

**DEPARTMENT OF ENVIRONMENTAL QUALITY
LITIGATION REPORT
December 2019**

AIR QUALITY

1. *DEQ v. VW, Audi, Porsche-DDV* 2016-1045 (State District Court, Lewis and Clark County). Enforcement action under § 75-2-413, MCA, for violation of air quality rule ARM 17.8.325 for installing defeat devices after sale and registration of automobiles. Oral argument on VW's motion to dismiss held on Oct. 31, 2018. No decision issued yet. In similar case, on December 9, 2019, Ohio intermediate Court of Appeals reversed dismissal by trial court and reinstated Ohio's case against VW and remanded for trial proceedings. Norm Mullen will supplement DEQ's opposition to VW's motion to dismiss with Ohio order.
2. *DEQ v. Cardinal Oil* Case 19-40 (State District Court, Roosevelt County). Enforcement action under § 75-2-413, MCA, for violation of air quality rule ARM 17.8.1710 and 1711 for failing to operate pit flares to combust VOCs when sending produced gas to pipeline; and failing to have 95% combustion device when not selling gas to pipeline. Complaint filed 7/25/19. Service made on 8/13/19; proof of service filed 8/26/19. Working on motion for summary judgment.
3. *DEQ v. Talen Montana LLC*- Case DV 19-61, (State District Court, Rosebud County). Enforcement action under § 75-2-413, MCA, for violation of air quality rule ARM 17.8.342 for exceeding particulate matter limit that is surrogate for non-mercury metals under Mercury and Air Toxics (MATS) rule at Colstrip power plant. Also, there was a violation of a compliance certification requirement in ARM 17.8.1207. DEQ filed complaint and consent decree 11/26/19. Court entered Consent Decree 12/1/19. Consent Decree requires: \$450,000 penalty; \$ 112,000 cash, the remainder in two Supplemental Environmental Projects for City of Colstrip, Northern Cheyenne Tribe. CD also requires Talen to continue operating newly-installed controls; increase monitoring frequency from quarterly to monthly for at least 12 months, and evaluate compliance indicators and report to Department.
4. *DEQ v. Yellowstone Energy Limited Partnership (YELP)*, Case DV 19-61, (State District Court, Yellowstone County). Enforcement action under § 75-2-413, MCA, for violation of air quality rule ARM 17.8.342 for excess mercury emission in 2017 and 2018 under Mercury and Air Toxics (MATS) rule at YELP power plant in Billings. Filed complaint in 8/23/19 with proposed consent decree. Consent Decree entered on 11/15/19. Penalty of \$49,000 paid on 12/5/19. Injunctive relief requires YELP to: continue operating CaBr₂ control; operate continuous monitor, conduct Relative Accuracy Test Audit (RATA) correlation, and submit source test protocol and testing contractor for Department approval.

5. *Ash Grove Cement Kiln (Montana City)* (Federal District Court, Kansas). Federal consent decree 2:13-cv-02299-JTM-DJW, to which DEQ and other states are parties, is being terminated. This case was filed as part of EPA's multistate cement kiln enforcement initiative. It required installation of controls, and monitoring for NO_x, SO₂, and particulate.

BANKRUPTCY AND REMEDIATION

1. *Ch-11 01-01139 – AMC W.R. Grace & Co., et al* (BR DE). From 1963 to 1990, W.R. Grace ("Grace") owned and operated vermiculite mining and processing facilities in Libby, Montana. The vermiculite concentrate from the mine contains varying concentrations of a mixture of amphibole mineral fibers, commonly known as Libby Amphibole Asbestos, which has been shown to cause harm to human health and the environment. On October 24, 2002, the United State Environmental Protection Agency ("EPA") listed the Libby Asbestos Superfund Site on the National Priorities List and the site was split into 8 operable units. EPA also designated the site a public health emergency, which is the only site to date given that designation. Grace filed for Chapter 11 Bankruptcy in the US Bankruptcy District of Delaware in 2001. The State of Montana, through DEQ, filed a claim in March 2003 based on the Libby Asbestos Superfund Site remediation and restoration activities. The claim was amended and expanded to three claims in May 2003 and amended again in November 2007 to reserve claims related solely to the remedial and restorative activities to be done on Operable Unit 3 ("OU3"), which is the mine site. This claim was estimated at around \$55 million and remains because it addresses the only operable unit not addressed in a settlement between Montana and Grace, which was finalized and adopted by the Court in 2008. Since then, Grace, EPA, and DEQ have been engaged in CERCLA clean-up activities at OU3. The parties have not yet identified a final remedy. In June 2019, Grace filed "Reorganized Debtor's Request for Partial Allowance and Partial Disallowance of the Claim by the Montana Dept. of Env. Quality ("MDEQ") for Environmental Remediation at Operable Unit 3 of the Libby Asbestos Superfund Site (Substantive Objection)" asking that the Bankruptcy Court only allow a limited contingent claim to continue, based on Montana's potential obligation for 10% cost share and operation and maintenance costs if the site was cleaned up using "Superfund" account money in the future. DEQ, in conjunction with NRDP, responded asserting that other claims were necessary, and Grace replied. Currently, Montana has invested in a cost estimate process for both remedial and restoration based claims. A mediation schedule has been adopted by the court and mediation is scheduled to begin in February or March 2020.

