STILLWATER COUNTY

Nancy L. Rohde | Stillwater County Attorney
Ryan C. Addis | Deputy County Attorney

CROWLEY FLECK PLLP
ATTORNEYS

GREG DORRINGTON
PAMELA GARMAN
P.O. BOX 2529
BILLINGS, MT 59103-2529
TELEPHONE: (406) 252-3441
pgarman@crowleyfleck.com
gdorrington@crowleyfleck.com

October 24, 2023

VIA US MAIL AND EMAIL:

Hard Rock Mining Impact Board
MONTANA DEPARTMENT OF COMMERCE
301 S. Park Ave.
PO Box 200523
Helena, MT 59620-0523

Re: Joint Response to Dusty R. Weber's Citizen Complaint #1, dated August 23, 2023

Dear Sir or Madam:

On behalf of Stillwater Mining Company ("SMC") and Stillwater County, please accept this joint response to the Citizen Complaint ("Complaint") dated August 23, 2023, filed by Dusty R. Weber, which concerns the Hard Rock Mining Impact Plan ("Impact Plan") for the Stillwater Mine.[1] For nearly four decades, SMC and Stillwater County have worked collaboratively, and without objection, to implement and administer SMC's Impact Plan for the Stillwater Mine to mitigate any potential economic impacts of SMC's operations and ensure the needs of local communities are met. Mr. Weber's complaint lacks merit, is procedurally improper, and comes decades too late in the impact planning process. While the Hard Rock Impact Board ("Board") and/or the Montana Department of Environmental Quality ("DEQ") would be justified in summarily dismissing Mr. Weber's complaint, SMC and Stillwater County feel compelled to defend their good practices, careful planning, and dutiful implementation of Montana's Hard

[1] The issues raised in the Complaint refer to or mirror those raised by Park City School District in a letter to the Stillwater County Commissioners dated March 2, 2023, and a similar letter provided to the Hard Rock Impact Board on October 10, 2023. The March 2, 2023 letter is an attachment to the Complaint and the October 10, 2023 letter. SMC did not receive a copy of the October 10, 2023 letter from Park City School District but it was provided to the Stillwater County Commissioners. This response is directed to all three submissions, although organized based on the Complaint as that appears to be the operative document before the Board for its consideration.

Rock Mining Impact Act and respectfully request that the Board and/or DEQ consider the following comments in addressing Mr. Weber's submission.

I. Background of SMC's Impact Plan.

The Hard Rock Mining Impact Act("Impact Act")[2] and Metal Mine Reclamation Act ("MMRA")[3] require developers of large-scale hard rock mines to create an Impact Plan that identifies "any increased costs to local government units for public services and facilities which will be needed as a result of the proposed project."[4] Generally, this Impact Plan is created in conjunction with the developer's application for a mine operating permit under the MMRA and must be in place before an operating permit can be approved.[5] Once an impact is identified, the Plan provides for financial assistance to meet those needs for increased services.

The Stillwater Mine's first Impact Plan was approved in 1985 based on the platinum and palladium mineral development near Nye, in Stillwater County, Montana. The plan was amended twice, once in 1988, and again in 1998. The 1998 Impact Plan is still in effect today for the mine. The 1998 amendments included, among other changes, the addition of a new affected "Local Government Unit," the Absarokee Water and Sewer District, which was formed after the previous amendment. The Impact Plan currently includes nine affected Local Government Units that are contemplated for impact funds. This includes Stillwater County, Town of Columbus, Columbus Elementary School District, Columbus High School District, Absarokee Elementary School District, Absarokee High School District, Fishtail Elementary School District, Nye Elementary School District, and Absarokee Water and Sewer District.

II. Mr. Weber's Complaint is Procedurally Improper.

As a threshold issue, Mr. Weber filed his Complaint with the wrong administrative agency and improperly sought DEQ's review of SMC's Impact Plan under ARM 17.24.129. As noted by DEQ in response to Mr. Weber, DEQ lacks statutory authority to investigate or resolve issues related to SMC's Impact Plan and it cannot assume that a hard rock mining violation exists based on the allocation of Impact Plan funds. DEQ notified Mr. Weber that the Hard Rock Impact Board, not DEQ, has jurisdiction over Hard Rock Impact Plans and, therefore, it referred the Complaint to the Board.

