Exhibit A

D.C. Doc. 63, Order of Petition for Judicial Review (Oct. 28, 2021).

DATE October 28, 2021
CLERK OF DISTRICT COURT
By: [signature]

KATHERINE M. BIDEGARY
District Judge, Department 2
Seventh Judicial District
300 12th Avenue, N.W., Suite #2
Sidney, Montana 59270

MONTANA SIXTEENTH JUDICIAL DISTRICT, ROSEBUD COUNTY

MONTANA ENVIRONMENTAL INFORMATION CENTER, and SIERRA CLUB, Petitioners, vs. MONTANA DEPARTMENT OF ENVIRONMENTAL QUALITY, MONTANA BOARD OF ENVIRONMENTAL REVIEW, WESTERN ENERGY CO., NATURAL RESOURCE PARTNERS, L.P., INTERNATIONAL UNION OF OPERATING ENGINEERS, LOCAL 400, and NORTHERN CHEYENNE COAL MINERS ASSOCIATION, Respondents.	Cause No.: DV 19-34 Judge Katherine M. Bidegaray **ORDER ON PETITION**

I. INTRODUCTION

Pursuant to the Montana Administrative Procedure Act ("MAPA"), which provides for the judicial review of final agency action, the Montana Environmental Information Center and Sierra Club ("Conservation Groups") petitioned this Court, contending that the approval by the Montana Board of Environmental Review ("BER") of the AM4 permit expanding the Rosebud Mine was procedurally and substantively flawed and should be reversed and remanded to the Montana Department of Environmental Quality ("DEQ") to review the AM4 permit application consistent with applicable laws.

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The Conservation Groups assert that the BER committed procedural error by (1) erroneously applying administrative issue exhaustion to the Conservation Groups' permit appeal; (2) employing an unlawful double standard, limiting the Conservation Groups to evidence and issues raised in public comments prior to the permitting decision, while permitting DEQ and the permit applicant Westmoreland Rosebud Mining ("WRM") to present post-decisional evidence and argument; (3) allowing unqualified witnesses to present expert testimony on behalf of DEQ; and (4) by unlawfully reversing the burden of proof.

Substantively, the Conservation Groups assert that the BER unlawfully upheld a permit that relied upon evidence that the BER and DEQ both found unreliable, and which allowed WRM to cause material damage to a stream, the East Fork Armells Creek, in violation of applicable legal standards.

Following the parties' submission of briefs, this matter came on for hearing before the Court on December 16, 2020. Having considered the briefs and the parties' well-presented arguments, the Court is prepared to rule.

II. LEGAL FRAMEWORK

Resolution of this case involves consideration of the administrative record in conjunction with the rather complex legal framework, including the burden of proof. This case involves application of two federal laws—the Surface Mining Control and Reclamation Act, 30 U.S.C. §§ 1201-1328, and Clean Water Act, 33 U.S.C. §§ 1251-1387—and two state laws—the Montana Strip and Underground Mine Reclamation Act, §§ 82-4-201 to -254, MCA, and Montana Water Quality Act, §§ 75-5-101 to -1126, MCA.

A. The Surface Mining Control and Reclamation Act and the Montana Strip and Underground Mine Reclamation Act.

The federal Surface Mining Control and Reclamation Act ("SMCRA") and the state Montana Strip and Underground Mine Reclamation Act ("MSUMRA") regulate coal mining through a system of "cooperative federalism" that allows states to develop and administer regulatory programs that meet minimum federal standards. *Hodel v. Va. Surface Mining & Reclamation Ass'n*, 452 U.S. 264, 289 (1981); 30 U.S.C. § 1253(a). MSUMRA is Montana's federally approved program. 30 C.F.R. Part 926.

The fundamental purpose of SMCRA is to "protect society and the environment from the adverse effects of surface coal mining." 30 U.S.C. § 1202(a); *In re Bull Mountains*, No. BER 2016-03, at 59-63 (Mont. Bd. Of Envtl. Rev. Jan. 14, 2016) (detailing SMCRA's background) (in record at BER:141, Ex. 1). In enacting SMCRA, Congress stressed that citizen participation is essential for effective regulation of coal mining: "The success or failure of a national coal surface mining regulation program will depend, to a significant extent, on the role played by citizens in the regulatory process." S. Rep. No. 95-128, at 59 (1977).

Citing to Article II, § 3 and Article IX of the Montana Constitution, MSUMRA's stated intent is to "maintain and improve the state's clean and healthful environment for present and future generations" and to "protect the environmental life-support system from degradation." § 82-4-202(2)(a)(b), MCA. In *Park County Envtl. Council v. Dep't of Envtl. Quality*, 2020 MT 303, 402 Mont. 168, 477 P.3d 288 (decided December 8, 2020), the Montana Supreme Court explained that Montana laws that implement Montana's constitutional right to a clean and healthful environment must be interpreted consistently with that fundamental constitutional right, which was "intended ... to contain the strongest

environmental protection provision found in any state." *Id.*, ¶ 61 (quoting *Mont. Envtl. Info. Ctr. v. Mont. Dep't of Envtl. Quality* (*MEIC I*), 1999 MT 248, ¶ 66, 296 Mont. 207, 988 P.3d 1236). The *Park County* Court also underscored that the right to a clean and healthful environment contains a precautionary principle: it is "anticipatory and preventive" and "do[es] not require that dead fish float on the surface of our state's rivers and streams before the [Montana Constitution's] farsighted environmental provisions can be invoked." *Id.*, ¶ 61 (quoting *MEIC I*, ¶ 77).

Under MSUMRA, DEQ is forbidden from issuing a mining permit unless and until the applicant "affirmatively demonstrates" and DEQ issues "written findings" that "confirm, based on information set forth in the application or information otherwise available that is compiled by [DEQ] that ... cumulative hydrologic impacts will not result in material damage to the hydrologic balance outside the permit area." ARM 17.24.405(6)(c); § 82-4-227(3)(a), MCA. "Cumulative hydrologic impacts" are the "total qualitative and quantitative direct and indirect effects of mining and reclamation operations." ARM 17.24.301(31). "Material damage" is defined as:

> degradation or reduction by coal mining and reclamation operations of the quality or quantity of water outside the permit area in a manner or to an extent that land uses or beneficial uses are adversely affected, water quality standards are violated, or water rights are impacted. Violation of a water quality standard, whether or not an existing water use is affected, is material damage.

§ 82-4-203(31), MCA. MSUMRA places the "burden" of demonstrating that material damage will *not occur* on the "applicant." § 82-4-227 (1), (3), MCA; ARM 17.24.405(6)(c).

DEQ's analysis occurs in a document called the "cumulative hydrologic impact assessment" or "CHIA," which assesses the "cumulative hydrologic impacts" from "all previous, existing, and anticipated mining" and determines, in light of these cumulative

impacts, whether the "proposed operation has been designed to prevent material damage." ARM 17.24.301(32), .314(5). "Anticipated mining" is defined to "include[], at a minimum ... all operations with pending applications." *Id.* 17.24.301(32).

Within 30 days of DEQ's permit decision, "any person ... adversely affected may submit a request for a hearing on the reasons for the final decision." *Id.* 17.24.425(1). DEQ's "reasons for the final decision" are only available to the public *after* the public comment period on the permit application. *Id.* 17.24.404(3), .405(6). Failure to submit public comments "in no way vitiates" or limits the right of an affected person to request a hearing. 56 Fed. Reg. 2,139, 2,141 (Jan. 22, 1991). The requested hearing occurs before the BER pursuant to the Montana Administrative Procedure Act (MAPA). § 82-4-206(1)-(2), MCA; §§ 2-4-601 to -631, MCA.

B. The Clean Water Act and the Montana Water Quality Act.

As noted, MSUMRA defines "material damage" (the key standard in this case) to include any "[v]iolation of a water quality standard" or "advers[e] [e]ffect[s]" to any "beneficial uses of water." § 82-4-203(31), MCA. Water quality standards are set by the federal Clean Water Act ("CWA") and the state Montana Water Quality Act ("MWQA"). These laws likewise establish a "system of cooperative federalism" in which states implement programs that meet minimum federal standards. *Mont. Envtl. Info. Ctr. v. Mont. Dept' of Envtl. Quality* (*MEIC III*), 2019 MT 213, ¶ 29, 397 Mont. 161, 451 P.3d 493. Water quality standards are "[p]rovisions of State or Federal law which consist of a designated use or uses for the waters of the United States and water quality criteria for such waters based upon such uses." 40 C.F.R. § 130.2(d). "Montana's water quality standards are set forth in [ARM] 17.30.601 through 17.30.670 ...." *MEIC III*, ¶ 33.

A water body that "is failing to achieve compliance with applicable water quality standards" is called an "[i]mpaired water body." § 75-5-103(14), MCA. When a water body reaches its "[l]oading capacity" for a pollutant, additional pollution will result in a "violation of water quality standards." *Id.*; § 75-5-103(18), MCA.

Under MSUMRA, a CHIA that fails to address "applicable water quality standards" in assessing material damage is unlawful. *In re Bull Mountains*, at 64.

III. BACKGROUND AND PRIOR PROCEEDINGS[1]

A. The Rosebud Mine and East Fork Armells Creek

The Rosebud Mine is a 25,752-acre coal strip-mine located near Colstrip. BER:152 at 9. It has five permit areas, Areas A, B, C, D, and E. *Id.* at 10. East Fork Armells Creek ("EFAC") is a prairie stream, whose headwaters are surrounded by the mine. *Id.* at 18. EFAC is outside the permit area. *Id.* The mine "dominates the potential anthropogenic pollutant sources in" the EFAC headwaters. *Id.* at 20.

Narrative water quality standards for EFAC require the stream "to be maintained suitable for ... growth and propagation of non-salmonid [i.e., warm water] fishes and associated aquatic life." ARM 17.30.629(1); BER:152 at 18. Since 2006, DEQ has designated and identified EFAC as an impaired water body, failing to achieve water quality standards for supporting the growth and propagation of aquatic life. BER:152 at 24; BER:95, Exs. DEQ-9, DEQ-10. DEQ identified excessive salinity, measured by total dissolved solids (TDS) and specific conductivity (SC), as a cause of the impairment, identified coal mining as an unconfirmed source of the excessive salt, and found that a

[1] Throughout this Order, citations to the administrative record will use the following format: for documents, "BER:[docket entry number] at [page]," and for exhibits, "BER:[folder number], Ex.[exhibit number in folder], at [page]."

"40% increase in TDS in the alluvial aquifer upstream of Colstrip appears to be directly associated with mining activity." BER:152 at 28; BER:95 Ex. DEQ-9 at 7; BER:95, Ex. DEQ-10 at 19. DEQ has not completed a plan "to correct the water quality violations" in EFAC. BER:152 at 25.

B. The AM4 expansion of Area B of the Rosebud Mine

In 2009, WRM applied for the AM4 amendment to its Area B permit. BER:152 at 13. The existing Area B permit covers 6,182 acres. *Id.* at 10. AM4 adds 12.1 million tons of coal from 306 acres to Area B. *Id.* After six years of back and forth with WRM, in July 2015, DEQ allowed 26 days for public comment on WRM's voluminous application. *Id.* at 14. The Conservation Groups submitted comments, addressing, *inter alia*, the existing impairment of EFAC and impacts of increased salinity and harm to aquatic life. BER:95, Ex. DEQ-4 at 2-7. The comments included and incorporated a letter raising concerns about cumulative hydrologic impacts from anticipated mining in proposed Area F, a 6,500-acre expansion for which WRM had applied in 2011. BER:95, Ex. DEQ-4 at 1; BER:95, Ex. DEQ-4L at 17. The comments also raised concerns about WRM's apparent dewatering of an intermittent reach of EFAC. BER:95, Ex. DEQ-4 at 2-3.

C. DEQ's Cumulative Hydrologic Impact Assessment

After the close of the public comment, DEQ issued its CHIA, response to comments, and written findings approving the AM4 expansion. BER:152 at 14-15. DEQ responded to the Conservation Groups' concerns about salinity, stating that "the 13% increase in TDS [salinity] ... in EFAC" would not adversely affect aquatic life or violate water quality standards. BER:95, Ex. DEQ-1 at 11. Regarding aquatic life, DEQ asserted that a survey of macroinvertebrates in EFAC by WRM proved the stream "currently meets

the narrative [water quality] standard of providing a beneficial use for aquatic life." BER:95, Ex. DEQ-1A at 9-8; BER:95, Ex. DEQ 1 at 8-9. Regarding dewatering, DEQ stated it could not determine whether mining had dewatered a portion of EFAC, so "material damage to this section cannot be determined." BER:95, Ex. DEQ-1 at 9; BER:95, Ex. DEQ 1-A at 9-10.

DEQ's CHIA did not directly address the Conservation Groups' concerns about anticipated mining in Area F. However, the CHIA included a legal definition of "anticipated mining" that is inconsistent with applicable regulations. Whereas the regulations define "anticipated mining" to include "operations with *pending applications*," ARM 17.24.301(32) (emphasis added), the CHIA narrowed the definition to "*permitted operations*." BER:95, Ex. DEQ-1A at 5-1 (emphasis added). Based on this narrow definition, DEQ excluded Area F (the application for which was *pending*, but not *permitted*) from analysis. BER:100, Exs. 19-22.

The Conservation Groups timely sought administrative review, claiming DEQ's analysis in the CHIA failed to adequately assess material damage to EFAC in light of the stream's status as an impaired water body. BER:1 at 3-4. The Conservation Groups also challenged the CHIA's unlawfully narrowed definition of "anticipated mining" and its reversal of the burden of proof regarding material damage. *Id.* at 2-3; BER:97 at 2. WRM intervened and the case went to a contested case hearing before the BER's hearing examiner. BER:4, 115-18.

D. Motions in Limine

Prior to the hearing, DEQ and WRM objected to a number of the Conservation Groups' claims based on "administrative issue exhaustion" (or "waiver"), contending that

the claims were not raised in their public comments. BER:73; BER:74. The Conservation Groups opposed the motions, contending that issue exhaustion does not apply to administrative review of permitting decisions under MSUMRA and that because they were not allowed to review any draft of DEQ's CHIA prior to submitting comments, they could not have been expected to foresee DEQ's legal errors in the CHIA. BER:84 at 3-15. The BER, however, applied issue exhaustion and, accordingly, dismissed multiple claims, including claims related to anticipated mining and dewatering. BER:152 at 77. The BER also barred the Conservation Groups from citing or discussing evidence from DEQ's permitting record if the evidence was not also referenced in their comments. *E.g.*, BER:152 at 77 ((precluding references to dissolved oxygen (which affects aquatic life) and chloride (which also affect aquatic life)).

The Conservation Groups complain here that, while the BER strictly limited the Conservation Groups to issues and evidence identified in their comments, the BER expansively permitted DEQ and WRM to present post-decisional evidence that was not included or evaluated in DEQ's CHIA or permitting record. *E.g.*, BER:152 at 37-39, 64 (relying on "probabilistic" and "statistical" analysis proffered by WRM in contested case); *cf.* BER:118 at 33:4-20 (parties stipulating that statistical analysis was not in permit record).

The Conservation Groups, for their part, moved in limine to prevent DEQ's hydrologist, Emily Hinz, Ph.D., from presenting testimony about aquatic life in EFAC. BER:76 at 5-7. The parties and the BER's hearing examiner "all agree[d] that she's [Dr. Hinz] not an expert in aquatic life of any kind." BER:117 at 86:20-21. However, based on Montana Rule of Evidence 703, the BER permitted and later relied upon opinion testimony

by Dr. Hinz about aquatic life health in EFAC. BER:152 at 48-50; BER:116 at 215:18 to 219:4.

E. The BER's Final Order

The BER upheld the AM4 permit. BER:152 at 85-86. Regarding the burden of proof, the BER held, over dissent,[2] that the Conservation Groups failed to demonstrate that material damage would likely result. BER:152 at 84 (Conservation Groups "failed to present evidence necessary to establish the existence of any water quality standard violations"); *accord id.* at 72, 76.

Regarding water quality standards, the BER recognized that DEQ's CHIA "must assess whether the action at issue will cause a violation of water quality standards." BER:152 at 75. The BER further recognized that under the "relevant water quality standard," EFAC must be "maintained to support ... growth and propagation of ... aquatic life." *Id.* at 18, *quoting* ARM 17.30.629(1). DEQ testified it does not use analysis of aquatic macroinvertebrates to assess this water quality standard because, as the BER found, such analysis "does not provide an accepted or reliable indicator of aquatic life support." *Id.* at 46-47. The BER nevertheless relied on DEQ's survey of macroinvertebrates to conclude that DEQ's CHIA adequately assessed the narrative water quality standard for growth and propagation of aquatic life. *Id.* at 85.

[2] One BER member objected that the BER was impermissibly placing the burden on the Conservation Groups to prove that material damage *would occur*, given MSUMRA's provision placing the burden on WRM and DEQ to prove that material damage *would not occur*. BER:151 at 204:18-22 ("[I] don't think we can flip and require the Petitioner to prove with certainty that damage will occur ...."); *accord* at 214:18-23; *cf. Park Cnty.*, ¶ 61 (explaining that state constitution "do[es] not require that dead fish float on the surface of our state's rivers and streams before the [Montana Constitution's] farsighted environmental provisions can be invoked," *quoting MEIC I*, ¶ 77).

Regarding salinity, the BER found that EFAC is impaired and not meeting water quality standards for growth and propagation of aquatic life due to excessive salinity (that is, existing salinity concentrations are adversely affecting growth and propagation of aquatic life in EFAC). *Id.* at 28. The BER further found that existing mining operations are expected to increase salinity cumulatively in EFAC by 13%. *Id.* at 39 (noting "anticipated 13% increase in the concentration of TDS [salinity] in EFAC"); BER:95, Ex. DEQ-1 at 11 (noting "the 13% increase in TDS ... in EFAC"); DEQ-1A at 9-9 (noting that "[b]aseflow in EFAC ... is predicted to experience a postmine increase in TDS of 13%, elevating the average concentration of TDS to almost 2,600 mg/L"). However, adopting an argument of DEQ that did not appear in the CHIA, the BER concluded it should consider salinity pollution from AM4 in isolation from the predicted cumulative salinity increase of 13% from other mining operations. *Id.* 63-64. The BER then reasoned that because AM4—viewed in isolation—would only extend the *duration* of elevated salinity concentrations (up to "tens to hundreds of years") but would not, on its own, increase the salinity *concentration*, it would not cause material damage. *Id.* at 62-72.

The Conservation Groups timely appealed the BER's decision.

IV. STANDARD OF REVIEW

Under MAPA, a district court may "reverse or modify" an agency decision in a contested case if "(a) the administrative findings, inferences, conclusions, or decisions are: (i) in violation of constitutional or statutory provisions ... (iii) made upon unlawful procedure ... [or] (vi) arbitrary and capricious," resulting in prejudice to the substantial rights of a party. § 2-4-704(2), MCA.

DEQ and WMR dispute that the arbitrary and capricious standard applies to judicial review of contested cases under MAPA. DEQ Br. at 3; WMR Br. at 2 n.3. The Montana Supreme Court, however, recently clarified that it does. *Vote Solar v. Mont. Dep't of Pub. Serv. Regulation*, 2020 MT 213A, ¶¶ 35-37, 401 Mont. 85, 473 P.3d 963. Legal conclusions are reviewed for correctness, not abuse of discretion. *Id.*, ¶ 35; *cf.* DEQ Br. at 3 (citing *Harris v. Bauer*, 230 Mont. 207, 212, 749 P.2d 1068 (1988)); *Steer, Inc. v. Dep't of Revenue*, 245 Mont. 470, 474, 803 P.2d 601, 603 (1990) (abrogating "abuse of discretion" standard for review of conclusions of law); *see also N. Cheyenne Tribe v. DEQ*, 2010 MT 111, ¶ 19, 356 Mont. 296, 234 P.3d 51.

"[I]nternally inconsistent analysis signals arbitrary and capricious action." *MEIC v. DEQ* (*MEIC III*), 2019 MT 213, ¶ 26, 397 Mont. 161, 451 P.3d 493 (quoting *NPCA v. EPA*, 788 F.3d 1134, 1141 (9th Cir. 2015)). "Montana courts do not defer to incorrect or unlawful agency decisions ...." *Id.*, ¶ 22.

"The goal of statutory interpretation is to give effect to the purpose of the statute. A statute will not be interpreted to defeat its object or purpose, and the objects to be achieved by the legislature are of prime consideration in interpreting it." *Dover Ranch v. Cnty. of Yellowstone*, 187 Mont. 276, 283, 609 P.2d 711, 715 (1980) (internal citations omitted). In reviewing agency decisions that impact the environment, the Montana Supreme Court "remain[s] mindful that Montanans have a constitutional right to a clean and healthful environment." *Mont. Envtl. Info. Ctr. v. Mont. Dep't of Envtl. Quality* (*MEIC IV*), 2020 MT 288, ¶ 26, 402 Mont. 128, 476 P.3d 32 (quoting *Upper Mo. Waterkeeper v. Mont. Dep't of Envtl. Quality*, 2019 MT 81, ¶ 41, 395 Mont. 263, 438 P.3d 792). Montana

courts afford "much less" deference to agency interpretations of statutes. *MEIC III*, ¶ 24 n.9.

V. DISCUSSION

A. Whether the BER erred by applying administrative issue exhaustion to preclude consideration of issues raised by the Conservation Groups.

In support of the BER on this issue, DEQ and WRM contend that issue exhaustion at the permit appeal stage is required by the *text* of MSUMRA, "rules, and the BER's *Signal Peak* [*Bull Mountains*] ruling." DEQ Br. at 8; *see also* WRM Br. at 7. A review of statutory text, however, does not support this contention. DEQ cites only one statutory provision—§ 82-4-231(8)(e)-(f), MCA, DEQ Br. at 8, 9, 11—but that provision says nothing about issue exhaustion. Instead, it provides that, after DEQ deems an application acceptable, it must provide public notice and a brief comment period during which an interested person "*may* file a written objection." § 82-4-231(8)(e), MCA (emphasis added). DEQ must then prepare written findings. *Id.* § 82-4-231(8)(f). There is no textual issue exhaustion requirement. DEQ also cites ARM 17.24.405(5)-(6), but these provisions are also devoid of any express written issue exhaustion requirement. Similarly, the *In re Bull Mountains* decision, also cited by DEQ, says nothing about administrative issue exhaustion.

The Court finds relevant here the *text* of § 82-4-206(1), MCA, which provides the sole requirements for seeking administrative review of a permit decision under MSUMRA; namely, (1) that the person seeking administrative review be adversely affected (undisputed here); and (2) that the request be timely (also, undisputed here). *Accord* ARM 17.24.425(1). Notably, the relevant *texts* do not impose *any* exhaustion requirement. The

Court further notes that the U.S. Department of Interior explained that the parallel federal provision for public comment on permit applications "in no way" limits the rights of affected members of the public from seeking administrative review. 56 Fed. Reg. 2,139, 2,141 (Jan. 22, 1991); *Save Our Cumberland Mountains v. OSM*, NX 97-3-PR at 16-17 (Dep't of Interior July 30, 1998) (in record as BER:141, Ex. 4). These interpretations of the parallel federal provisions are compelling because Montana, like other states with approved regulatory programs under SMCRA, must "interpret, administer, enforce, and maintain [them] in accordance with the Act [SMCRA], this chapter [SMCRA's federal implementing regulations], and the provisions of the approved State program." 30 C.F.R. § 733.11.[3]

Based on the absence of any exhaustion requirement in MSUMRA and its implementing regulations, and because MSUMRA must protect and encourage public participation to the same degree as SMCRA, 30 U.S.C. § 1253(a), the Court concludes that the BER erred in engrafting an extra-statutory exhaustion requirement onto MSUMRA.[4] *See also* S. Rep. No. 95-128, at 59 (1977) (expressing congressional intent that public play a significant role in administration of SMCRA).

Similarly, MAPA does not require issue exhaustion in contested cases, but instead allows parties to raise new issues revealed during administrative review. *Citizens Awareness Network v. BER*, 2010 MT 10, ¶¶ 23-30, 355 Mont. 60, 227 P.3d 583. *See*

[3] DEQ attempts to minimize the importance of this on-point federal authority, by noting the cooperative-federalism structure of SMCRA and MSUMRA. DEQ Br. at 8, n.8. However, as noted, because MSUMRA is a delegated program under SMCRA, it must be "in accordance with" and "consistent with" SMCRA and its implementing "rules and regulations." 30 U.S.C. § 1253(a)(1), (7); 30 C.F.R. § 733.11. Thus, MSUMRA may not be interpreted to be less protective of public participation than SMCRA.

§ 2-4-702(1)(b), MCA (issue exhaustion applies *after* contested case). Simply stated, the Court finds no authority for DEQ's and WRM's proposal to limit the public to issues raised *before* DEQ lays its cards on the table. *See Vote Solar*, ¶ 49 (exhaustion does not require party to identify error before it occurs).

This conclusion is buttressed by the Montana Constitution's rights to know and to participate, which entitle the public to review government analyses *before* objecting to government decisions. *Bryan v. Yellowstone Cnty.*, 2002 MT 264, ¶¶ 32-46, 312 Mont. 257, 60 P.3d 381; Mont. Const. art. II, §§ 8-9. As the *Bryan* Court noted, for these rights to be more than a "paper tiger," the public must have a "reasonable opportunity to know the claims of the opposing party [the government] and to meet them." *Bryan*, ¶¶ 44, 46.

Here, DEQ seeks to impute sufficient knowledge of the deficiencies which the Conservation Groups later complained of, asserting that WRM as part of its AM4 application submitted a Probable Hydrologic Consequences ("PHC") report, which should have tipped off the Conservation Groups as to the deficiencies that it complains of in DEQ's CHIA. DEQ misses the point. It is agency action (or inaction) that is at the heart of the review sought by the Conservation Groups. Under MSUMRA, the public only sees *DEQ's CHIA* when *the agency* approves or denies the permit, well *after* the comment period on WMR's application had closed. ARM 17.24.404(3)(a), 17.24.405(5)-(6). Administrative review thus is the first opportunity the public must contest *DEQ's* "reasons for the final decision." ARM 17.24.425(1). Application of issue exhaustion to limit the Conservation Groups to issues raised in comments made *before* ever seeing DEQ's CHIA and "final decision" would render public participation a "hollow right" and violate applicable statutory and constitutional rights. *Bryan*, ¶ 44.

In reaching the contrary conclusion, the BER cited one authority, its prior ruling in *In re Bull Mountains*. BER:103 at 5; BER:152 at 77. That decision is inapposite because it never addressed issue exhaustion in any respect. *See In re Bull Mountains*, at 56-59.

Even if it were applicable, issue exhaustion would not bar the Conservation Groups' claims here for two reasons. First, the Conservation Groups' comments identified the need to assess cumulative impacts to water from Area F and concerns about dewatering EFAC. *See* BER:95, Ex. DEQ-4L at 17 (noting that "Area B [i.e., AM4] and Area F" "will have cumulatively significant impacts on ... surface waters"); BER:95, Ex. DEQ-4 at 2-3 (noting dewatering); *see also* Conservation Groups' Br., at Argument I.B. WRM criticizes the precision with which the Conservation Groups' comments discussed Area F and dewatering. WRM Br. at 15. Nevertheless, at the very least, DEQ was alerted "in general terms" that these issues would be "fully sifted" in the ensuing administrative review and "the groups' theories for challenging the permit would not be confined to those presented in the original affidavit." *See Lands Council v. McNair, 629 F.3d 1070, 1076 (9th Cir. 2010)*; *Citizens Awareness Network*, ¶ 23.

Second, the record shows that DEQ also had actual knowledge of these issues. Discovery revealed that DEQ debated analyzing cumulative impacts from Area F but declined to do so based on an incorrect definition of "anticipated mining." BER:100, Ex. 19 (defining "anticipated mining" incorrectly as "approved—but not mined" and noting "proposed Area F and additional mining in Area A—not included" as a result); *id.* Exs. 20-22 (discussions resulting in exclusion of anticipated mining based on incorrect definition); BER:95, Ex. DEQ-1A at 5-1 (erroneous definition of "anticipated mining"); *cf.* ARM 17.24.301(32) (correct definition). DEQ also had actual knowledge of the Conservation

Groups' concerns about dewatering EFAC because it addressed them in the CHIA and response to comments. BER:95, Ex. DEQ-1 at 9-10 (stating DEQ could not determine whether mining had dewatered the stream and concluding "material damage to this section cannot be made"); *id.* Ex. DEQ 1-A at 9-10. Because the Conservation Groups raised these issues and DEQ knew about and addressed them (albeit erroneously), issue exhaustion does not apply. *Barnes v. U.S. Dep't of Transp.*, 655 F.3d 1124, 1132-34 (9th Cir. 2011) (explaining that there is "no need" for public to raise issue that agency already had knowledge of); *NRDC v. EPA*, 824 F.2d 1146, 1151 (D.C. Cir. 1987) ("This court has excused the exhaustion requirements for a particular issue when the agency has in fact considered the issue."); *see also State v. Baze*, 2011 MT 52, ¶ 11, 359 Mont. 411, 251 P.3d 122 (related doctrine of waiver inapplicable where parties raised and district court addressed issue).

In sum, issue exhaustion does not apply to administrative review of permits under MSUMRA. The BER erroneously required the Conservation Groups to exhaust issues which arose only upon publication of DEQ's analysis after the close of the public comment period. Further, even if issue exhaustion applied, DEQ's actual knowledge of the Conservation Groups' concerns foreclosed its application. The BER erred in dismissing the Conservation Groups' claims concerning DEQ's erroneous definition of "anticipated mining" and dewatering EFAC based on issue exhaustion. Moreover, the error was prejudicial because it precluded a merits-based ruling on the Conservation Groups' claims. *Organized Vill. of Kake v. U.S. Dep't of Agric.*, 795 F.3d 956, 969 (9th Cir. 2015) (explaining that "the required demonstration of prejudice is not a particularly onerous requirement").

B. Whether the Conservation Groups' brief met the requirements of § 2-4-621(1), MCA.

Under MAPA, after a hearing examiner issues proposed findings and conclusions, each party that is adversely affected must be given an "opportunity ... to file exceptions and present briefs and oral arguments to the officials [here, the BER] who are to render the decision." § 2-4-621(1), MCA. Accordingly, after issuance of the proposed findings and conclusions, the BER issued an order stating: "Any party adversely affected by the Proposed Order may file Exceptions to the proposed order on or before May 10, 2019." BER:135 at 2.

In response, each party filed a brief objecting to portions of the proposed findings and conclusions. BER:139; BER:140; BER:141. WRM and DEQ captioned their briefs "Exceptions," BER:139; BER:140. The Conservation Groups captioned their brief "Objections." BER:141. The Conservation Groups' brief, like those of WRM and DEQ, identified specific portions of the proposed findings to which the Conservation Groups' objected. *E.g.*, BER:141 at 7, 12, 24, 31, 47, 48, 52, 53. Previously, the Conservation Groups had submitted 55 pages of proposed findings, and 76 pages of objections to the proposed findings of DEQ and WRM. BER:123; BER:131.

Citing *Flowers v. BER of Personnel Appeals*, 2020 MT 150, 400 Mont. 238, 465 P.3d 210, WRM—now for the first time before this Court[5]—contends that the Conservation Groups' brief failed to meet the requirements of § 2-4-621(1), MCA, because it was denominated "objections" rather than "exceptions." WRM Br. at 6. WRM's argument is without merit. The Montana Supreme Court has long refused to interpret

[5] Notably, WRM did not raise this issue before the BER, though it had the opportunity to do so.

MAPA in such a hyper-technical fashion. *State ex rel. Mont. Wilderness Ass'n v. Bd. of Natural Res. & Conservation*, 200 Mont. 11, 39-40, 648 P.2d 734, 749 (1982) (refusing to "exalt form over substance" and not requiring agency to rule on each proposed finding offered by parties as provided in § 2-4-623(4), MCA); *see also* § 1-3-219, MCA. Thus, the Court "encourages a liberal interpretation of procedural rules governing judicial review of an administrative BER" and has "avoid[ed] an over-technical approach" to MAPA to "allow[] the parties to have their day in court." *In re Young v. Great Falls*, 194 Mont. 513, 516, 632 P.2d 1111, 1113 (1981). And the Montana Supreme Court has long-ago held "it is the substance of a document that controls, not its caption." *Carr v. Bett*, 1998 MT 266, P1, 291 Mont. 326, 329, 970 P.2d 1017, 1018, 1998 Mont. LEXIS 243, *1, 55 Mont. St. Rep. 1098, *quoting* Miller v. Herbert , 272 Mont. 132, 135-36, 900 P.2d 273, 275 (1995).

Here, contrary to WRM's argument, the Conservation Groups' brief objecting to the proposed findings and conclusions identified and cited specific findings and conclusions to which it objected and provided detailed analysis explaining the asserted errors. BER:141 at 7, 12, 23, 31, 47, 48, 52, 53. Thus, caption notwithstanding,[6] the Conservation Groups' brief was no different than those filed by WRM and DEQ. While it is true that the Conservation Groups' objections challenged the legal conclusions of the proposed ruling rather than the factual findings, *see generally* BER:141; BER:151 at 99, there is no requirement that parties challenge proposed factual findings. *Cf.* § 2-4-621(3), MCA (providing that BER may reject proposed legal conclusions *or* proposed factual findings). WRM is also mistaken in its suggestion that MAPA requires objections to

[6] "Exceptions" and "objections" are synonymous. *See* Black's Law Dictionary at 603 (8th ed. 2007).

include "modifying language for each exception." WRM Br. at 6. MAPA contains no such requirement. § 2-4-621(1), MCA. Nor did the BER's order on exceptions. BER:135 at 2.

Finally, *Flowers* is not to the contrary. There, Flowers did *not* file exceptions and the Court therefore held that,

> Flowers did *not* pursue to their conclusion "all administrative remedies available" before seeking judicial review. *Art*, ¶ 17; § 2-4-702(1)(a), MCA. *Hearing Officer Holien's recommended order directed him to file exceptions with BOPA if he was unsatisfied with her decision.* That her recommendation became a final order of the BER twenty days later did not obviate the requirement to file exceptions in order to completely exhaust the "available" administrative remedies.

Flowers, ¶ 13 (emphasis added). Here, unlike in *Flowers*, the Conservation Groups filed extensive exceptions (denominated "objections") to the hearing examiner's proposed findings and conclusions. BER:141. Nothing more was required.

C. Whether the BER erred by permitting DEQ and WRM to present post-decisional evidence and analysis.

Under MSUMRA, DEQ's permitting decisions must be based on "information set forth in the application or information otherwise available that is compiled by [DEQ]." ARM 17.24.405(6); § 82-4-227(3), MCA. Under these provisions, "[t]he relevant analysis and the agency action at issue is that contained within the four corners of the Written Findings and CHIA." BER:152 at 76; *In re Bull Mountains*, at 56-59 ("What the agency may not do is present newly developed evidence that was not before the agency at the time of its decision or analysis that was not contained within the CHIA."). This is consistent with the bedrock rule of administrative law that "an agency's action must be upheld, if at all, on the basis articulated by the agency itself." *Park Cnty.*, ¶ 36 (quoting *Motor Vehicle Mfrs. v. State Farm*, 463 U.S. 29, 50 (1983)); *accord MTSUN, LLC v. Mont. Dep't of Pub. Serv. Regulation*, 2020 MT 238, ¶ 51, 401 Mont. 324, 472 P.3d 1154 (explaining that an

agency's "decision must be judged on the grounds and reasons set forth in the challenge order(s); no other grounds should be considered"); *Kiely Constr., L.L.C. v. Red Lodge*, 2002 MT 241, ¶¶ 92-97, 312 Mont. 52, 57 P.3d 836 ("after-the-fact opinions" cannot support decisions).

Here, over objection by the Conservation Groups, the BER admitted and then relied heavily on testimony by WRM's expert William Schafer, Ph.D., about a post-decisional "statistical" and "probabilistic" analysis in which he concluded that the projected 13% salinity increase in EFAC "would not be statistically significantly measurable." BER:152 at 38; *id.* at 37, 39, 64 (relying on "statistical" analysis); *see also id.* at 84 (incorporating prior discussion including "statistical" analysis). However, all parties stipulated and the BER's hearing examiner agreed that this "probabilistic" analysis was post-decisional and not included in the information "compiled" by DEQ to support its decision. BER:118 at 33:4-20.

WRM now argues that the BER's admission of *post hoc* testimony from Dr. Schafer was harmless, asserting that it was not "relevant to the BER's directed verdict." WRM Br. at 16. WRM is mistaken, placing form over substance. While the BER framed its ruling as granting a "directed verdict," BER:152 at 85, the BER's analysis shows that this was a misnomer. A directed verdict is only appropriate if there is no weighing of evidence, and all evidence and inferences are viewed in the light most favorable to the non-moving party. *Massee v. Thompson*, 2004 MT 121, ¶ 25, 321 Mont. 210, 90 P.3d 394. The BER, however, rejected the Conservation Groups' expert testimony and, instead, credited testimony of witnesses from DEQ and WRM (some of whom denied any expertise). *E.g.*, BER:152 at 34-36, 51-53, 67, 72.

Thus, contrary to WRM's assertion, the fact that the BER denominated its ruling as a "directed verdict" does not establish that its erroneous admission of *post hoc* testimony from Dr. Schafer was harmless. To the contrary, the record indicates that the BER relied on Dr. Schafer's *post hoc* "statistical" analysis to discount the significance of the projected 13% increase in salinity in base flow in EFAC from the cumulative impacts of mining. BER:152 at 64-65; *see also id.* at 37-38. Because this testimony was crucial to the BER's decision, it was prejudicial and not harmless. *In re Thompson*, 270 Mont. 419, 430-35, 893 P.2d 301, 307-310 (1995) (improper admission of crucial expert testimony warranted reversal of agency decision); *see also Murray v. Talmage*, 2006 MT 340, ¶ 18, 335 Mont. 155, 151 P.3d 49 (finding improper admission of "critical evidence" prejudicial).

Similarly, regarding salinity, the CHIA's material damage assessment and determination were premised on a projected 13% cumulative increase in salinity in EFAC. BER:95, Ex. DEQ-1A at 9-9 (noting that "[b]aseflow in EFAC ... is predicted to experience a postmine increase in TDS of 13%"); BER:95, Ex. DEQ-1 at 11 (evaluating material damage with respect to "the 13% increase in TDS ... in EFAC"). However, at hearing, DEQ made the *post hoc* argument, which the BER accepted, that its material damage assessment was based not on the 13% cumulative increase in salinity predicted in the CHIA, but on the additional salinity from the AM4 expansion considered in isolation (which the BER found would extend the duration of elevated salinity by decades or centuries, without itself increasing the salt concentration at any one time). BER:152 at 63-65; *see also infra* Part V.G (discussing the claim of substantive error of "extended duration").

