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February 24, 2023

To: Montana Department of Environmental Quality, Open Cut Division

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

On January 1, 25, 2023, the Department of Environmental Quality (DEQ) released its Draft Environmental Assessment (DEA) for public comment. The DEA was released to disclose and document the possible effects to the “human environment” which could or are likely to arise from the issuance of Opencut Permit #3415. The proposed activities in Permit #3415 include those from the operation of a gravel mine and asphalt plant over the next twenty-five (25) years.

On behalf Friends of the Jocko we submit these comment on the DEA. We appreciate the opportunity to provide these comments on a variety of issues, including the need for the agency to conduct meaningful consultation with the CSKT, as well as adequately analyzing the impacts of the proposed operations.

INTEREST AND PARTICIPATION OF FRIENDS OF THE JOCKO

(FOTJ) is a Montana Nonprofit organization dedicated to preventing industrial developments in the Jocko Valley. Membership of FOTJ is comprised of residents of Arlee, including those owning property and residing within one-half mile of the proposed open cut gravel mine and asphalt plant. FOTJ are predominantly concerned with the public health, safety and economic impacts of the proposed mine on community members and the effect on natural environment and public natural resources in proximity to the proposed operations. FOTJ has submitted previous public comments in opposition to the issued permit, including requests for public hearings on the matter.

PERMIT BACKGROUND

Pursuant to 82-4-432, MCA, on April 4, 4044, Riverside Contracting, Inc, (Applicant) submitted its *Application for Standard Opencut Mining Permit #3415*. On August 17, 2022, DEQ issued its first deficiency letter requesting additional information and application materials. On September 21, 2022, Applicant submitted an amended application for Permit #4315. On November 18, 2022, the DEQ issued a second deficiency letter. On December 6, 2022, Applicant submitted a

second amended application for Permit #3415. On January 25, 2023, DEQ released its Draft Environmental Assessment (DEA) to the public for comment.

In enacting The Opencut Mining Act, the Legislature specifically addressed its intent 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.” § 82-4-402 (1). Title 82, chapter 4, part 4, MCA, regulates opencut mining such as the proposed gravel operation in this case. “The Opencut Mining Act regulates permitting of opencut mines by the ...“DEQ” to ensure that the constitutional guarantee to a clean and healthful environment is fulfilled.” *Elliott v. Powell Cnty. Plan. Bd.*, 2018 MT 148N, ¶ 9, 392 Mont. 555, 420 P.3d 511. The agency must consider the following purposes of the act:

- (a) to preserve natural resources;
- (b) to aid in the protection of wildlife and aquatic resources;
- (c) to safeguard and reclaim through effective means and methods all agricultural, recreational, home, and industrial sites subjected to or that may be affected by opencut operations;
- (d) to protect and perpetuate the taxable value of property through reclamation;
- (e) to protect scenic, scientific, historic, or other unique areas; and
- (f) to promote the health, safety, and general welfare of the people of this state.

Section 82-4-402, Mont. Code Ann.

The permit-proposed dimensions are 157.1 acres. The Applicant proposes to mine, screen, crush, stockpile and transport 1,000,000 cubic yards of gravel from the permitted acres. The Applicant also proposed to crush the mined gravel and use it for operating an asphalt plant. The Applicant has not proposed any specific hours of operation and is permitted to operate for 24 hours per day and 7 days per week. Thus, it must be assumed that this is the schedule of operation. This operation is permitted until and must be reclaimed by 2047.

MONTANA ENVIRONMENTAL PROTECTION ACT CONSIDERATIONS

The Legislature imposed a constitutional duty to maintain and provide for a clean and healthful environment, for the purpose of protecting our environment in balance with the right to use and enjoy private property. “MEPA requires state agencies to conduct an environmental review of any contemplated agency action that may have an impact on the human environment.”

Bitterrooters for Plan., Inc. v. Montana Dep’t of Env’t Quality, 2017 MT 222, ¶ 17, 388 Mont. 453, 461, 401 P.3d 712, 718–19; Sections 75-1-102, -201(1), and -220(5), MCA.

“MEPA is a broad-reaching law that requires state agencies in Montana to conduct analyses of contemplated actions that may impact the environment—like approving a mining permit.” *Belk v. Montana Dep’t of Env’t Quality*, 2022 MT 38, ¶ 17, 408 Mont. 1, 7, 504 P.3d 1090, 1094. Additionally, MEPA is “modeled after the federal National Environmental Policy Act and

imposes a procedural onus on the state to take a “hard look” at the potential environmental consequences of proposed measures.” *Id.* (citing *Ravalli Cty. Fish & Game Ass'n v. Mont. Dep't of State Lands*, 273 Mont. 371, 377, 903 P.2d 1362, 1366 (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.” *Clark Fork Coal. v. Montana Dep't of Env't Quality*, 2008 MT 407, ¶ 47, 347 Mont. 197, 211, 197 P.3d 482, 492.

The law provides a list of things that its environmental reviews must include a “detailed statement on.” See § 75-1-201(1)(b)(iv), MCA. At the top of the list sit topics like environmental impacts, unavoidable adverse effects, and available alternatives. Section 75-1-201(1)(b)(iv)(A)-(C), MCA. The law mandates agencies to “use a systematic, interdisciplinary approach that will ensure... the integrated use of the natural and social sciences and the environmental design arts in planning and in decisionmaking for a state-sponsored project that may have an impact on the Montana **human environment** by projects in Montana[.]” Section 75-1-201 (i)(A), MCA (emphasis added).

Mont. Admin. R. 17.4.603, defines “Human environment” to include, but is not limited to, biological, physical, social, economic, cultural, and aesthetic factors that interrelate to form the environment. In certain circumstances, an agency must also discuss the “economic and social impacts and their relationship to biological, physical, cultural and aesthetic impacts[.]” ARM 17.4.603 (12).

In assessing the impact of the proposed action on the “human environment” the agency is required to 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. ARM 17.4.608.

Under ARM 17.4.607, DEQ is required to prepare an environmental impact statement (EIS) whenever an environmental assessment (EA) indicates that an EIS is necessary or whenever, based on the criteria in ARM 17.4.608, the proposed action is a major action of state government significantly affecting the human environment.

An EA “serves as both the initial tool for determining whether a more intensive EIS is necessary and as the mechanism for required environmental review of agency actions that will likely impact the environment but not sufficiently to require an EIS.” *Bitterrooters for Plan., Inc. v. Montana Dep't of Env't Quality*, 2017 MT 222, ¶ 20, 388 Mont. 453, 462, 401 P.3d 712, 719; see also §§ 75-1-102(1) and (3)(a), -201(1)(a) and (b)(i)(B), and -220(5), MCA.

FRIENDS OF THE JOCKO COMMENTS ON DRAFT EA

I. The DEQ Must Further Analyze the Impacts to Geology and Soil Quality, Stability and Moisture

As noted by the DEQ in its DEA, direct impacts of the project on the geology, soil quality, stability, and moisture would include the “irreversible and irretrievable removal” of 1,000,000 cubic yards of mineral materials from a 157.1 acre site within the Flathead Reservation. Other undisclosed impacts to the quality and quantity of soils resulting from the salvaging, stockpiling, and re-soiling would occur,” according to the DEQ’s very limited analysis. DEA at 7.

Nowhere in the DEA does the DEQ cite or provide support for its assertion that these impacts to the quality and quantity of the soils and geology of the project area “would not impair the capacity of the soils to support final reclamation.” In fact, nowhere in its analysis does the DEQ provide even a scintilla of data or scientific support for the conclusory assertions made in this and other sections of the DEA.

The DEQ does admit, however, that long-term topographic impacts would occur due to the removal of so much material from the site. Despite this admission, the DEQ concludes that it “does not anticipate an impact to the geology and soil quality, stability and moisture.” DEA at 8. This conclusion is not supported by data and is thus arbitrary and capricious. DEQ must offer

actual scientific analysis in support of its conclusions. Given that there is no current work from which DEQ can draw in the DEA, starting from scratch with an EIS is the appropriate place for such an examination.

A. The DEA must address seismic activity on the permitted site.

Despite the occurrence of two recent earthquakes with epicenters located near Pistol Creek, within mere miles of the project area, nowhere does the DEA address the potential for strong ground motion at, and associated impacts to, the project site from seismic activity. On October 14, 2022 and again on November 16, 2022 the area was subject to 3.2 and 3.7 magnitude earthquakes with epicenters less than eight miles from the project site, near Pistol Creek.

