MONTANA ELEVENTH JUDICIAL DISTRICT, FLATHEAD COUNTY

HENRY and DIANE BELK, Plaintiffs vs. **MONTANA DEPARTMENT OF ENVIRONMENTAL QUALITY,** an agency of the State of Montana, Defendant	Cause No. DV-15-2019-0000328-OC **SUMMONS** Judge Dan Wilson

THE STATE OF MONTANA TO THE ABOVE-NAMED DEFENDANT, MONTANA DEPARTMENT OF ENVIRONMENTAL QUALITY:

You are hereby Summoned to answer the Complaint in this action which is filed in the office of the Clerk of this Court, a copy of which is herewith served upon you, and to file your answer and serve a copy thereof upon the Plaintiff's attorney within forty-two (42) days after the date of service of this Summons, exclusive of the day of service; and in case of your failure to appear or answer, judgment will be taken against you by default for the relief demanded in the Complaint.

Witness my hand and seal of said Court, this 18 day of April, 2019.

Peg L. Allison

SEAL

CLERK OF COURT Clerk of Court

BY: Cassandra Lovelace
Deputy Clerk

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MONTANA ELEVENTH JUDICIAL DISTRICT, FLATHEAD COUNTY

HENRY and DIANE BELK, Plaintiffs vs. **MONTANA DEPARTMENT OF ENVIRONMENTAL QUALITY,** an agency of the State of Montana, Defendant	Cause No. DV-15-2019-0000328-OC **COMPLAINT** Judge Dan Wilson

COMES NOW Plaintiffs, Henry and Diane Belk, through counsel, and in support of their complaint seeking review of a State agency decisions: the March 8, 2019 Final Environmental Assessment (EA) for the Glacier Stone Supply mine in Flathead County. This Complaint alleges violations of the Montana Environmental Policy Act (MEPA) and the Metal Mine Reclamation Act (MMRA).

I. PARTIES, JURSIDICTION AND VENUE

1. Plaintiffs Henry and Diane Belk are residents of Flathead County. They reside outside Marion, Montana east of Little Bitterroot Lake. They own 15-acres of land. Their

property abuts the property owned by Glacier Stone Supply on three sides, and they have an interest in an easement that runs through the Glacier Stone property. For the past fifteen-years, they have been adversely impacted by activity on the mine site as it operated under, and then in violation of, the "Small Miner's Exclusion." They have commented on mine operations to DEQ extensively over the years and specifically commented on the EA. In addition, they hired a consultant, Water and Environmental Technologies (WET) to assess the EA. Much of the "Comments" section of the final EA is devoted to responding to the Belk's, and their agent's, comments. The Belks will be harmed by DEQ's decision to approve the mining permit for the Glacier Stone Mine.

2. Defendant DEQ is an agency of the State of Montana. It regulates hard rock mining through the MMRA, and is required to comply with MEPA.

3. Jurisdiction is based on: § 75-1-201(5)(a) MCA; § 82-1-301, *et seq.*, MCA, Article II, Sections 3, 16 and 17; Article VII Section 4(1); and Article IX Section 1 of the Montana Constitution. Venue is proper in this district under § 75-1-108, MCA.

II. FACTS

4. Glacier Stone has operated a mine for decorative rock outside Marion to the east of Little Bitterroot Lake since 2004. It has operated under a "Small Miner's Exclusion" (SMES), a provision of the MMRA that allows mines to operate without a permit so long as the disturbed area does not exceed 5-acres, and so long as, among other things it does not pollute any water bodies. § 82-4-305, MCA.

5. In December 2016 DEQ issued a "violation letter" because Glacier Stone had exceeded the amount of mining allowed under the Small Miner's Exclusion "for operating two SMES sites within 1-mile of each other and for having disturbance between the two sites

that exceeded the 5-acre SMES limitation." According to the EA at issue here, "the option for applying for an operating permit was a corrective action identified in a December 27, 2016 DEQ violation letter." In other words, Glacier Stone applied for an operating permit under the MMRA because it got caught in violation of the SMES. And, to its greater good fortune, it has been allowed by DEQ to continue to operate in violation of the SMES between December, 2016 and the release of the EA and permit in March, 2019 – a period of over two-years.

6. Glacier Stone proposes to continue mining for a period of 25-years, with a proposed disturbance area of 30-acres. The company proposes a form of "mountain top mining", in that it intends to, and DEQ has approved, the removal of the top fifty-feet of a hilltop in the Canyon Creek site. (Attached as Exhibit A is a color photo of the mine site.)

7. The EA is replete with incomplete, inaccurate and contradictory information.

    1. In several areas, DEQ indicates no depressions will be created during the mining operation (WIL-22) and then in other areas indicates that "creating large depressions in porous material, preventing most of the storm runoff that would transport sediment from leaving the quarry area." These two things contradict each other.

    2. In Section 4 on Vegetation Cover, Quantity and Quality, the EA states that "approximately 66% of the proposed site is forested (USGS StreamStats, 2017)" and then in Section 5 on Terrestrial, Avian and Aquatic Life and Habitats, under direct impacts it states that "There is no boreal forest habitat within the permit boundary. The probability of any lynx occurring within the proposed permit area is considered very low." These statements contradict each other.

    3. In some areas DEQ is requiring re-vegetation, but not requiring importation of soils; for example, in Section 8 on Aesthetics it states that "Disturbance at the site would be a rocky outcrop during mining operations and would be a vegetated plateau post reclamation." But there is no requirement to bring in soils for reclamation. "Reclamation would consist of smoothing disrupted ground surface, re-applying any topsoil that has been salvaged and stockpiled and seeding sites where rock had been removed." Thus, a vegetated plateau is unlikely post reclamation.

4. Ground water is important when it is someone's drinking water supply, as it is here. Surface water in Little Bitterroot Lake is definitely important as evidenced by the fact that local residents have formed a watershed group and are paying to monitor the resource to ensure its protection. When the EA states that "mining operations are essentially creating large depressions in porous material" and that "allows for rapid infiltration of runoff and snowmelt both within the permit boundary and just outside the permit boundary" this indicates that downstream water resources may be at risk. Further study and monitoring to make sure the water resources are protected is warranted.

5. Although the EA notes that "potential impacts are expected to be less than the permit threshold requirement", Plaintiffs as neighboring landowners have already experienced serious air quality impacts from the existing operation pre-expansion, which was not adequately evaluated in the EA.

6. The EA does not in any way evaluate the potential impacts of noise and dust from the mine on the recreational use and economy of Little Bitterroot Lake, not even mentioning such impacts under the headings 17, "Access to and Quality of Recreational Activities" and 20, "Cultural Uniqueness and Diversity."

7. The EA's finding that the severity, duration, geographic extent and frequency of the occurrence of the mining impacts would be "limited" is belied by the fact that the mine will operate at least 8 hours per day 5 days per week for a period of 25 years.

8. The proposed mine expansion is highly controversial, with dozens of neighboring residents (77) signing a Petition Statement expressing concern about the failure of DEQ to fully analyze impacts to Little Bitterroot Lake.

9. Little Bitterroot Lake is located in a rare area of humid continental climate in MT. The Little Bitterroot Lake Association (LBLA) realized it as an important resource and formed an association in 1988 with the purpose of "preserving the high recreational value of Little Bitterroot Lake, maintaining its aesthetic integrity, and to educate the public and others as to the value of Little Bitterroot Lake as a recreational resource." They have contracted and funded the collection of water quality monitoring data on the lake to protect this resource since 1999. It is a unique, pristine and fragile water body. The EA

does not reference or take into account the years of data collected on the Lake's water quality or its value to area residents or the State of Montana in general.

10. Plaintiffs, as neighbors of the mine site, stand to be significantly impacted by the mine operations, just as they have been by the prior fifteen-years of operation under the Small Miner Exclusion, and during the over two-years that the mine was operating unlawfully in violation of the MMRA.

III. COUNT ONE – VIOLATION OF MEPA

11. The preceding paragraphs are realleged as though set forth in full hereunder.

12. MEPA is intended to implement the environmental imperatives of Article II, Section 3 and Article IX, Section 1 of the Montana Constitution. §75-1-102 MCA.

13. MEPA requires state agencies to carefully scrutinize the potential environmental consequences of their actions. § 75-1-101 et seq., MCA; A.R.M. 17.4.607.

14. Under A.R.M. 17.4.608 and 17.4.609(3)(d), in order to implement MEPA, the agency shall determine the significance of impacts, including secondary and cumulative impacts associated with a proposed action. This determination is the basis of the agency's decision concerning the need to prepare an EIS.

15. The agency shall consider, among other things: (a) the severity, duration, geographic extent, and frequency of occurrence of the impact, . . . (c) growth-inducing or growth-inhibiting aspects of the impact, including the relationship or contribution of the impact to cumulative impacts, (d) the quantity and quality of each environmental resource or value that would be affected, including the uniqueness and fragility of those resources or values, (e) the importance to the state and to society of each environmental resource or value that would be affected. . . .

16. An EA must include, among other things: . . .. (d) an evaluation of the impacts, including cumulative and secondary impacts, on the physical environment, (e) an evaluation of the impacts, including cumulative and secondary impacts, on the human population in the area to be affected by the proposed action, (f) a description and analysis of reasonable alternatives to a proposed action whenever alternatives are reasonably available and prudent to consider and a discussion of how the alternative would be implemented, (g) a listing and appropriate evaluation of mitigation, stipulations, or other controls enforceable by the agency or another government agency, . . . and (j) a finding on the need for an EIS and, if appropriate, an explanation of the reasons for preparing the EA. If an EIS is not required, the EA must describe the reasons the EA is an appropriate level of analysis. A.R.M. 17.4.609(3).

17. In this case, and under these rules, the EA was inadequate as set forth, *supra,* ¶ 7. The importance to the State of the resources at risk, i.e. the water quality of Little Bitterroot Lake and related water systems, is reflected by the twenty-years of study devoted to this pristine water resource, and by the over 70 area residents signing the petition opposing the mine expansion. Moreover, given Glacier Stone's history of non-compliance with the MMRA which led to this application, DEQ's reliance on "mitigation, stipulations, or other controls enforceable by the agency" is misplaced.

18. The Glacier Stone EA is inadequate under DEQ's MEPA rules.

19. Plaintiffs are harmed by DEQ's actions.

20. Granting the operating permit for the Glacier Stone Mine, as set forth above, is a major state action significantly affecting the human environment, and an environmental impact statement (EIS) should have been prepared.

IV. COUNT TWO – VIOLATION OF THE MMRA

21. The preceding paragraphs are realleged as though set forth in full hereunder.

22. The Metal Mine Reclamation Act (MMRA), and rules implemented thereunder, sets forth detailed requirements for reclamation at § 82-4-336, MCA.

23. As set forth in the Facts above, the Glacier Stone permit fails to meet the requirements of § 82-4-336 (9), MCA, in failing to ensure reclamation to comparable utility and stability of adjacent lands; the reclamation of open pits does not provide for some utility to humans or the environment; the reclamation plan fails to mitigate post-reclamation visual contrasts; and the reclamation plan fails to mitigate or prevent undesirable offsite environmental impacts.

24. As set forth in the Facts above, the Glacier Stone permit fails to meet the requirements of § 82-4-336 (10), MCA, because it fails to provide sufficient measures to prevent the pollution of air and water and the degradation of adjoining lands, including lands owned by Plaintiffs.

25. As set forth in the Facts above, the Glacier Stone permit fails to meet the requirements of § 82-4-336 (12), MCA because it does not provide for permanent landscaping and contouring sufficient to minimize the amount of precipitation that infiltrates into disturbed areas; and fails to prevent objectionable postmining ground water discharges.

26. Plaintiffs are harmed by DEQ's actions.

27. The Glacier Stone Permit violates the MMRA.

V. COUNT THREE – VIOLATION OF THE MONTANA CONSTITUTION

28. The preceding paragraphs are realleged as though set forth in full hereunder.

29. Plaintiffs have a right to a clean and healthful environment. Article II, Section 9, Montana Constitution.

30. DEQ has a duty to maintain and improve a clean and healthful environment (Article IX, Section 1 (1)), and a duty to reclaim all lands disturbed by the taking of natural resources (Article IX, Section 2 (1)).

31. The constitutional duties set forth above are implemented, in part, through MEPA and the MMRA.

32. DEQ has violated the Constitution in failing to adhere to the requirements of MEPA and the MMRA.

REQUEST FOR RELIEF

WHEREFORE, Plaintiffs request relief against Defendant DEQ as follows:

A. For an order declaring void *ab initio* DEQ's issuance of Operating Permit No. 00190 and remanding the permit to DEQ for reconsideration in light of its lawful mandates.

B. For a determination and declaration that issuance of Operating Permit No. 00190 is illegal and violates the Montana Metal Mine Reclamation Act.

C. For a determination and declaration that issuance of Operating Permit No. 00190 is illegal and violates the Montana Environmental Policy Act for its failure to sufficiently review the environmental impacts of the proposed Facility and the issuance of the permit.

D. Upon a favorable decision under Count One above, for injunctive relief, preventing Glacier Stone from operating pending completion of lawful review under MEPA.

E. For reasonable attorneys' fees and expenses as damages under the private attorney general theory and as otherwise provided by law.

F. For costs of suit.

G. For such further relief as this Court deems equitable and just.

Dated this 17 day of April, 2019.

MORRISON SHERWOOD WILSON & DEOLA PLLP

David K. W. Wilson, Jr.

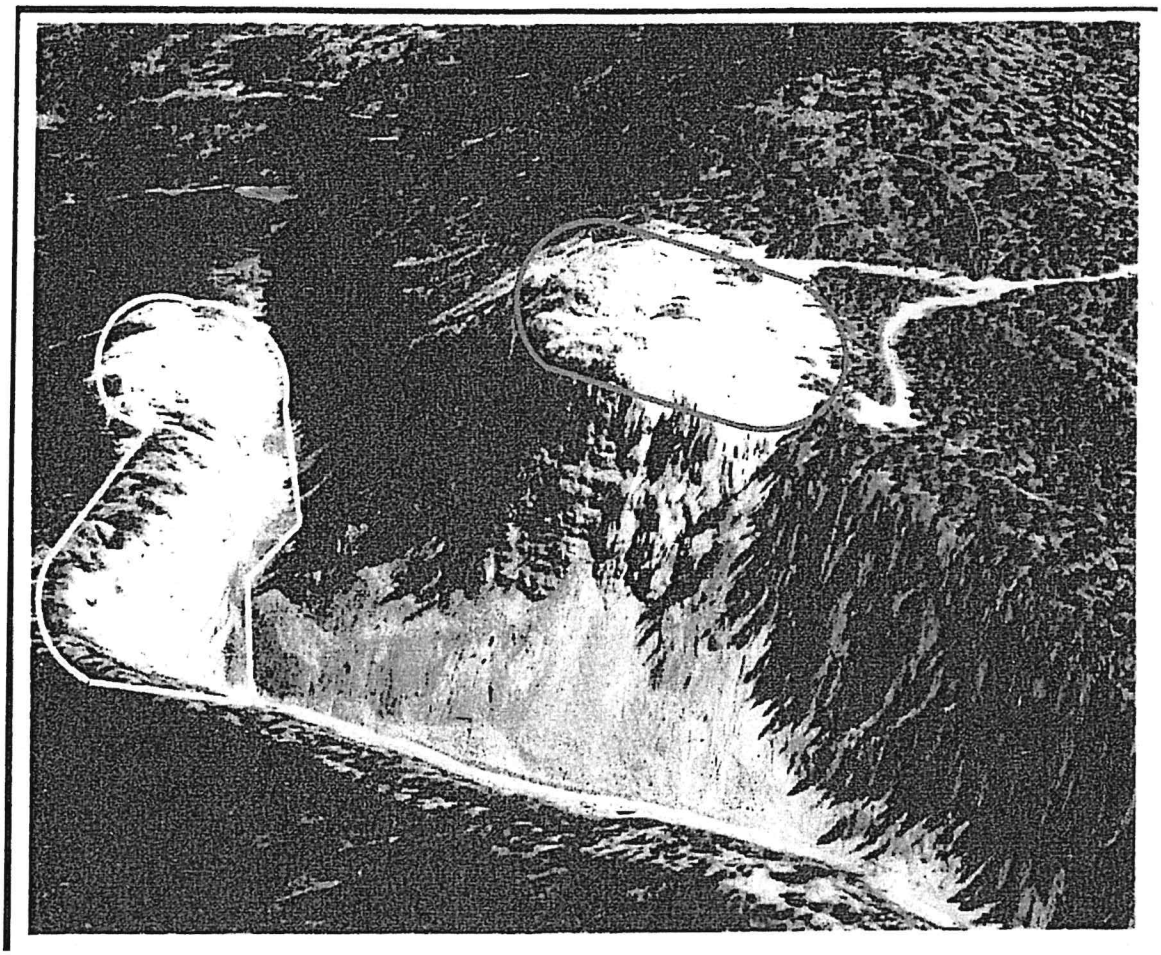

Figure 2. Area to be quarried at the Canyon Creek site with the proposed up to 50-foot top removal (enclosed in red). The Glacier Stone Mine is composed of the Canyon Creek site and the Glacier Mountain site. Glacier Mountain site is enclosed in yellow.

The quarry sites would be expanded by removing vegetation, stripping and stockpiling available soil for future reclamation use, and removing overburden or waste rock to access the desired rock materials. Generally, the materials to be quarried are rock outcrops and talus slopes. The upper elevation of the Canyon Creek Site would be lowered by up to fifty feet (See Figure 2). Depending on the product being produced, rock may be removed by various methods ranging from picking, drilling, and blasting followed by excavation and hauling, ripping with a bulldozer or excavator followed by removal, or drilling and sawing with diamond saws and splitting blocks followed by removal.

A rock or stone collection site would be worked with hand bars and other hand tools, or with loaders, backhoes or other similar equipment that would lift rock and stones from the ground surfaces, or from under thin soil layers. The rock materials would be sorted, stockpiled and placed on pallets for removal. The rock products would be loaded onto trucks and shipped to Glacier Stone's Kalispell plant operation using existing roads. The access roads are depicted on Exhibit A in Glacier Stone's Application.

EXHIBIT
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MONTANA ELEVENTH JUDICIAL DISTRICT COURT, FLATHEAD COUNTY

HERB ENGEL and ART VAIL, Plaintiffs, v. MONTANA DEPARTMENT OF ENVIRONMENTAL QUALITY, an agency of the State of Montana, Defendant.	Cause No. DV-15-2019-0000404-DK **COMPLAINT** Judge Amy Eddy

COME NOW, Plaintiffs Herb Engel and Art Vail, by and though their attorney, Lindsey W. Hromadka of J.W. Anderson & Associates, PLLC, seeking review of the March 8, 2019 Final Environmental Assessment for the Glacier Stone Supply, LLC mine in Flathead County. This Complaint alleges violations of the Montana Environmental Policy Act, the Metal Mine Reclamation Act and the Montana Constitution.

INTRODUCTION

1. This case challenges state approval for a plan by Glacier Stone Supply, LLC ("Glacier Stone") to mine two rock quarries by essentially stripping the top of Canyon Creek mountain, and picking, drilling, blasting and then excavating, hauling, ripping with a bulldozer or excavator and removing forty-five (45) acres of land. The Glacier Stone site is approximately three miles northwest of Marion, Montana and within a mile of, and very visible from, Little Bitterroot Lake, a pristine and sensitive lake known for its recreational

and aesthetic values to local landowners, state residents and tourists. Glacier Stone applied for permit under the Metal Mine Reclamation Act ("MMRA") as a "corrective action" after it had been caught violating the Small Miner's Exclusion Statement ("SMES") of the MMRA in 2016. During the Draft Environmental Assessment ("Draft EA") period more than seventy landowners petitioned the Montana Department of Environmental Quality ("DEQ") to further investigate the impacts of the Glacier Stone permit in general and specifically on Little Bitterroot Lake. However, without sufficiently addressing these concerns, on March 8, the DEQ determined that the mining would not cause any significant environmental impacts and approved the project.

2. DEQ's determination violated the Montana Environmental Policy Act ("MEPA") which was enacted to "prevent or eliminate damage" by fostering more informed decision making by state agencies. *Pompeys Pillar Historical Association v. Montana Deparmtent of Environmental Quality*, 2002 MT 352, ¶ 17, 313 Mont. 401, 61 P.3 148. Although the DEQ acknowledged in its Final Environmental Assessment ("EA") that the mining would impact viewshed aesthetics, and could impact unique, endangered, fragile or limited environmental resources, among other things, DEQ arbitrarily deemed these impacts insignificant without disclosing any legitimate rationale for its determination based on the evidence before the agency. Additionally, DEQ completely ignored legitimate concerns regarding Little Bitterroot Lake, including impacts to water quality and aquatic life and habitats. Absent a rational finding that mining at the Glacier Stone site will not cause significant environmental impacts, DEQ was required under MEPA to prepare an environmental impact statement ("EIS") thoroughly vetting the project's impacts.

3. DEQ failed to take a hard look at the environmental impacts of mining at the Glacier Stone

site, and dismissed evidence of significant impacts requiring preparation of an EIS. DEQ's decision to issue a permit to Glacier Stone based on this incomplete environmental analysis was therefore arbitrary, capricious and contrary to MEPA.

PARTIES

1. Plaintiff Herb Engel ("Engel") is a resident of Flathead County. He owns several hundred acres near the Glacier Stone site, including a large parcel within one mile of the site and directly south of it. He also owns property adjacent to Little Bitterroot Lake. Engel is a member of the Little Bitterroot Lake Association ("LBLA"). Engel signed a Petition submitted to the Montana Department of Environmental Quality ("DEQ") by the LBLA, which included significant comments expressing concern about Little Bitterroot Lake, as well as an addendum addressing concerns with the incomplete and inaccurate Draft EA, including comments and questions about water quality, storm water run-off, air quality, dust impacts, limited resources, aquatic life, wetland, reclamation generally, and soil quality and stability, among other things.

2. Plaintiff Art Vail ("Vail") is a resident of Flathead County. He owns property near Marion, Montana on Little Bitterroot Lake. Vail is also a member of the LBLA. Vail commented on the Draft EA regarding aesthetics, run off, air pollution, noise pollution and reclamation concerns arising from the Glacier Stone permit, as well as Glacier Stone's prior violations of the SMES. He also signed the Petition submitted by the LBLA which included comments and questions concerning Little Bitterroot Lake, as well as an addendum addressing several concerns with the incomplete and inaccurate Draft EA as explained more thoroughly above.

3. DEQ's decision concerning the EA will adversely affect Plaintiffs. The EA ignores crucial information that will adversely affect the Plaintiffs, which was not addressed by the DEQ. Further, the EA will degrade the safety, welfare, wildlife, and aesthetic values of the Little Bitterroot Lake and the surrounding area, thereby harming the property values and quality of life for Plaintiffs. Glacier Stone's mining allowed under the MMRA pursuant to the DEQ's decision challenged herein will impair the use and quiet enjoyment of Plaintiffs' real property on a regular basis.

4. The Court can redress all of these injuries by declaring the EA insufficient and unlawful and providing relief as requested herein.

5. Defendant DEQ is an agency of the State of Montana. It regulates hard rock mining through the Metal Mine Reclamation Act ("MMRA") and is required to comply with the Montana Environmental Policy Act ("MEPA").

JURISDICTION AND VENUE

6. Jurisdiction and venue are proper in this Court. This Court has jurisdiction over the parties and the subject matter of this action pursuant to Mont. Code Ann. §§ 75-1-201(5)(a); 82-1-301, *et. seq.*, and Article II §§ 3, 16 and 17, Article VII § 4(1), and Article IX § 1 of the Montana Constitution. Venue is proper in this district pursuant to Mont. Code Ann. § 75-1-108.

ALLEGATIONS COMMON TO ALL COUNTS

7. Glacier Stone has operated a mine under the SMES near Marion to the east of Little Bitterroot Lake since 2004. The SMES allows a mine to operate without a permit so long as the disturbed area does not exceed five acres, and so long as it does not pollute any water

bodies. *See* Mont. Code Ann. § 82-4-305. Little Bitterroot Lake is less than one mile from the Glacier Stone site. Part of the site sits on a ridge which overlooks Little Bitterroot Lake.

8. In December 2016, DEQ issued a violation letter to Glacier Stone because it had exceeded the amount of mining allowed under the SMES. Rather than pursue corrective action and require Glacier Stone to comply with the SMES, DEQ allowed Glacier Stone to continue to operate the mine in violation of the SMES while it applied for a permit under the MMRA.

9. In its permit application under the MMRA, which the DEQ has approved, Glacier Stone proposes to mine for 8 hours per day, 5 days per week, for a period of 25 years with a proposed disturbance area of thirty (30) acres within a forty-five (45) acre boundary. Glacier Stone intends on "mountain top mining," which means removing the top 50 feet of the Canyon Creek site, which is visible from Little Bitterroot Lake and the surrounding area.

10. In several instances the EA is inaccurate, incomplete or contradictory:

    1. The EA states that "mining operations are essentially creating large depressions in porous material" and that "allows for rapid infiltration of runoff and snowmelt both within the permit boundary and just outside the permit boundary." The EA notes that DEQ inspectors noticed sediment discharged outside the permit boundary, yet the DEQ found no indication that runoff could reach Little Bitterroot Lake despite the observation of discharge outside the permit boundary and distance of less than a mile between the site and the Lake. This is contradictory and entirely ignores the seasonal streams that flow from the site to the Little Bitterroot Lake.

    2. The EA states the MMRA does not require the use of dust suppressants for road maintenance and the DEQ would essentially trust Glacier Stone to apply dust suppressant as needed, but then states that "impacts to air quality would be minor due to the limited area of operation and use of water for dust control." This is contradictory.

3. The EA admits that the views and aesthetics will be significantly impacted by the mine and "last significantly beyond the 25 year life of the mine due to the length of time it will take to produce mature trees," especially considering the Canyon Creek quarry will lower the elevations of the area by up to 50 feet; however, the DEQ dismisses these impacts as a legitimate concern because the views are "limited" to Little Bitterroot Lake – which, the DEQ explains in other areas of the EA, is populated by several subdivisions and hundreds of landowners. The EA incompletely addresses the aesthetic impact, and completely fails to address how it would impact recreational use and the economy of Little Bitterroot Lake.

