IN THE SUPREME COURT OF THE STATE OF MONTANA

Case No. DA 22-0064

MONTANA ENVIRONMENTAL INFORMATION CENTER and SIERRA CLUB,

Plaintiffs and Appellees,

v.

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

Respondent-Intervenors and Appellants,

and

MONTANA DEPARTMENT OF ENVIRONMENTAL QUALITY,

Respondent and Appellant,

and

MONTANA BOARD OF ENVIRONMENTAL REVIEW,

Respondent and Appellant.

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

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

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

Page(s)

CASES

STATUTES

OTHER AUTHORITIES

INTRODUCTION

The district court and, in turn, this Court are tasked with reviewing the Board of Environmental Review's ("Board") Final Order (App.0001-87) concluding a Montana Administrative Procedure Act ("MAPA") contested case proceeding and upholding the Department of Environmental Quality's ("DEQ's") approval of a mine permit amendment ("AM4"). The Board's Order may not be disturbed unless prejudice to the substantial rights of Petitioners Montana Environmental Information Center and Sierra Club ("MEIC") is demonstrated. MEIC can demonstrate no such prejudice.

The Board's procedures were appropriate and fair, its conclusions of law correct, and its findings of fact – unchallenged by MEIC – are not subject to review. Untethered to this reality, MEIC rewrote the Board's findings and distorted its conclusions when it penned the district court's Merits Order (App.0088-122) and Remedy Order (App.0123-145). Before this Court, MEIC continues its revisionist account of the Board's decision in an unconvincing effort to demonstrate arbitrary behavior. MEIC's tactics must be rejected, and the Board's Order upheld to prevent damage to MAPA and this Court's MAPA precedent.

ARGUMENT

I. THIS APPEAL IS GOVERNED BY MONTANA LAW.

Two Montana statutes are the touchpoints for this appeal: MAPA, which governs the procedure for both the contested case at issue and this Court's judicial review, and the Montana Strip and Underground Mining Reclamation Act ("MSUMRA"), which establishes the substantive standards for the permit at issue. MEIC is particularly hostile to MAPA, which the district court essentially ignored in undertaking fact-finding contrary to its role as a court of record review.

A. MAPA's Standards of Review Control.

This Court is well-familiar with MAPA's judicial review standards, having decided almost 30 MAPA cases in the past two years. A court's review is restricted to the record. *See, e.g., Ced Wheatland Wind, LLC v. Mont. Dept. of Publ. Serv. Regulation*, 2022 MT 87, ¶12-13, citing § 2-4-704, MCA. Courts review findings of fact under a clearly erroneous standard and conclusions of law for correctness. *Id.* As relevant here, a court may not reverse or modify the decision on review unless a party's substantial rights have been prejudiced by one of six enumerated errors. *Id.* This Court corrects the standard of review if, as here, the district court applied the wrong standard. *See Wangerin v. State*, 2022 MT 236, ¶9, ¶15.[1]

[1] MEIC's attempt to claim a default victory because this appeal focuses on the Board's decision rather than the lower court's ruling (Resp. 24) fails for the same

MEIC pays lip service to the correct standard before urging this Court to repeat the district court's error and employ "arbitrary and capricious" standard of review. *See* Resp. 22-23, 41-65. MEIC's version of "arbitrary and capricious" review affords no deference to the Board's trial-type decisions (*id.*, 41-57) or technical judgments (*id.*, 57-65) and disregards the substantial evidence standard by requesting a reweighing of the facts (*see infra*, Sections II and III.D and E). This is distinctly at odds with this Court's explanation of the standard. *See Comm. Assn. North Shore Cons. v. Flathead Cnty.*, 2019 MT 147, ¶28 (reviewing court may not reverse under the arbitrary and capricious standard "merely because the record contains inconsistent evidence or evidence which might support a different result" — the decision must be "random, unreasonable, or seemingly unmotivated"). MEIC's interpretation displaces the legislature's carefully crafted standard of review with its own, which would allow courts to disregard agency decisions and effectively re-try contested cases, contrary to Montana law.

