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BEFORE THE BOARD OF ENVIRONMENTAL REVIEW  
OF THE STATE OF MONTANA

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IN THE MATTER OF: NOTICE OF ) CASE NOS.  
APPEAL BY RIPPLING WOODS ) BER 2019-08  
HOMEOWNERS ASSOCIATION, ET AL., ) through 21 OC  
REGARDING APPROVAL OF OPENCUT )  
MINING PERMIT NO. 2949, MOUDY )  
PIT SITE, RAVALLI COUNTY, MT )

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ORAL ARGUMENT (VIA ZOOM)

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February 16th, 2024  
9:15 a.m.

BEFORE CHAIRMAN DAVID SIMPSON,  
BOARD MEMBERS JON REITEN, JOSEPH SMITH,  
STACY AGUIRRE,  
and JENNIFER RANKOSKY

PREPARED BY: LAURIE CRUTCHER, RPR  
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A P P E A R A N C E S

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ATTORNEY APPEARING ON BEHALF OF THE APPELLANTS:

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1           WHEREUPON, the following proceedings were  
2 had:

3                           \* \* \* \* \*

4           CHAIR SIMPSON: We will now move into  
5 Item (b), in the Matter of the Notice of Appeal by  
6 the Rippling Woods Homeowners Association, et.  
7 al., regarding approval of opencut mining permit  
8 No. 2949, Moudy Pit site, Ravalli County, Montana,  
9 BER 2019-08 through 21 OC. I believe the parties  
10 are represented here. Is that the case?

11           MR. BLOOMQUIST: Mr. Chairman, this is  
12 John Bloomquist, attorney representing the  
13 Appellants in the matter. I'm present.

14           CHAIR SIMPSON: Thank you.

15           MS. WHITFIELD: This is Kaitlin  
16 Whitfield with DEQ, and I'm also present.

17           CHAIR SIMPSON: Thank you. What I'd  
18 like to do here is proceed with statements from  
19 the parties, allocating fifteen minutes for each.  
20 What I suggest is ten minutes to review your  
21 position, and five minutes for rebuttal. I'll  
22 start with the Petitioners.

23           MR. BLOOMQUIST: Thank you, Mr.  
24 Chairman, members of the Board. Again, my name is  
25 John Bloomquist. I'm an attorney from Helena here

1 on behalf of the Appellants.

2 This matter involves a very protracted  
3 appeal filed in October of 2019 regarding issuance  
4 by DEQ of a gravel permit in Ravalli County in the  
5 Victor area. The Board has had an opportunity, I  
6 assume, to see the findings of fact and the  
7 exceptions filed by the various parties.

8 The record in this matter is voluminous,  
9 and the record in this matter is important because  
10 the record will demonstrate that the DEQ decision  
11 to issue the Moudy permit violated the law, in  
12 particular the Opencut Mining Act at 82-4-434 Sub  
13 (2) sub(1), which was in place at the time this  
14 permit application was considered, and required  
15 DEQ to protect ground and surface water resources  
16 from deterioration consistent with State law,  
17 which may be affected by opencut mining  
18 activities.

19 We have numerous exhibits which we have  
20 cited in the exceptions. I want to go through  
21 just through a few of those. I'm not sure we're  
22 going to be able share the screen or not.

23 But the setting of this particular  
24 application is important. The Moudy gravel pit is  
25 situated near Victor, Montana, directly adjacent,

1 within 200, 250 feet of a stream called Big Creek.  
2 Big Creek is home to various fish species,  
3 including to protect bull trout, but more  
4 importantly is the source of irrigation water for  
5 numerous water users along the source. The Moudy  
6 site is in direct proximity to Big Creek, various  
7 wells and homes in the area.

8 And public comment, which is in the  
9 record of this matter -- I would refer you to  
10 Exhibits 4 through 6. I'm not going to pull those  
11 up. But if you review the record, Exhibits 4  
12 through 6 are the public comment.

13 And early on in this matter, it was  
14 brought to the attention of the Department that  
15 given the high groundwater table at the site where  
16 Moudy was proposing to mine gravel, and the direct  
17 proximity of that groundwater to Big Creek, was of  
18 utmost concern, not only to water users in the  
19 area, but other residents.

20 And in fact early on, the importance of  
21 assessing groundwater and surface water impacts  
22 was initially a concern of DEQ, and was of the  
23 utmost importance to the agency. And I don't know  
24 if Ms. Reichert, Marlana, if you're on the line,  
25 if you can pull up Exhibit 17 or not. I would

1 appreciate that. I'll continue. Perhaps we're  
2 not going to be able to share.

3 But Exhibit 17, Mr. Chairman and members  
4 of the Board, is the Water Resource Assessment  
5 guidelines and requirements promulgated --

6 BOARD MEMBER SMITH: Is this exhibit in  
7 the FOFCOL?

8 MR. BLOOMQUIST: Yes, it is. It was  
9 referred to -- It is in the record of the FOFCOL,  
10 yes. Exhibit 17 was one of the exhibits produced  
11 to the Hearing Examiner, and has been cited in our  
12 exceptions.

13 Exhibit 17, the Water Resources  
14 Assessment, are the requirements that DEQ  
15 promulgated for applicants to follow and to  
16 demonstrate that the surface water and the  
17 groundwater resources would be given appropriate  
18 protection.

19 In this particular matter, very early  
20 on, DEQ referred the Applicant to the requirements  
21 of the Water Resources Assessment, Exhibit 17.  
22 And I would, as you review this matter and the  
23 exceptions to this matter, request that each Board  
24 member review Exhibit 17, and observe the  
25 requirements that DEQ was informing the Applicant

1 were necessary for purposes of complying not only  
2 with the statute, but also DEQ's rules,  
3 particularly 17.24.218 sub (1) sub(h).