4. The EA declined to address concerns regarding the Little Bitterroot Lake watershed by stating it is "beyond the scope of this environmental assessment;" however, the DEQ also stated that the changes in topography would be minor and "not affect the watershed" without giving any explanation or evaluation of the watershed in the EA. This is incomplete and inaccurate.

5. Glacier Stone's ability to blast in the site is contradictory throughout the EA. At one point in the EA, the DEQ states that Glacier Stone plans to blast "once every few years," but in other sections of the EA, Glacier Stone is permitted to blast "less than once a year at the site."

6. The EA states that "approximately 66% of the proposed site is forested," but then when addressing direct impacts on terrestrial species and endangered, fragile or limited environmental resources dismisses any direct impacts to Canada Lynx because "[t]here is no boreal forest habitat within the permit boundary." This is contradictory.

7. The EA requires re-vegetation pursuant to Mont. Code Ann. § 82-4-336, but acknowledges "soil is expected to be shallow or non-existent over much of the proposed site." Despite the lack of soil, the DEQ is not requiring Glacier Stone import soils for reclamation purposes. Thus, the statements in the EA that "disturbance at the site would be a rocky outcrop during mining operation and would be a *vegetated* plateau post reclamation" and that "Over time disturbances to the viewshed would be less noticeable as revegetation and weathering of rock surfaces occurs" are contradictory and unlikely.

8. The EA does not in any way address or evaluate the potential impacts of noise and dust from the site on the recreational use and economy of Little Bitterroot Lake, even when required to analyze direct impacts under "Access to and Quality of Recreational Activities" or "Cultural Uniqueness and Diversity."

9. The EA fails to consider any reasonable alternatives to the permit as applied for by Glacier Stone.

10. In general, the EA's findings that the severity, duration, geographic extent and frequency of the occurrence of the mining impacts would be "minimal" is contradicted by the fact that the mine will operate at least 8 hours per day, 5

days a week for a period of 25 years.

11. Glacier Stone's mining and permit under the MMRA is extremely contentious. Plaintiffs, as well as 75 other neighboring landowners, signed and submitted a Petition to DEQ asking it to further analyze impacts to Little Bitterroot Lake and other areas of concern, which the DEQ declined to do.

12. Little Bitterroot Lake is the headwaters of the Little Bitterroot River. It is located in the Salish Mountains Ecoregion in a rare area of humid continental climate in Montana. There are several intermittent and seasonal creeks that flow into Little Bitterroot Lake, one of which is located at the Glacier Stone site. Groundwater contributes a substantial portion of water to the lake. The LBLA was founded in 1988 to "preserve the high recreational value of Little Bitterroot Lake, maintaining its aesthetic integrity, and to educate the public and others as to the value of Little Bitterroot Lake as a recreational resource." Realizing the Lake's unique and fragile nature, the LBLA has funded and conducted the collection of water quality monitoring data on the lake since 1999. Further, Montana State Parks operate a State Park Recreation Site on Little Bitterroot Lake, which is used and cherished by Montanans. The EA does not comment on the potential impact of the Glacier Stone mining on Little Bitterroot Lake and does not take into account the years of data collected by LBLA. Additionally, the EA does not comment or take into consideration the impact of Glacier Stone's permit under the MMRA on the recreational and aesthetic value of Little Bitterroot Lake to both residents and visitors.

13. Plaintiffs, as members of the LBLA, property owners on Little Bitterroot Lake, and residents near the mining site, stand to be significantly impacted by the mine operations.

COUNT ONE – VIOLATION OF MEPA

14. The allegations set forth in Paragraph Nos. 1-13 above, are plead and incorporated herein as if fully set forth.

15. MEPA is intended to implement the environmental imperatives of Art. II, Section 3 and Art. IX, Section 1 of the Montana Constitution. *See* Mont. Code Ann. § 75-1-102.

16. Under MEPA, the DEQ is required to "take a 'hard look' at the environmental impacts of a given project or proposal." *Montana Wildlife Federation v. Montana Bd. Of Oil and Gas Conservation, 2012 MT 128*, ¶ 43, 365 Mont. 232, 280 P.3d 877. The "hard look" must include an evaluation of all of the project's direct, indirect, and cumulative environmental impacts, as well as all reasonable alternatives. *See* Mont. Code Ann. § 75-1-101, *eq. seq.*; Admin. R. Mont. 17.4.609.

17. DEQ must prepare an environmental impact statement ("EIS") before granting an operation permit if the proposed project will "significantly affect[] the quality of the human environment." Admin. R. Mont. 17.4.607. DEQ may issue a permit without preparing an EIS only if it rationally determines through preparation of an EA that the project's impacts will not be significant or that otherwise significant impacts can be mitigated below the level of significance. *See* Admin R. Mont. 17.4.607(1)(b) and 17.4.607(4) ("for an EA to suffice in this instance, the agency must determine that all of the impacts of the proposed action have been accurately identified, that they will be mitigated below the level of significance, and that no significant impact is likely to occur").

18. To determine the significance of impacts, the agency must consider the following, among other things:

(a) the severity, duration, geographic extent, and frequency of occurrence of the impact;

(b) the probability that the impact will occur if the proposed action occurs; or conversely, reasonable assurance in keeping with the potential severity of an impact that the impact will not occur;

(c) growth-inducing or growth-inhibiting aspects of the impact, including the relationship or contribution of the impact to cumulative impacts;

(d) the quantity and quality of each environmental resource or value that would be affected, including the uniqueness and fragility of those resources or values;

(e) the importance to the state and to society of each environmental resource or value that would be affected.

See Admin R. Mont. 17.4.608.

19. The EA itself must analyze, among other things, the following: (b) the environmental sensitivity of the area affected by the proposed action; (c) the degree of uncertainty that the proposed action will have a significant impact on the quality of the human environments.

20. Further, the EA must include, among other things, the following:

(d) an evaluation of the impacts, including cumulative and secondary impacts, on the physical environment. This evaluation may take the form of an environmental checklist and/or, as appropriate, a narrative containing more detailed analysis of topics and impacts that are potentially significant, including, where appropriate: terrestrial and aquatic life and habitats; water quality, quantity, and distribution; geology; soil quality, stability, and moisture; vegetation cover, quantity and quality; aesthetics; air quality; unique, endangered, fragile, or limited environmental resources; historical and archaeological sites; and demands on environmental resources of land, water, air and energy;

(e) an evaluation of the impacts, including cumulative and secondary impacts, on the human population in the area to be affected by the proposed action. This evaluation may take the form of an environmental checklist and/or, as appropriate, a narrative containing more detailed analysis of topics and impacts that are potentially significant, including where appropriate, social structures and mores; cultural uniqueness and diversity; access to and quality of recreational and wilderness activities; local and state tax base and tax revenues; agricultural or industrial production; human health; quantity and distribution of employment; distribution and density of population and housing; demands for government services; industrial and commercial activity; locally adopted environmental plans and goals; and other appropriate social and economic circumstances;

(f) a description and analysis of reasonable alternatives to a proposed action whenever alternatives are reasonably available and prudent to consider and a discussion of how the alternative would be implemented;

(g) a listing and appropriate evaluation of mitigation, stipulations, and other controls enforceable by the agency or another government agency;

(h) a listing of other agencies or groups that have been contacted or have contributed information; . . .

(j) a finding on the need for an EIS and, if appropriate, an explanation of the reasons for preparing the EA. If an EIS is not required, the EA must describe the reasons the EA is an appropriate level of analysis.

See Admin R. Mont. 17.4.609

21. In addition, the DEQ must prepare environmental impact statements whenever an "action is 'controversial,' that is, when 'substantial questions are raised as to whether a project ... may cause significant degradation of some human environmental factor.'" *See National Parks Conservation Ass'n v. Babbitt*, 241 F.3d 736 (9th Cir. 2001); *Protecting Paradise v. Mont. Dep't of Envtl. Quality*, No. DV-12-123, slip. op. at 10–11 (Mont. 6th Jud. Dist. July 16, 2013) (applying "substantial questions" standard in MEPA case). Where an uncertain impact of an agency action is potentially severe, DEQ may not deem it insignificant without "reasonable assurance … that the impact will not occur." Admin. R. Mont. 17.4.608(1)(b).

22. In this case, the EA was inadequate as set forth herein. The importance to the State of the resource at risk, Little Bitterroot Lake's water quality and tributaries, is reflected by the decades long study of the water body, and by the overwhelming response from the neighboring property owners opposing the MMRA permit. DEQ's reliance on "mitigation, stipulations, or other controls enforceable by the agency" is misplaced considering Glacier Stone's history of violating the SMES.

23. The Glacier Stone EA is inadequate under MEPA rules.

24. Plaintiffs are specifically harmed by DEQ's actions.

25. Granting the permit for the Glacier Stone Mine under the MMRA is a major state action significantly affecting the human environment, and an EIS should have been prepared.

COUNT TWO – VIOLATION OF THE MMRA

26. The allegations set forth in Paragraph Nos. 1-25 above, are plead and incorporated herein as if fully set forth.

27. The MMRA was enacted to "provide adequate remedies for the protection of the environmental life support system from degradation and provide adequate remedies to prevent unreasonable depletion and degradation of natural resources." Mont. Code Ann. § 82-4-301(2)(a).

28. To that end, the MMRA sets forth specific reclamation requirements in Mont. Code Ann. § 82-4-336 to "prevent undesirable land and surface water conditions detrimental to the general welfare, health, safety, ecology, and property rights of the citizens of the state." Mont. Code Ann. § 82-4-301(3).

29. As set forth herein, the Glacier Stone permit fails to meet the requirements of Mont. Code Ann. § 82-4-336 by failing to ensure: (i) reclamation to comparable utility and stability of adjacent lands; (ii) the reclamation of open pits does not provide for some utility to humans or the environment; (iii) the reclamation plan fails to mitigate post-reclamation visual contrasts; and (iv) the reclamation plan fails to mitigate or prevent undesirable offsite environmental impacts.

30. In addition, the Glacier Stone permit violates Mont. Code Ann. § 82-4-336(10) by failing

to provide sufficient measures to prevent the pollution of air and water and the degradation of adjoining lands.

31. The Glacier Stone permit fails to meet the requirements of Mont. Code Ann. § 82-4-336(12) by failing to provide for permanent landscaping and contouring to minimize the amount of precipitation that infiltrates into disturbed areas that are to be graded, covered, or vegetated.

32. Plaintiffs are specifically harmed by DEQ's actions.

33. The Glacier Stone Permit violates the MMRA.

COUNT THREE – VIOLATION OF MONTANA CONSTITUTION

34. The allegations set forth in Paragraph Nos. 1-33 above, are plead and incorporated herein as if fully set forth.

35. The State's constitutional obligation to prevent unreasonable environmental degradation under Article II, Section 3, and Article IX, Section 1 of the Montana Constitution is expressly implemented by MEPA, Mont. Code Ann. § 75-1-102, which promotes a healthy environment by requiring state agencies to thoroughly evaluate the environmental consequences of activities they permit before those activities occur.

36. The State's constitutional obligation to prevent unreasonable environmental degradation under Article II, Section 3, and Article IX, Section 1 of the Montana Constitution is expressly implemented by the MMRA, Mont. Code Ann. § 82-4-301, which provides for adequate remedies for the protection of the environmental life support system from degradation and provides adequate remedies to prevent unreasonable depletion and

degradation of natural resources.

37. Plaintiffs have a right to a clean and healthful environment. *See* Article II, Section 9, Montana Constitution.

38. DEQ has a duty to maintain and improve a clean and healthful environment pursuant to the Montana Constitution, Article IX, Section 1, and a duty to reclaim all lands disturbed by the taking of natural resources pursuant to Article IX, Section 2 of the Montana Constitution.

39. DEQ has violated the Montana Constitution by failing to adhere to the requirements of MEPA and the MMRA.

PRAYER FOR RELIEF

Now, therefore, the Plaintiffs pray for judgment from this Court in their favor and against Defendants as follows:

1. For an order declaring void ab initio DEQ's issuance of Operating Permit No. 00190 and remanding the permit to DEQ for reconsideration in light of its lawful mandates;

2. For a determination and declaration that issuance of Operating Permit No. 00190 is illegal and violates the MMRA;

3. For a determination and declaration that issuance of Operating Permit No. 00190 is illegal and violates the MEPA for its failure to sufficiently review the environmental impacts of the proposed mine and the issuance of the permit;

4. Upon a favorable decision under Count One above, for injunctive relief, preventing Glacier Stone from operating pending completion of lawful review under MEPA.

5. For reasonable attorneys' fees and expenses as damages under the private attorney general theory and as otherwise provided by law.

6. For costs of suit.

7. For such other relief as this Court deems just and proper.

Dated this 6th day of May, 2019

J.W. ANDERSON & ASSOCIATES, PLLC

/s/ Lindsey Hromadka
Lindsey W. Hromadka

Hon. Dan Wilson
District Court Judge, Dept. D
Flathead County Justice Center
920 South Main Street, Suite 310
Kalispell, MT 59901
Phone: (406) 758-5906

MONTANA ELEVENTH JUDICIAL DISTRICT COURT, FLATHEAD COUNTY

Henry Belk and Diane Belk, Plaintiffs, vs. Montana Department of Environmental Quality, an agency of the State of Montana, and Glacier Stone Supply, LLC, Defendants, State of Montana, by and through the Office of the Attorney General, Intervenor, Herb Engel and Art Vail, Plaintiffs, vs. Montana Department of Environmental Quality, an agency of the State of Montana, and Glacier Stone Supply, LLC, Defendants.	Cause No's DV-15-2019-328 (D), DV-15-2019-404 (A) ORDER ON MOTIONS FOR SUMMARY JUDGMENT

This matter is before the Court on various motions for summary judgment.

Plaintiffs Henry Belk and Diane Belk and Herb Engel and Art Vail have filed a joint motion for summary judgment (Dkt. No. 45). Plaintiffs request a declaration that DEQ's issuance

of Operating Permit No. 00190 (the Permit) to Defendant Glacier Stone, LLC (Glacier Stone) was made in violation of the Metal Mine Reclamation Act (MMRA) and, therefore, void *ab initio*. Plaintiffs further request a declaration that the Environmental Assessment conducted by DEQ is illegal and violates the Montana Environmental Policy Act (MEPA).

The Plaintiffs' joint motion is opposed.

Defendant Montana Department of Environmental Quality (DEQ) sets out its opposition to the Plaintiffs' joint motion in its answer brief and, additionally, requests summary judgment in its favor on the claims in Plaintiffs' Amended Complaints (Dkt. No. 54). Glacier Stone sets out its opposition to the Plaintiffs' joint motion in its answer brief (Dkt. No. 55). Intervenor State of Montana sets out its position in its answer brief (Dkt. No. 52) and, more particularly, requests that this Court avoid the constitutional issue raised by the Plaintiffs – whether § 75-1-201(6)(c), MCA, satisfies Montana's constitutional right to a clean and healthful environment.

Further, Glacier Stone has moved for summary judgment (Dkt. No. 48) on all issues raised in the Plaintiffs' Amended Complaints. The motion is opposed. Plaintiffs set out their opposition to Glacier Stone's motion in their answer brief (Dkt. No. 53).

The motions are fully briefed.

On October 26, 2020, the Court conducted a hearing on the motions. Attorneys David K. W. Wilson, Jr. and Lindsey W. Hromadka argued for Plaintiffs. Special Assistant Attorney General Edward Hayes argued for DEQ. Attorney Mark L. Stermitz argued for Glacier Stone. Assistant Attorney General Jeremiah Langston appeared for Intervenor State of Montana.

The motions are submitted and ready for decision.

ANALYSIS

Because the Legislature modeled the Montana Environmental Policy Act (MEPA) on the National Environmental Policy Act (NEPA), federal authority construing NEPA is generally persuasive guidance in the construction of similar provisions of MEPA. *Bitterrooters for Planning, Inc. v. Mont. Dep't of Envtl. Quality*, 2017 MT 222, ¶ 18, 388 Mont. 453, ¶ 18, 401 P.3d 712 (other citations omitted). Federal courts reviewing agency actions taken under NEPA apply the standard at 5 U.S.C. § 706(2) of the federal Administrative Procedure Act, which provides that a reviewing court shall "hold unlawful and set aside agency action . . . found to be . . . arbitrary, capricious . . . or otherwise not in accordance with law[.]" *Alliance for the Wild Rockies v. Probert*, 412 F. Supp. 3d 1188, 1195-96 (D. Mont. 2019). Where an agency's administrative record is complete and constitutes the whole and undisputed facts underlying agency decision making, summary judgment is the appropriate vehicle to address claims that the agency action is arbitrary, capricious or unlawful. *Id*. at 1196 (citing *City & Cty. of S.F. v. United States*, 130 F.3d 873, 877 (9th Cir. 1997) ("[T]he function of the district court is to determine whether or not as a matter of law the evidence in the administrative record permitted the agency to make the decision it did."). All parties, except Intervenor State of Montana,[1] have requested summary judgment in their favor. Further, this Court previously denied the Plaintiffs' joint motion to supplement the administrative record. Therefore, this Court's consideration of the parties' arguments in support of their requests for summary judgment is appropriately limited to the administrative record, which is deemed to be both complete and constituting the whole and undisputed facts underlying DEQ's issuance of the Permit to Glacier Stone under the MMRA

[1] Intervenor State of Montana is participating in this action for the purpose of defending the constitutionality of § 75-1-201(6)(c), MCA, of the Montana Environmental Policy Act against the challenge that the statute violates Montana's right to a clean and healthful environment.

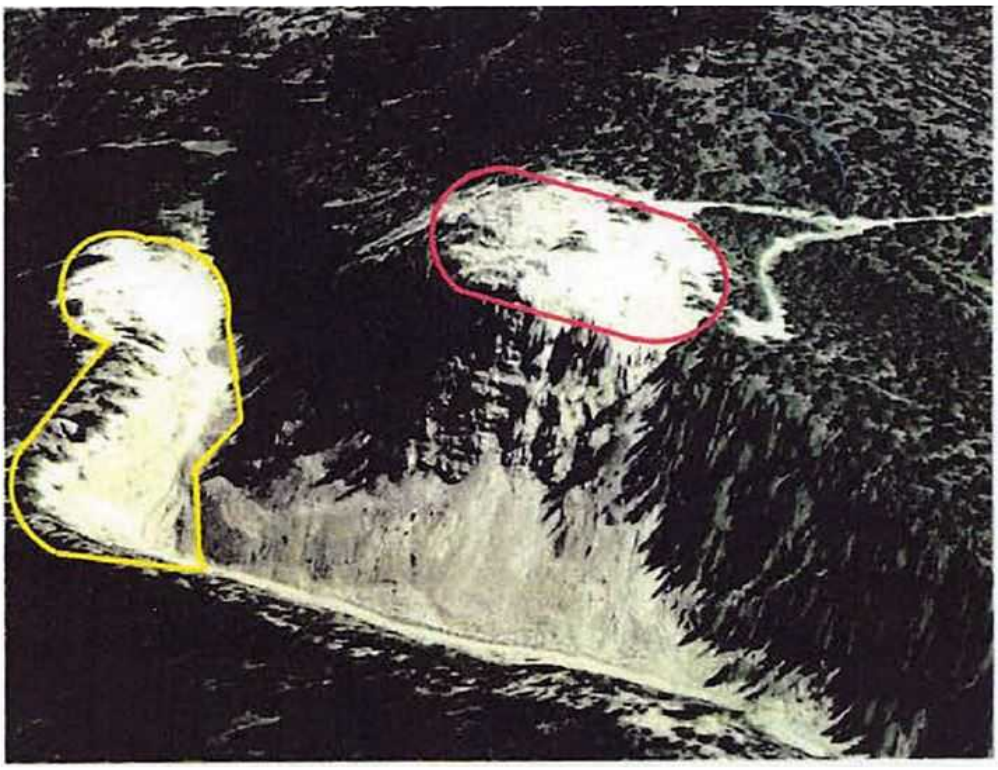
and DEQ's determination that its issuance of the Final Environmental Assessment (EA or Final EA) satisfies DEQ's obligation for review of Glacier Stone's application under MEPA.

In relevant part, the administrative record sets out the following matters.

1. On April 27, 2017, Glacier Stone applied for an operating permit to mine for decorative rock on property in Flathead County that is less than one mile from Little Bitterroot Lake. (AR 896; 914). Glacier Stone had previously operated under a Small Miner Exclusion Statement (SMES) in accordance with the Metal Mine Reclamation Act (MMRA), which allows miners, under certain conditions, to operate mines less than five acres in size without an operating permit. (*Id.*). Glacier Stone leases the property it uses for the mine. (AR 892; 914)
2. Glacier Stone is a supplier of architectural and landscaping stone and has been operating at two sites under SMES 07-027 since the early 2000s, Canyon Creek and Glacier Mountain. With its application, it sought to convert the existing operation from one under the SMES to a single general operating permit under the MMRA. (AR 50)
3. Glacier Stone violated its SMES permit, and because it exceeded the SMES requirements, it had to apply for an operating permit, or reclaim its operation back into compliance with the SMES. It chose to apply for the permit. The EA provides the following detailed description of the SMES and how its violation led to the current application:

> Glacier Stone has previously conducted rock mining operations at the site under (SMES) #07-27 that was issued in 2015. SMES #07-27 covered an operation consisting of mining at two sites (Canyon Creek and Glacier Mountain) located in close proximity to each other. Glacier Stone is applying for an operating permit to cover the mining operations conducted at these sites because the disturbance area has grown beyond 5-acres - the size limitation for operating under the SMES. . . . The option for applying for an operating permit was a corrective action identified in a December 27, 2016 (DEQ) violation letter. The violation letter was issued by DEQ to Glacier Stone for operating two SMES sites within 1-mile of each other, and for having a disturbance between the two sites that exceeded the 5-acre SMES limitation. (AR 914).

4. After DEQ processed Glacier Stone's application, DEQ prepared a draft environmental assessment (Draft EA) on July 20, 2018. (AR 892-909).
5. In the Draft EA, DEQ described Glacier Stone's proposal and purported to evaluate its impacts. Rock would be removed by handpicking, drilling and blasting, followed by excavation and hauling, ripping with a bulldozer or excavation followed by removal. (AR 895).The mine was projected to operate for 25-years, 9 ½ -hours per day Monday through Friday. (AR 896).The existing mining sites under the SMES would be expanded by removing vegetation, stripping and stockpiling available soil, and removing overburden or waste rock to access the desired rock. (AR 895)
6. The Draft EA noted that the proposal includes essentially a removal of a mountain top by 50-feet as illustrated below:



7. In the Draft EA, DEQ stated "[n]o baseline water quality and quantity measurements in the greater project area have been collected." (AR 898). DEQ states in the Final EA that "[n]o

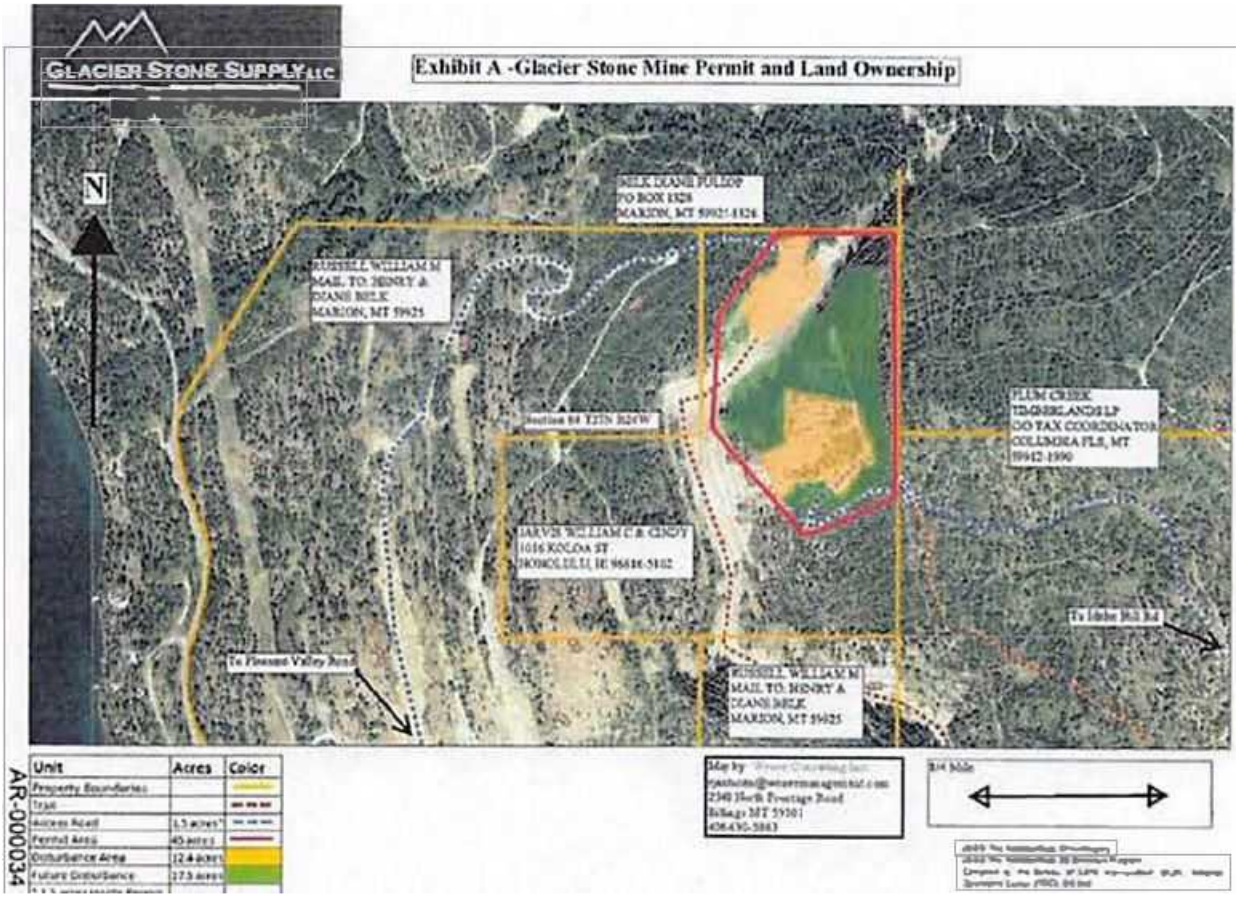
baseline water quality and quantity measurements in the greater project area have been collected by DEQ." (AR 0920). Further, the Draft EA stated "[t]here will be minimal risk of degradation to surface or groundwater resulting from this project because of the distance to surface water and the water table. There would be some modifications to storm water run-off patterns due to changes in topography and storm water control best management practices."

