DEPARTMENT OF ENVIRONMENTAL QUALITY PERMIT CHALLENGE AND REMEDIATION CASES IN ACTIVE LITIGATION: March, 2016, to November, 2017

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 Lewis and Clark County case. The Rosebud County case was then reinstated. Upon lifting of the stay, the parties filed cross-motions for summary judgment and offered oral argument on the motions. The Plaintiffs and Talen Montana entered into a settlement agreement, which DEQ approved, prior to the Rosebud County District Court ruling on the cross-motions for summary judgment. In the settlement agreement, Talen Montana agreed to convert to a "non-liquid" disposal system for coal ash generated by Colstrip Units 3 and 4 no later than July 1, 2022. The settlement agreement was entered as an order of the Court and the matter was dismissed with prejudice.

MINING CASES

1. **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 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 signed a stipulation for consent judgment settling the case on May 5, 2016. The stipulation was adopted by the court and made part of the court's judgment on May 17, 2016. The settlement required Knife River to pay a $140,000 civil penalty and reclaim the site in accordance with the amended opencut permit and plan of operation.

2. **Park County Environmental Council and Greater Yellowstone Coalition v. DEQ, Lucky Minerals, Inc.** (State District Court, Park County)-- On September 22, 2017, Park County Environmental Council and Greater Yellowstone Coalition filed a complaint against DEQ in regard to DEQ's issuance of an exploration license to Lucky Minerals,

Inc. The exploration license authorizes Lucky Minerals to drill 46 mineral exploration drill holes over two field seasons on private land owned by Lucky Minerals near Emigrant Peak in Park County. The plaintiffs allege that DEQ did not comply with the Montana Environmental Policy Act when it prepared an Environmental Assessment prior to issuance of the exploration license. The Park County District Court has entered a schedule for the filing of summary judgment briefs, culminating in an oral argument scheduled for April 16, 2018.

SUBDIVISION CASE

1. **The Ranch Homeowners Assoc., et al. v.; Gallatin County; John Tubbs, DNRC; and Tracy Stone-Manning, DEQ** (State District Court, Gallatin County)—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. In April, 2016, the plaintiffs voluntarily dismissed the case.

UNDERGROUND STORAGE TANK CASES

1. **Summers, et al. v. Short Stop Service Station, et. al. v. O'Day Management, Inc. et al.** (State District Court, Custer County)--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 their First Amended Complaint on or about April 7, 2014. The plaintiffs 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 claimed 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.

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 was held on February 29, 2016. The case was settled with DEQ being paid $500,000 in remediation costs.

2. **Estate of Suta** (State District Court, Toole County)—This is a probate of an estate that includes a contaminated lot in the Town of Sunburst. In 2013 DEQ filed a claim for remediation costs in the probate. The claim was denied and DEQ filed a petition asking the Court to allow the claim. Settlement negotiations have proceeded, and it appears that the matter will be settled. The Town of Sunburst will acquire the property and acquire a brownfields grant for cleanup of the property. DEQ will then dismiss its petition.

WATER QUALITY CASES

1. **MEIC and Sierra Club v. DEQ and Western Energy Company** (State District Court, Lewis and Clark County)—The plaintiffs filed a complaint on December 21, 2012, challenging DEQ's issuance of a surface water discharge 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. On March 4, 2016, the Court entered summary judgment for the plaintiffs. On September 25, 1016, Western Energy appealed the judgment to the Montana Supreme Court. On October 26, 2016, the Court dismissed the appeal on grounds that the appeal was premature because the Court had not determined whether it would order payment of attorney fees and, if so, the amount of those fees. On June 16, 2017, the Court ruled that DEQ must pay the plaintiffs' attorney fees. The parties are currently negotiating the amount owed.

2. **Bitterrooters for Planning, Inc., MEIC, and Bitterroot River Protective Ass'n v. DEQ**—The plaintiffs filed a complaint in the on June 24, 2014, challenging DEQ's issuance of a groundwater discharge permit for the planned Grantsdale Addition subdivision in Ravalli County. The complaint alleged 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. On June 28, 2016, the Court granted summary judgment for the plaintiffs on both counts. The decision was not appealed.