4           And within the Water Resources  
5 Assessment and the guidelines, DEQ listed what was  
6 expected of the Applicant in assessing the water  
7 resources in the area, in particular groundwater  
8 and surface water; and in particular highlighting  
9 concerns for impacts to water rights in the area;  
10 and in particular irrigation ditches which run  
11 directly adjacent and through the Moudy site.

12           In particular, you will hear reference  
13 to the Park Hill Ditch. That ditch, as shown in  
14 the FOFCOL on Page 3 in the map, runs directly  
15 adjacent to the west boundary and the south  
16 boundary of the Moudy site.

17           Exhibit 8 of the hearing exhibits, which  
18 is also referred to in the FOFCOL and in our  
19 exceptions, were deficiency letters issued by DEQ  
20 to the Moudy application. And in particular, as  
21 of August 14th, 2019, almost a month prior to DEQ  
22 issuing its approval of Permit 2949, DEQ  
23 specifically identified numerous exceptions and  
24 numerous deficiencies in the Water Resources  
25 Assessment that had been tendered by the

1 Applicant's consultant Tetrattech.

2 And I would implore members of the Board  
3 to review Exhibit 8, in particular the August  
4 14th, 2019 exceptions. And if you go to Page 2 of  
5 Exhibit 8, you will see under Item C, 1-4,  
6 numerous deficiencies, which continue on to the  
7 next page, that DEQ had found regarding  
8 information provided by the applicant in a Water  
9 Resources Assessment which was dated February 8th,  
10 2019. That is Exhibit 21 in the record of this  
11 matter.

12 And as seen on Page 2 and Page 3, DEQ  
13 was informing the Applicant that the Water  
14 Resources Assessment which was tendered February  
15 8th, 2019 does not provide the information  
16 required by the Department for the Water Resources  
17 Assessment.

18 In particular, if you go to Page 3, it  
19 was explained to the Applicant that the  
20 description of the groundwater aquifer in the area  
21 was incomplete, and was inconsistent with the  
22 analysis and the information that was provided;  
23 and importantly, there was no cross-sections or  
24 explanation of the interaction with Big Creek  
25 regarding the groundwater in the area that was to



1 be mined, nor was there any indication or  
2 depiction or explanation of impacts on irrigation  
3 ditches.

4 As DEQ stated, "Big Creek and the  
5 irrigation ditches will have significant impacts  
6 on the interpretation. The irrigation ditches and  
7 creek will act as constant head boundaries, and it  
8 will have a profound effect on the behavior of the  
9 system." This was in August 14th, 2019.

10 In response to the deficiency, on  
11 September 27th, 2019, Tetrattech, on behalf of the  
12 Applicant, submitted another Water Resources  
13 Assessment which is Exhibit 32. And Ms. Reichert,  
14 if you could pull up Exhibit 32.

15 Exhibit 32, Mr. Chairman and members of  
16 the Board, is a revised Water Resources Assessment  
17 by Tetrattech. And if you go to Page 5, you'll see  
18 two headings in the, quote, "Water Resources  
19 Assessment" provided by the Applicant. One  
20 heading is nearby water wells and water rights,  
21 where it is explained that Tetrattech searched the  
22 GWIC data base for wells within 1,000 feet in the  
23 area.

24 Now, that is directly contrary to what  
25 was requested by DEQ, not only in the Water

1 Resources Assessment guidelines, but also in the  
2 deficiency letter issued to the Applicant, which  
3 stressed that the Applicant was required to  
4 identify wells, all wells, within 1,000 feet, and  
5 locate those wells -- not simply use the GWIC data  
6 base, which the record in this matter indicates is  
7 insufficient for identifying the location of  
8 wells.

9 But most importantly, here, if you read  
10 the probable effects analysis, this is the  
11 Tetrattech explanation of effects of mining gravel  
12 in the area, and the impacts that mining would  
13 have on area groundwater and surface water  
14 sources.

15 The explanation is, as is shown,  
16 Paragraph 1, "No dewatering will occur. It will  
17 be necessary to extract the sand and gravel  
18 reserves within the permitted area, and the year  
19 around pond will not be used for any beneficial  
20 use as regulated by DNRC. Therefore no adverse  
21 effects on nearby surface water sources or  
22 groundwater well water rights are expected."

23 That's the analysis, Mr. Chairman and  
24 members of the Board, that the Applicant provided  
25 DEQ in response to the obligations under the Water

1 Resource Guidelines, and in response to the  
2 deficiency letters tendered by the agency on the  
3 deficiencies of the Water Resources Assessment.

4 The difference -- and this is in the  
5 record as well -- between the September 27th, 2019  
6 Water Resources Assessment, which was ultimately  
7 determined to be acceptable by the Department, and  
8 the prior February 2019 analysis, as DEQ's  
9 hydrologist testified -- and I refer you to  
10 Exhibit 28, Page 53, Lines 1 through 22. We won't  
11 need to pull those up.

12 But when asked what was the difference  
13 between the deficient February 2019 Water  
14 Resources Assessment and the approved September  
15 2019 Water Resources Assessment, DEQ's hydrologist  
16 stated that there was a statement added that the  
17 irrigation ditch -- this is in Paragraph 2, the  
18 last sentence -- the ditch does not convey water  
19 to downstream users, and that the 2019 Water  
20 Resources Assessment included a list of water  
21 rights.

22 Those are the two differences between  
23 the Water Resources Assessment of February which  
24 was disapproved by the Department in September of  
25 2019.