The Court finds that the BER's decision to admit and rely on post-decisional evidence and analysis from DEQ and WRM violates ARM 17.24.405(6)(c) and the BER's

own rule that "[w]hat the agency may not do is present newly developed evidence that was not before the agency at the time of its decision or analysis that was not contained within the CHIA." *In re Bull Mountains*, at 59; BER:152 at 76 (relevant analysis is in "four corners" of CHIA); *see also MEIC III*, ¶ 26 (inconsistent rulings are arbitrary). As the BER itself previously cautioned: "The public's ability to rely on DEQ's express written findings and analysis supporting its permitting decision is for naught if at the contested case stage, the agency is permitted to present extra-record evidence and manufacture novel analysis and argument." *In re Bull Mountains*, at 49.

In sum, the Court finds unlawful the BER's decision to allow DEQ and WRM to present post-decisional evidence and analysis. The BER's decision is at the same time impermissibly arbitrary and capricious because, as noted above, the BER simultaneously limited the Conservation Groups to evidence and argument contained in their *pre-decisional* comments. *See supra* Part III.D. This decision created an uneven playing field, which was plainly prejudicial. *Organized Vill. of Kake*, 795 F.3d at 969.

D. Whether the BER erroneously allowed DEQ's hydrology expert to present expert testimony about aquatic life.

The Conservation Groups moved *in limine* to exclude expert testimony about aquatic life by Dr. Hinz, who is a hydrologist, on the basis that she has no expertise in aquatic life or aquatic biology. BER:76 at 5-7. At hearing, the parties and the BER's hearing examiner "all agree[d] that she's [Dr. Hinz] not an expert in aquatic life of any kind." BER:117 at 86:20-21. The BER, however, permitted and relied on testimony by Dr. Hinz about aquatic life health in EFAC. BER:152 at 48-50.

Contested cases before BER are subject to "common law and statutory rules of evidence." § 2-4-612(2), MCA. If a witness lacks expertise in a given field, she may not

give expert testimony in that field, even if she possesses expertise in another field. *State v. Russette*, 2002 MT 200, ¶¶ 13-14, 311 Mont. 188, 53 P.3d 1256, *abrogated on other grounds by State v. Stout*, 2010 MT 137, 356 Mont. 468, 237 P.3d 37; Mont. R. Evid. 702.[7] Admission of improper expert testimony in a contested case constitutes reversible error. *In re Thompson*, 270 Mont. 419, 429-30, 435, 893 P.2d 301, 307, 310 (1995).

The apparent basis of the BER's decision was that Dr. Hinz's testimony was permissible under Montana Rule of Evidence 703. *See* BER:116 at 215:18 to 219:4. As clear from arguments advanced at hearing before this Court, both DEQ and WMR now rely on Rule 703 in defending BER's decision. However, Rule 703 merely addresses the "bases" on which expert opinion testimony may rest. Mont. R. Evid. 703. Rule 703 does not expand Rule 702, and it does not permit an expert to give testimony that is beyond her field of expertise, as Dr. Hinz did here with respect to aquatic life. *State v. Hardman*, 2012 MT 70, ¶¶ 27-28, 364 Mont. 361, 276 P.3d 839; *Weber v. BNSF Ry. Co.*, 2011 MT 223, ¶ 38, 362 Mont. 53, 261 P.3d 984.

WRM asserts that the admission of Dr. Hinz's testimony about aquatic life was harmless. WRM Br. at 16. However, Dr. Hinz was DEQ's only witness who offered testimony about aquatic life in EFAC, and the BER's finding and decision regarding aquatic life relied almost exclusively on Dr. Hinz's testimony. BER:152 at 44-50, 85. The BER relied on Dr. Hinz's testimony to discount the testimony of the Conservation Groups' aquatic life expert Mr. Sullivan. BER:152 at 51-52. The BER's analysis of aquatic life cited only one other expert—WRM's expert Ms. Hunter—but conceded that, while Ms. Hunter sampled aquatic life in EFAC, she was not requested to analyze aquatic life health in the

[7] *Accord, e.g., Dura Auto. Sys. v. CTS Corp.*, 285 F.3d 609, 612-14 (7th Cir. 2002).

stream, BER:152 at 45. And, in fact, DEQ directed Ms. Hunter to "collect, *but not analyze*" aquatic life in the stream. BER:152 at 46 (emphasis added).[8] Thus, Dr. Hinz's testimony was critical to the BER's findings and conclusions with respect to aquatic life and, therefore, its admission was prejudicial and not harmless. *In re Thompson*, 270 Mont. at 430-35, 893 P.2d at 307-310; *Murray*, ¶ 18.

In sum, the BER's admission and reliance on opinion testimony by Dr. Hinz about aquatic life in EFAC—an area admittedly beyond her field of expertise—was reversible error. *Russette*, ¶¶ 13-14; *Weber*, ¶¶ 36-39; *In re Thompson*, 270 Mont. at 429-30, 435, 893 P.2d at 307, 310.

E. Whether the BER imposed a burden of proof that erroneously required the Conservation Groups to prove that the mine would cause material damage.

MSUMRA places the "burden" of demonstrating that material damage will *not occur* on the permit applicant and the regulatory authority, here WRM and DEQ. § 82-4-227(1), (3)(a), MCA; ARM 17.24.405(6)(c). Where a statute imposes the burden to show the "lack of adverse impact" on a permit applicant, as here, that burden remains with the applicant throughout administrative review of the permit. *Bostwick Props., Inc. v. DNRC*, 2013 MT 48, ¶¶ 1, 10-14, 36, 369 Mont. 150, 296 P.3d 1154; *accord* S. Rep. No. 95-128, at 80 (1977) (legislative history of SMCRA stating that permit applicant retains burden of showing lack of environmental effects in contested hearing) (in record at BER:141, Ex. 2).

[8] Indeed, as explained at the hearing, DEQ management seems to have arbitrarily prevented *anyone* with expertise in aquatic life from reviewing data on aquatic life in EFAC. *See* BER:117 at 183:25 to 184:8 (DEQ explaining that it instructed its expert in aquatic life, David Feldman, from analyzing data from EFAC); BER 100, Ex. MEIC 15; *see also* BER:152 at 46 (DEQ also prohibited WRM's aquatic life expert from analyzing data).

Here, in violation of the statutory text of MSUMRA, a divided BER placed the burden on the Conservation Groups to "present evidence necessary to establish the existence of any water quality standard violations." BER:152 at 84. Elsewhere, the BER stated the burden differently but maintained that the Conservation Groups had to show "more-likely-than-not" that material damage would or "could" occur. *Id.* at 72 (concluding "burden of proof ... falls to Conservation Groups to present a more-likely-than-not probability that a water quality standard could be violated by the proposed action"); *id.* at 76 (concluding Conservation Groups "have the burden to show, by a preponderance ... that DEQ had information available to it at the time of issuing the permit that indicated that the project is not designed" to prevent material damage).

As the dissenting BER member aptly explained, this "burden of proof ... impermissibly read out of the statute the agency's regulation," BER:151 at 214:18-23; that is, the BER ignored its own requirement that the applicant "affirmatively demonstrates" and DEQ "confirm[s]" that the "cumulative hydrologic impacts will not result in material damage." ARM 17.24.405(6)(c); § 82-4-227(1), (3)(a), MCA ("The applicant ... has the burden" of establishing compliance with MSUMRA's requirements); BER:151 at 204:5-25. This allocation of the burden of proof is consistent with the precautionary principles of MSUMRA, § 82-4-227(1), (3), and Montana's right to a clean and healthful environment, which imposes "anticipatory and preventive" protections. *Park Cnty.*, ¶ 61. It is, thus, not the responsibility of the public to demonstrate that environmental harm will occur, but, instead, the duty of the applicant (WRM) and the agency (DEQ) to demonstrate that environmental harm will not occur.

The BER based its erroneous allocation of the burden on *Montana Environmental Information Center v. Montana Department of Environmental Quality* (*MEIC II*), 2005 MT 96, 326 Mont. 502, 112 P.3d 964, a case on which both DEQ and WMR rely here.[9] However, as the Conservation Groups point out, that case is inapposite because, unlike MSUMRA, the Clean Air Act of Montana, at issue there, has no provision allocating the burden of proof to the permit applicant. *Compare MEIC* (2005), ¶ 13, *with* § 82-4-227(1), (3)(a), MCA.

Further, even in *MEIC II*, the Supreme Court did not burden the public with affirmatively demonstrating that environmental harm would occur. Instead, there, after the Supreme Court stated that the Clean Air Act permit challengers had the general burden of proof, the Court emphasized that the challengers did not have to prove that environmental harm would occur—as WRM contends and the BER held, here. Instead, the Supreme Court explained that, during the contested case, the dispositive question was whether the permit *applicant* had "established" that environmental *harm would not occur*:

> Thus, on remand the BER shall enter [findings and conclusions] determining whether, based on the evidence presented, Bull Mountain [the permit applicant] established that emissions from its proposed project will not cause or contribute to [environmental harms] ....

MEIC II, ¶ 38; *accord id.*, ¶ 36.

Thus, in any event, WRM's and the BER's asserted requirement that the Conservation Groups affirmatively demonstrate that material damage *would* occur was

[9] WRM also cites the Court to ARM 17.24.425(7), but that provision refers to cases where a party seeks to "reverse the decision of the BER," not, as here, where the Conservation Groups sought to reverse DEQ's permit. Further, to the degree that the provision is ambiguous, the clear statutory test of § 82-4-227(1), MCA, which places the burden on the applicant, controls.

error. Where, as here, the underlying statute (MSUMRA) expressly places the burden to demonstrate the lack of adverse environmental impacts, the applicant and agency retain their assigned burdens in administrative review of the permit. *Bostwick*, ¶ 36; § 82-4-227(1), (3); ARM 17.24.405(6)(c). The BER's decision to the contrary was error.

Reversal of the burden of proof was plainly prejudicial error. *See Organized Vill. of Kake*, 795 F.3d at 969 ("If prejudice is obvious to the court, the party challenging agency action need not demonstrate anything further."). Further, here, the Conservation Groups' presented testimony that WRM and DEQ had failed to demonstrate that material damage would not occur. BER:115 at 297:6-15 (aquatic life survey does not show that water quality standard is met); *id.* at 298:1-8 (same). This Court cannot conclude that the BER's reversal of the burden of proof had "no bearing on the procedure used or the substance of the decision reached." *Nw. Res. Info. Ctr., Inc. v. Nw. Power & Conservation Council*, 730 F.3d 1008, 1019-20 (9th Cir. 2013).

F. Whether the BER arbitrarily approved and relied on DEQ's and WRM's assessment of aquatic life health.

The BER properly recognized that, to confirm that the cumulative hydrologic impacts will not result in material damage (which, as noted, includes any violation of a water quality standard), DEQ must assess applicable water quality standards. BER:152 at 75; *In re Bull Mountains*, at 87; ARM 17.24.405(6); §§ 82-4-203(31), 227(3)(a), MCA. The BER further recognized that the narrative water quality standard for EFAC requires that the creek "be maintained suitable for ... growth and propagation of non-salmonid fishes and associated aquatic life." ARM 17.30.629 (1); BER:152 at 18.

However, as confirmed by the record of the BER's decision, the BER *relied* on WRM's survey of macroinvertebrates to conclude that the CHIA adequately assessed the

water quality standard for growth and propagation of aquatic life. *Id.* at 85. The problem with this analysis is that it is demonstrably inconsistent with DEQ's explanation and the BER's finding that "analyzing macroinvertebrate data ... would *not* provide an *accepted* or *reliable* indicator of aquatic life support" for assessing water quality standards in eastern Montana streams. *Id.* at 46 (emphasis added); *see also id.* at 47-48. It was irrational and arbitrary for the DEQ and the BER to *rely* on an analysis that both entities expressly found to be *unacceptable* and *unreliable* for assessing applicable water quality standards. *MEIC III*, ¶ 26 ("an internally inconsistent analysis signals arbitrary and capricious action"); § 2-4-704(2)(vi), MCA. While agencies have a degree of discretion in determining what evidence to rely upon, an agency may not rely on evidence that the agency itself deems inadequate. *E.g.*, *Idaho Conservation League v. Guzman*, 766 F. Supp. 2d 1056, 1077 (D. Idaho 2011) ("If an agency fails to make a reasoned decision based on an evaluation of the evidence, the Court must conclude that the agency has acted arbitrarily and capriciously."; *MEIC IV*, ¶ 26 (Court declined to defer to agency analysis that was not a "reasoned decision" because it "sidestep[ed]" environmental protections).

WRM misapprehends the gravamen of the Conservation Groups' challenge, which is *not* to the BER's factual findings with respect to DEQ's assessment of water quality standards for aquatic life support. *Cf.* WRM Br. at 18. The Conservation Groups' argument is that it was inconsistent and arbitrary (i.e., unlawful) for the BER to *rely* on a metric that the BER and DEQ both find *unreliable* to assess water quality standards for aquatic life support.

Both WRM and DEQ argue a distinction between the CWA and MSUMRA in their attempt to excuse DEQ's assessment of water quality standards for aquatic life support. *See, e.g.,* WRM Br. at 18, and arguments at hearing. The argument fails because MSUMRA adopts and incorporates "water quality standards" from the CWA as criteria for assessing material damage. § 82-4-203(31), MCA; *see also* Conservation Groups' Reply to DEQ, at Argument Part V. Thus, DEQ's CHIA purported to assess the narrative *water quality standard* for growth and propagation of aquatic life by relying on the (admittedly unreliable) macroinvertebrate survey: "the survey demonstrated that a diverse community of macroinvertebrates was using the stream reach. *Therefore*, the reach currently meets the *narrative* [water quality] *standard of providing a beneficial use for aquatic life.*" BER:95, Ex. DEQ-1A at 9-8 (emphasis added); ARM 17.30.629(1) (narrative standard—stream must "be maintained suitable for ... growth and propagation of non-salmonid fishes and associated aquatic life"). The BER, similarly, used the assessment of macroinvertebrates to support its conclusion about water quality standards in EFAC. BER:152 at 48-49. Accordingly, DEQ's and WRM's effort to excuse the BER's inconsistent and arbitrary assessment of water quality standards for aquatic life fails.

Finally, WRM's harmless error argument also fails. Despite generalized assertions about "multiple lines of evidence," the unreliable macroinvertebrate survey was the *only* specific evidence on which the BER and DEQ relied to reach their conclusion about potential violations of the narrative water quality standard for growth and propagation of aquatic life. BER:152 at 82 (citing macroinvertebrate survey (the "ARCADIS report")); *id.* at 48-50 (basing analysis on Dr. Hinz's inexpert assessment of macroinvertebrate survey—but citing no other specific evidence); BER:95, Ex. DEQ-1A at 9-8 (basing

assessment of narrative water quality standard for aquatic life exclusively on macroinvertebrate survey). As such, the BER's arbitrary and capricious reliance on DEQ's inexpert analysis of this unreliable survey was prejudicial, not harmless. *In re Thompson*, 270 Mont. at 430-35, 893 P.2d at 307-310; *Murray*, ¶ 18; *Organized Vill. of Kake*, 795 F.3d at 969.

G. Whether the BER arbitrarily concluded that adding more salt to a stream impaired for salt will not cause additional impairment.

The BER found that EFAC is an impaired water and not meeting narrative water quality standards for supporting growth and propagation of aquatic life due to, among other things, excessive salinity pollution. BER:152 at 24-25. WRM disputes that EFAC is impaired—i.e., not meeting water quality standards—due to salinity. WRM Br. at 20-22. However, the record indicates that DEQ's official CWA assessment concluded: "Salinity/TDS/chlorides will remain a cause of impairment." BER:95, Ex. 10 at 17. While, as the BER noted, DEQ's level of *certainty* in this conclusion was low and not confirmed, BER:95, Ex. 10 at 17, *cited in* BER:152 at 28, it nevertheless remains DEQ's official impairment determination with respect to EFAC.

The BER further found that existing mining operations will cause a 13% increase in salinity in EFAC, and AM4 will extend the duration of these increased salinity levels for up to "tens to hundreds of years." *Id.* at 32, 39, 63, 68-69 n.4.[10] The BER nevertheless determined that this increased salinity would not result in a violation of water quality standards for growth and propagation of aquatic life or adversely affect that beneficial use

[10] *Accord* BER:95, Ex. DEQ-1 at 11 (DEQ findings noting "the 13% increase in TDS ... in EFAC"); DEQ-1A at 9-9 (DEQ CHIA noting that "[b]aseflow in EFAC ... is predicted to experience a postmine increase in TDS of 13%, elevating the average concentration of TDS to almost 2,600 mg/L").

of EFAC. *Id.* at 61-72. The BER's determination was reached by considering the increased salinity from AM4 in isolation from the cumulative impacts of existing mining. BER:152 at 63-65 (stating that "AM4 specifically ... is all this case concerns" and declining to consider cumulative salinity pollution from the total mine operation). However, as pointed out by the Conservation Groups, MSUMRA requires DEQ and the BER to analyze the impacts of a proposed mining operation in light of the "*cumulative* hydrologic impacts" of *all* past, existing, and anticipated mining. § 82-4-227(3)(a), MCA (emphasis added); ARM 17.24.301(31)-(32), .405(6)(c). "Cumulative" means "increasing by successive additions." Merriam-Webster Dictionary, www.merriam-webster.com. Thus, if pollution from "successive" mining operations will cause violations of water quality standards, DEQ must remedy those violations *before* permitting more mining. *See* 48 Fed. Reg. 43,956, 43,972-73 (Sept. 26, 1983) (material damage must be considered in light of "cumulative" impacts from "any preceding operations"). As the Supreme Court of Alaska explained in interpreting its SMCRA program, regulators must

> consider the probable cumulative impact of all anticipated activities which will be part of a 'surface coal mining operation,' whether or not the activities are part of the permit under review. If [the regulatory authority] determines that the cumulative impact is problematic, the problems must be resolved before the initial permit is approved.

Trustees for Alaska v. Gorsuch, 835 P.2d 1239, 1246 (Alaska 1992).

Thus, the BER's conclusion, reached by considering the increased salinity from AM4 in isolation from the cumulative impacts of existing mining, was error. If a stream, like EFAC, is not meeting water quality standards due to excessive pollution—that is, it is beyond its loading capacity, § 75-5-103(14), MCA—release of additional amounts of pollution that increase the concentration of that pollution will violate water quality

standards. *Id.*; § 75-5-103(18), MCA; *accord Friends of Pinto Creek v. EPA*, 504 F.3d 1007, 1011-12 (9th Cir. 2007) (discharge of additional copper into stream impaired by copper would violate water quality standards). Similarly, if existing salinity concentrations are adversely affecting growth and propagation of aquatic life (as here), then increasing salinity concentrations or extending the duration of the increased concentrations will also adversely affect growth and propagation of aquatic life. *See* § 82-4-203(31), MCA (adversely affecting beneficial uses or violating water quality standards is material damage). To conclude otherwise is unreasonable and arbitrary.

WRM attempts further reliance on Dr. Schafer's "statistical" analysis to assert that the projected increase in salinity would not be "statistically significant." WRM Br. at 22. However, as noted, Dr. Schafer's *post hoc* "statistical" analysis was not properly before the BER. *See supra*, Part V.C. In any event, Dr. Schafer's "statistical" argument (which the BER adopted) misses the point. As noted above, if the creek is impaired and, therefore, not meeting water quality standards, it cannot be maintained that a greater-than 10% increase in salt in the creek will not result in a further violation of water quality standards. ARM 17.24.405(6)(c) ((applicant and DEQ must demonstrate that material damage (i.e., a violation of a water quality standard) "will not result")); § 75-5-103(18), MCA (when water body has reached its loading capacity for a pollutant—as EFAC has for salinity—additional pollution causes a "violation of water quality standards"); *Friends of Pinto Creek*, 504 F.3d at 1011-12 (adding more pollution to impaired stream will cause or contribute to violation of water quality standard).

To the point here, violations of water quality standards are measured on a *daily* basis—each additional day of elevated pollution levels is an additional violation. § 75-5-

611(9)(a), MCA; *Id.*; § 82-4-254(1)(a), MCA. Thus, extending the 13% increase in salinity in already-impaired EFAC for decades or centuries would result in additional violations. Plainly, this is not a demonstration that AM4 "will *not* result in" a "violation of water quality standards." ARM 17.24.405(6)(c); § 82-4-203(31), MCA (emphasis added); *Id.*; § 82-4-202(2)(a)-(b), MCA (MSUMRA purpose is environmental protection and implementation of the Montana Constitution's right to a clean and healthful environment); *Park Cnty.*, ¶ 61; *Dover Ranch*, 187 Mont. at 283, 609 P.2d at 715 (statutory goal paramount).

Thus, the BER's conclusion that the cumulative impacts of AM4 will not result in material damage was arbitrary and capricious. It was, therefore, unlawful.

H. DEQ's and WRM's Motion to Strike was granted.

DEQ and WRM moved to strike two exhibits proffered by the Conservation Groups during briefing, purportedly containing admissions by DEQ and DEQ's former counsel, which contradict an argument DEQ presented to this Court in its answer brief. In an order filed separately, the Court granted DEQ's and WRM's Motion to Strike. The Court has not relied upon the challenged exhibits in reaching its decision.

VI. CONCLUSION

For the foregoing reasons, this Court reverses the BER and remands to DEQ to review the AM4 permit application consistent with this decision and applicable laws.

DATED this 27th day of October, 2021.

Katherine M. Bidegaray
District Court Judge

DISTRICT COURT 16TH JUDICIAL DISTRICT ROSEBUD COUNTY MONTANA

Certificate of Service
I hereby certify that a true and correct copy of the original document was duly served upon counsel of record and interested parties by regular mail/e-mail on _____.
By _____.
Clerk/Deputy Clerk

Exhibit B

D.C. Doc. 107, Order on Remedy and Stay (Jan. 28, 2022).

KATHERINE M. BIDEGARY
District Judge, Department 2
Seventh Judicial District
300 12th Avenue, N.W., Suite #2
Sidney, Montana 59270

DATE January 25, 2022
CLERK OF DISTRICT COURT
By: Kathleen Ball

MONTANA SIXTEENTH JUDICIAL DISTRICT COURT

ROSEBUD COUNTY

MONTANA ENVIRONMENTAL INFORMATION CENTER, and SIERRA CLUB, Petitioners, vs. MONTANA DEPARTMENT OF ENVIRONMENTAL QUALITY, MONTANA BOARD OF ENVIRONMENTAL REVIEW, WESTERN ENERGY CO., NATURAL RESOURCE PARTNERS, L.P., INTERNATIONAL UNION OF OPERATING ENGINEERS, LOCAL 400, and NORTHERN CHEYENNE COAL MINERS ASSOCIATION, Respondents.	Cause No.: DV 19-34 Judge Katherine M. Bidegaray **ORDER ON REMEDY AND STAY**

I. PROCEDURAL AND FACTUAL BACKGROUND

Pursuant to the Montana Administrative Procedures Act (MAPA), which provides for the judicial review of final agency action, the Montana Environmental Information Center and Sierra Club (Conservation Groups) petitioned the Court contending that the approval by the Montana Board of Environmental Review (BER) of the AM4 permit expanding the Rosebud Mine was procedurally and substantively flawed and should be reversed and remanded to the Montana Department of

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Environmental Quality (DEQ) to review the AM4 permit application consistent with applicable laws. By Order dated October 27, 2021, this Court "reverse[d] the BER and remand[ed] to DEQ to review the AM4 permit application consistent with this decision and applicable laws." Order on Petition at 34. This Court held that BER committed four procedural errors: (1) unlawfully engrafting an issue exhaustion requirement onto MSUMRA; (2) unlawfully allowing Respondents to submit *post hoc* evidence and argument; (3) allowing an unqualified witness to provide key expert testimony; and (4) unlawfully reversing the burden of proof. *Id.* at 13-28. This Court further held that BER and DEQ committed two critical substantive errors: (1) arbitrarily and capriciously assessing water quality standards regarding the growth and propagation of aquatic life; and (2) arbitrarily and capriciously determining that releasing additional salt for decades to centuries into a stream that is already impaired for excessive salt will not worsen the impairment. *Id.* at 31-37.

Thereafter, Respondents DEQ and Westmoreland Rosebud Mining, LLC (WRM) (together, "Respondents") sought leave to allow WRM to continue strip-mining operations in the AM4 Area of the Rosebud Mine, notwithstanding this Court's reversal of the permit approval that authorized the AM4 mining. In addition, DEQ and WRM request the Court to stay its decision pending anticipated but yet-unfiled appeals. The principal justifications offered for these requests, supported by briefs and declarations, are (1) the burden to DEQ of complying at this juncture with

its legal obligations and (2) alleged threats to the public power supply caused by WRM's potential inability to supply sufficient coal to the Colstrip Power Plant.

The Conservation Groups have opposed Respondent's motions, also supported by briefs and declarations, arguing that the standard judicial remedy for an unlawfully issued permit is reversal and vacatur of the permit and further arguing that, because vacatur is an equitable remedy, the Court may defer vacatur.

The Court notes that there is no substantial dispute of fact that DEQ has (1) determined the receiving stream, East Fork Armells Creek (EFAC), to be impaired and not meeting water quality standards for over a decade; and (2) failed to prepare a remedial plan. *Id.* at 6-7.[1] Nor is it disputed that in fall 2020 and again in spring 2021, one of the two Colstrip units was shut down for two and one-half months. Declaration of David Schlissel ¶ 7 (attached as Exhibit 2 to Conservation Groups' Response). The Conservation Groups argue that, because hydroelectric and solar energy is abundant and energy demand is low in spring, it is possible to shut down one of the two units during this "shoulder" season without negatively affecting energy supplies or energy costs. *Id.* ¶¶ 7, 14, 19.

[1] Of further note, since this case was filed, WRM has violated water pollution limitations 67 times. Declaration of Anne Hedges ¶ 9, attached as Exhibit 1 to Conservation Groups' Combined Response to DEQ's and WRM's Motions for Stay and Motions on Remedy (hereafter Conservation Groups' Response).

Specifically, the Conservation Groups request that this Court defer vacatur of the AM4 permit until April 1, 2022, which the Conservation Groups argue will allay Respondents' proffered concerns, while assuring that the environmental protections of the Montana Strip and Underground Mine Reclamation Act (MSUMRA) and the Montana Constitution are honored. Additionally, the Conservation Groups argue that Respondents' stay motions should be denied because they are untimely, and they fail to meet the legal standard for a stay in that: they demonstrate no likelihood of success on appeal; DEQ and WRM will suffer no irreparable harm from a remedy that defers vacatur until April 2022; and a stay would harm the Conservation Groups and the public.

Having considered the parties' arguments and affidavits, the Court is prepared to rule.

II. LEGAL FRAMEWORK

Vacatur

The Montana Supreme Court has recently affirmed that "[t]he judiciary's standard remedy for permits or authorizations improperly issued without required procedures is to set them aside." *Park Cnty. Envtl. Council v. DEQ*, 2020 MT 303, ¶ 55, 402 Mont. 168, 477 P.3d 288.[2] The *Park County* Court explained that, where

[2] *Accord, e.g., Mont. Envtl. Info. Ctr. v. DEQ* (*MEIC II*), 2020 MT 288, ¶ 27, 402 Mont. 128, 476 P.3d 32 ("[W]e conclude the 2017 Permit was not validly issued and must be vacated."); *Northern Cheyenne Tribe v. DEQ*, 2010 MT 111, ¶ 47, 356 Mont. 296, 234 P.3d 51 (reversing approval of

an agency fails to conduct an adequate "environmental review," vacatur is essential to ensure that "the government will not take actions jeopardizing ... Montana's natural environment without first thoroughly understanding the risks involved." *Id.* ¶¶ 74-77. Thus, it is only in "limited circumstances" when courts decline to vacate unlawful permits. *Id.* ¶ 55.

Setting aside (or "vacatur") of an unlawful permit is an "equitable remedy." *Id.* ¶ 89. Accordingly, in appropriate circumstances, a court may in equity defer vacatur to allow the orderly winding down of unlawfully permitted activities. *Northern Cheyenne Tribe*, ¶ 47 (vacating permit but allowing permittee to "continue operating under its current permits" for "90 days").

Stay

"The power to stay proceedings is incidental to the power inherent in every court to control the disposition of the causes on its docket with economy of time and effort for itself, for counsel, and for litigants." *Landis v. N. American Co.*, 299 U.S. 248, 255 (1936), *followed in Henry v. Dist. Ct. of Seventeenth Jud. Dist.*, 198 Mont. 8, 13-14, 645 P.2d 1350, 1352-53 (1982). A motion for a stay pending appeal must

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water permit and "declar[ing] Fidelity's [the applicant's] permits void"); *Aspen Trails Ranch, LLC v. Simmons*, 2010 MT 79, ¶¶ 58-59, 356 Mont. 41, 230 P.3d 808 (affirming district court decision to "void [a] preliminary plat" that was approved "unlawfully" by county commission); *Kadillak v. Anaconda Co.*, 184 Mont. 127,144, 602 P.2d 147, 157 (1979) ("Because the application was not returned Permit 41A was void from the beginning and Anaconda may not continue the mining activities on the Permit 41A area until a valid permit is granted by State Lands."); *see also Alliance for the Wild Rockies v. U.S. Forest Serv.*, 907 F.3d 1105, 1121 (9th Cir. 2018) ("Although not without exception, *vacatur* of an unlawful agency action normally accompanies remand.").

be filed first in district court. Mont. R. App. P. 22(1)(a). While Montana Rule of Appellate Procedure 22(1)(a) does not establish a standard for district courts to evaluate motions for stays pending appeal, the decision ultimately rests with the district court's discretion and requires a "weigh[ing] [of] competing interests." *Landis*, 299 U.S. at 254-55 (decision calls "calls for the exercise of judgment"); *Flying T Ranch, LLC v. Catlin Ranch, LP*, 2020 MT 99, ¶ 7, 400 Mont. 1, 462 P.3d 218 (district court order on motion for stay reviewed for abuse of discretion).

Consistent with the need to assess competing interests, the U.S. Supreme Court considers the following four factors in evaluating a motion for a stay pending appeal:

> (1) whether the stay applicant has made a strong showing that he is likely to succeed on the merits; (2) whether the applicant will be irreparably injured absent a stay; (3) whether issuance of the stay will substantially injure the other parties interested in the proceeding; and (4) where the public interest lies.

Nken v. Holder, 556 U.S. 418, 426 (2009) (quoting *Hilton v. Braunskill*, 481 U.S. 770, 776 (1987)); *see also Flying T Ranch*, ¶ 16 (requiring party seeking stay to "make out a clear case of hardship or inequity" (quoting *Henry*, 198 Mont. at 13, 645 P.3d at 1353)).[3] "A party requesting a stay pending appeal bears the burden of showing that the circumstances justify an exercise of the court's discretion." *N.*

[3] Montana Rule of Appellate Procedure 22(2)(a)(i) provides that a motion for a stay from the Montana Supreme Court must demonstrate "good cause." A showing of "good cause" inherently requires an evaluation of competing interests, as in *Nken*, *Landis*, *Flying T Ranch*, and *Henry*.

Plains Res. Council v. U.S. Army Corps of Eng'rs (*Northern Plains*), 460 F. Supp. 3d 1030, 1044 (D. Mont. 2020); *Flying T Ranch*, ¶ 16. A party's failure to satisfy any prong of the standard "dooms the motion." *In re Silva*, No. 9:10-bk-14135-PC, 2015 WL 1259774, at *4 (C.D. Cal. Mar. 17, 2015).

III. DISCUSSION

A. Appropriate Remedy

This Court previously reversed the BER's affirmance of the AM4 permit for the Rosebud strip-mine. The practical and legal effect of this determination is that WRM does not have a valid permit to mine in compliance with, and as required by, MSUMRA. Nevertheless, WRM contends that this Court lacks authority to grant effective relief that would stop its strip-mining operations in the AM4 Area, i.e., vacatur of WRM's unlawful permit. WRM Br. on Remedy at 5-7 (Nov. 8, 2021). WRM's argument, however, is refuted by case law, MSUMRA, and the Montana Administrative Procedure Act (MAPA). The touchstone here is that this Court has broad authority to grant effective relief to remedy unlawful agency action, including reversing and vacating DEQ's permitting decision. Clearly Montana courts possess equitable authority to vacate or "set aside" unlawfully issued permits, which is the "standard remedy for permits or authorizations improperly issued." *Park Cnty.*, ¶¶ 55, 89. What is more, a statutory denial of the judicial authority to set aside unlawful action that may harm the environment would violate Montana's

constitutional mandate to the Legislature to "provide adequate remedies for the protection of the environmental life support system from degradation." Mont. Const. art. IX, § 1(3); *Park Cnty.*, ¶ 89.

However, the Court at this juncture need not consider whether the relevant laws unconstitutionally preclude effective remedies. MSUMRA and MAPA plainly authorize a reviewing court to vacate an unlawfully issued permit. As this Court explained, MSUMRA is required to meet the minimum standards of the federal Surface Mining Control and Reclamation Act (SMCRA). 30 U.S.C. § 1253(a)(1), *cited in* Order on Petition at 14 n.3. SMCRA provides that on judicial review of any action by a regulatory authority, including permitting, a "court may affirm, *vacate*, or modify any order or decision or may remand the proceedings ... for such further action as it may direct." 30 U.S.C. § 1276(b) (emphasis added). "States with an approved State program shall implement, administer, enforce and maintain it in accordance with the Act [SMCRA], this chapter and the provisions of the approved State program." 30 C.F.R. § 733.11.

This broad authority of judicial review is mirrored at the state level in MSUMRA and MAPA. MSUMRA provides that permit appeals are subject to the provisions of MAPA. § 82-4-206(1)-(2), MCA. MAPA, like SMCRA, provides reviewing courts broad authority review to "affirm," "remand," "reverse," or

"modify" an agency decision. § 2-4-704(2), MCA.[4] Here, the final agency action subject to judicial review was the BER decision, which "Affirmed" the "AM4 Permit." BER:152 at 85-86. Reversal of BER's approval of the permit is equivalent to vacatur of the permit. The contrary conclusion advanced by WRM would violate *Park County*, the Montana Constitution, MSUMRA, and SMCRA.

Finally, WRM argues that § 2-4-711, MCA, somehow prevents a court from vacating an unlawful agency permitting decision. WRM Br. on Remedy at 6-7. In fact, that statute cuts sharply *against* WRM's argument and provides in relevant part that "if appeal is taken from a judgment of the district court reversing or modifying an agency decision" (as here) "the agency decision *shall be stayed* pending final determination of the appeal unless the supreme court orders otherwise." § 2-4-711(2), MCA (emphasis added). Far from requiring a district court to allow unlawfully permitted activities to continue, this provision—like the above-cited provisions of SMCRA and MAPA—provides that an unlawful action must be stopped pending appeal. *In re Investigative Records of Columbus Police Dep't*, 265 Mont. 379, 381-82, 877 P.2d 470, 471 (1994) ("The word 'may' is commonly understood to be permissive or discretionary. In contrast 'shall' is understood to be compelling or mandatory." (internal citations omitted)); *see also* Merriam-Webster Dictionary,

[4] WRM states incorrectly that MAPA only permits courts to "affirm" or "remand" agency decisions, ignoring the express authority to "reverse" or "modify." WRM Br. on Remedy at 6.

www.merriam-webster.com (defining to "stay" as "to stop going forward: PAUSE" or "to stop doing something: CEASE"). Simply stated, WRM's contention that these provisions somehow straitjacket the district court's ability to stop unlawful action is without merit.

Deferred Vacatur

That said, deferred vacatur of the AM4 permit until April 1, 2022, is the appropriate remedy. As explained in *Park County*, requiring DEQ to conduct the necessary "environmental review"—here the required analysis of cumulative impacts to water resources under the MSUMRA—before mining has occurred is necessary to secure Montanans' right to a clean and healthful environment, which mandates "anticipatory and preventative" action. *Id.* ¶¶ 72-78; Mont. Const. arts. II, § 3, IX, § 1(1) ("The state ... shall maintain and improve a clean and healthful environment in Montana for present and future generations."); *Mont. Wilderness Ass'n v. Fry*, 408 F. Supp. 2d 1032, 1038 (D. Mont. 2006) ("[T]he public interest is best served when the law is followed.").

Here, the impacts of mining on water resources adjacent to the mine—principally East Fork Armells Creek (EFAC)—have already been severe. As the record shows and this Court explained, the stream is impaired for multiple pollutants, including salinity; mining in the AM4 Area will add more salinity to the stream; and the cumulative impact of all mining will increase the concentration of salinity in the

stream substantially. Order on Petition at 6-7. This is precisely the harm MSUMRA is intended to prevent. *See* ARM 17.24.405(6)(c) (prohibiting issuance of a permit unless applicant demonstrates and DEQ confirms that "cumulative hydrologic impacts will not result in material damage"); § 82-4-203(32), MCA, (defining "material damage" to include any "[v]iolation of a water quality standard"); *Northern Plains*, 460 F. Supp. 3d at 1039-40 (vacatur appropriate to avoid harm underlying statute is designed to prevent). As demonstrated by the wall of decisions from *Kadillak*, 184 Mont. at 144, 602 P.2d at 157, to *Park County*, ¶¶ 55, 89, this is precisely the situation in which vacatur of an unlawful permitting decision is warranted. *See supra* note 1 (collecting cases).

While WRM and DEQ raise several complaints in opposition to vacatur, to the degree that any have merit, they can be resolved by deferring vacatur until April 1, 2022. The Montana Supreme Court addressed an analogous situation in *Northern Cheyenne Tribe*, where DEQ had issued unlawful discharge permits to a company that extracted coal-bed methane. *Id.* ¶¶ 4, 10, 46. The Court "declare[d]" the unlawfully issued permits "void." *Id.* ¶ 47. However, to avoid unnecessary disruption, the Court granted DEQ 90 days to reevaluate the permits, "during which time Fidelity [the company] may continue operating under its current permits." *Id.* ¶ 47; *see also Northern Plains*, 460 F. Supp. 3d at 1040 (finding that narrowed vacatur "strikes a reasonable balance" between competing concerns).

Here, WRM claims that ,if it is required to cease operations in the AM4 Area, it might not be able to supply sufficient coal to the Colstrip Power Plant, which could in turn "jeopardize" electricity supplies during the winter period of high energy demand. WRM Br. on Remedy at 10-11. WRM's hypothetical concerns about coal and electricity supply are highly speculative, given AM4 constitutes less than 10% of the mine's permitted reserves, which are distributed between four active mine areas. Schlissel Decl. ¶ 9; *cf.* WRM Br. on Remedy, Ex. A (Declaration of Russell Batie) ¶ 4 (stating only 30% of mine production from AM4, 70% from other areas). Even assuming WRM's worst-case scenario were accurate, however, if vacatur is deferred until spring, when electricity demand is low and supplies of hydroelectric and solar energy are abundant, "it is still extremely unlikely that energy supplies or energy costs in ... Montana or the Pacific Northwest would be negatively affected." Schlissel Decl. ¶ 19. This is because coal stockpiles at the mine and power plant, identified by WRM and plant operator Talen Montana, LLC, are sufficient to keep at least one of the two Colstrip units operating for four months (the maximum time need to move WRM's equipment), which is sufficient to meet reduced spring electricity demands. *Id.* Indeed, in both 2021 and 2020, one of the two Colstrip units was shut down for two-and-one-half months during spring and fall shoulder seasons. *Id.* ¶ 7.

