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

MONTANA ENVIRONMENTAL INFORMATION CENTER and SIERRA CLUB,

Plaintiffs / Appellees,

v.

MONTANA DEPARTMENT OF ENVIRONMENTAL QUALITY,

Respondent / Appellant,

and

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

Respondent-Intervenors / Appellants,

and

MONTANA BOARD OF ENVIRONMENTAL REVIEW

Respondent / Appellant

MONTANA DEPARTMENT OF ENVIRONMENTAL QUALITY'S REPLY 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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TABLE OF CONTENTS

TABLE OF AUTHORITIES

Montana Cases

Federal Cases

Montana Statutes

Federal Statutes

Montana Administrative Rules

Code of Federal Regulations

Administrative Orders

INTRODUCTION

This case concerns Appellant/Respondent-Intervenor Westmoreland Rosebud Mining, LLC's ("Westmoreland") fourth amendment to its Area B permit ("AM4") for the Rosebud Mine approved by Appellant/Respondent Montana Department of Environmental Quality ("Department" or "DEQ"), which was affirmed in a Montana Administrative Procedure Act ("MAPA") contested case proceeding before the Montana Board of Environmental Review ("BER"). DEQ respectfully requests this Court reverse the district court on both its merits and attorney's fees decisions and affirm BER.

ARGUMENT

I. MSUMRA is controlled by Montana law.

As explained in DEQ's opening brief, this case is governed by Montana law such that the district court's frequent invocation of federal law to overturn the BER ruling is contrary to the structure of the Montana Strip and Underground Mine Reclamation Act ("MSUMRA") and the Surface Mine Control Reclamation Act ("SMCRA"). DEQ Opening Br. at 25–26. In response, Appellee/Petitioners Montana Environmental Information Center and Sierra Club (collectively "MEIC") argue 30 CFR § 733.11 requires Montana to follow federal procedures related to SMCRA and Montana must interpret MSUMRA in a manner no less stringent and effective than SMCRA under 30 CFR § 730.5. MEIC Answer Br. at

35. MEIC neglects to inform this Court how these obligations are imposed upon the State.

The Fourth Circuit has clarified the federal government's authority over state implementation of coal programs is limited to its initial approval:

> To obtain approval of its program, a State must pass a law that provides for the minimum national standards established as "requirements" in SMCRA and must also demonstrate that it has the capability of enforcing its law. Once the Secretary is satisfied that a State program meets these requirements and approves the program, the State's laws and regulations implementing the program become operative for the regulation of surface coal mining, and the State officials administer the program, giving the State "exclusive jurisdiction over the regulation of surface coal mining" within its borders.

Bragg v. W. Va. Coal Ass'n, 248 F.3d 275, 288 (4th Cir. 2001) (citations omitted).

States are required to maintain their minimum compliance with federal law, but it doesn't occur how MEIC suggests in this case where it picks and chooses between federal and state law when convenient. *Id.* at 289 ("[B]ecause the regulation is mutually exclusive, either federal law or State law regulates coal mining activity in a State, but not both simultaneously."). Rather, if a state fails to maintain minimum standards, that state program may be revoked after a formal proceeding which, if successful, vests the federal government with exclusive jurisdiction. *Id.* ("Only if an approved State program is revoked, as provided in § 1271, however, does the *federal* program become the operative regulation for

surface coal mining in any State that has previously had its program approved.") (emphasis in original and citation omitted).

MEIC ignores DEQ's argument that MEIC already unsuccessfully made this minimum standards argument in federal court. *MEIC v. Opper*, 2013 U.S. Dist. LEXIS 29184, 2013 WL 485652 (D. Mont. 2013), *aff'd on other grounds* 766 F.3d 1184 (9th Cir. 2014). MEIC's extensive reliance on federal law in its answer brief—at the expense of Montana law—signals the inherent weakness of much of MEIC's arguments.

II. On burden of proof, MEIC continues to confuse the permitting process before DEQ and administrative appeal process before BER.

In its opening brief, DEQ points out the district court's fundamental error in the burden of proof analysis, confusing the burden during (1) the application process before DEQ and (2) the administrative review process before BER. MEIC provides no response to DEQ's argument on this point. MEIC's Answer Br. at 52–57. Instead, MEIC continues to incorrectly assert that under § 82-4-227(1), MCA, DEQ and Westmoreland must carry the burden of proof before BER. *Id*. But as repeatedly argued by DEQ, the burden discussed in this statute applies to the permitting process before DEQ—not administrative review before BER. DEQ Opening Brief at 27–30.