2. *Westmoreland and related companies*, Case 18-35672 (BR S.D. TX). DEQ worked with TX attorney to protect state permits, bonds, permit fees. Worked informally to get air quality fees (\$103,000) and water quality fees (\$41,000) paid as administrative expenses. Fees were paid at 100% in July, 2019.

3. *Spring Creek/ Cloud Peak/Navajo Transitional Energy Co, LLC*. -Case 19-11047-KG (BR DE). DEQ worked with outside counsel to protect state permits and bonds and to get air quality fees (~\$63,000) paid as an administrative expense under 11 U.S.C. § 503. The fees were paid at 100% on 12/2/19.

4. *Legacy Reserves* - Bankruptcy Case 19-33395 (BR S.D. TX). Oil and gas producer owed \$17,850 in air quality fees for 21 oil and gas well facilities. DEQ made an informal request for administrative claim to be paid at 100%. These fees were paid in full on 12/5/19. Also filed proof of claim for \$10,000 for penalties.

COAL

1. *Montana Env'tl. Info. Center & Sierra Club v. Montana Dep't of Env'tl. Quality, Montana Board of Env'tl. Review, & Western Energy Co.*, DV-19-34: Challenge of DEQ's issuance of a coal mining permit amendment. BER 2016-03 SM, Board Order (June 6, 2019) was appealed to the Montana Sixteenth Judicial District Court after the Board of Environmental Review ratified the Hearing Examiner's grant of what amounted to an administrative law directed verdict against Petitioners MEIC and the Sierra Club following a four-day trial in 2018. *In re Western Energy AM4 Amendment*, BER 2016-03 SM, Board Order (June 6, 2019). The key holdings of the AM4 case included a finding that Petitioners had failed to exhaust statutory remedies by raising issues before DEQ in the permitting phase; the rejection of Petitioners' attempt to demonstrate by a preponderance of the evidence that the AM4 Amendment was not designed to prevent material damage; and the BER's refusal to amalgamate Clean Water Act point-source discharge permit restrictions with the "material damage" standard under MSUMRA. The District Court held a scheduling conference on November 26, 2019, and issued a Scheduling Order on December 9, 2019. Briefing on the matter is currently scheduled to conclude on April 13, 2020.

MEPA

1. *Water for Flathead's Future, Inc. et al v. DEQ and DNRC* (Cause No. DV-1109A) (State District Court, Flathead County). This is a MEPA challenge seeking review of DEQ's decision to issue MPDES permit MT0031861 to the Montana Artesian Water Company (MAWC), authorizing discharges to surface water from MAWC's drinking water bottling facility ("the Facility") and challenging a Montana Department of Natural Resources and Conservation ("DNRC") January 26, 2018 decision to grant MAWC a Beneficial Water Use permit for the same drinking water bottling facility. Plaintiffs' claims against DEQ and DNRC arise under the Montana Environmental Policy Act (MEPA), §§ 75-1-101 through 75-1-324, Montana Code Annotated (MCA), and administrative rules adopted to implement MEPA. On June 7, 2019, the Plaintiffs filed an Unopposed Motion to Stay the Proceedings until the Montana Supreme Court

rules on the appeal of a related case, *Flathead Lakers Inc et al v. DNRC and MAWC* (Cause No. CDV-2018-135, Montana First Judicial District Court), which voided MAWC's water right permit. On June 7, 2019, the Order Staying the Proceedings was signed by District Court Judge Eddy. Within 30 days of the Supreme Court's order in *Flathead Lakers* the parties are to submit a Joint Status Report and propose a schedule to resolve this litigation.

