

**BOARD OF ENVIRONMENTAL REVIEW
JUNE 26, 2026**

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**BOARD OF ENVIRONMENTAL REVIEW
MEETING MINUTES**

MAY 1, 2026

Call to Order

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

Attendance

Board Members Present

Chair Dave Simpson; Vice Chair Stacy Aguirre; Board Members Julia Altemus, Allan Payne, and Jennifer Rankosky. Board member Joe Smith was not present.

Roll was called and a quorum was present.

Board Attorney Present

Dana Hupp, Board Counsel

DEQ Personnel Present

Board Secretary: Sandy Moisey Scherer

Other Parties Present

None

I. ADMINISTRATIVE MATERIALS

A. **Use of AI Tools**

Chair Simpson referenced Lieutenant Governor Juras’ recent memo regarding the use of AI Tools during virtual public meetings. AI notetaking, transcription, or summarization bots may not be used until a formal policy is adopted.

II. GENERAL PUBLIC COMMENT

a. There was no further board discussion or public comment.

III. ADJOURNMENT

Board member Payne MOVED to adjourn the Board Meeting and move to the Closed Session; Board member Rankosky SECONDED. The motion PASSED unanimously. The meeting was adjourned at 9:05 A.M.

Board of Environmental Review May 1, 2026, minutes approved:

DAVID SIMPSON
CHAIR
BOARD OF ENVIRONMENTAL REVIEW

DATE



**BOARD OF ENVIRONMENTAL REVIEW
MEETING MINUTES**

MAY 15, 2026

Call to Order

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

Attendance

Board Members Present

Chair Dave Simpson; Board Members Julia Altemus, Allan Payne, Jennifer Rankosky, and Joe Smith. Vice Chair Stacy Aguirre was not present.

Roll was called and a quorum was present.

Board Attorney Present

Dana Hupp, Board Counsel

DEQ Personnel Present

Board Secretary: Sandy Moisey Scherer
DEQ Director Sonja Nowakowski
DEQ Legal: Catherine Armstrong, Sam King, and Kurt Moser
DEQ Communications: Mae Vader

Other Parties Present

Laurie Crutcher — Crutcher Court Reporting
Jenny Harbine, Shiloh Hernandez, Leo Killsback, and Chrissy Pepino — Earthjustice
Derf Johnson — MEIC
Nathaniel Shoaff, Sierra Club
Pamela Garman, and Vicki Marquis — Crowley Fleck
Andrea Grave, and Samuel Yemington — Holland & Hart
Mathew Bain — Parsons Behle & Latimer
Todd Briggs, Jeremy Cottrell — Westmoreland

I. ADMINISTRATIVE MATERIALS

Chair Simpson read a directive from the Lieutenant Governor's Office regarding the use of AI tools. The use of AI tools during virtual public meetings is not allowed by Board members or public participants pending State adoption of formal policies that address the concerns and issues surrounding these issues.

He also pointed out that the agenda is the same one that was prepared for the April meeting when the Board did not have a quorum and were not able to proceed with business.

A. Review and Approve Minutes

A.1. The Board will vote on adopting the February 20, 2026, Meeting Minutes.

Board member Rankosky moved to APPROVE the February 20, 2026, meeting minutes. Board member Smith SECONDED. The motion PASSED unanimously.

There was no further board discussion or public comment.

A.2. The Board will vote on adopting the March 20, 2026, Meeting Minutes.

Board member Payne moved to APPROVE the March 20, 2026, meeting minutes. Board member Altemus SECONDED. The motion PASSED unanimously.

There was no further board discussion or public comment.

A.3. Discussion regarding meeting dates – special meeting in May or in-person meeting in June

Chair Simpson said that this was on the agenda as it was a carryover from the April meeting. The June 26, 2026, meeting may be via Zoom and not in person.

There was no further board discussion or public comment.

II. CONTESTED CASE BRIEFINGS

- a. Contested case summaries are on page 10-36 of the meeting materials. Current case briefings are on the agenda.

Chair Simpson reviewed the current updates.

For BER 2022-06 WQ – Rosebud Mine Area B Amendment 5, Chair Simpson asked for an update from DEQ. Sam King of DEQ responded that Kirsten Bowers was out of the office, and he didn't think she was anticipating providing an update. Samuel Yemington of Holland and Hart said that the attorney from their firm who is assisting on this matter was not on the call. It is his understanding that the parties continue to work together towards solutions. Chair Simpson said that the Board will be looking forward to an update at the next regular meeting.

There was no further board discussion or public comment.

III. NEW CONTESTED CASES

a. **In the Matter Of: Appeal and Request for Hearing by R & D Transit, LLC, BER 2026-03 SW**

Chair Simpson asked DEQ for clarification and status.

Sam King of DEQ said that Nick Whitaker, who is DEQ's attorney on this matter, was in a bankruptcy hearing. This case involves a trucking accident spill on I-90, for which a violation was issued. DEQ has been communicating with Ms. Jennifer Crow, Counsel for R & D's insurance carrier, who is not on the call today. DEQ is hoping to provide a status update at the June meeting, to provide more information on where things stand. There is likely a solution that will not involve a contested case, but Ms. Crow has been unable to contact her client.

Chair Simpson asked for an update at the June meeting.

IV. ACTION ITEMS

a. **In the Matter of: Notice of Appeal and Request for Hearing by the Western Sugar Cooperative regarding Its Montana Pollutant Discharge Elimination System Permit No. MT0000281 Issued October 20, 2020, BER 2020-05 WQ**

Chair Simpson asked counsel for the parties for an update. Vicki Marquis of Crowley Fleck gave an update to the Board.

Board member Altemus motioned that the Board ACKNOWLEDGE and AMEND the Board's final agency action to allow for extended time for the settlement agreement. Board member Payne SECONDED.

The motion PASSED unanimously.

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

Board Counsel Hupp put together a decision-making tree to assist the Board with their decision regarding Westmoreland's filing to recover legal costs from the Conservation Groups. Just prior to the April meeting date, two filings were received from the Conservation Groups. The first was a notice filing of supplemental authority, and the second was a motion to assign a Hearing Examiner.

Board member Payne motioned to ACCEPT the notice of supplemental authority but STRIKE legal arguments contained therein due to timeliness. Board member Altemus SECONDED. Discussion ensued.

The motion PASSED unanimously.

Board member Payne motioned to DENY the motion to appoint a hearing examiner based on timeliness. Board member Smith SECONDED.

The motion PASSED unanimously.

The Board heard brief oral argument regarding the matter of jurisdiction from Shiloh Hernandez of Earthjustice and Samuel Yemington of Holland and Hart. Discussion ensued.

Board member Payne moved that the Board ACCEPT jurisdiction of Westmoreland's petition for attorney fees as to cause of action No. 2. Board member Altemus SECONDED. Discussion ensued.

The motion PASSED unanimously.

The Board heard brief oral argument regarding substantive matters, entitlement to attorney fees. Discussion ensued.

Board member Altemus motioned that Westmoreland MADE a substantial contribution to the Board's Final Order. Board member Smith SECONDED.

The motion PASSED unanimously.

Board member Altemus motioned that the Board FINDS that the Petitioners ACTED in bad faith. Board member Rankosky SECONDED. Discussion ensued.

The motion PASSED 4-1, with Board member Payne dissenting.

Board member Altemus motioned that the Board AFFIRM that the Conservation Groups participated for the purpose of harassing or embarrassing Westmoreland. Board member Smith SECONDED.

The motion PASSED 4-1, with Board member Payne dissenting.

The Board will schedule a second hearing to determine the amount of attorney fees to be awarded.

V. GENERAL PUBLIC COMMENT

No comments were received.

VI. BOARD CHAIR UPDATE

- a. Chair Simpson did not have any updates.

VII. ADJOURNMENT

Board member Payne MOVED to adjourn the Board Meeting; Board member Altemus SECONDED.
The motion PASSED unanimously. The meeting was adjourned at 12:55 P.M.

Board of Environmental Review May 15, 2026, minutes approved:

DAVID SIMPSON
CHAIR
BOARD OF ENVIRONMENTAL REVIEW

DATE

Contract #126003

BOARD OF ENVIRONMENTAL REVIEW LEGAL REPRESENTATION SERVICES

THIS CONTRACT is entered into by and between the State of Montana Board of Environmental Review (State) and Worden Thane, P.C. (Contractor), collectively the Parties, for the purpose of providing legal representation services. This Contract is entered into in accordance with Title 18, Montana Code Annotated (MCA) and Administrative Rules of Montana (ARM) Title 2 chapter 5.

1. EFFECTIVE DATE, DURATION, AND RENEWAL

1.1 Contract Term. The Contract's initial term is effective August 15, 2025, through August 14, 2026, unless terminated earlier as provided in this Contract. In no event is this Contract binding on the State unless the State's authorized representative has signed it. The State's authorized signatory for this Contract is the Board of Environmental Review Chair, or designee.

1.2 Contract Renewal. The State may renew this Contract under its then-existing terms and conditions, subject to potential cost adjustments described in Section 2 in 1-year intervals, or any interval that is advantageous to the State. This Contract, including any renewals, may not exceed a total of seven (7) years.

2. COST ADJUSTMENTS

2.1 Cost Increase by Mutual Agreement. After the Contract's initial term and if the BER agrees to a renewal, the parties may agree to a cost increase. The State is not obliged to agree upon a renewal or a cost increase. Any cost increases must be necessary to complete or continue the work within the scope of the Contract and cost increases must be based on demonstrated industry-wide or regional increases in Contractor's costs. Publications such as the Federal Bureau of Labor Statistics and the Consumer Price Index (CPI) for all Urban Consumers may be used to determine the increased value.

3. SERVICES/SUPPLIES

Contractor shall provide the State the following services:

3.1. Legal representation for State on an as needed basis for contested matters. Services include but are not limited to all necessary activity required of Board counsel in assisting the State in adjudicating contested case proceedings. In requesting services of Contractor, the State shall be mindful of, and adhere to, the Memorandum of Understanding Fiscal Stewardship Agreement incorporated by reference herein.

3.2 Contractor must comply with reporting and billing requirements outlined in Section 5, Consideration/Payment.

4. WARRANTIES

Contractor warrants that the services provided will conform to the Contract requirements, including all descriptions, specifications, and attachments made a part of this Contract. The State's acceptance of services provided by Contractor shall not relieve Contractor from its obligations under this warranty. In addition to its other remedies under this Contract, in law, or in equity, the State may, at Contractor's expense require prompt correction of any services failing to meet Contractor's warranty herein. Services corrected by Contractor shall be subject to all the provisions of this Contract in the manner and to the same extent as services originally furnished.

5. CONSIDERATION/PAYMENT

5.1 Payment Schedule. In consideration of the services to be provided, the State shall pay Contractor for the actual work completed per engagement utilizing the rates identified in the table below and as negotiated prior to commencing work and as the task progresses to address unanticipated additional efforts. See Section 5.2. Bullet 2 for additional information.

Line	Items/Description	Cost per Hour
1	Standard New Client Hourly Rate	\$250.00
2	Paralegal and Associates Hourly Rate	\$100-\$200.00

5.2 Allowable Costs. The allowable expense categories that may be reimbursed under this Contract for the fulfillment of the services provided are as follows:

- Supplies and materials necessary in the performance of the Contract including newsletter/articles and display boards and the cost of developing supplies and materials;
- Communications and reproduction expenses necessary in performance of the Contract including telephone, postage, facsimiles, and photocopying.

5.3 Invoice Requirements, Inspections, and Payments. Contractor shall submit monthly invoices to the State for services rendered for the prior month for and any other contractor expenses incurred. Invoices shall be submitted via email to the State Contract liaison named in Section 21.1, copying the State’s BER Secretary at DEQBERSecretary@mt.gov, by the first Friday of each month. Invoices shall list the total number or hours (or fractions) for Attorney and Paralegal time under this Contract on an hour and one-tenth hour basis, and itemized expenses, if any. Unless otherwise noted or agreed to in writing, the State has 30 days upon receipt to pay invoices as allowed by §17-8-242, MCA.

The State reserves the right to inspect invoices and seek clarifications and/or corrections for all submitted invoices. Payment for questioned costs may be withheld pending resolution and may require rebilling by Contractor for submittal of additional documentation, including any records required to be kept by Contractor; or may withhold payment if Contractor has not performed in accordance with the Contract. Such withholding cannot be greater than the additional costs to the State by Contractor’s lack of performance.

The Contractor may, upon execution of this Contract, provide the State with its banking information in order to facilitate electronic transfer of payments. Unless otherwise noted, all payments will be sent to the address provided in Contractor’s W-9.

6. ACCOUNTING, AUDIT AND RETENTION OF RECORDS

6.1 Access to Records. Contractor shall provide the State, Legislative Auditor, or their authorized agents access to any records necessary to determine contract compliance. The State may terminate this Contract under Section 16, without incurring liability, for the Contractor’s refusal to allow access as required by this section (18-1-118, MCA).

6.2 Retention Period. Contractor shall create and retain all records documenting the legal services for a period of eight (8) years after either the completion date of this Contract or termination of this Contract.

7. ASSIGNMENT, TRANSFER AND SUBCONTRACTING

In accordance with §18-4-141, MCA, Contractor may not assign, transfer or subcontract any portion of this Contract to any other entity without the State's prior written consent.

8. DEFENSE, INDEMNIFICATION/HOLD HARMLESS

8.1 Each party shall be responsible and assume liability for its own wrongful or negligent acts or omissions, or those of its officers, agents, or employees to the full extent required by law, and shall indemnify and hold the other party harmless from any such liability.

8.2 Each party shall maintain reasonable coverage for such liabilities, to include professional liability, either through commercial insurance or a reasonable self-insurance mechanism under the provisions of Title 2, Chapter 9, MCA, at the minimums prescribed by law.

8.3 Each party shall provide the other party with a certificate of insurance upon request.

9. COMPLIANCE WITH LAWS

Contractor shall, in performance of work under this Contract, fully comply with all applicable federal, state, or local laws, regulations, and executive orders including but not limited to the Montana Human Rights Act, the Equal Pay Act of 1963, the Civil Rights Act of 1964, the Age Discrimination Act of 1975, the Americans with Disabilities Act of 1990, and Section 504 of the Rehabilitation Act of 1973. Contractor is the employer for the purpose of providing healthcare benefits and paying any applicable penalties, fees and taxes under the Patient Protection and Affordable Care Act [P.L. 111-148, 124 Stat. 119]. Any subletting or subcontracting by Contractor subjects Subcontractors to the same provisions. In accordance with §49-3-207, MCA, and Executive Order No. 04-2016, Contractor agrees that the hiring of persons to perform this Contract will be made on the basis of merit and qualifications and there will be no discrimination based on race, color, sex, pregnancy, childbirth or medical conditions related to pregnancy or childbirth, political or religious affiliation or ideas, culture, creed, social origin or condition, genetic information, sexual orientation, gender identity or expression, national origin, ancestry, age, disability, military service or veteran status, or marital status by the persons performing this Contract.

10. DISABILITY ACCOMMODATIONS

The State does not discriminate on the basis of disability in admission to, access to, or operations of its programs, services, or activities. Individuals who need aids, alternative document formats, or services for effective communications or other disability related accommodations in the programs and services offered are invited to make their needs and preferences known to the State's Contract Manager identified herein. Interested parties should provide as much advance notice as possible.

11. NONDISCRIMINATION AGAINST FIREARMS ENTITIES/TRADE ASSOCIATIONS

Contractor shall not have a practice, policy, guidance, or directive that discriminates against a firearm entity or firearm trade association, and Contractor shall not discriminate during the term of the Contract against a firearm entity or association. This section shall be construed in accordance with § 30-20-301, MCA.

12. REGISTRATION WITH THE SECRETARY OF STATE

If applicable, any business intending to transact business in Montana must register with the Secretary of State. Businesses that are formed in another state or country that are conducting activity in Montana must determine whether they are transacting business in Montana in accordance with §35-1-1025 and §35-8-1001, MCA. Such businesses may want to obtain the guidance of their attorney or accountant to determine whether their activity is considered transacting business.

If businesses determine they are transacting business in Montana, they must register with the Secretary of State and obtain a certificate of authority to demonstrate they are in good standing in Montana. To obtain registration materials, call the Secretary of State at (406) 444-3665 or visit their website at <https://sosmt.gov/>.

13. COMPLIANCE WITH WORKER'S COMPENSATION ACT

Contractor shall comply with the provisions of the Montana Worker's Compensation Act while performing work for State of Montana in accordance with §39-71-401, §39-71-405, and §39-71-417, MCA. Proof of compliance must be in the form of worker's compensation insurance, an independent contractor's exemption certificate, or documentation from Montana Department of Labor and Industry of corporate officer status. Proof of compliance must be submitted on an ACCORD form, or other similar form. This insurance/exemption must be valid for the entire Contract term and any renewal. Upon expiration, a renewal document must be mailed to Montana Department of Environmental Quality ATTN Rebecca Gregg, PO Box 200901, Helena, MT 59620-0901.

14. CONFLICT OF INTEREST

14.1 For the purposes of the Montana Code of Ethics and this Section, Contractor and each of its employees and subcontractors, is a "public employee". As such, Contractor and each of its employees and subcontractors is subject to the requirements of Title 2, Chapter 2, MCA, regarding conflicts of interest, including §2-2-104, §2-2-105, §2-2-121, and §2-2-201, MCA, regarding conflicts of interest.

14.2 If the State discovers that an employee of Contractor or Subcontract is in violation of this Section, the State may, after consulting with Contractor, terminate this Contract or take other appropriate measures to address the conflict and Contractor shall reimburse the State for any services the State required be performed by another Contractor that duplicate the services performed by the employee who violated this Section.

15. DISCLOSURE

15.1 Contractor shall notify the State of any actual, apparent, or potential conflict of interest with regard to any individual working on a work assignment or having access to information regarding a subcontract. Notification of any conflict of interest shall include both organizational conflicts of interest and personal conflicts of interest (which are defined as the same types of relationships as organizational conflicts of interest, but applicable to an individual). If a personal conflict of interest exists, the individual who is affected shall be disqualified from taking part in any way in the performance of the assigned work that created the conflict-of-interest situation.

15.2 Contractor certifies that it has identified all current employees and proposed subcontractor's employees that will perform work under this Contract and that have worked for the State in the last two (2) years prior to submitting the solicitation request which resulted in the award of this Contract. Contractor further certifies that no former employee of the State of Montana or local government may work under this Contract for a period of twelve (12) months- after

voluntary termination of public employment, if by working under the Contract the employee will take direct advantage, unavailable to others, of matters with which the employee was directly involved during the employee's public employment. Pursuant to §2-2-201, MCA, a former employee of state or local government may not, within six (6) months following the termination of public employment, contract or be employed by an employer who contracts with the State of Montana or any of its subdivisions involving matters with which the former public employee was "directly involved", as defined in §2-2-201, MCA, during employment. Contractor further certifies it shall identify any new employees hired during this Contract that will perform work under this Contract and that have worked for the State of Montana in the last two (2) years prior to the submission of the solicitation request which resulted in the award of this Contract. Disclosure in all cases shall include the name of the agency and the nature of work performed by the employee.

16. CONTRACT TERMINATION

Any termination of this Contract is subject to the exception that Section 6, Accounting, Audit, and Retention of Records, relating to retention of and access to records, remain in effect.

16.1 Termination for Convenience. Either party may, by written notice to the other party, immediately terminate this Contract in whole or in part for failure to materially perform any of the services, duties, terms or conditions contained in this Contract.

16.2 Termination for Cause with Notice to Cure Requirement. Either party may terminate this Contract in whole or in part for failure of the party to materially perform any of the services, duties, terms, or conditions contained in this Contract after giving the other party written notice identifying items not performed. The written notice must demand performance of the items not performed. The written notice must demand performance of the items not performed within a specified period of not less than 30 days. If the demanded performance is not completed within the specified period, the termination is effective at the end of the specified period.

16.3 Reduction of Funding. Under §18-4-313(4), MCA, the State must terminate this Contract if funds are not appropriated or otherwise made available to support the State's continuation of performance of this Contract in a subsequent fiscal period. If state or federal government funds are not appropriated or otherwise made available through the state budgeting process to support continued performance of this Contract (whether at an initial contract payment level or any contract increases to that initial level) in subsequent fiscal periods, the State shall terminate this Contract as required by law. The State shall provide Contractor the date the State's termination shall take effect. The State shall not be liable to Contractor for any payment that would have been payable had the Contract not been terminated under this provision. As stated above, the State shall be liable to Contractor only for the payment, or prorated portion of that payment, owed to Contract up to the date the State's termination takes effect. This is Contractor's sole remedy. The State shall not be liable to Contractor for any other payments or damages arising from termination under this section, including but not limited to general special, or consequential damages such as lost profits or revenues.

17. EVENT OF BREACH-REMEDIES

17.1 Event of Breach by Contractor. Any one or more of the following Contractor acts or omissions constitute an event of material breach under this Contract:

- Products or services furnished fail to conform to any requirement;
- Failure to submit any report required by this Contract;
- Failure to perform any of the other terms and conditions of this Contract, including but not limited to beginning work under this Contract without State's prior approval; or
- Financial inability to perform its obligations under this Contract.

17.2 Event of Breach by State. The State's failure to perform any material terms or conditions of this Contract constitutes an event of breach.

17.3 Actions in Event of Breach. Upon a material breach by either party, the non-breaching party may:

- Terminate this Contract as defined under Section 16, and pursue any of its remedies under this Contract; at law or in equity; or
- Treat this Contract as materially breached and, except as the remedy is limited in this Contract, pursue any of its remedies under this Contract, at law or in equity.

18. WAIVER OF BREACH

Either party's failure to enforce any contract provisions after any event of breach is not a waiver of its right to enforce the provisions and exercise appropriate remedies if the breach occurs again. Neither party may assert the defense of waiver in these situations.

19. FORCE MAJEURE

Neither party is responsible for failure to fulfill its obligations due to causes beyond its reasonable control including without limitation actions or missions of government or military authority, acts of God, materials shortages, transportation delays, fires, floods, labor disturbances, riots, wars, terrorist acts, or any other causes directly or indirectly beyond the reasonable control of the non-performing party, so long as such party uses its best efforts to remedy such failure or delays. A party affected by a force majeure condition shall provide written notice to the other party within a reasonable time of the onset of the condition. In no event, however, shall the notice be provided later than five (5) working days after the onset. If the notice is not provided within the 5-day period, than a party may not claim a force majeure event. A force majeure condition suspends a party's obligations under this Contract, unless the parties mutually agree that the obligation is excused because of the condition.

20. CONFORMANCE WITH CONTRACT

No alteration of the terms, conditions, delivery, price, quality, quantities, or specifications of the Contract shall be granted without the State's prior written consent. Products or services provided that do not conform to the Contract terms, conditions, delivery, price, quality, quantities, or may be rejected and returned at Contractor's expense.

21. LIAISONS AND SERVICE OF NOTICES

21.1 Contract Liaisons. All project management and coordination on the State's behalf must be through a single point of contact designated as the State's liaison. Contractor shall designate a liaison that will provide the single point of contract for management and coordination of contractor's work. All work performed under this contract must be coordinated between the State's liaison and Contractor's liaison.

David Simpson, Chairman, is the State's liaison.
Department of Environmental Quality
PO Box 200901
Helena, MT 59620-0901
(406) 444-5225
Dave.simpson375@gmail.com

Dana Hupp, is the Contractor's liaison
Worden Thane P.C.
321 West Broadway Suite 300
Missoula, MT 59802
(406) 721-3400
Email: dhupp@wordenthane.com

21.2 Notifications. The State's Contract liaison and Contractor's liaison, or their respective designees, may be changed by written notice to the other party. Written notices, requests, or complaints must first be directed to the Contract Manager. Notice may be provided by personal service, email, or postal delivery. If notice is provided by personal service or email, the notice is effective upon receipt (if using email, use "Request Read Receipt"); if using postal service, the notice is effective within three (3) business days of mailing. The party receiving a notice shall sign and date an acknowledgement of the notice and mail it to the sending party.

22. CHOICE OF LAW AND VENUE

Montana law governs this Contract. If there is a dispute under this Contract the parties will meet in person and attempt to resolve the dispute. If the dispute cannot be settled through negotiation, the parties agree that prior to resorting to litigation they will attempt to settle the dispute by nonbinding mediation administered by a neutral mediator agreed to by the parties.

Both parties waive objection to personal jurisdiction in the First Judicial District in and for the County of Lewis and Clark, State of Montana. Any litigation concerning this bid, proposal, or contract must be brought in the First Judicial District in and for the County of Lewis and Clark, State of Montana, and each party shall pay its own costs and attorney fees.

23. SEVERABILITY CLAUSE

A declaration by any court or any other binding legal source that any provision of the Contract is illegal, and void shall not affect the legality and enforceability of any other provisions of the Contract, unless the provisions are mutually and materially dependent.

24. SCOPE, ENTIRE AGREEMENT, AND AMENDMENT

This Contract consists of eight (8) numbered pages and any Attachments as required. In the case of dispute or ambiguity arising between or among the documents, the order of precedence of document interpretation is the same. These documents are the entire agreement of the parties. They supersede all prior agreements, representations, and understandings. Any amendment or modification must be in a written agreement signed by the parties.

25. WAIVER

State's waiver of any Contractor obligation or responsibility in a specific situation is not a waiver in a future similar situation or is not a waiver of any other Contractor obligation or responsibility.

26. EXECUTION

The parties through their authorized agents have executed this Contract on the dates set out below.

WORDEN THANE, P.C.

08/22/2025

DATE

Signed by:
Dana Hupp
BY: 4CF06DA65838486...

Dana Hupp
321 West Broadway Suite 300
Missoula, MT 59802

BOARD OF ENVIRONMENTAL REVIEW

08/22/2025

DATE

DocuSigned by:
David Simpson
BY: 3054169CC91642B

David Simpson, Chair
PO Box 200901
Helena, MT 59620-0901

Approved as to Legal Content:

08/22/2025

DATE

Signed by:
Sam King, DEQ Legal
BY: E3268D52AF1B453

DEQ Attorney

CONTESTED CASE SUMMARIES:

A. CONTESTED CASE UPDATES

1. Cases in Court.

a. **Montana Environmental Information Center, and Sierra Club v. Montana Department of Environmental Quality, Montana Board of Environmental Review, and Western Energy Co. (DV-2019-34, Rosebud County, District Court).**

In July 2019, MEIC and the Sierra Club filed a petition for judicial review of BER's decision to approve a permit to expand the Rosebud Mine. BER filed a motion to dismiss on the grounds that BER should not have been named in the petition since it was the deciding agency, not a party to the underlying contested case proceeding. Judge Bidegaray denied the motion on March 12, 2020. On October 27, 2021, Judge Bidegaray issued a decision in favor of the conservation groups. On January 28, 2022, the Court issued its Order on Remedy and vacated the permit, effective April 1, 2022. DEQ and the mine appealed to the Montana Supreme Court in three separate actions and filed motions requesting the vacatur be stayed pending the appeal. The cases were consolidated, and the Court stayed the vacatur pending resolution of the appeals.

On May 26, 2022, Ms. Christensen and Mr. Segrest filed a Notice of Appeal on behalf of the Board of Environmental Review. All appeals have now been consolidated into one case. With briefing completed, oral argument was heard before the Montana Supreme Court on April 3, 2023, and a decision is pending.

The Montana Supreme Court has issued an Opinion in this matter. A portion of the issues will be remanded back to the Board for decision. Once the remand is received, the Board will have to decide whether to hear the case itself or assign a hearing examiner for some or the totality of the case.

The Supreme Court has remanded this matter back to the District Court and the District Court is considering how to remand it back to the Board. This matter is pending remand from the District Court.

This case was decided by the Montana Supreme Court in November 2023, and remanded to the District Court on several points. To date the Board has not received a remand order from the District Court on three remaining issues: additional water quality parameters, cumulative hydrologic impacts of related permit applications (Area F), and impairment status of the East Fork of Armell's Creek.

b. Montana Department of Environmental Quality v. Montana Board of Environmental Review, Teck Coal Limited, and the Board of County Commissioners of Lincoln County, Case No. CDV 2023-21.

Montana Environmental Information Center, Clark Fork Coalition, Idaho Conservation League, Idaho Rivers United v. Montana Board of Environmental Review, Teck Coal Limited, and The Board of County Commissioners of Lincoln County, Lewis and Clark County, Cause No. DV-23-0366.

On January 9, 2023, DEQ filed a Petition for Judicial Review of the BER's Final Agency Action and Order (04/19/2022) and the BER's Order Denying DEQ's Motion to Alter or Amend (12/12/2022). The Petition pertains to the selenium standard for Lake Koocanusa. On March 28, 2023, the District Court granted the State's Unopposed Motion to Intervene. All Respondents, including the BER, filed answers to the Petition in March of 2023. BER, the State, and Teck Coal also filed counterclaims. On May 9, 2023, DEQ filed a Motion to Dismiss the Respondents' counterclaims. The District Court issued a scheduling order on May 11, 2023, setting the completion of discovery for August 28, 2023; the deadline for DEQ's Motion for Summary Judgment on November 3, 2023; and the deadline for Respondent's and Respondent-Intervenor's Responses and Cross Motions for Summary Judgment on December 8, 2023. On May 23, 2023, the BER, Teck Coal, and the State filed response briefs in opposition to DEQ's Motion to Dismiss. The DEQ filed its reply brief on June 6, 2023. The Motion to Dismiss is fully briefed and pending. The DEQ transmitted the Administrative Record on June 29, 2023.

