

1 Hon. Leslie Halligan, District Court Judge  
2 Fourth Judicial District, Dept. No. 1  
3 Missoula County Courthouse  
4 200 West Broadway  
5 Missoula, Montana 59802  
6 (406) 258-4771

7 MONTANA FOURTH JUDICIAL DISTRICT COURT, MISSOULA COUNTY

<p>8 PROTECT THE CLEARWATER,</p> <p>9 Plaintiff,</p> <p>10 v.</p> <p>11 MONTANA DEPARTMENT OF ENVIRONMENTAL QUALITY,</p> <p>12 Defendant,</p> <p>13 And,</p> <p>14 LHC, Inc.,</p> <p>15 Intervenor-Defendants.</p>	<p>Dept. No. 1 Cause No. DV-32-2023-717-DK</p> <p><b>ORDER GRANTING PLAINTIFF’S MOTION TO STRIKE</b></p>
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16 This matter comes before the Court on Plaintiff Protect the Clear Water’s  
17 (“PTC”) Motion to Strike (“Motion”). The Court has considered the Motion and its  
18 corresponding Brief, the Responses in opposition filed by Defendants Montana  
19 Department of Environmental Quality (“DEQ”) and LHC, Inc. (“LHC”), and PTC’s  
20 Reply thereto. Having considered the record before it, the Court rules as follows:

1 **ORDER**

2 The Court GRANTS PTC’s Motion. Accordingly, DEQ’s proffered evidence  
3 IS HEREBY STRICKEN from the record and SHALL NOT be considered in the  
4 Court’s analysis of the pending Motion for Summary Judgment.

5 **MEMORANDUM**

6 **I. BACKGROUND**

7 PTC is suing DEQ for its issuance of dryland Open Cut Mining Permit No.  
8 3473 (“Permit”) to LHC who has intervened into the lawsuit as an interested party.  
9 The Permit was issued for LHC’s work on a project located west of Highway 83  
10 between Seeley Lake and Clearwater Junction. On April 27, 2023, DEQ issued its  
11 Environmental Assessment (“EA”) which verified that the project met the dryland  
12 permitting criteria. DEQ did not publish a preliminary draft EA, nor provide a period  
13 for public comment on the EA prior to the Final EA being issued.

14 On May 26, 2023, PTC filed an administrative appeal under Mont. Code Ann.  
15 § 82-4-427(1), with the Board of Environmental Review (“BER”) arguing the Permit  
16 should not have been used due to the effects the project will have on water systems  
17 and because of the occupied dwellings located near the project. The BER issued a  
18 decision in Case No. BER 2023-03 OC, which rejected PTC’s arguments. Separate  
19 from that appeal, on June 26, 2023, PTC raised the issue of the EA’s adequacy to  
20 this Court under the Montana Environmental Policy Act (“MEPA”). To demonstrate

1 inadequacy, PTC sought to supplement the record with evidence DEQ did not  
2 consider, arguing this information should have been considered. *See* Mot. to  
3 Supplement the Record (Doc. 30). DEQ opposed this request, arguing it is entitled  
4 to first review and consider this information prior to the Court's review of the same.  
5 *See* DEQ's Resp. Br. in Opposition to Mot. to Supplement the Record (Doc. 35).

6       Upon consideration of the controlling law, the Court agreed and remanded the  
7 issue to DEQ, instructing the agency to consider PTC's proffered evidence. *See* Or.  
8 on Mot. to Supplement the Record (Doc. 41). Finding that the information contained  
9 therein did not change its analysis, DEQ reached the same decision and resubmitted  
10 the record to the Court. However, upon recertifying the record, DEQ included  
11 additional material beyond what it was instructed to review.

12       Indeed, DEQ attached seven new documents and two new exhibits that it  
13 relied on in supplementing the EA. *See* AR 544-552; AR 553-645; AR 646-657;  
14 AR 658-698; AR 814-819; AR 820-828; AR 829-853; AR 542; and AR 543. Given  
15 that DEQ did not move to supplement the record, PTC claims, DEQ's extra-record  
16 information is inadmissible and cannot be considered on summary judgment.  
17 Therefore, on January 31, 2025, PTC file its Motion (Doc. 48) and Supporting Brief  
18 (Doc. 50), requesting that DEQ's new evidence not be considered by the Court.