MEIC's contradictory reading of *MEIC v. Mont. DEQ*, 2005 MT 96, 326 Mont. 502, 112 P.3d 964, further demonstrates the error of its and the district

court's efforts to distinguish this case. In one portion of its brief, MEIC argues "[t]he district court correctly distinguished [*MEIC*, 2005 MT 96] on the basis that the [Clean Air Act ("CAA")], unlike … MSUMRA, does not expressly assign the burden of proof." MEIC Answer Br. at 55 (citation omitted). But earlier, MEIC notes the relevant question in this same case, "is 'whether … [the *applicant*] established that … its *proposed project will not cause*' environmental harm." *Id.* at 54 (citation omitted and emphasis in original). MEIC, accordingly, agrees that in *MEIC*, 2005 MT 96, the applicant was indeed assigned the burden of proof in the application process before DEQ.

The applicant is likewise assigned the burden in the application process here. Section 82-4-227(1), MCA. But this doesn't confer DEQ and the applicant the same burden in administrative review before BER. For instance, in *MEIC*, 2005 MT 96, the applicant had the burden before DEQ in the permitting process, but this Court nevertheless found in an administrative appeal before BER "MEIC had the burden of presenting the evidence necessary to establish the facts essential to a determination that the Department's decision violated the law." ¶16. Therefore, MEIC has no basis to claim *MEIC*, 2005 MT 96, is distinguishable from the present case based on the statutory burdens assigned to the parties.

MEIC also sidesteps DEQ's arguments, *see* DEQ Opening Br. at 31–32, that the only rational way to read ARM 17.24.425(7) is to find during a cleanup

rulemaking in 2012 that transferred a number of responsibilities from DEQ to BER, that the "board" was incorrectly inserted into the Rule to say "[t]he burden of proof at such hearing is on the party seeking to reverse the decision of the *board*." (Emphasis added.) Instead, this Rule should say "[t]he burden of proof at such hearing is on the party seeking to reverse the decision of the *department*." Given MEIC's silence on this subject, this Court should find that the only way to rationally read this Rule is to conclude that "board" was incorrectly inserted for "department" during these revisions.

In addition to evading many of DEQ's arguments as to burden of proof, MEIC seems to agree with much of DEQ's analysis on the subject. *See* MEIC Answer Br. at 56; *see also id.* at 54 ("To be sure, [*MEIC*, 2005 MT 96] states that the party challenging a CAA permit 'had the burden of proof' to show DEQ's decision 'violated the law.'") (citation omitted). MEIC's primary response to DEQ's argument on this subject is limited to claiming BER required MEIC to prove material damage. MEIC Answer Br. at 56. Not so. As discussed in DEQ's opening brief, BER explicitly disavowed any such requirement in conclusion of law 12 of its final order:

> [MEIC had] the burden to show, by a preponderance of the evidence, that DEQ had information available to it at the time of issuing the permit that indicated that the project at issue is not designed to prevent land uses or beneficial uses of water from being adversely affected, water quality standards from being violated, or water rights from being impacted.

DEQ Opening Br. at 32–33 (citing AR152:76).

MEIC conspicuously provides no discussion of conclusion of law 12. Instead, MEIC complains the BER order required it to present evidence about material damage. MEIC Answer Br. at 56–57 (quoting AR152:84). But providing evidence and argument is precisely what is contemplated by a contested case proceeding. Section 2-4-612(1), MCA. What's more, *MEIC*, 2005 MT 96, explicitly contemplates the party challenging DEQ's issuance of a permit must "produc[e] evidence in support of that claim." ¶14. Here, that would involve producing evidence that DEQ's approval of the AM4 permit violated the material damage standard, which is what BER required in conclusion of law 12. AR152:76. This is markedly different than MEIC's unfounded claim that BER required it to prove material damage would result by issuing the permit. *See* DEQ Opening Br. at 32–33. MEIC, therefore, cannot complain BER expected it to produce evidence in a contested case proceeding.

