

Hon. Leslie Halligan, District Court Judge
Fourth Judicial District, Dept. No. 1
Missoula County Courthouse
200 West Broadway
Missoula, Montana 59802
(406) 258-4771

MONTANA FOURTH JUDICIAL DISTRICT COURT, MISSOULA COUNTY

PROTECT THE CLEARWATER,

Plaintiff,

v.

MONTANA DEPARTMENT OF
ENVIRONMENTAL QUALITY,

Defendant,

And,

LHC, Inc.,

Intervenor-Defendants.

Dept. No. 1
Cause No. DV-32-2023-717-DK

**ORDER ON MOTION
TO SUPPLEMENT
THE RECORD**

This matter comes before the Court on the *Motion to Supplement the Record* (“Motion”) by Plaintiff Protect the Clear Water (“PTC”). The Court has considered the Motion and its corresponding Brief, the Response in opposition by Defendant

1 Montana Department of Environmental Quality (“DEQ”), and PTC’s Reply thereto.

2 Having considered the entirety of the record before it, the Court is prepared to rule.

3 **ORDER**

4 (1) The Court GRANTS in part, and DENIES in part, PTC’s Motion.

5 (2) The Court GRANTS PTC’s Motion, to the extent it finds that PTC’s
6 evidence is material, significant, and relevant to the adequacy of the agency’s
7 environmental review. DEQ concedes it did not rely on PTC’s proffered evidence
8 during its MEPA process, which is the consequence of DEQ’s action to foreclose
9 the public’s opportunity to provide it with information before it published its final
10 Environmental Assessment. Thus, the materials are “new” within the meaning of
11 Mont. Code Ann. § 75-1-201.

12 (3) The Court DENIES PTC’s Motion, to the extent it finds that DEQ is
13 entitled to review new material prior to the Court’s review. Therefore, the Court
14 REMANDS the issue to DEQ with instruction that it consider the evidence before
15 the Court considers it as a part of the administrative record under review. DEQ shall
16 have 45 days, absent good cause shown, to consider the evidence, recertify the
17 administrative record, and provide notice to the Court concerning its review and
18 decision.

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1 **MEMORANDUM**

2 **I. BACKGROUND**

3 PTC is suing DEQ for its issuance of dryland Open Cut Mining Permit 3473
4 (“Permit”) to LHC, Inc. (“LHC”), who has intervened into the lawsuit as an
5 interested party. The Permit was issued for LHC’s work on a project located west of
6 Highway 83 between Seeley Lake and Clearwater Junction. The project area is 21.2
7 acres in size and is positioned approximately 1,250 feet east of Elbow Lake on the
8 Clearwater River. LHC intended to use the Permit to mine gravel for a construction
9 project near Salmon Lake on Highway 83.

10 In 2021, the Montana Legislature created a new category of open cut mining
11 permits referred to as “dryland” permits which allow for a swifter process in the
12 issuance of mining permits where the mining activity will not significantly affect the
13 environment, cutting down the review time which DEQ is otherwise required to
14 undertake. Mont. Code Ann. § 82-4-432(1). An applicant may only use the dryland
15 permit application when the project will not affect ground and surface water,
16 “including intermittent or perennial streams, or water conveyance facilities” and
17 only where the project area has fewer than ten “occupied dwelling units . . . within
18 one-half mile of the permit boundary of the operation.” § 82-4-432(1)(b), (c).

19 Proceeding under the dryland permit process, LHC revised its application to
20 address any deficiencies highlighted by DEQ, which ultimately resulted in the
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1 issuance of the Permit on April 27, 2023. On that same day, DEQ issued its
2 Environmental Assessment (“EA”) which verified that the project met the dryland
3 permit criteria, citing to LHC’s personal guarantee that it complied with the permit
4 requirements as noted above. DEQ did not publish a preliminary draft EA, nor
5 provide a period for public comment on the EA prior to the Final EA’s publication.

