COMPLAINT FOR DECLARATORY AND INJUNCTIVE RELIEF

Alex Rate
RATE LAW OFFICE, P.C.
P.O. Box 1387
Livingston, MT 59047
Telephone: 406-333-2711
alex@ratelawoffice.com

Michelle Uberuaga
MICHELLE UBERUAGA Z., PLLC
P.O. Box 711
Livingston, MT 59047
Telephone: 406-223-4714
michelle.uberuaga@gmail.com

Attorneys for the Plaintiffs.

MONTANA EIGHTEENTH JUDICIAL DISTRICT COURT
COUNTY OF GALLATIN

JANIS ECKERT, RALPH LACHENMAIER, SONJA BERG, IRENE OLSON, MITCH MILLER and ADELAIDE FOSTER, Plaintiffs, vs. MONTANA DEPARTMENT OF ENVIRONMENTAL QUALITY, MONTANA DEPARTMENT OF NATURAL RESOURCES AND CONSERVATION, and BRIDGER PINES COUNTY WATER AND SEWER DISTRICT, Defendants.	Cause No: DV-12-301A Judge: Holly Brown **COMPLAINT FOR DECLARATORY AND INJUNCTIVE RELIEF**

COME NOW THE PLAINTIFFS, by and through counsel, and hereby file and serve their complaint for declaratory and injunctive relief and allege:

INTRODUCTION

1. This complaint challenges the decision by the Montana Department of Environmental Quality (DEQ) and the Montana Department of Natural Resources and Conservation (DNRC) to grant public funds to Bridger Pines County Water and Sewer District (BPCWSD or the District) to build a new wastewater treatment plant in a rural mountain community for the purpose of servicing and expanding a private subdivision.

2. The allocation of public funds to the District constitutes a state action and triggers the Montana Environmental Policy Act (MEPA), Mont. Code Ann. §§ 75-1-101—324 (2009). *See also* Admin R. Mont. 17.4.603(1).

3. One of MEPA's primary purposes is "to promote efforts that will prevent or eliminate damage to the environment and biosphere and stimulate the health and welfare of humans." *Id.* § 75-1-102(2). MEPA does so by requiring State decision makers to fully examine the impacts of proposed actions and to evaluate alternatives that may reduce or avoid those impacts. *Id.* § 75-1-201; Admin. R. Mont. 17.4.603(2)(a). In this way, State decision makers may fulfill their constitutional obligation to prevent unreasonable environmental degradation. *See* Mont. Const., Art. II, sec. 3; *Id.* Art. IX, sec. 1; *see also* Mont. Code Ann. § 75-1-102 (MEPA intended to implement State's constitutional obligations with respect to environmental protection).

4. The DEQ finalized its environmental review of the District's wastewater treatment facility and issued a final Environmental Assessment (EA) and a Finding of No Significant Impact (FONSI) on March 1, 2012. *Department of Environmental Quality, Environmental Assessment (March 1, 2012) ("Final EA")*, attached Exhibit A. Through this document, DEQ approved a commitment of state funds pursuant to Mont. Code Ann. §§ 75-5-

1112 and 75-5-1113, to the District. The District intends to use the funds to build a $2.8 million wastewater treatment plant. The DEQ's review and final EA falls short of the requirements set forth in MEPA. The EA failed to consider a viable alternative to the proposed project. In addition, the size of the project and its potential for significant impacts on the environment warrant an environmental impact statement (EIS). Mont. Code Ann. § 75-1-201; Admin. R. Mont. 17.4.608.

5. The District intends to use public funding from DEQ, DNRC, and Department of Commerce to build the $2.8 million sewer to service the Bridger Pines subdivision (Subdivision). *Final EA* at 7. Sixty-six percent of the Subdivision remains undeveloped. The purpose of the new wastewater treatment plant is to allow the full build-out of the Subdivision. *Id.* A single party owns more than half of the undeveloped properties in the Subdivision. *Treasure State Endowment Program, Montana Department of Commerce 2009 Project Evaluations ("TSEP Evaluation")*, pp. 359-364, attached Exhibit B.

6. In 2005 the Subdivision formed a County Water and Sewer District. The formation of the District allows the Subdivision to qualify for public funds. In this way, grants and loans from DNRC, DEQ, and Department of Commerce subsidize private development. The District has also used its status as a public entity to circumvent local zoning regulations. *Gallatin County Planning Department Staff Report, September 8, 2011 ("Staff Report")*, attached Exhibit C.

7. Consistent with its obligations under Mont. Code Ann. § 90-6-710, the Montana Department of Commerce (DOC) did not recommend funding the project. *See, TSEP Evaluation* at 359-364. The DOC reported that the "review team does not think that the limited amount of funds available should be awarded to an applicant that has a high percentage of second homes

and a high percentage of un-developed, vacant lots (especially since 58% of those lots are owned by a single party, which would be a significant benefit for that one party)." *TSEP Evaluation*, p.363. As a result, the "DOC review team [did] not recommend that . . . any grant amount should be awarded to the district." *Id.* Yet the District is slated to receive nearly all of the $2.8 million for the project in the form of low-interest government sponsored loans or grants.

JURISDICTION AND VENUE

8. Plaintiffs bring this action pursuant to the Uniform Declaratory Judgments Act, Mont. Code Ann. §§ 27-8-201 and 202, Montana Constitution Article II, section 3 and Article IX, section 1, and MEPA, Mont. Code Ann. §§ 75-1-101—324 (2009).