MINING

1. *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 (Park County) 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 Park County alleged that DEQ did not comply with the Montana Environmental Policy Act (MEPA) when it prepared an Environmental Assessment prior to issuance of the exploration license. The parties filed cross motions for summary judgment. On May 23, 2018, the District Court entered summary judgment in favor of Park County. Park County subsequently filed an amended complaint challenging the constitutionality of MEPA provisions limiting the remedy for an insufficient environmental review to remand to the agency and precluding a court from enjoining the permitted activity while the matter is undergoing additional environmental review. The State Attorney General entered a special appearance to defend the constitutionality of the MEPA provisions. DEQ did not take a position in regard to the constitutionality of the MEPA provisions. On April 12, 2019, the District Court entered an order finding the MEPA provisions to be unconstitutional as applied. The District court entered a subsequent order denying Park County's request for attorneys' fees under the private attorney general doctrine. After entry of final judgment, DEQ, Lucky Minerals and the State Attorney General appealed the District Court's rulings. The matter is currently being briefed before the Montana Supreme Court.

2. *Henry and Diane Belk v. DEQ and Glacier Stone Supply, LLC; Herb Engel and Art Vail v. DEQ and Glacier Stone Supply* (State District Court, Flathead County) – On April 17 and May 19, 2019, Henry and Diane Belk, and Herb Engel and Art Vail filed complaints challenging DEQ's issuance of an operating permit to Glacier Stone Supply, LLC, respectively. The operating permit authorizes Glacier Stone to conduct decorative rock quarry activities at a site approximately three miles northwest of Marion, MT, near Little Bitterroot Lake. The complaints allege violations of the Montana Environmental Policy Act, the Metal Mine Reclamation Act and the Montana Constitution. The complaints also challenge the constitutionality of statutory provisions of MEPA limiting the remedy for an insufficient environmental review to remand to the agency and precluding a court from enjoining the permitted activity while the matter is undergoing additional environmental review. The State Attorney General has intervened based on the constitutional challenge to the MEPA provisions. The District Court has consolidated the

two cases, which are in the early stages of litigation. The plaintiffs have filed a motion for supplementation of the administrative record, which DEQ is opposing.

3. *Montanore Minerals Corp., Tory Mine Inc. and RC Resources, Inc. v. Montana DEQ* (State District Court, Lewis and Clark County) – On March 20, 2018, DEQ sent violation letters to Phillips S. Baker Jr. (Baker) and Hecla Mining (Hecla). The violation letter sent to Baker asserted that he was in violation of Section 82-4-360(1), MCA, prohibiting a person from conducting mining in Montana if a business entity of which that person was a principal or controlling member had a bond forfeited or DEQ otherwise received bond proceeds to perform reclamation on that business entities' behalf. Baker is currently an officer of Hecla and had been an officer of Pegasus Gold Corporation, for which DEQ received bond proceeds in approximately 2000. The violation letter sent to Hecla asserted that Hecla was subject to an enforcement action under Section 82-4-361(2)(a)(ii), MCA, because Hecla was aware that Baker was an officer of Pegasus leading up to DEQ's receipt of the bond proceeds and Hecla was seeking authorization to conduct mining under Baker's direction.

On March 23, 2018, Montana Minerals Corp., Troy Mine Inc., and RC Resources (collectively referred to as Hecla entities) filed a first amended complaint in Lincoln County. Hecla requested the District Court to declare that DEQ's decision that the Hecla entities could not obtain exploration licenses or operating permits under the Metal Mine Reclamation Act was unlawful and to enjoin DEQ from taking any actions to suspend the Hecla entities existing licenses and permits. The District Court granted DEQ's request for a change in venue, transferring the case to Lewis and Clark County District Court. In June of 2018, DEQ filed a third-party complaint against Baker, Hecla, RC Resources and Montanore Minerals, Corp. DEQ requested the District Court to declare Baker disqualified from conducting mineral exploration or mining in Montana and to enjoin him from doing so. In March of 2019, the District Court heard oral argument on Hecla and Baker's motion to dismiss DEQ's third-party complaint and to change venue to Lincoln or Sanders County. The District Court has not ruled on the pending motions.