Additionally, the seismically-active Jocko Fault is located less than five miles from the project area. The United States Geological Survey has recognized the potential for the area to experience a 6.5 magnitude earthquake that would have significant impacts to the project area and the surrounding region.¹ The DEQ must take a hard look at the potential for seismic activity affecting the project site and the potential impacts such activity could have on operations and associated environmental impacts which could result from a breach of water and soil containment described in the DEA.

B. The DEQ must address the Cumulative Impacts of landslides.

Landslides, slope failures, and mudflows of earth materials generally occur where slopes are steep and/or earth materials are too weak to support themselves. Earthquake-induced landslides may also occur due to seismic ground shaking. While the project site is comprised of relatively level ground, the Jocko Hills are located immediately upslope from the project site and mudslides have occurred in this area. Future such events could impact the project site and warrant further analysis in an Environmental Impact Statement.

Because DEQ's conclusions related to the impacts of the proposed project upon geology and soils were made without a proper consideration of relevant factors, the conclusions fail to meet the relevant threshold standard ("hard look") imposed by MEPA. The DEQ must therefore engage in a proper analysis of the relevant factors in its Final EA, and alternatively, should prepare a full Environmental Impact Statement (EIS).

While the DEQ has recognized that these impacts to topography would be "long-term," it concluded that such impacts would be "minor" and that "[n]o secondary impacts to topography, geology, soil quality, stability, and moisture would be expected." The DEQ bases these conclusions on the fact that the operator will employ several Best Management Practices (BMPs) while mining is underway at the site. However, these BMPs do not consider the potential impacts of seismic activity and associated landslides on geology and soils in the project area. Ultimately, DEQ's DEA does not provide support for its conclusory statements and significant additional

¹ https://earthquake.usgs.gov/scenarios/eventpage/bssc2014698_m6p47_se/shakemap/intensity.

² <https://csktribes.org/index.php/history-and-culture/cultural-preservation>.

research and analysis is needed to meet the legal requirements of MEPA.

II. The DEA Completely Disregards the Significance of CSKT's Historical and Cultural Uniqueness and Living Relationship with the Land

The DEA's overall analysis of the Confederated Salish and Kootenai Tribes (CSKT)'s resources and their relationship to their sacred lands is wanting and misguided.

Cultural resources are precious Tribal resources. They encompass the Tribes' elders, languages, cultural traditions, and cultural sites. They include the fish, wildlife and plants native to the region and landforms and landmarks. Tribal elders and the languages are perhaps the most vital of these resources because they teach and communicate the histories and traditional lifestyles of the Tribes. The traditions depend on land based cultural resources These land-based resources include native fish and wildlife and their habitats, food and medicinal plants and the areas where they grow, prehistoric and historical use sites, and other land areas where Tribal members currently practice cultural traditions.

Confederated Salish & Kootenai Tribes, Comprehensive Resources Plan. 17-2.

The Confederated Salish and Kootenai Tribes (CSKT) do not view "archaeological sites" and "objects" as historical relics of the past, but rather as "a living part of Tribal culture." *Id.* 17-4. With this understanding in mind, Friends of the Jocko addresses the DEA's Sections 7 (Historical and Archaeological Sites), 19 (Social Structures and Mores), and 20 (Cultural Uniqueness and Diversity) as a single section.

Taken together, the DEQ asked the following questions to guide its analysis in these sections:

- (1) *Are any historical, archaeological or paleontological resources present within the designated search locale?*
- (2) *Is some disruption of native or traditional lifestyles or communities possible?*
- (3) *Will the action cause a shift in some unique quality of the area?*

It should be implicit from the nature of the questions that input from the CSKT is necessary to answer them. However, owing to its failures to properly recognize tribal sovereignty, adequately account for the location of the project site within the cultural homeland of the CSKT, and to meaningfully consult with the Tribes in either the project permitting process or the drafting of its DEA, the DEQ's analysis in these sections is woefully inadequate. This is clear from the DEQ's unsupported conclusions finding that (1) "the likelihood of historical and archeological sites being impacted *would be low*"; (2) "DEQ is *not aware* of any native cultural concerns that would be affected"; and (3) "*[n]o impacts* to cultural uniqueness and diversity are anticipated from this project."

A. The DEQ must meaningfully consult with the CSKT.

The project area “lies *entirely within* the exterior boundaries of the Flathead Indian Reservation, the homeland of the Confederated Salish and Kootenai Tribes (CSKT).” Letter from CSKT Tribal Council Chairman Tom McDonald to DEQ Director Dorrington, September 20, 2022 (emphasis added). Yet, DEQ’s analysis fails to adequately address this fact. The project site and surrounding area are located squarely within the CSKT’s homeland, and both the agency and the applicant have failed to engage in any meaningful consultation with the tribes.

Because the project site is located on the Flathead Reservation, it is under the jurisdiction of the CSKT’s Tribal Historic Preservation Office (THPO). However, neither the applicant nor DEQ actually engaged in meaningful consultation with the CSKT, including the CSKT’s THPO. DEQ notes that it did not receive a response from the Flathead Reservation Tribal Historic Preservation Office (THPO) after the THPO was first notified of the application in the Spring of 2021 by the applicant and later by the DEQ’s Tribal and Cultural Resources Officer. As a result, DEQ relies on the National Historic Preservation Act (NHPA) to excuse its failure to engage in further consultation, stating that “no comment or response within 30 days of notification is considered concurrence.” DEA at 16.

The regulations implementing the NHPA state that “[i]f the SHPO/THPO fails to respond within 30 days of receipt of a request for review of a finding or determination, the agency official may either proceed to the next step in the process based on the finding or determination or consult with the [Advisory] Council [on Historic Preservation] in lieu of the SHPO/THPO” 36 C.F.R. §800.3(c)(4). However, there is no indication that either Riverside Contracting or the DEQ contacted the Council. Further, nothing in the NHPA or its implementing regulations prevents the DEQ from making further attempts to contact the THPO or engage in meaningful consultation with the Tribes. If DEQ had actually sought consequential engagement from the CSKT on this project, it would have gone beyond the bare minimum contact required by law.

Importantly, any purported attempts to contact the THPO occurred prior to submission of Riverside’s initial Opencut Permit Application #3415 on April 4, 2022. *See* DEA at 16 stating “THPO was originally notified in Spring of 2021[.]” Because Riverside had not yet to submit its application to the DEQ at the time the THPO was contacted, it is entirely disingenuous for the DEQ to claim that it participated in meaningful consultation when the full scope of the project was not yet even before the agency. This failure to engage in material consultation is problematic on a number of levels. Most fundamentally, it reveals a cultural bias against the Tribes that prevents the DEQ from asking the proper questions or analyzing a full range of impacts as it assesses and analyzes impacts in DEA.

“Often, when the Tribes or others have disclosed [the locations of important cultural sites], visitors have stolen from or vandalized them.” CSKT Resource Plan at 17-4. In an effort to keep such sites intact and preserve their sanctity, the Tribes maintain an internal database of cultural and historic sites that is not made available to outside interests. Had the DEQ and/or the Applicant made more of an effort to engage in meaningful consultation both before and after

Riverside had submitted its permit application to the DEQ, the Tribes would have had an opportunity to consult this database and determine whether and what cultural sites are located within the project area.

This lack of consultation is also relevant in the DEQ's breakdown of "Social Structures and Mores." The agency's only analysis in this section is whether "*some disruption of native or traditional lifestyles or communities [is] possible?*" It then concludes "[b]ased on the information provided by Applicant, DEQ is not aware of any native cultural concerns that would be affected by the proposed activity." DEA at 21.

The DEQ's decision to limit its analysis of native cultural concerns to information provided solely by the Applicant not only shirks the agency's statutory obligations but ignores pertinent information and input provided by the CSKT during a meeting with DEQ Staff and CSKT Tribal Council in Pablo, MT on September 22, 2022. At this meeting CSKT expressed environmental and cultural concerns and requested a public meeting and a full EIS. Prior to the issuance of the Final EA or an EIS, DEQ must engage in meaningful and actual consultation with the CSKT to determine the existence of any cultural concerns. It cannot, as it did here, rely on the failure to respond to a single contact attempt as acquiescence in the state's managerial control of inherently sovereign tribal resources.

B. DEQ misapprehends the cultural significance of Arlee Area & other cultural properties

Due to its willful circumvention of consulting with the CSKT, the DEQ's understanding and subsequent analysis of culturally significant properties is extremely limited and wholly inadequate.

