IN THE SUPREME COURT OF THE STATE OF MONTANA
No. DA 22-0064

MONTANA ENVIRONMENTAL INFORMATION CENTER and SIERRA CLUB,

Plaintiffs / Appellees,

v.

MONTANA DEPARTMENT OF ENVIRONMENTAL QUALITY,

Respondent / Appellant,

and

WESTERN ENERGY CO., NATURAL RESOURCE PARTNERS L.P., INTERNATIONAL UNION OF OPERATING ENGINEERS, LOCAL 400, and NORTHERN CHEYENNE COAL MINERS ASSOCIATION,

Respondent-Intervenors / Appellants,

and

MONTANA BOARD OF ENVIRONMENTAL REVIEW

Respondent / Appellant

MONTANA DEPARTMENT OF ENVIRONMENTAL QUALITY'S OPENING BRIEF

On Appeal from the Montana Sixteenth Judicial District Court, Rosebud County, Cause No. DV 19-34, the Honorable Katherine M. Bidegaray Presiding

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LIST OF ABBREVIATIONS

AM4	Westmoreland's fourth amendment to its Area B permit for the Rosebud Mine.
BER	Montana Board of Environmental Review
CHIA	Cumulative Hydrological Impact Assessment
DEQ	Montana Department of Environmental Quality
DNRC	Montana Department of Natural Resources and Conservation
EFAC	East Fork Armells Creek
FOFCOL	Findings of Fact and Conclusions of Law
IBLA	United States Interior Board of Land Appeals
MAPA	Montana Administrative Procedure Act
MCAA	Montana Clean Air Act
MEIC	Montana Environmental Information Center
MSUMRA	Montana Strip and Underground Mine Reclamation Act
MWUA	Montana Water Use Act
MWQA	Montana Water Quality Act.
PRBRC	Powder River Basin Resource Council
SMCRA	Surface Mine Control Reclamation Act
TDS	Total Dissolved Solids
TDML	Total Daily Maximum Load
WDEQ	Wyoming Department of Environmental Quality
WEQC	Wyoming Environmental Quality Council

ISSUES PRESENTED FOR REVIEW

1. Does the party challenging Appellant/Respondent Montana Department of Environmental Quality's ("Department" or "DEQ") permitting decision under the Montana Strip and Underground Mine Reclamation Act ("MSUMRA") bear the burden of proof in a contested case before the Montana Board of Environmental Review ("BER" or "Board")?

2. Were Appellee/Petitioners Montana Environmental Information Center and Sierra Club (collectively, "MEIC" or "Conservation Groups") required to exhaust all administrative remedies available within DEQ's MSUMRA permitting process?

3. Can DEQ present evidence and argument on all issues involved in a contested case proceeding?

4. Did BER correctly affirm DEQ's determination that Appellant/Respondent-Intervenor Westmoreland Rosebud Mining, LLC's ("Westmoreland") proposed permit amendment satisfied the material damage standard?

5. Did the district court exceed its statutory authority provided by § 82-4-251(7), MCA when it determined it could award MEIC attorney's fees against DEQ for both administrative and district court proceedings?

6. Was the district court's award of $862,755 in attorney's fees against DEQ reasonable?

STATEMENT OF THE CASE

I. DEQ's permitting decision.

Westmoreland operates the Rosebud Mine, which is a 25,752-acre coal strip-mine located in Colstrip, Montana. AR152:9. The Rosebud Mine is the sole provider of coal to the Colstrip electric generating units. DC Doc. 82, ¶10. Rosebud Mine Area B was originally permitted on January 18, 1978. AR95: Ex. 1 at 1. A total of three amendments to the original permit area have been previously approved. *Id*.

On June 15, 2009, Westmoreland applied to DEQ for its fourth amendment to its Area B permit ("AM4"). AR95: Ex. 1 at 1.[1] Between 2009 and 2015, DEQ and Westmoreland engaged in correspondence that included eight deficiency letters regarding the AM4 application, which were publicly available. *Id.* at 2–4; § 82-4-231(8)(a), MCA (permitting DEQ to "propose modifications to the application or delete areas from the application" when DEQ is determining the acceptability of the application). On July 8, 2015, DEQ determined the AM4 application was acceptable. AR95: Ex. 1 at 4.

[1] Citations to the administrative record in this brief use this format: "AR" followed by the document number corresponding with the administrative record index, and if necessary, a colon and the appropriate pincite.

On this same day, DEQ published a notice of acceptability to the interested parties as well as having this notice published in the Billings Gazette. *Id*. DEQ is required to "publish notice of its [acceptability] determination once a week for 2 consecutive weeks in a newspaper of general circulation in the locality of the proposed operation." Section 82-4-231(8)(e), MCA. Within 10 days of DEQ's last published notice, "[a]ny person having an interest that is or may be adversely affected may file a written objection to the determination[.]" *Id*.

On August 3, 2015, MEIC filed its objections to DEQ's acceptability determination for AM4. AR95: Ex. 4. MEIC identified three distinct issues of concern with the AM4 permit: (1) the level of total dissolved solids ("TDS")[2] in the East Fork Armells Creek ("EFAC"), *id.* at 6–7; (2) nitrogen levels in EFAC, *id.* at 5–6; and (3) aquatic life use of EFAC, *id*. at 3.

Under § 82-4-231(8)(f), MCA, DEQ has 45 days from the date the application is determined acceptable to issue its written findings granting or denying the permit. These written findings include a cumulative hydrological impact assessment ("CHIA"), which determines "whether the proposed operation has been designed to prevent material damage to the hydrologic balance outside the permit area." ARM 17.24.314(5). On December 4, 2015, DEQ issued its

[2] "TDS, which is simply a measure of the total weight of dissolved solids in a liter of water, serves as the most reliable way to measure salinity in water." AR152:31.

written findings, AR95: Ex. 1, and its CHIA, AR95, Ex. 1A, approving the AM4 permit. In its written findings, DEQ responded to the substance of MEIC's objections. AR95: Ex. 1 at 8–14.

II. Proceedings before BER.

Under § 82-4-206(1) & (2), MCA, a "person with an interest that is or may be adversely affected" by DEQ's approval of a MSUMRA permit may request a hearing before BER, which is conducted as a contested case proceeding under the Montana Administrative Procedure Act ("MAPA"). On January 4, 2016, MEIC filed its notice of appeal to BER of DEQ's approval of the AM4 permit. AR1. Westmoreland filed for intervention in the AM4 contested case proceeding, AR3, which BER granted, AR4.

On June 15, 2016, MEIC moved for summary judgment, AR15, which BER denied on December 9, 2016, and referred the AM4 proceeding for a hearing before a hearing examiner, AR152:4.

In preparation for hearing, the parties filed five motions *in limine* concerning, among other things, whether MEIC had adequately exhausted certain issues before DEQ to preserve that issue on appeal, AR74; AR75, whether DEQ's expert Dr. Emily Hinz could testify on aquatic life in EFAC, AR76, and whether DEQ and Westmoreland could present evidence and argument in support of DEQ's written findings granting the AM4 permit, AR77.

The hearing examiner issued an order on these motions *in limine* that clarified MEIC would be limited to addressing issues raised in their objections before DEQ, and Westmoreland and DEQ could "explain and support the CHIA and written findings, with expert testimony as needed." AR103:5. This order further elaborated neither DEQ nor Westmoreland "may make arguments or present evidence that is entirely new, or which it cannot tie back to the administrative record before DEQ at the time of the permitting decision." AR103:5.

As a result of this order, MEIC was limited to addressing three issues at hearing: (1) the material damage determination regarding increased TDS levels in EFAC; (2) the material damage determination regarding increased nitrogen levels in EFAC; and (3) the material damage determination regarding aquatic life use of EFAC. AR152:5. The hearing examiner's order on motions *in limine* also clarified "[a]ll the parties agree that at the hearing on this issue MEIC has the burden to prove by a preponderance of the evidence that the AM4 permit, and the corresponding CHIA, were not 'designed to prevent material damage.'" AR103:3.

A four-day contested case hearing was held March 19 through 22, 2018. AR152:6. The hearing examiner heard testimony from the three parties and their witnesses. AR152:6. After the conclusion of the hearing, the parties filed proposed

findings of fact and conclusions of law ("FOFCOL"), AR121; AR122; AR23, and responses to the other parties proposed FOFCOLs, AR129; AR130; AR131.

On April 11, 2019, pursuant to § 2-4-621(2), MCA, the hearing examiner issued their proposed FOFCOL recommending BER affirm DEQ's approval of the AM4 permit. AR134:90. The hearing examiner also issued an order explaining exceptions to the proposed FOFCOL could be filed by any party adversely affected by the proposed FOFCOL as contemplated by § 2-4-621(1), MCA. AR135. Westmoreland and DEQ filed exceptions to the hearing examiner's proposed FOFCOL for the purposes of clarity and accuracy. AR139; AR140. MEIC filed objections to the hearing examiner's proposed FOFCOL, which did not include exceptions to individual findings of fact or conclusions of law. AR141.

On May 31, 2019, BER heard oral argument on the hearing examiner's proposed FOFCOL and the parties' exceptions and objection. AR151. On June 6, 2019, BER adopted the bulk of the hearing examiner's proposed FOFCOL and issued its order affirming DEQ's approval of the AM4 permit AR152:85–86

III. Proceedings before the district court.

A. Merits and remedy.

On July 17, 2019, MEIC filed a petition for judicial review under § 2-4-702, MCA, challenging BER's order. DC Doc. 1. The parties fully briefed the merits

issues in this case, DC Docs. 43, 45, 47, 54–55, and the district court held oral argument on December 16, 2020, DC Doc. 67.

After oral argument, the parties filed proposed orders on December 23, 2020. DC Docs. 69–70. On October 28, 2021, the district court issued its order on petition for judicial review, which is nearly identical to MEIC's proposed order. *Compare* DC Doc. 79 *with* DC Doc. 70.

Identifying that the district court's order on petition for judicial review did not include a clear remedy, DEQ and Westmoreland filed motions requesting the district court clarify the effect of its order on petition for judicial review; these motions also requested a stay of the district court's order on petition for judicial review pending appeal. DC Docs. 81, 84. MEIC opposed DEQ's and Westmoreland's motion for stay and clarification. DC Doc. 89. Westmoreland and MEIC also filed proposed orders on remedy and stay. DC Docs. 69, 70.100.

On January 27, 2022, the district court issued an order vacating the AM4 permit effective April 1, 2022, and denied DEQ's and Westmoreland's request for stay pending appeal, which is nearly identical to MEIC's proposed order. *Compare* DC Doc. 107 *with* DC Doc. 91.

On February 3, 2022, Westmoreland filed a notice of entry of order on remedy and stay and on February 12, 2022, DEQ and Westmoreland filed notices

of appeal of the district court's order on petition for judicial review and order on remedy and stay.