1           The point here, Mr. Chairman and members  
2 of the Board, is DEQ simply did not require the  
3 Applicant to conform to the requirements of the  
4 law. DEQ did not require the Applicant to submit  
5 a sufficient Water Resources Assessment  
6 characterizing and assessing the impacts to  
7 groundwater resources in the area, nor to the  
8 surface water resources in the area, and in  
9 particular, impacts to the irrigation ditch known  
10 as the Park Hill Ditch, which goes directly  
11 adjacent to the site.

12           Now, in the contested case hearing --

13           CHAIR SIMPSON: Mr. Bloomquist.

14           MR. BLOOMQUIST: Yes.

15           CHAIR SIMPSON: Two more minutes.

16           MR. BLOOMQUIST: Okay. In order to  
17 review this record -- and it is the Board's  
18 obligation to review the record, and the whole  
19 record -- I would ask you go to the testimony at  
20 the contested case hearing from Charles Vandam,  
21 Lee Yelin, and Aimee McKinley in particular.

22           And the testimony will demonstrate and  
23 detail the deficiencies in the assessment and the  
24 analysis provided by Tetrattech, and how those  
25 deficiencies and how the Water Resources

1 Assessment did not respond to the requirements  
2 that DEQ set forth, and in particular impacts to  
3 the Park Hill Ditch.

4 The Park Hill Ditch was not assessed  
5 whatsoever by Tetrattech in the Water Resources  
6 Assessment. Their testimony demonstrated impacts  
7 to the water delivery capabilities of the Park  
8 Hill Ditch were not only expected, but in fact  
9 have occurred.

10 And that deficiency in Tetrattech and the  
11 Applicant's responsibility to identify and assess  
12 those impacts caused by mining should result in  
13 the Board reversing not only the proposed findings  
14 of fact and conclusions of law, and not accepting  
15 those that we've identified, but also in revoking  
16 this permit, or at a minimum suspending this  
17 permit until an adequate Water Resources  
18 Assessment is conducted.

19 The proximity of the pit to Big Creek  
20 also is of concern. As demonstrated at the  
21 hearing, the mining at the Moudy Pit site will go  
22 below the level of Big Creek. In fact, the mining  
23 will go forty feet below the level of the Park  
24 Hill Ditch, but also eight feet below the level of  
25 Big Creek.

1           The impacts on Big Creek flows are  
2 already being seen negatively, and the continued  
3 mining will only further run the risk of  
4 dewatering an already over-appropriated water  
5 source, again, an impact which was identified by  
6 public comment, and identified as requiring  
7 assessment, but DEQ simply failed to do so.

8           Now, the Hearing Examiner's  
9 misapprehension of the evidence --

10           CHAIR SIMPSON: Mr. Bloomquist.

11           MR. BLOOMQUIST: Yes.

12           CHAIR SIMPSON: You've used up your  
13 fifteen minutes, and we do need to move along, if  
14 you could wrap it up soon, please.

15           MR. BLOOMQUIST: I appreciate it. I  
16 would again implore the Board, and I think the  
17 Board has the obligation, to review the record,  
18 and when you review the record, simply put up the  
19 requirements of the statute, simply put up the  
20 requirements of the Water Resources Assessment  
21 Guidelines, simply put up the deficiencies noted  
22 by DEQ prior to September 2019, and compare those  
23 with what was provided by the Applicant which  
24 miraculously resulted in this permit being issued.

25           And if nothing else the Board looks at,

1 take a look at finding of fact No. 35. In finding  
2 of fact No. 35 the Hearings Examiner essentially  
3 adopts the analysis of DEQ's hydrologist, where  
4 the finding is, "Following construction of the  
5 Moudy Pit, DEQ predicts that water table on the  
6 upgradient side of the pit or pond will lower, and  
7 the downgradient side will raise as water travels  
8 through the slanted site. These effects will  
9 remain within boundaries of the permit," citing to  
10 Mr. Krogstad, the hydrologist.

11 Now, that is an astounding statement not  
12 only of hydrology, but of hydrogeology, to think  
13 that the groundwater surface water impacts of  
14 mining the site will remain within the boundaries  
15 of the permit. I'm not sure, Mr. Hearing  
16 Examiner, if I've ever seen a more astounding  
17 finding regarding hydrologic impacts of mining in  
18 my career.

19 The other thing I would like to point  
20 out, and I will close, is the Hearing Officer's  
21 judicial notice of water rights. In several  
22 places the Hearings Officer states that our  
23 concern with groundwater is unwarranted because  
24 the water rights that we're concerned with in Big  
25 Creek are for surface water.

1           Well, Mr. Hearing Examiner, members of  
2 the Board, it is fundamental in Montana law, the  
3 Water Use Act and State law, that groundwater  
4 tributary or contributing to surface water,  
5 they're interrelated. They're one and the same.  
6 And for the Hearings Examiner to hold that our  
7 concerns with groundwater and groundwater  
8 contributions to and impacts to Big Creek are  
9 unfounded is simply erroneous under the law.

10           I apologize for taking up my time. In  
11 review of this matter, there's many things we did  
12 not cover in oral argument. We laid those out in  
13 our written exceptions. It is incumbent upon the  
14 Board to review that in making a final decision.

15           I would ask -- this matter has gone on  
16 for some time obviously, and I know you have a lot  
17 of things to do, but I appreciate the Board's  
18 review of this matter, its attention to the record  
19 of this matter, and ultimately it is our belief  
20 that if you do those things, you'll see the errors  
21 and the impropriety of the Department's issuance  
22 of this permit contrary to law and contrary to the  
23 rules of the Department.

24           With that, Mr. Chairman, I will rest.

25           CHAIR SIMPSON: Thank you, Mr.



1 Bloomquist. DEQ.

2 MS. WHITFIELD: Good morning, Chairman  
3 Simpson, and members of the Board. My name is  
4 Kaitlin Whitfield, and I'm here representing DEQ  
5 in the Moudy Pit matter. I'm anticipating that my  
6 opening argument will be about nine minutes, and  
7 any remaining time I would like to reserve for  
8 rebuttal.

