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Montana Department of Environmental Quality
Opencut Mining Section
PO Box 200901
Helena, MT 59620-0901
email: DEQOpencut@mt.gov

RE: Opencut Permit # 3415, Riverside Contracting's Proposed Rehbein Gravel Mine and Asphalt Plant

To Whom it May Concern:

Our office represents Friends of the Jocko ("FotJ"), a nonprofit organization formed by and comprised of residents of Arlee, including those owning property and residing within one-half mile of Riverside Contracting's proposed Rehbein gravel mine. We are writing to convey FotJ's serious concerns with Opencut Permit # 3415, the effects of the proposed Rehbein gravel mine, and deficiencies in public notice and opportunities for public participation in the approval process. Friends of the Jocko submits these comments on behalf of its members.

First and foremost, FotJ is especially concerned with the public health, safety and economic impacts of the proposed mine on community members and the effects on natural environment and private/public natural resources in proximity to the project area. FotJ respectfully demands that the Department of Environmental Quality ("DEQ") do the following: (1) carefully considers these and all other comments submitted in relation to this application; (2) immediately schedule a public meeting in relation to the proposed mine; and (3) take a hard look at the significant environmental impacts to the community's land, water, and air.

As you know, all Montanans have fundamental Constitutional rights to public participation and to a clean and healthful environment. The DEQ is required to implement Montana's clear constitutional mandate to protecting these rights. Mont. Const. art II, § 3. DEQ must take a hard look at the environmental impacts of the proposed gravel mine before moving forward with any approval. *Id.* FotJ respectfully requests that DEQ undertake a thorough Environmental Impact Statement (EIS) to examine the potential significant environmental, cultural, and economic impacts of the proposed mine. Additionally, we request that DEQ holds a public hearing on the permit application to allow our community the opportunity to make their voices heard.

As submitted by the Applicant, the gravel mine is intended to support an asphalt plant. See D1 and D5-1A. Thus, in relation to any cumulative impacts analysis, the agency must consider the two together. In tandem, both will have significant impacts on the community, economy, and public health in and around the Jocko Valley. Asphalt plants mix gravel and sand

with derivatives of crude oil to make asphalt used in the paving of roads, highways, and parking lots. Such plants are responsible for the release of millions of pounds of harmful chemicals into the air, including carcinogenic pollutants such as arsenic, benzene, formaldehyde, and cadmium. Other cancer-causing, toxic chemicals, including polycyclic aromatic hydrocarbons (PAHs), volatile organic compounds, and very fine condensed particulates, are released into the air as asphalt is loaded into trucks and hauled from the site. U.S. Environmental Protection Agency Office of Air Quality Planning & Standards, AP-42, Fifth Edition, Vol. I, Ch. 11: Mineral Products Industry. The DEQ must carefully consider the impacts of both the gravel pit and the asphalt plant on this community.

Right to Public Participation.

Article II, Section 8 of the Montana Constitution guarantees the public the right to “expect governmental agencies to afford such reasonable opportunity for citizen participation in the operation of the agencies prior to the final decision as may be provided by law.” Article II, Section 8 is implemented through the Public Participation Act, §§ 2-3-101, et seq., Mont. Code Ann., which requires that the public be provided with reasonable opportunity to comment on agency decisions that are of significant interest to the public. Public participation and input are intended to foster better decision-making by agencies. An agency’s responsibility to the public to provide meaningful opportunity for public comment cannot be delegated to the applicant as it was here. Further, the Opencut Mining Act requires DEQ to “accept public comment throughout the review process.” Mont. Code Ann. § 82-4-432 (4)(b)(iii).

Friends of the Jocko respectfully requests that DEQ continue to accept, review, and consider public comments and to hold a community meeting to allow for meaningful public participation and input from members of our organization, their neighbors, and other interested parties. Despite the fact that the people of Montana have the right to be afforded reasonable opportunity to participate in the operation of governmental agencies prior to the final decision of the agency per Mont. Code Ann. § 2-3-101 and Mont. Const. Art. II § 8, residents of the Jocko Valley—including those who live and own properties within .5 miles of the permit area—have been denied the right to participate through a public meeting.

A critical component of the plan of operation and the procedural requirements that Riverside Contracting and the DEQ need to follow are the requirements for public notice and hearing. Under Mont. Code Ann. § 82-4-432(6)(a)-(d), the applicant shall:

- (a) publish notice at least twice in a newspaper of general circulation in the locality of the proposed opencut operation; and
- (c) post the notice in at least two prominent locations at the site of the proposed opencut operation, including near a public road if possible.

The process relative to Permit # 3415 is deficient as neither of these requirements was met. None of the members of Friends of the Jocko are aware of even a single notice in any local newspaper and there was never any notice posted on any location at the Rehbein site. Further, notice of the permit application to neighbors failed to adequately notify interested parties in other important ways as well. Notice only reached a handful of people, and some landowners with properties located less than .5 miles from the project area did not receive any notice whatsoever.