6 On May 26, 2023, PTC filed an administrative appeal under Mont.
7 Code Ann. § 82-4-427(1), with the Board of Environmental Review (“BER”)
8 arguing that the dryland permit should not have been used because of the effects the
9 project would have on water systems and because of the occupied dwellings located
10 near the project. Apparently, the hearing examiner published an order, which was
11 appealed to BER, and the case was then remanded back to the hearing examiner by
12 BER where the parties and the hearing examiner reconsidered the issues. As of
13 August 23, 2024, BER’s meeting minutes appear to indicate that a possible summary
14 judgment order may be available in December 2024. This issue is ongoing.

15 Separate from that appeal, on June 26, 2023, PTC raised the issue of the
16 inadequacy of the EA to this District Court under the Montana Environmental Policy
17 Act (“MEPA”) pursuant to Mont. Code Ann. § 75-1-201.

18 On June 28, 2023, two days after PTC filed its Complaint, LHC began using
19 heavy industrial equipment at the project site, which prompted PTC’s filing of an
20 independent ex parte temporary restraining order and preliminary injunction

1 (separate from the Complaint it filed on June 26), which sought to enjoin any of
2 LHC's mining activity in related cause DV-23-776. There, the Honorable John W.
3 Larson granted the injunction, which purported to remain in effect throughout the
4 pendency of both the administrative proceedings and this Court's review of PTC's
5 MEPA claim.

6 LHC and DEQ appealed Judge Larson's order, and the Montana Supreme
7 Court overturned the issuance of the injunction on August 20, 2024. The Supreme
8 Court explained that the crux of PTC's challenge related to the provisions of
9 Montana Code Annotated Title 75, (Parts 1-3 which address MEPA) and Title 82
10 (Part 4 which encompasses the Opencut Mining Act). In overturning the injunction,
11 the Court found that the lower court mistakenly applied the provisions of Title 27
12 and failed to make the findings necessary to grant the injunction, citing Mont. Code
13 Ann. § 75-1-201(6)(c)(ii) (Unless the court makes certain findings, it "may not
14 enjoin the issuance or effectiveness or a license or permit . . . issued pursuant to Title
15 75 or Title 82 . . ."). In summary, the Montana Supreme Court held that the lower
16 court exceeded the scope of the prescribed legislative remedy for PTC's claims when
17 it bypassed Title 82, relevant to PTC's claim regarding the dryland permit, and Title
18 75, relevant to PTC's MEPA claim, and instead used the general standards under
19 Title 27.

1 In this case, the Court examines PTC's MEPA claim under Title 82. In its
2 present Motion, PTC argues that supplementation of the record is necessary to
3 demonstrate that DEQ's Final EA was insufficient and lacked consideration for the
4 impact of LHC's mining activity on wildlife. On the other hand, DEQ argues that
5 under the specific statute PTC is referencing, even if such evidence proves to be
6 relevant, new, material, and significant to its EA, the Court must remand the issue
7 back to DEQ to consider the new evidence.

8 After careful consideration of the record before it, as well as the arguments of
9 the parties, the Court accepts DEQ's assertion that it had not relied on PTC's
10 evidence during its MEPA review, but finds that by failing to review the information,
11 the evidence now may be classified as "new" under Mont. Code Ann. § 75-1-
12 201(6)(b)(ii). This is a consequence of DEQ's own action of precluding the public
13 from an opportunity to present this evidence to it in response to a draft EA. The
14 Court further finds that PTC's evidence is relevant, material, and significant as it
15 demonstrates the availability of specific information DEQ could have considered in
16 the EA. This Court does not address the issue of whether DEQ should have
17 considered such evidence.

18 Accordingly, the Court is inclined to agree with PTC and finds the Motion
19 well taken, but agrees with DEQ, that the evidence should be remanded for DEQ's
20 "consideration and an opportunity to modify its decision or environmental review

1 before the court considers the evidence as a part of the administrative record under
2 review.” Mont. Code Ann. § 75-1-201(6)(b)(ii).

