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ANGIE SPARKS
CLERK DISTRICT COURT

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FILED
BY **D. NASON**
DEPUTY

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

WLG Association Inc.,

Plaintiffs and Petitioners,

vs.

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

Defendant and
Respondent.

Cause No. *CDU 2018-1249*

KATHY SEELEY
PRESIDING JUDGE

COMPLAINT

Plaintiffs, WLG Association (WLG), in support of the complaint seeking review of the June 6, 2018 decision of the Montana Department of Environmental Quality (DEQ) granting an Opencut Mining permit #2351 for a proposed gravel pit on the west end of Billings, state and allege as follows:

INTRODUCTION

Golden West Properties, LLC (Operator)'s application for Opencut Mining was approved and issued on June 6, 2018. The application approves a 47.1-acre gravel pit located in a residential area of Billings, Montana in an area known as the "West End". Specifically, the location of the pit is on west side of 64th Street West, just north of the intersection of 64th Street West and Danford Road. Operations of the gravel pit will impact the groundwater levels, flow, quality and other aspects of the human environment, and in turn impact, the properties and homes near and around the pit. Despite requests from the public, DEQ failed to comply with its mandatory statutory duties under the Montana Environmental Policy Act to consider whether the gravel pit operations, either or alone or cumulatively, would lead to degradation of groundwaters, including the water rights and wells surrounding the gravel pit, and/or negatively impact other elements of the human environment. Additionally, DEQ failed to consider the cumulative impacts of this operation along with other non-agricultural operations in the area, leaving the ground water quantity and quality at risk due to the decrease in groundwater recharge opportunities and pollution from open lake operations. The DEQ failed to adequately evaluate the impacts to the human environment of the gravel pit.

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, Opencut Mining Act, Mont. Code Ann. § 82-4-401 and as an informal administrative agency action. Venue is proper in this district under Mont. Code Ann § 25-2-126, because the Defendant is a state agency located in Helena, Montana.
2. Plaintiff WLG Association Inc., is a public benefit corporation pursuant to Mont. Code Ann. § 35-2-101, *et seq.*, whose principal place of business is in Billings, Montana. WLG is dedicated to the conservation and preservation of the quality of life, groundwater, wildlife, air quality and residential/sole proprietorship value of the area and subdivisions at and surrounding the Walden Meadows, Linlee Lakes Estates and Grizzly Creek Estates (“residential neighborhoods”) in Yellowstone County, Montana.
3. Members of WLG are homeowners within the residential neighborhoods and have an interest in the high quality residential value of said area. Their interests will be adversely affected by the actions of the Defendant and can be redressed by granting the relief requested herein.

4. The environmental, aesthetic and health interests of each Plaintiff's members will be adversely affected by DEQ's actions of permitting at issue herein. WLG members have ownership in, and use and enjoy the waters and properties around the gravel pit that will be adversely affected by the adverse environmental impacts from the gravel pit.
5. The properties of WLG members will be adversely impacted due to the gravel pit's aesthetics, noise, lights, and increase in truck traffic to and from the site. The Member's use of the groundwater for everyday purposes including drinking, bathing, cooking, gardening, livestock watering and acreage irrigation will be adversely affected by the operation of the gravel pit due the operations use of groundwater. Additionally, Plaintiff's members have an interest in sound land use planning and protecting Yellowstone County's rural agricultural and residential aesthetic character and promoting orderly, planned growth and such interest are adversely affected by DEQ's unlawful actions herein.
6. Plaintiff has as their mission, the goal of protecting water quality and quantity, preserving the purity of the groundwater, air, safety and unique balance of agricultural, native mixed grass and wetland, and rural residential character of the area. Plaintiff's 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 Plaintiff's members' interest in lawful governance and adherence to proper legal procedure. This action is brought on the Plaintiff's on behalf and on behalf of their members.

FACTUAL BACKGROUND

7. The West End of Billings, Montana, has seen a rapid rate of residential growth over the past decade. Formally, the area was primarily used for agriculture but has grown to become a residential area. In the last several years, the Yellowstone County Commissioners approved numerous residential subdivisions in the West End, specifically on the entire stretch of the S 64th Street West from Grand Avenue north to Neibauer Road. This essentially has made the area from Danford Road north to Grand Avenue a residentially developed area.
8. In 2018, the Commissioners approved an expansion to the Elder Grove primary school on Hesper Road and South 64th Street West. This school has been expanded several times to meet the demands of the increase residential population in the area. The school is less than two miles from the Golden West Pit site and is on the proposed route used for the trucks from the Golden West Pit site.