If the Board decides to consider Mr. Weber's Complaint, it should deny his request because the Complaint: (1) seeks relief contrary to the purpose of the Impact Act; (2) is time-barred as far past the objection period set forth to handle the circumstances raised in the Complaint; and (3) improperly requests amendment of an approved plan. Amendment of an approved plan can only be sought by a governing body of the affected county or the mineral developer, not an individual or local government unit not identified in the plan. Furthermore,

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[2] Mont. Code Ann. § 90-6-301, *et seq.; see also* Mont. Code Ann. § 90-6-401, *et seq.* The Impact Act works in tandem with the Hard-Rock Mining Impact Property Tax Base Sharing Act ("Tax Base Sharing Act").
[3] Mont. Code Ann. § 82-4-335.
[4] *Lincoln County v. Sanders County*, 261 Mont. 344, 346 (1993).
[5] Mont. Code Ann. § 90-6-308.

amendment of an Impact Plan under the Act is not mandatory; rather, it is permissive at the discretion of the governing body of the affected county and mineral developer. Although these prerequisite conditions are not met, the Complaint additionally fails to allege any violation of the Impact Act, the MMRA, NEPA/MEPA, or SMC's Operating Permit.

A. The Relief Sought by Mr. Weber is Contrary to the Purpose of the Impact Act.

A mineral developer identifies and commits to pay for any increased local government capital or net operating costs that results from initial development of the mine through its Impact Plan.[6] The Impact Plan is developed at the outset, before operation of the mine, to forecast local government costs that may result from mineral development. Those costs may precede or exceed the increase in tax base, so the Impact Plan is intended to prevent that cost from burdening the local residents and taxpayers in the short term, as operations and development begin.

The legislative history regarding the initial passage of the Impact Act similarly emphasizes the intent for Impact Plans to be directed towards the initial costs resulting from mineral development. Senator Conrad Fredricks, from Big Timber, testified that the Impact Act "is designed solely for front-end impacts which are identified and fixed at the time of approval by the hard rock mining impact board. There is no provision to handle to [sic] cost of impacts which could not be anticipated or which were overlooked by both the mineral developer and the local government unti [sic]. Nor are tail-end impacts covered."[7] This sentiment is reflected in the Impact Act's Declaration of Necessity and Purpose, which provides:

> The large-scale development of mineral deposits in the state may cause an influx of people directly related to the area of the development. This influx of people and the corresponding increase in demand for local government facilities and services may create a burden on the local taxpayer. There is a significant lag time between the time when additional facilities and services must be provided and the time when additional tax revenue is available as a result of the increased tax base. In addition, local government units in whatever jurisdiction the development is not located may receive substantial adverse economic impacts without benefit of a major increased tax base in the future. **There is therefore a need to provide a system to assist local government units in meeting the initial financial impact of large-scale mineral development.**

Mont. Code Ann. § 90-6-301 (emphasis added).

This identified purpose and the legislative history acknowledge that large-scale mining, as development *begins*, may cause an influx of people and that demand sometimes occurs before

[6] *See Hard Rock Impact Plan Information*, Hard Rock Mining Board, https://comdev.mt.gov/Programs-and-Boards/Hard-Rock-Mining-Impact-Board/Hard-Rock-Impact-Plan-Information.

[7] Conrad B. Fredricks, *Testimony Regarding House Bill No. 718*, Senate Taxation Committee, at 1 (April 6, 1981).

the new individuals are situated and paying taxes in that jurisdiction for those services.[8] The Impact Act was passed as preparational, not retrospective.

The Complaint argues that Park City Elementary School District and Park City High School District should be added to SMC's Impact Plan as Affected Local Government Units because they have increased costs resulting from the Stillwater Mine development. The Complaint points to the alleged "[f]ailure of the 25 year old impact plan to identify all affected government units or failure of the approved impact plan to provide for mitigation of documented and known impacts resulting from the mineral development.". The Complaint also alleges that in 2023, the Park City School District "was forced to move from Class C sports to Class B sports as a direct result of student population; which included increased costs without corresponding increased revenues."[9]

The type of retroactive action proposed by Mr. Weber is contrary to the purpose of the Impact Act and is not supported by its provisions. There is simply no mechanism in the Impact Act to address costs that may arise decades after implementation of an approved plan or may have been overlooked in the initial approval process. For example, whether Park City School District moved to compete in Class B sports, from Class C, 38 years after the mine began operating is simply not the nature of cost intended to be covered by the Impact Act. As noted by Senator Fredricks, the Impact Plan covers initial costs "identified and fixed at the time of approval" of the plan because it focuses on those ascertainable, known costs on the front end of development.

