (iii) a plan of operation that contains information sufficient to initiate acceptability review by addressing the requirements of Mont. Code. Ann. § 82-4-434 and rules adopted pursuant to this part related to 82-4-434;
- (iv) written documentation that the landowner has been consulted about the proposed plan of operation;
- (v) a written agreement between the landowner and the operator authorizing the operator access to the site to perform reclamation if the landowner revokes or otherwise terminates the operator's right to mine;
- (vi) a list that is certified by the operator and generated on a form furnished by the department using cadastral and field information at the time of permit application of owners of real property on which occupied dwelling units exist located within one-half mile of the proposed permit boundary using the owners of record as shown no more than 60 days prior to the submission of an application in the paper or electronic records of the county clerk and recorder for the county where the proposed opencut operation is located; and
- (vii) documentation of consultation with the state historic preservation office regarding possible archaeological or historical values on the affected land.

Mont. Code. Ann. § 82-4-432(2) (emphasis added). The application is deemed complete if it contains the above-listed items. Mont. Code. Ann. § 82-4-432(4)(a)(i). The statute on

its face does not require the DEQ to verify the accuracy of information submitted at the completeness review stage. *See id.*

Valley Garden argues that the DEQ should not have certified A.M. Welles' Application as complete for two reasons.³ First, A.M. Welles certified that it had the legal right to mine the property when it allegedly did not. (Dkt. # 130 at 3.) Second, the address used to identify Valley Garden as an owner within one-half mile of the proposed permit boundary was inaccurate, therefore the Application was incomplete. (*Id.*)

The DEQ argues in response that the Opencut Mining Act differentiates between "completeness" and "acceptability" review. (Dkt. # 127 at 4.) During completeness review, the DEQ administrative staff conduct an initial review to determine if required documents have been received. (Dkt. # 127, Ex. A (Allison Decl.) at 12; Dkt. # 127 at 4.) The administrative staff do not review the contents of such documents; that task is reserved for the acceptability review conducted by the DEQ staff scientist. (Dkt. # 127, Ex. A at 13-14; Dkt. # 27 at 4-5.) The notice of completeness and transmittal of the application to a staff scientist do not constitute a legal determination that the documents are "acceptable" under the Opencut Mining Act. (Dkt. # 127, Ex. A at 17; Dkt. # 127 at 5.)

Here, there is no dispute that the Application contained "a statement that the applicant has the legal right to mine the designated materials in the lands described." (Dkt. # 65, Ex. 1 at AR000022.) Nor were there any dwellings located within one-half mile of the mine. (*Id.* at AR000042.)

The dispositive issue for summary judgment is the scope of the DEQ's obligation during the statutory "completeness" review under the Opencut Mining Act (*see* Mont. Code. Ann. § 82-4-432; ARM § 17.24.212), i.e. whether completeness review requires only a ministerial check that the items listed in the statute were submitted with the application, or whether the Department must also verify the accuracy of the information contained in those submissions before deeming an application complete. To answer that question, one begins by examining the plain language of Mont. Code. Ann. § 82-4-432 and ARM § 17.24.212, which specify the items an application must contain to be deemed complete. *Consumer Prod. Safety Comm'n*, 447 U.S. at 108.

In interpreting the statute, each term is given its ordinary meaning, and the statute is to be interpreted as a whole to ensure that every required item is present and no provision is rendered superfluous. *State v. Heath*, 2004 MT 126, ¶ 31, 321 Mont. 280, 90 P.3d 426 (citations omitted). Interpretations of statute that should also not produce unreasonable or

³ Valley Garden also argues that the DEQ should have obtained a "Landowner Consultation" under ARM § 17.24.206. The DEQ accepts the DNRC lease in lieu of the landowner consultation because it satisfies the statutory completeness provision in Mont. Code. Ann. § 82-4-432(2)(b)(iv) that the applicant provide "documentation the landowner has been consulted about the proposed plan of operation." (Dkt. # 127, Ex. A (Allison Decl.) at 22-23; Dkt. # 127 at 8.)

absurd results. *Mont. Sports Shooting Ass'n*, ¶ 11. Ultimately, the question is whether the alleged defects identified by Valley Garden—i.e., A.M. Welles' certification that it had the legal right to mine and the incorrect address used to identify Valley Garden as a nearby property owner—bear on statutory completeness at all. The DEQ contends that completeness review is limited to confirming that required documents were submitted, leaving evaluation of their substance to later review. Valley Garden's argument assumes the DEQ must assess the truth or accuracy of those materials at the completeness stage.

E. Notice

Valley Garden argues that A.M. Welles failed to satisfy its obligation to provide notice under the Openpit Mining Act, which deprived Valley Garden of its rights as adjacent landowners, as an existing lessee of the area proposed for expansion, and as a member of the public. Valley Garden identifies four deficiencies:

- 1) **Description of Activities:** A.M. Welles' notice did not explicitly state it would import offsite materials for concrete and asphalt recycling activities, as proposed in the Application. (Dkt. # 105 at 14-15.)
- 2) **Valley Garden's Address:** A.M. Welles listed Valley Garden's address at 300 Turtle Creek Boulevard, instead of 3000 Turtle Creek Boulevard, in the form submitted to the DEQ identifying landowners within a half-mile of the permit site, which allegedly resulted in Valley Garden not receiving the mailed notice. (*Id.* at 11.)
- 3) **Public Comment Period:** A.M. Welles' notice contained a statement that the public comment period was only open until April 3, 2022, when the public comment period actually remained open until the permit was issued. (*Id.* at 11-12.)
- 4) **Public Meeting Requirement:** The notice purportedly mailed to Valley Garden did not include the form required to be used for requesting a public meeting and Valley Garden was improperly denied a public meeting (*Id.* at 11-12.)