9 DEQ is here today to urge the Board of  
10 Environment Review to adopt the Hearing Examiner's  
11 over-arching determination that DEQ properly  
12 issued Permit No. 2949.

13 In addition, DEQ is here to urge the  
14 Board to adopt DEQ's proposed exceptions to  
15 conclusions of law 149, 150, and 155 as stated in  
16 our exceptions brief submitted on January 16th.

17 A hearing was held in this matter on  
18 June 19th and June 20th of 2023. At that hearing,  
19 the Hearing Examiner heard testimony, and viewed  
20 exhibits from both Petitioners and DEQ. After  
21 hearing eleven hours of testimony, the Hearing  
22 Examiner utilized six months to write her own  
23 proposed findings of fact, conclusions of law, and  
24 recommended decision, and that is before you  
25 today. The Hearing Examiner's proposed findings

1 of fact, conclusions of law, and recommended  
2 decision is based on the substantial evidence  
3 presented to her in this record.

4 As the Board may be aware, there were  
5 changes made to the Opencut Act during the 2021  
6 legislative session, and the rules and statutes  
7 discussed today have been removed or amended. So  
8 if you hear me reference a rule or a statute with  
9 the year after it, it is because that was the rule  
10 or statute in effect at the time the permit was  
11 issued.

12 For example, Section 82-44-342(1) which  
13 dealt with the protection of water, has since been  
14 removed from the Opencut Act. In addition, ARM  
15 17.24.218(1)(g), which dealt with well  
16 identification, was amended in 2022 after the  
17 Opencut Act was issued.

18 Today DEQ asks that the Board undertake  
19 its role as provided by Section 2-4-621 of the  
20 Montana Code Annotated, and review the record in  
21 front of it.

22 While the Board may reject or modify the  
23 conclusions of law and interpretation of  
24 Administrative Rules, the Board may not modify or  
25 reject the findings of fact unless it first

1 determines from a review of the complete record,  
2 and states with particularity in the order that  
3 the findings of fact were not based upon competent  
4 substantial evidence.

5 Today's oral argument is not meant to be  
6 a new trial in front of the Board. Today's oral  
7 argument is meant to give the parties the  
8 opportunity to be heard on their exceptions brief  
9 filed in the middle of January as provided by  
10 Section 2-4-621(1) of the MCA.

11 The Hearing Examiner correctly  
12 determined that DEQ properly issued Permit No.  
13 2949, and DEQ requests that this Board affirm that  
14 decision. However, DEQ requests that this Board  
15 modify one issue within the conclusions of law.  
16 This issue can be found in conclusions of law 149,  
17 150, and 155.

18 The issue DEQ finds with conclusions of  
19 law 149, 150, and 155 is that the Hearing  
20 Examiner's determination in these conclusions of  
21 law goes against a former Board decision, DEQ's  
22 interpretation of its own rule, and statutory  
23 interpretation.

24 In regards to conclusions of law 149 and  
25 155, DEQ requests modification to reflect the

1 proposed conclusions of law provided in its  
2 exceptions brief, because DEQ is entitled to  
3 deference when interpreting its rules, and  
4 adopting the Hearing Examiner's proposed  
5 conclusion of law would be a violation of  
6 statutory interpretation and contrary to a former  
7 Board ruling.

8 First, conclusion of law 149 contradicts  
9 the previous Board decision in Golden West in  
10 2018. There the Board determined that the  
11 identification of individual wells within 1,000  
12 feet of a pit boundary under ARM 17.24.218(1)(g),  
13 2019, is not for protection of the individual  
14 wells, but instead to protect the underlying water  
15 resource.

16 Additionally, conclusion of law 149  
17 should be modified because it is contrary to case  
18 law determining that an agency is entitled to  
19 deference when interpreting its rules.

20 Finally, conclusion of law 149 is also  
21 contradictory of the Hearing Examiner's  
22 determination in conclusion of law 146. There she  
23 correctly determined that our expert Kevin  
24 Krogstad testified that DEQ uses the  
25 identification of wells to protect the underlying

1 water resource. It is important for the Board to  
2 understand that when the resource is protected,  
3 the wells are also protected, consistent with the  
4 Golden West decision.

5 Next, conclusion of law 155 should be  
6 modified because keeping it as-is is a violation  
7 of the statutory interpretation as governed by  
8 Section 1-2-101 of the MCA, and contradictory to  
9 the Golden West decision. Section 1-2-101 of the  
10 MCA makes clear that a Judge is not to insert into  
11 statute or rule what has been omitted or omit what  
12 has been inserted.

13 Here the Hearing Examiner determined in  
14 conclusion of law 155 that Petitioners had not  
15 carried their burden to produce evidence showing  
16 that DEQ's decision violated the law with respect  
17 to protection of individual wells under Section  
18 82-4-434(2)(1), 2019, of the MCA.

19 However, this determination is a  
20 violation of statutory construction, as nowhere in  
21 Section 82-4-434(2)(1), 2019, of the MCA is there  
22 a requirement for protection of individual wells.  
23 Instead, there is a requirement for appropriate  
24 protection from deterioration of water quality and  
25 quantity.

1           As such, the Board should modify  
2 conclusion of law 155 to read "underlying water  
3 resource" rather than "individual wells" to comply  
4 with the rules of statutory construction and the  
5 former Board decision in Golden West.

6           Finally, conclusion of law 150 should be  
7 rejected by the Board because it is also a  
8 violation of statutory construction, and  
9 contradictory to the Board's holding in Golden  
10 West.

