PETITION FOR JUDICIAL REVIEW AND/OR COMPLAINT FOR DECLARATORY AND INJUNCTIVE RELIEF

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MONTANA EIGHTEENTH JUDICIAL DISTRICT COURT

GALLATIN COUNTY, MONTANA

GATEWAY VILLAGE, LLC., Petitioner/Plaintiff, vs. MONTANA DEPARTMENT OF ENVIRONMENTAL QUALITY and GALLATIN GATEWAY COUNTY WATER AND SEWER DISTRICT, Respondents/Defendants.	Cause No. DV-13-657C Honorable John C. Brown PETITION FOR JUDICIAL REVIEW AND/OR COMPLAINT FOR DECLARATORY AND INJUNCTIVE RELIEF. (Ø) Summons Issued

The Petitioner, Gateway Village, LLC, ("Gateway") petitions this Court for judicial review of the final decision of the Montana Department of Environmental Quality ("DEQ") to issue a wastewater discharge permit to the Gallatin Gateway County Water & Sewer District

("District"). Gateway files this Petition pursuant to the Montana Administrative Procedure Act ("MAPA"), MCA § 2-4-702(1) and (2)(a), (2)(b) and (2)(d) because this action challenges a final permitting decision made pursuant to Title 75 of the Montana Code Annotated. In the alternative if it is determined that MAPA does not apply, or in addition, Gateway files this petition for review challenging a permitting decision made by the DEQ pursuant to MCA §§ 75-1-101, *et. seq.* (Montana Environmental Policy Act) and/or the Montana Declaratory Judgment Act, MCA §§ 27-8-101, *et. seq.* In each case, Gateway seeks a determination by this Court that the DEQ's issuance of a wastewater discharge permit to the District was unlawful, failed to comply with criteria or standards of environmental quality, was arbitrary and capricious, and/or clearly erroneous in view of the reliable, probative and substantial evidence on the whole record. *See, e.g.*, MCA §§ 75-1-104; 75-1-105; 2-4-704.

I.

FACTS UPON WHICH JURISDICTION AND VENUE ARE BASED (MCA §§ 2-4-702(2)(b); 75-1-201)

1. Petitioner, Gateway Village, LLC, ("Gateway") is a Montana Limited Liability Company and the owner of real property located in Gallatin County, Montana. It is adjacent to, and down gradient from, real property owned by the Gallatin Gateway County Water and Sewer District ("District"). Gateway proposes to construct a waste water treatment and disposal facility on its real property located in Gallatin County.

2. Respondent Department of Environmental Quality ("DEQ") is an Administrative Agency of the State of Montana, created under MCA § 2-15-3501. *See also* MCA § 75-5-103(8).

3. Respondent District is a unit of local government formed under the provisions of

Title 7 of the Montana Code Annotated, the purpose of which is provide water and/or sewer services, as more fully set forth in MCA § 7-13-2281. The District owns real property located in Gallatin County, Montana, and applied for a wastewater disposal permit from the DEQ. Because the District's interest in the subject of this action is so situated that disposing of the action in the District's absence may, as a practical matter impair or impede its ability to protect its interest, it is a Required Party under Rule 19 of the Montana Rules of Civil Procedure.

4. On or about September 6, 2013, and following public comment, DEQ made a final decision to issue a wastewater disposal permit to the District.

5. Gateway has exhausted all known available administrative remedies and is aggrieved by the final decision of DEQ.

6. Under MCA § 2-4-702(1)(a) and MCA §75-1-201(5)(a)(i), this Court has jurisdiction to review agency actions.

7. This Petition was filed within 30 days of service of DEQ's final decision to issue the permit at issue. MCA § 75-1-201(5)(a)(ii) (60 days); MCA § 2-4-702(2)(a) (30 days).

8. Venue is proper in Gallatin County, Montana because Gallatin County is the county where the District's facility is proposed to be located and where the action is proposed to occur. MCA§ 2-4-702(2)(a)(d) .

II.

STATEMENT OF THE MANNER IN WHICH GATEWAY IS AGGRIEVED

9. The District owns real property on Cottonwood Road, south of Gallatin Gateway, Montana. The District proposes to treat sewage and other wastewater from existing residential

and existing non-residential businesses, and five (5) community facilities including a school, post office, a community center, a church, and the Gallatin Gateway Rural Fire District.