On May 18, 2023, Montana Environmental Information Center, Clark Fork Coalition, Idaho Conservation League, and Idaho Rivers United filed a second lawsuit challenging the Board's Orders identified above. The Respondents, including the BER, answered the MEIC Complaint the week of July 17, 2023.

On June 9, 2023, the BER, Teck Coal, Lincoln County, and the State filed a Joint Motion to Consolidate Cases and For Scheduling Conference and/or Briefing on Record Issues, seeking to have the two lawsuits consolidated and a new case schedule. DEQ opposed that Motion and the Conservation Groups took no position. That Motion has been fully briefed and is awaiting a decision. On June 29, 2023, BER retained outside counsel, Dana Hupp of Worden Thane P.C., to represent it in these pending lawsuits. Ms. Hupp filed her notices of appearance the same day.

The aforementioned Motions are still pending before Judge Seeley and there are no scheduling orders in either case. On September 5, 2023, the Conservation Groups filed a Motion to Intervene in the lawsuit filed by DEQ. That Motion was unopposed. Judge Seely has not issued an order with respect to that Motion. The parties in the DEQ lawsuit have also exchanged initial discovery.

On October 6, 2023, the Court granted the Conservation Groups Motion to Intervene in the DEQ lawsuit.

On March 6, 2024, the Court granted Respondents' Motion to Consolidate Cases. In the same Order, the Court denied Respondents' request for a scheduling conference as premature. "[U]pon issuance of orders on the pending Motion to Dismiss and Motion to Strike, the Court will issue a new Stipulated Scheduling Order, pursuant to which the parties will propose new deadlines."

On March 7, 2024, the Court denied Respondent Teck Coal's Motion to Strike a Portion of the DEQ's Reply Brief in Support of its Motion to Dismiss. In its Motion to Strike, Teck argued that in DEQ's Reply Brief, for the first time, raised the question of "whether DEQ properly followed the explicit statutory remedy enacted by the Legislature to address the [Board's] determination that ARM 17.30.632(7)(a) is more stringent than comparable federal regulations or guidelines." (emphasis added.)

The Court denied Teck's Motion based upon its finding that the DEQ's Petition set forth the procedure the DEQ is to follow when the Board finds a State rule more stringent than a federal regulation or guideline and how the DEQ followed that procedure in this instance. The Court found that the "DEQ seeks to show that they, not BER, followed the correct procedure" and that, having raised the question at issue in its Petition, it is improper and unnecessary to strike the statement complained of in Teck's Motion.

On April 16, 2024, the Court granted DEQ's Motion to dismiss in part and denied it in part. The Court allowed the BER, State, and Teck Coal's counterclaims to proceed which were related to the "appropriate remedy." The Court dismissed the remainder of Teck Coal's counterclaims.

On May 17, 2024, the State filed a second Motion to consolidate with respect to a new lawsuit filed by MEIC and Earthworks (Cause No. CDV-25-2024-0250) against the AG's Office. In the new lawsuit, MEIC and Earthworks seek communications between the AG's office and Teck Coal. That Motion to consolidate is still being briefed.

On June 4, 2024, the Court issued a new scheduling order. Discovery in the case will continue this summer and the substantive briefing on the case is scheduled to occur this fall and winter.

On August 6, 2024, Intervenor-Respondent State of Montana filed a motion to withdraw from the case, which was granted by the Court on August 8, 2024.

On July 29, 2024, Teck Coal Limited provided notice to the parties that on July 17, 2024, Teck Coal Limited changed its name to EVR Operations Limited. The notice provided that the name changes is a result of the transaction where Teck Resources Limited, the ultimate parent company of Teck Coal Limited, sold a 77% interest in its Canadian steel making coal business to Glencore PLC.

In August 2024, the law firm of Schwabe, Williamson & Wyatt, P.C. and specifically, attorneys Ryen Godwin and Lindsay Thane, appeared in the

litigation as legal counsel for EVR Operations Limited. The Crowley Fleck PLLP law firm has withdrawn from its representation of EVR Operations Limited in this action.

Briefing of the substantive legal issues in this matter began in January 2025. Summary judgment briefing was concluded on May 9, 2025. Oral argument was held July 29 in Helena at 1:30 p.m. and a decision on summary judgment is pending.

On April 8, 2026, Judge Seeley issued an Order on Motions for Summary Judgment and Motion to Strike. The court concluded there are no genuine issues of material fact, and resolution of this issue involves construction of the applicable statutes. Those statutes establish the BER's lack of authority to enter its April 2022 Order. Petitioners are entitled to summary judgment.

NOTE: Any legal advice from BER counsel regarding this matter will be given in a closed session.

c. Montana Environmental Information Center v. Montana Department of Environmental Quality, Montana Board of Environmental Review, and Signal Peak Energy, LLC, DV-56-2022-0000722-JR.

This was an appeal from DEQ's approval of Signal Peak Energy, LLC's amendment application AM3 to the Bull Mountains Coal Mine #1 Permit No. C1993017. The Board issued a final order on June 16, 2022, upholding DEQ's approval. On July 21, 2022, MEIC filed a Petition for Review of Final Agency Action in Yellowstone County District Court. MEIC included the Board as a named party. Signal Peak Energy filed a Motion to Dismiss on August 12, 2022. At the August BER meeting the Board passed a motion to have Board counsel, Mike Russell, participate in the process as little as possible, but as appropriate preserving the Board's rights. On August 25, 2022, MEIC filed a response to the Motion to Dismiss. On September 8, 2022, Signal Peak filed a Reply in Support of the Motion to Dismiss, and filed a Notice of Submittal on September 13, 2022. On October 14, 2022, Board counsel filed a Motion to Dismiss and Brief in Support. On October 17, 2022, SPE filed a Motion for Clarification or Order on Motion to Dismiss. MEIC filed a Response to BER's Motion to Dismiss on October 31, 2022. Counsel for the Board filed a Reply in Support of Motion to Dismiss on November 16, 2022. On December 19, 2022, Signal Peak Energy filed a Motion for Judgment on the Pleadings, and MEIC filed their Response to SPE's Motion for Judgment on the Pleadings on January 27, 2023. Board counsel, Aislinn Brown, filed a Notice of Substitution of Counsel on January 31, 2023, replacing Michael Russell. On April 19, 2023, the Court issued an Order Staying BER's Motion to Dismiss in the interest of judicial economy pending the decision by the Montana Supreme Court in DA 22-0064, and ordered that BER shall remain a party to this judicial review process in the interim. The Court advised that BER may file a notice of non-participation. On May 2, 2023, Ms. Terisa Oomens filed a Notice of Appearance of Counsel and a Notice of Non-

Participation on behalf of BER. A Scheduling Order was filed on May 12, 2023. Petitioners filed their Opening Brief on September 29, 2023. Oral argument is scheduled to occur on February 15, 2024, at 1:30 p.m.

Pursuant to the Montana Supreme Court's Opinion in the AM4 matter, Judge Colette Davies granting BER's Motion to Dismiss on December 12, 2023, indicating the Court finds that BER was improperly named as a party for the purpose of judicial review and the relief sought by MEIC can be accomplished without naming BER as a party.

The parties completed briefing in January 2024, oral argument was held on February 15, 2024, and a decision is pending.

d. In the Matter of the Formal Appeal Challenging the Department of Environmental Quality's ("DEQ") Approval of Riverside Contracting's Opencut Mining Permit #3415 for the Marvin Rehbein Site Near Arlee in Lake County, Montana, BER 2023-02 OC, DV 25-18.

On May 3, 2023, Friends of the Jocko ("FotJ") and Jim Coefield, individually filed a formal appeal challenging the DEQ's approval of Riverside Contracting's Opencut Mining Permit #3415 for the Marvin Rehbein Site near Arlee in Lake County, Montana. The Board assigned this matter to ALSB at the June 9, 2023, meeting. On June 15, 2023, Terisa Oomens issued a Notice of Hearing Examiner. Hearing Examiner Oomens issued a Prehearing Order on June 15, 2023. Both DEQ and Friends of the Jocko filed their Preliminary Prehearing Statements on June 28, 2023. Riverside Contracting Inc. filed an Unopposed Petition to Intervene on July 28, 2023. A Scheduling Order was issued on June 29, 2023, ordering the parties to exchange Initial Disclosures on October 27, 2023, Discovery to be complete on March 15, 2024, and any Dispositive Motions filed on April 19, 2024. On July 31, 2023, the Hearing Examiner issued an Order Granting Riverside Intervention. On October 27, 2023, Petitioners filed their Initial Disclosures. On January 26, 2024, all involved parties filed their Expert Witness Disclosures.

On February 16, 2024, DEQ filed its Rebuttal Expert Disclosure. DEQ filed an Unopposed Motion for Stipulated Protective Order on March 1, 2024. The Hearing Examiner issued an Order RE: Stipulated Protective Order on March 4, 2024.

On May 10, 2024, Riverside Contracting, DEQ and the Petitioners all filed a Motion for Summary Judgment with supporting brief and Statements of Undisputed Facts. The Petitioners also filed a Motion in *Limine* on May 10, 2024. On May 24, 2024, DEQ and Riverside Contracting filed their responses to Petitioners' Motion in *Limine*. On May 29, 2024, DEQ filed a Motion to Continue Summary Judgment Response and Reply Deadlines. The Hearing Examiner granted DEQ's Motion to Continue on May 30, 2024. On June 6, 2024, the Petitioners filed their Brief in Reply to Motion in *Limine*.

On June 14, 2024, DEQ and Riverside filed their Response to FotJ's Motion for Summary Judgment with Statements of Disputed Facts. FotJ filed their Response in Opposition to DEQ's Motion for Summary Judgment and a Statement of Disputed Facts on June 14, 2024. On June 28, 2024, both DEQ and FotJ filed their Reply briefs to the respective motions for summary judgment.

On November 11, 2024, the Hearing Examiner issued her Proposed Findings of Fact and Conclusions of Law and an Order on Exceptions. On November 22, 2024, all parties filed their exceptions to the Proposed FoFCoL. On December 6, 2024, DEQ and FotJ filed their responses to the exceptions to the Proposed FoFCoL.

The Board heard oral argument at the December 20, 2024, meeting and adopted the Hearing Examiner's Proposed Findings of Fact and Conclusions of Law dated November 8, 2024, with revisions. Chairman Simpson issued the Final Agency Action and Order of the Board of Environmental Review on December 26, 2024. Petitioners have filed a Petition for Judicial Review in the Twentieth Judicial District Court, Lake County against DEQ and Riverside Contracting.

On May 16, 2025, DEQ filed a Motion to Supplement the Administrative Record and a proposed Amended Administrative Record. Petitioner's Opening Brief was due June 13, 2025. Respondents' Response Brief was due August 1, 2025. Oral argument was scheduled for September 25, 2025, and a decision is pending.

2. Non-enforcement cases

a. **In the Matter of Westmoreland Resources, Inc.'s appeal of final MPDES permit No. MT0021229 issued by DEQ for the Absaloka Mine in Hardin, Big Horn County, MT, BER 2015-06 WQ.**

On September 25, 2015, Westmoreland Resources, Inc. filed a notice of appeal and request for hearing. ALS was assigned as Hearing Examiner. The case was stayed pending a Montana Supreme Court decision, which was issued in September 2019. On April 24, 2020, the parties filed a Joint Motion for Stay indicating that they are working toward settlement of the case. That motion was granted on April 28, 2020, and the case was stayed until July 24, 2020. The parties filed a Joint Motion to Continue Stay on July 24, 2020, and September 9, 2020, which was granted on July 29, 2020, and September 9, 2020. On September 30, 2020, the parties filed a "Joint Motion to Remand and Suspension of Proceedings." The BER granted that Motion on October 9, 2020, and issued its Order granting remand on November 16, 2020. The parties filed a joint status report on June 30, 2021, stating that they continue to work through the settlement agreement provisions and updates to the permit renewal information. On January 11, 2023, Mr. Martin withdrew as counsel of record for Westmoreland. Westmoreland will continue to be represented by Holland and Hart LLP counsel. On May 31, 2023, Hearing Examiner Terisa Oomens issued a Notice of Change in Hearing Examiner.

On July 18, 2023, Hearing Examiner Oomens issued an Order Setting Status Conference, and a Status Conference was held on July 24, 2023. The parties agreed to providing an update to the Board at the August meeting with follow up deadlines for the October meeting. On November 24, 2023, the parties submitted a First Amendment to Settlement Agreement, providing procedural background and mutually agreed task deadlines for end of year 2023 proceeding into 2024. Westmoreland was to provide DEQ with an updated renewal application by April 1, 2024.

By July 1, 2024, or within four months of receipt of the updated renewal application, DEQ shall prepare a draft permit. By August 1, 2024, or within four months of receipt of an updated renewal application that includes all additional information requested by DEQ in its response to Westmoreland's June 26, 2023, letter, whichever is later, DEQ shall prepare a draft permit.

On August 29, 2024, the parties filed an Amendment 2 to Settlement Agreement wherein the parties agreed that by December 3, 2024, or within 90 days of giving public notice of its tentative decision to issue the renewal of the permit, DEQ shall make a final permit decision and issue a response to public comments; within 30 days after the notice of the final permit decision and after any administrative or judicial appeal or challenge is resolved, Westmoreland will seek voluntary dismissal of the Appeal.

On January 31, 2025, the parties filed an Amendment 3 to Settlement Agreement. On February 24, 2025, the parties filed Amendment 4 to Settlement Agreement wherein due to substantive changes to the permit resulting from comments and information received during the public comment period on the draft renewal of the permit, DEQ deems a second public notice period that was to close March 5, 2025, was necessary to allow the public to review and comment on changes to the draft permit. To address all comments received during both public comment periods, it was necessary to extend the deadline for completion of the final permit decision and responses to substantive public comments to June 1, 2025.

There has been no update after the extension of the above deadline to June 1, 2025.

Westmoreland filed a Notice of Appeal and Request for Hearing July 1, 2025. ALS was the Hearing Examiner, but ALS will discontinue services effective August 22, 2025. The Board will need to assume jurisdiction, and this is a new appeal in an old case.

The Board assumed jurisdiction August 22, 2025, until the next Board meeting October 24, 2025. On October 6, The board chair and counsel held a status conference with the parties; the parties plan to file a joint motion to stay formal proceedings in order to work toward a settlement.

On October 10, 2025, the parties filed a Joint Motion for Stay.

On October 24, 2025, the Board granted the Joint Motion to Stay. On October 31, 2025, Chair Simpson issued an Order Granting Joint Motion for Stay until June 1, 2026.

On June 1, 2026, DEQ and Westmoreland filed a Joint Status Report.

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

On May 31, 2019, the BER appointed ALS to preside over the contested case for procedural purposes only. At the Board's August meeting, it voted to assign the case in its entirety to ALS. The parties cross moved for partial summary judgment, and Westmoreland also filed a Motion to Dismiss. On November 24, 2020, former Hearing Officer Clerget issued an order denying Westmoreland's Motion to Dismiss, denying Conservation Groups' Motion for Partial Summary Judgment, and granting Westmoreland's and DEQ's Motions for Partial Summary Judgment. Ms. Clerget held a status conference on December 4, 2020, at which the parties could not agree to bring the motions decision before the Board. Therefore, the case proceeded to a hearing on the one remaining issue. Former Hearing Examiner Clerget issued an Amended Scheduling Order on January 14, 2021. Hearing Examiner Jeffrey Doud took responsibility for this matter as a hearing officer as of January 20, 2021. A four-day hearing took place on June 2-4 and 21, 2021. The parties sought an extension of time to file their respective proposed finding of fact and conclusions of law which was granted. The parties were due to file their respective FoFCoLs on October 8, 2021, and their response briefs on November 12, 2021. Thereafter, DEQ sought an 80-day extension to file their response brief following Mr. Lucas' withdrawal from the matter and assignment of a new DEQ attorney. Petitioners opposed the extension. Hearing Examiner Doud granted DEQ's request for an extension and ordered the parties to file their response briefs on January 31, 2022. On December 17, 2021, DEQ filed a Motion for Stay Pending Appeal of the AM4 Decision to the Montana Supreme Court and a Brief in Support. MEIC filed a response to the Motion for Stay on January 2, 2022, and DEQ filed their reply brief on January 13, 2022. That same day, DEQ filed a Motion for Extension of Time to File Response Findings of Fact and Conclusions of Law to Allow Hearing Examiner to Rule on DEQ's Motion for Stay and a Notice of Issue for DEQ's Motion to Stay of the Area F Permit Appeal Pending Appeal of AM4 Decision. On January 20, 2022, Michelle Dietrich issued a Notice of Assumption by Hearing Examiner and ordered that a new deadline for submittal of Response Findings of Fact and Conclusions of Law will be extended to 45 days after the Hearing Examiner decides DEQ's Motion to Stay the appeal pending the appeal of the AM4 decision. On February 28, 2022, Petitioners filed a Notice of Supplemental Authority. DEQ filed a Clarification of MEIC's Notice of Supplemental Authority.

On March 10, 2022, Patrick Risken filed a Notice of Assumption by Hearing Examiner and is preparing a decision on pending issues. On April 26, 2022, DEQ filed a Notice of Supplemental Authority with exhibit. Petitioners filed a Response to DEQ's Notice of Supplemental Authority on May 27, 2022. This matter has been stayed pending the outcome of the Montana Supreme Court's ruling regarding the AM4 decision. DEQ filed a Status Report on September 29, 2022, indicating there has been no change in the status of this matter. This matter was assigned to Rob Cameron as Hearing Examiner at the December 9, 2022, Board meeting. On March 24, 2023, DEQ filed a Status Report indicating the AM4 decision has been scheduled for oral argument before the Montana Supreme Court on April 3, 2023, and that the DEQ will continue to provide status updates commensurate with the Hearing Examiner's June 30, 2022, Order until a decision has been reached by the Montana Supreme Court. The AM4 matter is still pending decision by the Montana Supreme Court. On September 29, 2023, the DEQ filed a Status Report indicating there has been no change in the status of this matter and a decision is pending by the Montana Supreme Court. On November 22, 2023, DEQ submitted a Status Report indicating that the Montana Supreme Court has issued an Opinion in the AM4 matter.

On March 8, 2024, the Petitioners filed an Unopposed Motion to Lift Stay and Set a Briefing Deadline. The Hearing Examiner issued an Order Granting Motion to Lift Stay and Setting Briefing Scheduling on March 21, 2024, providing that responses to the proposed Findings of Fact and Conclusions of Law shall be filed and served on or before April 19, 2024.

On May 3, 2024, DEQ and Westmoreland filed their Joint Objections to Petitioners' Proposed Findings of Fact and Conclusions of Law and Petitioners filed their Response to WRM's and DEQ's Proposed Findings of Fact and Conclusions of Law.

This case has fully briefed motions and is pending decision by the Hearing Examiner.

The Board assumed jurisdiction of this case June 20, 2025, as Hearing Examiner Cameron is unable to continue. The parties have each filed a proposed FoFCoL, and subsequently filed exceptions. Remaining is preparation of the final proposed FoFCoL and exceptions before the case is ready for consideration before the board.

At the October 24, 2025, meeting the board will decide whether to retain jurisdiction or assign the case to a hearing examiner.

On October 24, 2025, the Board decided to appoint Dana Hupp as Successor Hearing Examiner. On November 10, 2025, DEQ and Respondent-Intervenors Westmoreland Rosebud Mining, LLC and the International Union of Operating Engineers, Local 400 filed a Joint Notice of Supplemental Authority. Petitioners filed an unopposed motion for extension of time to file their response brief until

January 9, 2025. On December 15, 2025, Chair Simpson issued an Order Setting Briefing Schedule on Westmoreland/Local 400's Petition for Costs, Expenses, and Fees.

On December 4, 2025, Petitioners filed a Petition for Judicial Review and Complaint for Declaratory and Injunctive Relief (DV-25-49) with the 16th Judicial District, Rosebud County.

c. In the matter of the Notice of Appeal and Request for Hearing by Alpine Pacific Utilities Regarding Issuance of MPDES Permit No. MTX000164, BER 2019-06 WQ.

At the Board's October 9, 2020, meeting it voted to adopt the parties Stipulation and Request for Retention of Board Jurisdiction. On May 3, 2021, the parties filed an update with Hearing Examiner Lindsey Simon stating that pursuant to the Stipulation, Alpine had submitted the monitoring well plan to DEQ, that DEQ has approved the monitoring well installation plan, and that the monitoring well has been installed. On June 11, 2021, William Holahan took responsibility for this matter as a hearing examiner. On August 2, 2021, the parties filed a Joint Status Report with the Hearing Examiner. Alpine Pacific Utilities has not exercised its discretion under the Stipulation that would trigger reporting of additional activities at this time to the Board. The Board retains jurisdiction in case the stipulated terms are not implemented and approved by DEQ. Status reports are due every three months. The Board's jurisdiction extends at the latest to July 2024. The parties submitted a joint status report on November 1, 2021, advising of the progress they have made in this matter. This matter was reassigned to Madison Mattioli as Hearing Examiner as of February 14, 2022. The parties filed a Joint Status Report on February 24, 2022. A Joint Status Report was filed on May 24, 2022. On August 24, 2022, the parties filed a Joint Status Report. Matthew Dolphay filed a Notice of Withdrawal of Counsel on August 29, 2022. Alpine Pacific Utilities continues to be represented by Victoria Marquis. A Joint Status Report was filed on November 23, 2022, indicating that Alpine continues pursuing the requested information to cure the deficiencies in the permit application and anticipates submitting a deficiency response in the next three months. The parties filed a Joint Status Report on November 23, 2022. On February 27, 2023, the parties filed a Joint Status Report. On March 14, 2023, Hearing Examiner Oomens filed a Notice of Change in Hearing Examiner. On May 31, 2023, the Parties filed a Joint Status Report indicating that Alpine submitted an updated application and non-degradation analysis to DEQ on February 21, 2023, to meet the requirement in paragraph 20 of the Board's Order adopting the Stipulation; DEQ reviewed Alpine's updated application and non-degradation analysis; DEQ sent Alpine a fee deficiency letter on March 3, 2023, and DEQ received the full amount on March 14, 2023; DEQ sent Alpine a second deficiency notice pertaining to deficiencies in Alpine's updated permit application on April 7, 2023; on May 1, 2023, Alpine responded to the notice of deficiency; after further discussions, Alpine resubmitted the application on May 24, 2023;

DEQ is currently reviewing the May 1 and 24, 2023 submittals. On August 25, 2023, the parties filed a Joint Status Report indicating that Alpine applied to modify the existing MGWPCS permit to which DEQ sent Alpine a Notice of Deficiency; Alpine responded with an updated application on June 24, 2023; DEQ subsequently sent an email to Alpine on July 24, 2023, summarizing the remaining issues with Alpine's application and DEQ will follow up the email with a detailed NoD by the end of August 2023. The next joint status report is due on November 27, 2023.

On November 27, 2023, the parties filed a Joint Status Report indicating that Alpine and DEQ continue to work through issues related to Alpine's application. The parties met on November 8, 2023. Alpine is currently assembling information requested by DEQ and will submit to DEQ for review.

On February 27, 2024, the parties filed a Joint Status Report indicating that Alpine and DEQ continue to work through issues related to Alpine's application to modify the existing Montana Ground Water Pollution Control System. Alpine has investigated several avenues for collecting the requested data by DEQ. In January 2024, Alpine compiled and provided DEQ shallow aquifer test data from a nearby site. DEQ is currently reviewing the information.

On May 28, 2024, the parties filed a Joint Status Report indicating that Alpine has retained Christopher Scoones as legal counsel as the parties continue to work on issues related to Alpine's application. Alpine will report site specific aquifer characteristics and non-degradation analyses and both parties will consider collected ground water data and analyses to estimate hydraulic conductivity, develop a mixing zone, and permit effluent limitations and conditions at each outfall. The next status report is due on August 28, 2024.

On September 4, 2024, the parties file a Joint Status Report. On December 4, 2024, the parties filed a Joint Status Report indicating that on November 16, 2024, DEQ received Alpine's updated permit application renewal and major modification of the permit. DEQ is currently processing the application and will determine whether the application is complete within 30 days of receipt. The next Joint Status Report is due on March 6, 2025.

On March 21, 2025, the parties filed a Joint Status Report and a First Amendment of the Second Stipulation and Request for Retention of Board Jurisdiction.

On June 9, 2025, the parties file a Joint Status Report indicating that on or before July 21, 2025, DEQ will make a tentative determination to renew or modify MTX000164 in accordance with the Montana Water Quality Act; on or before August 20, 2025, DEQ will give public notice of the tentative determination for 30 days; if a public hearing is not held DEQ will consider and respond to substantive public comments and make a final determination on or before October 20, 2025; within 30 days from final permit decision and not later than December 19, 2025,

Alpine will move to dismiss this appeal. The next status report is due on September 8, 2025.

Because DOJ has closed the ALS Bureau, BER must assume jurisdiction.

The Board assumed jurisdiction August 22, 2025, until the next Board meeting October 24, 2025.

On September 16, 2025, the Board issued an Order Requesting a Status Report be filed by September 19, 2025. On September 19, 2025, the parties filed a Joint Status Report. The Board will decide at its meeting on October 24, 2025, how to proceed with this case.

On October 24, 2025, the Board decided to retain jurisdiction and no further action is necessary at this time. On January 16, 2026, Chair Simpson issued an Order Requesting Status Report prior to the February 20, 2026, meeting. On February 4, 2026, DEQ filed a Status Update, a Motion to Dismiss with Prejudice, and a proposed Order. On February 4, 2026, Petitioner filed a letter objecting to some requirements included in the amended permit, but did not file a new petition within the specified time frame.

On February 13, 2026, Alpine Pacific filed an Unopposed Motion for Extension of Time to Respond to DEQ's Motion to Dismiss, with a proposed Order. On February 17, 2026, Chair Simpson issued an Order Granting Unopposed Motion of Time to Respond to DEQ's Motion to Dismiss, giving Alpine Pacific until February 25, 2026, to respond. On February 25, 2026, Alpine Pacific filed a Response to DEQ's Motion to Dismiss. On March 11, 2026, DEQ filed a Reply in Support of Motion to Dismiss.

On June 11, 2026, Chair Simpson issued an Order Setting Oral Argument for the June Board meeting, which will occur on June 26, 2026.

- d. **In the Matter of: Petitions of Teck Coal Limited and the Board of County Commissioners of Lincoln County, Montana, for Review of ARM 17.30.632(7)(A) Pursuant to Mont. Code Ann. Section 75-5-203 – Stringency Review of Rule Pertaining to Selenium Standard for Lake Kocanusa, BER 2021-04 and 08 WQ.**

On June 30, 2021, and July 1, 2021, the Board received a request from Teck Coal Limited for the Board to review Montana Administrative Rule 17.30.632 to determine whether it is more stringent than the comparable federal guideline in violation of the Montana Water Quality Act. The Board issued a Public Notice on August 27, 2021, inviting comment on the process to evaluate the stringency of the rule. Comments on the process to be used were due on September 24, 2021. The Public Notice also invited response to the comments suggesting a

process by September 28, 2021. The Board analyzed the comments and responses to comments regarding the process of evaluation at the special meeting on October 29, 2021. On October 29, 2021, the Board determined that a scheduling notice would be issued for submission of public comments and that the review will not be in a contested case format. On November 23, 2021, the scheduling notice was posted on the Board website. The record on the rule proceedings from 2020 was posted on December 15, 2021. Public comments and responses on the stringency review were filed and posted in January 2022 prior to the public meeting. The public comment meeting was held on January 31, 2022. Teck Coal, DEQ and MEIC and Earth Justice filed proposed decision documents on February 11, 2022. At the February 25, 2022, meeting, the Board deliberated on the rule-making record, public comments, meeting transcript and other filed documents; heard oral argument by certain interested parties; and by motions voted on by the Board decided various issues presented by the petitions. On April 8, 2022, the Board conducted further deliberations and considered and approved, with certain amendments, a proposed decision. The Board issued a Final Agency Decision on April 19, 2022. DEQ filed a Motion to Alter or Amend on May 17, 2022. On May 31, 2022, the Board of County Commissioners of Lincoln County and Teck Coal filed responses to DEQ's motion to alter or amend the Final Agency Decision. On June 14, 2022, DEQ filed a reply brief to its motion to alter or amend. A Joint Notice and Motion to Submit Final Agency Action to EPA was filed by Lincoln County and Teck Coal on July 20, 2022. On August 3, 2022, the DEQ filed a response to the Joint Notice and Motion to Submit Final Agency Decision and on August 17, 2022, the Petitioners filed their Reply in Support. At the October 14, 2022, Board meeting, the Board voted to deny DEQ's motion to alter or amend and direct Board Counsel, working with the Chairman, to draft a reasoned decision stating the basis for the Board's denial of the motion. The Board also voted to grant Lincoln County's and Teck Coal's joint Motion to submit the Final Agency Action to EPA and requested that Lincoln County and Teck Coal jointly file a proposed letter to the EPA transmitting the Board's order. On November 4, 2022, Lincoln County and Teck Coal jointly submitted a draft proposed letter to the EPA.