III. MEIC was required to exhaust administrative remedies.

In its opening brief, DEQ argues this Court has not identified a textual issue requirement as a prerequisite for the exhaustion doctrine to apply. DEQ Opening Br. at 36. In its response, MEIC fails to identify a single Montana case that has required as much. MEIC Answer Br. at 30–36. Instead, MEIC almost exclusively

cites to federal law. But as discussed above, this case is controlled by Montana law.

MEIC's avoidance of Montana law on this subject is unsurprising because this Court's prior decisions are diametrically opposed to what MEIC proposes. For instance, in *Vote Solar v. Mont. PSC*, 2020 MT 213A, ¶48, 401 Mont. 85, 473 P.3d 963, this Court said "[a] party forfeits argument as to an *issue* not raised during the administrative process[.]" (Emphasis added); *accord Marble v. State*, 2000 MT 240, ¶27, 301 Mont. 373, 9 P.3d 617 (holding that an issue that was never squarely raised, argued or adjudicated pursuant to the administrative process was not ripe for judicial review). Thus, it is not enough for a party to "proceed through each step of the administrative review scheme and receive a final decision" as MEIC suggests. MEIC Answer Br. at 31 (brackets, ellipses, and quotation marks omitted).

Even if this Court looks to federal law on this subject, MEIC's claims that this case is not subject to an issue-exhaustion requirement fails. In *Carr v. Saul*, 141 S. Ct. 1352, 1358 (2021), the U.S. Supreme Court said "[w]here statutes and regulations are silent . . . courts decide whether to require issue exhaustion based on 'an analogy to the rule that appellate courts will not consider arguments not raised before trial courts.'" This Court already found in *Vote Solar* and *Marble* that § 2-4-702(1), MCA—also applicable here—imposes an issue exhaustion

requirement, which applies to "*all administrative remedies* available within the agency[,]" § 2-4-702(1), MCA (emphasis added), and not just remedies available in the contested case proceeding, *Art v. Mont. Dep't of Labor & Indus.*, 2002 MT 327, ¶¶14–17, 313 Mont. 197, 60 P.3d 958.

Additionally, under this federal doctrine, "[t]he desirability of a court imposing a requirement of issue exhaustion depends on the degree to which the analogy to normal adversarial litigation applies in a particular administrative proceeding." *Carr*, 141 S. Ct. at 1358. "The critical feature that distinguishes adversarial proceedings from inquisitorial ones is whether claimants bear the responsibility to develop issues for adjudicators' consideration." *Id*. MEIC has had both an adversarial position in this case and been able to develop issues for adjudicators' consideration. In its comments provided during the permitting process, MEIC successfully preserved three issues for appeal. AR95: Ex. 4 at 3. MEIC's contention that seven additional issues "could not have been raised before the agency[,]" MEIC Answer Br. at 31 (citation omitted), is, therefore, unavailing.

Besides its efforts to invent a new exhaustion doctrine in Montana, MEIC also claims it nevertheless provided sufficient comment in the permitting stage to preserve the issues of dewatering and anticipated mining. MEIC Answer Br. at 36–41. The record demonstrates otherwise. First, regarding anticipated mining, MEIC points to a National Environmental Policy Act ("NEPA") document that was

presented to the Bureau of Land Management ("BLM"). AR95: Ex. 4L at 17. But these comments were provided to BLM in October of 2014—almost a year before August 3, 2015, when MEIC provided its objections in this case—and do not once mention the phrase "material damage." *Id*. These comments, therefore, could not have put DEQ on notice MEIC intended to raise this issue in the AM4 permitting stage under MSUMRA.

On the subject of dewatering, Westmoreland is correct to point out, *see* Westmorland Opening Br. at 34, MEIC's comments concerned *past* dewatering, AR95: Ex. 2–4. At trial, MEIC's counsel asserted this argument was based on an acknowledgment of Westmoreland "that an upper section of the creek in Section 15 was intermittent in 1986 . . . and that recent surveys indicate that it is now dry[.]" Hr'g Tr. Vol. 1 at 200:11–14 (AR115). MEIC's invocation of this information cannot possibly apply to future impacts from AM4 because this information was related to on the ground conditions that occurred before AM4 was approved. To say otherwise would render this information post-decisional which MEIC argues is impermissible in administrative decision-making. MEIC Answer Br. at 17.

