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STATE OF MONTANA

THE SUPREME COURT OF THE STATE OF MONTANA

Case No. DA 22-0064

MONTANA ENVIRONMENTAL INFORMATION CENTER and SIERRA CLUB,

Plaintiffs and Appellees,

v.

MONTANA DEPARTMENT OF ENVIRONMENTAL QUALITY, MONTANA BOARD OF ENVIRONMENTAL REVIEW,

Respondent and Appellant,

and

WESTMORELAND ROSEBUD MINING, LLC, F.K.A. WESTERN ENERGY CO., NATURAL RESOURCE PARTNERS, L.P., INTERNATIONAL UNION OF OPERATING ENGINEERS, LOCAL 400, and NORTHERN CHEYENNE COAL MINERS ASSOCIATION,

Respondent-Intervenors and Appellants,

and

MONTANA BOARD OF ENVIRONMENTAL REVIEW

Respondent and Appellant.

Opening Brief of Westmoreland Rosebud Mining, LLC, f.k.a. Western Energy Co., Local 400, Union of Operating Engineers, Natural Resource Partners, L.P., and Northern Cheyenne Coal Miners Association

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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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I. INTRODUCTION AND STATEMENT OF THE ISSUES

This appeal asks the Court to review and affirm an Order issued by the Board of Environmental Review (the "Board"). The Board's Order, in compliance with the Montana Administrative Procedure Act ("MAPA"), correctly upheld the decision of the Montana Department of Environmental Quality ("DEQ") to approve a permit amendment, known as AM4, requested by Westmoreland Rosebud Mining, LLC. The Board decided in favor of DEQ and the Intervenors[1] after a years-long contested case. In its 2019 decision, the Board concluded that AM4 is designed to prevent "material damage" to the "hydrologic balance" outside the permit area, as required by the Montana Strip and Underground Mine Reclamation Act, §§ 82-4-201, *et seq*. ("MSUMRA"). Nevertheless, Westmoreland/Local 400 and DEQ now are cast in the role of defending the Board's Order by this appeal because of an erroneous judicial decision in which the district court reversed the Board's decision at the request of Montana Environmental Information Center and Sierra Club (collectively, "MEIC"). Adopting, virtually verbatim, the orders that MEIC drafted, the district court allowed MEIC to flout MAPA, and transformed the judicial review proceeding from a deferential record review into a *de novo* fact-finding exercise, contrary to this Court's precedent.

[1] Intervenors in the administrative action included each Respondent-Intervenor in this litigation (collectively "Westmoreland/Local 400").

The issues on appeal are as follows:

1. Whether MEIC's failure to exhaust its administrative remedies bars judicial review of the Board's Findings of Fact; or alternatively, whether, because substantial evidence supports the Board's Findings of Fact, those Findings of Fact must be affirmed?

2. Whether the Hearing Examiner's Procedural Rulings (as affirmed by the Board) complied with MAPA by:

    a. placing the burden of proof on the party challenging the agency's decision and alleging violations of law;

    b. applying the doctrine of administrative exhaustion; and;

    c. allowing all parties to present evidence and testimony in the contested case proceeding?

3. Whether the Board's challenged Conclusions of Law are correct under MSUMRA?

4. Whether the district court's injunctive remedy of permit vacatur and remand to DEQ, rather than to the Board, is contrary to MAPA?

II. STATEMENT OF THE CASE

Thirteen years ago, Westmoreland requested DEQ approve a permit amendment, known as AM4, for its Rosebud Mine. After a six-year review and multiple opportunities for public participation, DEQ approved AM4. MEIC challenged DEQ's decision by initiating a MAPA contested case proceeding before the Board. After a four-day hearing, the Hearing Examiner submitted proposed findings and conclusions to the Board for its review and consideration. The Board provided the parties the opportunity to file exceptions to the proposed findings and conclusions, submit briefing, and present oral argument. MEIC did not challenge

any of the Hearing Examiner's proposed findings of fact. After in-depth consideration and debate, the Board dismissed MEIC's challenge and affirmed DEQ's approval of AM4 in a detailed 87-page decision (the "Board's Order").[2]

MEIC appealed the Board's Order under MAPA's judicial review provisions. MEIC purported to seek judicial review solely of what it called six "legal" errors, but in fact sought to have the district court reject and rewrite several key Findings of Fact, and to also accept procedural arguments about MAPA and MSUMRA specifically rejected by the Hearing Examiner and the Board. Despite MEIC's failure to follow MAPA's requirements, the district court adopted MEIC's proposed order on summary judgment (the "Merits Order").[3] The Merits Order reversed the Board's decision and purported to "remand" the AM4 permit application to DEQ for further review consistent with the Merits Order and applicable laws.

Following subsequent motions practice on remedy and stay, the district court doubled down, again adopting MEIC's proposed order virtually verbatim. It ordered the vacatur of the AM4 permit, enjoined operations on AM4 lands effective April 1, 2022, and remanded the permit application to DEQ (as opposed to the Board) (the "Remedy Order").[4]

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[2] The Board's Order is at App.0001-87.

[3] The Merits Order is at App.0088-122

[4] The Remedy Order is at App.0123-145.

This Court stayed the district court's decisions pending, *inter alia*, resolution of an attorneys' fees dispute and subsequently granted the stay pending appeal requested by DEQ and Westmoreland/Local 400. Dkt. DA 22-0064 (3-30-2022 & 8-9-2022 Orders). The Court consolidated the several dockets and set an appellate briefing schedule, including for this filing. *Id.* (5-27-2022 & 7-5-2022 Orders).

III. STATEMENT OF THE FACTS

A. STATUTORY AND REGULATORY BACKGROUND

MSUMRA governs DEQ's evaluation of applications for permit amendments like AM4. MSUMRA includes standards that must be met before DEQ may approve a mining permit. § 82-4-227. Regulations codified at ARM 17.24.400, *et seq.* implement MSUMRA.

Under MSUMRA, a permit application must "affirmatively demonstrates" that the proposed mining operations are "designed to prevent material damage to the hydrologic balance outside the permit area." § 82-4-227(3)(a). *See also* ARM 17.24.405(6)(c). The key terms are defined:

> "Material Damage" means, "with respect to protection of the hydrologic balance, degradation or reduction by coal mining and reclamation operations of the quality and quantity of water outside 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."

§ 82-4-203(32); ARM 17.24.301(68).

To confirm compliance, DEQ assesses the "cumulative hydrologic impacts" of the proposed operation and all previous, existing, and anticipated mining upon surface and groundwater systems in the cumulative impact area. § 82-4-227(3)(a); ARMs 17.24.405(6)(c); 17.24.301(31), (32), (55), (68). A "material damage" determination thus assesses whether the probable cumulative impacts from the proposed mining permit will cause a violation of water quality standards outside the permit area. § 82-4-203(32); ARM 17.24.301(68). This assessment is reflected in DEQ's Cumulative Hydrologic Impact Assessment ("CHIA"). Only after DEQ has confirmed compliance does it issue its "Findings and Notice of Decision." ARM 17.24.405. This process can be lengthy. In this instance, the process consumed approximately six years.

Within 30 days of DEQ's permit decision, "any person ... adversely affected may submit a request for a hearing on the reasons for the final decision." ARM 17.24.425(1). The requested hearing occurs before the Board pursuant to MAPA. Judicial review is then available in the district court. § 82-4-206(1)(2); §§ 2-4-601 to 631.

B. WESTMORELAND'S AM4 AMENDMENT

Westmoreland operates the Rosebud Mine near Colstrip, Montana. App.0009-10. East Fork Armells Creek ("EFAC") is an ephemeral prairie drainageway whose headwaters ("Upper EFAC") are surrounded by the mine.

App.0019, FOF, ¶¶50-52; § 82-4-203(18). In June 2009, Westmoreland requested DEQ approve a 49-acre amendment to its mining permit—AM4—to allow continuation of existing operations. Supp.App.1805-20. DEQ conducted its six-year review of the AM4 application under MSUMRA and determined AM4 had been designed to prevent material damage to the hydrologic balance outside the permit area. App.0013-15; Supp.App.1805-2234.