At the December 9, 2022, Board meeting the Board considered the draft decision and voted 5-2 to approve the decision. The Board also considered the draft letter to the EPA transmitting the Board's Final Agency Action and voted 5-2 to approve sending the letter and Final Agency Action to the EPA. On February 8, 2023, the Board received correspondence from Kathleen Becker, Regional Administrator for the EPA Region 8, indicating that the EPA will not begin considering the Board's request until the EPA has been notified by the State that the ongoing legal processes have concluded.

e. **In the Matter of: Appeal and Request for Hearing by Valley Garden Land & Cattle LLC Regarding Issuance of Opencut Mining Permit #674, Amendment #3, BER 2022-04 OC.**

On June 22, 2022, Valley Garden Land and Cattle LLC filed a Notice of Appeal and Request for Hearing challenging the Montana Department of Environmental Quality's ("DEQ") issuance of an Amendment to Open Cut Mining Permit to A. M. Welles, Inc., for expansion of an existing pit (known as "DSL Site") on Montana State Trust Lands between McAllister and Ennis, Madison County, Montana. On June 27, 2022, Chairman Ruffatto issued an Order re Informal Procedures. On June 30, 2022, Plaintiff's requested an informal conference to discuss the informal/formal procedure options. DEQ also filed a request for an informal conference on July 14, 2022. An informal conference will be scheduled with the parties. The Board voted to appoint Mike Russell as Hearing Examiner in this matter on August 12, 2022. The Hearing Examiner ordered an informal conference on August 16, 2022. An Initial Procedural Order was issued on August 18, 2022. On September 7, 2022, A.M. Welles, Inc., filed an uncontested Motion to Intervene. The Hearing Examiner granted the Motion to Intervene on September 12, 2022, and issued a Scheduling Order on September 19, 2022. On December 5, 2022, DEQ filed a Motion to Vacate the Scheduling Order. This matter was assigned to Rob Cameron at the December 9, 2022, Board meeting. Hearing Examiner Cameron issued an Order Vacating the Scheduling Order on December 29, 2022. On January 3, 2023, an Order Setting Scheduling Conference was issued, setting the conference for January 19, 2023. The Hearing Examiner issued an Order on January 20, 2023, regarding the Administrative Record filed in this matter. The Hearing Examiner declined to order the removal of the subject documents from the record at this time. A Scheduling Order was issued on February 24, 2023, and the parties were ordered to exchange witness and exhibit list by March 27, 2023. DEQ filed its list of hybrid witnesses with exhibits on March 27, 2023. On March 30, 2023, Intervenor A.M. Welles, Inc., filed a Notice to Adopt DEQ's Hybrid Witness Disclosures and Exhibits. The Hearing Examiner issued an Amended Scheduling Order on April 11, 2023. On May 23, 2023, Petitioner's filed their Expert Disclosure.

DEQ filed their Expert Witness Disclosures on May 30, 2023. Petitioners filed their Rebuttal Expert Witness Disclosures on June 6, 2023. On June 12, 2023, DEQ filed their Rebuttal Expert Witness Disclosures. Petitioners filed an Unopposed Motion to Amend Scheduling Order on June 13, 2023. On June 13, 2023, the Hearing Examiner issued an Order Extending Discovery Deadline granting Petitioner's request that the discovery deadline be extended to July 14, 2023. On September 8, 2023, the Petitioner filed a Motion to Limit Scope of Hearing/Motion in *Limine* with a Brief in Support. DEQ filed a Motion for Judicial Notice and a Motion for Hearing Examiner to Visit DSL Site on September 25, 2023. A.M. Welles, Inc., filed a Response in Opposition to Petitioner's Motion in *Limine* on September 25, 2023. On September 25, 2023, DEQ filed a Response to VGLLC's Motion to Limit Hearing Scope. Petitioner filed a Response to Motion

for Judicial Notice on September 26, 2023. On September 27, 2023, Petitioners filed a Response to DEQ's Motion for Hearing Examiner to View the DSL Site. Petitioner filed a Motion for Summary Judgment on October 3, 2023, with a Brief in Support. On October 3, 2023, DEQ filed a Motion in *Limine* to prohibit VGLLC from referring to filed discovery as the administrative record and to prohibit VGLLC from referring to, or making a claim under, any other statute other than the Opencut Act in this contested case hearing with a Briefs in Support. DEQ also filed its Motion for Summary Judgment on October 3, 2023, with a Statement of Undisputed Facts. Petitioner filed an Unopposed Motion to Amend Scheduling Order and a Motion to Extend Deadline for Summary Judgment Briefing, and to Set a Hearing for Motions in *Limine* on October 6, 2023. The Hearing Examiner issued an Order Amending Scheduling Order on October 6, 2023, providing that parties file responses to summary judgment by November 6, 2023. Petitioner filed its Reply Brief in Support of Petitioner's Motion to Limit Scope of Hearing/Motion in *Limine*. On October 10, 2023, DEQ filed its Reply to VGLLC's Response to DEQ Motion to Take Judicial Notice.

On October 11, 2023, DEQ filed a Reply to VLGGC Response to DEQ Motion for Hearing Examiner to View DSL Site and Memorandum in Support. Petitioner filed a Combined Response in Opposition to DEQ's Motion in *Limine* in October 17, 2023. On October 23, 2023, A.M. Welles filed a Response in Opposition to Petitioner's Motion to Extend Deadline for Summary Judgment Briefing and to Set a Hearing for Motions in *Limine*. On the same day, DEQ filed a Response to Valley Garden's Motion to Suspend Briefing. On October 26, 2023, Valley Garden filed a Reply to Respondents' Response to Petitioner's Motion to Suspend Briefing as well as a Notice of Submittal. On October 30, 2023, the Hearing Examiner issued an Order Staying Summary Judgment Briefing. DEQ filed its Replies to Plaintiff's Combined Response to DEQ's Motions in *Limine* on November 3, 2023. On November 6, 2023, the Hearing Examiner issued an Order Setting Hearing for December 14, 2023, on the outstanding motions in *limine*.

On December 1, 2023, DEQ filed a Notice of Additional Authority. On December 11, 2023, the Hearing Examiner issued an Order Continuing Hearing due to illness. DEQ filed a Motion for Reconsideration and Vacatur of Suspension of Summary Judgment Briefing Pending Resolution of Motions in *Limine* with a Brief in Support. On December 27, 2023, Valley Garden filed a Brief in Opposition to DEQ's Motion for Reconsideration. DEQ filed a Reply to Valley Garden's Response to DEQ's Motion for Reconsideration on January 10, 2024. Valley Garden filed an Opposed Motion to Schedule Hearing on all Pending Motions on January 30, 2024.

On February 13, 2024, DEQ filed a Response to Valley Garden's Motion for Hearing. Valley Garden filed its Reply in Support of Motion to Schedule Hearing on all Pending Motions on February 21, 2024. On March 21, 2024, the Hearing Examiner issued an Order requiring the parties to file status reports on pending motion and setting a Status Conference for April 4, 2024. On March 29, 2024,

both parties filed their Status Reports. DEQ filed a Notice of Supplemental Authority on April 4, 2024. On April 5, 2024, the Hearing Examiner issued an Order RE Valley Garden's Summary Judgment Brief requiring Valley Garden to resubmit its Motion for Summary Judgment and Statement of Undisputed Facts in compliance with the Initial Procedural Order on or before April 15, 2024.

On April 10, 2024, DEQ filed a Motion to Allow DEQ Opencut Scientist to Testify at Hearing on the Motion to Limit the Scope of Evidence. The same day VGLC filed its Motion for Summary Judgment. On April 11, 2024, the Hearing Examiner issued an Order for View of the DSL Site. Petitioner filed a Response to DEQ's Motion to Allow Testimony at the *Limine* Hearing on April 19, 2024. DEQ filed its Reply on Motion to Allow on April 24, 2024. On April 26, 2024, the Hearing Examiner denied DEQ's motion to allow testimony. On May 7, 2024, DEQ filed a Notice of Supplemental Authority regarding the Montana Supreme Court's encouragement of "full presentation of evidence" at the contested case hearing. The Petitioners filed their Response to Notice of Supplemental Authority and Motion to Strike on May 10, 2024. DEQ filed its Response to VGLLC Objection to DEQ's Notice of Supplemental Authority and Motion to Strike on May 24, 2024. On September 10, 2024, DEQ filed a Notice of Supplemental Authority.

This case has summary judgments fully briefed and is pending a decision by the Hearing Examiner.

The Board assumed jurisdiction of this case June 20, 2025 as Hearing Examiner Cameron is unable to continue. It was also noted that this case is not pending a decision, as Motions *in Limine* are still pending.

The Board received audio and video of the April 24, 2024, hearing regarding the Valley Garden Motion *in Limine*. A transcript was completed by Laurie Crutcher, Court Reporter, on October 2, 2025.

On September 24, 2025, the Board issued an Order Requesting Status Report and Setting Status Conference. On September 26, 2025, Intervenor Defendant, A.M. Welles, Inc. filed an Unopposed Motion to Continue Status Conference. On September 29, 2025, the Board issued an Order Resetting Status Conference.

On October 1, 2025, DEQ and the Petitioner filed Status Reports. The board chair and counsel held a status conference with the parties on October 7, 2025. The Board will decide at its October 24, 2025, meeting how to proceed with the case.

At the October 24, 2025, meeting the Board decided to retain jurisdiction, issue an order lifting the stay on the pending cross-motions for summary judgment and set forth a briefing schedule and a date for hearing on the summary motions. On October 31, 2025, Chair Simpson issued an Order Lifting Stay on Pending Cross-Motions for Summary Judgment and Setting Briefing Schedule.

On December 19, 2025, the Petitioner filed a Response Brief in Opposition to DEQ's Motion for Summary Judgment, with Exhibits 7-11, and a Statement of Disputed Facts. On December 19, 2025, DEQ filed a Response to Motion for Summary Judgment, with Exhibits A-H, and a Statement of Disputed Facts. On January 6, 2026, DEQ filed a Notice of Errata. On January 30, 2026, DEQ filed a Reply Brief. On March 11, 2026, Chair Simpson issued an Order regarding Oral Argument, to be held March 20, 2026. On March 17, 2026, DEQ filed a Notice of Supplemental Authority.

The Board will hear oral argument, discuss, and potentially vote on 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 Board heard oral argument during its special meeting March 20, 2026. The Board decided to grant DEQ's Summary Judgment motion with respect to notice, completeness and accuracy of issues at the June 26, 2026, meeting.

On June 11, 2026, Chair Simpson issued a Notice regarding Final Decision and Order of the Board. The draft of its Final Decision and Order in this matter with respect to the parties' cross-motions for summary judgment and motions in limine will be discussed and decided at the June 26, 2026, Board meeting.

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

On June 27, 2022, the Montana Environmental Information Center (MEIC) and Sierra Club filed a Notice of Appeal and Request for Hearing pursuant to Montana Code Annotated (MCA)§ 82-4-206(1)-(2), and Administrative Rule of Montana (ARM) 17.24.425(1), regarding Montana Department of Environmental Quality's May 27, 2022, approval of the Area B Amendment 5 (AMS) for the Rosebud Strip Mine, in Colstrip, Montana. Chairman Ruffatto issued an Order re Informal Procedures to the parties on July 8, 2022. A Joint Motion for Informal Conference was filed on July 13, 2022. On July 28, 2022, Westmoreland Rosebud Mining, LLC and International Union of Operating Engineers, Local 400 filed a Motion to Intervene. An informal conference was held on July 28, 2022, wherein the parties discussed the possibility of informal procedures, but ultimately decided this matter should be contested formally. The Board voted to

appoint Mike Russell as the Hearing Examiner in this matter at the August 12, 2022, meeting. On August 15, 2022, the Petitioner's filed a response to WRM's motion to intervene. An Initial Procedural Order was issued on August 18, 2022. On August 29, 2022, WMR filed a reply in support of its Motion to Intervene. The Hearing Examiner granted the Motion to Intervene on September 12, 2022. The parties filed a Joint Motion for Case Management Order on September 16, 2022. A Scheduling Order was issued on September 19, 2022. An Amended Notice of Appeal and Request for Hearing was filed on November 7, 2022. Rob Cameron was assigned as the Hearing Examiner in this matter at the December 9, 2022, Board meeting. On February 3, 2023, the parties filed a Joint Motion to Modify Scheduling Order. The Hearing Examiner issued an Amended Scheduling Order on February 6, 2023. On April 10, 2023, Westmoreland filed a Motion for Protective Order and Brief in Support. Petitioners filed a Motion for Extension to file a response brief on April 14, 2023, and the Hearing Examiner granted the Order the same day. On May 4, 2023, the Petitioners filed their Response to Intervenor-Respondents' Motion for Protective Order. On May 19, 2023, the parties jointly filed a Motion to Amend Scheduling Order. The Hearing Examiner issued an Amended Scheduling Order on May 22, 2023, providing that any dispositive motions, together with supporting briefs be filed on August 18, 2023. On May 22, 2023, Westmoreland filed their Reply in Support of Motion for Protective Order. Petitioners filed a Notice of Submission on May 23, 2023. On June 6, 2023, the Hearing Examiner issued an Order Re: Motion for Protective Order granting in part and denying in part. On June 21, 2023, the Hearing Examiner issued an Order Re: Site Inspection. The parties filed a Joint Motion and Brief in Support for Stipulated Protective Order on June 22, 2023. On June 28, 2023, the Hearing Examiner issued another Order Re: Site Inspection and Anderson Deposition. On July 10, 2023, Westmoreland Counsel filed a Motion for a Protective Order. Petitioners filed a Response to Motion for a Protective Order on July 26, 2023. The parties filed a Joint Reply in Support of Motion for Protective Order on August 14, 2023. On August 23, 2023, Petitioners, Westmoreland and International Union of Operating Engineers, Local 400, and DEQ all filed their Motions for Summary Judgment with Brief in Support and Statements of Undisputed Facts. The parties filed a Joint Motion for Extension of Dispositive Motion Response and Reply Briefing Deadlines on September 14, 2023, and the Hearing Examiner granted the Motion on September 18, 2023. On October 2, 2023, the Hearing Examiner issued an Order re Motion for Protective Order. Petitioner filed an Unopposed Motion for Extension on October 11, 2023. On October 11, 2023, the Hearing Examiner issued an Order Granting the Motion for Extension providing that the response briefs on Summary Judgment are due on October 18, 2023, and the reply briefs are due on November 8, 2023.

On October 18, 2023, Petitioners' Response to Respondents' Motions for Summary Judgment along with a Statement of Stipulated Facts. DEQ filed its Brief in Opposition to Petitioners' Motion for Summary Judgment, and WRM filed its Response Brief to Petitioners' Summary Judgment Motion on October 18, 2023. DEQ and WRM filed a Joint Motion to Strike on October 18, 2023, with a brief in support and a Joint Statement of Disputed Facts. On October 31, 2023,

Petitioners filed an Unopposed Motion for Extension of Time. The Hearing Examiner granted the Motion for Extension on the same day. On November 6, 2023, Petitioners filed a Response to Motion to Strike. On November 17, 2023, DEQ and WRM filed a Joint Motion for Extension of Deadline to Reply in Support of Joint Motion to Strike. The Hearing Examiner granted the joint motion for extension on November 20, 2023. On November 28, 2023, DEQ and WRM filed their Joint Reply in Support of Motion to Strike.

On December 21, 2023, WRM and IUO filed their Reply in Support of Summary Judgment. DEQ also filed their Reply Brief in Support of Summary Judgment on December 21, 2023. Petitioners filed their Combined Reply to DEQ and WRM's Response Briefs in Support of Motion for Summary Judgment on December 21, 2023, along with a Supplemental Statement of Disputed Facts.

On February 10, 2025, the parties provided the Hearing Examiner with their proposed orders regarding the summary judgment motions.

On May 23, 2025, the Hearing Examiner issued an Order on Motion for Summary Judgment, denying the Conservation Groups Motion for Summary Judgment, granting DEQ's, and granting and denying in part Westmoreland/Local 400's Motion. He proposed Judgment be entered in favor of DEQ and Westmoreland/Local 400, the Conservation Groups' challenge be dismissed and DEQ's approval of AM5 be affirmed.

On May 30, 2025, the parties filed a Joint Motion for Clarification and Briefing Schedule requesting the Hearing Examiner to clarify that pursuant to § 2-4-621(1)-(3), any exceptions to the Order must be made to the Board of Environmental Review prior to seeking judicial review and further requested that an exception briefing schedule be ordered.

On June 6, 2025, the Hearing Examiner granted the parties' requests and ordered that the parties may file exceptions to the proposed Order with the Board of Environmental Review by July 25, 2025, and responses to the exceptions must be filed by August 29, 2025.

The Board assumed jurisdiction of this case June 20, 2025, as Hearing Examiner Cameron is unable to continue.

On July 17, 2025, the Conservation Groups filed a Partially Unopposed Motion for Extension of Time to File Exceptions to the Order. On July 18, 2025, Westmoreland/Local 400's filed a Response in Opposition to MEIC's Motion for Extension. On July 21, 2025, Chair Simpson issued an Order Granting the Motion for Extension of Time to File Exceptions to the Order. This case is expected to come before the Board at the October 24 meeting.

On August 29, 2025, the Conservation Groups filed Final Exceptions. On August 29, 2025, Westmoreland and Local 400 filed Exceptions to Recommended Order

on Motions for Summary Judgment. On August 29, 2025, DEQ filed Exceptions to Proposed FoFCoL.

On October 3, 2025, Westmoreland/Local 400's filed a Response in Opposition to Petitioners' Exceptions to Proposed Order on Summary Judgment. On the same day, the Conservation Groups filed a Combined Response to Exceptions to Proposed Order on Summary Judgment. This case is on the October 24, 2025 BER meeting agenda for a final decision.

On October 24, 2025, the Board decided to accept the proposed FoFCoL in favor of DEQ, Westmoreland and Operating Engineers Local 400. It was also decided to accept DEQ's Exceptions, reject the Petitioners' Exceptions, reject the Intervenor's Exceptions regarding Petitioners' standing, and accept the remaining exceptions of the Intervenor's Exceptions corrections as long as it doesn't conflict with DEQ's Exceptions. On November 4, 2025, Chair Simpson issued the Final Agency Action and Order of the Board of Environmental Review. On November 17, 2025, Intervenor-Respondents Westmoreland Rosebud Mining LLC and International Union of Operating Engineers, Local 400 filed a Notice of Withdrawal and Substitution of Counsel. On December 9, 2025, Petitioners filed an Unopposed Motion for Extension of Time, with proposed Order. On December 15, 2025, Chair Simpson issued an Order Setting Briefing Schedule on Westmoreland/Local 400's Petition for Costs, Expenses, and Fees. On December 17, 2025, Petitioners filed a Notice of Appearance of Robert Farris-Olsen. On January 9, 2026, Petitioners filed a Response to Petition for Costs, Expenses, and Fees.

On February 13, 2026, Westmoreland and Operating Engineers Local 400 filed a Reply in Support of Petition for Costs, Expenses, and Fees. On February 18, 2026, MEIC filed a Motion to Strike. On February 19, 2026, Westmoreland and Operating Engineers Local 400 filed a Response in Opposition to Conservation Groups' Motion to Strike. On February 19, 2026, MEIC filed a Reply in Support of Motion to Strike. At the February 20, 2026, Board meeting, the Board delegated to the Chair the resolution of the pending Motion to Strike.

On February 23, 2026, Chair Simpson issued an Order Denying Motion to Strike in Part and Granting It in Part.

On March 17, 2026, MEIC filed an Unopposed Motion for Extension of Time to File Sur-reply to Petition for Costs, Expenses, and Fees. On March 18, 2026, Chair Simpson issued an Order Granting Unopposed Motion for Extension of Time, until March 25, 2026. On March 25, 2026, MEIC filed a Sur-reply to Petition for Costs, Expenses, and Fees.

On April 15, 2026, MEIC filed a Notice of Supplemental Authority and Request to Take Judicial Notice, and a Motion to Assign Hearing Examiner.

On April 16, 2026, Westmoreland and Operating Engineers Local 400 filed a Response in Opposition to Notice of Supplemental Authority and Request to Take Judicial Notice, and a Response in Opposition to Petitioners' Motion to Assign

Hearing Examiner. On April 16, 2026, MEIC filed a Combined Reply in Support of Notice of Supplemental Authority and Motion to Assign Hearing Examiner.

The Board heard oral argument regarding Westmoreland’s Petition for Costs, Expenses, and Fees on May 15, 2026. The Board decided to accept the filing of Judicial Notice but strike the legal argument for Claim 2. The Board Denied the motion to appoint a hearing examiner based on timeliness. Also, the Board voted that Westmoreland had made substantial contributions to the Board’s Final Order, Petitioners had acted in bad faith, and that Petitioners had acted in a harassing and embarrassing manner.

On May 21, 2026, Chair Simpson issued an Order Setting Scheduling Conference for June 5, 2026.

On May 29, 2026, Westmoreland filed a Notice of Submission of Proposed Scheduling Order. On May 29, 2026, the Conservation Groups filed a Notice of Submission of Proposed Scheduling Order, and a proposed Scheduling Order. On June 4, 2026, the Conservation Groups filed a Notice of Appearance and Substitution of Counsel.

On June 10, 2026, Chair Simpson issued a Scheduling Order (Hearing on Amount of Attorney Fees, Costs, and Expenses).

g. In the Matter of: Appeal and Request for Hearing by Westmoreland Rosebud Mining LLC Regarding Issuance of MPDES Permit No. MT0032042, Colstrip, MT, BER 2022-06 WQ

On September 9, 2022, Westmoreland Rosebud Mining LLC filed a Notice of Appeal and Request for Hearing regarding the issuance of MPDES Permit No. MT0032042. On October 14, 2022, the Board moved to assign this matter to Mike Russell as Hearing Examiner to preside over the contested case. This matter was reassigned to Rob Cameron at the December 9, 2022, Board meeting. A Prehearing Order was issued on February 6, 2023. The parties filed a Joint Motion to Stay on February 10, 2023. The parties also filed a Stipulation for Final Agency Decision on February 10, 2023. On February 14, 2023, Hearing Examiner Cameron granted the Parties’ Joint Motion to Stay pending the Board’s final determination of the Parties’ proposed Stipulation. At the February 24, 2023, BER meeting the Board approved the proposed Stipulation and passed the Final Agency Action. The Board then requested that Board Counsel issue an Order to the parties requiring responses to the Board Member questions at the April 7, 2023, meeting. The parties subsequently filed their Joint Responses to BER Order on March 24, 2023. The Board heard from the parties regarding the settlement agreement at the April 7, 2023, meeting. The Board motioned and passed that the parties update the Board at each Board meeting. On May 31, 2023, the parties provided an update stating, “Under the terms of the Stipulation, DEQ and Westmoreland will compile and obtain data necessary to determine the nonanthropogenic condition of EC and SAR in state waters receiving discharges

authorized under MPDES Permit No. MT0032042 (“Receiving Waters”). DEQ prepared a draft Quality Assurance Project Plan (QAPP) and Westmoreland provided comments on the QAPP. DEQ and Westmoreland are currently in the process of finalizing the QAPP, which will describe analytical methods and approaches for developing site specific EC and SAR standards for the Receiving Waters.”

For the August 11, 2023 BER meeting, the parties provide the following update to the BER related to DEQ and Westmoreland’s progress under the Stipulation and the BER’s Final Agency Action in the above-named case: “Under the terms of the Stipulation, DEQ and Westmoreland are compiling existing data necessary to determine the nonanthropogenic condition of EC and SAR in state waters receiving discharges authorized under MPDES Permit No. MT0032042 (“Receiving Waters”). DEQ prepared a draft Quality Assurance Project Plan (QAPP) and Westmoreland provided comments on the QAPP. DEQ plans to finalize the QAPP by August 31, 2023. The QAPP will describe analytical methods and approaches for developing site specific EC and SAR standards for the Receiving Waters. After the QAPP is finalized, the work to compile and evaluate data, to determine whether additional data collection is required, and to develop NAS standards will proceed in accordance with BER’s Final Agency Decision.”

For the October 20, 2023, meeting DEQ submitted the following update: Under the terms of the Stipulation, DEQ and Westmoreland are compiling and obtaining data necessary to determine the nonanthropogenic condition of EC and SAR in state waters receiving discharges authorized under MPDES Permit No. MT0032042 (“Receiving Waters”). On August 31, 2023, DEQ and Westmoreland finalized the “Quality Assurance Project Plan (QAPP) for Identifying Nonanthropogenic Water Quality Criteria for Electrical Conductivity (EC) and Sodium Adsorption Ratio (SAR) for Specified Tributaries of Rosebud Creek” which describes analytical methods and approaches for developing EC and SAR nonanthropogenic standards for the Receiving Waters.

Since finalizing the QAPP, and in accordance with the Stipulation, Paragraph 21(c), DEQ and Westmoreland have compiled existing water quality data. DEQ Standards and Modeling Section completed its data compilation consulting the national Water Quality Portal, Montana’s MT-eWQX (EQulS) database, DEQ’s Coal program, and DEQ’s MPDES program. Westmoreland compiled and submitted its data.

In accordance with the Stipulation, Paragraph 21(d), DEQ is now in the process of evaluating the compiled existing data. Within 30 days of receiving all the data, or by October 30, 2023, DEQ will make a written determination whether ambient EC and SAR concentrations in the Receiving Waters exceed the applicable water quality criteria in ARM 17.30.670(4) for EC and SAR. If, in accordance with the Stipulation, Paragraph 21(e), DEQ determines additional data is required to conclude ambient EC and SAR concentrations in the Receiving Waters exceed the criteria in ARM 17.30.670(4), or to properly develop nonanthropogenic standards for EC and SAR for the Receiving Waters, Westmoreland and DEQ

will develop a Sampling and Analysis Plan (SAP) to fill the data gaps within 45 days of DEQ's determination that additional data is required. Westmoreland will be responsible for obtaining additional data in accordance with the SAP.

On November 22, 2023, DEQ counsel, Ms. Bowers provided an update indicating that DEQ and Westmoreland finalized the Quality Assurance Project Plan (QAPP) in accordance with the Stipulation paragraph 21(c). Since finalizing the QAPP, DEQ and Westmoreland have compiled existing water quality data. In accordance with Stipulation paragraph 21(d), DEQ evaluated the compiled existing data and made a written determination. In accordance with Stipulation paragraph 21(e), DEQ determined additional data is required to properly develop nonanthropogenic standards (NAS) for EC and SAR for the Receiving Water. By November 29, 2023, DEQ will determine whether NAS sources alone cause EC and SAR to exceed the standards in the Receiving Waters pursuant to Stipulation paragraph 21(f). By December 15, 2023, Westmoreland and DEQ will develop a Sampling and Analysis Plan (SAP) to fill the data gaps. DEQ and Westmoreland continue to consult on topics related to completing the next steps under the Stipulation including those described in Stipulation paragraph 21(g).

On February 2, 2024, Kirsten Bowers sent the following update: "After determining that additional data are required to properly develop nonanthropogenic standards for EC and SAR for the Receiving Waters, DEQ and Westmoreland developed a Sampling and Analysis Plan (SAP) (finalized on 12/15/23; minor edits made on 12/22), in accordance with the Stipulation Paragraph 21(e). Westmoreland will be responsible for obtaining additional data in accordance with the SAP. The SAP specifies that site visits for the purposes of sampling must occur every month for twelve months. Sampling will begin in February 2024 and end in January 2025 or, alternately, "If sampling does not begin by February 2024, 12 months of sampling from the actual beginning date must be completed."

On April 4, 2024, Kirsten Bowers sent the follow up update: "DEQ and Westmoreland are proceeding with data collection to develop nonanthropogenic standards for electrical conductivity (EC) and sodium adsorption ratio (SAR) for the Receiving Waters. Westmoreland began collecting data in February in accordance with the Sampling and Analysis Plan (SAP) developed by the parties pursuant to the Stipulation, Paragraph 21(e). The SAP specifies that site visits for the purposes of sampling must occur every month for twelve months.

At its February 16, 2024, meeting, Board Chair Simpson asked if DEQ reviewed and considered historic data collected by the Peabody Big Sky Mine in the Rosebud Creek drainage. DEQ is considering all available data, including previously collected historical data from the Big Sky Mine, in its evaluation of nonanthropogenic conditions for EC and SAR in the receiving waters of Lee Coulee and Richard Coulee. This data includes a range of years from 1984 to 2022 for the receiving waters of Lee Coulee, and a range of 1973 to 2022 for receiving waters of Richard Coulee."