4. *Knife River Corporation v. DEQ* (Cause No. CDV-2010-579) (State District Court, Lewis and Clark County). This case has been settled. This was an opencut matter in which the operator of what was known as the Target Range Gravel Pit in Missoula County obtained a 33-acre permit in 1975 when opencut-related activities such as processing, stockpiling, etc., did not need to be permitted. The law was changed in 1987, but the operator never amended the permit to cover the full 80+ acres of its operation. In 2010, DEQ initiated enforcement action and the operator filed a complaint in District Court under the Uniform Declaratory Judgment Act, § 27-8-101, MCA et seq, to determine its rights and obligations with respect to operation and reclamation of the opencut site under a Reclamation Contract dated June 3, 1975 and the current Montana Opencut Mining Act (§ 82-4-101, et seq). Cross motions for summary judgment were fully briefed and argued before Judge Seeley on November 27, 2012. Judge Seeley denied the motions.

Ultimately, Knife River and DEQ settled the action and a Satisfaction of Judgment was filed on December 2, 2019. Knife River applied for a permit, corrected deficiencies under its outdated permit, paid a penalty, and reclaimed the site to DEQ's satisfaction. Presently, Missoula County is acquiring the property and will put it to post-mining use.

SOLID WASTE

1. *Hillcrest Natural Area Foundation, Inc., et al. v. DEQ and the City of Billings* (State District Court, Yellowstone County)—Petitioners filed a Petition for Judicial Review February 13, 2019, challenging DEQ's issuance of a solid waste management system license for the expansion of the City of Billings Regional Landfill. Petitioners allege that: (1) DEQ's issuance of the license was unlawful, because the City had failed to make certain demonstrations required under Montana administrative rule prior to siting a landfill unit in wetlands; (2) DEQ's issuance of the license was unlawful, because the proposed expansion violates a provision of the Montana Solid Waste Management Act prohibit the dumping of garbage within 200 yards of a public roadway; and (3) DEQ's environmental review under MEPA is arbitrary and capricious because it ignored potential significant impacts to the human environment. The Court held a summary judgment hearing in Billings on November 19, 2019. The parties are currently preparing proposed orders for the Court's consideration.

2. *DEQ v. Dual Trucking and Transport, LLC* (State District Court, Roosevelt County). This is an enforcement action for the unlicensed operation of a solid waste management system in eastern Montana near Bainville. Defendant was operating an oil and gas waste processing facility, which involved the storage and disposal of solid waste, without a solid waste license.

3. *DEQ and Broadwater County Board of Health v. Two Brothers Tires, LLC/LLP, Darko Smilovic, Austin Smilovic, Grant Smilovic, and Winston Realty, LLC* (State District Court, Broadwater County). This is an enforcement action for the unlicensed operation of a solid waste management system in Broadwater County. Defendants were charging area tire shops to dispose of waste tires and were storing and/or disposing of the waste tires on multiple properties in Broadwater County without a solid waste license. Under the authority conferred by 75-10-231, MCA, the Broadwater County Attorney brought this action in the name of the department.

SUBDIVISIONS/ENGINEERING

1. *Plaster v. Montana City Properties, Inc.*, No. DV-2017-40 (State District Court, Jefferson County) - In 2016, a public drinking water well that served the Jackson Creek Saloon in Montana City was contaminated with benzene. The well had been approved by the Department of Environmental Quality. Across the street from the Jackson Creek Saloon is the Montana City Store, which operates a gas station and convenience store. The site was an existing DEQ remediation site. In 2017, the owners of the Jackson Creek Saloon filed suit against Montana

City Properties, who filed a third-party complaint seeking indemnity and contribution from various parties, including DEQ. The third-party complaint alleged that DEQ was negligent in its Petroleum Tank Cleanup Section's oversight of the remediation of gas leaks on Montana City Properties' property, and in DEQ's approval of the public water supply well. Montana City Properties also alleged that the drilling of the public water supply well might have caused, contributed to cause, or worsened the gas contamination on the plaintiffs' property. After the filing of the third-party complaint, the plaintiffs filed a first amended complaint that also alleged DEQ was negligent in its approval of the public water supply well.

