

**DEPARTMENT OF ENVIRONMENTAL QUALITY
LITIGATION REPORT
January 2021 - December 2021**

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. DEQ settled this case for \$357,280, or \$280 per car for the 1,276 cars that were affected in Montana.
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. The parties are proceeding under a scheduling order, with dispositive briefs due this spring.
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 required: \$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 the Department. Talen complied with the consent decree and the money judgment; therefore the Court terminated the consent decree and DEQ filed a Notice of Satisfaction of Money Judgement.
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. YELP paid the penalties and DEQ filed a Notice of Satisfaction of Money Judgment. The terms of the consent decree will be incorporated into the Title V permit at which point the case will be dismissed.
5. *MEIC v. DEQ and Northwestern Energy*, Case DV21-01307, (State District Court, Yellowstone County). This case challenges the adequacy of the Environmental Assessment (EA) issued with the MAQP for a 175-megawatt gas-fired power plant in Laurel. The first cause of action is brought as a Montana Environmental Policy Act (MEPA) challenge regarding various specific sections in the EA. §§ 75-1-101 through 75-1-324, MCA. The second cause of action is a facial and as-applied constitutional challenge to §75-1-201(2)(a), which essentially prevents DEQ from considering the effects of climate change in MEPA analysis. The AG's Office has notified DEQ that it will intervene to defend the constitutional challenge. DEQ and Northwestern

have filed Answers to the Complaint.

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. Mediation has been ongoing since March 2020 and the State anticipates another settlement proposal from Grace in early 2022.

2. *In re Lighthouse Resources, Inc. et al.*, Case No. 20-12056 (Bk Del.). This bankruptcy matter included Decker Coal Company, the permittee of the Decker Mine. DEQ worked with Delaware outside counsel to protect state permits and reclamation bonds and to get air quality fees (\$42,210) and MPDES fees (\$6,750) paid. These fees were paid in full on May 7, 2021.

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. On October 28, 2021, the District Court issued an Order on Petition that reversed the BER order and remanded the matter to DEQ to review the AM4 permit application consistent with the District Court's Order. Subsequent to the Order, several additional motions have been filed relating to the appropriate remedy and staying enforcement of the Order pending appeal. Petitioners have filed a Motion for Fees and Costs. Talen Montana, LLC, the operator of the Colstrip Steam Electric Station, has also sought to intervene in this matter.

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 MEPA and administrative rules adopted to implement MEPA. On July 21, 2021, Judge Eddy granted Water for Flathead's Motion for Summary Judgment and denied DEQ and DNRC's Motions for Summary Judgment. Judge Eddy found that DEQ did not reasonably respond to comments by EPA and UFWs on the draft permit and EA and that DEQ should have evaluated the impacts of full build out of the proposed facility because DNRC approved a much larger water appropriation than the MPDES Permit authorized. The Court determined DEQ should not have limited its analysis to the smaller volume reflected in MAWC's MPDES permit application. The MPDES permit was remanded to DEQ to correct deficiencies in its MEPA review.

Judge Eddy required further briefing on remedies (beyond remand) because Plaintiffs requested vacatur of both the MPDES permit and the DNRC water right. Judge Eddy found vacatur of the MPDES Permit to be warranted. Final judgment has not been entered in the case because the 12/29/2021 order on remedies did not address attorney fees and costs. DEQ is analyzing the decision and will determine whether to appeal and whether to move to stay vacatur of the MPDES Permit pending entry of final judgment and appeal. MEPA provides "[a]ttorney fees or costs may not be awarded to the prevailing party in an action alleging noncompliance or inadequate compliance with parts 1 through 3." 75-5-201(6)(f), MCA. Plaintiffs' requests for attorney fees and costs should be denied.

2. *Montana Rivers, Gallatin Wildlife Association & Cottonwood Environmental Law Center v. DEQ*, filed in the Eighteenth Judicial District, Gallatin County. The Plaintiffs claimed DEQ must supplement the 2007 EIS that was prepared to analyze environmental impacts associated with rulemaking to designate a segment of the Gallatin River as an outstanding resource water. The BER did not adopt a rule designating the Gallatin as an ORW, in part, because the petitioner decided not to proceed with the designation. The Plaintiffs assert DEQ is obligated to supplement its 2007 MEPA analysis to address new information or changed circumstances including the expansion of wastewater treatment at BSWSD and water quality impacts from pharmaceuticals and personal care products. Currently, Plaintiffs do not plan to bring a new petition for rulemaking to designate the Gallatin as an ORW and BER is not considering designation of the Gallatin as an ORW. DEQ's argued there was no state action that triggered further MEPA analysis (no pending rulemaking on the ORW designation and no pending discharge permits). The parties filed cross motions for summary judgment and oral

argument was held. On October 12, 2021, the District Court entered judgment denying Plaintiffs' motion for summary judgment and entering summary judgment in favor of DEQ finding DEQ is not required to supplement the 2007 ORW EIS and the Court declining to enjoin issuance of MPDES Permits and authorizations that may impact water quality in the segment of the Gallatin River that was proposed as an ORW. Plaintiffs filed a notice of appeal.

