

BEFORE THE BOARD OF ENVIRONMENTAL
REVIEW OF THE STATE OF MONTANA

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IN THE MATTER OF:) Cause No.
APPEAL AND REQUEST FOR) BER 2023-03 OC
HEARING BY PROTECT THE)
CLEARWATER REGARDING)
ISSUANCE OF OPENCUT MINING)
PERMIT #3473)

TRANSCRIPT OF PROCEEDINGS - ORAL ARGUMENT
(VIA ZOOM)

April 19, 2024

9:18 a.m.

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

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1 WHEREUPON, the following proceedings were
2 had:

3 * * * * *

4 CHAIR SIMPSON: The next item, I don't
5 think this one is going to be dealt with so
6 quickly. In the matter of the Appeal and Request
7 for Hearing by Protect the Clearwater regarding
8 issuance of Opencut Mining Permit No. 3473.

9 I assume that there are representatives
10 of the parties here to present their positions on
11 this to the Board. Just a reminder, this is not a
12 rehearing of the case. This is a summary of the
13 status of the parties with the information to the
14 Board before moving forward to a vote. Is there a
15 representative of Protect the Clearwater here?

16 I guess before we move forward, I would
17 say that I'd ask you to limit your comments to 15
18 minutes, and then we'll have another opportunity
19 for rebuttal once both parties have made their
20 presentations.

21 MR. COPPES: Good morning. This is
22 Graham Coppes, and I'm an attorney on behalf of
23 Protect the Clearwater. So I'm here appearing. I
24 don't think you all can see me, though, can you?

25 CHAIR SIMPSON: No, I can't.

1 MR. COPPES: I don't have the ability to
2 turn my video on here, like normally you can on
3 Zoom. Is that a function that the Board can do on
4 its end?

5 MS. MOISEY-SCHERER: So I'm sorry, I
6 can't.

7 MR. COPPES: Well, no problem. We'll
8 just do it through audio then. Are you all ready
9 to proceed then?

10 CHAIR SIMPSON: Yes. Please proceed.

11 MR. COPPES: Good morning, members of
12 the Board, Chairman. My name is Graham Coppes,
13 and I'm an attorney representing the Appellants,
14 the Petitioners and the Objectors here, Protect
15 the Clearwater.

16 As the Board is likely aware, this case
17 arises from a challenge to a new opencut mining
18 permit which was issued on public land immediately
19 adjacent to the Clearwater River, Elbow Lake, and
20 Montana Fish, Wildlife and Parks flagship
21 Blackfoot-Clearwater Game Range.

22 I'm not sure how many of you are
23 familiar with this corner of Montana, but it is
24 about 45 minutes outside of Missoula, in a
25 remarkably beautiful and pristine area.

1 The Appellants own homes nearby and
2 adjacent to the mine, and they draw their drinking
3 water from shallow groundwater wells in close
4 proximity to the site. They enjoy the quiet
5 solitude that this area provides, and they enjoy
6 the natural resources that are abundant and
7 protected by the State of Montana by and through
8 Fish, Wildlife and Parks in this area.

9 And in fact, several of the Appellants
10 and members of Protect the Clearwater here were
11 sold homes by the State of Montana through its
12 cabin leasing and sales program for top market
13 value dollars, shortly before DEQ turned around
14 and permitted this mine immediately adjacent to
15 their homes. So in 2022 and 2023, they're paying
16 top dollar to the State of Montana based on the
17 evaluation without a mine, and then the very next
18 year the State of Montana, by and through DEQ,
19 permits this mine directly next to their house.

20 So when they first found out about this,
21 their initial instinct was to hire a hydrologist,
22 which is what they did. And they hired a
23 hydrologist to look at the permit application,
24 review DEQ's analysis of how this mine might
25 affect the nearby stream and lake where they live,

1 as well as the groundwater where they source their
2 drinking water and domestic use water.

3 So in this case, the Applicant, who is
4 LHC, Inc., applied for and was granted a dryland
5 opencut mining permit. As the Board may or may
6 not be aware, that term is not specifically used
7 in the statute, but it is used colloquially
8 amongst DEQ and the legislators who drafted this
9 bill, due to the Bill Sponsor's intent that these
10 permits only be applied for and granted in those
11 areas in Montana that are far away from water
12 sources.

13 In the briefing that was submitted to
14 the Hearing Examiner, there was extensive
15 testimony that was given by the Bill Sponsor,
16 Representative Gunderson, that this entire process
17 is not to be used anywhere near water resources.
18 That is why it's called a dryland permit.

19 So in the statute, there are two
20 separate requirements that apply to this
21 demarcation, and the statute that's relevant, as
22 the Board is aware, is 82-4-432. And there
23 Montana law disconnects dryland permits from
24 standard permits, which are those that could be
25 near water.

1 And the law requires DEQ to answer two
2 questions there as a part of that statutory
3 bifurcation of these processes. Question No. 1,
4 "Will the mine being applied for have any effect
5 on ground or surface water?" And then if that
6 answer is no, then two, DEQ is to answer, "Are
7 there more than ten occupied homes within a half
8 mile of the mine?"

9 And that's the other component of this
10 dryland process, is that it's not supposed to be
11 used in residential areas, so away from water and
12 not in residential areas.

13 Most importantly here the Opencut Act
14 requires that DEQ fulfill its duty, and that is
15 the word that's used in the statute, to issue
16 permits only when the information set forth in the
17 application actually supports DEQ's evaluation
18 that the proposed operation meets those two
19 requirements.

20 So DEQ has an affirmative obligation
21 under the statute to make sure that the
22 information being submitted to it by the applicant
23 is in fact true and correct, that the mine will
24 not affect ground or surface water, and there are
25 not ten homes nearby, within a half a mile.

1 But in this case, DEQ has testified
2 under oath. The record before the Board includes
3 sworn testimony of DEQ's own staff members that it
4 did not do anything to fulfill those duties as the
5 statute says.

6 Instead DEQ in its briefing to the
7 Hearing Examiner -- and if you look at the Hearing
8 Examiner's findings and conclusions on these
9 issues -- is that DEQ is allowed to rely wholly on
10 the promises of the applicant, or the word that
11 they're using is "certifications." DEQ argues to
12 the Hearing Examiner and to this Board that
13 because the Applicant checked a box certifying
14 that information was true, and that it did certain
15 things, that the requirements for the dryland
16 permit were met.

17 But as the Board knows, the Montana
18 Supreme Court has held that an agency decision is
19 unlawful if it does not comply with the governing
20 laws and administrative rules. So an agency
21 decision is thus arbitrary and capricious if it's
22 made without consideration of the relevant factors
23 or based on a clearly erroneous judgment.

24 And you'll see in the briefing on the
25 exceptions from DEQ and from the parties that

1 there's a disagreement about the burden of proof
2 and the standard of review relevant to this burden
3 of proof. DEQ argues that the Petitioners have
4 put forward an improper standard to the Board, and
5 that essentially DEQ is not required to take this
6 affirmative obligation to look at this
7 information.

8 My clients and PTC urges the Board to
9 recognize that Montana law does not require that
10 we prove all of the affirmative facts are not
11 true. So we don't have to prove that there are
12 ten occupied dwelling units within a half a mile,
13 we don't have to prove that water will be
14 conclusively affected, because my clients aren't
15 the ones that are applying for a permit to mine.

16 That makes sense logically when the
17 Board thinks about it, because the company is the
18 one asking for the entitlement from the State of
19 Montana to do something, and so it has the burden
20 of proof. It's well established in Montana law
21 that applicants for a permit always have the
22 burden of proof, and they maintain that burden
23 throughout the permitting process.

24 Those cases in the law that established
25 that, and what can be called well-settled

1 precedent, is in the briefing on the exceptions
2 before the Board. We encourage you to look at
3 that.

4 But Montana law is clear about what
5 Petitioners needed to show to be entitled to
6 judgment as a matter of law here. In this case,
7 Petitioners were required to show that LHC did not
8 provide, the Applicant did not provide DEQ with
9 sufficient data and evidence to meet its burden
10 for the permit, so if they didn't provide
11 sufficient evidence, then the permit cannot be
12 issued; and/or --- either one -- DEQ relied on
13 deficient or missing information to reach its
14 decision that the threshold for issuance of the
15 permit was met.

16 So if DEQ doesn't fulfill its
17 affirmative obligation to go out and fact check
18 this information, is then relying on either
19 omitted or deficient information where it's not
20 included in the record, which is very well
21 undisputed here, because DEQ admits in certain
22 circumstances, especially in regards to the effect
23 on water sources, that that will in fact happen.

24 So we really encourage the Board to
25 consider that the burden of proof issue is one of

1 the main reasons it should reject the Hearing
2 Examiner's findings here. The Hearing Examiner's
3 findings of fact and conclusions to the Board are
4 quite short. They're truncated. There are
5 several inaccuracies there which lead to an
6 arbitrary and capricious decision that we ask this
7 Board to reverse.

8 The Hearing Examiner took no evidence,
9 she heard from no witnesses in reaching her
10 conclusion. So the contrast there with the Fourth
11 Judicial District, who reached the opposite
12 conclusion about the propriety of the dryland
13 permit, is stark.

14 Judge Larson in the Fourth Judicial
15 District who heard this case on a preliminary
16 injunction, heard from all of the DEQ's witnesses,
17 heard from LHC's witnesses, reviewed the evidence,
18 and reached an opposite conclusion. He said the
19 questions on the merits before the Court and the
20 BER is whether the proposed pit will affect
21 groundwater or surface water in any way.

