IN THE SUPREME COURT OF THE STATE OF MONTANA

DA 22-0064

MONTANA ENVIRONMENTAL INFORMATION CENTER and SIERRA CLUB,

Petitioners and Appellees,

vs.

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 DEPARTMENT OF ENVIRONMENTAL QUALITY,

Respondent and Appellant,

and

MONTANA BOARD OF ENVIRONMENTAL REVIEW,

Respondent and Appellant.

MONTANA ENVIRONMENTAL INFORMATION CENTER AND SIERRA CLUB'S COMBINED RESPONSE 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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SHORT FORMS AND ABBREVIATIONS

Board or BER	Montana Board of Environmental Review
CHIA	Cumulative hydrologic impact assessment
Conservation Groups	Montana Environmental Information Center and Sierra Club
CAA	Clean Air Act
CWA	Clean Water Act
DEQ	Montana Department of Environmental Quality
EFAC	East Fork Armells Creek
MAPA	Montana Administrative Policy Act
MEIC	Montana Environmental Information Center
MSUMRA	Montana Strip and Underground Mine Reclamation Act
MWQA	Montana Water Quality Act
MWUA	Montana Water Use Act
SMCRA	Surface Mining Control and Reclamation Act
Westmoreland or WRM	Westmoreland Rosebud Mining, LLC

CITATION FORMS

Citations to the administrative record use the following format: for documents, "AR[docket entry number] at [page number]"; for exhibits, "AR[folder number] Ex. [exhibit number in folder] at [page number]"; for transcripts, "AR[docket entry number] at [page number: line number]".

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ISSUES PRESENTED FOR REVIEW

This appeal raises four buckets of issues: (1) merits, (2) remedy, (3) costs and attorneys' fees; and (4) the propriety of Appellant Montana Board of Environmental Review (Board) as a party.

The merits issues, in the order addressed by the district court, are:

1. Whether the district court correctly held that the Montana Strip and Underground Mine Reclamation Act (MSUMRA) did not require Conservation Groups to identify flaws in DEQ's analysis *before* DEQ published its analysis.

2. Whether the court correctly reversed the Board for permitting DEQ and Westmoreland to submit *post hoc* evidence and argument, while limiting Conservation Groups to evidence from administrative comments.

3. Whether the Board violated Montana Rule of Evidence 702 when it admitted and relied heavily on expert testimony about aquatic-life health from a DEQ employee with no expertise in the area.

4. Whether MSUMRA requires DEQ and Westmoreland to demonstrate that the cumulative impacts of proposed strip-mining *will not* cause material damage, but does not force the public to demonstrate that cumulative impacts *will cause* material damage.

5. Whether it was arbitrary for DEQ and the Board to *rely* on a metric to assess standards for aquatic-life health that DEQ and the Board deemed *unreliable* for assessing standards for aquatic-life health.

6. Whether it was arbitrary for DEQ and the Board to conclude that adding more salt to a stream violating water quality standards for excessive salt will *not cause* additional violation of water quality standards.

The remedy issues are:

1. Whether Montana courts have authority to vacate unlawful agency actions.

2. Whether the district court correctly considered evidence submitted by all parties regarding remedy and did not abuse its discretion in ordering deferred vacatur.

The issues with respect to costs and attorneys' fees are:

1. Whether under MSUMRA, Conservation Groups are entitled to petition the Court—rather than DEQ—for an award of fees against DEQ.

2. Whether the district court abused its discretion in awarding reasonable fees against DEQ.

The issue with respect to the involvement of the Board in this matter is:

Whether under the Montana Administrative Procedure Act and this Court's precedent, an agency that issues a final decision in a contested case may be a party on judicial review.

STATEMENT OF THE CASE

This is a coal mining case, governed largely by MSUMRA. DEQ and Westmoreland challenge the district court's ruling reversing approval by DEQ and the Board of an expansion of the Rosebud Mine. The court held that the Board's decision and DEQ's underlying permit were procedurally and substantively flawed.

The court subsequently ordered deferred vacatur of the permit and awarded reasonable costs and fees to Conservation Groups. These two rulings are also challenged, as is the court's earlier order denying a motion to dismiss by the Board.

DEQ provides a generally satisfactory statement of the case. DEQ Br. 3-11; M. R. App. P. 12(1)(c).

FACTS

I. LEGAL FRAMEWORK

A. Federal and State Regulation of Coal Mining

SMCRA and MSUMRA regulate the impacts of coal mining through a system of cooperative federalism, in which states may develop and administer regulatory programs that meet federal standards. *Hodel v. Va. Surface Mining & Reclamation Ass'n*, 452 U.S. 264, 289 (1981); 30 C.F.R. § 733.11. MSUMRA is Montana's federally approved program. 30 C.F.R. Part 926.

The purpose of SMCRA is to "protect society and the environment from the adverse effects of surface coal mining operations." 30 U.S.C. § 1202(a); *see also In re Bull Mountains*, No. BER 2013-07 SM at 59–63 (Mont. Bd. of Env't Rev. Jan. 14, 2016) (detailing legal background) (in record at AR141 Ex. 1). Congress determined federal regulation was

necessary because states had proven unwilling to impose "stringent controls" on the coal industry to avoid "serious abuses." *In re Permanent Surface Mining Regul. Litig.*, 653 F.2d 514, 520 (D.C. Cir. 1981) (citing H.R. Rep. No. 95-218 (1977)).

MSUMRA, in turn, implements both the protections of SMCRA and those of Montana's Constitution. § 82-4-202(1)–(2), MCA; Mont. Const. art. II, § 3, art. IX, § 1. It is thus the policy of MSUMRA to "maintain and improve the state's clean and healthful environment"; "protect its environmental life-support system from degradation"; and "prevent unreasonable degradation of its natural resources." § 82-4-202(2)(a)–(c), MCA. These protections are "both anticipatory and preventative," embodying the precautionary principle. *Park Cnty. Env't Council v. DEQ*, 2020 MT 303, ¶¶ 61, 70, 72, 402 Mont. 168, 477 P.3d 288 (quoting *Mont. Env't Info. Ctr. v. DEQ* (*MEIC I*), 1999 MT 248, ¶ 77, 296 Mont. 207, 988 P.3d 1236).

MSUMRA applies this precautionary approach to cumulative impacts to water resources. DEQ is accordingly forbidden from issuing a permit unless and until the applicant "affirmatively demonstrates" and DEQ's "written findings confirm" based on information "compiled" by

DEQ that the "cumulative hydrologic impacts will not result in material damage to the hydrologic balance outside the permit area." ARM 17.24.405(6)(c); *see* § 82-4-227(3), MCA. "Cumulative hydrologic impacts" are the "total qualitative and quantitative, direct and indirect effects of mining and reclamation operations." ARM 17.24.301(31). MSUMRA defines "material damage" to include, as relevant here, any "[v]iolation of a water quality standard." § 82-4-203(32), MCA. The "burden" of demonstrating compliance with this provision, and all provisions of the law, rests with the "applicant for a permit." *Id.* § 82-4-227(1).

DEQ's analysis of hydrologic impacts occurs in a document called the "cumulative hydrologic impact assessment" or "CHIA." ARM 17.24.314(5). Standing alone, the CHIA "must be sufficient to determine, for purposes of a permit decision, whether the proposed operation has been designed to prevent material damage." *Id.*

After DEQ makes a permitting decision, "any person … adversely affected may submit a request for a hearing on the reasons for the final decision." *Id.* 17.24.425(1). The CHIA and the "reasons for the final decision" are only available to the public *after* the public comment

period on the permit application. *Id.* 17.24.404(3), 405(6), 425(1). Submitting comments is not a requirement for a permit appeal: even an adversely affected person's decision not to submit comments on an application "in no way vitiates" or limits that person's right to obtain a hearing on a permitting decision. 56 Fed. Reg. 2,139, 2,141 (Jan. 22, 1991). In Montana, the hearing occurs before the Board pursuant to the provisions of the Montana Administrative Procedure Act (MAPA). § 82-4-206(1)–(2), MCA; *id.* §§ 2-4-601 to -631.

SMCRA and MSUMRA allow successful plaintiffs to obtain costs and fees incurred in administrative and judicial review proceedings. 30 U.S.C. § 1275(e); § 82-4-251(7), MCA. A party seeking costs and fees must submit a petition, supported with affidavits and other evidence, within 45 days of receipt of the qualifying order. ARM 17.24.1308, 1309(1).

B. Federal and State Regulation of Water Pollution

The central MSUMRA provision in this case is the requirement for the applicant to "affirmatively demonstrate[]" that the "cumulative hydrologic impacts will not result in material damage." ARM 17.24.405(6)(c). As noted, "material damage" includes any "[v]iolation of

a water quality standard." § 82-4-203(32), MCA. Water quality standards, in turn, are established pursuant to the federal Clean Water Act (CWA) and the Montana Water Quality Act (MWQA). 40 C.F.R. § 131.3(i); 33 U.S.C. § 1313(a)–(c). Like SMCRA and MSUMRA, these laws establish a system of cooperative federalism, in which Montana implements a program that meets federal standards. *Mont. Env't Info. Ctr. v. DEQ* (*MEIC III*), 2019 MT 213, ¶ 29, 397 Mont. 161, 451 P.3d 493. The MWQA, like MSUMRA, also implements Montana's farsighted constitutional environmental protections. § 75-5-102(1), MCA.

Under the CWA and MWQA, water quality standards are "[p]rovisions of State or Federal law which consist of a designated use or uses for the waters of the United States and water quality criteria for such waters based upon such uses." 40 C.F.R. § 131.3(i). "Montana's water quality standards are set forth in [ARM] 17.30.601 through 17.30.670 …." *MEIC III*, ¶ 33. A water body that "is failing to achieve compliance with applicable water quality standards" is called an "[i]mpaired water body." § 75-5-103(13), MCA. When a water body is impaired or reaches its "[l]oading capacity" for a pollutant, additional

amounts of that pollutant result in a "violation of water quality standards." *Id.* § 75-5-103(17).

II. FACTUAL BACKGROUND

A. Southeastern Montana and the Development of Colstrip

Southeastern Montana, where Colstrip is located, is ancestral territory of the Northern Cheyenne and Crow tribes, among other native peoples. K. Ross Toole, Rape of the Great Plains at 33–49 (1976). The landscape is characterized by pine breaks, sandstone cliffs and mesas, sagebrush grasslands, and broad stream valleys. AR95 Ex. 1A at 4-1 to 4-2. The region's streams were described in early Montana literature:

> Sarpy Creek [one stream basin west from Colstrip] flowed almost across the yard, and there was plenty of long green grass and sturdy stout-limbed cottonwoods to cool the breeze and shade. Half-acre patches of wild-cherry and wild-rose bushes clustered on the bottom land behind the house.

Ira Stephens Nelson, On Sarpy Creek at 57 (1938). East Fork Armells Creek, like Sarpy Creek, flows north from the Little Wolf Mountains to the Yellowstone River. AR95 at 4-2.

Coal strip-mining came to the area in the 1920s, earning Colstrip its name and providing coal for the railroad. AR95 at 3-1. When the

railroad switched to diesel in the 1950s, the mine closed. *Id.* Utilities subsequently purchased the town and mine, and in the 1970s sought to build mine-mouth generating plants (i.e., plants adjacent to mines). *Id.*; Toole, *supra* at 100-01.

Utilities constructed the four units of the Colstrip Power Plant in the 1970s and 1980s. *See Pac. Power & Light Co. v. Mont. Dep't of Revenue*, 246 Mont. 398, 400, 804 P.2d 397, 399 (1991). Units 1 and 2 became uneconomical and closed in 2020. Pacific northwest utilities are majority owners of remaining Units 3 and 4. *Portland Gen. Elec. Co. v. Nw. Corp.*, 567 F. Supp. 3d 1203, 1208 (D. Mont. 2021). Montana's utility, Northwestern Energy Co., became a minority owner of Unit 4 in 2008, purchasing a 30% share for $187 million and rate-basing it the next year for $407 million. DC Doc. 89 Ex. 1 ¶ 10. As such, the plant is both lucrative for Northwestern and one of the most expensive sources of electricity for Montana ratepayers. *Id.*

The mine and plant owners face business failures and internal conflicts. Westmoreland's predecessor, unable to pay its debts, went bankrupt in 2018. *Holland v. Westmoreland Coal Co.* (*In re Westmoreland Coal Co.*), 968 F.3d 526, 531, 543 (5th Cir. 2020)

(allowing Westmoreland to shed worker retirement benefits in bankruptcy). The plant operator—Talen Energy LLC—is currently unable to pay its debts and has sought bankruptcy protection. *Portland Gen. Elec. Co. v. Nw. Corp.*, No. CV-21-47, 2022 WL 4547541, at *3 (D. Mont. Sept. 28, 2022). The majority owners of the plant are suing Talen and Northwestern over plant closure. *Portland Gen. Elec. Co.*, 567 F. Supp. 3d at 1208.