HARD ROCK 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 regarding 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 twofield seasons on private land owned by Lucky Minerals near Emigrant Peak in Park County. Park County alleged that DEQ did not comply with 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 Montana Supreme Court reversed the District Court ruling requiring DEQ to conduct supplemental review of water quality issues, additional analysis of alternatives, and possible impacts of potential future full-scale mining of federal lands. It affirmed the District Court ruling requiring DEQ to conduct supplementary review of the impacts of road improvements on wildlife in the area and mitigation plans for capturing expected artesian flows during drilling. Finally, the Montana Supreme Court affirmed the District Court's order vacating Lucky's current exploration license and finding § 75-1-201(6)(c) and (d), MCA, in violation of the Legislature's constitutional mandate to provide remedies adequate to prevent proscribed environmental harms under Article II, Section 3, and Article IX, Section 1, of the Montana Constitution.

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 District Court denied the Belks' motion to supplement the record and determined DEQ properly conducted the environmental review and issued the operating permit under MEPA and the MMRA, respectively. The Belks appealed. The appeal has been fully briefed and is waiting issuance of an opinion by the Montana Supreme Court.

3. *Montanore Minerals Corp., Troy 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). After receiving a favorable ruling on jurisdictional issues, DEQ filed an unopposed Motion to Dismiss, on which the Court has not yet ruled.

4. *Ksanka Elders Advisory Committee et al v. DEQ*, Case no. CDV 2021-1126 (State District Court, Lewis and Clark County). Several NGOs, the Fort Belknap Tribe, and CSKT sued DEQ for a writ of mandamus compelling DEQ to take action against Hecla and Phillip Baker for violation of § 82-4-360(1), MCA (the "bad actor" provision). Essentially, this was filed in response to DEQ's dismissal of the above action. DEQ filed a Motion to Dismiss in response to the Complaint, which is not yet fully briefed.

5. *Montana Trout Unlimited et al vs. DEQ and Tintina*, Case No. DV-20-10 (State District Court, Meargher County). Several NGOs appealed DEQ's issuance of a hard rock mining permit to Tintina for the Black Butte Copper Mine project. The causes of action include a permit appeal under the MMRA, specifically involving water quality and the construction of the cemented tailings facility, MEPA challenges, and an as-applied and facial challenge of § 82-4-303(34), MCA. Tintina intervened and the AG's office intervened to argue the constitutional issues. Plaintiffs, Tintina, and DEQ filed cross motions for summary judgment and held an oral argument before Judge Bidegary (who substituted for Judge Spaulding after he recused himself). The motions are currently pending before Judge Bidegaray with no decision yet.

6. *Fort Belknap Indian Community et al v. DEQ and Blue Arc, LLC*, Case No DV-2021-13 (State District Court, Phillips County). The Complaint in this case is filed, but Plaintiffs have not yet served DEQ. It is a declaratory judgment action asking the Court to set aside DEQ's EA and exploration license issued to Blue Arc for exploration on the Zortman mine site. Plaintiffs also ask the Court to declare that DEQ failed to engage in government-to-government consultation as required by §§ 2-15-142 and 75-1-201, MCA.

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 prohibiting 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, and the parties submitted proposed orders in January 2020. The summary judgment motions remain pending before the district court.

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. In November 2020, the Broadwater County District Court granted summary judgment to DEQ and Broadwater County. In April 2021, the District Court entered a final judgment ordering Defendants to removal all waste tires on their properties and to pay civil penalties and costs. The District Court also entered a permanent injunction against Defendants. Defendants appealed, and in December 2021 the parties entered into a settlement agreement to resolve the appeal. On December 8, 2021, the Montana Supreme Court dismissed the appeal.

4. *Yellowstone Disposal, LLC, v. DEQ*, Montana Supreme Court Case No. DA 21-0231. Yellowstone Disposal, LLC seeks a writ of mandamus compelling DEQ to issue a solid waste management system license for a proposed facility in Richland County. Yellowstone Disposal asserts DEQ failed to comply with statutory timelines in MEPA for completing an environmental review of the proposed facility and thus DEQ has a clear legal duty to issue a solid waste license to Yellowstone Disposal. The Lewis and Clark County District Court granted DEQ's Motion to Dismiss the Petition in April 2021, which Yellowstone Disposal appealed. The parties completed appellate briefing in November 2021.

SUBDIVISIONS/ENGINEERING

1. *Plaster v. Montana City Properties, Inc.*, No. DV-2017-40 (State District Court, Jefferson County) - DEQ was represented in this case by the Risk Management and Tort Defense Division. 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. This case was settled in August, 2021.