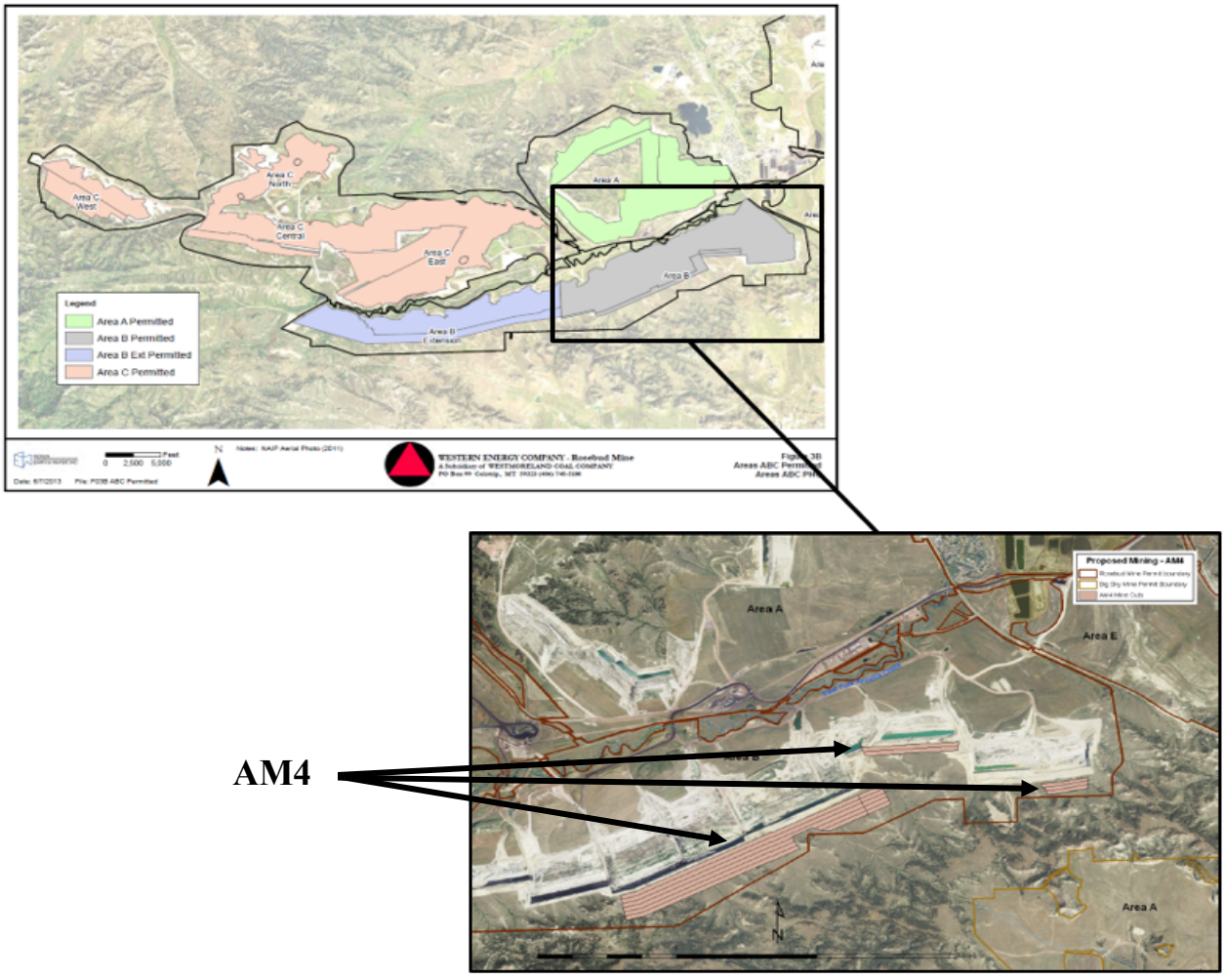

Figure 1: AM4 within Area B of the Rosebud Mine Complex - Supp.App.2015

DEQ solicited public comments, *aka* "objections." ARM 17.24.402(2)(a). MEIC filed written objections, identifying only three concerns: (1) the level of total dissolved solids ("TDS", also referred to as salinity) in the EFAC ephemeral drainage; (2) nitrogen levels in EFAC; (3) aquatic life use of EFAC. App.0014, FOF ¶¶16-17, 27; Supp.App.2239-2251.

The term "aquatic life" is a bit of a misnomer in this case. As noted above, the waterbody at issue is an ephemeral drainageway that bisects the Rosebud Mine. App.0019, FOF ¶¶50-52; § 82-4-203(18). An ephemeral drainageway "flows only in response to precipitation in the immediate watershed or in response to the melting of snow or ice and is always above the local water table." App.0019, FOF ¶53. The portion of the drainageway in the Mine's vicinity evidences "well-vegetated conditions with a narrow and defined stream channel without any flowing water." App.0021, FOF ¶61. Because the drainageway supports a diverse community of benthic macroinvertebrates—invertebrate fauna, *e.g.,* larval insects, living on and under sediment—DEQ thoroughly studied and documented its conclusions regarding this "aquatic life." App.0049-50, FOF ¶¶190-195.

Upon review of all comments/objections, DEQ "specifically responded to each of the issues raised." App.0014, FOF ¶29; Supp.App.1814-1820. After six years of technical review and multiple opportunities for public participation, on December 5, 2015, DEQ issued its Written Findings and CHIA, confirming, *inter*

alia, that AM4 was designed to prevent material damage to the hydrologic balance outside the permit area. Supp.App.1805-2234. DEQ then approved AM4. Supp.App.1805-2238.

C. THE MAPA CONTESTED CASE

MEIC initiated a MAPA contested case proceeding before the Board. App.0015, FOF ¶32, Supp.App.0141-146. MEIC's Notice of Appeal raised a litany of claims, some that were raised in its public comments and some that were not. App.0015, FOF ¶33. The Hearing Examiner—applying the doctrine of administrative exhaustion—limited MEIC's claims in the contested case proceeding to (1) specific issues raised in MEIC's comments *and* (2) any "new" issues arising after the close of the public comment period for which MEIC had no prior notice. App.0004-5; Supp.App.0002-8.

The Hearing Examiner explained "[t]his hearing must therefore fall somewhere between a records review and a freewheeling attack on, or defense of, the permit." Supp.App.0005. Accordingly, the Hearing Examiner ruled that "[a]ll parties are limited by the permitting process itself—DEQ and [Westmoreland/Local 400] are limited by the CHIA and the Written Findings and [MEIC is] limited by [its] written objections and the notice of appeal." Supp.App.0005. The Hearing Examiner provided a balanced approach for the evidentiary hearing:

> [MEIC] may explain and support [its] objections to DEQ's written findings, using expert testimony as necessary, in

> an effort to meet its burden to show by a preponderance that DEQ should not have issued the permit over its objections. DEQ and [Westmoreland/Local 400] may in turn explain and support the CHIA and written findings, with expert testimony as needed. Neither party, however, 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.

Supp.App.0005.

As the party alleging violations of the law and challenging DEQ's decision, MEIC had the burden to prove its claims by a preponderance of the evidence. § 82-4-206; ARM 17.24.425(7); *Mont. Envtl. Info. Ctr. v. Dep't of Envtl. Quality*, 2005 MT 96, ¶¶14, 16, 22 ("*MEIC I")*; App.0004-7, 0074, COL ¶5. The Hearing Examiner's *Order on Motions in Limine* explained: "[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.'" Supp.App.0003.

After three years of discovery and a four-day evidentiary hearing, the Hearing Examiner submitted 248 proposed findings of fact, 44 proposed conclusions of law, and 35 pages of discussion to the Board for its review and consideration. Supp.App.0013-115. The Board solicited exceptions, briefing, and oral argument on the proposed findings and conclusions. Supp.App.1360-1365. Unlike DEQ and Westmoreland/Local 400 (Supp.App.1366-1411), MEIC lodged *no exceptions* to

any of the proposed findings of fact and instead focused its briefing on purported legal errors. Supp.App.1412-1480. This focus was not lost on the Board:

> **Board Member Tweeten**: In your exceptions, is there anywhere where you object to any of these findings of fact on the grounds that they're not supported by substantial evidence in the record or are otherwise contrary to law?
>
> **MEIC**: In our objections we note that any finding of fact that includes a conclusion of law is something that we object to. And just because it's denominated a finding of fact does not mean that it's a finding of fact. If there is a legal issue embedded within it, we have objected within the four or five points we raised in our brief, which included the exhaustion issue that I raised.
>
> **Tweeten**: But your objection is not based on the argument that these are not supported by substantial evidence in the record; am I correct about that?
>
> **MEIC**: We have not expressly raised any substantial evidence. […] [W]e focused on what we perceived as key legal errors.
>
> […]
>
> **Tweeten**: Madam Chair, the time for any of the parties to bring to our attention findings of fact that they believe are either not supported by substantial evidence or are contrary to the law is in their exceptions, and [MEIC's] exceptions point us to no findings of fact that they claim, as far as I can tell – and please correct me if I'm wrong – but *I don't see anywhere in your exceptions where you suggest that any finding of fact is not supported by substantial evidence on the record as a whole.* You do make some arguments with respect to findings of fact that you believe may be built on an incorrect legal foundation, but those are subsumed within your arguments with respect to the conclusions of law. So I don't believe that – unless anybody on the Board has a particular problem

> with a finding of fact, and it's in the factual support for it in the record, I would suggest that we adopt the finding that the findings of fact are supported by substantial evidence in the record, and that any arguments with respect to the legal basis of a finding of fact be dealt with as they are incorporated in the challenges that are raised in the conclusions of law.

Supp.App.1624-1635 (emphasis added). The Board then voted unanimously to adopt all 248 findings of facts. Supp.App.1634-1635.

After a lengthy oral argument (Supp.App.0116-140), the Board issued its Order adopting the Hearing Examiner's proposed findings and conclusions with minor modifications. App.0001-87. The Board found that mining is *not* responsible for historic impairment of EFAC, that AM4 will *not* exacerbate naturally occurring concentrations of salinity in EFAC, and that AM4 *is* designed to prevent material damage outside the permit boundary:

- AM4 will not cause violations of groundwater standards. App.0039, FOF ¶145.
- AM4 will not cause violations of surface water standards. App.0043, FOF ¶168.
- AM4 will cause no measurable change to the water quality or quantity of EFAC. App.0039, FOF ¶144.
- AM4 will not increase salinity in EFAC. App.0036-37, FOF ¶¶132-134.
- AM4 will not increase salinity in EFAC's alluvium. App.0034, FOF ¶122
- AM4 will not increase salinity in groundwater. App.0037-38, FOF ¶138.