Deferred vacatur would also alleviate WRM's complaints about safety hazards caused if "operations in the AM4 Area suddenly cease." WRM Br. on Remedy at 11-12. Five months from the issuance of this Court's Order reversing BER's approval of the AM4 permit are certainly sufficient time for WRM to wind down operations in the AM4 Area, detonate set explosives, and remove exposed coal and blasted overburden. Batie Decl. ¶ 6 (two to four months to move equipment and preform preliminary work). So too with respect to WRM's investments in drilling and blasting. *See* WRM Br. on Remedy at 12. Five months is enough time to allow WRM wind down its operations in the AM4 Area without investing in additional, unnecessary drilling or blasting in AM4. Batie Decl. ¶ 6. In sum, deferred vacatur until April 1, 2022, will uphold the law, protect the environment, and avoid any negative impacts to power supplies.

Cognizable harm

DEQ's concerns about the costs associated with complying with its legal obligations, set forth in this Court's earlier Order, are not cognizable "harm". DEQ Br. in Supp. of Stay at 6-10 (Nov. 5, 2021). Agencies cannot complain about the burden of following the law. *Northern Plains* is illustrative. There the Court held that the nationwide permitting process used to approve dredge and fill activities associated with certain oil and gas pipelines violated the Endangered Species Act (ESA). 460 F. Supp. 3d at 1034-35. The agency sought a stay pending appeal,

"complain[ing] that, absent a stay, [the agency] will be burdened by having to process an increased number of individual permit applications." *Id.* at 1045, 1048 (noting thousands of pending pipeline preconstruction notices). The Court discounted the agency's complaints because they "resulted from the agency's failure to follow the law in the first instance." *Id.* (quoting *Swan View Coal. v. Weber*, 52 F. Supp. 3d 1160, 1161-62 (D. Mont. 2014)). So too here; DEQ's reticence to comply with the law is no basis for denying vacatur or staying this Court's decision.[5]

Finally, WRM's complaints about losing its investment in operations in the AM4 Area do not change the analysis. First, as noted, deferring vacatur until spring strikes a "reasonable balance" that will provide WRM time to wind down operations in AM4 and move its operations to one of its other approved permit areas. *See Northern Plains*, 460 F. Supp. 3d at 1040; *Northern Cheyenne Tribe*, ¶ 47. Further, the "cost of compliance" with the law, including some "lost profits and industrial inconvenience" are the "nature of doing business" and do not overcome the weighty interests of the rule of law and environmental protection. *Northern Plains*, 460 F. Supp. 3d at 1041 (quoting *Standing Rock Sioux v. U.S. Army Corps of Eng'rs*, 282 F. Supp. 3d 91, 104 (D.D.C. 2017)); *Park Cnty.*, ¶¶ 81-82 (explaining that a

[5] DEQ could have avoided these costs, if, for example, agency management had not prohibited agency and industry experts from reviewing and analyzing the relevant data regarding water quality standards. Order on Petition at 25 n.8; *see Northern Plains*, 460 F. Supp. 3d at 1045 (agency cannot complain of "self-inflicted" harm (quoting *Al Otro Lado v. Wolf*, 952 F.3d 999, 1008 (2020))).

company's right to conduct mining activities is restricted by requirement of a lawful permit and that "some administrative delay" does not infringe property rights). This is especially the case where, as here, the cessation of operations is temporary, and may end when DEQ, in compliance with the law, completes the remand process. *Park Cnty.*, ¶ 82; *League of Wilderness Defs. v. Connaughton*, 752 F.3d 755, 765-66 (9th Cir. 2014) (holding "irreparable environmental injuries outweigh the temporary delay" of economic gains from project).

In sum, the "standard remedy" of vacatur should apply here to assure environmental and constitutional protections and uphold the rule of law. *Park Cnty.*, ¶ 55. And, like *Northern Cheyenne Tribe*, ¶ 47, this Court defers vacatur until April 1, 2022, to strike a reasonable balance, allow WRM to wind down operations in AM4, and avoid or mitigate potential negative impacts.

B. Whether Stay Is Warranted

Consideration of merits

The Court notes that the gravamen of Respondents' arguments is a rehash of arguments rejected by the Court in its previous Order on Petition. Moreover, the Court notes that where a district court's decision rests on alternative grounds, as here, a party cannot demonstrate a strong likelihood of success on the merits without addressing *each* basis to the Court's holding. *State v. English*, 2006 MT 177, ¶ 47, 333 Mont. 23, 140 P.3d 454 ("Failure to challenge each of the alternative bases for

a district court's ruling results in affirmance."); *MEIC II*, ¶ 27 (finding single issue sufficient to affirm vacatur of unlawful permit and "declin[ing] to address the other issues" raised by appellants); *Life Spine, Inc. v. Aegis Spine, Inc.*, No. 19 CV 7092, 2021 WL 1750173, at *1-2 (N.D. Ill. May 4, 2021) (denying stay motion that failed to address alternative grounds).

Similarly, a party cannot make a "strong showing" of success on the merits by simply "rehash[ing]" unsuccessful summary judgment arguments. *Friends of Wild Swan v. U.S. Forest Serv.*, No. CV 11-125-M-DWM, 2014 WL 12672270, at *2 (D. Mont. June 20, 2014); *In re Pac. Fertility Ctr. Litig.*, No. 18-CV-01586-JSC, 2019 WL 2635539, at *3 (N.D. Cal. June 27, 2019); *Roman Catholic Archbishop of Wash. v. Sibelius*, No. 13-1441, 2013 WL 12333208, at *3 (D.D.C. Dec. 23, 2013); *Titan Tire Corp. of Bryan v. Local 890L, United Steelworkers of Am.*, 673 F. Supp. 2d 588, 590 (N.D. Ohio 2009). Thus, Respondents' motions fail because, in addition to being premature, neither addresses *each* of six grounds on which this Court reversed BER's decision. *Compare* DEQ Br. in Supp. of Stay at 11-13 (addressing one ground), *and* WRM Br. on Remedy at 14-17 (addressing only three of six grounds[6]), *with* Order on Petition at 13-34. This alone is fatal. Equally fatal, the arguments which Respondents raise (addressed below in reverse order) merely

[6] WRM also argues about this Court's ruling related to Montana Code Annotated § 2-4-621, WRM Br. on Remedy at 3, but while this Court rejected WRM's argument on that point, it was not one of the Court's six bases for reversing BER. Order on Petition at 13-34.

repeat arguments rejected in this Court's Order on Petition. *See, e.g.*, *Friends of Wild Swan*, 2014 WL 12672270, at *2.

Regarding this Court's substantive rulings on BER's and DEQ's arbitrary analysis of water quality standards (Order on Petition at 28-34), WRM argues that the Court incorrectly applied the "arbitrary and capricious standard," which, WRM suggests, is not permitted by MAPA. WRM Br. on Remedy at 17. WRM is plainly mistaken. MAPA expressly permits a court to reverse an agency decision that is "arbitrary or capricious." § 2-4-704(2)(a)(vi), MCA. Because Respondents must show a strong likelihood of success with respect to *each* of the Court's alternative rulings, *English*, ¶ 47; *MEIC II*, ¶ 27, this is fatal, and the Court need go no further. Nevertheless, Respondents' remaining arguments also miss the mark.

WRM continues to assert its argument that the Conservation Groups' brief in response to the Hearing Examiner's proposed order, which was captioned "objections," was flawed because it was not captioned "exceptions." WRM Br. on Remedy at 16. WRM merely rehashes its already rejected arguments about *Flowers v. Board of Personnel Appeals*, 2020 MT 150, 400 Mont. 238, 465 P.3d 210, and § 2-4-621, MCA. *Compare* WRM Br. on Remedy at 16, *with* Order on Petition at 18-20 (rejecting both arguments). WRM's argument is premised on a misstatement of the law. WRM contends that under § 2-4-621(1), MCA, parties "*must* 'file exceptions and present briefs and oral arguments.'" WRM Br. on Remedy at 16

(emphasis added). In fact, the law contains no such mandate, but states only that parties must be "afforded" the "opportunity ... to file exceptions and present briefs and oral arguments." § 2-4-621(1), MCA. The statute does not support WRM's argument that the exceptions a party files are not "exceptions" unless they are captioned as "exceptions." As this Court noted, "unlike in *Flowers*, the Conservation Groups filed extensive exceptions." Order on Petition at 20; *Flowers*, ¶ 15. That the Conservation Groups captioned their exceptions as "objections" does not make them not be "exceptions." As such, *Flowers* is plainly inapposite.

WRM also rehashes its administrative issue exhaustion argument and fails to address any of the numerous authorities addressed in this Court's ruling. *Compare* WRM Br. on Remedy at 15-16, *with* Order on Petition at 13-17. This constitutes a failure to make a "strong showing" of likely success on the merits. *Nken*, 556 U.S. at 426. Moreover, contrary to WRM's argument, Conservation Groups argued repeatedly that the claims that BER barred on issue exhaustion grounds arose after the close of the public comment period. BER:84 at 5-7 (motions *in limine* briefing); BER:94 at 1:25:50 to 1:26:02 (motions *in limine* hearing); BER:151 at 59:19 to 61:24, 66:1-20 (hearing before the Board).[7] Again, the Court finds that WRM's issue exhaustion argument has no merit.

[7] Conservation Groups also raised the same arguments at the pretrial conference, but the Hearing Examiner failed to properly record that hearing, causing the record to be lost. BER:151 at 66:24 to 67:12.

Likewise, DEQ's and WRM's argument[8] about the burden of proof is simply a rehash of their argument relying on *Montana Environmental Information Center v. DEQ* (*MEIC I*), 2005 MT 96, 326 Mont. 502, 112 P.3d 964,[9] which this Court already rejected. Order on Petition at 25-28. Notably, Respondents fail to address Montana Supreme Court case law holding that an applicant's (here, WRM's) *statutory* burden to show the lack of adverse environmental impacts does not shift in a contested case. *Id.* at 25 (citing *Bostwick Props., Inc. v. DNRC*, 2013 MT 48, ¶¶ 1, 10-14, 36, 369 Mont. 150, 296 P.3d 1154). When, as here with MSUMRA (but unlike the Clean Air Act, which was at issue in *MEIC I*), the *statutory* burden is placed on a permit applicant, it does not shift in a contested case because, consistent with the rules of evidence, "the applicant would be defeated if neither side produced evidence." *In re Royston*, 249 Mont. 425, 428, 816 P.3d 1054, 1057 (1991) (rejecting burden-shifting argument); § 82-4-227(1), (3)(a), MCA, (placing "burden" of proof on "applicant"); ARM 17.24.405(6)(c) (*applicant* must "affirmatively demonstrate[]" that "material damage" "will not result"). Nor do Respondents address the SMCRA legislative history confirming that the permit applicant bears the burden of proof on a permit appeal. S. Rep. No. 95-128 at 80 (1977), *cited in* Order on Petition at 25.

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[8] WRM presents the same rehash of rejected arguments regarding the burden of proof as DEQ. WRM Br. on Remedy at 14-15.

[9] DEQ also cites ARM 17.24.625, DEQ Br. in Supp. of Stay at 13, but that provision addresses "seismograph measurements," which is wholly inapposite.

Finally, *MEIC I* does not refute but confirms the reasoning of this Court's ruling. *MEIC I* did not hold (as BER did here) that in the contested case the public was required to demonstrate adverse environmental impacts. *MEIC I*, ¶¶ 36, 38. Instead, there, the Court explained that the question for BER was whether "Bull Mountain [the applicant] established that emissions from the proposed project will not cause or contribute to" adverse environmental impacts. *Id.*, ¶ 38. Thus, as this Court held, *MEIC I* does not support BER's decision requiring the Conservation Groups to "establish the existence of water quality standard violations." Order on Petition at 26-28 (quoting BER:152 at 84). Accordingly, Respondents' rehashed burden of proof argument does not constitute a "strong showing" of likely success on the merits. *Nken*, 556 U.S. at 426.

In sum, Respondents' failure to show a strong likelihood of success on each of the six bases of this Courts' decision "dooms the[ir] motion[s]." *In re Silva*, 2015 WL 1259774, at *4

Costs of complying

A party seeking a stay must demonstrate that "irreparable harm is probable, not merely possible." *Doe #1 v. Trump*, 957 F.3d 1050, 1059 (9th Cir. 2020). Here, if, as Conservation Groups request, vacatur is deferred until April 1, 2022, Respondents' concerns about coal and energy supplies will be assuaged. *See supra* Part III.A. Thus, there is no probability Respondents would suffer irreparable harm.

As noted, DEQ's concerns about the costs of complying with its legal obligations do not constitute irreparable harm. *Northern Plains*, 460 F. Supp. 3d at 1045; *Rodriguez*, 715 F.3d at 1146. Likewise, a temporary delay in economic activity does not constitute irreparable harm. *Park Cnty.*, ¶¶ 81-82; *Northern Plains*, 460 F. Supp. 3d at 1041; *League of Wilderness Defs.*, 752 F.3d at 766; *L.A. Mem'l Coliseum Comm'n*, 634 F.2d at 1202.

Conversely, a stay would cause substantial injury to the environment, Conservation Groups, and the rule of law. As this Court earlier noted, the waters that the AM4 and the Rosebud Mine impact are impaired for salinity, and the cumulative effects of WRM's AM4 mining operations will substantially worsen that impairment. Order on Petition at 6-7, 28-34. DEQ has known of this impairment for over a decade but taken no action to remedy it. *Id.* at 7. Such long-term environmental harm is irreparable. *See Amoco Prod. Co. v. Vill. of Gambell*, 480 U.S. 531, 545 (1987) ("Environmental injury, by its nature, can seldom be adequately remedied by money damages and is often permanent or at least of long duration, *i.e.*, irreparable. If such injury is sufficiently likely, therefore, the balance of harms will usually favor the issuance of an injunction to protect the environment.").[10] This ongoing pollution, along with WRM's repeated violation of

[10] DEQ admits that the harm from strip-mining is irreparable. *See* Declaration of Martin Van Oort ¶¶ 11, 17 (explaining impacts of strip-mining are "irreversible" and "not possible to revert" to pre-mining state).

pollution limits, also irreparably harms the Conservation Groups and their members. Hedges Decl. ¶¶ 4-11. Allowing strip-mining to continue despite DEQ's failure to take a hard look at the environmental consequences of the AM4 expansion would violate Montana's constitutional protections and the rule of law. *Park Cnty.*, ¶¶ 72-73; *Mont. Wilderness Ass'n*, 408 F. Supp. 2d at 1038 ("[T]he public interest is best served when the law is followed."); Mont. Const. arts. II, § 3, IX, § 1(1).[11] Thus the equities and the public interest do not support a stay.

IV.CONCLUSION

For the forgoing reasons, the standard judicial remedy, vacatur, is appropriate here; however, to strike an appropriate balance between competing interests, this Court will defer vacatur of the AM4 permit until April 1, 2022. The Court further concludes that Respondents have not demonstrated that a stay pending appeal is warranted.

Accordingly, it is HEREBY ORDERED:

1. WRM's motion on remedy is DENIED;
2. WRM's and DEQ's motions for a stay pending appeal are DENIED; and

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[11] Respondents' insinuation that Conservation Groups' decision not to seek preliminary relief somehow limits their ability to obtain relief now is without merit. The Montana Supreme Court has repeatedly approved vacatur in the absence of preliminary relief. *See supra* note 2 (collecting cases).

3. The AM4 Permit is VACATED, however vacatur is DEFERRED until April 1, 2022.

DATED this 27th day of January, 2022.

Signed:

Katherine M. Bidegaray
District Court Judge

Cc: Shiloh Hernandez
Derf Johnson
Walton Morris, Jr.
Roger Sullivan
John Martin
Samuel Yemington
Victoria Marquis
Nicholas Whitaker
Amy Christensen

Exhibit C

D.C. Doc. 54, MEIC's Proposed Order (Dec. 23, 2020).

KATHERINE M. BIDEGARY
District Judge, Department 2
Seventh Judicial District
300 12th Avenue, N.W., Suite #2
Sidney, Montana 59270

MONTANA SIXTEENTH JUDICIAL DISTRICT

ROSEBUD COUNTY

MONTANA ENVIRONMENTAL INFORMATION CENTER, and SIERRA CLUB, Petitioners, vs. MONTANA DEPARTMENT OF ENVIRONMENTAL QUALITY, MONTANA BOARD OF ENVIRONMENTAL REVIEW, WESTERN ENERGY CO., NATURAL RESOURCE PARTNERS, L.P., INTERNATIONAL UNION OF OPERATING ENGINEERS, LOCAL 400, and NORTHERN CHEYENNE COAL MINERS ASSOCIATION Respondents.	Cause No.: DV 19-34 Judge Katherine M. Bidegaray **[PETITIONERS' PROPOSED] ORDER**

I. INTRODUCTION

Pursuant to the Montana Administrative Procedure Act (MAPA), which provides for the judicial review of final agency action, the Montana Environmental Information Center and Sierra Club (Conservation Groups) have petitioned this Court, contending that the approval by the Montana Board of Environmental Review (Board) of the AM4 permit expanding the Rosebud Mine was procedurally and substantively flawed and should be reversed and remanded to the Montana

Department of Environmental Quality (DEQ) to review the AM4 permit application consistent with applicable laws.

The Conservation Groups assert that the Board committed procedural error by (1) erroneously applying administrative issue exhaustion to the Conservation Groups' permit appeal; (2) employing an unlawful double standard, limiting the Conservation Groups to evidence and issues raised in public comments prior to the permitting decision, while permitting DEQ and the permit applicant Westmoreland Rosebud Mining (WRM) to present post-decisional evidence and argument; (3) allowing unqualified witnesses to present expert testimony on behalf of DEQ; and (4) by unlawfully reversing the burden of proof.

Substantively, the Conservation Groups assert that the Board unlawfully upheld a permit that relied upon evidence that the Board and DEQ both found unreliable, and which allowed WRM to cause material damage to a stream, the East Fork Armells Creek (EFAC), in violation of applicable legal standards.

Following the parties' submission of briefs, this matter came on for hearing before the Court on December 16, 2020. Having considered the briefs and the well-presented arguments of the parties the Court is prepared to rule.

II. LEGAL FRAMEWORK

Resolution of this case involves consideration of the administrative record in conjunction with the rather complex legal framework, including the burden of proof.

This case involves application of two federal laws—the Surface Mining Control and Reclamation Act (SMCRA), 30 U.S.C. §§ 1201-1328, and Clean Water Act (CWA), 33 U.S.C. §§ 1251-1387—and two state laws—the Montana Strip and Underground Mine Reclamation Act (MSUMRA), §§ 82-4-201 to -254, MCA, and Montana Water Quality Act (MWQA), §§ 75-5-101 to -1126, MCA.

A. The Surface Mining Control and Reclamation Act and the Montana Strip and Underground Mine Reclamation Act.

The federal Surface Mining Control and Reclamation Act (SMCRA) and the state Montana Strip and Underground Mine Reclamation Act (MSUMRA) regulate coal mining through a system of "cooperative federalism" that allows states to develop and administer regulatory programs that meet minimum federal standards. *Hodel v. Va. Surface Mining & Reclamation Ass'n*, 452 U.S. 264, 289 (1981); 30 U.S.C. § 1253(a). MSUMRA is Montana's federally approved program. 30 C.F.R. Part 926.

The fundamental purpose of SMCRA is to "protect society and the environment from the adverse effects of surface coal mining." 30 U.S.C. § 1202(a); *In re Bull Mountains*, No. BER 2016-03, at 59-63 (Mont. Bd. Of Envtl. Rev. Jan. 14, 2016) (detailing SMCRA's background) (in record at BER:141, Ex. 1). In enacting SMCRA, Congress's stressed that citizen participation is essential for effective regulation of coal mining: "The success or failure of a national coal surface

mining regulation program will depend, to a significant extent, on the role played by citizens in the regulatory process." S. Rep. No. 95-128, at 59 (1977).

Citing to Article II, § 3 and Article IX of the Montana Constitution, MSUMRA's stated intent is to "maintain and improve the state's clean and healthful environment for present and future generations" and to "protect the environmental life-support system from degradation." § 82-4-202(2)(a)(b), MCA. In *Park County Envtl. Council v. Dep't of Envtl. Quality*, 2020 MT 303, ___ Mont. ___, ___ P.3d ___ (decided December 8, 2020), the Montana Supreme Court explained that Montana laws that implement Montana's constitutional right to a clean and healthful environment must be interpreted consistent with that fundamental constitutional right, which was "intended … to contain the strongest environmental protection provision found in any state." *Id.*, ¶ 61 (quoting *Mont. Envtl. Info. Ctr. v. Mont. Dep't of Envtl. Quality* (*MEIC I*), 1999 MT 248, ¶ 66, 296 Mont. 207, 988 P.3d 1236). The *Park County* Court also underscored that the right to a clean and healthful environment contains a precautionary principle: it is "anticipatory and preventive" and "do[es] not require that dead fish float on the surface of our state's rivers and streams before the [Montana Constitution's] farsighted environmental provisions can be invoked." *Id.*, ¶ 61 (quoting *MEIC I*, ¶ 77).

Under MSUMRA, DEQ is forbidden from issuing a a mining permit unless and until the applicant "affirmatively demonstrates" and DEQ issues "written

findings" that "confirm, on the basis of information set forth in the application or information otherwise available that is compiled by [DEQ] that … cumulative hydrologic impacts will not result in material damage to the hydrologic balance outside the permit area." ARM 17.24.405(6)(c); § 82-4-227(3)(a), MCA. "Cumulative hydrologic impacts" are the "total qualitative and quantitative direct and indirect effects of mining and reclamation operations." ARM 17.24.301(31). "Material damage" is defined as:

> degradation or reduction by coal mining and reclamation operations of the quality or quantity of water outside the permit area in a manner or to an extent that land uses or beneficial uses are adversely affected, water quality standards are violated, or water rights are impacted. Violation of a water quality standard, whether or not an existing water use is affected, is material damage.

§ 82-4-203(31), MCA. MSUMRA places the "burden" of demonstrating that material damage will *not occur* on the "applicant." § 82-4-227 (1), (3), MCA; ARM 17.24.405(6)(c).

DEQ's analysis occurs in a document called the "cumulative hydrologic impact assessment" or "CHIA," which assesses the "cumulative hydrologic impacts" from "all previous, existing, and anticipated mining" and determines, in light of these cumulative impacts, whether the "proposed operation has been designed to prevent material damage." ARM 17.24.301(32), .314(5). "Anticipated mining" is defined to "include[], at a minimum … all operations with pending applications." *Id.* 17.24.301(32).

Within 30 days of DEQ's permit decision, "any person … adversely affected may submit a request for a hearing on the reasons for the final decision." *Id.* 17.24.425(1). DEQ's "reasons for the final decision" are only available to the public *after* the public comment period on the permit application. *Id.* 17.24.404(3), .405(6). Failure to submit public comments "in no way vitiates" or limits the right of an affected person to request a hearing. 56 Fed. Reg. 2,139, 2,141 (Jan. 22, 1991). The requested hearing occurs before the Board pursuant to the Montana Administrative Procedure Act (MAPA). § 82-4-206(1)-(2), MCA; §§ 2-4-601 to -631, MCA.

B. The Clean Water Act and the Montana Water Quality Act.

As noted, MSUMRA defines "material damage" (the key standard in this case) to include any "[v]iolation of a water quality standard" or "advers[e] [e]ffect[s]" to any "beneficial uses of water." § 82-4-203(31), MCA. Water quality standards are set by the federal Clean Water Act (CWA) and the state Montana Water Quality Act (MWQA). These laws likewise establish a "system of cooperative federalism" in which states implement programs that meet minimum federal standards. *Mont. Envtl. Info. Ctr. v. Mont. Dept' of Envtl. Quality* (*MEIC III*), 2019 MT 213, ¶ 29, 397 Mont. 161, 451 P.3d 493. Water quality standards are "[p]rovisions of State or Federal law which consist of a designated use or uses for the waters of the United States and water quality criteria for such waters based upon

such uses." 40 C.F.R. § 130.2(d). "Montana's water quality standards are set forth in [ARM] 17.30.601 through 17.30.670 …." *MEIC III*, ¶ 33.

A water body that "is failing to achieve compliance with applicable water quality standards" is called an "[i]mpaired water body." § 75-5-103(14), MCA. When a water body reaches its "[l]oading capacity" for a pollutant, additional pollution will result in a "violation of water quality standards." *Id.* § 75-5-103(18).

Under MSUMRA, a CHIA that fails to address "applicable water quality standards" in assessing material damage is unlawful. *In re Bull Mountains*, at 64.

III. BACKGROUND AND PRIOR PROCEEDINGS[1]

A. The Rosebud Mine and East Fork Armells Creek

The Rosebud Mine is a 25,752-acre coal strip-mine located near Colstrip. BER:152 at 9. It has five permit areas, Areas A, B, C, D, and E. *Id.* at 10. East Fork Armells Creek (EFAC) is a prairie stream, whose headwaters are surrounded by the mine. *Id.* at 18. EFAC is outside the permit area. *Id.* The mine "dominates the potential anthropogenic pollutant sources in" the EFAC headwaters. *Id.* at 20.

Narrative water quality standards for EFAC require the stream "to be maintained suitable for … growth and propagation of non-salmonid [i.e., warm

[1] Throughout this Order, citations to the administrative record will use the following format: for documents, "BER:[docket entry number] at [page]," and for exhibits, "BER:[folder number], Ex.[exhibit number in folder], at [page]."

water] fishes and associated aquatic life." ARM 17.30.629(1); BER:152 at 18. Since 2006 DEQ has designated and identified EFAC as an impaired waterbody, failing to achieve water quality standards for supporting the growth and propagation of aquatic life. BER:152 at 24; BER:95, Exs. DEQ-9, DEQ-10. DEQ identified excessive salinity, measured by total dissolved solids (TDS) and specific conductivity (SC), as a cause of the impairment, identified coal mining as an unconfirmed source of the excessive salt, and found that a "40% increase in TDS in the alluvial aquifer upstream of Colstrip appears to be directly associated with mining activity." BER:152 at 28; BER:95 Ex. DEQ-9 at 7; BER:95, Ex. DEQ-10 at 19. DEQ has not completed a plan "to correct the water quality violations" in EFAC. BER:152 at 25.

B. The AM4 expansion of Area B of the Rosebud Mine

In 2009 WRM applied for the AM4 amendment to its Area B permit. BER:152 at 13. The existing Area B permit covers 6,182 acres. *Id.* at 10. AM4 adds 12.1 million tons of coal from 306 acres to Area B. *Id.* After six years of back and forth with WRM, in July 2015, DEQ allowed 26 days for public comment on WRM's voluminous application. *Id.* at 14. The Conservation Groups submitted comments, addressing, *inter alia*, the existing impairment of EFAC and impacts of increased salinity and harm to aquatic life. BER:95, Ex. DEQ-4 at 2-7. The comments included and incorporated a letter raising concerns about cumulative hydrologic impacts from anticipated mining in proposed Area F, a 6,500 acre expansion for which WRM had

submitted an application in 2011. BER:95, Ex. a DEQ-4 at 1; BER:95, Ex. DEQ-4L at 17. The comments also raised concerns about WRM's apparent dewatering of an intermittent reach of EFAC. BER:95, Ex. DEQ-4 at 2-3.

C. DEQ's Cumulative Hydrologic Impact Assessment

After the close of the public comment, DEQ issued its CHIA, response to comments, and written findings approving the AM4 expansion. BER:152 at 14-15. DEQ responded to the Conservation Groups' concerns about salinity, stating that "the 13% increase in TDS [salinity] … in EFAC" would not adversely affect aquatic life or violate water quality standards. BER:95, Ex. DEQ-1 at 11. Regarding aquatic life, DEQ asserted that a survey of macroinvertebrates in EFAC by WRM proved the stream "currently meets the narrative [water quality] standard of providing a beneficial use for aquatic life." BER:95, Ex. DEQ-1A at 9-8; BER:95, Ex. DEQ 1 at 8-9. Regarding dewatering, DEQ stated it could not determine whether mining had dewatered a portion of EFAC, so "material damage to this section cannot be determined." BER:95, Ex. DEQ-1 at 9; BER:95, Ex. DEQ 1-A at 9-10.

DEQ's CHIA did not directly address the Conservation Groups' concerns about anticipated mining in Area F. However, the CHIA included a legal definition of "anticipated mining" that is inconsistent with applicable regulations. Whereas the regulations define "anticipated mining" to include "operations with *pending applications*," ARM 17.24.301(32) (emphasis added), the CHIA narrowed the

definition to "*permitted operations*." BER:95, Ex. DEQ-1A at 5-1 (emphasis added). Based on this narrow definition, DEQ excluded Area F (the application for which was *pending*, but not *permitted*) from analysis. BER:100, Exs. 19-22.

The Conservation Groups timely sought administrative review, claiming DEQ's analysis in the CHIA failed to adequately assess material damage to EFAC in light of the stream's status as an impaired waterbody. BER:1 at 3-4. The Conservation Groups also challenged the CHIA's unlawfully narrowed definition of "anticipated mining" and its reversal of the burden of proof regarding material damage. *Id.* at 2-3; BER:97 at 2. WRM intervened and the case went to a contested case hearing before the Board's hearing examiner. BER:4, 115-18.

D. Motions in Limine

Prior to the hearing, DEQ and WRM objected to a number of the Conservation Groups' claims on the basis of "administrative issue exhaustion" (or "waiver"), contending that the claims were not raised in their public comments. BER:73; BER:74. The Conservation Groups opposed the motions, contending that issue exhaustion does not apply to administrative review of permitting decisions under MSUMRA and that because they were not allowed to review any draft of DEQ's CHIA prior to submitting comments, they could not have been expected to foresee DEQ's legal errors in the CHIA. BER:84 at 3-15. The Board, however, applied issue exhaustion and, accordingly, dismissed multiple claims, including claims related to

anticipated mining and dewatering. BER:152 at 77. The Board also barred the Groups from citing or discussing evidence from DEQ's permitting record if the evidence was not also referenced in their comments. *E.g.*, BER:152 at 77 (precluding references to dissolved oxygen (which affects aquatic life) and chloride (which also affect aquatic life).

The Conservation Groups complain here that while the Board strictly limited the Groups to issues and evidence identified in their comments, the Board expansively permitted DEQ and WRM to present post-decisional evidence that was not included or evaluated in DEQ's CHIA or permitting record. *E.g.*, BER:152 at 37-39, 64 (relying on "probabilistic" and "statistical" analysis proffered by WRM in contested case); *cf.* BER:118 at 33:4-20 (parties stipulating that statistical analysis was not in permit record).

The Conservation Groups, for their part, moved in limine to prevent DEQ's hydrologist, Emily Hinz, Ph.D., from presenting testimony about aquatic life in EFAC. BER:76 at 5-7. The parties and the Board's hearing examiner "all agree[d] that she's [Dr. Hinz] not an expert in aquatic life of any kind." BER:117 at 86:20-21. However, on the basis of Montana Rule of Evidence 703, the Board permitted and later relied upon opinion testimony by Dr. Hinz about aquatic life health in EFAC. BER:152 at 48-50; BER:116 at 215:18 to 219:4.

E. The Board's Final Order

The Board upheld the AM4 permit. BER:152 at 85-86. Regarding the burden of proof, the Board held, over dissent,[2] that the Conservation Groups failed to demonstrate that material damage would likely result. BER:152 at 84 (Groups "failed to present evidence necessary to establish the existence of any water quality standard violations"); *accord id.* at 72, 76.

Regarding water quality standards, the Board recognized that DEQ's CHIA "must assess whether the action at issue will cause a violation of water quality standards." BER:152 at 75. The Board further recognized that under the "relevant water quality standard," EFAC must be "maintained to support … growth and propagation of … aquatic life." *Id.* at 18 (quoting ARM 17.30.629(1)). DEQ testified it does not use analysis of aquatic macroinvertebrates to assess this water quality standard because, as the Board found, such analysis "does not provide an accepted or reliable indicator of aquatic life support." *Id.* at 46-47. The Board nevertheless

[2] One Board member objected that the Board was impermissibly placing the burden on the Conservation Groups to prove that material damage *would occur*, given MSUMRA's provision placing the burden on WRM and DEQ to prove that material damage *would not occur*. BER:151 at 204:18-22 ("[I] don't think we can flip and require the Petitioner to prove with certainty that damage will occur …."); *accord* at 214:18-23; *cf. Park Cnty.*, ¶ 61 (explaining that state constitution "do[es] not require that dead fish float on the surface of our state's rivers and streams before the [Montana Constitution's] farsighted environmental provisions can be invoked." (quoting *MEIC I*, ¶ 77)).

relied on DEQ's survey of macroinvertebrates to conclude that DEQ's CHIA adequately assessed the narrative water quality standard for growth and propagation of aquatic life. *Id.* at 85.

Regarding salinity, the Board found that EFAC is impaired and not meeting water quality standards for growth and propagation of aquatic life due to excessive salinity (that is, existing salinity concentrations are adversely affecting growth and propagation of aquatic life in EFAC). *Id.* at 28. The Board further found that existing mining operations are expected to cumulatively increase salinity in EFAC by 13%. *Id.* at 39 (noting "anticipated 13% increase in the concentration of TDS [salinity] in EFAC"); BER:95, Ex. DEQ-1 at 11 (noting "the 13% increase in TDS … in EFAC"); DEQ-1A at 9-9 (noting that "[b]aseflow in EFAC … is predicted to experience a postmine increase in TDS of 13%, elevating the average concentration of TDS to almost 2,600 mg/L"). However, adopting an argument of DEQ that did not appear in the CHIA, the Board concluded it should consider salinity pollution from AM4 in insolation from the predicted cumulative salinity increase of 13% from other mining operations. *Id.* 63-64. The Board then reasoned that because AM4—viewed in isolation—would only extend the *duration* of elevated salinity concentrations (up to "tens to hundreds of years") but would not, on its own, increase the salinity *concentration*, it would not cause material damage. *Id.* at 62-72.

The Conservation Groups timely appealed the Board's decision.

IV. STANDARD OF REVIEW

Under MAPA, a district court may "reverse or modify" an agency decision in a contested case if "(a) the administrative findings, inferences, conclusions, or decisions are: (i) in violation of constitutional or statutory provisions … (iii) made upon unlawful procedure … [or] (vi) arbitrary and capricious," resulting in prejudice to the substantial rights of a party. § 2-4-704(2), MCA.

DEQ and WMR dispute that the arbitrary and capricious standard applies to judicial review of contested cases under MAPA. DEQ Br. at 3; WMR Br. at 2 n.3. The Montana Supreme Court, however, recently clarified that it does. *Vote Solar v. Mont. Dep't of Pub. Serv. Regulation*, 2020 MT 213A, ¶¶ 35-37, 401 Mont. 85, 473 P.3d 963. Legal conclusions are reviewed for correctness, not abuse of discretion. *Id.*, ¶ 35; *cf.* DEQ Br. at 3 (citing *Harris v. Bauer*, 230 Mont. 207, 212, 749 P.2d 1068 (1988)); *Steer, Inc. v. Dep't of Revenue*, 245 Mont. 470, 474, 803 P.2d 601, 603 (1990) (abrogating "abuse of discretion" standard for review of conclusions of law); *see also N. Cheyenne Tribe v. DEQ*, 2010 MT 111, ¶ 19, 356 Mont. 296, 234 P.3d 51.

"[I]nternally inconsistent analysis signals arbitrary and capricious action." *MEIC v. DEQ* (*MEIC III*), 2019 MT 213, ¶ 26, 397 Mont. 161, 451 P.3d 493 (quoting *NPCA v. EPA*, 788 F.3d 1134, 1141 (9th Cir. 2015)). "Montana courts do not defer to incorrect or unlawful agency decisions …." *Id.*, ¶ 22.

"The goal of statutory interpretation is to give effect to the purpose of the statute. A statute will not be interpreted to defeat its object or purpose, and the objects to be achieved by the legislature are of prime consideration in interpreting it." *Dover Ranch v. Cnty. of Yellowstone*, 187 Mont. 276, 283, 609 P.2d 711, 715 (1980) (internal citations omitted). In reviewing agency decisions that impact the environment, the Montana Supreme Court "remain[s] mindful that Montanans have a constitutional right to a clean and healthful environment." *Mont. Envtl. Info. Ctr. v. Mont. Dep't of Envtl. Quality* (*MEIC IV*), 2020 MT 288, ¶ 26, ___ Mont. ___, 476 P.3d 32 (quoting *Upper Mo. Waterkeeper v. Mont. Dep't of Envtl. Quality*, 2019 MT 81, ¶ 41, 395 Mont. 263, 438 P.3d 792). Montana courts afford "much less" deference to agency interpretations of statutes. *MEIC III*, ¶ 24 n.9.

V. DISCUSSION

A. Whether the Board erred by applying administrative issue exhaustion to preclude consideration of issues raised by the Conservation Groups.

In support of the Board on this issue, DEQ and WRM contend that issue exhaustion at the permit appeal stage is required by the *text* of MSUMRA, "rules, and the Board's *Signal Peak* [*Bull Mountains*] ruling." DEQ Br. at 8; *see also* WRM Br. at 7. A review of statutory text, however, does not support this contention. DEQ cites only one statutory provision—§ 82-4-231(8)(e)-(f), MCA, DEQ Br. at 8, 9, 11—but that provision says nothing about issue exhaustion. Instead, it provides that

after DEQ deems an application acceptable, it must provide public notice and a brief comment period during which an interested person "*may* file a written objection." § 82-4-231(8)(e), MCA (emphasis added). DEQ must then prepare written findings. *Id.* § 82-4-231(8)(f). There is no textual issue exhaustion requirement. DEQ also cites ARM 17.24.405(5)-(6), but these provisions are also devoid of any express written issue exhaustion requirement. Similarly, the *In re Bull Mountains* decision, also cited by DEQ, says nothing about administrative issue exhaustion.

The Court finds relevant here the *text* of § 82-4-206(1), MCA, which provides the sole requirements for seeking administrative review of a permit decision under MSUMRA; namely, (1) that the person seeking administrative review be adversely affected (undisputed here); and (2) that the request be timely (also, undisputed here). *Accord* ARM 17.24.425(1). Notably, the relevant *texts* do not impose *any* exhaustion requirement. The Court further notes that the U.S. Department of Interior explained that the parallel federal provision for public comment on permit applications "in no way" limits the rights of affected members of the public from seeking administrative review. 56 Fed. Reg. 2,139, 2,141 (Jan. 22, 1991); *Save Our Cumberland Mountains v. OSM*, NX 97-3-PR at 16-17 (Dep't of Interior July 30, 1998) (in record as BER:141, Ex. 4). These interpretations of the parallel federal provisions are compelling because Montana, like other states with approved regulatory programs under SMCRA, must "interpret, administer, enforce, and maintain [them] in

accordance with the Act [SMCRA], this chapter [SMCRA's federal implementing regulations], and the provisions of the approved State program." 30 C.F.R. § 733.11.[3]

Based on the absence of any exhaustion requirement in MSUMRA and its implementing regulations, and because MSUMRA must protect and encourage public participation to the same degree as SMCRA, 30 U.S.C. § 1253(a), the Court concludes that the Board erred in engrafting an extra-statutory exhaustion requirement onto MSUMRA.[4] *See also* S. Rep. No. 95-128, at 59 (1977) (expressing congressional intent that public play a significant role in administration of SMCRA).