DEQ is represented in this case by the Risk Management and Tort Defense Division. The District Court has denied DEQ's motion for summary judgment, as well as various other motions to dismiss. DEQ and two other defendants petitioned the Supreme Court for a writ of supervisory control directing the District Court to reverse part of its order on a *motion in limine*. On November 12, 2019, the Supreme Court denied the petition. A trial has not yet been scheduled.

2. *McKeon v. Granite County*, DV 18-33 (State District Court, Granite County). Plaintiff McKeon brought this action against DEQ, Granite County, and her neighbor, alleging that the defendants violated an easement right on her neighbor's property. McKeon alleged that her easement protected the view from her property and gave her the right to put her septic drainfield on her neighbor's property. She further alleged that DEQ violated her easement rights when, in 2002, DEQ approved a rewrite application for the neighbor's certificate of subdivision approval, which allowed the neighbor to construct a house in the area that McKeon claimed was protected by the easement.

DEQ and the neighbor moved to dismiss for failure to state a claim. On January 30, 2019, the District Court granted both motions and dismissed both parties with prejudice, concluding that the claims against DEQ were barred by the statute of limitations and that the claims against the neighbor were not legally cognizable. McKeon is still litigating with Granite County regarding its role in the approval of the house location. Although DEQ has been dismissed with prejudice, there is a good chance that this case will be appealed to the Supreme Court.

UNDERGROUND STORAGE TANKS

1. *Jon Kantorowicz, and Charlotte Kantorowicz and the Sunnyside Ranch v. DEQ and Wells Fargo Bank*, DDV-16-0407(B) (State District Court, Cascade County) – On May 9, 2016, Jon Kantorowicz filed a complaint against DEQ and Wells Fargo in the Eighth Judicial District Court alleging, among other things, that DEQ did not have jurisdiction over Kantorowicz under the Montana Underground Storage Tank Act. Subsequently DEQ filed its Answer. A Scheduling Order has never been issued. On February 4, 2019, the Court granted a Motion to Dismiss from Wells Fargo. DEQ and Kantorowicz have reached an agreement in principle to resolve the issues

still pending before the court. When ERRA funding is available DEQ will oversee investigation and remediation at the Sunnyside Ranch until a PMZ closure can be achieved. In exchange for funding and DEQ's efforts Kantorowicz agrees to hold the current case against DEQ in abeyance. Once the release is resolved Kantorowicz agrees to dismiss the case against DEQ with prejudice.

2. *In the Matter of the Estate of Lois L. Suta*, DP-12-028 (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. DEQ approved a Brownfields application after the town of Sunburst passed a resolution of intent to purchase the Suta property. DEQ is working with Sunburst to continue groundwater monitoring until the site can be closed. When Sunburst takes possession of the property, DEQ will dismiss its Creditors Claim against the Suta estate.

3. *In the Matter of the Estate of Richard Schott*, DP-17-02 (State District Court, Chouteau County). This is a probate of an estate that includes a contaminated lot in Highwood, MT. In 2017, DEQ filed a claim for remediation costs in the probate. In 2018, the estate agreed to take responsibility for investigating and remediating the release using the proceeds from the estate. Remediation is ongoing.

WATER QUALITY

1. *Waterkeeper v. EPA*, Case No. CV-16-52-GF-BMM (U.S. Dist. of Montana- Judge Morris, Great Falls). Montana intervened in this case along with several other intervenors. The case challenged EPA's approval of Montana's general nutrients standards variance. While the Court found significant portions of the general nutrients standards variance to be lawful and supported by the record, the Court partially vacated and remanded a portion of EPA's approval. The Court then stayed this vacatur and provided the DEQ 120 days from the date of the Order to adopt a revised general variance timeline, and provided U.S. EPA 90 days to complete its review of these changes. DEQ complied with this deadline and submitted to EPA for approval in November 2019; EPA's approval review is still pending. EPA also filed a Motion to Alter or Amend Judgment and this is pending. At the same time, intervenors National Association of Clean Water Agencies and Montana League of Cities and Towns appealed the decision to the 9th Circuit and sought a stay pending appeal of Judge Morris' ruling (seeking to stay the court-ordered revised rule from proceeding). Judge Morris denied the stay because of EPA's pending motion. The 9th Circuit had also ruled the appeal was premature because of EPA's motion. DEQ's appeal timelines have been stayed because of EPA's pending motion.

