



HJ18: PROGRESS OF FEDERAL REMEDiation AT SMURFIT- STONE MILL SITE

FINAL REPORT TO THE 69TH
MONTANA LEGISLATURE

Environmental Quality Council

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Sept. 18, 2024



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This report is a summary of the work of the Environmental Quality

Council, specific to the 2023-2024 study as outlined in the Environmental Quality Council's 2023-24 work plan and House Joint Resolution 18 (2023). Members received additional information and public testimony on the subject, and this report is an effort to highlight key information and the processes followed by the Environmental Quality Council in reaching its conclusions. To review additional information, including audio minutes, and exhibits, visit the Environmental Quality Council website: www.leg.mt.gov/eqc.

HJ18: PROGRESS AT FEDERAL REMEDIATION OF SMURFIT-STONE MILL SITE

SUMMARY

Hazardous substances were used and produced at the Smurfit-Stone mill site, which is located southwest of Frenchtown and lies next to the Clark Fork River. Mill infrastructure—such as the pulp mill, holding ponds surrounded by berms that formerly held containing sludge and wastewater, an on-site dump, and outfall pipes jutting into the river—are part of the 5-square mile site. The Environmental Quality Council attempted to clarify aspects of the U.S. Environmental Protection Agency’s Superfund cleanup process.

HISTORY AND BACKGROUND

The industrial history of the Smurfit-Stone mill site begins in 1957. First opened under the ownership of the Waldorf Paper Products Co. of St. Paul, Minn., the site produced linerboard (a thin cardboard) and pulp products (raw materials for tissues, books, baby wipes, et al) for nearly 53 years, before Smurfit Stone Container Co. (of Missouri and Chicago) declared bankruptcy and closed the site.

Remediation of the site began soon after the facility ceased operations in 2010. Former mill workers spoke of burying unlabeled drums and dumping “black liquor”¹ down the drain.² Before the Environmental Protection Agency began its cleanup planning, various new uses for the site were promoted, such as converting the site to a biomass power plant, a manufacturer of wind mill parts and wood pellets, or selling off the mill for scrap.³



¹ Black liquor is a pulping byproduct containing pulp residues and inorganic chemicals.

² Written testimony of Bob Culp and Chuck Frey to EQC, Nov. 13, 2023.

³ Testimony of Jeri Delys, Frenchtown Smurfit Stone Community Advisory Group to EQC, Nov. 13, 2023.

Redevelopment of the site for industry, businesses or homes may be in the site's future, but for now it is one of 19 Superfund sites in Montana.⁴ Site remediation is expected to last into the 2030s.

In 2023, the Montana Legislature passed House Joint Resolution 18 (Study remediation of Smurfit-Stone mill site). The resolution states that an advisory group believes the site risk analysis was inadequate and sampling should be increased. The resolution called for a "full cleanup of the waste repositories, berms, and site could return the mill site to full commercial use."⁵

Later in 2023, the Legislative Council assigned the study to the Environmental Quality Council to:

- Examine past and ongoing investigations into the extent of contamination, assessment of risks to human health and environment, and proposed cleanup options
- Examine the creation, implementation, and operations of the Libby Asbestos Superfund Oversight Committee as a possible model for state involvement at the Smurfit Stone mill site
- Offer recommendations to ensure full cleanup of the mill site, mitigation of risks to downstream communities, determination of impacts to the state fishery, restoration of the floodplains, and rehabilitation of the site to drive the Frenchtown community economy.

CLEANUP PROCESS

The cleanup is following the EPA's Superfund process (see Figure 1).⁶ During the HJ18 study, the agency was conducting remedial investigation to identify "what and where" the risks lie.⁷ This work is done in consultation with the Montana

Department of
Environmental
Quality (DEQ)

Years of testing
have determined
that past

Figure 1. Simplified federal Superfund remediation process



(EPA, 2018)

contamination at the site poses some level of risk across the operable units,⁸ including most notably that:

- Groundwater contamination exists in the shallow aquifer, and groundwater generally flows toward the Clark Fork River
- Soil within the former wastewater ponds pose some risk to future residents

⁴ The site's status on the EPA's National Priorities List is pending.

⁵ <https://bills.legmt.gov/#/bill/20231/LC4160>

⁶ More specifically named the Comprehensive Environmental Response, Compensation, and Liability Act of 1980, 42 U.S.C. 9601 et seq.

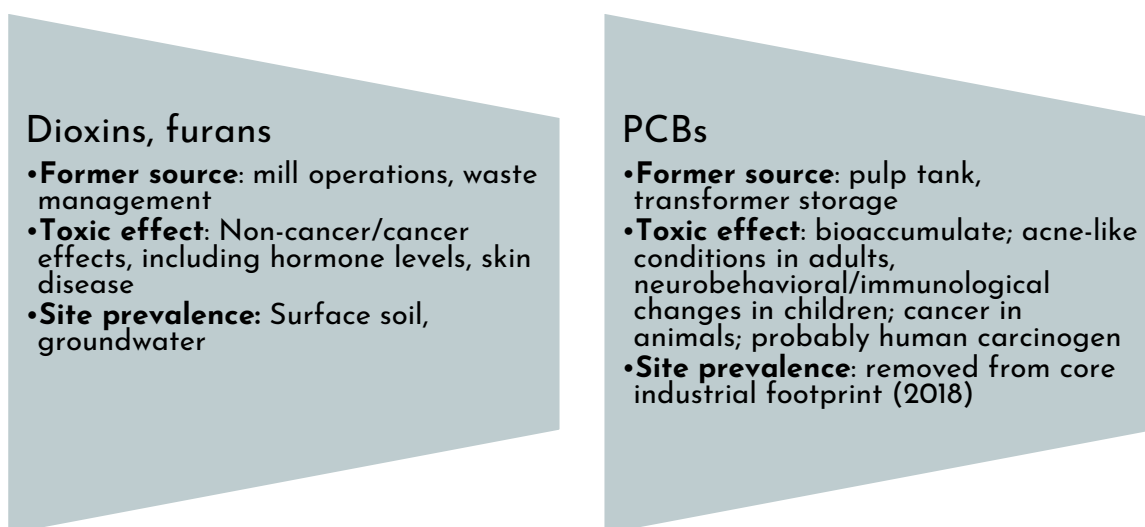
⁷ EPA web site for mill site, <https://cumulis.epa.gov/supercpad/cursites/csitinfo.cfm?id=0802850>

⁸ Testimony of Allie Archer, remedial project manager (EPA) to EQC, Nov. 13, 2023.

- Some soils within the industrial footprint poses possible risks to future residents

A 2011 preliminary assessment and site investigation discovered a range of potential contaminants, such as arsenic, manganese, and chromium. Thousands of soil and water samples tested for heavy metals, dioxins, furans, and polychlorinated biphenyls (PCBs), which pose the biggest health threat to humans, plants, and wildlife (see Figure 2).⁹

Figure 2. Sources, effects, prevalence of site contaminants.



Experts use the sampling and monitoring data of groundwater, soil, surface water, air, and plants and animals (macroinvertebrates, fish, mice) to create health risk assessments. These assessments will inform the final cleanup plan. (A small amount of PCB-contaminated soil was removed in 2017.)

As shown in figure 3, the site has been organized into three operable units (OUs):

- OU1: agricultural lands (1,200 acres)
- OU2: core industrial footprint, including the mill, recycling plant, wood chipping area, hog fuel area, and equipment storage areas (255 acres)
- OU3: wastewater treatment facilities (including various ponds and basins; 1,700 acres)

The site is proposed for the federal National Priorities List; this list is based on a hazard ranking system and helps guide the agency in future investigation and remediation.¹⁰ Superfund laws authorizes two responses: short-term removal and long-term remedial response actions.

⁹ Various risk assessments found listed on “site documents & data” page at <https://cumulis.epa.gov/supercpad/SiteProfiles/index.cfm?fuseaction=second.docdata&id=0802850>

¹⁰ Montana has 18 NPL sites. <https://www.epa.gov/superfund/national-priorities-list-npl-sites-state#MT>

COMMUNITY CONCERNS

In the 14 years since the closure of the mill, community members have actively participated in the site assessment and cleanup plan development. Some expressed concerns to the EQC on how risk sampling is done, aging outfall pipes, an extensive berm system build around wastewater ponds, toxics in fish, and water rights.¹¹

SAMPLING

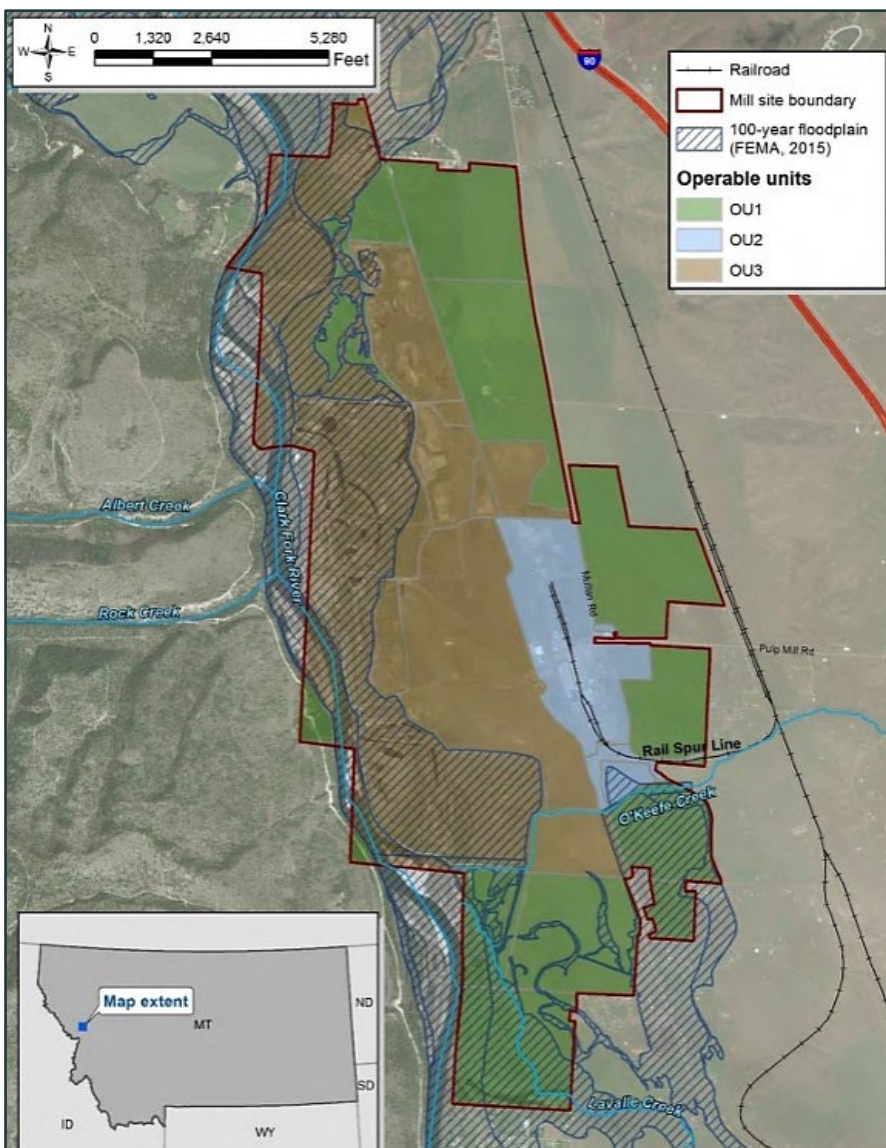
The EPA, its contractors and other agencies have sampled soil, groundwater, sediment, surface water, and fish for at least 10 years.¹² But some say not enough sampling has been conducted—nor in the correct places. An incomplete cleanup could limit future uses and opportunities at the site, they say.