Similarly, MAPA does not require issue exhaustion in contested cases, but instead allows parties to raise new issues revealed during administrative review. *Citizens Awareness Network v. BER*, 2010 MT 10, ¶¶ 23-30, 355 Mont. 60, 227 P.3d 583. *See* § 2-4-702(1)(b), MCA (issue exhaustion applies *after* contested case). Simply stated, the Court finds no authority for DEQ's and WRM's proposal to limit

[3] DEQ attempts to minimize the importance of this on-point federal authority, by noting the cooperative-federalism structure of SMCRA and MSUMRA. DEQ Br. at 8, n.8. However, as noted,because MSUMRA is a delegated program under SMCRA, it must be "in accordance with" and "consistent with" SMCRA and its implementing "rules and regulations." 30 U.S.C. § 1253(a)(1), (7); 30 C.F.R. § 733.11. Thus, MSUMRA may not be interpreted to be less protective of public participation than SMCRA.

the public to issues raised *before* DEQ lays its cards on the table. *See Vote Solar*, ¶ 49 (exhaustion does not require party to identify error before it occurs).

This conclusion is buttressed by the Montana Constitution's rights to know and to participate, which entitle the public to review government analyses *before* objecting to government decisions. *Bryan v. Yellowstone Cnty.*, 2002 MT 264, ¶¶ 32-46, 312 Mont. 257, 60 P.3d 381; Mont. Const. art. II, §§ 8-9. As the *Bryan* Court noted, for these rights to be more than a "paper tiger," the public must have a "reasonable opportunity to know the claims of the opposing party [the government] and to meet them." *Bryan*, ¶¶ 44, 46.

Here, DEQ seeks to impute sufficient knowledge of the deficiencies which the Conservation Groups later complained of, asserting that WRM as part of its AM4 application submitted a Probable Hydrologic Consequences (PHC) report, which should have tipped off the Conservation Groups as to the deficiencies that it complains of in DEQ's CHIA. DEQ misses the point. It is agency action (or inaction) that is at the heart of the review sought by the Conservation Groups. Under MSUMRA, the public only sees *DEQ's CHIA* when *the agency* approves or denies the permit, well *after* the comment period on WMR's application had closed. ARM 17.24.404(3)(a), .405(5)-(6). Administrative review thus is the first opportunity the public has to contest *DEQ's* "reasons for the final decision." ARM 17.24.425(1). Application of issue exhaustion to limit the Conservation Groups to issues raised in

comments made *before* ever seeing DEQ's CHIA and "final decision" would render public participation a "hollow right" and violate applicable statutory and constitutional rights. *Bryan*, ¶ 44.

In reaching the contrary conclusion, the Board cited one authority, its prior ruling in *In re Bull Mountains*. BER:103 at 5; BER:152 at 77. That decision is inapposite because it never addressed issue exhaustion in any respect. *See In re Bull Mountains*, at 56-59.

Even if it were applicable, issue exhaustion would not bar the Conservation Groups' claims here for two reasons. First, the Conservation Groups' comments identified the need to assess cumulative impacts to water from Area F and concerns about dewatering EFAC. *See* BER:95, Ex. DEQ-4L at 17 (noting that "Area B [i.e., AM4] and Area F" "will have cumulatively significant impacts on … surface waters"); BER:95, Ex. DEQ-4 at 2-3 (noting dewatering); *see also* Conservation Groups' Br., at Argument I.B. WRM criticizes the precision with which the Conservation Groups' comments discussed Area F and dewatering. WRM Br. at 15. Nevertheless, at the very least DEQ was alerted "in general terms" that these issues would be "fully sifted" in the ensuing administrative review and "the groups' theories for challenging the permit would not be confined to those presented in the original affidavit." *See, Lands Council v. McNair, 629 F.3d 1070, 1076 (9th Cir. 2010)*; *Citizens Awareness Network*, ¶ 23.

Second, the record shows that DEQ also had actual knowledge of these issues. Discovery revealed that DEQ debated analyzing cumulative impacts from Area F, but declined to do so based on an incorrect definition of "anticipated mining." BER:100, Ex. 19 (defining "anticipated mining" incorrectly as "approved—but not mined" and noting "proposed Area F and additional mining in Area A—not included" as a result); *id.* Exs. 20-22 (discussions resulting in exclusion of anticipated mining based on incorrect definition); BER:95, Ex. DEQ-1A at 5-1 (erroneous definition of "anticipated mining"); *cf.* ARM 17.24.301(32) (correct definition). DEQ also had actual knowledge of the Groups' concerns about dewatering EFAC because it addressed them in the CHIA and response to comments. BER:95, Ex. DEQ-1 at 9-10 (stating DEQ could not determine whether mining had dewatered stream and concluding "material damage to this section cannot be made"); *id.* Ex. DEQ 1-A at 9-10. Because the Groups raised these issues and DEQ knew about and addressed them (albeit erroneously), issue exhaustion does not apply. *Barnes v. U.S. Dep't of Transp.*, 655 F.3d 1124, 1132-34 (9th Cir. 2011) (explaining that there is "no need" for public to raise issue that agency already had knowledge of); *NRDC v. EPA*, 824 F.2d 1146, 1151 (D.C. Cir. 1987) ("This court has excused the exhaustion requirements for a particular issue when the agency has in fact considered the issue."); *see also State v. Baze*, 2011 MT 52, ¶ 11, 359 Mont.

411, 251 P.3d 122 (related doctrine of waiver inapplicable where parties raised and district court addressed issue).

In sum, issue exhaustion does not apply to administrative review of permits under MSUMRA. The Board erroneously required the Conservation Groups to exhaust issues which arose only upon publication of DEQ's analysis after the close of the public comment period. Further, even if issue exhaustion applied, DEQ's actual knowledge of the Conservation Groups' concerns foreclosed its application. The Board erred in dismissing the Groups' claims concerning DEQ's erroneous definition of "anticipated mining" and dewatering EFAC on the basis of issue exhaustion. Moreover, the error was prejudicial because it precluded a merits ruling the Conservation Groups' claims. *Organized Vill. of Kake v. U.S. Dep't of Agric.*, 795 F.3d 956, 969 (9th Cir. 2015) (explaining that "the required demonstration of prejudice is not a particularly onerous requirement").

B. Whether the Conservation Groups' met the requirements of § 2-4-621(1), MCA.

Under MAPA, after a hearing examiner issues proposed findings and conclusions, each party that is adversely affected must be given an "opportunity … to file exceptions and present briefs and oral arguments to the officials [here, the Board] who are to render the decision." § 2-4-621(1), MCA. Accordingly, after issuance of the proposed findings and conclusions, the Board issued an order stating:

"Any party adversely affected by the Proposed Order may file Exceptions to the proposed order on or before May 10, 2019." BER:135 at 2.

In response, each party filed a brief objecting to portions of the proposed findings and conclusions. BER:139; BER:140; BER:141. WRM and DEQ captioned their briefs "Exceptions," BER:139; BER:140. The Conservation Groups captioned their brief "Objections." BER:141. The Conservation Groups' brief, like those of WRM and DEQ, identified specific portions of the proposed findings to which the Groups' objected. *E.g.*, BER:141 at 7, 12, 24, 31, 47, 48, 52, 53. Previously, the Conservation Groups had submitted 55 pages of proposed findings, and 76 pages of objections to the proposed findings of DEQ and WRM. BER:123; BER:131.

Citing *Flowers v. Board of Personnel Appeals*, 2020 MT 150, 400 Mont. 238, 465 P.3d 210, WRM—now for the first time before this Court[5]—contends that the Conservation Groups' brief failed to meet the requirements of § 2-4-621(1), MCA, because it was denominated "objections" rather than "exceptions." WRM Br. at 6. WRM's argument is without merit. The Montana Supreme Court has long refused to interpret MAPA in such a hyper-technical fashion. *State ex rel. Mont. Wilderness Ass'n v. Bd. of Natural Res. & Conservation*, 200 Mont. 11, 39-40, 648 P.2d 734, 749 (1982) (refusing to "exalt form over substance" and not requiring agency to rule

[5] Notably, WRM did not raise this issue before the Board, though it had the opportunity to do so.

on each proposed finding offered by parties as provided in § 2-4-623(4), MCA). Thus, the Court "encourages a liberal interpretation of procedural rules governing judicial review of an administrative board" and has "avoid[ed] an over-technical approach" to MAPA to "allow[] the parties to have their day in court." *In re Young v. Great Falls*, 194 Mont. 513, 516, 632 P.2d 1111, 1113 (1981).

Here, contrary to WRM's argument, the Conservation Groups' brief objecting to the proposed findings and conclusions identified and cited specific findings and conclusions to which it objected and provided detailed analysis explaining the asserted errors. BER:141 at 7, 12, 23, 31, 47, 48, 52, 53. Thus, caption notwithstanding,[6] the Conservation Groups' brief was no different than those of WRM and DEQ. While it is true that the Conservation Groups' objections challenged the legal conclusions of the proposed ruling rather than the factual findings, *see generally* BER:141; BER:151 at 99, there is no requirement that parties challenge proposed factual findings. *Cf.* § 2-4-621(3), MCA (providing that Board may reject proposed legal conclusions *or* proposed factual findings). WRM is also mistaken in its suggestion that MAPA requires objections to include "modifying language for each exception." WRM Br. at 6. MAPA contains no such requirement. § 2-4-621(1), MCA. Nor did the Board's order on exceptions. BER:135 at 2.

[6] "Exceptions" and "objections" are synonymous. *See* Black's Law Dictionary at 603 (8th ed. 2007).

Finally, *Flowers* is not to the contrary. There, Flowers did *not* file exceptions and the Court therefore held that,

> Flowers did *not* pursue to their conclusion "all administrative remedies available" before seeking judicial review. *Art*, ¶ 17; § 2-4-702(1)(a), MCA. *Hearing Officer Holien's recommended order directed him to file exceptions with BOPA if he was unsatisfied with her decision*. That her recommendation became a final order of the Board twenty days later did not obviate the requirement to file exceptions in order to completely exhaust the "available" administrative remedies.

Flowers, ¶ 13 (emphasis added).

Here, unlike in *Flowers*, the Conservation Groups filed extensive exceptions (denominated "objections") to the hearing examiner's proposed findings and conclusions. BER:141. Nothing more was required.

C. Whether the Board erred by permitting DEQ and WRM to present post-decisional evidence and analysis.

Under MSUMRA, DEQ's permitting decisions must be based on "information set forth in the application or information otherwise available that is compiled by [DEQ]." ARM 17.24.405(6); § 82-4-227(3), MCA. Under these provisions, "[t]he relevant analysis and the agency action at issue is that contained within the four corners of the Written Findings and CHIA." BER:152 at 76; *In re Bull Mountains*, at 56-59 ("What the agency may not do is present newly developed evidence that was not before the agency at the time of its decision or analysis that was not contained within the CHIA."). This is consistent with the bedrock rule of administrative law that "an agency's action must be upheld, if at all, on the basis

articulated by the agency itself." *Park Cnty.*, ¶ 36 (quoting *Motor Vehicle Mfrs. v. State Farm*, 463 U.S. 29, 50 (1983)); *accord MTSUN, LLC v. Mont. Dep't of Pub. Serv. Regulation*, 2020 MT 238, ¶ 51, 401 Mont. 324, 472 P.3d 1154 (explaining that an agency's "decision must be judged on the grounds and reasons set forth in the challenge order(s); no other grounds should be considered"); *Kiely Constr., L.L.C. v. Red Lodge*, 2002 MT 241, ¶¶ 92-97, 312 Mont. 52, 57 P.3d 836 ("after-the-fact opinions" cannot support decisions).

Here, over objection by the Conservation Groups, the Board admitted and then relied heavily on testimony by WRM's expert William Schafer, Ph.D., about a post-decisional "statistical" and "probabilistic" analysis in which he concluded that the projected 13% salinity increase in EFAC "would not be statistically significantly measurable." BER:152 at 38; *id.* at 37, 39, 64 (relying on "statistical" analysis); *see also id.* at 84 (incorporating prior discussion including "statistical" analysis). However, all parties stipulated and the Board's hearing examiner agreed that this "probabilistic" analysis was post-decisional and not included in the information "compiled" by DEQ to support its decision. BER:118 at 33:4-20.

WRM now argues that the Board's admission of *post hoc* testimony from Dr. Schafer was harmless, asserting that it was not "relevant to the Board's directed verdict." WRM Br. at 16. WRM is mistaken, placing form over substance. While the Board framed its ruling as granting a "directed verdict," BER:152 at 85, the Board's

analysis shows that this was a misnomer. A directed verdict is only appropriate if there is no weighing of evidence and all evidence and inferences are viewed in the light most favorable to the non-moving party. *Massee v. Thompson*, 2004 MT 121, ¶ 25, 321 Mont. 210, 90 P.3d 394. The Board, however, rejected the Conservation Groups' expert testimony and, instead, credited testimony of witnesses from DEQ and WRM (some of whom denied any expertise). *E.g.*, BER:152 at 34-36, 51-53, 67, 72.

Thus, contrary to WRM's assertion, the fact that the Board denominated its ruling as a "directed verdict" does not establish that its erroneous admission of *post hoc* testimony from Dr. Schafer was harmless. To the contrary, the record indicates that the Board relied on Dr. Schafer's *post hoc* "statistical" analysis to discount the significance of the projected 13% increase in salinity in base flow in EFAC from the cumulative impacts of mining. BER:152 at 64-65; *see also id.* at 37-38. Because this testimony was crucial to the Board's decision, it was prejudicial and not harmless. *In re Thompson*, 270 Mont. 419, 430-35, 893 P.2d 301, 307-310 (1995) (improper admission of crucial expert testimony warranted reversal of agency decision); *see also Murray v. Talmage*, 2006 MT 340, ¶ 18, 335 Mont. 155, 151 P.3d 49 (finding improper admission of "critical evidence" prejudicial).

Similarly, regarding salinity, the CHIA's material damage assessment and determination were premised on a projected 13% cumulative increase in salinity in

EFAC. BER:95, Ex. DEQ-1A at 9-9 (noting that "[b]aseflow in EFAC … is predicted to experience a postmine increase in TDS of 13%"); BER:95, Ex. DEQ-1 at 11 (evaluating material damage with respect to "the 13% increase in TDS … in EFAC"). However, at hearing, DEQ made the *post hoc* argument, which the Board accepted, that its material damage assessment was based not on the 13% cumulative increase in salinity predicted in the CHIA, but on the additional salinity from the AM4 expansion considered in isolation (which the Board found would extend the duration of elevated salinity by decades or centuries, without itself increasing the salt concentration at any one time). BER:152 at 63-65; *see also infra* Part V.G (discussing the claim of substantive error of "extended duration").

The Court finds that the Board's decision to admit and rely on post-decisional evidence and analysis from DEQ and WRM violates ARM 17.24.405(6)(c) and the Board's own rule that "[w]hat the agency may not do is present newly developed evidence that was not before the agency at the time of its decision or analysis that was not contained within the CHIA." *In re Bull Mountains*, at 59; BER:152 at 76 (relevant analysis is in "four corners" of CHIA); *see also MEIC III*, ¶ 26 (inconsistent rulings are arbitrary). As the Board itself previously cautioned: "The public's ability to rely on DEQ's express written findings and analysis supporting its permitting decision is for naught if at the contested case stage, the agency is

permitted to present extra-record evidence and manufacture novel analysis and argument." *In re Bull Mountains*, at 49.

In sum, the Court finds unlawful the Board's decision to allow DEQ and WRM to present post-decisional evidence and analysis. The Board's decision is at the same time impermissibly arbitrary because, as noted above, the Board simultaneously limited the Conservation Groups to evidence and argument contained in their *pre-decisional* comments. *See supra* Part III.D. This decision created an uneven playing field, which was plainly prejudicial. *Organized Vill. of Kake*, 795 F.3d at 969.

D. Whether the Board erroneously allowed DEQ's hydrology expert to present expert testimony about aquatic life.

The Conservation Groups moved in limine to exclude expert testimony about aquatic life by Dr. Hinz, who is a hydrologist, on the basis that she has no expertise in aquatic life or aquatic biology. BER:76 at 5-7. At hearing, the parties and the Board's hearing examiner "all agree[d] that she's [Dr. Hinz] not an expert in aquatic life of any kind." BER:117 at 86:20-21. The Board, however, permitted and relied on testimony by Dr. Hinz about aquatic life health in EFAC. BER:152 at 48-50.

Contested cases before BER are subject to "common law and statutory rules of evidence." § 2-4-612(2), MCA. If a witness lacks expertise in a given field, she may not give expert testimony in that field, even if she possesses expertise in another field. *State v. Russette*, 2002 MT 200, ¶¶ 13-14, 311 Mont. 188, 53 P.3d 1256,

abrogated on other grounds by State v. Stout, 2010 MT 137, 356 Mont. 468, 237 P.3d 37; Mont. R. Evid. 702.[7] Admission of improper expert testimony in a contested case constitutes reversible error. *In re Thompson*, 270 Mont. 419, 429-30, 435, 893 P.2d 301, 307, 310 (1995).

The apparent basis of the Board's decision was that Dr. Hinz's testimony was permissible under Montana Rule of Evidence 703. *See* BER:116 at 215:18 to 219:4. As clear from arguments advanced at hearing before this Court, both DEQ and WMR now rely on Rule 703 in defending BER's decision. However, Rule 703 merely addresses the "bases" on which expert opinion testimony may rest. Mont. R. Evid. 703. Rule 703 does not expand Rule 702, and it does not permit an expert to give testimony that is beyond her field of expertise, as Dr. Hinz did here with respect to aquatic life. *State v. Hardman*, 2012 MT 70, ¶¶ 27-28, 364 Mont. 361, 276 P.3d 839; *Weber v. BNSF Ry. Co.*, 2011 MT 223, ¶ 38, 362 Mont. 53, 261 P.3d 984.

WRM asserts that the admission of Dr. Hinz's testimony about aquatic life was harmless. WRM Br. at 16. However, Dr. Hinz was DEQ's only witness who offered testimony about aquatic life in EFAC, and the Board's finding and decision regarding aquatic life relied almost exclusively on Dr. Hinz's testimony. BER:152 at 44-50, 85. The Board relied on Dr. Hinz's testimony to discount the testimony of

[7] *Accord, e.g., Dura Auto. Sys. v. CTS Corp.*, 285 F.3d 609, 612-14 (7th Cir. 2002).

the Conservation Groups' aquatic life expert Mr. Sullivan. BER:152 at 51-52. The Board's analysis of aquatic life cited only one other expert—WRM's expert Ms. Hunter—but conceded that, while Ms. Hunter sampled aquatic life in EFAC, she was not requested to analyze aquatic life health in the stream, BER:152 at 45. And, in fact, DEQ directed Ms. Hunter to "collect, *but not analyze*" aquatic life in the stream. BER:152 at 46 (emphasis added).[8] Thus, Dr. Hinz's testimony was critical to the Board's findings and conclusions with respect to aquatic life and, therefore, its admission was prejudicial and not harmless. *In re Thompson*, 270 Mont. at 430-35, 893 P.2d at 307-310; *Murray*, ¶ 18.

In sum, the Board's admission and reliance on opinion testimony by Dr. Hinz about aquatic life in EFAC—an area admittedly beyond her field of expertise—was reversible error. *Russette*, ¶¶ 13-14; *Weber*, ¶¶ 36-39; *In re Thompson*, 270 Mont. at 429-30, 435, 893 P.2d at 307, 310.

[8] Indeed, as explained at the hearing, DEQ management seems to have arbitrarily prevented *anyone* with expertise in aquatic life from reviewing data on aquatic life in EFAC. *See* BER:117 at 183:25 to 184:8 (DEQ explaining that it instructed its expert in aquatic life, David Feldman, from analyzing data from EFAC); BER 100, Ex. MEIC 15; *see also* BER:152 at 46 (DEQ also prohibited WRM's aquatic life expert from analyzing data).

E. Whether the Board imposed a burden of proof that erroneously required the Conservation Groups to prove that the mine would cause material damage.

MSUMRA places the "burden" of demonstrating that material damage will *not occur* on the permit applicant and the regulatory authority, here WRM and DEQ. § 82-4-227(1), (3)(a), MCA; ARM 17.24.405(6)(c). Where a statute imposes the burden to show the "lack of adverse impact" on a permit applicant, as here, that burden remains with the applicant throughout administrative review of the permit. *Bostwick Props., Inc. v. DNRC*, 2013 MT 48, ¶¶ 1, 10-14, 36, 369 Mont. 150, 296 P.3d 1154; *accord* S. Rep. No. 95-128, at 80 (1977) (legislative history of SMCRA stating that permit applicant retains burden of showing lack of environmental effects in contested hearing) (in record at BER:141, Ex. 2).

Here, in violation of the statutory text of MSUMRA, a divided Board placed the burden on the Groups to "present evidence necessary to establish the existence of any water quality standard violations." BER:152 at 84. Elsewhere, the Board stated the burden differently but maintained that the Groups had to show "more-likely-than-not" that material damage would or "could" occur. *Id.* at 72 (concluding "burden of proof … falls to Conservation Groups to present a more-likely-than-not probability that a water quality standard could be violated by the proposed action"); *id.* at 76 (concluding Groups "have the burden to show, by a preponderance … that

DEQ had information available to it at the time of issuing the permit that indicated that the project is not designed" to prevent material damage).

As the dissenting Board member aptly explained, this "burden of proof … impermissibly read out of the statute the agency's regulation," BER:151 at 214:18-23; that is, the Board ignored its own requirement that the applicant "affirmatively demonstrates" and DEQ "confirm[s]" that the "cumulative hydrologic impacts will not result in material damage." ARM 17.24.405(6)(c); § 82-4-227(1), (3)(a), MCA ("The applicant … has the burden" of establishing compliance with MSUMRA's requirements); BER:151 at 204:5-25. This allocation of the burden of proof is consistent with the precautionary principles of MSUMRA, § 82-4-227(1), (3), and Montana's right to a clean and healthful environment, which imposes "anticipatory and preventive" protections. *Park Cnty.*, ¶ 61. It is, thus, not the responsibility of the public to demonstrate that environmental harm will occur, but, instead, the duty of the applicant (WRM) and the agency (DEQ) to demonstrate that environmental harm will not occur.

The Board based its erroneous allocation of the burden on *Montana Environmental Information Center v. Montana Department of Environmental Quality* (*MEIC II*), 2005 MT 96, 326 Mont. 502, 112 P.3d 964, which case both DEQ and WMR rely on here.[9] However, as the Conservation Groups point out, that

[9] WRM also cites the Court to ARM 17.24.425(7), but that provision refers to

case is inapposite because, unlike MSUMRA, the Clean Air Act of Montana, at issue there, has no provision allocating the burden of proof to the permit applicant. *Compare MEIC* (2005), ¶ 13, *with* § 82-4-227(1), (3)(a), MCA.

Further, even in *MEIC II*, the Supreme Court did not burden the public with affirmatively demonstrating that environmental harm would occur. Instead, there, after the Supreme Court stated that the Clean Air Act permit challengers had the general burden of proof, the Court emphasized that the challengers did not have to prove that environmental harm would occur—as WRM contends and the Board held, here. Instead, the Supreme Court explained that during the contested case the dispositive question was whether the permit *applicant* had "established" that environmental *harm would not occur*:

> Thus, on remand the Board shall enter [findings and conclusions] determining whether, based on the evidence presented, Bull Mountain [the permit applicant] established that emissions from its proposed project will not cause or contribute to [environmental harms] ….

MEIC II, ¶ 38; *accord id.*, ¶ 36.

Thus, in any event, WRM's and the Board's asserted requirement that the Conservation Groups affirmatively demonstrate that material damage *would* occur

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cases where a party seeks to "reverse the decision of the board," not, as here, where the Groups sought to reverse DEQ's permit. Further, to the degree that the provision is ambiguous, the clear statutory test of § 82-4-227(1), MCA, which places the burden on the applicant, controls.

was error. Where, as here, the underlying statute (MSUMRA) expressly places the burden to demonstrate the lack of adverse environmental impacts, the applicant and agency retain their assigned burdens in administrative review of the permit. *Bostwick*, ¶ 36; § 82-4-227(1), (3); ARM 17.24.405(6)(c). The Board's decision to the contrary was error.

Reversal of the burden of proof was plainly prejudicial error. *See Organized Vill. of Kake*, 795 F.3d at 969 ("If prejudice is obvious to the court, the party challenging agency action need not demonstrate anything further."). Further, here, the Groups' presented testimony that WRM and DEQ had failed to demonstrate that material damage would not occur. BER:115 at 297:6-15 (aquatic life survey does not show that water quality standard is met); *id.* at 298:1-8 (same). This Court cannot conclude that the Board's reversal of the burden of proof had "no bearing on the procedure used or the substance of the decision reached." *Nw. Res. Info. Ctr., Inc. v. Nw. Power & Conservation Council*, 730 F.3d 1008, 1019-20 (9th Cir. 2013).

F. Whether the Board arbitrarily approved and relied on DEQ's and WRM's assessment of aquatic life health.

The Board properly recognized that in order to confirm that the cumulative hydrologic impacts will not result in material damage (which, as noted, includes any violation of a water quality standard), DEQ must assess applicable water quality standards. BER:152 at 75; *In re Bull Mountains*, at 87; ARM 17.24.405(6); §§ 82-4-203(31), 227(3)(a), MCA. The Board further recognized that the narrative water

quality standard for EFAC requires that the creek "be maintained suitable for … growth and propagation of non-salmonid fishes and associated aquatic life." ARM 17.30.629 (1); BER:152 at 18.

However, as confirmed by the record of the Decision, the Board *relied* on WRM's survey of macroinvertebrates to conclude that the CHIA adequately assessed the water quality standard for growth and propagation of aquatic life. *Id.* at 85. The problem with this analysis is that it is demonstrably inconsistent with DEQ's explanation and the Board's finding that "analyzing macroinvertebrate data … would *not* provide an *accepted* or *reliable* indicator of aquatic life support" for assessing water quality standards in eastern Montana streams. *Id.* at 46 (emphasis added); *see also id.* at 47-48. It was irrational and arbitrary for the DEQ and the Board to *rely* on an analysis that both entities expressly found to be *unacceptable* and *unreliable* for assessing applicable water quality standards. *MEIC III*, ¶ 26 ("an internally inconsistent analysis signals arbitrary and capricious action"); § 2-4-704(2)(vi), MCA. While agencies have a degree of discretion in determining what evidence to rely upon, an agency may not rely on evidence that the agency itself deems inadequate. *E.g., Idaho Conservation League v. Guzman*, 766 F. Supp. 2d 1056, 1077 (D. Idaho 2011) ("If an agency fails to make a reasoned decision based on an evaluation of the evidence, the Court must conclude that the agency has acted arbitrarily and capriciously."; *MEIC IV*, ¶ 26 (Court declined to defer to agency

analysis that was not a "reasoned decision" because it "sidestep[ed]" environmental protections).

WRM misapprehends the gravamen of the Conservation Groups challenge, which is *not* to the Board's factual findings with respect to DEQ's assessment of water quality standards for aquatic life support. *Cf.* WRM Br. at 18. The Groups' argument is that it was inconsistent and arbitrary (i.e., unlawful) for the Board to *rely* on an metric that the Board and DEQ both find *unreliable* to assess water quality standards for aquatic life support.

Both WRM and DEQ argue a distinction between the Clean Water Act and MSUMRA in an attempt to excuse DEQ's assessment of water quality standards for aquatic life support. *See, e.g.*, WRM Br. at 18, and arguments at hearing. The argument fails because MSUMRA adopts and incorporates "water quality standards" from the Clean Water Act as criteria for assessing material damage. § 82-4-203(31), MCA; *see also* Conservation Groups' Reply to DEQ, at Argument Part V. Thus, DEQ's CHIA purported to assess the narrative *water quality standard* for growth and propagation of aquatic life by relying on the (admittedly unreliable) macroinvertebrate survey: "the survey demonstrated that a diverse community of macroinvertebrates was using the stream reach. *Therefore*, the reach currently meets the *narrative* [water quality] *standard of providing a beneficial use for aquatic life*." BER:95, Ex. DEQ-1A at 9-8 (emphasis added); ARM 17.30.629(1) (narrative

standard—stream must "be maintained suitable for … growth and propagation of non-salmonid fishes and associated aquatic life"). The Board, similarly, used the assessment of macroinvertebrates to support its conclusion about water quality standards in EFAC. BER:152 at 48-49. Accordingly, DEQ's and WRM's effort to excuse the Board's inconsistent and arbitrary assessment of water quality standards for aquatic life fails.

Finally, WRM's harmless error argument also fails. Despite generalized assertions about "multiple lines of evidence," the unreliable macroinvertebrate survey was the *only* specific evidence on which the Board and DEQ relied to reach their conclusion about potential violations of the narrative water quality standard for growth and propagation of aquatic life. BER:152 at 82 (citing macroinvertebrate survey (the "ARCADIS report")); *id.* at 48-50 (basing analysis on Dr. Hinz's inexpert assessment of macroinvertebrate survey—but citing no other specific evidence); BER:95, Ex. DEQ-1A at 9-8 (basing assessment of narrative water quality standard for aquatic life exclusively on macroinvertebrate survey). As such, the Board's arbitrary and capricious reliance on DEQ's inexpert analysis of this unreliable survey was prejudicial, not harmless. *In re Thompson*, 270 Mont. at 430-35, 893 P.2d at 307-310; *Murray*, ¶ 18; *Organized Vill. of Kake*, 795 F.3d at 969.

G. Whether the Board arbitrarily concluded that adding more salt to a stream impaired for salt will not cause additional impairment.

The Board found that EFAC is an impaired water and not meeting narrative water quality standards for supporting growth and propagation of aquatic life due to, among other things, excessive salinity pollution. BER:152 at 24-25. WRM disputes that EFAC is impaired—i.e., not meeting water quality standards—due to salinity. WRM Br. at 20-22. However, the record indicates that DEQ's official Clean Water Act assessment concluded: "Salinity/TDS/chlorides will remain a cause of impairment." BER:95, Ex. 10 at 17. While, as the Board noted, DEQ's level of *certainty* in this conclusion was low and not confirmed, BER:95, Ex. 10 at 17, *cited in* BER:152 at 28, it nevertheless remains DEQ's official impairment determination with respect to EFAC.

The Board further found that existing mining operations will cause a 13% increase in salinity in EFAC, and AM4 will extend the duration of these increased salinity levels for up to "tens to hundreds of years." *Id.* at 32, 39, 63, 68-69 n.4.[10] The Board nevertheless determined that this increased salinity would not result in a violation of water quality standards for growth and propagation of aquatic life or

[10] *Accord* BER:95, Ex. DEQ-1 at 11 (DEQ findings noting "the 13% increase in TDS … in EFAC"); DEQ-1A at 9-9 (DEQ CHIA noting that "[b]aseflow in EFAC … is predicted to experience a postmine increase in TDS of 13%, elevating the average concentration of TDS to almost 2,600 mg/L").

adversely affect that beneficial use of EFAC. *Id.* at 61-72. The Board's determination was reached by considering the increased salinity from AM4 in isolation from the cumulative impacts of existing mining. BER:152 at 63-65 (stating that "AM4 specifically … is all this case concerns" and declining to consider cumulative salinity pollution from the total mine operation). However, as pointed out by the Conservation Groups, MSUMRA requires DEQ and the Board to analyze the impacts of a proposed mining operation in light of the "*cumulative* hydrologic impacts" of *all* past, existing, and anticipated mining. § 82-4-227(3)(a), MCA (emphasis added); ARM 17.24.301(31)-(32), .405(6)(c). "Cumulative" means "increasing by successive additions." Merriam-Webster Dictionary, www.merriam-webster.com. Thus, if pollution from "successive" mining operations will cause violations of water quality standards, DEQ must remedy those violations *before* permitting more mining. *See* 48 Fed. Reg. 43,956, 43,972-73 (Sept. 26, 1983) (material damage must be considered in light of "cumulative" impacts from "any preceding operations"). As the Supreme Court of Alaska explained in interpreting its SMCRA program, regulators must

> consider the probable cumulative impact of all anticipated activities which will be part of a 'surface coal mining operation,' whether or not the activities are part of the permit under review. If [the regulatory authority] determines that the cumulative impact is problematic, the problems must be resolved before the initial permit is approved.

Trustees for Alaska v. Gorsuch, 835 P.2d 1239, 1246 (Alaska 1992).

Thus, the Board's conclusion, reached by considering the increased salinity from AM4 in isolation from the cumulative impacts of existing mining, was error. If a stream, like EFAC, is not meeting water quality standards due to excessive pollution—that is, it is beyond its loading capacity, § 75-5-103(14), MCA—release of additional amounts of pollution that increase the concentration of that pollution will violate water quality standards. *Id.* § 75-5-103(18); *accord Friends of Pinto Creek v. EPA*, 504 F.3d 1007, 1011-12 (9th Cir. 2007) (discharge of additional copper into stream impaired by copper would violate water quality standards). Similarly, if existing salinity concentrations are adversely affecting growth and propagation of aquatic life (as here), then increasing salinity concentrations or extending the duration of the increased concentrations will also adversely affect growth and propagation of aquatic life. *See* § 82-4-203(31), MCA (adversely affecting beneficial uses or violating water quality standards is material damage). To conclude otherwise is unreasonable and arbitrary.

WRM attempts further reliance on Dr. Schafer's "statistical" analysis to assert that the projected increase in salinity would not be "statistically significant." WRM Br. at 22. However, as noted, Dr. Schafer's *post hoc* "statistical" analysis was not properly before the Board. *See supra*, Part V.C. In any event, Dr. Schafer's "statistical" argument (which the Board adopted) misses the point. As noted above, if the creek is impaired and, therefore, not meeting water quality standards, it cannot

be maintained that a greater-than 10% increase in salt in the creek will not result in a further violation of water quality standards. ARM 17.24.405(6)(c) (applicant and DEQ must demonstrate that material damage (i.e., a violation of a water quality standard) "will not result"); § 75-5-103(18), MCA (when water body has reached its loading capacity for a pollutant—as EFAC has for salinity—additional pollution causes a "violation of water quality standards"); *Friends of Pinto Creek*, 504 F.3d at 1011-12 (adding more pollution to impaired stream will cause or contribute to violation of water quality standard).

To the point here, violations of water quality standards are measured on a *daily* basis—each additional day of elevated pollution levels is an additional violation. § 75-5-611(9)(a), MCA; *id.* § 82-4-254(1)(a). Thus, extending the 13% increase in salinity in already-impaired EFAC for decades or centuries would result in additional violations. Plainly, this is not a demonstration that AM4 "will *not* result in" a "violation of water quality standards." ARM 17.24.405(6)(c); § 82-4-203(31), MCA (emphasis added); *id.* § 82-4-202(2)(a)-(b) (MSUMRA purpose is environmental protection and implementation of the Montana Constitution's right to a clean and healthful environment); *Park Cnty.*, ¶ 61; *Dover Ranch*, 187 Mont. at 283, 609 P.2d at 715 (statutory goal paramount).

Thus, the Board's conclusion that the cumulative impacts of AM4 will not result in material damage was arbitrary and unlawful.

H. Whether DEQ's and WRM's motion to strike is moot.

DEQ and WRM moved to strike two exhibits proffered by the Conservation Groups during the course of briefing, purportedly containing admissions by DEQ and DEQ's former counsel, which contradict an argument DEQ presented to this Court in its response brief. The Court has not relied upon the challenged exhibits in reaching its decision. Accordingly, the Court finds that DEQ's and WRM's motion to strike is moot.

VI. CONCLUSION

For the foregoing reasons, this Court reverses the Board and remands to DEQ to review the AM4 permit application consistent with this decision and applicable laws.

DATED this _____ day of December, 2020.

Signed: _____

Honorable Katherine M. Bidegaray
District Court Judge

Exhibit D

D.C. Doc. 65, DEQ's Brief ISO of Motion for Stay and Request for Clarification (Nov. 5, 2021).

Nicholas A. Whitaker
Staff Attorney
Department of Environmental Quality
Legal Unit, Metcalf Building
P.O. Box 200901
1520 East Sixth Avenue
Helena, MT 59601-0901
(406) 444-5690
Nicholas.Whitaker@mt.gov
Attorney for Respondent DEQ

MONTANA SIXTEENTH JUDICIAL DISTRICT, ROSEBUD COUNTY

MONTANA ENVIRONMENTAL INFORMATION CENTER, and SIERRA CLUB, Petitioners, vs. MONTANA DEPARTMENT OF ENVIRONMENTAL QUALITY, MONTANA BOARD OF ENVIRONMENTAL REVIEW, WESTERN ENERGY CO., NATURAL RESOURCE PARTNERS, L.P., INTERNATIONAL UNION OF OPERATING ENGINEERS, LOCAL 400, and NORTHERN CHEYENNE COAL MINERS' ASSOCIATION, Respondents.	Cause No.: DV 19-34 Judge Katherine M. Bidegaray **BRIEF IN SUPPORT OF DEQ'S MOTION FOR STAY PENDING APPEAL AND REQUEST FOR CLARIFICATION**

Respondent Montana Department of Environmental Quality (DEQ)

respectfully files this Brief in Support of its Motion for Stay Pending Appeal and Request for Clarification (Motion).

Facts Supporting Motion

As the Court is aware, this matter is a judicial review of a contested case decision under the Montana Administrative Procedure Act, Title 2, chapter 4, MCA (MAPA). In the contested case below, Petitioners challenged, and the Board of Environmental Review (BER) affirmed, a regulatory decision by DEQ to approve Western Energy Company's[1] fourth amendment (AM4) to the "Area B" coal mining permit for the Rosebud surface mine (Rosebud Mine) located in Colstrip, Montana. The coal mined by WRM is transferred to the Colstrip Steam Electric Station located immediately adjacent to the mine where it is used to generate electricity for Montanans and people in other northwestern states. Decl. Martin Van Oort (November 5, 2021), ¶ 10. Currently, the Rosebud Mine is the sole source for coal combusted at the Colstrip Steam Electric Station. Decl. Van Oort, ¶ 10.

The underlying permitting process for AM4 dates to 2009, when WRM first submitted an application for the AM4 Amendment under the Montana Strip and Underground Mine Reclamation Act, Title 82, chapter 4, part 2, MCA

[1] Western Energy is now known as Westmoreland Rosebud Mining LLC. Consistent with the Court's Order on Petition, this brief will refer to this entity as "WRM."

(MSUMRA). BER:152 at 13. The AM4 Amendment sought to increase the surface disturbance area and the quantity of coal that WRM could mine in Area B of its mining operation. *Id.* After eight rounds of deficiency notices and responses, DEQ issued the AM4 Amendment in December of 2015. WRM began mining in the AM4 area in 2016. Decl. Van Oort, ¶ 9.

Petitioners appealed DEQ's permitting decision to the BER. Following a contested case hearing, the BER issued an order affirming DEQ's approval of the AM4 Amendment in June 2019. Petitioners then sought judicial review of the BER's decision in this Court.

