

DEPARTMENT OF ENVIRONMENTAL QUALITY PERMIT CHALLENGE AND REMEDIATION CASES IN ACTIVE LITIGATION: March, 2014, to February, 2016

MAJOR FACILITY SITING CASE

1. MEIC, Sierra Club, and National Wildlife Federation v. DEQ (State District Court, Rosebud County)--On October 4, 2012, the plaintiffs filed a petition challenging the Administrative Order on Consent entered into between PPL Montana and DEQ for assessment and cleanup of groundwater contaminated by the PPL Colstrip power plant. They petitioned the Court to declare that the order was not a valid enforcement action under Major Facility Siting Act and the Montana Water Quality Act. On February 20, 2013, the Court granted the Plaintiffs' motion to stay the proceeding until a related case in Lewis and Clark County was resolved. The Court found that there were overlapping issues in the two related cases that created a potential risk of unnecessary and piecemeal litigation. On May 31, 2013, the Helena district court granted DEQ's and PPLM's motions to dismiss. The Rosebud County case was then reinstated, and opposing motions for summary judgment are pending. The court will hear oral argument on February 22.

MINING CASES

1. MEIC et al. v. DEQ, Golden Sunlight, CURE (State District Court, Jefferson County)- In January of 2014, DEQ issued a record of decision approving expansion of Golden Sunlight's main pit (the Mineral Hill Pit) and the mining of a smaller nearby pit (North Area Pit). In regard to expansion of the Mineral Hill Pit, DEQ selected the Agency Modified Alternative that would leave the pit open so that a water collection system could be installed in the underground workings to maintain a hydrologic sink preventing acid mine drainage from leaving the site. In regard to the North Area Pit, DEQ selected also selected the Agency Modified Alternative that provided for the capture of acid mine drainage by two dewatering wells installed adjacent to the pit; the pit would remain open to maintain the option of installing an in-pit sump in the event that one or both of the dewatering wells failed. In April of 2014, MEIC filed a complaint in the District Court for Jefferson County, challenging the reclamation alternative selected by DEQ for the North Area Pit. MEIC asserted that the selected reclamation alternative, which did not require backfill of the North Area Pit, resulted in: (1) an as applied violation of the Montana Constitution requiring all lands disturbed by the taking of natural resources to be reclaimed, and (2) a violation of the reclamation criteria set forth in the Metal Mine Reclamation Act. The parties filed motions for summary judgment. On February 4, 2015, the District Court granted DEQ's and Golden Sunlight Mine's motions. The District Court determined that MEIC was precluded from asserting that the Montana Constitution or the MMRA required backfill of the North Area Pit under the doctrine of issue preclusion. The District Court determined that the issue had previously been litigated to MEIC's detriment in MEIC v. DEQ, DV-08-10896 (5th Dist. June 30,

2011). The District Court also determined that the reclamation alternative selected by DEQ complied with the Metal Mine Reclamation Act. MEIC appealed the decision to the Montana Supreme Court.

On April 1, 2015, MEIC appealed the Jefferson County District Court's grant of summary judgment in favor of DEQ discussed above to the Montana Supreme Court. MEIC asserted that: (1) MEIC should not be barred from bringing its statutory and constitutional claims under the doctrine of issue preclusion, (2) the MMRA implementing the reclamation provisions of the Montana Constitution should be interpreted as requiring selection of the most effective reclamation alternative, and (3) if the MMRA does not require the most effective reclamation, then the MMRA is unconstitutional as applied to DEQ's selection of the reclamation alternative for the North Area Pit. The Montana Supreme Court issued an opinion on January 12, 2016, affirming the District Court. The Montana Supreme Court determined that the District Court did not err in determining MEIC was precluded from relitigating the issue of whether the Montana Constitution or the MMRA requires land disturbed by the taking of natural resources to be fully reclaimed to its previous condition. The Montana Supreme Court also determined that DEQ made a reasoned decision in selecting the Agency Modified Alternative under the criteria set forth in the MMRA. The Agency Modified Alternative resulted in reclamation of the North Area Pit to a condition: (1) of structural stability that would not be a threat to public safety or the environment, (2) that affords some utility to humans or the environment, (3) that mitigates postreclamation visual contrasts between reclamation lands and adjacent lands, and (4) that mitigates or prevents undesirable offsite environmental impacts. The Montana Supreme Court also concluded that the Agency Modified Alternative provided better assurances against ground water contamination than if the reclamation alternative requiring backfill of the North Area Pit.