Montana's harmless error doctrine provides that the Board "at every stage of the proceeding must disregard any error or defect in the proceeding which does not affect the substantial rights of the parties." *Liberty Cove, Inc. v. Missoula Cnty.*, 2009 MT 377, ¶ 21, 353 Mont. 286, 220 P.3d 617 (citing Mont. R. Civ. P. 61). Moreover, "[t]he law has long recognized that actual attendance and participation may constitute a waiver of alleged deficiencies of notice." *Id.* (citing *Knodel v. Williamson*, 84 U.S. 586, 589 (1873)). Thus, if a party receives actual notice and participates, any error contained in a notice is harmless. *Id.* (emphasis added).

As an initial matter, the question is whether Valley Garden's participation in the public comment process constitutes a waiver of its objections to the notice provided by A.M.

Welles. *Id.* If such participation does not, however, constitute a waiver, then the question is whether any of the deficiencies identified by Valley Garden deprived it of its “substantial rights” under the Opencut Mining Act.

Description of Activities

Valley Garden argues that the public notice issued by A.M. Welles was deficient because it failed to fully disclose the full range of facilities proposed in the Application. (Dkt. # 105 at 14.). The Opencut Mining Act specifies that public notice must include, among other items:

[A] description of the acreage, the estimated overburden and materials to be removed, the type of materials to be removed, the duration of the activities, and the access points of the proposed opencut operation[.]

Mont. Code. Ann. § 82-4-432(5)(b).

The Notice stated:

DSL Pit is located in Madison County, T52-R1W-S16, 3.1 miles north of Ennis, MT on Hwy 287. The site is 63.2 acres. Topsoil to an average depth of 8 inches will be stockpiled for reclamation. 300,000 cubic yards of sand and gravel is proposed to be removed from the pit over the life of the permit. No permanent access facilities will be erected. Proposed reclamation date is December 2042. Access is at two points along HWY 287 north of Ennis.

(Dkt. # 65, Ex. B.)

The question is whether A.M. Welles’ notice satisfied the substantive notice requirements set out in Mont. Code. Ann. § 82-4-432(5)(b), or whether, as Valley Garden contends, the statute required a more substantively detailed notice than A.M. Welles provided.

Valley Garden’s Address

The Opencut Mining Act requires a permit applicant to publish public notice of a permit application within 15 days of the DEQ’s favorable completeness determination. Mont. Code. Ann. § 82-4-432(5). To provide public notice, an applicant must:

- (a) publish notice at least twice in a newspaper of general circulation in the locality of the proposed opencut operation
- (b) mail the notice by first-class mail to the board of county commissioners of the county in which the proposed opencut operation is located and to surface owners of land located within one-half mile of the boundary of the proposed opencut permit area using the most current known owners of record as shown in the paper or electronic records of the county clerk

- and recorder for the county where the proposed open-cut operation is located.
- (c) post the notice in at least two prominent locations at the site of the proposed open-cut operation, including near a public road, if possible; and
 - (d) provide the department with the names and addresses of those notified pursuant to subsection (6)(b).

Mont. Code. Ann. § 82-4-432(6)(a)-(d).

Valley Garden argues that a typographical error included in a form identifying Valley Garden to the DEQ was prejudicial to its ability to receive notice. Instead of listing the correct address of 3000 Turtle Creek Blvd, A.M. Welles inadvertently listed the address as 300 Turtle Creek Blvd. (Dkt. # 1 at ¶¶ 19-20.) The DEQ argues that the typographical error had no impact on whether Valley Garden received notice and the form was only submitted to the DEQ to identify owners of property who have occupied dwelling units within a half mile of the proposed permit boundary. (Dkt. # 127 at 20-21.)

The DEQ also argues that the copy of the notice letter addressed to Valley Garden contained the correct address of 3000 Turtle Creek Blvd. (Dkt. # 64 at 21.) It remains unresolved whether Valley Garden received the public notice via mail from A.M. Welles. (*Cf.* Dkt. # 105 at 11; Dkt. # 127 at 26-27).

What is undisputed, however, is that any errors in the address did not prevent Valley Garden from receiving actual notice of the permitting process. Diane Conradi submitted an email and subsequent letter on May 17 and 20, 2022, respectively, on behalf of Valley Garden providing comments on the Application. (Dkt. # 65, Ex. 1 at AR 0000066-80.)

The question is whether the typographical error substantively impacted Valley Garden's right to participate in the public comment process, as Valley Garden argues, or whether, as the DEQ contends, the typo in the form submitted to the DEQ was irrelevant in determining whether Valley Garden received sufficient notice.

Public Comment Deadline

The DEQ is required to accept public comment throughout the Application review process. Mont. Code. Ann. § 82-4-432(b)(iii). There is no specific statutory requirement to include a deadline for public comment in the Applicant's public notice. *See* Mont. Code. Ann. § 82-4-432(5).

A.M. Welles' notice contained a statement that the public comment period was only open until April 3, 2022. However, the DEQ issued deficiency letters that delayed application approval beyond April 3, 2022. (Dkt. 65-1 at AR000059-65.) On May 17, 2022, Diane Conradi submitted an email to the DEQ objecting to the Application and requested a

public meeting on behalf of Valley Garden. (Dkt. 65, Ex. 1 at AR000066-67.) On May 20, 2022, Diane Conradi submitted an additional letter to the DEQ objecting to the Application on behalf of Valley Garden. (*Id.* at AR000069-80.) The DEQ had not approved the Application when Ms. Conradi submitted her email or letter. (*Id.* at AR000001).

The Board's analysis involves two related questions. The first is whether the statement in the notice identifying April 3, 2022, as the close of the public comment period constituted a violation of the governing statute, Mont. Code. Ann. § 82-4-432(5)(b). The DEQ argues that this date was listed because it was merely the earliest possible date the Application could have been approved. (Dkt. 127 at 25.) The DEQ notes that the statute does not require applicants to continually update the deadline for submitting public comment, because the applicant does not know when or if the DEQ will determine that an application is acceptable. (*Id.*) Valley Garden argues that the statement identifying April 3, 2022, as the close of public comment should render the permit invalid. (Dkt. 105 at 11-12.)