9. This Court has jurisdiction over Plaintiffs' claims pursuant to Mont. Code Ann. § 3-5-302(1)(b) and (c). *See also Ravalli County Fish & Game Ass'n v. Dep't of State Lands*, 273 Mont. 371, 903 P.2d 1362 (1995) (exercising jurisdiction over claim that agency failed to comply with MEPA).

10. Venue is proper in this District pursuant to Mont. Code Ann. § 75-1-108, because the proposed wastewater treatment plant that is the subject of this action is located in Gallatin County.

PARTIES

11. Plaintiffs Janis Eckert, Ralph Lachenmaier, Sonja Lachenmaier Berg, Irene Lachenmaier Olson, (collectively "Lachenmaier Family") own property that borders the proposed site for new wastewater treatment plant. The Lachenmaier Family's property constitutes the last remaining piece of land from the original ranch where the Lachenmaier siblings were born and raised. The Lachenmaier Family uses the property for family excursions, picnics, hiking, horseback riding, cross-country skiing, and wildlife viewing. The property has

served as a place of refuge for the Lachenmaier Family for the past 60 years. The property remains as place where family members, now scattered across the country, can return home. The property is valuable to the Lachenmaier Family because of its natural and remote setting in Bridger Canyon.

12. The Lachenmaier Family's property will border a 14 acre sewer plant with settling ponds, chain link fences, large machinery, and accessory buildings if the District's proposal to build a wastewater treatment plant moves forward. The Lachenmaier Family will be forced to deal with the sight, smell, and sound of a sewer plant year-round. The Lachenmaier Family will also have to deal with any environmental degradation or contamination from the sewer. The sewer will change the way the Lachenmaier Family uses their property. They will no longer be able to use the property as a place of refuge. They will no longer be able to use the property for wildlife viewing or hunting. The land will no longer serve as a peaceful retreat.

13. Plaintiffs Mitch Miller and Adelaide Foster are year-round residents in Bridger Canyon and live directly east of the proposed sewer site. They have owned their property and home since 1994. They have spent significant amounts of time and money to improve their property. They purchased their home because of the beautiful natural setting in Bridger Canyon and because of the amazing views of Bridger Bowl and the Bridger Mountains. Their family spends a significant amount of time outside together horseback riding, fishing and swimming in their pond, and skiing. During the summer months they use a front deck for family gatherings, dinners, and barbeques. The proposed sewer would be built within 1,600 feet of their property line. Construction and operation of the proposed sewer will interfere directly with the use and enjoyment of their property by diminishing their view and creating dust and odors.

14. Plaintiffs stand to bear the burden of the negative impacts from the sewer. The sewer will dramatically reduce the Plaintiffs' quality of life and their property values.

15. Plaintiffs fear that the new sewer will contaminate groundwater, create additional air pollution, cause erosion, and negatively impact their view-shed.

16. Defendant DEQ is a state agency whose mission is "to protect, sustain, and improve a clean and healthful environment to benefit present and future generations." DEQ, Mission Statement, http://www.deq.mt.gov/about/mission.mcpx (accessed April 7, 2012). DEQ was created pursuant to Mont. Code Ann. § 2-15-3501. DEQ administers Title 75 "Environmental Protection", Chapter 5 "Water Quality", of the Montana Code Annotated. DEQ administers the Water Pollution Control State Revolving Fund found at Mont. Code Ann. §§ 75-5-1101, *et seq*. Mont. Code Ann. § 75-5-211.

17. Defendant DNRC was created pursuant to Mont. Code Ann. § 2-15-3301. DNRC "is responsible for promoting the stewardship of Montana's water, soil, forest, and rangeland resources." DNRC, Mission Statement, http://dnrc.mt.gov/AboutUs/about.asp (accessed April 7, 2012). With DEQ, DNRC co-administers the Water Pollution Control State Revolving Fund.

18. The property owners of the Bridger Pines subdivision formed a county-sponsored water and sewer district with the express purpose of solving sewer deficiencies at Bridger Pines. Defendant Bridger Pines County Water and Sewer District was established pursuant to Mont. Code Ann. § 7-13-2204. The District is located entirely within Gallatin County, with the following address: P.O. Box 4028, Bozeman, MT 59772.

19. This Court has jurisdiction over the parties to this action.

FACTUAL BACKGROUND

20. The Bridger Pines subdivision was created in the early 1970's. The Subdivision is located just north of the Bridger Bowl ski area. The Subdivision was platted in 1972 for 58 lots. However, only 10 homes and 10 condominiums have been built. Approximately 5 to 7 full-time residents occupy the Subdivision. Sixty-six percent of the Subdivision remains undeveloped. A single party owns fifty-eight percent of the un-developed properties in the Subdivision. *TSEP Evaluation* at 363.

21. The homes and condos in the Subdivision serve primarily as recreational properties and second homes. *TSEP Evaluation* at 359, 363.

22. Most of the lots in the Subdivision are owned by only a few private developers. *TSEP Evaluation* at 363.

23. Some property owners in the subdivision oppose the proposed sewer because the high cost of new services will force them to sell their property. *See Final EA* at 16, 22.

24. The District apparently has used public funds to purchase a $900,000 parcel of private property nearly a quarter of a mile from the Subdivision for the proposed sewer. *Purchase and Sale Agreement, June 30, 2011*, attached Exhibit D.