Under MSUMRA, a permittee may begin mining operations associated with a permit or permit amendment immediately upon approval of a permit application. Decl. Van Oort, ¶ 9. Petitioners have not sought, either during the contested case proceedings or before this Court, to enjoin WRM from conducting mining under the AM4 Amendment during the pendency of their appeal. Decl. Van Oort, ¶ 9; *see* 2-4-702(3), MCA (providing process to stay enforcement of agency decision pending judicial review).

On October 28, 2021, the Court issued an Order on Petition (Order) reversing the BER decision. The Court remanded the case to DEQ "to review the AM4 permit application consistent with the decision and applicable laws." Order, p. 34. The Order on Petition did not expressly vacate the DEQ permitting decision

underlying the BER contested case, nor did it expressly enjoin WRM from conducting further mining under the AM4 Amendment. *Id.*

Based on the 2020 Annual Mine Report submitted by WRM and DEQ inspection reports from 2021, DEQ estimates that 60 to 111 out of the 293 acres of mining permitted in the AM4 area has already been mined. Decl. Van Oort, ¶¶ 12-13. Therefore, DEQ estimates that WRM has mined at least 24 percent and likely 38 percent of the coal permitted by the AM4 Amendment. Decl. Van Oort, ¶ 14.

Strip-mining produces spoil, the broken-up rock from the overburden which is replaced in the pit after the coal is removed. Decl. Van Oort, ¶ 11. As the spoil has different physical properties than the pre-mining overburden, this results in an irreversible change to the geology and hydrology in the mined area. Decl. Van Oort, ¶ 11. In AM4, mining has produced spoils in the 24 to 38 percent of AM4 mined to date. Decl. Van Oort, ¶ 15.

Argument

1. DEQ requests the Court stay enforcement of its October 28, 2021, Order on Petition pending appeal and final resolution of this matter before the Montana Supreme Court.

M. R. App. P. 22(1) authorizes a party to an action to file a motion in the district court "[t]o stay a judgment or order of the district court pending appeal." M. R. App. P. 22(1)(a)(i). While this rule does not set forth any standards for a district court to evaluate such a stay motion, a motion for stay filed in the Montana

Supreme Court under M. R. App. P. 22(2) must "demonstrate good cause for the relief requested." M. R. App. P. 22(2)(a)(i).

"Good cause is generally defined as a 'legally sufficient reason' and referred to as 'the burden placed on a litigant (usu. by court rule or order) to show why a request should be granted or an action excused.'" *City of Helena v. Roan*, 2010 MT 29, ¶ 13, 355 Mont. 172, 226 P.3d 601 (quoting *Black's Law Dictionary* 251 (Bryan A. Garner ed., 9th ed., West 2009)). Good cause "will necessarily depend upon the totality of the facts and circumstances of a particular case." *Id.*

As set forth below, good cause exists for this Court to stay its October 28, 2021, Order on Petition pending appeal and final resolution of this matter before the Montana Supreme Court. The potential downstream effects of the Order on Petition on other MSUMRA permitting actions before the agency and the BER are far-reaching. DEQ, applicants for permits, and interested parties to DEQ's regulatory processes rely on certainty and stability in the agency's treatment of its review of permit applications under Montana law. The issues decided in the Order on Petition go to fundamental administrative principles that permeate through DEQ's permitting regime and the litigation of permit challenges stemming from DEQ's regulatory decisions. Without a stay of the Order on Petition pending appeal, there will be substantial uncertainty as to the current state of the law pending a final decision from the Montana Supreme Court.

Further, if not stayed, the Order on Petition would require DEQ to take substantial immediate action to address the effects of the Order on the AM4 area, all of which would be rendered moot if DEQ prevails on appeal. Finally, other equitable considerations weigh in favor of staying the Order on Petition. As discussed below, DEQ believes it has a substantial likelihood of success on appeal, Petitioners will not be substantially harmed if a stay is issued, and the public interest weighs in favor of a stay.

A. Absent a stay pending appeal, the Order on Petition will introduce tremendous uncertainty into DEQ's permitting regime for the agency, regulated entities, and the public.

The potential impacts of the Court's ruling reach far beyond the BER decision and DEQ's review of the AM4 Amendment. The issues decided in the Order on Petition go to the heart of DEQ's permitting process under MSUMRA and the fundamental administrative principles at play in litigation concerning challenges to permits. These are issues the Montana Supreme Court will be asked to decide on appeal. If the Order on Petition is not stayed pending that appeal, it will undermine the certainty and stability of DEQ permitting regime until these issues are finally decided by the Montana Supreme Court.

Several of the Court's rulings in the Order on Petition have potential far-reaching impacts for the agency, the regulated community, and any interested party who seeks to participate in DEQ decision-making processes on permit applications.

For example, the Court ruled that, in the context of a contested case conducted under MAPA, a party is not required to have exhausted administrative remedies by previously raising an issue in comments submitted on a permit application. Order, pp. 13-17. In addition, the Court ruled that an applicant has the burden of proof throughout all permitting stages, despite the provision of ARM 17.24.425 stating that in the administrative review of a final permitting decision made by DEQ under MSUMRA, "[t]he burden of proof is on the party seeking to reverse the decision of the board." Order, pp. 25-28. Finally, the Court ruled on "material damage" as it related to salinity impacts to East Fork Armells Creek as a result of the AM4 amendment. Order, pp. 31-34.

These rulings have the potential to affect DEQ's processing of other applications submitted under MSUMRA, including not only a remanded AM4 amendment, but also the proposed AM5 amendment that DEQ is currently reviewing. Decl. Van Oort, ¶¶ 25-27. In addition, the exhaustion of administrative remedies ruling and the burden of proof ruling have the potential to impact procedural and substantive issues to be decided in current or future litigation of challenges to DEQ permitting decisions.[2] Specifically, there are two other coal

[2] Because the Order on Petition affects fundamental principles of administrative law in Montana, these effects may not be limited to solely permit appeals under MSUMRA, or, indeed, those appeals before DEQ.

permit appeals currently before the BER that may need to be stayed or relitigated depending on the outcome of the appeal. DEQ believes that before such fundamental rulings apply to agencies' actions, the Order on Petition should be stayed to allow the Montana Supreme Court to finally decide these issues. Absent a stay, it will be extremely difficult for the regulated community and interested parties to know what compliance with the procedural and substantive environmental requirements entails. As such, DEQ believes the status quo should be maintained pending ultimately resolution of the issues by the Montana Supreme Court.

B. Absent a stay of the Order on Petition pending appeal, DEQ will be compelled to undertake immediate action to ensure environmental protections are in place for the areas of AM4 that have already been mined.

As explained in the Declaration of Martin Van Oort, substantial mining and disturbance in the AM4 area has already occurred, making it impossible to simply revert to the Area B permit that existed prior to the approval of the AM4 amendment. Decl. Van Oort, ¶ 16. If the Order on Petition is intended to invalidate the AM4 permit amendment, there would exist significant mining and associated surface disturbance outside the area covered by the pre-AM4 Area B permit. Decl. Van Oort, ¶ 16. Additionally, the reclamation plan which existed in the permit prior to the AM4 Amendment would be impossible to complete in compliance with

the requirements of MSUMRA given the existing conditions on the ground. Decl. Van Oort, ¶ 16.

In the absence of a stay of the Order on Petition, DEQ would likely require WRM to submit a revision to the Area B permit to incorporate the mining disturbance that occurred under the AM4 Amendment area and to revise its reclamation plan to require the reclamation of said mining disturbance in accordance with the performance standards set forth in MSUMRA. Decl. Van Oort, ¶ 16. DEQ's new review of this submission would involve at least one engineer, a vegetation specialist, a soil scientist, a wildlife specialist and two hydrologists, as well as coordination by a permit coordinator, assistance from administrative staff, and review by the Coal Program Section supervisor. Decl. Van Oort, ¶ 19. DEQ's review would also require the preparation of analysis under the Montana Environmental Policy Act (MEPA), written findings, and a Cumulative Hydrologic Impact Analysis (CHIA). Decl. Van Oort, ¶ 20. These are extensive interdisciplinary projects that use significant DEQ staff resources. Decl. Van Oort, ¶¶ 21-24.

Additionally, the Order on Petition directs DEQ to "review the AM4 permit application consistent with this decision and applicable laws." Order, p. 34. Absent a stay, DEQ would be required to begin a new review of the AM4 application consistent with the Order on Petition while simultaneously appealing the rulings in

that Order to the Montana Supreme Court. Decl. Van Oort, ¶ 18. DEQ's new review of the AM4 application would likewise require substantial agency resources and extensive additional analysis in essentially re-reviewing the AM4 permit application.

If no stay is granted and DEQ adjusts course by giving effect to the Court's reversal of the BER's decision and direction that DEQ review the AM4 permit application consistent with the Court's decision, and then DEQ prevails on appeal, DEQ will have unnecessarily spent limited agency resources. Moreover, if DEQ prevails on appeal, it would then be required to take additional action to undo this work to reevaluate the AM4 area, expending additional agency resources to reinstate the changes to the mining and reclamation plan accorded under the AM4 Amendment. DEQ believes the status quo of the parties should be maintained pending ultimate resolution of the issues by the Montana Supreme Court.

C. Other equitable considerations weigh in favor of staying the Order on Petition pending appeal and final resolution by the Montana Supreme Court.

Neither M. R. App. P. 22 nor Montana Supreme Court case law provides guidance as to the factors that courts are to consider in determining "good cause" for the issuance of a stay pending appeal. As indicated above, the Montana Supreme Court has defined "good cause" as a "legally sufficient reason." *City of Helena v Roan,* ¶ 13. However, at least one Montana district court has looked to

federal case law discussing factors to consider when evaluating a motion for stay pending appeal:

> Although there is no Montana Case law directly on point, federal case law pursuant to Rule 8(a) of the Federal Rules of Appellate Procedure -- the corresponding rule pertaining to stays on appeal -- provides for the consideration of four factors. They are: 1) whether the stay applicant has made a strong showing that he is likely to succeed on the merits; 2) whether the applicant will be irreparably injured absent a stay; 3) whether issuance of the stay will substantially injure the other parties interested in the proceedings; and 4) where the public interest lies.

BNSF Ry. Co. v. Cringle, 2010 Mont. Dis. LEXIS 228, ¶ 29 (First Jud. Dist. July 12, 2010) (citing *Stormans, Inc., v. Selecky*, 526 F.3d 406, 408 (9th Cir. 2008); *Hilton v. Braunskill*, 481 U.S. 770, 776, 107 S. Ct. 2113, 95 L. Ed. 2d 724 (1987)). These equitable considerations, in conjunction with reasons articulated in Section I.A and B above, establish the requisite "good cause" for issuance of a stay.

i. DEQ believes it has a substantial likelihood of success on the merits of an appeal.

DEQ has sixty days from issuance of the Order on Petition to file a notice of appeal under M. R. App. P. 4(5)(a)(I) and reserves the right to appeal any and all issues addressed in the Order on Petition. While DEQ has not settled on the contours of its forthcoming appeal, central to the Order on Petition was its ruling regarding the burden of proof. This Court determined that the BER improperly placed the burden on the Petitioners to establish the existence of water quality

violations or, stated differently, to show by the preponderance of the evidence that the project was not designed to prevent material damage. Order, pp. 25-28. Rather, the Court placed the burden on WRM to demonstrate a lack of adverse impact throughout the administrative review of the permit amendment application.

To support its placement of the burden of proof on WRM, the Order on Petition distinguished *Montana Environmental Information Center v. Montana Department of Environmental Quality (MEIC II),* 2005 MT 96, 326 Mont. 502, 112 P.3d 964, from the present case. The Order on Petition asserted that, unlike MSUMRA, the Clean Air Act of Montana at issue in *MEIC II* did not have a provision allocating the burden of proof to the permit applicant. Order, p. 28.

To the contrary, the administrative rules implementing the Clean Air Act of Montana contain provisions allocating the burden of proof to the permit applicant that are analogous to §§ 82-4-227(1) and (3)(a), MCA, and ARM 17.24.405(6)(c). ARM 17.8.749(3), an administrative rule promulgated under the Clean Air Act of Montana, states that a Montana air quality permit may not be issued for a new or modified facility or emitting unit unless the applicant demonstrates that the facility or emitting unit can be expected to operate in compliance with the Clean Air Act of Montana. Indeed, the Montana Supreme Court expressly recognized in *MEIC II* that DEQ "is precluded from issuing an air quality permit unless the applicant affirmatively demonstrates to it that the proposed project will not cause or

contribute to an adverse impact on visibility in Class I areas," citing to ARM 17.8.1106(1) and 17.8.1109(2). *MEIC II*, ¶ 36.

Further, the Court in *MEIC II* explained that "contested case hearings are bound by the common law and statutory rules of evidence unless otherwise provided by a specific statute." *MEIC II*, ¶ 13 (citing § 2-4-612(2), MCA). In the absence of a specific statute – like in *MEIC II* and as is the case here – the Court held that a party asserting a claim for relief bears the burden of proof. *MEIC II,* ¶ 14 (citing *Wright Oil & Tire Co. V. Goodrich*, 284 Mont. 6, 11, 942 P.2d 128, 131 (1998)). This is because Montana's rules of evidence state, "the initial burden of producing evidence as to a particular fact is on the party who would be defeated if no evidence were given on either side" and because "a party has the burden of persuasion as to each fact the existence or nonexistence of which is essential to the claim for relief or defense he is asserting." *MEIC II*, ¶ 14 (quoting §§ 26-1-401 and –402, MCA).

In accordance with case law and statutory rules of evidence, along with ARM 17.24.625(6), Petitioners bear the burden of producing evidence in support of their claims during a contested case in which they have appealed a coal mining permit issued pursuant to MSUMRA. Because there were no grounds for the Court to distinguish *MEIC II* from the present case, DEQ believes there is a substantial possibility of its success upon appeal.

ii. Neither the Petitioners, nor the environment, will be substantially harmed if the Order on Petition is stayed pending appeal.

Because Petitioners have never sought to enjoin mining in the AM4 area, WRM has mined AM4 since 2016. Decl. Van Oort, ¶ 9. As such, DEQ believes as much as 38 percent of the 293 acres permitted to be disturbed under the AM4 Amendment already having been mined and the associated spoils have already been generated. Decl. Van Oort, ¶¶ 12-15. Because mining has been ongoing for five years, and because Petitioners did not seek to enjoin WRM from mining in the AM4 amendment area before a substantial portion of the mining and surface disturbance allegedly resulting in the material damage has already occurred, Petitioners will not be substantially damaged if the Order on Petition is stayed pending appeal.

DEQ intends to establish through an appeal to the Montana Supreme Court that the BER was correct in determining DEQ's permitting procedures followed Montana law and were protective of the environment. Specifically, DEQ continues to firmly believe that its approval of the AM4 Amendment will not result in degradation or reduction of the quality or quantity of water outside the permit area, including that of the East Fork of Armells Creek. Furthermore, allowing the AM4 Amendment to stay in place pending appeal will ensure the environmental protections, including but not limited to a reclamation plan and bond for the AM4,

remain in place throughout the appeal process.

iii. The public interest weighs in favor of granting a stay.

The public interest lies in support of staying the Order on Petition pending appeal. As noted in Section I.A, absent a stay of the Order on Petition, it will be extremely difficult for DEQ, the regulated community, and interested parties to discern what compliance with the procedural and substantive environmental requirements entails. This uncertainty has the potential to penetrate all levels of DEQ decision-making and litigation until the Montana Supreme Court finally decides the issues in this matter. Furthermore, as an agency of state government, a stay of the Order on Petition would be in the public interest as it would conserve the unnecessary expenditure of agency resources that would prove unnecessary if DEQ prevails on appeal.

2. DEQ requests clarification from the Court on the effect of the Court's October 28, 2021, Order on Petition as it relates to WRM's mining under AM4.

While, for the reasons stated, DEQ believes there is ample good cause to stay enforcement of the Order on Petition pending appeal, DEQ also seeks clarification from the Court on the effect of the Order on Petition, absent a stay, as it relates to WRM's mining under the AM4 Amendment. As noted above, Petitioners did not request the Court to enjoin or otherwise order cessation of mining in AM4 in the event the Court reversed the BER. The Order on Petition did

not expressly address this issue. Under § 2-4-711(2), MCA, it is DEQ's understanding that, if the parties file an appeal of the Order on Petition, the agency decision would be stayed pending final determination of an appeal in the Montana Supreme Court, unless this Court or the Montana Supreme Court orders otherwise.

However, because the Order on Petition did not expressly enjoin mining within AM4, the status of whether, absent a stay, WRM may lawfully continue mining in the AM4 area, both prior to and after a notice of appeal is filed, is unclear. Out of an abundance of caution, DEQ respectfully requests clarification from the Court as to whether Respondent-Intervenor WRM may continue to mine AM4 or whether it must cease mining that area under the Court's October 28, 2021, Order on Petition.

Conclusion

For the reasons stated, DEQ respectfully requests this Court stay enforcement of the Order on Petition pending appeal and final resolution of this matter by the Montana Supreme Court. Furthermore, DEQ respectfully requests this Court clarify the effect, in the absence of a stay, of its October 28, 2021, Order on Petition as it relates to WRM's mining under the AM4 Amendment.

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DATED this 5th day of November, 2021.

MONTANA DEPARTMENT OF
ENVIRONMENTAL QUALITY

NICHOLAS A. WHITAKER
Attorney for Respondent DEQ

CERTIFICATE OF SERVICE

I hereby certify that on November 5, 2021, a true and accurate copy of the foregoing document for DV 2019-34 was mailed by electronic mail, addressed as follows:

Original by electronic mail:

Dan Eakin
Judicial Assistant to Judge Bidegaray
300 12th Avenue NW, Suite 2
Sidney, MT 59270
dan.eakin@mt.gov
lball@mt.gov
kbidegaray@mt.gov
**Courtesy Copy, Email and U.S. Mail*

Shiloh Hernandez
Earthjustice
313 East Main Street
P.O. Box 4743
Bozeman, Montana 59772-4743
shernandez@earthjustice.org

Derf Johnson
Montana Environmental Information Center
W. Lawrence St., #N-6
Helena, Montana 59624
djohnson@meic.org

Walton D. Morris, Jr., pro hac vice
Morris Law Office, P.C.
1901 Pheasant Lane
Charlottesville, VA 22901
Telephone: (434) 293-6616
wmorris@fastmail.net

Roger Sullivan
McGarvey Law
345 1st Avenue East
Kalispell, MT 59901
rsullivan@mcgarveylaw.com

Victoria A. Marquis
Holland & Hart LLP
401 North 31st Street, Suite 1500
Billings, Montana 59103-0639
Telephone: (406) 252-2166
vamarquis@hollandhart.com
aforney@hollandhart.com

John C. Martin
Holland & Hart LLP
645 S. Cache Street, Suite 100
P.O. Box 68
Jackson, Wyoming 83001-0068
jcmartin@hollandhart.com

Samuel R. Yemington
Holland & Hart LLP
2515 Warren Avenue, Suite 450
Cheyenne, Wyoming 82001
sryemington@hollandhart.com

Amy Christensen,
Christensen & Prezeau, PLLP
314 N. Last Chance Gulch, Suite 300
Helena, MT 59601
Amy@cplawmt.com

Nicholas A. Whitaker
Attorney for Respondent DEQ

Exhibit E

D.C. Doc. 66, Declaration of Martin Van Oort (Nov. 5, 2021).

Nicholas A. Whitaker
Staff Attorney
Department of Environmental Quality
Legal Unit, Metcalf Building
P.O. Box 200901
1520 East Sixth Avenue
Helena, MT 59601-0901
(406) 444-5690
Nicholas.Whitaker@mt.gov
Attorney for Respondent DEQ

MONTANA SIXTEENTH JUDICIAL DISTRICT
ROSEBUD COUNTY

MONTANA ENVIRONMENTAL INFORMATION CENTER, and SIERRA CLUB, Petitioners, vs. MONTANA DEPARTMENT OF ENVIRONMENTAL QUALITY, MONTANA BOARD OF ENVIRONMENTAL REVIEW, WESTERN ENERGY CO., NATURAL RESOURCE PARTNERS, L.P., INTERNATIONAL UNION OF OPERATING ENGINEERS, LOCAL 400, and NORTHERN CHEYENNE COAL MINERS ASSOCIATION, Respondents.	Cause No.: DV 2019-34 Judge Katherine M. Bidegaray **DECLARATION OF MARTIN VAN OORT**

//

I, MARTIN VAN OORT, declare as follows:

1. I am over 18 years of age.

2. I reside in Lewis & Clark County, Montana.

3. I make this Declaration in support of the Montana Department of Environmental Quality's ("DEQ" or "Department") Motion for Stay Pending Appeal and Request for Clarification.

4. I make this Declaration based upon personal knowledge. The basis of my personal knowledge is as follows: Since 2013, I have worked as a Hydrologist for the DEQ Coal Section. In that capacity, I have become fully familiar with the amendment 4 to Surface Mining Permit No. C1984003B (AM4) for the Rosebud Strip Mine based upon my review and processing of the application and permit materials, my participation as a testifying hydrologist through the discovery and contested case hearing portions of this case, and my discussions with DEQ technical and legal staff. My resume, a true and complete copy of which was previously provided to the District Court as part of the administrative record fully and accurately describes my education, training, and experience. BER:95, Ex. 14.

5. Since the submittal of this resume, I have continued with my duties as a hydrologist in DEQ's Coal Section and have also been assigned as the Inspection Coordinator for the Coal Section. In my role as inspection coordinator, I coordinate routine inspections of permitted coal mines by DEQ staff, review and approve all

inspection reports following inspections, and determine, along with the Section Supervisor when and how to take enforcement action for non-compliance.

6. I have reviewed and am familiar with true and accurate copies of all exhibits that were admitted by the Hearing Examiner during the March 19 through 22, 2018 contested case hearing.

7. I have also reviewed the Board of Environmental Review's June 6, 2019 Board Order and the District Court's October 28, 2021 Order on Petition.

8. As a Coal Section Hydrologist, my duties include but are not limited to reviewing coal mine permit applications for new permits, amendments, and major and minor revisions to evaluate their compliance with applicable laws and rules; preparing cumulative hydrologic impact assessments (CHIAs) and written findings for permitting actions; reviewing water monitoring data to evaluate any impacts of mining on the hydrologic balance or water users and to require mitigation if necessary; and conducting routine and discipline-specific on site mine inspections to evaluate compliance with the laws and rules.

9. Under the Montana Strip and Underground Mining Reclamation Act, Title 82, chapter 4, part 2, MCA (MSUMRA), a permittee such as Westmoreland Rosebud Mining LLC (WRM) may begin mining operations associated with a permit or permit amendment immediately upon approval of a permit application. After DEQ approved the AM4 Amendment in late 2015, WRM commenced

mining the AM4 area in 2016. Petitioners neither requested nor received an injunction to prevent the initiation of mining in AM4.

10. As described in the CHIA and Environmental Assessment issued with the AM4 written findings, the coal from the Rosebud Mine is used at the Colstrip Steam Electric Station, where it is used to generate electricity for Montanans and people in other northwestern states. Currently the Rosebud Mine is the sole source for coal combusted at the Colstrip Steam Electric Station.

11. Strip-mining produces spoil, the broken-up rock from the overburden which is replaced in the pit after the coal is removed. As the spoil has different physical properties than the pre-mining overburden, this results in an irreversible change to the geology and hydrology in the mined area.

12. Mining in the AM4 area commenced in 2016 and spoil has been created. The 2020 Annual Mine Report, dated December 31, 2020, reported that 224 acres remain to be mined of the 293 acres permitted by AM4.

13. DEQ inspectors working for the Coal Section, including myself, have observed and reported continued mining in the AM4 area in 2021. DEQ estimates that an additional 42 acres of the AM4 area have been mined in 2021, leaving about 182 acres to be mined under AM4 as of today. The actual area mined this year will be reported in the 2021 Annual Mine Report.

14. Based on the above, at least 24 percent, but likely 38 percent of the

coal permitted by AM4 has been mined.

15. WRM's mining in AM4 has produced spoils in the area mined, which is 24 to 38 percent of AM4.

16. Because AM4 permitted approximately 12.1 million tons of coal, there is likely 7.5 million tons of coal remaining and at most 9.2 million tons of coal remaining to be mined pursuant to the AM4 Amendment.

17. Because substantial mining and disturbance in AM4 has already occurred, it is not possible to simply revert to the Area B permit which existed prior to the approval of AM4, as there would then be existing mining and disturbance outside the permitted limits for these activities. Additionally, the reclamation plan which existed in the permit prior to AM4 would be impossible to complete in compliance with the requirements of MSUMRA given the existing conditions on the ground.

18. In the absence of a stay of the Court's Order on Petition, DEQ would likely require WRM to submit a revision to the Area B permit to incorporate the mining and disturbance that has already occurred, and to include the changes in the reclamation plan which would be necessary for reclamation to meet the performance standards in MSUMRA, including any additional future disturbance for highwall reduction which may be necessary. This revision would likely qualify as a Major Revision pursuant to ARM 17.24.301(66) and ARM 17.24.415.

19. Simultaneously with this revision, DEQ would begin a new review of AM4. This would likely involve requesting additional information from WRM to support a DEQ permitting decision according to the District Court's October 28, 2021 Order on Petition.

20. Each permitting action would involve reviews of the application by at least one engineer, vegetation specialist, soil scientist, and wildlife specialist, and two hydrologists, as well as coordination by the permit coordinator, assistance from administrative staff, and review by the section supervisor.

21. Both the Major Revision to ensure compliance of the existing mining with MSUMRA, and the review of the remanded AM4 Amendment would require preparation of a new MEPA analysis, and a new written findings and CHIA, which are compiled by DEQ based on the permit application and many other technical studies, reports, etc. Preparing these documents also involve input and effort by all of the staff listed above.

22. Each technical specialist can spend from a few days to several weeks reviewing the application materials during each round of review, and major permitting actions usually go through multiple rounds of review over the course of many months to a few years of time.

23. Preparing MEPA documents, the written findings, and the CHIA are extensive interdisciplinary projects which use significant staff resources.

24. Reviewing the Major Revision and the remanded AM4 applications would require a substantial amount of DEQ Coal Section staff's time. Total time expended to complete these reviews would likely be in the range of a couple thousand manhours, potentially stretched out over months to years.

25. Additionally, WRM has an application for another amendment to the Area B permit (AM5) pending before DEQ. The AM5 application was originally received by DEQ on February 17, 2017.

26. AM5 is currently in the 9th round of acceptability review and DEQ is nearing a decision on this application.

27. DEQ may have to reconsider the AM5 permit application based on the October 28, 2021 Order on Petition, potentially extending the review and using additional staff time.

I declare under penalty of perjury that the foregoing is true and correct.

11/5/21 Helena, MT
Date and Place

By: [signature]
Martin Van Oort

CERTIFICATE OF SERVICE

I hereby certify that on November 5th, 2021, a true and accurate copy of the foregoing document for DV 2019-34 was mailed by electronic mail, addressed as follows:

Original by electronic mail:

Dan Eakin
Judicial Assistant to Judge Bidegaray
300 12th Avenue NW, Suite 2
Sidney, MT 59270
dan.eakin@mt.gov
lball@mt.gov
kbidegaray@mt.gov
**Courtesy Copy, Email and U.S. Mail*

Shiloh Hernandez
Earthjustice
313 East Main Street
P.O. Box 4743
Bozeman, Montana 59772-4743
shernandez@earthjustice.org

Derf Johnson
Montana Environmental Information Center
W. Lawrence St., #N-6
Helena, Montana 59624
djohnson@meic.org

Walton D. Morris, Jr., pro hac vice
Morris Law Office, P.C.
1901 Pheasant Lane
Charlottesville, VA 22901
Telephone: (434) 293-6616
wmorris@fastmail.net

Roger Sullivan
McGarvey Law
345 1st Avenue East
Kalispell, MT 59901
rsullivan@mcgarveylaw.com

Victoria A. Marquis
Holland & Hart LLP
401 North 31st Street, Suite 1500
Billings, Montana 59103-0639
Telephone: (406) 252-2166
vamarquis@hollandhart.com
aforney@hollandhart.com

John C. Martin
Holland & Hart LLP
645 S. Cache Street, Suite 100
P.O. Box 68
Jackson, Wyoming 83001-0068
jcmartin@hollandhart.com

Samuel R. Yemington
Holland & Hart LLP
2515 Warren Avenue, Suite 450
Cheyenne, Wyoming 82001
sryemington@hollandhart.com

Amy Christensen,
Christensen & Prezeau, PLLP
314 N. Last Chance Gulch, Suite 300
Helena, MT 59601
Amy@cplawmt.com

Nicholas A. Whitaker
Attorney for Respondent DEQ

Exhibit F

D.C. Doc. 68, Intervenor's Brief ISO Motion on Remedy (Nov. 8, 2021).

John C. Martin
Holland & Hart LLP
645 S. Cache Street, Suite 100
P.O. Box 68
Jackson, Wyoming 83001-0068
Telephone: (307) 734-4509
Email: jcmartin@hollandhart.com

Samuel R. Yemington
Holland & Hart LLP
2515 Warren Ave, Suite 450
Cheyenne, WY 82001
Telephone: (307) 778-4207
Email: syemington@hollandhart.com

Victoria A. Marquis
Holland & Hart LLP
401 North 31st Street, Suite 1500
P.O. Box 639
Billings, Montana 59103-0639
Telephone: (406) 252-2166
Email: vamarquis@hollandhart.com

ATTORNEYS FOR RESPONDENTS WESTMORELAND ROSEBUD MINING LLC f/k/a WESTERN ENERGY CO., NATURAL RESOURCE PARTNERS, L.P., INTERNATIONAL UNION OF OPERATING ENGINEERS, LOCAL 400, and NORTHERN CHEYENNE COAL MINERS ASSOCIATION

MONTANA SIXTEENTH JUDICIAL DISTRICT COURT, ROSEBUD COUNTY

MONTANA ENVIRONMENTAL INFORMATION CENTER, and SIERRA CLUB, Petitioners, vs. MONTANA DEPARTMENT OF ENVIRONMENTAL QUALITY, MONTANA BOARD OF ENVIRONMENTAL REVIEW, WESTERN ENERGY CO., NATURAL RESOURCE PARTNERS, L.P., INTERNATIONAL UNION OF OPERATING ENGINEERS, LOCAL 400, and NORTHERN CHEYENNE COAL MINERS ASSOCIATION Respondents.	CASE NO. DV 19-34 Judge Katherine M. Bidegaray **Brief in Support of Intervenors' Motion on Remedy**

Westmoreland Rosebud Mining LLC, f/k/a Western Energy Co. ("Westmoreland"), the International Union of Operating Engineers, Local 400, Natural Resource Partners, L.P., and Northern Cheyenne Coal Miners Association (collectively, "Intervenors") move the Court (i) to address remedy by remand to the Board of Environmental Review (the "Board"), and by declining to enter vacatur or an injunction of the AM4 permit, which it lacks authority to do, and, (ii) irrespective of the remedy selected, to stay the effectiveness of its ruling pending appeal to the Montana Supreme Court by Intervenors.[1]

BACKGROUND

I. BACKGROUND OF THESE PROCEEDINGS

Following an intensive review of Westmoreland's 2009 application for expansion of the Rosebud Mine ("Mine"), in 2015, the Department of Environmental Quality ("DEQ") issued the permit authorizing expansion of mining into the AM4 Area.[2] Shortly afterward, Petitioners Montana Environmental Information Center and Sierra Club (collectively, "Petitioners") initiated a contested case proceeding before the Board. Petitioners did not request that the permit be stayed pending resolution of their challenge, nor does Mont. Code Ann. § 82-4-206, which

[1] Intervenors anticipate initiating an appeal of this Court's decision to the Montana Supreme Court. The Montana Administrative Procedure Act ("MAPA") prescribes the standards and procedures for judicial review of MSUMRA contested case proceedings. Mont. Code Ann. § 82-4-206(2). As provided therein, an aggrieved party may appeal a final judgment of a District Court to the Supreme Court, and such appeal is taken in the same manner as an appeal from a District Court in a civil case. Mont. Code Ann. § 2-4-711. If an appeal is taken from a judgment or order of the District Court, the appellant may obtain a stay of the judgment or order pending disposition of the appeal by moving the District Court for such relief. Mont. R. Civ. P. 62(d) and (e); Mont. R. App. P. 22(1)(a)(i).

[2] The details of the procedural background in this case are set forth in detail in the pleadings before the District Court. *See, e.g.*, *Pet. for Review of Final Agency Action* [Doc. No. 1] and Joint *Motion of Montana DEQ and Westmoreland to Strike Exhibits to Petitioners' Reply to DEQ* [Doc. No. 59].

authorizes challenges to DEQ mining permits, impose an automatic stay of mining during the pendency of Petitioners' challenge. Following three years of discovery, multiple motions and a four-day trial,[3] the Hearing Examiner rejected Petitioners' position and issued the equivalent of a directed verdict, affirming DEQ's permitting decision. From there, Petitioners took their case to the Board, and, in 2019, the Board heard a full day of oral argument on the Hearing Examiner's recommendations from the contested case hearing and issued its 87-page decision affirming DEQ's permit decision.

Petitioners appealed the Board's decision to this Court. July 10, 2019 *Pet. for Review of Final Agency Action* at ¶¶ 13-16 [Doc. No. 1]. Petitioners did not move this Court for preliminary relief as prescribed by Mont. Code Ann. 2-4-702(3). *Id*. at 21. The Court has reversed the Board and adopted Petitioners' proposed Order, which purports to "reverse[] the BER and remand[] to DEQ to review the AM4 permit application consistent with this decision and applicable laws." *See* October 28, 2021 *Order on Petition* ("Order") (October 28, 2021) at 34. [Doc. No. 79]. The Order does not impose a remedy specific to the AM4 permit.

II. THE MINE AND THE COLSTRIP POWER STATION

The Colstrip Power Station uses all of the coal produced by the Mine to generate electricity for Montana and surrounding states. Ex. A, Declaration of Russell Batie (Batie Decl.) at ¶ 5. The Mine is the only source of fuel for the Colstrip Power Station. *Id.* at ¶ 8.

Westmoreland has been operating in the AM4 Area since 2015, during which time Westmoreland has extracted four million tons of coal and performed extensive reclamation. *Id.* at ¶ 10. Coal from the AM4 Area comprises roughly thirty percent of the Mine's coal extracted

[3] Petitioners filed more than 5,000 pages of briefing and exhibits and participated in no less than seven days of hearings and argument.

annually. *Id.* at ¶ 4. Notably, AM4 Area coal is of higher quality than much of the coal from other areas of the Mine. *Id*. Because Westmoreland blends coal from various areas before delivering it to the Colstrip Power Station, AM4 Area coal is essential to meeting the coal quality standards under contractual specifications, which are driven, in part, by air quality standards imposed on the Colstrip Power Station. *Id.* at ¶ 7.

If AM4 Area operations were to cease, the rate of coal extraction from the Mine would decline sharply. *Id.* at ¶ 6. Within about a month, Westmoreland would run out of inventory to fill the gap caused by this loss of production. *Id*. At that point, Westmoreland likely would be unable to provide the Colstrip Power Station with enough coal to meet the Colstrip Power Station's fuel demands and to satisfy Westmoreland's contractual obligations. *Id*. Moreover, Westmoreland would struggle to satisfy its quality-based contractual specifications due to the lack of high-quality Area AM4 coal. *Id.* at ¶ 7. All of this could have far-reaching consequences that jeopardize the generation of reliable electricity.

Cessation of mining in the AM4 Area will pose safety hazards, including the risk of coal seam fires in currently exposed coal, accidental detonation of currently placed undetonated explosives, and risks related to unstable disturbed but unmined coal. *Id.* at ¶ 9. Insofar as reclamation is concerned, an order requiring cessation of AM4 activities could also prevent reclamation of pits that have yet to be reclaimed in the AM4 Area. *Id.* at ¶ 10.

ARGUMENT

The Court's Order does not impose a remedy pertaining to the AM4 permit. Specifically, the Order does not provide for vacatur of the AM4 permit or for an injunction of the permit's effectiveness. In fact, neither is authorized or appropriate here.

I. THE COURT SHOULD NOT ENJOIN OR VACATE THE AM4 PERMIT.

A. The Governing Statutes Do Not Allow for Injunction or Vacatur of the DEQ Permit.

Provisions of MAPA defining the scope of the District Court's discretion on remedy as well as the effect of a District Court decision pending appeal are specifically confined to the agency "decision" that is on appeal to the District Court. The agency "decision" those statutes refer to is the Board's decision in the contested case, not the underlying permit.[4]

The authority of the district court to act on judicial review of a contested case proceeding is governed by Mont. Code Ann. § 2-4-701, et seq. Part 7 of MAPA applies to "Judicial Review of Contested Cases." This part provides that one "who is aggrieved by a final written decision in a contested case is entitled to judicial review." Mont. Code Ann. § 2-4-702(1). Here, of course, the contested case was conducted by the Board. Similarly, MAPA Subpart 702 compels "the agency to transmit to the reviewing court the original and certified copy of the entire record of the proceeding under review." Mont. Code Ann. § 2-4-702(4). Again, "the agency" can only be the Board; the Board transmitted the contested case record to the district court. All of this confirms that the Montana Legislature intended that the "agency decision" subject to judicial review be limited to the contested case proceeding, rather than the Department's underlying approval of the permit application.

The Court's Order on Motion to Strike, which was issued concurrently with the Order on the merits, recognizes and correctly describes the posture of the case:

> Petitioners brought this matter after completion of an administrative contested case, conducted by the Board of Environmental Review

[4] DEQ and the Board are each a separate and distinct "agency" as that term is defined in statute. § 2-4-102(2), MCA.

> ("BER") pursuant to the Montana Administrative Procedure Act. Petitioners challenge the BER's Order . . . which granted a motion for a directed verdict against Petitioners, dismissed Petitioners' appeal, and affirmed the Department of Environmental Quality's permitting decision.

Order of Motion to Strike at 1-2.

MAPA circumscribes the remedy a court can order. A reviewing court "may affirm" the decision of the agency (in this case, the Board), or a court may "remand the case for further proceedings" before the entity whose decision is being appealed. Mont. Code Ann. § 2-4-704(2). MAPA does not provide additional authority to vacate or enjoin agency action, including actions authorized by the underlying permit.

Here, the District Court remand necessarily leaves the DEQ permit intact. Under the regulatory procedure of the Board, a permit is ***not*** suspended during the pendency of an appeal to the Board absent a grant of temporary relief. *See* ARM 17.24.425(3) (providing procedures and standards for a grant of temporary relief). Petitioners did not request temporary relief from the Board, so there is no question that the AM4 permit remained valid throughout the contested case.[5] Thus, under this Court's current decision, the remand is properly to the Board and the Permit remains in place pending the Board's decision to issue whatever order is consistent with the District Court's decision.