B. Rosebud Mine and East Fork Armells Creek

The Rosebud Mine, a 25,000-acre coal strip-mine, has fueled the Colstrip Power Plant since the 1970s. AR152 at 9; AR95 Ex. 1A at 3-1 to 3-2. Recent expansions swelled the mine area to 40,000 acres, *see* WRM Reply in Supp. of Mot. for Stay, Ex. A ¶¶ 3–5 (June 29, 2022), an area larger than Billings.[1]

East Fork Armells Creek, a small prairie stream, is flanked by mine pits. AR152 at 18; AR95 Ex. 1A at 4-2 & 13-1 Fig. 1-1. The strip-mine "dominates the potential anthropogenic pollutant sources" in the stream. AR152 at 20. The following map depicts the mine and stream:

[1] *See* Billings, Montana, Wikipedia, https://en.wikipedia.org/wiki/Billings,_Montana (total area 45 square miles or approximately 29,000 acres).

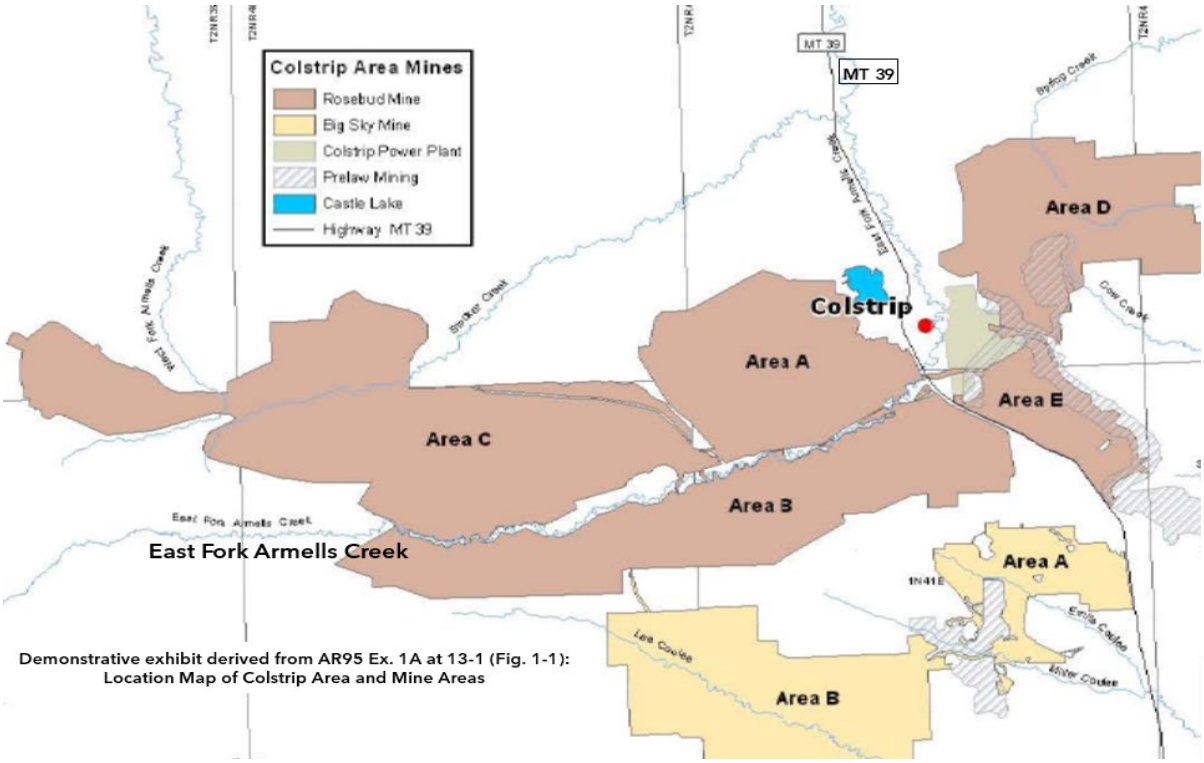

Figure 1: Location Map of Colstrip Area and Mine Areas. AR95, Ex. 1A at 13-1 Fig. 1-1.

East Fork Armells Creek is administratively divided into upper and lower segments. AR152 at 19–20. The upper segment has intermittent[2] and ephemeral reaches and extends from the headwaters to Highway 39. AR152 at 19–20; AR95 Ex. 1A at 13-1 Fig. 1-1. Multiple studies, which DEQ classified as "anecdotal," identified a reach of the upper segment (referred to as "Section 15") as perennial to intermittent prior to mining. AR95 Ex. 1A at 9-9 to 9-10. The reach experienced "steep declines" in water levels during mining and is now dry, which

[2] Westmoreland falsely states that this reach is purely ephemeral. WRM Br. 7; *but see* AR152 at 19, 44; AR95 Ex. 1A at 8-8, 9-7.

became an issue in this case. AR95 Ex. 1A at 9-9 to 9-10. The lower segment is predominantly intermittent and perennial and extends from Highway 39 to its confluence with West Fork Armells Creek north of Colstrip. AR152 at 20.

Both segments are "C-3" waters, subject to a narrative water quality standard requiring the stream to be maintained suitable for "growth and propagation of non-salmon[]id [i.e., warm water] fishes and associated aquatic life." AR152 at 18 (quoting ARM 17.30.629(1)). Neither segment is attaining this standard.

Since at least 2006, DEQ has designated the stream as impaired and failing to achieve water quality standards for supporting growth and propagation of aquatic life. AR152 at 24; AR95 Ex. 9 at 10–12; AR95 Ex. 10 at 17–19. DEQ identified excessive salinity, measured by total dissolved solids (TDS) and specific conductivity (SC), as a cause of the impairment and identified coal mining as an unconfirmed source of the excessive salt. AR152 at 28; AR95 Ex. 9 at 7; AR95 Ex. 10 at 19.

C. The AM4 Expansion of the Rosebud Mine

The focus of this case is Westmoreland's 2009 application for the "AM4 Amendment" (or "AM4")—adding 12.1 million tons from 306

acres—to the Rosebud Mine. AR95 Ex. 1 at 2; AR152 at 13. After six years of back-and-forth with DEQ, Westmoreland assembled a permit application containing thousands of pages of technical information. *See* AR152 at 13; DC Doc. 82 ¶¶ 20–24 (describing process). In July 2015, DEQ deemed the application acceptable and allowed the public 26 days to comment. AR95 Ex. 1 at 4. Conservation Groups submitted comments. AR95 Exs. 4–4L.

The comments raised concerns with the impairment of East Fork Armells Creek and increasing salinity. AR95 Ex. 4 at 2–7. They also incorporated a related letter with concerns about cumulative hydrologic impacts from anticipated mining in proposed Area F, a 6,500-acre expansion Westmoreland applied for in 2011. AR95 Ex. 4 at 1; AR95 Ex. 4L at 17, 19, 24. The comments also noted the mine's prior dewatering of Section 15. AR95 Ex. 4 at 2–3.

Five months later, December 2015, DEQ issued its CHIA, response to comments, and written findings approving the AM4 expansion. AR152 at 14–15. DEQ responded to the concerns about the "predicted increase in TDS [total dissolved solids, or salinity] from mining" on aquatic life in the stream, stating that the agency lacked

"scientific evidence that the 13% increase in TDS will adversely affect macroinvertebrates in [East Fork Armells Creek]." AR95 Ex. 1 at 11.

DEQ's CHIA acknowledged that water quality standards from the MWQA are criteria for assessing material damage and asserted that a survey of aquatic macroinvertebrates (mostly, aquatic insects) by Westmoreland's consultant—the "Arcadis Report"—"demonstrated that a diverse community of macroinvertebrates was using the stream reach. Therefore, the reach currently meets the narrative [water quality] standard of providing a beneficial use for aquatic life." AR95 Ex. 1A at 2-2, 9-8; AR95 Ex. 7 (Arcadis Report). DEQ's CHIA noted prior surveys of macroinvertebrates in the stream, but explained that because they were collected with "different methodologies" they "may not be directly comparable" to the Arcadis Report. *Id.* Accordingly, the CHIA made no such comparison. *See id.*

In the permit-review process, DEQ management *prohibited* its only expert in aquatic life,[3] David Feldman, from analyzing the data from the survey (Arcadis Report). AR116 at 139:24 to 143:7; AR117 at

[3] Mr. Feldman's title was "Biological Water Quality Standards Specialist." AR100 Ex. 15 at 122.

183:25 to 184:8; AR100 Ex. 15 at 122. DEQ also prohibited Westmoreland's aquatic life expert from analyzing the data. AR152 at 46; AR100 Ex. 43 at 629. Instead, data from the Arcadis Report were analyzed only by Emily Hinz, Ph.D., a DEQ hydrologist without expertise in aquatic life. AR116 at 253:20 to 254:5, 255:8 to 258:12; AR117 at 86:20–21.

DEQ responded to concerns about dewatering in Section 15, stating that DEQ could not determine whether mining had dewatered that reach, so "material damage to this section cannot be determined." AR95 Ex. 1 at 9–10.

The CHIA did not address Conservation Groups' concerns about anticipated mining in Area F. However, the CHIA employed an incorrect definition of "anticipated mining." Whereas regulations define "anticipated mining" to include "operations with *pending applications*," ARM 17.24.301(32) (emphasis added)—like Area F—DEQ's CHIA narrowed the definition to "*permitted operations*." AR95 Ex. 1A at 5-1 (emphasis added). Internal communications from the record illuminated DEQ's development and use of this erroneous definition. AR100 Ex. 19; *see also* AR100 Exs. 20–22.

Conservation Groups sought administrative review of DEQ's written findings and CHIA. AR1 at 3–4. After lengthy pretrial proceedings, the matter went to a contested-case hearing before a hearing examiner. AR115–118.

D. Contested Case: Motions *In Limine*

The parties filed motions *in limine*. DEQ and Westmoreland argued that administrative issue exhaustion precluded multiple claims. AR73; AR74. Conservation Groups responded, arguing that they could not be expected to foresee errors in the CHIA because they had had no opportunity to review the CHIA before submitting comments. AR84 at 3–15; AR107 at 60:21 to 62:2; AR151 at 59:19 to 62:24, 66:1–20.[4] The Board, however, relied on issue exhaustion to dismiss claims related to the erroneous definition of "anticipated mining" and DEQ's analysis of dewatering in Section 15, among others. AR152 at 77. Going farther, the Board precluded Conservation Groups from even citing evidence from the record if it was not also cited in their comments. AR152 at 77

[4] Conservation Groups made the same point again at the pretrial hearing, but the recording of the hearing was lost due to a technical error by the hearing examiner. AR151 at 66:24 to 67:12.

(precluding discussion of impacts of increased chloride levels and decreased dissolved oxygen on aquatic life).

Conservation Groups, in turn, moved to preclude DEQ and Westmoreland from presenting *post hoc* argument and evidence. AR77. However, while the Board limited Conservation Groups to issues and evidence identified in comments, it permitted DEQ and Westmoreland to present post-decisional evidence and argument not contained in the CHIA or the record. AR152 at 37–39, 64. Specifically, the Board permitted DEQ and Westmoreland to present evidence and argument to refute DEQ's own finding that cumulative impacts would increase salinity in the stream by 13%. *See* AR95 Ex. 1 at 11. Westmoreland presented a *post hoc* "probabilistic" analysis by William Schafer, Ph.D., that the 13% increase would not be "statistically significantly measurable." AR152 at 37–39, 64; *see* AR118 at 33:4–22 (stipulating analysis was *post hoc*). DEQ presented the *post hoc* argument that its material damage determination was not, in fact, based on the expected 13% cumulative increase in salinity, but instead on the salinity from AM4 alone, which, the argument went, would not increase salinity concentrations *at all*, but only extend the duration of elevated salinity

levels (by decades or centuries). AR152 at 63–65; AR116 at 187:23 to 188:2.