9. All of the residential properties and all of the proposed residential developments rely or will rely on the same groundwater source. The proposed Golden West Pit site will also be using the same groundwater for its operations.
10. The West End of Billings is now composed of residential neighborhoods intermixed with agricultural and farming properties.
11. The only parcel in this area that is not inline with the residential characteristics of this area is the Golden West Pit site.
12. The area at issue, including the Golden Wets Pit site is not zoned.
13. The decrease in agricultural use and the increase in residential use has an impact on groundwater. This is because when agricultural land is irrigated, the groundwater level increases. Without irrigation, the groundwater recharging flow decreases.
14. The increase in residential neighborhoods alone in this area will decrease the available groundwater over time as irrigation decreases and demand from residential housing increases.
15. Gravel pits also have an impact on groundwater. This is because when the operators dig a gravel pit, the groundwater seeps into the pit causing a decrease in the groundwater level. When the operations dewater the pit or move the water from one area of the operations to

another in capture basins or open lake areas, nearby groundwater levels are impacted.

16. These groundwater impacts affect residential homes by causing poor or no well performance and/or flooded basements or crawl spaces.

17. If a dragline is used to dredge the gravel, the open lake will become cloudy and particle laden and also pick up petroleum byproducts from necessary contact with the bucket and other lubricated moving parts, including residue from the diesel engine(s) and move into the groundwater supply.

18. Additional pollution can enter the groundwater from other particulate matter in the air, pesticides, herbicides, manure, rotting carcasses, lead from fired ammunition, and various other sources, which come in contact with the open lakes.

Opencut Mining Act

19. The Montana legislature enacted the Opencut Mining Act ("Act") to provide adequate remedies and protection of the environmental life support system from degradation and provide adequate remedies to prevent unreasonable depletion and degradation of natural resources from the operation of gravel pits.

20. DEQ is responsible for issuing permits and promulgating regulations for Opencut Mining operations.
21. The Board of Environmental Review (BER) has adopted rules governing the Opencut Mining Act and established a permit program. Mont. Code Ann. § 82-4-401 *et seq.*
22. An application for a permit under the Opencut Mining Act must be accompanied by, among other things, “a plan of operation that addresses the requirements of 82-4-434 and the rules adopted pursuant to this part related to 82-4-434.” Mont. Code Ann. § 82-4-432(2)(c).
23. The plan of operation *must* provide that “surface water and ground water will be given appropriate protection, consistent with state law, from deterioration of water quality and quantity that may arise as a result of the open cut operation; . . . that any additional procedures, including monitoring, that are necessary, consistent with the purposes of this part, to prevent significant physical harm to the affected land or adjacent land, structure, improvements or life forms will be implemented.” Mont. Code Ann. § 82-4-434(3)(1),(n).
24. Regulations require that the depths, water levels and uses of all wells in and within 1,000 feet of the permit area be disclosed in the plan of operations, along with “the estimated seasonal high and seasonal low

water table levels in the permit area and the information sources used, such as landowners, field observations, and water well logs.” ARM 17.24.218(1)(g)(i-iv).

25.Regulations require that the plan of operation include

“acknowledgement that the operator consulted with the regional office of the Department of Natural Resources and Conservation, Water Resources Division, concerning the requirements to obtain water rights and possible adverse impacts to existing water rights” if the pit may result “in the diversion, capture or use of water.” ARM 17.24.218(1)(g)(v).

26.Regulations further require “an explanation of measures to prevent . . .

impairment of a water right including but not limited to an explanation of water management . . . plans for storm water and ground water . . . and an explanation of proposed measures to protect the water rights of other parties or to replace an adversely affected water source that has beneficial use.” ARM 17.24.218(1)(h)(ii)(B).

27.In accordance with ARM 17.24.212(4), DEQ is required to determine

whether the application for the permit contains a plan of operations that meets the statutory and regulatory requirements.

Golden West Pit

28. On June 6, 2018, the Montana Department of Environmental Quality issued the Open Cut Mining Permit #2351 to Golden West Properties, LLC (operator). The Permit comprises a total of 47.1 acres.
29. The Golden West Pit site is located in the middle of three residential/sole proprietorship neighborhoods and several privately owned parcels of primarily residential land. Walden Meadows, Linlee Lakes and Grizzly Estates subdivisions.
30. Walden Meadows is a primarily residential/sole proprietorship area with larger parcels, and includes truck drivers, farmers, professionals, and retirees; Linlee Lakes and Grizzly Creek Estates are primarily moderately upscale residential properties
31. The pit sits directly north of Walden Meadows, to the southeast of Linlee Lakes, and to the west of Grizzly Creek Estates.
32. Pursuant to Mont. Code Ann. § 75-1-201 et seq., DEQ conducted an Environmental Assessment on the Golden West Opencut Mining permit.
33. The DEQ issued permit #2351 that does not comply with the Opencut Mining Act.