B. Attorney's fees.

On December 13, 2021, MEIC filed a motion for costs and attorney's fees in this case invoking 30 USC § 1275(e) and ARM 17.24.1307(1) rather than § 82-4-251(7), MCA, which explicitly authorizes a district court to award attorney's fees in MSUMRA cases. DC Doc. 97 at 6.

On January 18, 2022, DEQ and MEIC jointly agreed to stay briefing on attorney's fees to discuss possible settlement, DC Doc. 105, which the district court granted, DC Doc. 107. On March 8, 2022, MEIC requested that the stay be lifted ending settlement negotiations between the two parties. Doc. 120.

On March 25, 2022, DEQ filed its answer brief responding to MEIC's motion for attorney's fees arguing that the plain text of § 82-4-251(1), MCA limited the district court determination on attorney's fees to district court proceedings and precluded any determination district court on the attorney's fees stemming from BER proceedings. DC Doc. 121.

In its March 30, 2022 order, this Court temporarily stayed the district court's order on remedy and remanded this case back to the district court to address attorney's fees. On April 8, 2022, MEIC filed its reply brief arguing the district

court could determine both fees resulting from district court and BER proceedings notwithstanding the text of § 82-4-251(7), MCA. DC Doc. 124 at 6.

Both parties provided proposed orders on the scope of the district court's determination of attorney's fees. DC Docs. 123A, 128. On April 21, 2022, the district court again adopted MEIC's proposed order without any meaningful modification. *Compare* DC Doc. 128 *with* DC Doc. 129. In this order, the district court gave DEQ two business days to produce its expert report on the reasonableness of attorney's fees in this case for both BER and district court proceedings. Even with the short deadline imposed by the district court, DEQ produced an expert report by Maxon Davis on April 25, 2025, but with the caveat that the attorney's fees requested by MEIC for the BER proceeding were not fully addressed by Mr. Davis in the two-day period provided by the district court. DC Doc. 137.

On May 6, 2022, the district court held a hearing on the reasonableness of MEIC attorney's fees via Zoom. Prior to the hearing date, the district court informed the parties that they would be limited to two hours to conduct this hearing. App. D, Attach. A at 12.

Randall Bishop was MEIC's sole witness at the evidentiary hearing. Through cross examination, it was revealed that Mr. Bishop was unfamiliar with many of the hours claimed by MEIC's attorneys in this case. *See, e.g.*, Hr'g Tr. at

48:1–7 (May 6, 2022) (Mr. Bishop describing counsel's questions about MEIC's time entries as "quibbling about details"). MEIC attempted to offer Mr. Hernandez as a witness to explain his various time entries, but at this juncture, MEIC had already taken up one hour of the allotted two hours for the hearing with Mr. Bishop, and DEQ asserted that it would need at least an hour to present its witness. *Id.* at 49:21–50:6. Instead of requiring DEQ to take up its allotted time cross examining another one of MEIC's witness, the district court allowed DEQ to address its concerns with MEIC's time logs in a proposed order. *Id.* at 50:7–15. DEQ's proposed order identified, among other things, that MEIC had errantly claimed hours against DEQ for time its attorneys spent responding to a Westmoreland motion that both MEIC and DEQ had opposed. App. D at 20.

In issuing its order on the reasonableness of fees, the district court disregarded the portion of DEQ's proposed order identifying errors in MEIC's time logs and again adopted MEIC's proposed order but with a small modification to the hourly rate provided to two of MEIC's attorneys. *Compare* App. C *with* DC Doc. 139. The order issued by the district court awarded MEIC $896,030.25 in attorney's fees and costs against DEQ with an hourly rate of $350/hour for Shiloh Hernandez, Roger Sullivan, and Walton Morris and $225/hour for Derf Johnson and Laura King.

This appeal followed.

FACTS

I. The AM4 Permit.

AM4 proposes the following changes to the Area B permit: a 49 acre increase in the area permitted; a 146 acre increase in the proposed amount of surface disturbance limit; 8.6% increase in the minable coal reserve; 306 more acres of coal removal or 8.3% increase in the amount of coal aquifer disturbed; re-calculation of the performance bond to account for current practices and future conditions; and changes to the post mine topography. AR95: Ex. 1 at 3. Mining and reclamation operation under AM4 will not deviate substantially from what was previously approved for the Rosebud Mine. *Id*.

II. East Fork Armells Creek ("EFAC").

EFAC is an ephemeral to intermittent stream that flows through the Rosebud Mine. AR152:19; AR95: Ex. 1A at 13-1 (providing a map of EFAC in comparison to the Rosebud Mine). EFAC is divided into two sections: (1) the upper section of the EFAC originates upstream of the Rosebud mine and continues through the mine and downstream past the mine permit area to the Highway 39 bridge and (2) the lower section stretches from the Highway 39 bridge to EFAC's confluence with Yellowstone River west of Forsyth, Montana. AR152:19–20.

The lower portion of EFAC has lower quality water than the upper portion of the creek. AR152:20. In the lower portion of EFAC, increased levels of TDS,

nitrogen, and other constituents are influenced by "cattle grazing, agriculture, fertilizer from residential lawns, fertilizer from a commercial golf course, and discharges from a municipal water treatment plant" rather than coal mining operations. AR152:22–23.

III. Impairment.

DEQ's Water Quality Planning Bureau, which includes the Water Protection Bureau, assesses Montana waters pursuant to Section 303(d) of the federal Clean Water Act every two years and produces a list of impaired waters which is included in a biennium integrated report to EPA. *See generally MEIC v. Mont. DEQ*, 2019 MT 213, ¶40, 397 Mont. 161, 451 P.3d 493. [3] EFAC is designated as a C-3 surface water, AR152:18, which requires it to be "suitable for bathing, swimming, and recreation, and growth and propagation of non-salmonid fishes and associated aquatic life, waterfowl, and furbearers." ARM 17.30.629(1). Beginning in 2006, EFAC has been listed on DEQ's 303(d) list as impaired for the function of aquatic life support. AR152:24.

DEQ's Water Quality Planning Bureau has not completed a remedial plan—called a Total Maximum Daily Load ("TMDL")—to correct the water quality violations identified in EFAC. AR152:25. Because no TMDL has been prepared,

[3] While DEQ's Coal Section considers impairment determinations, it does not make impairment determinations or have any responsibilities connected to these determinations. AR152:24.

DEQ's Water Quality Planning Bureau has not calculated and assigned pollution limitations calculated to bring EFAC back into compliance with water quality standards. AR152:26.

The impairment analysis for EFAC is divided into the upper and lower portions of the creek.

A. Upper EFAC impairment.

For the upper portion, DEQ issued its assessment record in 2006. AR125:26. This assessment record "identifies '[a]lteration in stream-side or littoral vegetation covers' as the cause, with surface mining identified as a possible, but unconfirmed source of the alteration." AR125:27. When the permitting process for AM4 began, DEQ was aware that the impairment status of the upper portion of EFAC had been attributed to surface mining. AR152:27. An investigation in the AM4 permitting process revealed mining could not be the source of alteration of streamside vegetation. AR125:27. Because mining near EFAC was never within 300 feet of the creek, AR152:27, DEQ determined the Rosebud Mine could not be the source of the alterations in streamside vegetation. AR152:28.

B. Lower EFAC impairment.

In 2008, the DEQ Water Quality Planning Bureau evaluated the lower portion of EFAC to determine if that portion of the creek was meeting applicable water quality standards. AR152:28. That assessment record determined, with low

confidence, the causes of the impairment were, among other things, specific conductance[4] and TDS. AR152: 28. That same attainment record also identified coal mining as one unconfirmed source of pollution along with agriculture and transfer of water from an outside watershed. AR152:28. Typically, the Water Quality Planning Bureau lists impairment causes with low confidence, indicating that additional investigation is needed, before drawing conclusions about the impairment cause. AR152:29. A possible source of impairment is not usually confirmed until the next phase of the assessment process, which is development of a TMDL. AR152:29.

On the issue of specific conductance, the assessment record states values in EFAC "do not appear to be vastly different from other drainages in the region; however, the probable impact from municipal sources and industrial pond seepage cannot be ignored." AR152:29. In its findings, DEQ's Coal Section further examined the possible impacts of mining on EFAC to determine if mining was the source of impairment. AR152:29–30. Rather than mining, DEQ's findings identify "the town of Colstrip, discharges from the water treatment plant, infiltration and runoff from the golf course, agriculture, and grazing as sources of nitrogen, specific conductance, and TDS in Lower EFAC." AR152:30; Hr'g Tr. Vol 2 at

[4] Specific conductance, which is a measure of how well water can conduct an electrical current, is a proxy for the salinity of water. AR152:23–24, 31–32.

231:9–232:24 (AR116). Because mining is not a significant contributor of conductivity, nitrogen, or TDS in the lower portion of EFAC, "DEQ concluded that mining is not a likely cause of the impairment [in the lower portion of EFAC]." AR152:30.

IV. Impacts of AM4 on EFAC.

To the extent mining has the potential to impact the water quality and quantity in EFAC, potential sources are (1) spoil[5] replacing pre-mine aquifers that contributed to baseflow, AR95: Ex. 1A at 9-55–9-56, and (2) the reduction of water runoff and flow delivered to EFAC through temporary removal of EFAC's ephemeral tributaries by mining and operational sediment ponds, *id.* at 9-8. Because the spoils include broken up rocks containing more reactive surfaces than the earth that existed prior to disturbance (which increases the exchange of ions with water), mining can increase concentrations of dissolved solids in an area. AR152:17. Once water levels in the spoil recover to around their pre-mining conditions, some of the increased TDS in the spoil can move down through the

[5] "Strip mining at the Rosebud Mine ... consists of topsoil salvage, overburden removal to expose the coal seam, and removal of the coal seam. Blasting is used to fracture overburden prior to removal by the dragline. Once exposed, the Rosebud coal seam is blasted to fragment it for removal by electric shovel or loader. Haul trucks deliver the coal to the conveyor terminal and the coal is transported via conveyor to the Colstrip power plant. Overburden from each successive cut is used to backfill the previous cut. Overburden backfill material is commonly referred to as spoil." AR95: Ex.1A:3-2.

hydrological system either to bedrock units outside of the mine or towards the alluvia aquifer associated with EFAC. AR152:17–18.

Understanding this interaction between spoil and water, DEQ asked Westmoreland to produce an addendum to its analysis of probable hydrological consequences to anticipate possible changes in salinity in EFAC because of AM4. AR95: Ex. 1A at 2-7. This addendum modeled the EFAC alluvium and found the cumulative impacts of mining areas A and B (with AM4 included) "is expected to experience a 13% increase over the baseline TDS[.]" *Id.* at 9-33. Even though the EFAC alluvium would experience this increase in TDS, DEQ found material damage to the EFAC alluvium is not indicated, *id.* at 9-33, because, among other things, (1) 13% increase in conductivity would not change the groundwater class, *id.* at 9-31, and (2) any mine related water quality changes are not likely to be distinguishable from natural variations, *id.* at 9-33; *accord* AR152:38–39, 64.