- AM4 will not increase salinity in ephemeral runoff. App.0039, FOF ¶144, 0057 at FOF ¶231.
- AM4 contributions of salinity to EFAC, if any, will be immeasurable and undetectable. App.0037, FOF ¶137.
- Salinity sampled in EFAC is not attributable to mining. App.0022, FOF ¶71; 0026-28, FOF ¶¶87-94; 0031, FOF ¶106; 0041, FOF ¶155.
- DEQ's past attribution of EFAC impairment to mining was wrong. App.0022, FOF ¶71; 0026-28, FOF ¶¶87-94; 0031, FOF ¶106; 0041, FOF ¶155.
- MEIC presented no convincing evidence that EFAC's existing impairment is attributable to mining. App.0083, FOF ¶37.

The Board granted DEQ and Westmoreland/Local 400's motion for "directed verdict,"[5] entered judgment in favor of DEQ and Westmoreland/Local 400, dismissed MEIC's challenge, and affirmed DEQ's approval of AM4. App.0085-86, COL ¶44.

D. JUDICIAL REVIEW IN THE DISTRICT COURT

MEIC sought judicial review of the Board's Order. MEIC purported not to challenge any of the Board's 248 factual findings; rather, MEIC said it sought judicial review of six purported "legal" errors: (i) that the Board erred by applying the doctrine of issue exhaustion to matters MEIC neglected to raise before DEQ in public comments; (ii) that the Board erred by allowing DEQ and

[5] The Board, consistent with the Hearing Examiner's recommendation, directed entry of judgment based upon the lack of evidence offered by MEIC, *i.e.,* without the necessity of considering DEQ and Westmoreland/Local 400's evidence. *See* Mont.R.Civ.P. 52(c).

Westmoreland/Local 400 to present evidence and argument responsive to MEIC's case; (iii) that the Board erred by concluding MEIC bore the evidentiary burden to prove its claims; (iv) that the Board erred by crediting DEQ's aquatic life material damage assessment that relied, in part, on third party expertise and analysis; (v) that the Board acted arbitrarily by finding that DEQ adequately assessed impacts to aquatic life; and (vi) that the Board acted arbitrarily by concluding that the addition of TDS to a waterway listed as "impaired" does not constitute *per se* material damage. App.0089. MEIC's fifth and sixth challenges, although presented as purported questions of law, collaterally attacked (and sought to relitigate) the Board's factual findings specific to TDS and aquatic life. App.0089, 0116; *compare with* App.0005, App.0031-39, FOF ¶¶107-147, App.0043-61, FOF ¶¶170-248.

Despite the Hearing Examiner's and Board's rulings, on summary judgment the district court adopted MEIC's proposed orders, overruled the Board on facts and law, vacated AM4, bypassed the Board and remanded the matter to DEQ to restart the permit application review process, and halted mining on AM4 lands. App.0088-0145. This appeal follows.

IV. STANDARD OF REVIEW

MAPA "governs judicial review of final agency decisions" like that conducted by the district court. § 2-4-704; *Griz v. State*, 2020 MT 285, ¶12 (citing *Mont. Fish, Wildlife & Parks v. Trap Free Mont. Pub. Lands*, 2018 MT 120, ¶11).

Findings of fact are reviewed to determine whether they are "clearly erroneous", while the agency's conclusions of law are reviewed for correctness. *Id.* (citing *Talon Plumbing & Heating, Inc. v. State Dep't of Labor and Indus.*, 2008 MT 376, ¶19). "The same standard of review applies to both the district court's review of the agency decision and this Court's review of the district court's decision." *Id.* (quoting *Trap Free*, ¶11). This Court, thus, reviews the district court's orders *de novo* for whether it properly followed MAPA in rendering its decision, and will correct standard-of-review and other errors made by the district court. *Id.* By statute, § 2-4-704(2), this Court will determine *de novo*—without deference to the district court—whether the lower court erroneously "substitute[ed its own] judgment for that of the agency as to the weight of the evidence on questions of fact," reached conclusions of law that are not "correct[]," or failed to "limit[] [its review] to the administrative record." *Id.* (internal quotation marks and citations omitted). Review of agency decisions "must be confined to the record." § 2-4-704(1). At the same time, this Court will grant some deference in the form of "respectful consideration" to an agency's legal interpretation of any ambiguity in the statute. *E.g., Mont. Envtl. Info. Ctr. v. Mont. Dept. of Envtl. Quality,* 2019 MT 213, ¶24 n.9 (*MEIC II*).

The "mere existence of an error [in the agency decision] does not mandate a reversal; the error must cause substantial prejudice." *Erickson v. State ex rel. Bd. of*

Med. Exam'r, 282 Mont. 367, 375 (1997); *Bostwick Props., Inc. v. Mont. Dep't of Nat. Res. & Conservation*, 2013 MT 48, ¶53 (same, citing *Erickson*); *Abbey v. City of Billings Police Comm'n*, 268 Mont. 354, 364 (1994) (harmless error "does not affect the substantial rights of the party"). This is "the crucial determination for reversal," and MEIC carries a "heavy burden" to prove such prejudice for each claimed error. *Harris v. Trustees, Cascade Cty. Sch. Dists.*, 241 Mont. 274, 280 (1990); *State v. Laird*, 2019 MT 198, ¶48.

V. SUMMARY OF THE ARGUMENT

The first step in judicial review of a MAPA-contested case is determining whether the petitioner has exhausted administrative remedies sufficient to maintain jurisdiction. Here, MEIC did not challenge the Hearing Examiner's findings of fact, so those findings, which were unanimously adopted by the Board, may not be reviewed or altered on judicial review. The district court therefore erred when it purported to adopt facts contrary to the Board's unchallenged and well-supported findings that (1) AM4 will not cause violations of water quality standards, including water quality standards designed to protect aquatic life, App.0052, ¶207; and (2) AM4 will not increase salinity in EFAC, EFAC alluvium, groundwater, or ephemeral runoff. App.0034-38, FOF ¶¶122-138.

The Board followed MAPA during the contested case proceedings when it (1) placed the burden of proving DEQ's approval of AM4 violated MSUMRA on

MEIC, consistent with *MEIC I*; (2) applied administrative exhaustion to bar MEIC from raising certain claims; and (3) allowed all parties to present relevant evidence to challenge or defend DEQ's decision so long as the issue was not entirely "new" and could be tied to the record before DEQ at the time of its decision.

The Board correctly applied MSUMRA when it concluded MEIC had failed to meet its burden of proving that AM4 would cause water quality violations or "material damage" outside the permit area, properly rejecting MEIC's reliance on water quality assessments and federal Clean Water Act 303(d) impairment determinations, which, "as a matter of law, …— do not equate to determinations of water quality standard violations or 'material damage' determinations that may prevent permit approval pursuant to MSUMRA." App.0082, COL ¶22. In addition, the Board correctly interpreted and applied MSUMRA when it concluded that mere extension of impacts which themselves never rise to the level of "material damage" cannot, through the simple passage of time, become material damage. App.0055, FOF ¶219; 0068, n.4.

Finally, MAPA limits the relief available on judicial review to affirming or remanding the Board's decision back *to the Board* to address and rectify identified errors. The district court erred in purporting to fashion instead the injunctive relief of vacating the AM4 permit and remanding to DEQ to start the permit process anew,

with all mining halted on AM4 lands, rather than remanding to the Board, with the *status quo ante* kept in place, for it to reconsider the contested case.

VI. ARGUMENT

A. THE BOARD'S FINDINGS OF FACT ARE NOT SUBJECT TO JUDICIAL REVIEW; REGARDLESS THE FINDINGS ARE SUPPORTED BY SUBSTANTIAL EVIDENCE.

1. The Board's Factual Findings Are Final And Not Subject To Review.

Because MEIC failed to "pursue to their conclusion" all steps of the administrative process necessary to maintain claims challenging the Board's factual findings on judicial review, this Court should affirm the Board's factual findings, and reverse the district court's unlawful review and rewriting of facts that underlie its orders. *Flowers v. Mont. Bd. of Personnel Appeals*, 2020 MT 150, ¶13.

There is no dispute that the penultimate step of the administrative process is the lodging of exceptions to proposed findings and conclusions. § 2-4-621(1). To exhaust its remedies and preserve its claims for judicial review, a party adversely affected by proposed findings and conclusions *must* "file exceptions and present briefs and oral argument" prior to the Board rendering a final decision. *Id.* (emphasis added); *Flowers*, ¶13.

Here, the Board solicited written exceptions, briefing, and oral argument on the Hearing Examiner's proposed findings and conclusions. Supp.App.1360-1365. All parties filed briefs and participated in oral argument. Supp.App.1366-1529.

However, while both DEQ and Westmoreland/Local 400 lodged exceptions to specific findings and conclusions (offering modifying language for each exception), MEIC did not lodge a single exception. Supp.App.1412-1480. As shown above, the Board called out MEIC's failure to lodge exceptions, and, when pressed on its omission, MEIC admitted it did not "expressly raise any substantial evidence" or "identify individual [findings],"—*i.e*., lodge exceptions—and instead "focused on what [they] perceived as key legal errors"—*i.e*., MEIC filed a brief with legal argument, not exceptions. Supp.App.1624-1635.