Specifically, Missoula County Water Quality District said to-date sampling was more appropriate for a much-smaller site.¹³ And proposed ongoing groundwater testing did not consider seasonal variations, such as Spring runoff compared to the state's driest months, August and September.¹⁴

POND BERMS

The mill site wastewater treatment system included clarifier and settling ponds, aeration basins, polishing ponds, treated water holding ponds, and infiltration

Figure 3. Map of Smurfit-Stone mill site (Montana Natural Resource Damage Program, 2021)



¹¹ Testimony of Elena Evans, division manager, Missoula Valley Water Quality District (Missoula Co.) to EQC, Nov. 13, 2023.

¹² Testimony of Allie Archer, remedial project manager (EPA) to EQC, Nov. 13, 2023.

¹³ Testimony of Elena Evans, division manager, Missoula Valley Water Quality District (Missoula Co.) to EQC, Nov. 13, 2023.

¹⁴ EPA did agree in Dec. 2023 to additional testing. See page 7.

basins. All of these are proximate to the Clark Fork River—some separated from the river by a rock and earthen berm.

Although the Missoula Conservation District approved 10 maintenance permits to allow repair or armoring of the berm system from 1974-2007,¹⁵ the berms may be problematic:

- The berms effectively cordon off parts of the river plain that flowed in the 1950s—and an active river like the Clark Fork is continually changing course. Since 2017, the river has migrated eastward against Pond No. 2, forcing more water into a berm that has been bolstered by additional riprap, barbs, and other repairs five times in the past five decades
- The river is guarded on the west by Cambrian Dolomite, forcing high-flow velocities into the river plain—and into the berms, including a 2018 boil or “volcano” that threatened to breach a settling pond
- The berms may be trespassing within a state-owned riverbed

Missoula Conservation District supervisors do not want the final cleanup plan to include “maintenance and upkeep of the berm in perpetuity.”¹⁶

OUTFALL PIPES

The Smurfit-Stone mill site includes various outfall pipes, directing waste and wastewater from the industrial footprint and the ponds into the Clark Fork River. At least six outfall pipes extend from the mill site into the river.¹⁷ These pipes range from one- to 3-feet in diameter. Certain permits or authorizations are necessary for such incursions into waterways—although not all of today’s laws were in effect during the lifetime of the mill operation.

For example, federal law requires a permit for pollution outflows into the nation’s lakes or rivers.¹⁸ Montana agencies issued three pollution discharge permits for the mill, the first in 1995 and the last in 2014.¹⁹ (Treated wastewater not released into the river was placed in infiltration ponds or galleries.)

But while the Department of Natural Resources and Conservation issues a land use license or lease for use of (or trespass onto) state land, no licenses or leases were issued related to mill.²⁰ It is also unclear if the mill secured or needed a federal “dredge and fill” permit, county floodplain permit, or a permit under the Montana Stream Protection Act.

Although no longer used or permitted to discharge waste or pollutants, many groups seek removal of these pipes.

¹⁵ Testimony of Tim Hall, chairman, Missoula Conservation District to EQC, Nov. 13, 2023. See also Appendix L.

¹⁶ Testimony of Tim Hall, chairman, Missoula Conservation District to EQC, Nov. 13, 2023.

¹⁷ Memo from Ryan Weiss, deputy trust lands administrator (DNRC) to EQC, Dec. 8, 2023. Appendices B, C.

¹⁸ Clean Water Act, 33 U.S.C. 1251 et seq.

¹⁹ Memo from Montana Natural Resources Damage Program to DNRC, March 1, 2018.

²⁰ See p. 8 for further discussion of trespass

FISH HEALTH

Due to the bioaccumulation of PCBs, scientists collected fish for evidence of toxicity soon after the mill's closure. In 2010, FWP issued fish consumption advisories for rainbow trout and northern pike downstream of the mill.

Studies have continued, and scientists later collected rainbow trout and northern pike to analyze fillet and carcass samples for dioxin, furan, and PCBs. These examinations showed that these toxins did not produce unacceptable risks to fish.²¹

However, human consumption of these fish continues to be more problematic. In 2019, three state agencies²² issued guidance against consuming fish in the Clark Fork River. The agencies updated the guidance in 2020, recommending avoiding consumption of all species of fish from the Clark Fork River at the Bitterroot River to the confluence of the Flathead River, a 148-mile reach.²³ Testing at the time indicated high levels of contaminants in the fish tissue, but noted "the source of all the contaminants found in the fish has not been attributed."

FWP biologists recently conducted a longer study of the Clark Fork River, extending the scope up the river to Silver Bow Creek near Butte, and downstream to Cabinet Gorge Reservoir near the Idaho border. Initial water quality study results found toxic compounds prevalent throughout the Clark Fork River. Sources may include the paper industry, like the Smurfit Stone mill, but also natural sources like forest fires.²⁴ Fish tissue sampling results may result in changes to the fish consumption advisory.

Community groups said the fish consumption advisory was impacting the local economy.²⁵

WATER RIGHTS

Forty-six water rights are associated with the core industrial footprint of the Smurfit-Stone mill site. In 2022, the DNRC preliminarily approved a change of use for 17 of these water rights, allowing a redevelopment company, MLH Montana, LLC, to change mostly industrial water rights to marketing water rights, which would essentially allow sale of the water.

The Missoula Valley Water Quality District objected to the change due to potential water quality issues. State law allows a water right to be changed if it does not adversely affect the water quality of other appropriators.

Ultimately, the redeveloper and the water quality district agreed²⁶ to:

- report the sale of water rights

²¹ Environmental Protection Agency, *Final Baseline Ecological Risk Assessment* (2021), 60.

²² Departments of fish, wildlife and parks; environmental quality; and public health and human services.

²³ Department of Fish, Wildlife and Parks, *Fish consumption guidance updated for portions of Clark Fork, Bitterroot and Blackfoot Rivers in western Montana* (2020).

²⁴ Department of Fish, Wildlife and Parks, *Study shows impact of pollution on water quality of Clark Fork River* (2024). Appendix D.

²⁵ Testimony of Elena Evans, division manager, Missoula Valley Water Quality District (Missoula Co.) to EQC, Nov. 13, 2023.

²⁶ Stipulated settlement agreement, *In the Matter of Change Application Nos. 76M-30150596 and 76M-30151160 by MLH Montana LLC* (2023). Appendix E.

- not market 20 percent of the water rights' volume until the EPA issues a cleanup plan. This plan may or may not include a requirement to "treat and pump" water on the site
- test for furans and dioxins any of their groundwater wells within one miles of the mill site perimeter and comply with water quality standards, if necessary

COUNCIL INPUT

ADDITIONAL SAMPLING

EPA's approach to site investigation and characterization is to "chase contamination."²⁷ For example, the agency does discrete and compound sampling of soil to mimic a person traveling through the site. The site's groundwater monitoring network of 64 wells shows contamination in the shallow aquifer. Future uses of land at the pond site and the industrial footprint show varying levels of future risk (see Figure 4).

The EPA proposed biannual groundwater sampling during high- and low-groundwater conditions to capture highest concentrations of contaminants.²⁸ Groundwater modelling at the site does not show a strong relationship between groundwater levels and contamination or risk levels, according to agency consultants.²⁹

However, in response to complaints from site neighbors, former employees, and local officials, the EPA agreed to quarterly sampling "in the spirit of moving the site forward."³⁰ Seasonal testing may capture contaminants left by groundwater flowing through the site.³¹

In addition, the agency agreed to drill 12 more groundwater monitoring wells. The pond berms will be assessed as part of a climate vulnerability assessment.³²

Under federal Superfund laws, the EPA negotiates with those responsible for contamination of a site to clean up (or pay to clean up). These "potentially responsible parties" may be people, businesses, or government agencies. They may or may not have owned a site. And they may have inherited cleanup responsibility when purchasing a site—and its liabilities. Bankrupt entities remain responsible for environmental liabilities.

Potentially responsible parties	
International Paper Co.	Memphis, Tenn.
WestRock CP, LLC	Sandy Springs, Ga.
M2Green Redevelopment, LLC	Alton, Ill.
BNSF Railway Co.	Ft. Worth, Tex.
Montana Rail Link	Missoula

²⁷ Testimony of Allie Archer, remedial project manager (EPA) to EQC, Nov. 13, 2023.

²⁸ Readout from Smurfit-Stone Mill Technical Working Group meeting (2023). Appendix F.

²⁹ Ibid.

³⁰ Ibid.

³¹ Ibid.

³² Testimony of Allie Archer, remedial project manager (EPA) to EQC, Nov. 13, 2023.

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In response to questions, EPA officials said they do not believe the potentially responsible parties are driving the testing and science behind the remediation work, as the agency must engage and negotiate with those parties to fund much of the work.³³

The EPA estimated a record of decision for a proposed cleanup plan by 2028. It is unclear if additional testing may delay the plan and eventual remediation of the site.

Figure 4. Summary of assessed risk by Smurfit-Stone operable unit

Waste treatment areas (ponds) (OU3)		Agricultural lands (OU1)	
metals, dioxins/furans in soil	certain metals in groundwater		
		select metals (low risk to ecological receptors) in soil	Mn (in 2 groundwater wells)
Mn (fish) in surface water/sediment	dioxins/furans, PCBs from eating fish	Core industrial (OU2) (chromium) in soil	certain metals in groundwater

RIVERBED TRESPASS

As discussed in previous pages, mill operators installed outfall pipes, pond berms, and riprap to maintain their waste and runoff system. These structures extend either into the river or into the historic flood plain of the river.

During the study, the council advocated for a cleanup that “upholds the state’s interest and rectifies the trespass on state trust lands.”³⁴ The council asked the DNRC to:

- Determine extend of trespass of berms and riprap
- Advise how to mitigate trespass at Smurfit Stone site during Superfund process

³³ Testimony of Allie Archer, remedial project manager (EPA) to EQC, Nov. 13, 2023.

³⁴ Letter from EQC to DNRC, Feb. 14, 2024. Appendix G.

- Suggest legal strategies to remove all outfall pipes, berms, riprap and other unauthorized trespasses from state lands
- Provide guidance on how to prevent similar instances of trespass
- Work with DEQ to ensure mitigation of trespass is standard procedure at state and federal Superfund sites

In response, the department determined that while the outfall pipes, berms, and riprap at the Smurfit Stone site may “occur on or beneath the riverbed,” agency does not consider those to be in trespass.³⁵ The state is unable to show ownership of the riverbed, and thus cannot enforce trespass. Because the riverbed adjacent to the Smurfit Stone mill site has not been adjudicated as “navigable,” the state’s regulatory leverage is essentially diminished. And actions to assert state ownership, such as by quiet title action, would likely be snarled in the courts for years, like the “riverbed rent” case over hydroelectric dams on the Missouri, Clark Fork, and Madison rivers.

Absent state ability to enforce trespass, it appears that removal the outfall pipes, berms, and rip rap is more contingent upon negotiations primarily with the responsible parties. The DNRC may need to authorize other parties to remove the structures from the riverbed.³⁶

OTHER SUPERFUND SITES

During the 2023-24 interim, the council offered a mix of advice, support, and “lessons learned” at federal Superfund sites in Columbia Falls, Butte, and Libby.

The three sites are at different stages of the federal Superfund process: the Columbia Falls Aluminum Co. plant does not yet have a cleanup plan; cleanup at Libby began in 2000 with much of the work completed; and the extensive Silver Bow Creek/Butte area cleanup began in the 1980s, covering 7 separate operating units and 26 miles of creek bed.