While any mine related impacts on water quality from AM4 are likely to be so small as to be indistinguishable from natural variations, DEQ did acknowledge this small amount of TDS attributable to mining may persist longer into the future as a result of AM4 (*i.e.*, AM4 may impact the duration of salt in EFAC). AR152:37–38. Because AM4 will produce additional spoils, the interaction between water and ions in the spoil will continue to have the same minimal impact—indistinguishable from natural variations—on TDS levels in EFAC for a

potentially longer period. Hr'g Tr. Vol. 2 at 188:7–19. Thus, the *status quo* of negligible TDS in EFAC from mining may persist longer because of AM4. This calculation of duration, however, is uncertain because, for an interaction that occurs on such a long timescale, "[i]t's very hard to give exact numbers for spoil recovery." AR152:68–70, n.4.

To evaluate AM4's impacts, DEQ also examined aquatic life surveys conducted in the upper portion of EFAC. AR152:43–53. In particular, DEQ compared surveys of macroinvertebrate species conducted in the 1970s with a similar survey conducted in 2014. AR152:43–46. Based on this comparison, DEQ determined the taxa (*i.e.*, diversity)[6] of macroinvertebrates in the upper portion of EFAC remained consistent between the 1970s and 2014, demonstrating 50 years of mining had not adversely impacted the community of these species in this area. AR152:49–50.

In addition to examining salinity and aquatic life in EFAC, DEQ examined other physical, chemical, and biological data in its 414-page CHIA, AR95: Ex. 1A, in arriving at its conclusion AM4 is designed to prevent material damage as defined by Montana law, which BER affirmed, AR152:85–86.

[6] Taxa richness is essentially a count of the number of distinct species in the water. AR95: Ex. 7 at 3.

STANDARD OF REVIEW

I. Judicial review of agency action.

MAPA provides the standards of review applicable to judicial review of an agency decision in a contested case. Section 2-4-704, MCA. This Court applies "the same standards of review that a district court applies[.]" *Whitehall Wind, LLC v. Mont. PSC.*, 2015 MT 119, ¶8, 379 Mont. 119, 347 P.3d 1273. "This Court reviews an administrative decision in a contested case to determine whether the agency's findings of fact are clearly erroneous and whether its interpretation of the law is correct." *Vote Solar v. Mont. PSC*, 2020 MT 213A, ¶35, 401 Mont. 85, 473 P.3d 963.

Montana courts may not substitute their judgment for that of the agency as to the weight of the evidence on questions of fact. Section 2-4-704(2), MCA. "A finding of fact is clearly erroneous if it is not supported by substantial evidence in the record, if the fact-finder misapprehended the effect of the evidence, or if a review of the record leaves the court with a definite and firm conviction that a mistake has been made." *Northwestern Corp. v. Mont. PSC*, 2016 MT 239, ¶26, 385 Mont. 33, 380 P.3d 787.

"The agency's experience, technical competence, and specialized knowledge may be utilized in the evaluation of evidence." Section 2-4-612(7), MCA. "We therefore defer to consistent, rational, and well-supported agency decision-

making." *MEIC*, 2019 MT 213, ¶26. "Montana courts do not defer to incorrect or unlawful agency decisions; an agency's action within permissible statutory bounds is lawful and deserves deference." *Id.*, ¶22. "Where the agency's interpretation of its rule or regulation is within the range of reasonable interpretation, it is lawful and deserves deference." *Id*.

The court may reverse or modify an agency decision if the substantial rights of the appellant have been prejudiced because the agency's decision exceeds its statutory authority, is made upon unlawful procedure, is affected by legal error, is clearly erroneous in light of the whole record, is arbitrary or capricious, or is characterized by an abuse of discretion. Section 2-4-704(2)(a)(ii)–(vi), MCA.

II. Attorney's fees.

"Montana generally follows the American Rule regarding attorney fees, 'where each party is ordinarily required to bear [their] own expenses absent a contractual or statutory provision to the contrary.'" *King v. State Farm Mut. Auto. Ins. Co.*, 2019 MT 208, ¶11, 397 Mont. 126, 447 P.3d 1043. In evaluating requests for attorney's fees, Montana courts first look to whether legal authority exists to award attorney's fees. *Folsom v. City of Livingston*, 2016 MT 238, ¶13, 385 Mont. 20, 381 P.3d 539. If legal authority exists, *id.*, then the district court may exercise discretion in determining a reasonable amount of attorney's fees, which "must be based on competent evidence" after holding a hearing and considering "testimony

and evidence submitted by the parties." *DiMarzio v. Crazy Mt. Constr., Inc.*, 2010 MT 231, ¶54, 358 Mont. 119, 243 P.3d 718.

SUMMARY OF THE ARGUMENT

In arriving at the conclusion that BER improperly affirmed DEQ's approval of the AM4 permit, the district court upended several well-established principles of administrative law. First, it departed from this Court's precedent in *MEIC v. Mont. DEQ*, 2005 MT 96, ¶¶10–16, 326 Mont. 502, 112 P.3d 964, that the party seeking to overturn DEQ's permitting decision bears the burden of proof in a contested case proceeding before BER. DC Doc. 79 at 25–28. Second, it decided that the doctrine of exhausting administrative remedies did not apply in this case, *id.* at 13–17, in violation of § 2-4-702, MCA, which states "a person who has exhausted *all administrative remedies* available within the agency ... is entitled to judicial review[.]" (Emphasis added.) Third, it contravened the plain text of § 2-4-612(1), MCA, when it decided DEQ could not present argument and evidence in a contested case proceeding to explain its material damage assessment regarding salinity. DC Doc. 79 at 22.

The district court's reasoning on these three issues places DEQ in a nearly impossible predicament. For instance, the district court's order assigns DEQ the burden of proof, yet DEQ cannot present explanatory evidence in a contested case because, according to the district court, it is supposed to rely exclusively on the

materials provided in its permitting decision. It's unclear how DEQ could satisfy its burden (or why it would be assigned with this task) if its role in a contested case proceeding is strictly limited to reiterating the findings from its permitting decisions. *MEIC*, 2005 MT 96, ¶14 ("the party asserting a claim for relief bears the burden of producing evidence in support of that claim."). Further exacerbating this conundrum, under the district court's reasoning, MEIC is excused from the exhaustion doctrine in the permitting process before DEQ and may present new and novel arguments attacking DEQ's permitting decision on appeal. Such a scenario would preclude DEQ from responding to MEIC's new, novel arguments on appeal, practically guaranteeing DEQ will not adequately respond to petitioner's arguments.

MSUMRA and MAPA, of course, do not set up DEQ for failure. While DEQ acknowledges it may not present completely brand-new rationale on appeal to defend its permitting decision, MEIC, too, should be limited to presenting argument on issues addressed in the objection period before DEQ. To this end, the hearing examiner's order on motions *in limine* strikes the appropriate balance between allowing parties to present evidence and argument in a contested case proceeding, while at the same time tethering DEQ to its initial decision and MEIC to its initial objections. AR103:5. This order on motions *in limine*, and the resulting

Board order, accordingly, should be upheld as adhering to well-established principles of administrative law.

On substance, BER's order finding that AM4 is designed to prevent material damage should also be affirmed. It correctly found AM4 would not cause violations of water quality standards because mining occurring under the permit would not increase the magnitude of salinity in EFAC. AR152:69–70. Further, BER properly found a consistent community of macroinvertebrates in the upper portion of EFAC between the 1970s and 2014, among other sources of data, demonstrates there would be no material damage to the aquatic life uses of EFAC from the AM4 amendment. AR152:52.

Rather than accepting BER's well-supported factual findings, the district court injects the requirements of the Montana Water Quality Act ("MWQA") into MSUMRA to convert its reweighing of evidence into analysis under the arbitrary and capricious standard. DC Doc. 79 at 28–34. But this Court's recent decision in *Clark Fork Coalition v. Mont. DNRC*, 2021 MT 44, ¶36, 403 Mont. 225, 481 P.3d 198, demonstrates that it is improper to conflate the purpose and requirements of the MWQA with other bodies of law. The MWQA and MSUMRA have separate and distinct purposes because MSUMRA exists to prevent material damage caused "by coal mining[,]" § 82-4-231, MCA, whereas the impairment requirements of the

MWQA exist "to improve the quality of the impaired water." *MEIC*, 2019 MT 213, ¶40.

Indeed, it would be nonsensical to expect DEQ to improve EFAC's impairment status through this AM4 permit when the record is clear that any mine related water quality changes are so small that they are *indistinguishable* from natural variations, AR95: Ex. 1A at 9-33; AR152:64, and the impairment status of the lower portion of EFAC is likely attributable to other downstream sources such as agricultural and municipal sources, AR152:22–23; Hr'g Tr. Vol. 2 at 230:9–232:24 (AR116). This Court should, therefore, affirm BER's finding that AM4 is designed to prevent material damage.

If this Court reaches the question of attorney's fees, a brief review of § 82-4-251(7), MCA will reveal that the district court exceeded its statutory authority in awarding attorney's fees for both district court and BER proceedings, which is probably why MEIC failed to mention this statute in its petition for attorney's fees. DC Doc. 97. Additionally, the district court in its reasonableness determination failed to modify MEIC's time logs which, among other things, unjustly request fees against DEQ for time MEIC's attorneys spent opposing a motion filed by Westmoreland that *both DEQ and MEIC opposed*. This problem is pervasive in that much of the time MEIC spent litigating this case was in response Westmoreland, but MEIC did not seek attorney's fees against Westmoreland and

the district court permitted MEIC to recover fees against DEQ for time MEIC spent responding to Westmoreland's filings. The district court refusal to correct the errors in MEIC's time logs is an abuse of discretion and should be reversed.

ARGUMENT

I. Montana law controls.

Montana, under the auspices of the federal Surface Mine Control Reclamation Act ("SMCRA"), implements MSUMRA through a system of cooperative federalism in which state programs approved by the U.S. Secretary of Interior assume exclusive jurisdiction over the regulation of surface coal mining and reclamation operations within its borders. 30 USC § 1253(a); 30 CFR §§ 926.10 to 926.30. At various points in its order, the district court finds that federal law and procedure applicable to SMCRA controls MSUMRA procedure. DC Doc. 79 at 14, n.3 (implying federal law applicable to SMCRA overtakes Montana administrative law on the issue of exhaustion), 25 (the same for burden of proof). This is incorrect.

The federal district court of Montana has already resolved this issue by rejecting MEIC's prior effort to bring a citizen suit under SMCRA to compel DEQ to comply with SMCRA. *MEIC v. Opper*, 2013 U.S. Dist. LEXIS 29184, *3 (D. Mont. Jan. 22, 2013), *aff'd on other grounds* 766 F.3d 1184 (9th Cir. 2014). Recognizing that SMCRA operates under a system of cooperative federalism, the

federal district court found Montana law controls in the context of issuing a CHIA—not SMCRA: "Plaintiffs have appropriate state remedies. State administrative and judicial review are available for coal mine permits." *MEIC*, 2013 U.S. Dist. LEXIS 29184 at *13 (citing § 82-4-205(2), -206, MCA); *id.* ("Montana is a primacy state and the federal government has not asserted its authority to disturb *Montana's exclusive jurisdiction* granted by SMCRA.") (emphasis added).