22 He then found it is patently clear --
23 and this is a quote from his opinion -- "it is
24 patently clear that neither DEQ nor the Permittee
25 LHC know the answer to this question."

1 And why did he reach that conclusion?

2 And that relates directly to the Hearing

3 Examiner's errors here, because she relied on

4 Judge Larson's opinion as well. You'll see that

5 in her findings and conclusions. So in reaching

6 her conclusion, the Hearing Examiner, as to the

7 meaning of the word "affect," the Hearing Examiner

8 joined Judge Larson. She found exactly as he did,

9 that the Fourth Judicial District defined affect

10 as "to influence in some way."

11 And while Judge Larson relied on

12 Webster's Dictionary to reach that conclusion, the

13 Hearing Examiner relied on Black's Law Dictionary,

14 but both dictionaries provided the same result

15 that "affect" means to "influence in some way."

16 And again, this goes to the first

17 question relevant to the dryland permitting

18 process, which is: Is this mine going to affect

19 ground or surface water in some way? That's what

20 the Hearing Examiner found, that's what the Fourth

21 Judicial District found.

22 But DEQ asks the Board to disregard this

23 clear and plain language. It asks to look at the

24 legislative history, that the Legislature meant

25 something totally different, that it actually

1 meant to define this much more narrowly than the
2 basic dictionary definitions.

3 But the case law doesn't give the Board
4 or the Hearing Examiner authority to look at
5 legislative history, where the plain language is
6 clear. And that's exactly what happened here.
7 The Hearing Examiner applied that law correctly,
8 but --

9 VICE CHAIR AGUIRRE: I think we lost the
10 sound.

11 CHAIR SIMPSON: Yes, we did.

12 MR. COPPES: Now I'm here on video. Can
13 you all see me? Okay. We're back. I'm not sure
14 what happened.

15 So the plain language is simple. The
16 Hearing Examiner found correctly that the word
17 "affect" as used in the Opencut Act means to
18 affect in any way.

19 But where the Hearing Examiner went
20 wrong is that she failed to apply the meaning that
21 she found, that plain language meaning of the
22 word, to the actual facts in this case and the
23 record, and that created a legal error on her
24 part, which this Board should reverse.

25 As argued by PTC in its exceptions, it

1 is the party that is entitled to judgment here as
2 a matter of law because DEQ acknowledges in its
3 own exceptions and arguments to this Board that
4 the Clearwater River and Elbow Lake at minimum
5 will in fact be affected. There's no evidence in
6 the record related to groundwater not being
7 affected, but they do admit that the surface water
8 will be affected by dust that is coming off of
9 this immediately adjacent mine and going into the
10 water.

11 This water is home to endangered
12 species, including bull trout. It's entitled to
13 protection by Montana Species of Special Concern
14 for Westslope Cutthroat. And DEQ admits that this
15 is going to happen, but they argue in essence that
16 the Opencut Act is not designed to protect water
17 quality, and therefore none of that matters.

18 And that I guess is a separate question
19 I'd like to address, but importantly, DEQ does
20 admit that there will be some effect on the nearby
21 Clearwater River and Elbow Lake, and as a result,
22 that means that this type of permit, the dryland
23 permit, is insufficient. It's not the correct
24 permit, and this Board should reverse the decision
25 that the Hearing Examiner used to uphold that.

1 This also relates to the independent
2 duty to verify information as required. Within
3 the statute of the Opencut Act, DEQ is commanded
4 to verify information in relation to all aspects
5 of the permit. DEQ says that that's not true, and
6 that's a question this Board should consider.

7 In the exceptions and in the briefing,
8 we provide the exact plain language that says that
9 DEQ must fulfill its duty to make investigations
10 necessary to ensure compliance with the law, so
11 DEQ is required to look at whether there will be
12 effect from these mines on both surface and
13 groundwater, but also whether the second criteria
14 is met, whether there are ten homes within a half
15 mile, and it did not do that in this.

16 And the Fourth Judicial District also
17 found that in its review of the evidence, and this
18 Board should look at the Fourth Judicial
19 District's review as a part of its analysis here,
20 especially because the Hearing Examiner relied on
21 it as well.

22 What Judge Larson said is that the
23 evidence in the record goes beyond the omission of
24 proof. The evidence in the record reveals that
25 the proposed gravel mine is in fact likely to have

1 an influence on ground and surface water first.

2 He then says, "If neither the applicant
3 for a mining permit, nor the DEQ tasked with
4 reviewing that application, conduct the due
5 diligence necessary to determine the legal
6 threshold for applicability of the standard or
7 dryland permit, then the permitting decision must
8 fail as arbitrary and capricious."

9 That's what we're asking this Board to
10 consider today. The Hearing Examiner misconstrued
11 that both in relation to the effect on water
12 quality, but also in relation to the effect on
13 occupied dwelling units. The Hearing Examiner in
14 Finding of Fact 55 said, "Even if LHC does not
15 consider occupied dwelling units on leaseholds,
16 Clearwater has not presented any evidence that the
17 lack of consideration caused its certification or
18 promise to be incorrect." That's Finding of Fact
19 55 from the Hearing Examiner.

20 Yet the Hearing Examiner, so what we see
21 here is that they're faulting Protect the
22 Clearwater, my client, for not putting forward the
23 affirmative obligation that DEQ was required to
24 actually do itself. As the Hearing Examiner
25 noted, "Occupied dwelling units based on land

1 ownership adjacent to the proposed mining activity
2 does not have any relevance as to whether it meets
3 this criteria for an occupied dwelling unit or
4 not."

5 So what we see in the record is that
6 because there are DNRC State Trust Lands on which
7 all of the homes nearby are located -- well,
8 there's a few fee -- but most of them are leased
9 properties. None of those properties were
10 considered as a part of whether they meet this
11 obligation as an occupied dwelling unit for
12 consideration within the half mile.

13 The Hearing Examiner and the Applicant
14 both just promised that that was going to happen;
15 DEQ relied on that promise; and nobody checked
16 whether these lease lands had occupied dwelling
17 units on them or not. And this is an error that,
18 according to the HE's own analysis, this Board
19 should reverse.

20 And I think I have gone a little bit
21 over my time here, so I'd like to remain a few
22 minutes and reserve a few minutes left for a
23 rebuttal.

24 CHAIR SIMPSON: Thank you, Mr. Coppes.
25 Is there a representative from the Department to

1 address the Board?

2 (No response)

3 CHAIR SIMPSON: I'm not getting any
4 response. Is there an attorney from the
5 Department who would like to address this issue?

6 (No response)

7 CHAIR SIMPSON: Hearing none, I do have
8 a question, Mr. Coppes. How does the District
9 Court proceeding intersect with the Board's
10 deliberations on this matter?

11 MS. OOMENS: I'm sorry. I don't mean to
12 cut you off, Chair Simpson, but there is a third
13 party that would probably like to argue before the
14 Board gets into questions. The mining company,
15 LHC, is --

16 CHAIR SIMPSON: I wanted to ask that one
17 as well.

18 MS. OOMENS: Go ahead.

19 CHAIR SIMPSON: Let me proceed. I'll
20 reserve that question. The reason I ask it is I
21 have a good memory, but it's short, and I wanted
22 to be sure I asked it while it was on my mind.

23 MR. COPPES: I'm happy to answer, but
24 I'm happy if you want me to wait. I'm happy to do
25 that as well.

1 CHAIR SIMPSON: Let's defer. I'm
2 satisfied to have raised it. I'm sure you'll
3 remember it.

4 MS. MOISEY-SCHERER: Chair Simpson, this
5 is Sandy. DEQ is having technical difficulties.
6 They are on the call.

7 CHAIR SIMPSON: Mr. Stermitz?

8 MR. STERMITZ: Yes, Mr. Chairman. Well,
9 I was just wanting to indicate that I'm here on
10 behalf of LHC, but I hear now that maybe we can
11 hear from DEQ, and if so, that probably would be
12 the appropriate order. If not, I will be happy to
13 weigh in.

14 CHAIR SIMPSON: Thank you very much.
15 DEQ.

16 (No response)

17 CHAIR SIMPSON: Still nobody to speak on
18 behalf of DEQ?

19 VICE CHAIR AGUIRRE: Chairman Simpson,
20 They're having -- there's a chat that they're
21 having technical difficulties, and that Kaitlin
22 Whitfield is on the call for DEQ. But for some
23 reason they're having technical difficulties
24 getting connected. Can somebody maybe speak on
25 behalf of DEQ on where they're at with the

1 technical difficulties?

2 CHAIR SIMPSON: While they're sorting
3 that out, Mr. Stermitz, why don't you proceed,
4 please.

5 MR. STERMITZ: Thank you, Mr. Chairman.
6 We didn't file a summary judgment brief. We did
7 not want to burden the Board with basically an
8 agreement with DEQ's position, which of course we
9 do agree with, but I'd be happy to comment on Mr.
10 Coppes' statements here this morning.

11 First of all, I'll just go right to your
12 question about the relationship, if any, between
13 the District Court's proceedings and the Board
14 decision here.

15 Our position, to put it simply and
16 directly, is that the District Court went far
17 beyond its jurisdiction; that its ruling was
18 burdened with a ton of error. And the injunction
19 that it issued is on appeal to the Montana Supreme
20 Court now. It's been I think fully briefed, and
21 we're awaiting a decision.

22 Part of the problem there, just to let
23 you know jurisdictionally, is that the Plaintiffs
24 here used a blend of MEPA, which would be District
25 Court jurisdiction argument, and direct challenge

1 to DEQ's decision to issue the permit in its
2 efforts, among other problems that we saw. I'm
3 sure Mr. Coppes disagrees with that, and all of
4 that is on appeal to the Montana Supreme Court.