Lodging exceptions *is not optional*. *Flowers*, ¶13. MEIC must "pursue to their conclusion all administrative remedies available," including the filing of exceptions; simply briefing "key legal errors" is no substitute for filing exceptions. *Id*. By failing to lodge exceptions and then further failing to verbalize any exceptions during oral argument, MEIC did not exhaust its administrative remedies, and, consequently, this Court lacks subject matter jurisdiction to review the Board's finding of facts and must, instead, adopt them. *Id*., ¶¶12-13, 17. Judicial review should essentially end here, and the Board's Order should be upheld. As shown below, the purported "legal errors" are not errors, and the underpinning of the MEIC-drafted orders are "facts" different from—indeed, contrary to—those found by the Board. Allowing MEIC to so flout MAPA and this Court's precedent would render superfluous the contested case process that this Court has required of all other

petitioners, and the statutory scheme the legislature adopted. In this setting, the Board's facts are *the* facts on review and further analysis is unnecessary.

2. In Any Event, The Board's Findings Of Fact Are Supported By Substantial Evidence And May Not Properly Be Disturbed.

Even if the Board's findings of fact were subject to judicial review—they are not—by statute such review would be closely circumscribed. Because the Board's findings are supported by substantial evidence, they cannot be disturbed on judicial review. Substantial evidence is something "more than a mere scintilla of evidence" but less than a preponderance. *Peretti v. Dep't of Revenue*, 2016 MT 105, ¶¶17-18. The Court must view challenged findings in the light most favorable to the prevailing parties, *Benjamin v. Anderson*, 2005 MT 123 ¶12, and give deference to the findings of the Hearing Examiner and the agency, especially where, as here, "the agency utilized its experience, technical competence, and specialized knowledge in making that evaluation." *Nw. Corp. v. Mont. Dep't of Pub. Serv. Regulation*, 2016 MT 239, ¶27 (internal quotations omitted); *KB Enters., LLC v. Mont. Human Rights Comm'n,* 2019 MT 131, ¶ 9 (Hearing Examiner's findings are "entitled to great deference."). With limited exceptions, "[f]indings of fact by an agency are *binding* on the court 'if there is substantial, credible evidence in the record.'" *Carruthers v. Bd. of Horse Racing*, 216 Mont. 184, 187 (1985) (emphasis added) (internal quotations omitted).

While the district court purported *not* to review the findings of fact, its orders nevertheless recite "facts" in support of conclusions of law that are contrary to the

Board's findings of fact. Such a *sub silentio* reversal of the Board's findings is error, both because the court lacked jurisdiction, *supra* at 1.A., and because each of the findings implicated by the district court's decision *is* supported by substantial evidence. Here again, to allow a district court—sitting as a MAPA reviewing court—to engage in this type of wholesale beyond-the-record fact creation, would render contested case proceedings before the Board entirely superfluous.

a. The Board's Aquatic Life Findings Are Supported By Substantial Evidence.

The Board's Order made over 40 findings of fact related to DEQ's evaluation of aquatic life. App.0043-53, FOF ¶¶170-208. The Merits Order improperly reviewed and adopted the factual findings that MEIC substituted for those of the Board—despite the absence of exceptions and MEIC's concession regarding substantial evidence. App.0115-116.

First, contrary to the Board's findings, the Merits Order says that the "the unreliable macroinvertebrate survey was the *only* specific evidence on which the [Board] and DEQ relied to reach their conclusion about potential violations of the narrative water quality standard for growth and propagation of aquatic life." App.0117 (emphasis in original). The order then concluded that this reliance was arbitrary because DEQ acknowledged "analyzing macroinvertebrate data … would *not* provide an *accepted* or *reliable* indicator of aquatic life support[.]" App.0116.

In fact, DEQ's findings *did not* rest solely, or even primarily, on the aquatic life survey: Rather, DEQ assessed "multiple line of evidence" including "available biological, physical, and chemical data in its entirety" before reaching its determination that aquatic life in the drainage is unaffected by mining. App.0050-51, FOF ¶¶196-198. Plainly, even disregarding the aquatic life survey, the Board's aquatic life findings are supported by substantial evidence. App.0043-53, 85.

Nothing in MEIC's expert's testimony rebutted DEQ's conclusions. The Board noted that MEIC's expert had worked predominantly on western Montana streams with significantly different physical, chemical, and biological characteristics than eastern Montana waters; he had done no fieldwork in eastern Montana prairie streams like the ephemeral drainageway at issue here, and he had never visited the waters at issue. App.0050-53. The expert's testimony "did not compare any of the water chemistry upstream of the mine to water chemistry downstream from the mine" or include "any kind of causal assessment or empirical data addressing any potential cause of impairment." App.0052. Thus, the Board properly held that MEIC had not carried its burden to prove material damage to aquatic life and directed its verdict against MEIC accordingly.

Second, the Merits Order confuses the technical limitations on the sufficiency of aquatic life surveys to fulfill a specific type of federal *Clean Water Act* analysis with the different *MSUMRA* analysis at issue here. App.0117. The Board, and even

MEIC's expert, recognized that "macroinvertebrate monitoring can be conducted for purposes *other* than an attainment demonstration." App.0046-51, FOF ¶199 (emphasis added). Here, the aquatic life survey supports DEQ's findings because it found "a diverse community of macroinvertebrates, consisting of taxa commonly found in eastern Montana prairie streams." App.0049. The survey showed EFAC to be "consistent with natural conditions of ephemeral prairie streams and with historic [pre-mining aquatic life survey] data" from the same drainage, findings not rebutted by MEIC at the hearing. App.0049-52.

b. The Board's Salinity Findings Are Supported By Substantial Evidence.

(i) Mining has not and will not impair EFAC.

The Board's findings of fact explained that EFAC's impairment is attributable to the "ephemeral nature" of the drainageway and "other downstream sources," *not* coal mining. App.0027-28; 31, 62. But to prove a MSUMRA violation, MEIC needed to identify material damage *caused by coal mining*—not background conditions. *See* § 82-4-203(32) (defining "material damage" to require "degradation or reduction *by coal mining*") (emphasis added).

Attempting to bridge this gap and connect "impairment" to coal mining, the Merits Order improperly reviewed and misconstrued four of the Board's findings. *First*, it concludes that "[t]he Board found that EFAC is an impaired water and not meeting narrative water quality standards for supporting growth and propagation of

aquatic life *due to*, among other things, excessive salinity pollution." App.0118 (referencing "DEQ's official CWA assessment") (emphasis added). *No such finding exists*. In fact, the Board examined "DEQ's official CWA assessment" and explained that it identified only *potential* and *"unconfirmed" causes* of impairment. App.0027-29 (emphasis added).

Second, the district court—really MEIC—inaccurately explained that "[t]he Board further found that existing mining operations will cause a 13% increase in salinity in *EFAC*." App.0118 (emphasis added). The Board actually discussed "the effects of the predicted 13% increase in [salinity] on the EFAC *alluvium*," carefully noting that the "alluvium" is essentially the streambed (not the ephemeral stream itself), and then finding that the alluvium "provides a minor contribution" to EFAC's surface water. App.0032, 38, 63-64 (emphasis added). Thus, the Board did *not* make any findings regarding salinity increases in the *surface water* of EFAC from existing mining.

Third, the Merits Order improperly mischaracterizes the Board's Order as "considering the increased salinity from AM4 in *isolation* from the cumulative impacts of existing mining." App.0119 (emphasis added). The district court ignored the Board'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.*" App.63 (emphasis in original).

Fourth, the Merits Order wrongly asserts that the Board found AM4 would "extend the duration of [increased salinity levels and] the impaired condition of EFAC for 'tens to hundreds of years.'" App.0118. The Board specifically did *not* make a finding regarding the duration of any impacts. Rather, in a lengthy footnote it explained the difficulty in considering such a finding. App.0068, n.4 ("Neither side presented any convincing evidence about exactly how or to what extent the duration of time for 'salt loading' would actually increase because of the AM4 Amendment specifically").

In short, despite having no authority to review the Board's factual findings, by adopting MEIC's proposed order the district court ignored substantial evidence and either misconstrued or rewrote the Board's findings in order to support reversal. Under MAPA, this Court must affirm *the Board's* findings that mining has not and will not impair EFAC, which findings are unreviewable *and* supported by substantial evidence.

(ii) AM4 is designed to comply with water quality standards.

The Board concluded that *no evidence* suggests AM4 will cause a water quality violation. The Board's unrebutted findings establish that MEIC's own expert "did not calculate an increase in salinity in [EFAC] associated with the AM4

Amendment," did not consider components that would affect "the amount [or load] of salt, that could migrate downstream," did not "address the extent to which the AM4 Amendment would increase the long-term salt-loading to" the drainage, and did not "address the question of whether the claimed increase in salt loading to EFAC from the AM4 Amendment would be significant." App.0035. Thus, the Board ruled that MEIC did not make its case that salinity from AM4 will cause material damage.