3 **II. LEGAL STANDARD**

4 Judicial review of an agency decision is limited to what was “on the record
5 before the governing body at the time of its decision.” *Belk v. Mont. Dep’t of Env’t.*
6 *Quality*, 2022 MT 38, ¶ 33, 408 Mont. 1, 504 P.3d 1090 (citing *Heffernan v.*
7 *Missoula City Council*, 2011 MT 91, ¶ 66, 360 Mont. 207, 255 P.3d 80). A court
8 may admit extra-record evidence if, without it, it would be “impossible for the court
9 to determine whether the agency took into consideration all relevant factors in
10 reaching its decision.” *Skyline Sportsmen’s Assn. v. Bd. of Land Commrs.*, 286 Mont.
11 108, 113, 951 P.2d 29, 32 (1997) (citations omitted). Extra-record evidence may be
12 admitted when there is a showing that “the proffered information is new, material,
13 and significant evidence that was not publicly available before the agency’s decision
14 and that is relevant to the decision or to the adequacy of the agency’s environmental
15 review” Mont. Code Ann. § 75-1-201(6)(b)(ii). To meet this burden, the
16 materials the plaintiff seeks to admit must “have been considered by the agency in
17 reaching its decisions or . . . demonstrate what the agency should have considered
18 but did not.” *Belk*, ¶ 36.

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III. ANALYSIS

PTC seeks the admission of four documents it argues DEQ ignored or should have considered when it approved LHC's Permit and published its EA:

(1) FWP's Decision Notice and Draft EA concerning a proposal from FWP to exchange land with the Montana Department of Transportation adjacent to the Clearwater Pit site,

(2) a declaration from Chris Servheen, the former Grizzly Bear Recovery Coordinator with the U.S. Fish and Wildlife Service, and

(3) and (4) two scholarly articles on Grizzly bear movement authored by FWP staff.

PTC's Br. Supp. Mot. at 3 (Doc. 31). The EA by Montana Fish, Wildlife, and Parks ("WFP") was completed when WFP acquired the land that neighbors the project site where LHC's mining activity is planned to occur. This land is known as the Blackfoot-Clearwater Wildlife Management Area. WFP's Draft EA discusses how the newly acquired land provides critical habitat for a number of species and provides migration corridor for species such as grey wolves, grizzly bears, and lynx.

PTC's Br. Supp. Mot. at 4. The Draft EA discusses how the acquired land was beneficial because it protects against the land's future development which would negatively impact wildlife. Turning to the declaration of Chris Servheen, who was in charge of coordination efforts for grizzly bear conservation in the lower 48 States, he opines that the Permit can impact grizzly bears for multiple generation and not just during the life of LHC's mining activity. Lastly, the two articles PTC seeks to

1 admit regard research papers written by FWP employees on the importance of
2 wildlife corridors in the wildlife management scheme.

3 The framework which addresses supplementing the administrative record is
4 in part, designed to protect an agency's ability to first come to a decision, before that
5 decision is reviewed by another body. Mont. Code Ann. § 75-1-201(6)(a)(ii). DEQ
6 appears to be familiar with the four documents, as it states that "much of the
7 information that PTC requests this Court supplement the record with is already
8 contemplated by DEQ's EA." DEQ's Resp. Br. at 12 (Doc. 35).¹ Nevertheless, DEQ
9 makes clear that it "did not rely on any of these documents in its MEPA review."
10 DEQ's Resp. Br. at 5. Accordingly, where evidence satisfies the following test of
11 admissibility, it must be remanded for the agency's initial review:

12 (i) When a party challenging the decision or the adequacy of the
13 environmental review or decision presents information not in the record
14 certified by the agency, the challenging party shall certify under oath in
15 an affidavit that the information is new, material, and significant
evidence that was not publicly available before the agency's decision
and that is relevant to the decision or the adequacy of the agency's
environmental review.

16 (ii) If upon reviewing the affidavit the court finds that the proffered
17 information is new, material, and significant evidence that was not
18 publicly available before the agency's decision and that is relevant to
19 the decision or to the adequacy of the agency's environmental review,
the court shall remand the new evidence to the agency for the agency's
consideration and an opportunity to modify its decision or

20 ¹ To the extent DEQ had considered this information in creating its EA but chose to not cite to any of it or
21 include it in the administrative record, then such information is admissible and should have been included
in the administrative record. *Belk*, ¶ 6. The Court presumes DEQ's argument to mean it finds the new
evidence unremarkable in effect, and not that it had considered PTC's specific evidence in its EA.