Finally, MEIC offers no response to DEQ's argument that the district court's findings on exhaustion would put the agency in an impossible position, permitting litigants to intentionally neglect to raise issues before the agency and

opportunistically raise them for the first time on appeal (wherein, under MEIC's conception of the rules, DEQ would be unable to present any evidence or argument on the newly raised issues). DEQ Opening Br. at 21–23, 36–37. This Court should reject MEIC's arguments because otherwise they would nullify the purpose of the exhaustion doctrine which is, in part, to allow agencies to correct mistakes prior to advancing past a critical stage in administrative decision making. *Vote Solar*, ¶48.

IV. DEQ did not provide *post hoc* explanation regarding salinity.

In its opening brief, DEQ explains its cumulative examination of the 13% increase in salinity of the alluvium of AM4 was not *post hoc*. DEQ Opening Br. at 39–40. MEIC claims DEQ waived this argument because it did not present it before the district court. That's not true. DEQ raised this precise argument in its brief before the district court. DC Doc. 45 at 18 (asserting the CHIA explained the "13% increase in alluvial TDS was based on all of Areas A and B … of the mine after all mining is complete.").

MEIC, additionally, has no response to DEQ's argument that questioning from MEIC's counsel opened the door to such discussion. DEQ Opening Br. at 39, n.9. Demonstrating MEIC's counsel had blundered by presenting this line of questioning, before ceasing to ask additional questions on the subject, MEIC's counsel stated, "I'm being instructed to shut up" by co-counsel. Hr'g Tr. Vol. 3 at 68:9–10 (AR117).

Continuing its confusion as to burden of proof, MEIC also invokes ARM 17.24.405 and § 82-4-227(3), MCA, as a basis for which DEQ and Westmoreland should be precluded from presenting argument and evidence in contested case proceedings. MEIC Answer Br. at 41–42. But these authorities are applicable to the permitting decision before DEQ and not administrative review before BER. Thus, neither of these authorities override § 2-4-612, MCA, which affords all parties in a contested case proceeding the opportunity "to respond and present evidence and argument on all issues involved."

V. DEQ and BER properly considered aquatic life surveys.

In its opening brief, DEQ points out the hearing examiner is entitled to significant deference in determining whether to permit testimony, admission of expert testimony is to be liberally construed, and concerns about shaky expert testimony can be alleviated by cross examination and competing expert testimony. DEQ Opening Br. at 50–51. Here, MEIC's witness corroborated DEQ's witness' testimony that aquatic life surveys could be used for other purposes than § 303 determinations. AR152:51.

Doubling down on its prior inaccurate recitation of the record, MEIC continues to claim BER found "'analyzing macroinvertebrate data ... would *not* provide an *accepted* or *reliable* indicator of aquatic life support' for assessing water quality standards in eastern Montana streams." MEIC Answer Br. at 58

(citation omitted and emphasis in original). But DEQ already pointed out this is a misleading quotation of BER's finding, DEQ Opening Br. at 47–48, which actually states "analyzing macroinvertebrate data in conjunction with indices of biologic integrity would not provide an accepted or reliable indicator of aquatic life support functionality in an eastern Montana ephemeral stream *for Section 303(d) listing purposes*." AR152:46–47 (emphasis added).

When this finding is read in its entirety, it's apparent DEQ's and BER's decision-making did not violate the arbitrary and capricious standard. "An agency action is arbitrary if it fails to consider relevant factors, including the standards and purposes of the statutes the agency administers." *Vote Solar*, ¶37 (citation omitted). Here, DEQ is not engaged in a Section 303(d) listing action. AR152:24–26. Thus, DEQ's reliance on this information is not contrary to the relevant standards.

Probably recognizing its arbitrary and capricious argument hinges on a misleading presentation of BER's finding, MEIC now cites to additional testimony from its witness, asserting, among other things, that "Montana does not even use aquatic insects to assess water quality standards in prairie streams." MEIC Answer Br. at 50. But BER rejected MEIC's witnesses' testimony along these lines finding MEIC's witness' testimony to be less credible. AR152:51–52. MEIC's efforts to now request this Court to impermissibly reweigh evidence, *see* § 2-4-704(2),

MCA, demonstrates the weakness of its arbitrary and capricious argument on the subject.