2. JTL Group dba Knife River v. DEQ, Missoula County (State District Court, Lewis and Clark County)--On June 17, 2010, JTL filed a declaratory judgment action in state district court in Helena requesting a judgment that it has a valid permit for its Fort Missoula gravel pit. DEQ filed a counterclaim in which it contends that JTL had mined outside its permit boundary and seeking cessation of the operation and payment of a penalty. JTL then stipulated that it will no longer mine gravel from the pit. The parties filed cross motions for summary judgment that were denied by the Court in an order dated June 26, 2013. The parties are attempting to settle this matter.

3. MEIC et al v. Stone-Manning (U.S. 9th Circuit Court of Appeals). On April 17, 2012, MEIC filed suit against DEQ in the U.S. District Court for Montana under the citizen suit provision of the Surface Mining Control and Reclamation Act, which is the federal act requiring coal mine reclamation. DEQ's strip mine reclamation program has been approved under the federal act, and DEQ regulates coal mining in Montana in lieu of federal regulation. The plaintiffs alleged that DEQ has engaged in a pattern and practice of approving coal mine permits without appropriately determining that the proposed mine plan was designed to prevent damage to the hydrologic balance outside the permit area for eleven permits approved since 1995 and petitioned the Court to enjoin issuance of new coal mine operating permits. Opper (predecessor to Stone-Manning) filed motions to dismiss the lawsuit, arguing that it violated the Eleventh Amendment prohibition

against suits against states in federal court. In an order dated January 22, 2013, Judge Christiansen issued an order dismissing the lawsuit on Eleventh Amendment grounds and because MEIC's claims against the state were not ripe for review. MEIC appealed the matter to the 9th Circuit. On September 11, 2014, the Court of Appeals affirmed Judge Christiansen's dismissal of the case.

SOLID WASTE CASE

1. The Ranch Homeowners Assoc., et al. v.; Gallatin County; John Tubbs, DNRC; and Tracy Stone-Manning, DEQ—This case was filed on March 4, 2014, in the Montana Eighteenth Judicial District Court, Gallatin County. At the time the Complaint was filed, Ranch HOA was challenging what it presumed would be the “inevitable approval” of the Springhill Reserve Major Subdivision (Springhill) under the Sanitation in Subdivisions Act. Ranch HOA asserts that certain water usage restrictions were necessary to ensure that both subdivisions had access to an adequate supply of ground water. The Court suspended the scheduling order and issued a stay of the case on April 16, 2015. The intent of staying the proceedings was to allow the Court time to address the issues between Ranch HOA and Gallatin County. Ranch HOA stated that it might be able to dismiss the counts that pertain to DEQ following resolution of its issues with Gallatin County. As of February 16, 2016, both the County and Ranch HOA still have motions pending before the Court.

SUPERFUND/HAZARDOUS WASTE CASES

1. Silver Bow Creek Headwaters Coalition v. State (State District Court, Silver Bow County)— This is a declaratory judgment action regarding the correct and legal name of the channel that is currently used as part of Butte/Silver Bow's storm water collection system running from below the Berkeley Pit down through Butte to Blacktail Creek. The Coalition sought a judgment that the “legal name” of that channel is “Silver Bow Creek” and sought to prohibit the State from using the term “Metro Storm Drain” when referring to the channel. On August 21, 2015, Judge Newman granted summary judgment for the plaintiffs.

2. Grimes v. Sieben Ranch Co., DEQ, Stimson Lumber, and Geographic Investments Group (State District Court, Lewis and Clark County)—This case was filed on November 9, 2010. The Grimes are the owners of land near the site of the waste repository for mine tailings from the Mike Horse Mine and other areas of the Upper Blackfoot Mining Complex. The Grimes' claim against DEQ alleges that the DEQ's construction of the repository on a site (selected by the by United States Forest Service) near the Grimes' property will so adversely affect their property value that it constitutes a “taking” of their property. The matter was settled by DEQ purchasing the portion of the Grimes' property that is nearest to the repository. DEQ ownership of the property during construction is useful for the project and the property can later be sold to recoupment most or all of the purchase price

