Hon. John W. Larson
District Judge
Missoula County Courthouse
Missoula, MT 59802

MONTANA FOURTH JUDICIAL DISTRICT COURT
MISSOULA COUNTY

MONTANA FOURTH JUDICIAL DISTRICT COURT, MISSOULA COUNTY

PROTECT THE CLEARWATER, Plaintiff, vs. MONTANA DEPARTMENT OF ENVIRONMENTAL QUALITY, and LHC, INC, Defendants.	Dept. 3 Cause No. DV-23-776 FINDINGS OF FACT, CONCLUSIONS OF LAW, AND ORDER; ORDER SETTING HEARING

A hearing was held on July 21, 2023, on Plaintiff Protect the Clearwater's Petition for *Ex Parte* Temporary Restraining Order and Preliminary Injunction to enjoin the operation of a gravel pit operations by the Montana Department of Environmental Quality's (DEQ) Opencut Permit No. 3473.

Plaintiffs were represented by Graham Coppes, Esq., of Ferguson and Coppes, PLLC; and David K. W. Wilson, Jr., Esq., and Robert Farris-Olsen, Esq. of Morrison Sherwood Wilson & Deola, PLLP.

Defendant DEQ was represented by Jeremiah Langston, Esq., and Sara Christopherson, Esq.

Defendant L.H.C., Inc., was represented by Scott D. Hagel, Esq. and Mark Stermitz, Esq., of Crowley Fleck PLLP.

All counsel were present in the Missoula County Courthouse.

The hearing followed the issuance of a Temporary Restraining Order pursuant to Mont. Code Ann. §§ 27-19-201 and 27-19-314. No party objected to the hearing setting.

At the commencement of the hearing, all of the above counsel stated their appearance for the record and acknowledged receipt of this Court's Order and their readiness to proceed on the Application for Preliminary Injunction.

Proposed Findings of Fact and Conclusions of Law have been submitted by the parties, and the matter is now ready for decision.

FINDINGS OF FACT

1. On March 23, 2023, Defendant LHC, Inc., ("LHC") applied for a "Dry Land Opencut Mining Permit."
2. On April 10, 2023, and pursuant to § 82-4-432(14)(c), MCA, DEQ issued a deficiency letter to LHC which asked, in part, LHC to clarify the number of occupied dwelling units within one-half mile of the Permit boundary.

3. On April 13, 2023, LHC submitted a revised dryland application in response to DEQ's deficiency letter, addressing deficiencies.

4. The deficiency letter was a mechanism for the DEQ to require more information to make the application acceptable pursuant to § 82-4-432(14)(d), MCA.

5. On April 27, 2023, Defendant Montana Department of Environmental Quality (DEQ) approved LHC's application. The permit is Opencut Permit #3473. Exhibit A.

6. LHC obtained Open Permit No. 3473 to provide a source of gravel for a Montana Department of Transportation highway construction project near Salmon Lake on which LHC is a subcontractor to Kiewit Infrastructure. The construction project is located a short distance from the site where gravel would be mined.

7. LHC's application was submitted as a Dryland Opencut Mining Permit Application, authorized by Mont. Code Ann. § 82-4-432(14). Mining operations subject to a standard opencut permit, as opposed to a dryland opencut permit, are those that (i) affect ground water or surface water, including intermittent or perennial streams, or water conveyance facilities; or (ii) where 10 or more occupied dwelling units

are within one-half mile of the permit boundary of the operation. *See* Mont. Code Ann. § 82-4-432(1)(b)(i)-(ii).

8. A dryland opencut permit application provides for a slightly more streamlined application and review process, compared with a standard opencut permit application. It involves shorter time frames for determining completeness, for environmental review of the application, and for determining that an application is acceptable. Additionally, it does not require a public meeting. A standard opencut permit application requires a public meeting *if* one is requested by at least 51 percent of the real property owners on which occupied dwelling units exist within one-half mile of the mine site, or at the request of 10 owners of real property on which occupied dwelling units exist within one half mile of the mine site, *whichever is greater*. Further, a standard opencut application requires submission of a plan of operation, while the dryland opencut application does not. *Compare* Mont. Code Ann. § 82-4-432(2) through (13) with Mont. Code Ann. § 82-4-432(14)(a).

9. In this case, LHC was required to certify that fewer than 10 owners of real property on which occupied dwelling units exist were located within one half mile of the property.

10. Also on April 27, 2023, DEQ issued its final Environmental Assessment (EA) for the project. Exhibit B.

11. Ruby Hopkins, an environmental science specialist who prepared the EA, determined LHC's application was complete and that the requirements of Mont. Code Ann. 82-4-432(14)(a) were satisfied, testified at the July 21, 2023 hearing that she visited the site, made visual observations of the distance of the project boundaries to surface water, reviewed well data from the Ground Water Information Center (GWIC), and concluded that the separation between the static level of groundwater and the surface of the mine was approximately 100 feet and that any disturbance would occur above the level of groundwater. Her EA notes that the nearest surface water is a pond located 670 feet south of the project area. The EA further notes that the Clearwater River is approximately 1,250 feet away from the project area at the closest point. EA, p. 8.

12. The EA also reviewed and drew conclusions on the likely impacts on geology and soil quality, stability and moisture, water quality, quantity and distribution, air quality, vegetation cover, wildlife, unique, endangered, fragile or limited environmental resources, historical and archealogical sites, aesthetics, demands on wildlife, demands on other environmental resources, human health and safety, industrial, commercial and agricultural activities and production, quantity and distribution of employment, local and state tax base and tax revenues, demand for government services, locally adopted environmental plans and goals, access to and quality of recreational and wilderness activities, density and distribution of population and housing, social structures and mores, cultural uniqueness and diversity, private property impacts and other appropriate social and economic circumstances. While the EA identified numerous short-term and minor environmental impacts, it did not identify any significant impacts that would require preparation of an environmental impact statement, under the significance criteria of Administrative Rules of Montana ("ARM") 17.4.608.