The second question is, assuming such a defect occurred, whether it affected Valley Garden's substantial rights. The record shows that Valley Garden, through counsel, submitted objections and requested a public meeting in May 2022, while the Application remained under review. These circumstances may be relevant to whether Valley Garden received actual notice and had an opportunity to participate notwithstanding the statement in the notice and, therefore, whether any defect materially affected Valley Garden's substantial rights.

Public Meeting Requirement

The DEQ is required to hold a public meeting in the area of the proposed opencut operation at the request of:

- (i) the applicant; or
- (ii) at least 51% of the real property owners **on which occupied dwelling units exist** or 10 real property owners **on which occupied dwelling units exist**, whichever is greater, notified pursuant to [Mont. Code. Ann. § 82-4-432].

Mont. Code. Ann. § 82-4-432(9)(a)(i)-(ii) (emphasis added).

Valley Garden's interpretation of the foregoing statute focuses on the fact that it is the only landowner within a half-mile of the permit boundary, other than the DNRC. (Dkt. # 105 at 13.) Valley Garden does not allege that it has occupied dwellings within a half-mile of the proposed permit boundary.

DEQ argues in response that Valley Garden did in fact request a public meeting in the comments submitted by Diane Conradi on May 17, 2022, but the request wasn't granted because Valley Garden did not have any occupied units within a half-mile radius of the proposed permit boundary. (Dkt. # 127 at 22-26.)

The question is whether the public meeting requirement is triggered by ownership of land alone, as Valley Garden contends, or whether the statute limits the right to request a meeting to owners of property containing occupied dwelling units within the specified radius, as suggested by the DEQ.

F. Acceptability

Valley Garden asserts that the DEQ should have denied A.M. Welles' Application because it did not satisfy the statutory requirements of "acceptability." Under the Openpit Mining Act, an application is acceptable "if it complies with the requirements of subsections (1) and (2) [completeness] and includes a plan of operation that satisfies the requirements of 82-4-434 and rules adopted pursuant to this part" Mont. Code. Ann. § 82-4-432(10)(a).

Valley Garden raises four issues regarding the acceptability of A.M. Welles' Application:

- 1) **Legal Right to Mine:** A.M. Welles lacked the legal right to mine the expanded area because the DNRC had not independently completed its environmental impact assessment for the mine under the MEPA. (Dkt. # 130 at 6-7.)
- 2) **Plan of Operations/Test Holes:** The plan of operations itself was deficient because Valley Garden did not dig a sufficient number of test holes pursuant to ARM § 17.24.218(1)(c).
- 3) **Offsite Materials:** The DEQ failed to address the storage and processing of offsite material. (Dkt. # 130 at 8-9.)
- 4) **Hydrology:** A.M. Welles' Application should have been denied because it was using a well that was unpermitted when the DEQ approved the Application. (Dkt. # 130 at 4-5.)

Legal Right to Mine

Valley Garden argues that the Application was defective because A.M. Welles lacked the required "legal right to mine," asserting that the DNRC had not yet authorized mining activities pending review under the MEPA, despite having granted the mineral rights to sand and gravel across the 63.2-acre DSL site. (Dkt. # 105 at 7.)

The Opencut Mining Act requires applicants to include in their application “a statement that the applicant has the **legal right to mine** the designated materials in the lands described.” Mont. Code. Ann. § 82-4-432(2)(a)(v) (emphasis added). Additionally, permit applicants must certify, to the best of their knowledge, the truth of that statement. ARM § 17.24.222(3)(b). The statute does not define the phrase “legal right to mine.”

The parties advance different interpretations of what the requirement entails at the time an application is submitted. Valley Garden argues that A.M. Welles lacked the “legal right to mine” because the February 4, 2022, DNRC Aggregate and Rock Mining Permit was conditioned on final review under MEPA. (Dkt. # 105 at 7.) The DNRC did not permit A.M. Welles to conduct mining activities on the site until the MEPA review was complete. (Dkt. # 106, Ex. 3 at 11.) The DNRC did not complete its MEPA analysis for the proposed permit expansion at the DSL Site until May 23, 2023, which was 12 months after A.M. Welles submitted the subject Application to the DEQ. (*Id.* at 10.)

In response, the DEQ argues that A.M. Welles did in fact have the “legal right to mine” under the Opencut Mining Act. (Dkt. # 127 at 8.) The DNRC permit granted the *right* to sand and gravel effective February 4, 2022, and merely conditioned *activities* on subsequent approvals. (Dkt. # 127 at 9.)

In interpreting the phrase “legal right to mine,” one begins with the plain language of Mont. Code. Ann. § 82-4-432(2)(a)(v) and gives effect to its ordinary meaning. *Mont. Vending, Inc.*, ¶ 21. Where the statute does not define a term, as here, that term is understood according to its plain and ordinary meaning. *Alpine Aviation, Inc.*, ¶ 11. If the statutory language is ambiguous, respectful consideration should be given to the DEQ’s interpretation, recognizing that agency expertise may inform the practical understanding of what constitutes a “legal right to mine.” *MEIC 2019*, ¶ 24 n.9.

Applying these principles, the question is whether the statutory requirement is satisfied only when an applicant possesses a presently exercisable authorization to conduct mining operations, or whether it is sufficient that the applicant holds a permit or other legal entitlement to the mineral materials even if additional regulatory approvals remain pending.

Plan of Operation/Test Holes

In its Application, A.M. Welles provided data from three test holes to demonstrate soil and overburden thickness in the permit area. Both the 2016 and 2022 versions of ARM § 24.17.218(1)(c) require an application to include:

a soil and overburden characterization section that includes the average soil and overburden thickness in the permit area determined on the basis of no less than three test holes spaced representatively to describe proposed permit areas of less than nine acres and one test hole per each three-acre area for

proposed permit areas of nine acres or more . . . or as otherwise approved by the department in the permit.