11           The Hearing Examiner incorrectly  
12 determined that the purpose of well identification  
13 is to protect individual wells. As discussed  
14 previously, this is contradictory to the Golden  
15 West decision, and goes against DEQ's  
16 interpretation of its own rules.

17           The Hearing Examiner also incorrectly  
18 determined that all wells within 1,000 feet of the  
19 permit boundary need to be identified. Again,  
20 this goes against statutory construction and the  
21 Golden West decision by inserting the term "all"  
22 into ARM 17.24.218(1)(g), 2019. As determined in  
23 Golden West, the purpose of identifying wells  
24 within 1,000 feet of a pit boundary is to protect  
25 the underlying water resource, not the individual

1 well.

2 Because inserting the term "all" into  
3 ARM 17.24.218(1)(g), 2019, is a violation of  
4 statutory construction, and contradictory to the  
5 decision in Golden West, it should be rejected in  
6 its entirety from the Board's final findings of  
7 fact and conclusions of law.

8 While ARM 17.24.218(1)(g), 2019, is no  
9 longer in effect, it is important for the Board to  
10 remain consistent in its decisions and  
11 requirements of DEQ. In conclusion, while the  
12 Hearing Examiner's over-arching determination is  
13 that DEQ properly issued Permit No. 2949, DEQ  
14 requests that this Board modify conclusions of law  
15 149 and 155, and reject conclusion of law 150 in  
16 its entirety.

17 In doing so, the Board remains  
18 consistent in its decisions, and will not violate  
19 the rules of statutory construction and case law.  
20 Thank you for your time and review of this appeal.

21 CHAIR SIMPSON: Thank you. Mr.  
22 Bloomquist, no more than five minutes, please.

23 MR. BLOOMQUIST: Thank you, Mr.  
24 Chairman. Briefly I concur wholeheartedly in the  
25 Department's arguments regarding statutory

1 construction, and the Board's obligation to  
2 construe the statute, as well as DEQ's obligation  
3 to construe the statute as written and the rules  
4 as written.

5 In doing so, in reviewing the law that  
6 was in place at the time this permit application  
7 was reviewed, the Board will have ample reason to  
8 revoke the permit or reverse the decision of DEQ,  
9 and to understand the flaws in proposed findings  
10 of fact and conclusions of law.

11 As the statute 85-2-403 Sub (2) sub(1)  
12 is very clear, DEQ was obligated to protect  
13 groundwater and surface water sources from  
14 deterioration, and consistent with State law,  
15 State law meaning the Opencut Act; State law  
16 meaning do not dewater Big Creek and adversely  
17 effect water rights; State law meaning do not  
18 impact or interfere with water rights protected  
19 under Montana law conveyed via the Park Hill  
20 Ditch. Those were the requirements of State law.

21 In addition comply with State law  
22 regarding the need for beneficial water use  
23 permits for the reclamation plan. We did not  
24 discuss that initially, but that's part of the  
25 exceptions. Statutory construction in regards to



1 the Opencut Act, in regards to the Water Use Act,  
2 State law, are clear, and they clearly should  
3 guide this Board in its review of the agency  
4 decision and review of the record.

5 And if the Board is guided by those  
6 statutory mandates, the Board will see that DEQ  
7 simply erred in issuing the permit, which did not  
8 protect area groundwater and surface water  
9 resources as required by law.

10 Deference to the agency. Yes, the  
11 agency gets deference, but it's not unfettered  
12 deference. The agency must, and the Board's  
13 decision must be based on scientifically driven,  
14 well-reasoned explanation of the analysis of the  
15 impacts on groundwater and surface water.

16 Unfortunately the Applicant has left the  
17 Department and left the Board with an empty box.  
18 The Water Resources Assessment did not provide any  
19 scientific basis or any analysis necessary to  
20 protect the groundwater and surface water  
21 resources of the area.

22 Although the record is large, if the  
23 Board goes to simply looking at Tetrattech's  
24 analysis provided to the Department, and then  
25 compare that with what the Department was asking

1 for, you will readily see the deficiencies related  
2 to the obligations to protect ground and surface  
3 water resources.

4 And with that, Mr. Chairman, I  
5 appreciate the time. Again, I implore the Board  
6 to take a good hard look at this matter. If the  
7 Board does, and follows some of the guidance that  
8 has been set forth in our exceptions, you will be  
9 pointed to the record in this case which clearly  
10 demonstrate the errors of DEQ, and the errors of  
11 the application.

12 On that review, we would urge the Board  
13 to reject the proposed findings of fact, issue an  
14 order revoking the permit, or at a minimum  
15 suspending the permit from further operations  
16 until an adequate Water Resources Assessment is  
17 provided as required by the law. Thank you.

18 CHAIR SIMPSON: Thank you, Mr.  
19 Bloomquist. DEQ, anything further?

20 MS. WHITFIELD: Thank you, Chairman  
21 Simpson. DEQ would just note for the Board that  
22 because there is substantial evidence in the  
23 record, the Board cannot overturn the findings of  
24 facts of the Hearing Examiner's determinations.  
25 And if the Board goes through the record, they

1 will find that there's substantial evidence  
2 supporting DEQ's decision in issuing Permit No.  
3 2949.

4 In addition, many of Mr. Bloomquist's  
5 arguments regarding the Park Hill Ditch were post  
6 hoc, meaning a lot of those measurements were  
7 taken after DEQ had issued its permit, and that  
8 was not in front of DEQ at the time DEQ issued its  
9 permit.

10 And then one last thing for the Board is  
11 that DEQ would request that conclusions of law 149  
12 and 150 are modified as stated in its exceptions  
13 brief, and that conclusions of law 150 is  
14 rejected. Thank you.