On April 3, 2026, DEQ and Westmoreland provided a joint status update.

On June 11, 2026, Chair Simpson issued an Order Requesting Status Update at the June Board Meeting.

h. In the Matter of: Notice of Appeal and Request for Hearing by Gateway Conservation Alliance Regarding Issuance of Opencut Mining Permit No. 3462, Case No. BER 2024-03 OC.

On March 29, 2024, Gateway Conservation Alliance filed a Notice of Appeal and Request for Hearing regarding the issuance of Opencut Mining Permit No. 3462 to TMC Inc., asking the Board to set aside the permit as being unlawful.

At the April 19, 2024, meeting the Board voted to consolidate these matters and have the consolidated case heard before the full Board. On May 16, 2024, DEQ filed a Preliminary Prehearing Statement. On May 16, 2024, TMC, Inc., filed an Unopposed Motion to Intervene and a Preliminary Prehearing Statement. On May 16, 2024, Chair Simpson dismissed Petitioners Bilotti and Seth upon request. Chair Simpson also granted TMC's motion to intervene the same day and issued an Order Vacating Scheduling Conference & Requesting Scheduling. Gateway Conservation Alliance filed its Preliminary Prehearing Statement on May 16, 2024.

On May 15, 2024, GCA filed its Preliminary Hearing Statement. Petitioners filed a Motion to Limit Evidence on June 28, 2024, with a brief in support. On July 19, 2024, DEQ filed an Unopposed Motion to Extend Response Deadline to Petitioners' Motion *in Limine*. Chair Simpson granted DEQ's Motion for Extension on July 23, 2024. On August 2, 2024, DEQ filed its Response in Opposition to GCA's Motion *in Limine* and TMC filed its Opposition to Appellant's Motion *in Limine* to Limit Evidence. On August 8, 2024, GCA filed a Motion for Stay and Brief in Support. On August 9, 2024, GCA filed its Reply Brief in Support of Motion to Limit Evidence. Chair Simpson issued an Order Setting Oral Argument on August 9, 2024, setting oral argument for the August 23, 2024, Board meeting. On August 13, 2024, DEQ filed its Response to Motion for Stay. At the August 23, 2024, meeting, the Board heard oral argument from the parties on the pending Motion to Limit Evidence.

On September 9, 2024, the Board Chair issued an Order on Motion in *Limine* denying GCA's motion. Also on September 9, 2024, the Board Chair issued an Order on Motion to Stay, granting the unopposed motion to stay the proceedings. The parties are directed to file a status report within 30 days of issuance of a decision from the Montana District Court.

On October 15, 2025, the Montana 18th Judicial District, Gallatin County, issued an Order re Motion to Dismiss Facial Constitutional Claim (DV-2024-838A). The Order stated that the Plaintiff failed to exhaust administrative remedies. On November 14, 2025, DEQ filed a Notice of Substitution of Counsel. On

November 14, 2025, DEQ filed a Joint Status Report and GCA will be appealing Judge Ohman's decision to the Montana Supreme Court.

i. In the Matter of: Appeal and Request for Hearing by Gallatin County Community Coalition Regarding Issuance of Opencut Mining Permit #3561, Case No. BER 2024-04 OC

On July 26, 2024, Gallatin County Community Coalition filed a Notice of Appeal and Request for Hearing regarding DEQ's issuance of Open Cut Mining Permit #3561 to Concrete Materials of Montana, Inc., for a new gravel permit located in Gallatin County, Montana. At the August 23, 2024, meeting, the Board decided to hear the case itself.

On September 9, 2024, the Board Chair issued a Prehearing Order. On September 20, 2024, GCCC filed an Unopposed Motion for Stay with a Brief in Support. On October 10, 2024, the Board Chair issued an Order on Motion for Stay granting the Petitioner's Motion. The parties are directed to file a status report within 30 days of issuance of a decision from the Montana District Court.

On November 14, 2025, DEQ filed a Joint Status Report and GCA will be appealing Judge Ohman's decision to the Montana Supreme Court.

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

On February 13, 2025, Decker Coal Company ("DCC") filed a Request for Hearing on DEQ's January 29, 2025, Order to Revise Permit. On February 28, 2025, DCC filed an Amended Request for Hearing to revise the caption to keep the east and west mine issues in separate contested cases. On April 9, 2025, Decker filed a Motion for Temporary Relief with a Brief in Support. DEQ filed a Brief in Opposition on April 21, 2025. Decker filed its Reply Brief in Support on April 25, 2025.

On June 20, 2025, the Board issued a Stay until the December 2025 Board meeting, as the parties are working towards a resolution.

On November 26, 2025, DEQ and Decker Coal filed separate Status Reports. On December 9, 2025, Chair Simpson issued an Order Extending Stay, until the Board's February 20, 2026, meeting.

On February 25, 2026, Chair Simpson issued an Order Extending Stay, until the Board's June 2026 meeting.

On June 4, 2026, DEQ filed a Status Report, with an attached Resolution of Order to Revise the Permit to West Decker Mine. On June 4, 2026, Decker Coal filed a Status Report.

On June 11, 2026, Chair Simpson issued an Order Requesting Status Update for the June Board meeting, which will be held June 26, 2026.

k. 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, BER 2025-04 SM

On October 24, 2025, the Board tabled the discussion about this case and whether the Board has jurisdiction in this matter.

On October 24, 2025, Westmoreland filed a Response Opposing DEQ's Motion to Dismiss, Oral Argument Requested (with Exhibits N-W). On November 7, 2025, DEQ filed a Reply in Support to Dismiss Westmoreland's Request for Hearing and Petition for Declaratory Ruling. On January 21, 2026, Westmoreland filed a Notice. On January 28, 2026, Chair Simpson issued an Order Setting Oral Argument at the February 20 meeting on DEQ's Motion to Dismiss; the Board will decide whether or not to grant this motion.

On February 6, 2026, Westmoreland filed a Motion to Consolidate this case with BER 2026-02 SM, and a Brief in Support of the Motion to Consolidate. On February 9, 2026, Chair Simpson issued an Order Requesting Supplemental Legal Authority, to be submitted no later than February 11, 2026 to ensure sufficient time for the additional information to be included in the Board meeting packet. On February 11, 2026, Westmoreland filed a Supplemental Briefing on Legal Authority. On February 11, 2026, DEQ filed a Supplemental Brief. On February 19, 2026, Westmoreland filed a Notice of Bond Submittal Under Protest and Request for Bond Reduction. At the Board's February 20, 2026, meeting, it heard oral arguments on the DEQ's motion to dismiss. The Board voted that it did not have jurisdiction to hear Westmoreland's appeal and consequently, to grant the DEQ's motion to dismiss. The Board's meeting packet for the March 20, 2026, special meeting contains a draft final order for this matter entitled "Final Agency Action and Order of the Board of Environmental Review," which includes findings of fact and conclusions of law related to the DEQ's motion to dismiss. The Board will have the opportunity to discuss and modify the draft order at the March 20, 2026, special meeting. The Board will ultimately need to vote to approve the language in the proposed order as drafted or as may be amended at the meeting.

At the March 20, 2026, meeting, the Board voted to approve the language in the proposed order as drafted.

On March 24, 2026, the Board issued a Final Agency Action and Order of the Board of Environmental Review, Granting DEQ's Motion to Dismiss and Denying Westmoreland's Motion to Consolidate.

The Board has been notified that Westmoreland appealed the Board's decision to District Court.

I. In the Matter of: Appeal and Request for Hearing by Stillwater Mining Company regarding Major Modification of MPDES Permit No. MT0026808, BER 2025-05 WQ

On December 19, 2025, Stillwater Mining Company filed an appeal and request for hearing regarding a major modification of MPDES Permit No. MT0026808. The Board can decide to hear the case itself or assign a hearing examiner for some or the totality of the case. On February 20, 2026, the Board decided to retain jurisdiction.

On February 24, 2026, Chair Simpson issued an Initial Procedural Order. On February 25, 2026, DEQ filed a Notice of Appearance. On March 10, 2026, the parties filed a Stipulated Scheduling Order. On March 20, 2026, Stillwater Mining filed an Initial Prehearing Statement. On March 20, 2026, DEQ filed an Initial Prehearing Statement. On March 25, 2026, Chair Simpson issued a Scheduling Order.

On May 13, 2026, Stillwater Mining filed an Unopposed Motion to Amend Scheduling Order, and proposed Order. On May 18, 2026, Chair Simpson issued an Order Granting Unopposed Motion to Amend Scheduling Order. On May 18, 2026, DEQ filed a Motion to Dismiss and Brief in Support to Dismiss Stillwater Mining's Appeal Issue "C". On June 1, 2026, Stillwater Mining filed its Response to DEQ's Motion to Dismiss, Oral Argument Requested. On June 12, 2026, DEQ filed a Reply Brief in Support of Motion to Dismiss Stillwater Mining Company's Appeal Issue "C".

m. In the Matter Of: Appeal and Request for Hearing Regarding MDEQ's Decision on MAQP #5263-03, BER 2026-01 AQ

On January 14, 2026, the Board received a request for a hearing from Angela Otero with respect to the DEQ's December 15, 2025, decision to approve Montana Air Quality Permit #5263-03. The permit applicant was Montana Renewables LLC for the MRL Great Falls Renewable Fuels Plant.

Under the Clean Air Act, if the DEQ approves or denies an application for an operating permit, or the renewal, modification, or amendment of a permit, any

person that participated in the public comment process may request a hearing from the board, subject to two conditions: (1) the request must be filed within 30 days after the department renders its decision; and (2) the request must include an affidavit setting forth grounds for the request. Mont. Code. Ann. § 75-2-218(5).

Ms. Otero participated in public comment and timely submitted her request for a hearing. However, her request was not accompanied by a sworn affidavit or declaration in lieu of an affidavit. Mont. Code. Ann. § 1-6-105(1)(a). Her request acknowledges this deficiency.

The Board can decide to hear the case itself, assign a hearing examiner for some or the totality of the case, or reject the petition as incomplete.

On February 20, 2026, the Board decided to retain jurisdiction through the initial steps on this moving forward, to try to clarify the issues, so that the Board can make a more informed decision.

On March 17, 2026, Montana Renewables, LLC filed a Limited Appearance and Motion to Intervene, as well as a Motion to Dismiss. On March 23, 2026, Ms. Otero filed a General Affidavit.

On April 16, 2026, Chair Simpson issued an Order Setting Deadline for MRL's Reply Briefs. To ensure that MRL is not prejudiced, the Board will provide MRL until May 1, 2026, to file optional reply briefs in support of its Motions.

On May 1, 2026, MRL filed a Combined Reply in Support of Its Motion to Intervene and Dismiss.

On June 11, 2026, Chair Simpson issued an Order Setting Oral Argument for the June Board Meeting, which will be held June 26, 2026.

n. In the Matter of: The Notice of Appeal and Request for Hearing by Westmoreland Absaloka Mining, LLC for Coal Surface Mine Permit C1985005, Noncompliance No. CN2026001, BER 2026-02 SM

On February 6, 2026, the Board received a Notice of Appeal and Request for Hearing by Westmoreland Absaloka Mining, LLC.

At the Board's February 20, 2026, meeting, the Board decided to table this matter until the April meeting.

On February 24, 2026, Chair Simpson issued an Order Setting Deadline for Responsive Pleading. On March 12, 2026, DEQ filed a Motion for Partial Dismissal and to Limit the Scope of Westmoreland's Notice of Appeal and Request for Formal Hearing. On March 26, 2026, Westmoreland filed a

Response Opposing DEQ's Motion for Partial Dismissal and to Limit the Scope of Westmoreland's Notice of Appeal and Request for Hearing.

On April 9, 2026. DEQ filed a Reply in Support of its Partial Motion to Dismiss and to Limit the Scope of Westmoreland's Notice of Appeal and Request for Hearing. On April 17, 2026, Westmoreland filed a Motion to Strike DEQ's Reply Brief, in Whole or in Part, or Allow Sur-Reply Brief. On April 17, 2026, DEQ filed a Response to Westmoreland's Motion to Strike or Allow Sur-Reply. On April 20, 2026, DEQ filed a Proposed Revised Reply Brief in Support of Its Partial Motion to Dismiss and to Limit the Scope of Westmoreland's Notice of Appeal and Request for Hearing. On April 21, 2026, Chair Simpson issued an Order Denying in Part and Granting in Part Westmoreland's Motion to Strike or Allow Sur-Reply Brief. This Order notes that DEQ's brief filed April 9, 2026 (#5) is struck from the record. On April 21, 2026, DEQ filed a Revised Reply in Support of Its Partial Motion to Dismiss and to Limit the Scope of Westmoreland's Notice of Appeal and Request for Hearing. On May 7, 2026, DEQ filed a Motion to Stay and Brief in Support for BER 2026-02 SM and 2026-04 SM. On May 21, 2026, Westmoreland filed its Response to DEQ's Motion to Stay Proceedings.

- o. In the Matter of: The Notice of Appeal and Request for Contested Case Hearing by Westmoreland Absaloka Mining LLC regarding the Department of Environmental Quality's March 25, 2026, Notice of Violation, BER 2026-04 SM**

On April 24, 2026, Westmoreland Absaloka Mining LLC filed a Notice of Appeal and Request for Contested Case Hearing regarding a Notice of Violation. On May 7, 2026. DEQ filed a Motion to Stay Proceedings and Brief in Support. On May 21, 2026, Westmoreland filed its Response to DEQ's Motion to Stay Proceedings.



TO: Chair David Simpson
Board of Environmental Review

FROM: Sandy Moisey Scherer, Board Secretary
P.O. Box 200901
Helena, MT 59620-0901

DATE: April 27, 2026

SUBJECT: Board of Environmental Review Case No. BER 2026-04 SM

BEFORE THE BOARD OF ENVIRONMENTAL REVIEW OF THE STATE OF MONTANA	
IN THE MATTER OF: THE NOTICE OF APPEAL AND REQUEST FOR CONTESTED CASE HEARING BY WESTMORELAND ABSALOKA MINING LLC REGARDING THE DEPARTMENT OF ENVIRONMENTAL QUALITY'S MARCH 25, 2026, NOTICE OF VIOLATION	Case No. BER 2026-04 SM

On April 24, 2026, the BER received the attached request for a contested case hearing. Please serve copies of pleadings and correspondence on me and on the following DEQ representatives in this case.

Jeremiah Langston Amanda Galvan Legal Counsel Department of Environmental Quality P.O. Box 200901 Helena, MT 59620-0901	Sam King Chief Legal Counsel Department of Environmental Quality P.O. Box 200901 Helena, MT 59620-0901
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Attachments

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Electronically Filed with the
Montana Board of Environmental Review
4/24/26 at 4:12 PM
By: Sandy Moisey Scherer
Docket No: BER 2026-04 SM

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Attorneys for Westmoreland Absaloka Mining LLC

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

IN THE MATTER OF:

THE NOTICE OF APPEAL AND
REQUEST FOR CONTESTED
CASE HEARING BY
WESTMORELAND ABSALOKA
MINING LLC REGARDING THE
DEPARTMENT OF
ENVIRONMENTAL QUALITY'S
MARCH 25, 2026, NOTICE OF
VIOLATION

Case No.: BER 2026-04 SM

**WESTMORELAND ABSALOKA
MINING LLC'S NOTICE OF
APPEAL AND REQUEST FOR
CONTESTED CASE HEARING**

Pursuant to ARM 17.24.1211(2), Westmoreland Absaloka Mining, LLC
("Westmoreland") timely requests "a contested case hearing in accordance with

82-4-206, MCA” of the Department of Environmental Quality’s (“DEQ”) March 25, 2026, Notice of Violation (the “NOV”) issued pursuant to ARM 17.24.1211(2) for an alleged “Failure to Maintain Adequate Bond.” Exhibit II, X.¹ Westmoreland requests a contested case hearing before the Board of Environmental Review (“Board”) in accordance with the Montana Administrative Procedure Act (“MAPA”) as provided in ARM 17.24.1211(2) (incorporating section 82-4-206, MCA which provides a “Procedure for contested case hearings” before the Board).

I. FACTUAL BACKGROUND

This MAPA contested case arises from DEQ’s finding, as articulated in the NOV, that “[a]fter issuance of a Notice of Noncompliance² and evaluating the circumstances of the violation, DEQ has found no factors that would warrant a vacatur of the Notice of Noncompliance;” therefore, the NOV was issued pursuant to ARM 17.24.1211(2). Ex. II. DEQ did not explain what “circumstances” were evaluated, nor did DEQ provide the criteria used to evaluate the “circumstances.” Ex. II, p. 1. DEQ also failed to articulate what “factors” it looked for that “would warrant a vacatur of that Notice of Noncompliance” and eliminate the need for an NOV. Ex. II, p. 1.

¹ Because this case involves many of the same facts alleged in Case Nos. BER 2025-04 SM and 2026-02 SM, both initiated by Westmoreland involving bond calculations for the Abasloka Mine, Westmoreland the sequential exhibit designation from those cases.

² See Case No. BER 2026-02 SM initiated by Westmoreland, challenging the Notice of Noncompliance and Order of Abatement.

Because the NOV is an extension of DEQ’s enforcement action that began as Notice of Noncompliance and Order of Abatement, CN2026001, issued January 8, 2026 (the “NON”), this case necessarily involves the factual background and issues presented in that NON and Westmoreland’s challenge to that NON in Case No. BER 2026-02 SM (the “NON Appeal”). In turn, the NON Appeal follows Case No. BER 2025-04 SM, which challenged DEQ’s final agency action denying Westmoreland’s application for Minor Revision 311 proposing a bond estimate for the Absaloka Mine of \$23,630,000. By letter dated August 29, 2025, DEQ denied Westmoreland’s proposal and demanded \$3,330,000 additional bond. Because DEQ’s August 29, 2025, letter led to the NON, which then lead to the NOV, Westmoreland hereby incorporates, but does not restate the factual background and legal issues provided in both of those appeals, Cases No. BER 2025-04 SM and BER 2026-02 SM.

II. LEGAL BASIS FOR THIS CONTESTED CASE

The NOV adversely impacts Westmoreland, not only from a reputational and regulatory perspective, but also because the NOV may later be used by DEQ to craft future enforcement actions alleging a pattern of violations and/or a history of violations to support increased penalties. §§ 82-4-251(3), MCA (2022);³ 82-4-

³ Section 82-4-221, MCA, as it existed before amendment by House Bill 656 (2023), governs because HB656 (2023) has not yet been approved by the Department of Interior’s Office of Surface Mining Reclamation and Enforcement.

1001(1)(c), MCA (requiring consideration of “the violator’s prior history of violation,” which includes violations documented “in an administrative order” such as an Order of Abatement). Therefore, Westmoreland hereby exercises its right to a contested case hearing on the NOV “[i]n order to contest the fact of violation.” ARM 17.24.1211(2). Westmoreland requests the contested case hearing because no violation occurred. This appeal is timely filed within 30 days of the March 25, 2026, NOV. § 82-4-254(3)(a), MCA.

III. JURISDICTION

Under § 82-4-254(3)(a), MCA, a person charged with a violation is entitled to a contested case hearing before the Board “on the issues of whether the alleged violation has occurred” and after the hearing, the Board must make findings of fact and issue a written decision as to the occurrence of the violation. Likewise, the rule provides that, to contest “the fact of violation *or* the amount of penalty,” the person charged must file a written request for a contested case hearing with the Board. ARM 17.24.1211. When promulgating the rule, DEQ specifically noted that the 30-day deadline for filing a request for a contested case hearing applies to “a person charged with a violation.” Exhibit JJ (2005 Montana Admin. Reg. No. 24, p. 2530). Therefore, the Board has jurisdiction over this request from Westmoreland for a MAPA contested case to determine whether a violation occurred.

In previous enforcement actions before this Board, the Board held that DEQ has “the burden of persuasion with respect to those matters that are essential for them to prove in order to establish the violations that they claim.” Case No. BER 2015-01 WQ and BER 2015-02 WQ, *Second Proposed Findings of Fact & Conclusions of Law on Owner/Operator Issue* (February 22, 2021), pp. 6-7; 54 (adopted by *Final Agency Action and Order of the Board of Environmental Review*) (May 18, 2021). The federal process parallel to MSUMRA, governed by 43 C.F.R. 4.1171, is the same:

In a proceeding involving an application for review of an NOV, OSM’s initial burden is limited to going forward to make a prima facie showing that the person named in the notice is engaged in a surface coal mining operation and violated the Act, the regulations, or a permit condition. If OSM meets its burden of establishing a prima facie case, the ultimate burden of persuasion rests with the applicant for review, and if OSM’s evidence is not overcome by a preponderance of the evidence, the NOV will be affirmed.

Rith Energy, Inc. v. Office of Surface Mining Reclamation and Enforcement, 119 IBLA 83, 86 (April 9, 1991) (Internal citations removed) (copy attached).

Therefore, the Board, through this contested case, has jurisdiction to decide whether the alleged violation occurred, after a hearing wherein DEQ has the initial burden of proving the alleged violation occurred and if it does so, then the burden switches to Westmoreland to prove, by a preponderance of the evidence, that the violation did not occur.

VI. REQUESTED RELIEF

Westmoreland requests the Board:

1. Accept jurisdiction of this MAPA contested case appeal and assign it to a Hearing Examiner for discovery, motions practices, and an evidentiary hearing.
2. Issue an order declaring that no violation occurred in this matter.
3. Issue an order declaring DEQ's NOV unlawful and therefore null and void.
4. Issue an order vacating DEQ's NOV and, pursuant to ARM 17.24.1211(2), the underlying Notice of Noncompliance and Order of Abatement.
5. Issue an order requiring DEQ to reduce, or to approve Westmoreland's request for reduction of, the bond for the Absaloka Mine to \$23,630,000.
6. In accordance with section 82-4-251(7), MCA, award Westmoreland its costs, expenses, and attorneys fees incurred in this litigation and any following judicial review, including but not limited to all costs associated with Westmoreland's posting of and/or continued posting of bond in excess of \$23,630,000.
7. Award Westmoreland such other relief as it deems appropriate.

Dated this 24th day of April, 2026.

/s/ Victoria A. Marquis _____

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

Attorneys for Westmoreland Absaloka Mining, LLC

CERTIFICATE OF SERVICE

I hereby certify that the foregoing document was served upon the following counsel of record, by the means designated below, this 24th day of April, 2026:

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

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

/s/ Victoria A. Marquis

VICTORIA A. MARQUIS

Attachments:

1. RITH ENERGY, INC. v. OFFICE OF SURFACE MINING RECLAMATION AND ENFORCEMENT
IBLA 89-27, Decided April 9, 1991
2. Exhibit X, Notice of Noncompliance and Order of Abatement, dated January 8, 2026
3. Exhibit II, Notice of Violation (NOV) and Waiver of Penalty, dated March 25, 2025
4. Exhibit JJ, MAR, Issue No. 24

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

<p>IN THE MATTER OF:</p> <p>THE NOTICE OF APPEAL AND REQUEST FOR HEARING BY WESTMORELAND ROSEBUD MINING LLC REGARDING ISSUANCE OF MPDES PERMIT NO. MT0032042</p>	<p>CAUSE NO. BER 2022-06 WQ</p> <p>FINAL AGENCY DECISION</p>
--	--

Appellant Westmoreland Rosebud Mining LLC (“Westmoreland”) and the Montana Department of Environmental Quality (“DEQ”), collectively (“Parties”), hereby stipulate and agree as follows:

1. Pursuant to Mont. Code Ann. § 75-5-403, the Board of Environmental Review (“Board”) has authority to hear contested case appeals of DEQ’s Montana Pollutant Discharge Elimination System (“MPDES”) permitting decisions, such that the Board may affirm, modify, or reverse a permitting action of DEQ.

2. DEQ is a department of the executive branch of state government, duly created and existing under the authority of Mont. Code Ann. § 2-15-3501. DEQ has statutory authority to administer Montana’s water quality statutes, including the review and issuance of MPDES Permits under Mont. Code Ann. § 75-5-402 and Admin. R. Mont. 17.30, subchapter 13.

3. Westmoreland is a limited liability company registered to do business in Montana.

4. Westmoreland owns the Rosebud Mine, which is an existing surface coal mine located adjacent to Colstrip, Montana.

5. Areas A, B, C, and D of the Rosebud Mine are covered by MPDES Permit No. MT0023965.

6. Westmoreland plans to expand Area B of the Rosebud Mine through amendment AM5, which is located south of and adjacent to Area B.

7. On March 11, 2020, Westmoreland submitted an application for a new MPDES permit to cover proposed Area B AM5. The receiving waters associated with the Rosebud Mine Area B AM5 MPDES permit are Lee Coulee, Fossil Fork of Lee Coulee, unnamed tributaries to Fossil Fork of Lee Coulee, and unnamed tributaries to Richard Coulee (collectively, the “Receiving Waters”).

8. DEQ released a Draft MPDES Permit for the Rosebud Mine Area B AM5 (the “Draft Permit”) on or around May 31, 2022.

9. In Westmoreland’s comments on the Draft Permit, it argued that proposed numeric effluent limitations for electrical conductivity (“EC”) and sodium absorption ratio (“SAR”) are inappropriate limitations that fail to consider the naturally occurring EC and SAR levels or the ephemeral nature of the Receiving Waters.

10. On August 12, 2022, DEQ issued MPDES Permit No. MT0032042 (the “Permit”) for Area B AM5.

11. The Permit included EC limitations for all 18 outfalls as follows:

Final Effluent Limitations: Average Monthly limit of 500 $\mu\text{S}/\text{cm}$
Maximum Daily limit of 500 $\mu\text{S}/\text{cm}$

Alternate Effluent Limitation: Maximum Daily limit of 500 $\mu\text{S}/\text{cm}$

12. The Permit included SAR limitations for all 18 outfalls as follows:

Final Effluent Limitations: Average Monthly limits of 3.0 (from 3/2 through 10/31) and 5.0 (from 11/1 through 3/1)
Maximum Daily limits of 4.5 (from 3/2 through 10/31) and 7.5 (from 11/1 through 3/1)

Alternate Effluent Limitations: Maximum Daily limits of 4.5 (from 3/2 through 10/31) and 7.5 (from 11/1 through 3/1)

13. On August 17, 2022, in accordance with Admin. R. Mont. 17.30.1362, DEQ issued a minor modification to the Permit to remove erroneously included text at Permit Part 3.1.2. On September 16, DEQ issued a second minor modification to the Permit to correct additional typographical errors in the Permit. These minor modifications did not change the EC or SAR effluent limitations and do not affect this Appeal.

14. On September 9, 2022, Westmoreland timely filed with the Board a Notice of Appeal and Request for Hearing, appealing only the EC and SAR effluent limitations for all 18 outfalls. *See* Notice of Appeal (Sept. 9, 2022).

15. On October 4, 2022, pursuant to Admin. R. Mont. 17.30.1379, DEQ noted that all provisions of the Permit were fully effective and enforceable, except for the EC and SAR effluent limitations, which were stayed.

16. Admin. R. Mont. 17.30.670(4) provides “[f]or all tributaries and other surface waters in the Rosebud Creek, Tongue, Powder, and Little Powder River watersheds, the monthly average numeric water quality standard for EC is 500 [μ S/cm] and no sample may exceed an EC value of 500 [μ S/cm]. The monthly average numeric water quality standard for SAR from March 2 through October 31 is 3.0 and no sample may exceed an SAR value of 4.5. The monthly average numeric water quality standard for SAR from November 1 through March 1 is 5.0 and no sample may exceed an SAR value of 7.5.” The Receiving Waters are tributaries to Rosebud Creek.

17. As outlined in DEQ’s white paper titled A Review of the Rationale for EC and SAR Standards, “[w]hen the natural EC values exceed the proposed EC standards, the provisions of 75-5-306, MCA would apply” directing that “[i]t is not necessary that wastes be treated to a purer condition than the natural condition of the receiving stream as long as the minimum treatment requirements” are met.

DEQ “will determine the natural condition of the stream at any given point in time through monitoring, interpretation of historic data, and modeling to ensure that water quality is not diminished.” Rationale, Sec. 6.0, p. 15. Neither DEQ nor Westmoreland has yet determined the natural condition of EC or SAR in the Receiving Waters for purposes of surface water quality regulation.

18. The Receiving Waters meet the definition of hydrologically ephemeral streams where they receive discharges from the Rosebud Mine. *See* Admin. R. Mont. 17.30.602(10), 2022 Fact Sheet, pages 4 – 7, 20.

19. The Reasonable Potential Analysis for EC and SAR provided in the 2022 Fact Sheet did not account for the natural condition of EC and SAR in the Receiving Waters. *See* 2022 Fact Sheet at p. 21.

20. DEQ and Westmoreland agree that the Permit effluent limitations for EC and SAR should account for the nonanthropogenic condition of the Receiving Waters and agree to undertake the process of compiling and obtaining data necessary to determine the nonanthropogenic condition of EC and SAR in the Receiving Waters.