The district court's order fails to identify a single instance in which a state with primacy has been required to yield its exclusive jurisdiction to federal caselaw or statute pertaining to SMCRA in a state coal regulation proceeding. And to the contrary, federal courts have routinely rejected other efforts to foist SMCRA's substance on state coal programs. *Bragg v. W. Va. Coal Ass'n*, 248 F.3d 275, 295 (4th Cir. 2001) (rejecting the argument "the national minimum standards set out in SMCRA retain operative force against West Virginia."); *M.L. Johnson Family Props. v. Zinke*, 298 F. Supp. 3d 1014, 1023 (E.D. Ky. 2018) ("SMCRA should not be interpreted as preempting [state] common law rights of entry.").

This Court should, accordingly, reaffirm a federal district court's finding that Montana has exclusive jurisdiction to enforce its coal regulations and reject MEIC's persistent efforts to smuggle SMCRA's substance and procedure into MSUMRA.

II. The party seeking to challenge DEQ's permitting decision has the burden of proof in a contested case proceeding before BER.

A. This Court has already resolved this issue in *MEIC*, 2005 MT 96.

As described in DEQ's reply in support of its motion to stay, the district court's analysis on the burden of proof fundamentally errs in confusing the relative burdens in the permitting process before DEQ and the administrative review of that permit process that occurs before BER. In the permitting process, DEQ and the applicant undoubtedly have the burden of demonstrating the application satisfies the relevant legal requirements. Section 82-4-227(1), MCA (under MSUMRA, a permit "*may not be approved by the department unless* ... the applicant has affirmatively demonstrated that ... [a number of environmental controls] can be carried out consistently with the purpose of this part")(emphasis added). But once DEQ has determined that the application is sufficient, the burden then shifts to the party claiming that the permit was unlawfully issued. *Missoula County Sch. Dist. v. Anderson*, 232 Mont. 501, 503, 757 P.2d 1315, 1317 (1988) ("When confronted with reviewing an administrative decision ... this Court recognizes that a rebuttable presumption exists in favor of the agency's decision and that the burden of proof is on the party attacking it to show that it is erroneous.").

This process is precisely what happened in *MEIC*, 2005 MT 96, which concerned a permit DEQ granted under Clean Air Act of Montana ("MCAA"). The district court attempts to distinguish *MEIC*, 2005 MT 96, from the present case by

reasoning "unlike MSUMRA, the [MCAA] … has no provision allocating the burden of proof to the permit applicant." DC Doc. 79 at 27. But that simply isn't true. In *MEIC*, 2005 MT 96, this Court said "[t]he Department *may not* issue an air quality permit unless the applicant demonstrates that there will be no resulting adverse impact on visibility in Class I areas." ¶28 (emphasis added). This Court further elaborated once DEQ had made its determination of the permit, then MEIC, as the party challenging DEQ's permitting decision, "had the burden of presenting the evidence necessary to establish the facts essential to a determination that the Department's decision violated the law." *Id.*, ¶16. This Court's discussion in *MEIC*, 2005 MT 96, of the relative burdens in the permitting process before DEQ and administrative review before BER reveals that the district court fundamentally misunderstood the differences between these two steps in the administrative process.

Exemplifying the district court's confusion on this point, in its order on remedy, it posits that in a MSUMRA contested case before BER, "the applicant would be defeated if neither side produced evidence." DC Doc. 19 (citation omitted). This analysis overlooks that in the permitting process, the applicant has already provided DEQ all the relevant information. If the applicant failed to provide this information, the permit would be denied before DEQ, and MEIC would never need to seek an appeal before BER. Continuing with the hypothetical

posited by the district court, if no party presented any evidence in the BER appeal, the party challenging DEQ's permitting decision would fail to meet their burden because it would have been as if no one requested a contested case proceeding challenging DEQ's decision in the first place. Section 82-4-206, MCA.

In sum, because the district court's analysis distinguishing *MEIC*, 2005 MT 96, from the present case improperly conflates the permitting process before DEQ and administrative review before BER, this Court should reject the district court's departure from its precedent.

B. SMCRA's legislative history says nothing about assigning burden of proof in state contested case proceedings.

As discussed above, this case is controlled by state law—not federal law. In any event, the district court's order still gets SMCRA wrong by claiming the legislative history of SMCRA states "that permit applicant retains burden of showing lack of environmental effects in contested hearing" DC Doc. 79 at 25 (citing AR141: Ex 2 at 80). This legislative history does not support this proposition. To begin with, this document says nothing about Congress' intent because it is simply draft legislation in a committee report that contains different language than current SMCRA statutes. *Compare* AR141: Ex. 2 at 80, § 413 *with* 30 USC § 1264(c) (stating what occurs when a state's permitting decision is challenged but neglecting to mention anything about the parties' burden of proof). Second, this legislative history says precisely what DEQ advocates here: the

applicant has the burden of proof in submitting its "reclamation plan *prior to issuance of a mining permit*[.]" AR141: Ex. 2 at 76, § 408. This legislative history, however, says nothing regarding the burdens of administrative review of the approval of a reclamation plan.

This legislative history, therefore, cuts sharply against the district court's conclusion that SMCRA required DEQ and Westmoreland to carry the burden of proof before the BER.

C. *Bostwick* is inapposite to the proposition DEQ has the burden of proof before BER.

Bostwick Properties, Inc. v. Mont. DNRC, 2013 MT 48, 369 Mont. 150, 296 P.3d 1154, concerned, among other things, the burden of proof for an appeal of a Montana Department of Natural Resources and Conservation's ("DNRC") decision to *not* grant a water use permit to an applicant. *Id.*, ¶36. On appeal, the applicant sought "to shift the burden of proof to DNRC[.]" *Id*. This Court rejected this argument finding the applicant had the burden of proof in seeking to overturn the DNRC's decision. *Id*.

The district court's decision misapprehends the import of this decision. DC Doc. 79 at 25. Notably, MEIC—not the applicant—is seeking to reverse DEQ's decision. Because the district court did not account for this important procedural posture in *Bostwick*, it erred in making the bald assertion that the "burden remains with the applicant throughout administrative review of the permit." DC Doc. 79 at

25. As demonstrated by *MEIC*, 2005 MT 96, that is not true when DEQ's initial determination is in favor of the applicant.

D. ARM 17.24.425(7) assigns the burden of proof to MEIC.

This Rule states "[t]he burden of proof at such hearing is on the party seeking to reverse the decision of *the board*." (Emphasis added.) A quick review of the Montana Administrative Register reveals this rule should instead state "the burden of proof at such hearing is on the party seeking to reverse the decision of *the department*."

This confusion stems back to a rulemaking that was conducted in 2012 to clean up ARM 17.24.425, 2012 MAR 2727, 2735–36 (Dec. 22, 2011), after HB 370 was passed in the 2005 legislative session, which transferred the responsibility of conducting MSUMRA contested case hearings from DEQ to BER, 2005 Mont. Laws 385, ch. 127, § 6(9). When this rule was updated, "the board" was incorrectly inserted into certain places that had previously said "the department." Relevant here, this rulemaking should not have amended subsection (7) of the Rule because MSUMRA permit authority was not transferred to BER and thus, a contested case proceeding before BER would seek to reverse the decision of DEQ—not BER.

Reference to this rulemaking history is appropriate as the errant language of ARM 17.24.425(7) falls within the scrivener's error doctrine. *State v. Heath*, 2004 MT 126, ¶32, 321 Mont. 280, 90 P.3d 426 ("It has long been a rule of statutory

construction that a literal application of a statute which would lead to absurd results should be avoided whenever any reasonable explanation can be given consistent with the legislative purpose of the statute."). The district court makes no effort to read ARM 17.24.425(7) rationally. In a footnote, the district court dispels with this provision by declaring it "ambiguous" and goes on to assert the permitting requirements of § 82-4-227(1), MCA, control. DC Doc. 79 at 27, n.9. But § 82-4-227(1), MCA, concerns permitting decisions at the DEQ level—it does not concern appeals of DEQ permitting decisions before BER. In contrast, ARM 17.24.425(7), based on its title, is explicitly aimed at "administrative review." This Court should, accordingly, harmonize this Rule with the authorities discussed above to find MEIC had the burden of proof before BER. *City of Missoula v. Sadiku*, 2021 MT 295, ¶14, 406 Mont. 271, 498 P.3d 765 ("We must interpret a statutory scheme so as to give meaning and effect to each provision, whenever possible.")(citation omitted).

E. BER did not require MEIC to prove material damage *would* occur as a result of granting AM4.

Instead, BER assigned MEIC the burden to prove DEQ's grant of the AM4 permit violated Montana law. This is demonstrated by BER's conclusion of law number 12:

> Conservation Groups have the burden to show, by a preponderance of the evidence, that DEQ had information available to it at the time of issuing the permit that indicated that the project at issue is not designed

> to prevent land uses or beneficial uses of water from being adversely affected, water quality standards from being violated, or water rights from being impacted.

AR152:76 (citation omitted). BER, therefore, never required MEIC to "prove that the mine would cause material damage." DC Doc. 79 at 25.

Indeed, standards for administrative review do not require a party challenging an administrative proceeding to prove some future, factual outcome; instead, they require that the challenging party has the "burden of presenting the evidence necessary to establish the facts essential to a determination that the Department's decision violated the law." *MEIC*, 2005 MT 96, ¶16. BER's conclusion of law 12 reflects that obligation imposed on MEIC, as it did not focus on possible future damage, but on whether DEQ, at the time of its decision, had sufficient information to address whether AM4 was designed to prevent material damage. MEIC, additionally, understood it had the burden of proof going into the AM4 hearing before BER. AR103:3 ("All the parties agree that at the hearing on this issue MEIC has the burden to prove by a preponderance of the evidence that the AM4 permit [was] not 'designed to prevent material damage.'").

III. MEIC failed to exhaust administrative remedies.

In its final order, based on the Hearing Examiner's order on motion *in limine*, BER identified three issues that were properly preserved from MEIC's objections provided in the permitting process: (1) the material damage

determination regarding increased TDS levels in EFAC; (2) the material damage determination regarding increased nitrogen levels in EFAC; and (3) the material damage determination regarding aquatic life use of EFAC. AR152:78. BER also found MEIC had failed to preserve six additional issues for appeal before BER because MEIC had neglected to raise them in the permitting process. AR152:78. In reversing BER, the district court asserted "issue exhaustion does not apply to administrative review of permits under MSUMRA." DC Doc. 79 at 17.