19       In turn, DEQ maintains its extra-record material was necessary for its review  
20 of PTC's evidence. *See* DEQ's Resp. Br. to Mot. (Doc. 60). Echoing DEQ's

1 arguments, LHC similarly opposes PTC’s Motion. *See* LHC’s Resp. Br. to Motion  
2 (Doc. 58). On March 21, 2025, PTC filed its Reply Brief (Doc. 66), contending it is  
3 DEQ’s own shortcomings which precluded it from having the ability to respond to  
4 PTC’s evidence through the regular public participation process, and DEQ should  
5 not be given the opportunity to do so now. Accordingly, we address whether DEQ’s  
6 new extra-record material should be stricken from the record.

## 7 **II. LEGAL STANDARD**

8 Judicial review of an agency decision is limited to what was “on the record  
9 before the governing body at the time of its decision.” *Belk v. Mont. Dep’t of Env’t.*  
10 *Quality*, 2022 MT 38, ¶ 33, 408 Mont. 1, 504 P.3d 1090 (citing *Heffernan v.*  
11 *Missoula City Council*, 2011 MT 91, ¶ 66, 360 Mont. 207, 255 P.3d 80). Still, a  
12 court “may need to admit extra-record evidence, materials beyond those considered  
13 by the agency, if it would make clear what the agency should have considered.” *Id.*  
14 Without such evidence, it may be “impossible for the court to determine whether the  
15 agency took into consideration all relevant factors in reaching its decision.” *Skyline*  
16 *Sportsmen's Assn. v. Bd. of Land Commrs.*, 286 Mont. 108, 113, 951 P.2d 29, 32  
17 (1997) (citation omitted). Extra-record evidence may thus be admitted if it is “new,  
18 material, and significant evidence that was not publicly available before the agency’s  
19 decision and that is relevant to the decision or to the adequacy of the agency’s  
20 environmental review . . . .” Mont. Code Ann. § 75-1-201(6)(b)(ii).

1 To meet this burden, a party must demonstrate the agency should have  
2 considered the evidence but did not. *Belk*, ¶ 36. If this burden is satisfied, then the  
3 new evidence is remanded to the agency for its consideration where it will be given  
4 “an opportunity to modify its decision or environmental review before the court  
5 considers the evidence as a part of the administrative record under review.” *Id.*

### 6 **III. LEGAL ANALYSIS**

7 After satisfying its burden in demonstrating the additional evidence should  
8 have been considered by DEQ but was not, four documents proffered by PTC were  
9 remanded to the agency as extra-record evidence. The four documents include:

10 (1) the Decision Notice and Draft EA concerning a proposal from FWP  
11 to exchange land with the Montana Department of Transportation  
12 adjacent to the Clearwater Pit site, (2) a declaration from Chris  
13 Servheen, the former Grizzly Bear Recovery Coordinator with the U.S.  
14 Fish and Wildlife Service, and (3), (4) two scholarly articles on Grizzly  
15 bear movement authored by FWP staff.

16 PTC’s Br. Supp. Mot. at 3 (Doc. 31). Upon being remanded, DEQ was provided an  
17 opportunity to modify its decision or environmental review before the Court would  
18 consider the evidence as a part of the administrative record.

19 DEQ avers consideration of these documents did not reverse its decision. Nor  
20 did these materials appear sufficiently impactful to justify substantive modification  
of DEQ’s environmental review. Nevertheless, DEQ felt as though additional  
material was necessary to refute the relevance of PTC’s extra-record evidence.

Indeed, DEQ included the below seven documents in the record:

1 (1) Montana Blackfoot Elk Study (June 2021), AR 544-552;  
2 (2) Montana Blackfoot Elk Study (June 2022), AR 553-645;  
3 (3) Perception of Human-Derived Risk Influences Choice at Top of the  
4 Food Chain Report, AR 646-657; (4) Montana Department of Natural  
5 Resources and Conservation's ("DNRC") Environmental Assessment,  
6 AR 658-698; (5) DNRC's Aggregate and Rock Mining Permit No. G-  
7 1535-23, AR 814-819; (6) Journal of Applied Ecology (2012), AR 820-  
8 828; and (7) BioOne Complete Report (2019), AR 829-853.