8. The Draft EA stated, "[m]inimal particulate would be produced or become airborne during operations due to the breaking up and movement of rock product."
9. The Final EA concludes that it has not identified any "long-term or significant impacts associated with the proposed activities on any environmental resource." (AR 908)
10. DEQ provided the Code Compliance Officer for the Flathead County Planning and Zoning Office an electronic copy of the Draft EA. The Code Compliance Officer indicated that there were no County regulations or plans applicable to the quarrying activities to be conducted under the proposed permit. The Little Bitterroot Lake Neighborhood Plan is part or the Flathead County Growth Policy. The quarries operated by Glacier Stone are not located within the area encompassed by the Little Bitterroot Lake Neighborhood Zoning District. (AR 942)
11. The DEQ received several dozen comments regarding the Draft EA, including comments from the Plaintiffs. (AR 937-992)
12. In the section of the Draft EA addressing "private property impacts," the document addressed only impacts to Glacier Stone's property, not to any property surrounding the mine that will be affected, such as the Belks' or other potentially affected property. (AR 905-906)."DEQ's issuance of an operating permit with conditions could affect the applicant's real property. DEQ has determined, however, that the permit conditions are reasonably necessary to ensure

compliance with applicable requirements of the (MMRA) .... [t]herefore, DEQ's issuance of the operating permit with conditions would not have private property taking or damaging implications." (AR 906).This statement was carried over into the Final EA. (AR 932-933)

13. The Belks submitted extensive comments on the Draft EA through counsel (AR 937-945), and through their consultant, Water and Environmental Technology (WET). (AR 946-960)

14. Glacier Stone's application materials for the Operating Permit clearly show the Belks' property nearly surrounding the property Glacier Stone leases for the mining operations (AR 34):



15. The letter from Belks' counsel dated August 2, 2018 noted this fact. It also noted that they have "property rights that are adversely affected by the actions of Glacier Stone." (AR 937).The letter contains a detailed history of the property leased by Glacier Stone, and the

Belk properties, and describes the Belks' purchase of portions of property formerly owned by Williams Jarvis (Jarvis). Glacier Stone currently leases other property owned by Jarvis for the mine. Attached to the letter was Glacier Stone's Exhibit A (photo immediately above) showing the Belks' property in relation to the Glacier Stone property. (AR 945).The letter discussed how the Belks' claim a "reciprocal access easement through the center of the mining property," delineated on AR 945, which, at the time, Glacier Stone was blocking. The letter went on to state: "The Draft EA should thoroughly evaluate the mine's impacts on the Belks' property and property rights. Instead, the EA contains no discussion of the impacts to neighboring property owners, including the Belks, nor does it discuss the access easement that the Belks have through the mine site. Glacier Stone has routinely interfered with the Belks' access easement as well as trespassed on other neighboring property of the Belks." (AR 938).The letter then noted one of MEPA's purposes is to "protect the right to use and enjoy private property free of undue government regulations" (§ 75-1-102 (2), MCA); and that environmental reviews must evaluate "any regulatory impacts on private property rights, including whether alternatives that reduce, minimize or eliminate the regulation of private property rights has been analyzed." (AR 939)

16. DEQ received a comment on the Draft EA asserting that it failed to discuss impacts to the Belk's property or their road easement. In response, DEQ stated that it was aware of a reciprocal easement agreement signed by predecessors in interest to the Belks and Glacier Stone, that any dispute regarding the existence or enforcement of the easements was a civil matter, and that DEQ was not a court and did not have the authority to adjudicate competing civil matters regarding private property. (AR 939). Section 82-4-336(10), MCA, requires a reclamation plan to provide sufficient measures to ensure public safety. DEQ considered

whether members of the public had access to the quarry site which could potentially expose them to safety risks. In that context, DEQ reviewed the reciprocal access agreement and other documents. Based on that review, DEQ expressed a belief that the Belks did not have a road easement that goes through the quarry site. DEQ, however, reiterated that DEQ's action on Glacier Stone's application for an operating permit was not the proper forum to adjudicate the Belks' asserted access easement because DEQ is not a court and has no authority to adjudicate private property claims. (AR 939)

17. DEQ then stated: "The private property being protected in[§ 75-1-201 (l)(b)(iv)(D), MCA] is the private property rights of the applicant. DEQ conducts the private property assessment if it is proposing to deny an application for a permit or to place in the approval of the application a condition that has not been agreed to be (sic) the regulated person at the time of the publication of the EA or EIS [Environmental Impact Statement]. Property owned by surrounding landowners are not being regulated and, therefore, are not subject to the private property analysis set forth in § 75-1-201 (l)(b)(iv)(D), MCA." (AR 939).
18. AR 561 shows the "New Road" for the mine running through the Belks' property into the NW comer of the permit area. AR 34 depicts an "Access Road" on the west side of the Jarvis property traversing the Belk property. That road has been abandoned. AR 34 also shows a second road running through the Plum Creek property to the east (now owned by Belks) into the mine permit area. That access route is limited to residential use, and accordingly, Glacier Stone does not have access to the mine permit area from the east. (AR 548; 554)
19. AR 555-561 is an "Amended and Restated Reciprocal Easement Declaration" between Wilkins, Jarvis and Trudeau. The "New Road" depicted on AR 561 is the main access road now used by Glacier Stone. Under the Amended and Restated Reciprocal Easement, the

Belks, as owners of the subservient estate, are subject to this access easement providing the main access to the Glacier Stone Mine.

20. Plaintiff Art Vail submitted a comment, which was incorporated into the Draft EA. (AR 865).Vail's comment noted the past history of Glacier Stone's violations of its SMES permit. Vail additionally noted the fact that Glacier Stone had "trashed" the mountain top by throwing rock over the cliff face, which destroyed the "aesthetics from the lake[.]" Vail also commented on the water pollution of Little Bitterroot Lake, air pollution and noise pollution – all caused by Glacier Stone's mining operations. Lastly, Vail raised concerns that reclamation of the two SMES sites had never materialized, and that DEQ should require a sufficient bond to ensure adequate reclamation of the expanded mining. (*Id*.).
21. Herb Rolfes, Operating Permit Section Supervisor for DEQ, conducted a site investigation on or before July 25, 2018. In an email to Glacier Stone, Mr. Rolfes stated, "One question that has arisen and is a concern of the nearby landowners is that in the past rock was pushed off the edge of the working area and downslope. This created a visual impact that still exists. Please commit to not pushing material over the edge of the working area . . . [a]lso, not[e] how overburden is currently handled and would be handled in the future." (AR 515)
22. Kevin Pederson, Glacier Stone representative, responded "We have no problem committing to not pushing overburden off the cliff face. We might possibly even be able to get some seed on the exposed faces to green them up a bit." Mr. Pederson did not address how overburden is currently handled under the Small Miner Exclusion Statement.
23. Plaintiffs Art Vail and Herb Engel signed a statement and petition created by the Little Bitterroot Lake Association ("LBLA"), of which Vail and Engel are members. (AR 1049-1067). The LBLA was formed in 1935 by area residents concerned about the Lake's pristine

water quality. (AR 530-531; 948). Importantly, the Lake is the "primary" source of drinking water for lakeshore residents. (AR 533)

24. The LBLA submitted extensive comments to the DEQ, including the aforementioned statement and petition, which was signed by over 70 landowners. (AR 1049-1067). The LBLA comments are primarily concerned with the potential pollution of Little Bitterroot Lake. LBLA notes that seasonal streams were not reviewed in the Draft EA, "there are seasonal streams/creeks that run from the site to our lake. One is known to be quite voluminous. Because of its heavy flow it is one of the first to open up the ice from the shore . . . [w]e request a more complete impact study of the site, the watershed, and a competent review of the effect on Little Bitterroot Lake Water Quality." (AR 980). LBLA additionally raised concerns about the potential impacts to cultural uniqueness and diversity and private property rights: "[m]ost of us came to Marion and heavily invested in the area, because it was quiet, peaceful and beautiful . . . We have a culture, economic circumstances, and social structures built on that peaceful serenity. A MAJOR MINE in our backyard changes ALL that and this EA gives no consideration of our culture and investment." (AR 856).The DEQ simply "noted" the comment and maintained its position that no significant impacts were contemplated. (*Id.*). That position was carried over into the Final EA. (AR 932). LBLA requested the DEQ conduct an EIS based on the concerns raised in its comments. (AR 968)
25. The Final EA states that "DEQ does not predict that sediment will travel from the site to Little Bitterroot Lake" [but] "even if flow were to escape the catchment basin, which it is not expected to do, the flow would not reach Little Bitterroot Lake." (AR 869). In drawing that conclusion, the Draft EA reasoned, "runoff would have to take a circuitous route to reach

Little Bitterroot Lake. The flow path from the proposed disturbance area would be about three miles long [as] depicted on Figure WET-2." (*Id.*).

26. DEQ considered two potential flow paths to Little Bitterroot Lake. (AR 920, 948). These flow paths are shown on the following diagram at AR 834. Most of the runoff from the two quarry sites would flow to a large natural catchment basin existing downgradient from the Canyon Creek and Glacier Mountain disturbance areas. The catchment basin is shown as the area devoid of vegetation on Figure WET-2, the diagram immediately above. (AR 949). This flow path is in a southerly direction. DEQ recognized that only a small portion of the north quarry is in a watershed to the north. (AR 0920, 0948). There is also a catchment basin in this flow path. Several berms located within the permit area will stop the transport of sediment in

a storm event. DEQ considered this potential northern flow path, but dismissed it as very unlikely as a contaminant transport because of these filters. The majority of the north quarry will drain toward the coarse rock basin at the head of the longer southern flow. (AR 0920, 0948). DEQ did not predict that sediment will travel to Little Bitterroot Lake because of the various filters that exist along the path. The large catchment basin existing downgradient from both mine sites is composed of porous gravel/rock. Any runoff carrying sediment from the two quarry sites will infiltrate into the subsurface and drain away, providing for any deposition of any transported sediment within this coarse rock filter. Even if flow were to escape the catchment basin, which it is not expected to do, the flow would not reach Little Bitterroot Lake. Runoff would have to take a circuitous route about three miles long to reach Little Bitterroot Lake. This flow path is also porous and vegetated, promoting the settling of any transported sediment prior to reaching Little Bitterroot Lake.

27. In addition, DEQ indicated that Glacier Stone would have to obtain coverage under the Multi-Sector General Permit for Storm Water Discharges Associated with Industrial Activity, requiring Glacier Stone to implement best management practices to minimize discharge of sediment from the site. Finally, DEQ indicated that Glacier Stone is required to construct berms along haul roads and the main operations area as required by the Mine Safety and Health Administration. In addition to providing mine safety, the berms would function as water control. Based on these factors, DEQ predicted that sediment from storm water running off the permit area may travel beyond the boundary. However, the identified filters (primarily coarse, porous ground and vegetation) would limit the transport to tens or hundreds of feet beyond the permit boundary and would not reach Little Bitterroot Lake. (AR 0920, 0948)

28. WET submitted comments on behalf of the Belks. (AR 866-871). In its comments, WET noted that DEQ inaccurately stated that "no baseline water quality and quantity measurements in the greater project area have been collected." WET then discussed the need for DEQ to review such baseline data, including determining the depth to groundwater, the potential for metals to be released into surface water, the potential impact to local water resources, the potential for metals to be released to groundwater, evaluating best management practices to prevent degradation of water quality, and water management at the mine. (AR 947). WET noted that it had been collecting water quality data for the Little Bitterroot Lake for the past 18 years and provided a several paragraph summary of its report on the Little Bitterroot Lake's water quality. WET then stated "(t)his summary illustrates the pristine water quality in this lake, and the fact that it is predominately (sic) fed by area ground water." WET recommended that the monitoring of the lake's water quality be taken over by Glacier Stone. Finally, WET took issue with DEQ's conclusion that the mine posed minimal risk to ground and surface water: "It is difficult to make this statement as the aquifer beneath the site is much shallower that (sic) indicated and impacts from surface infiltration would be difficult to predict and impossible to detect without baseline sampling." (AR 948-949)
29. By letter dated November 9, 2018, Lisa-kay Keen, Compliance Inspector for DEQ's Water Quality Division, notified Glacier Stone that it would have to take corrective action by (1) implementing additional best management practices and maintain existing best management practices to minimize the discharge of sediment from the site; and (2) submitting a notice of intent package to DEQ to obtain coverage under the Multi-Sector General Permit for Storm Water Discharges Associated with Industrial Activity. In her letter, Inspector Keen stated

that, "[t]here are two unnamed ditches to the Little Bitterroot Lake; one to the north flowing southwest, and the other flowing east and south. Storm water runoff from the site has the potential to discharge to both unnamed ditches." Inspector Keen's identification of the two unnamed ditches to Little Bitterroot Lake is consistent with the identification of two potential flow paths in the Final EA. Additionally, Inspector Keen states that runoff from Glacier Stone's operation would discharge to the ditches; she does not indicate that the runoff would discharge to Little Bitterroot Lake via the ditches. Thus, her correspondence with Glacier Stone is consistent with the analysis in the Final EA. (AR 1095-97)

30. Glacier Stone submitted a "Notice of Intent (NOI) Form" to DEQ requesting coverage under the Multi-Sector General Permit for Storm Water Discharges Associated with Industrial Activity dated August 15, 2019. (AR 1112). Instruction for completing the form are attached to the NOI. (AR 1116-1122). These instructions indicate that "surface waters" is defined to include any waters on the earth's surface including, but not limited to, streams, lakes, ponds, reservoirs, or other surface water, including any ephemeral and intermittent drainage ways and irrigation systems." The instructions require identification of the receiving surface water and the latitude and longitude of the outfall using decimal degrees. (AR 1120).Based on the location of the outfalls, the receiving "surface water" is the drainage way existing between the Glacier Mountain and Canyon Creek disturbance areas. Glacier Stone provided the coordinates for the outfalls on the NOI Form. The NOI Form instructions indicate that if the immediate receiving water is unnamed, the applicant is required to provide the latitude and longitude of the immediate receiving water and indicate the closest named surface water that the unnamed receiving water flows into, more particularly, the unnamed tributary to Rock Creek or unnamed drainage to Clear Creek. (AR 1120). Under these instructions, Glacier

Stone should have indicated that the immediate receiving water was an unnamed drainage to Little Bitterroot Lake. However, Glacier Stone identified Little Bitterroot Lake as the receiving water. (AR 1114)

31. In the comments DEQ received on the Draft EA, commenters raised concerns regarding impacts from blasting, including noise and dust impacts. (AR 0939, 0949, 0970). In response to these comments, DEQ indicated that Glacier Stone would be conducting blasting less than once a year at the site. (AR 0939, 0970).The operating permit issued to Glacier Stone (Operating Permit No. 00190) requires Glacier Stone to conduct mining activities as specified in the operating and reclamation plan set forth in the application for an operating permit as revised during the deficiency review. (AR 0001). In its operating permit application, Glacier Stone indicated that if blasting were to be used, it would comply with provisions of § 82-4-356, MCA, and ARM 17.24.157-159. (AR 0057). Section 82-4-356, MCA, provides a procedure in which an owner of property who resides within an area subject to property damage or safety hazards related to the use of explosives files a complaint with DEQ. DEQ then investigates the complaint and, if the complaint is validated, orders the responsible party to make changes in the use of explosives to alleviate property damage or safety hazards. That complaint procedure is further described in ARM 17.24.157 through 159.
32. In the Final EA, DEQ evaluated potential impacts on access to and quality of recreational and wilderness activities. (AR 00931).The heading of this section contains these questions: “Are wilderness or recreational areas nearby or accessed through this tract?” and “Is there recreational potential with the tract?” In the discussion of direct impacts, DEQ indicates that the quarries are on private land and at the end of the access road. DEQ acknowledges that

Little Bitterroot Lake is about a mile from the quarries. Finally, DEQ indicates that there are no wilderness areas nearby and no access to recreation areas from the site. On that basis, DEQ determined that there would be no impact to recreational potential on the proposed permit area. In its discussion of secondary impacts, DEQ took a broader view. DEQ indicates that recreators on Little Bitterroot Lake may notice activity and noise from the quarries due to running of heavy equipment and vehicle traffic. DEQ indicates that secondary impacts to access and quality of recreational activities would be minimal given the limited scope of the project and the almost one-mile distance between the quarries and Little Bitterroot Lake. (AR 0931). In addition, DEQ acknowledges that the quarry disturbances would be visible from Little Bitterroot Lake. (AR 0928). While viewshed aesthetics would be impacted by the quarry operations, the visual disturbance would not dominate the landscape. (AR 0926). DEQ received a comment on the Draft EA from the Little Bitterroot Lake Association (LBLA) indicating Glacier Stone was working within earshot of homes along the shoreline of Little Bitterroot Lake and requesting noise mitigation be imposed. LBLA indicated that specific and limited daylight and week day operations be written in the permit. (AR 0970). Glacier Stone's operating permit authorizes operating hours of 6:30 a.m. to 4:00 p.m., Monday through Friday. No weekend operations are proposed. (AR 0917)

33. Area residents experienced impacts from dust blowing from the quarry activities that Glacier Stone conducted under SMES #07-027. Deed restrictions have been put in place requiring Glacier Stone to perform dust abatement when Glacier Stone was using the access road. The Belks have had to call Glacier Stone to either water the road or put down road oil. These concerns were echoed by LBLA (AR 0969) and WET (AR 0949).

34. DEQ had limited regulatory authority over Glacier Stone while it was conducting quarry activities under SMES #07-027, which did not include oversight of air impacts from dust blowing off the access roads. (AR 0940). Now that Glacier Stone will be regulated under an operating permit, DEQ has that authority. The operating permit requires Glacier Stone to take "reasonable precautions" regarding air quality impacts to meet the reasonable precautions and/or opacity standards, including the application of chemical dust suppressant and/or water on haul roads and access roads and the prompt revegetation of disturbed areas. (AR 0922, 0951).The provisions of the operating permit are enforceable by DEQ under § 82-4-361(1), MCA.
35. The Canyon Creek quarry is located on a ridge that would be lowered by up to 50 feet and flattened. The height of the feature is approximately 450 feet from the base to the top. (AR 0919). The site is a prominent topographic feature visible from populated and scenic areas. The Final EA includes photographs of the existing disturbance and other adjacent disturbance in the surrounding area from three vantage points – one from the north, one from the northwest, and one from the southwest. (AR 0927). The Final EA states that impacts to visual resources would be minimal due to the existing SMES disturbance and partially restricted view of the quarry sites. (AR 0928). There are hills in higher elevation to the east which would limit the viewshed of the site. The quarry disturbance would be visible from Little Bitterroot Lake and other neighboring residents and visitors may be able to see the disturbance. (AR 0928). While viewshed aesthetics would be impacted, the visual disturbance would not dominate the landscape. (AR 0926).
36. The Final EA states that Glacier Stone's quarry operation is not expected to create open pits or rock faces. (AR 0943). This statement was in response to a comment submitted by

Plaintiffs challenging compliance with the reclamation standards that are specific to open pits and rock faces set forth in § 82-4-336(9)(b), MCA. The Final EA states that Glacier Stone's mining operations are essentially creating large depressions in porous material, preventing most of the storm runoff that would transport sediment from leaving the quarry site. (AR 0948). This statement was in response to Plaintiffs' comment raising concerns that sediment may potentially be transported from the quarries to Little Bitterroot Lake. The use of different terms – "open pit" and "depressions" denotes different meanings. The Final EA is not contradictory in the use of these terms.

37. DEQ evaluated whether Glacier Stone's reclamation plan would provide comparable utility and stability as that of adjacent areas. (AR 0917). Soil is shallow or non-existent over much of the proposed site. (AR 0917, 0946). However, Glacier Stone is required to salvage all available soil material for reclamation, although some soil may not be safely salvaged due to equipment limitations for equipment operating on steep slopes and rock terrain. (AR 0917, 0919, 0946). The reclamation plan does not require Glacier Stone to import soil material; it does require Glacier Stone to add organic material, as necessary, to enhance the establishment of vegetation. (AR 0943, 0947)

38. Although there are minimal soil resources, gravel and loam are available in the disturbance area to serve as growth media. Glacier Stone has successfully reclaimed areas that it disturbed under SMES #07-027. The soils and fines left in place have been sufficient to re-establish vegetation. (AR 0943). Photographs of the reclamation performed under SMES #07-027 showing successful reclamation, even given the limited amount of salvageable soil, are included in the record. (AR 0943)

39. Glacier Stone's reclamation plan requires the site to be reclaimed to a landscape dominated by rock rather than soil. (AR 0917). Rock dominated habitats are abundant in the area due to mountainous terrain, geology and glaciation. (AR 0917, 0946). Glacier Stone's reclamation plan will provide comparable utility and stability to that of areas adjacent to the quarries. (AR 0946). Glacier Stone's quarry operation is not expected to create open pits or highwalls. (AR 0917, 0944). If highwalls are created, Glacier Stone is required to scale back the highwall if necessary for stability and safety. Overburden and waste rock, if present, would be graded to conform to the natural topography against the highwall (if present) to match and blend with the existing topography and to ensure a free draining topography. The quarry floor would be graded, covered with growth media, and revegetated. Coarse rock would not be revegetated but would remain as a rubble or scree feature. (AR 0917, 0944). Any remaining highwall or rubble or scree feature would provide comparable habitat as currently existing rocky outcrops and talus slopes. (AR 0944)
40. DEQ issued its Final EA on March 8, 2019, addressing all comments that it received on the Draft EA.
41. On April 24, 2019, DEQ issued Operating Permit 00190 to Glacier Stone. (AR 4)
42. DEQ reviewed the reclamation plan contained in Glacier Stone's application. Pursuant to the procedure set forth in § 82-4-337(1)(d)(i) and (iv), MCA, DEQ issued a completeness and compliance determination and a draft permit on October 20, 2017, determining that the proposed operation met the substantive requirements of the MMRA. One of its substantive requirements is the prevention of the pollution of water set forth in § 82-4-336(10), MCA. DEQ's completeness and compliance determination did not address transportation of sediment to Little Bitterroot Lake. Pursuant to § 82-4-337(1)(f), MCA, issuance of the draft

permit as a final permit is the proposed state action subject to MEPA. Therefore, DEQ's completeness and compliance determination was issued before the MEPA environmental review regarding Glacier Stone's application for an operating permit began. In the Draft EA issued on July 20, 2018, DEQ did not analyze potential impacts on Little Bitterroot Lake from the transport of sediment by runoff from the quarry sites. (AR 0898). In its application of the significance criteria set forth in ARM 17.4.608, DEQ stated that no surface water would be impacted. (AR 989). In comments received by DEQ on the Draft EA, the Belks' attorney and WET on behalf of the Belks, and the Little Bitterroot Lake Association (LBLA) raised concerns regarding impacts on the water quality of Little Bitterroot Lake. In response to these comments, DEQ analyzed the potential impact on Little Bitterroot Lake from the transport of sediment. (AR 948). DEQ revised the Final EA to reflect the additional analysis. (AR 919-21). The analysis concluded that no impacts to surface water resources are expected because sediment would not travel from the site to Little Bitterroot Lake. (AR 0920). Under § 82-4-337(2)(b), MCA, DEQ may include stipulations in a final permit that were not included in the draft permit by citing to the statute that gives DEQ the authority to impose the stipulation and the reason why it was not included in the draft permit. This provision gives DEQ a mechanism to modify the provisions of a final permit based on analysis conducted during the environmental review. DEQ did not impose additional stipulations in the final permit based on additional analysis because the analysis did not identify any impacts to surface water resources that would violate § 82-4-336(10), MCA. Moreover, the additional analysis did not change DEQ's application of the significance criteria set forth in ARM 17.4.608 which was based, in part, on the determination that no surface water would be impacted.

43. Glacier Stone submitted a Storm Water Prevention Plan in August of 2019 after the Final EA was completed. Attached to the plan is Figure 3 entitled "Facility Operations, Drainage and [best management practices]." (AR 1152). Blue arrows on the figure denote "storm water flow direction." The figure shows storm water flow direction leaving northerly from the Glacier Mountain disturbance area along an access road. Similarly, the map shows a southerly storm water flow direction on two roads from the Canyon Creek disturbance area. The figure shows that Glacier Stone is placing earthen berms and rock drainage swales along the road as best management practices. On one of the southerly roads, it shows construction of a runoff interceptor swale as a best management practice. DEQ Inspector Lisa-kay Keen conducted an inspection of the project area on November 2, 2008. Inspector Keen attached to her report photographs of the berms around quarry roads and areas of depressions to drop sediment prior to moving off-site that Glacier Stone has constructed to control sediment. (AR 1107-1110). The figure also shows stormwater flow direction to the two outfalls covered under the Multi-Sector General Permit for Storm Water Discharges Associated with Industrial Activity. These two outfalls are located in the catchment basin existing downgradient from both the Canyon Creek and Glacier Mountain disturbance areas. DEQ determined that any runoff from the disturbance areas would infiltrate into the subsurface, providing for deposition of any transported sediment within this coarse rock filter area. (AR 0920).

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A party is entitled to summary judgment under Mont. R. Civ. P. 56 when there are no genuine issues of material fact and the moving party is entitled to judgment as a matter of law.

Vincelette v. Metro. Life Ins. Co., 273 Mont. 408, 410, 903 P.2d 1374, 1376 (1995). Summary judgment may be awarded to a nonmoving party, irrespective of that party's failure to assert a cross-motion for summary judgment, provided the case warrants that result. *Hereford v. Hereford*, 183 Mont. 104, 107, 598 P.2d 600, 602 (1979). However, the court must be very careful that the original movant had a full and fair opportunity to meet the proposition, that there is no genuine issue of material fact, and the other party is entitled to judgment as a matter of law. *Id*. (citing 6 Moore's Federal Practice, para.56.12, pp. 56-331 and 56-334). Here, DEQ made its request for summary judgment on the Plaintiffs' amended complaints in its answer brief to the Plaintiffs' joint brief in support of their motion for summary judgment. The Plaintiffs had the opportunity to address DEQ's proposition that it should have summary judgment both by addressing it in their reply brief and during the hearing on their joint motion for summary judgment. Should DEQ demonstrate it is entitled to summary judgment on the Plaintiffs' amended complaints as a matter of law, the lack of a cross-motion for summary judgment by DEQ will not preclude this Court's granting DEQ that relief.