13. DEQ described the project details in its Final EA as follows:

a. The applicant proposes to mine, screen, crush, stockpile, and transport material from a 21.2-acre site located approximately 3.25 north of the Clearwater Junction, Montana. Ex. B, at p. 4.
b. Typical opencut excavating/hauling equipment includes a backhoe, bulldozer, dump/haul truck, excavator, loader, scraper, and skidsteer. Typical opencut processing equipment includes an asphalt plant, crusher, pug mill, screen, and conveyor. Processing equipment may be stationary or mobile (moves with highwall as mining progresses across the site. Equipment could also be moved on and off the site as needed by the Applicant. *Id.*, at p. 5
c. As this is a Dryland site, it is unknown whether water would be used on site or what the source of water would be. *Id.*
d. The site is situated on a stream terrace that is derived from alluvium and an irreversible and irretrievable removal of opencut materials from the site would occur. *Id.*, at p. 7.
e. Petroleum products would likely be present onsite as fuel, lubricant, asphalt production, etc. The Opencut Act does not directly have any control over these products or how they are stored. *Id.*, at p. 8.

f. Although Dryland Opencut applications do not specify site topography or drainage patterns during or after mining, the depression caused by mining activities would likely cause runoff to drain internally into the site. Precipitation and surface water runoff leaving the site would generally be expected to infiltrate into the subsurface. *Id.*

g. Fugitive dust from point source mining activities could be generated from mining, conveying, screening, and crushing. Fugitive dust from non-point source mining activities could be generated from the pit floor, soil stockpiles, equipment used onsite and gravel roads used for access. Dust consisting of particulate matter (PM), and particulate matter with an aerodynamic diameter of less than 10 microns (PM_{10}), and particulate matter with an aerodynamic diameter of less than 2.5 microns ($PM_{2.5}$) could be generated from mining of sand and gravel as well as crushing and screening of material. *Id.*, at p. 9

h. There would be a temporary alteration of aesthetics while mining is underway. *Id.*, at pp. 5, 18.

14. More specifically, in relation to water quality, DEQ states that "[d]uring the beginning stages of mining surface water may leave the site during a heavy storm event could carry sediment...." Ex. B, at p. 8

15. Additionally, DEQ found that "[i]mpacts to water quality would be short term and would be negligible...." *Id.*, at p. 9.

16. The mine proposed by LHC, Inc. lies on State School Trust Lands about three miles south of Salmon Lake. The project area is 21.2 acres, and the mine is projected to operate for 17 years. The one-page April 27, 2023, Permit incorporated and adopted as part of the Permit the "Dryland Opencut Mining Permit Application" submitted by LHC, Inc. on April 12, 2023. Ex. A.

17. The mine is adjacent to the Blackfoot-Clearwater Wildlife Management Area and lies in an area designated as Resource Protection Level 1 by Missoula County. Ex. B, at p. 21.

18. DEQ's EA identifies numerous endangered and protected species in the vicinity of the site, including Bull Trout and Grizzly Bears, both of which are species listed under the federal Endangered Species Act. *Id.*, at pp. 11-16

19. On May 15, 2023, the Montana Department of Natural Resources and Conservation (DNRC) granted LHC a Gravel Take permit, which

allowed LHC to begin mining the property. *See*, Elbow Lake Aggregate Take and Remove Permit, Checklist Environmental EA (2023).

20. As part of DNRC's permitting process, it completed an EA. *Id.*

21. Pursuant to § 82-4-427, MCA, on May 26, 2023, Protect the Clearwater filed a formal administrative appeal with the Board of Environmental Review. *In the matter of: Appeal and Hearing Request by Protect the Clearwater Regarding Issuance of Opencut Mining Permit #3473*, Mont. Board of Env. Review, Cause No. BER 2023-03 OC.

22. Pursuant to § 75-1-201, MCA, on June 26, 2023, Protect the Clearwater filed a Complaint in the Fourth Judicial District challenging the sufficiency of Montana DEQ's Environmental Assessment under the Montana Environmental Policy Act. *Protect the Clearwater v. Mont. Dept. of Env. Quality*, Mont. 4th Jud. Dist. Ct., Missoula County, Cause No. DV 32-2023-0000717-DK.

23. Both of those cases are currently pending in their respective jurisdictions, with litigation schedules which will surpass this summer's mining season.

24. On June 28, 2023, LHC Inc. and/or its agents and employees began actively mining and/or preparing the site for mining by way of utilizing heavy industrial equipment.

25. In response to the activities on the mining site, Plaintiffs filed this suit on July 11, 2023, seeking an *ex parte* temporary restraining order and preliminary injunction to enjoin the mining of gravel under Opencut Permit #3473. Plaintiffs sought relief under § 27-19-201, MCA (2023).

26. This suit is independent of either the BER appeal or MEPA suit.

27. On July 17, 2023, this Court granted an *ex parte* restraining order and ordered the parties to appear for a hearing on Friday July 21, 2023, at 1:30 p.m.

28. At the July 21, 2023, hearing, DEQ provided testimony from two witness – Ruby Hopkins and Sierra Farmer.

29. Ruby Hopkins, who works at DEQ, authored the EA and reviewed and helped approve the mine under a Dryland Permit. She testified that DEQ granted the Dryland permit based on LHC's certification that mine would not affect ground or surface water. DEQ did not require test wells. DEQ's only visit to the subject property was in April 2023, while there was melting snow. Ms. Hopkins could not

confirm whether the ground was still frozen, or the depth to surface water.

30. Ms. Hopkins testified that before approving the Permit, DEQ issued a deficiency letter requesting, in part, LHC to verify that the Permit boundary was not within one-half a mile of 10 occupied dwelling units. She explained that, in response, LHC confirmed that the proposed Permit area met the requirements of a dryland permit. *See* DEQ Proposed Findings, ¶ 24.

31. Ms. Hopkins did not further testify as to how the requirements were "met" in terms of the occupied dwellings.

32. No testimony, exhibit, or post hearing proposed finding submitted by Defendant DEQ or LHC indicates the number of occupied dwellings within 1/2 mile of the proposed gravel pit.

33. Accordingly, there was no factual basis for LHC to certify that the number of occupied dwellings within 1/2 mile of the proposed gravel pit was fewer than 10.

34. Defendant DEQ requested more information on the issue through a deficiency letter on April 10, 2023. Still the number of occupied dwellings within 1/2 mile of the proposed gravel pit was not determined.

35. Defendant DEQ employee Hopkins visited the site, made visual observations of the distance of the project boundaries to surface water, and reviewed well data from the Ground Water Information Center.

36. Both DEQ and LHC have access to the Groundwater Information Center's (GWIC) data as well as Missoula County septic and well permits as further detailed in Findings and Conclusions below.