At the request of Columbia Falls-area residents, the council requested the EPA pause its decision on a final cleanup plan, owing to concerns over the agency’s proposal to cap—rather than remove—a dumping site containing cyanide, flouride, and polycyclic aromatic hydrocarbons.³⁷ The council also lent its support for a federal technical grant for the Coalition for a Clean CFAC. The EPA responded by agreeing to additional opportunities for information-sharing³⁸, and promised aid to the coalition.³⁹

The council also supported an effort by a Butte mining company to further test the feasibility of filtering out rare earth elements (REEs) and critical minerals from water pooling in the Berkeley Pit.⁴⁰ Preliminary tests by Montana Resources Inc. indicate high levels of REEs and critical minerals, especially zinc, gadolinium, dysprosium, and erbium. Recovery of these and others in a produced rare earth oxide compound may reduce current reliance on

³⁵ Memo from Ryan Weiss, deputy trust lands administrator (DNRC) to EQC, July 15, 2024. Appendix H.

³⁶ Testimony of Ryan Weiss, deputy trust lands administrator (DNRC) to EQC, Jan. 18, 2024.

³⁷ Letter from EQC to EPA, April 10, 2024. Appendix I.

³⁸ Letter from Kathleen Becker, Region 8 administrator (EPA) to EQC, April 23, 2024. Appendix J.

³⁹ Email from Sisay Ashenafi, Regional Technical Assistance Grant coordinator (EPA) to Legislative Environmental Policy Office, June 17, 2024.

⁴⁰ Letters from EQC to Montana Congressional delegation, April 10, 2024. Appendix K.

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foreign countries, such as China, for the elements necessary for uses ranging from electric cars to special forces gear. The company is attempting to get a U.S. Department of Defense grant to continue their work.

At the time of writing this report, the council was scheduled to visit an operable unit at the Libby Asbestos Site, and to hear from the Libby Asbestos Superfund Oversight Committee.⁴¹ The oversight committee was set up in 2017 to primarily monitor activities related to the Libby asbestos Superfund site. The oversight committee also provides recommendations to government agencies, including for a cleanup trust fund and operation maintenance account. The oversight committee may serve as a model for future legislative involvement at the Smurfit-Stone mill site.

RECOMMENDATIONS AND LEGISLATION

At the time of drafting this report, the council had not offered recommendations or potential legislation related to HJ18.

⁴¹ Section 75-10-1601, MCA

APPENDIX A: ENVIRONMENTAL QUALITY COUNCIL MEMBERS

Before the close of each legislative session, House and Senate leadership appoint lawmakers to interim committees. The members of the Environmental Quality Council, like most other interim committees, serve one 20-month term. Members who are reelected to the Legislature, subject to overall term limits and if appointed, may serve again on an interim committee. This information is included in order to comply with 2-15-155, MCA.

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MEMORANDUM

To: Ryan Weiss, Deputy Trust Lands Administrator, Forestry and Trust Lands Division, MT-DNRC

From: Teresa Kinley, Geologist/Hydrologist, Minerals Management Bureau, FTLD, MT-DNRC, and
Andrea Stanley, Hydrologist/Soil Scientist, SWLO, MT-DNRC

RE: Updates on Outfall Pipes in/near Clark Fork at Former Smurfit-Stone/Frenchtown Mill Superfund Site, Location: Sections 14, 23, (24, and 11) of T14N, R21W, Missoula County, Montana

Summary

This memo was brought on by an inquiry from Missoula County on State of Montana Department of Natural Resources & Conservation (MT-DNRC, or Department) interest/purview in the reclamation planning at the Smurfit-Stone/Frenchtown Mill Superfund Site, specifically, the outfall infrastructure and berms located near the right bank of the Clark Fork. DNRC Trust Lands Staff have made two visits to the site (November 2019 and November 2023) to observe the location of infrastructure (primarily outfall pipes) between the low-water marks of the Clark Fork. Some outfall infrastructure is located below the low-water mark as is the bank of the river which may or may not be part of the constructed berm. Outfalls 2 and 3, and possibly Outfall 1 are sites of interest. Communication with parties about potential options to fund and contract the removal and reclamation of outfalls/pipe and related material on State Trust Land and involvement with the EPA superfund process will be important in moving forward.

Introduction

Based on historic evidence of use in commerce, the State of Montana considers this segment of the Clark Fork of the Columbia River to be a navigable waterway. The State of Montana holds ownership of the land and minerals below navigable rivers, streams, and related acreage as established in the Equal Footing Doctrine, Montana statutes, and case law. The MT-DNRC, Forestry and Trust Lands Division administers these lands on behalf of the State.

Montana Code Annotated (MCA) 70-16-201 provides for State ownership from low water mark to the low water mark on navigable water bodies." MCA 70-1-202 provides for State ownership of all land below the water of navigable lakes or streams." According to Administrative Rules of Montana [ARM 36.25.1101(1)]. "Bed" means an area on or above state-owned land between the low-water marks of a navigable river channel. "Low-water mark" means the location of the water line of a navigable river at the lowest tenth percentile of historic annual flow as measured by the nearest upstream hydrograph station [ARM 36.25.1101(12)].

The Department considers navigable waterways to be those (waterways or segments of waterways) for which it has historical evidence of use in commerce. The Department believes that based on available evidence and case law, these waterways would be judicially determined as navigable for title purposes. MT-DNRC has not located any leases or licenses or similar documents from MT-Dept of State Lands, or MT-DNRC, (as landowner) that provided for emplacement of pipe below the low water flow discharge in the above noted areas that also contain active channel of the Clark Fork of the Columbia.

November 13, 2019 Site Visit

In the afternoon on November 13, 2019, MT-DNRC staff met with Allie Archer, EPA Remedial Project Manager for the Smurfit-Stone/Frenchtown Mill Superfund Site to field-verify and assess the footprint existing outfalls have with State Trust Lands. MT-DNRC staff present included: Andrea Stanley, Hydrologist, SWLO and Larry Schock, Civil Engineering Specialist, WRD MRO. Brian Bartkowiak, Environmental Science Specialist, Natural Resource Damage Program, DOJ, also attended.

To estimate the location of the low-water mark relative to infrastructure observed November 13th, we calculated the lowest tenth percentile of historic annual flow (Q_{LOW}) to be 2,197 cubic-feet per second (cfs) at USGS 12353000 "Clark Fork below Missoula MT," which is located approximately 8.5 miles upstream of the Smurfit-Stone/Frenchtown Mill Superfund Site. In the afternoon on November 13th, the provisional river discharge at the USGS gage is 2,970 cfs, or approximately 770 cfs greater than the Q_{LOW} . At the USGS gage station location this change in discharge results in a 0.47-foot change in river stage. This change in stage may not be equivalent at the river geometries at the Smurfit-Stone /Frenchtown Mill Superfund Site, but are likely similar; therefore, we assumed the "low-water mark" at the observed outfall locations listed below is 0.5 feet below the water surface elevation observed on November 13th.

1. No outfall infrastructure located below the low-water mark was visually observed [as defined in ARM 36.25.1101(12)] at or near the structures located at "Outfall 1" (46.9582, -114.2193; Section 23, T14N R21W). Other structures are located beyond (and upslope) of the low-water mark, including riprap armoring of a constructed berm. The photo below shows the condition of the river bank at the Outfall 1 location.



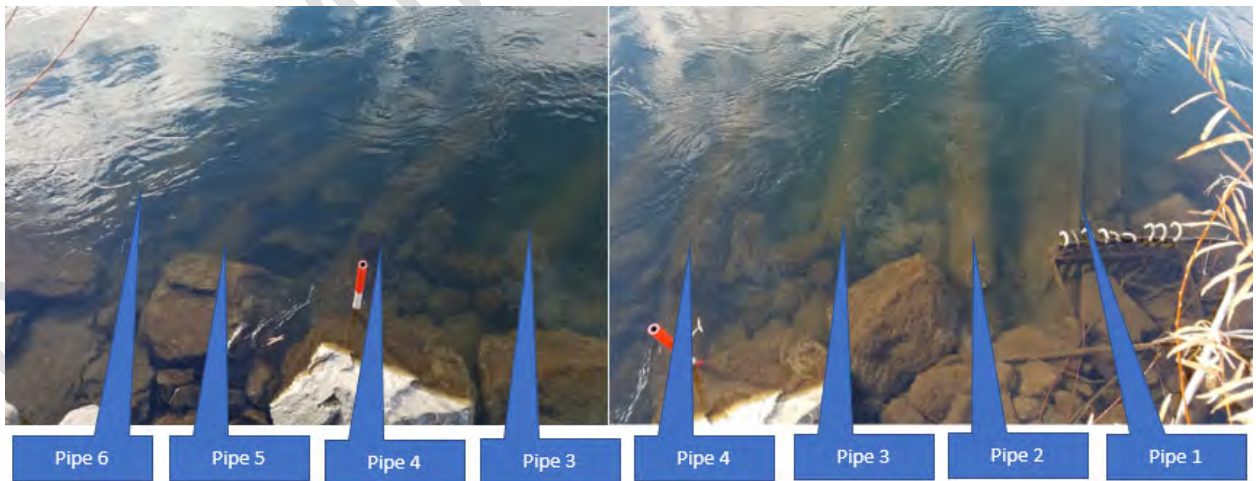
2. At "Outfall 2" (46.9602, -114.2199; Section 23, T14N, R21W) a single three-foot diameter steel pipe extends beyond a berm located on the right bank of the Clark Fork and below the low-water mark. On November 13, we observed the pipe to extend at least 30 feet onto the river bed below the water surface elevation.

Aerial imagery of the site from July 22, 2013 (see below), indicates the pipe extending approximately 40 feet beyond the wetted perimeter of the river. The river discharge at the upstream USGS on that day of the aerial image varied between 1,980 and 2,050 cfs, well below the Q_{LOW} . Therefore, based on this imagery and the correlated river discharge for July 22, 2013,

we assume the pipe extends at least 40 feet onto the river bed beyond the low-water mark.



3. At “Outfall 3” (46.9771, -114.2271, Section 14, T14N, R21W), see below, six pipes extend beyond a berm located on the right bank of the Clark Fork and extend onto the riverbed beyond the low-water mark. Five of the pipes are approximately 1-foot diameter and the sixth pipe has a three-foot approximate diameter; all six extend at least five feet (likely farther) beyond the low-water mark. Two photos taken November 13, 2019, below, show the view of the pipes from the right bank of the Clark Fork.



4. A fourth outfall, “Outfall 4” (46.9900, -114.2250, Section 11, T14N, R21W) is located off a slough adjacent to the Clark Fork and would not encroach on the riverbed.

During the November 2019 field meeting, Allie Archer explained more of the current status of the Superfund Site and Brian Bartkowiak discussed the Natural Resource Damage Program (NRDP) damage assessment of the site. Here are some of the key points:

- In 2019, the Smurfit-Stone/Frenchtown Mill Superfund Site was involved in the Remedial Investigation and Risk Assessment phase of the Superfund remedial process. This process consisted mainly of understanding the contamination and its migration within the beyond the site and understanding the risks. This information would be used in subsequent phases which would include addressing the identified risks through remediation. The Remedial Investigation and Risk Assessment phase was not anticipated for completion until 2021, but is now ongoing. In 2019, a cleanup plan was not likely until at least 2023, and now has been extended for several more years. Updated info is posted by the EPA here: <https://cumulis.epa.gov/supercpad/cursites/csitinfo.cfm?id=0802850>
This site now notes that EPA will begin a Climate Vulnerability Assessment in September, 2023
- Staff at the NRDP are conducting a natural resource damage assessment (NRDA) at the Site where damages for injuries to natural resources. A Preassessment Screen was completed in April 2018 and an Assessment Plan was completed in 2021. Neither report mentions the outfalls beyond their use for discharge during mill operations. Based on the conversation with Brian and a forwarded Memorandum from Alicia Stickney (attached), the NRDP is aware that the DNRC Trust Lands may have purview and interest to provide authorization to the responsible party to remove the outfall pipes that are located on the riverbed between the low water marks.