10. On or about March 6, 2013, the District applied to the DEQ for a new Montana Ground Water Pollution Control System wastewater discharge permit. DEQ identified deficiencies in the permit application and notified the District of those deficiencies by letter dated April 3, 2013. The district provided supplemental information on April 31, 2013. Thereafter, on May 13, 2013 the DEQ determined the application complete.

11. In its application, as approved by DEQ, the District proposes to discharge effluent into Class I ground water and requested a 500 foot mixing zone for nitrates.

12. Gateway owns all land immediately north of the outfall for the discharge permit granted by the DEQ to the Gallatin Gateway County Water & Sewer District ("District").

A. <u>The DEQ'S Fact Sheet, Upon Which it Relied, Contained Clear Errors. The Resulting Reliance Upon the Flawed Data and Analysis, After Being Advised of the Errors, was Arbitrary and Capricious</u>.

13. On July 8, 2013, the DEQ issued Public Notice (MT-13-17) indicating its intent to issue a Montana Groundwater Pollution Control System (MGWPCS) wastewater discharge permit to the District authorizing the District to discharge a daily maximum 50,000 gpd of sewage, and other domestic and commercial wastewater, through a drainfield into groundwater. The DEQ determined that the discharge contemplated by the District would not result in unlawful levels of nitrates (7.5mg/L) at the end of the 500 foot mixing zone. The DEQ invited public comment on the application and its analysis, Exhibit A, including a Preliminary Discharge Permit (Exhibit B) and "Fact Sheet" (Exhibit C).

14. On or about August 7, 2013, Gateway filed its comments in opposition to the proposed discharge permit. Gateway's comments and supporting scientific analysis

demonstrated that if approved, the District's discharge would violate the Montana Water Quality Act, MCA §§ 75-5-101 *et. seq.* Stated another way, the available data, analyses and studies did not support DEQ's conclusion, as set forth in its "Preliminary Discharge Permit," that the District's discharge will not result in unlawful levels of nitrates (7.5mg/L) at the end of the 500 foot mixing zone. Accordingly, DEQ had no information that the discharge permit will not violate Montana's nondegradation policy, see MCA § 75-5-303, and associated regulations. ARM 17.30.701 *et. seq.*

15. Gateway's analysis also demonstrated that the DEQ's Permit Fact Sheet, Exhibit B, failed to analyze whether a 500 foot mixing zone is appropriate for the requested discharge given the existence of a public water supply well within such a zone. Gateway also advised that the DEQ Permit Fact Sheet failed to consider that the proposed mixing zone requires the dedication of lands not owned by the District to accomplish the water treatment required by the terms of the draft permit.

16. The Permit Fact Sheet, Exhibit C, recognized that a mixing zone is the portion of the aquifer "[t]hat receives and dilutes discharge. The mixing of receiving water with discharge changes the water quality." Exhibit C at p. 8. As Gateway advised the DEQ, to evaluate an appropriate mixing zone that will not result in water quality violations at its down-gradient edge, one must assess the local hydrogeologic conditions to determine whether groundwater will sufficiently dilute the discharge to yield acceptable concentrations at its down-gradient terminus.

17. In support of its comments, Gateway retained Dr. Michael Nicklin, a hydrogeologist, to assess whether the groundwater conditions at the site of the proposed outfall would be sufficient to dilute nitrates to DEQ's standard of 7.5mg/L or less at the end of the 500 foot mixing zone as contemplated by the draft discharge permit. *See* Exhibit D. Dr. Nicklin

concluded that the available data could not support such a determination, and instead, concluded that existing data makes it likely that nitrate levels will exceed exceed DEQ's 7.5mg/L threshold. *See* Exhibit D.

18. In his report submitted to DEQ, Dr. Nicklin agreed with DEQ that hyrdo-geologic conditions are important in assessing whether Montana's nondegradation requirements are met, stating:

> Permeability is very important to discharges that seek to treat water through drainfields. The effluent must percolate readily, and downward, from the drain piping and into the saturated zone (groundwater). Once the effluent reaches the groundwater or aquifer, this aquifer must be permeable enough so that the effluent mixes readily with, and disperses within, the groundwater. In other words, it must be diluted as opposed to becoming concentrated down-gradient of the drainfield.
>
> The more permeable the first portion of the saturated zone is, the more quickly and readily the effluent will be dispersed/diluted away from the drainfield. If the saturated zone is not permeable enough, the effluent will tend to concentrate in the aquifer to a greater degree. In other words, it will not be diluted effectively enough to meet mixing zone requirements.