37. At the July 21, 2023, hearing, Ms. Hopkins conceded that she did not confirm whether there were 10 occupied dwelling units.

38. At the July 21, 2023, hearing, Ms. Hopkins stated that the DEQ did not perform any independent hydrologic evaluation to confirm the depth to groundwater or whether there would be an intersection with ground or surface water by conducting a hydrological study or contract for one.

39. Ms. Hopkins testified that prior to submitting the application, LHC was required to dig three test holes. *See* § 82-4-432(14)(a)(vi), MCA. LHC did not encounter ground water or surface water in these test holes, which were dug to 14 feet below ground surface.

40. DEQ concedes that Ms. Hopkins also testified that LHC submitted a bond for a highwall that is a maximum of 20 feet high, which typically

correlates to the depth of planned mining. *See* DEQ Proposed Findings, ¶ 38.

41. DEQ concedes Ms. Hopkins explained that while the 14-foot test holes were not deep enough to show that groundwater was not present at 20 feet below ground surface (i.e., the expected depth of mining), it was helpful information to consider as it shows no groundwater at least 14 feet below ground surface. *See* DEQ Proposed Findings, ¶ 39.

42. Ms. Hopkins further testified that she believed that in order for water to be "affected" by a mining operation, it had to either "intersect" groundwater or surface water. She was unable to identify a section of code defining it that way.

43. Ms. Hopkins is not a trained hydrologist and has no education or background in hydrology.

44. Nevertheless, she testified that she was "sure" the mine would not "affect" groundwater.

45. Ms. Hopkins also testified that DEQ relies on the applicant's certification identifying "occupied dwelling units," and properties within half a mile of the site. DEQ does not independently verify that information.

46. Ms. Hopkins confirmed in her testimony that under the Opencut Act, for a Dryland permit, there are no requirements to review water quality, noise, hours of operation, or visual impacts.

47. Ms. Hopkins repeatedly testified that DEQ is authorized by "MCA" to "rely on the certifications of applicants" and that no further evidentiary investigations are necessary.

48. DEQ's second witness, Sierra Farmer, works for DNRC. She testified that the State's beneficiary is slated to gain approximately $180,000 in royalties over the life of the mine. She further testified that the money was to be directed to the Pine Hills School.

49. LHC then presented its testimony from Frank Tabish and Jeff Claridge.

50. Frank Tabish is a project manager for LHC, and he prepared the application for Opencut Permit #3473. He is the person that certified, on behalf of LHC, the information, representations, and statements provided or acknowledged in the *Dryland Opencut Mining Permit.*

51. Mr. Tabish testified that he visited the site prior to development and observed what he thought was evidence of previous gravel mining, and that he did not see any evidence of surface or high groundwater.

He did not know when or if there actually had been previous mining at the site.

52. He further explained that he relied "exclusively on analysis from the EAs" to determine that the property qualified for a dryland permit, and that there was no affect on surface or ground water. To this end, he admitted on cross examination that neither he, nor LHC did "anything" to analyze whether the mine would "affect" groundwater before he certified the same.

53. On cross examination, Mr. Tabish admitted no independent hydrologic studies were conducted, and LHC relied on the State without confirming its conclusions with a methodology.

54. DEQ's EA, in turn, simply noted the difference between the elevation of the Clearwater River and Elbow Lake, and referenced a review of the Groundwater Information Center's (GWIC) website. The GWIC data review revealed 25 water wells with original static water levels of between 5 and 300 feet in depth. *See*, Ex. D.

55. Petitioner's opinion witness, David Donohue, subsequently testified that these depths were not verified and that no professional in the field of hydrology would reasonably rely on this type of unverified data because it is so inherently unreliable.

56. Mr. Tabish also confirmed that LHC dug test pits for the site that went to 14 feet in depth, and he admitted that mining activity would be 20 feet deep. LHC, though, did not dig any test pit to 20 feet as admitted by Mr. Tabish in testimony.

57. During the July 21, 2023, hearing, no reason was offered or apparent as to the use of 14 feet test holes when the gravel pit was going to 20 feet. The depth of 14 feet appeared to be random or arbitrary. Clearly, LHC had the equipment and DEQ had the authority to ask for more information, by letter, which they did on the issue of occupied dwellings.

58. The 14 feet depth of the pits is not sufficient to rule out impact.

59. The evidence in the record reflects further that LHC did not consider or analyze any hydrologic or hydrogeologic studies or data in submitting its applications. In other words, LHC was unaware of the depth of groundwater, or the direction of its flow at the time it submitted its application and at the time it certified to DEQ that there would be “no affect” to groundwater as a result of its mining operation.

60. The evidence in the record further reveals that as of today’s date, LHC is still unaware whether, how, and to what extent its mining

operations may “affect” groundwater in the area and/or private water rights with their source in groundwater immediately adjacent to its mine.

61. Mr. Tabish testified that LHC cannot state with any reasonable certainty the attributes of the shallow aquifer in the area of the mine, including what the depth to groundwater is and whether LHC might encounter water in its operation of the mine.

62. Following Mr. Tabish, Mr. Claridge testified. Mr. Claridge is the vice president of LHC, and prepared a description of how an injunction would financially affect LHC. Based on his calculations, an injunction would cause a $1,340,184.80 loss of revenue.

63. This calculation was based, in part, on the LHC’s involvement in the $30 million highway construction project on Highway 83, directly north of the gravel pit. LHC is contracted with Kiewit Infrastructure (the general contractor for the project) to provide asphalt and paving services.

64. However, Mr. Claridge testified LHC was awarded the contract based on a bid utilizing its existing gravel mine in Ovando, Montana.

65. Of note, the bid in this case was, in part, based on a different pit.

66. Nevertheless, while gravel mining and crushing is enjoined, LHC is trucking asphalt and other materials from Kalispell, and potentially the Ovando site. The Ovando pit is approximately 25 miles away. Mr. Claridge testified that LHC would need to move the equipment that is currently at the Clearwater Site to Ovando if the injunction is granted.

67. DNRC's EA agrees. If the proposed project were put on hold, LHC would haul gravel from "a privately owned site north of Browns Lake to the Salmon Lake reconstruction job scheduled to occur in the summer of 2023. The haul would be a 50-mile round trip from the pit to the job." *See*, DNRC EA, at p. 2.