9 PTC's Reply at 2-3 (Doc. 66). DEQ also included two new exhibits: " (1) an October  
10 30, 2024, letter from Quentin Kujala at FWP to DEQ, AR 542; and (2) DNRC  
11 permitted uses on the easter half of Section 20 T 15N R 14W, AR 543." *Id.*

12 MEPA imposes on an agency "the obligation to make an adequate compilation  
13 of relevant information, to analyze it reasonably, and to consider all pertinent data."  
14 *Clark Fork Coal. v. Mont. Dep't of Env'tl. Quality*, 2008 MT 407, ¶ 47, 347 Mont.  
15 197, 197 P.3d 482. PTC brought this action, based in part on the argument DEQ did  
16 not compile and consider all pertinent data. DEQ refutes this position, contending  
17 all necessary data was properly compiled and considered. Accordingly, DEQ  
18 remained firm in its conviction PTC's proffered evidence was not impactful to its  
19 EA, and did not need to be considered. What's more, prior to the Court's  
20 consideration of the same, DEQ was provided an opportunity to look at the new  
evidence and determine whether it warrants modification of its prior decision.

The framework which addresses extra-record evidence is, *inter alia*, designed  
to protect an agency's ability to first come to a decision, before that decision is  
reviewed by another body. Mont. Code Ann. § 75-1-201(6)(a)(ii). Hence, the ability

1 to remand new information which the agency was unable to review prior to making  
2 a decision is a mechanism that encourages agencies to self-correct if the evidence is  
3 impactful, or if the evidence is not impactful, stand firm by its decision.

4 Hence, upon remand, DEQ had the option to stand by its EA. If DEQ felt it  
5 had not compiled sufficient information in its first EA, it also had the option to derive  
6 a new EA pursuant to MEPA. It appears DEQ felt it did not compile all relevant  
7 data, and rather than using the remand process to self-correct by requesting  
8 additional time to conduct an appropriate and comprehensive MEPA review, DEQ  
9 precluded the public's ability to provide information to the agency, and strategically  
10 included only some information in the administrative record.

11 DEQ's justification is contradictory and suggests PTC's evidence was  
12 sufficiently impactful to warrant inclusion of new material, but not impactful enough  
13 to change its decision or prompt a full MEPA review. As stated, Mont. Code Ann.  
14 § 75-1-206 is not a sword and shield, yet it appears DEQ intends to use it as such.  
15 On one hand, DEQ has represented it adequately compiled all relevant data and  
16 PTC's evidence does not alter its position. On the other hand, DEQ suggests PTC's  
17 evidence required it to consider new data to properly conduct its review, but not to  
18 the extent a full review of data (e.g., public comment) was necessary.

19 The Court takes issue with DEQ's position that it can continuously side step  
20 MEPA's mandate regarding public comment. DEQ's Resp Br. at 6 ("nothing in

1 MEPA requires DEQ to publish a draft EA and solicit public comment.”). Montana  
2 jurisprudence makes clear that MEPA functions to:

3 inform not just public officials, but also the public of project impacts  
4 within their communities . . . Administrative processes contemplate  
5 public participation . . . and DEQ must consider the substantive  
6 comments received in response to an EA.

7 *Mont. Env't Info. Ctr. v. Mont. Dep't of Env't Quality*, 2025 MT 3, ¶ 62, 420 Mont.  
8 150, 561 P.3d 1033 (Citing Mont. Code Ann. § 75-1-102(3)(a); Mont. Code Ann. §  
9 2-3-103; and A.R.M 17.4.610(6)). Accordingly, the public is entitled to know the  
10 information DEQ utilizes in forming its EA. *Mont. Wildlife Fed'n v. Mont. Bd. of*  
11 *Oil & Gas Conservation*, 2012 MT 128, ¶ 42, 365 Mont. 232, 280 P.3d 877. This  
12 includes any subsequent environmental review conducted by DEQ. *Id.* Despite this  
13 mandate, DEQ again contends it was permitted to sidestep MEPA.