5 I don't understand the argument that the
6 Hearing Examiner relied on what the District Court
7 did, which will be kind of the last thing I'll say
8 about the District Court, other than I know
9 there's a difference of opinion between DEQ and
10 Plaintiffs about the affect, the word "affect,"
11 and the statute, and that was referenced in the
12 Hearing Examiner's findings. But beyond that, if
13 she had relied on the District Court, she would
14 have come to a different conclusion ultimately.

15 The statements that this is in a
16 residential area, and that it's adjacent to the
17 Clark Fork River, and that there's a concession by
18 DEQ that water quality is going to be affected,
19 those are not borne out by the record. They're
20 not consistent with the Hearing Examiner's
21 findings that were based on the record materials
22 and the information submitted by DEQ.

23 There was a deficiency letter issued by
24 DEQ during the process of LHC's application
25 concerning the extent of notice, and determination

1 of the ten residences within one half mile
2 requirement that's statutory, and LHC addressed
3 that. And so that's -- You know, we talk about
4 the burden of proof, but however you look at the
5 burden of proof, the fact is that there's nothing
6 in the record indicating that that statutory
7 requirement was not met.

8 In a big picture sense here, members of
9 the Board, this challenge was clearly brought in
10 part not to diminish the feelings of the
11 individual Plaintiffs here, but because this was
12 the first, as near as we can tell, application, at
13 least one that's getting litigated for this
14 so-called dryland opencut permit.

15 And it does have a different statutory
16 process than the traditional, if you will, opencut
17 permit, but this is not a radical or unique
18 regulatory scheme in which the applicant certifies
19 that information is accurate and true, and
20 certifies that it has complied with the statutory
21 criteria, and DEQ has varying obligations to
22 confirm that information. And here, DEQ followed
23 the statute.

24 In a way, what I'm trying to say is that
25 this is really a challenge to the statute itself,

1 although not styled as such, because DEQ followed
2 the statute, we followed the statute, and
3 Plaintiffs' complaints are largely about items
4 that either aren't required by the statute, or
5 would be if it was a traditional opencut permit
6 site, but it's not.

7 So there is something new here that
8 probably hasn't been seen at the Board previously.
9 But this construct that DEQ relies on is to some
10 extent, or to a great extent, is not, like I say,
11 it's not a radical concept. We have serious
12 consequences for not complying with the statute,
13 and those go with our application to DEQ when we
14 certify this information.

15 I would like to say lastly, because I
16 really think that the Hearing Examiner's findings
17 were thorough, and reflect what was in the record,
18 and reflect the information that DEQ submitted,
19 that there's a certain amount of rhetoric and --
20 how would I put it -- exaggeration frankly in
21 Plaintiffs' arguments, and you hear them in
22 statements like, "DEQ did nothing," "DEQ did
23 nothing to verify this information." And that's
24 simply not true, and you can look at the Hearing
25 Examiner's findings for confirmation of that.

1 We did not weigh in on the distinction
2 or the specific definition about the effect that
3 was addressed in the parties' exceptions, or in
4 DEQ and the Plaintiffs' exceptions, because either
5 way, we're confident that we don't have a problem.
6 I think DEQ is looking at a broader context for
7 its regulation of these dryland permits and in
8 this disagreement over that part of the Hearing
9 Examiner's findings. And that's not of concern to
10 us in particular here, because we're in compliance
11 either way.

12 We urge you to uphold the Hearing
13 Examiner's findings and approve this permit.
14 Thank you.

15 CHAIR SIMPSON: Thank you, Mr. Stermitz.
16 Ms. Armstrong.

17 MS. WHITFIELD: Good morning, Chairman
18 Simpson, and members of the Board. Can you hear
19 me?

20 CHAIR SIMPSON: Yes.

21 MS. WHITFIELD: Sorry about that. We're
22 having some technical difficulties here at DEQ.

23 My name is Kaitlin Whitfield, and I'm
24 representing DEQ in this matter. DEQ is here
25 today to urge the Board of Environmental Review to

1 adopt the Hearing Examiner's overall determination
2 that DEQ properly issued Permit No. 3473 to
3 Intervenor Defendant LHC, Incorporated.

4 In addition, DEQ is here to urge the
5 Board to adopt DEQ's proposed exceptions to
6 Conclusions of Law 9, 10, 11, 15, 16, 29, 55, and
7 52, as stated in our exceptions brief submitted on
8 March 22nd. While you just heard quite a bit of
9 background of this, I'm going to briefly restate
10 what we're focusing on today, which is:

11 The briefs supporting motions for
12 summary judgment were submitted by both Protect
13 the Clearwater, or PTC, and DEQ on December 1st of
14 2023. Response briefs were filed by all parties
15 on December 22nd, 2023, and finally reply briefs
16 were filed on January 12th, 2024, and this matter
17 was then deemed submitted for decision.

18 It should be noted for the Board that
19 the Hearing Examiner, in her prehearing order
20 dated June 15th, 2023, specifically required the
21 parties to file separate statements of disputed
22 facts if any facts were in dispute. If a party
23 failed to do so, as PTC did here, the facts
24 submitted by the moving party or DEQ would be
25 deemed undisputed.

1 After reviewing the briefs and evidence
2 submitted pursuant to summary judgment, the
3 Hearing Examiner in this matter granted summary
4 judgment in favor of DEQ, and issued her proposed
5 findings of fact and conclusions of law on March
6 8th.

7 Today, DEQ asks that the Board undertake
8 its role as provided by Section 2-4-621 of the
9 Montana Code Annotated, and review the record in
10 front of it. While the Board may reject or modify
11 the conclusions of law and interpretation of
12 administrative rules, the Board may not modify or
13 reject the findings of fact unless it first
14 determines from a review of the complete record,
15 and states with particularity in the order that
16 the findings of fact were not based on competent
17 substantial evidence.

18 As we just heard from Protect the
19 Clearwater's Counsel Mr. Coppes, he would like you
20 guys to review this under an arbitrary and
21 capricious standard. However, that's not the
22 standard here. That's the standard for judicial
23 review. The standard here is competent
24 substantial evidence.

25 Today's oral argument is not meant to be

1 a new bite at the apple. Today's oral argument is
2 meant to give the parties the opportunity to be
3 heard on their exceptions briefs that were filed
4 at the end of March and beginning of April.

5 Finally, while the Applicant had the
6 initial burden to prove to DEQ permit issuers that
7 its application complied with the Opencut Act, the
8 burden then shifted to the Petitioners when they
9 challenged the permit. As such, in this contested
10 case proceeding the Petitioners bear the burden of
11 proving each of their claims by a preponderance of
12 the evidence.

13 As the Board is aware, in the 2021
14 legislative session, changes were made to Title 82
15 Chapter 4 of the Montana Code Annotated, or the
16 Opencut Act. Specifically House Bill 599 was
17 passed, and created an alternative avenue for
18 obtaining an opencut permit as a dry site. As
19 such, Section 82-4-332(1)(c) and (14) is referred
20 to as a dryland permit application.

21 The goal of the bill as stated by a
22 proponent before the Montana Natural Resources
23 Committee in February of 2021 is to make very low
24 impact gravel pits an easier application process.
25 Permit No. 3473 was reviewed and issued under

1 House Bill 599 as a dryland application.

2 DEQ makes these modification and removal
3 requests because the aforementioned conclusions of
4 law are inconsistent with governing law,
5 inconsistent with legislative intent, or
6 inconsistent with evidence in the record.

7 In regard to Conclusions of Law 9, 10,
8 and 11, DEQ's interpretation of the term "affect"
9 to mean "opencut operations intersecting or
10 touching surface and groundwater" is consistent
11 with the plain language of 82-4-432(1)(b) of the
12 MCA. As stated in our exceptions brief, the
13 Hearing Examiner has defined "affect" as to
14 influence in some way, as it is defined in Black's
15 Law Dictionary.

16 However, simply because a term exists in
17 the dictionary does not mean that its plain
18 language is clear. This is amplified by the
19 District Court order from the preliminary
20 injunction hearing regarding this permit in July
21 of 2023. There District Court Judge Larson cited
22 two other definitions of affect, showing that the
23 same word may have varying definitions in
24 different dictionaries. As such, other factors
25 must be considered to determine the plain

1 language, the plain meaning of affect.

2 Pursuant to Section 1-2-101 of the MCA,
3 a Court cannot insert language that has been
4 omitted from statutory language when determining
5 its meaning. However, the Hearing Examiner did
6 just that. Instead, statutes must be interpreted
7 as a whole, giving meaning and effect to all
8 provisions if possible.

9 If the term "affect" is read broadly, it
10 would be impossible to obtain a dryland permit
11 under the Opencut Act, because all Opencut Act
12 permits marginally affect ground and surface
13 water. For example, virtually all dryland
14 operations generate a small amount of sediment
15 that may end up in surface water due to
16 precipitation because rainfall falls on nearly
17 every site in Montana. Such a definition of
18 "affect" leaves dryland permits out of the Opencut
19 Act, and goes against legislative intent.

20 While PTC's Counsel cited that the
21 Representative of this bill has stated that the
22 intent was for high and dry places not near
23 people, the comments they have cited to were made
24 in newspaper articles over a year after the bill
25 was passed, and cannot count as legislative

1 history.

2 Instead the legislative intent for the
3 term "affect" supports DEQ's definition of
4 "intersect or touch." As stated in Montana
5 Contractors Association versus Department of
6 Highways, as cited in our brief on Page 9, a Court
7 may look to a legislative history of the statute,
8 and give great deference and respect to the
9 interpretations given to the statute by officers
10 and agencies charged with its administration.