15 CHAIR SIMPSON: Thank you very much.  
16 Questions from the Board. Are there any questions  
17 for either of the parties before we move to a  
18 motion?

19 (No response)

20 CHAIR SIMPSON: I have one question.  
21 Nowhere -- and maybe I missed it -- but nowhere in  
22 the documents that I have reviewed have I seen  
23 anything documenting the typical depth of wells in  
24 the area. Did I miss something, or is that  
25 information available? I'm directing that to

1 either DEQ to the Petitioners.

2 MS. WHITFIELD: Thank you --

3 MR. BLOOMQUIST: Mr. Chairman -- go  
4 ahead.

5 MS. WHITFIELD: Sorry. The typical  
6 depth of the wells would be within the well logs  
7 within the permit.

8 MR. BLOOMQUIST: And the reason --

9 CHAIR SIMPSON: Mr. Bloomquist.

10 MR. BLOOMQUIST: Mr. Chairman, that is a  
11 good point. The only information that the  
12 Applicant and DEQ reviewed were a smattering of  
13 well logs related to the sites identified by the  
14 GWIC data base, which there's significant  
15 testimony on the deficiencies there.

16 But that is an important point. When  
17 you compare the depths of the area wells to the  
18 test well, the pump test well that was provided by  
19 the Applicant, and the aquifer test, which I  
20 believe was somewhere in the neighborhood of 14  
21 feet.

22 And we had extensive testimony on the  
23 deficiency in the record by both Mr. Vandam and  
24 Mr. Yelin regarding the aquifer test, the pump  
25 test, and in particular the deficiency or the

1 insufficiency of the well depth related to that  
2 test.

3 CHAIR SIMPSON: Thank you.

4 VICE CHAIR AGUIRRE: I don't know that  
5 we can consider that. I mean that information is  
6 in the approved permit. And the statements in  
7 front of us, the record, provides information,  
8 provides information on -- I'm trying to make sure  
9 I say this correct -- I mean it provides  
10 information on the situation with groundwater and  
11 wells.

12 And I don't know. It's not untypical,  
13 or it seems like that's exactly what should have  
14 been done, is to review the well logs, so -- which  
15 was done, and that's part of the record, and then  
16 also part of the approved permit. So just trying  
17 to figure out -- I don't think that that is part  
18 of our decision. I know I'm kind of stumbling.

19 CHAIR SIMPSON: Well, I understand your  
20 point, Vice Chair Aguirre. And I guess I would  
21 direct this to our Counsel, Ms. Oomens.

22 In the AM4 decision, the Supreme Court  
23 made it pretty clear that the Board may consider  
24 all information, and this information is contained  
25 in the applications. It doesn't seem to have been

1 addressed in the FOFCOL itself.

2 But my point is this. I suspect -- I  
3 don't know -- but I suspect that the wells that  
4 are, the domestic wells in the area are completed  
5 at a much greater depth than the depth of this  
6 gravel pit. And that being the case, I guess I  
7 would question whether the assertion that the  
8 shallow groundwater test was not appropriate  
9 because the gravel pit is in fact -- it's shallow.  
10 And so what the test would have done was to  
11 evaluate the hydrologic conditions close to the  
12 surface.

13 Be that as it may, I don't know that  
14 it's the Board's responsibility to get too far  
15 into the weeds on the hydrology. I'm just trying  
16 to get at this question of the probability of  
17 impacts to local wells.

18 And I guess I'd defer to Mr. Reiten, who  
19 is much more versed in this than I am, but it  
20 seems that the likelihood of impact to nearby  
21 wells is pretty small.

22 BOARD MEMBER REITEN: Mr. Chairman,  
23 members of the Board, I agree with your comment  
24 there. Without having to go through every single  
25 detail of the initial report, it's kind of hard

1 for us to assess this. And I probably should have  
2 looked into it a little bit more, but I didn't.  
3 And part of it is just how to access that  
4 information. I don't really know how.

5 But it looks like it's quite a  
6 complicated little aquifer system, with shallow  
7 perch zones. One of the questions I have --  
8 probably for DEQ -- is what I read is leaving out  
9 the pump or discharge water to do the mining; is  
10 that correct?

11 MS. WHITFIELD: I'm sorry. I didn't  
12 quite hear your question.

13 BOARD MEMBER REITEN: As they are  
14 mining, are they pumping water to access the  
15 gravel? Do they have to drop the water table? To  
16 me that's an important thing, and the way I read  
17 it is that they did not.

18 MS. WHITFIELD: Correct. You are  
19 correct.

20 BOARD MEMBER REITEN: So what is the  
21 source of the water for the pond after it's  
22 reclaimed?

23 MS. WHITFIELD: Groundwater.

24 BOARD MEMBER REITEN: That's kind of  
25 counter intuitive to me. If they don't have to

1 get rid of water, where is it going come into the  
2 pit from? I don't know. That's a question I  
3 have, but it's kind of a side point more than  
4 anything right now.

5 I suspect -- I don't know 100 percent --  
6 but most of the domestic wells -- I'd have to  
7 agree with Dave -- that they are probably  
8 significantly deeper than this gravel pit, and it  
9 is unlikely that they would be impacted. But  
10 that's my personal opinion. I don't have a lot of  
11 facts to come up with that. But I think that's --  
12 based on my experience, that's what I see. A lot  
13 of times you do not see significant impacts along  
14 gravel pits that I'm aware of.

15 BOARD MEMBER SMITH: Mr. Reiten, a quick  
16 question. You mentioned the fact that the water  
17 in the pond being fed by groundwater. It makes  
18 sense. I guess my question is how that would  
19 potentially negatively affect the water table, or  
20 even surface water, the fact that it's different  
21 from groundwater. If it's not dewatered, wouldn't  
22 static water elevation in that pond just be  
23 directly tied to groundwater, and have minimal  
24 losses to the system?

