

**DEPARTMENT OF ENVIRONMENTAL QUALITY PERMIT  
CHALLENGE AND REMEDIATION CASES ACTIVELY  
LITIGATED: September, 2009, to August, 2011**

AIR QUALITY CASES

1. MEIC, Citizens for Clean Energy, Sierra Club, and National Parks Conservation Association v. DEQ (State District Court, Lewis and Clark County)--On March 30, 2009, the Plaintiffs filed a complaint for declaratory relief in district court requesting a declaratory judgment that the air quality permit for the Southern Montana Electric Highwood Generating Station expired for failure to commence construction by the deadline in the permit. While this case was pending, the permit was revoked by request of Southern Montana Electric, and this case was then dismissed.
  
2. Citizens Awareness Network, WVE, & Clark Fork Coalition v. Board of Environmental Review--On September 3, 2006, the Clark Fork Coalition, Women's Voices for the Earth, and Citizens Awareness Network requested a contested case hearing before the Board of Environmental Review to challenge modification of the permit for Thompson River CoGen to change emission limits and control technology requirements. Several months after the petition was filed, the petitioners moved for leave to amend their petition to add a new claim. The Board denied the motion, but remanded the permit to the Department for further evaluation of best available control technology (BACT) during non-steady state operation. The petitioners petitioned district court for judicial review of the Board's decision denying their motion to amend, and the district court affirmed the Board's decision. The petitioners appealed to the Montana Supreme Court, On January 26, 2010, by a 4-2 vote, the Montana Supreme Court overruled the district court, holding that the Board should have allowed the petitioners to amend their request for hearing.
  
3. Kip Barhaugh et al. v. State of Montana—This was an original action filed on May 4, 2011, in the Montana Supreme Court. The petitioners requested that the Supreme Court take jurisdiction and enter a judgment declaring that the State of Montana holds the atmosphere in trust for present and future citizens of Montana and that the State has an affirmative duty to protect and preserve the atmospheric trust, including establishing and enforcing limitations on greenhouse gas emission as necessary to mitigate human-caused climate change. The State filed a response to the petition recommending that the Court not accept the petition. On June 15, 2011, the Court declined to accept the petition on grounds that fact finding is necessary.

MAJOR FACILITY SITING CASES:

1. In the Matter of MATL—This is a challenge, filed on August 5, 2011, to a decision by the Department to grant an application filed by MATL to amend its certificate. The amendment allows a minor adjustment of the MATL line to avoid a cultural site. The adjustment brings the line closer to adjoining property, and the adjoining landowner,

Jerry McRae has filed this appeal with the Board of Environmental Review. Pursuant to 75-20-223(1)(c), MATL on August 19 filed notice that it has elected to have the matter submitted directly to district court. Mr. McRae must now file a petition in district court.

2. Jefferson County v. DEQ, Northwestern Energy (State District Court, Jefferson County)—On May 18, 2010, Jefferson County filed suit against DEQ seeking an injunction to prohibit DEQ from issuing a draft EIS on Northwestern’s application for certificate for its proposed MSTI power line and a writ of mandamus requiring DEQ to consult with Jefferson County prior to releasing the EIS for public comment. The court issued the injunction and issued a writ of mandamus requiring DEQ to consult with Jefferson County in a manner agreed to by the parties. The court directed the parties to determine how consultation would occur. DEQ and Northwestern appealed to the Montana Supreme Court. The Court heard oral argument on August 2, 2011.

### MINING CASES

1. MEIC et al. v. DEQ, Golden Sunlight, CURE (State District Court, Jefferson County)-In August of 2007, DEQ issued a record of decision selecting the underground sump alternative for reclamation of the open pit at the Golden Sunlight Mine. This reclamation alternative 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. Analysis conducted in the environmental impact statement indicated that any reclamation alternative that partially backfilled the pit with waste material would not be sufficient to protect ground water and surface water quality. In January of 2008, a number of plaintiffs filed a complaint in the District Court for Lewis and Clark County challenging the record of decision. Venue was subsequently changed to the District Court for Jefferson County, where the mine is located. The plaintiffs alleged that the underground sump alternative violates (1) the provision in the Montana Constitution requiring all lands disturbed by the taking of natural resources to be reclaimed; and (2) the reclamation criteria set forth in the Metal Mine Reclamation Act. The parties filed motions for summary judgment. On June 30, 2011, the district court granted DEQ’s and Golden Sunlight’s motions. The court held that selection of the underground sump alternative complies with the metal mine act and that the metal mine act does not violate the constitutional requirement that all lands disturbed by the taking of natural resources must be reclaimed. In addition, the court found that selection of the underground sump alternative did not violate the right to a clean and healthful environment, an issue that the court had raised with the parties. The court reasoned that, given that the pit and water contamination exist, the underground sump alternative is the most protective of the environment. The court added that water quality is more important than aesthetics. The plaintiffs have not appealed the decision, but the time for filing an appeal has not run.