The DEA states that:

The proposed opencut activities would occur entirely on private land within the boundary of the Flathead Indian Reservation. The Confederated Salish and Kootenai Tribes have designated Arlee as a 'cultural Property'. A 'Cultural Property' has been defined as 'one that is eligible for inclusion in the National Register'. The proposed project would be located approximately 1.45 miles from Arlee. The proposed project is not expected to have significant noise or visual impacts to Arlee. Trucks hauling gravel from the site may use Highway 93 as it passes through Arlee, depending on the location where the gravel is needed.

DEA at 21.

This statement makes clear DEQ's misapprehension of the CSKT's designation of the Arlee area as a "Cultural Property," as the designation applies not only to the "town of Arlee" proper, as stated in the DEQ's DEA, but to the entire surrounding area, which is culturally significant to the CSKT.

The Confederated Salish and Kootenai Tribes' Tribal Historic Preservation Program has designated Arlee as a "Cultural Property." A traditional cultural property has been defined by the federal government as "one that is eligible for inclusion in the National Register because of its association with cultural practices or beliefs of a living community that (a) are rooted in that community's history, and (b) are important in maintaining the continuing cultural identity of the community." National Park Service Bulletin 38, Guidelines for Evaluation and Documenting Traditional Cultural Properties, p. 1.

According to the CSKT:

The cultural foundation of the tribes should be preserved as a living part of our community life and development in order to give a sense of orientation to the Salish, Pend d'Oreille and Kootenai people. Cultural resources of the tribes are being lost, substantially altered or destroyed, with increasing frequency. It is the policy of the Tribal Preservation Department to protect cultural resources by identifying, evaluating, and protecting cultural, historic and archaeological resources and by regulating undertakings upon protected lands when they may result in changes in the character or use of such cultural resources.²

As a matter of law, the Greater Arlee Area's designation by the CSKT as a "Cultural Property" precludes the Rehbein site from consideration as a gravel mine and asphalt plant.

The DEA's misunderstanding of its obligations also extends to the Class III Archeological Survey. The agency concludes that the survey determined that "[t]he project would have no adverse impact on any nearby site which may or may not be eligible for lists on National Register." DEA at 21. The DEQ however, fails to address that this Archeological Survey does not mention the CSKT's designation of the Arlee area as a Cultural Property or that the party who conducted the Survey did not communicate with the Tribes in reaching its determination. In order to meet its "hard look" obligations imposed by MEPA, the agency must consider **ALL** pertinent and relevant data. See *Clark Fork Coal. v. Montana Dep't of Env't Quality*, 2008 MT 407. Inherently, this must include data and surveys that properly consider CSKT's relationship with Arlee as a cultural property, as well as sufficiently recognizes the complexity of what cultural resources encompass from the tribal perspective.

The agency must consult with the Tribal Historic Preservation Office in relation to the Tribes' designation of Arlee as a Cultural Property in order to properly consider potential significant impacts to cultural resources on and adjacent to the site. The agency cannot meet its MEPA obligations without this consultation. A single attempted contact does not suffice as a matter of law. Nor, as required under Mont. Code Ann, § 82-4-434(3)(h), can the agency sufficiently

² <https://csktribes.org/index.php/history-and-culture/cultural-preservation>.

conclude that “archaeological and historic values on affected lands will be given appropriate protection.”

C. The DEA downplays the significance of the Garden of One Thousand Buddhas

In addition to the significance of the area as a Cultural Property to the Tribes, the project area is located within ½ mile of the Garden of One Thousand Buddhas, a spiritual site of great importance to the Nyingma School of Tibetan Buddhism that has existed in the area for nearly a quarter century. The importance of this spiritual site, and the natural environment in which it is situated, are recognized and touted by the State of Montana’s Office of Tourism, which includes the Garden of One Thousand Buddhas in advertisements promoting Montana and on its website.

According to the Office of Tourism, “the Garden of One Thousand Buddhas aligns positive properties of the physical world in a sacred architectural arrangement based on the eight-spoked Dharma wheel.” The Office further describes the Garden as “a center for Tibetan Buddhist studies offering teachings, meditation classes, empowerment ceremonies and traditional gatherings.” See <https://www.visitmt.com/listings/general/cultural-center/garden-of-one-thousand-buddhas>. Despite the local, regional, national, and international significance of the Garden of One Thousand Buddhas and the many negative impacts it will suffer, the DEQ fails to adequately consider the impacts of the gravel mine and asphalt plant upon the Garden of One Thousand Buddhas in its DEA.

Until it meaningfully and substantively consults with the Tribes and takes into consideration the important cultural and spiritual significance of both the CSKT’s homeland and the Garden of One Thousand Buddhas, the DEQ cannot reasonably find that archaeological and historic values, social structures and mores, and cultural uniqueness and diversity on affected lands have been given appropriate consideration or protection.

II. **The DEA Fails to Consider Locally Adopted Tribal Laws and Management Plans and Other Environmental Plans**

The proposed operation would occur within Lake County and within the Flathead Indian Reservation boundary. The CSKT have designated the entire Arlee area, including the area encompassing the project site, as a “Significant Cultural Area.” The DEA fails to identify or take into account specific Tribal laws, regulations, or management plans. For example, the CSKT recognize that “cultural, religious and historical artifacts and areas of importance . . . continue[] to be jeopardized by non-Indian interests and persons not having comprehension nor respect for traditional values of the Tribes,” adopted Tribal Ordinance 73A. This ordinance was adopted to provide protection to the areas such as this site.

Additionally, DEA states that it is “unknown whether management plans relate to the proposed opencut site.” DEA at 20. Not knowing the answer to a question does not mean an agency does not need to find the answer. As a matter of law, this analysis is not sufficient to meet MEPA’s hard look standard. The agency must make an adequate compilation of relevant information in order to reasonably analyze the impacts. *Clark Fork Coal. v. Montana Dep’t of Env’t Quality*, 2008 MT 407. It is the obligation of the agency to compile this relevant information and present

it to the public. Simply stating it is unknown is unacceptable. It is the job of the agency to compile this information and reasonably analyze it. The DEA is devoid of this required analysis and the agency must conduct further review.

III. The DEA Fails To Adequately Analyze The Significant Impacts Permit # 3415 Will Have On Water Quality And Quantity

David Donohue, M.S., P.G., Senior Hydrogeologist, HydroSolutions Inc. authored a report on February 16, 2023 describing specially Comments of FOTJ on the Hydrogeologic and Environmental Resource Information Presented in the DEA. Those comments are made and incorporated here as Exhibit A, as if fully set forth herein.

IV. Permit #3415 Will Have Significant Impacts on Air Quality

Shane A. Bofto, MBA, Senior Chemical/Environmental Engineer, HydroSolutions Inc. authored a report on February 16, 2023, describing specially Comments of FOTJ on Air Quality. Those comments are made and incorporated here as Exhibit B, as if fully set forth herein.

In addition to those comments, FOTJ asserts that the project is located in a Class I airshed, which is protected under the Clean Air Act (CAA) Prevention of Significant Deterioration program (PSD) Section 162(a) for its natural, scenic, and cultural resources. Class I increments are the most protective because they allow the least amount of air quality degradation. Designation as a Class I airshed also allows the tribe to define its own Air Quality Related Values (AQRVs). In a Class I airshed, air quality is not permitted to deteriorate by more than the PSD increments established for Class I areas and no PSD permit may be issued if the source will have an adverse impact on any AQRV that has been defined for the particular area. An “increment” is the maximum allowable amount by which the ambient concentration of a particular pollutant can increase above a baseline concentration. 42 U.S.C. § 7473; §§ 7473; 7476. Class I airsheds PSD increments are as follows:

INCREMENTS	
Pollutant	Class I $\mu\text{g}/\text{m}^3$
Particulate Matter	
PM ₁₀ , Annual arithmetic mean	4
PM ₁₀ , 24-hour maximum	8
PM _{2.5} , Annual arithmetic mean	1
PM _{2.5} , 24-hour maximum	2
Sulfur Dioxide	
Annual arithmetic mean	2
24-hour maximum	5
3-hour maximum	25

Nitrogen Dioxide:	
Annual arithmetic mean	2.5

The application lists the following processing equipment to be used in the project area: Asphalt Plant, Crushing Equipment, Pug Mill, Conveyor and Screen. Processing crushed stone generally includes crushing, screening, size classification, material handling and storage operations. “All of these processes can be significant sources of PM and PM-10 emissions if uncontrolled.” EPA 11.19.2-1 Minerals Products Industry. Each of these processes has been evaluated and studied by the EPA for emission factors and emission control.