To seek an appeal of an agency decision under § 2-4-702(1), MCA, a party must "exhaust[] *all* administrative remedies available within the agency." (Emphasis added.). The process that DEQ, the applicant, and interested parties are required to follow in addressing MSUMRA permits is dictated by statute. In particular, § 84-4-231(8)(e), MCA, states "[a]ny person having an interest that is or may be adversely affected [by an application] may file a written objection to [DEQ's acceptability] determination within 10 days of the department's last published notice." Additionally, § 84-4-231(8)(f), MCA, requires DEQ to issue its written findings—including a CHIA under ARM 17.24.405(5)—within 45 days of its acceptability determination. DEQ's issuance of its written findings and CHIA constitutes a decision that is appealable to BER as a contested case. Section 82-4-206, MCA.

The district court found "issue exhaustion does not apply to administrative review of permits under MSUMRA." DC Doc. 79 at 17; *see also id.* at 13 (the district court finding "[t]here is no textual issue exhaustion requirement" within MSUMRA.) The district court's reasoning is incorrect for several reasons. To begin with, the federal district court of Montana has already found the objections process in the permitting stage before DEQ affords MEIC a remedy: "MSUMRA provides a *state remedy* permitting comments on the procedures and findings during the CHIA process." *MEIC*, 2013 U.S. Dist. LEXIS 29184 at *9. While this federal case is only persuasive, it demonstrates a federal court has already identified the objections process as a remedy that could be exhausted.

The district court's exhaustion reasoning, additionally, runs afoul of the "general principle that if an administrative remedy is *provided by statute*, that relief must be sought from the administrative body and the statutory remedy exhausted before relief can be obtained by judicial review." *Barnicoat v. Commissioner of Dep't of Labor & Indus.*, 201 Mont. 221, 225, 653 P.2d 498, 500 (1982) (citation omitted)(emphasis added); *Flowers v. Bd. of Personnel Appeals*, 2020 MT 150, ¶8, 400 Mont. 238, 465 P.3d 210 ("For a case to be ripe for judicial review, each individual issue must have been properly raised, argued, or adjudicated *pursuant to the administrative process*.") (citation omitted and emphasis added). This principle simply requires that an administrative remedy is provided by statute (and used by

the aggrieved party)—it does not additionally say the statute itself must explicitly require exhaustion.

While this Court has identified exceptions to the exhaustion doctrine, a "textual issue exhaustion requirement" is not one of them. William Corbett, *Montana Administrative Law Practice: 41 Years after the Enactment of the Montana Administrative Procedure Act*, 73 Mont. L. Rev. 339, 375 (2012) (identifying four exceptions to the exhaustion doctrine: (1) matters outside the agency's expertise, (2) facial challenges to agency jurisdiction, (3) facial challenges to statutes enabling agency action, and (4) when recourse to an agency would be futile). Proving this point, the district court failed to provide a citation when this Court has identified a textual issue exhaustion requirement within the exhaustion doctrine. DC Doc. 79 at 13–14.

The district court's analysis, additionally, ignores the purpose of the exhaustion doctrine, which "serves to provide administrative agencies an opportunity to utilize their expertise, correct any mistakes, and avoid unnecessary judicial intervention." *Vote Solar*, ¶48 (citation omitted). DEQ's issuance of written findings and a CHIA is the last opportunity for DEQ to correct any errors or omissions prior to advancing to a contested case proceeding before BER. DEQ relies on the written objections provided by interested persons to make its final permitting determination. Section 82-4-231(8)(e)–(f), MCA; AR95, Ex. 1:8–14

(providing responses to objections). Objectors (and soon-to-be petitioners) should, accordingly, be required to raise issues at this critical stage in the permitting process. To say otherwise would give petitioners an unreasonable incentive to "hide the ball" in the objections period before DEQ and raise new issues on appeal arguing DEQ failed to address them in the permit process, contrary to the purpose of the exhaustion doctrine.

To this end, the district court's concern that MEIC was not able to see the CHIA prior to providing objection is without merit because this process is statutorily required. DC Doc. 79 at 15. DEQ is required to receive objections under § 82-4-231(8)(e), MCA, prior to issuing its written decisions, including the CHIA, *id.* at (8)(f). This process is analogous to an agency issuing its final decision after a contested case proceeding. The district court's concern about MEIC being required to provide its objections prior to the publication of the CHIA rings hollow because, by analogy, nothing in MAPA requires an agency to reconsider or take public comment on its final decision in a contested case proceeding after it has been issued. Section 2-4-623, MCA. Furthermore, DEQ and Westmoreland exchanged eight deficiency notices regarding AM4 between 2009 and 2015, which were publicly available, so the relevant issues pertaining to the AM4 permit should have been known well in advance of the objections period. AR103:3; AR95: Ex. 1 at 2–

6.[7] MEIC's apparent dislike of the statutorily prescribed objections process available within MSUMRA, *see MEIC*, 2013 U.S. Dist. LEXIS 29184, is insufficient to excuse it from the exhaustion doctrine.

Finally, the district court did not find petitioners had sufficiently articulated (albeit imprecisely) these issues at the permitting stage. *Vote Solar*, ¶48 ("A party forfeits argument as to an issue not raised during the administrative process; however, so long as a claimant provides enough clarity such that the decision maker understands the issues raised for the agency to use its expertise to resolve the claim, the claimant will have met this burden."). Instead, the district court excused MEIC's failures by stating that either the exhaustion doctrine didn't apply or DEQ was already aware of certain issues that MEIC would contest. DC Doc. 79 at 13–17. But no such Montana case law exists that excuses a failure to exhaust administrative remedies when an agency allegedly has "actual knowledge" of an issue. *Id.* at 16–17 (citing federal case law).[8] Because MEIC did not raise these six additional issues in the administrative process, AR152:78, it forfeited any allegation DEQ did not adequately address these issues.

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[7] BER's hearings examiner offered "if there were a fundamental issue with the CHIA and the permit, and if that issue were introduced for the first time with the publication of the CHIA" then MEIC would be able to present evidence on these new issues, AR103:7, which MEIC did not take advantage of, Oral Arg. Tr. at 62–65 (AR151).

[8] As discussed above, Montana law controls this MSUMRA proceeding. *MEIC*, 2013 U.S. Dist. LEXIS 29184.

IV. Section 2-4-612(1), MCA, allows DEQ to submit evidence and argument explaining its permitting decision in a contested case proceeding.

MSUMRA states DEQ's permitting decisions appealed to BER are subject to "[t]he contested case provisions of [MAPA.]" Section 82-4-206(2), MCA. MAPA's contested case hearing provision states "[o]pportunity shall be afforded *all parties* to respond and present evidence and argument on *all issues involved*." *Id.* § 2-4-612(1) (emphasis added). DEQ has the clear statutory right to present evidence and argument in contested case proceedings before BER.

The district court faulted BER for considering supposed *post hoc* evidence from DEQ explaining the scope of its salinity evaluation. DC Doc. 79 at 22. The district court mischaracterizes the nature of this testimony. First, this was not a *post hoc* rationalization provided by DEQ because this matter was addressed by DEQ in its CHIA. AR95: Ex. 1A at 9-9, 9-31–9-33. Second, the evidence, presented by DEQ and considered by BER, was in response to arguments raised by MEIC's witness. AR152:63–64; Hr'g Tr. Vol. 2 at 235–243 (AR116).[9]

Because this information is traceable to the CHIA and in response to MEIC's expert testimony, DEQ's expert testimony on this subject is, therefore, consistent with the hearing examiner's guidance in the order on motions *in limine*:

[9] MEIC's counsel also failed to lodge a *timely* objection to this testimony as to preserve it as an issue for appeal, Hr'g Tr. Vol. 2 at 235 (AR 116), and continued to ask questions on the subject on redirect, Hr'g Tr. Vol. 3 at 66–68, 71–72; Mont. R. Evid. 103(a)(1) (requiring objections to be timely).

"DEQ and [Westmoreland] may [] explain and support the CHIA and written findings, with expert testimony as needed." AR103:5.

Additionally, the district court's reliance on *Park County Environmental Council v. Mont. DEQ*, 2020 MT 303, ¶36, 402 Mont. 168, 477 P.3d 288 ("*PCEC*"); *MTSUN, LLC v. Mont. PSC*, 2020 MT 238, ¶51, 401 Mont. 324, 472 P.3d 1154; and *Kiely Construction L.L.C. v. City of Red Lodge*, 2002 MT 241, ¶94, 312 Mont. 52, 57 P.3d 836, for the proposition that DEQ should have been precluded from providing this testimony, DC Doc. 79 at 20, is unavailing because none of these cases concerned appeals of agency decision making through a MAPA contested case proceeding.

This Court should, accordingly, affirm BER's decision permitting DEQ to explain the nature of its salinity analysis, which was already addressed in the CHIA and provided in response to MEIC's witness' testimony on the subject.

V. DEQ and BER properly found that AM4 is designed to prevent material damage.

A. DEQ and BER applied the correct legal standard.

1. Material damage is causation analysis.

Under MSUMRA, the AM4 permit may only be approved if (1) DEQ assesses "the probable cumulative impact of all anticipated mining in the area on the hydrologic balance" and (2) "the proposed operation of the mining operation has been designed to prevent *material damage* to the hydrologic balance outside

the permit area." Section 82-4-227(3)(a), MCA (emphasis added). In AM4, DEQ's and BER's analysis hinged on the material damage standard, which means:

> with respect to protection of the hydrologic balance, degradation or reduction *by coal mining* and reclamation operations of the quality or quantity of water outside of the permit area in a manner or to an extent that land uses or beneficial uses of water 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.

Section 82-4-203(32), MCA (emphasis added).

Because the definition of material damage includes the phrase "by coal mining," BER and DEQ have applied causation analysis to this material damage assessment (*i.e.*, "whether the proposed mining operation would cause violation of water quality standards outside the permit boundary"). *In re Bull Mountain*, BER 2013-07 SM, pp. 34, 63–64 (BER Jan. 14, 2016)("*Bull Mountain*")(DC Doc. 46, App. A); ARM 17.24.405(6)(c) (before approving an MSUMRA application, DEQ must demonstrate that "the hydrologic consequences and cumulative hydrologic impacts *will not result* in material damage to the hydrologic balance outside the permit area") (emphasis added).

Based on these authorities, BER in AM4 determined "as a matter of law" MEIC's "arguments regarding salinity fail because there must be some causal connection between the permitted mining activity and a water quality violation." AR152:65. BER similarly found that "[c]oal mining has never been a confirmed

'source of impairment' for aquatic life beneficial use in" EFAC, AR152:52, in concluding that MEIC had failed to meet its burden under the material damage standard, AR152:85. While the district court did not specifically find that either DEQ or BER had improperly articulated the causation analysis for material damage, it nevertheless found that DEQ and BER erred in applying this standard. DC Doc. 79 at 28–34.