2. Cabinet Resource Group v. DEQ, Revett, Genesis (State District Court, Lincoln County)-- In January of 2007, Cabinet Resource Group, Inc., (Cabinet) filed a complaint against DEQ regarding the Troy Mine. In its complaint, Cabinet asserted that the

reclamation plan for the Troy Mine was inadequate. Based on this assertion, it alleged that ( 1) the permit for the Troy Mine should be suspended or revoked under the Metal Mine Reclamation Act, (2) DEQ violated its statutory duty to enforce the Metal Mine Reclamation Act by allowing the mine to continue to operate, and (3) the provision in the Montana Constitution requiring the reclamation of all lands disturbed by mining was being violated. The court subsequently issued a scheduling order setting a trial date for May 13, 2008. At the time the complaint was filed, DEQ was reviewing an application to amend the reclamation plan submitted in 2000. DEQ's review of the application had been delayed largely due to the mining company's untimely responses to deficiencies in the application identified by DEQ. DEQ was preparing an environmental assessment when the lawsuit was initiated. In January of 2008, Cabinet requested the Court to suspend the scheduling order and vacate the trial date pending DEQ's completion of the environmental assessment. Cabinet acknowledged that completion of the environmental review may render moot the issues raised in its complaint. The Court subsequently suspended the scheduling order. The lawsuit remains suspended pending completion of an EIS. On August 5, 2011, the comment period closed on the draft EIS. DEQ is currently reviewing the public comments.

3. JTL Group dba Knife River v. DEQ, Missoula County CURE (State District Court, Lewis and Clark County)--Knife River has 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 has contended that Knife River does not have a permit for the entire operation. DEQ has filed a counterclaim seeking payment of a penalty and an injunction requiring cessation of the operation.

### SUPERFUND/HAZARDOUS WASTE CASES

1. State of Montana ex rel. DEQ v. BNSF Railway Company (U.S. District Court for the District of Montana)--This is an action for cleanup of the Livingston Railyard. Cleanup has been occurring under a partial consent decree. On December 20, 2007, BNSF filed a motion with the federal district court for injunction of the state court proceedings in the case of *The City of Livingston, et al. v. BNSF Railway Company, et al.*, No. DV 07-141 (Mont. Dist. Ct. filed Sept. 27, 2007). Defendant asked the court to "craft a limited injunction to prevent a Montana state court from litigating a claim which will interfere with this Court's established jurisdiction over the Livingston rail yard remediation." On April 30, 2008, the federal magistrate issued an order denying the injunction, which was adopted by the district court on July 8, 2008. BNSF appealed this denial to the Ninth Circuit Court of Appeals. On November 1, 2010, the Ninth Circuit affirmed the district court's decision.

Also, on August 5, 2009, BNSF filed a Petition for Review of DEQ's decision resolving a dispute between DEQ and BNSF regarding indoor air mitigation. BNSF contended that DEQ improperly required the mitigation, and the Director, under the dispute resolution provision of the 1990 Modified Partial Consent Decree between DEQ and BNSF, affirmed the DEQ's action. The district court assigned the case to a federal

magistrate. On February 10, 2010, the magistrate issued a recommendation that the district court uphold DEQ's mitigation requirements. On March 26, 2010, the district judge adopted the magistrate's recommendation and upheld the mitigation requirements.