VI. DEQ and BER made the correct decision regarding salinity under the material damage standard.

MEIC's argument on salinity boils down to an overly simplistic assertion that a 13% increase in the salinity of the EFAC alluvium from AM4 and other mining automatically results in a violation of the material damage standard. MEIC Answer Br. at 61–65. MEIC's argument, however, misses important nuance in DEQ's finding, which it neglects to address in its answer brief. *Id.* First, DEQ found this 13% increase would be indistinguishable from natural variations of salinity in EFAC. AR95: Ex. 1A at 9-33; AR152:38–39, 64. Second, DEQ considered the existing impairment of EFAC is likely from non-mining sources like agriculture and municipal sources. AR152:30; Hr'g Tr. Vol. 2 at 229:3–232:24, 231:9–232:24 (AR116).[1] Third, DEQ found AM4 would not change the groundwater class of the EFAC alluvium. AR95: Ex. 1A at 9-31.

With this background in mind, the causation standard of material damage becomes important. Quoting § 82-4-203(32), MCA, MEIC asserts "MSUMRA

[1] While the DEQ coal section considers impairment determinations from DEQ's water quality planning bureau, the coal section has no authority to make impairment determinations under MSUMRA. AR152:24. Furthermore, the water quality planning bureau has not completed a Total Maximum Daily Load for EFAC. AR152:25. Therefore, conclusions about the source of impairments are not definitively confirmed. AR152:29, 82–84.

defines material damage to include any '[v]iolation of a water quality standard[.]'" MEIC Answer Br. at 62. MEIC omits critical language from this authority, which states that violation must result from coal mining:

> "Material damage" means, with respect to protection of the hydrologic balance, degradation or reduction *by coal mining* and reclamation operations of the quality or quantity of water outside of the permit area in a manner or to an extent that land uses or beneficial uses of water are adversely affected, water quality standards are violated or water rights are impacted.

Section 82-4-203(32), MCA (emphasis added). ARM 17.24.405(6)(c) further states DEQ may not approve a permit unless "the hydrologic consequences and cumulative hydrologic impacts *will not result* in material damage to the hydrologic balance outside the permit area[.]" (Emphasis added.) BER's precedent reiterates this point by stating the relevant question is "whether the proposed *mining operation* would *cause* violation of water quality standards outside the permit boundary." *In re Bull Mountain*, BER 2013-07 SM, pp. 63, 75, 87 (BER Jan. 14, 2016) ("*Bull Mountain*") (DC Doc. 45, App. A) (emphasis added). Thus, MEIC's recitation of the material damage standard is an error because it disregards the causal language present in all the relevant authorities.

Under this standard, DEQ and BER limit their determination to examining impacts to water quality resulting from mining. At trial, DEQ's witness explained the water quality impacts were not the result of mining, in part, due to the locations of the increases of salinity in the stream:

> [A]s soon as you round the corner of [EFAC] from upper to lower … what we have seen in the data is that water quality dramatically decreases in quality…. The concentrations of total dissolved solids … dramatically increase as you go around the corner. Again, *none of that is due to mining*, so it is not in the realm of analysis for impacts from AM4 except to just note that it's in the data.

Hr'g Tr. Vol. 2 at 230:13–25 (AR116) (emphasis added); *see also id.* at 232:18–24 (DEQ's witness stating that of "all the constituents that are listed as causing impacts to … lower EFAC, none of those are related to mining sources."). Based on this information, BER agreed with DEQ that "a golf course, a sewage treatment plant, the power plant itself, municipal runoff, and agriculture" appeared to be the source of impairment, Hr'g Tr. Vol 2 at 230:1–3 (AR116), rather than mining, AR152:30.

MEIC argues DEQ's and BER's understanding of this issue is incorrect because the district court "cited DEQ's and BER's finding that the cumulative impacts of mining would *cause* a 13% increase in salinity in the stream." MEIC Answer Br. at 63 (emphasis in original and citation omitted). But that's not what the standard says. The standard asks "whether the proposed mining operation would cause violation of *water quality standards* outside the permit boundary." *Bull Mountain* at 63–64 (DC Doc. 45, App. A) (emphasis added). Additionally, because there is no numeric salinity standard for EFAC, *see* AR152:81–82, a 13% increase in salinity alone cannot automatically cause a violation of a water quality standard.