B. MSUMRA and Its Regulations Control.

MEIC uses federal law as the substantive basis of many arguments (*see* Resp. 31-36, 62-63). But Montana law controls. It is well-settled that when the

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reason. *Griz v. State*, 2020 MT 285, ¶12 ("The same standard of review applies to both the district court's review of the agency decision and this Court's review of the district court's decision.") (quoting *Mont. Fish, Wildlife & Parks v. Trap Free Mont. Pub. Lands*, 2018 MT 120, ¶11).

federal Office of Surface Mining, Reclamation and Enforcement determines a state's coal mining program meets all required SMCRA elements, the state's program *displaces* SMCRA. *See Montana Environmental Info. Ctr. v. Opper*, 2013 U.S. Dist. LEXIS 29184, *7-8 (D. Mont. Jan. 22, 2013) (noting regulation is "mutually exclusive" and that SMCRA's provisions "drop out" upon state program approval). MSUMRA has been Montana's approved program for decades. *Id.*, *8.

MEIC's eagerness to avoid Montana's standards is not surprising. As shown in the opening briefs and discussed in Section III below, applying the correct standard of review within the correct body of law leads to only one conclusion: The Board fully considered MEIC's claims and properly determined within its settled authority that MEIC did not carry its burden to demonstrate DEQ violated the law when it issued the AM4 Permit.

II. THE BOARD'S FACTUAL FINDINGS, UNCHALLENGED BY MEIC, MAY NOT BE ALTERED ON JUDICIAL REVIEW.

This Court has repeatedly emphasized that a party seeking judicial review of a MAPA contested case decision must have fully participated at each step of the administrative process to preserve its claims. *Flowers v Bd. of Personnel Appeals*, 2020 MT 150, ¶13. MEIC did not lodge exceptions to ***any*** of the Hearing Examiner's proposed findings of fact (Supp.App.1624-1635) or seek judicial review of any of the findings adopted by the Board (Supp.App.2333-57). The Board's 248 Findings of Fact are therefore not subject to judicial review.

Nevertheless, MEIC urges this Court to follow the district court's example and reweigh the facts. *See* Resp. 46-51 (challenging weight assigned to witness testimony); 57-65 (challenging facts regarding aquatic life and salinity). Indeed, MEIC takes its unlawful approach a step further than it did when drafting the district court's Merits Order. Now MEIC appears to believe courts may ***edit*** the Board's findings. For example, MEIC asserts that the Board's Finding of Fact ¶198 provides the following:

> Dr. Hinz assessed . . . biological [evidence] . . . to reach her determination . . . [about] material damage to the aquatic life . . .

Resp. 48 (ellipses in Resp.). MEIC then insinuates Dr. Hinz and DEQ considered no other evidence regarding aquatic life. Resp. 60. However, the omitted text contradicts MEIC's argument:

> Dr. Hinz assessed **multiple lines of evidence (physical, chemical, and** biological) **in order** to reach her determination **that there would be no** material damage to the aquatic life **uses of EFAC from the AM4 Amendment.**

App.0050-51. This practice is repeated elsewhere in MEIC's argument. [2]

[2] *See also* Resp. 61-62 (disregarding FOF ¶210 that DEQ's cumulative impact analysis included all mining that would interact with AM4); 57-65 (failing to challenge substantial evidence supporting the Board's findings on aquatic life and salinity); 48 (selectively quoting FOFs ¶¶188, 190, 191, and 197 to misrepresent Dr. Hinz's review of aquatic life).

Judicial review of facts evaluates whether the facts found are supported by competent substantial evidence. *Vote Solar v. Mont. Dep't of Pub. Serv. Regulation*, 2020 MT 213A, ¶36. Even if MEIC had preserved the issue, MEIC never argues that the Board's Finding that DEQ considered ***"multiple lines of evidence"*** is not supported by substantial evidence. MAPA does not allow a court to override the Board's unchallenged finding that DEQ considered the aquatic life survey as one among many lines of evidence supporting its conclusion on aquatic life.