The standard of review of the sufficiency of an agency's environmental review under MEPA is whether the decision was unlawful or arbitrary and capricious. *Bitterrooters for Planning, Inc. v. Mont. Dep't of Envtl. Quality*, 2017 MT 222, ¶ 15, 388 Mont. 453, 401 P.3d 712 (citing § 75-1-201(6)(a)(iii), MCA; *Montana Wildlife Fed. v. Mont. Bd. of Oil & Gas Conserv.*, 2012 MT 128, ¶ 25, 365 Mont. 232, 280 P.3d 877). An agency decision is unlawful if it does not comply with governing laws and administrative rules. *Id*. (citing *North Fork Preservation Ass'n v. Dep't of State Lands*, 238 Mont 451, 459, 778 P.2d 862, 867 (1989)). A court will sustain an agency's interpretation of its rule "so long as it lies within the range of reasonable interpretation permitted by" the language of the rule. *Id*. (quoting *Clark Fork Coal. v. Mont. Dep't of Envt'l*

Quality, 2008 MT 407, P20, 347 Mont. 197, 197 P.3d 482). The interpretation of a statute by an agency may be entitled to "respectful consideration," but the interpretation is not binding on a court. See *Mont. Power Co. v. Mont. PSC*, 2001 MT 102, ¶ 25, 305 Mont. 260, 26 P.3d 91 (citing *Doe v. Colburg*, 171 Mont. 97, 100, 555 P.2d 753, 754 (1976)).

An agency decision is arbitrary and capricious if made without consideration of all relevant factors or based on a clearly erroneous judgment. *Bitterrooters for Planning, Inc.,* ¶ 16 (citing *Clark Fork Coal*., ¶ 21; *North Fork Preservation Ass'n*, 238 Mont at 465, 778 P.2d at 871). However, the arbitrary and capricious standard does not permit reversal "merely because the record contains inconsistent evidence or evidence which might support a different result." *Id*. (quoting *Montana Wildlife Fed.*, ¶ 25). Rather, the decision "must appear to be random, unreasonable or seemingly unmotivated based on the existing record." *Id*. (quoting *Montana Wildlife Fed*., ¶ 25). A court may not substitute its own judgment for that of the agency but will not defer to an agency decision without a searching and careful review of the record to verify that the agency made a reasoned decision. *Id*. (citing *Friends of the Wild Swan v. Dep't of Nat. Res. & Conservation*, 2000 MT 209, ¶ 28, 301 Mont. 1, 6 P.3d 972; *North Fork Preservation Ass'n*, 238 Mont. at 465, 778 P.2d at 871).

The Plaintiffs' view is that the Environmental Assessment (EA) conducted by DEQ for its review of the Glacier Stone Permit application was inadequate under MEPA criteria and, consequently, a full EIS must be required.

1. Water Quality of Little Bitterroot Lake

In their first contention, Plaintiffs argue that DEQ's determination that the water quality of nearby Little Bitterroot Lake would not be impacted by Glacier Stone's mining operation was an arbitrary and capricious decision because, as Plaintiffs see it, the administrative record

indicates the operation "has the potential to significantly affect the water quality of Little Bitterroot Lake" and, further, because the record contains conflicting evidence regarding the connection between stormwater discharges from the quarry and the waters of Little Bitterroot Lake, the potential impacts from the project trigger the need for a full EIS. Overall, the Plaintiffs contend that DEQ "dismissed as irrelevant" the water quality in Little Bitterroot Lake.

DEQ answers that its conclusion the water quality of Little Bitterroot Lake would not be impacted by Glacier Stone's operation is based on its analysis of how and where the filtration and deposition of water-borne sediments from the operation will occur. DEQ made this analysis of this issue in the administrative record:

> Based on multiple site visits by DEQ inspectors, small amounts of sediment that had discharged outside the proposed permit boundary were present. Because Glacier Stone is quarrying rock at the two sites its mining operations are essentially creating large depressions in porous material, preventing most of the storm runoff that would transport sediment from leaving the quarry area. Moreover, the perimeter of the site was walked (where accessible) by DEQ inspectors and was otherwise observed by DEQ staff on several occasions. The existing sediment control (berms and sediment control structures) and the rocky nature of the native and reclaimed ground allows for rapid infiltration of runoff and snowmelt both within the permit boundary and just outside the permit boundary.
>
> Moreover, DEQ does not predict that sediment will travel from the site to Little Bitterroot Lake because of various filters that exist along the flow path. A large natural catchment basin exists downgradient from both the Canyon Creek and Glacier Mountain disturbance areas. The catchment basin is clearly shown as the area devoid of vegetation that exists between the two quarry sites depicted on WET-2.[2] This catchment basin is composed of porous gravel/coarse rock. Any runoff carrying sediment from the two quarry sites would infiltrate into the subsurface and slowly drain away, providing for deposition of any transported sediment with this coarse rock filter.
>
> Only a small portion of the north quarry is within a watershed to the north. There is also a catchment basin in this flow path. Several berms located within the permit area will stop the transport of sediment in a storm event. DEQ considered a potential northern flow path, but dismissed it as very unlikely as a contaminant transport of sediment because of these filters. The majority of the north quarry will drain toward the coarse rock at the head of the longer southern flow path. As discussed above, it is predicted that any flow of

[2] The WET-2 diagram is shown, above, in paragraph 25.

water carrying sediment from the north quarry would infiltrate in the coarse rock, depositing any sediment into the subsurface.

Even if flow were to escape the catchment basins, which it is not expected to do, the flow would not reach Little Bitterroot Lake. The distance between the nearest disturbance that would be caused by the quarry operations and the lake is approximately one mile in a direct line. Runoff would have to take a circuitous route to reach Little Bitterroot Lake. This flow path is depicted on Figure WET-2. This pathway is also porous and vegetated, promoting the settling of any transported sediment prior to reaching Little Bitterroot Lake.

Finally, Glacier Stone will be required to obtain coverage under the Multi-Sector General Permit for Storm Water Discharges Associated with Industrial Activity. Glacier Stone has already implemented many of the best practices that may be required under the Multi-Sector Permit for Storm Water Discharges Associated with Industrial Activity. The berms that it has constructed along the [haul roads] and around the main operations area as required by the Mine Safety and Health Administration (MSHA) also function as berms for water control. In addition, Glacier Stone has already constructed roadside ditches with turnouts to decrease the volume of water along the roadway and to minimize the sediment discharge.

Based on the above, DEQ predicts that sediment from storm water running off the permit area may travel beyond the boundary. However, the filters discussed above (primarily coarse, porous ground and vegetation) would limit the transport to tens or hundreds of feet beyond the permit boundary and would not reach Little Bitterroot Lake.

In addition, the DEQ Water Protection Bureau has notified Glacier Stone that they are required to apply for permit coverage under the Multi-Sector General Permit for Storm Water Discharges Associated with Industrial Activity (MSGP) at the Canyon Creek Quarry: MTUS002002.

In addition, DEQ answers that the administrative record shows that Glacier Stone committed to various measures to mitigate the sediment from its operation:

1. Implement/maintain additional [best management practices] to minimize discharge of sediment and non-sediment pollutants from the site.
2. Submit a Notice of Intent (NOI) package to the DEQ to obtain coverage under the MSGP.
3. Complete NOI-SWI form.
4. Submit a Storm Water Pollution Prevention Plan (SWPPP).
5. Submit all related permitting fees and/or expenses.
6. Identify/document all pollutant sources at the Canyon Creek Quarry.

In light of this report of its study and analysis of the water quality issue in the administrative record, DEQ maintains that its determination that the water quality of Little Bitterroot Lake would not be impacted by Glacier Stone's operation shows that it met its obligation to take the requisite "hard look" at the potential impacts on Little Bitterroot Lake by completing the appropriate significant impacts analysis mandated by ARM 17.4.608. More particularly, DEQ maintains that it appropriately identified, considered, and applied each of the "significance criteria" at ARM 17.4.608 in making its determination that the water quality of Little Bitterroot Lake would not be impacted by Glacier Stone's operation. Therefore, as DEQ maintains, the preparation of the EA was the appropriate level of environmental review under MEPA and a full EIS is not required.

Similarly, Glacier Stone argues that DEQ's analysis of the water quality issue is correct as a matter of law. In this regard, Glacier Stone quotes *Bark v. U.S. Bureau of Land Mgmt*., 643 F.Supp.2d 1214, 1223 (D. Or. 2009) for the proposition that an agency "is not required to conduct any particular test or to use any particular method, so long as the evidence provided to support its conclusions, along with other materials in the record, ensure that the agency made no clear error of judgment that would render its action arbitrary and capricious."

ARM 17.4.608 states the following:

DETERMINING THE SIGNIFICANCE OF IMPACTS

(1) In order to implement 75-1-201, MCA, the agency shall determine the significance of impacts associated with a proposed action. This determination is the basis of the agency's decision concerning the need to prepare an EIS and also refers to the agency's evaluation of individual and cumulative impacts in either EAs or EISs. The agency shall consider the following criteria in determining the significance of each impact on the quality of the human environment:

(a) the severity, duration, geographic extent, and frequency of occurrence of the impact;

(b) the probability that the impact will occur if the proposed action occurs; or conversely, reasonable assurance in keeping with the potential severity of an impact that the impact will not occur;

(c) growth-inducing or growth-inhibiting aspects of the impact, including the relationship or contribution of the impact to cumulative impacts;

(d) the quantity and quality of each environmental resource or value that would be affected, including the uniqueness and fragility of those resources or values;

(e) the importance to the state and to society of each environmental resource or value that would be affected;

(f) any precedent that would be set as a result of an impact of the proposed action that would commit the department to future actions with significant impacts or a decision in principle about such future actions; and

(g) potential conflict with local, state, or federal laws, requirements, or formal plans.

(2) An impact may be adverse, beneficial, or both. If none of the adverse effects of the impact are significant, an EIS is not required. An EIS is required if an impact has a significant adverse effect, even if the agency believes that the effect on balance will be beneficial.

DEQ maintains that its review and analysis of Glacier Stone's operation and its subsequent determination that the operation is not predicted to significantly impact the human environment demonstrates that the EA was the appropriate level of environmental review under MEPA. In further support DEQ cites *Alliance for the Wild Rockies v. Savage*, 209 F.Supp.3d, 1181, 1189 (2016) for the proposition that "Courts must be mindful to defer to agency expertise, particularly with respect to scientific matters within the purview of the agency. The ultimate standard of review is a narrow one and a court may not substitute its judgment for that of the agency[.]" DEQ further notes that the Plaintiffs have not raised a substantial question whether Glacier Stone's operation may have a significant effect on the water quality in Little Bitterroot Lake. In particular, DEQ notes that the Plaintiffs cite communications between DEQ Inspector Keen and Glacier Stone in which Inspector Keen acknowledges there are two unnamed ditches

that run toward Little Bitterroot Lake but did not indicate that water-borne sediment or pollutants would reach Little Bitterroot Lake through these ditches.

Glacier Stone notes the administrative record shows that DEQ reviewed the information regarding the possibility of water from the quarry reaching Little Bitterroot Lake, along with the information provided by the Plaintiffs and DEQ's own observations to make this determination:

> Even if flow were to escape the catchment basins, which it is not expected to do, the flow would not reach Little Bitterroot Lake. The distance between the nearest disturbance that would be caused by the quarry operations and the Lake is approximately one mile in a direct line. Runoff would have to take a circuitous route to reach Little Bitterroot Lake. The flow path from the proposed disturbance area would be about three miles long. This flow path is depicted on Figure WET-2. This pathway is also porous and vegetated, promoting the settling of any transported sediment prior to reaching Little Bitterroot Lake.

Glacier Stone further seeks to distinguish an authority cited by the Plaintiffs on the need for a full EIS to examine the water quality issue and the need for water quality monitoring. Plaintiffs rely on *Idaho Conservation League v. U.S.F.S.*, 2019 U.S. Dist. LEXIS 219476. There, a U.S. District Court determined that an EA was insufficient and that an EIS must be prepared when the analysis in the EA acknowledged that mine drilling activities could encounter groundwater, alter groundwater quality, and discharge drilling fluids to subsurface zones. However, the Forest Service had not determined how the fluid discharge would drain into the existing groundwater and no groundwater monitoring was occurring to determine whether the drilling fluids were being carried into a creek. Glacier Stone is correct that *Idaho Conservation League* is distinguishable.

In the *Idaho* case, the pollutant potentially affecting groundwater quality was, itself, a liquid – a miscible drilling fluid that would mix with groundwater and be carried wherever the groundwater flowed. Here, the pollutant from Glacier Stone's operation is sediment – a non-fluid constituent of stormwater discharge or other runoff which is separable from the stormwater or

runoff, itself, by the action of the water flowing through various constructed and natural features, including berms situated within the Permit area, catchment basins, and the coarse rock, porous ground, and vegetation existing withing the flowpaths downgradient from both mine sites.

The administrative record demonstrates that DEQ took the requisite hard look at the potential impacts on the water quality of Little Bitterroot Lake from Glacier Stone's operation by engaging in an analysis of the significant impacts factors set out in ARM 17.4.608. Further, DEQ appropriately identified, considered, and applied each of the 'significance criteria' in making its determination that the water quality of Little Bitterroot Lake would not be impacted by Glacier Stone's operation, and DEQ made this determination by applying its particular expertise to the appropriate considerations.[3] The Plaintiffs have not shown that DEQ committed any clear error of judgment or engaged in its investigation, analysis, and determination that Glacier Stone's operation will not significantly affect the water quality of Little Bitterroot Lake, in a manner which could be characterized, properly, as either arbitrary or capricious. Neither have Plaintiffs shown that DEQ erred in not imposing water quality monitoring protocols on Glacier Stone or in declining to conduct a full EIS to include either a water quality monitoring protocol or obtaining the full water quality monitoring data collected by WET – as opposed to a summary of the full data actually submitted by Plaintiffs for the administrative record – because DEQ could properly

[3] As its argument implies, DEQ's conclusion about the potential impact by Glacier Stone's operation on the water quality of Little Bitterroot Lake cannot be shown to be arbitrary or capricious or demonstrate a clear error of judgment, because DEQ's analysis does not conclude that stormwater or runoff from Glacier Stone's quarry could not, conceivably, reach the shores of Little Bitterroot Lake. Rather, DEQ's investigation, review, and analysis of the stormwater and runoff from Glacier Stone's quarry supports its determination that the waterflows will not be sufficient to carry the sediment as far as Little Bitterroot Lake due to the filtration and settling of sediments which will occur within the various flowpaths of the runoff due to the placement and existence of berms within the permit area, the coarse rock, porous ground, and vegetation existing within the catchment basins downgradient from both mine sites. As DEQ's analysis concludes, the deposition of any transported sediment will occur within to tens or hundreds of feet from the permit boundary and the sediments will not reach Little Bitterroot Lake.

determine without such data and without imposing such protocols that the sediment from Glacier Stone's operation would not be carried by stormwater discharge or other runoff as far as Little Bitterroot Lake. DEQ determined, properly, that preparation of the EA was the appropriate level of environmental review under MEPA with respect to the water quality issues raised by Plaintiffs and that an EIS is not required on such bases.

2. Air Quality

In their second contention, Plaintiffs argue that the EA is replete with incomplete, inaccurate, and contradictory information regarding air quality. Plaintiffs further contend that "although the EA notes that 'potential impacts are expected to be less than the permit threshold requirement,' and 'DEQ does not believe the particulate matter would be hazardous to nearby residents,' the record reflects that the Belks, as immediately neighboring landowners, and [Little Bitterroot Lake Association] members had already experienced serious air quality impacts from the existing operation pre-expansion, which was not adequately evaluated in the EA."

DEQ answers that, in response to comments submitted by Plaintiffs' counsel and consultant (WET) concerning air quality impacts, DEQ considered the issue as demonstrated by the following analysis in the EA:

> DEQ reviewed the proposed activities at the quarry and has determined that the potential emissions from the equipment are less than the applicable threshold for requiring a Montana Air Quality Permit (ARM 17.8.743(1)(b)). However, Glacier Stone would still be subject to the following emission standards which apply to both permitted and unpermitted facilities.
>
> • ARM 17.8.304(2) Visible Air Contaminants – No person may cause or authorize emissions to be discharged into the outdoor atmosphere from any source installed after November 23, 1968, that exhibit an opacity of 20% or greater averaged over 6 consecutive minutes.
>
> • ARM 17.8.308(1) Particulate Matter, Airborne – No person shall cause or authorize the production, handling, transportation, or storage of any material unless reasonable precautions to control emissions of airborne particulate matter are taken. Such

emissions of airborne particulate matter from any stationary source shall not exhibit an opacity of 20% or greater averaged over six consecutive minutes, except for emission of airborne particulate matter originating from any transfer ladle or operation engaged in the transfer of molten metal which was installed or operating prior to November 23, 1968.

- ARM 17.8.308(2) Particulate Matter, Airborne – No person shall cause or authorize the use of any street, road, or parking lot without taking reasonable precautions to control emissions of airborne particulate matter.

To satisfy "reasonable precautions" provisions, Glacier Stone would employ a number of control measures to reduce emissions, as necessary, including but not limited to, the application of chemical dust suppressant and/or water on haul roads and access roads and the prompt revegetation of disturbed areas.

Sampling and pre-monitoring is not required under the Clean Air Act of Montana or the corresponding administrative rules. An air quality permit is not required for the Glacier Stone operations. Ambient air quality monitoring for such operations is typically not required by DEQ even for sources that are required to obtain an air quality permit.

The quarried material is inert. The particulate matter potentially released during operation would be regulated as particulate matter – primarily as Particulate Matter with an aerodynamic diameter of 10 micrometers or less (PM10). Potential emissions are expected to be less than the permit threshold requirement, and dust control is required to meet the reasonable precautions provisions. Therefore, because particulate would be emitted at levels below the permitting threshold and controlled, DEQ does not believe that particulate matter would be hazardous to nearby residents.

Concurrent reclamation would limit the potential for blowing dust from the operating area. The rock fragments left in the soils would also limit blowing dust.

DEQ's response further notes that the Plaintiffs' concerns based on Glacier Stone's past operations and levels of dust production is not the appropriate measure to determine whether DEQ has taken a hard look at the issue or whether the Plaintiffs will likely experience the same dust levels as in the past. Before Glacier Stone applied for its Permit, it operated under the Small Miner Exclusion Statement, which largely exempted Glacier Stone from the obligation to comply with the air quality standards that DEQ now has the authority to enforce against Glacier Stone by virtue of its status as a permitted mining operator. DEQ took the requisite hard look at Glacier Stone's operation and, upon reviewing the proposed activities at the quarry, determined

that the potential emissions from the equipment are less than the applicable threshold for requiring a Montana Air Quality Permit pursuant to ARM 17.8.743(1)(b). DEQ's further analysis of the issue in the EA also noted that Glacier Stone's operations under its Permit will require that it comply and continue to comply with the air quality control standards contained in ARM 17.8.304(2) (Visible Air Contaminants) and ARM 17.8.308 (Particulate Matter, Airborne) under DEQ's enforcement authority established at § 82-4-361, MCA. Finally, DEQ notes that Glacier Stone's compliance with these air quality standards will require, among other things, that it employ a number of control measures to reduce emissions, as necessary, including the application of chemical dust suppressant and/or water on haul roads and access roads and the prompt revegetation of disturbed areas to satisfy "reasonable precautions" provisions of the regulations that Glacier Stone, while previously operating under the Small Miner Exclusion Statement, was not bound to satisfy.

Glacier Stone responds to the Plaintiffs' second contention with additional points.

First, Glacier Stone maintains that, in making their assertions of error by DEQ, the Plaintiffs rely primarily on 'facts' which are either not in the record or consist of complaints made by the Plaintiffs, themselves, during DEQ's environmental review of Glacier Stone's application. By way of example, Glacier Stone notes that, as evidence of an existing air quality problem, the Plaintiffs state that residents of the Little Bitterroot Lake area "had already experienced *serious air quality impacts*" that were "not adequately evaluated in the EA." However, as Glacier Stone further observes, the points of reference to the administrative record cited by the Plaintiffs for these allegations contain only references to the draft EA and a description of blasting from the Final EA but nothing about *serious air quality impacts*. Glacier Stone also notes that Plaintiffs' objection to DEQ's finding that the production of particulate

matter from Glacier Stone's operation will be minimal "is likely false" is based on an opinion offered by the Plaintiffs' consultant, whose opinion, it appears, is not supported by any scientifically collected data or analysis in the administrative record.

In an action challenging or seeking review of an agency's decision that an environmental review is not required or that the environmental review is inadequate, the burden of proof is on the person challenging the decision. *Pompeys Pillar Historical Assoc. v. Mont. DEQ*, 2002 MT 352, ¶ 20, 313 Mont. 401, 61 P.3d 148. The arbitrary and capricious standard does not permit reversal of an agency's decision "merely because the record contains inconsistent evidence or evidence which might support a different result." *Mont. Wildlife Fed'n* , ¶ 25. "Implicit in the requirement that an agency take a hard look at the environmental consequences of its actions is the obligation to make an adequate compilation of relevant information, to analyze it reasonably, and to consider all pertinent data." *Clark Fork Coal.*, ¶ 47. However, MEPA requirements are merely "procedural" and do not require an agency to reach any particular decision in the exercise of its independent authority. *Mont. Wildlife Fed'n*, ¶ 32; also § 75-1-102(3)(b), MCA (MEPA provides no additional regulatory authority to an agency). A court must "be mindful to defer to agency expertise, particularly with respect to scientific matters within the purview of the agency[.]" *All. for the Wild Rockies v. Savage*, 209 F. Supp. 3d 1181, 1189 (D. Mont. 2016) (quoting *Klamath-Siskiyou Wildlands Ctr. v. Bureau of Land Mgmt.*, 387 F.3d 989, 993 (9th Cir. 2004)). Finally, a court cannot substitute its judgment for that of the agency but will not defer to an agency decision without a searching and careful review of the record to verify that the agency made a reasoned decision. *Friends of Wild Swan*, ¶ 28.

With respect to the air quality issue, Plaintiffs have not met their burden in challenging DEQ's consideration of the issue and its determination that the EA comprises the appropriate

level of environmental review for Glacier Stone's operating permit application. DEQ's analysis in the EA demonstrates that it made an adequate compilation of the relevant information, considered all the relevant air quality data, and analyzed it reasonably according to the facts and governing air quality standards. The Plaintiffs' proffer of contrary assertions in the administrative record that they experienced "serious air quality impacts" before Glacier Stone was operating under the regulations now applicable to it as a permitted mining operator, does not meet the Plaintiffs' burden. The DEQ applied its expertise in determining that Glacier Stone does not require a Montana Air Quality Permit for its operation, and the DEQ is entitled to this Court's deference in that regard. The law does not require a court to afford the same deference to the characterization of potential impacts of a mining operation as constituting 'serious air quality impacts' by opponents of the operation, particularly where, as here, the opponents have proffered the opinion of a retained consultant to the effect that DEQ's air quality impact determination "is likely false" – an opinion not apparently supported by data gathered or analyzed in accordance with any particular scientific standard. Finally, DEQ's analysis of the air quality issue cannot be faulted for not observing or imposing any stricter standards than those provided by the applicable, governing air quality standards in Montana law. DEQ adequately considered, evaluated, and analyzed the air quality issue in the EA and its determinations were not arbitrary or capricious, nor were they the product of any clearly erroneous judgments.

3. Dust, Noise, Recreation, Wilderness, Economy, Viewshed & Cultural Factors

In their third contention, Plaintiffs argue that the EA does not "in any way evaluate the potential impacts of noise and dust from the mine on the recreational use and economy of the Lake. The EA does not even mention such impacts under headings 17, 'Access to and Quality of Recreational Activities' and 20, 'Cultural Uniqueness and Diversity.'" The Plaintiffs also proffer

a comment from the Little Bitterroot Lake Association (LBLA). The comment indicates the following:

> Glacier Stone is working within earshot of our shoreline which is solid with homes. We ask you to include in your permit noise mitigation strategies for their expanded operation. Specific and limited daylight and weekday operations should be written in to their permit. We are now living with their noise and it is a problem.

DEQ considered and evaluated the noise impact of Glacier Stone's operation and incorporated into the Permit limitations to address this concern and mitigate the impact of noise. Glacier Stone's operations under the Permit are limited to the hours of 6:30 a.m. to 4:00 p.m., Monday through Friday, with no night or weekend operations occurring. Finally, the administrative record demonstrates that DEQ considered the impact proffered by Plaintiffs as it concerns the noise from Glacier Stone's operation on the area's cultural uniqueness based on its relative serenity. In the EA, DEQ indicates that it took this proffered impact into reconsideration and determined that, with respect to its analysis concerning potential impacts to "Social Structures and Mores," no significant impacts are anticipated.

DEQ further responds that it acknowledged, specifically, the noise impacts on Little Bitterroot Lake in its discussion of secondary impacts on recreational activities and, while it did not specifically address dust impacts on Little Bitterroot Lake,[4] it did address the air quality impacts of Glacier Stone's operation in the EA. The Court has addressed DEQ's consideration of the air quality issue, above.

DEQ considered and analyzed the potential impact of noise of Glacier Stone's operation on wilderness and recreational activities as demonstrated by this discussion:

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[4] Glacier Stone's quarry sits approximately one mile from Little Bitterroot Lake. While the Plaintiffs make the general observation that "the record shows that the mine has caused and will continue to cause . . . dust beyond the mine boundaries", there is no indication in the Plaintiffs' brief that the record would support a finding that the dust travels airborne to reach even the shores of the Lake.

> Direct Impacts:
> The project would be located on private land and at the end of the access road. The proposed operating permit area is about a mile from Little Bitterroot Lake. There [are] no wilderness areas nearby and no access to recreational areas from the site. There would be no impact to recreational potential on the proposed permit area.
>
> Secondary Impacts:
> Recreators on Little Bitterroot Lake may notice activity and noise from the proposed project due to running of heavy equipment and vehicle traffic. Secondary impacts to access and quality of recreational activities would be minimal due to the limited scope of the project and the distance of almost one mile between the Little Bitterroot Lake and the proposed project area.