21. DEQ agrees to develop a nonanthropogenic standard for EC and SAR in the Receiving Waters pursuant to § 75-5-222(1), MCA and applicable guidance and reference materials. Westmoreland will consult and collaborate with DEQ in

development of the nonanthropogenic standard for EC and SAR in the Receiving Waters, according to the following schedule:

- a. Within 60 days of the Board's approval of this Stipulation, DEQ will provide a Quality Assurance Project Plan (QAPP) to Westmoreland describing analytical methods and approaches for developing EC and SAR nonanthropogenic standards for the Receiving Waters;
- b. Westmoreland will have no less than 14 days to review the QAPP and provide comments to DEQ. DEQ will consider Westmoreland's comments in the final QAPP;
- c. Within 30 days of finalizing the QAPP, Westmoreland and DEQ will compile all existing water quality data that meets the QAPP to establish the nonanthropogenic EC and SAR levels in the Receiving Waters;
- d. DEQ will evaluate and review the compiled existing ambient water quality data and, within 30 days of receiving the data, DEQ will make a written determination whether ambient EC and SAR concentrations in the Receiving Waters exceed the applicable water quality criteria in ARM 17.30.670(4);
- e. If DEQ determines that additional data are required to conclude ambient EC and SAR concentrations in the Receiving Waters exceed the criteria in ARM 17.30.670(4), or to properly develop nonanthropogenic

standards for EC and SAR for the Receiving Waters, Westmoreland and DEQ shall develop a sampling analysis plan (SAP) to fill the data gaps within 45 days of DEQ's determination that additional data is required. Westmoreland will be responsible for obtaining additional data in accordance with the SAP. The SAP must identify the analytical lab or labs, the detection limits, sampling locations, and a sampling schedule that is acceptable to DEQ;

f. Within 30 days of determining whether ambient EC and SAR concentrations in the Receiving Waters are greater than the applicable water quality criteria in ARM 17.30.670(4), DEQ will determine whether nonanthropogenic sources alone cause the EC and SAR concentrations in the Receiving Waters to exceed the standards in ARM 17.30.670(4);

g. DEQ and Westmoreland will consult to discuss the extent to which existing water quality of the receiving water is above the water quality standards in ARM 17.30.670(4), whether the data is sufficient to proceed with development of a nonanthropogenic standard for EC and SAR, and whether development of the nonanthropogenic water quality standard through rulemaking is feasible. If the Parties decide that DEQ should not proceed with rulemaking, they will either propose an amendment to the

Stipulation or move the Board to terminate the Stipulation and request a new Prehearing Order;

h. Throughout the nonanthropogenic water quality standard development process, Westmoreland and DEQ will protect existing beneficial uses in the Receiving Waters and affected downstream waterbodies;

i. Within 90 days after all data is analyzed, including any additional data collected by Westmoreland under Paragraph 21(e), DEQ will recommend new water quality standard(s) that protect the highest attainable beneficial use of the Receiving Waters and downstream waterbodies and initiate rulemaking pursuant to the Montana Water Quality Act (MWQA) and the Montana Administrative Procedures Act (MAPA); and

j. Effluent limitations based on the new water quality standard(s) for the Receiving Waters will be implemented in MPDES Permit No. MT0032042.

22. Westmoreland agrees to supply existing data that meets the QAPP and obtain new data in accordance with the SAP to support the study contemplated in Paragraph 21, as reasonably requested by DEQ.

23. Once DEQ adopts new water quality standard(s) for the Receiving Waters and develops appropriate effluent limitations for EC and SAR, DEQ will

incorporate effluent limitations in the Permit for EC and SAR based on the nonanthropogenic condition of the Receiving Waters.

24. The Parties agree that the rulemaking contemplated in Paragraph 21 and the incorporation of appropriate effluent limitations for EC and SAR in the Permit will be subject to public notice and comment provisions in the MWQA, administrative rules adopted under the MWQA including Admin. R. Mont. 17.30.1372, MAPA, and the review and approval of the United States Environmental Protection Agency (EPA).

25. DEQ and Westmoreland agree that, until DEQ adopts new water quality standard(s) based on the nonanthropogenic condition of the Receiving Waters and appropriate effluent limitations for EC and SAR are incorporated in the Permit, Westmoreland will not discharge to the Receiving Waters and will protect existing beneficial uses in the Receiving Waters and in downstream water bodies.

26. Neither DEQ nor Westmoreland waives the right to assert any obligations, challenges, or defenses in the future based on the nonanthropogenic condition of EC or SAR in the Receiving Waters.

27. Westmoreland does not admit that Admin. R. Mont. 17.30.670(4) governs the discharges to the Receiving Waters in terms of EC and SAR and Westmoreland maintains that the provisions of Mont. Code Ann. § 75-5-306 govern.

28. The singular issue identified in Westmoreland's Notice of Appeal and Request for Hearing may be completely resolved under the terms of this Stipulation.

29. The Board will maintain jurisdiction of the matter until appropriate effluent limitations for EC and SAR are incorporated into the Permit, after which Westmoreland will move to dismiss this contested case in its entirety with prejudice.

30. Nothing in this Stipulation shall prohibit DEQ or Westmoreland from exercising any rights or authority under the MWQA.

31. The Parties request the Board approve this Stipulation as the final agency decision concerning Westmoreland's Notice of Appeal, pursuant to its authority to hear contested case appeals of MPDES Permits under Mont. Code Ann. § 75-5-403(2).

32. Each of the signatories to this Stipulation represents that he or she is authorized to enter this Stipulation and to bind the Parties represented by him or her to the terms of this Stipulation.

33. Westmoreland's Notice of Appeal has been fully and finally compromised and settled by agreement of the Parties and the Parties stipulate to and respectfully request the Board's entry of a final agency decision approving this Stipulation.

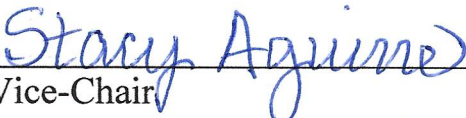
34. The Parties shall each pay their own attorney fees and costs.

35. The Board's Decision as to Westmoreland's Notice of Appeal shall represent the Final Agency Decision.

36. This Stipulation may only be modified or amended by written agreement executed by the Parties and approved by the Board.

This Final Agency Decision is hereby entered by the Board, the Board agrees to retain jurisdiction as described above, and orders the Parties to proceed in compliance with the terms described herein.

DATED this 24TH day of February 2023.



Vice-Chair
BOARD OF ENVIRONMENTAL REVIEW

From: [Bowers, Kirsten](#)
To: [DEQ BER Secretary](#)
Cc: [Melissa L. Reynolds](#)
Subject: BER Cause No. 2022-06-WQ (Westmoreland Rosebud Mining LLC Appeal of MPDES Permit No. MT0032042)
Date: Friday, April 3, 2026 2:18:31 PM

Sandy,

The following is DEQ's and Westmoreland's update on progress under the Stipulation settling Westmoreland's appeal of MPDES Permit No. MT0032042 for BER's April 17, 2026 meeting.

Cause No. BER 2022-06-WQ – Joint Status Report of Westmoreland Rosebud Mining LLC and Montana Department of Environmental Quality

MDEQ and Westmoreland provide the following joint status report for Cause No. BER 2022-06-WQ. The non-anthropogenic standards process is still moving forward consistent with the Stipulation, as the Parties continue analyzing the existing water quality data and data collected by Westmoreland. In May 2025, MDEQ conducted a preliminary analysis of the data, and shortly thereafter Westmoreland engaged a consultant to assist with its own analysis of the data. Westmoreland provided its analysis to MDEQ in January 2026 and is awaiting MDEQ's response. As of the date of this joint update, MDEQ anticipates providing its response to Westmoreland during the week of April 6. All data will be analyzed and the Parties will determine next steps, which may include initiating rulemaking to adopt new water quality standards for the Receiving Waters by proposing nonanthropogenic electrical conductivity (EC) and sodium adsorption ratio (SAR) water quality standards within 90 days after completion of data analyses, as contemplated by Section 21(i) of the Stipulation, by proposing an amendment to the Stipulation, or by terminating the Stipulation and requesting a new Prehearing Order in this matter pursuant to 21(g) of the Stipulation.

Thank you,
Kirsten

Kirsten Bowers | Legal Counsel
Montana Department of Environmental Quality
Office: 406-444-4222

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 BY WESTMORELAND ROSEBUD MINING LLC REGARDING ISSUANCE OF MPDES PERMIT NO. MT0032042	CASE NO. BER 2022-06 WQ ORDER REQUESTING STATUS UPDATE AT JUNE BOARD MEETING
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The Board received the parties' April 4, 2026, status update. The Chair requests that counsel for the parties appear via Zoom and provide an update to the Board on the status of this matter at the Board's June 26, 2026, meeting. Video conferencing information and the meeting agenda can be found on the Board's website one week ahead of the meeting.

DATED this 11th day of June, 2026.

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

CERTIFICATE OF SERVICE

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

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deqbersecretary@mt.gov

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

Melissa Reynolds
Holland and Hart
222 South Main Street, Suite 2200
Salt Lake City, UT 84101
T: 801.799.5875
F: 801.935.8323
melreynolds@hollandhart.com

/s/ Dana L. Hupp

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

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Attorneys for DEQ

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

IN THE MATTER OF: DECKER COAL COMPANY'S REQUEST FOR HEARING REGARDING PERMIT C1987001C (WEST DECKER MINE) AND PERMIT C1983007 (EAST DECKER MINE)	CAUSE NO. BER 2025-01 SM JOINT STATUS REPORT
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Pursuant to the Board of Environmental Review's Order Extending Stay dated December 9, 2025, Decker Coal Company ("Decker") and Montana Department of Environmental Quality ("DEQ") provide the following information as a status report:

1. As noted in Decker's Status Report dated November 26th, 2025, only the first ordered revision seeking "updates to the reclamation plan to include detailed steps and dates for completion" remains outstanding.

2. Decker and DEQ continue to work diligently on the updates, including through submission of Minor Revision 213 on January 5, Minor Revision 215 on January 13, and Minor Revision 216 on January 13, 2026.
3. Decker's November 26, 2025, Status Report noted that "Decker might need additional time to fulfill all of DEQ's requests" based on the timeline for PMT approval. That prediction has become reality; therefore, Decker requested, and DEQ approved, an extension until April 1, 2026, to resolve the remaining deficiencies. Exhibit A, attached.

Therefore, Decker and DEQ request the Board extend the stay of this case until its April meeting or later. Decker and DEQ will provide a status report(s) to the Board on April 3, 2026 or any other date the Board deems appropriate.

Dated this 29th day of January, 2026.

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

Attorney for Decker Coal Company

/s/ Samuel J. King
Samuel J. King
Jeremiah R. Langston

Counsel for DEQ

CERTIFICATE OF SERVICE

I hereby certify that the foregoing document was served upon the following counsel of record, by the means designated below, this 29th day of January, 2026:

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

<input type="checkbox"/> U.S. Mail	Sam King
<input type="checkbox"/> FedEx	Chief Legal Counsel
<input checked="" type="checkbox"/> Email	Jeremiah Langston
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	Department of Environmental Quality
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	samuel.king@mt.gov
	jeremiah.langston2@mt.gov

*Attorneys for Montana Department of
Environmental Quality*

/s/Victoria A. Marquis
VICTORIA A. MARQUIS

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6/4/26 at 3:49 PM
By: Sandy Moisey Scherer
Docket No: BER 2025-01 SM

Attorneys for the Department

BEFORE THE BOARD OF ENVIRONMENTAL REVIEW
OF THE STATE OF MONTANA

IN THE MATTER OF: DECKER COAL COMPANY'S REQUEST FOR HEARING REGARDING PERMIT C1987001C (WEST DECKER MINE)	BER 2025-01 SM MONTANA DEPARTMENT OF ENVIRONMENTAL QUALITY'S STATUS REPORT
---	--

Respondent Montana Department of Environmental Quality (DEQ) submits the following status report for the above-captioned case as requested by this Board in its February 20, 2026, Order Extending Stay and requiring the parties file status reports no later than June 4, 2026.

On June 4th, the Department issued the attached Resolution of Order to Revise the Permit to West Decker Mine, concluding that the Order to Revise the West Decker Permit has been resolved.

DATED this 4th day of June 2026.

Signed: /s/Samuel J. King
Samuel J. King
Jeremiah R. Langston
Counsel for DEQ

Certificate of Service

I hereby certify that on this 4th day of June 2026, I caused to be served a true and correct copy of the foregoing document to all parties or their counsel of record by electronic mail, addressed as follows:

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

Victoria Marquis
CROWLEY FLECK PLLP
500 Transwestern Plaza II
P.O. Box 2529
Billings, MT 59103-2529
(406) 252-3441
vmarquis@crowleyfleck.com

BY: /s/ Samuel J. King
Samuel J. King, Attorney
Dept. of Environmental Quality

June 4, 2026

Sent via electronic mail to: t.tonozzi@lhr-inc.com

Tay Tonozzi
Lighthouse Resources Inc
10980 South Jordan Gateway
South Jordan, UT 84095

Permit ID: C1987001C
Action: Resolution of Order to Revise the Permit

Dear Mr. Tonozzi:

On January 29, 2025, the Department of Environmental Quality (DEQ) issued an Order to Revise the West Decker Permit based on the 2023 mid permit review. DEQ, upon request by Decker Coal Company (DCC), issued multiple extensions to the order with the last extension requiring completion of the remaining items by June 1, 2026.

DCC has addressed the permit changes that were required under the order. Below is a summary of the changes that were required and the permitting action DCC used to address the required permit changes.

- 1) Reclamation plan update pursuant to Administrative Rules of Montana (ARM) 17.24.313(1) and included:
 - a) Timetables and plans for pit reclamation including the sequence of dragline and truck-shovel operations to accomplish the pit backfilling.
Minor Revision 216 (MR 216) addressed this item.
 - b) A map of the reclamation sequence (ARM 17.24.313(1)(b, d, g)) that identified when and where material would be placed to accomplish the reclamation.
Minor Revision 216 (MR 216) addressed this item.
 - c) Timetable for mine pit dewatering in relation to the pit backfill sequence (ARM 17.24.313(1)(b, d, g)).
Minor Revision 216 (MR 216) addressed this item.
 - d) Sequence of soil laydown and details on the soil pile that will be used for specific fields (ARM 17.24.313(1)(g)).
Minor Revision 216 (MR 216) addressed this item.
 - e) The sequence and timing of seeding specific areas (ARM 17.24.313(1)(h)).
Minor Revision 216 (MR 216) addressed this item.

- f) A revised PMT map and plan that integrated the reduction in disturbance into the overall reclamation plan (ARM 17.24.313(1)(d)(v)).

Minor Revision 213 (MR 213) addressed this item.

Specific areas in the PMT were addressed as follows:

- i. DCC performed work on their reclamation field to address drainage connectivity and excessive erosion (ARM 17.24.313(1)(e)). DEQ has not received or reviewed a phase I bond release application. The acceptability of the field work will be determined when a bond release application has been submitted by DCC.
- ii. DCC proposed and DEQ agreed that DCC would submit a detailed design for Pearson Creek (ARM 17.24.313(1)(f)(i)) prior to reclamation of Pearson Creek.
- iii. Submittal of general geomorphic drainage designs for non-critical drainages (ARM 17.24.313(1)(f)(ii)).
Minor Revision 213 (MR 213) addressed this item.
- iv. Submittal of a map showing the small depressions that are proposed to remain, with special attention paid to small depressions that are within a channel (ARM 17.24.503).
Minor Revision 213 (MR 213) addressed this item.
- v. Drainages included on the PMT maps that show the drainage length and drainage density sufficient to meet to the requirements of ARM 17.24.313(1)(e).

Minor Revision 213 (MR 213) addressed this item.

- 2) Timeline for the removal of buildings and other support facilities (ARM 17.24.304(1)(b)).

Minor Revision 215 (MR 215) addressed this item.

- 3) A hydrologic control plan, including the sizing and location of ponds, to show when and where ponds will be built for retention of sediment through at least Phase II bond release. (ARM 17.24.308(1)(b)(vi)).

Minor Revision 220 (MR 220) addressed this item. DCC will be required to submit additional plans as reclamation of the West Decker Mine proceeds.

ARM 17.24.1116(5) states that DEQ may not release any portion of a performance bond if such release would reduce the total remaining bond to an amount less than that necessary for DEQ to complete the approved reclamation plan. DEQ currently holds \$46,100,000 in bond for West Decker. Prior to any bond release consideration by DEQ, DCC must submit a bond update.

DEQ concludes that the Order to Revise the West Decker Permit has been resolved. All regulatory requirements remain in effect and DCC may be required to perform additional permitting actions to maintain compliance with the Montana Strip and Underground Mine Reclamation Act and any rules adopted thereunder. Please contact me if you have any questions related to the resolution of the order.

Sincerely,



Eric Dahlgren, Mining Bureau Chief
Phone: 406-444-5245
Email: edahlgren@mt.gov

CC: Jeffrey Fleischman, OSMRE - Casper Office
Matt Guptill, DCC

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Review 6/4/26 at 3:46 PM
By: Sandy Moisey Scherer
Docket No: BER 2025-01 SM

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Attorneys for Decker Coal Company

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

IN THE MATTER OF:	CAUSE NO. BER 2025-01 SM
DECKER COAL COMPANY'S REQUEST FOR HEARING REGARDING PERMIT C1987001C (WEST DECKER MINE)	DECKER COAL COMPANY'S STATUS REPORT

On January 29, 2025, the Montana Department of Environmental Quality (“DEQ”) issued an “Order to Revise Permit C1987001C” (the “Order”) to the Decker Coal Company (“Decker”) for the West Decker Mine. Decker timely responded to DEQ and appealed the Order to the Board of Environmental Review

(the “Board”). Decker first alleged that because the Order was not tethered to any mid-permit review, DEQ lacked authority to issue the Order. Second, Decker alleged that DEQ’s seven new demands were unlawful because they are unreasonable and beyond the statutory and regulatory requirements of the Montana Strip and Underground Mine Reclamation Act (“MSUMRA”).

Decker moved for temporary relief from the Board but before that motion could be decided, DEQ extended the Order’s deadline to July, then to October 2025, and ultimately to June 1, 2026. Decker moved to stay this matter, which the Board originally granted on June 26, 2025. Ultimately, the Board extended the stay to June 19, 2026 and required status reports by today, June 4, 2026.

By November 26, 2025, only one item from DEQ’s Order remained outstanding, which is addressed in Decker’s Minor Revision 213 (submitted January 5, 2026), Minor Revision 216 (submitted January 13, 2026), and Minor Revision 220 (submitted May 20, 2026). On April 15, 2026, the DEQ Coal Program, accompanied by DEQ attorney Amanda Galvan and OSMRE technical staff, inspected the West Decker Mine, focusing on areas of active regrade. Ex. A, attached. On May 26, 2026, DEQ approved Minor Revision 220 and on June 2, 2026, DEQ approved Minor Revisions 213 and 216.

Also on June 2, 2026 DEQ issued a Notice of Completeness and opened public comment for Decker’s Application for Bond Release SL9, submitted to

DEQ on January 5, 2026. Decker's Application seeks bond release for 13 acres of Phase I, 140 acres of Phase II, and 666 acres of Phase III.

Without waiving any arguments raised in this contested case appeal, Decker acknowledges that the dispute has been resolved, DEQ should terminate the Order, and then Decker may dismiss this appeal.

Dated this 4th day of June, 2026.

/s/Victoria A. Marquis

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

Attorneys for Decker Coal Company

CERTIFICATE OF SERVICE

I hereby certify that the foregoing document was served upon the following counsel of record, by the means designated below, this 4th day of June, 2025:

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

<input type="checkbox"/> U.S. Mail	Sam King
<input type="checkbox"/> FedEx	Chief Legal Counsel
<input checked="" type="checkbox"/> Email	Jeremiah Langston
<input type="checkbox"/> Sharefile	Legal Counsel
	Department of Environmental Quality
	P.O. Box 200901
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	samuel.king@mt.gov
	jeremiah.langston2@mt.gov
	samuel.doxzon2@mt.gov

*Attorneys for Montana Department of
Environmental Quality*

/s/Victoria A. Marquis
VICTORIA A. MARQUIS

EXHIBIT A



MINING BUREAU FIELD INSPECTION REPORT

Coal Section
 Department of Environmental Quality
 P. O. Box 200901
 Helena MT 59620-0901

Permit Information	Inspection Information
Permit Number: C1987001C Mine Name: West Decker Coal Mine Operator Name: Decker Coal Company, LLC Operator Address: P.O. Box 12 Decker, MT 59025-0000	Inspector(s): Emily Lodman, Mitchell Hoffman Inspection Type: Complete Inspection Reason: Periodic Inspection Date(s): 4/15/2026 7:30:00 AM, 4/15/2026 Other Persons Present: Matt Guptill, Frank Bartlett (OSMRE), Amanda Galvan (DEQ)

Inspection Topic Summary	
NOTE: Y=Observed, F=Follow-Up Item, M=Maintenance Item, N=Non-Compliance, Blank=Not Observed	
YAdministrative YAir Resource Protection YBackfill & GradingBlasting YCoal Conservation YContaminant ControlCultural ResourcesDrillingExcavation YFacilities YFish & Wildlife	YHydrologyMine Plan YOff-Site ImpactOtherPermit StipulationsProcessing Waste YRail Loops and RoadsSubsidenceSediment Control YSigns & Markers YSoilsVegetation

Inspection Topic Observations
<p>Administrative: OSMRE conducted an oversight inspection of the DEQ's West Decker inspection. The inspection focused on areas of active regrade.</p> <p>The following revisions are under review: SL9 bond release for 8 acres of phase I, 135 acres of phase II, and 666 acres of phase III. A deficiency response was submitted by Decker on 4/6/2026. MR210: BNSF railroad. DEQ sent a deficiency to Decker on 12/19/2024 MR213: Postmine Topography. DEQ sent a deficiency to Decker on 4/1/2026 MR216: Reclamation Schedule. DEQ sent a deficiency to Decker on 4/1/2026 In addition, DEQ extended the deadline to complete changes to the permit, as addressed by MR213 and</p>

MR216 to June 1.

Air Resource Protection:

No fugitive dust issues were observed.

Backfilling & Grading:

Rework in field E12u-S13, E17ass-f17, E15uss-sh-f17 had started with a dozer. This rework is to fix drainage grading issues identified in the SL6 bond release. Wet conditions have slowed rework in the area.

A D-11 dozer was actively working on highwall reduction in the Pit 16 West area.

Coal Conservation:

The smoker on the Pit 16 S endwall was had visible smoke along the haul road.

Contaminant Control:

No hydrocarbon or other spills were noted.

Facilities:

The facilities area had no new equipment parked in the area. The existing equipment had hydrocarbon spill containment under the vehicles and no issues were observed.

Fish & Wildlife:

A deer, a coyote, rabbits, and birds were all present on site.

Hydrology:

Pond Creek is undergoing a rework to allow for better drainage functionality. At the time of the inspection the area had been dozed, but not yet bladed. The blading step will clean up the drainage, remove dozer tracks, and deepen the channel. Three of the four areas of the Department's concerns are currently being addressed, with the last area to be addressed at a later date when the area dries out enough to allow dozers to work with overly damaging the drainage.

Since the regrade, the South Fork of Pond Creek has short circuited. This area was addressed by cutting the confluence of Pond Creek to formalize the new tributary, then using this cut material to block the short circuiting, thereby ensuring the South Fork flows to the intended channel (Photo 1 and Photo 2). This will improve the areas longitudinal profile and increase the chance of successful reclamation.

The confluence at the North Fork and the mainstem of Pond Creek has been moved south and has been regraded into the channel (Photo 3).

The region of the mainstem of Pond Creek near the new confluence has historically had disappearing definition. This area was cut in with the dozer to create channel definition. It appears the tie-in to the existing to the existing reach was successfully blended (Photo 4). This area would benefit from even more definition when bladed.

Off-Site Impact:

No off-site impacts were noted.

Rail Loops and Roads:

Roads were generally in good condition.

Signs & Markers:

The perimeter and soil piles observed during the inspection were properly signed.

Soils:

Soil in the Pit 16 West highwall reduction area has been temporarily stockpiled. A ring ditch berm had been established around the stockpile.

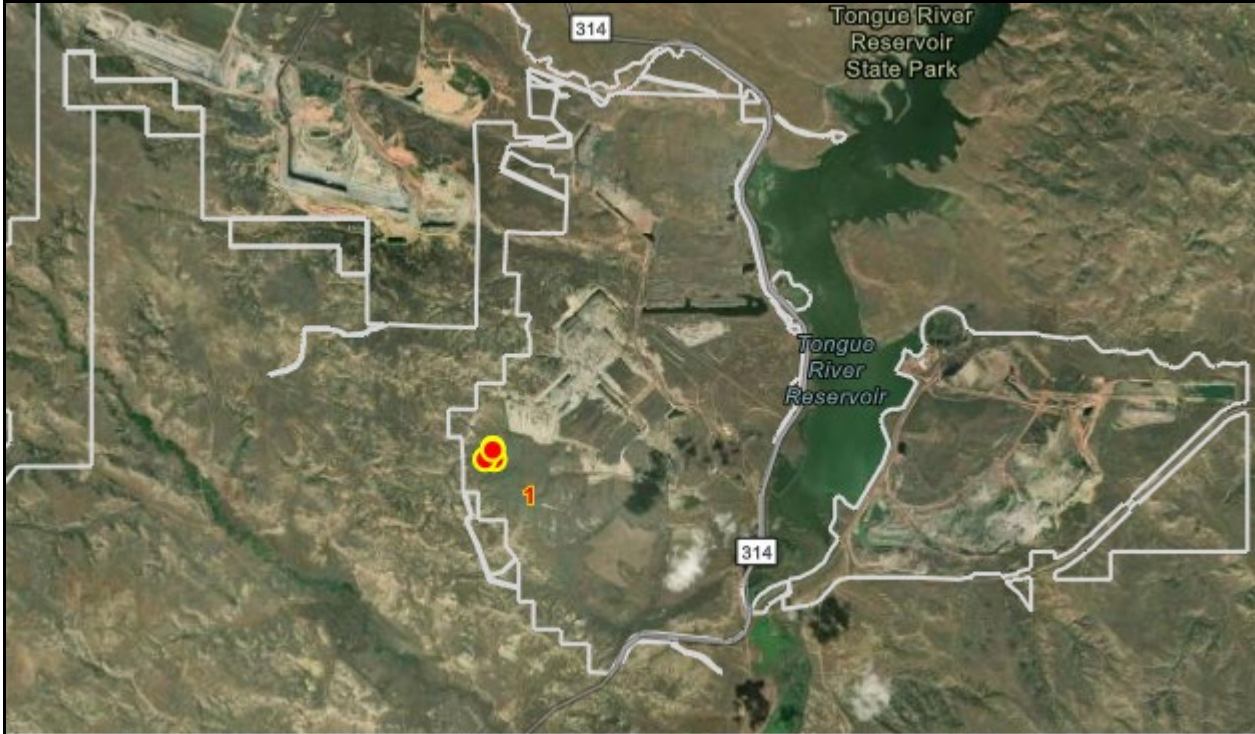
Signature of Inspector(s): Emily Lodman Mitchell Hoffman	Date: April 28, 2026
Reviewed by: Zachary Ashauer	Date: April 28, 2026

Coal Mining Section Inspection Photo Log

Permit: Decker (West)

Inspector(s): Mitch Hoffman, Emily Lodman, Amanda Galvan

Date: April 15, 2026



Earthstar Geographics | Montana State Library, Esri, TomTom, Garmin, SafeGraph, GeoTechnol... Powered by Esri

Photo: 1

Location: -106.86542, 45.05035 | Date, Time: 2026/04/15, 08:18:47

Topic: Hydrology

Description: The South Fork of Pond Creek short circuit regrade area - cut area



Photo: 2

Location: -106.86723, 45.05035 | Date, Time: 2026/04/15, 08:21:19

Topic: Hydrology

Description: The South Fork of Pond Creek short circuit regrade area - fill area



Photo: 3

Location: -106.86574, 45.05176 | Date, Time: 2026/04/15, 08:27:30

Topic: Hydrology

Description: The confluence at the North Fork and the mainstem of Pond Creek has been moved south and has been regraded into the channel



Photo: 4

Location: -106.8656, 45.05153 | Date, Time: 2026/04/15, 08:25:26

Topic: Hydrology

Description: The region of the mainstem of Pond Creek that was cut in with the dozer to create channel definition. It appears the tie-in to the existing to the existing reach was successfully blended



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: DECKER COAL COMPANY'S REQUEST FOR HEARING REGARDING PERMIT C1987001C (WEST DECKER MINE)	CASE NO. BER 2025-01 SM ORDER REQUESTING STATUS UPDATE AT JUNE BOARD MEETING
---	--

On February 25, 2026, the undersigned issued an Order extending the stay of this appeal until the Board's June 2026 Board meeting. The parties filed status reports on June 4, 2026. The Chair requests that counsel for the parties appear via Zoom at the Board's June 26, 2026, meeting and provide an update on whether this matter can now be dismissed. Video conferencing information and the agenda for the June meeting can be found on the Board's website one week ahead of the meeting.