For example, the use of screening, even using controlled wet suppression, emits 0.00074 pounds of PM-10 per ton aggregate. The project is permitted for 1,000,000 cubic yards or approximately 1,113,000 tons. Without any guardrails on hours of operation, or additional information on operational capacity, the impact is unknown. If, for example, the applicant had a contract for 100,000 cubic yards of asphalt, the controlled screening alone could produce 83.62 pounds of PM-10. This type of aggregate dust can produce nuisance problems and can have an effect upon attainment of ambient particulate standards.³

The DEA barely acknowledges the fugitive dust issues ubiquitous with these types of operations. Fugitive dust consists of several regulated pollutants such as Particulate Matter (PM) and particulate matter less than 10 microns (PM₁₀). A substantial portion of these emissions may consist of heavy particles that settle outside the permitted area. Other potentially significant sources of PM and PM-10 emissions are haul roads.

An operation like this can use either natural gas or fuel oil to dry and heat the aggregate used to make the asphalt mix. A typical asphalt plant using fuel oil emits over 74,000 pounds per year of criteria pollutants(PM-10, and PM-2.5, hazardous air pollutant (HAP) metals, and HAP organic compounds). EPA-454/R-00-019 (2000) at 2.⁴ Mobile sources, using diesel exhaust, also emit hazardous air pollutants such as polycyclic aromatic hydrocarbons, phenols, formaldehyde and toluenes. *Id* at 19.

The DEA simply concludes that because the applicant has certified it will obtain all necessary air quality permits, the direct impacts would be “short-term” and “negligible,” with “negligible” secondary impact from malfunction of the asphalt plant. This assessment completely ignores the severity and seriousness of the types of pollutants that are emitted from these types of operations. It also fails to address the scope of direct impacts on neighboring properties. For example, asphalt plants can emit nuisance odors which can impact the value of one’s property.

DEQ must quantify the air quality impacts through air emissions testing and air dispersion modeling to identify the reach of these pollutants on neighboring properties. It must also identify a comprehensive list of the dangerous pollutants that are commonly emitted from asphalt plants. Given that DEQ has no base research or analyses from which to draw in the DEA, his type of investigation would be most properly conducted in an EIS.

³ EPA: Mineral Products Industry 11.19-1.

⁴ <https://www3.epa.gov/ttnchie1/ap42/ch11/related/ea-report.pdf>

V. DEA's Aesthetics Analysis is Flawed

The DEQ must adequately address the impacts on the aesthetics and actual operational impacts on surrounding homeowners. The DEA's aesthetics analysis is flawed for two reasons: first, it ignores impacts to aesthetic from scenic areas and second, it attempts to downplay the long-term operational impacts to neighboring homeowners.

A. The agency must analyze whether there will be visible impacts from scenic areas.

The DEA fails to address whether the project will be visible from scenic areas despite the fact that the proposed project site abuts the foothills of the Mission Mountain range. The Mission Mountains are predominately designated federal wilderness area and as well as tribal wilderness. The designation of tribal wilderness recognizes the significance of the Mission Mountain range's undeveloped wild lands to protect and preserve cultural resources. This was memorialized in Ordinance 79 A, which expressed the importance of this designation:

Wilderness has played a paramount role in shaping the character of the people and the culture of the Salish and Kootenai Tribes; it is the essence of traditional Indian religion and has served the Indian people of these Tribes as a place to hunt, as a place to gather medicinal herbs and roots, as a vision seeking ground, as a sanctuary, and in countless other ways for thousands of years. Because maintaining an enduring resource of wilderness is vitally important to the people of the Confederated Salish and Kootenai Tribes and the perpetuation of their culture, there is hereby established a Mission Mountains Tribal Wilderness Area and this area, described herein, shall be administered to protect and preserve wilderness values.

The designation's principal objective is to:

protect and preserve an area of land in its natural conditions in perpetuity. This Wilderness shall be devoted to the purposes of recreational, scenic, scientific, educational, conservation, cultural, religious and historical use only insofar as these uses are consistent with the spirit and provisions of this Ordinance. Human use of this area must not interfere with the preservation of the area as wilderness.

Tribal Ordinance 79A.

While the foothills are not within the tribal wilderness, they serve as a common recreation area for community members. The DEA fails to acknowledge that the permitted area is visible from scenic and frequently recreated areas. The viewshed aesthetics are going to be impacted by the

proposed operations and the visual disturbance must be accounted for in the agency's aesthetics analysis. The agency must address and actually analyze this impact to the aesthetic viewshed from scenic areas.

B. The agency must further analyze the long-term operational impacts to neighboring homeowners.

The DEA conclusion that no significant impacts will be associated with the proposed project is disingenuous and belies its own admissions within the DEA. First, DEA minimizes the 24 hour-7 day a week visual and noise impacts of a gravel crushing operation to neighboring homeowners in a rural community as moderate. The DEA defines "moderate" as "[t]he effect would be easily identifiable and would change the function or integrity of the resource." DEA at 7. Major effects "alter the resource." *Id.*

When determining whether an impact is significant ARM 17.4.608 (1) requires an agency to consider "the severity, duration, geographic extent, and frequency of occurrence of the impact." The DEA attempts to side-step this consideration by mischaracterizing the actual duration of impacts of this project on surrounding homeowners.⁵ The DEA states "[n]earby residences would incur visual and noise impacts during operation of the gravel pit." DEA at 17. These impacts are permitted to occur 24 hours a day, 7 days a week. The DEA initially states that one of the direct impacts "would be *temporary* alteration of aesthetics while mining is under way." DEA at 17 (emphasis added), however goes on to conclude "[t]his project is considered to be *long term*, i.e., planned to take 25 years to complete" and "[i]mpacts to aesthetics would *continue through the life of the permit* and would be moderate." *Id.* (emphasis added).

Noise is generally defined as unwanted or annoying sound that is typically associated with human activity and which interferes with or disrupts normal activities. Although exposure to high noise levels has been demonstrated to cause hearing loss, the principal human response to environmental noise is annoyance. The response of individuals to similar noise events is diverse and influenced by the type of noise, the perceived importance of the noise and its appropriateness in the setting, the time of day, and the sensitivity of the individual hearing the sound. The minimum change in sound level that the human ear can detect is approximately 3 decibels (dB). A change in sound level of 10 dB is usually perceived by the average person as a doubling (or halving) of the sound's loudness. A case study of surface granite mining operations found that rock crushers and screens can produce sound levels outside ranging from 92-104 decibels. Exhibit C.

The EPA has determined that a 24-hour exposure of 70 decibels is the level of environmental noise which prevents measurable hearing loss over a lifetime.⁶ Likewise, levels of 55 decibels outdoors and 45 decibels indoors are identified as preventing activity interference and annoyance. *Id.* There are twenty-nine (29) neighboring homeowners within a half-mile radius of

⁵ Without citing to a statute or rule or even agency manual the DEA states "[i]mpacts identified as moderate or major in severity may not be significant if the duration is short-term." *Id.* at 24. Presumably, the duration of these impacts have been downplayed so as to gloss over its "moderate" impact determination and justify no significance through this unfounded assertion.

⁶ <https://www.epa.gov/archive/epa/aboutepa/epa-identifies-noise-levels-affecting-health-and-welfare.html>

the proposed project who have purchased and resided on their properties without the existence of industrial impacts from a rock-crushing and asphalt plant. The closest home is only 195 feet away from the perimeter of the permitted area. Without an adequate buffer, these homes will face a substantial permanent increase in ambient noise levels that could exceed EPA's allowable limits. The noise pollution will be permanent for the life of the project and thus the remainder of the lifetimes of many individuals.

Surely, the introduction of visual and industrial noise impacts from an around the clock rock-crushing operation permitted to operate for the next 25 years would be considered significant. Therefore, the agency must thoroughly analyze the direct, indirect, and cumulative impacts to aesthetics, particularly as they relate to noise, either by performing on-the-ground measurements or modeling acoustical and vibration impacts to neighbors and describe that research's conclusions in an EIS.

C. DEQ Should further analyze the impacts to recreational opportunities and access.

Asking about recreational and wilderness areas, while important considerations, reveal a striking oversight on the part of the drafters of the DEA as they exclude the most predominant land designation in the vicinity of the project area and on the reservation: tribally owned and managed lands.

The Jocko Hills, which are situated immediately to the west of the proposed project area, are comprised of such tribal lands. The Jocko Hills form the northern boundary of the Jocko Valley, and are an important area for big game hunting and other recreational activities as they provide striking views of the Jocko Valley on one side and the majestic Mission Mountains on the other. Importantly, the Jocko Hills provide essential winter habitat for large mammals such as deer and elk.

