DATE October 28, 2021
CLERK OF DISTRICT COURT
By: [signature]

KATHERINE M. BIDEGARY
District Judge, Department 2
Seventh Judicial District
300 12th Avenue, N.W., Suite #2
Sidney, Montana 59270

MONTANA SIXTEENTH JUDICIAL DISTRICT, ROSEBUD COUNTY

MONTANA ENVIRONMENTAL INFORMATION CENTER, and SIERRA CLUB, Petitioners, vs. MONTANA DEPARTMENT OF ENVIRONMENTAL QUALITY, MONTANA BOARD OF ENVIRONMENTAL REVIEW, WESTERN ENERGY CO., NATURAL RESOURCE PARTNERS, L.P., INTERNATIONAL UNION OF OPERATING ENGINEERS, LOCAL 400, and NORTHERN CHEYENNE COAL MINERS ASSOCIATION, Respondents.	Cause No.: DV 19-34 Judge Katherine M. Bidegaray **ORDER ON PETITION**

I. INTRODUCTION

Pursuant to the Montana Administrative Procedure Act ("MAPA"), which provides for the judicial review of final agency action, the Montana Environmental Information Center and Sierra Club ("Conservation Groups") petitioned this Court, contending that the approval by the Montana Board of Environmental Review ("BER") of the AM4 permit expanding the Rosebud Mine was procedurally and substantively flawed and should be reversed and remanded to the Montana Department of Environmental Quality ("DEQ") to review the AM4 permit application consistent with applicable laws.

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The Conservation Groups assert that the BER committed procedural error by (1) erroneously applying administrative issue exhaustion to the Conservation Groups' permit appeal; (2) employing an unlawful double standard, limiting the Conservation Groups to evidence and issues raised in public comments prior to the permitting decision, while permitting DEQ and the permit applicant Westmoreland Rosebud Mining ("WRM") to present post-decisional evidence and argument; (3) allowing unqualified witnesses to present expert testimony on behalf of DEQ; and (4) by unlawfully reversing the burden of proof.

Substantively, the Conservation Groups assert that the BER unlawfully upheld a permit that relied upon evidence that the BER and DEQ both found unreliable, and which allowed WRM to cause material damage to a stream, the East Fork Armells Creek, in violation of applicable legal standards.

Following the parties' submission of briefs, this matter came on for hearing before the Court on December 16, 2020. Having considered the briefs and the parties' well-presented arguments, the Court is prepared to rule.

II. LEGAL FRAMEWORK

Resolution of this case involves consideration of the administrative record in conjunction with the rather complex legal framework, including the burden of proof. This case involves application of two federal laws—the Surface Mining Control and Reclamation Act, 30 U.S.C. §§ 1201-1328, and Clean Water Act, 33 U.S.C. §§ 1251-1387—and two state laws—the Montana Strip and Underground Mine Reclamation Act, §§ 82-4-201 to -254, MCA, and Montana Water Quality Act, §§ 75-5-101 to -1126, MCA.

A. The Surface Mining Control and Reclamation Act and the Montana Strip and Underground Mine Reclamation Act.

The federal Surface Mining Control and Reclamation Act ("SMCRA") and the state Montana Strip and Underground Mine Reclamation Act ("MSUMRA") regulate coal mining through a system of "cooperative federalism" that allows states to develop and administer regulatory programs that meet minimum federal standards. *Hodel v. Va. Surface Mining & Reclamation Ass'n*, 452 U.S. 264, 289 (1981); 30 U.S.C. § 1253(a). MSUMRA is Montana's federally approved program. 30 C.F.R. Part 926.

The fundamental purpose of SMCRA is to "protect society and the environment from the adverse effects of surface coal mining." 30 U.S.C. § 1202(a); *In re Bull Mountains*, No. BER 2016-03, at 59-63 (Mont. Bd. Of Envtl. Rev. Jan. 14, 2016) (detailing SMCRA's background) (in record at BER:141, Ex. 1). In enacting SMCRA, Congress stressed that citizen participation is essential for effective regulation of coal mining: "The success or failure of a national coal surface mining regulation program will depend, to a significant extent, on the role played by citizens in the regulatory process." S. Rep. No. 95-128, at 59 (1977).

Citing to Article II, § 3 and Article IX of the Montana Constitution, MSUMRA's stated intent is to "maintain and improve the state's clean and healthful environment for present and future generations" and to "protect the environmental life-support system from degradation." § 82-4-202(2)(a)(b), MCA. In *Park County Envtl. Council v. Dep't of Envtl. Quality*, 2020 MT 303, 402 Mont. 168, 477 P.3d 288 (decided December 8, 2020), the Montana Supreme Court explained that Montana laws that implement Montana's constitutional right to a clean and healthful environment must be interpreted consistently with that fundamental constitutional right, which was "intended ... to contain the strongest

environmental protection provision found in any state." *Id.*, ¶ 61 (quoting *Mont. Envtl. Info. Ctr. v. Mont. Dep't of Envtl. Quality* (*MEIC I*), 1999 MT 248, ¶ 66, 296 Mont. 207, 988 P.3d 1236). The *Park County* Court also underscored that the right to a clean and healthful environment contains a precautionary principle: it is "anticipatory and preventive" and "do[es] not require that dead fish float on the surface of our state's rivers and streams before the [Montana Constitution's] farsighted environmental provisions can be invoked." *Id.*, ¶ 61 (quoting *MEIC I*, ¶ 77).

Under MSUMRA, DEQ is forbidden from issuing a mining permit unless and until the applicant "affirmatively demonstrates" and DEQ issues "written findings" that "confirm, based on information set forth in the application or information otherwise available that is compiled by [DEQ] that ... cumulative hydrologic impacts will not result in material damage to the hydrologic balance outside the permit area." ARM 17.24.405(6)(c); § 82-4-227(3)(a), MCA. "Cumulative hydrologic impacts" are the "total qualitative and quantitative direct and indirect effects of mining and reclamation operations." ARM 17.24.301(31). "Material damage" is defined as:

> degradation or reduction by coal mining and reclamation operations of the quality or quantity of water outside the permit area in a manner or to an extent that land uses or beneficial uses are adversely affected, water quality standards are violated, or water rights are impacted. Violation of a water quality standard, whether or not an existing water use is affected, is material damage.

§ 82-4-203(31), MCA. MSUMRA places the "burden" of demonstrating that material damage will *not occur* on the "applicant." § 82-4-227 (1), (3), MCA; ARM 17.24.405(6)(c).

DEQ's analysis occurs in a document called the "cumulative hydrologic impact assessment" or "CHIA," which assesses the "cumulative hydrologic impacts" from "all previous, existing, and anticipated mining" and determines, in light of these cumulative

impacts, whether the "proposed operation has been designed to prevent material damage." ARM 17.24.301(32), .314(5). "Anticipated mining" is defined to "include[], at a minimum ... all operations with pending applications." *Id.* 17.24.301(32).

Within 30 days of DEQ's permit decision, "any person ... adversely affected may submit a request for a hearing on the reasons for the final decision." *Id.* 17.24.425(1). DEQ's "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). Failure to submit public comments "in no way vitiates" or limits the right of an affected person to request a hearing. 56 Fed. Reg. 2,139, 2,141 (Jan. 22, 1991). The requested hearing occurs before the BER pursuant to the Montana Administrative Procedure Act (MAPA). § 82-4-206(1)-(2), MCA; §§ 2-4-601 to -631, MCA.