ATTACHMENT – Memorandum from NRDP to DNRC



MEMORANDUM

TO: John Tuobbs

CC: Harley Harris
Doug Martin

FROM: Alicia Stickney

DATE: March 1, 2018

SUBJECT: Smurfit-Stone MPDES Permit Outfalls
Locations, Descriptions, Photos

As we discussed on the phone this morning, attached is a brief summary description including lat/longs, Google Earth maps, and photographs of the three Montana Pollution Discharge Elimination System Permit MT-0000035 outfalls on the Clark Fork River by the Smurfit-Stone Mill Site in Missoula County. Please let me know if I can help track down additional information to further the discussion on these outfalls.

Note that Outfall 4 flows into a slough adjacent to the Clark Fork River, but not directly into the river.

Sources of information:

Montana Department of Health and Environmental Sciences. 1995. Authorization to Discharge Under the Montana Pollutant Discharge Elimination System Permit MT-0000035, Stone Container Corporation.

Montana Department of Environmental Quality. 2014. Authorization to Discharge Under the Montana Pollutant Discharge Elimination System Permit MT0000035, M2Green Redevelopment, LLC.

URS Operating Services, Inc. 2011. Preliminary Assessment Smurfit-Stone Mill, Missoula, Missoula County, Montana. TDD No. 1105-6. Report prepared for U.S. Environmental Protection Agency Contract No. EP-W-05-050. 36 p.

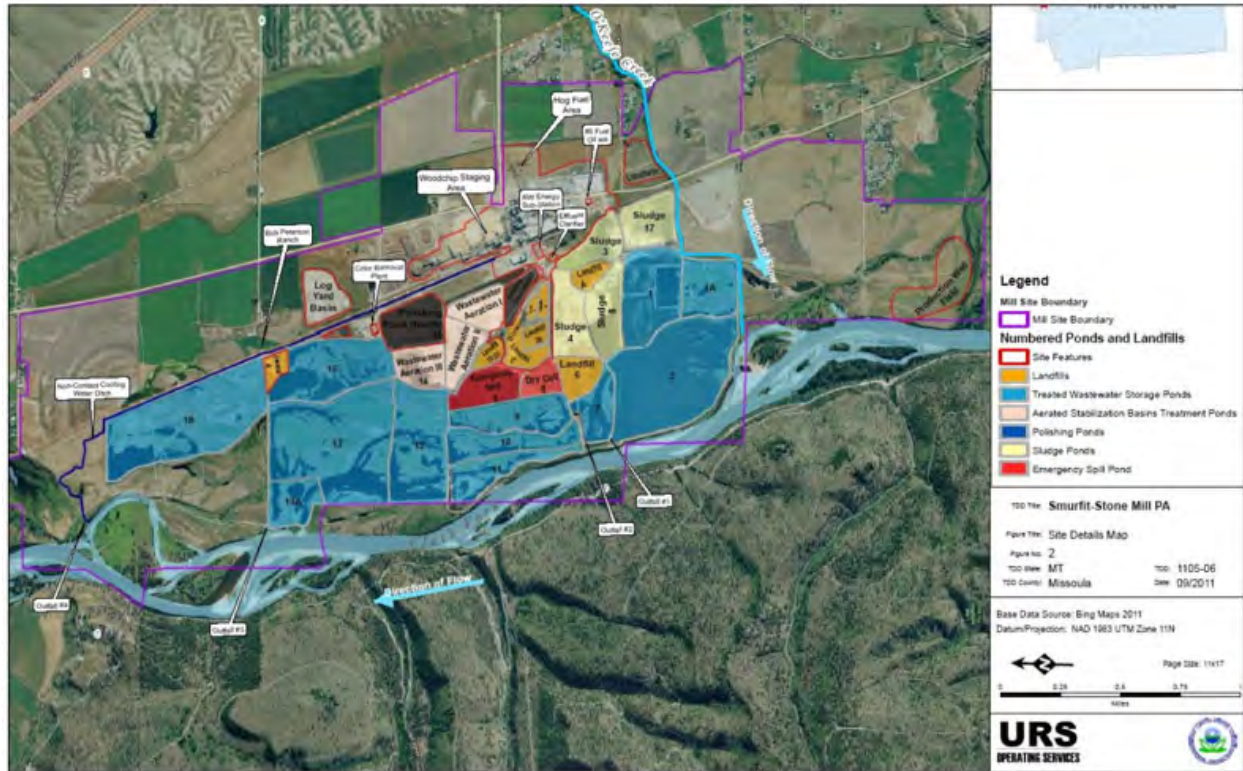


Figure 1. Generalized map of Smurfit-Stone site facilities; river flow direction is right to left (URS).

Permit No.: MT0000035

From the 2014 Permit Renewal:

Outfall 001 -

Location: At the end of the pipe, discharging into the Clark Fork River, located at 46.95819 N latitude and 114.21928 W longitude.



Photo courtesy of Missoula County.

From the 2014 MPDES Permit Renewal:

Outfall 002 -

Location: At the end of the pipe, discharging into the Clark Fork River, located at 46. 96022 N latitude and 114.21992 W longitude.

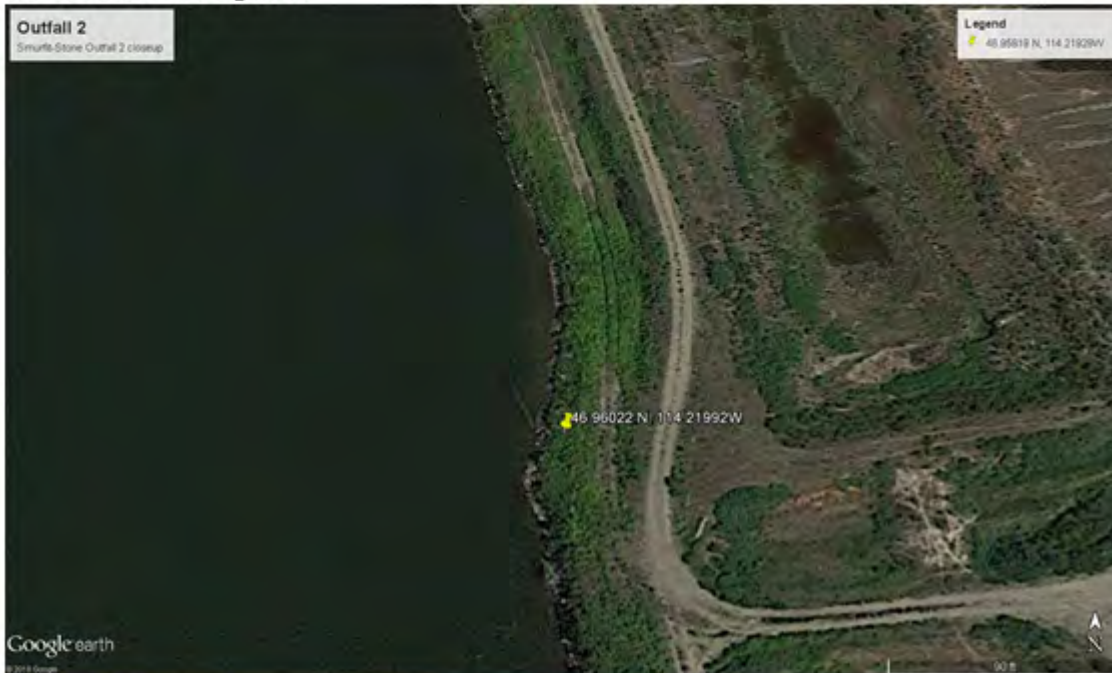


Photo courtesy of Missoula County.

From the 2014 MPDES Permit Renewal:

Outfall 003 -

Location: At the end of the pipe, discharging into the Clark Fork River, located at 46.97717 N latitude and 114.22708 W longitude.



Photo Courtesy of Missoula County

Note: This pipe is a diffuser. From the 1995 Permit:

"Point 003 is a diffuser to assure effluent mixing at lower river flows."

Smurfit-Stone Site Visit on November 2, 2023

MT-DNRC conducted a site visit to gather information on the current site status with regard to outfalls that may encroach on State ownership areas.

Attendees:

Trevor Taylor, (Chief, Minerals Management Bureau (MMB), Forestry & Trust Lands Div., MT-DNRC)

Teresa Kinley (Geologist/Hydrologist, MMB., Forestry and Trust Lands Div., MT-DNRC)

Sierra Farmer (Trust Lands Program Mgr., Southwestern Land Office (SWLO), MT-DNRC)

Amy Helena (Missoula Unit Manager, SWLO, MT-DNRC)

Andrea Stanley (Hydrologist/Soil Scientist SWLO, MT-DNRC)

Allie Archer, Remedial Project Manager, US EPA

Emma Rott, Project Manager, Helena (MT) Superfund Section, US EPA

David Tooke, Geochemist, Newfields Consulting, Consultant to the Potential Responsible Parties (PRPS)

T. Kinley checked discharge at the USGS gage below Missoula, MT prior to leaving Helena to travel to Missoula on November 2, 2023. Preliminary data indicated the discharge was 2,240 cfs, just slightly above the low-water discharge computed by Andrea Stanley in 2019.

We met a little after 3 pm at the Smurfit Stone entrance at 14377 Pulp Mill Road off of Mullan Road. Allie and David indicated that they remain in the Remedial Investigation and Risk Assessment phase. Additional soil and groundwater sampling has started. Their berm monitoring program is continuing. Allie, David, and Emma took the group on site to see the outfall areas of interest: 1, 2, 3, and 4.

At Outfall 1, no surface pipe was visible. Confirmation of presence or absence of outfall pipe is needed and determination of what constituted the outfall. Part of a berm with consistent slope goes into the water at this site. Features looked similar to those seen in the Outfall 1 photo on page 2.

At Outfall 2 we found the ~ 3 ft. diameter pipe, see below. Amy Helena takes a closer look.



We continued to Outfall 3 where we saw the hook apparatus associated with the “diffuser” see photo below. The conditions at this point did not provide a clear view of all the pipes extending into the river. Photos on page 3 provide a clearer view.



After this stop we proceeded farther north to reach Outfall 4. This outfall empties into a slough area on the west side of the two-track trail (see left photo below). The adjacent photo shows David Tooke at the outfall of the former pond area on the east side of the trail.



From a navigable-waters ownership standpoint, MT-DNRC would not own this area.

Per previous e-mail from Elena Evans, Missoula County, on Nov. 9, 2022, Outfall 5 is in a pond area in Section 24, T14N, R21W, not at river's edge. According to this e-mail, it discharges to groundwater. We did not see Outfall 5.

Conclusions

This memo results from an inquiry from Missoula County on MT-DNRC Trust Land's interest/purview in the reclamation planning at the Smurfit-Stone/Frenchtown Mill Superfund Site, specifically, the outfall infrastructure and berms located near the right bank of the Clark Fork.

This Superfund project continues in the Remedial Investigation and Risk Assessment phase due to additional sampling and other information gathering. This created timeline shifts for Superfund activities at this site.

MT-DNRC (WRD and/or FTLD) has no knowledge of any studies/evaluations by MT-DNRC of the Smurfit-Stone berms. Some outfall infrastructure is located below the low-water mark, as is the bank of the river, which may or may not be part of the constructed berm. MT-DNRC legal input is needed on case law decisions, particularly regarding man-made changes along the banks of navigable/non-navigable rivers.

Relic outfall structure could be buried below the shoreline and streambed at Outfall 1. Confirmation of presence or absence of outfall structure at Outfall 1 is needed.

Removal of the outfalls encroaching on State ownership is necessary. The November 2, 2023 field visit confirmed that Outfalls 2 and 3 occur in part or whole on the bed of the Clark Fork of Columbia River at/below the low-water discharge.