Similarly, MEIC pulls Finding of Fact ¶146 out of context by asserting the Board found AM4 would increase total dissolved solids ("TDS") in the ***surface water*** of East Fork Armells Creek ("EFAC") by 13%. Resp. 63 n.29. Finding of Fact ¶146 refers to "***[t]he*** 13% increase" at the conclusion of ***40*** Findings of Fact, which define and consistently refer to "***the*** 13% increase" as occurring ***in the alluvium***, and having little, if any impact on the surface water.[3] *See* App.0031-39.

MEIC does not dispute that the Board's Findings of Fact cannot be changed on judicial review because MEIC did not formally challenge them. But editing facts under the guise of "legal arguments" is likewise prohibited. MEIC's

[3] MEIC does not dispute that the pertinent water quality standard applies to ***surface*** water, ***not*** groundwater.

arguments (and the district court's holdings) that rely on facts outside of or contradicting the Board's Findings must be rejected.

III. THE BOARD'S DECISIONS COMPLY WITH MAPA.

A. The Board Correctly Applied Administrative Exhaustion.

MSUMRA and its implementing regulations afford the public multiple opportunities to participate in the administrative review and alert DEQ to perceived errors in a mine permit application before initiating a MAPA contested case. Despite submitting written objections to Westmoreland's application during the administrative review, MEIC did not alert DEQ to many issues that it subsequently sought to litigate.

MEIC now argues that meaningful participation during the administrative review is not a prerequisite to challenging a permit. Resp. 26, 49. Yet, the doctrine of administrative exhaustion applies equally at all steps of the administrative process. As this Court recently confirmed, an aggrieved party must exhaust ***all*** administrative remedies available within an agency. *North Star Dev., LLC v. Mont. Pub. Serv. Comm'n*, 2022 MT 103, ¶13. This exhaustion requirement is intended to afford the agency an opportunity to correct its own errors before a court interferes. *Id*. Notably, "the exhaustion of administrative remedies requirement applies equally to the ultimate case decision, constituent or related issues adjudicated therein or thereby, as well as ***any other related issue that***

could have been timely raised and adjudicated by the agency pursuant to the available administrative process." *Id*. (cleaned up and emphasis added).

Here, the statutory administrative process provides for public participation. MSUMRA requires that permit applications be noticed for public inspection and comment, and, critical here, an adversely affected person may object to the permit application. § 82-4-231(6), MCA.[4] An objecting party may request an informal conference, and, if requested, DEQ must conduct the conference and notify all parties of its response and the reasons for its decision. *Id*. MEIC did not request an informal conference with DEQ ***on any issue***. The clear intent of these administrative remedies is to (1) notify DEQ of perceived errors in the application and (2) allow DEQ to correct such errors before issuing a permit, thereby averting the need for a contested case. Absent this rule, parties seeking to obstruct an administrative action would be incentivized to withhold their objections to "sandbag" the agency in the contested case.

MEIC did not "completely exhaust" these administrative remedies. *Flowers*, ¶13. MEIC filed limited written objections, and, as the Board noted, DEQ "specifically responded to each of the issues raised in the Public Comments, including [MEIC]'s comment letter." App.0014. Thereafter, MEIC initiated a

[4] MSUMRA's implementing regulations restate and reinforce these administrative remedies. ARM 17.24.401, 402(2)(a), and 403.

contested case forwarding a litany of claims that it had ***not*** raised in the public comment period. App.0015. After careful consideration, the Board – applying the doctrine of administrative exhaustion – held that MEIC's written objections had not alerted DEQ to claims regarding six discrete issues.[5] App.0004-05. Accordingly, the Board limited MEIC's claims in the contested case proceeding to: (1) issues raised in MEIC's written comments and (2) any new issues arising after the close of the public comment period for which MEIC had no prior notice.[6] App.0076-78; App.0095-97; Supp.App.0001-08.

