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ATTORNEY GENERALS OFFICE  
HELENA, MONTANA

**MONTANA FIRST JUDICIAL DISTRICT, LEWIS AND CLARK COUNTY**

**BITTERROOTERS FOR PLANNING  
Inc., and BITTERROOT RIVER  
PROTECTIVE ASSOCIATION Inc.,**

Plaintiffs and Petitioners,

vs.

**MONTANA DEPARTMENT OF  
ENVIRONMENTAL QUALITY,**  
an agency of the State of Montana,

Defendant and Respondent.

Cause No. ADV-2015-32

HONORABLE MENAHAN  
PRESIDING JUDGE

**COMPLAINT**

COMES NOW Plaintiffs, Bitterrooters for Planning and Bitterroot River Protective Association (collectively, "Bitterrooters"), through counsel, and in support of their complaint seeking review of the November 17th, 2014 decision of the Montana Department of Environmental Quality (DEQ) granting a groundwater discharge permit for a proposed large-

scale retail store (the Facility) south of Hamilton, declaratory relief, and their other claims and causes of action, state and allege as follows:

### **Introduction**

The Facility is a proposed large-scale retail store on 18 acres on the northeast corner of U.S. Highway 93 and Blood Lane south of Hamilton, Montana in the Bitterroot Valley. Effluent from the Facility's septic system will contribute to pollution in groundwater, which through its hydrologic connection to the Bitterroot River, will increase contamination in the Bitterroot River, a stream already identified by the Defendant as "at risk" for pollutants. Despite repeated requests from the public, including Bitterrooters, DEQ failed to comply with its mandatory, statutory duties under the Montana Water Quality Act to consider whether sewage from the Facility, either alone or cumulatively, would lead to degradation of surface waters, including the Bitterroot River. DEQ failed to consider the cumulative impacts of this facility along with other sewage permits it has recently approved in the Bitterroot Valley, leaving the river at risk to multiple new pollution sources. The DEQ also violated Montana Environmental Policy Act for failing to adequately evaluate the environmental impacts of the Facility.

Furthermore, DEQ has failed to require any information regarding the nature of the facility that is being permitted, except that it is potentially a gigantic big box store, the largest in Ravalli County. The public, left in the dark, could not provide meaningful comment on the proposed permit, a violation of the Montana Constitution Article II, Sections 8 and 9 that ensure the public right to information and participation.

### **Jurisdiction and Venue**

1. Jurisdiction is based on, *inter alia*, Article II, Sections 3,4, 16 and 17, Article VII Section 4(1), Article IX Sections 1 and 2, of the Montana Constitution, the Montana Water Quality Act § 75-

5-101 *et seq.*, MCA, and as an informal administrative agency action. Venue is proper in this district under § 25-2-126, MCA, because the Defendant is a state agency located in Helena, Montana.

2. Plaintiff Bitterrooters for Planning Inc., is a non-profit public-benefit corporation pursuant to § 35-2-101, *et seq.*, MCA, dedicated *inter alia*, to water quality protection, sound governance, and wise land use planning.
3. Plaintiff Bitterroot River Protective Association, Inc. is a Montana non-profit, public-benefit organization that works, in part, to protect the surface and ground waters of the Bitterroot River watershed from degradation.
4. Members of each of these organizations live in the state of Montana and in Ravalli County and use the Bitterroot River, including the areas affected by the Facility in Ravalli County, and have an interest in preserving water quality. Members of each Plaintiff organization use the Bitterroot River for recreation and nature appreciation, and those interests will be adversely affected Defendant's actions because of the increased pollution unlawfully permitted by the Defendant, and can be redressed by granting the relief requested herein.
5. The environmental, health, aesthetic, and recreational interests of each Plaintiff's members will be adversely affected by DEQ's actions of permitting at issue herein. Members of the Plaintiff organizations use and enjoy the waters and lands associated with the Bitterroot River that will be adversely affected by the pollution and other negative environmental impacts from the Facility for recreation and aesthetic purposes. Plaintiffs' members intend to use said lands and waters for these purposes in the future. In addition, Plaintiffs' members have interests in sound land use planning, protecting Ravalli County's rural aesthetic character, and promoting orderly, planned growth. Such interests are adversely affected by DEQ's unlawful actions herein.