68. Thereafter, Plaintiffs called their expert witness, David A. Donohue. Mr. Donohue is a hydrogeologist employed at HydroSolutions, in Helena, Montana. Mr. Donohue has more than 30 years of experience in hydrogeologic sciences and is the senior hydrogeologist in his office. His work and education experience includes numerous aspects of groundwater science, including being contracted by the state of Montana to research and author Environmental Assessments on gravel mines in the past. He was admitted as an opinion witness without objection.

69. Mr. Donohue was retained to determine if the Dryland Permit was the appropriate permit to issue based on its potential effect on surface and/or groundwater. In his review, Mr. Donohue examined the application materials, both DEQ and DNRC's EAs and the relevant data from the 25 GWIC wells that DEQ relied on in its EA – data which DEQ admitted was not verified.

70. Mr. Donohue testified that this area is characterized by complex hydrogeology. He testified that although the well logs cannot be reasonably relied upon to determine aquifer characteristics – such as the depth to shallow groundwater interception, the transmissivity (i.e., speed) of groundwater movement, or the direction of groundwater flow - they do provide general information which is relevant. More specifically, Mr. Donohue testified that the well log data indicates to him that this area is typified by significant heterogeneity in aquifer characteristics, meaning there is significant variation in the depth and location of groundwater resources near the mine.

71. Of greatest concern to Mr. Donohue was the inherently unreliable data which forms the foundation of DEQ's analysis in relation to the region's complex hydrology. Mr. Donohue testified to the fact that none of the groundwater wells relied upon by DEQ were located at or

adjacent to the proposed pit, so verification of depth to groundwater could not be determined until mining began.

72. During the July 21, 2023, hearing, Mr. Donohue testified there was a lot of variability between surface elevations, depth to groundwater, static water level within the wells located from GWIC database and it has not been field verified, and neither have the locations of the wells. *See* Hearing Exhibit D.

73. In Mr. Donohue's expert opinion, the lack of field verified well locations and depth to water level, does not confirm that groundwater resources will not be impacted. Accordingly, he believed that the applicant would need to verify the depth to groundwater before it could "certify" that groundwater would not be affected by the mining operation.

74. Mr. Donohue was also concerned that if mining began without the depth to the groundwater being verified, it could lead to significant environmental and health impacts if groundwater were encountered. Namely, the diesel, gasoline and heavy hydrocarbon fuels being used by different vehicles and as a part of the mining and production processes could contaminate the groundwater. Mr. Donohue testified

that the hydrocarbons used in asphalt production could similarly negatively impact groundwater.

75. During the July 21, 2023, hearing, Mr. Donohue testified that the DEQ in this case did not look at the water quality impacts of these chemicals infiltrating the groundwater.

76. As noted by DEQ in its EA, “Although Dryland Opencut applications do not specify site topography or drainage patterns during or after mining, the depression caused by mining activities would likely cause runoff to drain internally into the site. Precipitation and surface water runoff leaving the site would generally be expected to infiltrate into the subsurface.” This is the exact fact that was of concern to Mr. Donohue. If this water carries the toxic hydrocarbon fuels or materials into the groundwater, Mr. Donohue testified that general groundwater flow in this area could be towards domestic wells and cabin sites situation along the banks of the Clearwater River and Elbow Lake. He further testified these materials could also make it to these surface water bodies.

77. To that end, Mr. Donohue noted that LHC and DNRC and DEQ were unaware of the direction of flow of the groundwater, or its potential connectivity to Elbow Lake or the Clearwater River. These

connections could make a contamination event more impactful as the contaminated groundwater may flow directly into the lake or river.

78. Based on Mr. Donohue's evaluation, he testified that his ultimate opinion was that a Dryland permit was inappropriate for this site because there is no reliable evidence in the record which supports the scientific conclusion that the Clearwater mine will not have some "[a]ffect" on ground or surface water – i.e. there would not be no affect. He testified that the only way to appropriately determine if an effect on ground or surface water may exist is for a detailed assessment of the hydrogeology to be conducted – an assessment that neither LHC nor DEQ conducted.

79. During the July 21, 2023, hearing, Mr. Donohue testified that no professional in his field would rely on data that has this great of uncertainty.

80. Following Mr. Donohue, Jon Watson testified. Mr. Watson is a full-time resident on Elbow Lake, and a member of Protect the Clearwater. Mr. Watson began using the property in 1977 and has never observed any gravel mining operations – until this one – in the area of the current gravel mine.

81. In 2001 Mr. Watson leased his property from DNRC as a cabin lease site. Since then, he has made significant improvements, including water, septic and constructed his “dream home.” The home was completed in the fall of 2022, and he moved in as a full-time resident.

82. These improvements cost him approximately $400,000. He believes the gravel pit will significantly reduce the value of his home and is protesting the recent reappraisal with the Department of Revenue because it did not consider the new gravel pit.

83. Mr. Watson suffers from a respiratory health issue that is exacerbated by dust. So far, the operation has already created extensive dust from simply removing the top layer of dirt and doing minimal crushing. That dust, as described by Mr. Watson, is a fine particulate matter that drifts towards his house directly to the east of the pit site. He can see it as almost a fine mist that covers his car, his house, and drops into Elbow Lake.

84. Mr. Watson testified that the dust is somewhat limited at this point because the crusher has not yet begun operating, but once it does, he stated there will be significantly more dust. This testimony was based on Mr. Watson’s experience as the State Pavement Engineer from 1998-2010.

85. In addition to the dust, Mr. Watson testified that when the pit was operating, every time he opened his door he would hear backup alarms from the vehicles, and that the noise would only get worse once the crusher was operating full time.

86. Last, Mr. Watson confirmed that an abundance of wildlife utilizes the area – bears (grizzly and black), ducks, otters, beaver, deer, elk, loons, and swans are just a few of the animals. They also use the land so frequently that there is a game trail at the mouth of the Clearwater River, where it flows into Elbow Lake.

87. Gayla Nicholson, also a member of Protect the Clearwater, testified next. Her property is also in close proximity to the mine. She confirmed the significant presence of animals in the area. She also highlighted pictures of the pit site showing the pre-existing state of the land, and the impacts from just the beginning of the operation, including the irreparable loss of old-growth trees.

88. In contrast to Mr. Watson, Ms. Nicholson owns her property fee simple, and uses it as a recreational residence. Ms. Nicholson testified that she recently purchased the property from DNRC through its cabin sales program – a program intended to allow the State to sell previously leased recreational cabins. During that sales process,

DNRC did not mention that DNRC would site a mine directly adjacent to the property they were then selling.