Adhering to the appropriate standard of review, the question with respect to DEQ's consideration of the noise impacts of Glacier Stone's operation is not whether the record contains inconsistent evidence or whether the record might support a different result but whether DEQ made an adequate compilation of relevant information, analyzed it reasonably, and considered all pertinent data. In this regard, DEQ's consideration of the noise impacts of Glacier Stone's operation satisfies this standard. DEQ considered the appropriate multitude of potential impacts, analyzed them in the context of the circumstances of each, and considered the data before reaching the reasoned conclusion that the impacts would not be significant in most respects and imposing mitigation measures, including daytime and weekday limitation on operations in the Permit, to address these concerns. While the Plaintiffs and others may continue to assert that DEQ's impact analyses should have included a more far-reaching discussion of their individual or associational interests concerning the impacts of Glacier Stone's operation in ways including, but not limited to, the impacts of dust and noise on the recreational uses of the area, the wilderness viewshed, and the local economy and culture, the consideration and analysis undertaken by DEQ acknowledged and appropriately considered both the potential impacts and the varying degrees to which these impacts would be manifest in a manner sufficient to satisfy the hard look standard.

4. Consideration of the Belks' Property Rights

In their fourth contention, the Plaintiffs argue that DEQ did not heed the Belks' request for a more thorough analysis of the impacts to their property which surrounds Glacier Stone's quarries. As the Plaintiffs contend, "the EA completely fails to discuss in any way the impacts to the Belks' property or to their road easement" and "[s]uch analysis is mandated by MEPA."

DEQ answers that the relevant statutory provisions of MEPA – primarily § 75-1-201(1)(b)(iv)(D) – in addition to the Legislature's statements of purpose at §§ 75-1-102 and 75-1-103 directing that state agencies must consider whether regulatory impacts on private property rights amount to the "undue government regulation" of the right to use and enjoy private property free of such undue regulation, do not apply to direct the DEQ to examine impacts on the Belks' surrounding property in the course of making its environmental review of Glacier Stone's application. DEQ is correct.

In applying a statute, a court's purpose is to "ascertain the legislative intent and give effect to the legislative will[.]" *State v. Thomas*, 2019 MT 155, ¶ 8, 396 Mont. 284, 445 P.3d 777 (quoting *S.L.H. v. State Comp. Mut. Ins. Fund*, 2000 MT 362, ¶ 16, 303 Mont. 364, 15 P.3d 948). A court's role "is simply to ascertain and declare what is in terms or in substance contained therein, not to insert what has been omitted or to omit what has been inserted." *Id.* (quoting *Diaz v. Blue Cross & Blue Shield*, 2011 MT 322, ¶ 14, 363 Mont. 151, 267 P.3d 756). The legislative intent, in the first instance, is to be ascertained "from the plain meaning of the words used." *Id.* (quoting *Mont. Vending, Inc. v. Coca-Cola Bottling Co. of Mont.*, 2003 MT 282, ¶ 21, 318 Mont. 1, 78 P.3d 499). "Where the plain language of the statute is clear and unambiguous, no further statutory interpretation is necessary." *Id.* (quoting *Diaz*, ¶ 14) (other citation omitted). In any event, "[s]tatutory construction should not lead to absurd results if a reasonable interpretation can

avoid it." *Bratton v. Sisters of Charity of Leavenworth Health Sys*., 2020 MT 86, ¶ 14, 399 Mont. 490, 461 P.3d 127 (quoting *Mont. Sports Shooting Ass'n v. State*, 2008 MT 190, ¶ 11, 344 Mont. 1, 185 P.3d 1003).

The operative provision of MEPA which concerns DEQ's arguable duty to consider impacts on Plaintiffs Belks' property abutting the Glacier Stone mines is found at § 75-1-201(1)(b)(iv)(D), MCA. The statutory language provides, in relevant part, the following:

> The legislature authorizes and directs that, to the fullest extent possible under this part, all agencies of the state . . . shall . . . include in each recommendation or report on proposals for projects, programs, and other major actions of state government significantly affecting the quality of the human environment in Montana a detailed statement on . . . any *regulatory impacts on private property rights*, including whether alternatives that reduce, minimize, or eliminate the *regulation of private property rights* have been analyzed.

Assuming, for the purpose of this analysis, that DEQ's environmental review of Glacier Stone's application for a mining permit constitutes a 'project', 'program', or 'other major action of state government significantly affecting the quality of the human environment in Montana', the question is whether the language referencing a state agency's duty to prepare a detailed statement on "regulatory impacts on private property rights" and "regulation of private property rights" in the course of conducting an environmental review refers to the duty of DEQ, as alleged by the Plaintiffs, to consider the impacts of Glacier Stone's operation on the Belks' neighboring property.

The transitive verb 'regulate' means "to govern or direct according to rule, to bring under the control of law or constituted authority, or to make regulations for or concerning." Merriam Webster, *Online Dictionary*, accessed December 04, 2020 at https://www.merriam-webster.com/dictionary/regulate. The term 'regulation' is the noun form of the transitive verb, 'regulate', and means "the act of regulating or the state of being regulated." Merriam Webster,

Online Dictionary, accessed December 04, 2020 at https://www.meriam-webster.com/dictionary/regulation. Likewise, the term 'regulatory' is the adjective form of the transitive verb 'regulate' and carries the same meaning and import. Merriam Webster, *Online Dictionary*, accessed December 04, 2020 at https://www.merriam-webster.com/dictionary/regulatory. The only regulatory authorities invoked by Glacier Stone's application for a mining permit include DEQ's authority to conduct an environmental review under MEPA and DEQ's authority to issue an operating permit under MMRA. Neither authority grants to DEQ the ability to govern, direct, bring under control, or make regulations for or concerning anything but mining sites which are the subject of Glacier Stone's application. Nothing in the invocation of these regulatory schemes grants to DEQ any authority to govern, direct, bring under control, or make regulations for or concerning the Belks' use of their neighboring property. It is an absurdity, therefore, to interpret the terms "regulatory impacts" and "regulation of private property rights" in § 75-1-201(1)(b)(iv)(D), MCA, to have been included by the Legislature in the statute to refer to anything but the property which is the subject of the environmental review or mining permit application. A plain language interpretation of the statute so dictates.

The Plaintiffs' contention that DEQ violated MEPA by failing to consider, sufficiently, the 'regulatory impacts' on the Belks' property, including the Belks' rights in the access road, is without merit.

5. Whether the Environmental Assessment is the Appropriate Review

In their fifth contention, Plaintiffs argue that DEQ should have prepared an environmental impact statement (EIS) instead of the EA.

DEQ answers that the standard for determining whether an EIS is necessary is governed by § 75-1-201(1)(b)(iv), MCA, which specifies that a state agency must prepare a "detailed

statement" on the environmental impact of "major actions of state government significantly affecting the quality of the human environment in Montana." The threshold criteria for determining whether this standard has been met are set out in ARM 17.4.608, the administrative rule adopted by DEQ to implement the standard at § 75-1-201(1)(b)(iv), MCA. ARM 17.4.608(1) provides the following:

> In order to implement 75-1-201, MCA, the agency shall determine the significance of impacts associated with a proposed action. This determination is the basis for the agency's decision concerning the need to prepare an EIS and also refers to the agency's evaluation of individual and cumulative impacts in either EAs or EISs. The agency shall consider the following criteria in determining the significance of each impact on the quality of the human environment:
>
> (a) the severity, duration, geographic extent, and frequency of occurrence of the impact;
>
> (b) the probability that the impact will not occur if the proposed action occurs; or conversely, reasonable assurance that the impact will not occur;
>
> (c) growth-inducing or growth-inhibiting aspects of the impact, including the relationship or contribution of the impact to cumulative impacts;
>
> (d) the quantity and quality of each environmental resource or value that will be affected, including the uniqueness and fragility of those resources or values;
>
> (e) the importance to the state and to society of each environmental resource that would be affected;
>
> (f) any precedent that would be set as a result of an impact of the proposed action that would commit the department to future actions with significant impacts or a decision in principle about such future actions; and
>
> (g) potential conflict with local, state, or federal laws, requirements of formal plans.

As the administrative record demonstrates, along with the Court's analysis and disposition of the Plaintiffs' various contentions and arguments, above, DEQ applied, appropriately, the 'significance criteria' of ARM 17.4.608(1) in making the requisite hard look at Glacier Stone's permit application and mining activities and proposed quarry operation before

determining they would not significantly impact the human environment. Preparation of the Final EA constitutes the appropriate level of environmental review under MEPA.

As DEQ observes, Glacier Stone's operating permit authorizes it to quarry rock at the two sites for up to 25 years. The administrative record contains DEQ's various analyses and determinations that the environmental impacts during the period of operation are not predicted to be significant, including impacts to geology and soils, water quality and quantity including the water of Little Bitterroot Lake, air quality, terrestrial, avian, and aquatic life, unique, endangered, fragile or limited environmental resources, historical and archaeological sites, aesthetics, demands on environmental resources of land, water, air or energy, access to and quality of recreation and wilderness activities, cultural uniqueness and diversity, and all other environmental resources evaluated in the Final EA. The Plaintiffs' manifold contentions and objections have not raised a genuine issue of material fact whether DEQ's consideration or resolution of any issue with respect to its preparation of the Final EA, or its determination that the EA was the appropriate level of environmental review or its decision was arbitrary and capricious or unlawful in some other respect. The DEQ considered and analyzed all relevant information and did not ignore any pertinent information. Having taken the required hard look at the environmental impacts, DEQ determined the environmental impacts from operation of Glacier Stone's quarry would not be significant.

6. Grant of the Operating Permit Under the MMRA

In their sixth contention, Plaintiffs argue that DEQ's grant of the Permit to Glacier Stone violates the MMRA. As Plaintiffs put it, "[t]he Metal Mine Reclamation Act[,] like MEPA, is intended to implement the environmental provisions of the Montana Constitution.§ 82-4-301(1), MCA." Further, the Plaintiffs contend, "[a]s set forth in [their statement of undisputed facts], the

Glacier Stone permit fails to meet the requirements of § 82-4-336(10), MCA, because it fails to provide sufficient measures to prevent the pollution of air and water and the degradation of adjoining lands, including land owned by Plaintiffs." The Plaintiffs further contend that the "Glacier Stone permit also fails to meet the requirements of § 82-4-336(12), MCA, because it does not provide for permanent landscaping and contouring sufficient to minimize the amount of precipitation that infiltrates into disturbed areas, and fails to prevent objectionable postmining ground water and surface water discharges."

Glacier Stone responds that Plaintiffs' contentions of error on DEQ's part are predicated on a misreading of both the administrative record and DEQ's analysis. Glacier Stone observes that DEQ's purported acknowledgment that discharged sediment from the mine site will be transported into the Belks' property relies on an incorrect assumption that the water will flow in a direction (uphill) from the mine site that water generally does not flow and that the waterflows will consist of wastewater or processed water discharged from the mine site. As the EA determined, the anticipated water discharged from the mine site consists only of stormwater discharge, which flows to the south and generally away from the Belks' property. Finally, Glacier Stone takes issue with Plaintiffs' contention that DEQ is wrong to assume that Glacier Stone will comply with the provisions of its stormwater permit.

DEQ answers that the reclamation plan imposed on Glacier Stone satisfies all lawful requirements. DEQ cites § 82-4-336(10), MCA, which provides: "The reclamation plan must provide sufficient measures to ensure public safety and to prevent the pollution of air or water and the degradation of adjacent lands." However, as DEQ observes, properly, the Plaintiffs are foreclosed by § 75-1-201(6)(a)(ii), MCA, from raising the issue of potential impact on the Belks' property from water discharged from Glacier Stone quarry sites, because these issues were not

first presented to DEQ for its consideration prior to DEQ's issuance of the operating permit to Glacier Stone. In this regard, DEQ is correct and the issue will not be considered further in the context of the Plaintiffs' challenge to DEQ's issuance of the operating permit.

Further, Plaintiffs' challenge to DEQ's consideration of the air quality impacts and the impacts to Little Bitterroot Lake have been addressed, above, in resolution of the Plaintiffs' contentions with respect to DEQ's consideration and analysis of these issues in the course of its preparation of the Final EA and need not be considered further with respect to the issuance of the operating permit.

DEQ further answers the Plaintiffs' challenge that DEQ failed to comply with § 82-4-336(12), MCA. The statute provides:

> The reclamation plan must provide for permanent landscaping and contouring to minimize the amount of precipitation that infiltrates into disturbed areas that are to be graded, covered or revegetated, including but not limited to tailings impoundments and waste rock dumps. The plan must also provide measures to prevent objectionable postmining ground water discharges.

In particular, Plaintiffs contend that Glacier Stone's operating permit violates the statute by failing to provide for permanent landscaping and contouring sufficient to minimize the infiltration of precipitation into disturbed areas and failing to prevent objectionable postmining ground water and surface water discharges. Plaintiffs reassert their contention that DEQ did not address, adequately, the impacts to Little Bitterroot Lake, and they cite to DEQ's Completeness and Compliance determination issued October 20, 2017.

As DEQ observes, however, the Completeness and Compliance determination is part of the initial process of determining that a mining permit application is complete and complies with the provisions of the MMRA. Once the Completeness and Compliance determination is made the law specifies that DEQ issue a draft operating permit, which is subject to amendment and

modification as a consequence of the environmental review. As DEQ further observes, the environmental impacts to Little Bitterroot Lake were examined appropriately in the course of preparing the Final EA. Plaintiffs' contention that DEQ issued the operating permit unlawfully based on an insufficient consideration of the potential impacts on Little Bitterroot Lake lacks merit.

The Plaintiffs also contend the Final EA contains contradictory statements regarding the creation of depressions at the quarry sites. As DEQ notes, however, the Final EA states that Glacier Stone's quarry operation is not expected to create open pits or rock faces, and this statement was made in response to a comment submitted by Plaintiffs challenging compliance with the reclamation standards specific to open pits and rock faces in § 82-4-336(9)(b), MCA. In response to one of the Plaintiffs' comments raising concern that sediment may be transported from the quarries to Little Bitterroot Lake, DEQ observes that the Final EA distinguished between use of the terms "open pit" and "depressions" which have different meanings.

Answering the Plaintiffs' challenge that Glacier Stone cannot make a satisfactory reclamation effort because the revegetation plan does not require the importation and deposit of soil, DEQ responds that the Plaintiffs' challenge is based on comments submitted by Plaintiffs' counsel and consultant asserting that Glacier Stone will not be able to revegetate the disturbed areas without the importation of soils. DEQ further notes that it responded to these comments with the following:

> Reclamation would consist primarily of smoothing disrupted ground surfaces, re-applying any topsoil that had been salvaged and stockpiled, and seeding sites where rock had been removed. The proposed reclamation plan states that Glacier Stone would bring in organic material where needed to augment growth media. These reclamation activities have been used in areas north of the Canyon Creek quarry[.]

DEQ cites, appropriately, to the statutory provisions which establish the standards for reclamation from mining activities under the MMRA. Section 82-4-336(8), MCA, requires the reestablishment of vegetative cover if appropriate for the approved post-mine land use and § 82-4-336(9)(a), MCA, requires the reclamation of disturbed areas other than open pits and rock faces to comparable utility and stability as adjacent areas. DEQ also notes that Glacier Stone has successfully reclaimed areas that it disturbed while operating under the Small Miner Exclusion Statement and offered photos of the same and, finally, notes that while little native soil was salvaged from the disturbed area, the soil and fines material left in place were sufficient to re-establish vegetation, including the growth of pine trees ranging from 6-inches to 4-feet tall in the disturbed areas. As DEQ finally observes, the reclamation of mining disturbance under Glacier Stone's proposed reclamation plan would provide comparable utility and stability to that which existed prior to mining and to areas adjacent to the quarries, achieving the reclamation standard set forth in § 82-4-336(9)(a), MCA.

Plaintiffs' challenge to the issuance of the operating permit based on the sufficiency of Glacier Stone's reclamation plan is without merit.

Plaintiffs contend that DEQ violated § 82-4-336(9)(b)(i)-(iv) by approving a reclamation plan that fails to provide sufficient measures for open pits and rock faces. Section 82-4-336(9)(b) establishes standards for reclaiming open pits and rock faces as follows:

> With regard to open pits and rock faces, the reclamation plan must provide sufficient measures for reclamation to a condition:
>
> (i) of stability structurally competent to withstand geologic and climatic conditions without significant failure that would be a threat to public safety and the environment;
>
> (ii) that affords some utility to humans or the environment;
>
> (iii) that mitigates postreclamation visual contrasts between reclamation lands and adjacent lands; and

(iv) that mitigates or prevents undesirable offsite environmental impacts.

As DEQ observes, Glacier Stone's quarry operation is not expected to create an open pit or a rock face, but would instead generally disturb the ground from which the rock has been removed. Accordingly, reclamation standards for open pits and rock faces will not likely apply. However, as DEQ notes, the reclamation plan addresses reclamation of highwalls in the event they are created. The Plaintiffs focus their objection on Glacier Stone's asserted inability to revegetate "destabilized" slopes, and Plaintiffs assert this would be impossible without the importation of soils. DEQ points out, however, that the standards for reclaiming open pits and rock faces at § 82-4-336(9)(b)(i)-(iv), MCA, does not require the measures described in the Plaintiffs' objection. As DEQ notes, the proposed reclamation plan satisfies the reclamation requirements of § 82-4-3336(9)(b), MCA, by providing for the scaling back of highwalls and stabilization of upslope scree or loose rock for stability and safety and further provides for the grading of cut slopes and highwalls in unconsolidated material and the grading of overburden and waste rock against the highwall to mitigate post reclamation visual contrasts between reclamation lands and adjacent lands. In addition, DEQ notes, revegetation of the quarry floor and other areas which are disturbed, but not quarried, would reduce post-reclamation visual contrasts in addition to providing wildlife habitat. Any remaining highwall or rubble or scree feature left remaining would provide habitat comparable to currently existing rocky outcrops and talus slopes. The quarry floor would be graded to provide a free draining topography to avoid the creation of a quarry pond. Further, DEQ does not anticipate that the proposed quarry operation will create an open pit of any significant size and the use of backfill, in addition to the grading of overburden and waste rock against the highwall provided in the proposed reclamation plan, would not be necessary to achieve the reclamation standards set forth in § 82-4-336(9)(c), MCA.

The Plaintiffs' final challenges to Glacier Stone's proposed reclamation plan lack merit.

CONCLUSION

The Plaintiffs have not demonstrated they are entitled to summary judgment on any of the grounds raised in their joint motion for summary judgment. Defendants DEQ and Glacier Stone have demonstrated, conversely, that they are entitled to summary judgment on Counts 1 (MEPA violation claims) and Counts 2 (MMRA violation claims) as pleaded, similarly, in both of the Amended Complaints filed by the Plaintiffs. Finally, because the Plaintiffs have not prevailed on their similarly-pleaded Counts 1 (MEPA violation claims), their requests for injunctive relief based on the alleged unconstitutionality of § 75-1-201(6)(c), MCA are moot, and their similarly-pleaded Counts 3 (Montana Constitution claims) will be dismissed.

ORDER

For the reasons discussed above, the Plaintiffs' Joint Motion for Summary Judgment (Dkt. No. 45) is DENIED; Defendant Glacier Stone's Motion for Summary Judgment (Dkt. No. 48) is GRANTED; summary judgment is GRANTED to Defendant DEQ as to all of the Plaintiffs' claims against it; and the Plaintiffs' Amended Complaints are DISMISSED with prejudice.

SO ORDERED.

ELECTRONICALLY SIGNED AND DATED BELOW.

/s/ Dan Wilson
Hon. Dan Wilson
District Court Judge

c: Lindsey Hromadka / Michelle Tafoya Weinberg / Bruce Fredrickson /
David K. W. Wilson, Jr.
Edward Hayes
Mark L. Stermitz / Danielle A. R. Coffman / Darrell Worm
Robert Cameron / Jeremiah R. Langston

Hon. Dan Wilson
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MONTANA ELEVENTH JUDICIAL DISTRICT COURT, FLATHEAD COUNTY

Henry Belk and Diane Belk, Plaintiffs, vs. Montana Department of Environmental Quality, an agency of the State of Montana, and Glacier Stone Supply, LLC, Defendants, State of Montana, by and through the Office of the Attorney General, Intervenor, Herb Engel and Art Vail, Plaintiffs, vs. Montana Department of Environmental Quality, an agency of the State of Montana, and Glacier Stone Supply, LLC, Defendants.	Cause No's DV-15-2019-328 (D), DV-15-2019-404 (A) ORDER ON MOTIONS FOR SUMMARY JUDGMENT

This matter is before the Court on various motions for summary judgment.

Plaintiffs Henry Belk and Diane Belk and Herb Engel and Art Vail have filed a joint motion for summary judgment (Dkt. No. 45). Plaintiffs request a declaration that DEQ's issuance

of Operating Permit No. 00190 (the Permit) to Defendant Glacier Stone, LLC (Glacier Stone) was made in violation of the Metal Mine Reclamation Act (MMRA) and, therefore, void *ab initio*. Plaintiffs further request a declaration that the Environmental Assessment conducted by DEQ is illegal and violates the Montana Environmental Policy Act (MEPA).

The Plaintiffs' joint motion is opposed.

Defendant Montana Department of Environmental Quality (DEQ) sets out its opposition to the Plaintiffs' joint motion in its answer brief and, additionally, requests summary judgment in its favor on the claims in Plaintiffs' Amended Complaints (Dkt. No. 54). Glacier Stone sets out its opposition to the Plaintiffs' joint motion in its answer brief (Dkt. No. 55). Intervenor State of Montana sets out its position in its answer brief (Dkt. No. 52) and, more particularly, requests that this Court avoid the constitutional issue raised by the Plaintiffs – whether § 75-1-201(6)(c), MCA, satisfies Montana's constitutional right to a clean and healthful environment.

Further, Glacier Stone has moved for summary judgment (Dkt. No. 48) on all issues raised in the Plaintiffs' Amended Complaints. The motion is opposed. Plaintiffs set out their opposition to Glacier Stone's motion in their answer brief (Dkt. No. 53).

The motions are fully briefed.

On October 26, 2020, the Court conducted a hearing on the motions. Attorneys David K. W. Wilson, Jr. and Lindsey W. Hromadka argued for Plaintiffs. Special Assistant Attorney General Edward Hayes argued for DEQ. Attorney Mark L. Stermitz argued for Glacier Stone. Assistant Attorney General Jeremiah Langston appeared for Intervenor State of Montana.

The motions are submitted and ready for decision.

ANALYSIS

Because the Legislature modeled the Montana Environmental Policy Act (MEPA) on the National Environmental Policy Act (NEPA), federal authority construing NEPA is generally persuasive guidance in the construction of similar provisions of MEPA. *Bitterrooters for Planning, Inc. v. Mont. Dep't of Envtl. Quality*, 2017 MT 222, ¶ 18, 388 Mont. 453, ¶ 18, 401 P.3d 712 (other citations omitted). Federal courts reviewing agency actions taken under NEPA apply the standard at 5 U.S.C. § 706(2) of the federal Administrative Procedure Act, which provides that a reviewing court shall "hold unlawful and set aside agency action . . . found to be . . . arbitrary, capricious . . . or otherwise not in accordance with law[.]" *Alliance for the Wild Rockies v. Probert*, 412 F. Supp. 3d 1188, 1195-96 (D. Mont. 2019). Where an agency's administrative record is complete and constitutes the whole and undisputed facts underlying agency decision making, summary judgment is the appropriate vehicle to address claims that the agency action is arbitrary, capricious or unlawful. *Id*. at 1196 (citing *City & Cty. of S.F. v. United States*, 130 F.3d 873, 877 (9th Cir. 1997) ("[T]he function of the district court is to determine whether or not as a matter of law the evidence in the administrative record permitted the agency to make the decision it did."). All parties, except Intervenor State of Montana,[1] have requested summary judgment in their favor. Further, this Court previously denied the Plaintiffs' joint motion to supplement the administrative record. Therefore, this Court's consideration of the parties' arguments in support of their requests for summary judgment is appropriately limited to the administrative record, which is deemed to be both complete and constituting the whole and undisputed facts underlying DEQ's issuance of the Permit to Glacier Stone under the MMRA

[1] Intervenor State of Montana is participating in this action for the purpose of defending the constitutionality of § 75-1-201(6)(c), MCA, of the Montana Environmental Policy Act against the challenge that the statute violates Montana's right to a clean and healthful environment.

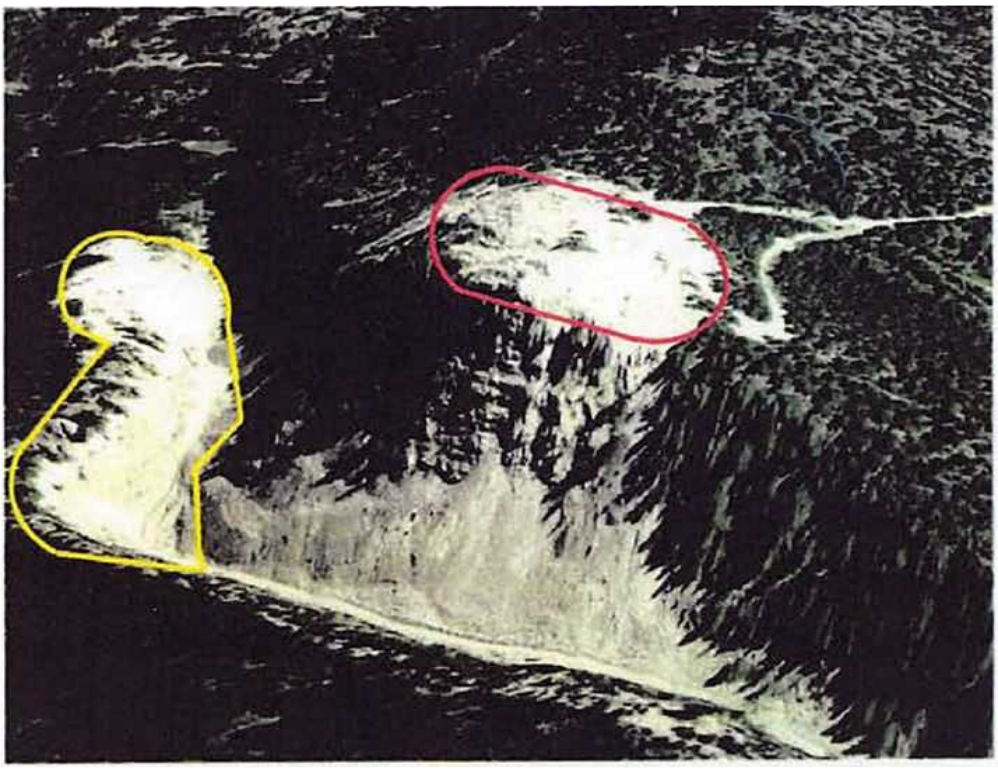
and DEQ's determination that its issuance of the Final Environmental Assessment (EA or Final EA) satisfies DEQ's obligation for review of Glacier Stone's application under MEPA.