Communicating with parties willing to fund and contract the removal and reclamation of outfalls/pipe and related material on State land will be important in moving forward. This involves Outfalls 2 and 3, and possibly Outfall 1. Per Allie Archer on Nov. 30, 2023, any work/plans would have to be coordinated with the EPA superfund team up front. This would help avoid incurring any potential liability or possibly unintended contamination release. Allie also indicated that Remedial Activity is currently scheduled to begin in 2029.

References

Abt Associates Inc., 2021, Assessment Plan: Smurfit-Stone/Frenchtown Mill Site
Frenchtown, Montana, *Prepared for:* Montana Natural Resource Damage Program

Montana Natural Resources Damage Program, Smurfit-Stone/ Frenchtown Mill Site, at
<https://dojmt.gov/lands/sites/smurfit-stone/> accessed 2023Nov29.

ATTACHMENT – Memorandum from NRDP to DNRC



MEMORANDUM

TO: John Tubbs

CC: Harley Harris
Doug Martin

FROM: Alicia Stickney

DATE: March 1, 2018

SUBJECT: Smurfit-Stone MPDES Permit Outfalls
Locations, Descriptions, Photos

As we discussed on the phone this morning, attached is a brief summary description including lat/longs, Google Earth maps, and photographs of the three Montana Pollution Discharge Elimination System Permit MT-0000035 outfalls on the Clark Fork River by the Smurfit-Stone Mill Site in Missoula County. Please let me know if I can help track down additional information to further the discussion on these outfalls.

Note that Outfall 4 flows into a slough adjacent to the Clark Fork River, but not directly into the river.

Sources of information:

Montana Department of Health and Environmental Sciences. 1995. Authorization to Discharge Under the Montana Pollutant Discharge Elimination System Permit MT-0000035, Stone Container Corporation.

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URS Operating Services, Inc. 2011. Preliminary Assessment Smurfit-Stone Mill, Missoula, Missoula County, Montana. TDD No. 1105-6. Report prepared for U.S. Environmental Protection Agency Contract No. EP-W-05-050, 36 p.



STUDY SHOWS IMPACT OF POLLUTION ON WATER QUALITY OF CLARK FORK RIVER

May 13, 2024 3:14 PM

HELENA – Recent results from an ongoing water quality study on the Clark Fork River show that pollution is more prevalent than initially thought.

Preliminary results of the new water studies show the presence of toxic compounds, such as polychlorinated biphenyls (PCBs), dioxins and furans, which are compounds associated with industrial activities, including the paper industry, but are also from some natural sources like forest fires.

In 2023 biologists with Montana Fish, Wildlife & Parks sampled for toxins on the Clark Fork River from Silver Bow Creek, near Butte, to Cabinet Gorge Reservoir on the Idaho border, including samples from the Clark Fork's major tributaries – the Flathead, Bitterroot and Blackfoot rivers.

The compounds discovered are more widespread than previously thought. This includes their presence in headwater areas and also downstream of the Flathead River, which was previously the lower boundary of a fish consumption advisory issued in 2020.

FWP staff collected both water and fish samples looking for pollutants.

Depending on the results of the fish samples, FWP will work with the Montana Department of Environmental Quality and the Montana Department of Public Health and Human Services to evaluate a further need for an advisory on fish consumption. Currently, there is a fish consumption advisory on a 148-mile stretch of the mainstem of the Clark Fork River from the Bitterroot to the Clark Fork's confluence with the Flathead River.

"Dioxins, furans and PCBs are stored in the fat and muscle of fish" said FWP fisheries biologist David Schmetterling. "Although they do pose risks for developmental problems, reproductive issues, and even endocrine system problems in fish, the main issue is with human consumption of the fish."

To date, the recent findings have not been correlated with any particular site or source of contamination, and continued monitoring and investigation will help identify potential sources of the pollution. The current studies follow up on earlier studies of toxic compounds in the river system. For more than a century, water quality concerns in the Clark Fork River focused on the effects of heavy metals from hard-rock mining. After Smurfit-Stone closed its paper mill near Frenchtown in 2010, FWP biologists conducted preliminary surveys to determine if any contaminants associated with the pulping and paper industry were found in fish tissue downstream of the mill. This led to fish consumption advisories for northern pike and rainbow trout.

In 2018 and 2019, FWP worked with the Environmental Protection Agency (EPA) to collect fish tissue samples from a larger area, and results led to a wider fish-consumption advisory.

The current studies are funded through a grant from the EPA. FWP worked with several partners to secure the grant of more than \$221,000. Partners include the Confederated Salish and Kootenai Tribes, Trout Unlimited, Missoula County Health Department, the Clark Fork Coalition, and the Montana Department of Justice Natural Resource Damage Program.

For more information, contact FWP Fisheries Pollution Biologist Trevor Selch at 406-444-5686 or ttselch@mt.gov (<mailto:ttselch@mt.gov>).

[BUY AND APPLY \(/BUYANDAPPLY\)](#)[REPORT A VIOLATION \(/ABOUTFWP/ENFORCEMENT\)](#)[MYFWP LOGIN \(HTTPS://MYFWP.MT.GOV/FWPEXTPORTAL/LOGIN/LOGIN.JSP\)](https://myfwp.mt.gov/fwpeportal/login/login.jsp)[MYFWP MOBILE APP \(/MYFWPAPP\)](#)[ABOUT FWP \(/ABOUTFWP\)](#)[MONTANA OUTDOORS MAGAZINE \(/MONTANA-OUTDOORS\)](#)[CONTACT FWP \(/ABOUTFWP/CONTACT-US\)](#)

BEFORE THE DEPARTMENT OF
NATURAL RESOURCES AND CONSERVATION
OF THE STATE OF MONTANA

IN THE MATTER OF CHANGE APPLICATION) STIPULATED
NOS. 76M-30150596 AND 76M-30151160 BY) SETTLEMENT AGREEMENT
MLH MONTANA LLC)

SETTLEMENT STIPULATION

This Stipulation is entered into as of the last date below written by and between
Applicant MLH Montana, LLC (MLH) and Objector Missoula Valley Water Quality District
(MVWQD), (collectively the "Parties" or individually "Party").

CHANGE APPLICATION NOS. 76M-30150596 AND 76M-30151160
BY MLH MONTANA, LLC

WHEREAS, MLH Montana, LLC filed Application Nos. 76M-30150596 and 76M-30151160 (Applications) with the Department of Natural Resources and Conservation (DNRC) on January 28, 2021, to change Water Right Nos. 76M 118475-00, 76M 118477-00, 76M 118478-00, 76M 118480-00, 76M 118484-00, 76M 118485-00, 76M 118490-00, 76M 118491-00, 76M 118492-00, 76M 118494-00, 76M 118495-00, 76M 11497-00, Permit 76M 2789-00, 76M 118481-00, 76M 118483-00, 76M 118507-00, and 76M 118509-00. The DNRC determined that the clear and convincing evidentiary standard applies to the change applications since the requested changes necessary to authorize MLH to market for mitigation these water rights would result in more than 4,000 cfs of consumed volume being changed.

STIPULATED SETTLEMENT AGREEMENT- Change Application Nos. 76M-30150596 AND 76M-30151160.

WHEREAS, the DNRC determined the Applications were “correct and complete” on July 26, 2022. On November 30, 2022, the Department issued two Preliminary Determinations to Grant (PDG) the Applications and each PDG included two (2) remarks and conditions including but not limited to a twenty (20) year period for completion and perfection of the change to mitigation use and that any water not sold and changed to the purpose of mitigation will revert to its historical use.

WHEREAS, the DNRC on January 4, 2023, provided public notice of the Applications and the requested changes pursuant to Mont. Code Ann. § 85-2-307 and provided until February 17, 2023, for the objection period for the Applications.

WHEREAS, on February 17, 2023, MVWQD objected to the Applications using Form No. 611 “Objection to Application” based on the ongoing CERCLA process at the related Smurfit Stone Mill Site and the associated groundwater contamination. On March 10, 2023, the DNRC deemed MVWQD’s objection to water quality pursuant to Mont. Code Ann. § 85-2-402(2)(f) as valid, but determined that the remaining objections were deficient. The DNRC then provided MVWQD an additional fifteen (15) days to supply information to correct the deficiencies for the invalid objections. On March 24, 2023, the MVWQD provided responsive information to the Department.

WHEREAS, on April 13, 2023, the DNRC then deemed the MVWQD’s objections valid for 1) water quality pursuant to Mont. Code Ann. § 85-2-402(2)(f), and for 2) the reasonable use criteria pursuant to Mont. Code Ann. § 85-2-402(4)(b)(i)-(vi).

WHEREAS, No other person filed any objection to the Applications.

WHEREAS, on April 17, 2023, the DNRC issued a scheduling order and set a scheduling conference. After the scheduling conference, the Department issued a new scheduling order dated

April 28, 2023. The parties then agreed to continue the schedule order for two months to allow the parties to negotiate a potential resolution, and the DNRC issued a new schedule order on August 29, 2023.

WHEREAS, the parties, represented by legal counsel, participated in settlement discussions and have reached a resolution to resolve MVWQD's objections to the Applications as set forth below, which will result in the withdrawal of MVWQD's objections, thus making a hearing on those objections unnecessary.

AGREEMENT

WHEREFORE, in consideration of the mutual covenants contained herein, the Parties stipulate and agree as follows:

1. Until such time as the EPA issues its Record of Decision pursuant to the CERCLA for the Smurfit Stone Mill Site, MLH agrees not to market or use twenty percent (20%) of the historically diverted volume of the combined water rights under Application Nos. 30151159 and 30151160 ("Water Rights").

If the EPA orders that a pump and treat method be conducted at the Mill site, then MLH agrees not to market or use any portion of the 20% of the Water Rights, including the flow rate and volume, needed for this treatment method until such time as the treatment is no longer required by the EPA.

2. If MLH uses any of the wells associated with the water rights set forth in Application Nos. 30151159 and 30151160 within one mile of the outer perimeter of the Mill Site, as defined in the EPA's Administrative Order on Consent: (a) MLH agrees to conduct testing for the constituents of concern related to the Mill Site, including but not limited to dioxins and furans, as required by and in accordance with the methods and standards

STIPULATED SETTLEMENT AGREEMENT- Change Application Nos. 76M-30150596 AND 76M-30151160.

under the Montana Numeric Water Quality Standards Circular DEQ-7 for the type of use contemplated; (b) MLH agrees to conduct any necessary remediation to come into compliance with the Circular DEQ-7 standards for the contemplated use of the water rights prior to such use.

MLH additionally agrees that, if any part of any future purchase agreement of the Water Rights set forth in Application Nos. 30151159 and 30151160 involves the use of wells located within one mile of the outer perimeter of the Mill Site, as defined in the EPA's Administrative Order on Consent, MLH will require the purchasing party and any successor (whether by purchase, merger, consolidation, or otherwise): (a) to conduct testing on said wells for the constituents of concern related to the Mill Site, including but not limited to dioxins and furans, as required by and in accordance with the methods and standards under the Montana Numeric Water Quality Standards Circular DEQ-7 for the type of use contemplated; (b) to conduct any necessary remediation to come into compliance with the Circular DEQ-7 standards for the contemplated use of the water rights prior to such use.

3. MLH agrees to provide the MVWQD with any independent testing of the Wells that MLH or its agents have conducted or will conduct in the future.
4. This Stipulation is a compromise of disputed objections to the Applications and is not to be construed as an admission against the interests of any party.
5. The terms of this Stipulation are binding on the Parties, their successors, heirs, and assigns.