Similarly, MAPA Section 2-4-711, which addresses appeals to the Supreme Court from District Court decisions on agency action is addressed to the "agency decision" – not the underlying permit action. Section 711 prescribes the procedures for the appeal of a District

[5] In the same vein, MAPA Subpart 702 provides that, "unless otherwise provided by statute, the filing of the petition for judicial review may not stay enforcement of the agency's decision. The agency may grant or the reviewing court may order a stay upon terms that it considers proper, following notice to the affected parties and an opportunity for hearing. ..." Mont. Code Ann. § 2-4-702(3).

Court's decision in such cases and allows "an aggrieved party [to] obtain review of a final judgment of a district court . . . by appeal to the Supreme Court . . .". *Frazer Sch. Dist. v. Flynn*, 225 Mont. 299, 300-301 (1987) (quoting *Yanzick v. School District #23*, 196 Mont. 375, 383 (1982)). If the appeal is taken from a judgment of the District Court "reversing or modifying an **agency decision**, the agency decision shall be stayed pending final determination of the appeal unless the Supreme Court orders otherwise." Mont. Code Ann. § 2-4-711(2) (emphasis added).

MAPA is silent as to whether the "agency decision" subject to an automatic stay on appeal is (1) the Department's permitting decision or (2) the Board's final order in the contested case proceeding. As a threshold matter, words and phrases used in the statutes of Montana are construed according to the context and the approved usage of the language, but technical words and phrases and such others as have acquired a peculiar and appropriate meaning in law are to be construed according to such peculiar and appropriate meaning or definition. Mont. Code Ann. § 1-2-106. Moreover, "a statute must be read as a whole, and its terms should not be isolated from the context in which they were used by the Legislature." *Houston Lakeshore Tract Owners v. Whitefish*, 2017 MT 62 ¶ 10 (quoting *Eldorado Coop Canal Co. v. Hoge*, 2016 MT 145 ¶ 18) (internal quotation marks omitted). Here, the term "agency decision" must be read in harmony with the rest of MAPA Section 7, which as discussed above, can only mean the written decision following the completion of the MAPA contested case, i.e., the Board's decision. Because the statutory authority vested in this Court by MAPA Section 7 is limited to the Board's decision, this Court's authority on remedy is likewise restricted to the Board's decision and does not reach the underlying permit approval.

B. This Court Should Not Enjoin Westmoreland's Operations Conducted Pursuant to the AM4 Permit.

Even setting aside that the Court lacks statutory authority to do so, an injunction of Westmoreland's AM4 operations is inappropriate. "An injunction is an equitable remedy fashioned according to the circumstances of a particular case. The issuance or refusal of injunction is addressed to the discretion of the trial court." *Talley v. Flathead Valley Community College*, 259 Mont. 479, 491 (Mont. 1993) (internal citations omitted); *see* Mont. Code Ann. § 29-17-101 *et seq.* Here, principles of equity strongly disfavor an injunction because (i) Petitioners will not suffer irreparable harm in the absence of an injunction, (ii) Westmoreland and the other intervenors would be greatly harmed by an injunction, and (iii) the public interest would be disserved by an injunction.[6]

1. Petitioners Will Not Suffer Irreparable Harm Absent an Injunction.

An injunction of AM4 operations cannot be justified on the basis that it is necessary to prevent irreparable harm to Petitioners. To support injunctive relief, an injury must be specific to petitioners themselves: generalized claims of environmental harm are insufficient. Environmental harm unrelated to Petitioners cannot support an injunction. *See Sierra Forest*

[6] As the U.S. Supreme Court has explained, "a plaintiff seeking a permanent injunction must satisfy a four-factor test before a court may grant such relief. A plaintiff must demonstrate: (1) that is has suffered an irreparable injury; (2) that remedies available at law, such as monetary damages, are inadequate to compensate for that injury; (3) that, considering the balance of hardships between the plaintiff and defendant, a remedy in equity is warranted; and (4) that the public interest would not be disserved by a permanent injunction." *Monsanto Co. v. Geertson Seed Farms*, 561 U.S. 139, 156-57 (2010). Federal courts have made clear that these four factors must be satisfied in order to trigger an injunction, even when a permit necessary to perform the ongoing conduct has already been vacated. *See, e.g.*, *Standing Rock Sioux Tribe v. U.S. Corps of Eng'rs*, 2020 WL 4548123 (D.C. Cir. 2020) (upholding the district court's vacatur of a pipeline easement, but reversing an injunction of oil flow through the pipeline on the grounds that the district court did not apply the proper standard to assess whether an injunction was appropriate); *Standing Rock Sioux Tribe v. U.S. Corps of Eng'rs*, 2021 WL 2036662 at *13-*16, (D.D.C. 2021) (district court, on remand, denying request for injunction of oil flow on the grounds that plaintiffs failed to establish irreparable harm, even though the pipeline operator no longer held a valid easement and the pipeline therefore constituted "an unlawful encroachment on federal land").

Legacy v. Sherman, 951 F. Supp. 2d 1100, 1111 (E.D. Cal. 2013) (denying permanent injunction where plaintiffs "failed to show a particularized injury to their interests rather than an abstract injury to the environment" (emphasis added)).

Petitioners do not purport to have any members who work or live in close proximity to the Mine. Thus, continued operations in the AM4 Area pose no irreparable harm to Petitioners or their members. Tellingly, to date, Petitioners have not requested an injunction of the AM4 operations. During the multi-year challenge to the AM4 Area permit below, Petitioners never asked the Hearing Examiner or the Board for temporary relief to stay the ongoing mining operations. When they appealed the Board's decision to this Court, Petitioners did not contend that they were entitled to preliminary injunctive relief while this Court considered their petition as required by MAPA. July 10, 2019 *Pet. for Review of Final Agency Action* at 21 [Doc. No. 1]; Mont. Code Ann. 2-4-702(2)-(3). Nor, for that matter, did Petitioners request an injunction in their proposed order. [Doc. No. 70].[7]

Westmoreland has been operating in the AM4 Area since 2015. During this time, Westmoreland has extracted four million tons of coal and supplied the Colstrip Power Station with the coal necessary to generate electricity for its consumers. Ex. A, Batie Decl. at ¶ 10. According to the reclamation plan approved as part of the AM4 permit, Westmoreland has also performed extensive reclamation in the AM4 Area, reclaiming land after mining is completed.

[7] Not only have Petitioners never sought an injunction and thus never suggested that irreparable harm exists, but as a practical matter, reclamation means that any harm is not "irreparable." By definition, to qualify as "irreparable," the "certain and immediate harm that a plaintiff alleges must also be truly irreparable in the sense that it is 'beyond remediation.'" *Sierra Club v. U.S. Army Corps of Eng'rs*, 990 F. Supp. 2d (D.D.C. 2013) (citation omitted). Here, reclamation is not only possible, but it is required, and it is timely completed. *See* § 82-4-223, MCA.

Id. Notably, both mining and reclamation in AM4 are covered by the same permit. *Id.* Thus, reclamation is dependent on continued AM4 operations.

In short, maintaining the status quo would promote reliable electricity generation and reclamation of mined areas. An injunction is unwarranted.

2. Westmoreland Would Be Greatly Harmed by an Injunction, and the Balance of Harms Weighs Strongly Against an Injunction.

While the status quo does not pose irreparable harm, an injunction certainly does. Indeed, a cessation of permitted operations in the AM4 Area would impose grave harm on Westmoreland and the Colstrip Power Station. Westmoreland currently provides all of its coal to the Colstrip Power Station, which burns the coal to generate electricity. Ex. A, Batie Decl. at ¶ 5. Conversely, the Colstrip Power Station currently uses only coal from the Mine. *Id.* at ¶ 8.

A cessation of operations in the AM4 Area would sharply reduce the Mine's extraction rate. *Id.* at ¶ 6. In order to make up for this drastic loss of production, Westmoreland would have to deplete its inventory of coal. *Id.* However, Westmoreland's inventory is large enough to last only approximately one month, after which Westmoreland will likely be unable to provide sufficient quantities of coal to meet its contractual obligations to the Colstrip Power Station. *Id.*

Moreover, while Westmoreland would seek to compensate for the loss of Area AM4 coal by shifting operations to other areas of the Mine, it would take between two and four months to complete the preliminary work necessary to enable mining in other areas. *Id.* Thus, Westmoreland would face a multi-month shortfall in which it is unable to meet its obligations to the Colstrip Power Station. *Id.* Furthermore, Westmoreland's operations in other areas are subject to permit limitations. *Id.* If Westmoreland is unable to obtain the permits necessary to expand operations in these areas, that would exacerbate Westmoreland's inability to adequately supply the Colstrip Power Station. *Id.*

In addition to causing severe problems regarding the quantity of coal supplied, a cessation of operations in the AM4 Area would also impair Westmoreland's ability to supply the Colstrip Power Station with coal of sufficient quality to meet contractual specifications, which are, in turn, designed to satisfy air quality standards imposed on the Colstrip Power Station. *Id.* at ¶ 7. Westmoreland blends coal from different mining areas before delivering it to the Colstrip Power Station. *Id.* Because AM4 Area coal is lower in ash, sodium, and mercury than much of the coal from other areas of the Mine, the AM4 Area coal is a critical component of the blending process. *Id.* A cessation of mining in the AM4 Area would force Westmoreland to use a higher ratio of lower quality coal from other Mine areas, which would disrupt the blending process and impair Westmoreland's ability to meet its contractual specifications. *Id.*

As noted above, the Colstrip Power Station is heavily dependent on the Mine given that it receives coal from no other source. Thus, the disruption of Westmoreland's ability to provide coal of sufficient quantity and quality would jeopardize the Colstrip Power Station's ability to generate enough electricity to meet its customers' demands. *Id.* at ¶ 8. This risk is exacerbated by the timing, as the coming winter months will likely entail a spike in power demand throughout Montana. *Id.*

In addition to posing grave risks to Westmoreland's and the Colstrip Power Station's output, a cessation of operations in the AM4 Area would also pose safety risks. First, approximately 150,000 tons of coal have been uncovered but not yet extracted from the AM4 Area. If operations in the AM4 Area suddenly cease, this coal will remain exposed, posing environmental and safety hazards such as coal seam fires. Second, a portion of the AM4 Area has already been loaded with explosives for future blasting. If permitted activity within the AM4 Area were to cease, these undetonated explosives would remain in place, posing a danger of

accidental detonation. Third, a portion of the AM4 Area has already been blasted but has not yet been mined. If permitted activity within the AM4 Area were to cease, the spoils in the blasted area would collect water, resulting in decreased stability. This would pose a danger of slides or collapse. And fourth, a cessation of operations in the AM4 Area would force Westmoreland to consolidate operations in other areas of the Mine. This would likely increase the density of employees and contractors within a given area, which would marginally increase the risk of accidents. *Id.* at ¶ 9.

Finally, a cessation of AM4 Area operations poses economic harm to Westmoreland. Westmoreland has already invested millions of dollars in preparatory work for future mining within the AM4 Area, and Westmoreland has made plans to extract millions of tons of coal from the AM4 Area in the coming year. If AM4 operations cease, these investments will be stranded. *Id.* at ¶¶ 11-12.

Given the myriad of harms posed by an injunction and the lack of harm posed by the status quo, the balance of harms strongly disfavors an injunction.

3. The Public Interest Would Be Disserved by an Injunction.

The people of the Mountain West and Montana depend on electrical generation from the Colstrip Power Station, which in turn depends on the Mine. The public interest therefore greatly favors a maintenance of Westmoreland's ability to provide coal of sufficient quantity and quality to the Colstrip Power Station. The public interest also favors Westmoreland's continued ability to perform reclamation work. Further, as noted in Brief in Support of DEQ's Motion for Stay Pending Appeal, the Order's potential downstream effects on other MSUMRA permitting actions before DEQ and the pending contested cases before the Board are far-reaching and will create "substantial uncertainty as to the current state of the law pending a final decision from the

Montana Supreme Court." [Doc. No. 81 at 5-8] As a result, the public interest disfavors an injunction of AM4 operations.

II. IRRESPECTIVE OF THIS COURT'S DECISION ON REMEDY, THAT DECISION SHOULD BE STAYED PENDING APPEAL TO THE MONTANA SUPREME COURT.

Because Montana Rule of Civil Procedure 62 is similar to Federal Rule of Civil Procedure 62, federal law is appropriate guidance on the applicable standard.[8] *See Chipman v. Northwest Healthcare Corp.*, 2012 MT 242, ¶ 43, 366 Mont. 450, 464-65, 288 P.3d 193, 205 (Mont. 2012) (looking to federal authority for guidance where the Federal Rules of Civil Procedure align with the Montana Rules); *Farmers Union Mut. Ins. Co. v. Bodell*, 2008 MT 363, ¶ 21, 346 Mont. 414, 419, 197 P.3d 913, 916 (Mont. 2008) (same).

The United States Supreme Court has set forth four factors to determine whether a stay pending appeal is appropriate: "whether the stay applicant has made a strong showing that he is likely to succeed on the merits; (2) whether the applicant will be irreparably injured absent a stay; (3) whether issuance of the stay will substantially injure the other parties interested in the proceeding; and (4) where the public interest lies." *Nken v. Holder*, 556 U.S. 418, 426 (2009). Several federal circuit courts, including the Ninth, apply a "sliding scale," whereby the four factors "are balanced, so that a stronger showing of one element may offset a weaker showing of another." *Lado v. Wolf*, 952 F.3d 999, 1007 (9th Cir. 2020) (quoting *Alliance for the Wild Rockies v. Cottrell*, 632 F.3d 1127, 1131 (9th Cir. 2011)); *Revel AC, Inc. v. IDEA Boardwalk LLC*, 802 F.3d 558, 569-70 (3d Cir. 2015) (applying the sliding scale approach); *In re A & F Enters., Inc. II*, 742 F.3d 763, 766 (7th Cir. 2014) ("As with a motion for a preliminary injunction, a 'sliding scale' approach applies [to a stay pending appeal]; the greater the moving

[8] No Montana case law bears on the interpretation of Rule 62 of the Montana rules in this case.

party's likelihood of success on the merits, the less heavily the balance of harms must weigh in its favor, and vice versa."). Although the sliding scale applies to both stays pending appeal and preliminary injunctions, "a flexible approach [*i.e.*, the sliding scale] is even *more* appropriate in the stay context," given that a stay operates only on a judicial proceeding as opposed to the conduct of a party. *Leiva-Perez v. Holder*, 640 F.3d 962, 966 (9th Cir. 2011) (emphasis in original); *see also Lado*, 952 F.3d at 1007.

Here, each of the four factors favors a stay of this Court's decision pending appeal.

A. Westmoreland Is Likely to Prevail on the Merits of Its Appeal.

Both DEQ and Intervenors will appeal the Court's Order. Intervenors respectfully believe they are likely to prevail on the merits of the appeal because the Court's Order (as advocated for and drafted by Petitioners) does not comply with applicable statutory or regulatory authority and disregards controlling Supreme Court precedent. Without limiting the arguments Intervenors may present on appeal, the following examples of the errors in the Order suffice to demonstrate the Intervenors are likely to prevail on appeal.

First, the holding on burden of proof in Section E disregards applicable law and misreads Supreme Court precedent. The Order holds that the Board erred in concluding that the Petitioners had the burden of proof to demonstrate that the DEQ decision violated the law. Slip Op. at 25-28. In fact, the Board's decision directly follows a previous Montana Supreme Court decision, *MEIC v. DEQ*, 2005 MT 96 (Mont. 2005), which addressed the allocation of the burden of proof. There, the Supreme Court rejected Petitioners' reading of MAPA in the context of the analogous statutory scheme governing air permits. Petitioners' attempt to distinguish this Supreme Court decision is not persuasive in light of the Supreme Court's clear allocation of the burden of proof on the party bringing the challenge. The near verbatim similarity between the provisions in MSUMRA and the Clean Air Act on this procedural issue renders Petitioners'

position implausible. Further, because MSUMRA's implementing regulation explicitly instructs that the challenger bears the burden of proof, ARM 17.24.425(7),[9] the Supreme Court is unlikely to accept Petitioners' reallocation of burden to DEQ and the Intervenors. Because Petitioners' text in the Order mischaracterizes binding Supreme Court precedent and ignores controlling regulations, DEQ and the Intervenors are likely to prevail on this issue.

Second, the Order's holding on administrative exhaustion within the contested case (Section A) is fundamentally flawed because it is premised on an incorrect understanding of the Board's application of the exhaustion requirement. The Order asserts that the Board did not allow Petitioners to present argument or raise claims "which arose only upon publication of DEQ's analysis after the close of the public comment period." Slip Op. at 17. But the Order on Motion in Limine specifically allowed Petitioners to raise any new information arising after the close of public comment. AR103:5-7. Despite the explicit invitation to present evidence on any subject that was "new" to Petitioners, Petitioners are unable to cite even one instance, any time during the four-day hearing, when they sought to bring such a "new" issue to the attention of the Hearing Examiner. Later, when pressed by the Board on whether Petitioners had availed themselves of this opportunity to present new argument or information on a subject that was unknown when they submitted comments, Petitioners identified none. AR151:58-59, 62, 64. Because the Order's analysis of administrative exhaustion is premised on Petitioners' fundamental misstatement of the Board's holding and because it overlooks the absence of any

[9] ARM 17.24.425 is titled "Administrative Review" and provides procedural requirements for contested cases challenging DEQ decisions under MSUMRA. Subsection (7) provides that "The burden of proof at such hearing is on the party seeking to reverse the decision of the board." Thus, the regulation plainly addresses "Administrative Review", yet Petitioners advance the wholly implausible argument that the regulation must be meant only for judicial review.

instance when Petitioners sought to provide evidence on an issue for which they did not have opportunity to comment, Intervenors are likely to succeed on appeal of this issue.

Third, the Supreme Court recently instructed that district courts lack jurisdiction to hear a petition for review of a contested case where the petitioner failed to fully participate in each element of the underlying administrative proceeding and fully exhaust administrative remedies. *Flowers v. Montana Bd. of Personnel Appeals*, 2020 MT 150, ¶ 13 (Mont. 2020. The Order mischaracterizes Intervenors' argument on this point, asserting that it is merely a matter of semantics in the naming of a brief. It is not. MAPA requires that a party adversely affected by proposed findings and conclusions must "file exceptions ***and*** present briefs and oral argument." Mont. Code Ann. § 2-4-621(1) (emphasis added). Petitioners filed a brief and presented oral argument. They conceded at that oral argument when questioned by the BER that their brief did ***not*** include exceptions. AR151:96, 99. Exceptions are different from legal argumentation. Each element of the statutory requirement must be given meaning. *Mont. Trout Unlimited v. Mont. Dept. of Natural Res.*, 2006 MT 72, ¶ 23 (Mont. 2006) ("We must endeavor to avoid a statutory construction that renders any section of the statute superfluous or fails to give effect to all of the words used."). By adopting the Petitioners' position that filing a brief of legal argument that omitted specific exceptions satisfied Section 621(1), the Order reads the "exceptions" requirement out of the statute entirely. The Order fails to address this critical issue and in so doing asserts jurisdiction which, by law, the District Court does not have due to the Petitioners' failure to fully exhaust their administrative remedies during the contested case. Because the Order fails to address the actual *Flowers* argument presented and cannot rewrite history to supplement Petitioners' "brief" with "exceptions," Intervenors are likely to prevail on this issue.

Fourth, the Order applies an incorrect standard of review contrary to MAPA's statutorily mandated standard of review by purporting to broadly apply an arbitrary and capricious standard rather than the detailed standards of review required for the District Court's review for conclusions of law and findings of fact by Mont. Code Ann. § 2-4-704. Slip Op. at 11-12. This error in the standard of review is particularly apparent in Sections F and G of the Order, which purport to overrule findings of fact made in the contested case regarding the impact of the proposed operations on aquatic life and water quality. Slip Op. at 28-34. MAPA, however, specifically provides that "[t]he court ***may not substitute its judgment for that of the agency as to the weight of the evidence on questions of fact***." Mont. Code Ann. § 2-4-704(2). Moreover, in adopting Petitioners' text, the Order violated MAPA's highly deferential standard of review, which provides that the court may reverse or modify a decision only "if substantial rights of the appellant have been prejudiced" based on an enumerated reason. The Order's substitution of the "arbitrary and capricious" standard for the "substantial evidence" and "correctness" standards required by statute and case law is plain error. Because the Order disregards the statutory standards of review as well as Supreme Court precedent on this issue, Intervenors are likely to prevail on this issue.

B. Westmoreland Will Suffer Irreparable Harm Absent a Stay Pending Appeal.

As explained in Section I.B.2 above, Westmoreland will suffer grave and irreparable harm if it is compelled to cease operations in the AM4 Area. Such a cessation would significantly impair Westmoreland's ability to provide the Colstrip Power Station with coal of sufficient quantity and quality to meet Westmoreland's contractual obligations. Moreover, because the Colstrip Power Station depends exclusively on the Mine as its source of coal, a cessation of AM4 Area operations could jeopardize the Power Station's ability to satisfy its fuel demands, thereby potentially causing widespread impacts to consumers of electricity.

C. A Stay Pending Appeal Will Not Harm Petitioners.

As explained in Section I.B.1 above, Petitioners will not be harmed—let alone substantially harmed—by a continuation of AM4 Area operations. In fact, Petitioners do not purport to have any members who work or live in close proximity to the Mine. Moreover, AM4 operations have been ongoing for six years, and Petitioners have not identified substantial harm from such operations.

D. The Public Interest Weighs Heavily in Favor of a Stay Pending Appeal.

As explained in Section I.B.3 above, the public interest weighs in favor of continued operations in the AM4 Area. Maintaining the status quo will promote reliable electricity generation and continued reclamation. A cessation of AM4 Area operations, on the other hand, would adversely impact the supply chain for electrical generation.

CONCLUSION

For the foregoing reasons, Intervenors request the Court to issue an order on remedy that is restricted to the decision on appeal – the Board decision – consistent with MAPA's statutory limitations and that the Court stay the Order pending appeal to prevent substantial harm to Intervenors and the public interest.

DATED this 8th day of November, 2021.

/s/ John C. Martin

John C. Martin
Holland & Hart LLP
645 S. Cache Street, Suite 100
P.O. Box 68
Jackson, Wyoming 83001-0068
Telephone: (307) 734-4509
Email: jcmartin@hollandhart.com

Samuel R. Yemington
Holland & Hart LLP
2515 Warren Ave, Suite 450
Cheyenne, WY 82001
Telephone: (307) 778-4207
Email: syemington@hollandhart.com

Victoria A. Marquis
Holland & Hart LLP
401 North 31st Street, Suite 1500
P.O. Box 639
Billings, Montana 59103-0639
Telephone: (406) 252-2166
Email: vamarquis@hollandhart.com

ATTORNEYS FOR RESPONDENT WESTMORELAND ROSEBUD MINING LLC f/k/a WESTERN ENERGY CO., NATURAL RESOURCE PARTNERS, L.P., INTERNATIONAL UNION OF OPERATING ENGINEERS, LOCAL 400, and NORTHERN CHEYENNE COAL MINERS ASSOCIATION

CERTIFICATE OF SERVICE

The undersigned certifies that on November 8, 2021, the original or a copy of the foregoing was delivered or transmitted as noted to the persons named below:

Amy D. Christensen 314 N. Last Chance Gulch Suite 300 Helena, MT 59601 Amy@cplawmt.com	[ ] U.S. Mail, postage prepaid [X] Electronic Mail [ ] Facsimile Transmission [ ] Personal Delivery
Shiloh Hernandez Earthjustice 313 East Main Street P.O. Box 4743 Bozeman, MT 59772-4743 shernandez@earthjustice.org	[ ] U.S. Mail, postage prepaid [X] Electronic Mail [ ] Facsimile Transmission [ ] Personal Delivery
Derf Johnson Montana Environmental Information Center 107 W. Lawrence St., #N-6 Helena, MT 59624 djohnson@meic.org	[ ] U.S. Mail, postage prepaid [X] Electronic Mail [ ] Facsimile Transmission [ ] Personal Delivery
Walton D. Morris, Jr. Morris Law Office, P.C. 1901 Pheasant Lane Charlottesville, VA 22901 wmorris@fastmail.net	[ ] U.S. Mail, postage prepaid [X] Electronic Mail [ ] Facsimile Transmission [ ] Personal Delivery
Roger Sullivan McGarvey Law 345 1st Avenue East Kalispell, MT 59901 rsullivan@mcgarveylaw.com	[ ] U.S. Mail, postage prepaid [X] Electronic Mail [ ] Facsimile Transmission [ ] Personal Delivery
Nicholas A. Whitaker Montana Department of Environmental Quality 1520 East Sixth Avenue P.O. Box 200901 Helena, Montana 59620-0901 Nicholas.whitaker@mt.gov	[ ] U.S. Mail, postage prepaid [X] Electronic Mail [ ] Facsimile Transmission [ ] Personal Delivery
Honorable Katherine M. Bidegaray 300 12th Avenue NW Suite 2 Sidney, Montana 59270 kbidegaray@mt.gov	[X] U.S. Mail, postage prepaid [X] Electronic Mail [ ] Facsimile Transmission [ ] Personal Delivery
Dan Eakin Law Clerk to Honorable Katherine M. Bidegaray 300 12th Avenue NW Suite 2 Sidney, Montana 59270 dan.eakin@mt.gov	[X] U.S. Mail, postage prepaid [X] Electronic Mail [ ] Facsimile Transmission [ ] Personal Delivery

/s/ Trisa J. DiPaola
Trisa J. DiPaola, Legal Specialist
Holland & Hart LLP

Exhibit G

D.C. Doc. 68A, Declaration of Russell Batie (Nov. 5, 2021).

John C. Martin
Holland & Hart LLP
901 K Street NW, Suite 850
Washington, DC 20001

P.O. Box 68
Jackson, WY 83001
Phone: (307) 739-9741
Fax: (307) 739-9744
jcmartin@hollandhart.com

Attorneys for Westmoreland Rosebud Mining LLC

MONTANA SIXTEENTH JUDICIAL DISTRICT COURT, ROSEBUD COUNTY

MONTANA ENVIRONMENTAL INFORMATION CENTER, and SIERRA CLUB, Petitioners, vs. MONTANA DEPARTMENT OF ENVIRONMENTAL QUALITY, MONTANA BOARD OF ENVIRONMENTAL REVIEW, WESTERN ENERGY CO., NATURAL RESOURCE PARTNERS, L.P., INTERNATIONAL UNION OF OPERATING ENGINEERS, LOCAL 400, and NORTHERN CHEYENNE COAL MINERS ASSOCIATION, Respondents.	Cause No. DV 19-34 **DECLARATION OF RUSSELL BATIE**

I, Russell Batie, declare under penalty of perjury as follows:

1. I am the Environmental and Engineering Manager at the Rosebud Mine ("Mine"), which is owned and operated by Westmoreland Rosebud Mining LLC ("Westmoreland"), formerly Western Energy Company. I have been employed at the Mine in various capacities for 16 years, and I have served in my current role for five years.

2. I am familiar with this Court's October 27, 2021 Order in this matter.

3. I have personal knowledge of Westmoreland's operations at the Mine, including its operations in the area covered by the AM4 Permit (the "AM4 Area"). I also have personal knowledge of the anticipated impacts to the Mine if operations in the AM4 Area were to cease.

4. Of the Mine's aggregate extracted coal, approximately thirty percent comes from the AM4 Area on an annual basis. The coal from the AM4 Area is of higher quality than much of the coal from other areas at the Mine.

5. Currently, Westmoreland provides all of its coal to the nearby Colstrip Power Station, which burns the coal to generate electricity. A cessation of operations in the AM4 Area would greatly jeopardize Westmoreland's ability to provide the Colstrip Power Station with coal of sufficient quantity and quality to meet the Power Station's fuel demands. A cessation of operations would also pose heightened safety risks at the Mine.

6. Regarding quantity, a cessation of operations in the AM4 Area would greatly reduce the Mine's extraction rate for at least several months. It would take at least two to four months to move the necessary equipment and perform preliminary work (e.g., removing and storing or depositing topsoil, blasting, removing overburden) before coal could be mined in a different area. During this transition period, Westmoreland would be forced to deplete its inventory of coal in order to make up for the massive loss of production. Westmoreland only has

sufficient inventory to make up for this production loss for approximately one month, after which Westmoreland likely would be unable to provide the Colstrip Power Station with sufficient quantities of coal to meet its contractual obligations. Because the transition period to other Mine areas is likely to last two to four months, Westmoreland would face a multi-month shortage during which it is unable to adequately meet the Colstrip Power Station's fuel demands. This disruption would be especially impactful because of the anticipated spike in demand associated with the coming winter months. In addition, Westmoreland's ability to extract coal in other areas of the Mine is constrained by permit limitations. If Westmoreland is unable to obtain additional permits required to expand production in these areas, that would amplify the shortage posed by the loss of AM4 Area coal.

7. Regarding quality, Westmoreland blends coal from different mining areas before delivering it to the Colstrip Power Station. The coal within the AM4 Area is lower in ash, sodium, and mercury than much of the coal from other areas within the Mine, and the AM4 Area coal is therefore a critical component of the blending process. A cessation of mining in the AM4 Area would force Westmoreland to use a higher ratio of lower quality coal from other Mine areas, which would disrupt the blending process and impair Westmoreland's ability to meet specifications designed to satisfy air quality standards at the Colstrip Power Station.

8. The Colstrip Power Station operates exclusively on coal from the Mine. Thus, the impairment of Westmoreland's ability to provide coal of sufficient quantity and quality would jeopardize the Colstrip Power Station's ability to generate enough electricity to meet the demands of its customers. This risk is particularly grave given the coming winter months, when electricity is typically in high demand in order to generate heat.

9. A cessation of operations in the AM4 Area would pose multiple safety hazards. First, there are approximately 150,000 tons of uncovered coal within the AM4 Area that is ready for imminent extraction. If operations were halted, this coal would remain exposed, posing a number of environmental and safety hazards, including a risk of coal seam fires. Second, a portion of the AM4 Area has already been loaded with explosives for future blasting. If permitted activity within the AM4 Area were to cease, these undetonated explosives would remain in place, posing a danger of accidental detonation. Third, a portion of the AM4 Area has already been blasted but has not yet been mined. If permitted activity within the AM4 Area were to cease, the spoils in the blasted area would collect water, resulting in decreased stability. This would pose a danger of slides or collapse. Fourth, a cessation of operations in the AM4 Area would force Westmoreland to consolidate operations in other areas of the Mine. This would likely increase the density of employees and contractors within a given area. While Westmoreland always strives to maintain a safe work environment, more crowded working conditions marginally increase the chances of an accident. Thus, a cessation of operations in the AM4 Area could have a wide variety of adverse safety consequences.

10. Westmoreland has conducted mining and reclamation operations in the AM4 Area since 2015, resulting in the extraction of four million tons of coal and the reclamation of pits following extraction. Both mining and reclamation within the AM4 Area are covered by the same permit. Thus, a cessation of permitted activity within the AM4 Area would thwart not only Westmoreland's ability to mine, but also its ability to reclaim pits that have already been mined.

11. Westmoreland has already invested millions of dollars in preparatory work, including blasting and drilling, for future mining within the AM4 Area. This investment would be lost if mining in the AM4 Area ceases.

12. Westmoreland plans to extract between 2.5 and 3 million tons of coal from the AM4 Area by the end of 2022. This production would not be realized if mining in the AM4 Area ceases.

Executed this 5th day of November, 2021.

Russell Batie

Exhibit H

D.C. Doc. 73, Petitioners' Combined Response to DEQ & WRM's Motions for Stay and Motions for Remedy (Nov. 22, 2021).

Shiloh S. Hernandez
Earthjustice
Northern Rockies Office
313 East Main Street
P.O. Box 4743
Bozeman, MT 59772-4743
(406) 426.9649
shernandez@earthjustice.org

Derf Johnson
Montana Environmental Information Center
107 W. Lawrence St., #N-6
Helena, MT 59624
(406) 443-2520
djohnson@meic.org

Walton D. Morris, Jr. *pro hac vice*
Morris Law Office, P.C.
1901 Pheasant Lane
Charlottesville, Virginia 22901
(434) 293 6616
wmorris@fastmail.net

Roger Sullivan
McGarvey Law
345 1st Avenue East
Kalispell, MT 59901
(406) 752-5566
rsullivan@mcgarveylaw.com

Attorneys for Petitioners

MONTANA SIXTEENTH JUDICIAL DISTRICT COURT
ROSEBUD COUNTY

MONTANA ENVIRONMENTAL INFORMATION CENTER, and SIERRA CLUB, Petitioners, vs. MONTANA DEPARTMENT OF ENVIRONMENTAL QUALITY, et al., Respondents.	Case No. DV 19-34 **PETITIONERS' COMBINED RESPONSE TO DEQ AND WRM'S MOTIONS FOR STAY AND MOTIONS ON REMEDY**

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INTRODUCTION

Respondents Montana Department of Environmental Quality (DEQ) and Westmoreland Rosebud Mining, LLC (WRM) (together, "Respondents") seek leave to allow WRM to continue illegal strip-mining operations in the AM4 Area of the Rosebud Mine, despite this Court's reversal of the permit approval that authorized the mining in the first place. In addition, DEQ and WRM ask this Court to stay its decision pending a yet-unfiled appeal. The principal justifications for these extraordinary requests, which Respondents present now for the first time in this case, are: (1) the burden to DEQ of complying with its legal obligations; and (2) hypothetical threats to the public power supply caused by WRM's potential inability to supply sufficient coal to the Colstrip Power Plant.

Respondents' motions should be denied. The standard judicial remedy for an unlawfully issued permit is reversal and vacatur of the permit. Because this is an equitable remedy, a court may defer vacatur. Here, this Court was well justified in reversing approval of the AM4 permit. However, in light of WRM's newfound (and speculative) allegations about impacts to regional power supplies, Petitioners Montana Environmental Information Center and Sierra Club (together, "Conservation Groups") request that this Court defer vacatur of the AM4 permit for approximately 5 months until April 1, 2022. Because electricity demand is low in the spring and inexpensive hydroelectric and solar energy are abundant, the

more expensive energy from Colstrip is unneeded and plant units often shut down in the "shoulder" season. As such, this requested remedy—deferred vacatur until April 1, 2022—is a reasonable compromise that will allay Respondents' proffered and hypothetical concerns, while assuring that the environmental protections of the Montana Strip and Underground Mine Reclamation Act (MSUMRA) and the Montana Constitution are honored.

Respondents' stay motions should also be denied because they are untimely and, further, they fail to meet the legal standard for a stay: they demonstrate no likelihood of success on appeal; DEQ and WRM will suffer no irreparable harm from a remedy that defers vacatur until April 2022; and, conversely, a stay would harm the Conservation Groups and the public.

FACTUAL AND PROCEDURAL BACKGROUND

DEQ issued the permit for the AM4 expansion of the Rosebud Mine in December 2015. BER:95, Ex. DEQ-1 at cover page. Conservation Groups appealed, and in 2019, the Montana Board of Environmental Review (BER) affirmed issuance of the permit. BER:152 at 85-86. The Conservation Groups sought judicial review, and in October 2021, this Court "reverse[d] the BER and remand[ed] to DEQ to review the AM4 permit application consistent with this decision and applicable laws." Order on Petition at 34 (Oct. 27, 2021).

This Court held that BER committed four procedural errors: (1) unlawfully engrafting an issue exhaustion requirement onto MSUMRA; (2) unlawfully allowing Respondents to submit *post hoc* evidence and argument; (3) allowing an unqualified witness to provide key expert testimony; and (4) unlawfully reversing the burden of proof. *Id.* at 13-28. This Court further held that BER and DEQ committed two critical substantive errors: (1) inconsistently and irrationally assessing water quality standards regarding the growth and propagation of aquatic life; and (2) arbitrarily and irrationally determining that releasing additional salt for decades to centuries into a stream that is already impaired for excessive salt will not worsen the impairment. *Id.* at 28-34.

There is no dispute that the receiving stream, East Fork Armells Creek (EFAC), has been determined by DEQ to be impaired and not meeting water quality standards for over a decade and that DEQ has failed to prepare a remedial plan. *Id.* at 6-7. Since this case was filed, WRM has violated water pollution limitations 67 times. Declaration of Anne Hedges ¶ 9 (attached as Exhibit 1).

In fall 2020 and again in spring 2021, one of the two Colstrip units was shut down for two and one-half months. Declaration of David Schlissel ¶ 7 (attached as Exhibit 2). Because hydroelectric and solar energy are abundant and energy demand is low in spring, it is possible to shut down own of the two units during this “shoulder” season without negatively affecting energy supplies or energy

costs. *Id.* ¶¶ 7, 14, 19. For Montana ratepayers, Colstrip is the most expensive resource in the state utility's energy portfolio. *Id.* ¶ 17; Hedges Decl. ¶ 10.

LEGAL STANDARDS

I. VACATUR

"The judiciary's standard remedy for permits or authorizations improperly issued without required procedures is to set them aside." *Park Cnty. Envtl. Council v. DEQ*, 2020 MT 303, ¶ 55, 402 Mont. 168, 477 P.3d 288.[1] Where, as here, an agency fails to conduct an adequate "environmental review," vacatur is essential to ensure that "the government will not take actions jeopardizing … Montana's natural environment without first thoroughly understanding the risks involved." *Id.* ¶¶ 74-77. Thus, it is only in "limited circumstances" when courts decline to vacate unlawful permits. *Id.* ¶ 55.

[1] *Accord, e.g., Mont. Envtl. Info. Ctr. v. DEQ* (*MEIC II*), 2020 MT 288, ¶ 27, 402 Mont. 128, 476 P.3d 32 ("[W]e conclude the 2017 Permit was not validly issued and must be vacated."); *Northern Cheyenne Tribe v. DEQ*, 2010 MT 111, ¶ 47, 356 Mont. 296, 234 P.3d 51 (reversing approval of water permit and "declar[ing] Fidelity's [the applicant's] permits void"); *Aspen Trails Ranch, LLC v. Simmons*, 2010 MT 79, ¶¶ 58-59, 356 Mont. 41, 230 P.3d 808 (affirming district court decision to "void [a] preliminary plat" that was approved "unlawfully" by county commission); *Kadillak v. Anaconda Co.*, 184 Mont. 127,144, 602 P.2d 147, 157 (1979) ("Because the application was not returned Permit 41A was void from the beginning and Anaconda may not continue the mining activities on the Permit 41A area until a valid permit is granted by State Lands."); *see also Alliance for the Wild Rockies v. U.S. Forest Serv.*, 907 F.3d 1105, 1121 (9th Cir. 2018) ("Although not without exception, *vacatur* of an unlawful agency action normally accompanies remand.").

Setting aside (or "[v]acatur") of an unlawful permit is an "equitable remedy." *Id.* ¶ 89. Accordingly, in appropriate circumstances, a court may in equity defer vacatur to allow the orderly winding down of unlawfully permitted activities. *Northern Cheyenne Tribe*, ¶ 47 (vacating permit but allowing permittee to "continue operating under its current permits" for "90 days").