11 Here, as cited in our briefing, the two
12 initial drafts of House Bill 599 defined standard
13 permits as operations that intercept groundwater
14 or surface water. Upon its second reading on the
15 Senate floor, "intercept" was changed to "affect."
16 The purpose of the change, as stated by Senator
17 Brown, was to ensure that water conveyance
18 facilities, like irrigation pipelines, were
19 provided the same protection as ground and surface
20 water. Thus "affect" was added to the bill to
21 ensure projects that affect water conveyance
22 facilities are addressed by standard permits.

23 Essentially while the Legislature
24 changed the term from "intercept" to "affect," the
25 Legislature did not intend for this amendment to

1 increase the applicability of standard permits to
2 anything beyond projects that intercept ground or
3 surface water.

4 For the foregoing reasons, DEQ is
5 requesting this Board to modify Conclusions of Law
6 9, 10, 11, and 16 in accordance with its
7 modifications submitted in briefing.

8 Next, regarding Conclusion of Law 15,
9 the Opencut Act does not require field
10 verification of proposed opencut operations to
11 evaluate a permit. Section 82-4-432 of the MCA
12 requires DEQ to evaluate the information provided
13 to it by the applicant. It does not require DEQ
14 to field verify the information contained within
15 the application.

16 Here, the Hearing Examiner correctly
17 determined in Conclusion of Law 13 that field
18 verification is not required under the Opencut
19 Act. However, she muddies the water in Conclusion
20 of Law 15 by arguably placing a requirement on DEQ
21 to field verify a permit application.

22 Instead of the current language of
23 Conclusion of Law 15, DEQ requests that this Board
24 modify the language to reflect DEQ's suggested
25 language in briefing to ensure that additional

1 requirements not in statute are not inadvertently
2 imposed on DEQ by the Board.

3 Additionally, regarding Conclusion of
4 Law 29, the Opencut Act does not regulate impacts
5 to water. As addressed previously, the Opencut
6 Act provides a substantive requirement of an
7 opencut application where the Montana
8 Environmental Policy Act, or MEPA, governs the
9 substantive requirements of an environmental
10 analysis.

11 The BER has jurisdiction over matters
12 that arise under the Opencut Act, but not under
13 MEPA. In Conclusion of Law 29, the Hearing
14 Examiner confuses these standards by
15 interchangeably using the terms "impacts" and
16 "affects." The term "impacts" falls under MEPA,
17 where "affects" falls under the Opencut Act.

18 It's important for the Board not to
19 conflate the terms, as the standards they are
20 assessed under are different. As such, DEQ's
21 proposed modification of Conclusion of Law No. 29
22 should be adopted by the Board to aid in
23 clarifying what is required of applicants and DEQ
24 under the Opencut Act.

25 Finally, regarding Conclusions of Law 52

1 and 55, the record does not show that LHC excluded
2 leaseholders of DNRC-owned land from its
3 consideration of occupied dwelling units. Section
4 82-4-432(14)(a)(ix) requires certification from
5 the Applicant that fewer than ten occupied
6 dwelling units exist within one half mile of the
7 proposed opencut permit boundary.

8 And occupied dwelling unit is defined
9 under the Opencut Act as a structure with
10 permanent water and sewer facilities that is used
11 as a primary sleeping place by at least one person
12 who maintains a household that is lived in as a
13 primary residence.

14 The Hearing Examiner made a mistake in
15 Conclusion of Law 52 when she stated that LHC
16 determined occupied dwelling units based on land
17 ownership adjacent to the proposed mining boundary
18 area.

19 Instead, the evidence in the record
20 shows that LHC separated the private property
21 ownership from the leased sites; observed that
22 none of the privately owned lots had Elbow Lake
23 addresses; at several opportunities checked to see
24 if there was anyone to talk to; and consulted with
25 the local DNRC contact to determine that there

1 were no full-time residents present.

2 As such, the Hearing Examiner's
3 Conclusion of Law 52 is incorrect, and should be
4 removed from the Board's final findings of fact
5 and conclusions of law.

6 Additionally, because the evidence in
7 the record does not support a conclusion that LHC
8 did not consider leasehold interests in
9 determining occupied dwelling units, Conclusion of
10 Law 55 should be modified in accordance with DEQ's
11 suggestion and briefing to support the evidence in
12 the record.

13 In conclusion, while DEQ agrees with the
14 Hearing Examiner's determination that Permit No.
15 3473 was properly issued, and that the Petitioners
16 failed to carry their burden in this MAPA
17 contested case proceeding, DEQ requests that this
18 Board incorporate our modifications of Conclusions
19 of Law 9, 10, 11, 15, 16, 29, 55 and 52 into the
20 Board's final findings of fact and conclusions of
21 law. Thank you for your time today.

22 CHAIR SIMPSON: Thank you. Let's
23 proceed with questions before taking a break. Are
24 there questions from the Board for any of the
25 representatives that we've just heard from?

1 VICE CHAIR AGUIRRE: Chairman Simpson, I
2 have a question on Conclusion of Law 12 for Ms.
3 Whitfield. You don't include that in the
4 modifications. I guess I'm asking you to confirm
5 you don't include that in the modifications if the
6 Board agrees with DEQ's interpretation of a fact;
7 is that correct?

8 MS. WHITFIELD: That is correct.

9 VICE CHAIR AGUIRRE: Thanks for
10 confirming that.

11 MS. WHITFIELD: Of course.

12 CHAIR SIMPSON: Other questions from the
13 Board?

14 VICE CHAIR AGUIRRE: One other
15 clarification. In modifying, modifying also
16 includes like deleting and replacing text,
17 correct?

18 MS. WHITFIELD: Correct.

19 VICE CHAIR AGUIRRE: Thank you for that
20 confirmation.

21 MS. WHITFIELD: Of course.

22 CHAIR SIMPSON: Further questions?

23 (No response)

24 CHAIR SIMPSON: I have a question for
25 DEQ. This gravel pit, is it -- What's the purpose

1 of this gravel pit? Is it associated with highway
2 construction which I had the privilege of driving
3 through about a week ago, or is it a commercial
4 gravel pit?

5 MS. WHITFIELD: Thank you, Chair
6 Simpson. To the best of our knowledge, it is.
7 However, Mr. Stermitz is also on the call, who is
8 the representative for LHC, and he may be better
9 suited to answer that question.

10 CHAIR SIMPSON: Thank you. Mr.
11 Stermitz.

12 MR. STERMITZ: Mark Stermitz on behalf
13 of LHC. It was created to serve the work that was
14 done on that highway up there through the Swan,
15 and due to the injunction, LHC had to go to an
16 alternate site to provide that gravel. So
17 originally that was its purpose, but that project
18 I think is completely concluded now, so if
19 permitted, it will go somewhere else. I think
20 it's undetermined at this point.

21 CHAIR SIMPSON: Thank you. Any other
22 questions?

23 VICE CHAIR AGUIRRE: I have a follow up
24 question on that. So Mr. Stermitz, you said they
25 had to go to another pit for the project?

1 MR. STERMITZ: Yes. They had a site
2 over in the Ovando area, as I understand it, that
3 they went to after the injunction was entered.

4 VICE CHAIR AGUIRRE: So in other words,
5 they had to go farther --

6 MR. STERMITZ: Yes, it was further.
7 Correct.

8 VICE CHAIR AGUIRRE: Okay.

9 CHAIR SIMPSON: Another question for Mr.
10 Stermitz. The material to be mined here, is it
11 typical river gravel or bedrock material to be
12 crushed into gravel?

13 MR. STERMITZ: I am not 100 percent sure
14 about that, so I should hedge my bets here. But
15 my understanding was that it wouldn't need to be
16 crushed.

17 CHAIR SIMPSON: Well, gravel in general
18 needs to be crushed to size.

19 MR. STERMITZ: I mean it's not in --
20 Yes, as river -- it's river material, in other
21 words.

22 CHAIR SIMPSON: The reason I'm asking is
23 from the standpoint of hydrology.

24 MR. STERMITZ: Well, I mean there was
25 work done to test the elevation between

1 groundwater and the bottom of the pit, if that's
2 what you're asking, and I don't remember -- What
3 I'm saying is I don't remember that being
4 influenced by the type of material that was
5 involved.

6 CHAIR SIMPSON: We'll get into this a
7 little bit later, but of course gravel is porous,
8 and typically groundwater in a gravel deposit is
9 unconfined, and has a shallow gradient, just
10 because water can move through it very easily.
11 Behaves differently than bedrock where aquifers
12 can be confined.

13 MR. STERMITZ: I understand what you're
14 saying. I just don't know that I am in a position
15 to answer. I can tell you that the material that
16 will come out of that will not be commercial. It
17 won't be a commercial pit. It will be used for
18 projects.

19 MS. WHITFIELD: Chair Simpson, if I may.

20 CHAIR SIMPSON: Thank you very much.
21 Yes.

22 MS. WHITFIELD: The answer to your
23 question is that, yes, it is the rounded river
24 rock that is being dug.

25 CHAIR SIMPSON: Thank you, Ms.

1 Whitfield.

2 MS. WHITFIELD: Of course.

3 MR. COPPES: Chair, I'd also like to
4 address that at some point in my rebuttal.

5 CHAIR SIMPSON: Okay. Are there any
6 further questions at this point from the Board?

7 (No response)

8 CHAIR SIMPSON: Let's take a five minute
9 break. It's eight minutes after. Let's say come
10 back at 10:15 for rebuttal, and then consideration
11 by the Board.