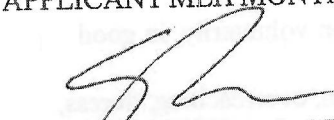
6. Upon execution of this Agreement, MVWQD hereby withdraws all objections to Change Application Nos. 76M-30150596 and 76M-30151160.
7. Each Party represents it has the authority to execute this Stipulation and is bound by the terms herein.
8. The Parties represent and affirm that the signatories to this Stipulated Settlement Agreement are legally authorized to bind their respective parties in this matter.
9. Each undersigned Party entered into and executed this Stipulation voluntarily, in good faith, and without any fraud, misunderstanding, misrepresentation, overreaching, duress, or undue influence.
10. Each Party agrees to bear its own costs and attorney fees arising from the negotiation and execution of this Stipulation and the proceedings before the DNRC.
11. Each Party represents that their execution of the Stipulation is knowing and voluntary, and that they had the opportunity, if so desired, to consult with legal counsel before executing this document.
12. The Parties agree that this document embodies the entire Stipulated Settlement Agreement of the Parties.
13. This Stipulation may be executed by the parties in several counterparts, each of which when executed and delivered shall be an original, but all of which together shall constitute one instrument. Facsimile or electronically transmitted copies of signatures will be deemed the equivalent of original signatures.
14. The effective date of this Stipulation shall be the date of the last signature below.

OBJECTOR MISSOULA VALLEY WATER QUALITY DISTRICT

 11/16/2023

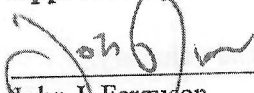
Ross Miller
Board Chair, duly authorized to sign on behalf of Missoula Valley Water Quality District Board

APPLICANT MLH MONTANA, LLC

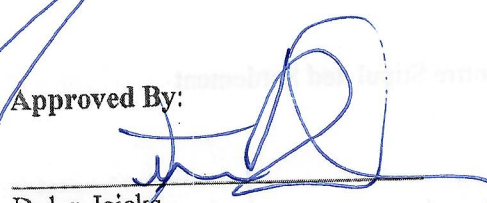
 11/7/23

Steve Malsam
Principal, duly authorized to sign on behalf of the Corporation

Approved By:

 11/7/23
John J. Ferguson
Attorney for MLH Montana, LLC

Approved By:


Dylan Jaicks
Vincent J. Pavlish
Attorneys for Missoula Valley Water Quality District

APPENDIX F

Smurfit-Stone Mill Technical Working Group (TWG) Meeting

Meeting Read out:

A Smurfit-Stone Mill Technical Working Group Meeting took place at EPA's Helena, MT office on November 13 from 2:00-4:00 pm. Representatives from EPA, DEQ, NRDP, Missoula County and the potentially responsible parties' (PRP) contractor were in attendance in person. Representatives from DPHHS, DEQ, CAG admin team, USFS, USFWS, Westrock, International Paper, Newfields, Clark Fork Coalition, and John Tester's office were in attendance online. Additionally, two Missoula County Commissioners, two state representatives, and one candidate for Montana's congressional race were in attendance online.

Newfields, representing the PRPs, presented on the current groundwater conceptual site model. This included discussions on the influence of the Clark Fork River and Frenchtown Irrigation Ditch on site groundwater and how there have been significant changes from Mill operations to current conditions, and those historical conditions were taken into account when choosing well locations and while developing the Remedial Investigation Work Plan.

EPA's Allie Archer then discussed with the group the overarching goals of a Remedial Investigation in CERCLA. She reviewed what the data collected to date tells us about the contaminants of concerns (COCs) and risks from groundwater at the site and how that information will be used to help EPA make cleanup decisions. EPA then presented their rationale for conducting biannual sampling which included a discussion on sampling during both high and low groundwater conditions to ensure we are capturing the highest concentrations of COCs.

Newfields then presented the statistical evaluations conducted to determine if seasonal patterns onsite would change the current understanding of the site's nature and extent of contamination or the risk assessments. The presentation concluded that there are some COCs that have a relationship with groundwater levels, but most on site do not show a strong relationship.

Missoula County's (MC) Elena Evans presented rationale for quarterly sampling. MC described how groundwater moving through the site historically left contaminants in its wake and suggested that those areas are not being captured by both the locations and depths of current monitoring wells onsite and by the frequency of sampling. MC presented that they are requesting quarterly monitoring for 2024-2025.

EPA has attached the presentation material that they prepared for the TWG meeting. Please request presentation material from the other parties (Newfields and Missoula County) if the EQC has interest in viewing it.

Current Update:

In the spirit of moving work on the Site forward, the EPA team has agreed to proceed with quarterly sampling. This will involve four seasonal sampling events beginning as soon as possible, dependent on multiple factors. EPA will provide a future update on the specifics of what quarterly sampling will entail. This sampling will be in addition to source characterization activities planned for 2024. EPA is currently scheduling future technical working group meetings.



APPENDIX G

ENVIRONMENTAL QUALITY COUNCIL

PO BOX 201704
HELENA, MONTANA 59620-1704
(406) 444-3742

GOVERNOR
GREG GIANFORTE
DESIGNATED REPRESENTATIVE
MIKE FREEMAN

HOUSE MEMBERS
PAUL FIELDER
STEVE GUNDERSON – Chair
JEDEDIAH HINKLE
JONATHAN KARLEN
RHONDA KNUDSEN
MARILYN MARLER

SENATE MEMBERS
DAN BARTEL
BOB BROWN
WILLIS CURDY – Vice Chair
PAT FLOWERS
STEVE HINEBAUCH
THERESA MANZELLA

PUBLIC MEMBERS
JIM KEANE
DAVE GALT
JON METROPOULOS
DAN VERMILLION

COUNCIL STAFF
JASON MOHR, Lead Staff
KATY CALLON, Research Analyst
JOE CARROLL, Legal Staff
JOLANDA SONGER, Secretary

Director Amanda Kaster
Montana Department of Natural Resources and Conservation
1539 11th Ave.
P.O. Box 201601
Helena, MT 59620-1601

Feb. 14, 2024

Subject: Removal of Historical Outfall Pipes, Berms, and Riprap in the Clark Fork River

Dear Director Kaster:

The Environmental Quality Council of the Montana Legislature appreciates the department's recent determination that at least three outfall pipes from the Smurfit-Stone mill site are in the bed of the Clark Fork River and are trespassing on state trust lands.

While the Environmental Protection Agency leads the remediation process, the state has an important role in ensuring that the clean-up best serves the people of Montana and the Frenchtown community. The berms and riprap can no longer be used for their original purpose under the original, authorized pollution discharge permit (MPDES), so we believe that any new activity, including remediation of the Smurfit-Stone mill site by the EPA, must also include the removal of this trespassing infrastructure.

The council would like the DNRC to assist us with collecting information necessary to advocate for a cleanup that upholds that state's interests and rectifies the trespass on state trust lands. Based on the discussion during the Jan. 18 EQC meeting, we would also like to examine trespass on state trust lands elsewhere, and we kindly request that DNRC support these objectives in the following ways:

- Determine the extent to which the berms and rip-rap adjacent to the Smurfit-Stone site are trespassing on state trust lands within the Clark Fork River
- Advise the council on how best to represent Montana's interest in mitigating trespass during the Smurfit-Stone mill site Superfund process
- Suggest legal strategies to effect removal of all outfall pipes, berms, riprap, or other unauthorized trespasses from all state lands without resorting to an "after-the-fact" agency authorization
- Provide guidance on how to prevent similar instances of trespass in other Montana streambeds, and whether Montana statutes can better protect state trust lands

APPENDIX G

- Work with the Department of Environmental Quality to ensure that mitigating trespass on state lands is a standard procedure in their management of sites under both state and federal Superfund processes

Thank you for your attention to our concerns. We trust that the department shares our commitment to remediation of the mill site and will address the concerns raised in this letter.

Should you require any further information or assistance, please do not hesitate to contact us.

Sincerely,

(signed)

Rep. Steve Gunderson, presiding officer, EQC

APPENDIX H

DEPARTMENT OF NATURAL RESOURCES AND CONSERVATION



GREG GIANFORTE, GOVERNOR

1539 ELEVENTH AVENUE

STATE OF MONTANA

DIRECTOR'S OFFICE: (406) 444-2074
FAX: (406) 444-2684

PO BOX 201601
HELENA, MONTANA 59620-1601

SENT VIA EMAIL

July 15, 2024

The Honorable Chairman Steve Gunderson
Environmental Quality Council
PO Box 201704
Helena, MT 59620-1704

RE: Removal of Historical Outfall Pipes, Berms, and Riprap in the Clark Fork River

Dear Chairman Gunderson and Members of the Council:

The Environmental Quality Council, (EQC, or Council) requested that the Department of Natural Resources and Conservation (DNRC, or Department) assist the Council with collecting information necessary to advocate for cleanup that upholds the State's interest and rectifies trespass of outfall-related infrastructure (i.e., outfall pipes, berms and riprap) on the riverbed of the Clark Fork of the Columbia River (Clark Fork River), a navigable waterway that the State could potentially assert ownership of pursuant to the Equal Footing Doctrine and state law.¹ This response will provide a brief historical, legal, and policy context for State ownership of navigable riverbeds, and the process for asserting such ownership claims. This reply will also address the specific requests made of the Department in support of the EQC's objectives.

The State acquired ownership of all lands lying under navigable waters from the Federal Government upon statehood under a legal principle known as the "Equal Footing Doctrine."² Following statehood, title to the land is governed by state law.³ Under Montana state law, the beds and banks of navigable waterways belong to the State.⁴ Those lands are held in trust by the Montana Board of Land Commissioners (Board, or Land Board), as trustee, for the benefit of the public.⁵ The Land Board, through the Department as the Board's administrative arm, administers the navigable rivers of the State to ensure the public's right to use this resource for commerce, navigation, fishing, hunting, recreation, and other trust values, in addition to generating income for the Public Land Trust Navigable Rivers trust beneficiary, established in 2010, to fund the School Facility and Technology account.

¹ See e.g. *Montana v. United States*, 450 U.S. 544 (1981).

² *Pollard's Lessee v. Hagan*, 44 U.S. 212 (1845).

³ *Id.*

⁴ 70-1-202(1) and 77-1-102(1), MCA.

⁵ Mont. Const. Art. X, § 11(1); 77-1-102(2), MCA.

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The State's ownership extends to the beds and banks lying between the navigable waterway's low-water marks.⁶ "Bed" is defined as "an area on or above state-owned land between the low-water marks of a navigable river channel."⁷ "Low-water mark" is defined as "the location of the water line of a navigable river at the lowest tenth percentile of historic annual flow, as measured by the nearest upstream hydrograph station."⁸ "Navigable river" is defined as "a segment of a river adjudicated as navigable for title purposes by a court of competent jurisdiction."⁹

A waterway, or segment thereof, is navigable when, at statehood, it was "used or susceptible of being used, in its ordinary condition, as a highway for commerce, over which trade and travel are or may be conducted in the customary modes of trade and travel on water."¹⁰ A river is assessed on a segment-by-segment basis to determine navigability.¹¹ The Department considers navigable waterways to be those waterways or segments of waterways for which it has historical evidence of use in commerce at statehood. The DNRC believes that based on available evidence and Montana's body of law on the topic, the portion of the Clark Fork River on which the Smurfit-Stone mill site is located would be judicially determined as navigable for title purposes. While the DNRC considers the subject segment of the Clark Fork River to satisfy the criteria of a navigable waterway, ownership has not been adjudicated in a court of law. Absent adjudication, the State is unable to assert the ownership interest necessary to claim trespass of the outfall infrastructure.

The EQC outlined five objectives in the request:

1. Determine the extent to which the berms and riprap adjacent to the Smurfit-Stone (mill) site are trespassing on state trust lands within the Clark Fork River.

There is no trespass on state trust lands in the Clark Fork River. Title to this segment of the Clark Fork River has not been adjudicated by a court of competent jurisdiction, and unless or until such time, the DNRC cannot enforce trespass based on claims of ownership.