1 environmental review before the court considers the evidence as a part
2 of the administrative record under review.

3 Mont. Code Ann. § 75-1-201(6)(b)(i)-(ii).

4 **A. The evidence constitutes as “new” because it was not available to
5 the agency prior to its decision, by no fault of PTC.**

6 As a threshold matter, the Court must examine whether any of this evidence
7 is “new” as required under Mont. Code Ann. § 75-1-201(6)(b)(ii). This requirement
8 underlines the right of an agency to review material before the material is reviewed
9 by a court. Relevant here, the legal framework provides as follows:

10 (i) In an action alleging noncompliance or inadequate compliance with
11 a requirement of [MEPA] . . . or a claim that the review is inadequate,
12 the agency shall compile and submit to the court the certified record of
13 decision at issue . . .

14 (ii) . . . a court may not consider any information, including but not
15 limited to an issue, comment, argument, proposed alternative, analysis,
16 or evidence, that was not first presented to the agency for the agency’s
17 consideration *prior to the agency’s decision or within the time allowed*
18 *for comments to be submitted.*

19 (iii) Except as provided in subsection (6)(b), the court shall confine its
20 review to the record certified by the agency. . .

21 Mont. Code Ann. § 75-1-201(6)(a) (emphasis added). However, Mont. Code Ann. §
22 75-1-206 is not a sword and shield which allows an agency, by its own hand, to
preclude the public’s ability to provide preliminary information, while later
permitting the agency to state that the information cannot be reviewed by an
appellate body because the information was not initially presented to the agency for
consideration.

1 Indeed, the public is entitled to know the information an agency utilizes in
2 forming its EA. See *Mont. Wildlife Fed'n v. Mont. Bd. of Oil & Gas Conservation*,
3 2012 MT 128, ¶ 42, 365 Mont. 232, 280 P.3d 877 (“... an EA should make specific
4 reference to MEPA documents from which it is tiered so that members of the public,
5 not just the Board and others involved in the process, are made aware of the
6 information utilized by MBOGC in issuing permits.”). In the ordinary course of
7 MEPA reviews, the agency proceeds with an initial draft EA, providing public
8 opportunity for comments so as to offer the agency with guidelines as to areas of
9 their decision which deserve further attention. A.R.M. 17.4.607(2)(d); A.R.M.
10 17.4.610. The public comment period allows for discussion and provides the agency
11 with information to consider prior to the agency’s final decision. Absent the initial
12 draft, a final EA simply informs the public of its decision and makes obsolete the
13 crucial aspect of public engagement. In this case, DEQ concedes it did not provide
14 a draft EA, which effectively precluded the public’s ability to provide information
15 to DEQ to consider before it published its EA. DEQ Ans., ¶¶ 6, 8.

16 The Court is aware that DEQ is left in the middle of countering directions.
17 DEQ is asked to quickly meet the deadlines for the dryland permit applicant, yet also
18 conduct an adequate environmental review regarding the effects the permit would
19 have on the proposed project site. However, DEQ’s argument that it should be
20 excused from abiding by MEPA with regard to dryland permits but then strictly

1 impose MEPA procedures to preclude review of information which could not be
2 provided sooner to DEQ through a public process, is not an appropriate solution.
3 Since DEQ did not allow for public comment on the draft EA, PTC's proffered
4 evidence was not publicly available to the agency prior to its decision. Therefore,
5 the evidence constitutes as "new" under Mont. Code Ann. § 75-1-201(6)(b)(ii),
6 because it could not be used as commentary in response to a draft EA that was never
7 published.