2. *Upper Flathead Neighborhood Association v. Montana Dep't of Env'tl. Quality*, No. BDV 2021-981 (State District Court, Lewis and Clark County) – In this case, Plaintiffs challenge DEQ's approval of a subdivision in Flathead County, alleging that DEQ violated Plaintiffs' constitutional rights by not providing adequate public participation and that DEQ erred in its conclusion that the proposed subdivision would have nonsignificant impacts to groundwater. DEQ's answer is due January 6, 2022.

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. *Upper Missouri Waterkeeper v. EPA*, Case No 20-CV-00027 (D. Mont.) (Waterkeeper II) – In February of 2020, EPA approved two Montana rule provisions that EPA had initially chosen not to act upon in 2015. These non-severability provisions were adopted by the Board of Environmental Review in 2014 to ensure that Montana's stringent numeric nutrient criteria would be made void, should general variances from the numeric nutrient criteria ever become unavailable. DEQ intervened in this litigation in June 2020, briefs were filed, and oral argument was held in September 2020. On October 30th, 2020, the Court consolidated this case with the previous district court case (now concluded at the 9th Circuit – reversal upholding EPA's approval of Montana's general variance in full) and ordered Montana to undertake rulemaking again. In its Consolidated Order the court deferred ruling on the merits of the case but commented that EPA's approval if Montana's non-severability provisions was likely unlawful. DEQ filed a Motion to Stay Rulemaking and this was granted in February 2021.

Because the appeal concerning the variance itself was decided in October 2021, it is likely the district court will move ahead soon on this case. Other than on-going legal work, it is not likely there would be any liability for the state related to this case.

3. *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 24th 2020. (Montana Supreme Court Appeal No. DA 19-0553).

4. *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.

5. *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, or "WRM") 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, and after the parties briefed the issue of liability for attorney fees, 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 attorneys' fees unless, upon appeal, the MT Supreme Court reversed the District Court's rulings.

DEQ and WECo appealed final judgment 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 and on November 19, 2019, the Montana Supreme Court denied MEIC's petition.

On remand, First Judicial District Court Judge Abbott granted a joint motion by DEQ and Westmoreland Rosebud Mining, LLC (WRM, formerly WECo) to stay the litigation due to pending renewal of the MPDES Permit at issue, MT0023965. The renewed Permit took effect on August 1, 2021. Judge Abbot ordered the Parties to either move to dismiss First Judicial District Court Cause No. CDV 2012-1075 or move for a status conference to determine future proceedings in the case. DEQ and WRM moved to dismiss the case with prejudice. MEIC did not oppose dismissal but maintained the matter should be dismissed without prejudice. On November 5, 2021, the District Court ordered dismissal for lack of jurisdiction as the case was moot upon the effective date of the renewed MPDES Permit.

6. *Copper Ridge Development Corporation and Reflections at Copper Ridge LLC v. Montana Board of Environmental Review and Montana Department of Environmental Quality*, filed in the Thirteenth Judicial District, Yellowstone County. Petitioners seek judicial review of the BER's Order Denying a Motion to Separate the Consolidated Contested Cases and the Board's Order Denying a Motion in Limine. Both of the BER Orders were issued in consolidated contested case proceedings pending before the BER (and its appointed Hearing Examiners) involving alleged violations of the Montana Water Quality Act by Copper Ridge and Reflections arising from unpermitted storm water discharges associated with construction activity at Copper Ridge and Reflections subdivisions in Billings, MT. BER issued a final administrative decision pursuant to §2-4-623, MCA, on May 18, 2021. This case should be dismissed because the BER dismissed the underlying administrative cases.

7. *Upper Missouri Waterkeeper and MEIC v. DEQ* (18th Judicial District Court Case No DV-21-756A). Upper Missouri Waterkeeper and MEIC seek review of the renewal of the Montana Ground Water Pollution Control System Discharge Permit (MGWPCS) issued to the Lazy J subdivision in Big Sky alleging violations of the Montana Water Quality Act, MEPA, and the Montana Constitution. The Parties are completing discovery and will brief motions for summary judgment.

8. *Gallatin Wildlife Association & Cottonwood Environmental Law Center v. DEQ*, 18th Judicial District, Gallatin Co., Case No. DV-21-833B – District court challenge to MPDES discharge permit issued to Yellowstone Club for discharges related to the use of reclaimed wastewater for snowmaking operations. Case is just beginning, and Yellowstone Club has intervened. There is potential exposure here for attorney’s fees and costs. Beyond MPDES Permit decision, case also involves a MEPA challenge and a constitutional challenge to the MEPA statute that does not allow attorney’s fees to be awarded. Attorney General’s Office was notified of the constitutional issue – DEQ has not received any feedback.

ADMINISTRATIVE ACTIONS

During this period, there were 12 administrative cases pending before the Board of Environmental Review regarding DEQ permitting decisions. Ten of these actions challenged DEQ's issuance of a permit, one challenged DEQ's refusal to issue a permit or a permit amendment, and one challenged permit conditions imposed by DEQ. This number does not include enforcement cases or challenges to BER (now DEQ) rulemakings.