Nonetheless, the Merits Order*, again*, improperly reviewed and rewrote the Board's factual findings to support reversal. *See* App.0119-121. For example, the Board found that: "[n]o evidence was presented showing that mining associated with the AM4 Permit will change the concentration of [salinity] outside the permit boundary in a manner or to an extent that the C-3 designated uses of EFAC would be adversely affected." App.0039, ¶147. This finding was unchallenged and, thus, binding. But disregarding this finding, and citing no evidence, the district court nevertheless held that "if existing salinity concentrations are adversely affecting growth and propagation of aquatic life (as here), then increasing salinity concentrations or extending the duration of the increased concentrations will also adversely affect growth and propagation of aquatic life." App.0120. In short, without evidence and providing no reason to discredit the Board, the district court adopted a fact *exactly opposite* of the Board's actual finding. The Board correctly

relied on evidence and testimony that any additional salinity from *all* mining would not even be measurable in EFAC. App.0031-34 (finding that the salinity level in EFAC "ranges widely" such that the predicted increase from *all* mining would not "be distinguishable from natural variations").

Here again, the district court violated MAPA. The Board's finding that impacts from AM4 *will not* be discernable or statistically significant—which is supported by substantial evidence—must be affirmed. App.0036-39 (emphasis added). In short, to enforce MAPA, this Court must discard the district court's improper orders and affirm, *de novo*, the Board's Order, and reject MEIC's attempt to rewrite the Board's established, binding facts.

B. THE BOARD'S PROCEDURAL DECISIONS COMPLIED WITH MAPA.

The Board appropriately ruled that: (1) MEIC bore the burden of proving that DEQ's approval of AM4 violated MSUMRA; (2) administrative issue exhaustion applies and bars some of MEIC's claims; and (3) all parties may present evidence and testimony to challenge or defend AM4 so long as the evidence and testimony are not entirely "new" and can be tied back to the administrative record before DEQ at the time of the permitting decision.

Procedural rulings, including on administrative issues, are reviewed for abuse of discretion. *City of Missoula v. Girard,* 2013 MT 168, ¶10. Abuse of discretion exists when an agency "exercises its discretion based on a mistake of law, clearly

erroneous finding of fact, or otherwise acts arbitrarily without employment of conscientious judgment, or in excess of the bounds of reason, resulting in substantial injustice." *Larson v. State*, 2019 MT 28, ¶16. An agency's interpretations of its "rules, procedures, and policies," are given "great weight," and the Hearing Examiner's trial determinations are "entitled to great deference." *Knowles v. State ex rel. Lindeen*, 2009 MT 415, ¶22; *KB Enters.,* ¶9. Because the Board acted in a legally correct manner, well within its discretion and in accordance with MAPA when making each of its procedural rulings, the legal rulings challenged by MEIC must be upheld.

1. <u>The Board Properly Imposed The Burden Of Proof On MEIC.</u>

Before the contested case hearing began, MEIC acknowledged bearing the burden of proof. Supp.App.0003 ("[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.'"). MEIC had no real choice but to so concede. The statutory provisions applicable in MAPA-contested cases are clear: "the initial burden of producing evidence as to a particular fact is on the party who would be defeated if no evidence were given on either side"; and "a party has the burden of persuasion as to each fact the existence or nonexistence of which is essential to the claim for relief or defense he is asserting." §§ 26-1-401, 402, and 403(1). And the applicable regulation

provides: "[t]he burden of proof at such hearing is on the party seeking to reverse the decision[.]" ARM 17.24.425(7).

This Court has already so ruled in yet another MEIC contested-case appeal:

> The claim MEIC asserted before the Board was that [DEQ's] decision to issue the air quality permit violated Montana law. If no challenge had been made or, as in this case, no evidence were presented at the contested case hearing establishing that issuance of the permit violated the law, the Board would have no basis on which to determine [DEQ's] decision was legally invalid. *Thus, as the party asserting the claim at issue, MEIC had the burden of presenting the evidence necessary to establish the facts essential to a determination that [DEQ's] decision violated the law*.

MEIC I, 2005 MT 96, ¶¶14-16 (emphasis added) (internal citations omitted).

Following *MEIC I*, the Board held that in order to prevail on its claims challenging AM4, MEIC bore:

> 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.

App.0074-76 (citing *MEIC I*, ¶16). The Board determined MEIC did not carry this burden at the hearing. App.0072, 85.

In reversing the Board's Order, the district court adopted the same arguments from MEIC that the Board had properly rejected, *i.e.,* that (1) MSUMRA's permit application requirements alter the burden of proof in the contested case, App.0113-

114; and (2) that *MEIC I* is distinguishable because the underlying statute at issue in the contested case was the Clean Air Act, App.0114-115. This MEIC-penned analysis is flat wrong.

First, the requirements for permit applications have no bearing on the burden of proof required of a party alleging in a MAPA-contested case proceeding that DEQ's decision violates the law. The MSUMRA permit application process required *Westmoreland* to initially demonstrate to DEQ that its permit application was designed to prevent "material damage," § 82-4-227(3)(a), and DEQ determined that Westmoreland fully satisfied that burden. App.0007, 53, FOF ¶209; 78, COL ¶¶19-20. As the Board has now properly held in this and a subsequent permit challenge, however, contested case proceedings are governed by MAPA, not MSUMRA. *See* § 2-4-601, *et seq*.; *see also* Dkt. DA 22-0064 (*Reply in Supp. of R. 22(a) Motion for Stay*, Ex. B at 7-9).[6] Nothing in MAPA or MSUMRA purports to extend MSUMRA-specific permit application provisions into the contested case process. MAPA places the burden on the *challenging party*, the norm in civil litigation.

The Merits Order incorrectly cites *Bostwick Props., Inc. v. Dep't of Natural Res. & Conservation*, 2013 MT 48, to support carrying forward the permit

[6] The Board expressly rejected the district court's burden of proof analysis in the analogous Case No. BER 2016-07 (SM) (June 16, 2022).

applicant's requirements into the contested case. App.0112. *Bostwick* actually reinforces the *MEIC I* rule that the party challenging the agency's decision must prove its claim. In *Bostwick*, unlike here the agency *denied* a permit and the applicant challenged *that* decision. Consistent with the Board's decision here and in *MEIC I*, this Court (and the district court) required Bostwick—*as the party challenging the agency's decision and asserting violations of law*—to prove his arguments and determined he did not meet that burden. *Bostwick*, ¶¶31, 36, 39, 41. Thus, *Bostwick* supplies no support for MEIC's contrary position.

MEIC's attempt to distinguish *MEIC I* because it involved an air permit (as opposed to a mine permit), also fails. In *MEIC I*, MEIC made the same argument—that because the permit applicant had to demonstrate it met the criteria for issuance of the permit, it must also bear that burden in the MAPA contested case challenging the agency's decision. *MEIC I*, ¶¶11-13. This Court *rejected* that argument. *Id.,* ¶¶14-16. There is no meaningful difference between the permit processes at issue in *MEIC I* and those at issue here. *Compare* § 82-4-227(1) with ARM 17.8.749(3). Thus, *MEIC I* controls here.

Moreover, in *MEIC I*, this Court explained that in a MAPA-contested case, ordinary rules of evidence—including the burden of proof—apply in the absence of a statutory direction to the contrary. *MEIC I*, ¶¶13-14; *see also* William L. Corbett, *Montana Administrative Law Practice: 41 Years After the Enactment of the*

Montana Administrative Procedure Act, 73 Mont. L. Rev. 339, 362 n.184 (2012). Here, MSUMRA's language applying MAPA to permit challenges is functionally identical to the Clean Air Act language at issue in *MEIC I*. *Compare* § 82-4-206(2) *with* § 75-2-211(10). There is no instruction reallocating the burden of proof.

In sum, the Board correctly applied *MEIC I* and required MEIC to bear the burden of proof in the contested case.

2. <u>The Board Properly Applied Administrative Exhaustion.</u>

a. The Board correctly decided to apply the exhaustion principle.

The Board's application of issue exhaustion was both fair and well-supported by applicable precedent. Administrative law is well-settled: public commenters, such as MEIC, must "'structure [their] participation so that it … alerts the agency to the [parties'] position and contentions' in order to allow the agency to give the issue meaningful consideration." *DOT. v. Pub. Citizen*, 541 U.S. 752, 764 (2004) (alterations in original). "[T]here is a near absolute bar against raising new issues—factual or legal—on appeal in the administrative context." *Nat'l Wildlife Fed'n v. EPA*, 286 F.3d 554, 562 (D.C. Cir. 2002); *see also* Hickman and Pierce, <u>Administrative Law Treatise</u>, § 15.8 (5th ed. 2017 update); 7 West's Fed. Admin. Law Prac. § 8225 (2017 update). The primary purpose of the rule is to ensure objections are made "while [the agency] has opportunity for correction." *U.S. v. L.A. Tucker Truck Lines*, 344 U.S. 33, 37 (1952). MAPA incorporates this

administrative exhaustion rule, requiring that a party must "exhaust[] all administrative remedies available within the agency." § 2-4-702(1).

This Court has affirmed this reasoning: "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." *Wiser v. State*, 2006 MT 20, ¶30 (internal quotations omitted). A general objection to the agency's decision does not preserve every argument on appeal. *Art v. Dep't of Labor & Industry*, 2002 MT 327, ¶14 (must exhaust "particular issues as well as entire cases.").

Absent this rule, agencies would have no opportunity to explain their rationales or address public concerns, and parties interested only in delaying and derailing a permit application (as opposed to providing constructive input) would have every incentive to reserve their objections for a contested case in hopes of upsetting and restarting DEQ's review process with endless "new" issues that the agency had no opportunity consider in its permitting process. This Court concurs. *See Citizens Awareness Network v. Mont. Bd. of Envtl. Review*, 2010 MT 10, ¶31 ("parties should not be allowed to abuse procedural rules in order to obstruct the administrative process"). In short, MEIC's approach would render the administrative review and public participation process meaningless and reward non-participation and obstruction.