12 (Recess taken)

13 CHAIR SIMPSON: It's 10:16. Let's
14 reconvene the meeting. Sandy, would you take the
15 roll, please.

16 MS. MOISEY-SCHERER: Yes, sir. Chair
17 Simpson.

18 CHAIR SIMPSON: Here.

19 MS. MOISEY-SCHERER: Vice Chair Aguirre.

20 VICE CHAIR AGUIRRE: Here.

21 MS. MOISEY-SCHERER: Board Member
22 Altemus.

23 BOARD MEMBER ALTEMUS: Here.

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

1 BOARD MEMBER RANKOSKY: Here.

2 MS. MOISEY-SCHERER: Board Member
3 Reiten.

4 BOARD MEMBER REITEN: Here.

5 MS. MOISEY-SCHERER: Board Member Smith.

6 BOARD MEMBER SMITH: Here.

7 MS. MOISEY-SCHERER: We have a quorum,
8 sir.

9 CHAIR SIMPSON: Thank you. Let's
10 proceed with rebuttal. Is Mr. Coppes -- I don't
11 see Mr. Coppes here. Oh, yes, there he is. If
12 you would proceed, please.

13 MR. COPPES: Thank you, Chair Simpson.
14 And you had asked a question early on which I just
15 want to address while it's fresh in my mind here,
16 which is what was the relationship or the impact
17 of the District Court's order and findings of
18 fact, and -- Well, what was the impact of those
19 findings of fact on the Examiner's findings of
20 fact, is what I thought I understood you to ask.
21 And it is purely --

22 CHAIR SIMPSON: Excuse me, Mr. Coppes.
23 That really wasn't my question. My question was
24 we seem to have parallel proceedings going on here
25 with the -- As I understand it right now, the

1 District Court has enjoined work on this gravel
2 pit, and that's gone to the Supreme Court; is that
3 correct?

4 MR. COPPES: That is correct.

5 CHAIR SIMPSON: So my question was at
6 the time how do these two proceedings intersect
7 with each other? And it appears that they don't,
8 because if I understand correctly, the injunction
9 had to do specifically with stopping work until
10 these questions could be resolved. Is that your
11 view, or do you take a different view?

12 MR. COPPES: Well, I guess I take a
13 slightly different view, sir. They do interact
14 and intersect directly in the sense that the very
15 first criteria that is looked at by any Court in
16 determining whether a preliminary injunction is
17 appropriate is to look at the question of whether
18 the party asking for the injunction is likely to
19 succeed on the merits of the case. So that's the
20 very first. And then there's a balancing of
21 equities amongst the parties, and then there's a
22 public interest analysis.

23 So in reaching its decision that a
24 preliminary injunction was correctly applied here,
25 the Fourth Judicial District found in very clear

1 findings that PTC is likely to prevail on the
2 merits of this case as a matter of law, because of
3 the reasons it set out. One of those that was
4 very much highlighted by the District Court was
5 the potential for affect of the ground or surface
6 water.

7 The interaction is also shown by the
8 fact that the Hearing Examiner relied quite
9 extensively on the record that was developed by
10 the Fourth Judicial District Court, and that's
11 because that is the only evidentiary record of
12 testimony that exists before this Board, that
13 existed before the Hearing Examiner.

14 So in that District Court record, we had
15 the testimony of all DEQ witnesses about this
16 permit, about what happened, the process that was
17 used, the evidence that was reviewed, and the
18 original submission of the permit. We heard from
19 LHC's witnesses about what it did, the due
20 diligence it did and what it did not do in
21 relation to the submission of this permit.

22 And then we heard from the only expert
23 hydrologic testimony in this entire record was
24 from PTC's expert, a senior hydrogeologist David
25 Donohue, and he spoke directly in his testimony,

1 both in the comments that were submitted to the
2 DEQ, but also in the testimony he gave to the
3 District Court, about that question that you
4 raised, Chairman, which was about the porosity of
5 the soil, that is that issue here, and how the
6 removal of surface top soil, which is inherent in
7 any part of an opencut mining process, is going to
8 expose this more porous and more transmissive soil
9 that's directly being mined, and that gives rise
10 to infiltration and increased speed in rate at
11 which infiltration of both precipitation, as DEQ
12 acknowledges, but also chemicals.

13 He talks about heavy hydrocarbons that
14 are stored and known to be stored on site, asphalt
15 production chemicals that are used, all of which
16 are more likely to be infiltrated into groundwater
17 and shallow groundwater as a result of the mining
18 process.

19 And nobody looked at that in relation to
20 this word "affect," and whether this high and dry
21 expedited permit type was the appropriate permit
22 for a mine situated directly on the banks and
23 adjacent to the Clearwater River and Elbow Lake.

24 And that relates to the exceptions that
25 both parties take with the Hearing Examiner's

1 application of the statutory language "affect,"
2 and I think it's important for the Board to
3 consider that both parties, DEQ and my clients
4 Protect the Clearwater, are here telling the Board
5 that the Hearing Examiner got it wrong in relation
6 to her application of this statutory threshold.

7 So DEQ is saying, and as you just heard
8 DEQ's lawyer argue, that the Hearing Examiner was
9 too broad, that she found that applying the plain
10 language of the word "affect" would render too
11 broad of a conclusion that's going to -- I think
12 she said read dryland opencut mines out of
13 existence.

14 And obviously that's simply not the
15 case, as the Hearing Examiner affirmed this
16 decision in the proposed findings and conclusions
17 here, but it is just simply not true that there
18 are not plenty of areas in Montana that are far
19 away from groundwater and surface water where this
20 issue that we're describing for the Board here
21 simply would not exist.

22 This is the opposite of a high and dry
23 site. It is immediately adjacent to both shallow
24 groundwater and a surface water river, which is
25 directly connected to blue ribbon streams in

1 Montana. We're immediately upstream of the
2 Blackfoot River. We have endangered species
3 present. This is the exact opposite location
4 where a high and dry permit is appropriate.

5 But DEQ and PTC again take issue with
6 the findings. They want exceptions made to the
7 Hearing Examiner's findings. And so DEQ said
8 Conclusions of Law 9 and 10, and I think what I
9 want to draw the Board's attention to those --
10 because we think those are correct -- it's just
11 the application of those that was incorrect.

12 So nine says, the Hearing Examiner
13 concluded, "The common definition of 'affect' is
14 to influence in some way." She cites to Black's
15 Law Dictionary. That is the exact same definition
16 that the District Court reached in its findings of
17 fact and conclusions, it just relied on Webster's
18 Dictionary. So Webster's Dictionary and Black's
19 Law Dictionary are lining up exactly here, and
20 both the Hearing Examiner and Judge Larson reached
21 the same conclusion as to what that word means.

22 And DEQ is essentially attempting to
23 convince the Board that the word "affect" doesn't
24 mean "affect" in the context of the Opencut Act.
25 Instead essentially DEQ is arguing that it means

1 something totally different, to intercept. And in
2 doing so, DEQ has defined that the foundational
3 rule of statutory interpretation which is apply
4 the plain language meaning first.

5 And it instead asks you to go past the
6 plain language, and look at legislative history,
7 which the Montana Supreme Court has been very
8 clear is inappropriate unless the word is or the
9 statutory language is ambiguous. And both the
10 Hearing Examiner and the District Court found that
11 the word "affect" is not ambiguous, that it is
12 very easily ascertainable by non-lawyers in
13 relation to what the dictionary says that it
14 means.

15 The Legislature is presumed to know what
16 the words mean that it writes in statutes, and
17 here it meant to create a high and dry category of
18 permits that are far away from water sources. And
19 as we said, this is just not that.

20 But because of that, because they used
21 this high and dry permit right next to a river,
22 there was a truncated analysis. There was a much,
23 much significantly reduced permitting process here
24 as a result of that.

25 And when we look at the statement of

1 undisputed facts that are put forward by DEQ, it
2 is admitted in the record, it's undisputed in the
3 record before this Board, that there will at least
4 be some effect to the nearby Clearwater River
5 and/or groundwater.

6 And so DEQ's statements of fact from its
7 motions of summary judgment -- and these are
8 statements of undisputed fact -- Paragraph 46, it
9 states that Ruby Hopkins, who is DEQ's opencut
10 expert here, stated that, "During the beginning
11 stages of mining, surface water may leave the site
12 during a heavy storm event, and could carry
13 sediment."

14 Statement of undisputed fact continues,
15 DEQ says, "Ms. Hopkins explained that while the 14
16 foot test holes were not deep enough to show that
17 groundwater would be present at the 20 foot level
18 below groundwater, which is where mining is going
19 to occur."

20 So the only information that was
21 available in relation to whether there's going to
22 be an interception of very shallow groundwater are
23 the bore holes that were used in conjunction with
24 this soil test as a part of the opencut soil
25 requirements, and those didn't show groundwater

1 being intercepted in those soil profiles, but they
2 weren't even to the depth of the bottom of the
3 mining, let alone looking at whether there is a
4 separation between the floor of the mine and those
5 porous soils that you described, Chairman, and
6 whether these porous soils are going to be
7 transmissive of water into groundwater.

8 Your question was very astute. It was
9 very right on point.

10 CHAIR SIMPSON: Mr. Coppes, excuse me.
11 Could you wrap up in a minute or two, please.

12 MR. COPPES: Yes. And so your point was
13 right on, sir. There is no expert testimony and
14 there is no evidence in the record that shows that
15 this will not impact groundwater, and DEQ's
16 exception briefing to this Board actually
17 indicates that it admits that dust will land on
18 the Clearwater River, and affect the Clearwater
19 River.