II. STAYS

"The power to stay proceedings is incidental to the power inherent in every court to control the disposition of the causes on its docket with economy of time and effort for itself, for counsel, and for litigants." *Landis v. N. American Co.*, 299 U.S. 248, 255 (1936), *followed in Henry v. Dist. Ct. of Seventeenth Jud. Dist.*, 198 Mont. 8, 13-14, 645 P.2d 1350, 1352-53 (1982). A motion for a stay pending appeal must be filed first in district court. Mont. R. App. P. 22(1)(a). While Montana Rule of Appellate Procedure 22(1)(a) does not establish a standard for district courts to evaluate motions for stays pending appeal, the decision ultimately rests with the district court's discretion and requires a "weigh[ing] [of] competing interests." *Landis*, 299 U.S. at 254-55 (decision "calls for the exercise of judgment"); *Flying T Ranch, LLC v. Catlin Ranch, LP*, 2020 MT 99, ¶ 7, 400 Mont. 1, 462 P.3d 218 (district court order on motion for stay reviewed for abuse of discretion).

Consistent with the need to assess competing interests, the U.S. Supreme Court considers the following four factors in evaluating a motion for a stay pending appeal:

> (1) whether the stay applicant has made a strong showing that he is likely to succeed on the merits; (2) whether the applicant will be irreparably injured absent a stay; (3) whether issuance of the stay will substantially injure the other parties interested in the proceeding; and (4) where the public interest lies.

Nken v. Holder, 556 U.S. 418, 426 (2009) (quoting *Hilton v. Braunskill*, 481 U.S. 770, 776 (1987)); *see also Flying T Ranch*, ¶ 16 (requiring party seeking stay to "make out a clear case of hardship or inequity" (quoting *Henry*, 198 Mont. at 13, 645 P.3d at 1353)).[2] "A party requesting a stay pending appeal bears the burden of showing that the circumstances justify an exercise of the court's discretion." *N. Plains Res. Council v. U.S. Army Corps of Eng'rs* (*Northern Plains*), 460 F. Supp. 3d 1030, 1044 (D. Mont. 2020); *Flying T Ranch*, ¶ 16. A party's failure to satisfy any prong of the standard "dooms the motion." *In re Silva*, No. 9:10-bk-14135-PC, 2015 WL 1259774, at *4 (C.D. Cal. Mar. 17, 2015).

[2] Montana Rule of Appellate Procedure 22 provides that a motion for a stay from the Montana Supreme Court must demonstrate "good cause." Mont. R. App. P. 22(2)(a)(i). A showing of "good cause" inherently requires an evaluation of competing interests, as in *Nken*, *Landis*, *Flying T Ranch*, and *Henry*.

DISCUSSION

I. THE APPROPRIATE REMEDY THAT BEST BALANCES ALL INTERESTS IS DEFERRED VACATUR.

A. This Court has broad authority to grant effective relief to remedy unlawful agency action, including reversing and vacating DEQ's permitting decision.

WRM contends that this Court lacks authority to grant effective relief that would stop its illegal strip-mining operations in the AM4 Area, i.e., vacatur of WRM's unlawful permit. WRM Br. on Remedy at 5-7 (Nov. 8, 2021). WRM's argument, however, is refuted by case law, MSUMRA, and the Montana Administrative Procedure Act (MAPA). As noted, Montana courts possess equitable authority to vacate or "set aside" unlawfully issued permits, which is the "standard remedy for permits or authorizations improperly issued." *Park Cnty.*, ¶¶ 55, 89. Courts will "not lightly assume" any "deni[al] or limit[ation]" of this equitable remedial authority "absen[t] … a clear and valid legislative command." *Weinberger v. Romero-Barcelo*, 456 U.S. 305, 314 (1982) (quoting *Porter v. Warner Holding Co.*, 328 U.S. 395, 398 (1946)). What is more, a statutory denial of the judicial authority to set aside unlawful action that may harm the environment would violate Montana's constitutional mandate to the Legislature to "provide adequate remedies for the protection of the environmental life support system from degradation." Mont. Const. art. IX, § 1(3); *Park Cnty.*, ¶ 89.

But the Court need not consider whether the relevant laws unconstitutionally preclude effective remedies: MSUMRA and MAPA plainly authorize a reviewing court to vacate an unlawfully issued permit. As this Court explained, MSUMRA is required to meet the minimum standards of the federal Surface Mining Control and Reclamation Act (SMCRA). 30 U.S.C. § 1253(a)(1), *cited in* Order on Petition at 14 n.3. SMCRA provides that on judicial review of any action by a regulatory authority, including permitting, a "court may affirm, *vacate*, or modify any order or decision or may remand the proceedings ... for such further action as it may direct." 30 U.S.C. § 1276(b) (emphasis added). "States with an approved State program shall implement, administer, enforce and maintain it in accordance with the Act [SMCRA], this chapter and the provisions of the approved State program." 30 C.F.R. § 733.11.

This sweeping authority of judicial review is mirrored at the state level in MSUMRA and MAPA. MSUMRA provides that permit appeals are subject to the provisions of MAPA. Mont. Code Ann. § 82-4-206(1)-(2). MAPA, like SMCRA, provides reviewing courts broad authority to "affirm," "remand," "reverse," or "modify" an agency decision. Mont. Code Ann. § 2-4-704(2).[3] Here, the final agency action subject to judicial review was the Board of Environmental Review's

[3] WRM states incorrectly that MAPA only permits courts to "affirm" or "remand" agency decisions, ignoring the express authority to "reverse" or "modify." WRM Br. on Remedy at 6.

(BER) decision, which "AFFIRMED" the "AM4 Permit." BER:152 at 85-86. Reversal of BER's approval of the permit is equivalent to vacatur of the permit. The contrary conclusion proffered by WRM would violate *Park County*, the Montana Constitution, MSUMRA, and SMCRA.

Finally, WRM argues that Montana Code Annotated § 2-4-711 somehow prevents a court from vacating an unlawful agency permitting decision. WRM Br. on Remedy at 6-7. In fact, that statute cuts sharply *against* WRM's argument, and provides in relevant part that "if appeal is taken from a judgment of the district court reversing or modifying an agency decision"—as here—"the agency decision *shall be stayed* pending final determination of the appeal unless the supreme court orders otherwise." Mont. Code Ann. § 2-4-711(2) (emphasis added). Far from requiring a court to allow unlawfully permitted activities to continue, this provision—like the above-cited provisions of SMCRA and MAPA—provides that an unlawful action must be stopped pending appeal. *In re Investigative Records of Columbus Police Dep't*, 265 Mont. 379, 381-82, 877 P.2d 470, 471 (1994) ("The word 'may' is commonly understood to be permissive or discretionary. In contrast 'shall' is understood to be compelling or mandatory." (internal citations omitted)); *see also* Merriam-Webster Dictionary, www.merriam-webster.com (defining to "stay" as "to stop going forward: PAUSE" or "to stop doing something: CEASE"). WRM's contention that these provisions somehow straitjacket the court's ability to

stop unlawful action is not only inconsistent with all relevant authorities, it is absurd. *See In re Estate of Engellant*, 2017 MT 100, ¶ 11, 387 Mont. 313, 400 P.3d 218 (courts must construe statutes "to avoid absurd results").

B. This Court should defer vacatur until April 1, 2022, to uphold the law, protect the environment, and avoid any negative impacts to power supplies.

Here, deferred vacatur of the AM4 permit until April 1, 2022, is the appropriate remedy. As explained in *Park County*, requiring DEQ to conduct the necessary "environmental review"—here the required analysis of cumulative impacts to water resources under MSUMRA—before mining has occurred is necessary to secure Montanans' right to a clean and healthful environment, which mandates "anticipatory and preventative" action. *Id.* ¶¶ 72-78; Mont. Const. arts. II, § 3, IX, § 1(1) ("The state … shall maintain and improve a clean and healthful environment in Montana for present and future generations."); *Mont. Wilderness Ass'n v. Fry*, 408 F. Supp. 2d 1032, 1038 (D. Mont. 2006) ("[T]he public interest is best served when the law is followed.").

Here, the impacts of mining on water resources adjacent to the mine—principally East Fork Armells Creek (EFAC)—have already been severe. As the record shows and this Court explained, the stream is impaired for multiple pollutants, including salinity; mining in the AM4 Area will add more salinity to the stream; and the cumulative impact of all mining will increase the concentration of

salinity in the stream substantially. Order on Petition at 6-7. This is precisely the harm MSUMRA is intended to prevent. *See* ARM 17.24.405(6)(c) (prohibiting issuance of a permit unless applicant demonstrates and DEQ confirms that "cumulative hydrologic impacts will not result in material damage"); Mont. Code Ann. § 82-4-203(32) (defining "material damage" to include any "[v]iolation of a water quality standard"); *Northern Plains*, 460 F. Supp. 3d at 1039-40 (vacatur appropriate to avoid harm that underlying statute is designed to prevent). As demonstrated by the wall of decisions from *Kadillak*, 184 Mont. at 144, 602 P.2d at 157, to *Park County*, ¶¶ 55, 89, this is precisely the situation in which vacatur of an unlawful permitting decision is warranted. *See supra* note 1 (collecting cases).

WRM and DEQ raise a number of complaints in opposition to vacatur, but to the degree that any have merit, they can be resolved by deferring vacatur until April 1, 2022. The Montana Supreme Court addressed an analogous situation in *Northern Cheyenne Tribe*, where DEQ had issued unlawful discharge permits to a company that extracted coal-bed methane. *Id.* ¶¶ 4, 10, 46. The Court "declare[d]" the unlawfully issued permits "void." *Id.* ¶ 47. However, to avoid unnecessary disruption, the Court granted DEQ 90 days to reevaluate the permits, "during which time Fidelity [the company] may continue operating under its current permits." *Id.* ¶ 47; *see also Northern Plains*, 460 F. Supp. 3d at 1040 (finding that narrowed vacatur "strikes a reasonable balance" between competing concerns).

Here, WRM claims that if it is required to cease operations in the AM4 Area, it might not be able to supply sufficient coal to the Colstrip Power Plant, which could in turn "jeopardize" electricity supplies in winter when energy demand is high. WRM Br. on Remedy at 10-11. WRM's hypothetical concerns about coal and electricity supply are highly speculative, given AM4 constitutes less than 10% of the mine's permitted reserves, which are distributed between four active mine areas. Schlissel Decl. ¶ 9; *cf.* WRM Br. on Remedy, Ex. A (Declaration of Russell Batie) ¶ 4 (stating only 30% of mine production from AM4, 70% from other areas). But even assuming WRM's worst-case scenario were accurate, if vacatur is deferred until spring, when electricity demand is low and supplies of hydroelectric and solar energy are abundant, "it is still extremely unlikely that energy supplies or energy costs in … Montana or the Pacific Northwest would be negatively affected." Schlissel Decl. ¶ 19. This is because coal stockpiles at the mine and power plant, identified by WRM and Talen, are sufficient to keep at least one of the two Colstrip units operating for four months (the maximum time to move WRM's equipment), which is sufficient to meet reduced spring electricity demands. *Id.* Indeed, in both 2021 and 2020, one of the

two Colstrip units was shut down for two-and-one-half months during spring and fall shoulder seasons. *Id.* ¶ 7.[4]

Deferred vacatur would also alleviate WRM's complaints about safety hazards caused if "operations in the AM4 Area suddenly cease." WRM Br. on Remedy at 11-12. Five months are certainly sufficient time for WRM to wind down operations in the AM4 Area, detonate set explosives, and remove exposed coal and blasted overburden. Batie Decl. ¶ 6 (two to four months to move equipment and preform preliminary work). So too with respect to WRM's investments in drilling and blasting. *See* WRM Br. on Remedy at 12. Five months is enough time to allow WRM wind down its operations in the AM4 Area without investing in additional, unnecessary drilling or blasting in AM4. Batie Decl. ¶ 6.

C. DEQ's concerns about the burdens of complying with the law are not cognizable harms and WRM's concerns about temporary interruption of strip-mining do not outweigh permanent environmental harm.

DEQ's principal concerns about the costs associated with complying with its legal obligations, as set forth in this Court's order, are not cognizable, much less irreparable, harm. DEQ Br. in Supp. of Stay at 6-10 (Nov. 5, 2021). Agencies

[4] As it is, the owners of the Colstrip Plant from Washington and Oregon plan to exit the plant by 2025 or sooner. Schlissel Decl. ¶ 18. While Montana's utility, NorthWestern Energy, has not announced exit plans, the energy it provides to Montana ratepayers from Colstrip is the most expensive energy in its portfolio. *Id.* ¶ 17.

cannot complain about the burden of following the law. *Northern Plains* is illustrative. There the Court held that the nationwide permitting process used to approve dredge and fill activities associated with certain oil and gas pipelines violated the Endangered Species Act (ESA). 460 F. Supp. 3d at 1034-35. The agency sought a stay pending appeal, "complain[ing] that, absent a stay, [the agency] will be burdened by having to process an increased number of individual permit applications." *Id.* at 1045, 1048 (noting thousands of pending pipeline preconstruction notices). The Court discounted the agency's complaints because they "resulted from the agency's failure to follow the law in the first instance." *Id.* (cleaned up) (quoting *Swan View Coal. v. Weber*, 52 F. Supp. 3d 1160, 1161-62 (D. Mont. 2014)).[5] So too here. DEQ's reticence to comply with the law is no basis for denying vacatur or staying this Court's decision.[6]

Finally, WRM's complaints about losing its investment in operations in the AM4 Area should not change the analysis. First, as noted, deferring vacatur until

[5] Although vacatur is distinct from an injunction, the rationale of *Rodriguez v. Robbins*, 715 F.3d 1127, 1146 (9th Cir. 2013), is similarly relevant here. There, the Ninth Circuit rejected agency complaints about "severe logistical difficulties" associated with implementing an injunction because the difficulties "merely represent the burdens of complying with the applicable statutes." *Id.*

[6] DEQ could have avoided these costs, if, for example, agency management had not prohibited agency and industry experts from reviewing and analyzing the relevant data regarding water quality standards. Order on Petition at 25 n.8; *see Northern Plains*, 460 F. Supp. 3d at 1045 (agency cannot complain of "self-inflicted" harm (quoting *Al Otro Lado v. Wolf*, 952 F.3d 999, 1008 (2020))).

spring strikes a "reasonable balance" that will provide WRM time to wind down operations in AM4 and move its machines to one of its other approved permit areas. *See Northern Plains*, 460 F. Supp. 3d at 1040; *Northern Cheyenne Tribe*, ¶ 47. Further, the "cost of compliance" with the law, including some "lost profits and industrial inconvenience" are the "nature of doing business" and do not overcome the weighty interests of the rule of law and environmental protection. *Northern Plains*, 460 F. Supp. 3d at 1041 (quoting *Standing Rock Sioux v. U.S. Army Corps of Eng'rs*, 282 F. Supp. 3d 91, 104 (D.D.C. 2017)); *Park Cnty.*, ¶¶ 81-82 (explaining that a company's right to conduct mining activities is restricted by requirement of a lawful permit and that "some administrative delay" does not infringe property rights). This is especially the case where, as here, the cessation of operations is temporary, and may end when DEQ, in compliance with the law, completes the remand process. *Park Cnty.*, ¶ 82; *League of Wilderness Defs. v. Connaughton*, 752 F.3d 755, 765-66 (9th Cir. 2014) (holding "irreparable environmental injuries outweigh the temporary delay" of economic gains from project); *L.A. Mem'l Coliseum Comm'n v. NFL*, 634 F.2d 1197, 1202 (9th Cir. 1980) ("[M]onetary injury is not normally considered irreparable.").

In sum, the "standard remedy" of vacatur should apply here to assure environmental and constitutional protections and uphold the rule of law, *Park Cnty.*, ¶ 55, and, similar to *Northern Cheyenne Tribe*, ¶ 47, this Court should defer

vacatur until April 1, 2022, to strike a reasonable balance, allow WRM to wind down operations in AM4, and avoid any potential negative impacts.

II. RESPONDENTS FAIL TO CARRY THEIR BURDEN OF DEMONSTRATING THAT A STAY IS WARRANTED.

This Court should deny Respondents' motions for a stay pending appeal because the motions are premature, Respondents have failed to demonstrate a strong likelihood of success on the merits or a probability of irreparable harm, and a stay would harm the Conservation Groups and the public.

A. Respondents' request for a stay pending appeal is premature because no appeal has been filed.

Respondents' stay motions must fail first because the fundamental prerequisite for a stay pending an appeal is missing—there is no pending appeal. Mont. R. App. P. 22(1)(a)(i) (providing for stay "pending appeal"). "A stay pending appeal is not warranted, since no appeal is currently pending." *Mathis v. Zant*, 708 F. Supp. 339, 340 (N.D. Ga. 1989); *accord, e.g.*, *Gregory v. Baucum*, No. 7:16-CV-00103-BP, 2018 WL 10096597, at *1 (N.D. Tex. Feb. 23, 2018); *Gagan v. Sharer*, No. CIV 99-1427PHX RCB, 2006 WL 3736057, at *4 (D. Ariz. Nov. 6, 2006); *In re Hayes Microcomputer Prod., Inc. Patent Litig.*, 766 F. Supp. 818, 822 n.2 (N.D. Cal. 1991).

B. Respondents' rehash of failed arguments does not demonstrate a strong likelihood of success on the merits.

Where a district court's decision rests on alternative grounds, as here, a party cannot demonstrate a strong likelihood of success on the merits without addressing *each* holding. *State v. English*, 2006 MT 177, ¶ 47, 333 Mont. 23, 140 P.3d 454 ("Failure to challenge each of the alternative bases for a district court's ruling results in affirmance."); *MEIC II*, ¶ 27 (finding single issue sufficient to affirm vacatur of unlawful permit and "declin[ing] to address the other issues" raised by appellants); *Life Spine, Inc. v. Aegis Spine, Inc.*, No. 19 CV 7092, 2021 WL 1750173, at *1-2 (N.D. Ill. May 4, 2021) (denying stay motion that failed to address alternative grounds); *Exodus Refugee Immigration, Inc. v. Pence*, No. 1:15-CV-01858-TWP-DKL, 2016 WL 1222265, at *3 (S.D. Ind. Mar. 29, 2016) (same).

Similarly, a party cannot make a "strong showing" of success on the merits by simply "rehash[ing]" unsuccessful summary judgment arguments. *Friends of Wild Swan v. U.S. Forest Serv.*, No. CV 11-125-M-DWM, 2014 WL 12672270, at *2 (D. Mont. June 20, 2014); *In re Pac. Fertility Ctr. Litig.*, No. 18-CV-01586-JSC, 2019 WL 2635539, at *3 (N.D. Cal. June 27, 2019); *Roman Catholic Archbishop of Wash. v. Sibelius*, No. 13-1441 (ABJ), 2013 WL 12333208, at *3 (D.D.C. Dec. 23, 2013); *Titan Tire Corp. of Bryan v. Local 890L, United Steelworkers of Am.*, 673 F. Supp. 2d 588, 590 (N.D. Ohio 2009).

Here, Respondents' motions fail because, in addition to being untimely, neither addresses *each* of the six grounds on which this Court reversed BER's decision. *Compare* DEQ Br. in Supp. of Stay at 11-13 (addressing one ground), *and* WRM Br. on Remedy at 14-17 (addressing only three of six grounds[7]), *with* Order on Petition at 13-34. This alone is fatal. Equally fatal, the arguments which Respondents raise (addressed below in reverse order) merely repeat arguments rejected in this Court's order. *See, e.g.*, *Friends of Wild Swan*, 2014 WL 12672270, at *2.

Regarding this Court's detailed substantive rulings on BER and DEQ's arbitrary analysis of water quality standards (Order on Petition at 28-34), WRM argues that the Court incorrectly applied the "arbitrary and capricious standard," which, WRM suggests, is not permitted by MAPA. WRM Br. on Remedy at 17. But WRM is plainly mistaken. MAPA expressly permits a court to reverse an agency decision that is "arbitrary or capricious." Mont. Code Ann. § 2-4-704(2)(a)(vi). Because Respondents must show a strong likelihood of success with respect to *each* of the Court's alternative rulings, *English*, ¶ 47; *MEIC II*, ¶ 27, this

[7] WRM also argues about this Court's ruling related to Montana Code Annotated § 2-4-621, WRM Br. on Remedy at 3, but while this Court rejected WRM's argument on that point, it was not one of the Court's six bases for reversing BER. Order on Petition at 13-34.

is fatal, and the Court need go no further. In any event, Respondents' remaining arguments also miss the mark.

WRM continues to press its specious argument that the Conservation Groups' brief in response to the Hearing Examiner's proposed order, which was captioned "objections," was flawed because it was not captioned "exceptions." WRM Br. on Remedy at 16. But WRM merely rehashes its rejected arguments about *Flowers v. Board of Personnel Appeals*, 2020 MT 150, 400 Mont. 238, 465 P.3d 210, and Montana Code Annotated § 2-4-621. *Compare* WRM Br. on Remedy at 16, *with* Order on Petition at 18-20 (rejecting both arguments). As with its arguments about the arbitrary and capricious standard, WRM's argument is premised on a misstatement of the law. WRM contends that under Mont. Code Ann. § 2-4-621(1) parties "*must* 'file exceptions and present briefs and oral arguments.'" WRM Br. on Remedy at 16 (emphasis added). In fact, the law contains no such mandate, but states only that parties must be "afforded" the "opportunity … to file exceptions and present briefs and oral arguments." Mont. Code Ann. § 2-4-621(1). "Afforded the opportunity" does not mean "must." Further, as this Court noted, "unlike in *Flowers*, the Conservation Groups filed extensive exceptions." Order on Petition at 20; *Flowers*, ¶ 15. As such, *Flowers* is plainly inapposite.

WRM also rehashes its administrative issue exhaustion argument, but fails entirely to address any of the numerous authorities cited in this Court's ruling. *Compare* WRM Br. on Remedy at 15-16, *with* Order on Petition at 13-17. This constitutes a failure to make a "strong showing" of likely success on the merits. *Nken*, 556 U.S. at 426. Moreover, contrary to WRM's argument, Conservation Groups argued repeatedly that their claims, which BER barred on issue exhaustion grounds, arose after the close of the public comment period. BER:84 at 5-7 (motions in limine briefing); BER:94 at 1:25:50 to 1:26:02 (motions in limine hearing); BER:151 at 59:19 to 61:24, 66:1-20 (hearing before the Board).[8] WRM's argument has no merit.

DEQ and WRM's arguments about the burden of proof simply rehash their merits arguments relying on *Montana Environmental Information Center v. DEQ* (*MEIC I*), 2005 MT 96, 326 Mont. 502, 112 P.3d 964,[9] which were already rejected. Order on Petition at 25-28. Critically, Respondents fail to address Montana Supreme Court case law holding that an applicant's (here, WRM's)

[8] Conservation Groups also raised the same arguments at the pretrial conference, but the Hearing Examiner failed to properly record that hearing, causing the record to be lost. BER:151 at 66:24 to 67:12. WRM improperly attempts to gain advantage from the Hearing Examiner's failure to preserve the record of that hearing.

[9] DEQ also cites ARM 17.24.625, DEQ Br. in Supp. of Stay at 13, but that provision, which addresses "seismograph measurements," is wholly inapposite.

statutory burden to show the lack of adverse environmental impacts does not shift in a contested case. *Id.* at 25 (citing *Bostwick Props., Inc. v. DNRC*, 2013 MT 48, ¶¶ 1, 10-14, 36, 369 Mont. 150, 296 P.3d 1154). When, as with MSUMRA (but unlike the Clean Air Act, which was at issue in *MEIC I*), the *statutory* burden is placed on a permit applicant, it does not shift in a contested case, because consistent with the rules of evidence, "the applicant would be defeated if neither side produced evidence." *In re Royston*, 249 Mont. 425, 428, 816 P.3d 1054, 1057 (1991) (rejecting burden-shifting argument); Mont. Code Ann. § 82-4-227(1), (3)(a) (placing "burden" of proof on "applicant"); ARM 17.24.405(6)(c) (*applicant* must "affirmatively demonstrate[]" that "material damage" "will not result"). Nor do Respondents address the SMCRA legislative history confirming that the permit applicant bears the burden of proof on a permit appeal. S. Rep. No. 95-128 at 80 (1977), *cited in* Order on Petition at 25.

Finally, *MEIC I* does not refute but confirms the reasoning of this Court's ruling. *MEIC I* did not hold (as BER did here) that in the contested case the public was required to demonstrate adverse environmental impacts. *MEIC I*, ¶¶ 36, 38. Instead, there, the Court explained that the question for BER was whether "Bull Mountain [the applicant] established that emissions from the proposed project will not cause or contribute to" adverse environmental impacts. *Id.*, ¶ 38. Thus, as this Court held, *MEIC I* does not support BER's decision requiring the Conservation

Groups to "establish the existence of water quality standard violations." Order on Petition at 26-28 (quoting BER:152 at 84). Accordingly, Respondents' rehashed argument does not constitute a "strong showing" of likely success on the merits. *Nken*, 556 U.S. at 426.[10]

Respondents' failure to show a strong likelihood of success on each of the six bases of this Courts' decision "dooms the[ir] motion[s]." *In re Silva*, 2015 WL 1259774, at *4

C. Respondents' arguments about the costs of complying with the law fail to demonstrate a probability of irreparable harm.

A party seeking a stay must demonstrate that "irreparable harm is probable, not merely possible." *Doe #1 v. Trump*, 957 F.3d 1050, 1059 (9th Cir. 2020). Here, if, as Conservation Groups request, vacatur is deferred until April 1, 2022, Respondents' concerns about coal and energy supplies will be assuaged. *See supra* Discussion Part I.B. Thus, there is no probability that Respondents would suffer irreparable harm. As noted, DEQ's concerns about the costs of complying with its legal obligations do not constitute irreparable harm. *Northern Plains*, 460 F. Supp. 3d at 1045; *Rodriguez*, 715 F.3d at 1146. No does a temporary delay in economic activity. *Park Cnty.*, ¶¶ 81-82; *Northern Plains*, 460 F. Supp. 3d at 1041;

[10] WRM presents the same rehash of rejected arguments regarding the burden of proof as DEQ. WRM Br. on Remedy at 14-15.

League of Wilderness Defs., 752 F.3d at 766; *L.A. Mem'l Coliseum Comm'n*, 634 F.2d at 1202.

D. A stay would cause substantial injury to the environment, Conservation Groups, and the rule of law.

Conversely, as this Court explained, the waters impacted by AM4 and the Rosebud Mine are impaired for salinity and the cumulative effects of WRM's AM4 mining operations will substantially worsen that impairment. Order on Petition at 6-7, 28-34. DEQ has known of this impairment for over a decade, but taken no action to remedy it. *Id.* at 7. Such long-term environmental harm is irreparable. *See Amoco Prod. Co. v. Vill. of Gambell*, 480 U.S. 531, 545 (1987) ("Environmental injury, by its nature, can seldom be adequately remedied by money damages and is often permanent or at least of long duration, *i.e.*, irreparable. If such injury is sufficiently likely, therefore, the balance of harms will usually favor the issuance of an injunction to protect the environment.").[11] This ongoing pollution, along with WRM's repeated violation of pollution limits, also irreparably harms the Conservation Groups and their members. Hedges Decl. ¶¶ 4-11. Allowing strip-mining to continue despite DEQ's failure to take a hard look at the environmental consequences of the AM4 expansion would violate Montana's

[11] DEQ admits that the harm from strip-mining is irreparable. *See* Declaration of Martin Van Oort ¶¶ 11, 17 (explaining impacts of strip-mining are "irreversible" and "not possible to revert" to pre-mining state).

constitutional protections and the rule of law. *Park Cnty.*, ¶¶ 72-73; *Mont. Wilderness Ass'n*, 408 F. Supp. 2d at 1038 ("[T]he public interest is best served when the law is followed."); Mont. Const. arts. II, § 3, IX, § 1(1).[12] Thus the equities and the public interest do not support a stay.

CONCLUSION

In sum, Conservation Groups request that this Court: (1) defer vacatur of the AM4 permit until April 1, 2022; (2) deny Respondents' motions on remedy; and (3) deny Respondents' premature motions for a stay pending appeal.[13]

Respectfully submitted this 22nd day of November, 2021.

/s/ Shiloh Hernandez
Shiloh Hernandez
Earthjustice
Northern Rockies Office
313 East Main Street
P.O. Box 4743
Bozeman, MT 59772-4743
(406) 426.9649
shernandez@earthjustice.org

Derf Johnson
Montana Environmental Information Center

[12] Respondents' insinuation that Conservation Groups' decision not to seek preliminary relief somehow limits their ability to obtain permanent relief is without merit. The Montana Supreme Court has repeatedly approved vacatur in the absence of preliminary relief. *See supra* note 1 (collecting cases).

[13] Conservation Groups are filing this combined response to the motions of DEQ and WRM. Pursuant to Local Rule 6(A), Petitioners will file a proposed order by November 26, 2021, the date on which their response to WRM's motion would have otherwise been due.

107 W. Lawrence St., #N-6
Helena, MT 59624
(406) 443-2520
djohnson@meic.org

Walton D. Morris, Jr. *pro hac vice*
Morris Law Office, P.C.
1901 Pheasant Lane
Charlottesville, Virginia 22901
(434) 293 6616
wmorris@fastmail.net

Roger Sullivan
McGarvey Law
345 1st Avenue East
Kalispell, MT 59901
(406) 752-5566
rsullivan@mcgarveylaw.com

Attorney for Petitioners

CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing was served via email on counsel for all parties at the following addresses:

John C. Martin
Holland & Hart, LLP
975 F. Street, N.S. Ste. 900
Washington, DC 20004
JCMartin@hollandhart.com

Samuel R. Yemington
Holland & Hart, LLP
2515 Warren Ave. Suite 450
Cheyenne, WY 82001
sryemmington@hollandhart.com

Victoria A. Marquis
Holland & Hart
401 North 31st Street, Suite 1500
PO Box 639
Billings, MT 59103
VAMarquis@hollandhart.com
aforney@hollandhart.com

Nicholas A. Whitaker
Department of Environmental Quality
Legal Unit, Metcalf Building
P.O. Box 200901
1520 East Sixth Ave.
Helena, MT 59601-0901
nicholas.whitaker@mt.gov
catherine.armstrong2@mt.gov

Amy D. Christensen
Christensen & Prezeau, PLLP
314 N. Last Chance Gulch, Suite 300
Helena, MT 59601
amy@cplawmt.com

Dan Eakin
Judicial Assistant to Judge Bidegaray
300 12th Avenue NW, Suite 2
Sidney, MT 59270
dan.eakin@mt.gov

Dated: November 22, 2021

/s/ Shiloh Hernandez
Shiloh Hernandez

Exhibit I

D.C. Doc. 75, Petitioners' Proposed Order on Remedy and Stay (Nov. 25, 2021).

KATHERINE M. BIDEGARY
District Judge, Department 2
Seventh Judicial District
300 12th Avenue, N.W., Suite #2
Sidney, Montana 59270

MONTANA SIXTEENTH JUDICIAL DISTRICT COURT

ROSEBUD COUNTY

MONTANA ENVIRONMENTAL INFORMATION CENTER, and SIERRA CLUB, Petitioners, vs. MONTANA DEPARTMENT OF ENVIRONMENTAL QUALITY, MONTANA BOARD OF ENVIRONMENTAL REVIEW, WESTERN ENERGY CO., NATURAL RESOURCE PARTNERS, L.P., INTERNATIONAL UNION OF OPERATING ENGINEERS, LOCAL 400, and NORTHERN CHEYENNE COAL MINERS ASSOCIATION, Respondents.	Cause No.: DV 19-34 Judge Katherine M. Bidegaray [PETITIONERS' PROPOSED] **ORDER ON REMEDY AND STAY**

I. PROCEDURAL AND FACTUAL BACKGROUND

Pursuant to the Montana Administrative Procedures Act (MAPA), which provides for the judicial review of final agency action, the Montana Environmental Information Center and Sierra Club (Conservation Groups) petitioned the Court contending that the approval by the Montana Board of Environmental Review (BER) of the AM4 permit expanding the Rosebud Mine was procedurally and substantively flawed and should be reversed and remanded to the Montana Department of

Environmental Quality (DEQ) to review the AM4 permit application consistent with applicable laws. By Order dated October 27, 2021, this Court "reverse[d] the BER and remand[ed] to DEQ to review the AM4 permit application consistent with this decision and applicable laws." Order on Petition at 34. This Court held that BER committed four procedural errors: (1) unlawfully engrafting an issue exhaustion requirement onto MSUMRA; (2) unlawfully allowing Respondents to submit *post hoc* evidence and argument; (3) allowing an unqualified witness to provide key expert testimony; and (4) unlawfully reversing the burden of proof. *Id.* at 13-28. This Court further held that BER and DEQ committed two critical substantive errors: (1) arbitrarily and capriciously assessing water quality standards regarding the growth and propagation of aquatic life; and (2) arbitrarily and capriciously determining that releasing additional salt for decades to centuries into a stream that is already impaired for excessive salt will not worsen the impairment. *Id.* at 31-37.

Thereafter, Respondents DEQ and Westmoreland Rosebud Mining, LLC (WRM) (together, "Respondents") sought leave to allow WRM to continue strip-mining operations in the AM4 Area of the Rosebud Mine, notwithstanding this Court's reversal of the permit approval that authorized the AM4 mining. In addition, DEQ and WRM request the Court to stay its decision pending anticipated but yet-unfiled appeals. The principal justifications offered for these requests, supported by briefs and declarations, are (1) the burden to DEQ of complying at this juncture with

its legal obligations and (2) alleged threats to the public power supply caused by WRM's potential inability to supply sufficient coal to the Colstrip Power Plant.

The Conservation Groups have opposed Respondent's motions, also supported by briefing and declarations, arguing that the standard judicial remedy for an unlawfully issued permit is reversal and vacatur of the permit, and further arguing that because vacatur is an equitable remedy the Court may defer vacatur.

The Court notes that there is no substantial dispute of fact that the receiving stream, East Fork Armells Creek (EFAC), has been determined by DEQ to be impaired and not meeting water quality standards for over a decade and that DEQ has failed to prepare a remedial plan. *Id.* at 6-7.[1] Nor is it disputed that in fall 2020 and again in spring 2021, one of the two Colstrip units was shut down for two and one-half months. Declaration of David Schlissel ¶ 7 (attached as Exhibit 2 to Conservation Groups' Response). The Conservation Groups argue that because hydroelectric and solar energy is abundant and energy demand is low in spring, it is possible to shut down own of the two units during this "shoulder" season without negatively affecting energy supplies or energy costs. *Id.* ¶¶ 7, 14, 19.

[1] Of further note, since this case was filed, WRM has violated water pollution limitations 67 times. Declaration of Anne Hedges ¶ 9, attached as Exhibit 1 to Conservation Groups' Combined Response to DEQ's and WRM's Motions for Stay and Motions on Remedy (hereafter Conservation Groups' Response).

Specifically, the Conservation Groups request that this Court defer vacatur of the AM4 permit until April 1, 2022, which the Conservation Groups argue will allay Respondents' proffered concerns, while assuring that the environmental protections of the Montana Strip and Underground Mine Reclamation Act (MSUMRA) and the Montana Constitution are honored. Additionally, the Conservation Groups argue that Respondents' stay motions should be denied because they are untimely, and they fail to meet the legal standard for a stay in that: they demonstrate no likelihood of success on appeal; DEQ and WRM will suffer no irreparable harm from a remedy that defers vacatur until April 2022; and a stay would harm the Conservation Groups and the public.

Having considered the arguments and affidavits of the parties the Court is prepared to rule.

II. LEGAL FRAMEWORK

Vacatur

The Montana Supreme Court has recently affirmed that "[t]he judiciary's standard remedy for permits or authorizations improperly issued without required procedures is to set them aside." *Park Cnty. Envtl. Council v. DEQ*, 2020 MT 303, ¶ 55, 402 Mont. 168, 477 P.3d 288.[2] The *Park County* Court explained that where

[2] *Accord, e.g., Mont. Envtl. Info. Ctr. v. DEQ* (*MEIC II*), 2020 MT 288, ¶ 27, 402 Mont. 128, 476 P.3d 32 ("[W]e conclude the 2017 Permit was not validly issued and must be vacated."); *Northern Cheyenne Tribe v. DEQ*, 2010 MT 111, ¶ 47, 356 Mont. 296, 234 P.3d 51 (reversing approval of

an agency fails to conduct an adequate "environmental review," vacatur is essential to ensure that "the government will not take actions jeopardizing … Montana's natural environment without first thoroughly understanding the risks involved." *Id.* ¶¶ 74-77. Thus, it is only in "limited circumstances" when courts decline to vacate unlawful permits. *Id.* ¶ 55.

Setting aside (or "vacatur") of an unlawful permit is an "equitable remedy." *Id.* ¶ 89. Accordingly, in appropriate circumstances, a court may in equity defer vacatur to allow the orderly winding down of unlawfully permitted activities. *Northern Cheyenne Tribe*, ¶ 47 (vacating permit but allowing permittee to "continue operating under its current permits" for "90 days").

Stay

"The power to stay proceedings is incidental to the power inherent in every court to control the disposition of the causes on its docket with economy of time and effort for itself, for counsel, and for litigants." *Landis v. N. American Co.*, 299 U.S. 248, 255 (1936), *followed in Henry v. Dist. Ct. of Seventeenth Jud. Dist.*, 198 Mont. 8, 13-14, 645 P.2d 1350, 1352-53 (1982). A motion for a stay pending appeal must

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water permit and "declar[ing] Fidelity's [the applicant's] permits void"); *Aspen Trails Ranch, LLC v. Simmons*, 2010 MT 79, ¶¶ 58-59, 356 Mont. 41, 230 P.3d 808 (affirming district court decision to "void [a] preliminary plat" that was approved "unlawfully" by county commission); *Kadillak v. Anaconda Co.*, 184 Mont. 127,144, 602 P.2d 147, 157 (1979) ("Because the application was not returned Permit 41A was void from the beginning and Anaconda may not continue the mining activities on the Permit 41A area until a valid permit is granted by State Lands."); *see also Alliance for the Wild Rockies v. U.S. Forest Serv.*, 907 F.3d 1105, 1121 (9th Cir. 2018) ("Although not without exception, *vacatur* of an unlawful agency action normally accompanies remand.").

be filed first in district court. Mont. R. App. P. 22(1)(a). While Montana Rule of Appellate Procedure 22(1)(a) does not establish a standard for district courts to evaluate motions for stays pending appeal, the decision ultimately rests with the district court's discretion and requires a "weigh[ing] [of] competing interests." *Landis*, 299 U.S. at 254-55 (decision calls "calls for the exercise of judgment"); *Flying T Ranch, LLC v. Catlin Ranch, LP*, 2020 MT 99, ¶ 7, 400 Mont. 1, 462 P.3d 218 (district court order on motion for stay reviewed for abuse of discretion).

Consistent with the need to assess competing interests, the U.S. Supreme Court considers the following four factors in evaluating a motion for a stay pending appeal:

> (1) whether the stay applicant has made a strong showing that he is likely to succeed on the merits; (2) whether the applicant will be irreparably injured absent a stay; (3) whether issuance of the stay will substantially injure the other parties interested in the proceeding; and (4) where the public interest lies.