B. The Clean Water Act and the Montana Water Quality Act.

As noted, MSUMRA defines "material damage" (the key standard in this case) to include any "[v]iolation of a water quality standard" or "advers[e] [e]ffect[s]" to any "beneficial uses of water." § 82-4-203(31), MCA. Water quality standards are set by the federal Clean Water Act ("CWA") and the state Montana Water Quality Act ("MWQA"). These laws likewise establish a "system of cooperative federalism" in which states implement programs that meet minimum federal standards. *Mont. Envtl. Info. Ctr. v. Mont. Dept' of Envtl. Quality* (*MEIC III*), 2019 MT 213, ¶ 29, 397 Mont. 161, 451 P.3d 493. 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. § 130.2(d). "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(14), MCA. When a water body reaches its "[l]oading capacity" for a pollutant, additional pollution will result in a "violation of water quality standards." *Id.*; § 75-5-103(18), MCA.

Under MSUMRA, a CHIA that fails to address "applicable water quality standards" in assessing material damage is unlawful. *In re Bull Mountains*, at 64.

III. BACKGROUND AND PRIOR PROCEEDINGS[1]

A. The Rosebud Mine and East Fork Armells Creek

The Rosebud Mine is a 25,752-acre coal strip-mine located near Colstrip. BER:152 at 9. It has five permit areas, Areas A, B, C, D, and E. *Id.* at 10. East Fork Armells Creek ("EFAC") is a prairie stream, whose headwaters are surrounded by the mine. *Id.* at 18. EFAC is outside the permit area. *Id.* The mine "dominates the potential anthropogenic pollutant sources in" the EFAC headwaters. *Id.* at 20.

Narrative water quality standards for EFAC require the stream "to be maintained suitable for ... growth and propagation of non-salmonid [i.e., warm water] fishes and associated aquatic life." ARM 17.30.629(1); BER:152 at 18. Since 2006, DEQ has designated and identified EFAC as an impaired water body, failing to achieve water quality standards for supporting the growth and propagation of aquatic life. BER:152 at 24; BER:95, Exs. DEQ-9, DEQ-10. DEQ identified excessive salinity, measured by total dissolved solids (TDS) and specific conductivity (SC), as a cause of the impairment, identified coal mining as an unconfirmed source of the excessive salt, and found that a

[1] Throughout this Order, citations to the administrative record will use the following format: for documents, "BER:[docket entry number] at [page]," and for exhibits, "BER:[folder number], Ex.[exhibit number in folder], at [page]."

"40% increase in TDS in the alluvial aquifer upstream of Colstrip appears to be directly associated with mining activity." BER:152 at 28; BER:95 Ex. DEQ-9 at 7; BER:95, Ex. DEQ-10 at 19. DEQ has not completed a plan "to correct the water quality violations" in EFAC. BER:152 at 25.

B. The AM4 expansion of Area B of the Rosebud Mine

In 2009, WRM applied for the AM4 amendment to its Area B permit. BER:152 at 13. The existing Area B permit covers 6,182 acres. *Id.* at 10. AM4 adds 12.1 million tons of coal from 306 acres to Area B. *Id.* After six years of back and forth with WRM, in July 2015, DEQ allowed 26 days for public comment on WRM's voluminous application. *Id.* at 14. The Conservation Groups submitted comments, addressing, *inter alia*, the existing impairment of EFAC and impacts of increased salinity and harm to aquatic life. BER:95, Ex. DEQ-4 at 2-7. The comments included and incorporated a letter raising concerns about cumulative hydrologic impacts from anticipated mining in proposed Area F, a 6,500-acre expansion for which WRM had applied in 2011. BER:95, Ex. DEQ-4 at 1; BER:95, Ex. DEQ-4L at 17. The comments also raised concerns about WRM's apparent dewatering of an intermittent reach of EFAC. BER:95, Ex. DEQ-4 at 2-3.

C. DEQ's Cumulative Hydrologic Impact Assessment

After the close of the public comment, DEQ issued its CHIA, response to comments, and written findings approving the AM4 expansion. BER:152 at 14-15. DEQ responded to the Conservation Groups' concerns about salinity, stating that "the 13% increase in TDS [salinity] ... in EFAC" would not adversely affect aquatic life or violate water quality standards. BER:95, Ex. DEQ-1 at 11. Regarding aquatic life, DEQ asserted that a survey of macroinvertebrates in EFAC by WRM proved the stream "currently meets

the narrative [water quality] standard of providing a beneficial use for aquatic life." BER:95, Ex. DEQ-1A at 9-8; BER:95, Ex. DEQ 1 at 8-9. Regarding dewatering, DEQ stated it could not determine whether mining had dewatered a portion of EFAC, so "material damage to this section cannot be determined." BER:95, Ex. DEQ-1 at 9; BER:95, Ex. DEQ 1-A at 9-10.

DEQ's CHIA did not directly address the Conservation Groups' concerns about anticipated mining in Area F. However, the CHIA included a legal definition of "anticipated mining" that is inconsistent with applicable regulations. Whereas the regulations define "anticipated mining" to include "operations with *pending applications*," ARM 17.24.301(32) (emphasis added), the CHIA narrowed the definition to "*permitted operations*." BER:95, Ex. DEQ-1A at 5-1 (emphasis added). Based on this narrow definition, DEQ excluded Area F (the application for which was *pending*, but not *permitted*) from analysis. BER:100, Exs. 19-22.

The Conservation Groups timely sought administrative review, claiming DEQ's analysis in the CHIA failed to adequately assess material damage to EFAC in light of the stream's status as an impaired water body. BER:1 at 3-4. The Conservation Groups also challenged the CHIA's unlawfully narrowed definition of "anticipated mining" and its reversal of the burden of proof regarding material damage. *Id.* at 2-3; BER:97 at 2. WRM intervened and the case went to a contested case hearing before the BER's hearing examiner. BER:4, 115-18.

D. Motions in Limine

Prior to the hearing, DEQ and WRM objected to a number of the Conservation Groups' claims based on "administrative issue exhaustion" (or "waiver"), contending that

the claims were not raised in their public comments. BER:73; BER:74. The Conservation Groups opposed the motions, contending that issue exhaustion does not apply to administrative review of permitting decisions under MSUMRA and that because they were not allowed to review any draft of DEQ's CHIA prior to submitting comments, they could not have been expected to foresee DEQ's legal errors in the CHIA. BER:84 at 3-15. The BER, however, applied issue exhaustion and, accordingly, dismissed multiple claims, including claims related to anticipated mining and dewatering. BER:152 at 77. The BER also barred the Conservation Groups from citing or discussing evidence from DEQ's permitting record if the evidence was not also referenced in their comments. *E.g.*, BER:152 at 77 ((precluding references to dissolved oxygen (which affects aquatic life) and chloride (which also affect aquatic life)).

The Conservation Groups complain here that, while the BER strictly limited the Conservation Groups to issues and evidence identified in their comments, the BER expansively permitted DEQ and WRM to present post-decisional evidence that was not included or evaluated in DEQ's CHIA or permitting record. *E.g.*, BER:152 at 37-39, 64 (relying on "probabilistic" and "statistical" analysis proffered by WRM in contested case); *cf.* BER:118 at 33:4-20 (parties stipulating that statistical analysis was not in permit record).

The Conservation Groups, for their part, moved in limine to prevent DEQ's hydrologist, Emily Hinz, Ph.D., from presenting testimony about aquatic life in EFAC. BER:76 at 5-7. The parties and the BER's hearing examiner "all agree[d] that she's [Dr. Hinz] not an expert in aquatic life of any kind." BER:117 at 86:20-21. However, based on Montana Rule of Evidence 703, the BER permitted and later relied upon opinion testimony

by Dr. Hinz about aquatic life health in EFAC. BER:152 at 48-50; BER:116 at 215:18 to 219:4.