When traveling from the north, Dumontier Road provides access not only to the Jocko Hills but to Jocko Canyon, which itself is the access point to Pistol Creek Road, which traverses the Jocko Hills, as well as the South Fork of the Jocko Primitive Area, the Mission Mountains Tribal Wilderness Area, and other tribal, federal, and state lands. Many people, including tribal members, engage in a variety of recreational pursuits on these lands, including hunting, fishing, wildlife-viewing, hiking, bicycling, and paddling.

The DEA states that "the proposed project would not limit access to wilderness or recreational areas nearby" without providing any support for this conclusory statement. The removal of one million cubic yards of openpit material will require thousands of dump truck trips up and down White Coyote and/or Dumontier Roads, small county roads that were not constructed for such industrial traffic and it is disingenuous for the DEQ to posit that so much industrial vehicle passage will not impact traffic on these country roads, which could slow or even limit access to these areas.

VI. DEA's Local and State Tax Base and Tax Revenues Analysis Ignores the Devaluation of Neighboring Properties

The DEA states that a direct positive impact would be the increase in tax revenue from the proposed tax base change from agricultural to industrial. DEA fails to assess the devaluation of residential property values to the neighboring homeowners. It is well studied that certain type of industries reduce residential property values. There are noted case studies where property values were affected by the proposal and presence of industrial operations similar to the permitted action.

A nationwide study published in 2015 evaluated housing prices near facilities registered with the EPA Toxic Releases Inventory (TRI) to determine if there was an effect on property prices within one mile associated with these facilities opening and closing.⁷ The results suggested that within ½ mile there was a statistically significant reduction of 10–11% on average due to a plant opening. This case studied facilities reporting to TRI which can range significantly by pollutant type and amounts and include a range of possible facilities and pollutants. In 2021, over 300 asphalt operations were required to report to TRI.

A study published in 2011 used US Census data at the microdata scale to evaluate a model for housing values and rents within US neighborhoods where power plants were opened in the 1990s.⁸ The results suggested that within a 2-mile radius, housing values decreased by 4–7%, with slight decreases in mean household income, educational attainment, and percent owner-occupied housing. Alternate models suggest that these effects may be higher at closer distances and may be related to the size of the facility. A non-peer-reviewed study by the Blue Ridge Defense League published in 2002 purports that residential property values decreased by an average of 27% around the Maymead Materials asphalt plant in Pineola, North Carolina, highlighting declines in assessed value for parcels up to 3,200 feet from the plant.⁹

Other impacts such as increased traffic from the operation may impact property values. A review of multiple studies highlighted that across different models, identified price impacts for noise are approximately 0.7–0.9% per dB over ambient for aircraft noise, and 0.5–0.6% per dB over ambient for traffic noise.¹⁰

A decrease in the value of these surrounding properties will decrease the tax revenue from the property tax base. The agency must conduct further analysis on the impacts to neighboring property values and the subsequent impacts to the total tax revenues. Additionally, acquiring and providing more information as to the proposed day to day operations of the project will promote transparency and aid analysts with determining whether other impacts, such as increased traffic, would also impact property values. The agency should conduct a market study analyzing the existing tax revenue from the residential properties in relation to tax benefits from the permitted project.

⁷ Currie, J., Davis, L., Greenstone, M., Walker, R. (2015) *Environmental Health Risks and Housing Values: Evidence from 1,600 Toxic Plant Openings and Closings*. American Economic Review 105(2): 678–709.

⁸ Davis, L. (2011) The Effect of Power Plants on Local Housing Values and Rents. *The Review of Economics and Statistics* 93(4): 1391–1402.

⁹ Blue Ridge Environmental Defense League. (2002) *Pineola Property Study Shows Adverse Impacts from Asphalt Plant*. http://www.bredl.org/air/maymead_propertystudy.htm.

¹⁰ Nelson J.P. (2008) *Hedonic Property Value Studies of Transportation Noise: Aircraft and Road Traffic*. In: Baranzini A., Ramirez J., Schaerer C., Thalmann P. (eds) *Hedonic Methods in Housing Markets*. Springer, New York, NY

VII. Demand for Government Services Analysis and Human Health and Safety is Inadequate

The DEA briefly addresses whether there would be additional traffic to the existing roads and whether other governmental services will be needed. The DEA states that “[o]ccasional increases in construction-related traffic may occur.” DEA at 20. It goes on to state that “[i]mpacts would be *short-term* and *minor*” and “traffic load...is unknown at this time.” *Id.* (emphasis added). It also similarly addresses human health and safety, only identifying one safety risk: traffic. The DEA states “[o]ccasional increases in construction-related traffic may occur[,]” concluding “[t]raffic load...is unknown at this time.” *Id.* at 18. Again, the agency makes conclusory statements as to the severity of the impact but undercuts its position with contradictory evidence, or lack thereof.

The proposed operation would remove 1,000,000 cubic yards of material from the site. In comparison, a full-size dump truck can typically transport 12 to 16 cubic yards. If extrapolated, 1,000,000 cubic yards would equate to 62,500 to 83,333 full size dump trucks. “Traffic load would depend on site activity” and it is unclear the size of projects for which the applicant will provide asphalt material. However, aggregate totals 90 to 95% of asphalt mixture and 75 to 85 percent by volume. Ultimately, this means a given amount of asphalt requires approximately the same amount of raw material.

A major concern with asphalt plants is the amount of traffic their activities generate, particularly in an area not historically home to commercial and industrial uses. Although it may be difficult to predict an exact traffic volume (as production can vary over time due to seasonal demands and market conditions), reasonable estimates can be made, based upon the production capacity of the operation and the loading of the vehicles used to transport both final product and raw materials. The public should be fully informed as to what the proposed operational capacity will be and annual volume of work to occur on the project site.

In a similar proposed project of 900,000 cubic yard material over 30 years—with an estimated annual production of 10,000 cubic yards—traffic estimates found that the number of truckloads that would be generated by average daily production at asphalt plant would be ten additional total truck trips per day. (three truckloads with 2.5 ton trucks and two truckloads with 12-ton trucks.) Exhibit D at 2. This did not include other vehicle trips, such as a proposed truck to deliver water from off site to store in this applicant’s project. The same estimate found that if the annual production capacity was 100,000 cubic yards of raw materials, it would generate approximately 300 truck trips per day. “If the plant operated 12 hours per day, this would mean one truckload every five minutes.” *Id.* at 3. With no limit on operational hours or proposed operational capacity, the public is left uninformed as to how drastic these traffic impacts will really be.

For example, the project anticipates using two roads, White Coyote Road or Dumontier Road, neither of which is currently suitable for such an increase in traffic loads particularly as it pertains to weight and width. Without some understanding of operational capacity and annual production, the public is left to assume that the project will result in unprecedented volumes and

tonnage on these unstable roads. Increased tonnage alone will quickly lead to degradation of the roadways and require improvement. While omitting that the grades of these roads are unsuitable for such weights, the agency makes note that “[l]ocal roads may be improved.” DEA at 19. This cryptic assumption does not address the actual demand on government services. It does not identify whether the roads will be improved by the applicant or taxpayer dollars. It does, however, imply that improvement may be necessary, but does not identify it as an actual impact. Using these road as “haul roads” requires the agency to take a harder looker at the impact of the proposed project. Three conclusory, yet unsubstantiated, sentences do not meet the standard of human environment analysis imposed by MEPA.

Moreover, the agency must address whether there will be a demand on other governmental services such as fire protection or emergency services. The agency is responsible for addressing potential secondary impacts that may arise with specific equipment or storage hazards that could increase the likelihood of wildfires or other emergency situations. For example, fuel storage, presumably for the portable asphalt plant, will be present on the site. In an area previously not subject to industrial uses the potential for accidental spills and increased wildfire exposure should be fully analyzed.

Because the Legislature modeled 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 Plan., Inc. v. Montana Dep't of Env't Quality*, 2017 MT 222, ¶ 18, 388 Mont. 453, 461–62, 401 P.3d 712, 719; *see also North Fork Preservation Ass'n*, 238 Mont. at 457, 778 P.2d at 866; *Ravalli County Fish & Game Ass'n v. Montana Dep't of State Lands*, 273 Mont. 371, 377, 903 P.2d 1362, 1367 (1995)).