In relevant part, the administrative record sets out the following matters.

1. On April 27, 2017, Glacier Stone applied for an operating permit to mine for decorative rock on property in Flathead County that is less than one mile from Little Bitterroot Lake. (AR 896; 914). Glacier Stone had previously operated under a Small Miner Exclusion Statement (SMES) in accordance with the Metal Mine Reclamation Act (MMRA), which allows miners, under certain conditions, to operate mines less than five acres in size without an operating permit. (*Id.*). Glacier Stone leases the property it uses for the mine. (AR 892; 914)
2. Glacier Stone is a supplier of architectural and landscaping stone and has been operating at two sites under SMES 07-027 since the early 2000s, Canyon Creek and Glacier Mountain. With its application, it sought to convert the existing operation from one under the SMES to a single general operating permit under the MMRA. (AR 50)
3. Glacier Stone violated its SMES permit, and because it exceeded the SMES requirements, it had to apply for an operating permit, or reclaim its operation back into compliance with the SMES. It chose to apply for the permit. The EA provides the following detailed description of the SMES and how its violation led to the current application:

> Glacier Stone has previously conducted rock mining operations at the site under (SMES) #07-27 that was issued in 2015. SMES #07-27 covered an operation consisting of mining at two sites (Canyon Creek and Glacier Mountain) located in close proximity to each other. Glacier Stone is applying for an operating permit to cover the mining operations conducted at these sites because the disturbance area has grown beyond 5-acres - the size limitation for operating under the SMES. . . . The option for applying for an operating permit was a corrective action identified in a December 27, 2016 (DEQ) violation letter. The violation letter was issued by DEQ to Glacier Stone for operating two SMES sites within 1-mile of each other, and for having a disturbance between the two sites that exceeded the 5-acre SMES limitation. (AR 914).

4. After DEQ processed Glacier Stone's application, DEQ prepared a draft environmental assessment (Draft EA) on July 20, 2018. (AR 892-909).
5. In the Draft EA, DEQ described Glacier Stone's proposal and purported to evaluate its impacts. Rock would be removed by handpicking, drilling and blasting, followed by excavation and hauling, ripping with a bulldozer or excavation followed by removal. (AR 895).The mine was projected to operate for 25-years, 9 ½ -hours per day Monday through Friday. (AR 896).The existing mining sites under the SMES would be expanded by removing vegetation, stripping and stockpiling available soil, and removing overburden or waste rock to access the desired rock. (AR 895)
6. The Draft EA noted that the proposal includes essentially a removal of a mountain top by 50-feet as illustrated below:



7. In the Draft EA, DEQ stated "[n]o baseline water quality and quantity measurements in the greater project area have been collected." (AR 898). DEQ states in the Final EA that "[n]o

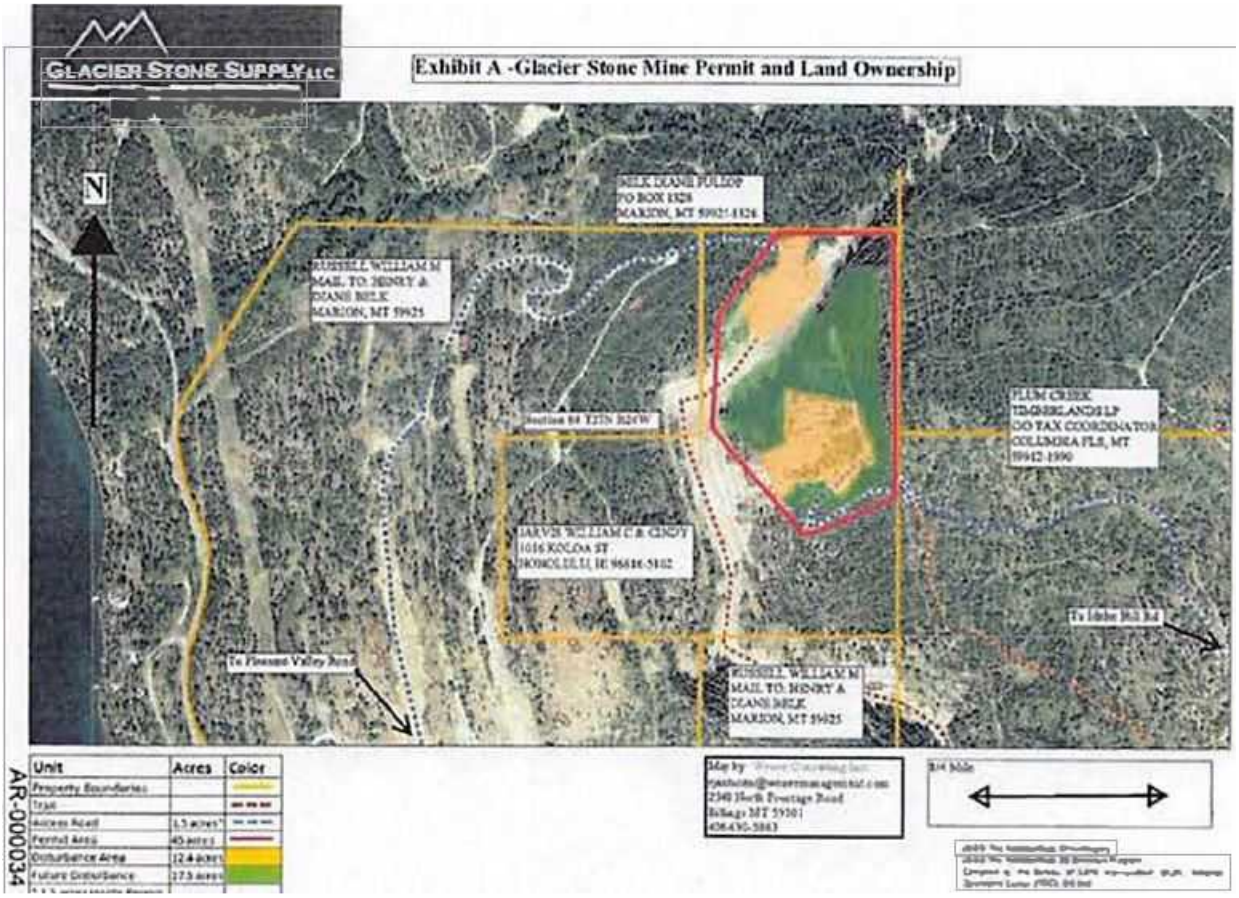
baseline water quality and quantity measurements in the greater project area have been collected by DEQ." (AR 0920). Further, the Draft EA stated "[t]here will be minimal risk of degradation to surface or groundwater resulting from this project because of the distance to surface water and the water table. There would be some modifications to storm water run-off patterns due to changes in topography and storm water control best management practices."

8. The Draft EA stated, "[m]inimal particulate would be produced or become airborne during operations due to the breaking up and movement of rock product."
9. The Final EA concludes that it has not identified any "long-term or significant impacts associated with the proposed activities on any environmental resource." (AR 908)
10. DEQ provided the Code Compliance Officer for the Flathead County Planning and Zoning Office an electronic copy of the Draft EA. The Code Compliance Officer indicated that there were no County regulations or plans applicable to the quarrying activities to be conducted under the proposed permit. The Little Bitterroot Lake Neighborhood Plan is part or the Flathead County Growth Policy. The quarries operated by Glacier Stone are not located within the area encompassed by the Little Bitterroot Lake Neighborhood Zoning District. (AR 942)
11. The DEQ received several dozen comments regarding the Draft EA, including comments from the Plaintiffs. (AR 937-992)
12. In the section of the Draft EA addressing "private property impacts," the document addressed only impacts to Glacier Stone's property, not to any property surrounding the mine that will be affected, such as the Belks' or other potentially affected property. (AR 905-906)."DEQ's issuance of an operating permit with conditions could affect the applicant's real property. DEQ has determined, however, that the permit conditions are reasonably necessary to ensure

compliance with applicable requirements of the (MMRA) .... [t]herefore, DEQ's issuance of the operating permit with conditions would not have private property taking or damaging implications." (AR 906).This statement was carried over into the Final EA. (AR 932-933)

13. The Belks submitted extensive comments on the Draft EA through counsel (AR 937-945), and through their consultant, Water and Environmental Technology (WET). (AR 946-960)

14. Glacier Stone's application materials for the Operating Permit clearly show the Belks' property nearly surrounding the property Glacier Stone leases for the mining operations (AR 34):



15. The letter from Belks' counsel dated August 2, 2018 noted this fact. It also noted that they have "property rights that are adversely affected by the actions of Glacier Stone." (AR 937).The letter contains a detailed history of the property leased by Glacier Stone, and the

Belk properties, and describes the Belks' purchase of portions of property formerly owned by Williams Jarvis (Jarvis). Glacier Stone currently leases other property owned by Jarvis for the mine. Attached to the letter was Glacier Stone's Exhibit A (photo immediately above) showing the Belks' property in relation to the Glacier Stone property. (AR 945).The letter discussed how the Belks' claim a "reciprocal access easement through the center of the mining property," delineated on AR 945, which, at the time, Glacier Stone was blocking. The letter went on to state: "The Draft EA should thoroughly evaluate the mine's impacts on the Belks' property and property rights. Instead, the EA contains no discussion of the impacts to neighboring property owners, including the Belks, nor does it discuss the access easement that the Belks have through the mine site. Glacier Stone has routinely interfered with the Belks' access easement as well as trespassed on other neighboring property of the Belks." (AR 938).The letter then noted one of MEPA's purposes is to "protect the right to use and enjoy private property free of undue government regulations" (§ 75-1-102 (2), MCA); and that environmental reviews must evaluate "any regulatory impacts on private property rights, including whether alternatives that reduce, minimize or eliminate the regulation of private property rights has been analyzed." (AR 939)

16. DEQ received a comment on the Draft EA asserting that it failed to discuss impacts to the Belk's property or their road easement. In response, DEQ stated that it was aware of a reciprocal easement agreement signed by predecessors in interest to the Belks and Glacier Stone, that any dispute regarding the existence or enforcement of the easements was a civil matter, and that DEQ was not a court and did not have the authority to adjudicate competing civil matters regarding private property. (AR 939). Section 82-4-336(10), MCA, requires a reclamation plan to provide sufficient measures to ensure public safety. DEQ considered

whether members of the public had access to the quarry site which could potentially expose them to safety risks. In that context, DEQ reviewed the reciprocal access agreement and other documents. Based on that review, DEQ expressed a belief that the Belks did not have a road easement that goes through the quarry site. DEQ, however, reiterated that DEQ's action on Glacier Stone's application for an operating permit was not the proper forum to adjudicate the Belks' asserted access easement because DEQ is not a court and has no authority to adjudicate private property claims. (AR 939)

17. DEQ then stated: "The private property being protected in[§ 75-1-201 (l)(b)(iv)(D), MCA] is the private property rights of the applicant. DEQ conducts the private property assessment if it is proposing to deny an application for a permit or to place in the approval of the application a condition that has not been agreed to be (sic) the regulated person at the time of the publication of the EA or EIS [Environmental Impact Statement]. Property owned by surrounding landowners are not being regulated and, therefore, are not subject to the private property analysis set forth in § 75-1-201 (l)(b)(iv)(D), MCA." (AR 939).
18. AR 561 shows the "New Road" for the mine running through the Belks' property into the NW comer of the permit area. AR 34 depicts an "Access Road" on the west side of the Jarvis property traversing the Belk property. That road has been abandoned. AR 34 also shows a second road running through the Plum Creek property to the east (now owned by Belks) into the mine permit area. That access route is limited to residential use, and accordingly, Glacier Stone does not have access to the mine permit area from the east. (AR 548; 554)
19. AR 555-561 is an "Amended and Restated Reciprocal Easement Declaration" between Wilkins, Jarvis and Trudeau. The "New Road" depicted on AR 561 is the main access road now used by Glacier Stone. Under the Amended and Restated Reciprocal Easement, the

Belks, as owners of the subservient estate, are subject to this access easement providing the main access to the Glacier Stone Mine.

20. Plaintiff Art Vail submitted a comment, which was incorporated into the Draft EA. (AR 865).Vail's comment noted the past history of Glacier Stone's violations of its SMES permit. Vail additionally noted the fact that Glacier Stone had "trashed" the mountain top by throwing rock over the cliff face, which destroyed the "aesthetics from the lake[.]" Vail also commented on the water pollution of Little Bitterroot Lake, air pollution and noise pollution – all caused by Glacier Stone's mining operations. Lastly, Vail raised concerns that reclamation of the two SMES sites had never materialized, and that DEQ should require a sufficient bond to ensure adequate reclamation of the expanded mining. (*Id*.).
21. Herb Rolfes, Operating Permit Section Supervisor for DEQ, conducted a site investigation on or before July 25, 2018. In an email to Glacier Stone, Mr. Rolfes stated, "One question that has arisen and is a concern of the nearby landowners is that in the past rock was pushed off the edge of the working area and downslope. This created a visual impact that still exists. Please commit to not pushing material over the edge of the working area . . . [a]lso, not[e] how overburden is currently handled and would be handled in the future." (AR 515)
22. Kevin Pederson, Glacier Stone representative, responded "We have no problem committing to not pushing overburden off the cliff face. We might possibly even be able to get some seed on the exposed faces to green them up a bit." Mr. Pederson did not address how overburden is currently handled under the Small Miner Exclusion Statement.
23. Plaintiffs Art Vail and Herb Engel signed a statement and petition created by the Little Bitterroot Lake Association ("LBLA"), of which Vail and Engel are members. (AR 1049-1067). The LBLA was formed in 1935 by area residents concerned about the Lake's pristine

water quality. (AR 530-531; 948). Importantly, the Lake is the "primary" source of drinking water for lakeshore residents. (AR 533)

24. The LBLA submitted extensive comments to the DEQ, including the aforementioned statement and petition, which was signed by over 70 landowners. (AR 1049-1067). The LBLA comments are primarily concerned with the potential pollution of Little Bitterroot Lake. LBLA notes that seasonal streams were not reviewed in the Draft EA, "there are seasonal streams/creeks that run from the site to our lake. One is known to be quite voluminous. Because of its heavy flow it is one of the first to open up the ice from the shore . . . [w]e request a more complete impact study of the site, the watershed, and a competent review of the effect on Little Bitterroot Lake Water Quality." (AR 980). LBLA additionally raised concerns about the potential impacts to cultural uniqueness and diversity and private property rights: "[m]ost of us came to Marion and heavily invested in the area, because it was quiet, peaceful and beautiful . . . We have a culture, economic circumstances, and social structures built on that peaceful serenity. A MAJOR MINE in our backyard changes ALL that and this EA gives no consideration of our culture and investment." (AR 856).The DEQ simply "noted" the comment and maintained its position that no significant impacts were contemplated. (*Id.*). That position was carried over into the Final EA. (AR 932). LBLA requested the DEQ conduct an EIS based on the concerns raised in its comments. (AR 968)
25. The Final EA states that "DEQ does not predict that sediment will travel from the site to Little Bitterroot Lake" [but] "even if flow were to escape the catchment basin, which it is not expected to do, the flow would not reach Little Bitterroot Lake." (AR 869). In drawing that conclusion, the Draft EA reasoned, "runoff would have to take a circuitous route to reach

Little Bitterroot Lake. The flow path from the proposed disturbance area would be about three miles long [as] depicted on Figure WET-2." (*Id.*).

26. DEQ considered two potential flow paths to Little Bitterroot Lake. (AR 920, 948). These flow paths are shown on the following diagram at AR 834. Most of the runoff from the two quarry sites would flow to a large natural catchment basin existing downgradient from the Canyon Creek and Glacier Mountain disturbance areas. The catchment basin is shown as the area devoid of vegetation on Figure WET-2, the diagram immediately above. (AR 949). This flow path is in a southerly direction. DEQ recognized that only a small portion of the north quarry is in a watershed to the north. (AR 0920, 0948). There is also a catchment basin in this flow path. Several berms located within the permit area will stop the transport of sediment in

a storm event. DEQ considered this potential northern flow path, but dismissed it as very unlikely as a contaminant transport because of these filters. The majority of the north quarry will drain toward the coarse rock basin at the head of the longer southern flow. (AR 0920, 0948). DEQ did not predict that sediment will travel to Little Bitterroot Lake because of the various filters that exist along the path. The large catchment basin existing downgradient from both mine sites is composed of porous gravel/rock. Any runoff carrying sediment from the two quarry sites will infiltrate into the subsurface and drain away, providing for any deposition of any transported sediment within this coarse rock filter. Even if flow were to escape the catchment basin, which it is not expected to do, the flow would not reach Little Bitterroot Lake. Runoff would have to take a circuitous route about three miles long to reach Little Bitterroot Lake. This flow path is also porous and vegetated, promoting the settling of any transported sediment prior to reaching Little Bitterroot Lake.

27. In addition, DEQ indicated that Glacier Stone would have to obtain coverage under the Multi-Sector General Permit for Storm Water Discharges Associated with Industrial Activity, requiring Glacier Stone to implement best management practices to minimize discharge of sediment from the site. Finally, DEQ indicated that Glacier Stone is required to construct berms along haul roads and the main operations area as required by the Mine Safety and Health Administration. In addition to providing mine safety, the berms would function as water control. Based on these factors, DEQ predicted that sediment from storm water running off the permit area may travel beyond the boundary. However, the identified filters (primarily coarse, porous ground and vegetation) would limit the transport to tens or hundreds of feet beyond the permit boundary and would not reach Little Bitterroot Lake. (AR 0920, 0948)

28. WET submitted comments on behalf of the Belks. (AR 866-871). In its comments, WET noted that DEQ inaccurately stated that "no baseline water quality and quantity measurements in the greater project area have been collected." WET then discussed the need for DEQ to review such baseline data, including determining the depth to groundwater, the potential for metals to be released into surface water, the potential impact to local water resources, the potential for metals to be released to groundwater, evaluating best management practices to prevent degradation of water quality, and water management at the mine. (AR 947). WET noted that it had been collecting water quality data for the Little Bitterroot Lake for the past 18 years and provided a several paragraph summary of its report on the Little Bitterroot Lake's water quality. WET then stated "(t)his summary illustrates the pristine water quality in this lake, and the fact that it is predominately (sic) fed by area ground water." WET recommended that the monitoring of the lake's water quality be taken over by Glacier Stone. Finally, WET took issue with DEQ's conclusion that the mine posed minimal risk to ground and surface water: "It is difficult to make this statement as the aquifer beneath the site is much shallower that (sic) indicated and impacts from surface infiltration would be difficult to predict and impossible to detect without baseline sampling." (AR 948-949)
29. By letter dated November 9, 2018, Lisa-kay Keen, Compliance Inspector for DEQ's Water Quality Division, notified Glacier Stone that it would have to take corrective action by (1) implementing additional best management practices and maintain existing best management practices to minimize the discharge of sediment from the site; and (2) submitting a notice of intent package to DEQ to obtain coverage under the Multi-Sector General Permit for Storm Water Discharges Associated with Industrial Activity. In her letter, Inspector Keen stated

that, "[t]here are two unnamed ditches to the Little Bitterroot Lake; one to the north flowing southwest, and the other flowing east and south. Storm water runoff from the site has the potential to discharge to both unnamed ditches." Inspector Keen's identification of the two unnamed ditches to Little Bitterroot Lake is consistent with the identification of two potential flow paths in the Final EA. Additionally, Inspector Keen states that runoff from Glacier Stone's operation would discharge to the ditches; she does not indicate that the runoff would discharge to Little Bitterroot Lake via the ditches. Thus, her correspondence with Glacier Stone is consistent with the analysis in the Final EA. (AR 1095-97)

30. Glacier Stone submitted a "Notice of Intent (NOI) Form" to DEQ requesting coverage under the Multi-Sector General Permit for Storm Water Discharges Associated with Industrial Activity dated August 15, 2019. (AR 1112). Instruction for completing the form are attached to the NOI. (AR 1116-1122). These instructions indicate that "surface waters" is defined to include any waters on the earth's surface including, but not limited to, streams, lakes, ponds, reservoirs, or other surface water, including any ephemeral and intermittent drainage ways and irrigation systems." The instructions require identification of the receiving surface water and the latitude and longitude of the outfall using decimal degrees. (AR 1120).Based on the location of the outfalls, the receiving "surface water" is the drainage way existing between the Glacier Mountain and Canyon Creek disturbance areas. Glacier Stone provided the coordinates for the outfalls on the NOI Form. The NOI Form instructions indicate that if the immediate receiving water is unnamed, the applicant is required to provide the latitude and longitude of the immediate receiving water and indicate the closest named surface water that the unnamed receiving water flows into, more particularly, the unnamed tributary to Rock Creek or unnamed drainage to Clear Creek. (AR 1120). Under these instructions, Glacier

Stone should have indicated that the immediate receiving water was an unnamed drainage to Little Bitterroot Lake. However, Glacier Stone identified Little Bitterroot Lake as the receiving water. (AR 1114)

31. In the comments DEQ received on the Draft EA, commenters raised concerns regarding impacts from blasting, including noise and dust impacts. (AR 0939, 0949, 0970). In response to these comments, DEQ indicated that Glacier Stone would be conducting blasting less than once a year at the site. (AR 0939, 0970).The operating permit issued to Glacier Stone (Operating Permit No. 00190) requires Glacier Stone to conduct mining activities as specified in the operating and reclamation plan set forth in the application for an operating permit as revised during the deficiency review. (AR 0001). In its operating permit application, Glacier Stone indicated that if blasting were to be used, it would comply with provisions of § 82-4-356, MCA, and ARM 17.24.157-159. (AR 0057). Section 82-4-356, MCA, provides a procedure in which an owner of property who resides within an area subject to property damage or safety hazards related to the use of explosives files a complaint with DEQ. DEQ then investigates the complaint and, if the complaint is validated, orders the responsible party to make changes in the use of explosives to alleviate property damage or safety hazards. That complaint procedure is further described in ARM 17.24.157 through 159.
32. In the Final EA, DEQ evaluated potential impacts on access to and quality of recreational and wilderness activities. (AR 00931).The heading of this section contains these questions: “Are wilderness or recreational areas nearby or accessed through this tract?” and “Is there recreational potential with the tract?” In the discussion of direct impacts, DEQ indicates that the quarries are on private land and at the end of the access road. DEQ acknowledges that

Little Bitterroot Lake is about a mile from the quarries. Finally, DEQ indicates that there are no wilderness areas nearby and no access to recreation areas from the site. On that basis, DEQ determined that there would be no impact to recreational potential on the proposed permit area. In its discussion of secondary impacts, DEQ took a broader view. DEQ indicates that recreators on Little Bitterroot Lake may notice activity and noise from the quarries due to running of heavy equipment and vehicle traffic. DEQ indicates that secondary impacts to access and quality of recreational activities would be minimal given the limited scope of the project and the almost one-mile distance between the quarries and Little Bitterroot Lake. (AR 0931). In addition, DEQ acknowledges that the quarry disturbances would be visible from Little Bitterroot Lake. (AR 0928). While viewshed aesthetics would be impacted by the quarry operations, the visual disturbance would not dominate the landscape. (AR 0926). DEQ received a comment on the Draft EA from the Little Bitterroot Lake Association (LBLA) indicating Glacier Stone was working within earshot of homes along the shoreline of Little Bitterroot Lake and requesting noise mitigation be imposed. LBLA indicated that specific and limited daylight and week day operations be written in the permit. (AR 0970). Glacier Stone's operating permit authorizes operating hours of 6:30 a.m. to 4:00 p.m., Monday through Friday. No weekend operations are proposed. (AR 0917)

33. Area residents experienced impacts from dust blowing from the quarry activities that Glacier Stone conducted under SMES #07-027. Deed restrictions have been put in place requiring Glacier Stone to perform dust abatement when Glacier Stone was using the access road. The Belks have had to call Glacier Stone to either water the road or put down road oil. These concerns were echoed by LBLA (AR 0969) and WET (AR 0949).

34. DEQ had limited regulatory authority over Glacier Stone while it was conducting quarry activities under SMES #07-027, which did not include oversight of air impacts from dust blowing off the access roads. (AR 0940). Now that Glacier Stone will be regulated under an operating permit, DEQ has that authority. The operating permit requires Glacier Stone to take "reasonable precautions" regarding air quality impacts to meet the reasonable precautions and/or opacity standards, including the application of chemical dust suppressant and/or water on haul roads and access roads and the prompt revegetation of disturbed areas. (AR 0922, 0951).The provisions of the operating permit are enforceable by DEQ under § 82-4-361(1), MCA.
35. The Canyon Creek quarry is located on a ridge that would be lowered by up to 50 feet and flattened. The height of the feature is approximately 450 feet from the base to the top. (AR 0919). The site is a prominent topographic feature visible from populated and scenic areas. The Final EA includes photographs of the existing disturbance and other adjacent disturbance in the surrounding area from three vantage points – one from the north, one from the northwest, and one from the southwest. (AR 0927). The Final EA states that impacts to visual resources would be minimal due to the existing SMES disturbance and partially restricted view of the quarry sites. (AR 0928). There are hills in higher elevation to the east which would limit the viewshed of the site. The quarry disturbance would be visible from Little Bitterroot Lake and other neighboring residents and visitors may be able to see the disturbance. (AR 0928). While viewshed aesthetics would be impacted, the visual disturbance would not dominate the landscape. (AR 0926).
36. The Final EA states that Glacier Stone's quarry operation is not expected to create open pits or rock faces. (AR 0943). This statement was in response to a comment submitted by

Plaintiffs challenging compliance with the reclamation standards that are specific to open pits and rock faces set forth in § 82-4-336(9)(b), MCA. The Final EA states that Glacier Stone's mining operations are essentially creating large depressions in porous material, preventing most of the storm runoff that would transport sediment from leaving the quarry site. (AR 0948). This statement was in response to Plaintiffs' comment raising concerns that sediment may potentially be transported from the quarries to Little Bitterroot Lake. The use of different terms – "open pit" and "depressions" denotes different meanings. The Final EA is not contradictory in the use of these terms.