E. The BER's Final Order

The BER upheld the AM4 permit. BER:152 at 85-86. Regarding the burden of proof, the BER held, over dissent,[2] that the Conservation Groups failed to demonstrate that material damage would likely result. BER:152 at 84 (Conservation Groups "failed to present evidence necessary to establish the existence of any water quality standard violations"); *accord id.* at 72, 76.

Regarding water quality standards, the BER recognized that DEQ's CHIA "must assess whether the action at issue will cause a violation of water quality standards." BER:152 at 75. The BER further recognized that under the "relevant water quality standard," EFAC must be "maintained to support ... growth and propagation of ... aquatic life." *Id.* at 18, *quoting* ARM 17.30.629(1). DEQ testified it does not use analysis of aquatic macroinvertebrates to assess this water quality standard because, as the BER found, such analysis "does not provide an accepted or reliable indicator of aquatic life support." *Id.* at 46-47. The BER nevertheless relied on DEQ's survey of macroinvertebrates to conclude that DEQ's CHIA adequately assessed the narrative water quality standard for growth and propagation of aquatic life. *Id.* at 85.

[2] One BER member objected that the BER was impermissibly placing the burden on the Conservation Groups to prove that material damage *would occur*, given MSUMRA's provision placing the burden on WRM and DEQ to prove that material damage *would not occur*. BER:151 at 204:18-22 ("[I] don't think we can flip and require the Petitioner to prove with certainty that damage will occur ...."); *accord* at 214:18-23; *cf. Park Cnty.*, ¶ 61 (explaining that state constitution "do[es] not require that dead fish float on the surface of our state's rivers and streams before the [Montana Constitution's] farsighted environmental provisions can be invoked," *quoting MEIC I*, ¶ 77).

Regarding salinity, the BER found that EFAC is impaired and not meeting water quality standards for growth and propagation of aquatic life due to excessive salinity (that is, existing salinity concentrations are adversely affecting growth and propagation of aquatic life in EFAC). *Id.* at 28. The BER further found that existing mining operations are expected to increase salinity cumulatively in EFAC by 13%. *Id.* at 39 (noting "anticipated 13% increase in the concentration of TDS [salinity] in EFAC"); BER:95, Ex. DEQ-1 at 11 (noting "the 13% increase in TDS ... in EFAC"); DEQ-1A at 9-9 (noting that "[b]aseflow in EFAC ... is predicted to experience a postmine increase in TDS of 13%, elevating the average concentration of TDS to almost 2,600 mg/L"). However, adopting an argument of DEQ that did not appear in the CHIA, the BER concluded it should consider salinity pollution from AM4 in isolation from the predicted cumulative salinity increase of 13% from other mining operations. *Id.* 63-64. The BER then reasoned that because AM4—viewed in isolation—would only extend the *duration* of elevated salinity concentrations (up to "tens to hundreds of years") but would not, on its own, increase the salinity *concentration*, it would not cause material damage. *Id.* at 62-72.

The Conservation Groups timely appealed the BER's decision.

IV. STANDARD OF REVIEW

Under MAPA, a district court may "reverse or modify" an agency decision in a contested case if "(a) the administrative findings, inferences, conclusions, or decisions are: (i) in violation of constitutional or statutory provisions ... (iii) made upon unlawful procedure ... [or] (vi) arbitrary and capricious," resulting in prejudice to the substantial rights of a party. § 2-4-704(2), MCA.

DEQ and WMR dispute that the arbitrary and capricious standard applies to judicial review of contested cases under MAPA. DEQ Br. at 3; WMR Br. at 2 n.3. The Montana Supreme Court, however, recently clarified that it does. *Vote Solar v. Mont. Dep't of Pub. Serv. Regulation*, 2020 MT 213A, ¶¶ 35-37, 401 Mont. 85, 473 P.3d 963. Legal conclusions are reviewed for correctness, not abuse of discretion. *Id.*, ¶ 35; *cf.* DEQ Br. at 3 (citing *Harris v. Bauer*, 230 Mont. 207, 212, 749 P.2d 1068 (1988)); *Steer, Inc. v. Dep't of Revenue*, 245 Mont. 470, 474, 803 P.2d 601, 603 (1990) (abrogating "abuse of discretion" standard for review of conclusions of law); *see also N. Cheyenne Tribe v. DEQ*, 2010 MT 111, ¶ 19, 356 Mont. 296, 234 P.3d 51.

"[I]nternally inconsistent analysis signals arbitrary and capricious action." *MEIC v. DEQ* (*MEIC III*), 2019 MT 213, ¶ 26, 397 Mont. 161, 451 P.3d 493 (quoting *NPCA v. EPA*, 788 F.3d 1134, 1141 (9th Cir. 2015)). "Montana courts do not defer to incorrect or unlawful agency decisions ...." *Id.*, ¶ 22.

"The goal of statutory interpretation is to give effect to the purpose of the statute. A statute will not be interpreted to defeat its object or purpose, and the objects to be achieved by the legislature are of prime consideration in interpreting it." *Dover Ranch v. Cnty. of Yellowstone*, 187 Mont. 276, 283, 609 P.2d 711, 715 (1980) (internal citations omitted). In reviewing agency decisions that impact the environment, the Montana Supreme Court "remain[s] mindful that Montanans have a constitutional right to a clean and healthful environment." *Mont. Envtl. Info. Ctr. v. Mont. Dep't of Envtl. Quality* (*MEIC IV*), 2020 MT 288, ¶ 26, 402 Mont. 128, 476 P.3d 32 (quoting *Upper Mo. Waterkeeper v. Mont. Dep't of Envtl. Quality*, 2019 MT 81, ¶ 41, 395 Mont. 263, 438 P.3d 792). Montana

courts afford "much less" deference to agency interpretations of statutes. *MEIC III*, ¶ 24 n.9.

V. DISCUSSION

A. Whether the BER erred by applying administrative issue exhaustion to preclude consideration of issues raised by the Conservation Groups.

In support of the BER on this issue, DEQ and WRM contend that issue exhaustion at the permit appeal stage is required by the *text* of MSUMRA, "rules, and the BER's *Signal Peak* [*Bull Mountains*] ruling." DEQ Br. at 8; *see also* WRM Br. at 7. A review of statutory text, however, does not support this contention. DEQ cites only one statutory provision—§ 82-4-231(8)(e)-(f), MCA, DEQ Br. at 8, 9, 11—but that provision says nothing about issue exhaustion. Instead, it provides that, after DEQ deems an application acceptable, it must provide public notice and a brief comment period during which an interested person "*may* file a written objection." § 82-4-231(8)(e), MCA (emphasis added). DEQ must then prepare written findings. *Id.* § 82-4-231(8)(f). There is no textual issue exhaustion requirement. DEQ also cites ARM 17.24.405(5)-(6), but these provisions are also devoid of any express written issue exhaustion requirement. Similarly, the *In re Bull Mountains* decision, also cited by DEQ, says nothing about administrative issue exhaustion.