25 BOARD MEMBER REITEN: Yes, you're



1 correct, but the issue is if you're not -- Usually  
2 what I see, digging a gravel pit, and it goes into  
3 the water table, you have to get rid of the water  
4 in most cases. And so I still don't see where the  
5 water goes -- Apparently the groundwater has to be  
6 high enough to fill that pond. And so to me,  
7 they're really tied together. So I don't know.

8 BOARD MEMBER SMITH: They are, but if  
9 they're not pumping, and they're not removing the  
10 groundwater from the pond, I guess the question  
11 still is how that could negatively affect adjacent  
12 groundwater, or surface water for that matter.

13 BOARD MEMBER REITEN: I would say -- So  
14 they're mining under water. They're pulling it  
15 out below the water table. That's what you're  
16 saying. Okay. That was my confusion. I thought  
17 they'd need to dry things to do the mining, they  
18 needed a dry pit. But that --

19 MR. BLOOMQUIST: Mr. Chairman, if I may.  
20 This is John Bloomquist. I'd just point the Board  
21 to the depth that the pit is proposed to be mined,  
22 which is elevation 3372. And as the record  
23 reflects, that's approximately 40 feet below the  
24 Park Hill Ditch elevation, and below the elevation  
25 of the Big Creek itself. And the impacts of that

1 are explained in the record.

2 BOARD MEMBER REITEN: Okay. That helps.  
3 Thanks.

4 CHAIR SIMPSON: Any further questions?  
5 Thank you, Mr. Reiten.

6 BOARD MEMBER SMITH: Chair Simpson, I do  
7 have another question that wasn't really brought  
8 up in either of the oral arguments. But in the  
9 exceptions, especially by the Appellant, it was  
10 brought up about the timing of this case, how long  
11 it's taken, and how it's negatively affected them.

12 But I guess first off, this is something  
13 we've discussed a lot since both of us have been  
14 on the Board, is how we can potentially speed up  
15 these cases. And I'd love to have the opportunity  
16 -- maybe not during this conversation but later --  
17 to talk about how we can do that, maybe even with  
18 Ms. Oomens.

19 But I guess my question for this  
20 conversation is how the timing, how could it have  
21 possibly negatively affected the Appellants in  
22 this case?

23 MR. BLOOMQUIST: Mr. Chairman, this is  
24 John Bloomquist. May I answer that question?

25 CHAIR SIMPSON: Yes, please.

1           MR. BLOOMQUIST: The negative impact --  
2 this is a MAPA contested case, Montana  
3 Administrative Procedures Act contested case.  
4 Contested cases by design, MAPA by design, is to  
5 afford timely, prompt and timely appeal processes  
6 in challenging agency decisions.

7           The negative effect here is quite  
8 frankly because the Department -- In order to get  
9 to District Court to review a matter, we are  
10 required to exhaust the administrative remedies.  
11 In other words, we're required to exhaust getting  
12 final agency action from the decision maker, in  
13 this instance DEQ and the Board.

14           Having that opportunity to go to court  
15 delayed by four years, it took about four and a  
16 half years to get a decision in this case.  
17 Denying the opportunity to have judicial review of  
18 this matter is an impact on the procedural due  
19 process rights of the Appellants. It may not seem  
20 like, "Well, why don't we just wait for four or  
21 five years."

22           In the interim, Mr. Moudy has been  
23 mining gravel. In the interim, as the record  
24 reflects, there have been impacts to water  
25 delivery via the Park Hill Ditch, and so the

1 impacts are real. There are impacts to Big Creek.  
2 And delaying the opportunity to have judicial  
3 review is an impact on the due process procedural  
4 rights of the Appellants.

5 In other words, they won't be able to  
6 get their day in court for five or six years after  
7 this decision. In the meantime, Mr. Moudy is  
8 mining gravel; in the meantime there are impacts  
9 on the Park Hill Ditch. That's about as straight  
10 forward as I can put it.

11 BOARD MEMBER SMITH: Thank you. That's  
12 helpful.

13 CHAIR SIMPSON: Anything further?

14 MS. WHITFIELD: Just quickly, Chair  
15 Simpson, if I may.

16 CHAIR SIMPSON: Yes.

17 MS. WHITFIELD: I understand Mr.  
18 Bloomquist's concern and the Board's concern in  
19 moving these cases along. I would like to note  
20 for the Board that we're not here to discuss that  
21 portion, but we're here to discuss whether there  
22 was substantial evidence in the record to support  
23 DEQ's permitting decision. So that's what we're  
24 here for today, and that the Board is not able to  
25 hear constitutional issues like due process.

1 Thank you.

2 CHAIR SIMPSON: Thank you. Members of  
3 the Board, it's just a couple of minutes after  
4 ten. Why don't we reconvene at 10:10 to consider  
5 this matter. Take a short break.

6 (Recess taken)

7 CHAIR SIMPSON: We'll reconvene the  
8 meeting. Would you take the roll, please.

9 MS. MOISEY-SCHERER: Chair Simpson.

10 CHAIR SIMPSON: Here.

11 MS. MOISEY-SCHERER: Vice Chair Aguirre.

12 VICE CHAIR AGUIRRE: Here.

13 MS. MOISEY-SCHERER: Board Member

14 Rankosky.

15 BOARD MEMBER RANKOSKY: Here.

16 MS. MOISEY-SCHERER: Board Member

17 Reiten.

18 BOARD MEMBER REITEN: Here.

19 MS. MOISEY-SCHERER: Board Member Smith.

20 BOARD MEMBER SMITH: Here.

21 MS. MOISEY-SCHERER: We have a quorum,  
22 sir.

23 CHAIR SIMPSON: Thank you very much.

24 The matter before us is to make a decision whether  
25 or not to accept the Hearing Examiner's

1 recommendation, findings of fact, and conclusions  
2 of law in the Moudy Pit case. Is there a motion?