6. Both Plaintiffs have as their mission the goal of protecting water quality and insuring compliance with the laws and regulations of Montana and the United States. In addition, both Plaintiffs have a history of using public participation opportunities to inform the public about environmental issues in Ravalli County. Plaintiffs and their members participated in the DEQ review process, attended meetings and hearings, and submitted comments on the proposed project. DEQ's actions at issue herein adversely affect Plaintiffs' members' interest in lawful governance and adherence to proper legal procedure. This action is brought on the Plaintiffs' own behalf and on behalf of their members.

## **FACTUAL BACKGROUND**

### **A. Urban Sprawl and Water Pollution**

7. The Clark Fork Basin, including the Bitterroot River watershed, has experienced a rapid population growth and associated growth in septic systems from 1990 to present.
8. Conventional septic tank and drainfield systems treat wastewater by settling solids and partly digesting the organic matter, allowing liquid effluent—which still contains nutrients and pathogens (bacteria, protozoa and viruses)—to be discharged into the soil beneath the drainfield.
9. Septic systems are a significant source of water quality degradation in groundwater and surface water in the Clark Fork Basin, including waters comprising the Bitterroot River watershed.
10. Standard septic systems in Montana locations do not effectively remove nitrate from wastewater and therefore contribute to high groundwater nitrate concentrations.
11. Nitrate is a very soluble chemical, which is transported readily in groundwater and can eventually reach surface water. Total nitrogen is comprised of 4 parameters: nitrate, nitrite, ammonia, and organic nitrogen (total nitrogen, also known as TKN, is the sum of the ammonia and organic nitrogen components). The nitrogen in raw wastewater is comprised primarily of

ammonia. Through treatment in the septic tank and drainfield, the ammonia is converted to nitrite and ultimately nitrate. Therefore, all of the nitrogen in the raw wastewater can be transformed into nitrate.

12. Nutrient enrichment, or eutrophication, is the over-fertilization of surface waters by nitrogen and phosphorus, and is one of the leading causes of pollution of lakes, rivers, and coastal bays in the United States. Nutrient enrichment can cause a host of negative ecological effects on streams and lakes, including loss of water clarity, proliferation of aquatic weeds, algae blooms, and drop-offs in dissolved oxygen (a critical factor for fish and other aquatic life).
13. Nitrogen, in its nitrate form, is a direct risk to human and livestock health if it reaches high concentrations in drinking water. The levels of nitrogen and phosphorus that cause ecological damage in lakes and rivers are far lower—usually more than 10 times lower—than the levels which are toxic to humans and livestock.
14. DEQ is responsible for promulgating regulations for discharges to groundwater. The Montana Groundwater Pollution Control System regulates septic systems.
15. The Board of Environmental Review (BER) has adopted rules governing the discharge of wastes into groundwater and established a permit program and water quality standards. The rules define a “source” as any point source or disposal system, which may reasonably be expected to discharge pollutants into groundwater.
16. The water-use classifications and groundwater standards adopted in ARM 17.30.1006 provide a basis for limiting the discharge of pollutants into groundwater. Groundwater standards are based on the human health standards given in Circular DEQ-7 and include a nondegradation criterion based on DEQ’s nondegradation policy and rules.

17. Montana's Non Degradation Policy requires DEQ to consider degradation of surface water and nitrogen concentrations at the end of the mixing zone. § 75-5-301(5)(d).
18. Septic systems are required to comply with all applicable water quality standards, including the nondegradation requirements in ARM 17.30.701 et seq. *Id.*
19. In accordance with ARM 17.30.706(2), DEQ is required to determine whether a new or increased source may cause degradation to state waters or whether the discharge from a new or increased source is nonsignificant according to ARM 17.30.715.