The Court finds relevant here the *text* of § 82-4-206(1), MCA, which provides the sole requirements for seeking administrative review of a permit decision under MSUMRA; namely, (1) that the person seeking administrative review be adversely affected (undisputed here); and (2) that the request be timely (also, undisputed here). *Accord* ARM 17.24.425(1). Notably, the relevant *texts* do not impose *any* exhaustion requirement. The

Court further notes that the U.S. Department of Interior explained that the parallel federal provision for public comment on permit applications "in no way" limits the rights of affected members of the public from seeking administrative review. 56 Fed. Reg. 2,139, 2,141 (Jan. 22, 1991); *Save Our Cumberland Mountains v. OSM*, NX 97-3-PR at 16-17 (Dep't of Interior July 30, 1998) (in record as BER:141, Ex. 4). These interpretations of the parallel federal provisions are compelling because Montana, like other states with approved regulatory programs under SMCRA, must "interpret, administer, enforce, and maintain [them] in accordance with the Act [SMCRA], this chapter [SMCRA's federal implementing regulations], and the provisions of the approved State program." 30 C.F.R. § 733.11.[3]

Based on the absence of any exhaustion requirement in MSUMRA and its implementing regulations, and because MSUMRA must protect and encourage public participation to the same degree as SMCRA, 30 U.S.C. § 1253(a), the Court concludes that the BER erred in engrafting an extra-statutory exhaustion requirement onto MSUMRA.[4] *See also* S. Rep. No. 95-128, at 59 (1977) (expressing congressional intent that public play a significant role in administration of SMCRA).

Similarly, MAPA does not require issue exhaustion in contested cases, but instead allows parties to raise new issues revealed during administrative review. *Citizens Awareness Network v. BER*, 2010 MT 10, ¶¶ 23-30, 355 Mont. 60, 227 P.3d 583. *See*

[3] DEQ attempts to minimize the importance of this on-point federal authority, by noting the cooperative-federalism structure of SMCRA and MSUMRA. DEQ Br. at 8, n.8. However, as noted, because MSUMRA is a delegated program under SMCRA, it must be "in accordance with" and "consistent with" SMCRA and its implementing "rules and regulations." 30 U.S.C. § 1253(a)(1), (7); 30 C.F.R. § 733.11. Thus, MSUMRA may not be interpreted to be less protective of public participation than SMCRA.

§ 2-4-702(1)(b), MCA (issue exhaustion applies *after* contested case). 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. *See Vote Solar*, ¶ 49 (exhaustion does not require party to identify error before it occurs).

This conclusion is buttressed by the Montana Constitution's rights to know and to participate, which entitle the public to review government analyses *before* objecting to government decisions. *Bryan v. Yellowstone Cnty.*, 2002 MT 264, ¶¶ 32-46, 312 Mont. 257, 60 P.3d 381; Mont. Const. art. II, §§ 8-9. As the *Bryan* Court noted, for these rights to be more than a "paper tiger," the public must have a "reasonable opportunity to know the claims of the opposing party [the government] and to meet them." *Bryan*, ¶¶ 44, 46.

Here, DEQ seeks to impute sufficient knowledge of the deficiencies which the Conservation Groups later complained of, asserting that WRM as part of its AM4 application submitted a Probable Hydrologic Consequences ("PHC") report, which should have tipped off the Conservation Groups as to the deficiencies that it complains of in DEQ's CHIA. DEQ misses the point. It is agency action (or inaction) that is at the heart of the review sought by the Conservation Groups. Under MSUMRA, the public only sees *DEQ's CHIA* when *the agency* approves or denies the permit, well *after* the comment period on WMR's application had closed. ARM 17.24.404(3)(a), 17.24.405(5)-(6). Administrative review thus is the first opportunity the public must contest *DEQ's* "reasons for the final decision." ARM 17.24.425(1). Application of issue exhaustion to limit the Conservation Groups to issues raised in comments made *before* ever seeing DEQ's CHIA and "final decision" would render public participation a "hollow right" and violate applicable statutory and constitutional rights. *Bryan*, ¶ 44.

In reaching the contrary conclusion, the BER cited one authority, its prior ruling in *In re Bull Mountains*. BER:103 at 5; BER:152 at 77. That decision is inapposite because it never addressed issue exhaustion in any respect. *See In re Bull Mountains*, at 56-59.

Even if it were applicable, issue exhaustion would not bar the Conservation Groups' claims here for two reasons. First, the Conservation Groups' comments identified the need to assess cumulative impacts to water from Area F and concerns about dewatering EFAC. *See* BER:95, Ex. DEQ-4L at 17 (noting that "Area B [i.e., AM4] and Area F" "will have cumulatively significant impacts on ... surface waters"); BER:95, Ex. DEQ-4 at 2-3 (noting dewatering); *see also* Conservation Groups' Br., at Argument I.B. WRM criticizes the precision with which the Conservation Groups' comments discussed Area F and dewatering. WRM Br. at 15. Nevertheless, at the very least, DEQ was alerted "in general terms" that these issues would be "fully sifted" in the ensuing administrative review and "the groups' theories for challenging the permit would not be confined to those presented in the original affidavit." *See Lands Council v. McNair, 629 F.3d 1070, 1076 (9th Cir. 2010)*; *Citizens Awareness Network*, ¶ 23.

Second, the record shows that DEQ also had actual knowledge of these issues. Discovery revealed that DEQ debated analyzing cumulative impacts from Area F but declined to do so based on an incorrect definition of "anticipated mining." BER:100, Ex. 19 (defining "anticipated mining" incorrectly as "approved—but not mined" and noting "proposed Area F and additional mining in Area A—not included" as a result); *id.* Exs. 20-22 (discussions resulting in exclusion of anticipated mining based on incorrect definition); BER:95, Ex. DEQ-1A at 5-1 (erroneous definition of "anticipated mining"); *cf.* ARM 17.24.301(32) (correct definition). DEQ also had actual knowledge of the Conservation

Groups' concerns about dewatering EFAC because it addressed them in the CHIA and response to comments. BER:95, Ex. DEQ-1 at 9-10 (stating DEQ could not determine whether mining had dewatered the stream and concluding "material damage to this section cannot be made"); *id.* Ex. DEQ 1-A at 9-10. Because the Conservation Groups raised these issues and DEQ knew about and addressed them (albeit erroneously), issue exhaustion does not apply. *Barnes v. U.S. Dep't of Transp.*, 655 F.3d 1124, 1132-34 (9th Cir. 2011) (explaining that there is "no need" for public to raise issue that agency already had knowledge of); *NRDC v. EPA*, 824 F.2d 1146, 1151 (D.C. Cir. 1987) ("This court has excused the exhaustion requirements for a particular issue when the agency has in fact considered the issue."); *see also State v. Baze*, 2011 MT 52, ¶ 11, 359 Mont. 411, 251 P.3d 122 (related doctrine of waiver inapplicable where parties raised and district court addressed issue).

In sum, issue exhaustion does not apply to administrative review of permits under MSUMRA. The BER erroneously required the Conservation Groups to exhaust issues which arose only upon publication of DEQ's analysis after the close of the public comment period. Further, even if issue exhaustion applied, DEQ's actual knowledge of the Conservation Groups' concerns foreclosed its application. The BER erred in dismissing the Conservation Groups' claims concerning DEQ's erroneous definition of "anticipated mining" and dewatering EFAC based on issue exhaustion. Moreover, the error was prejudicial because it precluded a merits-based ruling on the Conservation Groups' claims. *Organized Vill. of Kake v. U.S. Dep't of Agric.*, 795 F.3d 956, 969 (9th Cir. 2015) (explaining that "the required demonstration of prejudice is not a particularly onerous requirement").

B. Whether the Conservation Groups' brief met the requirements of § 2-4-621(1), MCA.

Under MAPA, after a hearing examiner issues proposed findings and conclusions, each party that is adversely affected must be given an "opportunity ... to file exceptions and present briefs and oral arguments to the officials [here, the BER] who are to render the decision." § 2-4-621(1), MCA. Accordingly, after issuance of the proposed findings and conclusions, the BER issued an order stating: "Any party adversely affected by the Proposed Order may file Exceptions to the proposed order on or before May 10, 2019." BER:135 at 2.