The example of the Park City School District changing from Class C sports to Class B sports in 2023 serves only to highlight the improper nature of the Complaint. In order to be considered an Affected Local Government Unit, there has to be some correlation between in-migrating employees and increased operation costs the Local Governmental Unit seeks to be covered. Although it seems like a stretch to say that this shift—occurring 38 years after the development of the mine began is a cost associated with ***beginning*** mine operation—the number of in-migrating students in 2023 does not support the finding. Based on the 2023 employee survey conducted by SMC, there were only three employees who began residing in Park City within one year of starting to work at the Stillwater Mine and now have children attending school within the Park City School District. Two of these employees each have one student enrolled in Park City High School. Those employees moved to Park City in 2004, and 2015, respectively. One employee currently has a student enrolled in Park City Elementary School. That employee moved to Park City in 2011. The addition of one in-migrating employee in 2004, one in 2015, and one in 2017, now totaling two in-migrating high school students and one elementary school student is not sufficient to demonstrate the type of costs contemplated by the Impact Act. It is hard to believe the switch from Class C to Class B sports happened because of two high school students who have resided in Park City since 2015 and 2017.

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[8] Mont. Code Ann. § 90-6-301; Mont. Code Ann. § 90-6-401.

[9] Complaint at page 6.

Ultimately, it is hard to see how such a lag time between the start of operations and now would be in line with the purpose of the Impact Act. The amendment provisions were not structured to *require* amendment to add new local government units decades later, especially under conditions that Mr. Weber asserts were in existence not only at the time the initial Impact Plan was approved, but through both subsequent amendments. While we understand that the Park City School District has had a difficult time raising the necessary revenue it needs through its normal mechanisms, amending the Impact Plan for the Stillwater Mine is not the appropriate solution, nor, under the circumstances, a legally permissible one.

B. Park City School District Had an Obligation to Object in the 90-day Period Prior to Approval of the Plan if it Anticipated an Impact and it Failed to Do So.

When a mineral developer seeks an operating permit for large-scale mineral development, the Impact Act requires it work with Local Government Units to identify which units might be impacted and create a plan to mitigate that impact for each Affected Local Government Unit. Local Government Units are defined in the Impact Act to include a county, city, town, school district, or a number of other special districts.[10] Local Government Units must ensure, along with the developer, that the Impact Plan contains accurate information on the expected impact.[11]

The Implementation Guide created by the Hard Rock Mining Impact Board emphasizes that Local Government Units assist with the preparation of the Impact Plan and "share the legal responsibility for ensuring that the plan contains all required information, projections, and commitments."[12] To that end, the Impact Act provides a specific remedy process if a Local Government Unit believes it is likely to experience increased capital and operating costs but has not been identified in the plan as an Affected Local Government Unit. It must raise its objection during the 90-day period after the plan is submitted to the Board.[13] After that 90-day period, the Board notifies a developer within 10 days about whether there has been an objection from a Local Government Unit. If there has been an objection, the developer and the Local Government Unit have 30 days, or longer if provided an extension, to resolve the objection.[14] If the objections are not resolved, the Board holds a hearing. Once the Board makes its findings and approves or amends the impact plan, an aggrieved party (either a Local Government Unit or the developer) may seek judicial review.[15] This process is key to allow early collaboration to avoid issues after the Impact Plan has been approved and to make sure that the developer has all necessary information to develop its Impact Plan.

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[10] Mont. Code Ann. § 90-6-302(5).

[11] Mont. Code Ann. § 90-6-307.

[12] *Guide of the Implementation of the Hard-Rock Mining Impact Act and the Property Tax-Base Sharing Act*, The Hard-Rock Mining Impact Board, at viii (May 2008) ("*Implementation Guide*").

[13] Mont. Code Ann. § 90-6-307.

[14] Mont. Code Ann. § 90-6-307(7).

[15] Mont. Code Ann. § 90-6-307(8).

The Impact Plan will define which Local Government Units are considered Affected Local Government Units for purposes of the plan. Once it is approved, it is binding and can only be altered under the amendment provisions.[16] If a Local Government Unit is not included as an *Affected* Local Government Unit, it must raise the issue during the 90-day public comment period prior to approval. This collaborative process allows the Board to conduct a hearing, and if still aggrieved, the Local Government Unit could seek judicial review following approval of the Impact Plan. Absent a timely submitted objection prior to approval of an impact plan, a Local Government Unit is not entitled to judicial review on the determination of whether it should have been included as an Affected Local Government Unit.

