DEPARTMENT OF ENVIRONMENTAL QUALITY PERMIT CHALLENGE AND REMEDIATION CASES ACTIVELY LITIGATED: September, 2011, to February, 2014

MAJOR FACILITY SITING CASES:

1. In the Matter of MATL—This was an administrative challenge, filed on August 5, 2011, with the Board of Environmental Review, to a decision by DEQ to grant an application filed by MATL to amend its certificate for its power line from Great Falls to the Canadian border. 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 filed this appeal. Pursuant to 75-20-223(1)(c), MATL on August 19, 2011, filed notice that it has elected to have the matter submitted directly to district court. In order to continue the case, Mr. McRae had to file a petition in district court by September 6, 2011. He did not do so.

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. On October 27, 2011, The Supreme Court reversed the district court and ordered the district court to dismiss the case. In its opinion, the Court stated that, at that stage in the MEPA process, DEQ did not have a clear legal duty to consult with Jefferson County more than it had already done. The Court further held that Jefferson County's challenge was premature and that a challenge to DEQ's MEPA compliance may only be made after issuance of the draft and final EIS and the issuance or denial of the certificate.

3. MEIC, Sierra Club, and National Wildlife Federation v. DEQ (State District Court, Rosebud County)--On October 4, 2012, the plaintiffs filed a petition challenging the Administrative Order on Consent entered into between PPL Montana and DEQ for assessment and cleanup of groundwater contaminated by the PPL Colstrip power plant. They petitioned the Court to declare that the order was not a valid enforcement action under MFSA and the MWQA. On February 20, 2013, the Court granted the Plaintiffs' motion to stay the proceeding until the related case (see #4 below) pending in Lewis and Clark County was resolved. The Court found that there were overlapping issues in the two related cases that created a potential risk of unnecessary and piecemeal litigation. Although the proceeding in the Lewis and Clark County has been resolved by dismissal of that action, the plaintiffs have not sought to reinitiate the litigation pending in Rosebud County.

4. In MEIC, Sierra Club, and the National Wildlife Federation v. DEQ (State District Court, Lewis and Clark County)--On October 26, 2012, the plaintiffs filed a Petition for a Writ of Mandamus and Complaint for Declaratory Relief requesting the Court to declare that the operation of the waste impoundments at the Colstrip power plant violates PPL Montana's Certificate of Compliance and the Montana Water Quality Act's pollution prohibition and nondegradation provisions by contaminating state waters. The plaintiffs further alleged that DEQ violated its obligations to enforce the terms of the Major Facility Siting Act certificate and the Water Quality Act. The Plaintiffs requested the Court to issue a writ of mandamus directing DEQ to enforce those provisions.
On May 31, 2013, the Court granted DEQ and PPL Montana's motions to dismiss the case. The Court determined that the plaintiffs were not seeking to compel DEQ to perform a clear legal duty and that the plaintiffs had a plain, speedy and adequate remedy in the ordinary course of law. On June 28, 2013, the plaintiffs filed a motion to amend the order, requesting the Court to strike language contained in the dismissal order. In substance, the plaintiffs were requesting the Court to clarify that it did not intend to rule on the legal sufficiency of the Administrative Order on Consent (see #3 above) and did not intend to address the merits of the action pending in the Rosebud County. (See #3 above.) On September 6, 2013, the Court declined to amend the dismissal order. The Court explained that it had determined the AOC was a valid exercise of DEQ's discretionary authority to enforce MFSA and the MWQA. The Court further stated that the issue of whether the AOC provided an adequate remedy to address the groundwater contamination at Colstrip was not before it. The plaintiffs did not appeal the decision.

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 EIS 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 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 claimed that those provisions require that the pit be at least partially backfilled as part of pit reclamation. 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 Reclamation Act and that Metal Mine Reclamation 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 did not appeal the decision.

2. Cabinet Resource Group v. DEQ; Revett Silver Company; and Genesis, Inc. (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 by Revett 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 was suspended pending completion of an EIS. DEQ later determined that an EIS was necessary. In June of 2012, the DEQ issued the final EIS and approved the amendments to the reclamation plan. The parties then stipulated to dismissal of the action, and the Court dismissed it on October 12, 2012.

3. JTL Group dba Knife River v. DEQ, Missoula County (State District Court, Lewis and Clark County)—On June 17, 2010, JTL 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 filed a counterclaim in which it contends that JTL had mined outside its permit boundary and seeking cessation of the operation and payment of a penalty. JTL then stipulated that it will no longer mine gravel from the pit. The parties filed cross motions for summary judgment that were denied by the Court in an order dated June 26, 2013. The parties are attempting to settle the matter.