Conservation Groups also moved to preclude Dr. Hinz, DEQ's hydrologist, from testifying about aquatic life. AR76 at 5–7. Everyone agreed Dr. Hinz was not an expert in aquatic life. AR117 at 86:20–21; AR116 at 253:20 to 254:4, 255:8 to 258:12. DEQ, however, argued that, despite her lack of expertise, Dr. Hinz could testify about aquatic-life health under Montana Rule of Evidence 703. AR79 at 21. The Board accepted DEQ's argument and ultimately relied heavily on Dr. Hinz's testimony about aquatic-life health. AR152 at 48–50. AR116 at 215:10 to 219:4.

E. Contested Case: Hearing and Final Decision

Following a four-day evidentiary hearing, the parties submitted proposed findings and conclusions. AR121; AR122; AR123. The hearing examiner in turn issued proposed findings and conclusions. AR134. Then, following more briefing and oral argument, a divided Board adopted the hearing examiner's proposed findings and conclusions. AR152; *see* AR151 at 135:15, 213:12 (dissenting votes).

The Board held, over dissent, that Conservation Groups failed to demonstrate that the AM4 expansion would cause material damage, such as violation of any water quality standard: "Conservation Groups failed to present evidence necessary to establish the existence of any water quality standard violations with respect to the AM4 Amendment." AR152 at 84; *see also id.* at 72; *id.* at 76. The dissenting member stated: "I don't think that we can then flip and require the Petitioner to prove with certainty that damage will occur …." AR151 at 204:18–22; *id.* at 214:19–23 ("I believe that the burden of proof definitions that we have adopted have impermissibly read out of the statute the agency's regulation [ARM 17.24.405(6)(c)] ….").

On the merits, the Board recognized that the CHIA "must assess whether the action at issue will cause a violation of water quality standards." AR152 at 75; *see also id.* at 18 (quoting ARM 17.30.629(1)). The Board found that macroinvertebrates are an *unreliable* indicator of aquatic-life health in prairie streams. *Id.* at 46–47. However, the Board then *relied* on the survey of macroinvertebrates—the Arcadis Report—to conclude that DEQ's CHIA adequately assessed the stream's narrative water quality standard for aquatic life. *Id.* at 49–50, 85.

Regarding salinity, the Board acknowledged East Fork Armells Creek is impaired and not meeting water quality standards due to excessive salinity. AR152 at 28. The Board found that the cumulative effect of existing mining operations will cause a "13% increase in the concentration of TDS in EFAC." *Id.* at 39; *see also* AR95 Ex. 1 at 11 (DEQ's finding "the 13% increase in TDS … in EFAC"); *accord* AR95 Ex. 1A at 9-9. The Board, however, concluded that this would not cause material damage or a violation of water quality standards because AM4 alone would only extend the *duration* of elevated salinity but would not, on its own, increase the concentration. AR152 at 63–72.

Conservation Groups petitioned for judicial review. DC Doc. 1.

F. Judicial Review

Conservation Groups' petition named the Board, DEQ, and Westmoreland as parties. *Id.* The Board moved to dismiss, which the district court denied. DC Doc. 12; DC Doc. 40.

After merits briefing, the court heard oral argument. At argument, in response to inquiry from the court, DEQ's counsel described the agency's material damage inquiry under MSUMRA: "The

issue in front of the DEQ hydrologist like it is in every case is whether water quality standards are met." Hr'g Tr. 74:21–24 (Dec. 16, 2020).

In October 2021, the court ruled that the Board and DEQ erred in multiple respects, reversed approval of the permit, and remanded to DEQ. DC Doc. 79 at 13–34.

DEQ and Westmoreland subsequently moved to clarify the remedy and stay the decision based on extra-record declarations. DC Docs. 80, 82, 83, 84 Ex. A. The district court denied the motions and ordered vacatur of the AM4 expansion. DC Doc. 107 at 22–23. The court deferred vacatur until April 1, 2022, to allow Westmoreland to move its strip-mining operations without interrupting coal supply to the plant. DC Doc. 107 at 12–13, 23. Before vacatur became effective, Westmoreland moved its operations to other reserves in Areas A and F, with no impact to energy supplies. *See* WRM Reply in Supp. of Mot. for Stay, Ex. A ¶¶ 2, 6 (June 29, 2022).

Conservation Groups petitioned for costs and attorneys' fees. DC Docs. 96–103. DEQ disputed entitlement but declined "to dispute the reasonableness" of the requested fees to avoid "incur[ring] the expense of hiring experts." DC Doc. 121 at 20. The court ruled that Conservation

Groups were entitled to fees and set an evidentiary hearing to determine a reasonable award. DC Doc. 129 at 17–18. The court held the hearing in May 2022. *See* DC Doc. 139 at 1. The court then issued a detailed order that carefully assessed the relevant factors under *Plath v. Schonrock*, 2003 MT 21, 314 Mont. 101, 64 P.3d 984, and awarded reasonable costs and fees. DC Doc. 139 at 27.

This appeal followed.

STANDARDS OF REVIEW

I. MERITS

MAPA governs judicial review of the Board's decision. § 2-4-704(2), MCA. A court may reverse or modify an agency decision that is "in violation of constitutional or statutory provisions"; "made upon unlawful procedure"; "affected by other error of law"; or "arbitrary or capricious." *Id.* § 2-4-702(2)(a)(i), (iii), (iv), (vi). "In administrative appeals, this Court applies the same standards of review as a district court." *CED Wheatland Wind, LLC v. Mont. Dep't of Pub. Serv. Regul.*, 2022 MT 87, ¶ 12, 408 Mont. 268, 509 P.3d 19.

"[A]n internally inconsistent analysis signals arbitrary and capricious action." *MEIC III*, ¶ 26 (quoting *Nat'l Parks Conservation*

Ass'n v. EPA, 788 F.3d 1134, 1141 (9th Cir. 2015)). "While agencies possess specific, technical, and scientific knowledge exceeding that of this Court, an agency must articulate a satisfactory explanation for its actions and provide a rational connection between the facts found and the choice made." *MT SUN, LLC v. Mont. Dep't of Pub. Serv. Regul.*, 2020 MT 238, ¶ 52, 401 Mont. 324, 472 P.3d 1154. Courts "will not defer to an agency's incorrect or unlawful decisions," *id.*, but will "defer only to 'consistent, rational, and well-supported agency decision-making.'" *DeBuff v. DNRC*, 2021 MT 68, ¶ 24, 403 Mont. 403, 482 P.3d 1183 (quoting *MEIC III*, ¶ 26).

In interpreting statutes, the Court first considers the plain text. *Id.* The Court is guided by the statutory objective and will not construe statutes to defeat their purpose. *Larson v. State By & Through Stapleton*, 2019 MT 28, ¶ 29, 394 Mont. 167, 434 P.3d 241; § 1-2-103, MCA.

"A court's decision that a party failed to exhaust administrative remedies presents a conclusion of law reviewed for correctness." *Flowers v. Bd. of Pers. Appeals*, 2020 MT 150, ¶ 6, 400 Mont. 238, 465 P.3d 210.

When a district court provides alternative bases for its ruling, "[f]ailure to challenge each of the alternative bases … results in affirmance." *State v. English*, 2006 MT 177, ¶ 47, 333 Mont. 23, 140 P.3d 454. In that circumstance, the appealing party has waived any challenge to the alternative ground for decision. *E.g.*, *Dennis v. BEH-1, LLC*, 520 F.3d 1066, 1069 n.1 (9th Cir. 2008).

II. REMEDY

Appellate courts review a decision to vacate unlawful agency action for abuse of discretion. *Neb. Dep't of Health & Hum. Servs. v. Dep't of Health & Hum. Servs.*, 435 F.3d 326, 330 (D.C. Cir. 2006); *accord Planned Parenthood of Mont. v. State by & through Knudsen*, 2022 MT 157, ¶ 5, 409 Mont. 378, 515 P.3d 301 (same standard for other equitable rulings). A district court abuses its discretion if it acts "arbitrarily, without employment of conscientious judgment, or exceeds the bounds of reason resulting in substantial injustice." *In re Marriage of Elder & Mahlum*, 2020 MT 91, ¶ 10, 399 Mont. 532, 462 P.3d 209.

III. COSTS AND FEES

Whether legal authority exists to support an award of costs and attorneys' fees is a question of law, reviewed for correctness. *Houden v. Todd*, 2014 MT 113, ¶ 19, 375 Mont. 1, 324 P.3d 1157.

"The amount of an award for attorney fees falls within the discretion of the District Court" and is reviewed for abuse of discretion. *Shephard v. Widhalm*, 2012 MT 276, ¶ 35, 367 Mont. 166, 290 P.3d 712; *Ferdig Oil Co. v. ROC Gathering, LLP*, 2018 MT 307, ¶ 29, 393 Mont. 500, 432 P.3d 118. This Court will not disturb a district court's fee award unless "it acted arbitrarily without conscientious judgment or exceeded the bounds of reason …." *Shephard*, ¶ 35.

IV. MOTION TO DISMISS

This court reviews de novo "a district court's ruling on a motion to dismiss pursuant to M. R. Civ. P. 12(b)(6)." *W. Sec. Bank v. Eide Bailly LLP*, 2010 MT 291, ¶ 18, 359 Mont. 34, 249 P.3d 35.

SUMMARY OF ARGUMENT

A fundamental premise of coal-mining regulation is that mining operations must be adjusted to conform to the law, rather than the opposite: the law *must not* be adjusted to accommodate the economic interests of individual coal mines. H.R. Rep. No. 95-218 at 115. In

approving the AM4 expansion, DEQ and the Board violated this basic premise. They repeatedly distorted the law and contradicted themselves—especially with respect to water quality standards—to allow expanded strip-mining, while ignoring the worsening impairment of East Fork Armells Creek.

In the permit-appeal process, the Board imposed a series of rulings that together effectively foreclose any public challenge to a permitting decision. The district court correctly reversed these unlawful decisions.

I. MERITS

No law requires issues to be exhausted before completion of the administrative process or before the agency even publishes its analysis. The law does not require clairvoyance, and the public is not limited to issues identified before DEQ laid its cards on the table. The district court correctly reversed the Board for dismissing claims based on administrative issue exhaustion.

The court also correctly reversed the Board for allowing DEQ and Westmoreland to present *post hoc* arguments and evidence, while simultaneously limiting Conservation Groups to evidence submitted in

administrative comments before seeing DEQ's analysis or decision. This created an uneven playing field, contrary to basic notions of fair play.

All parties agreed that DEQ's witness, Dr. Hinz, is "not an expert in aquatic life of any kind." Yet the Board admitted and relied heavily on Dr. Hinz's testimony about aquatic life. Thus, the court correctly reversed the Board for improperly admitting Dr. Hinz's unqualified testimony about aquatic life.

The court also correctly reversed the Board for, in the words of the dissenting Board member, "flip[ping] [the burden to] require the Petitioner to prove with certainty that damage will occur." The precautionary provisions of MSUMRA require the *applicant* to "affirmatively demonstrate" and *DEQ* to "confirm" that "cumulative hydrologic impacts *will not result* in material damage." ARM 17.24.405(6)(c) (emphasis added).

It was arbitrary and capricious for DEQ and the Board to *rely* on a metric that both deemed *unreliable*. DEQ and the Board admitted evaluation of aquatic insects is an *unreliable* means of evaluating water quality standards. Yet both *relied* on an evaluation of aquatic insects

(by Dr. Hinz, who lacks relevant expertise) to assess compliance with water quality standards for aquatic life.

The court also correctly reversed DEQ and the Board's arbitrary conclusion that adding more salt to a stream impaired for excessive salt will not worsen the impairment or violate water quality standards. Water quality standards establish hard limits for pollution. Once exceeded, further degradation is prohibited until the impairment is remedied.

II. REMEDY

SMCRA and MSUMRA, as well as Montana's Constitution, empower courts to "vacate" and "reverse" unlawful permitting decisions. The district court rightly rejected Westmoreland's overreaching argument that courts are powerless to remedy unlawful and destructive permitting decisions.