89. In all, both Ms. Nicholson and Mr. Watson stated that the mine would significantly interfere with their use of private property, significantly devalue their large monetary investments, negatively affect wildlife in the area, and have long term impacts on the natural environment that brought them to the area as real estate purchasers.

90. Petitioners also submitted the affidavit of Libby Langston, which reflects much of the testimony of Mr. Watson and Ms. Nicholson.

91. To the extent that any of the foregoing Findings of Fact are actually Conclusions of Law, they should be so construed.

CONCLUSIONS OF LAW

1. A preliminary injunction is "an extraordinary remedy never awarded as of right." *Winter v. Natural Resources Defense Council, Inc.*, 555 U.S. 7, 24 (2008).

2. Montana's preliminary injunction standard was amended in 2023 through Senate Bill 191. *See* 2023 Mont. Laws Ch. 43. This legislative change clarifies that "[t]he applicant for an injunction provided for in this section bears the burden of demonstrating the need for an injunction order." *Id.*, § 1(3).

3. The 2023 Legislature amended § 27-19-201, MCA, to state that four conjunctive factors must be satisfied before a preliminary injunction may be granted:

> (1) A preliminary injunction order or temporary restraining order may be granted when the applicant establishes that:
>
> (a) the applicant is likely to succeed on the merits;
>
> (b) the applicant is likely to suffer irreparable harm in the absence of preliminary relief;
>
> (c) the balance of equities tips in the applicant's favor; and
>
> (d) the order is in the public interest.

Id., § 1(1).

4. The 2023 Legislature also amended § 27-19-201, MCA to state its intent is that these four factors "mirror the federal preliminary injunction standard, and that interpretation and application of subsection (1) closely follow United States supreme court case law." *Id.*, § 1(4).

5. Plaintiffs are challenging a permit issued pursuant to Title 82, but this matter is not an action challenging "an agency action under [Title 75-1-201, MCA]." Section 75-1-201(5)(a)(i), MCA. Subsection 5(a)(ii) creates a private right of action to challenge a final agency action "alleging failure to comply with or inadequate compliance with a

requirement under" MEPA. Section 75-1-201(5)(a)(ii), MCA Similarly, subsection (6)(c)(i) notes that the remedies provided in MEPA "are exclusive" to the extent they challenge an agency decision based on compliance with MEPA. Section 75-1-201(5)(a)(ii), MCA. Put another way, when a party brings an action to challenge the issuance of a permit based on its compliance with MEPA, the party must comply with § 75-1-201, MCA. If the party brings an action challenging a permit for a separate reason, then § 75-1-201, MCA is not exclusive.

6. The amendments to § 75-1-201, MCA, in the 2023 legislature confirm that the exclusivity requirements only apply to challenges to an environmental review, and not separate, distinct, challenges to a permit under title 82. Indeed, Senate Bill 557 clarified that the requirements of § 75-1-201(5)(a)(ii), MCA, only apply to challenges based on "an agency's environmental review". And § 75-1-201(6)(a), MCA, was amended to include a new requirement for actions alleging non-compliance based on greenhouse gases. These changes confirm that the remedy provisions in § 75-1-201, MCA, are meant to apply exclusively to permit challenges based on MEPA violations, and not based on the failure to comply with separate environmental laws.

7. Defendants assert that this rationale is wrong because § 75-1-201(6)(c)(ii), provides that a court may not enjoin a permit or license issued "pursuant to Title 75 or Title 82." However, when read in conjunction with § 75-1-201(5)(a) and § 75-1-201(6)(i), MCA, this provision only applies to cases challenging a permit based on MEPA violations.

8. If Plaintiffs had sought an injunction in their MEPA case, then § 75-1-201, MCA, would certainly apply because they are challenging the issuance of the permit based on a faulty EA. Plaintiffs here, though, seek relief for the Defendants' violation of § 82-4-432, MCA. Specifically, they claim that the issuance of a Dryland Opencut Permit, as opposed to a standard permit was wrongful. This cause of action exists independent from the State's compliance with MEPA. Accordingly, they may proceed under § 27-19-201, MCA, and not § 75-1-201, MCA.

9. Mont. Code Ann. § 27-19-201, as it applies to this case, is not limited by the amendments to § 75-1-201, MCA, in the 2023 legislature.

10. The First *Winter Factor* is success on the merits. The "merits" here are the merits of the BER appeal. Plaintiffs have brought this separate action because the BER provides no mechanism for them

to protect their interest via injunctive relief (*see, e.g.,* §§ 2-4-611 & 612, MCA) while the appeal is pending. The application, here, then is permissible.

11. Section 82-4-432, MCA, allows gravel pit operators to apply for an Opencut permit as either a dry land permit or a standard permit. A dryland permit is the correct application only for those scenarios when the proposed project "will not affect ground water or surface water, including intermittent or perennial streams, or water conveyance facilities." Section 82-4-432(1)(b)(i), MCA (emphasis added). If the proposed project "affects" ground water or surface water in any way, then it must apply for the standard opencut permit. Section 82-2-432(2) to -432(13).

12. The question on the merits before this Court, and the BER, is whether the proposed pit will "affect" ground or surface water in any way. Petitioner asserts it will and defendants claim it will not.

13. DEQ argues that to "affect" a water source, the mine must "intersect" the ground and/or surface water. The definition of "affect" is not found in title 82 or the associated administrative rules and thus, there is no administrative basis for this definition and the Court is not bound by it.

14. Because the term affect is not defined, the Court looks to its common meaning. *State v. Madsen*, 2013 MT 281, ¶ 8, 372 Mont. 102, 317 P.3d 806. So "affect" means to "have an influence" or to "cause a change." Cambridge Dictionary, https://dictionary.cambridge.org/us/dictionary/english/affect (last accessed July 24, 2023); *see also*, Merriam-Webster, https://www.merriam-webster.com/dictionary/affect (last accessed July 24, 2023. ("to act on and cause a change in", or to "influence").

15. Adopting this definition, then, means that a pit must merely have an influence on groundwater or surface water, and not that it "intersects" it. Based on the testimony provided, it is patently clear that neither DEQ, nor the permittee LHC know the answer to this question. This in and of itself provides this Court with the evidence necessary to find that Plaintiffs are likely to succeed on the merits. If neither the applicant for a mining permit, nor the DEQ tasked with reviewing that application conduct the due diligence necessary to determine the legal threshold for applicability of the permit, then the permitting decision must fail as an arbitrary and capricious decision. *Clark Fork Coal. v. Dep't of Envtl. Quality*, 2012 MT 240, ¶¶ 19-20, 366 Mont.