NEPA and MEPA require agencies to adhere to “a systematic, interdisciplinary approach which will insure the integrated use of the natural and social sciences and the environmental design arts in planning and in decision making” “which may have an impact on [the Montana human environment][.]” Mont. Code Ann. § 75-1-201 (1)(b)(i); 42 U.S.C § 4332(2)(A). The agency must identify the methodologies used and must explicitly refer to the scientific and other sources of information relied upon for conclusions set forth in its analysis. The information included in an EA “must be of a high quality,” and must allow for “[a]ccurate scientific analysis, expert agency comments, and public scrutiny.” *Id.* § 1500.1(b). NEPA (and therefore MEPA) requires that agencies provide the data upon which it bases its environmental analysis. *Idaho Sporting Congress*, 137 F.3d at 1150 (“allowing the Forest Service to rely on expert opinion without hard data either vitiates a plaintiff's ability to challenge an agency action or results in the courts second guessing an agency's scientific conclusions”). “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. v. Montana Dep't of Env't Quality*, 2008 MT 407, ¶ 47, 347 Mont. 197, 211, 197 P.3d 482, 492.

Providing concrete data, studies, or agreements which an agency relies upon substantiates their position and provides the public with full transparency of the agency's decision-making. In contrast, the present DEA provides no supporting evidence for its conclusion that the impacts will be “short-term” and “minor” as it purports to not have the information to do so. Therefore, the

agency should at the very least provide to the public the proposed annual operation capacity of the project site, as well as the exact types of equipment and processes the applicant intends to use. In addition to this information, the agency must provide justification for its “short term” and “minor” impact conclusions by way of its own projected range of estimated traffic load and/or comprehensive traffic study on the applicable roadways. This analysis should also address the impact on traffic patterns as it pertains to safety and the effects of larger trucks utilizing narrow rural roads historically serving residential areas.

Of note, the DEA states that the “location of the proposed site was chosen by the applicant because of the location of the resource and to provide materials for local projects.” EA at 18. This language implies that there is an inherent benefit to the surrounding 29 residences solely because of the site’s location. Practically speaking, the location of an asphalt site does not wholly dictate what asphalt projects the applicant contracts with. The agency fails to cite to any specific certification or promise that the materials produced will be for local projects. The record is also devoid of any indication that this is the case. There is no signed contract or attestation of such promise. The mere existence of the asphalt plant does not automatically provide a beneficial impact. The agency cannot make conclusory statements in its analysis without providing some evidence to support them. Even if it was true that there would be some attenuated beneficial impact, an EIS is still “required if an impact has a significant adverse effect, even if the agency believes that the effect on balance will be beneficial.” Mont. Admin. R. 17.4.608 (2).

VIII. The DEA Analysis of Demands on Environmental Resources is Unsubstantiated

The DEA proclaims that “no unusual demands on land, water, air, or energy are anticipated from the proposed open-cut operation.” Yet the same document identifies that “fugitive dust may emanate from the pit floor, soil stockpiles, and gravel roads used for access. Fugitive dust is considered to be a nuisance.” “Impacts to air quality, including odor, could be expected with the proposed action due to an asphalt facility . . .” Similarly, the EA identifies that “surface water that may leave the site during a heavy storm event could carry sediment.” With regards to energy resources, the DEA does not identify how the project will be powered, where energy will come from, or what demands the project will place on energy resources. Simply put, there is no support for the conclusions reached in Section 9 of the EA. There is no analysis of relevant facts. As a result, in its current form, the EA does not meet the requirements of MEPA.

MEPA is a broad-reaching law that requires state agencies in Montana to conduct analyses of contemplated actions that may impact the environment—like approving a mining permit. *Belk v. Montana Dept. of Env'tl. Quality*, 2022 MT 38, ¶ 17, 408 Mont. 1, 7, 504 P.3d 1090, 1094, 2022, citing *Bitterrooters for Planning*, ¶¶ 17-18; §§ 75-1-102, -201(1), -220(5), MCA. MEPA is modeled after the federal National Environmental Policy Act and imposes a procedural onus on the state to take a “hard look” at the potential environmental consequences of proposed measures. *Ravalli Cty. Fish & Game Ass'n v. Mont. Dep't of State Lands*, 273 Mont. 371, 377, 903 P.2d 1362, 1366 (1995). The law provides a list of things that its environmental reviews must include a “detailed statement on.” *Belk*, 2022 MT 38, at ¶ 16.

In no light could the scant provisions of Section 9 of the DEA be determined to constitute a “hard look.” In contrast, the DEA provides generalized and conclusory statements that have no

supporting analysis of facts or law. To state that a brand-new mining operation in a rural, agricultural valley will have no impact on the demand for land, water, air or energy is a disservice to the CSKT tribal community and the citizens of the state of Montana. DEQ's rote statements are disingenuous, at best.

It is undeniable that mining in this area will cause an increase in the demands placed on local air, water, land, roads, fish, wildlife, government, and neighbors. The Jocko Valley similarly, as identified, is a Class 1 airshed. By definition, adding the air pollutants identified in the DEA will constitute a new strain on those resources. Yet the DEA does not even attempt to scrutinize how this may place a new "demand" on this community resource. Further action is needed by DEQ in this regard before the MEPA process can be finalized. An EIS is appropriate due to the identified significant impact.

As an additional example, there is no analysis of the water quality quantification and designation for the nearby Jocko River, as defined in the Surface Water Quality Standards and Anti Degradation Policy of the CSKT Tribal Water Quality Program. The DEA identifies that both surface water runoff and infiltration of that runoff to groundwater will occur, yet there is no hydrologic flow analysis as to if, how, when, and in what magnitude those flows could or will reach the Jocko River. Furthermore, the DEA's total dismissal of identifying the source from which water will be diverted and/or obtained to provide the needed water resources for the project underscores the faintness with which DEQ examined the demands this project will place on water resources.

Interestingly enough, the DEA does recognize that "increased acreage in the immediate area would be utilized for Opencut operations." This identified secondary impact is significant, yet receives no analysis which supports this conclusion. Pursuant to ARM 17.4.603, "Secondary impact" means a further impact to the human environment that may be stimulated or induced by or otherwise result from a direct impact of the action. Thus, it seems DEQ is envisioning that this project may or will spur additional development of opencut mining projects in adjacent lands. DEQ needs to identify the basis or belief which underlies this conclusion. The public and the community have a right to know why DEQ believes that such a result will occur and DEQ should analyze those compounding actions in a cumulative impacts analysis.

"Cumulative impact" means the collective impacts on the human environment of the proposed action when considered in conjunction with other past and present actions related to the proposed action by location or generic type. Related future actions must also be considered when these actions are under concurrent consideration by any state agency through preimpact statement studies, separate impact statement evaluation, or permit processing procedures." ARM 17.4.603. By correctly identifying that the approval of this project will likely lead to additional industrial mining development in the immediate vicinity, DEQ obligates itself to analyze the whole of that likely outcome. Such an analysis would be appropriately included in an EIS.

DEQ should conduct an EIS and fully analyze the significant impacts which are likely to burden the air, land, and water resources of the Tribes and neighboring lands and citizens. Alternatively, the Final EA should include an actual analysis of the impacts the proposed project will have on

these resources. Conclusions without factual and legal support cannot and will not rise to the legal requirement of the “hard look” standard as applied by the Montana Supreme Court.

IX. The DEA Fails to Address Actual Impacts to Vegetation and its Removal

Here, the agency begins its analysis by stating that there are “no known rare or sensitive plants or cover types” and “no known fragile or unique resources or values” present within the proposed permit boundary. This is because the DEA finds that the proposed permit area is simply “cultivated crops” consisting of hay. Nevertheless, the DEA identifies several noxious weeds present on site that will need to be mitigated as “land disturbance at the site may result in propagation of noxious weeds.” Thus, the DEA finds that “weed control” will be a condition of permit issuance.

As a baseline, the DEA conflates the concepts of “rare and sensitive plant types” and “fragile and unique resources” with the human environment that will be affected. “Human environment” includes, but is not limited to biological, physical, social, economic, cultural, and aesthetic factors that interrelate to form the environment. ARM 17.4.603.

Here, the DEA identifies that 80-90% of the permit area is currently in a state of vegetative cover. The DEA further identifies that all “existing vegetation would be removed as 12 inches of soil is stripped.” Based on this conclusion, the DEA lacks any meaningful analysis of the impact on the surrounding human environment that will occur once this vegetation and soil is stripped. More specifically, the DEA fails to analyze or discuss if, when, how, and to what magnitude, loss of all vegetative cover will affect erosive wind transport of the soil/materials on site, surface and ground water conveyance and runoff (both with and without additives resultant of the mining and extraction process), and the effect that the loss of this vegetative cover will have on the human and biological communities which live in the vicinity of the project area.

According to the United States Department of Agriculture, loss of vegetative cover and topsoil has both on site (direct) and off site (indirect) negative impacts.