Nonetheless, the Merits Order concluded that the Board could *not* apply issue exhaustion in contested case proceedings. App.100-101. The citation to *Citizens Awareness Network*, 2010 MT 10, for the conclusion that "MAPA does not require issue exhaustion in contested cases, but instead allows parties to raise new issues revealed during administrative review" is entirely misplaced. App.101. *Citizens Awareness* makes no mention of the exhaustion doctrine or § 2-4-204. 2010 MT, ¶¶13–20. Instead, it addressed whether a party may be permitted to amend its pleadings pursuant to Mont. R. Civ. P. 15. *Id*.

b. The record demonstrates the Board carefully applied exhaustion principles to the facts of the case.

This Court reviews, with great deference, the Hearing Examiner's case-by-case application of administrative exhaustion for abuse of discretion. *Knowles*, ¶21; *State v. Spottedbear*, 2016 MT 243, ¶9. A hearing examiner abuses her discretion if she acts "arbitrarily without the employment of conscientious judgment or exceeds the bounds of reason, resulting in substantial injustice." *State v. Derbyshire*, 2009 MT 27, ¶19.

Here, the Hearing Examiner found: "[f]rom the administrative record, it is clear to the undersigned that anyone from the public, including [MEIC], has had ample notice and opportunity to examine, in exhaustive detail, the permit at issue in this case." Supp.App.0005-6. Accordingly, the Hearing Examiner limited MEIC "to those issues contained in the administrative record, including those issues raised

in [its] August 3, 2015 objections and also preserved in the January 4, 2016 Notice of Appeal." Supp.App.0007. Applying this standard, the Hearing Examiner acted well within her discretion to prevent MEIC from arguing that DEQ should have considered future dewatering and Area F cumulative impacts (an application for mining in Area F, a separate area of the mine, was then pending), issues not earlier raised by MEIC. Supp.App.0188-193, 0283-284.

As to Area F, MEIC's AM4 comments made no mention of Area F and, instead, purported to incorporate by reference more than 5,000 pages of federal scoping comments and exhibits submitted to the Bureau of Land Management in 2014, with no explanation of how, if at all, such voluminous comments and exhibits should inform DEQ's AM4 MSUMRA review. Supp.App.2239, n.1, 2252-2291. The Hearing Examiner determined that MEIC—by simply referencing wide-ranging comments submitted to a *different agency* under a *different statute* concerning a *different issue*—did not sufficiently notify DEQ of any concerns related to Area F (much less the specific concern that Area F be included in the cumulative impact analysis). Supp.App.0188-194, 0283-284.

As to prospective dewatering, MEIC's comments asserted that *past* mining may have dewatered part of EFAC. Supp.App.0324-326. The Hearing Examiner determined that MEIC's comment "doesn't say anything about [prospective] dewatering" and deferred to DEQ's expert assessment that MEIC's preserved

salinity concerns did not implicate dewatering. Supp.App.0330-331. Because the Hearing Examiner's reasoned exhaustion determinations (and the Board's affirmations of those determinations) resulted from conscientious judgment, they are entitled to deference and must be upheld. *Derbyshire*, ¶19.

The Hearing Examiner expressly did *not* foreclose MEIC from challenging new issues (if any) that arose after the public comment period. Supp.App.7. In fact, the Hearing Examiner explicitly offered to hear any issue for which MEIC "had no opportunity to object prior to filing the notice of appeal." Supp.App.0006-7. The Hearing Examiner properly reasoned:

> … 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 and *after* the public had an opportunity to make objections, then this appeal before the BER would be the only forum in which to address such a deficiency. While this seems unlikely, it does present a very limited instance in which an appeal before the BER would be the public's only opportunity to object to and potentially correct a deficiency with the CHIA that was previously unaddressed in the administrative record. *If [MEIC] can articulate such an instance in this case, where they have not been previously given any notice or opportunity to object, then the undersigned will entertain an offer of evidence*.

Supp.App.0007 (emphasis added).

MEIC did not accept the Hearing Examiner's invitation, Supp.App.1587-1593, and, when repeatedly pressed by the Board to identify any such "new" issue raised at hearing in response to the Hearing Examiner's offer, MEIC identified none:

Tweeten: Having heard and discussed with the Hearing Examiner the opportunity that was laid before you to point in the CHIA to any issues that you feel were not adequately foreshadowed by the administrative record, can you point us to where in the transcript of the administrative hearing, or in what document that was following the issuance of order on the motion in limine MEIC identified in the CHIA issues that MEIC believed were not adequately foreshadowed in the administrative record?

MEIC: (non-responsive answer)

Tweeten: That wasn't my question. What I want to know is this Hearing Examiner extended this opportunity to you to bring to her attention any issues that were not adequately foreshadowed in the administrative record, whether it was in the CHIA or otherwise, did you take advantage of that opportunity? And if so, can you point us to the place in the record where you did it?

MEIC: (non-responsive answer)

Tweeten: You might want to use part of that lunch break to humor me by finding that place in the record where you took advantage of this opportunity, because I think my colleague, Mr. DeArment, is quite correct. It's about fairness. And I think the offer that the Hearing Examiner made you in the order in limine was quite fair in giving you the chance to bring up any issue in which you feel you were unfairly denied the opportunity to raise it in a timely fashion. I just want to see where it is in the record, so if you could humor me and find that during the lunch break, I'd appreciate it.

[Lunch Break]

Deveny: Let's pick up where we left off, and that was Mr. Hernandez was going to answer Chris Tweeten's question.

> **MEIC**: Yes. Thank you, Madam Chair. Member Tweeten, I've looked back through the record and haven't found the ideal quotation where we said, "This wasn't raised there."

Supp.App.0121-128.

In short, not only did the Board allow MEIC to raise claims that were included in its comments, and preserved in its Notice of Appeal, the Board also allowed MEIC to raise new claims if it could show that it had no meaningful opportunity to raise the new claim any earlier. Supp.App.0007. Thus, contrary to the Merits Order (App.0096), MEIC was not "barred … from citing or discussing evidence from DEQ's permitting record if the evidence was not also referenced in their comments."

Nevertheless, the Merits Order says the Board improperly excluded MEIC's Area F and dewatering arguments because (1) DEQ was alerted to the issues in "general terms" by MEIC's comments (as shown by DEQ's discussion of dewatering in the CHIA); and (2) DEQ had independent knowledge of Area F. App.0103-104. But the issue is not whether DEQ had general or independent knowledge that Area F existed, but whether there are "flaws" in the agency decision that are "so obvious" that DEQ had independent knowledge of them. *See, e.g., Barnes v. United States DOT*, 655 F.3d 1124, 1132 (9th Cir. 2011). The purported "flaw" is that the cumulative impacts analysis failed to include anticipated mining that is hydrologically connected to AM4, allegedly Area F. App.0103. As DEQ explained, however, it *did* consider this issue and found no hydrologic connection

between AM4 and Area F; therefore, no "flaw" was obvious to the agency, and, as such, the Hearing Examiner (and the Board) properly enforced the administrative exhaustion rule. Supp.App.2308-2310. So, too for dewatering; DEQ's information was sufficient to enable discussion in the CHIA, but did not flag a "flaw."

3. The Hearing Examiner's Evidentiary Rulings Are Proper And Due Deference.

The Hearing Examiner made several rulings on the admissibility of testimony and evidence during the contested case proceeding. Over MEIC's objections, the Hearing Examiner allowed DEQ's expert, Dr. Emily Hinz, to testify about aquatic life, and allowed both Westmoreland/Local 400 and DEQ to present rebuttal expert testimony to respond to MEIC's experts. These rulings were proper and cannot support reversal.

a. Admission of Dr. Hinz's testimony

The Hearing Examiner allowed Dr. Hinz, a hydrologist in DEQ's Coal Program, to testify regarding aquatic life; namely, why she requested an aquatic life survey and how the survey affected her determination that mining has not adversely affected aquatic life communities. Dr. Hinz testified as both an expert (providing her opinion on the anticipated impacts of AM4 on surface water) and a fact witness (describing DEQ's application review process, her role in that process, and her decision to request and consider the survey). *See, e.g.*, App.6, 36-37, 43-46, 48-50, 62, 67-68, 83.

The Merits Order concludes that admission of Dr. Hinz's testimony was reversible error because aquatic life is beyond her field of expertise. App.112. But this MEIC-argument embedded in the order mischaracterizes both Dr. Hinz's role within the DEQ Coal Program and the point of her testimony. Dr. Hinz was responsible for reviewing AM4's impacts on surface water. In that role, she relied upon her own expertise and the expertise of others, both within and outside DEQ, as well as an aquatic life survey. App.43 ¶¶170-173; 46-47 ¶¶179, 181; 48-49 ¶¶188, 190-191; 50 ¶197. Given her role in reviewing the AM4 application, the Board properly relied upon Dr. Hinz's testimony, nor (as an expert herself) was Dr. Hinz wrong to rely upon other experts in completing her review of the permitting decision.