The Board's rationale is consistent with *North Star* and *Flowers*: by failing to raise these claims during the administrative review process, MEIC did not allow DEQ the opportunity to correct or otherwise respond to the perceived errors, and, as such, MEIC failed to exhaust its administrative remedies. Because the precluded issues "could have been timely raised and adjudicated by the agency

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[5] The issues excluded were (1) the hydrologic interaction between AM4 and Area F, (2) prospective dewatering, (3) the hydrologic interaction between AM4 and Rosebud Creek, (4) blasting, (5) dissolved oxygen, and (6) chloride. App.0005; App.0077.

[6] In an Order on Motions in Limine, the Hearing Examiner ruled that in the hearing MEIC would be permitted to introduce evidence on any "new" issue that was not known to MEIC when it submitted its written objections. Supp.App.0006-07. MEIC now claims it did so. Resp. 40. But MEIC references the arguments it raised ***prior*** to the Order on Motions in Limine. The Board's point, to which MEIC had no response, is that MEIC did not identify any "new" issue ***at the hearing***. Supp.App.0118-28. MEIC's admission on the record that it failed to take advantage of the opportunity during the hearing puts this issue to rest.

pursuant to the available administrative process," the Board correctly foreclosed MEIC from litigating these unpreserved issues in the contested case proceeding. *North Star*, ¶13.

B. The Board Correctly Held the Burden Rested with MEIC to Prove its Claims.

Despite past acknowledgements[7] and dispositive precedent, MEIC persists in arguing that DEQ and Westmoreland/Local 400 carry the burden to ***disprove*** MEIC's contested-case claims. Resp. 52-57. However, statutes, regulations, and case law are unequivocally to the contrary: as the party initiating the contested case and challenging the agency decision, MEIC had the burden to prove its claims by a preponderance of the evidence. WM Op. 27-31; DEQ Op. 27-32; § 82-4-206, MCA; ARM 17.24.425(7); *Mont. Envtl. Info. Ctr. v. Dep't of Envtl. Quality*, 2005 MT 96, ¶¶20, 22 ("*MEIC I*").

MEIC's contrary arguments are meritless. *First,* MEIC incorrectly dismisses *MEIC I* as inapposite.[8] Resp. 52-57. For the first time, running from the

[7] Prior to the evidentiary hearing, "all parties agree[d] that […] MEIC has the burden to prove by a preponderance of the evidence that the AM4 permit, and the corresponding CHIA, were not 'designed to prevent material damage.'" Supp.App.0003. MEIC's post-hearing disavowals (Resp. 52 n.20) are unconvincing.

[8] That *MEIC I* concerned an air permit, rather than a mining permit, has no bearing on the burden of proof. WM Op. 30. The operative regulatory and statutory language is functionally identical.

controlling *MEIC I*, MEIC now relies on *In re Royston* for the proposition that because Westmoreland is the permit applicant, Westmoreland has the evidentiary burden at ***all*** stages of the administrative process to ***disprove MEIC's claims***. Resp. 53-55; 249 Mont. 425, 428, 816 P.2d 1054, 1057 (1991). *Royston* does not so hold. There, a water appropriator asked the agency to approve a change to its appropriation right. *Id*., 427. Affected water appropriators filed objections to Royston's application. *Id*. Notably, the Montana Legislature had amended the governing statute to require that, if an objection to a change of use application is filed, the applicant must prove the nonexistence of adverse impact before the agency approves the application. *Id*. This Court held that "[t]he plain language of the statute [as amended] now clearly places the burden on the applicant" to prove "the nonexistence of adverse impact." *Id*., 428. Because, as was also true in *MEIC I*, the pertinent statute here – MSUMRA – contains no comparable burden-shifting statutory directive, the Board correctly concluded MEIC bore the burden of proof in the MAPA contested case.