In response, each party filed a brief objecting to portions of the proposed findings and conclusions. BER:139; BER:140; BER:141. WRM and DEQ captioned their briefs "Exceptions," BER:139; BER:140. The Conservation Groups captioned their brief "Objections." BER:141. The Conservation Groups' brief, like those of WRM and DEQ, identified specific portions of the proposed findings to which the Conservation Groups' objected. *E.g.*, BER:141 at 7, 12, 24, 31, 47, 48, 52, 53. Previously, the Conservation Groups had submitted 55 pages of proposed findings, and 76 pages of objections to the proposed findings of DEQ and WRM. BER:123; BER:131.

Citing *Flowers v. BER of Personnel Appeals*, 2020 MT 150, 400 Mont. 238, 465 P.3d 210, WRM—now for the first time before this Court[5]—contends that the Conservation Groups' brief failed to meet the requirements of § 2-4-621(1), MCA, because it was denominated "objections" rather than "exceptions." WRM Br. at 6. WRM's argument is without merit. The Montana Supreme Court has long refused to interpret

[5] Notably, WRM did not raise this issue before the BER, though it had the opportunity to do so.

MAPA in such a hyper-technical fashion. *State ex rel. Mont. Wilderness Ass'n v. Bd. of Natural Res. & Conservation*, 200 Mont. 11, 39-40, 648 P.2d 734, 749 (1982) (refusing to "exalt form over substance" and not requiring agency to rule on each proposed finding offered by parties as provided in § 2-4-623(4), MCA); *see also* § 1-3-219, MCA. Thus, the Court "encourages a liberal interpretation of procedural rules governing judicial review of an administrative BER" and has "avoid[ed] an over-technical approach" to MAPA to "allow[] the parties to have their day in court." *In re Young v. Great Falls*, 194 Mont. 513, 516, 632 P.2d 1111, 1113 (1981). And the Montana Supreme Court has long-ago held "it is the substance of a document that controls, not its caption." *Carr v. Bett*, 1998 MT 266, P1, 291 Mont. 326, 329, 970 P.2d 1017, 1018, 1998 Mont. LEXIS 243, *1, 55 Mont. St. Rep. 1098, *quoting* Miller v. Herbert , 272 Mont. 132, 135-36, 900 P.2d 273, 275 (1995).

Here, contrary to WRM's argument, the Conservation Groups' brief objecting to the proposed findings and conclusions identified and cited specific findings and conclusions to which it objected and provided detailed analysis explaining the asserted errors. BER:141 at 7, 12, 23, 31, 47, 48, 52, 53. Thus, caption notwithstanding,[6] the Conservation Groups' brief was no different than those filed by WRM and DEQ. While it is true that the Conservation Groups' objections challenged the legal conclusions of the proposed ruling rather than the factual findings, *see generally* BER:141; BER:151 at 99, there is no requirement that parties challenge proposed factual findings. *Cf.* § 2-4-621(3), MCA (providing that BER may reject proposed legal conclusions *or* proposed factual findings). WRM is also mistaken in its suggestion that MAPA requires objections to

[6] "Exceptions" and "objections" are synonymous. *See* Black's Law Dictionary at 603 (8th ed. 2007).

include "modifying language for each exception." WRM Br. at 6. MAPA contains no such requirement. § 2-4-621(1), MCA. Nor did the BER's order on exceptions. BER:135 at 2.

Finally, *Flowers* is not to the contrary. There, Flowers did *not* file exceptions and the Court therefore held that,

> Flowers did *not* pursue to their conclusion "all administrative remedies available" before seeking judicial review. *Art*, ¶ 17; § 2-4-702(1)(a), MCA. *Hearing Officer Holien's recommended order directed him to file exceptions with BOPA if he was unsatisfied with her decision.* That her recommendation became a final order of the BER twenty days later did not obviate the requirement to file exceptions in order to completely exhaust the "available" administrative remedies.

Flowers, ¶ 13 (emphasis added). Here, unlike in *Flowers*, the Conservation Groups filed extensive exceptions (denominated "objections") to the hearing examiner's proposed findings and conclusions. BER:141. Nothing more was required.

C. Whether the BER erred by permitting DEQ and WRM to present post-decisional evidence and analysis.

Under MSUMRA, DEQ's permitting decisions must be based on "information set forth in the application or information otherwise available that is compiled by [DEQ]." ARM 17.24.405(6); § 82-4-227(3), MCA. Under these provisions, "[t]he relevant analysis and the agency action at issue is that contained within the four corners of the Written Findings and CHIA." BER:152 at 76; *In re Bull Mountains*, at 56-59 ("What the agency may not do is present newly developed evidence that was not before the agency at the time of its decision or analysis that was not contained within the CHIA."). This is consistent with the bedrock rule of administrative law that "an agency's action must be upheld, if at all, on the basis articulated by the agency itself." *Park Cnty.*, ¶ 36 (quoting *Motor Vehicle Mfrs. v. State Farm*, 463 U.S. 29, 50 (1983)); *accord MTSUN, LLC v. Mont. Dep't of Pub. Serv. Regulation*, 2020 MT 238, ¶ 51, 401 Mont. 324, 472 P.3d 1154 (explaining that an

agency's "decision must be judged on the grounds and reasons set forth in the challenge order(s); no other grounds should be considered"); *Kiely Constr., L.L.C. v. Red Lodge*, 2002 MT 241, ¶¶ 92-97, 312 Mont. 52, 57 P.3d 836 ("after-the-fact opinions" cannot support decisions).

Here, over objection by the Conservation Groups, the BER admitted and then relied heavily on testimony by WRM's expert William Schafer, Ph.D., about a post-decisional "statistical" and "probabilistic" analysis in which he concluded that the projected 13% salinity increase in EFAC "would not be statistically significantly measurable." BER:152 at 38; *id.* at 37, 39, 64 (relying on "statistical" analysis); *see also id.* at 84 (incorporating prior discussion including "statistical" analysis). However, all parties stipulated and the BER's hearing examiner agreed that this "probabilistic" analysis was post-decisional and not included in the information "compiled" by DEQ to support its decision. BER:118 at 33:4-20.

WRM now argues that the BER's admission of *post hoc* testimony from Dr. Schafer was harmless, asserting that it was not "relevant to the BER's directed verdict." WRM Br. at 16. WRM is mistaken, placing form over substance. While the BER framed its ruling as granting a "directed verdict," BER:152 at 85, the BER's analysis shows that this was a misnomer. A directed verdict is only appropriate if there is no weighing of evidence, and all evidence and inferences are viewed in the light most favorable to the non-moving party. *Massee v. Thompson*, 2004 MT 121, ¶ 25, 321 Mont. 210, 90 P.3d 394. The BER, however, rejected the Conservation Groups' expert testimony and, instead, credited testimony of witnesses from DEQ and WRM (some of whom denied any expertise). *E.g.*, BER:152 at 34-36, 51-53, 67, 72.

Thus, contrary to WRM's assertion, the fact that the BER denominated its ruling as a "directed verdict" does not establish that its erroneous admission of *post hoc* testimony from Dr. Schafer was harmless. To the contrary, the record indicates that the BER relied on Dr. Schafer's *post hoc* "statistical" analysis to discount the significance of the projected 13% increase in salinity in base flow in EFAC from the cumulative impacts of mining. BER:152 at 64-65; *see also id.* at 37-38. Because this testimony was crucial to the BER's decision, it was prejudicial and not harmless. *In re Thompson*, 270 Mont. 419, 430-35, 893 P.2d 301, 307-310 (1995) (improper admission of crucial expert testimony warranted reversal of agency decision); *see also Murray v. Talmage*, 2006 MT 340, ¶ 18, 335 Mont. 155, 151 P.3d 49 (finding improper admission of "critical evidence" prejudicial).