DATED this 11th day of June, 2026.

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

CERTIFICATE OF SERVICE

I certify that on June 11th, 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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Attorneys for the Department

/s/ Dana L. Hupp

Dana L. Hupp, Legal Counsel

Montana Board of Environmental Review



**WORDEN
THANE P.C.**
ATTORNEYS AT LAW

Established in 1924

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

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

Natalie L. Black
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Dillon Kato
Erika D. Colstad
Noah P. Hill
Erika L. Johnson
Jamie B. Ross (MT, CA)
Ryan R. Shaffer (MT, WY, ND)
Deanna R. DeSon
Madeline Clarke

MEMORANDUM

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

From: Dana L. Hupp, Legal Counsel

Date: June 18, 2026

Re: BER 2019-06 WQ; Notice of Appeal and Request for Hearing by Alpine Pacific Utilities Regarding Issuance of MGWPCS Permit No. MTX000164; *DEQ’s Motion to Dismiss*

This matter arises from the Notice of Appeal and Request for Hearing (“Notice”) filed in July 2019 by Alpine Pacific Utilities (“Alpine”) related to MGWPCS Permit No. MTX000164 (the “Permit”).

Alpine is the owner/operator of a wastewater treatment system serving the Glacier Ranch Subdivision in Flathead County, Montana. The purpose of the permit modification was “to increase overall capacity to accommodate airport [Glacier Park International Airport] flows, while maintaining the existing subdivision capacity and protecting groundwater quality.” (Dkt. #56 at 2.)

In sum, the DEQ’s argument is that Alpine contractually obligated itself to dismiss the appeal within 30 days of the DEQ’s final permit decision, that the DEQ fulfilled its obligations under the Stipulation by completing the permitting process and issuing a final permit, and that Alpine’s failure to comment on the draft permit or seek a new contested case hearing within the statutory 30-day window forecloses further review by the Board.

Alpine argues in response that the DEQ entered a binding settlement agreement that expressly retained Board jurisdiction, that the DEQ breached that agreement by issuing a permit materially inconsistent with the stipulated discharge limits, and that the DEQ cannot simultaneously rely on the dismissal provision to extinguish Board jurisdiction while disregarding its own substantive obligations under the same agreement.

The following Memorandum provides a decision-making tree for the June meeting and a summary of the facts and the parties’ briefing on the DEQ’s Motion to Dismiss.

DECISION-MAKING TREE

1. Whether the DEQ Complied with the Substantive Terms of the Stipulation

Was Paragraph 4 of the Stipulation, which states that Alpine’s application “provides sufficient information to support the daily flow of 52,000 gpd at Outfall 001 and daily flow of 100,000 gpd at proposed Outfall 002,” a binding commitment by the DEQ to authorize the stipulated discharge volumes, or a contingent determination that Alpine’s application was sufficiently complete to proceed to technical review, with the permitted discharge volumes remaining subject to the outcome of that review?

- **Contingent Determination** → Grant the DEQ’s Motion with prejudice. **(End)**
- **Binding Commitment** → Did Alpine’s failure to provide final engineering information necessary to support 100,000 gpd at Outfall 002 excuse the DEQ’s departure from the stipulated discharge limits?
 - **Yes** → Grant the DEQ’s Motion to Dismiss with prejudice. **(End)**
 - **No** → Proceed to analysis of whether Alpine failed to exhaust its administrative remedies.

2. Whether Alpine Failed to Exhaust its Administrative Remedies

Did Alpine’s failure to comment on the draft permit and failure to seek a contested case hearing within the 30-day window provided by Mont. Code Ann. § 75-5-403(2)(a), which requires a permit holder to request a hearing within 30 days of the DEQ’s final decision, constitute a waiver of its right to further Board review?

- **If Yes** → Grant the DEQ’s Motion to Dismiss with prejudice. **(End)**
- **If No** → Deny the DEQ’s Motion to Dismiss, and remand the permit to the DEQ to allow Alpine an opportunity to cure the deficiencies in its application.

FACTUAL BACKGROUND

1. On July 3, 2019, Alpine appealed the June 4, 2019, issuance and renewal of MGWPCS Permit No. MTX000164 (“Permit”) to the Board. (Dkt. #1.)
2. Alpine appealed the DEQ’s characterization of Trumbull Creek, the closest downgradient surface water to Outfall 001, and other permit conditions resulting from the characterization of the creek. (Dkt. #1 at 5-8.)
3. Alpine and the DEQ attempted to resolve the appeal and on September 14, 2020, the parties entered into the first Stipulation and Request for Retention of Board Jurisdiction. (Dkt. #15.)
4. The first Stipulation “stayed the 2019 Permit and required Alpine to meet the effluent limits, monitoring requirements, and other conditions of the 2007 Permit, as modified in 2009 and 2017, which limited Alpine to 52,000 gpd at Outfall 001 during the pendency of the Appeal.” (Dkt. # 60 at 2.)
5. On December 19, 2024, the parties proposed the Second Stipulation and Request for Retention of Board Jurisdiction to revise and update the original stipulation. (Dkt. #46.)
6. On March 21, 2025, the parties proposed a First Amendment of the Second Stipulation and Request for Retention of Board Jurisdiction (“Stipulation”). (Dkt. #49.)
7. That Amendment modified “Alpine’s application to renew and modify the Permit to maintain the daily flow limit of 52,000 gpd at existing Outfall 001 and to seek a daily flow limit of 100,000 gpd at proposed Outfall 002 at Glacier Park International Airport (“GPIA”).” (Dkt. #60 at 3; Dkt #49 at 4.)
8. The Stipulation provided in pertinent part:
 - 1) Recognizing a forthcoming notice of deficiency (NOD) from DEQ would require additional ambient water quality data and analyses to support increasing the daily flow limit at Outfall 001 from 52,000 gallons per day (gpd) to 100,000 gpd as requested in Alpine’s application for renewal and modification of MGWPCS Permit No. MTX000164, Alpine hereby agrees to modify its application for renewal and major modification of MTX000164 to maintain the daily flow limit of 52,000 gpd at existing Outfall 001 and to seek a daily flow limit of 100,000 gpd at proposed Outfall 002.

. . .

- 3) DEQ received Alpine's updated application for renewal and major modification of MTX000164 on November 16, 2024. By entering this First Amendment to the Second Stipulation, Alpine hereby modifies its application for renewal and major modification of MTX000164 to maintain the daily flow limit of 52,000 gallons per day (gpd) at existing Outfall 001 and to seek a daily flow limit of 100,000 gpd at proposed Outfall 002.
- 4) By entering this First Amendment to the Second Stipulation, DEQ hereby [sic] determines Alpine's modified application for renewal and major modification of MTX000164 is complete and provides sufficient information to support the daily flow of 52,000 gpd at Outfall 001 and daily flow of 100,000 gpd at proposed Outfall 002.
- 5) Notwithstanding DEQ's determination that the modified application for renewal and major modification of MTX000164 is complete and DEQ's acknowledgement that Alpine has provided sufficient information to assist DEQ's development of a tentative decision to renew and modify MGWPCS Permit No. MTX000164 in accordance with this First Amendment to the Second Stipulation, the Parties agree to continue to cooperate by sharing any information necessary to develop the renewal and major modification of MGWPCS Permit No. MTX000164.
- 6) Within 120 days of the Parties' execution of this First Amendment of the Second Stipulation, the DEQ will make a tentative determination to renew and modify MTX000164 in accordance with the Montana Water Quality Act (MWQA), Title 75, chapter 5, MCA and administrative rules adopted to implement the MWQA at ARM Title 17, chapter 30. DEQ's tentative permit decision will result in preparation of a draft MGWPCS permit, a fact sheet (briefly setting forth the factual and legal bases of the draft permit), and an environmental assessment (EA).

...
- 10) Upon making its final permit decision, DEQ will issue Alpine a renewal and modification of MGWPCS Permit No. MTX000164.
- 11) Within 30 days of DEQ's issuance of the final permit decision, Alpine will move to dismiss this Appeal with prejudice.

...
- 16) Nothing in this First Amendment to the Second Stipulation limits DEQ's authority to review the permit renewal application, request additional information, and renew and modify MTX000164 under the MWQA, § 75-5-

101, MCA et seq. and Montana administrative rules adopted under the MWQA.

(Dkt. #49 at 1-7 (emphasis added).)

9. The DEQ made a tentative decision to renew and modify the Permit and initiated public notice of the tentative decision on August 18, 2025. (Dkt. #52 at 2.)
10. The DEQ published the draft permit, fact sheet, and EA on August 18, 2025, which remained available for public comment for 30 days after the date the notice was published. (Dkt. #52 at 2-3.)
11. The proposed modified permit approved a maximum daily outflow of 22,000 gallons per day at Outfall 002, not 100,000 gallons per day as requested by Alpine. (Dkt. #60 at 7.)
12. The DEQ explained the rationale for their permitting decision as follows:

Before preliminary engineering review was complete, Alpine proposed three new drain fields on the GPIA property (outfalls 002, 003, and 004). To protect neighboring properties with domestic wells and downgradient surface water, DEQ capped Outfall 002 at 22,000 gpd; capped Outfall 003 at 45,600; and did not permit Outfall 004.

After Alpine completes preliminary engineering review and seasonal groundwater flow direction is determined, the permitted volumes may be increased at the GPIA outfalls through a permit modification. DEQ based the daily flow capacities at Outfalls 002 and 003 on the aerial drain field sizes indicated in the submitted drain field diagram and the proposed drain field locations. This was reflected in the tentative permit decision available for a 30-day comment period beginning on August 18, 2025. Alpine neither objected to the tentative permit nor sought modification of any timeframe or requirement in the stipulation.

(Dkt. #60 at 7 (emphasis added).)

13. The DEQ received no comments from Alpine or the public nor was a hearing requested before the comment period closed on September 18, 2025. (Dkt. #60 at 4.)
14. On September 19, 2025, the parties filed a Joint Status Report to the Board that acknowledged that the draft permit, fact sheet, and environmental assessment were available for public comment for 30 days after the date of public notice, that a

public hearing was not requested, and that the public comment period closed on September 18, 2025. (Dkt. #52 at 3.)

15. The Joint Status Report further confirmed that pursuant to Mont. Code Ann. § 7-5-403 and Mont. Admin. R. 17.30 subchapter 10, Alpine was entitled to request a new contested case hearing before the BER to appeal the DEQ's final permit decision regarding renewal and modification of the Permit, and could seek further modification of the Permit to increase the maximum permitted total discharge at Outfall 001 from 52,000 gallons per day to 100,000 gallons per day. (*Id.* at 3-4.)
16. The DEQ made a final determination to renew and modify the Permit, subject to the reduced outflows included in the Permit draft, on September 24, 2025, and the Permit became final on October 1, 2025. (Dkt. #55 at 3.)
17. Alpine did not request a contested case hearing within the 30-day window provided by Mont. Code Ann. § 75-5-403(2)(a).
18. On February 4, 2026, the DEQ filed its Motion to Dismiss with Prejudice, arguing that the appeal should be dismissed because the final permit had been issued, the 30-day appeal window had passed, and Alpine had stipulated to dismiss within 30 days of the DEQ's final permit decision. (*Id.*)
19. On February 25, 2026, Alpine filed its Response to DEQ's Motion to Dismiss, opposing dismissal on the grounds that the DEQ had issued a permit materially inconsistent with the parties' Stipulation. (Dkt. #59.)
20. On March 11, 2026, the DEQ filed its Reply in Support of Motion to Dismiss. (Dkt. #60.)

LEGAL ANALYSIS

The parties' dispute presents two sequential questions for the Board's consideration. The first question is whether DEQ's issuance of a permit authorizing less than 100,000 gpd at Outfall 002 constituted a material breach of the Stipulation's substantive terms.

The second question is whether, even if the DEQ breached the Stipulation, Alpine waived its right to seek relief from the Board by failing to participate in the public comment process and failing to appeal the final permit decision within the statutory 30-day window. Each question is addressed in turn below.

I. Whether the DEQ Complied with the Substantive Terms of the Stipulation

The Board must first decide whether Paragraph 4 of the First Amendment to the Second Stipulation constituted a substantive commitment by the DEQ to authorize 100,000 gpd at Outfall 002, or whether it was a procedural finding of application completeness that left the DEQ's permitting discretion intact. Paragraph 4 provides:

By entering this First Amendment to the Second Stipulation, DEQ hereby [sic] determines Alpine's modified application for renewal and major modification of MTX000164 is complete and provides sufficient information to support the daily flow of 52,000 gpd at Outfall 001 and daily flow of 100,000 gpd at proposed Outfall 002.

(Dkt. #49 at 4 (emphasis added).) Rather than authorizing 100,000 gpd at Outfall 002, the permit the DEQ issued capped Outfall 002 at 22,000 gpd, capped Outfall 003 at 45,600 gpd, and declined to permit Outfall 004 at all. (Dkt. #60 at 7.)

Analysis of Settlement Agreements

Settlement agreements are binding contracts, and their construction and enforcement are governed by principles of contract law. *Murphy v. Home Depot*, 2012 MT 23, ¶ 8, 364 Mont. 27, 270 P.3d 72.

Under basic contract principles, a material breach by one party may excuse the other party's performance of a dependent obligation. *Norwood v. Serv. Distrib., Inc.*, 2000 MT 4, ¶¶ 32-34, 297 Mont. 473, 994 P.2d 25 ("we conclude that a failure of 'part' of a promised performance may warrant rescission, but only if the claiming party adequately proves that the deficient 'part' of the other party's performance was in fact material to the contract.").

Contracts must be interpreted "to give effect to the mutual intention of the parties as it existed at the time of contracting, provided the parties' intent is ascertainable and lawful." *BMK Enters. v. Bailey Enters. of Mont., LLC*, 2026 MT 102, ¶ 9, 428 Mont. 111, ___ P.4d ___ (citing Mont. Code Ann. § 28-3-301) (internal quotations omitted).

When possible, the parties' intention must be ascertained from the writing alone. *Id.* (citing Mont. Code Ann. § 28-3-303). If the contract is clear and unambiguous, the Board must apply the language as written. *Id.* (citing *Richards v. JTL Grp., Inc.*, 2009 MT 173, ¶ 14, 350 Mont. 516, 212 P.3d 264); see also Mont. Code Ann. § 28-3-401 ("The language of a contract is to govern its interpretation if the language is clear and explicit and does not involve an absurdity.").

However, if a contract is reasonably susceptible to more than one reasonable but conflicting meaning, it is ambiguous and the Board must consider extrinsic evidence to ascertain the parties' intent. *BMK Enters.*, ¶ 9.

Parties' Arguments

Here, Alpine argues that Paragraph 4 of the Stipulation reflects the DEQ's substantive commitment to the stipulated discharge limits. (Dkt. #59 at 3-4.) Specifically, Alpine argues that Paragraph 4 was a substantive commitment going to the core purpose of the agreement. (Dkt. #59 at 3.) In Alpine's view, the engineering matters the DEQ later cited as justification for reducing Outfall 002's capacity were always understood to be post-permit implementation issues, not preconditions to the agreed limits. (*Id.*)

In response, the DEQ argues that Paragraph 4 was a procedural finding only, confirming that the application contained sufficient information to allow the DEQ to proceed with its technical review without predetermining the outcome of that review. (Dkt. #60 at 7-8.) In other words, the DEQ's position is that Paragraph 4 addressed only the "completeness" of Alpine's application for purposes of initiating the permitting process and did not constitute a determination that the application was acceptable or that the requested discharge volumes were automatically approved.

The parties competing interpretations raise the question of whether the phrase "sufficient information to support" is reasonably susceptible to more than one meaning. If the Board determines that the phrase "sufficient information to support" the requested flow volumes is reasonably susceptible to both readings, Paragraph 4 is ambiguous, and the Board must look to the surrounding provisions of the Stipulation to ascertain the parties' mutual intent. *BMK Enters.*, ¶ 9.

The DEQ argues that the surrounding provisions weigh against Alpine's broader interpretation. (Dkt. #60 at 8.) It points to the language in Paragraph 5 where the parties agreed to continue cooperating and sharing information necessary to develop the permit renewal and modification:

Notwithstanding DEQ's determination that the modified application . . . is complete and DEQ's acknowledgement that Alpine has provided sufficient information to assist DEQ's development of a tentative decision . . . , the Parties agree to continue to cooperate by sharing any information necessary

(Dkt. #49 at 4.) The DEQ argues that the use of "notwithstanding" in Paragraph 5 qualifies Paragraph 4's completeness determination and expressly contemplates that additional information sharing would be necessary to develop the permit. (Dkt. #60 at 6-8.)

The DEQ further relies on Paragraph 16, which provides:

Nothing in this First Amendment to the Second Stipulation limits DEQ's authority to review the permit renewal application, request additional

information, and renew and modify MTX000164 under the MWQA, § 75-5-101, MCA et seq. and Montana administrative rules adopted under the MWQA.

(Dkt. #49 at 7.) The DEQ argues that Paragraph 16 expressly preserved the DEQ's full authority to review the permit renewal application, request additional information, and renew and modify MTX000164 under the MWQA without limitation. (Dkt. #60 at 6-7.)

Likewise, the DEQ argues that Paragraph 1 of the First Amendment reinforces this reading by expressly recognizing that a forthcoming notice of deficiency would require additional ambient water quality data and analyses to support increasing the daily flow limit. (Dkt. #60 at 5-6.) Paragraph 1 provides in part:

Alpine hereby agrees to modify its application for renewal and major modification of MTX000164 to maintain the daily flow limit of 52,000 gpd at existing Outfall 001 and to seek a daily flow limit of 100,000 gpd at proposed Outfall 002.

(Dkt. #49 at 2.) In the DEQ's view, the use of the word "seek" confirms that the parties understood from the outset that the application remained subject to further technical development before a final permit could be issued. (Dkt. #60 at 5-6.)

The DEQ contends that Alpine failed to provide the final location and shape of the drain fields at GPIA, which was the information the DEQ needed to authorize 100,000 gpd at Outfall 002. (Dkt. #55 at 2; Dkt. #60 at 5, 7.) Thus, the DEQ argues, it was unable to "reconcile Alpine's request for 100,000 gpd at the GPIA outfalls with site specific conditions and the requirements of the MWQA and its implementing rules." (Dkt. #60 at 9.) As a result, when the DEQ issued its final permit, Alpine remained obligated to dismiss its appeal under Paragraph 11 of the Stipulation. (Dkt. #49 at 6; Dkt. #60 at 4.) In response, Alpine argues that the DEQ never asserted that the agreed discharge volumes were environmentally unsupportable or legally impermissible. (*Id.* at 6.) The result, Alpine argues, is that the DEQ improperly converted issues anticipated to be resolved through subsequent engineering submissions into permanent reductions of authorized capacity (*Id.* at 5.)

Finally, the DEQ argues that regardless of how Paragraph 4 is read, the parties' intent is constrained by law. Under Mont. Code Ann. § 28-2-702, contracts that have for their object, directly or indirectly, the exemption of any party from a violation of law are against public policy. The DEQ argues that any reading of Paragraph 4 that would require it to authorize 100,000 gpd regardless of what the submitted engineering information showed would conflict with its statutory obligations under the MWQA. (Dkt. #60 at 8-9.)

In sum, the Board's resolution of this matter turns on whether Paragraph 4 constituted a binding commitment regarding permitted discharge volumes or a procedural finding of

application completeness. If the Board concludes that Paragraph 4 was a procedural completeness finding only, Alpine's Paragraph 11 dismissal obligation was triggered when DEQ issued its final permit decision. Under that reading, the Board should grant DEQ's motion and dismiss this appeal with prejudice. If the Board concludes that Paragraph 4 constituted a binding commitment regarding permitted discharge volumes, the DEQ's issuance of a permit authorizing significantly less than 100,000 gpd at Outfall 002 the Board must determine whether Alpine nonetheless waived its right to seek relief by failing to exhaust its administrative remedies.

II. Whether Alpine Exhausted Its Administrative Remedies

If the Board finds that the DEQ materially breached the Stipulation, it must consider whether Alpine preserved its right to seek relief from the Board by exhausting the administrative remedies available to it.

Under Mont. Code. Ann. § 75-5-403(2)(a), a permit applicant or holder who is dissatisfied with the DEQ's final permit decision has 30 days to request a hearing before the Board. The DEQ initiated a 30-day public comment period on its tentative permit decision on August 18, 2025, and the comment period closed on September 18, 2025. (Dkt. #52 at 2-3.) Alpine did not submit comments during that period. (Dkt. #60 at 4.) The DEQ issued its final permit decision on September 24, 2025, and Alpine did not request a contested case hearing within the 30-day window provided by statute. (Dkt. #55 at 3.) The parties' September 19, 2025, Joint Status Report expressly acknowledged Alpine's right to seek a new contested case hearing or pursue a permit modification. (Dkt. #52 at 3-4.)

The DEQ argues that Alpine's failure to participate in the public comment process and its failure to appeal the final permit decision within the statutory window constitute a waiver of its right to further Board review. (Dkt. #60 at 9-10.) The DEQ argues that Alpine had a clear opportunity to request a hearing or raise its concerns about the reduced discharge limits during the public comment period. (*Id.*)

In response, Alpine argues that the Board's expressly retained jurisdiction over this appeal rendered a new contested case proceeding unnecessary. (Dkt. #59 at 4.) The Stipulation states:

This First Amendment to the Second Stipulation is hereby entered and the BER agrees to retain jurisdiction as described above and orders the Parties to proceed in compliance with the terms described herein.

(Dkt. #49 at 8.) In Alpine's view, it was entitled to rely on that retained jurisdiction rather than initiating a parallel administrative proceeding because the Board agreed in the Stipulation to retain jurisdiction over this matter to ensure compliance with the settlement terms. (Dkt. #59 at 4-5.) Alpine further argues that requiring it to initiate a new appeal

would multiply proceedings, delay resolution of the same dispute, and reward the DEQ's noncompliance with the settlement. (*Id.*)

If the Board finds that Alpine's failure to comment on the draft permit and failure to seek a contested case hearing within the statutory window constitutes a waiver of its right to further review, then the Board should grant the DEQ's Motion. The DEQ has acknowledged that Alpine may seek to increase the permitted volumes at the GPIA outfalls through a permit modification after preliminary engineering review is complete and seasonal groundwater flow direction is determined. (Dkt. #60 at 9.)

However, if the Board finds that its retained jurisdiction over this matter was sufficient to preserve Alpine's rights without resort to the statutory comment and appeal process, the Board should deny the DEQ's Motion and issue an order consistent with the Board's findings. (Dkt. #59 at 7.)

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ATTORNEY FOR THE
DEPARTMENT OF
ENVIRONMENTAL QUALITY

ATTORNEYS FOR ALPINE PACIFIC
UTILITIES

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

<p>IN THE MATTER OF:</p> <p>THE NOTICE OF APPEAL AND REQUEST FOR HEARING BY ALPINE PACIFIC UTILITIES REGARDING ISSUANCE OF MPDES PERMIT NO. MTX000164</p>	<p>CAUSE NO. 2019-06 WQ</p> <p>STIPULATION AND REQUEST FOR RETENTION OF BOARD JURISDICTION</p>
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COME NOW Appellant Alpine Pacific Utilities, LLC (“Alpine”) and the Montana Department of Environmental Quality (“DEQ”), collectively (“Parties”), and hereby stipulate and agree as follows:

I. JURISDICTION AND PARTIES

1. Pursuant to Mont. Code Ann. § 75-5-403, the Board of Environmental Review (“Board”) has authority to hear contested case appeals of DEQ’s Montana

Ground Water Pollution Control System (“MGWPCS”) permitting decisions, such that the Board may affirm, modify, or reverse a permitting action of DEQ.

2. DEQ is a department of the executive branch of state government, duly created and existing under the authority of Mont. Code Ann. § 2-15-3501. DEQ has statutory authority to administer Montana’s water quality statutes and rules, including the review and issuance of MGWPCS Permits under Mont. Code Ann. § 75-5-402 and ARM 17.30.1024.

3. Alpine is a limited liability company registered to do business in Montana, located in Flathead County, Montana, and is the owner and operator of the MGWPCS-permitted public wastewater facility serving the Glacier Ranch Subdivision (the “Facility”).

4. The Glacier Ranch Subdivision consists of five phases. The current Certificate of Subdivision Plat Approval approves a wastewater flow of 52,000 gpd, but the expected actual sewer usage rate is 47,196 gpd.

II. BACKGROUND

5. The Facility has been issued MGWPCS Permit No. MTX000164.

6. MGWPCS Permit No. MTX000164 was modified on January 17, 2017 (the “2017 Permit”) to transfer the permit to the current owner/operator, Alpine Pacific Utilities. The 2017 Permit permitted a discharge of 52,000 gpd,

included a source specific groundwater mixing zone, and provided Numeric Effluent Limits (“2017 Permit Effluent Limits”) for Outfall 001 as follows:

Table 1. Numeric Effluent Limits for Outfall 001 (at the dose tank, prior to discharge to the drainfield)

Parameter	Daily Maximum Concentration (mg/L) ⁽¹⁾	90-Day Average Load ⁽¹⁾ (pounds per day)
Total Nitrogen, as N (TN) ⁽²⁾	26	6.51
Total Phosphorus, as P (TP)	2.5	1.08

(1) See definitions in Part V of this permit.

(2) Total Nitrogen (TN) is the sum of nitrate, nitrite (as N) and total Kjeldahl nitrogen (TKN).

7. On June 4, 2019, DEQ issued a renewal of MGWPCS Permit No. MTX000164 for the Glacier Ranch Subdivision with an effective date of August 1, 2019 (the “2019 Permit”). As issued, the 2019 Permit permitted a discharge of 100,000 gpd, did not provide a mixing zone, and included Effluent Limits for Outfall 001, based on Montana’s then-applicable numeric nutrient criteria for surface water as follows:

Parameter	Units	Daily Maximum
Nitrogen, Total (as N)	mg/L	0.28
Phosphorus, Total (as P)	mg/L	0.025

8. On July 3, 2019, Alpine timely appealed certain provisions of the 2019 Permit before the Board. *See* Notice of Appeal (filed July 3, 2019) (“Appeal”).

9. Pursuant to Admin. R. Mont. 17.30.1379, the effluent limits of the 2019 Permit were stayed and the effluent limits, monitoring requirements, conditions and other requirements, including the 52,000 gpd flow set forth in the April 4, 2007 MGWPCS (as modified in 2009 and 2017) remain effective and enforceable throughout this Appeal.

10. A Prehearing Order was issued in August 13, 2019, followed by a Scheduling Order on September 9, 2019.

11. On February 10, 2020, following a Joint Motion filed by the Parties, an Order Granting Motion to Stay was issued, directing the Parties “to file a joint status report within 30 days of this order, which must include a proposed amended scheduling order.”

12. On March 11, 2020, following a Joint Status Report and Motion for 30-Day Extension, an Order Granting Motion to Stay was issued, directing the parties to file either a proposed settlement or a proposed amended scheduling order within 30 days.

13. On April 13, 2020, the Parties filed a Joint Status Report and Proposed Amended Scheduling Order, noting that their good faith settlement efforts continued.

14. On April 20, 2020, an Amended Scheduling Order was issued, providing deadlines leading to a contested case hearing in early 2021.

15. On May 1, 2020 in an email to the Nutrient Work Group, DEQ announced that “EPA’s 2020 disapproval of Montana’s nutrient variance 12B, which followed litigation challenging those variances, triggers the removal of 12A [the numeric nutrient criteria].” The 2019 Permit included effluent limitations that were based on the numeric nutrient criteria in 12A.

16. Without numeric nutrient criteria, nutrients in surface water are once again governed by a narrative water quality standard, requiring surface waters to be “free from substances attributable to municipal, industrial, agricultural practices or other discharges that will ... create conditions which produce undesirable aquatic life.” Admin. R. Mont. 17.30.637(1)(e).

17. Alpine may propose increasing the maximum permitted discharge, which would make the facility a new or increased source that is subject to nondegradation evaluation. DEQ implements the state nondegradation policy in 75-3-303, MCA. If, in accordance with paragraph 20 of Section III below, Alpine proposes a modification application that increases the maximum permitted

discharge, the criteria in Admin. R. Mont. 17.30.715 will govern nondegradation review to determine whether the proposed activities will result in nonsignificant changes to water quality as follows:

a. Because nutrient water quality standards are currently narrative, changes in water quality for nutrients are “nonsignificant” if those changes “will not have a measurable effect on any existing or anticipated use or cause measurable changes in aquatic life or ecological integrity.” Admin. R. Mont. 17.30.715(1)(h).

b. For potential impacts to surface water, Admin. R. Mont. 17.30.715(1)(c) provides criteria for determining when discharges causing changes in nitrate are “nonsignificant” and not required to undergo further nondegradation review.

c. For potential impacts to ground water, Admin. R. Mont. 17.30.715(1)(d) provides that discharges causing the sum of the “predicted concentrations of nitrate at the boundary of any applicable mixing zone” that do not exceed 7.5 mg/L and do not cause degradation of surface water are “nonsignificant” and not required to undergo further nondegradation review. Additionally, for ground water, Admin. R. Mont. 17.30.715(1)(e) provides criteria for determining changes in total inorganic phosphorus in ground

water that are “nonsignificant” and not required to undergo further nondegradation review.

d. DEQ may consider the criteria in Admin. R. Mont.