Second, MEIC's stubborn reliance on its misinterpretation of a prior Board decision (Resp. 53) carries no weight. Burden of proof was not disputed there because it was decided on stipulated facts – neither party bore the burden of proof. *In re Bull Mountains*, No. BER 2013-07 SM, ¶64. More importantly, MEIC makes

no attempt to distinguish the Board's subsequent decisions expressly rejecting MEIC's identical burden of proof argument. *See* WM Op. 28-29.

C. The Board Correctly Allowed Westmoreland/Local 400 and DEQ to Present Responsive Evidence and Argument.

MEIC maintains the Board should have limited Westmoreland/Local 400 and DEQ's evidence to DEQ's decision documents. Resp. 42. MEIC is wrong. MAPA affords all parties the opportunity to present evidence and argument, and, regardless, the Board ruled MEIC had not made out even a prima facie case. The Board would have reached the same decision even it if had only considered MEIC's evidence.

MAPA is unambiguous: "Opportunity shall be afforded ***all parties*** to respond and present evidence and argument on ***all issues*** involved" in a contested case. § 2-4-612(1), MCA (emphasis added). The Hearing Examiner correctly admitted responsive evidence and argument from Westmoreland/Local 400 and DEQ. Supp.App.0001-12. The Board's finding that this rebuttal evidence and argument "convincingly refuted" MEIC's "unsubstantiated" and "faulty" evidence is binding on judicial review. App.0006; App.0036; App.0063.

Notwithstanding, the rebuttal evidence and argument was ultimately not relevant to the Board's directed verdict on the issue of salinity (to which Dr. Schafer's expert testimony responded). Rather, in granting the motion for a directed verdict, the Board rested its decision on its evaluation of MEIC's case-in-

chief (and not, as suggested by MEIC, the rebuttal evidence and argument presented in response). App.0006; App.0085; *see McCann v. McCann*, 2018 MT 207, ¶12. To reach its decision, the Board evaluated MEIC's expert testimony (which the Board rejected as "faulty both as a matter of fact and as a matter of law"). App.0063. The Board explained "there is no evidence that the AM4 Amendment, which is the only permitting decision at issue in this case, will cause any increase in salinity to the EFAC alluvium," let alone an increase in the cumulative impact. App.0063.

MEIC next complains the Hearing Examiner improperly admitted (and the Board arbitrarily relied upon) the aquatic life testimony of Dr. Hinz over MEIC's objection. Resp. 18, 27, 46-51. MEIC mischaracterizes Dr. Hinz's testimony. The Hearing Examiner designated her an expert in hydrology (App.0006), and in that capacity, Dr. Hinz presented expert testimony that "convincingly refuted" MEIC's hydrologist. App.0036; App.0072.

As to the aquatic life survey, the Hearing Examiner allowed Dr. Hinz to testify "to what [DEQ] used the report for – how they used the report, what they did with it in terms of the CHIA, and why they needed it." Supp.App.0676-80. Dispositive here, the Hearing Examiner expressly prohibited Dr. Hinz from testifying on any matter that implicated expertise in aquatic life biology. Supp.App.0679-80. This Court (and the district court) may not reweigh Dr. Hinz's

testimony on judicial review because it is not the trier of facts and did not have the benefit of listening to and observing the demeanor, conduct, and testimony of witnesses. § 2-4-704(2), MCA; *Booth v. Argenbright*, 225 Mont. 272, 277 (1987).

On judicial review, MEIC presents highly selective excerpts of the Board's Findings of Fact ¶¶188, 190, 191, and 197 as "evidence" of Dr. Hinz's inexpert aquatic life testimony (Resp. 48), but MEIC's edited text materially misrepresents the Board's findings. *See* Section II, *supra*. Read in full, these findings demonstrate that the Hearing Examiner and the Board accepted Dr. Hinz's testimony only to describe ***how*** DEQ used the aquatic life report (and ***not*** her opinion of it). App.0048-50.