2. DEQ v. BNSF, Kalispell Pole and Timber, DNRC, et al. (State District Court, Lewis and Clark County)--DEQ filed a lawsuit against seven parties seeking cleanup of the KRY Site near Kalispell (comprised of the Kalispell Pole and Timber, Reliance Refinery, and Yale Oil facilities). The KRY Site is primarily contaminated from wood-treating, refinery, and railroad operations. DEQ settled with six of the parties and secured a partial summary judgment for the Kalispell Pole and Timber facility against BNSF. In March 2008, DEQ and BNSF went to trial on the outstanding issues and DEQ ultimately obtained a judgment against BNSF requiring the company to conduct cleanup at the entire site. On August 13, 2009, the district court ordered BNSF to abate the imminent and substantial endangerment to public health at the site and to reimburse DEQ for all its remediation costs for the site. However, the court did not require BNSF to comply with DEQ's record of decision, as DEQ requested, because the record of decision is subject to a challenge. (See next case). In addition, the court dismissed DEQ's nuisance claim. Both BNSF and DEQ appealed the order to the Montana Supreme Court. DEQ contended that the district court erred by not requiring cleanup according to the record of decision and by dismissing DEQ's public nuisance claim. BNSF claimed that the district court erred by holding that BNSF is liable for cleanup as a party that arranged for disposal of the hazardous substances because BNSF did not intentionally arrange for disposal of the substances. BNSF further argued that the court erred by approving DEQ's settlements with other liable parties. On December 21, 2010, the Supreme Court affirmed the district court's decision on these issues.

3. BNSF v. DEQ (State District Court, Lewis and Clark County)--In 2008, DEQ issued a record of decision selecting a final remedy for the Kalispell Pole and Timber, Reliance Refinery, and Yale Oil superfund sites near Kalispell. BNSF filed judicial review petition challenging the record of decision in state district court in Kalispell. DEQ moved to change venue to Lewis and Clark County, and the Flathead County district court granted the motion. BNSF appealed that ruling to the Montana Supreme Court, and the Court upheld the ruling. The case has now been submitted for decision to the district court in Lewis and Clark County on cross-motions for summary motion.

4. Asarco Bankruptcy (U.S. Bankruptcy Court, Texas)—A settlement was entered in this case requiring payment of \$44.8 million for remediation and restoration of the Upper Blackfoot Mining Complex and remediation of the Barker Hughesville Mining District NPL Site and the Iron Mountain Mine. In addition, Asarco has placed certain ASARCO-owned properties and \$29.4 into custodial trusts to provide for remediation of the Upper Blackfoot Mining Complex, the Black Pine/Combination Mine, and the Iron Mountain Mine. Following the settlement, DEQ filed a motion requesting entry of an order requiring that DEQ be reimbursed for its attorney fees. In October of 2010, the court denied the motion.

5. Flying J Bankruptcy (U.S. Bankruptcy Court, Delaware)—DEQ settled its claims in this case for remediation costs for the Diamond Asphalt, Big West Kevin, Tank Hill, and Cut Bank Creek for a \$2.7 million in general, unsecured, nonpriority claims. The settlement also preserves environmental obligations of the debtor from discharge at the other Flying J sites in Montana.

6. Smurfit-Stone Bankruptcy (U.S. Bankruptcy Court, Delaware)—Smurfit-Stone’s Chapter 11 plan was confirmed June 30, 2010. DEQ resolved its claims, which concerned environmental obligations of the debtor related to two confirmed petroleum releases and other suspected environmental contamination, with a paragraph in the confirmation order that preserves environmental obligations of the debtor from discharge. DEQ has incurred no actual remediation costs at the site and no penalties have been assessed. The site has been purchased by Green Investment Group, which indicates it will pay all remediation costs.

7. Silver Bow Creek Headwaters Coalition v. State (State District Court, Silver Bow County)—This is a declaratory judgment action in which the Coalition seeks a judgment that the correct and legal name of the historic Silver Bow Creek drainage as it passes through Butte is “Silver Bow Creek” and not “Butte storm drain.” DEQ filed a motion to dismiss, and the court denied this motion. The case is currently before the court on cross motions for summary judgment.