14 First, DEQ argues 45 days is insufficient time to draft a new EA. However,  
15 DEQ was instructed to determine whether PTC’s evidence required it to modify its  
16 decision. If DEQ determined modification was appropriate, it had the ability to  
17 request additional time to correct any prior deficiency in compiling data, but DEQ  
18 did not do so. Second, DEQ asserts it exercised “its prerogative to alter the level of  
19 public participation[.]” DEQ’s Resp. Br. at 7. This argument is inappropriate for  
20 several reasons, the first of which is glaring: DEQ did not alter the level of public  
participation, it erroneously eliminated it all together. *See Mont. Dep't of Env't*  
*Quality*, ¶ 62 (DEQ’s obligation to inform the public through adequate MEPA

1 analysis continues to exist even if a project continues to move forward). While DEQ  
2 correctly points out it is permitted to conduct additional MEPA review while a  
3 project is ongoing, DEQ did not use the remand process to alter its decision and  
4 conduct additional review. Instead, DEQ ignored MEPA procedure and attempted  
5 to selectively include only certain additional data without altering its decision.

6 Lastly, DEQ posits that even if it did not obtain any public comment, the Court  
7 should not exclude information “that was lawfully collected under the terms of § 75-  
8 1-201(6)(b)(ii), MCA.” DEQ’s Resp. Br. at 7. In consideration of the options  
9 provided under Mont. Code Ann. § 75-1-201 for allowing extra-record evidence, the  
10 Court echoes the general rule: the Court can only consider “the record before the  
11 governing body at the time of its decision.” *Heffernan*, ¶ 66.


12 Indeed, extra-record evidence may only be considered by the Court if an  
13 exception to this general rule applies. *Id.* (citing *Asarco, Inc. v. U.S. EPA*, 616 F.2d  
14 1153, 1160 (9th Cir. 1980)). The *Heffernan* court emphasized *Asarco*, which  
15 provides for three limited purposes where the use of extra-record evidence is proper:  
16 “for background information; for ascertaining whether the agency considered all the  
17 relevant factors; or for ascertaining whether the agency fully explicated its course of  
18 conduct or grounds of decision.” *Id.* However, “[c]onsideration of the evidence to  
19 determine the correctness or wisdom of the agency’s decision is not permitted, even  
20 if the court has also examined the administrative record.” *Id.*

1 Applied here, DEQ asks the Court to do what is explicitly “not permitted,”  
2 under *Heffernan*, ¶ 66 (citing *Asarco*, 616 F.2d at 1160)—i.e., have its proffered  
3 material considered in the Court’s determination of whether DEQ engaged in the  
4 prescribed level of environmental forecasting during adjudication of PTC’s Motion  
5 for Summary Judgment. See *Park Cnty. Env’t Council*, ¶¶ 31, 89 (explaining  
6 “MEPA requires DEQ to engage in a prescribed level of environmental forecasting  
7 before taking an action impacting the environment”). This determination necessarily  
8 involves a determination of “the correctness or wisdom of the agency’s decision,”  
9 to forgo further environmental review. *Heffernan*, ¶ 66 (citing *Asarco*, 616 F.2d at  
10 1160). Accordingly, in the absence of a lawful exception to the general rule, DEQ’s  
11 extra-record evidence shall not be considered and will be stricken from the record.

#### 12 IV. CONCLUSION

13 Based on the foregoing, the Motion is GRANTED. Accordingly, DEQ’s  
14 proffered evidence SHALL NOT be considered in the adjudication of the Motion  
15 Summary Judgment and IS HEREBY STRICKEN from the record.

16 DATED this 2nd day of April 2026.

17  
18   
19 Hon. Leslie Halligan,  
20 District Court Judge

cc: Robert Farris-Olsen, Esq./ Mark L. Stermitz Esq./ Graham J. Coppes, Esq./  
20 Jeremiah Radford Langston Esq./ Kaitlin Elizabeth Whitfield Esq.