The court also correctly considered evidence submitted by all parties regarding remedy. Westmoreland was the first to submit extra-record materials on remedy. Having done so, it cannot complain that the court considered such evidence. Nor did the court exceed the bounds

of reason in weighing the evidence and finding that the cumulative harm from strip-mining warrants vacatur.

III. COSTS AND FEES

Under MSUMRA, successful parties are entitled to petition the court—not DEQ—for a fee award against DEQ. The court correctly rejected DEQ's request to be both party to and judge of Conservation Groups' fee petition.

Nor did the court exceed the bounds of reason in awarding fees. In nearly fifty pages of analysis in two orders, the court carefully weighed the evidence and the *Plath* factors. DEQ's discontent with the court's weighing of the evidence does not establish an abuse of discretion.

IV. THE BOARD'S MOTION TO DISMISS

The district court correctly ruled that an agency that issues a final agency decision may be an appropriate party on judicial review of that decision. While such an agency may not be a necessary party under Rule 19, no authority supports the Board's position that such an agency is not even a permissible party. In fact, decades of precedent demonstrate the opposite.

ARGUMENT

I. MERITS

A. Issue Exhaustion Did Not Bar Claims

The district court held that administrative issue exhaustion does not apply to *administrative appeals* of coal-mining permits under MSUMRA; that is, *prior to* DEQ's issuance of its analysis and *prior to* judicial review. "Simply stated, the Court finds no authority for DEQ's and WRM's proposal to limit the public to issues raised *before* DEQ lays its cards on the table." DC Doc. 79 at 15. Alternatively, the court held, if issue exhaustion applied, it would not bar claims regarding DEQ's incorrect definition of "anticipated mining" and impacts of dewatering in Section 15 because DEQ had notice of and considered both issues. *Id.* at 16–17.

DEQ and Westmoreland argue the court erred but fail to address the court's reasoning, confuse the issues, fail to present relevant authority, and misconstrue the record.

1. Conservation Groups were not required to identify flaws in DEQ's analysis *before* DEQ published its analysis.

Initially, DEQ and Westmoreland confound *exhaustion of administrative remedies* and *administrative issue exhaustion*. *Carr v.*

Saul, 141 S. Ct. 1352, 1358 n.2 (2021). Failure to exhaust administrative remedies occurs when a party fails to "proceed through each step of the … administrative review scheme and receive[] a 'final decision.'" *Id.*; *Sims v. Apfel*, 530 U.S. 103, 107 (2000); *e.g.*, *Flowers*, ¶ 13.[5]

Issue-exhaustion requirements, by contrast, are "largely creatures of statute" and, when applicable, require a party seeking judicial review of agency action to have raised issues before the agency first. *Sims*, 530 U.S. at 107–08. When no statute requires issue exhaustion, extra-statutory issue exhaustion may only be imposed where the administrative procedure is "analog[ous] to normal adversarial litigation," *id.* at 109 (plurality), or the agency has expressly "notif[ied] claimants of an issue exhaustion requirement," *id.* at 113 (O'Connor, J., concurring). Issue exhaustion does not apply "where 'issues by their very nature could not have been raised before the agency.'" 4 Koch and Murphy, Administrative Law and Practice § 12:22 (3d ed. 2022 update)

[5] *See* § 2-4-702(1)(a), MCA (exhaustion of administrative remedies).

(quoting *Petroleum Comms., Inc. v. FCC*, 22 F.3d 1164, 1170 (D.C. Cir. 1994)).[6]

Here, the question is whether issue exhaustion applies—not on judicial review[7]—but *before* judicial review, during the administrative process before the Board. AR152 at 76–78. In other words, whether Conservation Groups comments on Westmoreland's application were required to identify issues or deficiencies in DEQ's CHIA and written findings[8] *before* DEQ published its CHIA and findings. The district court correctly concluded that the answer is no.

The court carefully surveyed authorities, identified no statutory issue-exhaustion requirement *prior to* an administrative appeal under MSUMRA, and reasoned that it would be unlawful to impose an extra-

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[6] *E.g.*, *Cigar Ass'n of Am. v. U.S. Food & Drug Admin.*, 480 F. Supp. 3d 256, 269 (D.D.C. 2020) ("[P]laintiffs can hardly be faulted for failing to divine the issue three years prior."); *accord All. for the Wild Rockies v. Savage*, 897 F.3d 1025, 1034–35 & n.13 (9th Cir. 2018).

[7] MAPA applies issue exhaustion on judicial review (but not before), subject to a "good cause" exception. § 2-4-702(1)(b), MCA.

[8] Here, DEQ's erroneous definition of "anticipated mining" first appeared in its CHIA. AR95 Ex. 1A at 5-1. DEQ's approval of the permit despite failing to make a negative material damage determination with respect to dewatering in Section 15 also first appeared in the CHIA. AR95 Ex. 1A at 9-10.

statutory issue-exhaustion requirement because the public must submit comments *before* ever seeing DEQ's CHIA. DC Doc. 79 at 13–15. The court specifically noted that MSUMRA does not require issue exhaustion for administrative appeals, but only requires that the party appealing be "adversely affected" and that the appeal be timely. *Id.* at 13 (citing § 82-4-206(1), MCA, and ARM 17.24.425(1)). The court further relied on the Department of Interior's statements that under SMCRA even the complete failure to submit comments "in no way" limits one's ability to administratively appeal a permit. *Id.* at 14 (quoting 56 Fed. Reg. 2,141)); *Save Our Cumberland Mountains v. OSM*, NX 97-3-PR at 15–17 (Dep't of Interior July 30, 1998) (affirming the "right of any adversely-affected person to challenge a permitting decision even if that person did not file comments during the permitting process") (in record at AR141 Ex. 4). Requiring comments to identify issues *before* DEQ publishes its CHIA, moreover, would violate Montana's constitutional rights to know and participate. DC Doc. 79 at 15 (citing *Bryan v. Yellowstone Cnty.*, 2002 MT 264, ¶¶ 32–46, 312 Mont. 257, 60 P.3d 381, and Mont. Const. art. II, §§ 8–9).

DEQ's and Westmoreland's counterarguments lack merit. Neither party disputes that MSUMRA has *no* textual issue-exhaustion requirement for administrative appeals. DEQ Br. 33–37; WRM Br. 31–33.[9] Nor does either contend that (1) the submission of comments before issuance of DEQ's CHIA—i.e., before the agency shows its hand—is "analog[ous] to normal adversarial litigation," *Sims*, 530 U.S. at 109; or (2) that DEQ or the Board anywhere "notif[ied] [the public] of an issue exhaustion requirement" for administrative appeals, *id.* at 113 (O'Connor, J., concurring); *cf.* DEQ Br. 33–37; WRM Br. 31–33. Neither appellant addresses the district court's constitutional analysis, DEQ Br. 33–37; WRM Br. 31–33, and therefore both waive the issue.[10] They thus fail to establish any basis for extra-statutory issue exhaustion.

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[9] DEQ cites "§ 84-4-231(8)(e), MCA" DEQ Br. 34—presumably referencing § 82-2-231(8)(e), MCA—but that provision states that an adversely affected person "may file" comments on a permit application. "May" does not denote a requirement. Westmoreland cites "§ 2-4-204," WRM Br. 33—presumably referencing § 2-4-702(1)(b), MCA—but that provision applies on judicial review, not in administrative appeals to the Board. *Cf. id.* § 82-4-204(6) (only requirements for administrative appeals are that person is "adversely affected" and appeal is timely).

[10] *See English*, ¶ 47; *Dennis*, 520 F.3d at 1069 n.1. Having failed to address this issue in their opening briefs, neither party may present new arguments in reply. *Unified Indus., Inc. v. Easley*, 1998 MT 145, ¶ 28, 289 Mont. 255, 961 P.2d 100.

Further, neither DEQ nor Westmoreland addresses the Department of the Interior's repeated findings that commenting is not a prerequisite for an administrative appeal under SMCRA. *Cf.* DEQ Br. 33–37; WRM Br. 31–33. DEQ argues SMCRA does not apply to permitting decisions under MSUMRA, DEQ Br. 25–26, but overlooks the requirement that Montana must "implement, administer, enforce, and maintain" MSUMRA "in accordance with" SMCRA and its regulations. 30 C.F.R. § 733.11. To do so, Montana must interpret and apply MSUMRA in a manner that is "no less stringent than … [SMCRA]" and "no less effective than the [federal] regulations in meeting the requirements of [SMCRA]." *Id.* § 730.5.

DEQ's remaining arguments fail because they address "exhaust[ion] [of] *administrative remedies*," DEQ Br. 33 (emphasis added), not issue exhaustion. *Cf.* DC Doc. 79 at 13–16; *see English*, ¶ 47 (failure to address basis of district court ruling results in affirmance). The issues are not the same. *See Sims*, 530 U.S. at 107–08. As such, DEQ's authorities are inapposite. *See* DEQ Br. 33–38.

While Westmoreland cites some issue-exhaustion cases, WRM Br. 31–33, none supports its position. None construes SMCRA or MSUMRA

(as here); none applies issue exhaustion during the administrative process *prior to* judicial review (as the Board did here); and none requires a party to predict errors *before* seeing the agency's analysis (as the Board did here).[11]

2. Alternatively, if issue exhaustion applied, it would not bar review of issues DEQ considered.

Issue exhaustion, if applicable, would only require comments to notify an agency about issues in "general terms." *Lands Council v. McNair*, 629 F.3d 1070, 1076 (9th Cir. 2010). Moreover, because the purpose of issue exhaustion is notice, it doesn't apply when an "agency has, in fact, considered the issue." 4 Koch and Murphy, Administrative Law and Practice § 12:22; *Barnes v. U.S. Dep't of Transp.*, 655 F.3d

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[11] *See Dep't of Transp. v. Pub. Citizen*, 541 U.S. 752, 761–62, 764–65 (2004) (issue exhaustion applied on judicial review where public commented after reviewing agency analysis); *Nat'l Wildlife Fed'n v. EPA*, 286 F.3d 554, 561–62 (D.C. Cir. 2002) (issue exhaustion applied on judicial review of CWA rulemaking where issues were disclosed in rulemaking); *United States v. L.A. Tucker Truck Lines*, 344 U.S. 33, 35–37 (1952) (issue exhaustion applied on judicial review where party had opportunity to raise issue during administrative appeal); *Wiser v. State*, 2006 MT 20, ¶ 30, 331 Mont. 28, 129 P.3d 133 (exhaustion of administrative remedies); *see also Art v. Dep't of Labor & Indus.*, 2002 MT 327, ¶ 17, 313 Mont. 197, 60 P.3d 958 (exhaustion of administrative remedies).

1124, 1132–34 (9th Cir. 2011); *Nat. Res. Def. Council v. EPA*, 824 F.2d 1146, 1151 (D.C. Cir. 1987); *see also* § 2-4-702(1)(b), MCA (allowing exceptions for "good cause"). Applying these rules, the district court held that if issue exhaustion applied, it would not bar claims about the CHIA's incorrect definition of anticipated mining or the CHIA's failure to make a material damage determination about dewatering Section 15. DC Doc. 79 at 16–17.

DEQ disputes—mistakenly—that the court found Conservation Groups had notified DEQ of these issues. DEQ Br. 38. In fact, the court stated, "Conservation Groups' comments identified the need to assess cumulative impacts to water from Area F and concerns about dewatering [East Fork Armells Creek]." DC Doc. 79 at 16.