(emphasis added.) Valley Garden argues that A.M. Welles’ Application failed to satisfy this criterion because the proposed permit expansion covered 23.2 acres. (Dkt. # 105 at 8-9.) Thus, Valley Garden argues, the Application should have included at least 8 test holes. (*Id.* at 9.)

In response, DEQ argues that it has discretion as to the number of test holes required for permit approval, because ARM § 17.24.218(1)(c) includes the clause “or as otherwise approved by the department in this permit[.]” (Dkt. # 127 at 13 (emphasis added).) Even if it did not have such discretion, the DEQ argues that three test holes would have satisfied the criteria in ARM § 17.24.218(1)(c) because the permit added only 9 mineable acres of land. (Dkt. # 127 at 13.)

The parties’ dispute presents a threshold question regarding the interpretation of ARM. § 24.17.218(1)(c). The first question is whether the clause allowing soil and overburden characterization “as otherwise approved by the department in the permit” grants the DEQ discretion to approve an application based on a number of test holes different from the numerical spacing requirement otherwise described in the rule. If the rule affords such discretion, then the second question is whether the DEQ properly exercised that discretion in approving A.M. Welles’ Application based on data from three test holes.

If the rule does not permit such a departure, then one needs to determine how the numerical requirement applies here—specifically, whether the required number of test holes should be calculated based on the full 23.2-acre proposed permit expansion, as Valley Garden contends, or based only on the nine acres of additional mineable land identified by the DEQ. Resolution of these questions will determine whether the Application satisfied ARM § 24.17.218(1)(c) as a matter of law.

Storage and Recycling of Off-Site Material

Valley Garden argues that the Application fails “acceptability review” because the plan of operation failed to fully describe that A.M. Welles would be importing concrete and asphalt for on-site recycling. (Dkt. # 105 at 9.) However, Valley Garden’s argument appears to turn not on the sufficiency of the information submitted generally, but rather the fact that the Application did not clearly disclose the importation of off-site materials (Dkt. # 130 at 11.)

ARM § 17.24.218(1)(e), which was enacted in October 2022, requires an applicant to submit:

- (ii) a construction plan that describes the locations and construction schedules for all areas to be disturbed and location of all facilities including

offices, parking, vehicle staging areas, roads designated by the landowner as affected land, and processing plants;

(iv) a description of the anticipated general mining progression, including the location of the first stripping and excavation, the direction of mining progress, and timing for the mobilization and setup of processing facilities such as a screen, crusher, asphalt plant wash plant, batch plant, pug mill, and other facilities;

The 2016 version of the administrative rule, which was abrogated in part by House Bill 599, included an identical provision. ARM § 17.24.218(1)(e)(ii), (iv) (2016). Neither version requires a permit applicant to disclose that materials come from “off-site.” In response to Valley Garden’s argument, the DEQ notes that the Application did, in fact, discuss off-site materials. (Dkt. # 127 at 16.) Though not clearly stated by the parties, recycling concrete and asphalt at a gravel mine necessarily involves the importation of discarded asphalt and concrete materials. The public comment submitted by Diane Conradi on behalf of Valley Garden acknowledged that “[A.M. Welles] is seeking permission for an Asphalt and Concrete Recycling Plant” (Dkt. # 65, Ex. 1 at AR000077.)

Notwithstanding, the DEQ argues that the Application satisfied all of the construction plan requirements in ARM § 17.24.218(1)(e)(ii) (Dkt. # 127 at 15-16.) For example, the Application included a site map showing the location of three test holes, a storage pond, a settling pond, materials storage piles, a mobile crusher, the proposed location of a temporary potential asphalt plant, the mobile wash plant, the recycled asphalt and concrete stockpiles, and the water well. (Dkt. # 65, Ex. 1 at AR000026.) There are no permanent facilities, no offices, no permanent parking, no vehicle staging areas, no roads designated as affected land, and no processing plants indicated on the site map. (*Id.*) The Application stated that all opencut equipment is mobile and is moved within the pit floor along the highwall. (*Id.* at AR000010.)

The DEQ argues that the Application satisfied the description of activities required in ARM § 17.24.218(1)(e)(iv) (Dkt. # 127 at 15-16.) The Application stated that mobile processing equipment and mine stockpile materials would move with mining activity. (Dkt. # 65, Ex. 1 at AR000010.) The Application describes the amount of minerals to be mined as 300,000 cubic yards. (*Id.* at AR000004.) The mining plan shows the areas to be disturbed and the description of the proposed mining. (*Id.* at AR000010-11, 13). The Application states that opencut activities will begin “[n]orth and east of the existing disturbance,” then will progress “north and east.” (*Id.* at AR000010.) The Application described the type of topography and the planned mining methods. (*Id.* at AR000011, 13-14.)

Because the material facts concerning the contents of the Application are not disputed, the issue presented is one of regulatory interpretation appropriate for resolution on

summary judgment. As such, the question becomes, what is the scope of the disclosure obligations imposed by ARM § 17.24.218(1)(e)? The analysis, then, is whether the rule requires an applicant to expressly identify the origin of materials to be processed at the site or whether it is satisfied if the application identifies the location and use of processing equipment and otherwise describes the proposed mining operations and disturbance areas.

Stated differently, the question is whether the rule imposes a requirement that applicants disclose the importation of off-site materials for on-site recycling as a distinct operational activity, even though the text of the rule focuses on the location of facilities and the anticipated progression of mining activities.

Hydrological Information

Valley Garden argues that A.M. Welles' Application should have been denied essentially because DEQ failed to obtain, and A.M. Welles did not provide, sufficient water quality data.

In 2021, HB 599 removed certain acceptability requirements related to ground water and the DEQ's ability to regulate surface water and ground water under the Opencut Mining Act:

~~(l) that surface water and ground water will be given appropriate protection, consistent with state law, from deterioration of water quality and quantity that may arise as a result of the opencut operation;~~

~~...~~

~~(n) that any additional procedures, including monitoring, that are necessary, consistent with the purposes of this part, to prevent significant physical harm to the affected land or adjacent land, structures, or life forms will be implemented.~~

See Mont. Code. Ann. § 82-4-434(2) (2019); HB 599.