427, 288 P.3d 183 (analysis of permit type based on arbitrary and capricious standard).

16. However, the evidence in the record goes beyond the omission of proof. The evidence in the record reveals the proposed gravel mine is in fact likely to "have an influence" on ground and surface water. The DEQ's EA states, "[d]uring the beginning states of mining, surface water that may leave the site during a heavy storm event could carry sediment." Exhibit B, DEQ EA, p. 8. Further, the EA states: "[a]s long as the applicant complies with the conditions of any necessary water quality permits, any impacts to the surface water would be short-term and would be negligible." *Id.* p. 9.

17. Testimony from Mr. Watson also shows that the operation of the pit has already had an effect on the Clearwater River and Elbow Lake because fine particulate matter is being blown from the pit site onto the surface water. This is expected to get worse as crushing begins.

18. Additionally, the Court concludes that DEQ and LHC have not met their burden to establish that the operation will not affect surface water or groundwater. As Mr. Donohue testified, the data relied on by the State and LHC is unreliable, at best. That coupled with the lack of ground truthing, or physical verification of onsite water, demonstrate

that DEQ and LHC cannot certify that the operation will not "affect ground water or surface water." Section 82-4-432, MCA.

19. DEQ also had an obligation to ensure compliance with the Opencut Act. Section 82-2-422, MCA. Specifically, DEQ has supervisory duties to "make investigations or inspections that are considered necessary to ensure compliance with any provision" of the Opencut Act. Section 82-422(1)(d), MCA.

20. The lack of information further supports the conclusion that a Dryland permit was inappropriate. A permit application is only "acceptable if the materials and information provided to [DEQ] demonstrate that the proposed opencut operation complies with the requirements of [the Opencut Act]." Admin. R. Mont. 17.24.212. Because LHC cannot demonstrate that the permit complies with § 82-4-432(1)(b)(i), MCA, (that there will be no effect on water), the permit was wrongfully issued.

21. In light of the foregoing, the Court finds that the Plaintiffs are likely to succeed on the merits of their claim – that DEQ erred when it issued the dryland permit instead of requiring an application for a standard opencut permit.

22. Thus, the first factor weighs in Plaintiff's favor.

23. The second element of *Winters* is whether the applicant for a preliminary injunction will suffer irreparable harm.

24. LHC asserted at the hearing on this matter that Montana has not adopted a rule that environmental injury is *per se* irreparable, but that must be balanced with the legislature's edict that "the interpretation and application of [the preliminary injunction standards] closely follow United States supreme court case law." Section 27-19-201(4), MCA (2023.)

25. Adopting this approach means that "[E]stablishing irreparable injury should not be an onerous task for plaintiffs" that seek to protect the environment, *Cottonwood Environmental Law Center v. U.S. Forest Service*, 789 F.3d 1075, 1086 (9th Cir. 2015) (cert. denied at 580 U.S. 916), because "Environmental injury, by its nature, can seldom be adequately remedied by money damages and is often permanent or at least of long duration, *i.e*., irreparable." *Amoco Prod. Co. v. Vill. of Gambell*, 480 U.S. 531, 545 (1987).

26. Additionally, while the Montana Supreme Court has not defined environmental harm as *per se* irreparable, it has acknowledged the loss of a constitutional right may constitute an irreparable injury. *Driscoll v. Stapleton*, 2020 MT 247, ¶15, 401 Mont. 405, 473 P.3d

386. So, an environmental injury, because it interferes with a person's constitutional right to a clean and healthful environment, may constitute an irreparable injury. *Netzer Law Office, P.C. v. State*, 2022 MT 234, ¶¶ 21-22, 410 Mont. 513, 520 P.3d 335; *Montana Envtl. Information Center v. Dep't of Envtl. Quality*, 1999 MT 248, ¶ 77, 296 Mont. 207, 988 P.2d 1236 (Montanans' have a fundamental constitutional right to a clean and healthful environment).

27. Relying on these standards, Plaintiffs have advanced a number of harms that are considered irreparable. For example, Ms. Nicholson described the loss of old growth pines, and destruction of a wildflower covered meadow. Those trees will not grow back for decades, and the meadow – while it may be reclaimed, will never be the same. The loss of the trees alone constitutes an irreparable injury. *Alaska Conservation Council v. United States Forest Serv.*, 413 F. Supp. 3d 973, 980 (D. Alaska 2019); *League of Wilderness Defs./Blue Mts. Biodiversity Project v. Connaughton*, 752 F.3d 755, 764 (9th Cir. 2014) ("The logging of mature trees, if indeed incorrect in law, cannot be remedied easily if at all. Neither the planting of new seedlings nor the paying of money damages can normally remedy such damage.")

28. Similarly, Plaintiffs have established an irreparable injury to the aquatic environment surrounding their property. Namely, DEQ, DNRC, and therefore LHC – which relied on DEQ and DNRC for its water impacts – admit that there will be some affect on ground and surface water. These impacts are already being seen. Fine particulate matter is impacting the Clearwater River and Elbow Lake. Such contamination of water can be considered irreparable. *See, e.g.*, *Diné Citizens Against Ruining Our Env't v. Jewell*, 2015 U.S. Dist. LEXIS 109986, at *151-54 (D.N.M. Aug. 14, 2015).

29. Dave Donohue further testified that if DEQ is correct, and surface water flows do infiltrate the groundwater from the site, those flows will carry hydrocarbon materials from the site towards the lakefront cabins and the river system.

30. As a matter of law, an agency is bound by its substantive rules and its stated procedures and that citizens are injured by their agencies failing to follow the law. *Whitehall Wind, LLC v. Montana Public Service Com'n*, 223 P.3d 907, 910, 355 Mont. 15, 20, 2010 MT 2, ¶ 24 (Mont., 2010). Tasked with managing Montana's valued natural resources, it is imperative the DEQ act within the bounds of its authority. The plain language of the Opencut Act does not provide

DEQ with discretion to categorically determine that a site will not affect groundwater when there is not scientifically reliable evidence to support that conclusion.