Westmoreland, in turn, argues Conservation Groups failed to identify the issues with extreme specificity. WRM Br. 34–35. The argument has no merit. *Lands Council*, 629 F.3d at 1076 ("alerting the agency in general terms" suffices). Here, the comments alerted DEQ that "future mining in Area B and Area F, as well as other potential mine expansions, will lead to additional cumulative impacts" that must be considered. AR95 Ex. 4L at 24; *accord* AR95 Ex. 4L at 17–19. True,

the comments did not reference "anticipated mining," but that is only because (1) DEQ had not yet issued its CHIA containing the erroneous definition of "anticipated mining," AR95 Ex. 1A at 5-1, and (2) Conservation Groups had not yet obtained DEQ's internal documents formulating and applying that erroneous definition, AR100 Ex. 19; *see also* AR100 Exs. 20–22.[12]

Moreover, the record demonstrates that DEQ considered the definition of "anticipated mining" and applied it to proposed expansions, including Area F. AR100 Exs. 19–22. Accordingly, issue exhaustion does not bar Conservation Groups' claim. *Barnes*, 655 F.3d at 1132–34; *NRDC*, 824 F.2d at 1151; DC Doc. 79 at 16–17; 4 Koch and Murphy, Administrative Law and Practice § 12:22. Westmoreland's attempt to reframe the claim to avoid this conclusion fails. WRM Br. 37–38.[13] The

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[12] Westmoreland is also mistaken in its complaint that discussion of Area F appears in an attachment. *Great Old Broads for Wilderness v. Kimbell*, 709 F.3d 836, 847 (9th Cir. 2013) (attachments are part of appeal).

[13] Westmoreland wrongly argues that DEQ considered potential cumulative impacts between Area F (on West Fork Armells Creek) and AM4 (on East Fork Armells). WRM Br. 37–38. DEQ admitted it never considered cumulative downstream impacts. AR116 at 249:25 to 250:3; *cf.* AR100 Exs. 19–22 (excluding Area F based on incorrect definition).

"flaw" in DEQ's analysis is that DEQ "used a legally erroneous definition of 'anticipated mining' in its" CHIA. AR97 at 2.

So too with dewatering. Comments cited evidence that mining dewatered Section 15 and explained that "[b]ecause this portion of the creek is outside the mine permit boundary, the dewatering of the creek by [Westmoreland] constitutes material damage." AR95 Ex. 4 at 3. DEQ addressed the issue in its CHIA and response to comments, stating it could not confirm the nature of this reach of the stream prior to mining and therefore "a determination of material damage cannot be made." AR95 Ex. 1A at 9-10; AR95 Ex. 1 at 9–10. Conservation Groups then challenged DEQ's failure to make a negative material damage determination for this reach, as required by ARM 17.24.405(6)(c). AR97 at 16. Thus, DEQ had notice of and considered the issue (albeit erroneously). *See Barnes*, 655 F.3d at 1132–34.

Finally, Westmoreland disingenuously disputes that Conservation Groups argued that these flaws in the CHIA arose after their submission of comments and, therefore, could not have been foreseen. WRM Br 35–37. While at a hearing before the Board, counsel for Conservation Groups was unable to immediately identify a portion of a

prior transcript where the groups advanced this argument, AR151 at 58:25 to 65:25, Westmoreland omits multiple statements about Conservation Groups' raising the argument in briefing and presenting the argument again to the Board. AR151 at 66:2–6 ("[I]n our response to … motions *in limine*, we made the argument I just made today …. Conservation Groups could not have known during the comment period on WECo's permit application that the Department's CHIA would formulate a legally erroneous definition of anticipated mining, which would reverse the burden of proof, and would ignore governing legal standards [regarding Section 15]." (internal quotation omitted) (quoting AR85 at 5)); *accord* AR151 at 59:12 to 61:25. The groups raised this argument at the hearing on motions *in limine*. AR107 at 60:21 to 62:2. And the groups raised the argument a *fourth* time at the pretrial hearing; however—as Westmoreland knows—the hearing examiner failed to preserve a record of that hearing because "the audio equipment … malfunctioned." *See* AR138 at 1. Fortunately, a party need not present an argument four times to preserve it for appeal—three times was more than enough. *See, e.g.*, *Montana v. Byrne*, 2021 MT 238, ¶ 21,

405 Mont. 352, 495 P.3d 440. Westmoreland's attempt to profit from the failed record is mere gamesmanship.

B. The Court Correctly Reversed the Board for Accepting *Post Hoc* Evidence and Argument from DEQ and Westmoreland, while Limiting Conservation Groups to Material in Comments

The court held that the Board "created an uneven playing field" when it allowed DEQ and Westmoreland to present *post hoc* and extra-record evidence and argument, while limiting Conservation Groups to evidence and argument presented in comments they submitted before seeing DEQ's CHIA or written findings. DC Doc. 79 at 21–23. The court based its decision on three principal authorities: (1) ARM 17.24.405(6); (2) § 82-4-227(3), MCA; and (3) *In re Bull Mountains*, No. BER 2013-07 SM. DC Doc. 79 at 21–23.

DEQ and Westmoreland argue the court erred, but neglect to address the authorities the court relied on. *See* DEQ Br. 39–40; WRM Br. 39–42. Those authorities refute DEQ and Westmoreland's arguments. DEQ and Westmoreland rely chiefly on § 2-4-612(1), MCA (which allows parties "to respond and present evidence and argument on all issues involved") to argue that they should be able to present *post hoc* evidence and argument, DEQ Br. 39, WRM Br. 39–42, while

limiting Conservation Groups to evidence in their comments. DEQ Br. 33–38; WRM Br. 31–38. The Board rejected this argument in *In re Bull Mountains*, No. BER 2013-07 SM at 56–59. While MAPA allows parties to present evidence, the "only relevant analysis is that contained within the four corners of the CHIA and the only relevant facts are those concluded by the agency in the permitting process before the agency makes its permitting decision." *Id.* at 56. This is because MSUMRA requires the permitting decision to be made "on the basis of information set forth in the application or information otherwise available that is *compiled by* the department [DEQ]." ARM 17.24.405(6) (emphasis added). Section 2-4-612(1), MCA, does not entitle DEQ and Westmoreland to submit irrelevant evidence. *See* Mont. R. Evid. 402.

The purpose of ARM 17.24.405(6) is to facilitate review of the permitting decision and promote public participation. *In re Bull Mountains*, No. BER 2013-07 SM at 56–57.[14] "What the agency may not do is present newly developed evidence that was not before the agency

[14] *See also, e.g.*, *Am. Petroleum Inst. v. Costle*, 609 F.2d 20, 23–24 (D.C. Cir. 1979) (explaining purpose of a similar provision under the Clean Air Act is to create a discrete record for review and prevent *post hoc* agency arguments).

at the time of its decision or analysis that was not contained within the CHIA." *Id.* at 57. Because DEQ and Westmoreland's interpretation of § 2-4-612(1), MCA, would negate ARM 17.24.405(6), it must be rejected. § 1-2-101, MCA.

On appeal, DEQ argues it did not, in fact, present a *post hoc* argument about salinity in East Fork Armells Creek. DEQ Br. 39. But DEQ did not present this argument at district court, DC Doc. 45 at 18, so it may not advance it here. *State v. Diaz*, 2006 MT 303, ¶ 34, 334 Mont. 479, 148 P.3d 628.

Plus, DEQ is mistaken. In the CHIA, DEQ predicted "[b]aseflow in [the creek] … to experience a postmine increase in TDS of 13%" but determined that this would not cause material damage (by violating water quality standards) because "the creek should be able to support its designated beneficial uses [i.e., water quality standards]." AR95 Ex. 1A at 9-9; *see also* AR95 Ex. 1 at 11. But before the Board, DEQ changed course and argued its material damage determination was based, not on the 13% salinity increase, but instead on a supposed finding that there would be *no increase* in salinity concentration at all. AR152 at 63–65. This is precisely the "newly developed argument" and

"*post hoc* rationalization" that is forbidden. *In re Bull Mountains*, No. BER 2013-07 SM at 59; ARM 17.24.405(6)(c).[15]

Westmoreland does not dispute that testimony of its expert Dr. Schafer—a "probabilistic" "statistical" analysis that effectively erased the 13% increase in salinity, AR152 at 37–39, 64—was *post hoc* and extra-record. WRM Br. 39–41. Instead, Westmoreland argues that Dr. Schafer's testimony was not "relevant" to the Board's "directed verdict," and, therefore, its admission was harmless. WRM Br. 40–41. But the court rejected this argument, DC Doc. 79 at 22–23, which Westmoreland fails to address, WRM Br. 40–41, which is, again, fatal. *English*, ¶ 47; *Dennis*, 520 F.3d at 1069 n.1.

Further, Westmoreland's argument lacks merit. A directed verdict is only appropriate in the "complete absence of any evidence" and inappropriate if there is weighing of "conflicting evidence." *DiMarzio v. Crazy Mountain Const., Inc.*, 2010 MT 231, ¶¶ 34–35, 358 Mont. 119, 243 P.3d 718; DC Doc. 79 at 21–22. The Board weighed conflicting evidence, rejecting testimony of Conservation Groups' experts based on

[15] DEQ also cites a discussion from the CHIA about groundwater, DEQ Br. 39 (citing AR95 Ex. 1A at 9-31 to 9-33), but that is irrelevant to the analysis about impacts to surface water. AR95 Ex. 1A at 9-9.

testimony from DEQ's and Westmoreland's experts, including Dr. Schafer. AR152 at 34–36, 51–53, 67–68, 72. And the Board relied repeatedly on Dr. Schafer's "probabilistic" and "statistical" analysis to conclude—contrary to the CHIA—that the salinity increase in the stream "cannot be measured" and that "[m]ining associated with the AM4 Permit will not impact that statistical analysis." AR152 at 37–38, 64–65. The improper admission of this *post hoc* testimony was not harmless. *Murray v. Talmage*, 2006 MT 340, ¶ 18, 335 Mont. 155, 151 P.3d 49 (improper admission of "critical evidence" prejudicial); *Martin v. BNSF Ry. Co.*, 2015 MT 167, ¶ 33, 379 Mont. 423, 352 P.3d 598 (admission of evidence prejudicial if it "might have contributed" to decision (quoting *Boude v. Union Pac. R.R. Co.*, 2012 MT 98, ¶ 21, 365 Mont. 32, 277 P.3d 1221)).[16]

Finally, Westmoreland suggests that Dr. Schafer's *post hoc* testimony was appropriate rebuttal to *new* evidence presented by Conservation Groups' expert Dr. Gardner. WRM Br. 41. But

[16] *See also Border Power Plants Working Grp. v. Dep't of Energy*, 260 F. Supp. 2d 997, 1023 (S.D. Cal. 2003) (rejecting identical argument that *calculated* salinity increase in sensitive water was insignificant because it could not be *measured*).

Westmoreland fails to identify any post-decisional evidence presented by Dr. Gardner. On the contrary, the hearing examiner and Board limited testimony from Dr. Gardner to evidence presented in comments, as the district court noted. AR152 at 76–77; AR116 at 180:14 to 181:9; DC Doc. 79 at 23.[17]

C. The Court Correctly Reversed the Board's Admission and Reliance on Unqualified Expert Testimony from DEQ about Aquatic Life

The district court reversed the Board for admitting and relying on "expert" testimony about aquatic-life health from DEQ's hydrologist Dr. Hinz, even though all parties agreed Dr. Hinz lacked expertise in this field. DC Doc. 79 at 23–25. Because the Board's and DEQ's material damage evaluations were based on Dr. Hinz's (inexpert) analysis, this issue alone can resolve the merits of this case.

A witness cannot present expert testimony without being qualified as an expert in the relevant field. Mont. R. Evid. 702. If a witness lacks

[17] Westmoreland asserts—without citation—that the district court allowed Conservation Groups to "present new expert testimony." WRM Br. 41. It did no such thing. The issue exhaustion ruling did not permit Conservation Groups to submit *post hoc* evidence, but merely allowed them to identify errors after reviewing DEQ's CHIA and written findings—like an incorrect legal definition of a critical term.

requisite expertise, she may not offer expert testimony, even if she possesses expertise in a different field. DC Doc. 79 at 23–24; *e.g.*, *State v. Russette*, 2002 MT 200, ¶¶ 13-14, 311 Mont. 118, 53 P.3d 1256, *abrogated on other grounds by State v. Stout*, 2010 MT 137, 356 Mont. 468, 237 P.3d 37. Here, Conservation Groups sought to exclude testimony from Dr. Hinz about aquatic-life health. AR75 at 5–7. Everyone agreed Dr. Hinz lacked such expertise.[18] Nevertheless, adopting an argument of DEQ based on Montana Rule of Evidence 703, the Board admitted and relied on testimony from Dr. Hinz about aquatic-life health. AR116 at 215:18 to 219:4; AR152 at 48–50.