All told, MEIC cannot satisfy its burden on judicial review to show (1) prejudice to a substantial right and (2) that, in the absence of rebuttal evidence and argument, the outcome of the contested case would have changed. § 2-4-704, MCA; *Erickson*, *State ex rel. Bd. of Med. Exam'r*, 282 Mont. 367, 375 (1997). This is the standard required on judicial review – and MEIC has failed to meet it.

D. The Board Correctly Concluded that AM4 is Designed to Prevent Material Damage to Aquatic Life.

The Board concluded AM4 is designed to prevent material damage to EFAC's aquatic life communities. App.0089. The Board based this conclusion, in part, on an aquatic life survey. App.0043-53. MEIC argues the Board's conclusion is arbitrary and capricious because (1) the survey was unreliable, (2)

DEQ and the Board knew it was unreliable, and (3) DEQ and the Board relied solely on the survey to reach its conclusion.[9] Resp. 27-28. MEIC's reasoning is faulty because its premises are false.

The Board's Order – which includes at least 39 discreet factual findings supporting its determination that AM4 is designed to prevent material damage to EFAC's aquatic life communities – belies MEIC's argument on each point.[10] App.0043-53. The Board's unchallenged factual findings explain:

- DEQ assessed physical, chemical, and biological lines of evidence in reaching its conclusion that EFAC is supporting a diverse aquatic life community consistent with pre-mining conditions. App.0050.
- Dr. Hinz (with assistance from DEQ's Water Quality Planning Bureau) requested the survey "to identify assemblages of aquatic life using the stream habitat" and "qualitatively assess" whether EFAC was supporting aquatic life. App.0044-46.
- The survey was conducted using the appropriate methodologies and protocols to assess general stream habitat conditions. App.0044-46.
- The survey evidenced macroinvertebrate diversity consistent with pre-mining conditions. App.0046-50.

[9] MEIC suggests, without evidence, that DEQ "prohibited" aquatic life experts from reviewing the aquatic life survey. Resp. 66. In fact, the Board's Order discusses the many experts involved in requesting, obtaining, and reviewing the aquatic life survey. App.0006; App.0043-0053.

[10] Again, the Board's findings are not subject to judicial review. MEIC's surreptitious attempt to challenge them using an "arbitrary and capricious" standard, rather than the MAPA-mandated substantial evidence standard, must be rejected.

- A qualified expert in aquatic toxicology and biological monitoring agreed with DEQ's aquatic life assessment and conclusions. App.0050.

- The Board found MEIC's aquatic life expert's testimony to be unreliable and of little value. App.0051-52.

Clearly, DEQ and the Board did not (1) deem the aquatic life survey to be unreliable or (2) reach its aquatic life material damage determination based solely on it. Rather, DEQ and the Board both determined – based on multiple lines of evidence and cross-discipline expertise – that EFAC is supporting a diverse aquatic life community consistent with pre-mining conditions.

E. The Board Correctly Concluded Salinity Associated with AM4 Would Not Cause Material Damage.

In the underlying contested case, MEIC asserted: (1) AM4 will increase salinity in EFAC surface water by 13% and, (2) this salinity increase constituted per se material damage. App.0061. The Board rejected this argument as factually and legally baseless:

> ***Conservation Groups' conclusion*** (that the AM4 will increase salinity and therefore necessarily cause increasing violations of water quality standards) ***is faulty both as a matter of fact and as a matter of law.*** As a matter of fact, Conservation Groups' conclusion fails because there is no evidence that the AM4 Amendment, which is the only permitting decision at issue in this case, will cause any increase in salinity in the EFAC alluvium. However, ***Conservation Groups fail to grasp (or intentionally [obfuscate])*** the fact that this calculation in the [permit application] is for groundwater in the spoils of all of Areas A and B of the mine after mining is

> complete. […] ***Conservation Groups repeatedly confuse this potential 13% increase in the total TDS alluvium groundwater under Areas A and B of the mine to mean that the AM4 amendment "will increase salt by at least 13% in EFAC." This is simply not a fact.*** Nothing in the evidence indicates that the surface water in EFAC (to the extent it exists at all in the ephemeral portions) will have a 13% salt increase as a result of the AM4 Amendment.