Similarly, regarding salinity, the CHIA's material damage assessment and determination were premised on a projected 13% cumulative increase in salinity in EFAC. BER:95, Ex. DEQ-1A at 9-9 (noting that "[b]aseflow in EFAC ... is predicted to experience a postmine increase in TDS of 13%"); BER:95, Ex. DEQ-1 at 11 (evaluating material damage with respect to "the 13% increase in TDS ... in EFAC"). However, at hearing, DEQ made the *post hoc* argument, which the BER accepted, that its material damage assessment was based not on the 13% cumulative increase in salinity predicted in the CHIA, but on the additional salinity from the AM4 expansion considered in isolation (which the BER found would extend the duration of elevated salinity by decades or centuries, without itself increasing the salt concentration at any one time). BER:152 at 63-65; *see also infra* Part V.G (discussing the claim of substantive error of "extended duration").

The Court finds that the BER's decision to admit and rely on post-decisional evidence and analysis from DEQ and WRM violates ARM 17.24.405(6)(c) and the BER's

own rule that "[w]hat the agency may not do is present newly developed evidence that was not before the agency at the time of its decision or analysis that was not contained within the CHIA." *In re Bull Mountains*, at 59; BER:152 at 76 (relevant analysis is in "four corners" of CHIA); *see also MEIC III*, ¶ 26 (inconsistent rulings are arbitrary). As the BER itself previously cautioned: "The public's ability to rely on DEQ's express written findings and analysis supporting its permitting decision is for naught if at the contested case stage, the agency is permitted to present extra-record evidence and manufacture novel analysis and argument." *In re Bull Mountains*, at 49.

In sum, the Court finds unlawful the BER's decision to allow DEQ and WRM to present post-decisional evidence and analysis. The BER's decision is at the same time impermissibly arbitrary and capricious because, as noted above, the BER simultaneously limited the Conservation Groups to evidence and argument contained in their *pre-decisional* comments. *See supra* Part III.D. This decision created an uneven playing field, which was plainly prejudicial. *Organized Vill. of Kake*, 795 F.3d at 969.

D. Whether the BER erroneously allowed DEQ's hydrology expert to present expert testimony about aquatic life.

The Conservation Groups moved *in limine* to exclude expert testimony about aquatic life by Dr. Hinz, who is a hydrologist, on the basis that she has no expertise in aquatic life or aquatic biology. BER:76 at 5-7. At hearing, the parties and the BER's hearing examiner "all agree[d] that she's [Dr. Hinz] not an expert in aquatic life of any kind." BER:117 at 86:20-21. The BER, however, permitted and relied on testimony by Dr. Hinz about aquatic life health in EFAC. BER:152 at 48-50.

Contested cases before BER are subject to "common law and statutory rules of evidence." § 2-4-612(2), MCA. If a witness lacks expertise in a given field, she may not

give expert testimony in that field, even if she possesses expertise in another field. *State v. Russette*, 2002 MT 200, ¶¶ 13-14, 311 Mont. 188, 53 P.3d 1256, *abrogated on other grounds by State v. Stout*, 2010 MT 137, 356 Mont. 468, 237 P.3d 37; Mont. R. Evid. 702.[7] Admission of improper expert testimony in a contested case constitutes reversible error. *In re Thompson*, 270 Mont. 419, 429-30, 435, 893 P.2d 301, 307, 310 (1995).

The apparent basis of the BER's decision was that Dr. Hinz's testimony was permissible under Montana Rule of Evidence 703. *See* BER:116 at 215:18 to 219:4. As clear from arguments advanced at hearing before this Court, both DEQ and WMR now rely on Rule 703 in defending BER's decision. However, Rule 703 merely addresses the "bases" on which expert opinion testimony may rest. Mont. R. Evid. 703. Rule 703 does not expand Rule 702, and it does not permit an expert to give testimony that is beyond her field of expertise, as Dr. Hinz did here with respect to aquatic life. *State v. Hardman*, 2012 MT 70, ¶¶ 27-28, 364 Mont. 361, 276 P.3d 839; *Weber v. BNSF Ry. Co.*, 2011 MT 223, ¶ 38, 362 Mont. 53, 261 P.3d 984.

WRM asserts that the admission of Dr. Hinz's testimony about aquatic life was harmless. WRM Br. at 16. However, Dr. Hinz was DEQ's only witness who offered testimony about aquatic life in EFAC, and the BER's finding and decision regarding aquatic life relied almost exclusively on Dr. Hinz's testimony. BER:152 at 44-50, 85. The BER relied on Dr. Hinz's testimony to discount the testimony of the Conservation Groups' aquatic life expert Mr. Sullivan. BER:152 at 51-52. The BER's analysis of aquatic life cited only one other expert—WRM's expert Ms. Hunter—but conceded that, while Ms. Hunter sampled aquatic life in EFAC, she was not requested to analyze aquatic life health in the

[7] *Accord, e.g., Dura Auto. Sys. v. CTS Corp.*, 285 F.3d 609, 612-14 (7th Cir. 2002).

stream, BER:152 at 45. And, in fact, DEQ directed Ms. Hunter to "collect, *but not analyze*" aquatic life in the stream. BER:152 at 46 (emphasis added).[8] Thus, Dr. Hinz's testimony was critical to the BER's findings and conclusions with respect to aquatic life and, therefore, its admission was prejudicial and not harmless. *In re Thompson*, 270 Mont. at 430-35, 893 P.2d at 307-310; *Murray*, ¶ 18.

In sum, the BER's admission and reliance on opinion testimony by Dr. Hinz about aquatic life in EFAC—an area admittedly beyond her field of expertise—was reversible error. *Russette*, ¶¶ 13-14; *Weber*, ¶¶ 36-39; *In re Thompson*, 270 Mont. at 429-30, 435, 893 P.2d at 307, 310.

E. Whether the BER imposed a burden of proof that erroneously required the Conservation Groups to prove that the mine would cause material damage.

MSUMRA places the "burden" of demonstrating that material damage will *not occur* on the permit applicant and the regulatory authority, here WRM and DEQ. § 82-4-227(1), (3)(a), MCA; ARM 17.24.405(6)(c). Where a statute imposes the burden to show the "lack of adverse impact" on a permit applicant, as here, that burden remains with the applicant throughout administrative review of the permit. *Bostwick Props., Inc. v. DNRC*, 2013 MT 48, ¶¶ 1, 10-14, 36, 369 Mont. 150, 296 P.3d 1154; *accord* S. Rep. No. 95-128, at 80 (1977) (legislative history of SMCRA stating that permit applicant retains burden of showing lack of environmental effects in contested hearing) (in record at BER:141, Ex. 2).

[8] Indeed, as explained at the hearing, DEQ management seems to have arbitrarily prevented *anyone* with expertise in aquatic life from reviewing data on aquatic life in EFAC. *See* BER:117 at 183:25 to 184:8 (DEQ explaining that it instructed its expert in aquatic life, David Feldman, from analyzing data from EFAC); BER 100, Ex. MEIC 15; *see also* BER:152 at 46 (DEQ also prohibited WRM's aquatic life expert from analyzing data).