25. The proposed sewer is projected to cost approximately $2.8 million. *Final EA* at 1. The sewer will have only the capacity to service this one Subdivision and cannot later be expanded to service other areas at Bridger Bowl. Of the $2.8 million price tag, the District proposes contributing only $32,600. The project will be funded primarily through taxpayer funded loans and grants from DNRC, DEQ, and DOC.

26. The Subdivision's current wastewater treatment facility was built in 1974-75. *TSEP Evaluation* at 359. The facility has been out of compliance with environmental standards

since shortly after its inception. The facility currently leaks contaminated wastewater at rates eight-time greater than current standards allow. *Final EA* at 2. As a result of the faulty facility, 20 single family residents and 18 condominiums platted for the Subdivision in 1972 have been under a building moratorium. *Id.*

27. After nearly forty years of ignoring their own leaking facility, members of the Bridger Pines Subdivision formed the Bridger Pines County Water and Sewer District. Rather than responsibly addressing the problems of the leaking facility, the District proposes transporting treated wastewater and sludge nearly a quarter mile out of the District and into the backyard of their neighbors.

28. The sewer will benefit only the homeowners in the Subdivision to the detriment of other property owners in the Bridger Canyon. To add insult to injury, the District admits that they are not complying with the Zoning Regulations adopted by government planners and created with hours of public input. *Bridger Pines County Water and Sewer District Zoning Variance Application, (July 11, 2011) ("BPCWSD Variance Application")*, attached Exhibit E.

29. The District has purchased a 13.88 acre parcel of private land to build the sewer (in an area with 40 acre lot minimums). *See Bridger Bowl Base Area Plan*, attached Exhibit F; *Bridger Canyon Zoning Regulations*, attached Exhibit G; *Bridger Canyon General Plan and Development Guide*, attached Exhibit H.

30. The nearly $1 million price tag for the 13.88 acre parcel reflects the beauty of this property and the potential for prime residential development. The District's decision to site the new wastewater treatment plant outside the District's boundaries places the burden of living adjacent to a wastewater treatment plant on other property owners in Bridger Canyon, including the Lachenmaier Family, and Mitch and Adelaide Foster.

31. The Bridger Canyon Zoning Regulations require that the District obtain a variance for the project. *Bridger Canyon Zoning Regulations* at 24. The District originally applied for a zoning variance in August 2011. *See BPCWSD Variance Application*, Exhibit E. In their application, the District acknowledges that the creation of a 13.88 acre parcel in the area (zoned B-4) violates the zoning regulations. *Id.* The District subsequently withdrew its application and informed the Planning and Zoning Commission that it intended to rely on Mont. Code Ann.§ 76-2-402, which provides that public entities do not have to abide by local land use rules on public land. *Staff Report*, Exhibit C. Nonetheless the District used private property without first obtaining a zoning variance.

32. To this date the District has avoided zoning oversight; however, in a separate lawsuit, landowners have sought judicial review of the District's purchase of the 14 acre parcel (Cause No. DA 12-0105, currently on appeal before the Montana Supreme Court). The purpose of the lawsuit is to achieve local oversight of the project to ensure that it comports with zoning regulations.

33. The District has applied for public funds to build the new wastewater treatment. The District purportedly has won the following grants and loans: "[A] $985,000 loan from the Montana Water Pollution Control State Revolving Fund, a loan from the Montana Coal Severance Fund loan program for $1,311,000, and grants from the Treasure State Endowment Program for $400,000 and the DNRC for $100,000." *Final EA* at 7.

34. DEQ and DNRC funded the project despite strong public opposition to the project, even from some of the residents in the Subdivision who likely cannot afford the increase in sewer rates associated with the project.

35. DEQ's decision to fund the project defies its own growth policy. DEQ's growth policy states that "due to recent significant population growth in Montana and the expansion of water and sewer services to accommodate that growth, both the WPCSRF and Drinking Water SRF programs have developed a growth policy to clarify the eligibility of certain types of projects directly associated with growth. Specifically, with regard to wastewater systems, new wastewater projects that serve areas that are not at least 50% occupied are not eligible for WPCSRF funding." *DEQ 2012 Water Pollution Control State Revolving Fund Intended Use Plan and Project Priority List ("SRF Intended Use Plan")*, p. 4, attached Exhibit I. DEQ has awarded the District SRF funds despite the fact that the Bridger Pines Subdivision only has 5 to 7 year-round residents, and the fact that sixty-six percent of the Subdivision remains undeveloped.

36. The purpose of the new wastewater treatment plant is to lift the building moratorium in order to allow the full build-out of the Subdivision. *Department of Environmental Quality, Environmental Assessment (October 14, 2011) ("Oct EA")*, p. 2, attached Exhibit J.

37. The District has proposed the $2.84 million project to build an entirely new wastewater treatment plant, despite the fact that an out-of-date and leaking facility already exists. *Final EA* at 2. The current wastewater system consists of a gravity collection system, lift station, primary settling cell and aerated holding cell. The existing treatment facility and lift station would be abandoned and the district would connect to a new wastewater treatment facility. *TSEP Evaluation* at 359. The District proposes disposing of sludge from the old facility at the new site. DEQ did not consider, and the District did not propose, making improvements to the current wastewater treatment plant. *Final EA* at 2.