App.0063-64 (internal citations omitted and emphasis added).

On judicial review, MEIC tries again, asserting that "it was arbitrary . . . 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." Resp. 1 (emphasis in original). MEIC's argument is premised on the fiction that AM4 will add more salt to EFAC surface water. Resp., 17, 20, 43, 61, 63-64. The Board made no such finding, and, in fact, found the opposite: AM4 will ***not*** measurably change the salinity of EFAC surface water. App.0057; App.0061-72. Here again, MEIC either confuses, fails to grasp, or intentionally obfuscates the Board's factual findings and DEQ's underlying analysis regarding the predicted salinity contribution from AM4.[11] App.0063.

MEIC also belatedly argues the Board acted arbitrarily by concluding that extending the duration of salinity contributions does not constitute material

[11] Again, the Board's Findings on this point were unchallenged and not subject to judicial review. Even if they were, the appropriate standard is substantial evidence, not the arbitrary and capricious review MEIC suggests.

damage.[12] Resp. 63-65. The Board's Order – featuring pages of discussion dedicated to the duration question – cannot properly be described as arbitrary. App.0036-37; App.0054-55; App.0060; App.0067-72. After considering the evidence, the Board reasoned that, from a scientific perspective, saying there will be "more" salt in the system misapprehends the standard by failing to differentiate between load and concentration.

The material damage assessment is measured by water quality standards, which are expressed in terms of ***concentration***. App.0067-72. The Board determined that, at no point during the extended duration, would the ***concentration*** exceed the water quality standard. App.0067-72. Because the water quality standard is expressed in concentration, not time, duration cannot be a measure of material damage. App.0036-37; App.0054-55; App.0060; App.0067-72. The Board's findings are well-reasoned and supported by the evidence. *Kiely Const., L.L.C. v. City of Red Lodge*, 2002 MT 241, ¶69 (only "random, unreasonable, or seemingly unmotivated" findings are arbitrary and capricious). When a concentration indisputably complies with the standard, it can hardly be construed to be a violation of the same standard simply because the concentration remains in place for a longer duration.

[12] The word "duration" does not appear in MEIC's Petition for Judicial Review. Supp.App.2333-56.

IV. THE DISTRICT COURT'S REMEDY IS UNLAWFUL AND IMPROPERLY SUPPORTED.

A. The District Court's Remedy Is Unlawful.

To be consistent with its previous MAPA decisions this Court should simply reject the district court's order *en toto* and affirm the Board's proper order. Yet, the procedural infirmity of the district court's vacatur order remains. If a reviewing court identifies an error in the contested case that prejudiced a party's substantial rights, the court may "reverse or modify" the decision on review and "remand the case for further proceedings." § 2-4-704(2), MCA; *Montana State University v. Bachmeier*, 2021 MT 26, ¶24.[13] Because the Board's decision is on review, any such remand must be to the Board.

This is not controversial. Where this Court has identified an error in administrative contested case procedures or affirmed a lower court's identification of such error, it remands to the agency for further proceedings ***in the contested case***. *See Jones v. All Star Painting, Inc.*, 2018 MT 70, ¶33; *cf. DeBuff v. Dept. of Natural Res. and Conserv.*, 2021 MT 68, ¶45. Here, the alleged errors identified in the Merits Order were those of process – excluding arguments, including

[13] MEIC's waiver argument (Resp. 65-66) is unavailing. The MEIC-penned remedy order purported ***not*** to make a constitutional determination (App.0130), so the discussion of the constitutionality of remedy in non-MAPA cases, in addition to being off point, is dicta. Westmoreland/Local 400 addressed the district court's statutory arguments (WM. Op. 51-52).

testimony, improperly applying the burden of proof, and reaching "arbitrary" conclusions of law, at least in part, as a result of these errors. *See* App.0089. Under this Court's precedent, the appropriate remedy would be remand to the ***Board*** for further proceedings in the contested case to correct the alleged errors.