Exhibit D, pp. 4-5

19. However, Dr. Nicklin observed that it is the site-specific conditions of the groundwater that determine these salient characteristics:

> In order to determine if a site has the suitable hydrogeologic conditions to receive and effectively dilute wastewater effluent, a site-specific assessment should be performed. The hydrogeologic conditions must be understood at the localized level of the discharge area in order to ensure that water quality standards enforced by the DEQ can be met.

Id. at p. 4.

20. Neither the District nor DEQ, in its draft permit, heeded this fundamental principle. DEQ's Permit Fact Sheet relied upon data and analyses derived by Dr. Nicklin from wells located on Gateway's lands, without noting that the aquifer test that defined a permeability of 608 ft/day came from a well located approximately 2,000 feet from the District's proposed

outfall. The DEQ, in its Permit Fact Sheet, then obscured the fact that the permeability data and analysis from the well located adjacent to the proposed outfall yielded a permeability of 37.7ft/day. DEQ, like the District, believed it was appropriate to simply average these values, *see* Permit Fact Sheet, Exhibit C, p. 4, to arrive at a conductivity of 327 ft/day. The Permit Fact Sheet suggested that Dr. Nicklin believes that averaging the two values is appropriate. However, the District failed to understand Dr. Nicklin's comments. Moreover, 327 ft/day is not the average of 608 ft/day and 37.7 ft/day.

21. A value of 608 ft/day is appropriate for groundwater 2,000 feet away, and 37.7ft/day is the appropriate value for groundwater near the well area adjacent to the outfall proposed by the District. However, the average is not a meaningful value for groundwater conditions at either well. Moreover, as Dr. Nicklin advised the DEQ, if one computes nitrate levels at the end of the mixing zone, using the conductivities of 37.7 ft/day from the adjacent well, the resulting values will greatly exceed Montana's nondegradation standards.

22. DEQ's description of the site hydrogeology also illustrates it is error to try and predict hydrogeologic conditions at one site using data generated 2,000 feet away. In its Permit Fact Sheet, DEQ notes that the groundwater system in this area is alluvial, consisting of cobbles and gravel with sands, silts and clays. Exhibit C, p. 4 These source materials reflect very different hydrogeologic incidents, so site specific data on what materials were deposited at that specific site is inherently necessary to determine the conductivity of the aquifer. *See* Exhibit C, p. 5.

23. The DEQ's lack of data supporting appropriate hydraulic conductivity was not salvaged by Stahly Engineering's test well mentioned in DEQ's Fact Sheet. First, it is unknown why DEQ deemed a five hour test sufficient on such a critical parameter of the nondegradation

analysis, when DEQ instructs all other applicants it regulates to provide data from 24 hour aquifer tests. Second, and more importantly, the data derived from the limited test demonstrate that the resulting numbers are flawed.

24. Dr. Nicklin advised DEQ that the test data showed that groundwater recharge skewed the data collected from the test. Stahly engineers acknowledged this difficulty, but erroneously attributed it to the slope of the water table. The flaw resulted from putting the outflow from the well being pumped too close to the observation well. As a result the pumped water infiltrated the aquifer penetrated by the observation well. This resulted in inflated conductivity values, because the water levels in the observation well are higher than they otherwise would have been, and the reduced drawdowns therefore record an inflated permeability. *Id.*

25. A measure of the sensitivity of the Stahly results to this flaw was provided to the DEQ by Dr. Nicklin. When Dr. Nicklin used only data from the Stahly report that does not register this error, the computed conductivity resulted in nitrate levels exceeding12 mg/L at the end of the 500 foot mixing zone, where discharges are at a concentration of a representative 24 mg/L. This understated the amount of the violation of DEQ's standards because Dr. Nicklin used a discharge of 40,000 gpd, while the actual daily maximum design flow is 50,000 gpd. *See* Permit Fact Sheet, Exhibit C, p. 12.