Here, any challenge is well beyond the 90-day limitations period set forth in the Impact Act. Aside from failing to show a new impact that would fall in line with the purpose and focus of the Impact Act, the Complaint asserts the conditions that would qualify Park City School District to be included as an Affected Local Government Unit existed at the time of the initial Impact Plan, and during each of the subsequent amendments. The Complaint states the "original 1985 plan, the amended 1988 plan, and the amended 1998 plan all *failed* to identify and commit to paying the increased local government costs of Park City Elementary School District and Park City High School District resulting from the construction and operation (and subsequent expansions in employment) of the new mineral development."[17]

The initial plan, and each of the amendments were publicly noticed and the Hard Rock Impact Plan provided the requisite objection period. Park City School District did not raise its concerns, seek to be added to the Impact Plan at any of those times, and did not formally lodge any objection with the Hard Rock Impact Board. The time for them to raise the issue was within 90 days of the submission of the proposed Impact Plan, or the same objection period for either of the proposed amendments. Park City School District chose to forgo its right to challenge its lack of inclusion in the plan and missed the statutory deadline by 25-38 years, in each instance. It did not engage in the resolution processes provided for in the Impact Act, did not avail itself of a contested hearing before the Hard Rock Impact Board, and missed the deadline for seeking judicial review of the approval of the Impact Plan and each subsequent amendment. Local Government Units assist with the preparation of the Impact Plan and "share the legal responsibility for ensuring that the plan contains all required information, projections, and commitments."[18] By failing to object and seek inclusion in the plan when it asserts the conditions existed at the relevant times, Park City has waived its ability to challenge the Impact Plan now.

C. Mr. Weber Lacks Standing to Seek Amendment of an Approved Impact Plan.

The procedure for amendment of an already approved Impact Plan is similar to the process for an initial review of an Impact Plan. A petition for amendment must be submitted to

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[16] Mont. Code Ann. § 90-6-307(6).

[17] "Citizen's Complaint" at page 2 (emphasis in original).

[18] *Guide of the Implementation of the Hard-Rock Mining Impact Act and the Property Tax-Base Sharing Act*, The Hard-Rock Mining Impact Board, at viii (May 2008) ("*Implementation Guide*").

the Hard Rock Impact Board, and include an explanation for the need for an amendment, the associated facts and circumstances, and a description of the proposed corrective measures.[19] Once a petition for amendment is submitted to the Board, it must publish notice "at least once in a newspaper of general circulation in the affected county."[20] The petition can only be submitted by the mineral developer, the governing body of the affected county, or the mineral developer and the governing body of the affected county jointly. No other party has standing to initiate an amendment of an approved Impact Plan. Once submitted, the Board: (1) can approve the amendment if no objections have been submitted; (2) allow for period of resolution between the petitioner and objectors; (3) or if no resolution is reached, hold a contested hearing on the validity of the objections and amend the impact plan according to its findings.[21]

The Impact Act allows the developer or governing body of the affected county to seek amendment if one of the statutory triggers is met, or one of the conditions set out in the Impact Plan for amendment is met. While an amendment could be sought when the requisite conditions exist, whether to seek an amendment is permissive, not compulsory. The statute and the Impact Plan both specify that an amendment *may* be sought. It does not specify amendment *must* be sought when a condition for amendment might arise. This is particularly important when looking to the amendments made to the Impact Act in 1995, which changed the language specific to the objection and appeal process to insert "must" in those areas where the language was intended to be mandatory rather than permissive.[22] Had amendment been a mandatory condition it would state amendment *must* be made, not *may* be made, when the conditions for amendment might exist. These textual references are particularly important where, as here, there is very little case law interpreting the Impact Act provisions.

An Affected Local Government Unit, identified and defined within the Impact Plan, can notify the Board at any time if the permittee fails to comply with its commitments in an approved Impact Plan, including any review and implementation provisions.[23] If the Affected Local Government Unit and the developer cannot resolve the dispute, the Board may hold a contested case hearing to determine whether the developer has failed to comply with its commitments in the approved Impact Plan or with the provisions of the Impact Act of Tax Base Sharing Act.

The Complaint submitted to DEQ was provided by Mr. Weber. It is improper for an individual to petition for amendment of the Hard Rock Impact Plan. The Impact Act only allows a petition for amendment to be brought by the mineral developer, or the governing body of the affected county. Here, that means that SMC, Stillwater County, or SMC and Stillwater County jointly, are the only entities able to seek amendment of the approved plan. While Stillwater County could seek an amendment on behalf of an affected government unit within its jurisdiction, a local government unit cannot unilaterally seek amendment. As a result, even if the Complaint had been submitted by Park City School District, it would still not be actionable.