37. DEQ evaluated whether Glacier Stone's reclamation plan would provide comparable utility and stability as that of adjacent areas. (AR 0917). Soil is shallow or non-existent over much of the proposed site. (AR 0917, 0946). However, Glacier Stone is required to salvage all available soil material for reclamation, although some soil may not be safely salvaged due to equipment limitations for equipment operating on steep slopes and rock terrain. (AR 0917, 0919, 0946). The reclamation plan does not require Glacier Stone to import soil material; it does require Glacier Stone to add organic material, as necessary, to enhance the establishment of vegetation. (AR 0943, 0947)

38. Although there are minimal soil resources, gravel and loam are available in the disturbance area to serve as growth media. Glacier Stone has successfully reclaimed areas that it disturbed under SMES #07-027. The soils and fines left in place have been sufficient to re-establish vegetation. (AR 0943). Photographs of the reclamation performed under SMES #07-027 showing successful reclamation, even given the limited amount of salvageable soil, are included in the record. (AR 0943)

39. Glacier Stone's reclamation plan requires the site to be reclaimed to a landscape dominated by rock rather than soil. (AR 0917). Rock dominated habitats are abundant in the area due to mountainous terrain, geology and glaciation. (AR 0917, 0946). Glacier Stone's reclamation plan will provide comparable utility and stability to that of areas adjacent to the quarries. (AR 0946). Glacier Stone's quarry operation is not expected to create open pits or highwalls. (AR 0917, 0944). If highwalls are created, Glacier Stone is required to scale back the highwall if necessary for stability and safety. Overburden and waste rock, if present, would be graded to conform to the natural topography against the highwall (if present) to match and blend with the existing topography and to ensure a free draining topography. The quarry floor would be graded, covered with growth media, and revegetated. Coarse rock would not be revegetated but would remain as a rubble or scree feature. (AR 0917, 0944). Any remaining highwall or rubble or scree feature would provide comparable habitat as currently existing rocky outcrops and talus slopes. (AR 0944)
40. DEQ issued its Final EA on March 8, 2019, addressing all comments that it received on the Draft EA.
41. On April 24, 2019, DEQ issued Operating Permit 00190 to Glacier Stone. (AR 4)
42. DEQ reviewed the reclamation plan contained in Glacier Stone's application. Pursuant to the procedure set forth in § 82-4-337(1)(d)(i) and (iv), MCA, DEQ issued a completeness and compliance determination and a draft permit on October 20, 2017, determining that the proposed operation met the substantive requirements of the MMRA. One of its substantive requirements is the prevention of the pollution of water set forth in § 82-4-336(10), MCA. DEQ's completeness and compliance determination did not address transportation of sediment to Little Bitterroot Lake. Pursuant to § 82-4-337(1)(f), MCA, issuance of the draft

permit as a final permit is the proposed state action subject to MEPA. Therefore, DEQ's completeness and compliance determination was issued before the MEPA environmental review regarding Glacier Stone's application for an operating permit began. In the Draft EA issued on July 20, 2018, DEQ did not analyze potential impacts on Little Bitterroot Lake from the transport of sediment by runoff from the quarry sites. (AR 0898). In its application of the significance criteria set forth in ARM 17.4.608, DEQ stated that no surface water would be impacted. (AR 989). In comments received by DEQ on the Draft EA, the Belks' attorney and WET on behalf of the Belks, and the Little Bitterroot Lake Association (LBLA) raised concerns regarding impacts on the water quality of Little Bitterroot Lake. In response to these comments, DEQ analyzed the potential impact on Little Bitterroot Lake from the transport of sediment. (AR 948). DEQ revised the Final EA to reflect the additional analysis. (AR 919-21). The analysis concluded that no impacts to surface water resources are expected because sediment would not travel from the site to Little Bitterroot Lake. (AR 0920). Under § 82-4-337(2)(b), MCA, DEQ may include stipulations in a final permit that were not included in the draft permit by citing to the statute that gives DEQ the authority to impose the stipulation and the reason why it was not included in the draft permit. This provision gives DEQ a mechanism to modify the provisions of a final permit based on analysis conducted during the environmental review. DEQ did not impose additional stipulations in the final permit based on additional analysis because the analysis did not identify any impacts to surface water resources that would violate § 82-4-336(10), MCA. Moreover, the additional analysis did not change DEQ's application of the significance criteria set forth in ARM 17.4.608 which was based, in part, on the determination that no surface water would be impacted.

43. Glacier Stone submitted a Storm Water Prevention Plan in August of 2019 after the Final EA was completed. Attached to the plan is Figure 3 entitled "Facility Operations, Drainage and [best management practices]." (AR 1152). Blue arrows on the figure denote "storm water flow direction." The figure shows storm water flow direction leaving northerly from the Glacier Mountain disturbance area along an access road. Similarly, the map shows a southerly storm water flow direction on two roads from the Canyon Creek disturbance area. The figure shows that Glacier Stone is placing earthen berms and rock drainage swales along the road as best management practices. On one of the southerly roads, it shows construction of a runoff interceptor swale as a best management practice. DEQ Inspector Lisa-kay Keen conducted an inspection of the project area on November 2, 2008. Inspector Keen attached to her report photographs of the berms around quarry roads and areas of depressions to drop sediment prior to moving off-site that Glacier Stone has constructed to control sediment. (AR 1107-1110). The figure also shows stormwater flow direction to the two outfalls covered under the Multi-Sector General Permit for Storm Water Discharges Associated with Industrial Activity. These two outfalls are located in the catchment basin existing downgradient from both the Canyon Creek and Glacier Mountain disturbance areas. DEQ determined that any runoff from the disturbance areas would infiltrate into the subsurface, providing for deposition of any transported sediment within this coarse rock filter area. (AR 0920).

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A party is entitled to summary judgment under Mont. R. Civ. P. 56 when there are no genuine issues of material fact and the moving party is entitled to judgment as a matter of law.

Vincelette v. Metro. Life Ins. Co., 273 Mont. 408, 410, 903 P.2d 1374, 1376 (1995). Summary judgment may be awarded to a nonmoving party, irrespective of that party's failure to assert a cross-motion for summary judgment, provided the case warrants that result. *Hereford v. Hereford*, 183 Mont. 104, 107, 598 P.2d 600, 602 (1979). However, the court must be very careful that the original movant had a full and fair opportunity to meet the proposition, that there is no genuine issue of material fact, and the other party is entitled to judgment as a matter of law. *Id*. (citing 6 Moore's Federal Practice, para.56.12, pp. 56-331 and 56-334). Here, DEQ made its request for summary judgment on the Plaintiffs' amended complaints in its answer brief to the Plaintiffs' joint brief in support of their motion for summary judgment. The Plaintiffs had the opportunity to address DEQ's proposition that it should have summary judgment both by addressing it in their reply brief and during the hearing on their joint motion for summary judgment. Should DEQ demonstrate it is entitled to summary judgment on the Plaintiffs' amended complaints as a matter of law, the lack of a cross-motion for summary judgment by DEQ will not preclude this Court's granting DEQ that relief.

The standard of review of the sufficiency of an agency's environmental review under MEPA is whether the decision was unlawful or arbitrary and capricious. *Bitterrooters for Planning, Inc. v. Mont. Dep't of Envtl. Quality*, 2017 MT 222, ¶ 15, 388 Mont. 453, 401 P.3d 712 (citing § 75-1-201(6)(a)(iii), MCA; *Montana Wildlife Fed. v. Mont. Bd. of Oil & Gas Conserv.*, 2012 MT 128, ¶ 25, 365 Mont. 232, 280 P.3d 877). An agency decision is unlawful if it does not comply with governing laws and administrative rules. *Id*. (citing *North Fork Preservation Ass'n v. Dep't of State Lands*, 238 Mont 451, 459, 778 P.2d 862, 867 (1989)). A court will sustain an agency's interpretation of its rule "so long as it lies within the range of reasonable interpretation permitted by" the language of the rule. *Id*. (quoting *Clark Fork Coal. v. Mont. Dep't of Envt'l*

Quality, 2008 MT 407, P20, 347 Mont. 197, 197 P.3d 482). The interpretation of a statute by an agency may be entitled to "respectful consideration," but the interpretation is not binding on a court. See *Mont. Power Co. v. Mont. PSC*, 2001 MT 102, ¶ 25, 305 Mont. 260, 26 P.3d 91 (citing *Doe v. Colburg*, 171 Mont. 97, 100, 555 P.2d 753, 754 (1976)).

An agency decision is arbitrary and capricious if made without consideration of all relevant factors or based on a clearly erroneous judgment. *Bitterrooters for Planning, Inc.,* ¶ 16 (citing *Clark Fork Coal*., ¶ 21; *North Fork Preservation Ass'n*, 238 Mont at 465, 778 P.2d at 871). However, the arbitrary and capricious standard does not permit reversal "merely because the record contains inconsistent evidence or evidence which might support a different result." *Id*. (quoting *Montana Wildlife Fed.*, ¶ 25). Rather, the decision "must appear to be random, unreasonable or seemingly unmotivated based on the existing record." *Id*. (quoting *Montana Wildlife Fed*., ¶ 25). A court may not substitute its own judgment for that of the agency but will not defer to an agency decision without a searching and careful review of the record to verify that the agency made a reasoned decision. *Id*. (citing *Friends of the Wild Swan v. Dep't of Nat. Res. & Conservation*, 2000 MT 209, ¶ 28, 301 Mont. 1, 6 P.3d 972; *North Fork Preservation Ass'n*, 238 Mont. at 465, 778 P.2d at 871).

The Plaintiffs' view is that the Environmental Assessment (EA) conducted by DEQ for its review of the Glacier Stone Permit application was inadequate under MEPA criteria and, consequently, a full EIS must be required.

1. Water Quality of Little Bitterroot Lake

In their first contention, Plaintiffs argue that DEQ's determination that the water quality of nearby Little Bitterroot Lake would not be impacted by Glacier Stone's mining operation was an arbitrary and capricious decision because, as Plaintiffs see it, the administrative record

indicates the operation "has the potential to significantly affect the water quality of Little Bitterroot Lake" and, further, because the record contains conflicting evidence regarding the connection between stormwater discharges from the quarry and the waters of Little Bitterroot Lake, the potential impacts from the project trigger the need for a full EIS. Overall, the Plaintiffs contend that DEQ "dismissed as irrelevant" the water quality in Little Bitterroot Lake.

DEQ answers that its conclusion the water quality of Little Bitterroot Lake would not be impacted by Glacier Stone's operation is based on its analysis of how and where the filtration and deposition of water-borne sediments from the operation will occur. DEQ made this analysis of this issue in the administrative record:

> Based on multiple site visits by DEQ inspectors, small amounts of sediment that had discharged outside the proposed permit boundary were present. Because Glacier Stone is quarrying rock at the two sites its mining operations are essentially creating large depressions in porous material, preventing most of the storm runoff that would transport sediment from leaving the quarry area. Moreover, the perimeter of the site was walked (where accessible) by DEQ inspectors and was otherwise observed by DEQ staff on several occasions. The existing sediment control (berms and sediment control structures) and the rocky nature of the native and reclaimed ground allows for rapid infiltration of runoff and snowmelt both within the permit boundary and just outside the permit boundary.
>
> Moreover, DEQ does not predict that sediment will travel from the site to Little Bitterroot Lake because of various filters that exist along the flow path. A large natural catchment basin exists downgradient from both the Canyon Creek and Glacier Mountain disturbance areas. The catchment basin is clearly shown as the area devoid of vegetation that exists between the two quarry sites depicted on WET-2.[2] This catchment basin is composed of porous gravel/coarse rock. Any runoff carrying sediment from the two quarry sites would infiltrate into the subsurface and slowly drain away, providing for deposition of any transported sediment with this coarse rock filter.
>
> Only a small portion of the north quarry is within a watershed to the north. There is also a catchment basin in this flow path. Several berms located within the permit area will stop the transport of sediment in a storm event. DEQ considered a potential northern flow path, but dismissed it as very unlikely as a contaminant transport of sediment because of these filters. The majority of the north quarry will drain toward the coarse rock at the head of the longer southern flow path. As discussed above, it is predicted that any flow of

[2] The WET-2 diagram is shown, above, in paragraph 25.

water carrying sediment from the north quarry would infiltrate in the coarse rock, depositing any sediment into the subsurface.

Even if flow were to escape the catchment basins, which it is not expected to do, the flow would not reach Little Bitterroot Lake. The distance between the nearest disturbance that would be caused by the quarry operations and the lake is approximately one mile in a direct line. Runoff would have to take a circuitous route to reach Little Bitterroot Lake. This flow path is depicted on Figure WET-2. This pathway is also porous and vegetated, promoting the settling of any transported sediment prior to reaching Little Bitterroot Lake.

Finally, Glacier Stone will be required to obtain coverage under the Multi-Sector General Permit for Storm Water Discharges Associated with Industrial Activity. Glacier Stone has already implemented many of the best practices that may be required under the Multi-Sector Permit for Storm Water Discharges Associated with Industrial Activity. The berms that it has constructed along the [haul roads] and around the main operations area as required by the Mine Safety and Health Administration (MSHA) also function as berms for water control. In addition, Glacier Stone has already constructed roadside ditches with turnouts to decrease the volume of water along the roadway and to minimize the sediment discharge.

Based on the above, DEQ predicts that sediment from storm water running off the permit area may travel beyond the boundary. However, the filters discussed above (primarily coarse, porous ground and vegetation) would limit the transport to tens or hundreds of feet beyond the permit boundary and would not reach Little Bitterroot Lake.

In addition, the DEQ Water Protection Bureau has notified Glacier Stone that they are required to apply for permit coverage under the Multi-Sector General Permit for Storm Water Discharges Associated with Industrial Activity (MSGP) at the Canyon Creek Quarry: MTUS002002.

In addition, DEQ answers that the administrative record shows that Glacier Stone committed to various measures to mitigate the sediment from its operation:

1. Implement/maintain additional [best management practices] to minimize discharge of sediment and non-sediment pollutants from the site.
2. Submit a Notice of Intent (NOI) package to the DEQ to obtain coverage under the MSGP.
3. Complete NOI-SWI form.
4. Submit a Storm Water Pollution Prevention Plan (SWPPP).
5. Submit all related permitting fees and/or expenses.
6. Identify/document all pollutant sources at the Canyon Creek Quarry.

In light of this report of its study and analysis of the water quality issue in the administrative record, DEQ maintains that its determination that the water quality of Little Bitterroot Lake would not be impacted by Glacier Stone's operation shows that it met its obligation to take the requisite "hard look" at the potential impacts on Little Bitterroot Lake by completing the appropriate significant impacts analysis mandated by ARM 17.4.608. More particularly, DEQ maintains that it appropriately identified, considered, and applied each of the "significance criteria" at ARM 17.4.608 in making its determination that the water quality of Little Bitterroot Lake would not be impacted by Glacier Stone's operation. Therefore, as DEQ maintains, the preparation of the EA was the appropriate level of environmental review under MEPA and a full EIS is not required.

Similarly, Glacier Stone argues that DEQ's analysis of the water quality issue is correct as a matter of law. In this regard, Glacier Stone quotes *Bark v. U.S. Bureau of Land Mgmt*., 643 F.Supp.2d 1214, 1223 (D. Or. 2009) for the proposition that an agency "is not required to conduct any particular test or to use any particular method, so long as the evidence provided to support its conclusions, along with other materials in the record, ensure that the agency made no clear error of judgment that would render its action arbitrary and capricious."

ARM 17.4.608 states the following:

DETERMINING THE SIGNIFICANCE OF IMPACTS

(1) In order to implement 75-1-201, MCA, the agency shall determine the significance of impacts associated with a proposed action. This determination is the basis of the agency's decision concerning the need to prepare an EIS and also refers to the agency's evaluation of individual and cumulative impacts in either EAs or EISs. The agency shall consider the following criteria in determining the significance of each impact on the quality of the human environment:

(a) the severity, duration, geographic extent, and frequency of occurrence of the impact;

(b) the probability that the impact will occur if the proposed action occurs; or conversely, reasonable assurance in keeping with the potential severity of an impact that the impact will not occur;

(c) growth-inducing or growth-inhibiting aspects of the impact, including the relationship or contribution of the impact to cumulative impacts;

(d) the quantity and quality of each environmental resource or value that would be affected, including the uniqueness and fragility of those resources or values;

(e) the importance to the state and to society of each environmental resource or value that would be affected;

(f) any precedent that would be set as a result of an impact of the proposed action that would commit the department to future actions with significant impacts or a decision in principle about such future actions; and

(g) potential conflict with local, state, or federal laws, requirements, or formal plans.

(2) An impact may be adverse, beneficial, or both. If none of the adverse effects of the impact are significant, an EIS is not required. An EIS is required if an impact has a significant adverse effect, even if the agency believes that the effect on balance will be beneficial.

DEQ maintains that its review and analysis of Glacier Stone's operation and its subsequent determination that the operation is not predicted to significantly impact the human environment demonstrates that the EA was the appropriate level of environmental review under MEPA. In further support DEQ cites *Alliance for the Wild Rockies v. Savage*, 209 F.Supp.3d, 1181, 1189 (2016) for the proposition that "Courts must be mindful to defer to agency expertise, particularly with respect to scientific matters within the purview of the agency. The ultimate standard of review is a narrow one and a court may not substitute its judgment for that of the agency[.]" DEQ further notes that the Plaintiffs have not raised a substantial question whether Glacier Stone's operation may have a significant effect on the water quality in Little Bitterroot Lake. In particular, DEQ notes that the Plaintiffs cite communications between DEQ Inspector Keen and Glacier Stone in which Inspector Keen acknowledges there are two unnamed ditches

that run toward Little Bitterroot Lake but did not indicate that water-borne sediment or pollutants would reach Little Bitterroot Lake through these ditches.

Glacier Stone notes the administrative record shows that DEQ reviewed the information regarding the possibility of water from the quarry reaching Little Bitterroot Lake, along with the information provided by the Plaintiffs and DEQ's own observations to make this determination:

> Even if flow were to escape the catchment basins, which it is not expected to do, the flow would not reach Little Bitterroot Lake. The distance between the nearest disturbance that would be caused by the quarry operations and the Lake is approximately one mile in a direct line. Runoff would have to take a circuitous route to reach Little Bitterroot Lake. The flow path from the proposed disturbance area would be about three miles long. This flow path is depicted on Figure WET-2. This pathway is also porous and vegetated, promoting the settling of any transported sediment prior to reaching Little Bitterroot Lake.

Glacier Stone further seeks to distinguish an authority cited by the Plaintiffs on the need for a full EIS to examine the water quality issue and the need for water quality monitoring. Plaintiffs rely on *Idaho Conservation League v. U.S.F.S.*, 2019 U.S. Dist. LEXIS 219476. There, a U.S. District Court determined that an EA was insufficient and that an EIS must be prepared when the analysis in the EA acknowledged that mine drilling activities could encounter groundwater, alter groundwater quality, and discharge drilling fluids to subsurface zones. However, the Forest Service had not determined how the fluid discharge would drain into the existing groundwater and no groundwater monitoring was occurring to determine whether the drilling fluids were being carried into a creek. Glacier Stone is correct that *Idaho Conservation League* is distinguishable.

In the *Idaho* case, the pollutant potentially affecting groundwater quality was, itself, a liquid – a miscible drilling fluid that would mix with groundwater and be carried wherever the groundwater flowed. Here, the pollutant from Glacier Stone's operation is sediment – a non-fluid constituent of stormwater discharge or other runoff which is separable from the stormwater or

runoff, itself, by the action of the water flowing through various constructed and natural features, including berms situated within the Permit area, catchment basins, and the coarse rock, porous ground, and vegetation existing withing the flowpaths downgradient from both mine sites.

The administrative record demonstrates that DEQ took the requisite hard look at the potential impacts on the water quality of Little Bitterroot Lake from Glacier Stone's operation by engaging in an analysis of the significant impacts factors set out in ARM 17.4.608. Further, DEQ appropriately identified, considered, and applied each of the 'significance criteria' in making its determination that the water quality of Little Bitterroot Lake would not be impacted by Glacier Stone's operation, and DEQ made this determination by applying its particular expertise to the appropriate considerations.[3] The Plaintiffs have not shown that DEQ committed any clear error of judgment or engaged in its investigation, analysis, and determination that Glacier Stone's operation will not significantly affect the water quality of Little Bitterroot Lake, in a manner which could be characterized, properly, as either arbitrary or capricious. Neither have Plaintiffs shown that DEQ erred in not imposing water quality monitoring protocols on Glacier Stone or in declining to conduct a full EIS to include either a water quality monitoring protocol or obtaining the full water quality monitoring data collected by WET – as opposed to a summary of the full data actually submitted by Plaintiffs for the administrative record – because DEQ could properly

[3] As its argument implies, DEQ's conclusion about the potential impact by Glacier Stone's operation on the water quality of Little Bitterroot Lake cannot be shown to be arbitrary or capricious or demonstrate a clear error of judgment, because DEQ's analysis does not conclude that stormwater or runoff from Glacier Stone's quarry could not, conceivably, reach the shores of Little Bitterroot Lake. Rather, DEQ's investigation, review, and analysis of the stormwater and runoff from Glacier Stone's quarry supports its determination that the waterflows will not be sufficient to carry the sediment as far as Little Bitterroot Lake due to the filtration and settling of sediments which will occur within the various flowpaths of the runoff due to the placement and existence of berms within the permit area, the coarse rock, porous ground, and vegetation existing within the catchment basins downgradient from both mine sites. As DEQ's analysis concludes, the deposition of any transported sediment will occur within to tens or hundreds of feet from the permit boundary and the sediments will not reach Little Bitterroot Lake.

determine without such data and without imposing such protocols that the sediment from Glacier Stone's operation would not be carried by stormwater discharge or other runoff as far as Little Bitterroot Lake. DEQ determined, properly, that preparation of the EA was the appropriate level of environmental review under MEPA with respect to the water quality issues raised by Plaintiffs and that an EIS is not required on such bases.

2. Air Quality

In their second contention, Plaintiffs argue that the EA is replete with incomplete, inaccurate, and contradictory information regarding air quality. Plaintiffs further contend that "although the EA notes that 'potential impacts are expected to be less than the permit threshold requirement,' and 'DEQ does not believe the particulate matter would be hazardous to nearby residents,' the record reflects that the Belks, as immediately neighboring landowners, and [Little Bitterroot Lake Association] members had already experienced serious air quality impacts from the existing operation pre-expansion, which was not adequately evaluated in the EA."

DEQ answers that, in response to comments submitted by Plaintiffs' counsel and consultant (WET) concerning air quality impacts, DEQ considered the issue as demonstrated by the following analysis in the EA:

> DEQ reviewed the proposed activities at the quarry and has determined that the potential emissions from the equipment are less than the applicable threshold for requiring a Montana Air Quality Permit (ARM 17.8.743(1)(b)). However, Glacier Stone would still be subject to the following emission standards which apply to both permitted and unpermitted facilities.
>
> • ARM 17.8.304(2) Visible Air Contaminants – No person may cause or authorize emissions to be discharged into the outdoor atmosphere from any source installed after November 23, 1968, that exhibit an opacity of 20% or greater averaged over 6 consecutive minutes.
>
> • ARM 17.8.308(1) Particulate Matter, Airborne – No person shall cause or authorize the production, handling, transportation, or storage of any material unless reasonable precautions to control emissions of airborne particulate matter are taken. Such

emissions of airborne particulate matter from any stationary source shall not exhibit an opacity of 20% or greater averaged over six consecutive minutes, except for emission of airborne particulate matter originating from any transfer ladle or operation engaged in the transfer of molten metal which was installed or operating prior to November 23, 1968.

- ARM 17.8.308(2) Particulate Matter, Airborne – No person shall cause or authorize the use of any street, road, or parking lot without taking reasonable precautions to control emissions of airborne particulate matter.

To satisfy "reasonable precautions" provisions, Glacier Stone would employ a number of control measures to reduce emissions, as necessary, including but not limited to, the application of chemical dust suppressant and/or water on haul roads and access roads and the prompt revegetation of disturbed areas.

Sampling and pre-monitoring is not required under the Clean Air Act of Montana or the corresponding administrative rules. An air quality permit is not required for the Glacier Stone operations. Ambient air quality monitoring for such operations is typically not required by DEQ even for sources that are required to obtain an air quality permit.

The quarried material is inert. The particulate matter potentially released during operation would be regulated as particulate matter – primarily as Particulate Matter with an aerodynamic diameter of 10 micrometers or less (PM10). Potential emissions are expected to be less than the permit threshold requirement, and dust control is required to meet the reasonable precautions provisions. Therefore, because particulate would be emitted at levels below the permitting threshold and controlled, DEQ does not believe that particulate matter would be hazardous to nearby residents.

Concurrent reclamation would limit the potential for blowing dust from the operating area. The rock fragments left in the soils would also limit blowing dust.

DEQ's response further notes that the Plaintiffs' concerns based on Glacier Stone's past operations and levels of dust production is not the appropriate measure to determine whether DEQ has taken a hard look at the issue or whether the Plaintiffs will likely experience the same dust levels as in the past. Before Glacier Stone applied for its Permit, it operated under the Small Miner Exclusion Statement, which largely exempted Glacier Stone from the obligation to comply with the air quality standards that DEQ now has the authority to enforce against Glacier Stone by virtue of its status as a permitted mining operator. DEQ took the requisite hard look at Glacier Stone's operation and, upon reviewing the proposed activities at the quarry, determined

that the potential emissions from the equipment are less than the applicable threshold for requiring a Montana Air Quality Permit pursuant to ARM 17.8.743(1)(b). DEQ's further analysis of the issue in the EA also noted that Glacier Stone's operations under its Permit will require that it comply and continue to comply with the air quality control standards contained in ARM 17.8.304(2) (Visible Air Contaminants) and ARM 17.8.308 (Particulate Matter, Airborne) under DEQ's enforcement authority established at § 82-4-361, MCA. Finally, DEQ notes that Glacier Stone's compliance with these air quality standards will require, among other things, that it employ a number of control measures to reduce emissions, as necessary, including the application of chemical dust suppressant and/or water on haul roads and access roads and the prompt revegetation of disturbed areas to satisfy "reasonable precautions" provisions of the regulations that Glacier Stone, while previously operating under the Small Miner Exclusion Statement, was not bound to satisfy.

Glacier Stone responds to the Plaintiffs' second contention with additional points.