31. The gravel pit also creates a significant, and potentially extensive, health risk for Mr. Watson. His respiratory health condition is exacerbated, and he will face significant health risks of the gravel pit if it is allowed to continue operating. The exposure to significant health risks constitutes an irreparable injury. *See, e.g., Basank v. Decker*, 613 F. Supp. 3d 776, 795 (S.D.N.Y. 2020).

32. Moreover, the project imperils endangered and non-endangered species and interfere with wildlife movements. Of particular concern are the impacts to the grizzly bear – an endangered species. The Montana Department of Fish Wildlife and Parks commented on DNRC's EA and opined that the project stating, "could have direct impact to fisheries, aquatic, wildlife, and vegetation resources." "The location of the proposed gravel mining operation also lives in an area rich with wildlife that is in species diversity." "Grizzly bears occur throughout the Clearwater and Blackfoot watersheds and regularly move north and south along the east and west sides of the Clearwater drainage." "Canada Lynx (Threatened under the ESA)

occur in the general area." Once these species are impacted, it is generally irreparable. *See,* DNRC EA.

33. FWP's past work in the area highlights the importance of maintaining the land as undeveloped. In 2010, FWP finalized a land purchase/swap with the Montana Department of Transportation to obtain 53 acres directly north of the proposed opencut mine. FWP Draft EA, Mitigation Plan for MT Highway 83 Right-of-Way Conveyance on the Blackfoot-Clearwater Wildlife Management Area, https://leg.mt.gov/content/publications/mepa/2009/fwp1104_2009001.pdf (Nov. 2009). In the Draft EA for the exchange, FWP noted elk and mule deer routinely cross highway 83 in the area. Grizzly bears also have been observed crossing highway 83. *Id.*, at pp. 11, 15. FWP, in fact, described this area as providing "critical connectivity" between the game range, and seasonal wildlife habitats to the west. *Id.*, at p. 15. Bull trout are also present in the Clearwater River, which is considered a nodal habitat for Bull trout. *Id.*, at p. 1. As stated above, DEQ admits in its EA that surface runoff from the mine site "may leave the site during a heavy storm event could carry sediment..."

34. As to the specific injuries of Plaintiff's members Libby Langston, Jon Watson and Gayla Nicholson testified as to their extensive personal investments in their real property, which lies immediately adjacent to the project site and through which they must pass every day to and from their homes. These investments stand to be harmed by large scale industrial mining less than half a mile away from their property. Once the mining has been established at the site, it will not be easily undone, requiring extensive and expensive remediation. And the mine is permitted to operate for seventeen years.

35. LHC contests this irreparable injury by looking to DEQ's EA, which provides little analysis. It merely mentions animals that are potentially present, but then fails to account for the actual impact to them, and it fails to account for adjacent development, and the unique corridor that the land at issue provides. Exacerbating this issue is DEQ's failure to communicate with FWP on the potential impact. The EA acknowledges that DEQ did not consult FWP. The resultant problem is that DEQ and LHC are unaware of the real impacts of the proposal. A more reasoned approach is to consider the impacts that the Petitioners testified to, and that FWP previously noted in its EA when it obtained the land from MDT.

36. In all, Petitioners have demonstrated they are likely to suffer irreparable injury to their health, wildlife, and the natural environment. Accordingly, the second *Winter* factor favors an injunction.

37. The third element of the *Winter* test – balance of the equities - also weighs in favor of Petitioners.

38. The U.S. Supreme Court has determined "the balance of harms will usually favor the issuance of an injunction to protect the environment" if a plaintiff demonstrates irreparable harm. *Amoco Prod. Co. v. Village of Gambell, AK*, 480 U.S. 531, 545, (1987).

39. When balancing the equities, economic harm to the defendant may be considered, but a minimal economic impact is generally outweighed by harm to the environment. *Alliance for the Wild Rockies*, 632 F.3d at 1137-38 (minimal economic harm is insufficient to overcome loss of wildness); *Nat'l Parks & Conservation Ass'n v. Babbitt*, 241 F.3d 722, 738 (9th Cir. 2001) (loss of anticipated cruise ship revenues "does not outweigh the potential irreparable damage to the environment.")

40. In its project EA for the use of State Trust Lands for the mine at issue, DNRC found that if it no permit was issued to LHC, "the proponent would haul gravel from a privately owned site north of Browns Lake to

the Salmon Lake reconstruction job scheduled to occur the summer of 2023. The haul would be a 50-mile round trip from pit to job." DNRC EA. Thus, the applicant owns another private gravel mine a mere 25 miles away from the site in question. On its own admission and the findings of DNRC, it has access to those resources, but just wants this site as it is more convenient and could save fuel costs. At the hearing these costs were estimated at approximately $250,000.

41. However, Mr. Claridge also testified that the contract with Kiewit was bid based on aggregate and asphalt coming from the Ovando gravel pit, or other LHC gravel pits in the State. This testimony indicates that the only difference is the amount of profit that LHC receives. It is not whether the project is economically feasible. LHC's bid on the project using the Ovando site is prima facie evidence that they believed that the project was profitable regardless of the Clearwater mine being involved.

42. The balance of the equities tips in favor of preserving the landscape in its natural state while this litigation plays out. Thus, the third *Winter* factor weights in favor of an injunction.

43. As with the first three *Winter* elements, the fourth – the public interest - militates in favor of an injunction.

44. The public interest is always an important consideration in determining whether to issue an injunction or stay an agency decision. *See Nat. Res. Def. Council, Inc. v. Winter*, 502 F.3d 859, 862 (9th Cir. 2007); *Earth Island Inst. V. U.S. Forest Serv.*, 442 F.3d 1147, 1177 (9th Cir. 2006) ("The preservation of our environment . . . is clearly in the public interest"). Enjoining LHC from continuing destruction under DEQ's permit is necessary to protect the environment and water resources from degradation, but also to protect the public's interest in holding its administrative agencies accountable.

45. It is undeniable that Montanans have an interest in making sure their government acts in compliance with the law. This is especially true for agencies charged with managing scarce resources. An agency's failure to comply with laws regulating natural resources "invokes a public interest of the highest order: the interest in having government officials act in accordance with the law." *Seattle Audubon Soc'y v. Evans*, 771 F. Supp. 1081, 1096 (W.D. Was. 1991). In Montana, the public interest in ensuring compliance with laws designed to protect water resources is paramount. This interest should outweigh the

potential economic harm that could result from a temporary enjoinder of any Opencut permit.