2. *MEIC et al. v. DEQ & Montanore Minerals Corp.* Case No. CDV-2017-641 (State Judicial Court, Lewis & Clark County). Appeal of an MPDES Permit (discharge permit) case for

a hard rock mine near Libby, MT and the Cabinet Wilderness Area. District Court agreed with most of Plaintiffs' appeal issues, vacated the permit, and remanded the permit to DEQ. Plaintiffs did not seek attorney's fees from the district court. DEQ appealed the decision of the district court and its initial appeal brief is due January 24, 2020 - Montana Supreme Court Appeal No. DA 19-0553.

3. *Upper Missouri Waterkeeper v. DEQ & City of Billings*, DA 18-0462 (State District Court, Gallatin County). Plaintiff/Appellant Upper Missouri Waterkeeper 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 18th Judicial Dist. Court granted DEQ's motion for summary judgment in full, upholding DEQ's issuance of the permit in all respects. Plaintiff appealed and on April 9, 2019, the Supreme Court unanimously upheld the district court's decision. *Upper Missouri Waterkeeper v. DEQ & City of Billings*, 2019 MT 81.

4. *MEIC and Sierra Club v. DEQ and Western Energy Company* (State District Court, Lewis & Clark County). In this case, plaintiff environmental groups filed a complaint on December 21, 2012, challenging DEQ's September 14, 2012 renewal of the MPDES permit for the Western Energy Company (now Westmoreland Rosebud Mining, LLC) Rosebud Coal Mine. The complaint alleged that: 1.) DEQ unlawfully reclassified C3 waters as ephemeral; 2.) the MPDES permit did not protect designated beneficial uses for the C3 receiving waters; 3.) the MPDES permit authorized discharges to an impaired receiving water without a TMDL; and 4) the MPDES permit did not require adequate monitoring. The parties moved for summary judgment. District Court Judge Seeley ruled that issuance of the MPDES permit was unlawful, invalidated the permit, and remanded the matter to DEQ for reconsideration. Judge Seeley further held the C3 classified receiving waters could not be treated as ephemeral without reclassification through a use attainability analysis; and that DEQ's representative sampling plan for precipitation-driven discharges was inadequate. Judgment was entered 8/25/2016, setting forth a briefing schedule for attorneys' fees. The parties briefed the issue of liability for attorney fees and Judge Seeley awarded attorney fees to MEIC. DEQ and MEIC then entered a Memorandum of Agreement (MOA) to resolve the issue of attorney's fees under which DEQ agreed to pay \$10,000 as reasonable attorney fees, payment of attorney's fees was stayed until appeals to the Montana Supreme Court were resolved, and the parties agreed the MOA was of no effect if the Montana Supreme Court reversed the District Court's rulings on application of ARM 17.30.637(4) to C-3 waters and representative monitoring of precipitation-driven discharges. DEQ and WECO appealed final judgement of the District Court to the Montana Supreme Court and the Montana Supreme Court reversed and remanded to the District Court finding that DEQ's

interpretation of ARM 17.30.637(4) was lawful and did not result in reclassification of C-3 waters and DEQ can lawfully permit representative monitoring. The Supreme Court further held there was insufficient evidence in the record to determine whether downstream intermittent and perennial waters would be impacted, how impaired segments would be protected, whether a TMDL was necessary; and, regarding representative monitoring, whether the outfalls selected for precipitation-driven discharge monitoring were representative of the monitored activity. On October 10, 2019, MEIC filed a petition for rehearing to amend the Opinion arguing the Montana Supreme Court's remedy, reversing the District Court's summary judgment and remanding questions of fact to the District Court conflicts with controlling decisions that were not addressed by the Montana Supreme Court. DEQ and WECO objected to MEIC's petition. On November 19, 2019, the Montana Supreme Court held its Order was not in conflict with a statute or controlling decision not addressed and MEIC's petition for rehearing was denied. On December 6, 2019, WECO filed a motion, under § 3-1-804(12), MCA, to substitute Judge Seeley on the remand.

ADMINISTRATIVE ACTIONS

During this period, there were pending before the Board of Environmental Review 12 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 or a permit amendment, and five challenged permit conditions imposed by DEQ.