2. The district court improperly injected the purpose of the MWQA into its material damage analysis under MSUMRA.

Rather than focusing on the causation-based material damage standard, the district court inserted elements from the MWQA into its analysis, DC Doc. 79 at 28–34, contrary to basic principles of statutory interpretation. In particular, the district court found that MSUMRA requires DEQ to "assess applicable water quality standards" to determine if "any violation of a water quality standards"—regardless of the sources of DEQ's permitting jurisdiction—will occur. DC Doc. 79 at 28. This conclusion conflates DEQ's duties under MSUMRA with DEQ's duties under the MWQA to assess state water for any violations of water quality standards.

This Court's recent decision in *Clark Fork Coalition*, 2021 MT 44, demonstrates this was in error. In that case, DNRC evaluated RC Resources' beneficial water use permit for a mine under the Montana Water Use Act ("MWUA"). *Id.*, ¶¶2–3. In addition to addressing the "legally available" standard

under the MWUA, Clark Fork Coalition argued that DNRC should have also examined its MWQA objections. *Id.*, ¶31. This Court rejected this argument finding, based on the plain language of the relevant statutes under the MWUA, *id.*, ¶36, that the legislature intended these two bodies of law to serve a distinct and separate purpose, *id.*, ¶41.

The same is true here. While DEQ's obligations under MSUMRA requiring it to determine that no material damage will occur refer to water quality standards[10] under the MWQA, § 82-4-203(32), MCA, the purpose and language of these bodies of law are distinct. For instance, the material damage standard under MSUMRA aims to prevent violations that result from coal mining. *Id.*; ARM 17.24.405(6)(c). In contrast, the purpose of the 303(d)-listing process under the MWQA is "to improve the quality of the impaired water." *MEIC*, 2019 MT 213, ¶40. As an example of the incongruent objectives of MSUMRA and the MWQA in this case, it would be nonsensical and futile to require a coal mine to remedy the impairment of EFAC when "any mine related water quality changes are not likely to be distinguishable from natural variations[,]" AR95: Ex. 1A at 9-33; *accord*

[10] Because MSURMA only requires that the application is designed to prevent material damage to the hydrologic balance outside the permit area, ARM 17.24.314(5), DEQ only reviews if the proposed activities of the application alone or in conjunction with other coal mining activities will cause a violation of a water quality standard, Hr'g Tr. Vol. 2 at 230:20–24 (AR116).

AR152:64, and the source of the impairment is likely to come from agricultural and municipal sources, AR152:83.

The relevant standards for an impairment analysis under the MWQA and a material damage analysis under MSUMRA reflect these divergent purposes. MSUMRA requires an evaluation to determine that coal mining "*will not result* in material damage to the hydrologic balance outside the permit area[.]" ARM 17.24.405(6)(c) (emphasis added); § 82-4-203(32), MCA (material damage means impacts "by coal mining"). In contrast, the requirements of the MWQA are broader and require DEQ to control pollutants that "will cause, have the *reasonable potential* to cause, or contribute to an excursion above any state water quality standard." *MEIC*, 2019 MT 213, ¶70. These divergent standards demonstrate the Legislature intended DEQ to conduct different analysis under these two bodies of law. *Clark Fork Coalition*, 2021 MT 44, ¶41 (rejecting plaintiffs' efforts to inject the MWQA into the MWUA when "straightforward textual interpretation is consistent with the primary purpose of the MWUA").

Furthermore, because DEQ and BER administer MSUMRA statutes and rules, which implicate considerable agency expertise, they are entitled to "great deference[.]" *MEIC*, 2019 MT 213, ¶20. Indeed, this causal analysis of material damage was the result of prior litigation before BER. *Bull Mountain*, pp. 63–64 (DC Doc. 46, App. A). If BER had "decline[d] to follow its precedent, it [would

have had to] 'provide a reasoned analysis explaining its departure' from any prior precedent." *McGree Corp. v. Mont. PSC*, 2019 MT 75, ¶37, 395 Mont. 229, 438 P.3d 326 (citation omitted). Because there is no new relevant information in the record that would have justified such a departure, BER acted appropriately in adhering to its prior precedent. *Vote Solar*, ¶46.

Additionally, the causation analysis of material damage is "both anticipatory and preventative" in furtherance of the constitutional right to a clean and healthful environment, *PCEC*, 2020 MT 303, ¶61, because it accounts for and mitigates material damage that results from mining. Because the Legislature is tasked with devising adequate remedies for this constitutional right, Mont. Const. art. IX, § 1, it is entitled to divide up these remedies as it sees fit, *Clark Fork Coalition*, 2021 MT 44, ¶60 ("The Legislature is presumed to be aware of all of its enactments, as well[] as all related constitutional duties and limitations."). Nothing requires the Legislature to place duplicative substantive remedies (available under the MWQA) into MSUMRA. *PCEC*, ¶ 76 (finding Montana Environmental Policy Act's constitutional significance comes from being "complementary to—rather than duplicative of—other environmental provisions").

B. The district court improperly reweighed evidence in overturning BER's finding that AM4 is designed to prevent material damage.

In violation of the requirement "[t]he court may not substitute its judgment for that of the agency as to the weight of the evidence on questions of fact[,]" § 2-

4-704(2), MCA, the district court overturned several of BER's findings of fact without engaging the substantial evidence standard.[11] Specifically, the district court overturned BER's witness credibility findings on the issues of (1) aquatic life and (2) salinity levels.

1. Aquatic life.

a. BER properly found macroinvertebrate surveys relevant to the material damage standard.

In arriving at DEQ's conclusion that the AM4 project would not violate this material damage standard, DEQ's expert witness, Dr. Hinz, assessed multiple lines of evidence including physical, chemical, and biological data. AR152:50. Included in this assessment, Dr. Hinz in 2014 requested that Westmoreland update certain macroinvertebrate aquatic life surveys which the mine had conducted in the 1970s to provide a "before and after" comparison of assemblages of aquatic life using the stream. AR152:43–44. The 2014 aquatic life survey demonstrated that EFAC provided habitat for a community of macroinvertebrates, consisting of taxa (*i.e.*, diversity) commonly found in such streams. AR152:49. Even more indicative of

[11] MEIC also did not file exceptions to individual findings of fact to the hearing examiner's proposed FOFCOL as permitted by § 2-4-621(1), MCA, and thus, BER, in adopting the proposed FOFCOL, could not ascertain how MEIC thought these findings of fact failed under the substantial evidence standard. Oral Arg. Tr. at 101–102 (AR151). Pursuant to the doctrine of exhaustion, MEIC was, accordingly, unable to request the district court overturn these findings of fact under the substantial evidence standard.

the health of aquatic species (and that there would be no material damage to the aquatic life uses of EFAC from the AM4 amendment), a comparison of the 1970s survey with the 2014 survey demonstrated that macroinvertebrates were present in roughly the same numbers of species as they were in 1970, after nearly 50 years of mining. AR152:49–50.

To contradict this evidence, MEIC presented an expert witness that had worked primarily on western Montana streams with significantly different physical, chemical, and biological characteristics than eastern Montana streams. AR152:51. He had not personally visited or observed conditions in EFAC prior to giving his testimony. AR152:51. MEIC's expert, furthermore, did not compare any of the water chemistry upstream of the mine to water chemistry downstream from the mine. AR152:52. Contrary to the applicable standard requiring a causal analysis of material damage, MEIC's expert did not provide any testimony touching upon a causal assessment or empirical data addressing any potential cause of impairment in EFAC. AR152:52.

Recognizing that its evidence presented to BER would be woefully inadequate to overturn BER's decision under the substantial evidence standard, MEIC resorted to an arbitrary and capricious challenge to BER's findings. DC Doc. 79 at 29. Specifically, MEIC argued, and the district court accepted, that the conclusion that no material damage would occur from mining was contradicted by

DEQ's supposed, prior finding that "analyzing macroinvertebrate data ... would *not* provide an *accepted* or *reliable* indicator of aquatic life support." DC Doc. 79 at 29 (emphasis in original). The district court's order omits a critical component of BER's finding on this point, which says in full, "that analyzing macroinvertebrate data in conjunction with indices of biologic integrity would not provide an accepted or reliable indicator of aquatic life support functionality in an eastern Montana ephemeral stream *for Section 303(d) listing purposes*." AR152:46 (emphasis added).

As discussed above, the MWQA—which concerns section 303(d) listing—functions independently of MSUMRA and cannot be used to engraft additional requirements onto MSUMRA. Demonstrating this point, MEIC's own witness agreed that "macroinvertebrate monitoring can be conducted for the purposes other than attainment documentation under the 303(d) list[.]" AR152:51.

DEQ also did not rely exclusively on aquatic life in its material damage assessment. AR152:50–51 (stating that DEQ also assessed "biological, physical, and chemical data ... to make a material damage determination."); AR95: Ex. 1A at 9-6–9-11 (the CHIA explaining the full analysis conducted regarding EFAC). Accordingly, the district court's analysis misstates the record because it falsely implies that DEQ only conducted analysis on macroinvertebrate data, and it does not give account to other data DEQ analyzed in its CHIA.

At bottom, the district court's finding on this point is peculiar because it faults DEQ for examining aquatic life in the upper portion of EFAC in conducting its material damage assessment. Intuitively, it doesn't take an expert to recognize that the upper portion of EFAC maintaining consistent numbers of species of macroinvertebrates between the 1970s and 2014 is generally indicative that coal mining has not had a detrimental impact on aquatic life. Regardless, DEQ's experts—and even MEIC's own expert—adequately contextualized these macroinvertebrate surveys, alongside other analysis, demonstrating that macroinvertebrate surveys would provide relevant information for a material damage assessment under MSUMRA. AR152:51.

This Court should, therefore, find that the district court committed reversable err in reweighing evidence in violation of § 2-4-704(1), MCA, under the guise of the arbitrary and capricious standard, and that BER's findings regarding aquatic life should be affirmed.

b. The Hearing Examiner properly admitted Dr. Hinz's testimony on aquatic life.

Under Mont. R. Evid. 703, "[t]he facts or data in a particular case upon which an expert bases an opinion or inference may be those perceived by or made known to the expert at or before the hearing." This Rule "allows an expert to rely upon third-party generated data in forming [their] opinion. Reference to such data is admissible if it is 'reasonably relied upon by experts' in that particular field."

Weber v. BNSF Ry. Co., 2011 MT 223, ¶38, 362 Mont. 53, 261 P.3d 984. The hearing examiner, therefore, found DEQ's and Westmoreland's experts could "testify about the Arcadis[12] report to the extent they can explain how they relied on it to reach their expert opinions (as, for example, hydrologists)." AR103:10.