20 That's also shown in the testimony from
21 the District Court record by eye witness John
22 Watson, who saw it happening prior to the
23 preliminary injunction being issued.

24 So in conclusion, members of the Board,
25 I represent citizens who are here as an

1 organization, Protect the Clearwater, who find
2 themselves in a situation where their
3 constitutionally protected interest in their real
4 property on the ground, and their interest in
5 their clean and healthful environment, are being
6 jeopardized by a process that essentially created
7 a void of information.

8 The high and dry permitting process did
9 not have the requisite information in it by design
10 to show whether there will be an effect on ground
11 and surface water, and this is categorically the
12 wrong place for it, as shown by DEQ's admissions.

13 The undisputed facts here in the
14 application, and the plain language of the law,
15 should convince the Board that DEQ acknowledges in
16 its own documentation that there will be some
17 effect to the water; and because at the time the
18 permit was granted, no one checked to make sure
19 that that was true, there is no record to support
20 the Hearing Examiner's conclusions.

21 And she faults Protect the Clearwater
22 for not affirmatively proving that there will be
23 an effect, but again, it wasn't my clients who
24 applied for the permit here. It was LHC. It was
25 their burden to prove, and it was DEQ's obligation

1 to make sure that in fact there would not be an
2 effect to ground or surface water.

3 And I guess at the end, in conclusion,
4 we'd ask the Court to apply the Hearing Examiner's
5 language of the word "affect" as she defined it.

6 So we're saying that she found that the
7 word means what -- we agree about what it means,
8 but we're asking this Board to apply her
9 definition in the way that the statute requires
10 her to apply it, that there be evidence to support
11 that this is high and dry, that there is no
12 connection to groundwater at the site, and that
13 there is not going to be effect on nearby surface
14 waters; and then finally that there are not ten
15 homes within a half a mile.

16 And I believe that if the Board reviews
17 this record, they will see that there is not
18 evidence to support those conclusions, and that
19 the Hearing Examiner should be reversed. So thank
20 you very much.

21 CHAIR SIMPSON: Mr. Stermitz, you had
22 your hand up.

23 MR. STERMITZ: I did. I wanted to give
24 you a little better information to your question
25 you asked and my response previously about the

1 type of gravel here. I'm told that this is
2 commonly referred to as bench gravel.

3 And I will add, if I can, that the
4 statements about the depth to groundwater and the
5 way that test pits were dug don't comport with the
6 sworn testimony that was given at the District
7 Court or this part of the record. I mean my
8 client dug test pits at the lowest part of the
9 lowest elevations it could find to get the most
10 conservative result, and that showed a minimum of
11 20 feet to groundwater.

12 The river and the nearest surface water
13 is a pond that's about 600 feet away. The river
14 is farther than that. The nearest well is about
15 1,000 feet away. So I just take serious issue
16 with these descriptions as this being next to the
17 river, in close proximity to groundwater.

18 The site was chosen for this upland
19 permit application for a reason, and that is
20 because it is a high and dry site. Thank you.

21 CHAIR SIMPSON: If I could ask one more
22 question, please. Where is this pit located? Is
23 it east of the highway?

24 MR. STERMITZ: It is.

25 MR. COPPES: It's west of the highway.

1 CHAIR SIMPSON: How far from Clearwater
2 Junction?

3 MR. COPPES: It's probably a few miles
4 north of the Clearwater Junction, if you're
5 driving on the highway where the river comes right
6 next to the highway, and then right before you get
7 to Salmon Lake, when you come around, it's on that
8 piece of DNRC State Trust land that is right there
9 sandwiched between the river, the lake, and the
10 highway.

11 CHAIR SIMPSON: So it's west of the
12 highway.

13 MR. COPPES: Correct.

14 MR. STERMITZ: The site is west of the
15 highway. That is correct. The highway is east of
16 the site. I think that was the way --

17 CHAIR SIMPSON: It would really help to
18 have a map. We'll get back to that in a few
19 minutes. Thank you very much, Mr. Stermitz.
20 While you have the floor, anything further before
21 we move on?

22 MR. STERMITZ: No. Thank you, sir.

23 CHAIR SIMPSON: Thank you. Ms.
24 Whitfield.

25 MS. WHITFIELD: Thank you, Chairman. I

1 just want to -- I'll be pretty short and sweet.

2 The Hearing Examiner granted summary
3 judgment in favor of DEQ, meaning that there are
4 no facts in dispute, which means that Protect the
5 Clearwater has agreed with DEQ's statements of
6 facts. There's no evidence that has been
7 presented through summary judgment motions to
8 support Protect the Clearwater's assertion that
9 this is not a high and dry location.

10 And then I did hear Mr. Coppes there at
11 the end state some constitutional issues, and the
12 BER is not here to determine any sort of
13 constitutionality of a statute.

14 And then finally in regards to the term
15 "affect" and what definition to use, the Supreme
16 Court has determined that they construe a statute
17 by reading and interpreting the statute as a
18 whole, without isolating specific terms from the
19 context in which they are used by the Legislature.

20 So they do look to legislative intent,
21 and that is partially how DEQ has interpreted
22 "intercept" is from the legislative history and
23 legislative intent of the statute. And I will
24 leave the Board with that.

25 CHAIR SIMPSON: Thank you very much.

1 Are there any further questions from the Board?

2 (No response)

3 CHAIR SIMPSON: Hearing none, we'll move
4 forward to the Board discussion. Normally what I
5 would do at this point is to ask for a motion, but
6 I'm going to make the motion to start out, and
7 that is we remand this back to the Hearing
8 Examiner for more clarification. And I'll get
9 into the details as we go through discussion. But
10 is there a second?

11 BOARD MEMBER ALTEMUS: I'll second.

12 CHAIR SIMPSON: Thank you, Julia.

13 BOARD MEMBER ALTEMUS: And Chairman
14 Simpson, I'm sorry. I didn't unmute fast enough.
15 Maybe somebody said this, but how far away is this
16 permit, would the site be from the water body
17 exactly?

18 MR. COPPES: Less than one quarter of a
19 mile.

20 CHAIR SIMPSON: That's one of the --

21 BOARD MEMBER ALTEMUS: Okay. Thank you.

22 CHAIR SIMPSON: Other comments or
23 discussion?

24 (No response)

25 CHAIR SIMPSON: Let me get on my soap

1 box for a few minutes, and then we can perhaps
2 discuss it a little further.

3 This Board has the responsibility to
4 examine whether or not the Department followed the
5 law in issuing the permit. That's our primary
6 function, but it's not limited to that. We also
7 have the responsibility to look at the substance
8 of the decision that's being made here under --
9 our responsibility under the Constitution.

10 And I just can't understand why we're in
11 a position of being asked to make a decision when
12 we have virtually no information. Example: The
13 issue that's been debated back and forth here is
14 whether or not there are less than ten occupied
15 homes within a half a mile of this project.
16 Nowhere does it say how many there are. How many
17 are there? Are there any at all? Is there one?
18 Are there nine? Where are they? That's where a
19 map would be helpful.

20 Second, hydrology. We've been debating
21 back and forth whether or not groundwater will be
22 affected here, or surface water directly, but
23 groundwater seems to be the main subject of
24 discussion.

25 So what is the elevation of the

1 groundwater? And what is the elevation of the
2 bottom of the pit? Maybe I'm talking like an
3 engineer, but they seem like very simple
4 questions. When we talk about depth to water,
5 depth to water is a useful piece of information,
6 but not necessarily definitive because the
7 topography varies over the area of the project.

8 So what really matters is the elevation
9 of the groundwater table or the piezometric
10 surface, if you will, and the depth to which
11 gravel is going to be removed under this project.
12 Those are to me fairly obvious questions, and what
13 I'm trying to do here is inject a little common
14 sense into our decision making.

15 Also we're being asked to approve a --
16 as always, the legal jargon won't come to me --
17 but anyway, are the parties in agreement on the
18 facts? It sounds to me like there's substantial
19 disagreement on the facts. Summary judgment, to
20 support a summary judgment. That's the term I'm
21 looking for.

22 So I think that's something that bears
23 some re-examination, and whether summary judgment
24 is even appropriate here, and whether this needs
25 to go to hearing. Those are my primary comments.

1 Any other thoughts from the Board?

2 BOARD MEMBER REITEN: Mr. Chairman, I
3 agree with you. I had a difficult time thinking
4 about this because of the same reasons, being a
5 hydrologist, not -- Why didn't they just simply
6 state the water table elevation or something like
7 that?

8 And I think all of this is real
9 critical. And the number of dwellings has got to
10 be easily obtained. And I had a real problem with
11 this because of the lack of that information.

12 And the thoughts that I have on the
13 terminology, definition of "affect," to me what
14 DEQ is using is they're using it as a direct
15 effect, and actually the interception of the water
16 table to be more like a direct effect, rather than
17 just a general effect.

18 Anyway, those are just -- I'm just
19 agreeing with your comments, and I think that
20 they're very critical to figuring out what the
21 issues are here.

22 CHAIR SIMPSON: Thank you, Mr. Reiten.

23 VICE CHAIR AGUIRRE: Mr. Chairman.

24 CHAIR SIMPSON: Yes.

25 VICE CHAIR AGUIRRE: I feel like I need

1 to respectfully disagree. I feel, I believe we
2 have the information in front of us that keeps us
3 within the scope of our decision making power in
4 order to hear these arguments, and determine how
5 to proceed. Reading through it prior, I didn't
6 have the same thoughts about the extra information
7 needed in order to make this decision. I feel
8 like it's a more straight forward decision that we
9 have to make.