Additionally, some property owners who formally requested a public meeting were not counted in the DEQ's tally that the agency used to determine if the public meeting threshold had been met. Therefore, DEQ must move forward with scheduling a public meeting to provide meaningful information and input to community members in accordance with Mont. Code Ann. § 82-4-432 and the Montana Constitution.

In violating the rights of individual members of Friends of the Jocko to participate by not providing them with meaningful opportunity to comment and failing to perform due diligence to confirm that the applicant had provided proper notice, DEQ reduced "what should have been genuine interchange into a mere formality." *Bryan v. Yellowstone Cty. Elementary School Dist.*, 2002 MT 264, ¶ 46.

Additionally, this industrial development is located very close to Highway 93 in the Jocko Valley, a highly utilized travel corridor to Flathead Lake and Glacier National Park. Development and commercial vehicle traffic along Highway 93 impacts numerous business owners and individuals. Industrial development creates significant public interest in Arlee and across Montana and deserves careful consideration from local, state, and federal officials. This community understands the importance of participating in the public process to help DEQ identify significant environmental issues related to development of an asphalt plant and gravel mine near Arlee. Friends of the Jocko strongly urges that the DEQ hold a public meeting in the Arlee community to allow for further community education, input, and review.

Montanans' Right to a Clean and Healthful Environment

All Montanans are guaranteed a "right to a clean and healthful environment" under Article II, § 3 of the Montana Constitution. The Montana Supreme Court has held that this "is a fundamental right." *Montana Env't Info. Ctr. v. Dep't of Env't Quality*, 1999 MT 248, ¶ 63. The DEQ has a Constitutional duty to maintain and improve a clean and healthful environment for present and future generations pursuant to Article IX, § 1. These constitutional guarantees and duties are, in part, through the Montana Environmental Policy Act ("MEPA") (*see Park County Environmental Council v. DEQ*, 2020 MT 303; Mont. Code Ann. § 75-1-102 (1)).

Additionally, Mont. Code Ann. § 82-4-402 (1) ("The Opencut Mining Act") regulates permitting of opencut mines by the Department of Environmental Quality ("DEQ"). The Opencut Mining Act was designed to "ensure that the constitutional guarantee to a clean and healthful environment is fulfilled." *Elliott v. Powell Cnty. Planning Board*, 2018 MT 148N, ¶ 9, 392 Mont. 555, 420 P.3d 511. In *Elliott*, the court describes that, "the DEQ may not grant a permit unless the application contains a complete plan of operation that addresses how the proposed permittee will comply with multiple requirements established to prevent damage and harm." *Id. citing Helena Sand & Gravel, Inc. v. Lewis & Clark County Planning & Zoning Comm'n*, 2012 MT 272, ¶ 38. Despite this clear legal mandate, Riverside Contracting's Permit #3415 is extremely vague and lacking in detail necessary to accurately determine the mine's impacts, and should not be approved by the DEQ.

Montana Environmental Policy Act

The development of a gravel pit and asphalt plant constitutes a state action and therefore triggers the Montana Environmental Policy Act ("MEPA"). Mont. Code Ann. § 75-1-101—324.

One of MEPA's primary purposes is "to promote efforts that will prevent or eliminate damage to the environment and biosphere and stimulate the health and welfare of humans." *Id.* § 75-1-102(2). MEPA does so by requiring Montana decision makers to fully examine the impacts of proposed actions and to evaluate alternatives that may reduce or avoid those impacts. *Id.* In this way, decision makers may fulfill their constitutional obligation to prevent unreasonable environmental degradation. See Mont. Const., Art. II, sec. 3; *Id.* Art. IX, sec. 1; see also Mont. Code Ann. § 75-1-102 (MEPA intended to implement State's constitutional obligations with respect to environmental protection).

An agency must take a hard look at the environmental impacts of a given project or proposal. *Ravalli Cty. Fish & Game Assn., Inc. v. Mont. Dept. of State Lands*, 273 Mont. 371, 377 (1995). 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. *Ravalli Cty. Fish & Game Assn., Inc.*, 273 Mont. at 381, 903 P.2d at 1369 (1995) (citing *Sierra Club v. U.S. Army Corps of Engrs.*, 701 F.2d 1011, 1029 (2nd Cir.1983)).

We demand DEQ take a hard look at the following potentially significant impacts from the gravel mine and asphalt plant:

Historic and Cultural Resources.