Since the passage of HB 599, two water quality-related provisions remain in the statutes governing permitting in the Opencut Mining Act.

- 1) **Type of Permit**: The first provision defines a standard permit (as opposed to a dryland permit) as one “that affect[s] ground water or surface water, including intermittent or perennial streams, or water conveyance facilities[.]” Mont. Code. Ann. § 82-4-432(1)(b)(i).
- 2) **Buried Waste**: The second provision requires that waste be buried in a manner that protects water quality and is compatible with the postmining use of the land or

be disposed of offsite in accordance with state laws and rules. Mont. Code. Ann. § 82-4-434(2)(d).

HB 599 abrogated certain administrative rules that required applicants to include detailed water resources information and a water quality protection and management section in the plan of operation required for permit approval. Mont. Code. Ann. § 2-4-305(6)(a) (“Whenever by the express or implied terms of any statute a state agency has authority to adopt rules to implement, interpret, make specific, or otherwise carry out the provisions of the statute, an adoption, amendment, or repeal of a rule is not valid or effective unless it is . . . consistent with and not in conflict with the statute”).

The water-related provisions carried over from the 2016 version to the 2022 version of ARM 17.24.218(1) require applications to contain a water resources section that includes “(i) identification of the sources of the information reported, such as landowners, field observations, and water well logs; [and] (ii) the estimated seasonal high and seasonal low water table levels in the permit area and the information sources used, such as landowners, field observations, nearby surface water, and water well logs.” ARM § 17.24.218(f) (2022); *cf.* ARM § 17.24.218(1)(g) (2016). Ostensibly, the first provision merely seeks identification of the sources of information provided under the second provision.

A.M. Welles’ Application speaks for itself. Though the numbers were transposed, the Application included estimates of seasonal high and seasonal low water table levels. (Dkt. # 65, Ex. 1 at AR000006.) The well logs disclosed the source of the information. (*Id.* at AR000050-53.) The Application also identified a different well used in the operation (*Id.* at AR000009.)

Valley Garden objects to the data provided by A.M. Welles on several bases. First, Valley Garden argues that the data should have been collected from the well used in the mine’s operations, not a different well. (Dkt. # 105 at 9.) Second, Valley Garden objects to the DEQ’s approval of A.M. Welles’ use of an unpermitted well in its mining operation. (Dkt. # 130 at 5.) Finally, relying on expert testimony, Valley Garden argues that the data submitted by A.M. Welles provided an inaccurate representation of the water resources directly connected to the permit area. (Dkt. # 125 at 16.)

In response, the DEQ simply argues that the requirement to report estimated seasonal high and seasonal low water table levels and the sources of that information were disclosed as required by ARM § 17.24.18, and HB 599 revoked from the DEQ any further authority to regulate water quality under the Opencut Mining Act; whether the well was permitted or not was irrelevant for purposes of determining the acceptability of the Application. (Dkt. # 127 at 18.) There is no requirement that A.M. Welles submit the well log data from the well currently in use in the operation. (*Id.*) The data may come from a variety of sources, including nearby landowners, field observations, nearby

surface area, and water well logs, as long as the data estimates the seasonal high and low water table levels in the area. *See* ARM § 17.24.218(f)(ii) (2022).

The dispute turns on the scope of the DEQ's authority after the Legislature enacted HB 599. Prior to those amendments, the permitting provisions of the Opencut Mining Act required findings addressing protection of surface and groundwater and supported administrative rules requiring detailed water-resource information from applicants. HB 599 removed those statutory provisions, substantially narrowing the role of water considerations in the opencut permitting framework.

That change defines the summary judgment question. The issue is not whether additional groundwater data might have been useful, but whether the governing statute authorized the DEQ to require it. Therefore, whether the DEQ retained authority to require additional groundwater information determines whether the alleged deficiencies Valley Garden identifies are legally relevant to the acceptability analysis under Mont. Code Ann. § 82-4-432.

APPENDIX A
SUMMARY OF FACTUAL BACKGROUND

APPENDIX A

SUMMARY OF FACTUAL AND PROCEDURAL BACKGROUND

Parties

1. A.M. Welles operates an opencut mining operation on Montana State Trust Lands between McAllister and Ennis, Montana. (Dkt. # 65, Ex. 1 at AR000029.)
2. Valley Garden holds a grazing lease from the DNRC for the property adjacent to and surrounding the gravel pit located at SW4, Sec. 8, Township 5S, Range 1W (160 acres) and SE4, Sec. 16, Township 5S, Range 1W, less the gravel pit (140.20 acres), in Madison County, Montana. (Dkt. # 106, Ex. 1 (Grazing Lease) at 2.)
3. Valley Garden's lease reserves the DNRC's right to lease mineral rights to other permittees and licensees for mining sand and gravel. (*Id.* at 3.)

HB 599

4. In 2021, the Montana Legislature enacted HB 599, which revised the Opencut Mining Act. H.B. 599, 67th Leg. (2021).
5. HB 599 became effective upon passage on May 14, 2021. *Id.* § 8.
6. HB 599 applied retroactively to amendments that propose to change the reclamation date or the post mine land use for opencut operations in existence on the day HB 599 became effective. *Id.* § 9.
7. Relevant here, HB 599 removed the requirements contained in Mont. Code. Ann. § 82-4-434 that required a plan of operation to contain:

~~(l) that surface water and ground water will be given appropriate protection, consistent with state law, from deterioration of water quality and quantity that may arise as a result of the opencut operation;~~

. . . .

~~(n) that any additional procedures, including monitoring, that are necessary, consistent with the purposes of this part, to prevent significant physical harm to the affected land or adjacent land, structures, or life forms will be implemented.~~

Id. § 5.