As discussed above, the macroinvertebrate data was just one glimpse into the overall hydrological conditions of EFAC. Because the relevant inquiry was whether EFAC would suffer material damage to the hydrological balance, Dr. Hinz's consideration of aquatic life surveys would unsurprisingly be directed towards her expertise of hydrology. DEQ scientists routinely rely on expert reports generated by applicants because MSUMRA directs DEQ to evaluate the proposed permit, among other things, "on the basis of the information set forth in the application[.]" Section 82-4-227(1), MCA. This Court has, additionally, rejected parties' previous efforts to apply excessive granularity to the scope of a witness' expertise. *McClue v. Safeco Ins. Co.*, 2015 MT 222, ¶26, 380 Mont. 204, 354 P.3d 604 (this Court rejecting a party's efforts to exclude the testimony of an expert in the neurological disease of ALS because that individual supposedly did not also have expertise in the "specific causation of ALS").

The hearing examiner, furthermore, was entitled to deference in her determinations about permissible expert testimony under Mont. R. Evid. 702,

[12] The Arcadis report contained the 2014 survey of macroinvertebrates. ER152:45.

Arneson-Nelson v. Nelson, 2001 MT 242, ¶27, 307 Mont. 60, 36 P.3d 874, and this Court has said trial courts should "construe liberally the rules of evidence so as to admit all relevant expert testimony[,]" *McClue*, ¶23. The hearing examiner, accordingly, applied appropriate discretion in limiting Dr. Hinz's testimony to hydrology, while at the same time allowing her to consider the relevant data of aquatic life surveys.

In reference to its preferred approach of liberally admitting expert testimony, this Court has said any concern about "shaky" testimony is alleviated by the understanding that "[t]he expert's testimony then is open for attack through 'the traditional and appropriate' methods." *Id.*, ¶23. Instead of robustly disagreeing with Dr. Hinz's analysis, MEIC's expert witness agreed that aquatic life surveys would be relevant to "whether there was macroinvertebrate life in EFAC." AR152:51. Given that MEIC's witness essentially corroborated Dr. Hinz's testimony on aquatic life, the district court failed to identify any substantial rights of MEIC that were prejudiced, § 2-4-704(2), MCA, when the hearing examiner permitted Dr. Hinz to provide limited testimony on aquatic life.

Accordingly, this Court should find BER's hearing examiner properly admitted this evidence.

2. BER properly determined that AM4 would not increase the magnitude of salinity in EFAC.

Before BER, MEIC's expert testified that the salinity of EFAC would increase if the AM4 permit were granted. AR152:35. BER considered this testimony from MEIC's expert but ultimately found more credible the testimony of DEQ's experts who explained that "[t]he AM4 Amendment could not increase the salinity to EFAC because a large section of previously-mined and since-reclaimed spoil area lies between AM4 mining area and EFAC, and therefore mining at AM4 will not increase the concentration of TDS in the existing spoil water which is already migrating towards EFAC." AR152:36. Considering the cumulative effects of prior mining, AR152:36–37, BER found that "all previous mining (not just mining associated with the AM4 Permit) provides a 'very, very small quantity' of the salt load in the basin when compared to the natural background levels of salt in EFAC[,]" AR152:64–65, and that AM4 is, therefore, designed to prevent material damage, AR152:84.

Despite BER's clear factual findings on the magnitude of salinity, the district court found that AM4 would increase salinity in EFAC in violation of the material damage standard. DC Doc. 79 at 31–34. In doing so, the district court again reweighed BER's consideration of evidence under the guise of the arbitrary and capricious standard. In particular, the district court's order incorrectly focuses on (1) BER's supposed failure to consider the cumulative effects of prior mining,

and (2) the duration of existing salinity levels in EFAC if AM4 were approved, *id*., neither of which warrant overturning BER's findings of fact on salinity under either the substantial evidence or arbitrary and capricious standard.

a. Cumulative impacts.

The district court's decision further mischaracterizes BER's order as "considering the increased salinity from AM4 in *isolation* from the cumulative impacts of existing mining." DC Doc. 79 at 32 (emphasis added). This ignores BER's analysis that "the 13% increase in TDS is not specific to the amount of TDS added to the alluvium by the AM4 Amendment, but rather the overall TDS that is added to the groundwater by all the mining in the area, including previously permitted areas." AR152:63 (emphasis in original).

Thus, the district court's concerns about DEQ not conducting a cumulative analysis does not reflect the realities of the record.

b. Duration.

BER also considered the question of duration of salinity levels that would result from the approval of the AM4 permit. DEQ's experts testified that the magnitude of salinity levels would not increase in EFAC because of AM4. AR152:36–37. These experts also explained that the duration of existing salinity levels would likely remain (*i.e.*, the *status quo* will persist) because of AM4. AR152:36–37, 55, 60, 67–72. Under a causation analysis of material damage, BER

found that "AM4 will not violate a water quality standard for TDS because it will not increase the pollutant concentration (or will not increase it beyond what has already been permitted). As AM4 will not violate a water quality standard, it will not cause 'material damage.'" AR152:71.

BER arrived at this conclusion, in part, by citing to its previous finding in *Bull Mountain*.[13] AR152:72, n.5. In that prior decision, BER faulted DEQ for setting a time frame for preventing material damage. *Bull Mountain*, p. 84 (DC Doc. 45, App. A) ("there is no basis in law for limiting the material damage assessment and determination to 50 years."). Responsive to its previous findings, BER found that, because DEQ "has not imposed any horizon on its consideration of material damage in the present case, and it has certainly considered water quality standards in the CHIA[,]" both "DEQ [and Westmoreland] have addressed the BER's concerns in [*Bull Mountain*]."") AR152:72, n.5.

Had BER imposed some horizon in its salinity determination, it would have acted inconsistently with its prior determinations, in violation of the principle that an agency departing from its prior determinations must adequately explain its reasons for doing so. *McGree*, ¶37; *Vote Solar*, ¶46. In furtherance of that principle, BER found that nothing in the record would support such a departure.

[13] BER refers to this decision as *Signal Peak*, who is the owner of the Bull Mountain Mine.

AR152:71 ("[T]here is no way to scientifically or legally measure (or at least none was presented in this case) the increase in the duration of time vis-à-vis a water quality standard.").

Because BER's decision to affirm DEQ's grant of the AM4 permit is supported by a strict causation-based material damage assessment, the district court was required to look to other bodies of law as a basis to deem BER's decision unlawful (namely, the MWQA and similar provisions from other jurisdictions). DC Doc. 79 at 33. For instance, the district court invoked *Friends of Pinto Creek v. U.S. EPA*, 504 F.3d 1007, 1011–12 (9th Cir. 2007), which involved *new* point source discharges regulated under 33 USC § 1342. *Id.* But BER examined this case and found it "was neither precedential nor on point" because it was a federal case that did not concern the "material damage" standard under MSUMRA. AR152:71–72, n.5.[14]

As discussed above, BER correctly determined that provisions related to the MWQA are not directly relevant to MSURMA. AR152:62, n.3, 65–66. Because these MWQA provisions are not directly relevant to MSUMRA proceedings, they

[14] Discharges from the Rosebud Mine are subject to MPDES Permit No. MT0023965 that contains effluent limits and conditions that ensure surface water discharges from the Mine will not cause or contribute to the violation of water quality standards. *MEIC*, 2019 MT 213, ¶1. Even if this MPDES permit was at issue in this case (it's not), MPDES Permit No. MT0023965 does not authorize a "new source" and, therefore, *Pinto Creek* is not applicable.

cannot serve as a basis for the conclusion that DEQ's or BER's respective decisions were arbitrary or capricious. *Belk v. Mont. DEQ*, 2022 MT 38, ¶15, 408 Mont. 1, 504 P.3d 1090 ("An agency decision is arbitrary and capricious if it ... was made without consideration of *relevant factors*[.]") (emphasis added); *Vote Solar*, ¶37 ("An agency action is arbitrary if it fails to consider *relevant factors*, including the standards and purposes of the statutes the agency administers.") (emphasis added). The district court cannot overturn BER's findings of fact on the grounds that it believes that a separate and distinct body of law should have been injected into BER's reasoning.

In sum, BER examined evidence that demonstrated that prior mining and AM4 together would not increase the magnitude of salinity levels in EFAC. Further, BER acted consistently with its prior determinations regarding the definition of material damage. The district court overturned BER's finding by ignoring evidence in the record, ignoring prior Board precedent, and inserting separate requirements of the MWQA into MSUMRA. Neither the substantial evidence nor the arbitrary and capricious standard support such an outcome and thus, this Court should affirm BER's decision that AM4 was designed to prevent material damage.

VI. The district court erred in its rulings on attorney's fees.

A. The district court's ruling on attorney's fees is limited to those resulting from the district court proceeding.

Section 82-4-251(7), MCA, unambiguously states:

> Whenever an order is issued under this section or as the result of any administrative proceeding under this part, at the request of any person, a sum equal to the aggregate amount of all costs, expenses, and attorney fees as determined by the department to have been reasonably incurred by the person for or in connection with the person's participation in the proceedings, including any judicial review of agency actions, may be assessed against either party *as the court, resulting from judicial review,* or the department, resulting from administrative proceedings, considers proper.

(Emphasis added.)

In other words, this statute contemplates a division of labor in determining attorney fees: DEQ may determine attorney fees resulting from administrative proceedings like those before BER and district court may determine the same for district court proceedings. Perhaps understanding the clarity of this statute would undermine their request for the district court to determine attorney fees from both BER and district court proceedings, MEIC entirely neglected to cite this statute in its brief in support of its motion for attorney's fees. DC Doc. 97.

The district court's analysis on the legal availability of attorney's fees fails to provide any analysis on the textual requirements of § 82-4-251(7). DC Doc. 129 at 8–14. Instead, the district court's analysis boils down to an assertion that ARM 17.24.1307–1309 should govern over statute because to say otherwise "would

create an unnecessarily duplicative and cumbersome process[.]" *Id.* at 12. This is wrong for several reasons.

First, this Court has been abundantly clear that statute—not administrative rule—may entitle a party to attorney's fees under the American Rule. *Sunburst Sch. Dist. No. 2 v. Texaco*, Inc., 2007 MT 183, ¶88, 338 Mont. 259, 165 P.3d 1079. In the same vein, "[w]here administrative rules are in conflict with or inconsistent with a statute, the statute prevails." *City of Great Falls v. Mont. PSC*, 2011 MT 144, ¶22, 361 Mont. 69, 254 P.3d 595. Further, "a court's authority to review administrative rulings is constrained by statute." *Molnar v. Mont. PSC*, 2008 MT 49, ¶7, 341 Mont. 420, 177 P.3d 1048. The district court's analysis elevating ARM 17.24.1307–1309 over § 82-4-251(7), MCA, accordingly, violates several well-established legal principles.