It is important to note that while outfall infrastructure may occur on or beneath the riverbed, only that portion of the outfall infrastructure that occurs on or beneath the riverbed between the low-water marks would fall under the purview of DNRC authorization if the riverbed were to be adjudicated as state-owned. Any and all portions of the outfall pipes, berms, riprap or other infrastructure above the low-water marks and on adjacent private property (e.g., riverbank, floodplain, etc.) is outside of the potential span of control of the Department.

2. Advise the Council on how best to represent Montana's interest in mitigating trespass during the Smurfit-Stone mill site Superfund process.

⁶ 70-16-201, MCA.

⁷ ARM 36.25.1101(1).

⁸ ARM 36.25.1101(12).

⁹ ARM 36.25.1101(14); 77-1-1110(3), MCA.

¹⁰ *PPL Montana, LLC v. Montana*, 565 U.S. 576, 591 (2012).

¹¹ *Id.* at 577-578.

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See response to item one. This segment of the Clark Fork River has not been adjudicated as navigable and therefore there is no trespass, or anticipated trespass, during the Smurfit-Stone mill site superfund process.

3. Suggest legal strategies to effect removal of all outfall pipes, berms, riprap, or other unauthorized trespasses from all state lands without resorting to an “after-the-fact” agency authorization.

The first step of any legal strategy is to determine whether the Department should initiate a quiet title action on behalf of the Land Board to assert title to this and other portions of the Clark Fork River as navigable waterways. These types of lawsuits require a considerable amount of time and resources, as evidenced by the ongoing litigation¹² currently at the United States Court of Appeals for the Ninth Circuit. That case began in 2003¹³ based on the alleged occupation and use of state-owned riverbeds and is still pending resolution. Multiple hydroelectric dams owned by PPL Montana, predecessor to Talen, were constructed and operating on the Missouri, Clark Fork, and Madison Rivers without authorization from the Department. After twenty years of litigation, the determination of ownership of the subject riverbeds remains undecided.

If the riverbed segment on which the Smurfit-Stone mill site is located is adjudicated for title and the court finds that the State owns the riverbed, existing state statutes and rule¹⁴ provide a legal mechanism and process for resolving unauthorized trespasses.

4. Provide guidance on how to prevent similar instances of trespass in other Montana streambeds, and whether Montana statutes can better protect state trust lands.

As described in prior responses, the State’s ownership claim for title to navigable waterways is subject to a complex set of legal, historic, and scientific criteria. Pending the outcome of active litigation in *State of Montana vs. Talen Montana, LLC*, criteria for adjudication for title to riverbeds may change, and subsequently, the State’s claim of ownership.

Opportunities for legal remedies may exist for future unauthorized installation, construction, or use of adjudicated riverbeds through changes to statutes. Administrative rule changes could further clarify processes and procedures for future authorizations and civil trespasses. However, the current statutory framework limits Department action taken on behalf of the State to effectively prevent trespass and protect state trust lands from unauthorized emplacement of infrastructure, or retroactively assess penalties for prior infrastructure emplacement between the low-water marks on state-claimed, unadjudicated navigable waterways.

Legislation enacted in 2011, in response to *PPL v. Montana*, provides a safe harbor for the continued use of this segment of the Clark Fork River until it is adjudicated as navigable. Specifically, 77-1-1112, MCA allows a historic use of a riverbed to continue until five years from the date that the Department issues notice that a river segment has been adjudicated as navigable. Even after that date,

¹² *State v. Talen Mont.*, CV 16-35-H-DLC (D. Mont. Aug. 25, 2023)

¹³ *Dolan v. PPL Montana, LLC*, No. 9:03-cv-167 (D. Mont., Sept. 27, 2005); *PPL Montana, LLC v. Montana*, 565 U.S. 576 (2012)

¹⁴ 77-1-125, MCA, 77-1-1109, MCA et. seq., and ARM 36.25.1101 et. seq.

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the Department is obliged to issue a lease, license, or easement authorizing the continued use, provided the applicant satisfies the criteria of 77-1-1112(4), MCA.

5. Work with the Department of Environmental Quality to ensure that mitigating trespass on state lands is a standard procedure in their management of sites under both state and federal Superfund processes.

Department staff have been working with the US Environmental Protection Agency (EPA), Montana Department of Environmental Quality (DEQ), and other private, local, state, and federal stakeholders regarding Superfund processes, including but not limited to the Smurfit-Stone mill site. Cooperation and coordination among agencies have proven beneficial and continued partnership is the Department-recommended path forward to ensure that mitigating trespass becomes a standard procedure. As a land management agency, the DNRC is notified of other proposed agency action through their respective jurisdictional action items, most often via scoping notices for National Environmental Policy Act (NEPA), Montana Environmental Policy Act (MEPA), or other authorities, such as the Montana Natural Streambed and Land Preservation Act and joint application for proposed work in Montana's streams under the 310 Law. Improved inter-agency coordination could be further explored in site-specific instances to ensure that the appropriate parties are coordinating and obtaining requisite authorizations to mutually fulfill respective agency mandates and missions.

Specific to Superfund processes, the Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA or Superfund) provides a federal "Superfund" to address the release of hazardous substances to the environment. The focus of Superfund response actions is protecting human health and other environmental receptors. DEQ typically serves in a consultative role to the EPA on federal Superfund cleanups. Part of that consultative role is to advocate for cleanups that the state views as protective of human health and the environment. This includes ensuring the cleanup meets state environmental standards (e.g., groundwater and surface water standards, requirements for discharges to surface, construction parameters for repositories, etc.).

The Superfund cleanup itself is meant to address the release of hazardous substances to the environment and the pathways of exposure to human health or ecological risks (e.g., address direct contact to contaminated surface soils). Based on the selected remedy for a Superfund site, as well as the sources or pathways of contamination, certain site features may need to be addressed. For example, a groundwater well may serve as a preferential pathway for contamination to move between aquifers. In that scenario, the Superfund cleanup may require the proper abandonment of that well. However, if the site feature does not impact how contamination may spread at the site, the Superfund cleanup itself may not be able to address that site feature, even if that site feature poses a trespass or some other nuisance to the property owner.

The CERCLA process does consider the existing and reasonably anticipated future use of the property when considering how a cleanup should be conducted. For example, a property cleaned up to commercial or industrial standards may be suitable for retail, offices, and manufacturing, but not for residential use without additional cleanup. DEQ has other regulatory programs that help ensure these situations don't occur in the future such as that the applicant for a public water supply would need to fulfill the requirements in DEQ's subdivision program and its implementing statutes and regulation, regardless of the Superfund activities at the site.

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In conclusion, the EQC requested the Department to provide information necessary for the Council to advocate for cleanup that upholds the State's interest and rectifies trespass of outfall-related infrastructure on the riverbed of the Clark Fork adjacent to the Smurfit-Stone mill site. The State has a potential claim to title to the riverbed throughout this river segment under a complex legal standard that includes, but is not limited to, the Equal Footing Doctrine, case law, common law, state statutes and rule.

The Clark Fork River has not been adjudicated for title and therefore, the State cannot satisfy the ownership element essential for a trespass claim. If a court were to rule in favor of the State's claim of title to the Clark Fork in the subject river segment, state statute precludes any trespass action taken by the Department for any structure placed on state trust lands prior to October 1, 1997. Furthermore, statutory allowances through July 15, 2025, provide a grace period for property owners to seek department authorization, or remove property in-trespass from state-owned lands. Therefore, outfall infrastructure at the Smurfit-Stone mill site is not and would not be subject to trespass action by the Department.

The DNRC recommends continued cooperation and coordination with private property owners, local, state, and federal regulatory agencies to affect the desired assessment, cleanup, remediation, and redevelopment of the Smurfit-Stone mill site. Court rulings, statutory changes by the legislature, and subsequent rulemaking by the Department, could provide for a more robust legal framework for which the Land Board and Department to claim title to riverbeds, administer uses of subject riverbeds, and take appropriate action when a trespass occurs.

Should you have further questions regarding this matter, please do not hesitate to contact me via telephone at (406) 444-5576, or via email at ryanweiss@mt.gov.

Sincerely,



Ryan Weiss
Trust Lands Deputy Administrator

Cc: Amanda Kaster, Director, DNRC
Erin Weisgerber, Deputy Director, DNRC
Brian Bramblett, Chief Legal Counsel, DNRC
Shawn Thomas, Forestry and Trust Lands Administrator
Sonja Nowakowski, Director, DEQ
Amy Steinmetz, Waste Management and Remediation Administrator, DEQ
Jason Mohr, Environmental Analyst, EQC



APPENDIX I

ENVIRONMENTAL QUALITY COUNCIL

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KATY CALLON, Research Analyst
JOE CARROLL, Legal Staff
JOLANDA SONGER, Secretary

April 10, 2024

KC Becker, administrator
EPA Region 8
1595 Wynkoop St.
Denver, CO 80202-1129

Dear KC,

I am writing to you on behalf of concerned citizens regarding the final Superfund cleanup plan proposed for the Columbia Falls Aluminum Company site in Columbia Falls, Montana, a site which is situated in proximity to the Flathead River. At our March 14, 2024, Environmental Quality Council meeting, it became apparent to the council that the community has serious reservations about the proposed final remediation plan.

The Columbia Falls Aluminum Company (CFAC) site has been a matter of concern for the community for many years due to its historical operations involving the production of aluminum, which resulted in the release of hazardous substances into the environment. While we appreciate the soil testing, the water sampling, and other cleanup efforts made by the Environmental Protection Agency to address these issues and develop a cleanup plan, we believe that more-thorough measures are necessary to ensure the protection of human health and the environment.

Specifically, our concerns center around the presence of potliner waste, which are known to contain hazardous substances such as cyanide and fluoride. These toxins have the potential to leach into the surrounding soil and groundwater, posing a long-term risk to public health and the ecosystem, including the nearby Flathead River. The presence of polycyclic aromatic hydrocarbons (PAHs) causes us additional concern. The agency's proposed plan to leave and cap or cover most of the contaminated areas, contain migrating toxins with a slurry wall, and monitor groundwater indefinitely do not do enough in the council's estimation.

Given the gravity of these concerns and the implications for the health and safety of the community, we respectfully request that the EPA pause its decision on the final cleanup plan for the CFAC site. We believe that additional time is needed to thoroughly assess the potential risks associated with the EPA's preferred clean-up alternative on this complex site and to explore an alternative prioritizes off-site removal of contaminants. The council believes that a made-in-Montana (or made-in-Columbia Falls) solution would foster a local sense of ownership and commitment, while adding flexibility and adaptability in case of changing circumstances.

Furthermore, we urge the EPA to continue in meaningful dialogue with local stakeholders, environmental organizations, and elected officials to ensure that their perspectives and concerns are fully considered in the final decision-making process.

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The health and well-being of the community depend on the thorough and effective cleanup of the CFAC site. The Environmental Quality Council appreciates your attention to this matter and looks forward to working collaboratively with the EPA to develop a cleanup plan that prioritizes the protection of human health and the environment.

Thank you for your consideration.

Sincerely,

Rep. Steve Gunderson, chairman
Cc: Matthew Dorrington, remedial project manager
U.S. EPA/CFAC
Eastern end of Aluminum Drive
Columbia Falls, MT 59912



REGION 8 ADMINISTRATOR

DENVER, CO 80202

Representative Steve Gunderson
Chairman
Environmental Quality Council
PO Box 201704
Helena, MT 59620-1704

Dear Mr. Gunderson:

EPA appreciates the April 10 letter sent by the Montana Environmental Quality Council regarding the agency's ongoing work to address site contaminants and risks at the Anaconda Aluminum Co. Columbia Falls Reduction Plant (also known as Columbia Falls Aluminum Company, or CFAC) Superfund Site (Site). In response to these concerns, as well as requests from the newly formed Coalition for a Clean CFAC (CCC), and renewed interest across the broader community, EPA will provide additional opportunities for focused information sharing about the Site. EPA has also identified additional resources, in the form of grants, to provide technical assistance to CCC throughout this process.