Here, in violation of the statutory text of MSUMRA, a divided BER placed the burden on the Conservation Groups to "present evidence necessary to establish the existence of any water quality standard violations." BER:152 at 84. Elsewhere, the BER stated the burden differently but maintained that the Conservation Groups had to show "more-likely-than-not" that material damage would or "could" occur. *Id.* at 72 (concluding "burden of proof ... falls to Conservation Groups to present a more-likely-than-not probability that a water quality standard could be violated by the proposed action"); *id.* at 76 (concluding Conservation Groups "have the burden to show, by a preponderance ... that DEQ had information available to it at the time of issuing the permit that indicated that the project is not designed" to prevent material damage).

As the dissenting BER member aptly explained, this "burden of proof ... impermissibly read out of the statute the agency's regulation," BER:151 at 214:18-23; that is, the BER ignored its own requirement that the applicant "affirmatively demonstrates" and DEQ "confirm[s]" that the "cumulative hydrologic impacts will not result in material damage." ARM 17.24.405(6)(c); § 82-4-227(1), (3)(a), MCA ("The applicant ... has the burden" of establishing compliance with MSUMRA's requirements); BER:151 at 204:5-25. This allocation of the burden of proof is consistent with the precautionary principles of MSUMRA, § 82-4-227(1), (3), and Montana's right to a clean and healthful environment, which imposes "anticipatory and preventive" protections. *Park Cnty.*, ¶ 61. It is, thus, not the responsibility of the public to demonstrate that environmental harm will occur, but, instead, the duty of the applicant (WRM) and the agency (DEQ) to demonstrate that environmental harm will not occur.

The BER based its erroneous allocation of the burden on *Montana Environmental Information Center v. Montana Department of Environmental Quality* (*MEIC II*), 2005 MT 96, 326 Mont. 502, 112 P.3d 964, a case on which both DEQ and WMR rely here.[9] However, as the Conservation Groups point out, that case is inapposite because, unlike MSUMRA, the Clean Air Act of Montana, at issue there, has no provision allocating the burden of proof to the permit applicant. *Compare MEIC* (2005), ¶ 13, *with* § 82-4-227(1), (3)(a), MCA.

Further, even in *MEIC II*, the Supreme Court did not burden the public with affirmatively demonstrating that environmental harm would occur. Instead, there, after the Supreme Court stated that the Clean Air Act permit challengers had the general burden of proof, the Court emphasized that the challengers did not have to prove that environmental harm would occur—as WRM contends and the BER held, here. Instead, the Supreme Court explained that, during the contested case, the dispositive question was whether the permit *applicant* had "established" that environmental *harm would not occur*:

> Thus, on remand the BER shall enter [findings and conclusions] determining whether, based on the evidence presented, Bull Mountain [the permit applicant] established that emissions from its proposed project will not cause or contribute to [environmental harms] ....

MEIC II, ¶ 38; *accord id.*, ¶ 36.

Thus, in any event, WRM's and the BER's asserted requirement that the Conservation Groups affirmatively demonstrate that material damage *would* occur was

[9] WRM also cites the Court to ARM 17.24.425(7), but that provision refers to cases where a party seeks to "reverse the decision of the BER," not, as here, where the Conservation Groups sought to reverse DEQ's permit. Further, to the degree that the provision is ambiguous, the clear statutory test of § 82-4-227(1), MCA, which places the burden on the applicant, controls.

error. Where, as here, the underlying statute (MSUMRA) expressly places the burden to demonstrate the lack of adverse environmental impacts, the applicant and agency retain their assigned burdens in administrative review of the permit. *Bostwick*, ¶ 36; § 82-4-227(1), (3); ARM 17.24.405(6)(c). The BER's decision to the contrary was error.

Reversal of the burden of proof was plainly prejudicial error. *See Organized Vill. of Kake*, 795 F.3d at 969 ("If prejudice is obvious to the court, the party challenging agency action need not demonstrate anything further."). Further, here, the Conservation Groups' presented testimony that WRM and DEQ had failed to demonstrate that material damage would not occur. BER:115 at 297:6-15 (aquatic life survey does not show that water quality standard is met); *id.* at 298:1-8 (same). This Court cannot conclude that the BER's reversal of the burden of proof had "no bearing on the procedure used or the substance of the decision reached." *Nw. Res. Info. Ctr., Inc. v. Nw. Power & Conservation Council*, 730 F.3d 1008, 1019-20 (9th Cir. 2013).

F. Whether the BER arbitrarily approved and relied on DEQ's and WRM's assessment of aquatic life health.

The BER properly recognized that, to confirm that the cumulative hydrologic impacts will not result in material damage (which, as noted, includes any violation of a water quality standard), DEQ must assess applicable water quality standards. BER:152 at 75; *In re Bull Mountains*, at 87; ARM 17.24.405(6); §§ 82-4-203(31), 227(3)(a), MCA. The BER further recognized that the narrative water quality standard for EFAC requires that the creek "be maintained suitable for ... growth and propagation of non-salmonid fishes and associated aquatic life." ARM 17.30.629 (1); BER:152 at 18.

However, as confirmed by the record of the BER's decision, the BER *relied* on WRM's survey of macroinvertebrates to conclude that the CHIA adequately assessed the

water quality standard for growth and propagation of aquatic life. *Id.* at 85. The problem with this analysis is that it is demonstrably inconsistent with DEQ's explanation and the BER's finding that "analyzing macroinvertebrate data ... would *not* provide an *accepted* or *reliable* indicator of aquatic life support" for assessing water quality standards in eastern Montana streams. *Id.* at 46 (emphasis added); *see also id.* at 47-48. It was irrational and arbitrary for the DEQ and the BER to *rely* on an analysis that both entities expressly found to be *unacceptable* and *unreliable* for assessing applicable water quality standards. *MEIC III*, ¶ 26 ("an internally inconsistent analysis signals arbitrary and capricious action"); § 2-4-704(2)(vi), MCA. While agencies have a degree of discretion in determining what evidence to rely upon, an agency may not rely on evidence that the agency itself deems inadequate. *E.g.*, *Idaho Conservation League v. Guzman*, 766 F. Supp. 2d 1056, 1077 (D. Idaho 2011) ("If an agency fails to make a reasoned decision based on an evaluation of the evidence, the Court must conclude that the agency has acted arbitrarily and capriciously."; *MEIC IV*, ¶ 26 (Court declined to defer to agency analysis that was not a "reasoned decision" because it "sidestep[ed]" environmental protections).

WRM misapprehends the gravamen of the Conservation Groups' challenge, which is *not* to the BER's factual findings with respect to DEQ's assessment of water quality standards for aquatic life support. *Cf.* WRM Br. at 18. The Conservation Groups' argument is that it was inconsistent and arbitrary (i.e., unlawful) for the BER to *rely* on a metric that the BER and DEQ both find *unreliable* to assess water quality standards for aquatic life support.

Both WRM and DEQ argue a distinction between the CWA and MSUMRA in their attempt to excuse DEQ's assessment of water quality standards for aquatic life support. *See, e.g.,* WRM Br. at 18, and arguments at hearing. The argument fails because MSUMRA adopts and incorporates "water quality standards" from the CWA as criteria for assessing material damage. § 82-4-203(31), MCA; *see also* Conservation Groups' Reply to DEQ, at Argument Part V. Thus, DEQ's CHIA purported to assess the narrative *water quality standard* for growth and propagation of aquatic life by relying on the (admittedly unreliable) macroinvertebrate survey: "the 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.*" BER:95, Ex. DEQ-1A at 9-8 (emphasis added); ARM 17.30.629(1) (narrative standard—stream must "be maintained suitable for ... growth and propagation of non-salmonid fishes and associated aquatic life"). The BER, similarly, used the assessment of macroinvertebrates to support its conclusion about water quality standards in EFAC. BER:152 at 48-49. Accordingly, DEQ's and WRM's effort to excuse the BER's inconsistent and arbitrary assessment of water quality standards for aquatic life fails.