17.30.715(2).

III. STIPULATION

18. Alpine shall submit the Monitoring Well Installation Plan for installation of MW-1E, described in Section I.D. on page 8 of the 2019 Permit, within 30 days of the Parties signing this Stipulation. Within 30 days of receipt, DEQ shall provide Alpine written approval or denial of the Monitoring Well Installation Plan. DEQ shall not unreasonably withhold its approval of the Monitoring Well Installation Plan.

19. Alpine shall install the approved monitoring well within six months of DEQ’s approval of the Monitoring Well Installation Plan.

20. Should Alpine propose increasing the maximum permitted discharge, subjecting the facility to nondegradation evaluation, Alpine will submit updated permit application information supporting the 100,000 gpd flow in the 2019 Permit, including nondegradation analysis (such as: a) updated modeling utilizing the QUAL2K water quality model or a widely accepted model used for water quality regulation, including permitting and compliance, wasteload allocations, and total maximum daily load (TMDL) development that: i) provides good

documentation and user support; ii) is endorsed by the U.S. Environmental Protection Agency (EPA), and iii) is capable of simulating the eutrophication variables of interest including dissolved oxygen, pH, total organic carbon, bottom-attached algal growth, and phytoplankton b) hydrogeologic investigation; and/or a fate and transport study) informed by data from the new monitoring well (noted above in paragraphs 18 and 19) and other information, to DEQ's Water Protection Bureau. The updated permit application information will require Alpine to pay the "Resubmitted application fee" totaling \$500.00 under Schedule I.D. in Admin. R. Mont. 17.30.201 to DEQ. Annual fees in Schedule III.A. in Admin. R. Mont. 17.30.201 must be paid and are not waived by DEQ.

21. Within 30 days after DEQ's receipt of Alpine's updated permit application information, DEQ and Alpine shall meet to discuss next steps, including whether additional information is needed and a timeline for DEQ issuance of a Modified 2019 Permit providing modified effluent limitations at the 100,000 gpd flow, considering the narrative nutrient criteria and nondegradation provision noted above.

22. Within 14 days after the meeting required in paragraph 21 above, the Parties will file a Joint Status Report with the Board outlining the timeline for issuance of a modified permit and proposing a process by which this Appeal will

be terminated; or, alternatively, the Parties will file a proposed scheduling order for a hearing within one year.

23. The Parties agree to file Joint Status Reports with the Board every three months, beginning November 1, 2020.

24. Upon reaching agreement to the terms and conditions of this stipulation as evidenced by their signatures, the Parties agree to suspend the deadline for discovery responses and the Parties further agree that this Appeal remains pending and that the Board retains jurisdiction over this Appeal. If, by the expiration date of the 2019 Permit (July 31, 2024), the Parties have not provided a process by which this Appeal may be terminated or scheduled for hearing, the Board may dismiss this Appeal with prejudice. Further, the Board may, if unsatisfied with any of the Joint Status Reports filed by the Parties, convene a status conference with the Parties or order the Parties to submit additional information and/or a proposed schedule for hearing.

IV. GENERAL PROVISIONS

25. Nothing in this Stipulation shall prohibit Alpine from also pursuing a surface water MPDES discharge permit from DEQ. If Alpine is issued an MPDES permit for the same discharge governed by the permit at issue in this Appeal, it will dismiss this Appeal with prejudice.

26. Nothing in this Stipulation shall waive Alpine's rights concerning any application it makes to DEQ or diminish DEQ's authority to review the application as provided by law.

27. Nothing in this Stipulation shall prohibit Alpine or DEQ from exercising any rights or authority under the Water Quality Act, including but not limited to the right to seek or issue permit modifications pursuant to Admin. R. Mont. 17.30.1030 or the right to seek a variance for any permit limit.

28. Each of the signatories to this Stipulation represents that he or she is authorized to enter this Stipulation and to bind the Parties represented by him or her to the terms of this Stipulation.

29. If for any reason the Board declines to enter this Stipulation in the form presented, the terms of this Stipulation may not be used as evidence in any litigation, administrative or judicial, between the Parties.

V. ENTRY OF STIPULATION

The Parties request that the Board enter this Stipulation. If the Board declines to enter this Stipulation in the form presented, the Parties respectfully request the Board provide some guidance on terms or edits that would make this Stipulation acceptable to the Board.

This Stipulation is hereby entered by the Board, the Board hereby stays the dates in the April 20, 2020 scheduling order and agrees to retain jurisdiction as

described above and orders the Parties to proceed in compliance with the terms described herein.

Dated this _____ day of September, 2020.

Sarah Clerget
Hearing Examiner
Agency Legal Services Bureau
1712 Ninth Avenue
P.O. Box 201440
Helena, MT 59620-1440

The Parties, by their respective counsel, hereby consent to the terms and conditions of the Stipulation as set forth above and consent to the entry thereof.

Dated this 14th day of
September, 2020.

/s/ Kirsten H. Bowers
Kirsten H. Bowers
Montana Department of Environmental Quality
1520 East Sixth Avenue
P.O. Box 200901
Helena, MT 59620-0901
ATTORNEY FOR THE DEPARTMENT OF
ENVIRONMENTAL QUALITY

Dated this 14th day of
September, 2020.

/s/ Victoria A. Marquis
Victoria A. Marquis
Matthew H. Dolphay
Holland & Hart LLP
401 North 31st Street, Suite 1500
P.O. Box 639
Billings, Montana 59103-0639
ATTORNEYS FOR ALPINE PACIFIC
UTILITIES, LLC

CERTIFICATE OF MAILING

I hereby certify that on this 14th day of September, 2020, I caused to be served a true and correct copy of the foregoing document and any attachments to all parties or their counsel of record as set forth below:

Deb Sutliff Secretary, Board of Environmental Review Department of Environmental Quality 1520 E. 6th Avenue P.O. Box 200901 Helena, MT 59620-0901 DSutliff@mt.gov	<input type="checkbox"/> U.S. Mail <input type="checkbox"/> Overnight Mail <input type="checkbox"/> Hand Delivery <input type="checkbox"/> Facsimile <input checked="" type="checkbox"/> E-Mail
Sarah Clerget, Hearing Examiner Agency Legal Services Bureau 1712 Ninth Avenue P.O. Box 201440 Helena, MT 59620-1440 sclerget@mt.gov asolem@mt.gov	<input type="checkbox"/> U.S. Mail <input type="checkbox"/> Overnight Mail <input type="checkbox"/> Hand Delivery <input type="checkbox"/> Facsimile <input checked="" type="checkbox"/> E-Mail
Kirsten Bowers Montana Department of Environmental Quality 1520 East Sixth Avenue P.O. Box 200901 Helena, MT 59620-0901 kbowers@mt.gov sscherer@mt.gov	<input type="checkbox"/> U.S. Mail <input type="checkbox"/> Overnight Mail <input type="checkbox"/> Hand Delivery <input type="checkbox"/> Facsimile <input checked="" type="checkbox"/> E-Mail
Jon Kenning, Bureau Chief Montana Department of Environmental Quality Water Protection Bureau P.O. Box 200901 Helena, MT 59620-0901 jkenning@mt.gov	<input type="checkbox"/> U.S. Mail <input type="checkbox"/> Overnight Mail <input type="checkbox"/> Hand Delivery <input type="checkbox"/> Facsimile <input checked="" type="checkbox"/> E-Mail

/s/ Victoria A. Marquis _____

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ATTORNEY FOR ALPINE
PACIFIC UTILITIES

ATTORNEY FOR DEQ

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

<p>IN THE MATTER OF:</p> <p>THE NOTICE OF APPEAL AND REQUEST FOR HEARING BY ALPINE PACIFIC UTILITIES REGARDING ISSUANCE OF MPDES PERMIT NO. MTX000164</p>	<p>CAUSE NO. BER 2019-06 WQ</p> <p>SECOND STIPULATION AND REQUEST FOR RETENTION OF BOARD JURISDICTION</p>
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COME NOW Appellant Alpine Pacific Utilities, LLC (“Alpine”) and the Montana Department of Environmental Quality (“DEQ”), collectively (“Parties”), and hereby revise and update the Stipulation and Request for Retention of Board Jurisdiction dated September 14, 2020 (“First Stipulation”) including deadlines for renewal of Montana Groundwater Pollution Control System (“MGWPCS”) Permit No. MTX000164. This Second Stipulation and Request for Retention of Board Jurisdiction (“Second Stipulation”) provides updated deadlines, agreed upon by the Parties, for:

1. Alpine's submission of a complete application for renewal and major modification of MTX000164 that is complete with sufficient data and analyses of site-specific aquifer characteristics for DEQ to review the proposal and determine the level of protection required to maintain uses and avoid degradation of the receiving ground water and downgradient surface water at existing Outfall 001 and proposed Outfall 002;

2. Alpine's submission of any supplemental information requested by DEQ to assist in evaluating site specific ground water data and analyses and accurately estimate hydraulic conductivity of the aquifer, develop mixing zones, and develop permit effluent limitations and conditions that will protect existing uses and the quality of the aquifer in the location of existing Outfall 001 and proposed Outfall 002;

3. DEQ's tentative decision to renew and modify or deny Alpine's requested renewal and modification of MGWPCS Permit No. MTX000164 in accordance with Administrative Rules of Montana ("ARM") 17.30.1024(3) and (4);

4. DEQ's public notice of its tentative decision to renew and modify MGWPCS Permit No. MTX000164 in accordance with ARM 17.30.1024(5) and ARM 17.30.1040, or DEQ's written notice to Alpine of DEQ's denial of the

requested renewal and modification of MGWPCS Permit No. MTX000164 that includes a statement of reasons for the denial;

5. DEQ's initiation of a public comment period on its tentative decision to renew and modify MGWPCS Permit No. MTX000164 in accordance with ARM 17.30.1024(6), which may be extended for good cause or to accommodate a public hearing in accordance with ARM 17.30.1024(6) and (7); and

6. DEQ's response to public comments and final determination to renew and modify Alpine's requested renewal and modification of MGWPCS Permit No. MTX000164 in accordance with ARM 17.30.1024(8) through (10).

I. JURISDICTION, PARTIES, AND CASE HISTORY

7. Pursuant to § 75-5-403, Montana Code Annotated ("MCA"), the Board of Environmental Review ("the Board") has authority to hear contested case appeals of DEQ's Montana Ground Water Pollution Control System permitting decisions, and the Board may affirm, modify, or reverse a permitting action of DEQ.

8. DEQ is an agency of the executive branch of the State government of Montana, duly created and existing under the authority of § 2-15-3501, MCA. DEQ has statutory authority to administer the Montana Water Quality Act ("MWQA"), § 75-5-101, MCA et seq. and administrative rules adopted under

authority of the MWQA, including rules related to the review and issuance of MGWPCS Permits codified at ARM Title 17, Chapter 30, subchapter 10.

9. Alpine is a limited liability company registered to do business in Montana, located in Flathead County, Montana, Alpine is the owner and operator of the MGWPCS-permitted public wastewater facility currently serving the Glacier Ranch Subdivision (the “Facility”), and Alpine is currently authorized to discharge to state ground water at Outfall 001 under MGWPCS Permit No. MTX000164.

10. On July 3, 2019, Alpine submitted a notice of appeal of DEQ’s issuance of MGWPCS MTX000164 (“2019 Appeal”). The Parties entered the First Stipulation on September 14, 2020, to resolve the 2019 Appeal. Under the First Stipulation, Alpine conducted ground water monitoring to provide technical and modeling information to submit with an application for permit modification requesting increased discharge volume at Outfall 001 and the addition of Outfall 002.

11. The current version of MGWPCS MTX000164, was issued on July 3, 2019, and expired on July 31, 2024 (“2019 Permit”). Pursuant to ARM 17.30.1034, the effective portions of the 2019 Permit are administratively extended pending Alpine’s renewal and major modification of the Permit.

12. Some of the effluent limits and conditions in the 2019 Permit were stayed and the effluent limits, monitoring requirements, conditions and other

requirements, including the 52,000 gallon per day (gpd) flow in the April 4, 2007 MGWPCS (as modified in 2009 and 2017) remain in effect and enforceable until this Appeal is resolved.

13. Increasing the maximum permitted total discharge from Outfalls 001 and 002 by 148,000 gpd makes the Facility a new or increased source that is subject to nondegradation evaluation under § 75-5-303, MCA.

14. Alpine's proposed modification requires DEQ to conduct a nondegradation review and determine whether the proposed increased source will result in nonsignificant changes to water quality pursuant to ARM 17.30.715.

III. STIPULATION

15. DEQ received Alpine's updated application for renewal and major modification of MTX000164 on November 16, 2024. In accordance with ARM 17.30.1024, DEQ processed the application and determined the application is deficient. Concurrently with this Second Stipulation, DEQ is sending a Notice of Deficiency to Alpine that requires submittal of information necessary to complete the application to authorize a new outfall at the airport (Outfall 002), to increase treatment capacity, and to approve the proposed increased discharge volume at Outfall 001. The December 13, 2024 Notice of Deficiency is attached hereto as Exhibit A and by this reference is incorporated herein. Alpine must resubmit the application with the data and analyses described in Exhibit A providing site-

specific aquifer characteristics that enable DEQ to review the proposal and determine the level of protection required to maintain uses and avoid degradation of the receiving ground water and downgradient surface water at existing Outfall 001 and proposed Outfall 002;

16. Alpine's proposal would increase the maximum permitted total discharge at Outfall 001 from 52,000 gpd to 100,000 gpd and would add outfall 002 with a maximum permitted discharge of 100,000 gpd. Approval of Alpine's proposal would increase the combined total discharge volume from the Facility from 52,000 gpd to 200,000 gpd and make the Facility a new or increased source that is subject to nondegradation evaluation under § 75-5-303, MCA. Alpine must submit updated information to support DEQ's nondegradation analysis of the proposed increased flow volume at 001 and the proposed new flow volume at 002. Such information may include updated modeling utilizing the QUAL2K water quality model or an alternative model subject to DEQ review and acceptance.

17. DEQ will determine Alpine's application for renewal and major modification of MTX000164 is complete upon receipt of sufficient data and analyses of site-specific aquifer and downgradient surface water characteristics to:

- (a) make a nonsignificance determination pursuant to ARM 17.30.715,
- (b) accurately estimate hydraulic conductivity of the receiving groundwater,
- (c) develop mixing zones at Outfall 001 and 002, and

(d) develop permit effluent limitations and conditions at:

- (i) Outfall 001 that support the requested flow increase from 52,000 gpd to 100,000 gpd and protect receiving ground water and downgradient surface water, and
- (ii) at new Outfall 002 that support the requested flow of 100,000 gpd and protect receiving ground water and downgradient surface water.

18. DEQ will make a tentative determination to renew and modify or deny the requested renewal and modification of MTX000164 within 120 days of DEQ's receipt of a complete MGWPCS permit application that includes any and all DEQ-requested supplemental information and provides sufficient data and analyses of site-specific aquifer and downgradient surface water characteristics for DEQ to make the determinations in Paragraphs 16 and 17. DEQ's tentative permit decision will be based on whether the requested renewal and modification will or will not comply with the Montana Water Quality Act (MWQA), Title 75, chapter 5, MCA and administrative rules adopted to implement the MWQA at ARM Title 17, chapter 30. *See* ARM 17.30.1024(3). DEQ's tentative permit decision will result in either: (a) a written notice of denial of the requested renewal and modification of MTX000164; or (b) preparation of a draft MGWPCS permit. *See* ARM 17.30.1024(4).

19. In accordance with ARM 17.30.1024(6) and 17.30.1040, within 30 days of DEQ's tentative permit decision, DEQ will give public notice of the tentative determination to renew and modify MTX000164 with a supporting fact

sheet and an environmental analysis (“EA”). DEQ will make the draft permit, fact sheet, and EA available for public comment for at least 30 days after the date of public notice and, if a public hearing is held, will provide no less than 30 days’ notice prior to the hearing;

20. DEQ will consider and respond to substantive public comments and make a final determination to renew and modify or to deny Alpine’s requested renewal and modification of MGWPCS Permit No. MTX000164 within 30 days after termination of the public comment period if a public hearing is not held. If a public hearing is held on the tentative determination, the department shall make its final determination to renew and modify MTX000164 within 60 days following the hearing. All public comments will be retained by the department and considered in the final determination in accordance with ARM 17.30.1024(8) through (10).

21. Upon making its final permit decision, DEQ will issue Alpine a renewal and modification of MGWPCS Permit No. MTX000164.

22. Within 30 days of DEQ’s issuance of the final permit decision, whether issuance of a renewed and modified permit or denial of the permit, Alpine will move to dismiss this Appeal with prejudice.

23. In accordance with § 75-5-403, MCA and ARM 17.30.1024(10) Alpine may request a new contested case hearing before the BER to appeal DEQ’s

final permit decision to renew and modify or deny MGWPCS Permit No. MTX000164.

24. The Parties agree to file Joint Status Reports with the BER every three months, beginning three months after the date the BER enters this Second Stipulation and ending on the date DEQ issues a final permit decision.

IV. GENERAL PROVISIONS

25. Nothing in this Stipulation limits DEQ's authority to review the permit renewal application and request for modification under the law.

26. Nothing in this Stipulation limits Alpine from exercising any rights under the MWQA, including the right to seek further permit modifications.

27. Each of the signatories to this Stipulation represents that he or she is authorized to enter this Stipulation and to bind the Parties represented by him or her to the terms of this Stipulation.

28. If for any reason the BER declines to enter this Stipulation in the form presented, the terms of this Stipulation may not be used as evidence in any litigation, whether administrative or judicial, between the Parties.

29. The timeframes set forth herein may be modified for cause and by agreement between the Parties. Neither party shall unreasonably withhold their agreement to modify the timeframes.

30. This Stipulation constitutes the entire agreement between the Parties and supersedes any prior agreements or understandings. The obligations expressed in this Stipulation may only be modified or amended by written agreement executed by the Parties.

31. This Stipulation may be signed in counterpart copies which together shall constitute a fully executed agreement.

V. ENTRY OF STIPULATION

The Parties request that the BER enter this Stipulation.

This Stipulation is hereby entered and the BER agrees to retain jurisdiction as described above and orders the Parties to proceed in compliance with the terms described herein.

Dated this _____ day of December, 2024.

David Simpson
BER Chairman

The Parties, by their respective counsel, hereby consent to the terms and conditions of the Stipulation as set forth above and consent to the entry thereof.

Dated this 19th day of
December, 2024.

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

ATTORNEY FOR THE DEPARTMENT OF
ENVIRONMENTAL QUALITY

Dated this 19th day of
December, 2024.

/s/ Christopher Scoones
Christopher Scoones
Scoones Law PLLC
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chris@scooneslaw.com
(406) 551-6499

ATTORNEY FOR ALPINE PACIFIC
UTILITIES, LLC

CERTIFICATE OF MAILING

I hereby certify that on this 19th day of December, 2024, I caused to be served a true and correct copy of the foregoing document and any attachments to all parties or their counsel of record as set forth below:

Secretary, Board of Environmental Review Montana Department of Environmental Review P.O. Box 200901 Helena, MT 59620-0901 Sandy.MoiseyScherer@mt.gov	<input type="checkbox"/> U.S. Mail <input type="checkbox"/> Overnight Mail <input type="checkbox"/> Hand Delivery <input type="checkbox"/> Facsimile <input checked="" type="checkbox"/> E-Mail
Terisa Oomens, Hearing Examiner Agency Legal Services Bureau 1712 Ninth Avenue P.O. Box 201440 Helena, MT 59620-1440 Terisa.Oomens@mt.gov	<input type="checkbox"/> U.S. Mail <input type="checkbox"/> Overnight Mail <input type="checkbox"/> Hand Delivery <input type="checkbox"/> Facsimile <input checked="" type="checkbox"/> E-Mail
Kirsten Bowers Montana Department of Environmental Quality 1520 East Sixth Avenue P.O. Box 200901 Helena, MT 59620-0901 kbowers@mt.gov	<input type="checkbox"/> U.S. Mail <input type="checkbox"/> Overnight Mail <input type="checkbox"/> Hand Delivery <input type="checkbox"/> Facsimile <input checked="" type="checkbox"/> E-Mail
Tatiana Davila, Bureau Chief Montana Department of Environmental Quality Water Protection Bureau P.O. Box 200901 Helena, MT 59620-0901 Tatiana.Davila@mt.gov	<input type="checkbox"/> U.S. Mail <input type="checkbox"/> Overnight Mail <input type="checkbox"/> Hand Delivery <input type="checkbox"/> Facsimile <input checked="" type="checkbox"/> E-Mail
Christopher Scoones Scoones Law PLLC P.O. Box 4570 Bozeman, MT 59772 chris@scooneslaw.com	<input type="checkbox"/> U.S. Mail <input type="checkbox"/> Overnight Mail <input type="checkbox"/> Hand Delivery <input type="checkbox"/> Facsimile <input checked="" type="checkbox"/> E-Mail

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

Kirsten H. Bowers
Montana Department of
Environmental Quality
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ATTORNEY FOR ALPINE
PACIFIC UTILITIES

ATTORNEY FOR DEQ

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

<p>IN THE MATTER OF:</p> <p>THE NOTICE OF APPEAL AND REQUEST FOR HEARING BY ALPINE PACIFIC UTILITIES REGARDING ISSUANCE OF MPDES PERMIT NO. MTX000164</p>	<p>CAUSE NO. BER 2019-06 WQ</p> <p>FIRST AMENDMENT OF THE SECOND STIPULATION AND REQUEST FOR RETENTION OF BOARD JURISDICTION</p>
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COME NOW Appellant Alpine Pacific Utilities, LLC (“Alpine”) and the Montana Department of Environmental Quality (“DEQ”), collectively (“Parties”), and hereby amend the Second Stipulation and Request for Retention of Board Jurisdiction dated December 19, 2024 (“Second Stipulation”) including deadlines for renewal of Montana Groundwater Pollution Control System (MGWPCS) Permit No. MTX000164. Except as modified, superseded, or amended by this First Amendment of the Second Stipulation and Request for Retention of Board Jurisdiction (“Second Stipulation”), the Second Stipulation remains in effect.

Under the terms of this First Amendment of the Second Stipulation the Parties agree to amend the Second Stipulation as follows:

1) Recognizing a forthcoming notice of deficiency (NOD) from DEQ would require additional ambient water quality data and analyses to support increasing the daily flow limit at Outfall 001 from 52,000 gallons per day (gpd) to 100,000 gpd as requested in Alpine's application for renewal and modification of MGWPCS Permit No. MTX000164, Alpine hereby agrees to modify its application for renewal and major modification of MTX000164 to maintain the daily flow limit of 52,000 gpd at existing Outfall 001 and to seek a daily flow limit of 100,000 gpd at proposed Outfall 002; and

2) the Parties agree to stay any deadline to send an NOD to Alpine pending DEQ's renewal and modification of MTX000164 in accordance with this First Amendment of the Second Stipulation and to update the deadlines for:

(a) Alpine's submission of any supplemental information requested by DEQ to assist the agency in evaluating site specific ground water data, accurately estimating hydraulic conductivity of the aquifer, developing mixing zones, performing a nonsignificance evaluation and nondegradation review pursuant to ARM 17.30.715 and § 75-5-303, MCA, developing permit effluent limitations and conditions that will protect existing uses and the quality of the aquifer in the location of existing Outfall 001 and proposed Outfall 002;

(b) DEQ's tentative decision to renew and modify MGWPCS Permit No. MTX000164 in accordance with ARM 17.30.1024(3) and (4);

(c) DEQ's public notice of its tentative decision to renew and modify MGWPCS Permit No. MTX000164 in accordance with this First Amendment of the Second Stipulation, ARM 17.30.1024(5), and ARM 17.30.1040;

(d) DEQ's initiation of a public comment period on its tentative decision to renew and modify MGWPCS Permit No. MTX000164 in accordance with this First Amendment of the Second Stipulation and ARM 17.30.1024(6), subject to any extension of the public comment period for good cause or to accommodate a public hearing in accordance with ARM 17.30.1024(6) and (7); and

(e) DEQ's response to public comments and issuance of a final determination to renew and modify MGWPCS Permit No. MTX000164 in accordance with this First Amendment of the Second Stipulation, and ARM 17.30.1024(8) through (10).

AMENDED SECOND STIPULATION

3. DEQ received Alpine's updated application for renewal and major modification of MTX000164 on November 16, 2024. By entering this First Amendment to the Second Stipulation, Alpine hereby modifies its application for renewal and major modification of MTX000164 to maintain the daily flow limit of

52,000 gallons per day (gpd) at existing Outfall 001 and to seek a daily flow limit of 100,000 gpd at proposed Outfall 002.

4. By entering this First Amendment to the Second Stipulation, DEQ hereby determines Alpine's modified application for renewal and major modification of MTX000164 is complete and provides sufficient information to support the daily flow of 52,000 gpd at Outfall 001 and daily flow of 100,000 gpd at proposed Outfall 002.

5. Notwithstanding DEQ's determination that the modified application for renewal and major modification of MTX000164 is complete and DEQ's acknowledgement that Alpine has provided sufficient information to assist DEQ's development of a tentative decision to renew and modify MGWPCS Permit No. MTX000164 in accordance with this First Amendment to the Second Stipulation, the Parties agree to continue to cooperate by sharing any information necessary to develop the renewal and major modification of MGWPCS Permit No. MTX000164 .

6. Within 120 days of the Parties' execution of this First Amendment of the Second Stipulation, DEQ will make a tentative determination to renew and modify MTX000164 in accordance with the Montana Water Quality Act (MWQA), Title 75, chapter 5, MCA and administrative rules adopted to implement the MWQA at ARM Title 17, chapter 30. DEQ's tentative permit decision will

result in preparation of a draft MGWPCS permit, a fact sheet (briefly setting forth the factual and legal bases of the draft permit), and an environmental assessment (EA).

7. Should Alpine fail to timely provide information requested by DEQ pursuant to Paragraph 5, the 120-day timeframe in Paragraph 6 for DEQ to make a tentative determination to renew and modify MTX000164 may be suspended until DEQ receives the requested information.

8. Within 30 days of making its tentative permit decision, DEQ will give public notice of the tentative determination to renew and modify MTX000164 including draft permit, supporting fact sheet, and EA. DEQ will make the draft permit, fact sheet, and EA available for public comment for at least 30 days after the date of public notice and, if a public hearing is held, will provide no less than 30 days' notice prior to the hearing.

9. DEQ will consider and respond to substantive public comments and make a final determination to renew and modify MGWPCS Permit No. MTX000164 within 30 days after termination of the public comment period if a public hearing is not held. If a public hearing is held on the tentative determination, the department will make its final determination to renew and modify MTX000164 within 60 days following the hearing. All public comments

will be retained by the department and considered in the final determination in accordance with ARM 17.30.1024(8) through (10).

10. Upon making its final permit decision, DEQ will issue Alpine a renewal and modification of MGWPCS Permit No. MTX000164.

11. Within 30 days of DEQ's issuance of the final permit decision, Alpine will move to dismiss this Appeal with prejudice.

12. In accordance with § 75-5-403, MCA and ARM 17.30.1024(10) Alpine may request a new contested case hearing before the BER to appeal DEQ's final permit decision to renew and modify MGWPCS Permit No. MTX000164.

13. The Parties agree to continue to file Joint Status Reports with the BER every three months, beginning three months after the date the BER enters this First Amendment to the Second Stipulation and ending on the date DEQ issues a final permit decision.

14. The Parties agree Alpine may seek further modification of MTX000164 to increase the maximum permitted total discharge at Outfall 001 from 52,000 gpd to 100,000 gpd. Alpine agrees modification to increase the daily flow at Outfall 001 will require updated fate and transport modeling utilizing the QUAL2K water quality model; characterization of the existing water quality in Trumbull Creek; and characterization of the connectivity of Trumbull Creek to the receiving groundwater and the facility's effluent discharge..

15. DEQ agrees that the information to be provided in Paragraph 14 is the only outstanding information necessary to process the Outfall 001 modification from 52,000 gpd to 100,000 gpd and further, DEQ agrees that, although Alpine may be required to provide updated sampling and analysis of receiving ground water and downgradient surface water, Alpine will not have to resubmit information already deemed satisfactory by the DEQ.

16. Nothing in this First Amendment to the Second Stipulation limits DEQ's authority to review the permit renewal application, request additional information, and renew and modify MTX000164 under the MWQA, § 75-5-101, MCA et seq. and Montana administrative rules adopted under the MWQA.

17. Nothing in this First Amendment to the Second Stipulation limits Alpine from exercising any rights under the MWQA, including the right to seek further permit modifications.

18. Each of the signatories to this First Amendment to the Second Stipulation represents that he or she is authorized to enter this Stipulation and to bind the Parties represented by him or her to the terms of this Stipulation.