Moreover, and controlling here, contrary to the Merits Order, the admission of Dr. Hinz's testimony in no way prejudiced MEIC's substantial rights, and, in its absence, the outcome of the contested case would not have changed. *Bostwick,* ¶53 (citing *Erickson*, 282 Mont. at 375). The Board's aquatic life determination was supported by *39 discreet findings*, the majority of which did not implicate Dr. Hinz's testimony or the survey. App.43-52. The district court erred in ordering reversal based on the allowance of Dr. Hinz's testimony.

b. Admission of rebuttal testimony

On judicial review, MEIC complained of a "double-standard," arguing the Hearing Examiner erred when she "admitted and relied heavily" on testimony from

Westmoreland/Local 400's expert, Dr. William Schafer, and considered DEQ's response to MEIC's expert's testimony. App.96-97, 108. The Merits Order erroneously adopted MEIC's arguments, mischaracterizing the Board's Order in the process by disregarding the key fact that the Board's Order was decided as a judgment on partial findings, also referred to as a directed verdict. App.108-109.

First, neither Dr. Schafer's testimony, presented in Westmoreland/Local 400's rebuttal case, nor DEQ's response to MEIC's expert, was relevant to the Board's directed verdict, which rested on its evaluation of *MEIC's* case-in-chief, exclusive of anything presented in rebuttal. App.0085; *see McCann v. McCann*, 2018 MT 207, ¶12 (the court may enter a judgment on partial findings "when the party pursuing a claim has been fully heard and failed to prove the elements of the claim"). To reach its decision, the Board evaluated the testimony of *MEIC's* expert, Dr. Payton Gardner and *MEIC's* evidence. The Board rejected Dr. Gardner's testimony as "faulty both as a matter of fact and as a matter of law," explaining that "there is no evidence that the AM4 Amendment, which is the only permitting decision at issue in this case, will cause any increase in salinity to the [EFAC] alluvium," let alone an increase in the cumulative impact. App.63. (emphasis in original) As such, and fatal here, MEIC cannot satisfy its burden to show prejudice to a substantial right and that, in the absence of Dr. Schafer's testimony and DEQ's evidence responsive to MEIC's claims (or any evidence offered by Westmoreland/

Local 400 and DEQ), the outcome of the contested case would have changed. *Bostwick*, ¶53 (citing *Erickson*, 282 Mont. at 375).

Second, MAPA specifies that all parties to a contested case *must* be afforded the opportunity "*to respond and present evidence* and argument *on all issues involved*." § 2-4-612(1) (emphasis added). MEIC itself exercised this right, presenting Dr. Gardner's testimony, which substantially elaborated on MEIC's comments, even though Dr. Gardner's testimony was not before DEQ when it made its permitting decision.

The Merits Order—holding that MEIC may present new expert testimony evidence, but other parties may not respond to that evidence—cannot be squared with § 2-4-612(1) and MAPA's provisions for a broad contested case. If there is an interpretation that would promote a double-standard, it is the district court's adoption of MEIC's self-serving argument. Logically, if no party could rebut a petitioner's evidence, there would be no need for a hearing—a result plainly contrary to MAPA and the legislative determination to provide for administrative decision by contested case proceedings.

Here, Westmoreland/Local 400 called Dr. Schafer to rebut Dr. Gardner's testimony and explain his disagreements with Dr. Gardner's reasoning based on the administrative record. App.0006, Supp.App.0998, 1066. Similarly, DEQ presented testimony, based on the record, that "convincingly refuted" Dr. Gardner's factual

errors and assumptions. App.0034-36, FOF ¶131; Supp.App.0625, 0692-695. The Hearing Examiner, exercising her discretion, admitted the testimony and afforded it appropriate weight. *See Steer, Inc. v. Dep't of Revenue*, 245 Mont. 470, 475 (1990); § 2-4-704(2). As such, this Court should reverse the district court's erroneous conclusion to the contrary.

C. THE BOARD'S CONCLUSIONS OF LAW ARE CORRECT

As shown above, to prevail before the Board, MEIC had to prove by a preponderance of the evidence that AM4 was not designed to prevent "material damage," *i.e.,* that the proposed operation would adversely affect a beneficial use or cause water quality standard violations. App.0066, 76. The Board held MEIC "failed to present evidence necessary to establish the facts essential to a demonstration in its favor." App.0084-85, COL ¶¶38-44. MEIC has not challenged that conclusion; therefore, under a properly allocated burden of proof, MEIC's judicial challenge fails. Even allowing review of the Board's conclusions of law, they were not erroneous.

1. The Board Correctly Concluded That MEIC Did Not Prove That AM4 Is Not Designed To Prevent Material Damage.

The Board applied the correct legal standard in evaluating whether the evidence presented by MEIC proved that AM4 would cause water quality violations or "material damage" outside the permit area. App.0082. Specifically, the Board concluded that MEIC's evidence was limited to water quality assessments and Clean

Water Act 303(d) impairment determinations. App.0082. But "as a matter of law," the Board concluded that "water quality assessments … and impairment determinations made … pursuant to the Clean Water Act do not equate to determinations of water quality standard violations or 'material damage' determinations that may prevent permit approval pursuant to MSUMRA." *Id.* To support this conclusion, the Board compared and contrasted MSUMRA's permitting standards with the Clean Water Act standards, particularly the purpose of water quality assessments. App.0082-83. Important here (as explained in detail above) is the undisputed fact that EFAC is subject to natural sources of salinity that cause the impairment. Similarly, with regard to assessing aquatic life, the Board applied the correct legal standards to ensure that DEQ appropriately confirmed that AM4 is designed to not adversely affect aquatic life in EFAC. App.0085.

The Merits Order applied an incorrect legal standard on judicial review, relying on CWA concepts instead of MSUMRA requirements. For example, the Order found that MSUMRA requires DEQ to "assess applicable water quality standards" to determine if "any violation of a water quality standard" will occur. App.0085, 115 ("water quality standard for EFAC requires that the creek 'be maintained suitable for ... growth and propagation of non-salmonid fishes and associated aquatic life.'").

This insertion of MWQA requirements into this MSUMRA proceeding was error. This Court's recent holding in *Clark Fork Coal. v. Montana Dep't of Nat. Res. & Conservation*, 2021 MT 44, explains why. The decision clarifies that it is improper to conflate the purpose and requirements of the MWQA with other statutory requirements. *Id.*, ¶36. The MWQA and MSUMRA have separate and distinct purposes; MSUMRA exists to prevent material damage caused "by coal mining[,]" § 82-4-203(32), whereas the impairment requirements of the MWQA exist "to improve the quality of the impaired water." *MEIC II*, ¶40.

Therefore, the appropriate assessment under MSUMRA is whether AM4 would "adversely affect" the beneficial use of aquatic life, not whether the use is currently impaired. § 82-4-203(32). The material damage assessment may be informed by a CWA or MWQA assessment, but the two are not the same. In addition, MSUMRA does not require a coal mine *to remedy* an already existing impairment when "any mine related water quality changes are not likely to be distinguishable from natural variations[,]" (Supp.App.1827-1833, 1890; *accord* App.0064) and the source of the impairment is known to come from agricultural and municipal sources. App.0083, COL ¶¶35-37 ("[MEIC] did not produce any convincing evidence that EFAC's existing impairment was 'previously attributable to operations at the Rosebud Mine.'").

As shown above, after weighing physical, chemical, and biological lines of evidence, DEQ found, and the Board affirmed, that aquatic life will not be adversely affected by AM4. Thus, the Board correctly concluded that MEIC failed to meet its burden to prove that "AM4 [was] not designed to prevent material damage to aquatic life." App.0085. The district court's adoption of MEIC's incorrect legal analysis to the contrary was error.

The Board also applied the correct legal standards in assessing salinity, requiring MEIC to prove the existence of a water quality violation that would prohibit DEQ from approving AM4, rather than simply relying on its assertions that the EFAC was "impaired." App.0083-84. Yet, the Merits Order disregarded this correct legal standard and instead allowed MEIC to conflate the issues. *See*, *e.g.*, App.0120 ("If the creek is impaired and, therefore, not meeting water quality standards, it cannot be maintained that a greater than 10% increase in salt in the creek will not result in a further violation of water quality standards."). That is error.

First, there is no support for the allegation of "a greater than 10% increase in salt in the creek" caused by AM4. As shown above, the district court mistook a 13% increase in salinity in the *alluvium* (which itself provides only minor volume contributions to the surface water) with an increase in the salinity of the surface water itself. The Board found that there would be no measurable change to the surface water quality or quantity. App.0039, FOF ¶144.

Second, an existing "impairment determination" is not a "water quality standard violation." "Material damage" includes only the latter. § 82-4-203(32). An impairment determination considers whether water quality *exceeds* standards, but it does not assign a cause, which is needed to convert the *exceedance* into a *violation*. *Compare* Title 75, Chapter 5, Part 7 (Water Quality Assessment) *with* Part 6 (Enforcement); App.0082-83. Indeed, for EFAC, where the mine is situated, the Board concluded the salinity impairment "was likely attributable to its inherent nature as an ephemeral stream," which, by law, cannot be a violation of a water quality standard. App.0083; §§ 75-5-222; 75-5-306.