The MEIC-drafted Remedy Order, however, skipped this important step. Instead, it jumped ahead and granted MEIC the remedy it ***might have won*** if the "further proceedings" played out in its favor. While MEIC claims that "modifying" the decision on review (i.e., the ***Board*** decision) includes vacating the underlying ***agency decision*** entirely (Resp. 66), MEIC identifies no relevant authority for this proposition.[14] Indeed, this Court's recent use of its remedial power to direct a substantive outcome in an underlying agency action demonstrates MEIC's overreach. In *Cascade County v. Petroleum Tank Release*, this Court remanded to the board that conducted the contested case with instructions on substantive action on remedy ***because*** the Court found that (1) the board had erred as a matter of law ***and*** (2) no fact-finding was necessary to resolve the remaining issue. 2021 MT 28, ¶¶29-30. Those necessary elements are decidedly missing from the district court's

[14] MEIC's reliance on Section 526(b) of SMCRA (Resp. 66) is misplaced. That provision governs judicial review of specific actions (***not*** including mine permitting) taken by the Secretary of the Interior. 30 U.S.C. § 1276(a). MSUMRA, with its use of MAPA for judicial review, was approved as the Montana program, and citations to extraneous portions of SMCRA cannot re-write MAPA's judicial review provisions.

decision. This Court has been leery of providing a remedy that a party did not earn on the merits. For example, in *Mont. Evtl. Info. Ctr. v. Dep't of Envtl. Quality ("MEIC II")*, the Court remanded to the district court – rather than vacating and remanding to the agency, as Petitioner MEIC suggested – when it determined the district court improperly applied the summary judgment standard and that issues remained to be resolved in the case. 2019 MT 213, ¶¶100-101. The Remedy Order erred by purporting to dictate a substantive remedy where questions of procedure and fact remained outstanding.

B. The District Court's Remedy Rests on "Facts" At Odds With The Board's Unchallenged Findings of Fact.

In addition to being wrong on the law (*see supra*, Section III), the district court's factual justification for its vacatur was improper. The district court relied on newly found facts contrary to those in the record. MEIC attempts to justify this by arguing that Westmoreland/Local 400 provided the district court with declaration evidence regarding the impact of vacatur (Resp. 68). This evidence was not in the record because the issue – the impacts of MEIC's proposed remedy – was not before the Board. Westmoreland/Local 400's evidence was intended to apprise the district court of the consequences of MEIC's proposed remedy; it did not address factual allegations related to the substantive claims in the case. Supp.App.2321-32. The Remedy Order's newly found facts are entirely different because they ***contradict*** the Board's facts. *See* Op. Br. 52; WM Reply on Motion

to Stay, 3-4 (June 29, 2022). MAPA does not permit a court to manufacture facts to support a preferred remedy.

CONCLUSION

To prevail on judicial review, it is not enough for MEIC to misquote the Board, and then call its decisions "arbitrary." The Board's Order demonstrates thoughtful procedural decisions that are consistent with this Court's case law on administrative review, detailed factual findings (not subject to review), and conclusions of law that are supported by the facts. There has been no prejudice of any party's substantial rights; the district court erred, and the Board's Order should be affirmed.

CERTIFICATE OF COMPLIANCE

Pursuant to Rule 11(4) of the Montana Rules of Appellate Procedure, I certify that this brief is printed with a proportionately spaced Times New Roman text typeface of 14 points; is double spaced except for footnotes and for quoted and indented material; and contains 5,000 or fewer words, excluding caption, table of context, table of authorities, signature blocks and certificate of compliance. The undersigned relies on the word count of the word processing system used to prepare this document.

/s/ John C. Martin

CERTIFICATE OF SERVICE

I, John C. Martin, 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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