Completeness

8. A.M. Welles submitted its Application for Amendment #3 to Opencut Mining Permit #674 to the DEQ on February 9, 2022. (Dkt. # 65, Ex. 1 at AR000002.)
9. The Application sought to add 23.2 acres to the existing permitted 40 acres. (*Id.* at AR000004.)
10. A.M. Wells' Application only added 9 acres of area to be mined. The additional area is to include a buffer between the pit and the highway, a buffer on the eastern edge where it is daylighting, and additional area to stockpile the necessary topsoil. (*Id.* at AR000008.)
11. With its Application, A.M. Welles submitted a copy of the State of Montana Aggregate and Rock Mining Permit No. G-1273-94 (the "DNRC Permit") that granted A.M. Welles the right to extract sand and gravel from approximately 63.2 acres located in Madison County at Township 5 South, Range 1 West, Section 16: W1/2SE1/4. (*Id.* at AR000033.)
12. The DNRC Permit requires that "[n]o activity shall occur on the permit area until such operation plan or amendment has been approved in writing by the Department . . . The Department shall not approve the Plan until the permittee has submitted all necessary information and no work will be conducted without written approval of the Operating Plan." (*Id.* at AR000034.)
13. The Application states that "A.M. Welles has the legal right to conduct opencut operations in the permit area described in the *Standard Opencut Mining Application.*" (Dkt. # 65, Ex. 1 at AR000022.)
14. During Completeness Review, the DEQ reviews applications for administrative completeness, i.e., whether an application includes all required documents. (Dkt. # 127, Ex. A, Allison Decl. (Dec. 19, 2025), ¶¶ 11-14; Dkt. # 130 at 3 (acknowledging that "Valley Garden conflated to some extent the completeness review requirements with the acceptability requirements . . .").)
15. On February 14, 2022, the DEQ issued a notice of incomplete application to A.M. Welles because (a) the application fee had not yet been received; (b) the Application form itself did not indicate that "Well Logs" were submitted (when they had been); (c) the Application did not include a consultation letter from the State Historic Preservation Office; and (d) because the required bond had not been submitted. (Dkt. # 65, Ex. 1 at AR000054-55.)
16. On March 4, 2022, the DEQ sent notice to A.M. Welles that its Application was complete and that A.M. Welles must provide public notice of the Application

within 15 days after the date of the notification letter. Instructions for what that public notice had to include were also provided. (*Id.* at AR000056-57.)

Notice

17. Valley Garden is the only landowner, other than the DNRC, within one-half mile of the proposed amended permit boundary. (*Id.* at AR000042.)
18. There are no dwellings located within one-half mile of the mine. (*Id.* at AR000042.)
19. A form submitted to the DEQ by A.M. Welles as part of the application process listed Valley Garden's address as 300 Turtle Creek Boulevard, instead of 3000 Turtle Creek Boulevard. (Dkt. # 65, Ex. 1 at AR000042.)
20. A.M. Welles provided notice to Valley Garden (Kaluza Decl. Dkt. # 65-16 at Ex. B); the Madison County Board of County Commissioners (*Id.* at Ex. A); and published in the Madisonian weekly newspaper on March 17 and 24, 2022 (*Id.* at Ex. D.)
21. The notice provided:

As required by Section 82-4-432(5)(6), MCA, A.M. Welles, INC PO Box 2808 Norris, MT 59745 (406) 685-3372, hereby gives notice that on March 4, 2022 it received receipt of the Montana Department of Environmental Quality's determination of administrative completeness for Permit Amendment #3 for Opencut Mining Permit #674 for DSL Pit.

DSL Pit is located in Madison County, T52-R1W-S16, 3.1 miles North of Ennis, MT on Hwy 287. The site is 63.2 acres. Topsoil to an average depth of 8 inches will be stockpiled for reclamation. 300,000 cubic yards of sand and gravel is proposed to be removed from the pit over the life of the permit. No permanent facilities will be erected. Proposed reclamation date is December 2042. Access is at two points along HWY 287 north of Ennis.

A map can be viewed at the entrance and exit to the site. Electronic maps and a copy of the completed amended application can be viewed at <https://deq.mt.gov/mining/Programs/opencut> and Search Opencut Permits.

Written comments, objections, and/or requests for informal conference on this application may be submitted to the Department of Environmental Quality, Opencut Section, P.O. Box 200901, Helena,

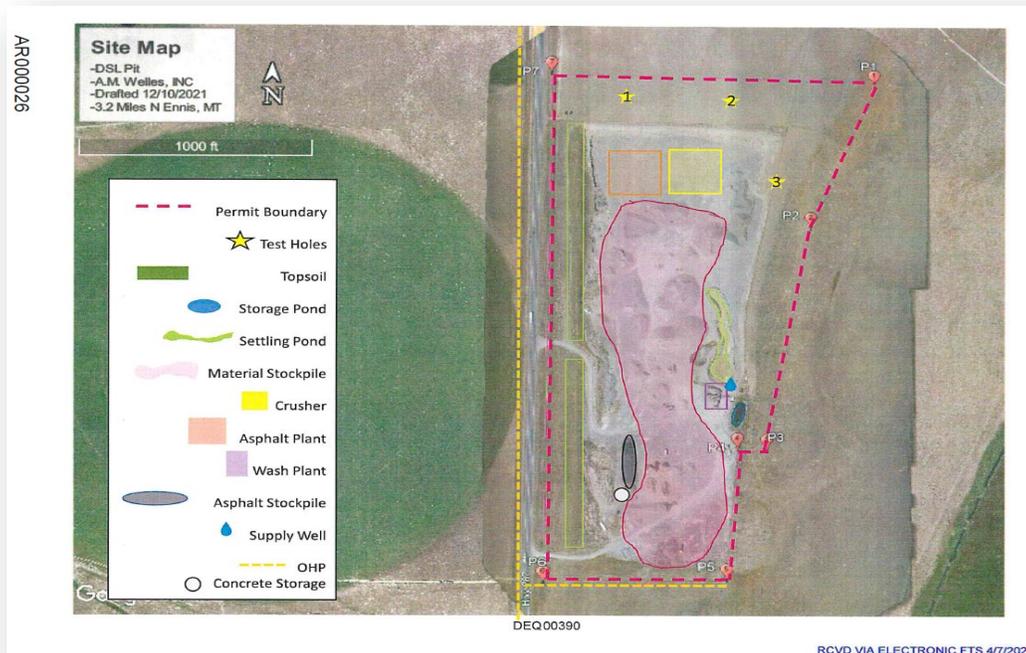
MT 59620-0901. The DEQ will accept requests for a public meeting or comments until April 3, 2022.