Unfortunately, cultural resources were not adequately considered, if at all, in the permit application. DEQ must consult with the State Historic Preservation Office and the Tribal Historic Preservation Office in order to consider potential significant impacts to cultural resources on this site. The Opencut Mining Act requires that "archaeological and historic values on affected lands will be given appropriate protection." Mont. Code Ann., § 82-4-434(3)(h). For example, the Rehbein farmhouse, which is located immediately adjacent to the proposed project area has been recommended for inclusion on the National Register of Historic Places.

DEQ must also initiate formal consultation with the Confederated Salish and Kootenai Tribes. Such consultation is necessary before DEQ can determine that archaeological and historic values have been given appropriate protection. The Plan fails to demonstrate the significant historical resources on the site, and therefore, DEQ must find the permit deficient and notify Riverside Contracting, Inc. This is not demonstrated by the Plan submitted by Riverside to date. Without adequate and independent studies, DEQ cannot find that archaeological and historic values on affected lands have been given appropriate protection and the Plan is inadequate and must be returned to the applicant.

Wildlife Corridors.

The site is also a well-known wildlife corridor through the Jocko Valley. Many species migrate from the Mission Range through the valley, across the Reservation Divide to the Ninemile area and the Bitterroot Mountains. Scientific evidence establishes this area as a key corridor for wildlife migration across the valley floor. Many species, including threatened and/or endangered species, either reside in or around the project area, or migrate across the Jocko Valley including: deer, elk, mountain lion, bobcat, wolf, black bear, grizzly bear, badger, coyote, racoon, ground squirrels, fox, golden and bald eagle, osprey, and grouse.

Of particular importance, DEQ must engage in Section 7 Consultation with the United States Fish and Wildlife Service in relation to impacts to federally protected species, such as the grizzly bear.

Public Health

Asphalt plants mix gravel and sand with crude oil derivatives to make the asphalt used to pave roads, highways, and parking lots. These plants release millions of pounds of chemicals to the air during production each year, including many toxic and carcinogenic air pollutants such as arsenic, benzene, formaldehyde, and cadmium. Other toxic chemicals are released into the air as the asphalt is loaded into trucks and hauled from the plant site, including volatile organic compounds, polycyclic aromatic hydrocarbons (PAHs), and very fine condensed particulates. U.S. Environmental Protection Agency Office of Air Quality Planning & Standards, AP-42, Fifth Edition, Volume I, Chapter 11: Mineral Products Industry.

In addition to smokestack emissions, large amounts of harmful “fugitive emissions” are released as the asphalt is moved around in trucks and conveyor belts, and is stored in stockpiles. A small asphalt plant producing 100 thousand tons of asphalt a year may release up to 50 tons of toxic fugitive emissions into the air. See, Asphalt Plant Pollution, Center for Health Environment and Justice, http://www.bredl.org/pdf/BeSafe_Aspphalt.pdf. Stagnant air and local weather patterns often increase the level of exposure to local communities. In fact, most asphalt plants are not even tested for toxic emissions. According to Dr. Luanne Williams, a North Carolina state toxicologist, only 40 percent of the toxins from asphalt plant smokestacks even meet air quality standards—and for the other 60 percent of these emissions, the state lacks sufficient data to determine safe levels. *Id.*

According to studies conducted to support the Center for Health Environment and Justice handout, nearly half of the residents studied reported negative impacts on their health from a new asphalt plant. The door-to-door health survey found 45 percent of residents living within a half mile of the plant reported a deterioration of their health, which began after the plant opened. The most frequent health problems cited were high blood pressure (18 percent of people surveyed), sinus problems (18 percent), headaches (14 percent), and shortness of breath (9 percent). The proposed asphalt plant and gravel pit are extremely close to residential homes. Several drinking wells exist very near the proposed asphalt plant. Industrial development in a residential area has the potential to significantly impact public health. Local air quality concerns could impact our most vulnerable populations, the elderly, children, and expectant mothers. Dust can travel long distances and could have far-reaching impacts to local families and to the pristine waters of the Jocko River.

Public Safety

Millions of tourists and Montanans travel on Highway 93 to visit Flathead Lake and Glacier National Park. Increased industrial traffic from the gravel pit could be a safety risk to visitors to our community and local residents that regularly travel on Highway 93.

Economic Impacts

The proposed project area is located within the most important tourism corridor to Glacier National Park. Noise, dust, traffic, and pollution from industrial development significantly impacts our local economy. A property value study referenced in a publication of the Center for Health, Environment & Justice documented losses of up to 56 percent because of the presence of a nearby asphalt plant. See, Asphalt Plant Pollution, http://www.bredl.org/pdf/BeSafe_Aspphalt.pdf, (last accessed August 29, 2022).

DEQ governmental approval of the mine (through agency approval from the DEQ), without proper notice and hearing could constitute a taking as it detrimentally effects the value of property held by adjacent landowners without just compensation. Riverside Contracting and DEQ must carefully consider impacts to Arlee's local economy.