#### **B. Hydrology of the Bitterroot Valley**

20. The Bitterroot River (Bitterroot) is a tributary of the Clark Fork River in southwestern Montana. The Bitterroot runs for about 75 miles (121 km) south-to-north through the Bitterroot Valley, from the confluence of its west and east forks near Conner to the Clark Fork near Missoula, Montana.
21. The Bitterroot River is a popular destination for fly fishing. Rainbow and brown trout are prevalent, as are smaller populations of westslope cutthroat trout and bull trout. The Bitterroot River is a popular place for viewing wildlife. Many species of ducks and waterfowl are common along with osprey, bald eagles, and heron. Both white-tailed deer and mule deer frequent the river as a source of water and graze near its banks. The most notable wildlife-viewing locale along the river is the famous Lee Metcalf National Wildlife Refuge.
22. The Permit factsheet estimates groundwater flow rate from the Bitterroot at 700 feet per year through the alluvium beneath the flood plain along the Bitterroot River.
23. In general, the water table of the Bitterroot River Basin gradually declines through the winter and early spring, and then rises rapidly in May and June in response to recharge from precipitation and irrigation. The direction of ground water flow in general is from

the mountain fronts along the basin margins toward the center of the basin and diagonally down valley.

24. The surface water and groundwater systems are closely interrelated in the Bitterroot Basin. After entering the basin as precipitation, water may interchange between systems several times and leave as either stream flow, underflow, or water vapor. Groundwater in the Bitterroot Basin moves laterally until it is discharged to the earth's surface through springs, wells, and gaining streams. Groundwater moves toward and into the Bitterroot River.
25. In addition to being responsible for issuing groundwater permits, DEQ is responsible for completing Total maximum Daily Load (TMDL) plans which assess the maximum ability of any stream to hold pollutants without impairing beneficial uses, and allocate pollution from all sources at levels to maintain water quality standards and eliminate pollution from the watershed.
26. Nitrogen and nitrate are both "pollutants" whose discharge to the Bitterroot River and groundwater are regulated by the Montana Water Quality Act.
27. In 2012, the Bitterroot River from Skalkaho Creek south to the Clark Fork River was listed as impaired under the Water Quality Act and § 303(d) of the federal Clean Water Act for nitrogen and nitrate.
28. In 2013, a new model for assessing TMDLs was implemented. Under the new method, the Bitterroot River was delisted, while most of the tributaries included in the Bitterroot basin TMDL study remain listed as impaired.

### **C. Blood Lane Permit**

29. In 2014 Lee Foss, a Ravalli County real estate broker filed an application for a groundwater discharge permit for the Facility. The application fails to identify the real party in interest for the permit.

30. The Bitterrooters submitted comments on the proposed permit application. Numerous other individuals and groups also submitted comments. One recurring theme in the comments was concern over the potential impacts to the Bitterroot River from the Facility's wastewater discharges.
31. DEQ concluded that the impact from the Facility was "nonsignificant" because it meets the discharge criteria of "7.5mg/L" at the end of the mixing zone and failed to conduct a non-degradation analysis. Notably, DEQ did not independently evaluate the Facility's discharge value, but rather relied on the value provided by the real estate broker.
32. DEQ did not provide analysis of possible degradation of surface water.
33. DEQ did not provide analysis of impacts on human health.
34. DEQ did not provide analysis of cumulative effects of other discharges such as stormwater discharge from the facility or cumulative impacts from other on-going developments in Ravalli County that will also contribute increased pollution to groundwater and the Bitterroot River.
35. DEQ does not explain the purpose or operation of the proposed facility.
36. DEQ does not explain how industrial or commercial activities, noise, air, visual, and traffic pollution will increase as a result of Facility operations.
37. DEQ does not explain the project impact on quality or distribution of employment.
38. DEQ does not explain projected impacts to tax revenue.
39. DEQ does not explain project impacts on the demand for government services as a result of the Facility.
40. DEQ does not explain its observation that discharges will be "residential in nature."

41. On September 18, 2014, DEQ held a hearing wherein many citizens including Bitterrooters, residents, scientists, city commissioners, and local business owners all voiced concern over the approval of the permit without consideration of impacts to the Bitterroot River. As set forth herein, no one knew what facility they were commenting on.
42. On November 17, 2014, DEQ issued the groundwater discharge permit for the Facility.