38. The proposed sewer will use a community septic tank and multiple fixed film biological treatment modules to treat wastewater. Wastewater will be stored in a 2.8 million gallon storage pond. The area required for the storage cell will be approximately 4.15 acres. *Final EA* at 5. Treated wastewater will be sprayed onto an approximately 7.3 acres of land to create a harvestable crop of hay. *Id.* The 7.3 acres of once forested land must be converted to grass. The proposed sewer will occupy a total of 14 acres with a community septic tank, multiple fixed film biological treatment modules, roads, auxiliary buildings, chain link fencing, and the 4.15 acre storage cell.

39. In order to qualify for funding from DNRC, DEQ, and DOC, through the SRF and TSEP programs, the proposed project must undergo environmental review. Mont. Code Ann. § 75-1-201; *See also Montana Department of Commerce. Treasure State Endowment Program Application Guidelines 2012*, http://comdev.mt.gov/TSEP/tsepapplyingforgrants.mcpx (last accessed April 6, 2012). The DEQ began its environmental review of the proposed project in February or March of 2011.

40. The DEQ arbitrarily relied upon public input for its environmental assessment that was gathered at a purported public meeting held nearly four years before the current EA was finalized. *Final EA* at 14. The DEQ arbitrarily adopted that public input despite the fact that the public commented on a very different project than the project evaluated in the final EA. DEQ did not provide any opportunity for public input on the project other than opening up the EA for comments. Property owners faced with living adjacent to the new sewer should have been invited to participate in the EA, or at least noticed of the project prior to DEQ's release of its Finding of No Significant Impact. *See* Admin. R. Mont. 17.4.610.

41. DEQ issued its initial EA and FONSI on May 20, 2011. *Department of Environmental Quality, Environmental Assessment (May 20, 2011) ("May EA")*, attached Exhibit K. DEQ did not receive any public comment for the proposed project because most of the landowners in Bridger Canyon did not learn of the District's proposed project until late that summer. DEQ reissued the May EA and reopened the comment period in October of 2011 in response to public concern that DEQ had failed to properly notice the project.

42. The Plaintiffs submitted comments on the October EA and FONSI. The DEQ responded to comments and issued its final EA and FONSI on March 1, 2012. *See Final EA*, Exhibit A.

43. The EA fails to comport with MEPA for the following reasons:

a. The EA fails to consider any viable alternative to the proposed action. The EA sets forth three alternatives, including the no action alternative (Alternative 1) and the preferred alternative (Alternative 3). *Final EA* at 4. The EA states that Alternative 2 is not viable because both scenarios proposed under Alternative 2 require a groundwater discharge permit that could not be obtained from DEQ.

b. DEQ's response to comments indicate that, in fact, a groundwater permit could have been obtained, but that the District abandoned this alternative because the permit could "easily take a year or more" to obtain. *Final EA* at 13. Either way, DEQ deemed Alternative 2 not viable. Alternative 2 therefore presents no meaningful alternative.

c. The no action alternative results in continued contamination to groundwater and surface water. *Final EA* at 4. The no action alternative would result in a

continued violation of Montana environmental laws. The no action alternative likewise is not a viable alternative. *Id.*

d. The EA fails to consider any meaningful alternative other than the proposed action. Instead, the DEQ's response to comments indicates that the District deemed other options non-viable, and therefore, the EA does not consider any real alternative to the proposed action.

e. The EA fails to evaluate any alternative locations for the proposed wastewater treatment plant, including a site within the District's border.

f. The proposed site is situated in an area zoned for high-density residential development. The properties potential for prime development is reflected in the exorbitant cost for the 14-acre parcel—$900,000. The EA nonetheless concludes, without support, that the particular site for the project does not constitute "prime residential land given its immediate proximity to the large Bridger Bowl parking lot." *Final EA* at 13.

g. The EA also concludes, again without adequate support, that the new wastewater treatment facility will not emit any odors, will not negatively impact the view-shed, and will not impact property values or quality of life for neighboring property owners. The EA states that the purpose and need for the new wastewater treatment facility is to address the leakage and capacity issues with the current facility in order to allow for the full build-out of the Bridger Pines Subdivision, up to 38 additional residences. *Final EA* at 1. Yet, the EA fails to discuss any environmental impacts that will result from the building of the proposed additional 20 residences and 18 condominiums at Bridger Pines. The EA instead

defers to subdivision review and an environmental impact statement prepared by the Department of Health and Environmental Services (DHES) in 1974, nearly forty years ago. *Final EA* at 9, 11-13, 15. The EA completely fails to address how the building of 38 new home and condos will impact the environment, including freshwater resources. *Final EA* at 15. This $2.8 million wastewater treatment plant and the accompanying build-out of the Bridger Pines subdivision warrant a new EIS. *See* Admin. R. Mont. 17.4.608.

h. Notwithstanding the fact that the DHES EIS is completely out-of-date, the DEQ completely failed to satisfy the procedure for adopting an existing EIS set forth in Admin. R. Mont. 17.4.625.

i. In that same regard, the EA fails to address any negative impacts from the abandonment of the old failing wastewater treatment system. Instead, the DNRC, DOC. and DEQ reward the District's noncompliance with environmental laws for the past 30+ years by awarding the District nearly $2.5 million in grants and loans to fund the new wastewater treatment plant—all for the benefit of a few private developers. and at the expense of adjoining landowners. The EA also fails to adequately evaluate impacts to freshwater resources, again relying on a 1974 EIS that is dramatically out of date and insufficient to provide the requisite analysis. *Final EA* at 9.

j. Finally, the EA erroneously concludes that no permission or easements will be required from neighboring property owners for the construction of the project. The Lachenmaier Family owns an easement across the property slated for the

proposed wastewater treatment. No one has contacted the Lachenmaier Family about a change of use to their easement.