On-site impacts: The loss of topsoil, either by actual removal with heavy equipment or erosion by wind and water, is the worst on-site damage. This layer of soil has the highest biological activity, organic matter, and plant nutrients— all key components of healthy soil. The on- site loss of this upper layer of soil nearly eliminates the soil’s natural ability to provide nutrients, regulate water flow, and combat pests and disease.

Off-site impacts: Erosion from construction sites has off-site environmental and economic impacts. Erosion creates two major water quality problems in surface waters and drainage ways: excess nutrients and excess sediment. These problems adversely impact the health and biological diversity of water bodies. More specifically:

- Excess nutrients impact water quality through eutrophication, a process whereby excess nitrogen and phosphorus causes unwanted biological growth.
- Sediment reduces water quality by making the water turbid (cloudy). Turbidity prevents sunlight from penetrating the water and thus reduces photosynthesis and underwater vegetation. Oxygen levels are reduced in turbid waters, further degrading habitat for fish and other aquatic organisms.
- Sediment can build up in stream channels, lowering flow capacity. The problem of low stream capacity is compounded as runoff increases from newly built-up or paved areas and causes stream channels to receive larger amounts of water in shorter periods of time. This leads to more frequent flooding in areas that never or only rarely flooded in the past. In flood-prone areas, levees may need to be built or enlarged to better protect public safety.
- A financial burden results from clean up of sediment-damaged areas. Taxpayers often bear the cost of removing sediment from public roads, road ditches, culverts or streams; not to mention damage to homes and the safety hazards associated with flooding. Other costs of erosion that are borne by the public are degraded soils, a polluted environment, more runoff, greater need for irrigation, and aesthetically unpleasing sites.

The DEA fails to address either of these categories of impacts. To that end, the DEA fails to make a logical or scientifically defensible conclusion in relation to either the direct impacts from the loss of all vegetative cover on this site, or the secondary impacts of that loss. Instead, the DEA myopically focuses on effects to “rare plant vegetation.” However, this is not what MEPA requires. Rather, MEPA requires “an evaluation of the impacts, including cumulative and secondary impacts, on the *physical environment*. Admin. R. Mont. 17.4.609(3)(d) (emphasis added). The DEA, in its current form, fails to analyze the effects of the loss of vegetation from the site on erosion, water quality, and biological functions, both on and off site.

In order to properly analyze the impacts from this project, an EIS should be prepared and should include discussion, research and analysis of the impacts of soil erosion, and increased surface and groundwater runoff of pollutants generated on site. An EIS describing how these processes will affect the known animal species in the area, the known land uses of neighboring properties, and how these impacts can be mitigated is required.

X. The DEA Fails to Adequately Address Impacts to Endangered Species

In its analysis of Unique, Endangered, Fragile or Limited Environmental Resources, DEQ’s DEA lists 19 species which are identified by the Montana Natural Heritage Program as species of concern which live in the vicinity of the site. Of those, several of the species identified are

listed as either threatened or endangered under the federal Endangered Species Act. The DEA does not identify this fact. As a result, the DEA fails to analyze the project's effects on known listed species. It follows that the DEA fails to identify if, when, how, and to what magnitude the proposed project could result in an incidental take of a listed species (requiring a permit from USFWS). The DEA needs to, at the very least, identify and analyze these issues with respect to known and listed species.

Instead, the DEA describes that "even if" the project area is "suitable habitat" for listed species, those species can find "similar or identical habitat surrounding the site." However, this is not how the Endangered Species Act (ESA) works. Since 1973, ESA's core mission has been "to provide a means whereby the ecosystems upon which endangered species and threatened species depend may be conserved." The ESA has sought to protect roughly 1,300 endangered and threatened plant and animal species, some of which are on the brink of extinction. As listed in the EA, the project area includes the federally listed grizzly bear. The largest contributor to habitat loss is development. See Linda Breggin & Susan George, *Planning for Biodiversity: Sources of Authority in State Land Use Laws*, 22 Va. Env'tl. L.J. 81, 87 (2003) (stating that "land development contributes to all of the leading causes of biodiversity loss including habitat destruction, degradation, and fragmentation, and non-native invasive species" and arguing that because of this, state and local land use planning can be a critical tool for protecting biological diversity).

Another major contributor to species decline is habitat fragmentation. Habitat fragmentation is the process whereby large blocks of habitat are broken into smaller, more isolated pieces.¹¹ Roads associated with industrial development are a significant contributor to habitat fragmentation by acting as barriers that may isolate some species. Industrial developments often have more far-reaching impacts than just the land they are built upon as they spur development around them. New highways or road expansions can permanently transform once rural areas into urban areas in just a few years.

Under §9 of the ESA, it is unlawful for any person to "take" any endangered species within the United States or the territorial sea of the United States. §1538(a)(1)(B). "Take" is defined very broadly to mean "harass, harm, pursue, hunt, shoot, wound, kill, trap, capture, or collect, or to attempt to engage in any such conduct." *Babbitt v. Sweet Home Chapter*, 515 U.S. 687, 704, 25 ELR 21194 (1995) ("Take is defined . . . in the broadest possible manner to include every conceivable way in which a person can 'take' or attempt to 'take' any fish or wildlife.") (quoting S. Rep. No. 93-307, at 7 (1973)). "Harm" includes "significant habitat modification or degradation where it actually kills or injures wildlife by significantly impairing essential behavioral patterns, including breeding, feeding or sheltering." 50 C.F.R. §17.3 (2009). Persons found liable of committing a "take" face criminal or civil penalties.

In the case at hand, the DEA fails to offer any meaningful analysis of the project's known and anticipated impacts on threatened or endangered species, including for example, grizzly bears.

¹¹ Mark L. Watson, *Habitat Fragmentation and the Effects of Roads on Wildlife and Habitats*, New Mexico Department of Game & Fish, 3 (January 2005), available at <http://www.safepassagecoalition.org/resources/Habitat%20Fragmentation.pdf> (citing Reed F. Noss & Allen Cooperrider, *Saving Nature's Legacy: Protecting and Restoring Biodiversity* (1994)).

Instead, the DEA essentially identifies that habitat fragmentation *will* occur as a result of the project, but without providing any support, asserts that such fragmentation will not affect species of concern because those species can move to other lands. This is the definition of fragmentation. The EA should analyze cumulative, direct, and secondary impacts of the mining project on habitat fragmentation, both for species of concern and others as described above.

With regard to species of concern, an EIS should be conducted to further address the anticipated significant impacts which will occur to such species as grizzly bears. Grizzly bears use the Jocko Valley to move throughout their larger wilderness habitats and core habitat areas, connecting them to additional landscapes that are necessary for their continued proliferation and recovery. Continued travel through connection corridors (Jocko Valley) from one critical habitat area to another (Mission Mountain Wilderness to the Rattlesnake Wilderness) are designated aspects of the USFWS recovery plan for the species. As a result, the DEA or a future EIS need to analyze whether having a large scale industrial mining operation in the Jocko Valley will make those landscape connections more or less likely for the threatened grizzly bear, and other identified species.

XI. The DEA Fails to Adequately Analyze Impacts to Wildlife and Fish Species

Section 75-1-201, MCA requires state agencies to integrate use of the natural and social sciences and the environmental design arts in planning and in decision-making ...” ARM 17.4.607. Currently the EA fails to integrate actual use of natural science in relation to its investigation of the proposed project’s impacts to fish and wildlife species. Undisputedly, the EA does not cite any scientific studies, literature, data, or reports which identify local populations of fish and wildlife. Instead, the Agency describes in the DEA that the permit area “could” support populations of “black bear, coyotes, deer, fox, raptors, rodents and song birds. Additionally, public comments noted populations of sandhill cranes, elk, grizzly bear, and wolves . . . Population numbers for species listed in this section are unknown.”

Based on these wholly unscientific statements, it is unclear what, if any, research the agency did to reach its determination of what “terrestrial, avian and aquatic life and habitats” exist on the property and/or how those species will be affected by the proposed mine. To that end, the DEA is devoid of any research or cited literature which could or does serve as the basis for the agency’s determination of what fish and wildlife actually live on site and in the surrounding landscape. Absent such a scientifically defensible analysis, the DEA fails to offer any noteworthy analysis of “the quantity and quality” of the fish and wildlife resources that would be affected, “including the uniqueness and fragility of those resources or values.” ARM 17.4.608(d). Without this analysis, the DEA cannot adequately “determine the significance of the impacts” as required by MEPA.

Section 75-1-201, MCA requires state agencies to *integrate use of the natural and social sciences and the environmental design arts in planning and in decision-making*, and to prepare a detailed statement (an EIS) on each proposal for projects, programs, legislation, and other major actions of state government significantly affecting the quality of the human environment.