Nken v. Holder, 556 U.S. 418, 426 (2009) (quoting *Hilton v. Braunskill*, 481 U.S. 770, 776 (1987)); *see also Flying T Ranch*, ¶ 16 (requiring party seeking stay to "make out a clear case of hardship or inequity" (quoting *Henry*, 198 Mont. at 13, 645 P.3d at 1353)).[3] "A party requesting a stay pending appeal bears the burden of showing that the circumstances justify an exercise of the court's discretion." *N.*

[3] Montana Rule of Appellate Procedure 22(2)(a)(i) provides that a motion for a stay from the Montana Supreme Court must demonstrate "good cause." A showing of "good cause" inherently requires an evaluation of competing interests, as in *Nken*, *Landis*, *Flying T Ranch*, and *Henry*.

Plains Res. Council v. U.S. Army Corps of Eng'rs (*Northern Plains*), 460 F. Supp. 3d 1030, 1044 (D. Mont. 2020); *Flying T Ranch*, ¶ 16. A party's failure to satisfy any prong of the standard "dooms the motion." *In re Silva*, No. 9:10-bk-14135-PC, 2015 WL 1259774, at *4 (C.D. Cal. Mar. 17, 2015).

III. DISCUSSION

A. Appropriate Remedy

This Court previously reversed the BER's affirmance of the AM4 permit for the Rosebud strip-mine. The practical and legal effect of this determination is that WRM does not have a valid permit to mine in compliance with and as required by MSUMRA. Nevertheless, WRM contends that this Court lacks authority to grant effective relief that would stop its strip-mining operations in the AM4 Area, i.e., vacatur of WRM's unlawful permit. WRM Br. on Remedy at 5-7 (Nov. 8, 2021). WRM's argument, however, is refuted by case law, MSUMRA, and the Montana Administrative Procedure Act (MAPA). The touchstone here is that this Court has broad authority to grant effective relief to remedy unlawful agency action, including reversing and vacating DEQ's permitting decision. Clearly Montana courts possess equitable authority to vacate or "set aside" unlawfully issued permits, which is the "standard remedy for permits or authorizations improperly issued." *Park Cnty.*, ¶¶ 55, 89. What is more, a statutory denial of the judicial authority to set aside unlawful action that may harm the environment would violate Montana's

constitutional mandate to the Legislature to "provide adequate remedies for the protection of the environmental life support system from degradation." Mont. Const. art. IX, § 1(3); *Park Cnty.*, ¶ 89.

However, the Court at this juncture need not consider whether the relevant laws unconstitutionally preclude effective remedies. MSUMRA and MAPA plainly authorize a reviewing court to vacate an unlawfully issued permit. As this Court explained, MSUMRA is required to meet the minimum standards of the federal Surface Mining Control and Reclamation Act (SMCRA). 30 U.S.C. § 1253(a)(1), *cited in* Order on Petition at 14 n.3. SMCRA provides that on judicial review of any action by a regulatory authority, including permitting, a "court may affirm, *vacate*, or modify any order or decision or may remand the proceedings ... for such further action as it may direct." 30 U.S.C. § 1276(b) (emphasis added). "States with an approved State program shall implement, administer, enforce and maintain it in accordance with the Act [SMCRA], this chapter and the provisions of the approved State program." 30 C.F.R. § 733.11.

This broad authority of judicial review is mirrored at the state level in MSUMRA and MAPA. MSUMRA provides that permit appeals are subject to the provisions of MAPA. Mont. Code Ann. § 82-4-206(1)-(2). MAPA, like SMCRA, provides reviewing courts broad authority review to "affirm," "remand," "reverse,"

or "modify" an agency decision. Mont. Code Ann. § 2-4-704(2).[4] Here, the final agency action subject to judicial review was the BER decision, which "Affirmed" the "AM4 Permit." BER:152 at 85-86. Reversal of BER's approval of the permit is equivalent to vacatur of the permit. The contrary conclusion advanced by WRM would violate *Park County*, the Montana Constitution, MSUMRA, and SMCRA.

Finally, WRM argues that Mont. Code Ann. § 2-4-711 somehow prevents a court from vacating an unlawful agency permitting decision. WRM Br. on Remedy at 6-7. In fact, that statute cuts sharply *against* WRM's argument, and provides in relevant part that "if appeal is taken from a judgment of the district court reversing or modifying an agency decision" (as here) "the agency decision *shall be stayed* pending final determination of the appeal unless the supreme court orders otherwise." Mont. Code Ann. § 2-4-711(2) (emphasis added). Far from requiring a district court to allow unlawfully permitted activities to continue, this provision—like the above-cited provisions of SMCRA and MAPA—provides that an unlawful action must be stopped pending appeal. *In re Investigative Records of Columbus Police Dep't*, 265 Mont. 379, 381-82, 877 P.2d 470, 471 (1994) ("The word 'may' is commonly understood to be permissive or discretionary. In contrast 'shall' is understood to be compelling or mandatory." (internal citations omitted)); *see also* Merriam-Webster

[4] WRM states incorrectly that MAPA only permits courts to "affirm" or "remand" agency decisions, ignoring the express authority to "reverse" or "modify." WRM Br. on Remedy at 6.

Dictionary, www.merriam-webster.com (defining to "stay" as "to stop going forward: PAUSE" or "to stop doing something: CEASE"). Simply stated, WRM's contention that these provisions somehow straitjacket the district court's ability to stop unlawful action is without merit.

Deferred Vacatur

That said, deferred vacatur of the AM4 permit until April 1, 2022, is the appropriate remedy. As explained in *Park County*, requiring DEQ to conduct the necessary "environmental review"—here the required analysis of cumulative impacts to water resources under the MSUMRA—before mining has occurred is necessary to secure Montanans' right to a clean and healthful environment, which mandates "anticipatory and preventative" action. *Id.* ¶¶ 72-78; Mont. Const. arts. II, § 3, IX, § 1(1) ("The state … shall maintain and improve a clean and healthful environment in Montana for present and future generations."); *Mont. Wilderness Ass'n v. Fry*, 408 F. Supp. 2d 1032, 1038 (D. Mont. 2006) ("[T]he public interest is best served when the law is followed.").

Here, the impacts of mining on water resources adjacent to the mine—principally East Fork Armells Creek (EFAC)—have already been severe. As the record shows and this Court explained, the stream is impaired for multiple pollutants, including salinity; mining in the AM4 Area will add more salinity to the stream; and the cumulative impact of all mining will increase the concentration of salinity in the

stream substantially. Order on Petition at 6-7. This is precisely the harm MSUMRA is intended to prevent. *See* ARM 17.24.405(6)(c) (prohibiting issuance of a permit unless applicant demonstrates and DEQ confirms that "cumulative hydrologic impacts will not result in material damage"); Mont. Code Ann. § 82-4-203(32) (defining "material damage" to include any "[v]iolation of a water quality standard"); *Northern Plains*, 460 F. Supp. 3d at 1039-40 (vacatur appropriate to avoid harm underlying statute is designed to prevent). As demonstrated by the wall of decisions from *Kadillak*, 184 Mont. at 144, 602 P.2d at 157, to *Park County*, ¶¶ 55, 89, this is precisely the situation in which vacatur of an unlawful permitting decision is warranted. *See supra* note 1 (collecting cases).

While WRM and DEQ raise a number complaints in opposition to vacatur, to the degree that any have merit, they can be resolved by deferring vacatur until April 1, 2022. The Montana Supreme Court addressed an analogous situation in *Northern Cheyenne Tribe*, where DEQ had issued unlawful discharge permits to a company that extracted coal-bed methane. *Id.* ¶¶ 4, 10, 46. The Court "declare[d]" the unlawfully issued permits "void." *Id.* ¶ 47. However, to avoid unnecessary disruption, the Court granted DEQ 90 days to reevaluate the permits, "during which time Fidelity [the company] may continue operating under its current permits." *Id.* ¶ 47; *see also Northern Plains*, 460 F. Supp. 3d at 1040 (finding that narrowed vacatur "strikes a reasonable balance" between competing concerns).

Here, WRM claims that if it is required to cease operations in the AM4 Area, it might not be able to supply sufficient coal to the Colstrip Power Plant, which could in turn "jeopardize" electricity supplies in during the winter period of high energy demand. WRM Br. on Remedy at 10-11. WRM's hypothetical concerns about coal and electricity supply are highly speculative, given AM4 constitutes less than 10% of the mine's permitted reserves, which are distributed between four active mine areas. Schlissel Decl. ¶ 9; *cf.* WRM Br. on Remedy, Ex. A (Declaration of Russell Batie) ¶ 4 (stating only 30% of mine production from AM4, 70% from other areas). Even assuming WRM's worst-case scenario were accurate, however, if vacatur is deferred until spring, when electricity demand is low and supplies of hydroelectric and solar energy are abundant, "it is still extremely unlikely that energy supplies or energy costs in … Montana or the Pacific Northwest would be negatively affected." Schlissel Decl. ¶ 19. This is because coal stockpiles at the mine and power plant, identified by WRM and plant operator Talen Montana, LLC, are sufficient to keep at least one of the two Colstrip units operating for four months (the maximum time need to move WRM's equipment), which is sufficient to meet reduced spring electricity demands. *Id.* Indeed, in both 2021 and 2020, one of the two Colstrip units was shut down for two-and-one-half months during spring and fall shoulder seasons. *Id.* ¶ 7.

Deferred vacatur would also alleviate WRM's complaints about safety hazards caused if "operations in the AM4 Area suddenly cease." WRM Br. on Remedy at 11-12. Five months from the issuance of this Court's Order reversing BER's approval of the AM4 permit are certainly sufficient time for WRM to wind down operations in the AM4 Area, detonate set explosives, and remove exposed coal and blasted overburden. Batie Decl. ¶ 6 (two to four months to move equipment and preform preliminary work). So too with respect to WRM's investments in drilling and blasting. *See* WRM Br. on Remedy at 12. Five months is enough time to allow WRM wind down its operations in the AM4 Area without investing in additional, unnecessary drilling or blasting in AM4. Batie Decl. ¶ 6. In sum, deferred vacatur until April 1, 2022, will uphold the law, protect the environment, and avoid any negative impacts to power supplies.

Cognizable harm

DEQ's concerns about the costs associated with complying with its legal obligations, set forth in this Court's earlier Order, are not cognizable "harm". DEQ Br. in Supp. of Stay at 6-10 (Nov. 5, 2021). Agencies cannot complain about the burden of following the law. *Northern Plains* is illustrative. There the Court held that the nationwide permitting process used to approve dredge and fill activities associated with certain oil and gas pipelines violated the Endangered Species Act (ESA). 460 F. Supp. 3d at 1034-35. The agency sought a stay pending appeal,

"complain[ing] that, absent a stay, [the agency] will be burdened by having to process an increased number of individual permit applications." *Id.* at 1045, 1048 (noting thousands of pending pipeline preconstruction notices). The Court discounted the agency's complaints because they "resulted from the agency's failure to follow the law in the first instance." *Id.* (quoting *Swan View Coal. v. Weber*, 52 F. Supp. 3d 1160, 1161-62 (D. Mont. 2014)). So too here; DEQ's reticence to comply with the law is no basis for denying vacatur or staying this Court's decision.[5]

Finally, WRM's complaints about losing its investment in operations in the AM4 Area do not change the analysis. First, as noted, deferring vacatur until spring strikes a "reasonable balance" that will provide WRM time to wind down operations in AM4 and move its operations to one of its other approved permit areas. *See Northern Plains*, 460 F. Supp. 3d at 1040; *Northern Cheyenne Tribe*, ¶ 47. Further, the "cost of compliance" with the law, including some "lost profits and industrial inconvenience" are the "nature of doing business" and do not overcome the weighty interests of the rule of law and environmental protection. *Northern Plains*, 460 F. Supp. 3d at 1041 (quoting *Standing Rock Sioux v. U.S. Army Corps of Eng'rs*, 282 F. Supp. 3d 91, 104 (D.D.C. 2017)); *Park Cnty.*, ¶¶ 81-82 (explaining that a

[5] DEQ could have avoided these costs, if, for example, agency management had not prohibited agency and industry experts from reviewing and analyzing the relevant data regarding water quality standards. Order on Petition at 25 n.8; *see Northern Plains*, 460 F. Supp. 3d at 1045 (agency cannot complain of "self-inflicted" harm (quoting *Al Otro Lado v. Wolf*, 952 F.3d 999, 1008 (2020))).

company's right to conduct mining activities is restricted by requirement of a lawful permit and that "some administrative delay" does not infringe property rights). This is especially the case where, as here, the cessation of operations is temporary, and may end when DEQ, in compliance with the law, completes the remand process. *Park Cnty.*, ¶ 82; *League of Wilderness Defs. v. Connaughton*, 752 F.3d 755, 765-66 (9th Cir. 2014) (holding "irreparable environmental injuries outweigh the temporary delay" of economic gains from project).

In sum, the "standard remedy" of vacatur should apply here to assure environmental and constitutional protections and uphold the rule of law. *Park Cnty.*, ¶ 55. And, similar to *Northern Cheyenne Tribe*, ¶ 47, this Court defers vacatur until April 1, 2022, to strike a reasonable balance, allow WRM to wind down operations in AM4, and avoid or mitigate potential negative impacts.

B. Whether Stay Is Warranted

Timing

The Court notes that Respondents have not yet filed an appeal. The prerequisite for a stay pending an appeal is missing—there is no pending appeal. Mont. R. App. P. 22(1)(a)(i) (providing for stay "pending appeal"). "A stay pending appeal is not warranted, since no appeal is currently pending." *Mathis v. Zant*, 708 F. Supp. 339, 340 (N.D. Ga. 1989); *accord, e.g.*, *Gregory v. Baucum*, No. 7:16-CV-00103-BP, 2018 WL 10096597, at *1 (N.D. Tex. Feb. 23, 2018); *Gagan v. Sharer*,

No. CIV 99-1427PHX RCB, 2006 WL 3736057, at *4 (D. Ariz. Nov. 6, 2006); *In re Hayes Microcomputer Prod., Inc. Patent Litig.*, 766 F. Supp. 818, 822 n.2 (N.D. Cal. 1991). Thus, Respondents motions for stay pending appeal are premature.

Consideration of merits

The Court notes that the gravamen of Respondents' arguments is a rehash of arguments rejected by the Court in its previous Order on Petition. Moreover, the Court notes that where a district court's decision rests on alternative grounds, as here, a party cannot demonstrate a strong likelihood of success on the merits without addressing *each* basis to the Court's holding. *State v. English*, 2006 MT 177, ¶ 47, 333 Mont. 23, 140 P.3d 454 ("Failure to challenge each of the alternative bases for a district court's ruling results in affirmance."); *MEIC II*, ¶ 27 (finding single issue sufficient to affirm vacatur of unlawful permit and "declin[ing] to address the other issues" raised by appellants); *Life Spine, Inc. v. Aegis Spine, Inc.*, No. 19 CV 7092, 2021 WL 1750173, at *1-2 (N.D. Ill. May 4, 2021) (denying stay motion that failed to address alternative grounds).

Similarly, a party cannot make a "strong showing" of success on the merits by simply "rehash[ing]" unsuccessful summary judgment arguments. *Friends of Wild Swan v. U.S. Forest Serv.*, No. CV 11-125-M-DWM, 2014 WL 12672270, at *2 (D. Mont. June 20, 2014); *In re Pac. Fertility Ctr. Litig.*, No. 18-CV-01586-JSC, 2019 WL 2635539, at *3 (N.D. Cal. June 27, 2019); *Roman Catholic Archbishop of*

Wash. v. Sibelius, No. 13-1441, 2013 WL 12333208, at *3 (D.D.C. Dec. 23, 2013); *Titan Tire Corp. of Bryan v. Local 890L, United Steelworkers of Am.*, 673 F. Supp. 2d 588, 590 (N.D. Ohio 2009). Thus, Respondents' motions fail because, in addition to being premature, neither addresses *each* of six grounds on which this Court reversed BER's decision. *Compare* DEQ Br. in Supp. of Stay at 11-13 (addressing one ground), *and* WRM Br. on Remedy at 14-17 (addressing only three of six grounds[6]), *with* Order on Petition at 13-34. This alone is fatal. Equally fatal, the arguments which Respondents raise (addressed below in reverse order) merely repeat arguments rejected in this Court's Order on Petition. *See, e.g.*, *Friends of Wild Swan*, 2014 WL 12672270, at *2.

Regarding this Court's substantive rulings on BER's and DEQ's arbitrary analysis of water quality standards (Order on Petition at 28-34), WRM argues that the Court incorrectly applied the "arbitrary and capricious standard," which, WRM suggests, is not permitted by MAPA. WRM Br. on Remedy at 17. WRM is plainly mistaken. MAPA expressly permits a court to reverse an agency decision that is "arbitrary or capricious." Mont. Code Ann. § 2-4-704(2)(a)(vi). Because Respondents must show a strong likelihood of success with respect to *each* of the Court's alternative rulings, *English*, ¶ 47; *MEIC II*, ¶ 27, this is fatal, and the Court

[6] WRM also argues about this Court's ruling related to Montana Code Annotated § 2-4-621, WRM Br. on Remedy at 3, but while this Court rejected WRM's argument on that point, it was not one of the Court's six bases for reversing BER. Order on Petition at 13-34.

need go no further. Nevertheless, Respondents' remaining arguments also miss the mark.

WRM continues to assert its argument that the Conservation Groups' brief in response to the Hearing Examiner's proposed order, which was captioned "objections," was flawed because it was not captioned "exceptions." WRM Br. on Remedy at 16. WRM merely rehashes its already rejected arguments about *Flowers v. Board of Personnel Appeals*, 2020 MT 150, 400 Mont. 238, 465 P.3d 210, and Montana Code Annotated § 2-4-621. *Compare* WRM Br. on Remedy at 16, *with* Order on Petition at 18-20 (rejecting both arguments). WRM's argument is premised on a misstatement of the law. WRM contends that under Mont. Code Ann. § 2-4-621(1) parties "*must* 'file exceptions and present briefs and oral arguments.'" WRM Br. on Remedy at 16 (emphasis added). In fact, the law contains no such mandate, but states only that parties must be "afforded" the "opportunity … to file exceptions and present briefs and oral arguments." Mont. Code Ann. § 2-4-621(1). "Afforded the opportunity" does not mean "must." Further, as this Court noted, "unlike in *Flowers*, the Conservation Groups filed extensive exceptions." Order on Petition at 20; *Flowers*, ¶ 15. As such, *Flowers* is plainly inapposite.

WRM also rehashes its administrative issue exhaustion argument, and fails to address any of the numerous authorities addressed in this Court's ruling. *Compare* WRM Br. on Remedy at 15-16, *with* Order on Petition at 13-17. This constitutes a

failure to make a "strong showing" of likely success on the merits. *Nken*, 556 U.S. at 426. Moreover, contrary to WRM's argument, Conservation Groups argued repeatedly that the claims that BER barred on issue exhaustion grounds arose after the close of the public comment period. BER:84 at 5-7 (motions in limine briefing); BER:94 at 1:25:50 to 1:26:02 (motions in limine hearing); BER:151 at 59:19 to 61:24, 66:1-20 (hearing before the Board).[7] Again, the Court finds that WRM's issue exhaustion argument has no merit.

Likewise, DEQ's and WRM's argument[8] about the burden of proof simply rehash their argument relying on *Montana Environmental Information Center v. DEQ* (*MEIC I*), 2005 MT 96, 326 Mont. 502, 112 P.3d 964,[9] which were already rejected. Order on Petition at 25-28. Notably, Respondents fail to address Montana Supreme Court case law holding that an applicant's (here, WRM's) *statutory* burden to show the lack of adverse environmental impacts does not shift in a contested case. *Id.* at 25 (citing *Bostwick Props., Inc. v. DNRC*, 2013 MT 48, ¶¶ 1, 10-14, 36, 369 Mont. 150, 296 P.3d 1154). When, as here with MSUMRA (but unlike the Clean Air

[7] Conservation Groups also raised the same arguments at the pretrial conference, but the Hearing Examiner failed to properly record that hearing, causing the record to be lost. BER:151 at 66:24 to 67:12.

[8] WRM presents the same rehash of rejected arguments regarding the burden of proof as DEQ. WRM Br. on Remedy at 14-15.

[9] DEQ also cites ARM 17.24.625, DEQ Br. in Supp. of Stay at 13, but that provision addresses "seismograph measurements," which is wholly inapposite.

Act, which was at issue in *MEIC I*), the *statutory* burden is placed on a permit applicant, it does not shift in a contested case, because consistent with the rules of evidence, "the applicant would be defeated if neither side produced evidence." *In re Royston*, 249 Mont. 425, 428, 816 P.3d 1054, 1057 (1991) (rejecting burden-shifting argument); Mont. Code Ann. § 82-4-227(1), (3)(a) (placing "burden" of proof on "applicant"); ARM 17.24.405(6)(c) (*applicant* must "affirmatively demonstrate[]" that "material damage" "will not result"). Nor do Respondents address the SMCRA legislative history confirming that the permit applicant bears the burden of proof on a permit appeal. S. Rep. No. 95-128 at 80 (1977), *cited in* Order on Petition at 25.

Finally, *MEIC I* does not refute but confirms the reasoning of this Court's ruling. *MEIC I* did not hold (as BER did here) that in the contested case the public was required to demonstrate adverse environmental impacts. *MEIC I*, ¶¶ 36, 38. Instead, there, the Court explained that the question for BER was whether "Bull Mountain [the applicant] established that emissions from the proposed project will not cause or contribute to" adverse environmental impacts. *Id.*, ¶ 38. Thus, as this Court held, *MEIC I* does not support BER's decision requiring the Conservation Groups to "establish the existence of water quality standard violations." Order on Petition at 26-28 (quoting BER:152 at 84). Accordingly, Respondents' rehashed burden of proof argument does not constitute a "strong showing" of likely success on the merits. *Nken*, 556 U.S. at 426.

In sum, Respondents' failure to show a strong likelihood of success on each of the six bases of this Courts' decision "dooms the[ir] motion[s]." *In re Silva*, 2015 WL 1259774, at *4

Costs of complying

A party seeking a stay must demonstrate that "irreparable harm is probable, not merely possible." *Doe #1 v. Trump*, 957 F.3d 1050, 1059 (9th Cir. 2020). Here, if, as Conservation Groups request, vacatur is deferred until April 1, 2022, Respondents' concerns about coal and energy supplies will be assuaged. *See supra* Part III.A. Thus, there is no probability Respondents would suffer irreparable harm. As noted, DEQ's concerns about the costs of complying with its legal obligations do not constitute irreparable harm. *Northern Plains*, 460 F. Supp. 3d at 1045; *Rodriguez*, 715 F.3d at 1146. Nor does a temporary delay in economic activity. *Park Cnty.*, ¶¶ 81-82; *Northern Plains*, 460 F. Supp. 3d at 1041; *League of Wilderness Defs.*, 752 F.3d at 766; *L.A. Mem'l Coliseum Comm'n*, 634 F.2d at 1202.

Conversely, a stay would cause substantial injury to the environment, Conservation Groups, and the rule of law. As this Court earlier noted, the waters impacted by AM4 and the Rosebud Mine are impaired for salinity and the cumulative effects of WRM's AM4 mining operations will substantially worsen that impairment. Order on Petition at 6-7, 28-34. DEQ has known of this impairment for over a decade but taken no action to remedy it. *Id.* at 7. Such long-term

environmental harm is irreparable. *See Amoco Prod. Co. v. Vill. of Gambell*, 480 U.S. 531, 545 (1987) ("Environmental injury, by its nature, can seldom be adequately remedied by money damages and is often permanent or at least of long duration, *i.e.*, irreparable. If such injury is sufficiently likely, therefore, the balance of harms will usually favor the issuance of an injunction to protect the environment.").[10] This ongoing pollution, along with WRM's repeated violation of pollution limits, also irreparably harms the Conservation Groups and their members. Hedges Decl. ¶¶ 4-11. Allowing strip-mining to continue despite DEQ's failure to take a hard look at the environmental consequences of the AM4 expansion would violate Montana's constitutional protections and the rule of law. *Park Cnty.*, ¶¶ 72-73; *Mont. Wilderness Ass'n*, 408 F. Supp. 2d at 1038 ("[T]he public interest is best served when the law is followed."); Mont. Const. arts. II, § 3, IX, § 1(1).[11] Thus the equities and the public interest do not support a stay.

IV.CONCLUSION

For the forgoing reasons, the standard judicial remedy, vacatur, is appropriate here; however, to strike an appropriate balance between competing

[10] DEQ admits that the harm from strip-mining is irreparable. *See* Declaration of Martin Van Oort ¶¶ 11, 17 (explaining impacts of strip-mining are "irreversible" and "not possible to revert" to pre-mining state).

[11] Respondents' insinuation that Conservation Groups' decision not to seek preliminary relief somehow limits their ability to obtain relief now is without merit. The Montana Supreme Court has repeatedly approved vacatur in the absence of preliminary relief. *See supra* note 2 (collecting cases).

interests, this Court will defer vacatur of the AM4 permit until April 1, 2022. The Court further concludes that Respondents have not demonstrated that a stay pending appeal is warranted.

Accordingly, it is HEREBY ORDERED:

1. WRM's motion on remedy is DENIED;

2. WRM's and DEQ's motions for a stay pending appeal are DENIED; and

3. The AM4 Permit is VACATED, however vacatur is DEFERRED until April 1, 2022.

DATED this _____ day of _____, 2020.

Signed: _____
Honorable Katherine M. Bidegaray
District Court Judge

Cc: Shiloh Hernandez
Derf Johnson
Walton Morris, Jr.
Roger Sullivan
John Martin
Samuel Yemington
Victoria Marquis
Nicholas Whitaker
Amy Christensen
Dan Eakin

Exhibit J

D.C. Doc. 82A, Declaration of Shannon Brown (Dec. 20, 2021).

Robert L. Sterup
BROWN LAW FIRM, PC
315 North 4th Street
Billings, Montana 59101
406-248-2611
rsterup@brownfirm.com

Joshua B. Frank
(MT Bar No. 59100464)
BAKER BOTTS LLP
700 K Street N.W.
Washington, D.C. 20001
202-639-7700
Joshua.Frank@bakerbotts.com
ATTORNEYS FOR PROPOSED RESPONDENT-INTERVENOR

MONTANA SIXTEENTH JUDICIAL DISTRICT COURT, ROSEBUD COUNTY

MONTANA ENVIRONMENTAL INFORMATION CENTER, and SIERRA CLUB, Petitioners, v. MONTANA DEPARTMENT OF ENVIRONMENTAL QUALITY, MONTANA BOARD OF ENVIRONMENTAL REVIEW, WESTERN ENERGY CO., NATURAL RESOURCE PARTNERS, L.P., INTERNATIONAL UNION OF OPERATING ENGINEERS, LOCAL 400, and NORTHERN CHEYENNE COAL MINERS ASSOCIATION, Respondents, and TALEN MONTANA, LLC, Proposed Respondent-Intervenor.	Case No. DV-19-34 Judge: Hon. Katherine M. Bidegaray **DECLARATION OF SHANNON BROWN**

I, Shannon Brown, declare under penalty of perjury as follows:

1. I am over 18 years of age.

2. I reside in Montgomery County, Texas.

3. I make this Declaration in support of Talen Montana, LLC's ("Talen Montana") Reply Brief in Support of Motion to Intervene as Respondent.

4. I make this Declaration based upon personal knowledge. The basis of my personal knowledge is as follows: Since May 2018, I have served as senior director of asset management at Talen Energy Supply, LLC ("Talen"), an indirect corporate parent of Talen Montana. In that capacity, I have represented Talen Montana on various committees relating to Units 3 and 4 of the Colstrip Steam Electric Station ("Units 3&4"), including committees providing oversight for the supply of coal to Units 3&4 and the operation of Units 3&4. My responsibilities related to coal supply include profit and loss of the power generation, coal supply contract negotiations, managing commercial and contractual issues arising under Talen Montana's coal supply agreement, approving invoices, and otherwise administering the coal supply agreement between Talen Montana and Westmoreland Rosebud Mining, LLC ("Westmoreland"). Through my role, I have gained extensive knowledge and experience regarding Unit 3&4's coal needs and the supply of coal from Rosebud Mine to Units 3&4.

5. I have reviewed the November 18, 2021 declaration of Mr. David Alan Schlissel and identified numerous errors in it with respect to Units 3&4. Select errors are discussed herein. Mr. Schlissel has never been employed at Units 3&4 or conducted any work at the Colstrip Steam Electric Station ("CSES").

Units 3&4 Background

6. CSES is a coal-fired power plant in Colstrip, Montana that depends on coal to generate power. CSES Units 1&2 were retired in early 2020. Units 3&4 are the remaining active coal-fired units, and they each have a net generating capacity of approximately 740 MW. Units 3&4's current capacity is therefore approximately 1,480 MW.

7. Talen Montana is the operator and a co-owner of Units 3&4. Talen Montana's ownership interest is 30% of Unit 3.

8. As operator of Units 3&4, Talen Montana is responsible for day-to-day operations and power generation activities, long-term scheduling and planning, compliance with permits, management of environmental liabilities, and otherwise acting on behalf of the Units 3&4 co-owners.

9. NorthWestern Corporation (d/b/a NorthWestern Energy) is another co-owner of Units 3&4.

10. A significant amount of Talen Montana's and NorthWestern Energy's power generated by Units 3&4 is supplied to Montana customers, including homeowners, commercial and industrial facilities, municipalities, and other customers. As noted above, Units 3&4 collectively can produce 1480 MW, of which approximately 375 to 450 MW are supplied to Montana customers. This is based on my belief that most, if not all, of NorthWestern Energy's share of the energy generated by Units 3&4 is supplied to Montana customers, in addition to the distribution of energy within Montana by Talen Montana's affiliates.

Current Coal Supply and Usage by Units 3&4

11. Rosebud Mine has been and is currently the exclusive supplier of coal to Units 3&4. Units 3&4 typically burn 500,000 to 600,000 tons of coal per month, and during most years is forecasted to burn around 7 million tons of coal per year (Units 3&4 will typically burn less during years with planned outages for maintenance).

12. With respect to Talen Montana's ownership interest in Units 3&4 specifically, Talen Montana and Westmoreland currently have a contract in place through 2025 requiring Westmoreland to supply coal from Rosebud Mine to Units 3&4. The contract is a full requirements contract obligating Westmoreland to supply all coal required by Talen Montana for its interest in Units 3&4. Talen Montana is obligated to purchase from Westmoreland all coal for its interest in Units 3&4, with a limited exception for test burns of coal from other mines.

Impacts of Vacatur of AM4 Permit on Ability to Fuel Units 3&4

13. Without sufficient coal supply of adequate quality from Rosebud Mine to CSES, Units 3&4 will be unable to run at full capacity (or potentially at all). If the coal supply from Rosebud Mine is completely halted, Units 3&4 has only about 25-30 days of coal stored on-site, meaning that Unit 3&4 operations could cease in a month or less.

14. Contrary to Mr. Schlissel's speculation, Talen Montana does not have the ability to materially expand Units 3&4 on-site storage of coal beyond the current supply of 25-30 days. The coal is in a "dead pile" that is covered in a concrete-like crust to prevent release of dust from the coal. The dead pile, which has not been significantly used since 2008, is used for emergency situations only. The amount of coal Units 3&4 can store on the dead pile is physically constrained

based on the size of the storage area. Accordingly, Units 3&4 does not have the ability to stockpile additional coal to accommodate a near-term loss of AM4 coal supply between now and April 2022.

15. Talen Montana's ability to obtain replacement coal for Units 3&4 is extremely limited, and it is very unlikely Talen Montana would be able to obtain any replacement coal even by the end of 2022. Accordingly, merely delaying vacatur of the AM4 permit by four months provides Talen Montana with no additional options to replace its coal supply.

16. First, Talen Montana does not have rail unloading facilities that would enable transport of coal to CSES by rail, and any construction of such facilities would take significant time and would be extremely expensive. Building new rail unloading facilities would take substantially longer than four months; it could take years to get such facilities permitted and constructed. For instance, construction of new facilities and burning of new coal would likely require an amendment to the air permit for Units 3&4, which could also take significant time (again, longer than four months) to obtain. Further, Talen Montana would likely need to do test burns for any new alternative coal source to assess its viability for combustion at Units 3&4.

17. Second, trucking coal to CSES presents other logistical challenges related to transporting large volumes of coal over long distances. In 2019 when Talen Montana was exploring alternative coal sources, Talen Montana calculated that approximately 724 truck trips per day would be required to supply Units 3&4 with coal entirely by truck (i.e., one truck every two minutes). Additionally, as with transporting new coal by rail, transporting new coal by truck would likely require test burns and an amendment to the air permit.

18. Third, contracts for coal and rail deliveries are typically negotiated at least a year or more in advance. Based on my current knowledge of the coal market and railroad capacities

currently, I do not believe there are material volumes for additional coal that Talen Montana could contract to buy and deliver prior to the end of 2022.

19. With respect to coal from other areas of Rosebud Mine, the coal within Rosebud Mine is not interchangeable. Even if Westmoreland is able to relocate its mining operations to other areas of Rosebud Mine (which is questionable for the reasons outlined in the December 6, 2021 Declaration of Russell Batie), it is unclear if Units 3&4 could burn coal from other areas of Rosebud Mine if that coal does not meet the contract specifications. Coal that does not meet contract specifications may disrupt boiler operations and threaten compliance with various permitting obligations. Blending coal from different mine areas is one way Rosebud Mine maintains the coal quality, but if the coal from AM4 cannot be mined and blended with coal from other areas, the resulting coal blend may not be of sufficient quality for Units 3&4.

20. For instance, Westmoreland's Environmental and Engineering Manager Russell Batie has stated that "AM4 is important to the Mine's production because it is a high-quality coal that can be blended with other coal." Batie December 6 Declaration ¶ 11. Area B coal cannot replace AM4 coal because it must be blended with higher quality coal to meet Westmoreland's contractual obligations to Units 3&4 related to coal quality. *See* Batie December 6 Declaration ¶ 9.2. According to Westmoreland, other areas of the mine are not suitable to replace the AM4 coal supply because Westmoreland already planned to mine those areas in the near future in addition to the AM4 area and potentially because mining activities in some of the other areas are also subject to ongoing legal challenges. *See* Batie December 6 Declaration ¶¶ 9.3, 9.4, 10. Thus, without AM4 it is unclear if Westmoreland will be able to supply coal that Units 3&4 can use to operate.

Impacts on Energy Supply if Units 3&4 Cannot Run at Full Capacity

21. As discussed in my prior declaration, there are significant potential impacts to the supply of energy to Montana and the region if Units 3&4 cannot run at full capacity due to a lack of fuel supply. These impacts remain a threat even if the supply of coal from AM4 is not cut off until April 2022.

22. Planned maintenance outages at Units 3&4 do not occur annually and do not occur every spring. Planned maintenance outages are carefully scheduled based on current energy market supply and the need to conduct certain maintenance and construction activities while units are offline. Additionally, Units 3&4 are almost never scheduled for outage at the same time (i.e., their outages are staggered so that one unit remains online at all times). No outage for either unit is currently planned for Spring or Fall 2022. The next planned outage is Unit 4 scheduled for 2024.

23. A "forced" unplanned outage in Spring 2022 due to lack of fuel supply would impact both energy supply and prices in potentially unpredictable ways. Even taking one unit offline in the spring could cause issues due to the 2021 drought that continues to affect the supply of hydropower. Once offline, the Colstrip unit may take at least a full day to come back online. If both units are offline, it may take several days to get both units online.

24. Likewise, although energy demand is typically reduced in the spring as compared to the winter, energy demand surges again in the summer months – as shown by Mr. Schlissel's own Chart 1. It is crucial for both Units 3&4 to be online during the summer months to meet that demand surge.

25. Units 3&4 are important dispatchable energy sources for this energy usage in Montana specifically and the northwest region more generally for all seasons. A dispatchable energy source is one that can be dispatched up and down to meet energy demand.

26. Non-dispatchable energy sources are those like wind and solar, which cannot be turned on and off to meet demand. Their power generation is dependent on external environmental factors. Hydropower is likewise partially dependent on external environmental factors; for instance, droughts will limit the supply of available hydropower.

27. Mr. Schlissel's graph showing the availability of hydropower, notably, shows 2020 rather than 2021. A significant drought in 2021 limited the availability of hydropower in the west and is expected to have impacts on the available supply of hydropower for at least the next year.

28. Solar power currently only supplies a very limited amount of energy within Montana (approximately 17 MW), and is unlikely to be a suitable replacement in the short-term for the approximately 375-450 MW supplied by Units 3&4 within the state of Montana. Transmitting solar power from California, as Mr. Schlissel suggests, may be theoretically possible, but it would be extremely costly and inefficient to move that power.

29. Accordingly, even if there is reduced energy demand in the spring and no unforeseen significant weather events that create a demand surge in the spring months, Montana may still face an energy shortage if the AM4 area cannot be mined further beginning April 2022. This is due to the surge in demand in summer months, the lack of readily available replacement coal, the lack of readily available replacement energy, and the continuing drought limiting the supply of hydroelectric generation.

30. Mr. Schlissel's hypothetical "worst case" scenario – that Talen Montana could operate just one unit for four months and then rely on coal from a new area of the Rosebud Mine

– is therefore not the worst-case scenario. The worst-case scenario is that Units 3&4 don't run all, especially if Westmoreland is not able to supply Units 3&4 with coal of sufficient quantity for significantly longer than four months because it cannot use or blend AM4 coal, and Talen Montana is not able to obtain replacement fuel for Units 3&4 until sometime in 2023 or even later.

31. Further, Mr. Schlissel understates the energy supply impacts of his own "worst case" scenario. Operating just one unit into the summer months – when energy demand increases – may very well be insufficient to meet energy demand in Montana.

Impacts on Price if Units 3&4 Cannot Run at Full Capacity

32. Mr. Schlissel's statement that "Colstrip is the most expensive resource in the portfolio . . . Northwestern Energy" is misleading and incomplete at best.

33. Talen Montana participates in wholesale energy markets where it sells power based on its variable cost to produce power. The variable cost to produce power is based on the current operational cost.

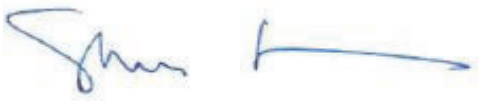
34. The dispatch of power to consumers in the region through the wholesale energy markets is based on the variable costs that power producers bid, with the daily market price determined by supply-demand fundamentals.

35. The variable cost to produce power at Units 3&4 is extremely low – around $20 per megawatt hour (MWh). For comparison, a typical natural gas peaking generation unit with a typical natural gas cost has the variable cost to produce around $45 per MWh. Natural gas generation is a dispatchable resource with more than double the cost of Units 3&4.

36. As a result, Units 3&4 are among the first to get dispatched to meet energy demand, generally running around the clock, and are among the cheapest sources of energy to consumers sold through the wholesale markets.

37. Current 2022 average on-peak power prices in the northwest are almost $60/MWh. Per MWh power prices in the region have already doubled in the past 12 months and are among the highest prices seen in the region in the past 10 years. If Units 3&4 are unable to operate and supply power to the wholesale markets, to the extent replacement power is available, it will be more expensive and result in increased prices to consumers.

Executed this 20th day of December, 2021.



Shannon Brown