Water Availability

DEQ must ensure that Riverside Contracting has a valid water right to meet the needs of the development. The permit application does not provide any information about the source of the water it plans to use. As a result, it is unclear how this water use will affect neighboring and nearby water rights and their availability. An industrial operation like the one outlined in the permit application does not constitute an historic use for the purposes of determining water rights. The application fails to address impacts to water rights in any way. DEQ must consult with Montana's Department of Natural Resources and Conservation to ensure that any new development comports with Montana water law.

Water Quality

The permit application does not demonstrate appropriate protection of off-site surface water and groundwater from adverse changes in quality and quantity likely to result from the gravel pit. Residents living near the project site are concerned with impacts to their wells, irrigation canals, and to surface water rights. They and others are concerned with potential impacts to the Jocko River, other smaller tributary surface waters and groundwater in the vicinity of the mine. More specifically, in the Application, the Applicant states that the seasonal high-water level of the groundwater in the area is 30' below ground surface. However, it appears the Applicant relied on a single groundwater well log to identify this data point. To make matters worse, the Applicant does not even provide the well log on which it relied. Even if it had, such a data source cannot offer sufficient proof of the fluctuating seasonal ground water level because it represents a single snapshot in time – the time of the drilling of the well at issue. As stated in the Application instructions from DEQ “seasonal high water levels may be influenced by irrigation and ditches and must be accounted for when determining groundwater elevations.” See C1. Thus, the Applicant has failed to meet DEQ's required analysis and further research is necessary to confirm the “highest level that water typically rises to each year.” *Id.*

In addition, DEQ must consider impacts from potential spills on the project site into neighboring properties and water sources. The project site lies less than 1 mile from the Jocko River. Extreme weather events and heavy rains can cause any settling ponds created by the gravel pit to overflow and flood into nearby waterways and irrigation canals, potentially impacting the Jocko River. The Plan fails to address prevention, minimization, or mitigation of

adverse impacts to off-site surface and groundwater, including: changes in groundwater flow patterns, changes in groundwater levels, and new consumptive loss of ground water through evaporation. Land uses within 1000 feet of the proposed gravel mine and asphalt plant are agricultural, pasture/rangeland, and residential, all of which rely on, in part, groundwater resources.

The Jocko River and its fish, including bull trout, a federally-listed threatened species, constitute an invaluable and irreplaceable resource. Emission of particulates from the proposed gravel pit and asphalt plant have the potential to cause acidic changes in nearby streams and the Jocko River, which could adversely impact fish populations. A tributary to the Jocko River, Pellew Creek, flows directly through, or under, the permit area. Hydrological studies must be conducted to define the historical channel and current flow of Pellew Creek, including its subsurface depth and location, in order to determine potential impacts to this perennial drainage directly crossing the proposed project area and flowing into the Jocko River. The Applicant fails to identify this source, as required, in B5.

The permit application fails to adequately address impacts to groundwater, irrigation conveyances, or the Jocko River. Asphalt or material containing asphalt, concrete, and salt will be stockpiled on the site. See D5-2. The permit application indicates that salt mixed with products from the mine will be stored on site upon a tarp and/or an asphalt pad. *Id.* The Plan does not indicate how asphalt, salt, or particulates will be kept out of groundwater and surface water. Based on the aforementioned, impacts to surface water and groundwater have not been sufficiently addressed by Riverside Contracting in its permit application.

Weeds

The Permit Application fails to adequately address a management plan for invasive weeds. Weed dispersion is a serious concern in the Jocko Valley costing residents, ranchers, and taxpayers thousands of dollars every year. Weeds from the site could potentially be dispersed far and wide as a result of the operation of the gravel mine. DEQ must carefully consider and ensure that Riverside Contracting is capable of implementing robust weed mitigation measures at the site.

CONCLUSION

Ultimately, the Applicant has failed to meet the statutory requirements for the issuance of an Open-cut Mining Permit under Montana Law. Although FotJ is aware that a deficiency letter has been issued in relation to some of the issues raised, the letter does not identify all of the deficiencies in the Application, as described herein. Thus, in addition to the issues raised in DEQ's letter, it should further demand from the Applicant the requisite data and analysis described here. If and when the Applicant cannot or does not supply this information, DEQ should deny the permit.

On a fundamental level, it is imperative that DEQ make a proper, thorough, and judicious review of the proposed gravel pit in order to protect the right to a clean and healthful environment and it must hold a public meeting to allow the affected public its constitutionally-protected right to participate. The health of residents, wildlife, waterways, way of life, and

economic prosperity of this region are at stake. Please don't hesitate to call if you have any questions about these comments or would like additional information about any potential issues.

Sincerely,

FEGUSON & COPPES, PLLC
A Natural Resource Law Firm



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