#### UNDERGROUND STORAGE TANK CASE

1. Cascade County v. DEQ (State District Court, Lewis and Clark County)--In December of 2008 Cascade County filed a petition for writ of mandamus in district court in Cascade County. In the petition, Cascade County alleges that it has had at least six different UST releases at its county shop site, and it requests the court to issue a writ ordering DEQ to assign separate release numbers for each release. In 2006 DEQ had refused to assign separate release numbers based on its one release policy. The number of sites influences the amount of compensation for cleanup that is contributed by the Petroleum Tank Release Compensation Board. DEQ moved to change venue for the case to Lewis and Clark County. The Cascade County district court granted the motion. Upon joint motion of the parties, the proceeding was stayed. During the stay of proceedings, Cascade County unsuccessfully attempted to negotiate additional reimbursement from the Petroleum Tank Release Compensation Board. Cascade County moved to amend its original petition to add the Board as a respondent. DEQ did not oppose the County’s motion to amend and the motion was granted on May 16, 2011. Cascade County will now file and serve a new application naming the Board as a respondent and the litigation will continue.

#### WATER QUALITY CASES

1. Northern Cheyenne Tribe, Northern Plains Resource Council, Tongue River Water Users v. DEQ, Opper, and Fidelity Exploration and Production (State District Court, Big

Horn County)--In this case, filed in state district court in Hardin, the Tribe challenges the permit and permit renewal recently issued to Fidelity for discharges of coal bed methane water on the Tongue. The alleged errors are: failure to imposed technology-based treatment limitations, violation of non-degradation requirements because the existing significance threshold for EC and SAR are allegedly unlawful, violation of the right to a clean and healthful environment, abuse of discretion (issuance of permits while new nondegradation rule change pending), failure to conduct adequate alternatives analysis under MEPA, failure to prepare an EIS, and inappropriate reliance on an invalid programmatic EIS. The district court held for DEQ. The plaintiffs appealed to the Montana Supreme Court. On May 18, 2010, the Court reversed the district court. The Court held that DEQ was required to impose technology-based effluent limitations that must be developed using best professional judgment because EPA has not adopted technology-based effluent limitations for the coal bed methane industry.

2. Clark Fork Coalition, Earthworks, TU, and Rock Creek Alliance v. DEQ, Revett, and RC Resources (State District Court, Lewis and Clark County)--Complaint was filed on June 8, 2008, challenging DEQ's decision to allow Revett to use DEQ's general construction storm water permit rather than requiring an individual discharge permit for construction activities at the Rock Creek Mine. On July 21, 2011, the court granted summary judgment for the plaintiffs. The court held that, because the construction activities would affect bull trout in Rock Creek, DEQ should have required Revett to obtain an individual storm water discharge permit rather than allowing it to use the general permit. Revett has filed a motion to alter or amend the judgment.

3. Pennaco Energy, Inc. et al v. U.S. Environmental Protection Agency (Federal District Court, Wyoming)--Petitioners Pennaco Energy, the State of Wyoming, Marathon Oil, Devon Energy Production, and St. Mary Land & Exploration Co. filed complaints in the federal district court of Wyoming challenging EPA's approval of water quality standards and nondegradation thresholds for electrical conductivity and sodium adsorption ratio that were adopted by the Montana Board of Environmental Review in 2003 and 2006 for streams located in southeastern Montana. The State of Montana and Tongue River Water Users intervened on behalf of EPA. Cross-motions for summary judgment were filed and the court heard oral argument on the motions on July 9 and 10, 2009. On October 13, 2009, the court vacated EPA's approval of the 2003 EC and SAR standards and the 2006 classification of those parameters as harmful for purposes of nondegradation. In his opinion, the judge stated that, EPA had not considered the entire administrative record, including comments submitted by industry to the Board; that it failed to identify the scientific basis for its decision; and that it failed to determine whether the standards are based on appropriate technical and scientific data. As for the 2006 classification of EC and SAR as harmful, the judge stated that EPA did not identify a rationale for approval based upon connection between the available evidence and the classification. In December of 2009 EPA appealed the decision to the 10<sup>th</sup> Circuit Court of Appeals, but EPA withdrew the appeal. In spring and summer of 2011, the Board performed its triennial review of the water quality rules. The Board specifically requested and received comments on the EC and SAR rules. The Board determined that the existing rules are

appropriate and submitted this information to EPA. EPA is reviewing the standards and thresholds in accordance with the court's judgment.

ADMINISTRATIVE CASES:

During this period, there were pending before the Board of Environmental Review 19 administrative cases challenging DEQ permitting actions. Six of these actions challenged DEQ's issuance of a permit, one challenged DEQ's refusal to issue a permit amendment, one challenged DEQ's revocation of a permit, and 11 challenged permit conditions imposed by DEQ.