LEGAL CLAIMS

COUNT I – VIOLATION OF MONTANA ENVIRONMENTAL POLICY ACT Mont. Code Ann. §§ 75-1-101—324 (2009).

44. Plaintiffs hereby reallege and incorporate Paragraphs 1 through 43.

I. Failure To Consider A Reasonable Range Of Alternatives.

45. The DEQ failed to satisfy its MEPA duties by not adequately considering other sound alternatives to the proposed project at issue. Mont. Code Ann. §§ 75-5-101—324 (2009).

46. Mont. Code Ann. § 75-1-201(1)(b)(i)(B) directs that every environmental review must meet the requirements for evaluating alternatives set forth in § 75-1-201(1)(b)(iv)(C)(I) – (C)(III).

47. MEPA requires that the EA consider reasonable alternatives to the proposed action. Mont. Code Ann. § 75-1-201(1)(b)(iv)(C)(I).

48. An analysis of any alternative included in the environmental review must comply with the following criterion:

> (I) *any alternative proposed must be reasonable, in that the alternative must be achievable under current technology and the alternative must be economically feasible* as determined solely by the economic viability for similar projects having similar conditions and physical locations and determined without regard to the economic strength of the specific project sponsor;

Mont. Code Ann. § 75-1-201(1)(b)(iv)(C)(I) (emphasis added); *see id.* § 75-1-201(1)(b)(i)(B).

49. The EA violates MEPA because it fails to consider a viable alternative to the proposed action and fails to analyze a reasonable range of alternatives to the proposed action.

See id. § 75-1-201(1)(b)(i)(B).

II. Failure to Prepare an EIS to Analyze Potentially Significant Impacts.

50. MEPA requires that an agency take procedural steps to review "projects, programs, legislation, and other major actions of state government significantly affecting the quality of the human environment" in order to make informed decisions. Mont. Code Ann. § 75-1-201(1)(b)(iv); Admin. R. Mont. 17.4.608.

51. The DEQ must prepare an EIS "in each recommendation or report on proposals for projects, programs, and other major actions of state government significantly affecting the quality of the human environment." Mont. Code Ann. § 75-1-201(1)(b)(iv).

52. If substantial questions are raised whether a project may have a significant effect upon the environment, an EIS must be prepared. *Ravalli Co. Fish & Game Assn., Inc. v. Mont. Dept. of State Lands*, 273 Mont. 371, 381, 903 P.2d 1362, 1369 (1995).

53. The District's proposal to build a $2.84 million wastewater treatment plant in order to facilitate the full build-out of the Bridger Pines Subdivision likely will have a significant impact on the human environment. DEQ must prepare an EIS in light of the potential for the project to significantly impact the environment. Mont. Code Ann. § 75-1-201(1)(b)(iv); Admin. R. Mont. 17.4.608; *Ravalli Co.*, 273 Mont. at 371.

III. Failure to Analyze and Disclose Cumulative Impacts

54. An agency shall, when appropriate, consider the cumulative impacts of a proposed project. Mont. Code Ann. § 75-1-208(11).

55. Cumulative impacts include "the collective impacts on the human environment of the proposed action when considered in conjunction with other past, present, and future actions related to the proposed action by location or generic type." Mont. Code Ann. § 75-1-220(3).

56. DEQ failed to consider the cumulative environmental impacts of the development of the Bridger Pines subdivision. The purpose of the proposed wastewater treatment plant is to allow the Subdivision to develop an additional 20 single family residents and 18 condominiums platted in 1972.

57. The DEQ arbitrarily relies upon an environmental impact statement prepared in 1974 to conclude that it does not need to consider any impacts from the development.

IV. Failure to Analyze and Disclose Direct Impacts

58. DEQ acted arbitrarily and capriciously by failing to fully and accurately disclose the environmental consequences of the proposed action. For example, DEQ arbitrarily concluded that the impact on freshwater resources would be minimal without providing any analysis of available freshwater resources for the subdivision or for the wastewater treatment plant.

59. The DEQ arbitrarily concluded the project will not emit any odors.

60. The DEQ arbitrarily relied on "evidence from similar systems throughout Montana" to conclude that no significant odors are expected. Other similar systems in Montana emit odors.

61. The DEQ arbitrarily analyzed the economic impacts to neighboring property owners' property values.

62. Because DEQ's environmental analysis is arbitrary and capricious, and counter to the evidence before the agency, it is unlawful. *Skyline Sportsmen's Assn. v. Bd. of Land Commrs.* 286 Mont. 108, 113, 951 P.2d 29, 32 (1997).

COUNT II - VIOLATION OF WATER POLLUTION CONTROL STATE REVOLVING FUND ACT
Mont. Code Ann. §§ 75-5-1101—1126.

63. Plaintiffs hereby reallege and incorporate Paragraphs 1 through 62.

I. Failure to Acquire Necessary Property Rights

64. Before committing SRF funds to the District the DEQ must ensure that "all necessary property titles, easements, and rights-of-way have been obtained [by the District] to construct, operate, and maintain the project." Mont. Code Ann. § 75-5-1113.

65. The proposed site for the wastewater treatment plant lies adjacent to the Lachenmaier Family's property. The project anticipates relying on an easement owned by the Lachenmaier Family. The project will significantly alter the use of the Lachenmaier's easement road. The road will be used to transport heavy equipment for the construction and maintenance of the facility.