3 VICE CHAIR AGUIRRE: I'll make a motion  
4 to adopt the Hearing Examiner's findings of fact  
5 with the exceptions, with DEQ's exceptions added  
6 to modify 149 and 155, and reject 150, for the  
7 conclusions of law.

8 CHAIR SIMPSON: Is there a second?

9 (No response)

10 CHAIR SIMPSON: I'll second it. It's  
11 been moved and seconded to accept the Hearing  
12 Examiner's findings of fact and conclusions of law  
13 incorporating the exceptions filed by the  
14 Department of Environmental Quality. Discussion.

15 (No response)

16 CHAIR SIMPSON: Discussion on the  
17 motion. Mr. Reiten.

18 BOARD MEMBER REITEN: Mr. Chairman,  
19 members of the Board, I do have some reservations  
20 about this. I think I'll probably vote for it,  
21 but I do have some reservations on the adequacy of  
22 the hydrologic investigation. It seems like they  
23 need to be a little bit more in depth, from what  
24 I've seen.

25 I admit I did not go through the actual

1 permit, but was what reported in the FOFCOL seemed  
2 a little inadequate. But my overall reasoning  
3 behind this is -- I do not believe, I do not see  
4 the potential for impacts either to the canal or  
5 to the areas of groundwater.

6 The issue of the canal, there's  
7 observations, a lot of potential reasons why that  
8 flow could be lower than it is, than it used to be  
9 -- climatic, how much is coming out of the  
10 headgate.

11 It would be a lot more satisfactory if  
12 there were actual measurements that were reported  
13 rather than just an observation. I see flaws in  
14 that, but that's what we do in this state. You  
15 don't require a lot of monitoring, and I suspect  
16 there's probably limited -- I didn't see any  
17 discussion of monitoring while mining was going  
18 on, of any of the groundwater or the surface water  
19 resources.

20 That would be some very strong evidence  
21 one way or the other, so -- but those are some of  
22 my concerns, and I think it's just kind of the way  
23 that we do business in the state overall. Anyway,  
24 that's my comment. Thank you.

25 CHAIR SIMPSON: Thank you, Mr. Reiten.

1 Further comments. Discussion.

2 (No response)

3 CHAIR SIMPSON: Hearing nothing further,  
4 I guess I'd like to make a comment or two.

5 First of all, from a hydrologic  
6 standpoint, I share Mr. Reiten's concern certainly  
7 to an extent. However, the question before us is  
8 whether the Department in issuing this permit  
9 complied with the law, that is, the Opencut Act.

10 I don't know that it's within our  
11 purview to reevaluate the hydrologic situation.  
12 And if there are impacts occurring, it seems to me  
13 that that's an enforcement issue, not really a  
14 permit issuance issue, since the permit was issued  
15 some years ago.

16 The other comment I'd like to make is  
17 that the Petitioners have filed extensive  
18 exceptions, and objected to virtually every item  
19 in the findings of fact and conclusions of law,  
20 but in so doing didn't really provide us with any  
21 alternate language that would satisfy them,  
22 although I think their main concern is they would  
23 like, obviously they'd like to see this permit  
24 revoked.

25 I guess I understand the -- Well, let me



1 put it this way. I think the real issue is just  
2 that there's this gravel pit was opened up in a  
3 neighborhood that has quite a few homes. I  
4 certainly wouldn't want a gravel pit next to my --  
5 establishing right next to my house; but on the  
6 other hand it's a legal issue, it's a private  
7 property issue, and it's a matter of complying  
8 with the statutes.

9 I don't see anything here that leads me  
10 to believe, after reviewing the findings of fact  
11 and conclusions of law, that the Department has  
12 erred in a legal sense, that is, that they failed  
13 to meet the requirements of the law for permit  
14 review. So I'll be supporting the motion.

15 Further discussion?

16 (No response)

17 CHAIR SIMPSON: We'll take the vote by  
18 roll call.

19 MS. MOISEY-SCHERER: Chair Simpson.

20 CHAIR SIMPSON: Aye.

21 MS. MOISEY-SCHERER: Vice Chair Aguirre.

22 VICE CHAIR AGUIRRE: Aye.

23 MS. MOISEY-SCHERER: Board Member  
24 Rankosky.

25 BOARD MEMBER RANKOSKY: Aye.

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MS. MOISEY-SCHERER: Board Member

Reiten.

BOARD MEMBER REITEN: Aye.

MS. MOISEY-SCHERER: Board Member Smith.

BOARD MEMBER SMITH: Aye.

CHAIR SIMPSON: The motion passes  
unanimously. Thank you very much.

(The proceedings were concluded

at 10:23 a.m. )

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C E R T I F I C A T E

STATE OF MONTANA )

: SS.

COUNTY OF LEWIS & CLARK )

I, LAURIE CRUTCHER, RPR, Court Reporter,  
Notary Public in and for the County of Lewis &  
Clark, State of Montana, do hereby certify:

That the proceedings were taken before me at  
the time and place herein named; that the  
proceedings were reported by me in shorthand and  
transcribed using computer-aided transcription,  
and that the foregoing - 42 - pages contain a true  
record of the proceedings to the best of my  
ability.

IN WITNESS WHEREOF, I have hereunto set my  
hand and affixed my notarial seal this 19th day of  
February, 2024.

*Laurie Crutcher*

\_\_\_\_\_  
LAURIE CRUTCHER, RPR  
Court Reporter - Notary Public  
My commission expires  
March 9, 2024.

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