(*Id.* at Exs. A-C.)

22. The notice letter sent to Valley Garden and copied to the DEQ listed the correct address, 3000 Turtle Creek Boulevard. (Kaluza Decl. (Dkt. # 65-16) at Ex. B.)
23. Valley Garden contends it did not receive the letter. (McGee Decl., Dkt. # 106-7, Sept. 11, 2023)
24. Deficiencies in the Application related to bonding delayed approval of the Application. (*Id.* at AR000059-65.)
25. On May 17, 2022, Diane Conradi submitted an email to the DEQ objecting to the Application and requested a public meeting on behalf of Valley Garden. (Dkt. 65, Ex. 1 at AR000066-67.)
26. On May 20, 2022, Diane Conradi submitted an additional letter to the DEQ objecting to the Application on behalf of Valley Garden. (*Id.* at AR000069-80.)
27. The DEQ had not approved the Application when Ms. Conradi submitted her email or letter. (*Id.* at AR000001).

Acceptability

28. The DNRC Permit granted A.M. Welles “a permit for extracting SAND AND GRAVEL located in or under the lands hereinafter described” and identified the permit location as 63.2 acres in Township 5 South, Range 1 West, Section 16:W ½ SE 1/4 in Madison County. (*Id.* at AR000033.)
29. The Application included a site map showing the location of three test holes, a storage pond, a settling pond, material storage piles, a mobile crusher, the proposed location of a temporary potential asphalt plant, the mobile wash plant, the recycled asphalt and concrete stockpiles, and the water well. (*Id.* at AR000026.)



30. There are no permanent facilities, no offices, no permanent parking, no vehicle staging areas, no roads designated as affected land, and no processing plants indicated on the site map. (*Id.* at AR000026.)
31. The Application stated that “mobile processing equipment . . . sand mine stockpiles would move with mining activity (i.e. migrate with the highwall).” (Dkt. 65, Ex. 1 at AR000010.)
32. The Application describes the quantity of materials to be mined as 300,000 cubic yards. (*Id.* at AR000004.)
33. The Mining Description shows the areas to be disturbed and the description of the proposed mining. (*Id.* at AR000010-13).
34. The Application describes the direction of the opencut activities as beginning “North and east [of the] existing disturbance” and then progressing “north and east.” (*Id.* at AR000010.)
35. The Application described the type of topography and the planned mining methods. (*Id.* at AR000011, 13-14.)
36. The Application describes asphalt and concrete recycling, including imported materials:

1. Asphalt Recycling – Typically, recycling involves accumulating

materials containing asphalt, crushing these materials periodically, and stockpiling the resulting crushed asphalt product as is or blending it with other suitable materials. These recycled products are commonly used to surface roads, and operations permitted to operate an asphalt plant may also use these as feed into the plant. . . .

Note: Imported debris may be a mixture of various materials (e.g., asphalt, concrete, soil, gravel, etc.) However, if the debris contains asphalt, it must be permitted as asphalt storage.

(Dkt. # 14 at AR000016-17.)

37. A.M. Welles posted a bond of \$20,000 for asphalt recycling. (*Id.* at AR000032.)
38. In Section C.1 of the Application, A.M. Welles provided an estimate of seasonal high and seasonal low ground water based on well logs for 2 onsite wells, drilled by the Montana Bureau of Mines and Geology and that are not used in the openpit operations. (*Id.* at AR000006.)
39. The numbers estimating seasonal high and seasonal low water were transposed. (*Id.* at AR000006.)

SECTION C - SITE PREPARATION AND PLANNING

C1. WATER TABLE LEVELS MCA 82-4-432(1)(b)(i)

Unless the Exception box is checked on page 2, complete and attach the *Determining Depth to Groundwater Worksheet* found here: <https://deq.mt.gov/mining/assistance> (click on the "Forms" tab), check the appropriate box on page 2, and provide information below as determined by the *Determining Depth to Groundwater Worksheet*. Note: Seasonal high water levels may be influenced by irrigation and ditches and must be accounted for when determining groundwater elevations.

- The seasonal high water table is the highest level that water typically rises to each year.
- The seasonal low water table is the lowest level that water typically falls to each year.

1. The maximum depth of mining is: 20 feet below ground surface
2. The seasonal high water table level is: 92 feet below ground surface
3. The seasonal low water table level is: 70 feet below ground surface
4. Water levels were determined by the following method(s):
 - Determining Depth to Groundwater Worksheet** (check applicable box on page 2 and attach if required)
 - Other - Describe: Well Logs**

40. A.M. Welles relies on a different well that was unpermitted at the time the Application was submitted as a water source for its operations. (*Id.* at AR000009.)
41. There is no well log for the unpermitted well. (Dkt. 127, Ex. C (Taylor Dep.) at 58:9-10.)
42. The DEQ approved the permit on May 24, 2022, and Valley Garden subsequently filed its Notice of Appeal on June 22, 2022. (Dkt. 65, Ex. 1 at AR000001; Dkt. 1, Notice of Appeal and Request for Hearing.)

APPENDIX B
STANDARDS OF REVIEW

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STANDARDS OF REVIEW

This appendix sets forth the legal standards governing the pending dispositive and evidentiary motions in the contested case BER 2022-04 OC.