8 **B. The evidence is "material," "significant," and "relevant" to the**
9 **adequacy of DEQ's Environmental Assessment.**

10 The Court next must examine whether the proffered evidence is material,
11 significant, and relevant under Mont. Code Ann. § 75-1-201(6)(b)(ii). If the evidence
12 satisfies this provision, then the court "shall remand the new evidence to the agency
13 for the agency's consideration and an opportunity to modify its decision or
14 environmental review before the court considers the evidence as a part of the
15 administrative record under review." *Id.*

16 Relevant to PTC's MEPA claim, is the inadequacy of DEQ's environmental
17 review. MEPA demands that an agency take a "hard look" at the "potential
18 environmental consequences." *Belk*, ¶ 17. Couched in this requirement to take a hard
19 look is "the obligation to make an adequate compilation of relevant information, to
20 analyze it reasonably, and to consider all pertinent data." *Clark Fork Coal. v. Mont.*
21 *Dep't of Env'tl. Quality*, 2008 MT 407, ¶ 47, 347 Mont. 197, 197 P.3d 482. This Court

1 does not take its own “hard look” but “requires that the agency do so.” *Id.* After the
2 agency decision is made, the reviewing court focuses “on the validity and
3 appropriateness of the administrative decision making process without intense
4 scrutiny on the decision itself.” *Id.* However, the agency must “articulate a
5 satisfactory explanation for its action, including a rational connection between the
6 facts found and the choice made.” *Id.* (citing *Motor Vehicle Mfrs. Ass'n v. State Farm*
7 *Mut. Auto. Ins. Co.*, 463 U.S. 29, 43, 103 S. Ct. 2856, 2866 (1983)).

8 PTC’s first proffered evidence relates to the alleged inadequacy of DEQ’s
9 compilation of evidence concerning the lands neighboring the project site. As a part
10 of its environmental review, DEQ analyzed “the immediate project area as well as
11 neighboring lands surrounding the analysis area, as appropriate for the impacts being
12 considered.” AR-05 (Doc. 15) (EA). MEPA required DEQ to compile all relevant
13 and pertinent information regarding these neighboring lands, regardless of DEQ’s
14 ultimate findings. Neighboring the project area, is the Blackfoot-Clearwater Wildlife
15 Management Area owned by WFP, DEQ’s sister agency. WFP also operates the
16 game range across the road from the project site. In this case, DEQ did not contact
17 the owner of the neighboring land, i.e., FWP. PTC suggests that DEQ’s compilation
18 of information concerning this factor was inadequate because it failed to consider
19 the neighbor’s environmental assessment regarding the land. Not only is this
20 information relevant, but considering the neighbor is FWP, a sister agency with

1 expertise in wildlife, the assessment is material and significant to DEQ's EA. Indeed,
2 the Montana Supreme Court has even gone as far as permitting agencies "to rely on
3 FWP in assessing wildlife impacts" for MEPA purposes. *Mont. Wildlife Fed'n*, ¶ 42.

4 PTC's second, third, and fourth pieces of evidence relate to the alleged
5 inadequacy of DEQ's compilation of evidence, and decision to use general
6 statements in the EA, concerning the specific impact LHC's mining activity would
7 have on grizzly bears.

8 The second proffered evidence is the opinion of the former Grizzly Bear
9 Recovery Coordinator with the U.S. Fish and Wildlife Service, Chris Servheen. As
10 part of the MEPA process, DEQ had to evaluate the impacts the Permit would have
11 on "terrestrial and aquatic life and habitats" as well as "endangered . . .
12 environmental resources." Admin. R. Mont. 17.5.609(d). The EA acknowledges that
13 "potential habitat for some individuals of the threatened and endangered species"
14 listed in the EA, such as bull trout, bald eagles, and grizzly bears, may exist on the
15 project site, and that grizzly sightings in the project area "commonly occur" but the
16 population size is not known. AR-11; AR-16. While the EA defines what a grizzly
17 bear is, pertinent information to this inquiry necessarily includes *how* the species
18 currently use the area and how such current use would be impacted by LHC's mining
19 activity. Regarding all relevant factors to this inquiry, the EA provides that the
20 project area "is a migration corridor for species, due to the shallow water at the
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1 mouth of Elbow Lake and the presence of the Blackfoot-Clearwater Wildlife
2 Management Area across Highway 83.” AR-11. Regarding the potential impact, the
3 EA states that habitat for endangered and threatened species “may exist” but “[e]ven
4 if suitable habitat did exist on this site, the disturbance area would be small in
5 relation to the large areas of similar or identical habitat surrounding the site.” AR-
6 11; AR-16. Chris Servheen’s declaration specifically provides information
7 concerning how the Permit could impact grizzly bears for multiple generations when
8 considering the effect of continuous commercialization of the surrounding area, like
9 the Holland Lake Lodge development. Mr. Servheen opines that any “one project by
10 itself is not a serious negative impact, but together they present a cumulative effects
11 disaster for grizzly bear survival.” PTC’s Br. Supp. Mot., Ex. B at 3 (Servheen’s
12 Decl.). While this declaration is not relevant to weigh DEQ’s credibility against
13 PTC’s evidence, it is relevant to challenge the sufficiency of the compilation of
14 evidence DEQ acquired in considering the impact the Permit will have on grizzly
15 bears.