UNDERGROUND STORAGE TANK CASE

1. Summers, et al. v. Short Stop Service Station, et. al. v. O'Day Management, Inc. et al.-- This consolidated lawsuit arises out of a petroleum release ("Release 4800") from an underground storage tank ("UST") that was discovered on October 27, 2010, at Frank's Short Stop Service Station ("Short Stop") in Miles City. The plaintiffs filed their original complaint in this action on June 4, 2012, and filed a companion case on June 5, 2013. The Court consolidated the two cases in July, 2013. Plaintiffs filed their First Amended Complaint on or about April 7, 2014. Plaintiffs in this case have asserted various claims, including negligence and products liability, against a number of defendants, including Frank Ngo, the owner of Short Stop, O'Day Management, Inc. ("O'Day"), the tank manufacturer, Marketing Specialties, Inc. and the Steel Tank Institute ("STI"). Frank Ngo and Short Stop have filed cross-claims against O'Day, STI, and Underwriters Laboratories, Inc. ("UL"), asserting various claims, including products liability and breach of warranty.

On April 9, 2014, O'Day filed a third party complaint against DEQ, the regulatory agency responsible for overseeing leak prevention, detection and remediation of petroleum releases from USTs in Montana, and Marketing Specialties, Inc., the UST service provider hired by Frank Ngo and Short Stop. O'Day claims that DEQ was negligent for failing to require Frank Ngo and Short Stop to properly monitor, oversee, operate and maintain the leak detection system and the UST from which Release 4800 occurred. L

On December 12, 2014, DEQ filed a cross-claim against Frank Ngo and Short Stop to recover the costs incurred by DEQ to remediate Release 4800. A mediation is scheduled for February 29, 2016.

WATER QUALITY CASES

1. Gateway Village, LLC v. DEQ and Gallatin Gateway County Water and Sewer District (State District Court, Gallatin County)—This complaint was filed on September 27, 2013. The plaintiff is challenging DEQ's issuance of a groundwater permit to the Gallatin Gateway County Water and Sewer District. The plaintiff is a land developer with land adjacent to the property served by the District. The complaint alleges that DEQ violated the nondegradation provisions of the Water Quality Act; authorized trespass of wastewater onto the plaintiff's land; violated Gateway Village's right to a clean and healthful environment; issued clearly erroneous findings in issuing the permit; and

violated unspecified water quality rules. On December 29, 2014, the judge ruled that DEQ's findings were erroneous, that DEQ authorized unlawful trespass of wastewater onto the plaintiff's land, that DEQ did not take the required hard look at nondegradation requirements, and that the plaintiff is not entitled to an award of attorney fees. DEQ appealed the trespass ruling to the Montana Supreme Court, and the plaintiff appealed the attorney fee ruling. On September 29, 2015, the Supreme Court overturned the trespass ruling and upheld the denial of attorney fees.

2. MEIC and Sierra Club v. DEQ and Western Energy Company--Plaintiffs filed a complaint in the First Judicial District Court, Lewis and Clark County, on December 21, 2012, challenging DEQ's issuance of an MPDES permit for Western Energy Company's Rosebud Coal Mine. The complaint alleges that: (1) DEQ unlawfully reclassified C3 waters as ephemeral; (2) the MPDES permit does not protect designated beneficial uses for the receiving waters; (3) the MPDES permit authorizes discharges to an impaired receiving water without a TMDL; and (4) the MPDES permit does not require adequate monitoring. The parties have fully briefed cross motions for summary judgment. Oral argument was held April 22, 2013, and the parties are awaiting a decision.

3. Bitterrooters for Planning, Inc., MEIC, and Bitterroot River Protective Ass'n v. DEQ--Plaintiffs filed a complaint in the First Judicial District Court, Lewis and Clark County, on June 24, 2014, challenging DEQ's issuance of a Montana Ground Water Pollution Control System (MGWPCS) permit for the planned Grantsdale Addition subdivision in Ravalli County. The complaint alleges that DEQ violated the WQA by issuing the permit because: 1.) the permit violated the state nondegradation policy related to nitrogen discharges; and 2.) DEQ failed to consider cumulative impacts as required under DEQ's nondegradation rules. The parties have fully briefed cross motions for summary judgment, oral argument was held on September 28, 2015, and the parties are awaiting a decision.