46. This elevated status arises out of the constitutional principle that the waters of Montana belong to and must be protected on behalf of the public. Mont. Const. Art. IX Sec. 3(3); *Montana Coalition for Stream Access, Inv. v. Curran*, 682 P.2d 163, 170 (Mont. 1984). To discount or understate the public interest in protecting this resource belies the Montana Constitution and contravenes the fundamental purpose of Montana's Water Use Act, the Montana Environmental Policy Act, and the clean and healthful protections afforded by the Montana Constitution. In fact, the legislature codified the importance of protecting water resources in enacting the Opencut Act, stating,

> The legislature, mindful of its constitutional obligations under Article II, section 3, and Article IX of the Montana constitution, has enacted The Opencut Mining Act. It is the legislature's intent that the requirements of this part 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), MCA.

47. Furthermore, the mine at issue is situated above the banks of one of Montana's most pristine rivers and just above a pristine lake. Home to numerous endangered species, the Clearwater River – a tributary

to the Blackfoot River – is a treasure not just for the citizens of Missoula County, but to all of Montana's people.

48. In contrast to the aforementioned public interest, DEQ asserts that the loss of revenue from school trust land will be significant. However, this revenue did not exist prior to the mine, so it is simply an anticipated, but not guaranteed revenue and the Pine Hills academy is operating without it. Defendants made no effort to show how this money would be used, or why it was critical to the continued operation of Pine Hills. As such, there is no evidence of how the loss of potential future revenue will hurt the State.

49. In addition, LHC also failed to provide any analysis of the project on State or Local Governments, other than to say that LHC would have trouble finding hotel rooms in Ovando. This may be because LHC will provide the gravel with, or without, the permit, so the impacts to the state and local economy are minimal.

50. In contrast, maintaining the area in its natural state will benefit state and local economies. Missoula County designated the area Class 1 Resource Protection.

51. Without the gravel pit, property values will also remain higher, thereby increasing local and state tax revenues. Mr. Watson's testimony

confirmed this fact. He testified that his recent tax appraisal as inappropriately high because it failed to account for the gravel pit. Such challenges are warranted as gravel pits decrease adjacent property values. *See, e.g.*, *Matter of Troy Sand & Gravel Co., Inc. v. Fleming*, 156 A.D.3d 1295, 1302-03 (N.Y. App. Div. 3rd Dept.) Defendants provided no testimony to the contrary.

52. LHC also suggests that its property rights may be impacted; however, DNRC owns the subject property, not LHC. So, any suggestion that LHC has an inalienable right to use the property is inaccurate.

53. The fourth *Winter* element tips in favor of granting an injunction.

54. As an alternative ground for relief, the Court finds that LHC's Dryland Opencut Mining Permit application as submitted, the review processes conducted by the DEQ and LHC, and the Environmental Assessment were inadequate pursuant to the requirements of § 82-4-432(14)(a) and (c), MCA.

55. Mont. Code Ann. § 82-4-432(14)(a)(ix) specifically requires a "certification from the operator that there are fewer than 10 occupied dwelling units within one-half mile of the permit boundary of the operation…", and no testimony provided at hearing indicated verification was conducted.

56. LHC failed to independently verify that there were less than 10 owners of real property on which occupied dwellings existed within 1/2 mile of the proposed gravel pit. No underlying data was presented during hearing to support any conclusions as to the number of seasonal dwellings or status of the occupied dwellings.

57. Further, no test pit was dug to a depth of the actual proposed mining activity to verify that the requirements of Mont. Code Ann. § 82-4-432(14)(a) were satisfied.

58. Specifically, Mont. Code Ann. § 82-4-432(14)(a)(vi) requires "results from three soil test pits meeting the soil guideline requirements."

59. The uncontroverted evidence provided during hearing provides that the depth of fourteen (14) feet was not an adequate depth to determine whether the projected mine would affect groundwater.

60. Therefore, the DEQ's Environmental Assessment and Permit for the project were incomplete, insufficiently analyzed, and not field verified.

61. The deficiency letter was a clear mechanism for the DEQ to require more information to make an application acceptable, as Mont. Code Ann. § 82-4-432(14)(e), specifically states,"[i]f the information submitted does not meet the requirements of subsection 14(a), the

department shall notify the applicant in writing and include a detailed identification of all deficiencies."

62. To the extent that any of the foregoing Conclusions of Law are actually Findings of Fact, they should be so construed.

63. Accordingly, the Court grants the requested relief on the additional grounds that the application, the EA, and review process were inadequate.

64. Pursuant to Mont. Code Ann. § 27-19-201, Plaintiff has established all necessary elements for a preliminary injunction based on the foregoing findings.

65. Next, both § 27-19-304, MCA, and § 75-1-201(6)(d), MCA require the Court to determine the necessity and amount of a bond. Accordingly, the Court sets a hearing on **AUGUST 25, 2023 at 1:30 p.m.** to determine the propriety of a bond, and if one is warranted, the amount of such bond.

66. The parties are allowed two weeks to exchange discovery and prepare for the hearing.

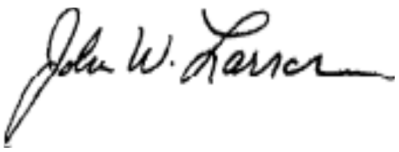
Based on the foregoing Findings of Fact and Conclusions of Law, and for good cause appearing,

IT IS ORDERED that LHC, Inc., its agents, employees, and those persons in active concert or participation with them are preliminarily enjoined from conducting any and all mining related activities authorized by Opencut Permit No. 3473, which is the subject of this dispute.

IT IS FURTHER ORDERED that the preliminary injunction shall last during the pendency of both the administrative matter pending before the Board of Environmental Review (Case No. BER 2023-03 OC) and any subsequent petition for judicial review pursuant to § 2-4-701, MCA *et seq*. and/or until the MEPA case currently before this Court reaches a judgement in herein.

IT IS FURTHER ORDERED that the parties shall appear on **FRIDAY, AUGUST 25, 2023 AT 1:30 P.M.** for a hearing to determine whether a bond shall be required, and if so, the appropriate amount of the bond. If the parties so desire, they may submit a brief outlining their position on the bond, on or before the time set for the hearing on the bond.

Dated this 8th day of August, 2023.



JOHN W. LARSON, DISTRICT JUDGE

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