In order to determine the level of environmental review for each proposed action that is necessary to comply with 75-1-201, MCA, the agency shall apply the criteria in ARM 17.4.608.

In the case at hand, Section 5 does not integrate any use of natural or social science of any kind. In fact, there is no explanation as to how mining activities impact terrestrial or aquatic species, to what extent, or what those species actually are for the project site and surround landscapes. Instead, the DEA, states “based on available information” the site “could” support a number of species. What it fails to do is state what species the immediate vicinity “does” in fact support and how. There is no reference to data from the CSKT Tribal Wildlife Department, Montana Fish, Wildlife, and Parks, or any other state, tribal, or national fish or wildlife agency. The final EA needs to include a scientifically verifiable list of species that are actually known by the state of Montana to be present in the project vicinity.

Similarly, the DEA does not include any research, data, or analysis in relation to the specific impacts of the project proposal on fish or wildlife, either in a direct or secondary impact function. The DEA does not include any scientific examination of the individual habitat, food, or life cycle needs of the species present in the project vicinity or how those biological needs could be impacted by the proposed project. Instead, the EA succinctly identifies that “the proposed mine could temporarily displace some individual members of species” The DEA goes on to find that “any displaced animals could find other suitable habitat nearby.”

Flatly, stating a conclusion with no analysis cannot suffice to inform the public of the proposed impacts of a project, nor does it suffice for MEPA’s “hard look” standard. Instead, the agency should conduct a full EIS which provides meaningful analysis of how the individual components of the proposed project (“to mine, screen, crush, stock pile and transport 1,000,000 yd.³ of gravel”) could each individually and cumulatively impact fish and wildlife that live in the landscape which includes the private property where the project is proposed, as well as the larger landscape that exists in the vicinity.

For example, the EA does not identify if elk live in this part of Montana or not. Instead, the DEA states that it was informed by “public comments” that they do. The EA does not identify what the population of elk is, on what types of habitat it relies, during what portions of the year, and whether the project site is an important component of that annual lifecycle. Furthermore, the EA does not identify whether the action of mining, screening, crushing, stockpiling, and transporting 1,000,000 yd.³ of gravel will impact elk. In contrast, scientific literature explains that:

In the Rocky Mountains elk use the summer range of high mountain regions, probably because of the cooler temperatures and fewer insects. Elk are forced to lower elevations where snow depths are not so great -- where travel is easier and forage is more available. Migration /to the winter range is principally a move to find food, and is a response to increasing snow depths of fall and winter (Marie, 1951). The spring migration to higher elevations is probably caused by the growth of new green vegetation, the elk following the retreating snow upward to the summer range (Marie, 1951).

There are seven areas that elk occupy in significant numbers: Mill Creek, Hog Heaven, Cabinet Mountains, Magpie and Revais Creeks, Valley Creek, Jocko Valley, and the Missions. (Jim E. Richard, Study of the big game animals of the Flathead Indian Reservation, Montana, University of Montana (1966)).

It is common knowledge that valley bottom and agricultural private lands play an important role in ungulate winter range (both elk and deer). While the EA brushes aside the loss of winter range by stating that “any displaced animals could find other suitable habitat nearby,” there is no analysis of where that habitat is, on whose land, and how the cumulative impacts of the proposed action will affect the whole of wildlife in the Jocko Valley vicinity. Said another way, the EA fails to take a “hard look” at whether the impacts of water pollution, air pollution, increased traffic, and loss of the proposed project area will have a negative or positive effect on terrestrial wildlife, its habitat, or seasonal aspects of their lifecycle needs. Elk are cited here as one single example. However, the EA is deficient in this same regard in relation to its analysis of all terrestrial wildlife. Further evaluation is needed to determine “the severity, duration, geographic extent, and frequency of occurrence of impacts” to wildlife that are currently using this landscape, both on the project property and off.

As for aquatic wildlife, the EA doesn't even mention fish or aquatic species that live in the project vicinity or that may be affected by reduced water quality that results from increased runoff containing pollutants identified specifically in the DEA. There is no description of aquatic resources or how they could be affected. Yet the EA states that “heavy storms may result in offsite sediment runoff.” It is well known that increased suspended sediment in streams has a negative impact on both native and non-native fish populations. Runoff from heavy rains and floods should be analyzed further to address whether this is potential harm to fish that live in the Jocko River, both from increased sedimentation and turbidity, but also from runoff water carrying chemicals or byproducts of the proposed mining, crushing, and washing of gravel, in addition to the asphalt plant operation and production of asphalt materials described in the DEA. The DEA's reliance on “infiltration into the subsurface” to manage the harm associated with increased runoff is not a best practice, or an acceptable practice to negate known harm. Instead, an EIS should be completed which analyzes the effects of increased runoff and increased erosion into nearby surface water sources. At the very least, the final EA should address what fish live in nearby waters and how they may be affected by the proposed project.

XII. The DEQ Misrepresents Density and Distribution of Population and Housing

The DEA states “[t]he project would not add to the population or require additional housing. Therefore, no impacts to density and distribution of population and housing are anticipated.” DEA at 21.

This conclusion is a purposefully misrepresentation of the facts, as DEQ staff members were aware of a policy of the contractor, Riverside Contracting, to allow employees to camp in its Opencut gravel pits. Despite this awareness, the DEA prepared by DEQ fails to analyze the impacts of employees residing within the project area. This failure does not represent an

oversight on behalf of the DEQ but, rather, is a purposeful omission consciously made to conceal the camping policy from public disclosure to minimize public perception of project impacts.

According to their own internal communications, DEQ staff acknowledged that it had been made aware of the contractor's policy permitting workers to reside, or camp, within the project area. Referencing Riverside's on-site camping policy, DEQ Section Supervisor Whitney Bausch wrote:

If Riverside is actually proposed [sic] this it should probably be in the EA, but I'm not sure where. ***I don't know if we want to disclose this.*** I tried combing through the Riverside website but couldn't find anything referencing it. It has been discussed in the pass [sic] that we (Opencut) does [sic] not allow people to set up residence within an Opencut boundary, but I don't think that there is anything specific within statute.

Exhibit E: Email from DEQ Opencut Section Supervisor Whitney Bausch to DEQ Reclamation Specialist Carly Russell, 9/30/2022.

Riverside does, in fact, have such a "Pit Camping Policy," which it clearly articulates on its website. Contrasting from the fact that pit camping is "often prohibited" in state-owned pits in Wyoming, the policy clearly states that on privately owned pits, such as the one currently being analyzed, "Riverside Contracting . . . allows Employee(s) to camp in the Pit Area on Montana projects; permission relies on land-owner approval." <https://riversidecontracting.com/company-policies/pit-camping-policy/>

Based on this policy and the fact that Riverside Contracting and the project site are both owned by the same individual, Marvin Rehbein, it is clear that the project will in fact add to the population of the area despite DEQ's assertions to the contrary in both its discussions of direct and secondary impacts in the DEA. The DEQ must analyze for the impacts of such an increase in population upon the area. This includes the impacts to additional traffic, sewage runoff, and other environmental impacts from camping.

The Montana Supreme Court has recognized the requirement that an agency must take a hard look at the environmental consequences of its actions and that "[i]mplicit in the requirement" . . . "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)).

Yet here, as made apparent by its purposeful omission of relevant facts necessary for an honest appraisal of the project, the DEQ has attempted to skirt its obligation in order to relieve itself of its duty to analyze impacts or consider any data at all. Agency decisions made without consideration of relevant factors are considered arbitrary and capricious. *See Montana Wildlife Fed. v. Mont. Bd. of Oil & Gas Conserv.*, 2012 MT 128, ¶ 25, 365 Mont. 232, 280 P.3d 877. The conclusions of the "Density and Distribution of Population and Housing" section of its DEA fail to consider all relevant (and known) factors. The agency must look at these secondary, undisclosed impacts from the project.

CONCLUSION

For the reasons described above, Friends of The Jocko respectfully requests that DEQ conduct an EIS which researches and analyzes the significant impacts to the human environment which are likely to occur as a result of the proposed action. If DEQ is not willing to do so, FOTJ respectfully requests that the Final EA provide meaningful research which incorporates natural and social sciences into its analysis of impacts so that the public can be adequately informed as to how this pristine rural area will be impacted.

Respectfully submitted this 24th day of February, 2023

FERGUSON & COPPES, PLLC
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By: /s/ Daniel M. Brister .

By: / s/ Emily F. Wilmott .