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[19] Mont. Code Ann. § 90-6-311(2).
[20] Mont. Code Ann. § 90-6-311(2).
[21] Mont. Code Ann. § 90-6-311(3) – (5).
[22] ENVIRONMENT—REVISION OF ENVIRONMENTAL AND NATURAL RESOURCE FUNCTIONS OF STATE GOVERNMENT, 1995 Montana Laws Ch. 418 (S.B. 234).
[23] Mont. Code Ann. § 90-6-307.

Here, it was submitted by an individual person, Mr. Weber, in what appears to be his personal capacity. Neither Mr. Weber, nor Park City School District have standing to seek amendment to SMC's Impact Plan.

III. MR. WEBER'S COMPLAIN FAILS TO ARTICULATE A VIOLATION OF SMC'S OPERATING PERMIT OR NEPA/MEPA.

Mr. Weber's assertion that SMC is in violation of its operating permit, the National Environmental Policy Act ("NEPA"), and the Montana Environmental Policy Act ("MEPA") are similarly misplaced. It appears that Mr. Weber's argument is that SMC is in violation of its operating permit by not including Park City School District in the 1998 Impact Plan. The Complaint alleges "PCSD should be given the same opportunity to demonstrate impacts and should have the same standard of impact evaluation the Impact Plan has previously applied to other school districts." As noted above, Park City School District had the same opportunity as every other Local Government Unit to raise the issue back in 1998, and even had an obligation to raise it if it felt it was improperly excluded. But it chose not to, and has forgone its chance to challenge it now, 25 years after the last amendment. Furthermore, as noted by DEQ, Mr. Weber does not identify any violation of SMC's operating permit. SMC has an approved Impact Plan and is operating in compliance with those terms. That is what is required under the law.

The Complaint's reliance on NEPA and MEPA are similarly misplaced. NEPA and MEPA are procedural standards that set forth the process an agency, at the federal and state levels, respectively, must follow in making decisions that may impact the environment. The purpose is to ensure agencies consider the environmental impact of their actions and the public is informed of those impacts.[24] Compliance with these statutes resides with the agency taking the action during its decision-making process, not the operator or mineral developer. During the MEPA and NEPA processes identified in the Complaint, the agencies carried out their responsibilities under state and federal law.

The Complaint alleges SMC "is in violation of ARM 17.24.153 because Sibanye-Stillwater is not in compliance with the National Environmental Policy Act and is not in Compliance with the Montana Environmental Policy Act." But ARM 17.24.153 is the administrative rule that speaks only to *operator* compliance with the Montana Hard Rock Mining Reclamation Act. NEPA and MEPA provide the procedures that *agencies* must follow when making decisions. SMC cannot be "in violation" of NEPA and MEPA, because such compliance resides with the relevant agencies during their decision-making processes. Moreover, the provisions of MEPA and NEPA do not directly impose any obligations upon an operator in terms of determining the operator's compliance with the MMRA. Accordingly, the Complaint fails to articulate any basis for a violation under the law by conflating two separate and distinct procedural mechanisms.

[24] *See, e.g.*, 40 C.F.R. § 1500.1(c); Mont. Code Ann. § 75-1-102.

IV. The Complaint Should be Dismissed.

SMC and Stillwater County have worked collaboratively to administer SMC's Impact plan over the last 38 years. SMC is dedicated to ensuring the needs of the local communities are met and has complied with the terms of the Impact Plan. The Complaint lodged by Mr. Weber lacks standing and a challenge of this nature has long been time-barred. The purpose of the Impact Act was to focus on the "front-end" of development of hard rock mining operations and to cover those early fiscal needs. Although it does continue to provide ongoing funding to those affected local government units, the Impact Act was not intended to be used in the manner suggested by Mr. Weber's Complaint. Park City School District had an obligation, and a set time to lodge objections if it felt it should have been included in the Impact Plan. It should not be permitted to wait decades before raising a challenge to the terms of the approved plan. Furthermore, under the Hard Rock Mining Impact Act, neither Mr. Weber nor Park City School District have legal standing to seek amendment of an already approved Impact Plan.

For the foregoing reasons, we respectfully request that the Complaint be dismissed.

Sincerely,

CROWLEY FLECK PLLP

/s/ Pamela Garman
Greg Dorrington
Pamela Garman

STILLWATER COUNTY

/s/ Nancy L. Rohde
Stillwater County Attorney
On behalf of Stillwater County Commissioners

cc:
Montana DEQ, Eric Dahlgren, edahlgren@mt.gov
Dusty Weber, 7 Pinto Place, Park City, MT 59063