34. The permit #2351 does not contain a plan of operations that meets the statutory and regulatory requirements of the Opencut Mining Act.
35. The DEQ acknowledged, “numerous wells (approximately 36) are located within 1,000 feet of the site.”
36. The plan of operations did not disclose all the wells within 1,000 feet of the permit area.
37. The plan of operations did not provide an acknowledgement that the operator consulted with the regional office of the Department of Natural Resources and Conservation, Water Resources Division, concerning the possible adverse impacts to existing water rights.
38. The plan of operations did not provide an explanation of measures to prevent impairment of a water right including but not limited to an explanation of water management and an explanation of proposed measures to protect the water rights of other parties or to replace an adversely affected water source that has beneficial use.
39. The DEQ did not provide an analysis of possible degradation of groundwater quantity and quality.
40. The DEQ did not provide an analysis of the potential groundwater pollution from the operations of the gravel pit.

41. The DEQ did not provide analysis of impacts on human health and population, including the increase in truck traffic.
42. The DEQ did not provide cumulative effects analysis of the gravel pit operations or other on-going developments in the West End of Billings that will also contribute to the adverse impacts to groundwater.
43. The DEQ did not provide analysis of the growth-inducing or growth-inhabiting aspect of the gravel pit operations.
44. The DEQ did not explain the how the industrial activities, noise, air, visual and traffic pollution will increase as a result of the gravel pit operations.
45. The DEQ did not explain how the operations would impact the land, water, air or energy.
46. The DEQ did not include an adequate project description.
47. The DEQ did not include a description and analysis of reasonable alternatives to the proposed action.
48. The DEQ did not include a listing and appropriate evaluation of mitigation, stipulations and other controls enforceable by the agency.

FIRST CLAIM FOR RELIEF
(Violation of the Montana Environmental Policy Act)

49. The allegations in the foregoing paragraphs are re-alleged and incorporated herein by reference.
50. The Montana Environmental Policy Act (MEPA) is intended to implement the environmental imperatives of Article II, Section 3 and Article IX, Section 1 of the Montana Constitution. Mont. Code Ann. § 75-1-102.
51. MEPA requires state agencies to carefully scrutinize the potential environmental consequences of their actions. Mont. Code Ann. § 75-1-101, et seq.; A.R.M. 36.2.524(1).
52. 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.
53. "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).

54. 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).

55. DEQ's environmental assessment for the Golden West Opencut Mining Permit #2351 is insufficient. The EA is void of a project description and environmental impacts were not assessed in violation of the Montana Environmental Policy Act and its implementing regulations.

56. The significance of both direct and indirect project impacts identified within the EA were not assessed in violation of the Montana Environmental Policy Act and its implementing regulations. The lack of adequate assessment includes, but is not limited to, impacts caused by the operations on air, water, noise, traffic, wildlife, water quantity and quality including groundwater, impacts on existing and future residential neighborhoods in the West End area, and cumulative impacts for all of these resources.

57. The DEQ failed to take a hard look at the impacts to the human environment caused by the Golden West Pit and failed to adequately describe why the EA is an appropriate level of analysis.

58. DEQ's non-significance determination is arbitrary and capricious in violation of the Montana Environmental Policy Act.

REQUEST FOR RELIEF

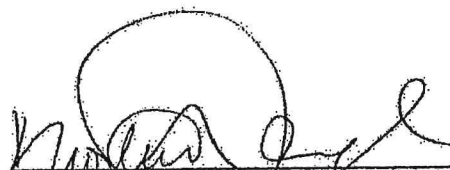
WLG Association prays for relief against Defendant DEQ as follows:

- A. For an order declaring void *ab initio* DEQ's issuance of the opencut mining permit #2351 for the Golden West Pit site and remanding the permit to the DEQ for reconsideration in light of its lawful mandates.
- B. For a determination and declaration that the issuance of the opencut mining permit #2351 is illegal and violates the Montana

Environmental Policy Act for its failure to take a hard look at impacts to the human environment, groundwater and cumulative impacts.

- C. For a determination and declaration that issuance of opencut mining permit #2351 is illegal and violates the Montana Environmental Policy act for its failure to sufficiently review the environmental impacts of the Golden West Pit.
- D. 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.
- E. For costs of suit.
- F. For such further relief as this Court deems equitable and just.

Dated this 7th day of October, 2018.


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