In light of this standard, it's important to examine the differences between MSURMA and the Water Quality Act ("MWQA"). As discussed above, MSUMRA intends to prevent violations of water quality standards from mining. In contrast, MWQA aims to improve the water quality of impaired Montana water. *MEIC v. Mont. DEQ*, 2019 MT 213, ¶40, 397 Mont. 161, 451 P.3d 493. Indeed, as DEQ explains in its opening brief, DEQ Opening Br. at 23–24, 43–44, it would be nonsensical to expect DEQ's permitting of this project to improve the impaired status of EFAC when the salinity increase is indistinguishable from natural variations and based on the compelling data, the source of the impairment appears to be from non-mining sources.

MEIC makes no effort to parse the actual text of these MSUMRA authorities that discuss water quality standards. MEIC Answer Br. at 62–63. Instead, it reflexively asserts because water quality standards are mentioned, that MSUMRA is identical to MWQA. *Id*. But this conflation of two distinct statutory schemes is precisely what this Court said was impermissible in *Clark Fork Coalition v. Mont. DNRC*, 2021 MT 44, ¶¶43–44, 403 Mont. 225, 481 P.3d 198, when it rejected Clark Fork Coalition's efforts to smuggle the requirements of MQWA into the Water Use Act. Here too, the Court should look to the causation language in MSUMRA to conclude that an existing impairment, which based on compelling data appears unrelated to mining, cannot defeat a coal permit.

Additionally, while DEQ did find that AM4 could impact the duration of salinity, its findings were much more qualified than what MEIC suggests. MEIC Answer Br. at 64, n.30. One of DEQ's witnesses stated the salinity impacts of AM4 could last for "some tens or hundreds of years" but noted that "[i]t's very hard to give exact numbers for spoil recovery." Hr'g Tr. Vol. 2 at 187:25–188:2 (AR116). In the same line of questioning, DEQ's other witness stated that "AM4 mining is expected to have a similar water quality as the previously existing and currently permitted spoil areas, so it is not expected to have any impact on the offsite water quality." *Id.* at 188:15–19. Because the relevant data in the record indicates that mining is not the source of the impairment of EFAC and AM4 would not increase salinity more than the *natural* variations of EFAC, AM4 will thus maintain the *status quo* of EFAC. AR152:22–23, 38–39, 64–65; AR95: Ex. 1A at 9-33; Hr'g Tr. Vol. 2 at 229:3–232:24 (AR116). Accordingly, BER correctly found that AM4 would not violate the causation standard applicable to material damage and MEIC failed to meet its burden to prove that AM4 was unlawfully approved by DEQ. AR152:69–72.

Additionally, contrary to MEIC's assertion, *see* MEIC Answer Br. at 63–64, BER's finding in *Bull Mountain* does nothing to render DEQ's finding on duration a violation of the material damage standard. *Bull Mountain* stands for the proposition that DEQ cannot impose a time limit on its material damage findings.

Bull Mountain, p. 83–84 (DC Doc. 45, App. A). DEQ complying with that command to find that AM4 will not cause an increase in the magnitude of salinity above the *status quo*, even over the course of tens or hundreds of years, does not make its decision a violation of the material damage standard. AR152:69–72.

Finally, MEIC selectively quotes a portion of BER's order to argue DEQ and BER improperly examined AM4 in isolation. MEIC Answer Br. at 61–62. But when read in its entirety, this passage says precisely the opposite: "the 13% increase in TDS is not specific to the amount of TDS added to the alluvium by the AM4 Amendment, but rather the overall TDS that is added to the groundwater by all the mining in the area, including previously permitted areas." AR152:63 (emphasis in original). MEIC's continued failure to accurately describe the record demonstrates its arguments attacking AM4 are without merit.

VII. The district court incorrectly awarded $896,030.25 in attorney's fees and costs against DEQ.

Recognizing that it cannot possibly justify requiring DEQ to pay for hours MEIC's attorneys spent responding to Westmoreland's filings, MEIC now asserts this argument was waived before the district court. MEIC Answer Br. at 71–72. This is incorrect. The district court explicitly stated DEQ could raise issues in its proposed order that MEIC's witness was unable to address through cross examination: "if you want to point out parts that you think are inflation of time … you can probably do that in a proposed order and draw attention to those parts of

the bill that you think are problematic in your view." Hr'g Tr. at 50:9–13 (May 6, 2022). MEIC did not lodge a timely objection to the district court's invitation, and its claim of waiver is revisionist history intended to insulate an unjust outcome from this Court's review. *Id.*