66. The Lachenmaier Family may have to travel through an area being sprayed with wastewater to reach their property.

67. No one has contacted the Lachenmaier Family about a change in use of their easement.

68. Admin. R. Mont. 36.24.106 likewise requires the borrower to "acquire all property rights necessary for the project including rights-of-way and interest in land needed for the construction, operation, and maintenance of the facility" and to "furnish title insurance, a title opinion, or other documents showing the ownership of the land, mortgagee, encumbrances, or other lien defects."

69. DEQ and DNRC violated Mont. Code Ann. § 75-5-1113, and Admin. R. Mont. 36.24.106, by committing SRF funds to the District without requiring the District to first acquire

necessary property rights.

II. Unlawful Disbursement of Funds While Litigation is Pending

70. Admin. R. Mont. 36.24.109 provides that DEQ cannot disburse SRF loans until the borrower has provided "a certificate of an official of the borrower that there is no litigation threatened or pending challenging the borrower's authority to undertake the project, to incur the loan, issue the bonds or enter into the loan agreement, collect the system charges in a form acceptable to the department or pledge its revenues or assets to the repayment of the loan or bonds."

71. Cause No. DA 12-0105 at the Montana Supreme Court challenges the District's illegal reliance on Mont. Code Ann. § 76-2-402, to avoid project review by the Gallatin County Planning and Zoning Commission.

III. Arbitrary Funding Inconsistent With DEQ's Growth Policy

72. DEQ and DNRC arbitrarily allocated funds in a manner inconsistent with DEQ's own growth policy.

73. The 2012 Intended Use Plan for State Revolving Funds states that: "Due to recent significant population growth in Montana and the expansion of water and sewer services to accommodate that growth, both the WPCSRF and Drinking Water SRF programs have developed a growth policy to clarify the eligibility of certain types of projects directly associated with growth. Specifically, with regard to wastewater systems, new wastewater projects that serve areas that are not at least 50% occupied are not eligible for WPCSRF funding." *SRF Intended Use Plan* at 4, Exhibit I.

74. DEQ's and DNRC's decision to fund the wastewater treatment plant for the Subdivision clearly contradicts this policy. The Subdivision is less than half built. The

Subdivision only has 5-7 year-round residents. The majority of the vacant lots in the subdivision are owned by one property owner. The agencies' decision to fund this $2.8 million project for the benefit of a few property owners in a community of recreational and second-homes clearly flies in the face of this policy. The agencies failed to explain why deviation from this policy is appropriate or necessary.

75. DEQ's and DNRC's decision to fund the wastewater treatment plant constitutes arbitrary decisionmaking and represents a misuse of public funds for private development in a manner inconsistent with DEQ's growth policy.

IV. Failure to Require the District to Demonstrate Financial Capability and Ability to Repay.

76. Mont. Code Ann. § 75-5-1113 provides that DNRC may lend funds out of the SRF to approved projects if the loan meets the following conditions:

> (a) meeting requirements of financial capability set by the department of natural resources and conservation to ensure sufficient revenue to operate and maintain the project for its useful life and to repay the loan, including the establishment and maintenance by the municipality of a reserve or revolving fund to secure the payment of principal of and interest on the loan to the extent permitted by the applicable law governing the municipality's obligation;
> (b) agreeing to operate and maintain the project properly over its structural and material design life, which may not be less than the term of the loan;
> (c) agreeing to maintain proper financial records in accordance with generally accepted accounting standards and agreeing that all records are subject to audit;
> (d) meeting the requirements listed in the federal act for projects constructed with funds directly made available by federal capitalization grants;
> (e) providing legal assurance that all necessary property titles, easements, and rights-of-way have been obtained to construct, operate, and maintain the project;
> (f) submitting an engineering report evaluating the proposed project, including information demonstrating its cost-effectiveness and environmental information necessary for the department and the department of natural resources and conservation to fulfill their responsibilities under the Montana Environmental Policy Act and rules

adopted to implement that act;
(g) complying with plan and specification requirements and other requirements established by the department; and
(h) providing for proper construction inspection and project management.

77. DOC evaluated the District's ability to manage a project of this size in its TSEP report under statutory priority #4. The project scored 140 points out of 700. *TSEP Evaluation* at 361-62. The DOC concluded that "the applicant did not demonstrate that it has made reasonable past efforts to ensure sound, effective long-term planning and management of public facilities, or to resolve its infrastructure problems with local resources. The MDOC review team did not score this priority higher primarily because the district was only recently formed and the team thought that operation and maintenance practices have been inadequate." *TSEP Evaluation* at 361.

78. The District also cannot meet the requirements for financial assistance from the SRF under Admin R. Mont. 36.24.104(iii), which provides that "the municipality shall covenant to collect and maintain rates. charges, and rentals such that the revenue for each fiscal year the bonds are outstanding will be at least sufficient to pay the current expenses of operation and maintenance of the system, to maintain the operating reserve, and to produce net revenues during each fiscal year not less than 125% of the maximum amount of principal and interest due on all outstanding bonds payable from the revenues of the system in any future fiscal year."

79. DNRC violated Admin. R. Mont. 36.24.108(1), which states that "before the commitment agreement is executed, the department shall conduct a review of the applicant's financial status and determine based on the information available as to whether the borrower will be able to repay the loan."

80. DEQ violated Admin. R. Mont. 17.40.308(1)(a) and Admin. R. Mont. 17.40.309(1), which provide that the District must have a dedicated source of revenue to repay the loan. and the District must meet the certain financial capability requirements.