A. Burden of Proof and Evidentiary Scope

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

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

Mont. Code Ann. § 82-4-427(1)(a). The contested case provisions under MAPA apply. Mont. Code Ann. § 82-4-427(4).

Valley Garden, the party alleging a violation of the law, bears the evidentiary burden of proof. *Mont. Env't Info. Ctr. v. Westmoreland Rosebud Mining, LLC*, 2023 MT 224, ¶¶ 19-21, 414 Mont. 80, 545 P.3d 623. To satisfy this burden, it must establish the facts essential to its claims by a preponderance of the evidence. The challenging party must demonstrate, through evidence or argument, that the DEQ's decision was erroneous. *Id.* at ¶ 21.

Evidence of potential contradictions or inconsistencies within the Permit Application Package and Decision Documents alone does not establish the facts necessary to prove that DEQ's decision violated the law. *DeBuff v. Mont. Dep't of Nat. Res. & Conservation*, 2021 MT 68, ¶ 41, 403 Mont. 403, 482 P.3d 1183.

There exists a rebuttable presumption that DEQ's decision to approve the permit is correct and lawful. *Westmoreland*, ¶ 18. Once the applicant has shown compliance during the permitting phase, the applicant "need not re-prove the factual elements of its case before the Board." *Id.* Statutory and common law rules of evidence govern the proceedings, and each party is entitled to present and respond to evidence and arguments. Mont. Code. Ann. § 2-4-612(1)-(2).

B. Statutory Construction

In interpreting a statute, the goal is to give effect to the objectives sought by the legislature. *Mont. Vending, Inc. v. Coca-Cola Bottling Co.*, 2003 MT 282, ¶ 21, 318 Mont. 1, 78 P.3d 499. The initial step in statutory interpretation is to examine the plain language of the statute. *Consumer Prod. Safety Comm'n v. GTE Sylvania, Inc.*, 447 U.S. 102, 108 (1980). If the legislative intent can be discerned from the plain meaning of the statute's language, that meaning controls, and no further analysis is required. *Mont. Vending, Inc.*, ¶ 21. Where the legislature has not provided a specific definition for a statutory term, the term is understood to carry its plain and ordinary meaning. *State v. Alpine Aviation, Inc.*, 2016 MT 283, ¶ 11, 385 Mont. 282, 384 P.3d 1035 (citations omitted). If the language of the statute is ambiguous, then agency interpretations of statutes are entitled to “respectful consideration.” *Mont. Env't Info. Ctr. v. Mont. Dep't of Env't Quality*, 2019 MT 213, ¶ 24, n.9, 397 Mont. 161, 451 P.3d 493 (citations omitted).

In all cases, statutory and regulatory construction is a “‘holistic endeavor’ and must account for the statute’s text, language, structure, and object.” *Heath*, ¶ 24. Interpretation of statutes and regulations must avoid results that would render any section of the statute superfluous, ensuring that every word and provision is given effect. *Id.* ¶ 31. Statutory and regulatory interpretation must also seek to avoid absurd or unreasonable results when a more sensible interpretation is available. *Mont. Sports Shooting Ass'n v. State*, 2008 MT 190, ¶ 11, 344 Mont. 1, 185 P.3d 1003.

C. Motions for Summary Judgment

Summary judgment is appropriate where the record demonstrates that there are “no material facts in dispute” and the moving party is “entitled to judgment as a matter of law.” *Clark Fork Coal. v. Mont. Dep't of Env't'l Quality*, 2008 MT 407, ¶ 19, 347 Mont. 197, 197 P.3d 482; Mont. R. Civ. P. 56(c)(3). “The party moving for summary judgment bears the initial burden of establishing that no material dispute of fact exists.” *Tonner v. Cirian*, 2012 MT 314, ¶ 8, 367 Mont. 487, 291 P.3d 1182 (citations omitted).

To survive summary judgment, the nonmoving party must present substantial evidence—not mere denial, speculation, or conclusory statements—that raises a genuine issue of material fact. *Peterson v. Eichhorn*, 2008 MT 250, ¶ 13, 344 Mont. 540, 189 P.3d 615. All reasonable inferences drawn from the evidence presented must be construed in favor of the party opposing summary judgment. *Erker v. Kester*, 1999 MT 231, ¶ 17, 296 Mont. 123, 988 P.2d 1221.

D. Motions in Limine

A motion in limine is a pre-trial motion to prevent irrelevant, immaterial, or prejudicial evidence from being introduced at trial. *State v. Ankeny*, 2010 MT 224, ¶ 38, 358 Mont. 32, 243 P.3d 391.

Whoever conducts the agency hearing is accorded broad authority to do so. Corbett, William L., *Montana Administrative Law Practice: 41 Years after the Enactment of the Montana Administrative Procedure Act*, 73 Mont. L. Rev. 339, 361 (2012). Like any other civil proceeding, “the party asserting the claim or initiating the action has the burden of proof, and is afforded the opportunity to ‘respond and present evidence and argument on all issues involved.’” Corbett, 361 (citing Mont. Code. Ann. § 2-4-612(5)).

A person presiding over an administrative case must apply the common law and statutory rules of evidence. Mont. Code. Ann. § 2-4-612(2). However, because administrative cases are heard without a jury, the rules of evidence and admissibility are more relaxed than in jury trials. Corbett, 362.

In contested case proceedings, the board may admit evidence and consider the weight to be given to such evidence when preparing findings and conclusions from all the evidence. *In re Renewal of Teaching Certificate of Thompson*, 270 Mont. 419, 427, 893 P.2d 301, 305 (1995). When in doubt, the person conducting the hearing should conditionally admit the evidence, and in the quiet of preparing a written proposed decision, decide the ultimate question—whether to rely on evidence that was the subject of an objection. Corbett, 363 (citing *Multi-Med. Convalescent v. N.L.R.B.*, 550 F.2d 974, 977).