Beginning with targeted public meetings this week, EPA is taking additional steps to engage the community as we continue to develop the Record of Decision for the Site. While these and future meetings throughout the upcoming months will be valuable, the agency will also be offering Technical Assistance Grant funding for CCC to organize and support public engagement efforts. The CCC is in the process of submitting their paperwork to EPA so that the agency can process their grant application. EPA is also supporting more immediate engagement needs through services provided by a Technical Assistance Service for Communities (TASC) contract while the group is working on their TAG application. The service will allow CCC to select a technical advisor in the coming weeks who will work alongside them throughout this extended engagement process. This is an extension of the TASC grant and advisors assigned to the site from March 2023 – December 2023 which helped the community with the release of EPA's Proposed Plan.

Our continued efforts to listen and engage with the community provide multiple benefits as we move forward. It will enhance the collective understanding of the Superfund process, including the investigations completed to date and next steps, and will lead to focused and productive discussions on areas of concern. It will also help the agency's site team work together with community groups, individuals, and local officials as we develop additional communication tools aimed at describing the investigations, risk assessments, alternative evaluations, and cleanups that have occurred at the Site since it was listed in 2016.

While we are expanding our engagement, we also do not want to discredit the hundreds of Montanans who have been engaged in this process over the past several years. To date, EPA has received more than 700 comments from many Montanans on the Proposed Plan. Many of these comments are the result of site tours, dozens of community meetings, and other engagements with community leaders over the past several years. We appreciate their engagement and want to provide assurances that their comments and insights are essential in helping us develop the Record of Decision. We encourage community members to continue to engage over the coming months.

We appreciate EQC's desire to engage more in Columbia Falls related to the Superfund Process at the Site. I have instructed my staff to ensure that EQC receives all the upcoming invitations to meetings in Columbia Falls. A remote option for EQC members to attend the public meeting portion of the two-day engagement was shared with EQC members on April 22nd. We are looking at ways to make future meetings more accessible to a broader group of remote participants. If you have questions throughout this expanded engagement, please do not hesitate to reach out to EPA's Project Manager, Matt Dorrington, or Community Involvement Coordinator, Dana Barnicoat.

The goals of the Superfund process are to protect the people of Columbia Falls and the Flathead River from exposure to site contaminants and enable the safe redevelopment for the benefit of the community. EPA's site team will work closely with the State and the community as we move forward in this process. We look forward to continued communication and engagement as we achieve these goals.

Sincerely,

Becker,
Kathleen

KC Becker

Digitally signed by
Becker, Kathleen
Date: 2024.04.23
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APPENDIX K

ENVIRONMENTAL QUALITY COUNCIL

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KATY CALLON, Research Analyst
JOE CARROLL, Legal Staff
JOLANDA SONGER, Secretary

April 10, 2024

[Congressman/Congresswoman/Senator's Name]
[Office Address]
[City, State, Zip Code]

Dear [Congressman/ Senator's Name],

I am writing to you today on behalf of the Montana Legislature's Environmental Quality Council to request your support for a critical initiative that has the potential to address our nation's dependence on foreign sources of rare earth elements. We urge you to consider allocating funding to support further development of a project for the recovery of rare earth elements (REEs) and critical minerals at the Berkeley Pit in Butte, as well as evaluate the feasibility at other permitted and/or abandoned mine sites in Montana for REE and critical minerals recovery.

As you may know, REEs are vital components in numerous modern technologies, including electronics, renewable energy systems, and defense applications. However, the United States currently relies heavily on imports from foreign countries, particularly China, for the supply of these essential materials. This overreliance poses significant economic and national security risks, as demonstrated by recent geopolitical tensions and trade disputes.

The Berkeley Pit presents a unique opportunity for the recovery of rare earth elements and critical minerals. The water treatment plant waste stream from this former open-pit copper mine contains high concentrations of cerium, gallium, neodymium, yttrium, zinc, and much more. Furthermore, similar opportunities to recover REEs and critical materials are likely to exist at other abandoned mine sites, as well as at currently operating mine operations.

By investing in this proposal, Congress can stimulate economic growth, create new jobs, and enhance our national security; it aligns with broader efforts to promote domestic resource development and strengthen America's position in the global marketplace.

We respectfully urge you to consider this Defense Subcommittee programmatic appropriation request. Your leadership on this issue is crucial to advancing our nation's strategic interests and ensuring a sustainable supply of REEs and critical minerals for generations to come.

Thank you for your attention to this matter. I look forward to your favorable response and continued advocacy for policies that promote American innovation, competitiveness, and security.

Sincerely,

Rep. Steve Gunderson, chairman
Environmental Quality Council



MISSOULA CONSERVATION DISTRICT

November 7, 2022

Jonathan Morgan, Legal Counsel
Montana Department of Environmental Quality
P.O. Box 200901
Helena MT 59620-0901

Dear Mr. Morgan:

The Missoula Conservation District has a history of involvement with the Smurfit-Stone site through issuance of nine 310 permits for berm repair after the 310 law was enacted in 1975. The unengineered berm was put in place prior to the implementation of the 310 law. During the operation of the mill site, issuance of repair permits were approved as the berms served a purpose in retaining water from entering the Clark Fork River from low flow per the MPDES permit issued by DEQ. To require the mill at that time to move the berms or require extensive improvements along approximately four miles of river was not in keeping with protection of the Clark Fork River. Prior to the construction of the berms and the excavation of floodplain for holding ponds, direct discharge had resulted in an extensive fish kill for miles downstream. Attached below is a summary of 310 and floodplain permits that document the pervious, and unstable nature of the berm. There is extensive evidence that repetitive and ongoing maintenance is required for the berm to function.

The Missoula Conservation District is charged with enforcement of the Montana Natural Streambed and Land Preservation Act, also known as the 310 Law.

MCA § 75-7-102(2): It is the policy of the state of Montana that its natural rivers and streams and the lands and property immediately adjacent to them within the state are to be protected and preserved to be available in their natural or existing state and to prohibit unauthorized projects, and in so doing, to keep soil erosion and sedimentation to a minimum, except as may be necessary and appropriate after due consideration of all factors involved. Further, it is the policy of this state to recognize the needs of irrigation and agricultural use of rivers and streams of the state of Montana and to protect the use of water for any useful or beneficial purpose as guaranteed by The Constitution of the State of Montana.

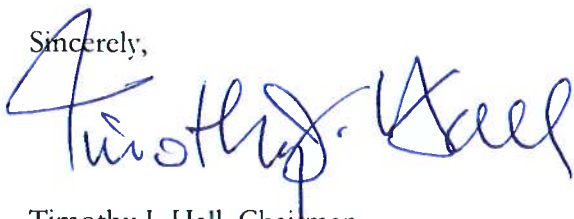
The MPDES permit was revoked in 2014 and the site sits vacant. The berms are no longer needed to hold back wastewater. Contaminated sediments and landfills sit behind the berms but are allowed to percolate into groundwater which ultimately reaches the Clark Fork River. As the site currently sits, the berms do not serve any useful or beneficial purpose. The berms impede the natural flow of the Clark Fork River and, if breached, could undermine downstream irrigation and agricultural uses of the river through increased soil erosion and sedimentation. Removal of the berms would allow for natural river function and the return of over 450 acres of floodplain.

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Riprap of stream banks is no longer preferred or in most cases an acceptable practice. Dictating that unstable berms are retained as part of an EPA Superfund remedy is not acceptable within our jurisdiction. The berms may be maintained while different remedies are debated and the site continues through the Superfund process - the final remedy and the Record of Decision, however, cannot include the maintenance and upkeep of the berm in perpetuity.

On behalf of the Missoula Conservation District Board of Supervisors.

Sincerely,



Timothy J. Hall, Chairman

Cc: Amelia Pigott, U.S. EPA, Region 8; Missoula Board of County Commissioners; John Harrison, Legal Department Confederated Salish & Kootenai Tribe; Frenchtown Community Advisory Group

Summary of 310 and Floodplain Permits

The berms have required ongoing repairs over a period of many years, in particular at the upstream end of the pond system along what is known as Pond number 2 and also in areas near the mill's discharge pipes at pond 2, pond 11 and pond 13A. Some examples of the repairs required, as documented in Missoula Country floodplain development permits and Missoula Conservation District 310 permits include the following:

- a. May 17, 1976 – 310 permit application requested to riprap 300 feet of the pond 2 dike. The application stated, "Due to a changing course of flow in the Clark Fork River, the west side of the pond 2 dike is being eroded. The placement of 300 lineal feet of rock riprap is needed to prevent further erosion during high river flow and possible loss of the pond 2 dike." The application also requested to riprap 300 lineal feet of the pond 11 dike, 50 feet at the discharge outfall from pond 2, 200 lineal feet of the south dike of pond 2, and 1,000 feet along the mill's well field.
- b. October, 1976 – 310 permit requested to repair damaged 30 inch outfall pipe and broken elbow in the river.
- c. October, 1978 – 310 permit application requested permit to riprap 3,250 lineal feet at various sections along the dikes. "The placement of rock rip-rap is needed to prevent further erosion during high river flows and possible loss of pond dikes." The dikes identified for repair included 200 feet of the south dike of pond 2, 1,200 feet of the west dike of pond 2, 1,600 feet of the west dike of pond 11, 50 feet in an area identified as area D near pond 13A, and 200 feet in the Northwest corner of pond 13A.
- d. October, 1985 – Floodplain permit application requested to riprap along Pond 2. "During each spring runoff, the river has cut away the bank in the west side of storage pond 2. ... To prevent the river from eventually cutting into the pond dike, we are proposing to rock

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riprap 500 feet of river bank.” The area proposed for riprapping is the same as indicated in the 1976 and 1978 permit applications.

- e. April, 1990 – Emergency 310 permit application requested to replace a 100 foot section of riprap that “slipped down and exposed the dirt face of the river bank.” Also to beef up 500 feet of remaining riprap on both sides of the 100 foot section. FWP biologist expressed concern that “...high water this spring could potentially erode this bank and release pulp mill wastes from the ponds to the river...”
- f. September 1991 – 310 permit requested to install two rock barbs on riverside of Pond 2. Riprap had failed at this location on two previous occasions. October, 1991 floodplain permit application submitted for same project, “The purpose of the bank barbs is to reduce the continued erosion to the riprap along the dike of our wastewater pond 2.” Barb location is in same location as 1976, 1978, and 1985 permit applications.
- g. October, 1991 – 310 permit requested to remove 2-3 large stumps lodged against a 10 inch discharge pipe in the river, repair damaged pipe and elbows in the river, and flush pipes that were clogged with river gravels.
- h. April, 1998 – Floodplain, and 310 permit applications submitted to repair rock riprap adjacent to mill discharge pipes. “The bank failed during last year’s ice flows and extended runoff.” WGM Group letter states that, “The proposed work is required prior to high water this year, since the lack of bank protection may cause the entire discharge facility to be washed out during this spring’s runoff.” The work would include installing a new barb, reinforcing an existing barb, riprapping 250 feet of bank and revegetating raw bank of the river. The existing barb and bank failed during the ice flows and extended runoff in 1997.
- i. May, 2001 – Emergency 310 permit application requested for repair of the dike in Pond 2. A leak of 150 gallons per minute was discovered, discharging wastewater into the river. The leak was indicated in the same area as previous repairs made to the pond 2 dike. Clay was applied at the outlet of the leak to stop the leak and the pond level was lowered. A rodent burrow was identified as a likely cause of the leak.
- j. August, 2007 – 310 permit application requests to repair the 30 inch pipe at outfall 001. An inspection of the pipe identified a corroded section near the inlet.