4. Bitterrooters for Planning, Inc., and Bitterroot River Protective Ass'n v. DEQ and Stephen Wanderer and Georgia Filcher--Plaintiffs filed a complaint in the First Judicial District Court, Lewis and Clark County, on January 14, 2015, challenging DEQ's issuance of a Montana Ground Water Pollution Control System (MGWPCS) permit for a planned "box store" in Ravalli County. The complaint alleges DEQ acted unlawfully by issuing the permit because: (1) the permit violates the WQA's nondegradation policy related to nitrogen discharges; (2) DEQ failed to consider cumulative impacts as required under DEQ's nondegradation rules, (3) DEQ violated MEPA by using a checklist EA to evaluate potential environmental impacts related to issuance of the Permit and by not considering impacts arising from the commercial development; and (4) DEQ violated plaintiffs' right to participate prior to final agency decision guaranteed by Article II, Section 8 and right to know guaranteed by Article II, Section 9 of the Montana Constitution by not requiring the permit applicant to reveal the commercial entity associated with the Permit. The parties have fully briefed cross motions for summary

judgment, oral argument was held on January 26, 2016, and the parties are awaiting a decision.

5. Clark Fork Coalition, Missoula Valley Water Quality District, Missoula City/County Health Board & Confederated Salish and Kootenai Tribes (“CSKT”) v. DEQ (State District Court, Lewis and Clark County)--In October 2014, Plaintiffs filed suit seeking to declare DEQ’s March 2014 issuance of an MPDES permit to M2Green Redevelopment, LLC (“M2Green”) void. Plaintiffs alleged DEQ violated state and federal law in renewing the MPDES permit at the former Smurfit Stone Container Corporation’s paper mill site in Frenchtown. Although the MPDES permit issued to M2Green authorized a discharge with a greatly reduced pollutant load to the Clark Fork River and no longer authorized a paper mill discharge, Plaintiffs alleged that DEQ was required to begin permit termination proceedings in May of 2011 (when the Smurfit Stone Container Site was sold to M2Green). Plaintiffs also argued that M2Green’s plans to redevelop the site were too speculative and therefore DEQ’s decision to issue the permit was arbitrary and capricious. Finally, Plaintiffs argued that DEQ had failed to provide direct notice of the draft permit to CSKT and that the MPDES Permit should be declared void for that reason. The parties filed cross motions for summary judgment motions in 2015 and the District Court heard oral argument on these motions December 16, 2015. The matter is therefore submitted for decision.

ADMINISTRATIVE CASES

During this period, there were pending before the Board of Environmental Review 17 administrative cases challenging DEQ permitting actions. Eight of these actions challenged DEQ’s issuance of a permit, two challenged DEQ’s refusal to issue a permit or permit amendment, one challenged DEQ’s revocation of a permit, and six challenged permit conditions imposed by DEQ.

Attorney Fee Settlements Paid or to be Paid by DEQ

MEIC et al. v DEQ, Golden Sunlight Mines, Inc.--\$95,000.00

Cameron Springs, LLC v. DEQ, Opper—\$22,676.74

Three Way Mining, Inc. v. DEQ, Opper--\$9,394.00

NOG, LLC v. DEQ, Opper--\$9,584.39

Spanish Peaks Sand and Gravel, Inc. v. DEQ, Opper--\$14,754.24

Clark Fork Coalition et al. v. DEQ--\$13,000

McDonald v. DEQ--\$64,754.27

Silver Bow Creek Headwaters Coalition v. State of Montana--\$170,739.76

In the Matter of Amendment No. 3 to the Mining Permit for Bull Mountain Coal Mine--\$30,000

Monetary Settlements of Lawsuits and Claims Paid from March, 2006, to February, 2016*

Goldin, Reclamation Services Corp. v. DEQ, Spectrum Engineering--\$525,000

Chalinor v. DEQ--\$20,000

Liberty Cove, Inc. v. DEQ--\$100,000

McDonald v. DEQ--\$20,458.96

Red Cliff Estates Homeowners Association, et al. v. DEQ, et al.--\$2,500

Claim of Pablo Sewer District—\$18,107.27

*Does not include wrongful discharge or motor vehicle accident claims.