81. The District does not have the financial capability to manage the wastewater treatment plant. The cost of the new wastewater treatment plant will unsustainably increase the rates and likely will require a few full-time residents to move. The Subdivision is only 50% built, and repayment depends on an undetermined amount of development. The DEQ and DNRC unlawfully awarded funds to the District.

REQUEST FOR RELIEF

THEREFORE, Plaintiffs respectfully request that this Court:

1. Declare that the DEQ violated Mont. Code Ann. §§ 75-1-101—342 (2009).

2. Declare that DEQ and DNRC violated Mont. Code Ann. §§ 75-5-1101—1126.

3. Order DEQ and DNRC to retract their funding commitments to the District.

4. Order DEQ to reexamine the environmental consequences of its decision and to prepare an environmental impact statement that adequately evaluates the project's environmental consequences and reasonable alternatives.

5. Issue a permanent injunction pursuant to Mont. Code Ann. § 27-19-102, preventing the construction of the wastewater treatment plant until DEQ complies with MEPA.

6. Award Plaintiffs their reasonable fees, costs, and expenses, including attorneys fees, associated with this litigation; and

7. Grant Plaintiffs such additional relief as the Court may deem just and proper.

Respectfully submitted on this 26th day of April, 2012,

Alex Rate
Rate Law Office, P.C.
P.O. Box 1387
Livingston, MT 59047
(406) 333-2711
alex@ratelawoffice.com
Attorney for Plaintiffs

ORDER ON MOTIONS FOR SUMMARY JUDGMENT

MONTANA EIGHTEENTH JUDICIAL DISTRICT COURT
GALLATIN COUNTY

JANIS ECKERT, RALPH LACHENMAIER, SONJA BERG, IRENE OLSON, MITCH MILLER and ADELAIDE FOSTER, Plaintiffs, v. MONTANA DEPARTMENT OF ENVIRONMENTAL QUALITY, MONTANA DEPARTMENT OF NATURAL RESOURCES AND CONSERVATION, and BRIDGER PINES COUNTY WATER AND SEWER DISTRICT, Defendants.	Cause No. DV-12-301A Hon. David Cybulski **ORDER ON MOTIONS FOR SUMMARY JUDGMENT**

On April 26, 2012, Plaintiffs filed a Complaint for Declaratory and Injunctive Relief. Plaintiffs challenge the decision by the Defendants, Montana Department of Environmental Quality ("DEQ") and Montana Department of Natural Resources and Conservation ("DNRC"), to grant public funds and enter into loans with Bridger Pines County Water and Sewer District ("the District") to build a new wastewater treatment

41

system to serve the Bridger Pines subdivision, which is located at the base of the Bridger Bowl ski area.

Plaintiffs' Complaint is divided into two counts. Count I of Plaintiffs' Complaint alleges that DEQ's review and final environmental assessment of the District's wastewater treatment facility falls short of the requirements set forth in the Montana Environmental Policy Act (MEPA), Mont. Code Ann. §§ 75-1-101 – 324 (2009). In particular, Plaintiffs claim DEQ failed to satisfy its MEPA duties by (1) not adequately considering other sound alternatives to the proposed project at issue; (2) failing to prepare an environmental impact statement ("EIS") that adequately analyzes potentially significant impacts; and (3) failing to analyze and disclose direct impacts, such as odors.

Count II of Plaintiffs' Complaint claims that DEQ and DNRC violated the Water Pollution Control State Revolving Fund Act, Mont. Code Ann. §§ 75-5-1101 –1126 ("Act") by lending financial assistance to the District. Plaintiffs argue that DEQ and DNRC violated the Act by (1) failing to require the District to first acquire all necessary property rights; (2) unlawfully disbursing funds while litigation is pending; (3) allocating funds in a manner inconsistent with DEQ's own growth policy and (4) failing to require the District to demonstrate financial capability and ability to repay.

Plaintiffs' Complaint requests the Court declare that DEQ violated MEPA and the Water Pollution Control State Revolving Fund Act. Plaintiffs ask the Court to order DEQ and DNRC to retract their funding commitments to the District. Plaintiffs further ask the Court to order DEQ to reexamine the environmental consequences of its decision and to prepare an EIS that adequately evaluates the project's environmental

consequences and reasonable alternatives. Finally, Plaintiffs request a permanent injunction be issued pursuant to Mont. Code Ann. § 27-19-102 preventing the construction of the wastewater treatment facility until DEQ complies with MEPA. However, no preliminary injunction or temporary restraining order was sought as the project was being constructed.

A case management conference was held in this matter on October 12, 2012. At that time, the parties agreed in open court that this case shall be decided on summary judgment briefs pursuant to Mont.R.Civ.P. 56, and that discovery was not necessary. Plaintiffs filed their motion for summary judgment on November 19, 2012. Defendants DEQ and DNRC filed their combined response brief on December 14, 2012. The District filed its response brief on December 17, 2012. The District's response brief includes a cross motion for summary judgment requesting that judgment be entered against Plaintiffs and in favor of the Defendants' on all counts of Plaintiffs' Complaint. A hearing on the parties' cross-motions for summary judgment was held on April 8, 2013. The parties represented to the Court that there are no genuine issues of material fact precluding the Court from entering summary judgment in this matter.