### **FIRST CLAIM FOR RELIEF**

#### **(Violation of Nondegradation Policy Regarding Nitrogen Pollution)**

43. The allegations in the foregoing paragraphs are re-alleged and incorporated herein by reference.
44. The objective of the federal Clean Water Act is to “restore and maintain the chemical, physical, and biological integrity of the Nation’s waters.” 33 U.S.C. §1251.
45. In furtherance of this objective, the Act imposes a non-degradation requirement upon states, including Montana, by delegating authority. 40 C.F.R. 131.12. The requirements of the Act and its implementing regulations are binding on Montana.
46. In addition, the Montana Constitution Article II, Section 3 and Article IX, Section 1 require the Defendant to be anticipatory and preventative in its duties to protect the state’s waters from pollution.
47. DEQ’s nondegradation analysis for groundwater discharge permit MTX000233 failed to consider whether nitrogen discharges from the Facility would cause degradation of surface water, as required by MCA § 75-5-301(5)(d), and ARM § 17.30.715(1)(d).
48. DEQ’s failure to consider whether the nitrogen discharges authorized by permit MTX000233 would degrade surface water was arbitrary, capricious, and a violation of the nondegradation provisions of the Montana Water Quality Act.

## **SECOND CLAIM FOR RELIEF**

### **(Violation of Nondegradation Policy: Failure to Take a Hard Look at Cumulative Impacts)**

49. The allegations in the foregoing paragraphs are re-alleged and incorporated herein by reference.
50. DEQ's nondegradation analysis for groundwater discharge permit MTX000233 failed entirely to consider the potential cumulative impacts, as required by ARM § 17.30.715(2)(a).
51. DEQ's failure to consider potential cumulative impacts of the wastewater discharges authorized by groundwater discharge permit MTX000233 was arbitrary, capricious, and a violation of the nondegradation provisions of the Montana Water Quality Act.

## **THIRD CLAIM FOR RELIEF**

### **(Violation of the Montana Environmental Policy Act)**

52. The allegations in the foregoing paragraphs are re-alleged and incorporated herein by reference.
53. MEPA is intended to implement the environmental imperatives of Article II, Section 3 and Article IX, Section 1 of the Montana Constitution. § 75-1-102, MCA.
54. MEPA requires state agencies to carefully scrutinize the potential environmental consequences of their actions. § 75-1-101, et seq., MCA; A.R.M. 36.2.524(1).
55. Under A.R.M. 36.2.524 (1), in order to implement MEPA, the agency shall determine the significance of impacts associated with a proposed action. This determination is the basis of the agency's decision concerning the need to prepare an environmental impact statement (EIS), and also refers to the agency's evaluation of individual and cumulative impacts in either an environmental assessment (EA) or EIS.
56. "The agency shall consider (a) the severity, duration, geographic extent, and frequency of occurrence of the impact, (b) the probability that the impact will occur if the proposed action occurs; or conversely, reasonable assurance in keeping with the potential severity of an impact

that the impact will not occur, (c) growth-inducing or growth-inhibiting aspects of the impact, including the relationship or contribution of the impact to cumulative impacts, (d) the quantity and quality of each environmental resource or value that would be affected, including the uniqueness and fragility of those resources or values, (e) the importance to the state and to society of each environmental resource or value that would be affected, (f) any precedent that would be set as a result of an impact of the proposed action that would commit the department to future actions with significant impacts or a decision in principle about such future actions, and (g) potential conflict with local, state, or federal laws, requirements, or formal plans.” A.R.M. 36.2.524 (1).