First, Glacier Stone maintains that, in making their assertions of error by DEQ, the Plaintiffs rely primarily on 'facts' which are either not in the record or consist of complaints made by the Plaintiffs, themselves, during DEQ's environmental review of Glacier Stone's application. By way of example, Glacier Stone notes that, as evidence of an existing air quality problem, the Plaintiffs state that residents of the Little Bitterroot Lake area "had already experienced *serious air quality impacts*" that were "not adequately evaluated in the EA." However, as Glacier Stone further observes, the points of reference to the administrative record cited by the Plaintiffs for these allegations contain only references to the draft EA and a description of blasting from the Final EA but nothing about *serious air quality impacts*. Glacier Stone also notes that Plaintiffs' objection to DEQ's finding that the production of particulate

matter from Glacier Stone's operation will be minimal "is likely false" is based on an opinion offered by the Plaintiffs' consultant, whose opinion, it appears, is not supported by any scientifically collected data or analysis in the administrative record.

In an action challenging or seeking review of an agency's decision that an environmental review is not required or that the environmental review is inadequate, the burden of proof is on the person challenging the decision. *Pompeys Pillar Historical Assoc. v. Mont. DEQ*, 2002 MT 352, ¶ 20, 313 Mont. 401, 61 P.3d 148. The arbitrary and capricious standard does not permit reversal of an agency's decision "merely because the record contains inconsistent evidence or evidence which might support a different result." *Mont. Wildlife Fed'n* , ¶ 25. "Implicit in the requirement that an agency take a hard look at the environmental consequences of its actions is the obligation to make an adequate compilation of relevant information, to analyze it reasonably, and to consider all pertinent data." *Clark Fork Coal.*, ¶ 47. However, MEPA requirements are merely "procedural" and do not require an agency to reach any particular decision in the exercise of its independent authority. *Mont. Wildlife Fed'n*, ¶ 32; also § 75-1-102(3)(b), MCA (MEPA provides no additional regulatory authority to an agency). A court must "be mindful to defer to agency expertise, particularly with respect to scientific matters within the purview of the agency[.]" *All. for the Wild Rockies v. Savage*, 209 F. Supp. 3d 1181, 1189 (D. Mont. 2016) (quoting *Klamath-Siskiyou Wildlands Ctr. v. Bureau of Land Mgmt.*, 387 F.3d 989, 993 (9th Cir. 2004)). Finally, a court cannot substitute its judgment for that of the agency but will not defer to an agency decision without a searching and careful review of the record to verify that the agency made a reasoned decision. *Friends of Wild Swan*, ¶ 28.

With respect to the air quality issue, Plaintiffs have not met their burden in challenging DEQ's consideration of the issue and its determination that the EA comprises the appropriate

level of environmental review for Glacier Stone's operating permit application. DEQ's analysis in the EA demonstrates that it made an adequate compilation of the relevant information, considered all the relevant air quality data, and analyzed it reasonably according to the facts and governing air quality standards. The Plaintiffs' proffer of contrary assertions in the administrative record that they experienced "serious air quality impacts" before Glacier Stone was operating under the regulations now applicable to it as a permitted mining operator, does not meet the Plaintiffs' burden. The DEQ applied its expertise in determining that Glacier Stone does not require a Montana Air Quality Permit for its operation, and the DEQ is entitled to this Court's deference in that regard. The law does not require a court to afford the same deference to the characterization of potential impacts of a mining operation as constituting 'serious air quality impacts' by opponents of the operation, particularly where, as here, the opponents have proffered the opinion of a retained consultant to the effect that DEQ's air quality impact determination "is likely false" – an opinion not apparently supported by data gathered or analyzed in accordance with any particular scientific standard. Finally, DEQ's analysis of the air quality issue cannot be faulted for not observing or imposing any stricter standards than those provided by the applicable, governing air quality standards in Montana law. DEQ adequately considered, evaluated, and analyzed the air quality issue in the EA and its determinations were not arbitrary or capricious, nor were they the product of any clearly erroneous judgments.

3. Dust, Noise, Recreation, Wilderness, Economy, Viewshed & Cultural Factors

In their third contention, Plaintiffs argue that the EA does not "in any way evaluate the potential impacts of noise and dust from the mine on the recreational use and economy of the Lake. The EA does not even mention such impacts under headings 17, 'Access to and Quality of Recreational Activities' and 20, 'Cultural Uniqueness and Diversity.'" The Plaintiffs also proffer

a comment from the Little Bitterroot Lake Association (LBLA). The comment indicates the following:

> Glacier Stone is working within earshot of our shoreline which is solid with homes. We ask you to include in your permit noise mitigation strategies for their expanded operation. Specific and limited daylight and weekday operations should be written in to their permit. We are now living with their noise and it is a problem.

DEQ considered and evaluated the noise impact of Glacier Stone's operation and incorporated into the Permit limitations to address this concern and mitigate the impact of noise. Glacier Stone's operations under the Permit are limited to the hours of 6:30 a.m. to 4:00 p.m., Monday through Friday, with no night or weekend operations occurring. Finally, the administrative record demonstrates that DEQ considered the impact proffered by Plaintiffs as it concerns the noise from Glacier Stone's operation on the area's cultural uniqueness based on its relative serenity. In the EA, DEQ indicates that it took this proffered impact into reconsideration and determined that, with respect to its analysis concerning potential impacts to "Social Structures and Mores," no significant impacts are anticipated.

DEQ further responds that it acknowledged, specifically, the noise impacts on Little Bitterroot Lake in its discussion of secondary impacts on recreational activities and, while it did not specifically address dust impacts on Little Bitterroot Lake,[4] it did address the air quality impacts of Glacier Stone's operation in the EA. The Court has addressed DEQ's consideration of the air quality issue, above.

DEQ considered and analyzed the potential impact of noise of Glacier Stone's operation on wilderness and recreational activities as demonstrated by this discussion:

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[4] Glacier Stone's quarry sits approximately one mile from Little Bitterroot Lake. While the Plaintiffs make the general observation that "the record shows that the mine has caused and will continue to cause . . . dust beyond the mine boundaries", there is no indication in the Plaintiffs' brief that the record would support a finding that the dust travels airborne to reach even the shores of the Lake.

> Direct Impacts:
> The project would be located on private land and at the end of the access road. The proposed operating permit area is about a mile from Little Bitterroot Lake. There [are] no wilderness areas nearby and no access to recreational areas from the site. There would be no impact to recreational potential on the proposed permit area.
>
> Secondary Impacts:
> Recreators on Little Bitterroot Lake may notice activity and noise from the proposed project due to running of heavy equipment and vehicle traffic. Secondary impacts to access and quality of recreational activities would be minimal due to the limited scope of the project and the distance of almost one mile between the Little Bitterroot Lake and the proposed project area.

Adhering to the appropriate standard of review, the question with respect to DEQ's consideration of the noise impacts of Glacier Stone's operation is not whether the record contains inconsistent evidence or whether the record might support a different result but whether DEQ made an adequate compilation of relevant information, analyzed it reasonably, and considered all pertinent data. In this regard, DEQ's consideration of the noise impacts of Glacier Stone's operation satisfies this standard. DEQ considered the appropriate multitude of potential impacts, analyzed them in the context of the circumstances of each, and considered the data before reaching the reasoned conclusion that the impacts would not be significant in most respects and imposing mitigation measures, including daytime and weekday limitation on operations in the Permit, to address these concerns. While the Plaintiffs and others may continue to assert that DEQ's impact analyses should have included a more far-reaching discussion of their individual or associational interests concerning the impacts of Glacier Stone's operation in ways including, but not limited to, the impacts of dust and noise on the recreational uses of the area, the wilderness viewshed, and the local economy and culture, the consideration and analysis undertaken by DEQ acknowledged and appropriately considered both the potential impacts and the varying degrees to which these impacts would be manifest in a manner sufficient to satisfy the hard look standard.

4. Consideration of the Belks' Property Rights

In their fourth contention, the Plaintiffs argue that DEQ did not heed the Belks' request for a more thorough analysis of the impacts to their property which surrounds Glacier Stone's quarries. As the Plaintiffs contend, "the EA completely fails to discuss in any way the impacts to the Belks' property or to their road easement" and "[s]uch analysis is mandated by MEPA."

DEQ answers that the relevant statutory provisions of MEPA – primarily § 75-1-201(1)(b)(iv)(D) – in addition to the Legislature's statements of purpose at §§ 75-1-102 and 75-1-103 directing that state agencies must consider whether regulatory impacts on private property rights amount to the "undue government regulation" of the right to use and enjoy private property free of such undue regulation, do not apply to direct the DEQ to examine impacts on the Belks' surrounding property in the course of making its environmental review of Glacier Stone's application. DEQ is correct.

In applying a statute, a court's purpose is to "ascertain the legislative intent and give effect to the legislative will[.]" *State v. Thomas*, 2019 MT 155, ¶ 8, 396 Mont. 284, 445 P.3d 777 (quoting *S.L.H. v. State Comp. Mut. Ins. Fund*, 2000 MT 362, ¶ 16, 303 Mont. 364, 15 P.3d 948). A court's role "is simply to ascertain and declare what is in terms or in substance contained therein, not to insert what has been omitted or to omit what has been inserted." *Id.* (quoting *Diaz v. Blue Cross & Blue Shield*, 2011 MT 322, ¶ 14, 363 Mont. 151, 267 P.3d 756). The legislative intent, in the first instance, is to be ascertained "from the plain meaning of the words used." *Id.* (quoting *Mont. Vending, Inc. v. Coca-Cola Bottling Co. of Mont.*, 2003 MT 282, ¶ 21, 318 Mont. 1, 78 P.3d 499). "Where the plain language of the statute is clear and unambiguous, no further statutory interpretation is necessary." *Id.* (quoting *Diaz*, ¶ 14) (other citation omitted). In any event, "[s]tatutory construction should not lead to absurd results if a reasonable interpretation can

avoid it." *Bratton v. Sisters of Charity of Leavenworth Health Sys*., 2020 MT 86, ¶ 14, 399 Mont. 490, 461 P.3d 127 (quoting *Mont. Sports Shooting Ass'n v. State*, 2008 MT 190, ¶ 11, 344 Mont. 1, 185 P.3d 1003).

The operative provision of MEPA which concerns DEQ's arguable duty to consider impacts on Plaintiffs Belks' property abutting the Glacier Stone mines is found at § 75-1-201(1)(b)(iv)(D), MCA. The statutory language provides, in relevant part, the following:

> The legislature authorizes and directs that, to the fullest extent possible under this part, all agencies of the state . . . shall . . . include in each recommendation or report on proposals for projects, programs, and other major actions of state government significantly affecting the quality of the human environment in Montana a detailed statement on . . . any *regulatory impacts on private property rights*, including whether alternatives that reduce, minimize, or eliminate the *regulation of private property rights* have been analyzed.

Assuming, for the purpose of this analysis, that DEQ's environmental review of Glacier Stone's application for a mining permit constitutes a 'project', 'program', or 'other major action of state government significantly affecting the quality of the human environment in Montana', the question is whether the language referencing a state agency's duty to prepare a detailed statement on "regulatory impacts on private property rights" and "regulation of private property rights" in the course of conducting an environmental review refers to the duty of DEQ, as alleged by the Plaintiffs, to consider the impacts of Glacier Stone's operation on the Belks' neighboring property.

The transitive verb 'regulate' means "to govern or direct according to rule, to bring under the control of law or constituted authority, or to make regulations for or concerning." Merriam Webster, *Online Dictionary*, accessed December 04, 2020 at https://www.merriam-webster.com/dictionary/regulate. The term 'regulation' is the noun form of the transitive verb, 'regulate', and means "the act of regulating or the state of being regulated." Merriam Webster,

Online Dictionary, accessed December 04, 2020 at https://www.meriam-webster.com/dictionary/regulation. Likewise, the term 'regulatory' is the adjective form of the transitive verb 'regulate' and carries the same meaning and import. Merriam Webster, *Online Dictionary*, accessed December 04, 2020 at https://www.merriam-webster.com/dictionary/regulatory. The only regulatory authorities invoked by Glacier Stone's application for a mining permit include DEQ's authority to conduct an environmental review under MEPA and DEQ's authority to issue an operating permit under MMRA. Neither authority grants to DEQ the ability to govern, direct, bring under control, or make regulations for or concerning anything but mining sites which are the subject of Glacier Stone's application. Nothing in the invocation of these regulatory schemes grants to DEQ any authority to govern, direct, bring under control, or make regulations for or concerning the Belks' use of their neighboring property. It is an absurdity, therefore, to interpret the terms "regulatory impacts" and "regulation of private property rights" in § 75-1-201(1)(b)(iv)(D), MCA, to have been included by the Legislature in the statute to refer to anything but the property which is the subject of the environmental review or mining permit application. A plain language interpretation of the statute so dictates.

The Plaintiffs' contention that DEQ violated MEPA by failing to consider, sufficiently, the 'regulatory impacts' on the Belks' property, including the Belks' rights in the access road, is without merit.

5. Whether the Environmental Assessment is the Appropriate Review

In their fifth contention, Plaintiffs argue that DEQ should have prepared an environmental impact statement (EIS) instead of the EA.

DEQ answers that the standard for determining whether an EIS is necessary is governed by § 75-1-201(1)(b)(iv), MCA, which specifies that a state agency must prepare a "detailed

statement" on the environmental impact of "major actions of state government significantly affecting the quality of the human environment in Montana." The threshold criteria for determining whether this standard has been met are set out in ARM 17.4.608, the administrative rule adopted by DEQ to implement the standard at § 75-1-201(1)(b)(iv), MCA. ARM 17.4.608(1) provides the following:

> In order to implement 75-1-201, MCA, the agency shall determine the significance of impacts associated with a proposed action. This determination is the basis for the agency's decision concerning the need to prepare an EIS and also refers to the agency's evaluation of individual and cumulative impacts in either EAs or EISs. The agency shall consider the following criteria in determining the significance of each impact on the quality of the human environment:
>
> (a) the severity, duration, geographic extent, and frequency of occurrence of the impact;
>
> (b) the probability that the impact will not occur if the proposed action occurs; or conversely, reasonable assurance that the impact will not occur;
>
> (c) growth-inducing or growth-inhibiting aspects of the impact, including the relationship or contribution of the impact to cumulative impacts;
>
> (d) the quantity and quality of each environmental resource or value that will be affected, including the uniqueness and fragility of those resources or values;
>
> (e) the importance to the state and to society of each environmental resource that would be affected;
>
> (f) any precedent that would be set as a result of an impact of the proposed action that would commit the department to future actions with significant impacts or a decision in principle about such future actions; and
>
> (g) potential conflict with local, state, or federal laws, requirements of formal plans.

As the administrative record demonstrates, along with the Court's analysis and disposition of the Plaintiffs' various contentions and arguments, above, DEQ applied, appropriately, the 'significance criteria' of ARM 17.4.608(1) in making the requisite hard look at Glacier Stone's permit application and mining activities and proposed quarry operation before

determining they would not significantly impact the human environment. Preparation of the Final EA constitutes the appropriate level of environmental review under MEPA.

As DEQ observes, Glacier Stone's operating permit authorizes it to quarry rock at the two sites for up to 25 years. The administrative record contains DEQ's various analyses and determinations that the environmental impacts during the period of operation are not predicted to be significant, including impacts to geology and soils, water quality and quantity including the water of Little Bitterroot Lake, air quality, terrestrial, avian, and aquatic life, unique, endangered, fragile or limited environmental resources, historical and archaeological sites, aesthetics, demands on environmental resources of land, water, air or energy, access to and quality of recreation and wilderness activities, cultural uniqueness and diversity, and all other environmental resources evaluated in the Final EA. The Plaintiffs' manifold contentions and objections have not raised a genuine issue of material fact whether DEQ's consideration or resolution of any issue with respect to its preparation of the Final EA, or its determination that the EA was the appropriate level of environmental review or its decision was arbitrary and capricious or unlawful in some other respect. The DEQ considered and analyzed all relevant information and did not ignore any pertinent information. Having taken the required hard look at the environmental impacts, DEQ determined the environmental impacts from operation of Glacier Stone's quarry would not be significant.

6. Grant of the Operating Permit Under the MMRA

In their sixth contention, Plaintiffs argue that DEQ's grant of the Permit to Glacier Stone violates the MMRA. As Plaintiffs put it, "[t]he Metal Mine Reclamation Act[,] like MEPA, is intended to implement the environmental provisions of the Montana Constitution.§ 82-4-301(1), MCA." Further, the Plaintiffs contend, "[a]s set forth in [their statement of undisputed facts], the

Glacier Stone permit fails to meet the requirements of § 82-4-336(10), MCA, because it fails to provide sufficient measures to prevent the pollution of air and water and the degradation of adjoining lands, including land owned by Plaintiffs." The Plaintiffs further contend that the "Glacier Stone permit also fails to meet the requirements of § 82-4-336(12), MCA, because it does not provide for permanent landscaping and contouring sufficient to minimize the amount of precipitation that infiltrates into disturbed areas, and fails to prevent objectionable postmining ground water and surface water discharges."

Glacier Stone responds that Plaintiffs' contentions of error on DEQ's part are predicated on a misreading of both the administrative record and DEQ's analysis. Glacier Stone observes that DEQ's purported acknowledgment that discharged sediment from the mine site will be transported into the Belks' property relies on an incorrect assumption that the water will flow in a direction (uphill) from the mine site that water generally does not flow and that the waterflows will consist of wastewater or processed water discharged from the mine site. As the EA determined, the anticipated water discharged from the mine site consists only of stormwater discharge, which flows to the south and generally away from the Belks' property. Finally, Glacier Stone takes issue with Plaintiffs' contention that DEQ is wrong to assume that Glacier Stone will comply with the provisions of its stormwater permit.

DEQ answers that the reclamation plan imposed on Glacier Stone satisfies all lawful requirements. DEQ cites § 82-4-336(10), MCA, which provides: "The reclamation plan must provide sufficient measures to ensure public safety and to prevent the pollution of air or water and the degradation of adjacent lands." However, as DEQ observes, properly, the Plaintiffs are foreclosed by § 75-1-201(6)(a)(ii), MCA, from raising the issue of potential impact on the Belks' property from water discharged from Glacier Stone quarry sites, because these issues were not

first presented to DEQ for its consideration prior to DEQ's issuance of the operating permit to Glacier Stone. In this regard, DEQ is correct and the issue will not be considered further in the context of the Plaintiffs' challenge to DEQ's issuance of the operating permit.

Further, Plaintiffs' challenge to DEQ's consideration of the air quality impacts and the impacts to Little Bitterroot Lake have been addressed, above, in resolution of the Plaintiffs' contentions with respect to DEQ's consideration and analysis of these issues in the course of its preparation of the Final EA and need not be considered further with respect to the issuance of the operating permit.

DEQ further answers the Plaintiffs' challenge that DEQ failed to comply with § 82-4-336(12), MCA. The statute provides:

> The reclamation plan must provide for permanent landscaping and contouring to minimize the amount of precipitation that infiltrates into disturbed areas that are to be graded, covered or revegetated, including but not limited to tailings impoundments and waste rock dumps. The plan must also provide measures to prevent objectionable postmining ground water discharges.

In particular, Plaintiffs contend that Glacier Stone's operating permit violates the statute by failing to provide for permanent landscaping and contouring sufficient to minimize the infiltration of precipitation into disturbed areas and failing to prevent objectionable postmining ground water and surface water discharges. Plaintiffs reassert their contention that DEQ did not address, adequately, the impacts to Little Bitterroot Lake, and they cite to DEQ's Completeness and Compliance determination issued October 20, 2017.

As DEQ observes, however, the Completeness and Compliance determination is part of the initial process of determining that a mining permit application is complete and complies with the provisions of the MMRA. Once the Completeness and Compliance determination is made the law specifies that DEQ issue a draft operating permit, which is subject to amendment and

modification as a consequence of the environmental review. As DEQ further observes, the environmental impacts to Little Bitterroot Lake were examined appropriately in the course of preparing the Final EA. Plaintiffs' contention that DEQ issued the operating permit unlawfully based on an insufficient consideration of the potential impacts on Little Bitterroot Lake lacks merit.

The Plaintiffs also contend the Final EA contains contradictory statements regarding the creation of depressions at the quarry sites. As DEQ notes, however, the Final EA states that Glacier Stone's quarry operation is not expected to create open pits or rock faces, and this statement was made in response to a comment submitted by Plaintiffs challenging compliance with the reclamation standards specific to open pits and rock faces in § 82-4-336(9)(b), MCA. In response to one of the Plaintiffs' comments raising concern that sediment may be transported from the quarries to Little Bitterroot Lake, DEQ observes that the Final EA distinguished between use of the terms "open pit" and "depressions" which have different meanings.

Answering the Plaintiffs' challenge that Glacier Stone cannot make a satisfactory reclamation effort because the revegetation plan does not require the importation and deposit of soil, DEQ responds that the Plaintiffs' challenge is based on comments submitted by Plaintiffs' counsel and consultant asserting that Glacier Stone will not be able to revegetate the disturbed areas without the importation of soils. DEQ further notes that it responded to these comments with the following:

> Reclamation would consist primarily of smoothing disrupted ground surfaces, re-applying any topsoil that had been salvaged and stockpiled, and seeding sites where rock had been removed. The proposed reclamation plan states that Glacier Stone would bring in organic material where needed to augment growth media. These reclamation activities have been used in areas north of the Canyon Creek quarry[.]

DEQ cites, appropriately, to the statutory provisions which establish the standards for reclamation from mining activities under the MMRA. Section 82-4-336(8), MCA, requires the reestablishment of vegetative cover if appropriate for the approved post-mine land use and § 82-4-336(9)(a), MCA, requires the reclamation of disturbed areas other than open pits and rock faces to comparable utility and stability as adjacent areas. DEQ also notes that Glacier Stone has successfully reclaimed areas that it disturbed while operating under the Small Miner Exclusion Statement and offered photos of the same and, finally, notes that while little native soil was salvaged from the disturbed area, the soil and fines material left in place were sufficient to re-establish vegetation, including the growth of pine trees ranging from 6-inches to 4-feet tall in the disturbed areas. As DEQ finally observes, the reclamation of mining disturbance under Glacier Stone's proposed reclamation plan would provide comparable utility and stability to that which existed prior to mining and to areas adjacent to the quarries, achieving the reclamation standard set forth in § 82-4-336(9)(a), MCA.

Plaintiffs' challenge to the issuance of the operating permit based on the sufficiency of Glacier Stone's reclamation plan is without merit.

Plaintiffs contend that DEQ violated § 82-4-336(9)(b)(i)-(iv) by approving a reclamation plan that fails to provide sufficient measures for open pits and rock faces. Section 82-4-336(9)(b) establishes standards for reclaiming open pits and rock faces as follows:

> With regard to open pits and rock faces, the reclamation plan must provide sufficient measures for reclamation to a condition:
>
> (i) of stability structurally competent to withstand geologic and climatic conditions without significant failure that would be a threat to public safety and the environment;
>
> (ii) that affords some utility to humans or the environment;
>
> (iii) that mitigates postreclamation visual contrasts between reclamation lands and adjacent lands; and

(iv) that mitigates or prevents undesirable offsite environmental impacts.

As DEQ observes, Glacier Stone's quarry operation is not expected to create an open pit or a rock face, but would instead generally disturb the ground from which the rock has been removed. Accordingly, reclamation standards for open pits and rock faces will not likely apply. However, as DEQ notes, the reclamation plan addresses reclamation of highwalls in the event they are created. The Plaintiffs focus their objection on Glacier Stone's asserted inability to revegetate "destabilized" slopes, and Plaintiffs assert this would be impossible without the importation of soils. DEQ points out, however, that the standards for reclaiming open pits and rock faces at § 82-4-336(9)(b)(i)-(iv), MCA, does not require the measures described in the Plaintiffs' objection. As DEQ notes, the proposed reclamation plan satisfies the reclamation requirements of § 82-4-3336(9)(b), MCA, by providing for the scaling back of highwalls and stabilization of upslope scree or loose rock for stability and safety and further provides for the grading of cut slopes and highwalls in unconsolidated material and the grading of overburden and waste rock against the highwall to mitigate post reclamation visual contrasts between reclamation lands and adjacent lands. In addition, DEQ notes, revegetation of the quarry floor and other areas which are disturbed, but not quarried, would reduce post-reclamation visual contrasts in addition to providing wildlife habitat. Any remaining highwall or rubble or scree feature left remaining would provide habitat comparable to currently existing rocky outcrops and talus slopes. The quarry floor would be graded to provide a free draining topography to avoid the creation of a quarry pond. Further, DEQ does not anticipate that the proposed quarry operation will create an open pit of any significant size and the use of backfill, in addition to the grading of overburden and waste rock against the highwall provided in the proposed reclamation plan, would not be necessary to achieve the reclamation standards set forth in § 82-4-336(9)(c), MCA.

The Plaintiffs' final challenges to Glacier Stone's proposed reclamation plan lack merit.

CONCLUSION

The Plaintiffs have not demonstrated they are entitled to summary judgment on any of the grounds raised in their joint motion for summary judgment. Defendants DEQ and Glacier Stone have demonstrated, conversely, that they are entitled to summary judgment on Counts 1 (MEPA violation claims) and Counts 2 (MMRA violation claims) as pleaded, similarly, in both of the Amended Complaints filed by the Plaintiffs. Finally, because the Plaintiffs have not prevailed on their similarly-pleaded Counts 1 (MEPA violation claims), their requests for injunctive relief based on the alleged unconstitutionality of § 75-1-201(6)(c), MCA are moot, and their similarly-pleaded Counts 3 (Montana Constitution claims) will be dismissed.

ORDER

For the reasons discussed above, the Plaintiffs' Joint Motion for Summary Judgment (Dkt. No. 45) is DENIED; Defendant Glacier Stone's Motion for Summary Judgment (Dkt. No. 48) is GRANTED; summary judgment is GRANTED to Defendant DEQ as to all of the Plaintiffs' claims against it; and the Plaintiffs' Amended Complaints are DISMISSED with prejudice.

SO ORDERED.

ELECTRONICALLY SIGNED AND DATED BELOW.

/s/ Dan Wilson
Hon. Dan Wilson
District Court Judge

c: Lindsey Hromadka / Michelle Tafoya Weinberg / Bruce Fredrickson /
David K. W. Wilson, Jr.
Edward Hayes
Mark L. Stermitz / Danielle A. R. Coffman / Darrell Worm
Robert Cameron / Jeremiah R. Langston