10 And I feel that DEQ did their work for
11 this permit according to how they need to approach
12 it. And that it's being objected to, I understand
13 that, but that in my mind, I don't see where they
14 did not do their job. And again, I didn't feel
15 like I needed additional information to make that
16 decision.

17 CHAIR SIMPSON: Thank you, Vice Chair
18 Aguirre.

19 BOARD MEMBER ALTEMUS: Chairman Simpson,
20 may I?

21 CHAIR SIMPSON: Ms. Altemus.

22 BOARD MEMBER ALTEMUS: I do agree with
23 your position at this point. I'm also very
24 concerned about the dwelling units, because if you
25 look at the statute, it's real clear what

1 constitutes a dwelling unit, and I'm not sure that
2 that was really identified very well. So I do
3 agree with that issue.

4 And I think the hydrology is important,
5 and the fact that it's so close to a water body.
6 So it is very convoluted. If the case is before
7 the Supreme Court, it went through District Court,
8 and now we're asked to try to reconcile two points
9 of view that are vastly different.

10 I honestly think I need more time to
11 look at the issues between the two because I'm not
12 going to take what they say at face value, so I
13 really feel like I need more time, even though
14 we've had this before us now for a couple weeks.
15 But it's pretty complicated. So that's my
16 opinion. Thank you.

17 BOARD MEMBER SMITH: I'll speak up, too.
18 I think I'm somewhere in between Chair Simpson and
19 Board Member Aguirre.

20 I think with the residences, the reason
21 I see it as being complicated here is the
22 definition of a primary residence, because there's
23 multiple homes in the area, but they're not
24 necessarily permanently occupied or a primary
25 residence. So I think that's where that is a

1 little convoluted.

2 On the groundwater in particular, I
3 would really like to see for the drylands
4 exemption what's been approved in the past. Are
5 there any thresholds that have been adopted as far
6 as distance from groundwater, effects on
7 groundwater. That's the part I'm still a little
8 confused on is what thresholds have been adopted
9 there in the past, because this does kind of seem
10 to be quite on the edge, and I'm not quite sure
11 how to interpret that.

12 I mean there are references to
13 groundwater wells and GWIC logs and stuff that
14 have been used here to determine that, but we
15 don't have any of that data in front of us. So
16 I'm probably going to side with the motion with
17 Chair Simpson.

18 BOARD MEMBER RANKOSKY: I would agree
19 that the groundwater is my biggest concern. When
20 we do septic and those types of things, that is
21 one of the kind of golden rules that we abide by.
22 And for you to have a gravel pit, I would like
23 more information before we move forward with that.

24 CHAIR SIMPSON: Thank you, Board Member
25 Rankosky.

1 Board Member Smith, I believe early in
2 the testimony the point was made that this is the
3 first gravel pit to come to the Board under the
4 new rules that talk about dryland gravel pits, but
5 there may be others out there, so I think it's a
6 pertinent question -- others that have not been
7 challenged, that is. Anything further from the
8 Board?

9 (No response)

10 CHAIR SIMPSON: I guess I'd circle back,
11 and the question of the meaning of "affect" is
12 something that has drawn a lot of comment here,
13 and it's kind of tough to wrap one's hands around.
14 It's not necessarily ambiguous, it's just vague,
15 because this was addressed by the Hearing
16 Examiner. Effects can be significant or
17 non-significant, material or non-material.

18 And as you all know, my background is in
19 coal mining, and in coal mining we have a standard
20 called material damage, that is, the operator must
21 demonstrate that the operation is being planned to
22 prevent material damage to ground and surface
23 water. And material damage assessment is based on
24 changes in quality or quantity that would have an
25 adverse effect on water users. I'm paraphrasing

1 here, but that's essentially what it means.

2 So whether that -- it's a different
3 statute, so it doesn't provide any direct guidance
4 here, but I think it does provide a side board at
5 least to what we might consider as a significant
6 or material impact on water.

7 And the question of impact, I know it
8 goes to the EIS, which is something that really
9 isn't within our realm of responsibility, but we
10 do have a general responsibility under the
11 Constitution to consider the requirements for a
12 clean and healthful environment balanced against
13 the need of the people and the citizens of Montana
14 to be able to make a living. So --

15 VICE CHAIR AGUIRRE: Mr. Chairman, in
16 DEQ's response, they did address that, and also
17 offered a replacement. If we did not agree with
18 the DEQ's interpretation of "affect," they did
19 offer a newly drafted conclusions of law for No.
20 12. So I mean that is a possibility. After
21 reading through it, I believe that I agree there
22 with DEQ's interpretation of "affect" and how
23 Conclusion of Law 12 was written.

24 CHAIR SIMPSON: Thank you, Vice Chair
25 Aguirre. Anything else?

1 (No response)

2 CHAIR SIMPSON: Well, I'll restate my
3 motion with a little bit of elaboration, and that
4 is to remand this to the Hearing Examiner, with
5 specific attention to several points. One is
6 whether or not this issue is sufficiently --
7 whether there's agreement on the facts to support
8 summary judgment, that's Item No. 1.

9 Item No. 2 is with respect to
10 residences, that we be given a number, and also a
11 map showing the location of the proposed gravel
12 pit relative to other features, including the
13 river, water bodies, and dwellings.

14 Third is definitive information on the
15 water table, and how it relates to the depth of
16 the pit, that is, the elevation to -- difference
17 in elevation between the groundwater surface and
18 the bottom of the pit; and also a re-examination
19 of the word "affect" and how we deal with it in
20 this context.

21 Then I'll state separately that my
22 inclination right now, based on what I know, is to
23 support the recommendation that's been made by the
24 Hearing Examiner, but I think we need more
25 information particularly to support the Board's

1 position in the event the decision we make,
2 whatever it is, is appealed. Any further
3 discussion?

4 BOARD MEMBER REITEN: I'll second that
5 motion.

6 CHAIR SIMPSON: A motion has been made
7 and seconded. Any further discussion?

8 (No response)

9 CHAIR SIMPSON: All in favor, signify by
10 saying aye. Let's take a roll call, please.

11 MS. MOISEY-SCHERER: Chair Simpson.

12 CHAIR SIMPSON: Aye.

13 MS. MOISEY-SCHERER: Vice Chair Aguirre.

14 VICE CHAIR AGUIRRE: Nay.

15 MS. MOISEY-SCHERER: Board Member

16 Altemus.

17 BOARD MEMBER ALTEMUS: Aye.

18 MS. MOISEY-SCHERER: Board Member

19 Rankosky.

20 BOARD MEMBER RANKOSKY: Aye.

21 MS. MOISEY SCHERER: Board Member

22 Reiten.

23 BOARD MEMBER REITEN: Aye.

24 MS. MOISEY-SCHERER: Board Member Smith.

25 BOARD MEMBER SMITH: Aye.

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MS. MOISEY-SCHERER: The vote is five to one.

CHAIR SIMPSON: Motion carries. Thank you. The motion carries by a vote of five to one. Shall we move forward? Thank you.

(The proceedings were concluded at 10:54 a.m.)

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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 - 65 - 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 25th day of
April, 2024.

Laurie Crutcher

LAURIE CRUTCHER, RPR
Court Reporter - Notary Public
My commission expires
March 9, 2028.