19. If for any reason the BER declines to enter this First Amendment to the Second Stipulation in the form presented, the terms of this Stipulation may not be used as evidence in any litigation, whether administrative or judicial, between the Parties.

20. The timeframes set forth herein may be modified for cause and by agreement between the Parties. Neither party shall unreasonably withhold their agreement to modify the timeframes.

21. This First Amendment to the Second Stipulation may only be modified or amended by written agreement executed by the Parties.

22. This First Amendment to the Second Stipulation may be signed in counterpart copies which together shall constitute a fully executed agreement.

ENTRY OF STIPULATION

The Parties request that the BER enter this First Amendment to the Second Stipulation.

This First Amendment to the Second Stipulation is hereby entered and the BER agrees to retain jurisdiction as described above and orders the Parties to proceed in compliance with the terms described herein.

Dated this ____ day of _____, 2025.

David Simpson
BER Chairman

The Parties, by their respective counsel, hereby consent to the terms and conditions of the First Amendment to the Second Stipulation as set forth above and consent to the entry thereof.

Dated this 21st day of March,
2025.

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

ATTORNEY FOR THE DEPARTMENT OF
ENVIRONMENTAL QUALITY

Dated this 21st day of March,
2025.

/s/ Rick C. Tappan
Rick C. Tappan
Tappan Law Firm, PLLC
7 West 6th Avenue, Suite 516
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(406) 449-3383

ATTORNEY FOR ALPINE PACIFIC
UTILITIES, LLC

CERTIFICATE OF MAILING

I hereby certify that on this 21st day of March, 2025, I caused to be served a true and correct copy of the foregoing document and any attachments to all parties or their counsel of record as set forth below:

Secretary, Board of Environmental Review Montana Department of Environmental Review P.O. Box 200901 Helena, MT 59620-0901 Sandy.MoiseyScherer@mt.gov	<input type="checkbox"/> U.S. Mail <input type="checkbox"/> Overnight Mail <input type="checkbox"/> Hand Delivery <input type="checkbox"/> Facsimile <input checked="" type="checkbox"/> E-Mail
Terisa Oomens, Hearing Examiner Agency Legal Services Bureau 1712 Ninth Avenue P.O. Box 201440 Helena, MT 59620-1440 Terisa.Oomens@mt.gov	<input type="checkbox"/> U.S. Mail <input type="checkbox"/> Overnight Mail <input type="checkbox"/> Hand Delivery <input type="checkbox"/> Facsimile <input checked="" type="checkbox"/> E-Mail
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/s/ Catherine Armstrong
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By: Sandy Moisey Scherer
Docket No: BER 2019-06 WQ

ATTORNEY FOR DEQ

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

<p>IN THE MATTER OF:</p> <p>THE NOTICE OF APPEAL AND REQUEST FOR HEARING BY ALPINE PACIFIC UTILITIES REGARDING ISSUANCE OF MGWPCS PERMIT NO. MTX000164</p>	<p>CAUSE NO. BER 2019-06 WQ</p> <p>DEQ's STATUS REPORT</p>
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This Status Report is presented by the Montana Department of Environmental Quality (“DEQ”) in response to the Montana Board of Environmental Review’s (“BER”) January 16, 2026 Order Requesting Status Report. On September 19, 2025, Appellant Alpine Pacific Utilities, LLC (“Alpine”) and the Montana Department of Environmental Quality (“DEQ”) filed a Joint Status Report. *See Document Sequence No. 52.* The September 19, 2025 Joint Status Report informed the BER that on December 19, 2024, Alpine and DEQ entered a Second Stipulation and Request for Retention of Board Jurisdiction (“Second Stipulation”) to revise and update the Stipulation and Request for Retention of Board Jurisdiction dated

September 14, 2020 (“First Stipulation”). On March 21, 2025, Alpine and DEQ jointly filed the First Amendment of the Second Stipulation and Request for Retention of Board Jurisdiction to modify Alpine’s application for renewal and major modification of MTX000164 to maintain the daily flow limit of 52,000 gallons per day (gpd) at existing Outfall 001 and to seek a daily flow limit of 100,000 gpd at proposed Outfall 002. *See* Document Sequence No. 49. Hereinafter, Alpine and DEQ are referred to collectively as “the Parties.”

The following is DEQ’s report on the status of this matter since the September 19, 2025 Joint Status Report:

1. On September 24, 2025, DEQ issued and provided written notice to Alpine of the final renewal and modification of Montana Ground Water Pollution Control System (MGWPCS) Permit No. MTX000164 (“the 2025 Permit”). The 2025 Permit went into effect on October 1, 2025.
2. DEQ received no comments from the public or from Alpine during the public comment period on the tentative 2025 Permit.
3. Alpine did not request further contested case hearing or appeal before the BER pursuant to §75-5-403, Montana Code Annotated (MCA) and Administrative Rules of Montana (ARM) 17.30.1024(10).
4. Under the First Amendment of the Second Stipulation and Request for Retention of Board Jurisdiction, Paragraph 11, Alpine agreed to move to

dismiss this appeal within 30 days of DEQ's issuance of the final permit decision, which would have required a motion to dismiss by October 24, 2025.

5. In accordance with Paragraph 11 of the First Amendment of the Second Stipulation and Request for Retention of Board Jurisdiction, DEQ, by and through its undersigned counsel, respectfully asserts the above-captioned matter is now fully resolved and should be dismissed with prejudice pursuant to DEQ's Motion to Dismiss with Prejudice filed herewith.

Dated this 4th day of February, 2026.

Montana Department of Environmental Quality

By: /s/ Kirsten H. Bowers

Kirsten H. Bowers

Attorney for DEQ

CERTIFICATE OF SERVICE

I hereby certify that on this 4th day of February, 2026, I caused to be served a true and correct copy of the foregoing document to all parties or their counsel of record as set forth below:

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On December 19, 2024, Appellant Alpine Pacific Utilities, LLC (“Alpine”) and the Montana Department of Environmental Quality (“DEQ”) entered a Second Stipulation and Request for Retention of Board Jurisdiction (“Second Stipulation”) to revise and update the Stipulation and Request for Retention of Board Jurisdiction dated September 14, 2020 (“First Stipulation”). *See* Doc. Seq. No. 46. On March 21, 2025, Alpine and DEQ jointly filed the First Amendment of the Second Stipulation and Request for Retention of Board Jurisdiction to modify Alpine’s application for renewal and major modification of MTX000164 to

maintain the daily flow limit of 52,000 gpd at existing Outfall 001 and to seek a daily flow limit of 100,000 gpd at proposed Outfall 002. *See* Doc. Seq. No. 49. Hereinafter, Alpine and DEQ are referred to collectively as “the Parties.”

The Parties proceeded to renew and modify Montana Ground Water Pollution Control System (MGWPCS) Permit No. MTX000164 (“the Permit”) to maintain the permitted discharge at Outfall 001 at 52,000 gallons per day (gpd) and permit new outfall (002), within the Glacier Park International Airport (“GPIA”) property, at up to 100,000 gpd.

Because Alpine’s request for modification of the Permit did not provide the final location and shape of the drain fields at GPIA, DEQ could not authorize 100,000 gpd at proposed Outfall 002. DEQ’s ground water permitting section provided the discharge volume supported by Alpine’s proposed location and shape/orientation of three separate drain fields. *See* DEQ’s Status Report filed herewith.

Upon final engineering approval, which should provide the final location and orientation of the drain fields at GPIA, Alpine may request a modification of the Permit to increase the discharge volume. A modification of the Permit would be a new permitting action, and Alpine would have the right to initiate a new BER appeal if they are not satisfied with DEQ’s decision. *See* § 75-5-403, Montana Code Annotated (MCA).

DEQ publicly noticed its tentative decision on the renewal and modification of MTX000164 on August 18, 2025, for a period of 30 days. DEQ received no comments from the public or from Alpine during this 30-day public comment period. The final permit was issued on September 24, 2025, and became final on October 1, 2025.

The time to appeal the Permit to the BER has passed, and Alpine's current Permit appeal should be dismissed. *See* 75-5-403(2)(a), MCA (If the department denies an application for a permit, issues a permit, or modifies a permit, the department shall give written notice of its action to the applicant or holder. Within 30 days of the department's decision, the applicant or holder may request a hearing before the board for the purpose of petitioning the board to reverse or modify the action of the department . . .), *See also* Administrative Rule of Montana (ARM) 17.30.1024 and 17.30.1035. Additionally, in accordance with Paragraph 11 of the First Amendment of the Second Stipulation and Request for Retention of Board Jurisdiction, Alpine stipulated and agreed to dismiss the above-captioned appeal with prejudice thirty days after DEQ's issuance of its final permit decision. DEQ provided written notice of its final action on the Permit on September 24, 2025, and the time for appeal has expired.

For the reasons set forth above and in DEQ's Status Report, DEQ respectfully requests that the Board dismiss this Appeal with prejudice.

Dated this 4th day of February, 2026.

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

CERTIFICATE OF SERVICE

I hereby certify that on this 4th day of February, 2026, I caused to be served a true and correct copy of the foregoing document to all parties or their counsel of record as set forth below:

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Wednesday, February 4, 2026

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2/4/26 at 4:59 PM
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Docket No: BER 2019-06 WQ

Distinguished Board Members,

This firm represents Alpine Pacific Utilities, LLC (“Alpine”) regarding the modification of the Montana Ground Water Pollution Control System (“MGWPCS”) Permit No. MTX000164 for the Glacier Ranch Subdivision and the Glacier Park International Airport facilities. Alpine respectfully submits this letter to request reconsideration and correction of the design capacity limits included in the permit and related materials.

On August 11, 2025, Montana Department of Environmental Quality (“DEQ”) sent Alpine the draft permit. Oddly, DEQ did not grant Alpine the capacities it requested—and DEQ stipulated too—for its permit’s outfalls (specifically, daily flow of 52,000 gallons per day (“gpd”) at Outfall 001 and daily flow of 100,000 gpd at proposed Outfall 002). On August 13, 2025, Alpine, through counsel, provided comment to DEQ via electronic mail providing notice to DEQ of the issues and to reserve the jurisdiction of the Environmental Review Board (“ERB”). Alpine at no point in this process agreed to dismiss the jurisdiction of ERB or agreed to DEQ’s failure to adhere to the stipulation and issue the permit for the agreed outfall capacities.

Alpine is entitled to the originally requested maximum discharge volumes for the airport outfalls. The reduced outfall limits ultimately approved by DEQ are inconsistent with the application materials, the environmental review record, and the process through which this project advanced through DEQ review and Environmental Review Board proceedings, including explicit acknowledgement by DEQ that the requested outfall discharge rates were acceptable.

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I. BACKGROUND AND PERMITTING HISTORY

Alpine applied to modify its existing MGWPCS permit to allow its centralized wastewater treatment system to treat and dispose of wastewater generated by the Glacier Park International Airport through additional subsurface drainfields located on airport property. The application materials contemplated expansion of the system through new outfalls in addition to continued operation of the existing Glacier Ranch Subdivision drainfield.

DEQ agreed and stipulated:

By entering the First Amendment to the Second Stipulation, DEQ hereby determines Alpine's modified application for renewal and major modification of MTX000164 is complete and provides sufficient information to support the daily flow of 52,000 gpd at Outfall 001 and daily flow of 100,000 gpd at proposed Outfall 002. (emphasis added).

DEQ's own Fact Sheet confirms that Alpine's application proposed approximately 100,000 gpd of new design capacity for the airport drainfields, based on the submitted layout and acreage of the proposed infiltration areas. The Fact Sheet further explains that the purpose of the modification was to increase overall capacity to accommodate airport flows, while maintaining the existing subdivision capacity and protecting groundwater quality.

Throughout DEQ's technical review and the environmental assessment process, Alpine worked closely with DEQ staff, provided responsive information, and participated in the procedural steps required for environmental review. The Environmental Assessment prepared by DEQ describes the proposed action as issuance of a modified MGWPCS permit authorizing discharge of treated wastewater associated with the Glacier Ranch Subdivision and the Glacier Park International Airport. Further, the assessment evaluated potential environmental effects on the premise that the modified permit would provide a regulatory mechanism for authorizing and controlling the discharges.

Likewise, DEQ's determination letter transmitted the draft permit, fact sheet, and environmental documents for public notice and comment, and advised Alpine and interested parties that the Department had made a determination to reissue and modify the MGWPCS permit for the proposed wastewater discharge associated with the Glacier Ranch Subdivision and airport facilities. However, the DEQ only provided for a capacity of 22,000 gpd at Outfall 002 and added an Outfall 003 with a capacity of 45,600 gpd, falling short of the stipulated capacity of 100,000 gpd by 32,400 gpd. Outfall 004 was also added by DEQ and simultaneously deemed

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unfit for any discharges. Further, and without explanation, DEQ did not size the drainfield based on level two treatment and instead use the lowest application rate used by DEQ (i.e, 0.075 gpd per square foot). Alpine submitted its application using a 0.4 gpd per square foot rate based upon samples collected and submitted with the application. At no point during this process did DEQ draw issue with the samples and rate submitted by Alpine. DEQ's change in absorption rate represent an approximate 81% reduction to the submitted rate with no evidence or reason let alone any discussion with Alpine regarding the change.

During this process, Alpine reasonably understood—based on DEQ's communications, the content of the environmental documents, and the progression of the matter through environmental review and Board consideration—that the airport expansion as proposed, including the requested design capacities of 52,000 gpd at Outfall 001 and 100,000 gpd at Outfall 002, was the project being evaluated and advanced. However, rather than grant the stipulated capacities or reach out for additional information, DEQ breached its obligations under the stipulation and failed to grant the requested capacities with little to no reason.

II. DEPARTURE REFLECTED IN THE PERMIT

Despite that history, the permit and supporting Fact Sheet reflect a significant departure from the project Alpine proposed and that DEQ evaluated and agreed to authorize. Instead of authorizing the new airport drainfields at the design capacities requested in the application, DEQ reduced the approved airport capacity to approximately 67,600 gpd, limited authorization to only certain portions of the proposed drainfield areas and excluded other areas entirely. DEQ also reduced the soil absorption rate in Alpine's application with no reason or evidence where Alpine's absorption rate was based upon soil samples submitted with the application.

The Fact Sheet indicates that these reductions were based largely on the absence of a preliminary engineering report, concerns regarding setbacks, groundwater flow direction, nearby wells, and property boundaries, and the need for further engineering review. Alpine understands and appreciates the importance of those considerations. However, those issues are the very matters that are typically addressed through the engineering review and design approval process, not through permanent or near-permanent reductions in authorized discharge capacity.

In Alpine's view, the permit converts what should be engineering conditions and siting refinements into substantive limitations on the scope of the permitted project. Additionally, DEQ agreed via stipulation that Alpine's application was complete and provided sufficient information to support the requested outfall daily flows.

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The reduced outflow outcome is inconsistent with the framework reflected in the application, environmental documents, and stipulated agreement with DEQ, all contemplating that detailed layout, setbacks, and final design parameters would be addressed as engineering materials are developed and reviewed.

III. BASIS FOR ALPINE'S REQUEST

Alpine respectfully submits that reconsideration of the entire requested capacity is warranted for several related reasons:

- First, the environmental review evaluated a project based on Alpine's proposed expansion to serve the airport, including the scale of that expansion. Substantially reducing the authorized volumes alters the project that was reviewed and that formed the basis for DEQ's conclusion that issuance of a modified permit was appropriate.
- Second, Alpine relied in good faith on DEQ's representations and on the advancement of the project through environmental review and Board processes in continuing to plan and invest in the airport wastewater expansion. The reduced limits reflected in the permit were not anticipated by Alpine and are inconsistent with the way the project had been framed during review.
- Third, DEQ's own documents indicate that the principal concerns giving rise to the reductions relate to engineering, siting, and data gaps—not to a determination that the originally requested design capacities are environmentally unsupportable. Alpine remains prepared to address those matters through submission of engineering reports, groundwater evaluations, and revised layouts, as is customary in MGWPCS permitting.

For these reasons, Alpine believes the permit should be corrected so that it authorizes the airport outfalls at the originally requested maximum volumes, with appropriate conditions requiring completion and approval of engineering submittals before construction and operation of specific drainfield areas.

IV. REQUESTED ACTION

Alpine therefore respectfully requests that DEQ and the Environmental Review Board:

1. Reconsider the reduced airport outfall capacities contained in the permit and supporting documents;

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2. Restore the originally requested maximum design capacities for the airport outfalls as set forth in Alpine's application materials;
3. Issue a corrected permit reflecting those capacities; and
4. Confirm that remaining issues related to drainfield layout, setbacks, groundwater characterization, and final design will be addressed through the engineering review and approval process, rather than through categorical capacity and absorption reductions.

Alpine remains committed to working cooperatively with DEQ and the Board to resolve any outstanding technical issues and to ensure that the corrected permit both protects water quality and allows the airport expansion to proceed in a manner consistent with the project that has been evaluated. However, Alpine also requests this issue move towards a contested case hearing to resolve DEQ's arbitrary and capricious changes and failure to follow the stipulation.

Regards,

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Attorneys for Alpine Pacific Utilities

**BEFORE THE BOARD OF ENVIRONMENTAL REVIEW
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<p>IN THE MATTER OF:</p> <p>THE NOTICE OF APPEAL AND REQUEST FOR HEARING BY ALPINE PACIFIC UTILITIES REGARDING ISSUANCE OF MGWPCS PERMIT NO. MTX000164</p>	<p>CAUSE NO. BER 2019-06 WQ</p> <p>ALPINE PACIFIC UTILITIES’ RESPONSE TO DEQ’S MOTION TO DISMISS</p>
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COMES NOW Applicant Alpine Pacific Utilities, LLC (“Alpine”), by and through counsel, respectfully submits this Response opposing the Montana Department of Environmental Quality’s (“DEQ”) Motion to Dismiss With Prejudice. DEQ’s motion attempts to terminate this proceeding despite the parties’ binding settlement agreement expressly preserving the jurisdiction of the Board of Environmental Review (“Board” or “BER”) and despite DEQ’s failure to implement the agreed permit terms. DEQ’s request should be denied because it rests on a fundamentally incorrect premise: that DEQ may depart from the settlement, issue a materially different permit, and then extinguish Board jurisdiction before that dispute may be reviewed. Montana law does not permit such a result.

I. INTRODUCTION

This case does not present a routine expired permit appeal. Rather, it presents a situation in which DEQ: (1) entered a negotiated stipulation resolving disputed permitting issues while expressly retaining BER jurisdiction; (2) subsequently issued a permit inconsistent with that settlement; and (3) now seeks dismissal to prevent Board review of its departure from the agreement. The Board's retained jurisdiction exists precisely for this circumstance. DEQ's motion asks the Board to relinquish jurisdiction at the very moment it is needed to enforce the parties' stipulation and resolve whether DEQ complied with it. Granting dismissal would convert the settlement process into a procedural trap—forcing Alpine to restart an entirely new appeal merely to regain jurisdiction the Board already possesses. Therefore, DEQ's Motion to Dismiss should be denied.

II. BACKGROUND

i. The Parties Settled the Permit Dispute While Retaining BER Jurisdiction

The parties entered the Second Stipulation and Request for Retention of Board Jurisdiction, later amended, to resolve disputes concerning MGWPCS Permit No. MTX000164. Critically, DEQ expressly determined in the stipulation that Alpine's modified application: "provides sufficient information to support the daily flow of 52,000 gpd at Outfall 001 and daily flow of 100,000 gpd at proposed Outfall 002." The settlement therefore resolved the central dispute regarding allowable discharge capacity. The purpose of retaining BER jurisdiction was straightforward: to ensure implementation of the agreed resolution.

ii. DEQ Issued a Permit Contrary to the Settlement

Despite stipulating that Alpine's application supported 100,000 gpd at Outfall 002, DEQ issued a permit authorizing substantially reduced capacity—approximately 67,600 gpd, while altering absorption assumptions and drainfield treatment parameters without explanation. DEQ's

reductions were not based on the determination that the agreed discharge volumes were environmentally unsupportable. Instead, DEQ identified issues typically addressed during engineering review, such as siting refinement and additional design information. As Alpine informed both DEQ and the Board, these engineering matters were always understood to be post-permit implementation issues—not grounds to abandon the stipulated limits.

iii. Alpine Never Agreed to Relinquish BER Jurisdiction

Alpine expressly notified DEQ that it did not agree to dismissal where the issued permit failed to reflect the stipulated capacities and reserved Board jurisdiction accordingly. DEQ nevertheless now argues the appeal must be dismissed because Alpine should instead pursue a new permit modification and a new appeal. That position contradicts both the settlement and basic administrative law principles.

III. ARGUMENT

i. The Board Retains Jurisdiction due to DEQ’s Noncompliance With the Settlement Agreement

Settlement agreements in Montana administrative proceedings are binding contracts. *Miller v. Fallon County*, 222 Mont. 214, 218, 721 P.2d 342, 345 (“a settlement agreement is a contract and its construction and enforcement are governed by the principles of contract law”); *see e.g. Pinnow v. Mont. State Fund*, 2007 MT 332, ¶ 37, 340 Mont. 217, 172 P.3d 1273; *State v. Skyline Broads., Inc.*, 2009 MT 193, ¶ 19, 351 Mont. 127, 211 P.3d 189 (all allowing enforcement of stipulations with state agencies). Agencies, like private parties, must comply with negotiated stipulations entered into during contested proceedings. Here, BER jurisdiction was expressly retained to oversee implementation of the settlement resolving Alpine’s permit dispute. DEQ cannot simultaneously rely on the stipulation to demand dismissal while disregarding its substantive obligations under that same agreement. The stipulated finding—that Alpine’s

application supported discharge of 100,000 gpd—was not conditional upon later engineering redesign. Rather, engineering review was anticipated as part of implementation. DEQ’s issuance of a materially different permit constitutes a live dispute arising directly from the settled appeal and contradicts its own statement: Alpine “provide[d] sufficient information to support the daily flow of 52,000 gpd at Outfall 001 and daily flow of 100,000 gpd at proposed Outfall 002.” Now DEQ argues that location data was not provided by Alpine so DEQ was unable to follow the stipulation.

The question before the board is not whether the issued permit was commented on, the question is whether DEQ followed the settlement entered into under this Board’s authority and whether DEQ has breached that agreement by misrepresenting it had all the necessary information to grant Alpine’s permit in accordance with the settlement. Because the dispute concerns compliance with the stipulation itself, the Board’s retained jurisdiction remains active. Dismissal would improperly allow one party to unilaterally defeat a settlement after obtaining its procedural benefits.

ii. DEQ’s Proposed Remedy is Redundant

The Board agreed in adopting the Second Stipulation that: “BER agrees to retain jurisdiction as described above and orders the Parties to proceed in compliance with the terms described herein.” *Supra*, at 10. DEQ proposes that Alpine must: (1) seek a future permit modification; and (2) file an entirely new BER appeal if dissatisfied. DEQ’s remedy is legally and practically flawed. The parties already invoked BER jurisdiction and expressly preserved it. Requiring Alpine to recreate jurisdiction through a second appeal would multiply administrative proceedings, delay resolution of the same dispute, and reward noncompliance with settlement obligations. Administrative tribunals routinely retain jurisdiction precisely to avoid repetitive

litigation following settlement implementation disputes. DEQ's position would render such provisions meaningless.

iii. DEQ Provides No Legal Basis Allowing Repudiation of the Parties' Agreement

DEQ's motion is notable for what it does not contain. While DEQ asserts that final engineering information had not yet been completed at the time the permit issued, it offers no legal explanation for why that circumstance authorizes the Department to depart from the settlement agreement reached by the parties. The record demonstrates that DEQ expressly stipulated that Alpine's modified application was complete and contained sufficient information to support discharge limits of 52,000 gallons per day at Outfall 001 and 100,000 gallons per day at proposed Outfall 002. Having made that determination as part of a negotiated resolution of a pending contested case, DEQ cannot now recast routine engineering refinement as justification for materially altering the agreed permit limits.

The permitting history confirms that the project advanced through environmental review and Board proceedings on the understanding that the stipulated discharge capacities defined the scope of the authorized expansion. The concerns later cited by DEQ—relating to drainfield configuration, setbacks, groundwater characterization, and additional design detail—are matters traditionally addressed during engineering review and implementation of an approved permit. They do not constitute a determination that the stipulated discharge volumes were environmentally unsupportable or legally impermissible. Instead, DEQ effectively converted issues anticipated to be resolved through subsequent engineering submissions into permanent reductions of authorized capacity.

Nothing in DEQ's motion identifies statutory authority allowing the Department to agree that an application supports specified discharge limits, secure dismissal of an appeal based upon that agreement, and then issue a materially different permit while insulating that decision from

Board review. Nor does DEQ contend that Alpine failed to comply with the stipulation, that performance became impossible, or that new environmental information rendered the agreed limits unlawful. Rather, DEQ's position would require Alpine to initiate an entirely new permitting process merely to obtain what the Department had already agreed was supported by the application record. In short, DEQ has provided no legal or factual basis demonstrating that it may disregard the settlement terms while simultaneously seeking dismissal of the proceeding through which those terms were negotiated and preserved.

iv. **Fairness and Equity Support BER's Continued Jurisdiction**

Retention of Board jurisdiction is particularly appropriate here because Alpine reasonably relied upon DEQ's representations and the parties' stipulation as the dispute progressed through the administrative process. The settlement resolved contested issues concerning allowable discharge capacity and allowed the project to proceed through environmental review with the shared understanding that the stipulated limits defined the approved expansion subject to normal engineering development. Alpine continued planning and investment in reliance on that framework and on the expectation that the Board retained authority to resolve any disagreement concerning implementation of the agreement.

Allowing dismissal under these circumstances would undermine the purpose of negotiated resolutions in administrative proceedings. Settlement agreements serve an important function in conserving agency and party resources, narrowing disputes, and promoting efficient regulatory outcomes. Those objectives cannot be achieved if one party may later depart from agreed terms and eliminate the tribunal's jurisdiction before compliance with the agreement can be reviewed. Such a result would discourage settlement in future Board proceedings and introduce uncertainty into negotiated administrative outcomes across Montana regulatory practice. The Board's retained jurisdiction ensures that disputes arising from implementation of a

settlement may be resolved within the existing contested case rather than through duplicative proceedings. Maintaining jurisdiction here promotes efficiency, fairness, and orderly administration while preserving the Board's role as the forum designated by the parties themselves to oversee resolution of this matter.

IV. CONCLUSION

DEQ's Motion to Dismiss seeks termination of this proceeding despite the existence of an unresolved dispute concerning DEQ's compliance with the parties' settlement agreement and despite the Board's expressly retained jurisdiction over that agreement. The Department issued a permit that materially departs from the discharge limits it previously stipulated were supported by Alpine's application and now attempts to characterize the resulting dispute as requiring an entirely new permitting action and appeal. That position is inconsistent with the purpose of the stipulation, contrary to principles governing administrative settlements, and incompatible with the Board's continuing authority over this matter. The controversy before the Board does not concern a routine expiration of appeal rights but instead concerns whether DEQ implemented the settlement that resolved this contested case. Because that issue falls squarely within the jurisdiction the Board agreed to retain, dismissal would be premature and would improperly foreclose review of DEQ's actions. For these reasons, Alpine respectfully requests that the Board deny DEQ's Motion to Dismiss, confirm that jurisdiction remains with the Board, and allow this matter to proceed so that the parties' stipulation and the permit issued pursuant to it may be properly reviewed and enforced.

DATED this 25th day of February, 2026.

TAPPAN LAW FIRM, PLLC

/s/ Rick C. Tappan
Rick C. Tappan

Connlan W. Whyte

Attorneys for Alpine Pacific Utilities, LLC

CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing *Response to DEQ's Motion to Dismiss* was filed with the Environmental Review Board and served on this 25th day of February 2026, upon the following:

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BEFORE THE BOARD OF ENVIRONMENTAL REVIEW
OF THE STATE OF MONTANA

<p>IN THE MATTER OF:</p> <p>THE NOTICE OF APPEAL AND REQUEST FOR HEARING BY ALPINE PACIFIC UTILITIES REGARDING ISSUANCE OF MGWPCS PERMIT NO. MTX000164</p>	<p>CASE NO. BER 2019-06 WQ</p> <p>ORDER SETTING ORAL ARGUMENT FOR JUNE BOARD MEETING</p>
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On January 16, 2026, the undersigned issued an Order Requesting Status Report. On February 4, 2026, the DEQ filed a status report and a Motion to Dismiss. The DEQ's Motion to Dismiss is fully briefed. The Board will hear oral argument on the DEQ's Motion to Dismiss at its June 26, 2026, meeting. Counsel for the parties will each have 15 minutes to present oral argument and 5 minutes for rebuttal and surrebuttal respectively. Video conferencing information and the agenda for the June meeting can be found on the Board's website one week ahead of the meeting.

DATED this 11th day of June, 2026.

/s/ David Simpson

David Simpson, Chairman

Montana Board of Environmental Review

CERTIFICATE OF SERVICE

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

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