57. An EA must include: (a) a description of the proposed action, including maps and graphs, (b) a description of the benefits and purpose of the proposed action, (c) a listing of any state, local, or federal agencies that have overlapping or additional jurisdiction or environmental review responsibility for the proposed action, (d) an evaluation of the impacts, including cumulative and secondary impacts, on the physical environment, (e) an evaluation of the impacts, including cumulative and secondary impacts, on the human population in the area to be affected by the proposed action, (f) a description and analysis of reasonable alternatives to a proposed action whenever alternatives are reasonably available and prudent to consider and a discussion of how the alternative would be implemented, (g) a listing and appropriate evaluation of mitigation, stipulations, and other controls enforceable by the agency or another government agency, (h) a listing of other agencies or groups that have been contacted or have contributed information, (i) the names of persons responsible for preparation of the EA, and (j) a finding on the need for an EIS and, if appropriate, an explanation of the reasons for preparing the EA. If an EIS is not

required, the EA must describe the reasons the EA is an appropriate level of analysis.” A.R.M. 36.2.525 (3).

58. DEQ’s environmental assessment for groundwater discharge MTX000233 is insufficient. The permit factsheet and EA are void of a project description and environmental impacts were not assessed in violation of A.R.M. 36.2.524 and 525.
59. The significance of both direct and indirect project impacts identified within the EA were not assessed in violation of A.R.M. 36.2.524 (1) and (2). The lack of adequate assessment includes, but is not limited to, impacts caused by the development on air, water, noise, traffic, wildlife, water quality including stormwater discharges, impacts on existing businesses in the Hamilton area, and cumulative impacts for all of these resources.
60. DEQ’s non-significance determination is arbitrary and capricious in violation of the Montana Environmental Policy Act.

#### **FOURTH CLAIM FOR RELIEF**

##### **(Violation of the Montana Constitution’s Meaningful Public Participation Requirement)**

61. Article II, Section 8 of the Montana Constitution guarantees the public a “right to expect governmental agencies to afford such reasonable opportunity for citizen participation in the operation of the agencies prior to the final decision as may be provided by law.”
62. Article II, Section 9 of the Montana Constitution guarantees “no person shall be deprived of the right to examine documents or to observe the deliberations of all public bodies or agencies of state government and its subdivisions, except in cases in which the demand of individual privacy clearly exceeds the merits of public disclosure.”
63. The permit factsheet fails to describe the purpose or operation of the proposed Facility.

64. The public has been denied information and meaningful opportunity to participate in the issuance of a permit for the Facility.
65. No public hearing will be held on the Facility under County regulations or the Montana Subdivision and Platting Act. Thus the DEQ EA and public process is the only opportunity for public input regarding the decision to approve or deny the Facility's permit, which is a condition precedent for its construction.
66. DEQ's failure to provide for meaningful public participation further implicates Plaintiffs' members' Constitutional environmental rights in Articles II and IX of the Montana Constitution because those rights cannot be effectively protected unless decision-makers give them an adequate opportunity to provide input on the impacts of the Facility before it is approved.
67. The approval of the Facility as outlined herein therefore violates Plaintiffs' fundamental constitutional rights in Article II Sections 8 and 9 of the Montana Constitution.

### **REQUEST FOR RELIEF**

WHEREFORE, Bitterrooters pray for relief against Defendant DEQ as follows:

A. For an order declaring void *ab initio* DEQ's issuance of groundwater discharge permit MTX000233 for discharges at the Facility, and remanding the permit to DEQ for reconsideration in light of its lawful mandates.

B. For a determination and declaration that issuance of groundwater discharge permit MTX000233 is illegal and violates the Montana Water Quality Act for its failure to take a hard look at impacts to surface waters and cumulative impacts.

C. For a determination and declaration that issuance of groundwater discharge permit MTX000233 is illegal and violates the Montana Environmental Policy Act for its failure to sufficiently review the environmental impacts of the proposed Facility.

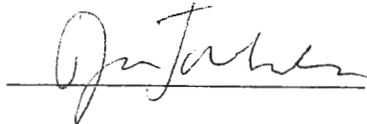
D. For a determination and declaration that directs DEQ to ensure the public is informed of the purpose and operation of the Facility and afforded opportunity to participate in the environmental review process pursuant to the Montana Constitution.

E. For reasonable attorneys' fees and expenses as damages under mandamus Mont. Code Ann. § 27-26-402; under the Private Attorney General Theory; and as otherwise provided by law.

F. For costs of suit.

G. For such further relief as this Court deems equitable and just.

Dated this 14<sup>th</sup> day of January, 2015.



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