Rule 703 merely provides that the bases of an expert's opinion "need not be admissible." Mont. R. Evid. 703. It does not circumvent Rule 702. DC Doc. 79 at 24; *State v. Hardman*, 2012 MT 70, ¶¶ 27–28, 364 Mont. 361, 276 P.3d 839 (explaining that Rule 703 does not obviate requirement for witness to be "qualified to provide an expert opinion"); *Weber v. BNSF Ry. Co.*, 2011 MT 223, ¶ 38, 362 Mont. 53, 261 P.3d 984

[18] AR116 at 253:20 to 254:4 ("Do you consider yourself [Dr. Hinz] an expert in aquatic ecology? A. No."); AR117 at 86:20–21 (all parties and hearing examiner agree Dr. Hinz is "not an expert in aquatic life of any kind").

(physician who "did not have … expertise" in medical imaging scan could not could offer testimony about results of scan under Rule 703).

On appeal, DEQ repeats its Rule 703 arguments but fails to address the court's analysis, DEQ Br. 49–51, which is waiver. *English*, ¶ 47; *Dennis*, 520 F.3d at 1069 n.1. Further, DEQ does not dispute that Dr. Hinz lacked expertise with respect to aquatic life. DEQ Br. 50–51. This is also fatal. While Rule 703 may allow Dr. Hinz to rely on inadmissible evidence to support testimony about *hydrology* (her field of expertise), here she offered testimony about *aquatic life*, a field in which she has no expertise. AR152 at 48 ("[D]r. Hinz appropriately utilized the updated macroinvertebrate sampling data via a qualitative analysis as an indicator of … aquatic life …."), at 49 ("Dr. Hinz's [sic] concluded the updated macroinvertebrate survey [the Arcadis Report] empirically demonstrated that a diverse community of macroinvertebrates … was using the stream reach at issue."), at 49 ("Dr. Hinz also compared … macroinvertebrate sampling data … to conclude …."), at 50 ("Dr. Hinz assessed … biological [evidence] … to reach her determination … [about] material damage to the aquatic life ….").

Westmoreland contends Dr. Hinz's testimony about the health of aquatic life in East Fork Armells Creek was admissible because she was a "fact witness." WRM Br. 39. But there is no exception to Rule 702 for fact witnesses. *See, e.g.*, *Weber*, ¶¶ 35–38 ("treating physician," i.e., fact witness, not allowed to testify about medical scan about which he "did not have … expertise").

Finally, DEQ's and Westmoreland's arguments that Dr. Hinz's improper testimony was harmless, in fact, reveal the fundamental flaws of DEQ and the Board's analysis. *Compare* DEQ Br. 51, *and* WRM Br. 39, *with* DC Doc. 79 at 24–25 & n.8. Dr. Hinz—who has *no expertise in aquatic life*—was the *only* person DEQ allowed to analyze aquatic-life data (the Arcadis Report). AR116 at 256:6 to 257:10. DEQ *prohibited* qualified experts—Mr. Feldman (DEQ) and Ms. Hunter (Westmoreland's consultant)—from doing this. AR116 at 139:24 to 143:7; AR117 at 183:25 to 184:8; AR100 Ex. 15 at 122; AR152 at 46; AR100 Ex. 43 at 629. It is therefore unsurprising that, though DEQ and the Board recognize that analysis of aquatic insects is *unreliable* for assessing compliance with water quality standards, AR152 at 45–46, in the CHIA, Dr. Hinz relied on the survey of aquatic insects (the Arcadis

Report) to "demonstrate[]" that "the reach currently meets the narrative [water quality] standard of providing beneficial use for aquatic life." AR95 Ex. 1A at 9-8; AR116 at 256:6 to 257:10. DEQ's reliance on unqualified personnel using an unreliable metric is not harmless, but arbitrary. *DeBuff*, ¶ 24.

DEQ argues Dr. Hinz's testimony was harmless because Conservation Groups' expert, Sean Sullivan, agreed that the Arcadis Report could be used to determine "whether there was any life whatsoever, any macroinvertebrate life whatsoever in EFAC." DEQ Br. 51 (citing AR152 at 51); AR116 at 115:9–13, *cited in* AR152 at 51. DEQ confuses the issue. The material damage determination is not whether *all life* has been extinguished, but whether cumulative impacts will violate *water quality standards*. ARM 17.24.405(6)(c); § 82-4-203(32), MCA. Mr. Sullivan specifically "disagreed with the conclusion that the State [i.e., Dr. Hinz] had made that it—the Arcadis Report provided evidence to conclude that it [EFAC] was meeting the aquatic use [water quality] standard." AR116 at 11:13–25. He explained Montana does not even use aquatic insects to assess water quality standards in prairie streams. AR116 at 8:24 to 11:2, 110:2 to 111:5.

Westmoreland argues Dr. Hinz's inexpert testimony was harmless because the Board's analysis of aquatic life was based on "39 discrete findings, the majority of which did not implicate Dr. Hinz's testimony or the [Arcadis] survey." WRM Br. 39 (emphasis omitted). The district court rightly rejected this argument, noting that Dr. Hinz was DEQ's *only* witness who analyzed aquatic life, the Board's analysis relied almost exclusively on Dr. Hinz's testimony, and the Board used Dr. Hinz's inexpert testimony to discount the expert testimony of Mr. Sullivan. DC Doc. 79 at 24–25; AR152 at 43–53. The only other expert cited in passing by the Board, Ms. Hunter, was directed by DEQ to "collect, but *not analyze*" macroinvertebrates in the stream. AR152 at 46 (emphasis added). Thus, Dr. Hinz's inexpert analysis[19] using an unreliable metric was the *only* analysis of aquatic life on which DEQ and the Board based their decisions. AR116 at 256:6 to 257:10.

[19] AR116 at 257:6–7 (Dr. Hinz admitting, "It wasn't some kind of expert determination of aquatic biology.").

D. MSUMRA Requires Westmoreland and DEQ to Demonstrate Environmental Harm Will *Not Occur*—It Does Not Require the Public to Demonstrate Environmental Harm *Will Occur*

The court correctly reversed the Board for requiring Conservation Groups to "prove that the mine would cause material damage." DC Doc. 79 at 25. The precautionary provisions of MSUMRA forbid DEQ from issuing a permit unless and until "the application affirmatively demonstrates and the department's written findings confirm … that … the hydrologic consequences and cumulative hydrologic impacts will not result in material damage." ARM 17.24.405(6)(c); DC Doc. 79 at 26. Bolstering its opinion with analysis of the legislative history of SMCRA, analogous cases, and Montana's constitution, the court held the law means what is says: the mining company must demonstrate material damage *will not occur*, and the public does not have to demonstrate material damage *will occur*. DC Doc. 79 at 25–26.

DEQ and Westmoreland object, but their arguments lack merit.[20] Westmoreland insists that on administrative review, the applicant's

[20] Westmoreland and DEQ seize on the hearing examiner's incorrect statement that "[a]ll parties agree that at a 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

burden to disprove material damage shifts, and the public instead must "*prove material damage*." WRM Br. 21 (emphasis added); *accord id.* 29, 42. But this Court rejected this "burden … shifts" argument decades ago, explaining that on appeal from a permitting decision, the applicant retains "the burden as to the non-existence of adverse impact." *In re Royston*, 249 Mont. 425, 428, 816 P.2d 1054, 1057 (1991).[21] The Board previously held that under MSUMRA, DEQ and the applicant retain the burden of proof in permit appeals. *In re Bull Mountains*, No. BER 2013-07 SM at 77–78, 86–87 (because MSUMRA requires a showing of a "likelihood or defensible level of confidence that material damage will not result," Board ruled against DEQ and applicant where evidence only showed that mining "may or may not cause material damage").

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prevent material damage.'" AR103 at 3 (quoting § 82-4-227(3)(a), MCA); WRM Br. 27; DEQ Br. 33. This statement, unsupported by citation, is incorrect. Conservation Groups consistently argued MSUMRA places the burden on the applicant and DEQ. AR1 at 2–3; AR97 at 2, 5, 6, 9, 11, 16, 18, 19.

[21] *Accord Bostwick Props. Inc. v. DNRC*, 2013 MT 48, ¶¶ 10–14, 18, 36, 369 Mont. 150, 296 P.3d 1154; *Missoula Cnty. Sch. Dist. v. Anderson*, 232 Mont. 501, 504–05, 757 P.2d 1315, 1317–18 (1988) (no burden shift). Westmoreland mistakenly argues *Bostwick* assigned the burden of proof based on who appealed the permit. WRM Br. 29–30. Instead, *Bostwick* assigned the burden as imposed by the statute. *Bostwick*, ¶ 36 (citing § 85-2-311(1)(a)(ii), MCA); *compare* § 82-4-227(1), MCA.

This is consistent with SMCRA's legislative history,[22] and the precautionary provisions in Montana's Constitution. *Park Cnty.*, ¶ 61; Mont. Const. art. II, § 3, art. IX, § 1(1); DC Doc. 79 at 25–27.

The principal authority Westmoreland relies on, *Montana Environmental Information Center v. DEQ* (*MEIC II*), 2005 MT 96, 326 Mont. 502, 112 P.3d 964, refutes the coal company's position. *MEIC II*, a Clean Air Act (CAA) case, expressly held that in a permit challenge the question is "whether … [the *applicant*] established that … its *proposed project will not cause*" environmental harm. *Id.* ¶ 38 (emphasis added). Westmoreland ignores this holding, but it is fatal.

To be sure, *MEIC II* states that the party challenging a CAA permit "had the burden of proof" to show DEQ's decision "violated the law." *Id.* ¶ 16. However, as noted, the Court expressly did *not* require the public to prove environmental harm. *See MEIC II*, ¶ 38. Westmoreland's reading of *MEIC II* must be rejected because, not only

[22] S. Rep. No. 95-128 at 80 (1977) (stating "applicant is required to … assume, if a public hearing is held, the burden of proving [compliance with SMCRA]"). DEQ disputes the report is the legislative history of SMCRA. DEQ Br. 29. But the Supreme Court has relied on it to construe SMCRA, refuting DEQ's argument. *Hodel v. Indiana*, 452 U.S. 314, 327 n.16, 328, 329 (1981).

is it inconsistent with the holding in *MEIC II*, ¶ 38, it also directly conflicts with *In re Royston*, 249 Mont. at 428, 816 P.2d at 1057, *Bostwick*, ¶ 36, and *Missoula County*, 232 Mont. at 504–05, 757 P.2d at 1317–18, among others.[23] The district court correctly distinguished *MEIC II* on the basis that the CAA, unlike the MWUA and MSUMRA, does not expressly assign the burden of proof. *Compare* § 82-4-227(1), MCA, *and id.* § 85-2-311(1)(a)(ii), *with id.* § 75-2-218. When a permitting statute, like the MWUA and MSUMRA, has "re-assigned" the "burden on the applicant," application of evidentiary statutes (§§ 26-1-401, -402, MCA) requires the applicant to bear the "burden as to the nonexistence of adverse impact" in a contested case appealing the permit. *In re Royston*, 249 Mont. at 428, 816 P.2d at 1057. If "neither side produced evidence" in the contested case, "the applicant would be defeated." *Id.*[24]

Finally, Westmoreland partially quotes ARM 17.24.425(7), but omits the text that defeats its argument. WRM Br. 28 ("[t]he burden of

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[23] *E.g.*, *Hohenlohe v. DNRC*, 2010 MT 203, ¶¶ 34–35, 357 Mont. 438, 240 P.3d 628, 634.

[24] Regardless of evidentiary burden, DEQ retains the burden to make rational and non-arbitrary decisions. *DeBuff*, ¶ 39.

proof at such hearing is on the party seeking to reverse the decision[.]" (brackets in Westmoreland brief) (quoting ARM.17.24.425(7)). The unedited text reads: "The burden of proof at such hearing is on the party seeking to reverse the decision *of the board*." ARM 17.24.425(7) (emphasis added). It is inapplicable to a contested case where, as here, Conservation Groups sought to reverse the permitting decision of *DEQ*, not "the board."