MEIC also provides no competing caselaw that demonstrates that attorney's fees *do not* impose joint and several liability when multiple parties are subject to attorney's fees, as discussed in *Animal Found. of Great Falls v. Mont. Eighth Judicial Dist. Court*, 2011 MT 289, ¶27, 362 Mont. 485, 265 P.3d 659. MEIC's citation of *Laudert v. Richland County Sheriff's Dep't*, 2001 MT 287, ¶20, 307 Mont. 403, 38 P.3d 790, is inapplicable because it concerned a case in which the attorney's time on prevailing issues could not be separated out and did not concern the precise issue here regarding attorney's fees attributable to multiple parties.

In response to DEQ's argument that § 82-4-251(7), MCA limits the district court's determination of attorney's fees to the district court proceedings, MEIC selectively quotes snippets from this statute to assert the district court may award fees after an order is issued. MEIC's Answer Br. at 69. But nowhere does MEIC address the portion of the statute that says the district court may award fees "resulting from judicial review" and DEQ may award fees "resulting from administrative proceedings[.]" Section 82-4-251(7), MCA; *see also id.* (stating "attorney fees *as determined by the department* to have been reasonably incurred"

may be awarded) (emphasis added). MEIC's analysis of the statute, accordingly, impermissibly omits critical language from the statute. Section 1-2-101, MCA. Indeed, the Fourth Circuit in evaluating 30 U.S.C. § 1275(e)—which has nearly identical language to § 82-4-251(7), MCA—has already found a district court cannot decide the reasonableness of attorney's fees under SMCRA, noting the "basic proposition that a reviewing court may not decide matters that Congress has assigned to an agency." *W. Va. Highlands Conservancy, Inc. v. Norton*, 343 F.3d 239, 248 (4th Cir. 2003).

MEIC further presents several policy arguments for why the district court should determine all of attorney's fees. But the district court's unfamiliarity with the BER proceeding is a policy consideration that ameliorates in the other direction for why it shouldn't have decided the reasonableness of these fees. *Hensley v. Eckert*, 461 U.S. 424, 437 (1983) (noting that a trial court, compared to a reviewing court, has "superior understanding of the litigation" and attorney's fees issues "essentially are factual matters"). For instance, the district court's failure to grapple with DEQ's contention that MEIC was unjustly asking DEQ to pay for time MEIC's attorneys spent responding to Westmoreland's filings is a prime example of why reviewing courts generally don't award attorneys fees for proceedings below.

MEIC's arguments also fail to appreciate that it could seek judicial review of DEQ's fees determination, resolving its due process concerns. *See, e.g., Clark Fork Coalition v. Mont. DEQ*, 2012 MT 240, ¶15, 366 Mont. 427, 288 P.3d 183 (environmental plaintiffs filing a declaratory judgment action to challenge DEQ's decision making in another context); *accord MEIC*, 2019 MT 213, ¶13. Nor has MEIC raised a constitutional challenge to § 82-4-251(7), MCA, and it, therefore, cannot use due process as a basis for this Court to ignore the plain text of the statute. *Cf. Broad Reach Power, LLC v. Mont. PSC*, 2022 MT 227, 410 Mont. 450, __P.3d.__ (finding that similar due process claims that an agency cannot sit in judgment of its own actions regarding discovery were too abstract to proceed).

CONCLUSION

For the reasons provided above, this Court should reverse the district court and provide the relief identified in DEQ's opening brief on pages 65–66.

Respectfully submitted this 19th day of December 2022.

/s/ Jeremiah Langston
JEREMIAH LANGSTON

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CERTIFICATE OF COMPLIANCE

Pursuant to Rule 11 of the Montana Rules of Appellate Procedure, I certify that this principal brief is printed with a proportionately spaced Times New Roman text typeface of 14 points; is double-spaced except for footnotes and for quoted and indented material; and the word count calculated by Microsoft Word for Windows is 4,991 words, excluding table of contents, table of citations, certificate of service, certificate of compliance, or any appendix containing statutes, rules, regulations, and other pertinent matters.

/s/ Jeremiah Langston
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CERTIFICATE OF SERVICE

I, Jeremiah Radford Langston, hereby certify that I have served true and accurate copies of the foregoing Brief - Appellant's Reply to the following on 12-19-2022:

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