At the outset, Defendants argue that Plaintiffs' requested relief – retraction of the funding commitments and construction of the wastewater treatment facility – are moot. Mootness is a threshold issue which a Court must resolve before addressing the substantive merits of a dispute. A matter is moot when, "due to an event or happening, the issue has ceased to exist and no longer presents an actual controversy" ... "[a] question is moot when the court cannot grant effective relief."

The parties do not dispute that the District's wastewater treatment facility is now

fully constructed, operational and actively providing service to the properties within the District's boundaries. The series of holding ponds comprising the original wastewater treatment system at Bridger Pines subdivision have been cleaned, bulldozed and regraded and no longer exist. The building formerly housing the original system's pumps and aeration equipment has also been dismantled and removed. Except for a small percentage of coal trust loan funds remaining to reimburse the District's expenses, all the monies have been disbursed.

It is axiomatic that a court must be able to grant meaningful relief or restore the parties to their original position. It is impossible for the district go back to using its old system. Plaintiffs contend the Court can still fashion meaningful relief by enjoining the operation of the facility until DEQ and DNRC prepare a revised environmental assessment ("EA") or an EIS to fully evaluate the environmental impacts of the facility and to consider any potential mitigation efforts that will minimize the negative impacts of the facility, even if all the funds have been allocated and spent.

. Beyond suggesting additional trees be planted to buffer the visual impact of the new storage lagoon and spray site when viewed across the large parking lots for the ski area, Plaintiffs have provided no quantifiable evidence in support of their argument that additional environmental review would make any significant difference in this case.

Furthermore, the "damage" that Plaintiffs seek to avoid has already been done. Plaintiffs seek to prevent the construction of the wastewater treatment facility and retract the funding already disbursed to the District. Plaintiffs do not dispute that the facility has been fully built and is operational. Mootness revolves around a court's ability to restore the parties to their original positions. The completion and operation of

the wastewater treatment facility and dismantling of the old facility has eliminated the Court's ability to provide relief to Plaintiffs. The Court cannot retroactively enjoin acts or actions that have already occurred. Plaintiffs' legal claims for injunctive relief on the construction and operation of the wastewater treatment facility and retraction of public funding are therefore moot.

Even if this Court were to move beyond the mootness issues and address the substantive merits of Plaintiffs' claim, it still could not grant the relief requested by Plaintiffs. The remedy in any action brought for failure to comply with or for inadequate compliance with a requirement of parts 1 through 3 of the Montana Environmental Protection Act, §§ 75-1-101, et seq., is limited to remand to the agency to correct deficiencies in the environmental review conducted pursuant to Mont. Code Ann. § 75-1-201(1). This Court would not have the authority to order the additional mitigation measures Plaintiffs suggest.

Finally, Plaintiffs have not met their burden of proving their claims under MEPA by clear and convincing evidence contained in the record. Mont. Code Ann. § 75-1-201 (6) provides in relevant part,

> In an action alleging noncompliance or inadequate compliance with a requirement of parts 1 through 3, including a challenge to an agency's decision that an environmental review is not required or a claim that the environmental review is inadequate, the agency shall compile and submit to the court the certified record of its decision at issue, and except as provided in subsection 6(b), the person challenging the decision has the burden of proving the claim by clear and convincing evidence contained in the record.
>
> ...[a] court may not consider any information, including but not limited to an issue, comment, argument, proposed alternative, analysis, or evidence, that was not first presented to the agency for the agency's consideration prior to the agency's decision or within the time allowed for comments to be submitted.

> ... The court shall affirm the agency's decision or environmental review unless the court specifically finds that the agency's decision was arbitrary and capricious or was otherwise not in accordance with law.

Before approving State Revolving Fund funding to the District, DEQ prepared three environmental assessments to evaluate the environmental impacts of the project. In May of 2011, DEQ issued an initial EA and Finding of No Significant Impact (FONSI). Notice of the EA and FONSI was published in the Bozeman Daily Chronicle. A 30-day public comment period was provided, but no comments were received. Two months after the comment period closed, DEQ received eight comment letters. After considering the comments, DEQ issued a revised EA in October of 2011, providing another 30-day comment period. Additional comments were received, and on March 1, 2012, DEQ issued a final FONSI and EA, together with a 24-page response to the comments. In its response to comments, DEQ provided additional analysis of the potential environmental impacts of the project. This additional analysis specifically addresses the deficiencies Plaintiffs argue about in this litigation; including but not limited to, potential impacts to water resources, water quality and water availability; potential for odors from the storage lagoon and spray irrigation site; impacts on property values; and impacts from full build-out of the Bridger Pines subdivision. Based on the record before it, this Court does not find that there is clear and convincing evidence that DEQ's decision was arbitrary, capricious or otherwise unlawful or that its environmental review was inadequate under MEPA. Pursuant to Mont. Code Ann. § 75-1-201(6)(c), DEQ's March 1, 2012 FONSI and final EA for the Bridger Pines Wastewater Treatment System Upgrade project must be affirmed.

ORDER

IT IS HEREBY ORDERED that Plaintiffs' Motion for Summary Judgment in this matter is DENIED. Defendants' Motion for Summary Judgment as to all counts in Plaintiffs' Complaint for Declaratory and Injunctive Relief is GRANTED. Plaintiffs' Complaint for Declaratory and Injunctive Relief filed in this action is DISMISSED WITH PREJUDICE.

Dated this 16th day of April, 2013.

Hon. David Cybulski
District Judge

cc: Alex Rate
Michelle Uberuaga
John North
Candace F. West
Jennifer L. Farve

Emailed 4-18-13