DEQ raises similar arguments to Westmoreland, but its interpretation of the burden of proof differs fundamentally, demonstrating the Board's error. DEQ agrees with the district court that under MSUMRA, a member of the public challenging a permitting decision *does not* have to prove material damage. DEQ Br. 32–33. DEQ errs, however, in arguing that the Board did not require Conservation Groups to prove material damage. *Id.* at 32. The Board did just that, holding, "Conservation Groups failed to present evidence necessary to establish the existence of any water quality standard violations [i.e., material damage] with respect to AM4." AR152 at 84; *accord id.* at 72,

76.[25] Hence, the dissenting Board member criticized the Board for "flip[ping] and require[ing] the Petitioner to prove with certainty that damage will occur …." AR151 at 204:18–22; *id.* at 214:18–23. Thus, DEQ's position demonstrates the Board's allocation of the burden of proof was error. DEQ Br. 33.

E. It Was Arbitrary for DEQ and the Board to *Rely* on a Metric to Assess Water Quality Standards that DEQ and the Board Both Deemed *Unreliable*

The district court correctly held that it was arbitrary of DEQ and the Board to *rely* on an evaluation of aquatic insects (macroinvertebrates) to assess water quality standards, when both also found that such evaluation is not a *reliable* means of assessing compliance with water quality standards. DC Doc. 79 at 28–31. This issue is central, straightforward, and sufficient to resolve this case.

DEQ assessed "whether water quality standards are met," Hr'g Tr. 74:21–24 (Dec. 16, 2020), and concluded they were, based on its inexpert review (*see supra* Argument Part I.C) of the "survey" of aquatic insects (the Arcadis Report). AR95 Ex. 1A at 9-8. This was arbitrary

[25] *See also* WRM Br. 21 (acknowledging Board required groups to "prove material damage to aquatic life").

because, as the court held, DEQ testified and the Board concluded that, assessment of aquatic insects does "not provide an accepted or *reliable* indicator of aquatic life support functionality" in a prairie stream. AR152 at 46–47 (emphasis added). For such streams, analysis of aquatic insects cannot "tell you harm has happened by humans." AR117 at 137:5–7. Thus, DEQ cannot and does not use such information "to determine stream health." AR117 at 163:11–12; AR116 at 8:24 to 11:2, 110:2 to 111:5.

DEQ and Westmoreland object, but their arguments are sleight of hand and lack merit. They mistakenly argue the district court improperly "engraft[ed]" a requirement of the MWQA (and CWA) onto MSUMRA—namely, assessment of water quality standards. DEQ Br. 48; WRM Br. 43–45. But MSUMRA defines material damage to include any "[v]iolation of a *water quality standard*." § 82-4-203(32), MCA (emphasis added); DEQ's CHIA identified water quality standards from the MWQA as "material damage criteria," AR95 Ex. 1A at 2-2 to 2-3; and the Board acknowledged that a "material damage determination must assess whether the action at issue will cause a violation of water quality standards." AR152 at 75; *In re Bull Mountains*, No. BER 2013-

07 SM at 63, 75. DEQ's counsel even conceded: "The issue in front of the DEQ hydrologist like it is in every case is whether water quality standards are met." Hr'g Tr. 74:21–24 (Dec. 16, 2020). Thus, the CHIA purported to assess water quality standards for aquatic life by analyzing the aquatic-insect survey (Arcadis Report):

> [T]he survey demonstrated that a diverse community of macroinvertebrates was using the stream reach. Therefore, the reach currently meets the narrative [water quality] standard of providing a beneficial use for aquatic life.

AR95 Ex. 1A at 9-8; *see id.* at 2-3 (narrative standard is ARM 17.30.629). The Board adopted this analysis to conclude that mining "will not cause violations of water quality standards." AR152 at 50, 52, 85. Thus, DEQ and Westmoreland's arguments lack merit—the district court did not "engraft" anything, but properly focused on the text of MSUMRA, which defines material damage to include violations of water quality standards.

DEQ argues about a supposed "before and after" analysis by Dr. Hinz (whom DEQ erroneously classifies as an "expert witness") of aquatic insects collected in the 1970s and in 2014 in the Arcadis Report DEQ Br. 46–48. The argument fails because, as noted, (1) Dr. Hinz lacks expertise to assess aquatic life, and (2) according to DEQ,

assessment of aquatic insects is unreliable for assessing water quality standards. The argument is also improper because the CHIA did not rely on a "before and after" comparison, *but rejected it* because the "sampling methodology [for the Aracadis Report] differed from the methodologies used in the previous studies." AR95 Ex. 1A at 9-8. DEQ's suggestion that it can compare these dissimilar surveys based on inexpert "intuiti[on]" epitomizes its unscientific analysis of aquatic life throughout. DEQ Br. 49.[26]

Finally, DEQ and Westmoreland contend the Board's and DEQ's arbitrary reliance on this unreliable metric was harmless because DEQ supposedly relied on other, unidentified information to assess water quality standards for aquatic life. DEQ Br. 48; WRM Br. 21, 44. But they fail to identify specific data, as the district court explained. DC Doc. 79 at 30. As noted, the CHIA expressly relied on its (inexpert) analysis of the (unreliable) insect survey to determine the water quality standards for aquatic life were met. AR95 Ex. 1A at 9-8. This was not harmless, but prejudicial error.

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[26] Recall DEQ *prohibited* expert analysis of the survey. AR116 at 139:24 to 143:7; AR117 at 183:25 to 184:8; AR100 Ex. 15 at 122; AR152 at 46; AR100 Ex. 43 at 629.

F. It Was Arbitrary for DEQ and the Board to Conclude that Adding More Salt to a Stream Impaired for Excessive Salt Will Not Worsen the Impairment

The district court correctly held that because East Fork Armells Creek is impaired and not meeting water quality standards due to excessive salinity,[27] it was arbitrary for the Board to conclude that increasing salinity concentrations and extending the duration of elevated salinity concentrations would *not* worsen the impairment or violate water quality standards. DC Doc. 79 at 31–34. The Board erroneously assessed material damage from AM4 in isolation. *Id.* at 32–33. Alternatively, even considered alone, AM4 will extend elevated salinity concentrations for decades or centuries. *Id.* at 33–34.

DEQ and Westmoreland object, but their arguments lack merit. First, appellants argue the Board did not isolate AM4, but considered cumulative hydrologic impacts of all mining. DEQ Br. 53; WRM Br. 48–49. Appellants mislead. While the Board acknowledged the cumulative

[27] Westmoreland disputes the salinity impairment because its source is unconfirmed. WRM Br. 23. The district court noted that while DEQ's assessment report identified the salinity impairment with low certainty, "it nevertheless remains DEQ's official impairment determination with respect to EFAC." DC Doc. 79 at 31; AR95 Ex. 10 at 17 ("Salinity/TDS/chlorides will remain a cause of impairment.").

impacts of mining would cause a "13% increase in the concentration of TDS in EFAC," AR152 at 39, it then emphasized that the "13% increase" in salt is "not specific to … the AM4 Amendment." *Id.* at 63–64. Considering AM4 in isolation contravenes ARM 17.24.405(6)(c). DC Doc. 79 at 32. As the Supreme Court of Alaska explained, under SMCRA, regulators must:

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

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

Second, unable to dispute that adding more salt to a stream impaired for salt would violate water quality standards,[28] DEQ and Westmoreland again argue the CWA and MWQA are irrelevant. DEQ Br. 55–56; WRM Br. 46–50. This argument again fails because MSUMRA defines material damage to include any "[v]iolation of a water quality standard," § 82-4-203(32), MCA, DEQ's CHIA identified water quality standards as "material damage criteria," AR95 Ex. 1A at

[28] *Friends of Pinto Creek v. EPA*, 504 F.3d 1007, 1011–12 (9th Cir. 2007); § 75-5-103(7), MCA.

2-3, and the CHIA (arbitrarily) assessed water quality standards in its material damage determination. *E.g.*, AR95 Ex. 1A at 9-8. Apparently recognizing the weakness of this argument, appellants argue that MSUMRA requires a causation analysis that the district court supposedly overlooked. DEQ Br. 55; WRM Br. 46. Wrong again. The court cited DEQ's and BER's finding that the cumulative impacts of mining would *cause* a 13% increase in salinity in the stream. DC Doc. 79 at 31, 33.[29]

Finally, DEQ and Westmoreland challenge the court's alternative holding—that even if AM4 were isolated, extending the duration of violations of water quality standards is also material damage. DC Doc. 79 at 34. DEQ argues that the extended duration of elevated salinity levels from AM4 alone is irrelevant to the material damage determination under *In re Bull Mountains*, No. BER 2013-07 SM at 84.

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[29] Attempting to rewrite the record, Westmoreland contends the cumulative effects of mining will not cause a 13% salinity increase in the stream, but only the alluvium (consolidated materials that make up the stream bed). WRM Br. 45. But the Board found a "13% increase in the concentration of TDS in EFAC." AR152 at 39. And the CHIA premised its material damage analysis for surface water on a 13% increase in salinity in baseflow in the creek. AR95 Ex. 1A at 9-9; *accord* AR95 Ex. 1 at 11 (DEQ's finding "the 13% increase in TDS … in EFAC").

But that case cuts sharply against DEQ, holding that DEQ must assess material damage for the "time period that such impacts [of mining] are expected to persist." *Id.* at 83. Here, AM4 will extend the duration of elevated salinity by decades or centuries. AR116 at 187:23 to 188:2.[30] Each additional day of elevated salinity is a separate violation of water quality standards, which are measured daily. § 75-5-611(9)(a), MCA. *In re Bull Mountains* requires DEQ and the Board to account for the elevated salinity over time. But the Board ignored it. Thus, DEQ's reliance on *In re Bull Mountains* is misplaced.

Westmoreland likens violations of water quality standards to speeding and contends that driving *below* the speed limit is not a speeding violation even if one drives the same speed for a longer time. WRM Br. 47. The analogy fails because East Fork Armells Creek is already over the limit. It is currently not meeting water quality standards because of excessive salt, the cumulative impacts of mining will increase salinity by 13%, and AM4 will extend elevated salinity

[30] Westmoreland grouses that the Board didn't make any finding with respect to the duration of impacts. WRM Br. 24 (citing AR152 at 68 n.4). But DEQ's testimony that increased salinity would continue for "tens or hundreds of years" was undisputed. AR116 at 187:23 to 188:2.

levels by decades or centuries. AR152 at 28; AR95 Ex. 10 at 17, 19. Driving 10 over the limit today does not permit a driver to go 10 over the limit tomorrow. If a stream exceeds pollution limits today, it does not free a polluter to keep the stream over the limit forevermore. That is why water quality standard violations are assessed daily. § 75-5-611(9)(a), MCA. Westmoreland's argument for perpetual pollution has no merit.[31]

II. REMEDY

A. Montana Courts Have Authority to Vacate Unlawful Agency Actions

Westmoreland asks this Court to read into MAPA and MSUMRA the limitation on adequate remedies this Court found unconstitutional in *Park County*—that is, the coal company contends vacatur is unavailable. It's an overreach and has no merit.

The district court explained that SMCRA and MAPA, respectively, authorize courts to "vacate" and "reverse" unlawful decisions. DC Doc.

[31] In one passing sentence Westmoreland also contends Conservation Groups failed to exhaust administrative remedies by labeling their challenge to the hearing examiner's proposed order "objections" rather than "exceptions." WRM Br. 18. The district court rightly rejected this semantic quibble. DC Doc. 79 at 18–20; DC Doc. 107 at 17–18.

107 at 8–9 (quoting 30 U.S.C. § 1276(b) and § 2-4-704(2), MCA). The court rejected Westmoreland's argument as inconsistent with Montana's constitutional obligation to provide adequate remedies to prevent environmental degradation. *Id.* at 7–8; *see also Park Cnty.*, ¶¶ 78–89; Mont. Const. art. II, § 3, art. IX, § 1(3).

Westmoreland disagrees, insisting MAPA and MSUMRA deprive courts of any authority to vacate an unlawful permit and only allow remand to the Board for further process. WRM Br. 51–52. But the company ignores the district court's statutory and constitutional analysis. *Compare id.*, *with* DC Doc. 107 at 7–8. Westmoreland thus waives any challenge to those holdings. *English*, ¶ 47; *Dennis*, 520 F.3d at 1069 n.1. Moreover, the court was correct: MSUMRA and MAPA unambiguously authorize courts to "reverse or modify" an unlawful decision, which is equivalent to vacatur. *See* 30 U.S.C. § 1276(b) (authorizing vacatur). Westmorland's contrary argument would violate SMCRA and Montana's Constitution.