16 The third and fourth proffered evidence relates to the opinions of two FWP
17 employees and their respective articles concerning grizzly bear conservation
18 management. In terms of the value the project area provides to endangered or
19 threatened species such as grizzly bears, the EA explains that because of the area’s
20 “value to wildlife, the area is designated as Resource Protection 1 in the Seeley Lake

1 Regional Plan adopted by the Missoula County Board of County Commissioners in
2 2010.” AR-11. This classification was given to the project area to provide the
3 “greatest potential resource protection on lands with the highest values for
4 biodiversity, fish and wildlife habitat, forest production, recreation, wetlands, and
5 other resources.” AR-11. Moreover, those familiar with the project area have stated
6 the land “should remain undeveloped, but if development occurs, it should be
7 accompanied by measures that minimize impacts to natural resources.” AR-11. The
8 EA opines that the project would not “impinge on the existing wildlife corridor” but
9 it does not provide specificity as to *how* it will not do so. AR 11. The research papers
10 PTC seeks to have admitted are relevant to this issue specifically because they
11 explain the importance of wildlife corridors as part of the wildlife management
12 scheme and challenge the lack of review on this issue in DEQ’s EA.

13 Moreover, PTC’s second, third, and fourth pieces of evidence are material and
14 significant to their MEPA claim because such evidence attacks the general language
15 used throughout the EA concerning grizzly bears and purports to demonstrate the
16 availability of more specific sources of information. “[G]eneral statements about
17 'possible' effects and the existence of 'some risk' do not constitute a 'hard look' absent
18 a justification regarding why more definitive information could not be provided.”
19 *Mont. Wildlife Fed’n*, ¶ 43 (internal citations omitted). Hence, the proffered evidence
20 is not only relevant to PTC’s claim, but such evidence is also material and significant

1 because by providing two sources of information from DEQ's sister agency, and one
2 source of information from a notorious author who was charged with leading grizzly
3 bear protection efforts in Montana, PTC uses the evidence to counter the implication
4 that DEQ's general statements in its EA was due to the unavailability of more
5 specific information. Accordingly, such evidence satisfies the provisions under
6 Mont. Code Ann. § 75-1-201(6)(b)(ii).

7 **IV. CONCLUSION**

8 The evidence PTC seeks to supplement the record with is new, relevant,
9 material, and significant to PTC's MEPA claim. Therefore, DEQ is entitled to
10 review such evidence prior to the materials becoming a part of the record before the
11 Court. The Court hereby REMANDS the issue to DEQ and instructs DEQ to review
12 and consider the evidence identified by PTC and determine whether to modify its
13 decision or environmental review, before recertifying the administrative record to
14 include any of its modifications, as well as the new material. These actions are
15 necessary before the Court shall consider the evidence as a part of the administrative
16 record under review. DEQ shall have 45 days, absent good cause shown, to consider
17 the new evidence, recertify the administrative record, and provide notice to the Court
18 concerning its decision and review.

19 PTC's Motion is hereby GRANTED in so far as the materials it requests
20 satisfy the parameters of Mont. Code Ann. § 75-1-201(6)(b)(ii), but DENIED to the
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1 extent it seeks to preclude DEQ from first reviewing the new evidence before the
2 Court does so.

3 DATED this 30th day of September, 2024.

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5 
6 Hon. Leslie Halligan
7 District Court Judge
8
9

10 cc: Graham J. Coppes, Esq., PTC
11 David K.W., Wilson, Esq., PTC
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