4. MEIC et al v. Stone-Manning (U.S. 9th Circuit Court of Appeals). On April 17, 2012, MEIC filed suit against DEQ in the U.S. District Court for Montana under the citizen suit provision of the Surface Mining Control and Reclamation Act, which is the federal act requiring coal mine reclamation. DEQ's strip mine reclamation program has been approved under the federal act, and DEQ regulates coal mining in Montana in lieu of federal regulation. The plaintiffs alleged that DEQ has engaged in a pattern and practice of approving coal mine permits without appropriately determining that the proposed mine plan was designed to prevent damage to the hydrologic balance outside the permit area

for eleven permits approved since 1995 and petitioned the Court to enjoin issuance of new coal mine operating permits. Opper (predecessor to Stone-Manning) filed motions to dismiss the lawsuit, arguing that it violated the Eleventh Amendment prohibition against suits against states in federal court. In an order dated January 22, 2013, Judge Christiansen issued an order dismissing the lawsuit on Eleventh Amendment grounds and because MEIC's claims against the state were not ripe for review. MEIC appealed the matter to the 9th Circuit. The matter has been fully briefed and the parties are waiting for a scheduling order for oral argument.

SUPERFUND/HAZARDOUS WASTE CASES

1. 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. The case was submitted to the Court for decision on cross-motions for summary motion. On December 19, 2011, the Court ruled for DEQ, finding that BNSF was required to implement the cleanup selected by DEQ in the record of decision. The Court found that DEQ had issued the decision in accordance with the law, was not arbitrary and capricious by not incorporating BNSF comments into the decision, and did not violate MAPA by not engaging in rulemaking when establishing site-specific cleanup levels and other cleanup requirements. The decision was not appealed.

2. 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.

3. Grimes v. Sieben Ranch Co., DEQ, Stimson Lumber, and Geographic Investments Group (State District Court, Lewis and Clark County)—This case is filed in on November 9, 2010. The Grimes are the owners of land near the site of the waste repository for mine tailings from the Mike Horse Mine and other areas of the Upper Blackfoot Mining Complex (which is being implemented by DEQ). The Grimes' claim against DEQ alleges that the decision of the United States Forest Service selecting certain property near Lincoln as a repository location has so adversely affected their property value that it constitutes a "taking" of their property. DEQ has filed an answer to the Grimes' complaint for damages, which will move forward once the Court rules on outstanding preliminary motions.

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. The number of sites influences the amount of compensation for cleanup that the Petroleum Tank Release Compensation Board will contribute. 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. On June 21, 2013, DEQ was dismissed from the case pursuant to stipulation of DEQ and Cascade County. The case is now proceeding against the Petroleum Tank Release Compensation Board.

WATER QUALITY CASES

1. Clark Fork Coalition, Earthworks, Trout Unlimited, and Rock Creek Alliance v. DEQ, Revett Silver Company, and RC Resources (State District Court, Lewis and Clark County)—On June 8, 2008, plaintiffs filed this suit 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 appealed the decision to the Montana Supreme Court. On October 29, 2012, in a 4-2 decision, the Supreme Court upheld the District Court.

2. Gateway Village, LLC v. DEQ and Gallatin Gateway County Water and Sewer District (State District Court, Gallatin County)—This complaint was filed on September 27, 2013. The plaintiff is challenging DEQ's issuance of a groundwater permit to the Gallatin Gateway County Water and Sewer District. The plaintiff is a land developer with land adjacent to the property served by the District. The complaint alleges that DEQ violated the nondegradation provisions of the Water Quality Act; authorized trespass of wastewater onto the plaintiff's land; violated Gateway Village's right to a clean and healthful environment; issued clearly erroneous findings in issuing the permit; and violated unspecified water quality rules. On November 15, 2013, DEQ filed a motion and supporting brief to dismiss the case or, in the alternative, for summary judgment. On the same day, the District filed a motion to dismiss and incorporated DEQ's brief into it motion. The parties are awaiting scheduling of oral argument on the motions.

ADMINISTRATIVE CASES:

During this period, there were pending before the Board of Environmental Review 17 administrative cases challenging DEQ permitting actions. Eight of these actions challenged DEQ's issuance of a permit, two challenged DEQ's refusal to issue a permit or permit amendment, one challenged DEQ's revocation of a permit, and six challenged permit conditions imposed by DEQ.