B. The District Court Correctly Considered Evidence Submitted by All Parties Regarding Remedy and Did Not Abuse Its Discretion in Ordering Deferred Vacatur

Vacatur is the "standard remedy" for unlawful permits, subject to equitable considerations. DC Doc. 107 at 4–5 (quoting *Park Cnty.*, ¶ 55, and citing *N. Cheyenne Tribe v. DEQ*, 2010 MT 111, ¶ 47, 356 Mont. 296, 234 P.3d 51). The district court assessed declarations from all parties[32] and ordered deferred vacatur to uphold the policies of Montana's Constitution and MSUMRA and prevent environmental degradation. DC Doc. 107 at 10–11, 21–22. The court noted: East Fork Armells Creek is impaired for salt, AM4 will add salt, and cumulatively strip-mining will significantly increase salt. *Id.*; *see also* AR95 Ex. 1A at 9-9; AR95 Ex. 1 at 11; AR152 at 28, 29, 39, 64. Westmoreland repeatedly violated pollution limits, and DEQ admitted cumulative impacts on surface water would be "major" and would "*permanently preclude existing land uses and/or beneficial uses of surface waters*." DC Doc. 107 at 21–22; DC Doc. 89 Ex. 1 ¶ 7 (emphasis added).

[32] *See* DC Doc. 82; DC Doc. 84 Ex. A; DC Doc. 89 Ex. 1.

Westmoreland argues the remedies analysis was limited to the administrative record. WRM Br. 52. However, having itself submitted extra-record evidence on remedy, DC Doc. 84 Ex. A, Westmoreland cannot challenge the court's consideration of such evidence. *State ex rel. State Fund v. Berg*, 279 Mont. 161, 174, 927 P.2d 975, 983 (1996). Furthermore, consideration of extra-record evidence on remedies is proper and often necessary. *E.g.*, *Esch v. Yeutter*, 876 F.2d 976, 991 (D.C. Cir. 1989).

Finally, Westmoreland asserts without support that the court's assessment of harm from the company's Billings-size strip-mine was an abuse of discretion. WRM Br. 52. But it is not the Court's job to fill in Westmoreland's missing argument. *In re Est. of Stukey*, 2004 MT 279, ¶ 92, 323 Mont. 241, 100 P.3d 114. And if "cumulative impact[s]" are "problematic, the problems must be resolved" before further mining is permitted. *Trustees for Alaska*, 835 P.2d at 1247. Abundant evidence demonstrated problematic cumulative impacts. DC Doc. 107 at 10–11, 21–22; DC Doc. 89 Ex. 1 ¶ 7. The court's balanced analysis and assessment of harm was not a "manifest abuse of discretion." *Driscoll v. Stapleton*, 2020 MT 247, ¶ 12, 401 Mont. 405, 473 P.3d 386.

III. FEES

A. Conservation Groups Were Not Required to Litigate Fees *against DEQ* in a Proceeding *before DEQ*

The district court held Conservation Groups were entitled to costs and fees pursuant to § 82-4-251(7), MCA and ARM 17.24.1307 to 1309. DC Doc. 129 at 8–13. DEQ does not dispute entitlement but mistakenly argues that fees associated with the administrative proceeding must be litigated *before DEQ*. DEQ Br. 57–61.

A "court" may "assess[]" fees "reasonably incurred by [a] person for or in connection with the person's participation in the proceedings, including any judicial review of agency actions" when an "order" is issued "at the request" of that person. § 82-4-251(7), MCA. "[P]roceedings" include both "any administrative proceeding" and "judicial review." *Id.* This provision allows a court to assess fees for the entirety of any proceeding that ultimately "culminate[s]" on judicial review. DC Doc. 129 at 9. Eligibility of fees is triggered by a final "order," § 82-4-251(7), MCA, which here occurred on judicial review and embraced the entire proceeding. DC Doc. 129 at 9–10. It would be illogical and violate due process to force Conservation Groups to litigate

fees against DEQ in a separate proceeding before DEQ. *Id.* at 12 (quoting *In re Murchison*, 349 U.S. 133, 136 (1955)). It would also waste resources to require—as DEQ proposed—two fee processes subject to separate appeals. *Id.*

DEQ disputes the court's analysis but ignores the due process problem. *See* DEQ Br. 58–61. This constitutes waiver. *English*, ¶ 47; *Dennis*, 520 F.3d at 1069 n.1. Further, while DEQ cites federal cases resolving fees in bifurcated fashion under SMCRA, DEQ Br. 58–60, there, administrative fees are resolved by an *independent* body, not by the agency against which fees are assessed, as DEQ proposes. DC Doc. 129 at 13. Finally, *Powder River Basin Resource Council v. Wyoming*, 869 P.2d 435 (Wyo. 1994), *cited in* DEQ Br. 60, is inapposite because it never addressed due process.

DEQ also fails to address the problem of judicial economy. *Compare* DC Doc. 129 at 12–13, *with* DEQ Br. 57–61. Conservation Groups attempted for months to settle fees with DEQ. DC Docs. 106, 120. To force the groups to further litigate fees before DEQ followed by a separate appeal would needlessly waste resources. "The law neither does nor requires idle acts." § 1-3-223, MCA; *Hensley v. Eckerhart*, 461

U.S. 427, 437 (1983) ("A request for attorney's fees should not result in a second major litigation.").

B. The District Court Did Not Abuse Its Discretion in Awarding Fees against DEQ

Before awarding fees, the court received briefing and multiple declarations, and conducted a two-hour hearing. DC Docs. 96 to 103, 131 to 138; Hr'g Tr. (May 6, 2022). The court then issued a detailed order addressing the lodestar calculation and *Plath* factors and awarding fees. DC Doc. 139 at 8–27. DEQ quibbles about time and rates but fails to demonstrate that the court acted "without conscientious judgment or exceeded the bounds of reason." *Shephard*, ¶ 35.

DEQ complains that the court did not specifically address an unidentified number of hours related to a motion by Westmoreland before the Board to disqualify certain Board members, which DEQ and Conservation Groups opposed. DEQ Br. 62. DEQ failed to timely raise this argument in district court. DEQ's opposition brief *declined* to challenge hours to avoid "incur[ing] the expense" of hiring an expert. DC Doc. 121 at 20. After briefing, DEQ submitted a declaration of Maxon Davis, but that only addressed judicial review. DC Doc. 137 at 11. DEQ only mentioned Westmoreland's motion to disqualify in

passing in its proposed order, *after* briefing and the hearing. DEQ App. D at 20. That was too late. *See Zempel v. Liberty*, 2006 MT 220, ¶ 13, 333 Mont. 417, 143 P.3d 123 (issues raised in reply waived).

Moreover, *Animal Foundation v. Montana Eighteenth Judicial District Court*, 2011 MT 289, 362 Mont. 485, 265 P.3d 659, *cited in* DEQ Br. 62, is inapposite. There, fees were awarded against distinct parties for distinct acts: discovery violations and vexatious litigation under § 37-61-421, MCA. *Animal Found.*, ¶ 26. MSUMRA provides fees for a successful litigant's "*participation* in the proceedings." § 82-4-251(7), MCA (emphasis added). "An attorney should receive fees for the full services provided where a plaintiff has obtained excellent results." *Laudert v. Richland Cnty. Sheriff's Dep't*, 2001 MT 287, ¶ 20, 307 Mont. 403, 38 P.3d 790. The decision not to address a minor issue raised after the close of briefing did not "exceed the bounds of reason." *Shephard*, ¶ 35. The court "thoroughly explained its reasoning for allowing the claimed hours, and its decision is supported by substantial evidence in the record." *Ferdig Oil*, ¶ 26.

Nor did the court abuse its discretion in setting rates. It based rates on testimony, declarations, and comparison to rates charged by

Westmoreland in this case and rates awarded in recent cases. Hr'g Tr. 17:4 to 26:7 (May 6, 2022); DC Doc. 101 ¶¶ 3–5; DC Doc. 102 ¶ 9; DC Doc. 139 at 22–24. DEQ contends the court abused its discretion by not affording greater weight to lower rates awarded in a different case 13–14 years ago. DEQ Br. 64–65 & n.15; *cf.* DC Doc. 139 at 24. DEQ "appears to seek de novo review of the evidence and a reweighing of the factors," but that's not the standard. *Peters v. Hubbard*, 2020 MT 282, ¶ 33, 402 Mont. 71, 475 P.3d 730.

C. Conservation Groups Request an Award of Fees for the Present Appeal

This Court may award to costs and attorneys' fees on appeal, the amount to be determined by the district court. *Houden*, ¶ 52; § 82-4-251(7), MCA. Conservation Groups respectfully request costs and fees associated with this appeal, the amount to be determined on remand.

IV. THE AGENCY THAT ISSUES A FINAL DECISION IS AN APPROPRIATE PARTY TO JUDICIAL REVIEW OF THAT DECISION.

The district court denied the Board's motion to dismiss based on precedent that an agency that issues a final decision in a contested case is *permissible* party, though not a *necessary* party under Montana Rule

of Civil Procedure 19. DC Doc. 40 at 3. The Board attacks this holding, but its arguments falter.

The fundamental flaw is the Board's reliance on *Young v. Great Falls*, 194 Mont. 513, 514–16, 632 P.2d 1111, 1112–13 (1981),[33] which held that such an agency was not a *necessary* party under Rule 19. *Young* did not take the further step (sought here by the Board) and hold that such an agency is not a *permissible* party. Precedent forecloses that step.

Forsythe v. Great Falls Holding, LLC, 2008 MT 384, ¶¶ 27–34, 347 Mont. 67, 196 P.3d 1233, holds that that such an agency is a permissible party to judicial review of its final decision in a contested case. Such agencies often appear as parties on judicial review, participating to differing degrees. *E.g.*, *Whitehall Wind LLC v. Mont. Pub. Serv. Comm'n*, 2010 MT 2, ¶¶ 10–36, 355 Mont. 15, 223 P.3d 907 (agency acted like adverse party); *Clark v. McDermott*, 2022 MT 186, ¶ 11, ___ Mont. ___, 518 P.3d 76 (participation limited to constitutional

[33] The Board cites *Hilands Golf Club v. Ashmore*, 277 Mont. 324, 326, 922 P.2d 469, 470 (1996), but that decision did not address necessary or permissible parties.

arguments); *Blaine Cnty. v. Stricker*, 2017 MT 80, ¶ 14, 387 Mont. 202, 394 P.3d 159 (participation limited to discovery).

Attempting to reconcile its position with conflicting precedent, the Board suggests three exceptions, allowing agencies to appear as parties if the agency (1) is designated by statute as a party; (2) was party to the contested case; or (3) issued a disputed permit. BER Br. 7–12. But this regime of exceptions is not contemplated by MAPA and is refuted by precedent. Agencies participate on judicial review even when they are not designated by statute (*Forsythe*), not party to the administrative proceeding (*Whitehall Wind*), and did not issue a permit (*Clark*).

Finally, the Board's policy arguments about "waste[d] … resources" and the Board being "transformed into an advocate" are misplaced. The Board wastes little resources by appearing, but not participating, as here and elsewhere. *E.g.*, Defendant/Appellee Board of Environmental Review's Notice of Non-Participation, *Signal Peak Energy, LLC v. Mont. Env't Info. Ctr.*, No. DA 19-0299, at 3 (Oct. 4, 2019). Further, agencies often defend their decisions and participate in judicial review without compromising their integrity. *E.g.*, *Whitehall Wind*, ¶¶ 10–36; *Forsythe*, ¶¶ 27–34. By contrast, adopting the Board's

proposed rule would destabilize established practice, creating great uncertainty.

CONCLUSION

The district court's rulings should be affirmed, and fees on appeal should be awarded to Conservation Groups.

Respectfully submitted this 4th day of November, 2022.

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CERTIFICATE OF COMPLIANCE

Pursuant to Montana Rule of Appellate Procedure 11(4)(e), I hereby certify that the foregoing brief is proportionately spaced, using Century Schoolbook typeface 14-point font, and containing 14,993 words. I relied on the word processing system used to prepare the brief to obtain the word count.

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I, Shiloh Silvan Hernandez, hereby certify that I have served true and accurate copies of the foregoing Brief - Appellee's Response to the following on 11-04-2022:

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