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| <p style="text-align: center;">1</p> <p>1 [2] 7:3, 63:8 1,000 - 51:15 1-2-101 - 29:2 10 [5] 25:6, 28:7, 31:6, 34:19, 45:8 100 [2] 2:12, 37:13 10:15 - 39:10 10:16 - 39:13 10:54 - 65:7 11 [4] 25:6, 28:8, 31:6, 34:19 12 [3] 35:2, 62:20, 62:23 12th - 25:16 13 - 31:17 14 [2] 27:19, 47:15 15 [6] 3:17, 25:6, 31:8, 31:20, 31:23, 34:19 15th - 25:20 16 [3] 25:6, 31:6, 34:19 19 - 1:14 1st - 25:13</p> | <p style="text-align: center;">3</p> <p>305 - 2:12 3473 [5] 1:9, 3:8, 25:2, 27:25, 34:15</p> <p style="text-align: center;">4</p> <p>4 - 27:15 45 - 4:24 46 - 47:8 4th - 2:12</p> <p style="text-align: center;">5</p> <p>52 [5] 25:7, 32:25, 33:15, 34:3, 34:19 55 [6] 16:14, 16:19, 25:6, 33:1, 34:10, 34:19 59801-2701 - 2:12 59802 - 2:5 599 [3] 27:16, 28:1, 30:12</p> <p style="text-align: center;">6</p> <p>600 - 51:13 65 - 66:12</p> | <p>4:1, 66:14 able - 62:14 abundant - 5:6 accordance [2] 31:6, 34:10 according [2] 17:18, 58:11 accurate - 22:19 acknowledges [3] 14:2, 43:12, 49:15 Act [19] 7:13, 13:17, 14:16, 15:3, 27:7, 27:16, 29:11, 29:11, 29:19, 31:9, 31:19, 32:4, 32:6, 32:8, 32:12, 32:17, 32:24, 33:9, 45:24 activity - 17:1 actual - 13:22 add - 51:3 added - 30:20 addition - 25:4 additional [2] 31:25, 58:15 Additionally [2] 32:3, 34:6 address [6] 14:19, 18:1, 18:5, 39:4, 40:15, 62:16 addressed [5] 22:2, 24:3, 30:22, 32:5, 61:15 addresses - 28:11 33:23 adjacent [9] 4:19, 5:2, 5:14, 14:9, 17:1, 21:16, 33:17, 43:23, 44:23 administration - 30:10 administrative [2] 8:20, 26:12 admissions - 49:12 admit [2] 14:7, 14:20 admits [3] 10:21, 14:14, 48:17 admitted -</p> | <p>47:2 adopt [2] 25:1, 25:5 adopted [3] 32:22, 60:5, 60:8 adverse - 61:25 affect [39] 5:25, 7:24, 11:20, 12:7, 12:9, 12:15, 12:18, 13:17, 13:18, 21:10, 21:10, 28:8, 28:13, 28:22, 29:1, 29:9, 29:12, 29:18, 30:3, 30:15, 30:20, 30:21, 30:24, 42:5, 43:20, 44:1, 44:10, 45:13, 45:23, 45:24, 46:11, 48:18, 50:5, 53:15, 57:13, 61:11, 62:18, 62:22, 63:19 affected [6] 9:14, 14:5, 14:7, 14:8, 21:18, 55:22 affects [2] 32:16, 32:17 affirmative [5] 7:20, 9:6, 9:10, 10:17, 16:23 affirmatively - 49:22 affirmed - 44:15 affixed - 66:16 aforementioned - 28:3 against [2] 29:19, 62:12 agencies - 30:10 agency [2] 8:18, 8:20 agree [8] 20:9, 50:7, 57:3, 58:22, 59:3, 60:18, 62:17, 62:21</p> | <p>agreed - 53:5 agreeing - 57:19 agreement [3] 20:8, 56:17, 63:7 agrees [2] 34:13, 35:6 Aguirre [20] 1:19, 13:9, 19:19, 35:1, 35:9, 35:14, 35:19, 36:23, 37:4, 37:8, 39:19, 39:20, 57:23, 57:25, 58:18, 59:19, 62:15, 62:25, 64:13, 64:14 ahead - 18:18 aid - 32:22 allowed - 8:9 alone - 48:3 Altemus [11] 1:19, 39:22, 39:23, 54:11, 54:13, 54:21, 58:19, 58:21, 58:22, 64:16, 64:17 alternate - 36:16 alternative - 27:17 although - 23:1 ambiguous [3] 46:9, 46:11, 61:14 amendment - 30:25 among - 21:2 amongst [2] 6:8, 41:21 amount [2] 23:19, 29:14 amplified - 28:18 analysis [6] 5:24, 15:19, 17:18, 32:10, 41:22, 46:22 and/or [2] 10:12, 47:5 Annotated [2] 26:9, 27:15 anyway [2] 56:17, 57:18</p> | <p>appeal [4] 1:5, 3:6, 20:19, 21:4 appealed - 64:2 appearing [4] 2:2, 2:6, 2:10, 3:23 appears - 41:7 Appellants [3] 4:13, 5:1, 5:9 apple - 27:1 applicability [2] 16:6, 31:1 applicant [11] 6:3, 7:22, 8:10, 8:13, 10:8, 16:2, 17:13, 22:18, 27:5, 31:13, 33:5 applicants [2] 9:21, 32:23 application [18] 5:23, 7:17, 16:4, 21:24, 22:12, 23:13, 27:7, 27:20, 27:24, 28:1, 31:15, 31:21, 32:7, 44:1, 44:6, 45:11, 49:14, 51:19 applied [6] 6:4, 6:10, 7:4, 13:7, 41:24, 49:24 apply [6] 6:20, 13:20, 46:3, 50:4, 50:8, 50:10 applying [2] 9:15, 44:9 approach - 58:11 appropriate [5] 19:12, 41:17, 43:21, 45:4, 56:24 approve [2] 24:13, 56:15 approved - 60:4 April [3] 1:14, 27:4, 66:17 aquifers - 38:11 arbitrary [4] 8:21, 11:6, 16:8, 26:20</p> |
| <p style="text-align: center;">2</p> <p>2 - 63:9 2-4-621 - 26:8 20 [2] 47:17, 51:11 200901 - 2:8 2021 [2] 27:13, 27:23 2022 - 5:15 2023 [5] 5:15, 25:14, 25:15, 25:20, 28:21 2023-03 - 1:5 2024 [3] 1:14, 25:16, 66:17 2028 - 66:23 22nd [2] 25:8, 25:15 25th - 66:16 29 [5] 25:6, 32:4, 32:13, 32:21, 34:19 29620-0901 - 2:8</p> | <p style="text-align: center;">8</p> <p>82 - 27:14 82-4-332(1)(c) - 27:19 82-4-432 [2] 6:22, 31:11 82-4-432(1)(b) - 28:11 82-4-432(14)(a) - 33:4 8359 - 2:4 8th - 26:6</p> <p style="text-align: center;">9</p> <p>9 [7] 25:6, 28:7, 30:6, 31:6, 34:19, 45:8, 66:23 9:18 - 1:15</p> <p style="text-align: center;">A</p> <p>a.m [2] 1:15, 65:7 abide - 60:21 ability [2]</p> | <p>4:1, 66:14 able - 62:14 abundant - 5:6 accordance [2] 31:6, 34:10 according [2] 17:18, 58:11 accurate - 22:19 acknowledges [3] 14:2, 43:12, 49:15 Act [19] 7:13, 13:17, 14:16, 15:3, 27:7, 27:16, 29:11, 29:11, 29:19, 31:9, 31:19, 32:4, 32:6, 32:8, 32:12, 32:17, 32:24, 33:9, 45:24 activity - 17:1 actual - 13:22 add - 51:3 added - 30:20 addition - 25:4 additional [2] 31:25, 58:15 Additionally [2] 32:3, 34:6 address [6] 14:19, 18:1, 18:5, 39:4, 40:15, 62:16 addressed [5] 22:2, 24:3, 30:22, 32:5, 61:15 addresses - 28:11 33:23 adjacent [9] 4:19, 5:2, 5:14, 14:9, 17:1, 21:16, 33:17, 43:23, 44:23 administration - 30:10 administrative [2] 8:20, 26:12 admissions - 49:12 admit [2] 14:7, 14:20 admits [3] 10:21, 14:14, 48:17 admitted -</p> | <p>47:2 adopt [2] 25:1, 25:5 adopted [3] 32:22, 60:5, 60:8 adverse - 61:25 affect [39] 5:25, 7:24, 11:20, 12:7, 12:9, 12:15, 12:18, 13:17, 13:18, 21:10, 21:10, 28:8, 28:13, 28:22, 29:1, 29:9, 29:12, 29:18, 30:3, 30:15, 30:20, 30:21, 30:24, 42:5, 43:20, 44:1, 44:10, 45:13, 45:23, 45:24, 46:11, 48:18, 50:5, 53:15, 57:13, 61:11, 62:18, 62:22, 63:19 affected [6] 9:14, 14:5, 14:7, 14:8, 21:18, 55:22 affects [2] 32:16, 32:17 affirmative [5] 7:20, 9:6, 9:10, 10:17, 16:23 affirmatively - 49:22 affirmed - 44:15 affixed - 66:16 aforementioned - 28:3 against [2] 29:19, 62:12 agencies - 30:10 agency [2] 8:18, 8:20 agree [8] 20:9, 50:7, 57:3, 58:22, 59:3, 60:18, 62:17, 62:21</p> | <p>agreed - 53:5 agreeing - 57:19 agreement [3] 20:8, 56:17, 63:7 agrees [2] 34:13, 35:6 Aguirre [20] 1:19, 13:9, 19:19, 35:1, 35:9, 35:14, 35:19, 36:23, 37:4, 37:8, 39:19, 39:20, 57:23, 57:25, 58:18, 59:19, 62:15, 62:25, 64:13, 64:14 ahead - 18:18 aid - 32:22 allowed - 8:9 alone - 48:3 Altemus [11] 1:19, 39:22, 39:23, 54:11, 54:13, 54:21, 58:19, 58:21, 58:22, 64:16, 64:17 alternate - 36:16 alternative - 27:17 although - 23:1 ambiguous [3] 46:9, 46:11, 61:14 amendment - 30:25 among - 21:2 amongst [2] 6:8, 41:21 amount [2] 23:19, 29:14 amplified - 28:18 analysis [6] 5:24, 15:19, 17:18, 32:10, 41:22, 46:22 and/or [2] 10:12, 47:5 Annotated [2] 26:9, 27:15 anyway [2] 56:17, 57:18</p> | <p>appeal [4] 1:5, 3:6, 20:19, 21:4 appealed - 64:2 appearing [4] 2:2, 2:6, 2:10, 3:23 appears - 41:7 Appellants [3] 4:13, 5:1, 5:9 apple - 27:1 applicability [2] 16:6, 31:1 applicant [11] 6:3, 7:22, 8:10, 8:13, 10:8, 16:2, 17:13, 22:18, 27:5, 31:13, 33:5 applicants [2] 9:21, 32:23 application [18] 5:23, 7:17, 16:4, 21:24, 22:12, 23:13, 27:7, 27:20, 27:24, 28:1, 31:15, 31:21, 32:7, 44:1, 44:6, 45:11, 49:14, 51:19 applied [6] 6:4, 6:10, 7:4, 13:7, 41:24, 49:24 apply [6] 6:20, 13:20, 46:3, 50:4, 50:8, 50:10 applying [2] 9:15, 44:9 approach - 58:11 appropriate [5] 19:12, 41:17, 43:21, 45:4, 56:24 approve [2] 24:13, 56:15 approved - 60:4 April [3] 1:14, 27:4, 66:17 aquifers - 38:11 arbitrary [4] 8:21, 11:6, 16:8, 26:20</p> |

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