Second, the district court's supposition that a two-step process in determining attorney's fees would be "unworkable" is belied by precedent in other jurisdictions. For instance, federal cases under SMCRA—wherein the federal attorney's fees statute, 30 USC § 1275(e), is nearly identical to § 82-4-251(7), MCA—divides up determinations on attorney's fees between the reviewing district court and the United State Interior Board of Land Appeals ("IBLA"). The IBLA described this two-step process in *S. Appalachian Mountain Steward v. OSM*, IBLA 2014-242, Order at *3 (IBLA Jun. 1, 2018). The IBLA first noted that the

Southern Appalachian Mountain Stewards and Sierra Club (collectively, "SAMS") "had earlier moved for an award of attorneys' fees for their efforts on judicial review, which the Court granted on November 6, 20017." *Id.* at 3; *see also S. Appalachian Mt. Stewards v. Zinke*, 2017 U.S. Dist. LEXIS 183050, 2017 WL 5147620 (W.D. Va. Nov. 6, 2017) (the federal district court granting these attorney's fees related to judicial review). The IBLA then noted that SAMS "petitioned the [IBLA] for an award of attorneys' fees for their efforts in pursuing this matter before [the Office of Surface Mining Reclamation and Enforcement ("OSM")] and the [IBLA] . . . but SAMS voluntarily dismissed their petition after OSM paid them an agreed-to amount." *S. Appalachian Mountain Steward*, IBLA 2014-242 at 3–4.

Federal courts have likewise acknowledged that the IBLA is responsible for determining attorney's fees related to administrative proceedings under SMCRA. *W. V. Highlands Conservancy, Inc. v. Norton*, 343 F.3d 239, 248 (4th Cir. 2003) (instructing district court to remand to IBLA for determination of attorney's fees issues, noting, "[i]f [IBLA] should find that [plaintiff] made a substantial contribution entitling it to fees, [IBLA] will also set the amount"); *Black Mesa Water Coal. v. Jewell*, 776 F.3d 1055, 1059–60 (9th Cir. 2015) (instructing district court to remand to agency for determination of entitlement to fees incurred during administrative proceedings); *Utah Int'l Inc. v. U.S. Dep't of Interior*, 643 F.Supp.

810, 825, n.30 (D. Utah 1986) (declining to include fees incurred during administrative phase in award of fees and costs).

Similar to the two-step process contemplated by § 82-4-251(7), the Wyoming Supreme Court directed the Wyoming Department of Environmental Quality ("WDEQ") to determine the amount of attorney's fees *against itself* in a case involving coal regulation. In *Powder River Basin Resource Council v. Wyo. EQC*, 869 P.2d 435 (Wyo. 1994) the Wyoming Environmental Quality Council ("WEQC") initially found—in evaluating Wyoming's implementation of SMCRA—that attorney's fees were limited to enforcement proceedings; could not be issued to a citizen conservation group, Powder River Basin Resource Council ("PRBRC"), against WDEQ; and could not be issued when a case was resolved by settlement. The Wyoming Supreme Court overturned the WEQC's determination finding that attorney's fees were legally available against WDEQ for settlement of a mine permit renewal proceeding. *Id.* at 439. To effectuate its legal determination, the Wyoming Supreme Court remanded the matter back to the WDEQ to "determine whether PRBRC is entitled to attorney fees for this appeal" from WDEQ. *Id*.; *see also id.* ("The record indicates that DEQ has already determined PRBRC's successful negotiation of the settlement agreement entitled them to attorney fees."). As this case demonstrates, an agency determining reasonable attorney's fees against itself is not a self-defeating proposition.

This division of labor of having the district court determining attorney's fees for district court proceedings and DEQ determining attorney's fees for administrative proceedings also makes intuitive sense. While the district court may be familiar with the time attorneys spent litigating a case before it, the same is not true regarding the parties' time spent litigating a case before BER. Reflecting this wisdom, this Court assigns district courts the duty to determining the reasonableness of attorney's fees rather than itself. *Houden v. Todd*, 2014 MT 113, ¶37, 375 Mont. 1, 324 P.3d 1157.

In sum, § 82-4-251(7), MCA, limits the district court's determination of attorney's fees to those resulting from district court proceedings. DEQ is left to make the initial determination on attorney's fees resulting from administrative proceedings like those before BER. The district court was therefore wrong to ignore statutory text and invoke administrative rules as the basis for why it could make a determination of attorney's fees resulting from BER proceedings.

B. The district court abused its discretion in awarding attorney's fees.

At the hearing on the reasonableness of MEIC's attorney fees, MEIC's witness took up one hour of the two hours the district court provided for this hearing. Through cross-examination, it was revealed that MEIC's witness had little to no familiarity with the nature of MEIC's attorney's claimed hours or even the nature of the underlying case. Hr'g Tr. at 42–49 (May 6, 2022).

Rather than forcing DEQ to forgo its allotted time to present its witness by permitting MEIC to present another witness to explain its attorneys' logged hours, the district court allowed DEQ to file a proposed order identifying the errors in MEIC's recorded hours. *Id.* at 50:7–15. Most egregiously, DEQ pointed out in this proposed order that MEIC sought to recover costs for hours spent by its attorneys responding to motions that Westmoreland had filed seeking to recuse BER members, which DEQ—along with MEIC—*had opposed*. App. D at 20. Nevertheless, the district court's order permitted MEIC to recover the hours responding to Westmoreland's motion. DC Doc. 139.

This type of error permeates almost all the district court's award against DEQ: MEIC never sought any attorney's fees against Westmoreland, yet the record makes clear much of MEIC's time litigating this case was in response to Westmoreland's advocacy. App. D at 20–21. This Court has stated "[t]he ultimate award of costs and attorney fees should reflect not joint and several liability, but liability based upon the specific events and the specific conduct of each respondent…." *Animal Found. of Great Falls v. Mont. Eighth Judicial Dist. Court*, 2011 MT 289, ¶27, 362 Mont. 485, 265 P.3d 659; *accord Gov't Emples. Ins. Co. v. Gonzalez*, 403 P.3d 1153, 1172 (Alaska 2017) (finding "in cases involving apportionment of fees among multiple non-prevailing parties that the fees should be roughly proportionate to their active involvement in the case" and the burden is

on the prevailing party to segregate attorney's fees)(citation and quotation marks omitted); *cf. TCH Builders & Remodeling v. Elements of Constrs., Inc.*, 2019 MT 71, ¶20, 395 Mont. 187, 437 P.3d 1035 ("courts are charged with evaluating attorney effort expended on multiple claims to allocate the fees applicable to each claim, and to award fees based upon that allocation.").

The district court's failure to engage in meaningful analysis parsing the hours claimed by MEIC's attorneys might not be surprising because, similar to every other decision issued by the district court in this case, the district court adopted almost the entire proposed order offered by MEIC. *Compare* App. C *with* DC Doc. 139. This Court has stated, in the context of attorney's fees, "[w]hile we discourage a district court's verbatim adoption of a prevailing party's proposed order, such an action is not per se error. A district court may adopt a party's proposed order *where it is sufficiently comprehensive and pertinent to the issues to provide a basis for the decision*." *Swapinski v. Lincoln Cnty.*, 2015 MT 275, ¶11, 381 Mont. 138, 357 P.3d 329 (emphasis added). Here, the district court's adoption of MEIC's proposed order is not sufficiently comprehensive because it entirely ignored many of the issues raised by DEQ.

The district court's failure to consider Westmoreland's involvement in generating MEIC's claimed hours is in stark contrast to the hourly rate it awarded MEIC attorneys. The district court's analysis on this point relies heavily on one of

Westmoreland's attorneys stating, after MEIC had been sanctioned by BER hearing examiner for discovery abuses, AR41 at 5–10, that Westmoreland's attorneys "charged rates 'generally higher' than $295-$395 per hour." DC Doc. 139 at 22–23. The reasonableness of these rates cannot rest on the notion that "turnabout is fair play" because MEIC has not sought fees against Westmoreland and the district court otherwise failed to consider the Westmoreland's impacts on the litigation in this case. Further demonstrating the inappropriateness of comparing MEIC's claimed hourly rates to those charged by Westmoreland's attorney's, MEIC's witness, in preparing his opinion on rates, did not disclose—let alone examine—the rates actually charged by MEIC attorneys in other cases. Hr'g Tr. at 38:17–20 (May 6, 2022).

The more compelling information—revealed through cross examination on incomplete information[15] provided by MEIC's witness, Hr'g Tr. at 35–36 (May 6, 2022)—is that Judge Malloy awarded Earthjustice attorneys Timothy Preso $225/hour and Jenny Harbine $175/hour in a similar environmental case. Doc. 139 at 24. Nothing in the district court's order rationally explains why Mr. Hernandez,

[15] In his declaration, Mr. Bishop asserted, citing a declaration from former Justice Regnier in a federal case, "that the top hourly billing rates in Montana in 2008 ranged between $350 and $450 per hour." DC Doc. 101, ¶3. Mr. Bishop's declaration, however, neglected to state that these claimed rates were rejected by Judge Malloy. *Defenders of Wildlife v. Hall,* CV-08-56-M-DWM, Dkt. 125 at 3 (D. Mont. Feb. 17, 2009).

who is currently supervised by Jenny Harbine, Hr'g Tr. at 35–36 (May 6, 2022), should be awarded $350/hour, a rate twice what Ms. Harbine was awarded in prior litigation for similar environmental work.

In sum, this Court should find that the district court's failure to consider time MEIC spent responding to Westmoreland's filings, while at the same time pegging MEIC's requested hourly rate to that of Westmoreland's attorneys, is unreasonable and an abuse of discretion.

CONCLUSION

For the reasons provided above, this Court should find: (1) that petitioners seeking to overturn DEQ's permitting decision before BER bear the burden of proof; (2) MEIC was required to exhaust all of its remedies available within the objections period before DEQ; (3) the hearing examiner properly afforded DEQ and Westmoreland an opportunity to present argument and evidence in the contested case proceeding before BER; and (4) DEQ properly found, and BER properly affirmed, that AM4 is designed to prevent material damage. As a result of these findings, this Court should, in turn, reverse and overturn the district court's order on petition for judicial review, DC Doc. 79, and order on remedy and stay, DC Doc. 107, and affirm BER's order finding that DEQ properly approved the AM4 permit, AR152. If this Court reaches the issue of attorney's fees, this Court

should find the fees awarded to MEIC were beyond the district court's statutory authority under § 82-4-251(7) and unreasonable.

Respectfully submitted this 10th day of August, 2022.

/s/ Jeremiah Langston
JEREMIAH LANGSTON

Counsel for Appellant/Respondent Montana Department of Environmental Quality

CERTIFICATE OF COMPLIANCE

Pursuant to Rule 11 of the Montana Rules of Appellate Procedure and this Court's July 7, 2022 order granting DEQ's motion for leave to file an overlength opening brief not to exceed 15,000 words, I certify that this principal brief is printed with a proportionately spaced Times New Roman text typeface of 14 points; is double-spaced except for footnotes and for quoted and indented material; and the word count calculated by Microsoft Word for Windows is 14,965 words, excluding table of contents, table of citations, certificate of service, certificate of compliance, or any appendix containing statutes, rules, regulations, and other pertinent matters.

/s/ Jeremiah Langston
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APPENDIX

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Electronically signed by Catherine Ann Armstrong on behalf of Jeremiah Radford Langston
Dated: 08-10-2022