3. **Bitterrooters for Planning, Inc., and Bitterroot River Protective Ass'n v. DEQ and Stephen Wanderer and Georgia Filcher** (State District Court, Lewis and Clark County)—The plaintiffs filed a complaint on January 14, 2015, challenging DEQ's issuance of a groundwater discharge 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; (4) DEQ violated MEPA by not requiring the applicant to reveal the identity of the owner of the proposed box store. On May 16, 2016, the Court granted summary judgment to the plaintiffs on the first three grounds and to the Department on the fourth because the plaintiffs were barred from bringing the claim by the statute of limitations. DEQ appealed the Court's decision on the third (MEPA) ground. Wanderer and Filcher appealed the Court's decision on the third and fourth grounds. On September 5, 2017, the Montana Supreme Court reversed the District Court on the third ground. The Court ruled that DEQ in its environmental assessment was only required to evaluate the impacts of the discharge and not the impacts of the box store because DEQ did not have regulatory authority over the box store. On the fourth ground, the Court ruled that, under rules for submission of water quality permit applications, DEQ should have required the applicant to identify the box store owner in the permit application.

4. **Clark Fork Coalition, Missoula Valley Water Quality District, Missoula City/County Health Board & Confederated Salish and Kootenai Tribes** v. DEQ (State District Court, Lewis and Clark County)--In October 2014, The plaintiffs filed suit seeking to declare void DEQ's March 2014 issuance of an MPDES permit to M2Green Redevelopment, LLC. The 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, the 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). The 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 and violated the Montana Constitution. Finally, the plaintiffs argued that DEQ had failed to provide direct notice of the draft permit to the Tribes and that the MPDES Permit should be declared void for that reason. On August 2, 2017, the Court granted summary judgment to the plaintiffs on all counts. Pursuant to stipulation of the parties, the Court amended its judgment to eliminate the holding that DEQ violated the Constitution. The judgment was not appealed.

5. **Upper Missouri Waterkeeper v. EPA et al.** (Federal District Court, Great Falls) – On May 31, 2016, the plaintiff filed a complaint challenging EPA's February 2015 decision to approve Montana's general nutrient standards variance. The parties submitted cross-motions for summary judgment. Judge Morris heard oral arguments in June 2017. Several days prior to the hearing, DEQ approved and submitted a new version of its general variance for EPA's review and approval. EPA approved portions of Montana's general variance submittal on October 31, 2017. The Court has since requested the parties submit status reports concerning the effect of EPA's approval of the June 2017 revisions to the general variance (including the issue of mootness). Following the filing of these status reports on November 22, 2017, the plaintiff filed a Motion to Amend Complaint to alter its pleadings to add a challenge to EPA's October 31, 2017 approval decision. The Motion to Amend is still pending. Intervenors State of Montana-

DEQ, Treasure State Resources, Montana League of Cities and Towns, and National Assoc. of Clean Water Agencies have indicated their objections to the Motion to Amend. EPA has not yet taken a position on the pending motion. Responses to the Motion to Amend are due on or before December 14, 2017.

6. **Upper Missouri Waterkeeper v. Montana DEQ & City of Billings** (State District Court, Gallatin County) – The plaintiff challenged DEQ's approval of the General Permit for Discharges from Municipal Separate Storm Sewers (or small MS4s). This is a general MPDES Permit that covers municipal stormwater discharges from the Cities of Billings, Great Falls, Missoula, Helena, Butte, Kalispell, and Bozeman, as well as certain portions of Yellowstone, Cascade, and Missoula Counties. The parties agreed to brief the issues based on the administrative record and submitted cross-motions for summary judgment. The plaintiff has requested oral argument but no hearing has been scheduled.

7. **MEIC, Save Our Cabinets, & Earthworks v. MDEQ & Montanore Minerals Corp.** (State District Court, Lewis and Clark County) – On August 14, 2017, the plaintiffs challenged the reissuance of a permit to the Montanore Minerals Corp. for surface water discharges from a proposed mine in the Cabinet Mountains. They allege that the permit violates a number of requirements contained in water quality statutes and rules. The parties are involved in preliminary discussions concerning case scheduling matters.

ADMINISTRATIVE CASES

During this period, there were pending before the Board of Environmental Review 19 administrative cases challenging DEQ permitting actions. Three of these actions challenged DEQ's issuance of a permit, seven challenged DEQ's refusal to issue a permit or a permit amendment, and nine challenged permit conditions imposed by DEQ.