Third, MSUMRA requires DEQ to evaluate only impacts caused by "coal mining and reclamation." § 82-4-203(32); ARM 17.24.301(68). Without some evidence that *AM4* (and other mining in the area if its hydrological impact will interact with that of AM4) will *cause* a violation, impairment from non-mining sources (including nature) cannot serve as the basis to deny the permit. Here, the data shows no difference between current impacts (which do not violate a water quality standard or adversely affect a beneficial use) and cumulative impacts predicted when AM4 is added. App.0054. AM4 merely extends the status quo. Thus, the Board's conclusion that AM4 is designed to prevent material damage was correct, and the district court erred in rejecting that conclusion.

2. The Board Correctly Concluded Duration Alone Does Not Constitute Material Damage.

The Board correctly determined that mere extension of impacts which themselves never rise to the level of "material damage" cannot, through the simple passage of time, become material damage. App.0071, n.5. This reasoned application of the statutory definition of "material damage" to the facts is entitled to respectful consideration. *MEIC II,* ¶24, n.9.

Building on its evidentiary determination—detailed above—that neither salinity from the entire Rosebud Mine, much less AM4, will cause a water quality violation or adversely affect a beneficial use, the Board considered MEIC's contention that merely extending the duration of impacts is material damage. App.0036-39, 54-55, 60, 84. DEQ determined, and the Board agreed, that extending the period of higher salinity in groundwater does not constitute material damage. App.0036-39. Lengthening the duration of something that is not material damage does not transform it into material damage. App.0069. DEQ likened this to driving a car at a higher speed for a longer distance. As long as the car's speed remains below the speed limit, the higher speed does not violate the law even if it occurs over a longer distance. Supp.App.1698-1699.

Before the Board, MEIC "cite[d] no case law that would support a conclusion of law finding a longer duration of time to constitute 'material damage' under MSUMRA." App.0071, n.5. The Board rejected MEIC's sole legal support as

"neither precedential nor on point" *vis-à-vis* MSUMRA, material damage, or "any increase in the duration of time for anything." App.0072. Instead, the Board clearly articulated the standard:

> As a matter of law, a material damage assessment is a threshold determination because it must be determined by water quality standards … Mont. Code Ann. §§ 82-4-203(31), 227(3)(a)); Admin. R. Mont. 17.24.301(68), 17.24.405(6)(c). Water quality standards are, in turn, evaluated through pollutant concentrations. Admin. R. Mont. 17.30.1006. Essentially, either a pollutant concentration is exceeded, or it is not; and, if the pollutant concentration is not exceeded, then there is no water quality violation … As the AM4 will not violate a water quality standard, it will not cause 'material damage.'

App.0070-71 (citations omitted).

Nonetheless, the Merits Order rejected the Board's conclusion and accepted MEIC's argument. *See* App.0120-121. But as so well explained by the Board, that unsupported conclusion is contrary to MSUMRA. It also fails to defer to the Board's interpretation of MSUMRA. *Mayer v. Bd. of Psychologists*, 2014 MT 85, ¶25.

Moreover, in accepting MEIC's argument, the district court relied on erroneous facts and analytic tangents that have no relevance or logic. *See* App.0119-120. MSUMRA provides that DEQ may not approve a permit until it assesses "the probable *cumulative impact* of all anticipated mining in the area" and determines there will be no material damage. § 82-4-227(3)(a) (emphasis added). The entire premise of the Merits Order's conclusion rests on the false assertion that the Board

and DEQ violated this requirement by "considering increased salinity from AM4 in isolation from the cumulative impacts of existing mining." App.0119. In fact, the Board's Order repeatedly makes clear that DEQ conducted an analysis of cumulative impacts of ***all*** mining impacts that would interact with those of AM4:

> [MEIC] fail[s] to grasp (or intentionally [obfuscates]) the fact that [the predicted 13% increase in alluvium salinity] is for groundwater in the spoils of all of Areas A and B of the mining after mining is complete… . Thus, the 13% increase in [salinity] is not specific to the amount of [salinity] added to the alluvium by the AM4 Amendment, but rather the overall [salinity] that is added to the groundwater by all the mining in the area, including previously permitted areas.

App.0063 (emphasis in original).

The Merits Order compounds this egregious factual error by ignoring MSUMRA's definition of "cumulative hydrologic impacts"[7] and DEQ's robust cumulative impacts analysis (Supp.App.1821-2234), and, instead, *substituting a dictionary definition* of "cumulative" and out-of-jurisdiction case law. App.0119-120 (citing *Trs. for Alaska v. Gorsuch*, 835 P.2d 1239, 1246 (Alaska 1992) and *Friends of Pinto Creek v. EPA*, 504 F.3d 1007, 1011-15 (9th Cir. 2007). This, too, was error.

[7] ARM 17.24.301(31) ("'Cumulative hydrologic impacts' means the expected total qualitative and quantitative, direct and indirect effects of mining and reclamation operations on the hydrologic balance.").

As an initial matter, the Merits Order erred by ignoring MSUMRA's own definition of cumulative impacts in favor of an out-of-context dictionary definition. The court's role is to apply statutory language, not disregard or rewrite it. *See, e.g.,* § 1-2-101 ("In the construction of a statute, the office of the judge is simply to ascertain and declare what is in terms or in substance contained therein, not to insert what has been omitted or to omit what has been inserted."). Further, both cited cases are inapplicable and fail to address whether extending the duration of impacts—which themselves will not cause material damage—equates to material damage.

Gorsuch is specific to Alaska's program, not MSUMRA, and dealt with whether the Alaska agency had a duty to analyze impacts from offsite facilities (such as roads and an airstrip) in the same permit as the mine itself. 835 P.2d at 1245. *Pinto Creek* is a federal case in which the Ninth Circuit addressed the EPA's issuance of an NPDES permit under § 402 of the Clean Water Act. 504 F.3d at 1009. Under Clean Water Act provisions not applicable here, the court found a discharge of copper violated the statute. *Id.* at 1015. *Pinto Creek* does not apply MSUMRA (or even its federal equivalent), does not contain the words "material damage," and does not concern any increase in the duration of time for anything. It is not precedential nor even relevant.

D. THE DISTRICT COURT'S REMEDY WAS IMPROPER.

1. MAPA Restricts The Remedies Available On Judicial Review.

The plain language of MAPA Part 7 does not authorize injunctive relief on judicial review; instead, MAPA directs a reviewing court to "affirm the decision of the agency or remand the case for further proceedings." § 2-4-704(2); *Ced Wheatland Wind v. Mont. Dep't of Pub. Serv. Regul.* 2022 MT 87, ¶¶12-13.

Here, the "agency decision" referred to in § 2-4-704(2) is the Board's Order concluding the contested case proceeding, and not, as stated in the Remedy Order, DEQ's approval of the underlying permit. DEQ and the Board are each a separate and distinct "agency" as that term is defined by statute. § 2-4-102(2). Moreover, "the case" referenced—indeed the only "case" subject to judicial review—is the Board's MAPA-mandated "contested case" that reviewed DEQ's consideration and approval of the permit application. DEQ does not adjudicate a "case." Rather, MAPA provides for "contested case" proceedings *after* DEQ approves or denies a permit, to provide a fair process in which "all parties" can present evidence and have their properly-preserved arguments heard. § 2-4-612(1). Calling DEQ's permit approval process a "case" would strip all meaning from the "contested case" statutory language.

And once that contested case proceeding occurs, MAPA then directs that if a petition for review of the Board's decision is filed—as happened here—the

reviewing court must either "affirm the decision of the agency or remand the *case* for further proceedings." § 2-4-704 (emphasis added). If the district court identifies error, it is the Board's purview to hold "further proceedings" as informed by an order on judicial review, not DEQ's. § 2-4-704(2). Here, then, the district court exceeded its "reviewing court" jurisdiction and violated § 2-4-704 by ordering extra-statutory relief in the form of vacatur of the permit, cessation of mining on AM4 lands, and remand of the permit application to DEQ, not the Board.

2. The District Court's Remedy Improperly Rests On Facts It Invented.

As shown above, a reviewing court is confined to the record developed in the contested case proceeding, and a reviewing court may not substitute its judgment for the judgment of the agency as to the weight of factual evidence, engage in a wholesale substitution of its opinion for the opinion of the Board, or re-weigh the evidence on questions of fact. § 2-4-704(2). Moreover, because MEIC did not lodge exceptions to *any* of the Board's findings of fact during the contested case proceeding, *all* of the Board's findings of fact are binding on the district court. *Carruthers*, 216 Mont. at 187. Here, however, the district court's basis for enjoining mining—that AM4 operations will cause environmental harms—is contrary to and irreconcilable with the Board's binding findings of fact. Because such factual inquiries exceed the district court's authority, the Remedy Order is unlawful. § 2-4-704(2).

VII. CONCLUSION

For the foregoing reasons, Westmoreland/Local 400 respectfully requests that this Court reverse the district court. The Merits Order and Remedy Order flout MAPA and MSUMRA. The Board's Order is correct and largely unreviewable; this Court should affirm it.

DATED this 10th day of August 2022.

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CERTIFICATE OF COMPLIANCE

Pursuant to Rule 16(3) of the Montana Rules of Appellate Procedure and this Court's *Order Granting Leave to File Overlength Opening Briefs*, Dkt. DA 22-0064 (7-5-2022 Order), I certify that this 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 contains 12,000 or fewer words, excluding caption, table of context, table of authorities, signature blocks and certificate of compliance. The undersigned relies on the word count of the word processing system used to prepare this document.

/s/ John C. Martin

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