Finally, WRM's harmless error argument also fails. Despite generalized assertions about "multiple lines of evidence," the unreliable macroinvertebrate survey was the *only* specific evidence on which the BER and DEQ relied to reach their conclusion about potential violations of the narrative water quality standard for growth and propagation of aquatic life. BER:152 at 82 (citing macroinvertebrate survey (the "ARCADIS report")); *id.* at 48-50 (basing analysis on Dr. Hinz's inexpert assessment of macroinvertebrate survey—but citing no other specific evidence); BER:95, Ex. DEQ-1A at 9-8 (basing

assessment of narrative water quality standard for aquatic life exclusively on macroinvertebrate survey). As such, the BER's arbitrary and capricious reliance on DEQ's inexpert analysis of this unreliable survey was prejudicial, not harmless. *In re Thompson*, 270 Mont. at 430-35, 893 P.2d at 307-310; *Murray*, ¶ 18; *Organized Vill. of Kake*, 795 F.3d at 969.

G. Whether the BER arbitrarily concluded that adding more salt to a stream impaired for salt will not cause additional impairment.

The BER found that EFAC is an impaired water and not meeting narrative water quality standards for supporting growth and propagation of aquatic life due to, among other things, excessive salinity pollution. BER:152 at 24-25. WRM disputes that EFAC is impaired—i.e., not meeting water quality standards—due to salinity. WRM Br. at 20-22. However, the record indicates that DEQ's official CWA assessment concluded: "Salinity/TDS/chlorides will remain a cause of impairment." BER:95, Ex. 10 at 17. While, as the BER noted, DEQ's level of *certainty* in this conclusion was low and not confirmed, BER:95, Ex. 10 at 17, *cited in* BER:152 at 28, it nevertheless remains DEQ's official impairment determination with respect to EFAC.

The BER further found that existing mining operations will cause a 13% increase in salinity in EFAC, and AM4 will extend the duration of these increased salinity levels for up to "tens to hundreds of years." *Id.* at 32, 39, 63, 68-69 n.4.[10] The BER nevertheless determined that this increased salinity would not result in a violation of water quality standards for growth and propagation of aquatic life or adversely affect that beneficial use

[10] *Accord* BER:95, Ex. DEQ-1 at 11 (DEQ findings noting "the 13% increase in TDS ... in EFAC"); DEQ-1A at 9-9 (DEQ CHIA noting that "[b]aseflow in EFAC ... is predicted to experience a postmine increase in TDS of 13%, elevating the average concentration of TDS to almost 2,600 mg/L").

of EFAC. *Id.* at 61-72. The BER's determination was reached by considering the increased salinity from AM4 in isolation from the cumulative impacts of existing mining. BER:152 at 63-65 (stating that "AM4 specifically ... is all this case concerns" and declining to consider cumulative salinity pollution from the total mine operation). However, as pointed out by the Conservation Groups, MSUMRA requires DEQ and the BER to analyze the impacts of a proposed mining operation in light of the "*cumulative* hydrologic impacts" of *all* past, existing, and anticipated mining. § 82-4-227(3)(a), MCA (emphasis added); ARM 17.24.301(31)-(32), .405(6)(c). "Cumulative" means "increasing by successive additions." Merriam-Webster Dictionary, www.merriam-webster.com. Thus, if pollution from "successive" mining operations will cause violations of water quality standards, DEQ must remedy those violations *before* permitting more mining. *See* 48 Fed. Reg. 43,956, 43,972-73 (Sept. 26, 1983) (material damage must be considered in light of "cumulative" impacts from "any preceding operations"). As the Supreme Court of Alaska explained in interpreting its SMCRA program, 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 regulatory authority] 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).

Thus, the BER's conclusion, reached by considering the increased salinity from AM4 in isolation from the cumulative impacts of existing mining, was error. If a stream, like EFAC, is not meeting water quality standards due to excessive pollution—that is, it is beyond its loading capacity, § 75-5-103(14), MCA—release of additional amounts of pollution that increase the concentration of that pollution will violate water quality

standards. *Id.*; § 75-5-103(18), MCA; *accord Friends of Pinto Creek v. EPA*, 504 F.3d 1007, 1011-12 (9th Cir. 2007) (discharge of additional copper into stream impaired by copper would violate water quality standards). Similarly, if existing salinity concentrations are adversely affecting growth and propagation of aquatic life (as here), then increasing salinity concentrations or extending the duration of the increased concentrations will also adversely affect growth and propagation of aquatic life. *See* § 82-4-203(31), MCA (adversely affecting beneficial uses or violating water quality standards is material damage). To conclude otherwise is unreasonable and arbitrary.

WRM attempts further reliance on Dr. Schafer's "statistical" analysis to assert that the projected increase in salinity would not be "statistically significant." WRM Br. at 22. However, as noted, Dr. Schafer's *post hoc* "statistical" analysis was not properly before the BER. *See supra*, Part V.C. In any event, Dr. Schafer's "statistical" argument (which the BER adopted) misses the point. As noted above, if the creek is impaired and, therefore, not meeting water quality standards, it cannot be maintained that a greater-than 10% increase in salt in the creek will not result in a further violation of water quality standards. ARM 17.24.405(6)(c) ((applicant and DEQ must demonstrate that material damage (i.e., a violation of a water quality standard) "will not result")); § 75-5-103(18), MCA (when water body has reached its loading capacity for a pollutant—as EFAC has for salinity—additional pollution causes a "violation of water quality standards"); *Friends of Pinto Creek*, 504 F.3d at 1011-12 (adding more pollution to impaired stream will cause or contribute to violation of water quality standard).

To the point here, violations of water quality standards are measured on a *daily* basis—each additional day of elevated pollution levels is an additional violation. § 75-5-

611(9)(a), MCA; *Id.*; § 82-4-254(1)(a), MCA. Thus, extending the 13% increase in salinity in already-impaired EFAC for decades or centuries would result in additional violations. Plainly, this is not a demonstration that AM4 "will *not* result in" a "violation of water quality standards." ARM 17.24.405(6)(c); § 82-4-203(31), MCA (emphasis added); *Id.*; § 82-4-202(2)(a)-(b), MCA (MSUMRA purpose is environmental protection and implementation of the Montana Constitution's right to a clean and healthful environment); *Park Cnty.*, ¶ 61; *Dover Ranch*, 187 Mont. at 283, 609 P.2d at 715 (statutory goal paramount).

Thus, the BER's conclusion that the cumulative impacts of AM4 will not result in material damage was arbitrary and capricious. It was, therefore, unlawful.

H. DEQ's and WRM's Motion to Strike was granted.

DEQ and WRM moved to strike two exhibits proffered by the Conservation Groups during briefing, purportedly containing admissions by DEQ and DEQ's former counsel, which contradict an argument DEQ presented to this Court in its answer brief. In an order filed separately, the Court granted DEQ's and WRM's Motion to Strike. The Court has not relied upon the challenged exhibits in reaching its decision.

VI. CONCLUSION

For the foregoing reasons, this Court reverses the BER and remands to DEQ to review the AM4 permit application consistent with this decision and applicable laws.

DATED this 27th day of October, 2021.

Katherine M. Bidegaray
District Court Judge

DISTRICT COURT 16TH JUDICIAL DISTRICT ROSEBUD COUNTY MONTANA

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