26. DEQ compounded these errors in its recitation of the asserted factual support for the proposed discharge permit by ignoring vertical conductivity. The Stahly Report attributes all of the transmissivity in the aquifer to the top 15 feet of water. While this is a convenient shorthand method of relating conductivity to nitrate levels at the end of mixing zones, it is a warped version of hydrogeology. Dr. Nicklin explained:

> Conductivity is key to the capacity of this aquifer to take and dilute such a large wastewater discharge. There is, however, vertical conductivity in this aquifer, as there is in virtually all alluvial aquifers. Moreover, in these circumstances, we know the depth (thickness) of the aquifer----39.5 feet. Thus, there is no reason to ignore standard hydrogeologic principles that define conductivity as a relation between the total thickness of the aquifer and transmissivity.

27. In approving the Permit, DEQ had no meaningful data on the central characteristic of conductivity at the site of the proposed outfall, and what data it had significantly overstated this central characteristic of groundwater. The closest well for which there was reliable data reflected a groundwater permeability that results in substantial exceedences to DEQ's 7.5mg/L or less at the end of the 500 foot mixing zone.

28. DEQ knew the aquifer thickness from the very reports it ostensibly relied upon---Dr. Nicklin's. Thus, even when one takes the inflated transmissivity number from Stahly's limited five hour test, and divides that number by an aquifer thickness of 39.8 feet to arrive at conductivity, the calculated nitrate level with a 50,000 gpd discharge at the end of the 500 foot mixing zone is approximately 10.8 mg/L. This result violates Montana's nondegradation standards. DEQ's use of truncated procedures that ignore salient hydrogeologic principlesis arbitrary and capricious because it assures a violation of the very standards DEQ is charged by law to enforce.

29. Moreover, and unlike other similarly situated applications, the DEQ did not require or provide for any monitoring well or wells that would provide tests of water quality at the down gradient end of the mixing zone over the term of the discharge permit. DEQ thus eliminated any chance that the fundamental errors in its conductivity assessment will ever result in discharges that are compliant with Montana's nondegradation standards and has compromised public health and safety by failing to require consistent down gradient monitoring, with

accompanying enforcement provisions, thus exposing future down gradient water users to unnecessary health and safety concerns .

30. In sum, the Permit Fact Sheet relied upon by the DEQ reflects many flaws including use of truncated procedures. It also ignores many of its own regulations in evaluating the environmental impacts of the District's application. The evidence before the DEQ established as a fact, that water containing contaminants will be discharged into the ground. Gateway Village provided documented flaws in the collection and interpretation of data that goes to the very core of the permit at issue: whether the District's site has the suitable hydrogeologic conditions to receive and effectively dilute wastewater effluent. This question raises substantial issues of public health and safety. Because the evidence demonstrated that DEQ's analysis of the impacts of the District's proposal was based upon faulty data and analysis, and in some instances without regard to its own standards, the DEQ's decision to grant a permit that failed to comply with its own regulations was, by definition, arbitrary, capricious and unlawful.

B. <u>The Approved Permit Reflects Violations of DEQ's Rules and Standards Governing Applications for Discharge</u>.

31. Historically, the DEQ has consistently insisted that aquifer tests to determine hydrogeologic conditions at a discharge site be of approximately a 24 hour duration. In this instance, DEQ authorized a discharge permit based on a single 5 hour test that was improperly executed and yielded mostly skewed data.

32. The data from the well nearest to the discharge site reflected conductivities that will result in nitrate levels that substantially exceed DEQ's nondegradation requirements. DEQ's 24-hour pump test standards exist for a reason. Without proper underlying data on the

hydrogeologic conditions at a discharge site, DEQ cannot know whether its water quality standards can be met.

33. The Permit Fact Sheet also ignores that there is a public water supply well down gradient of the primary septic field and the replacement drainfield.

34. The zone of influence of this public water supply well intercepts the mixing zone attendant to the replacement drainfield. As a result, the pumping of this well can induce the discharge effluent into the annulus of the public water supply well. This result is inconsistent with DEQ's requirements as set forth in ARM 17.30.508.

C. **The Draft Permit Purports to Authorize a Trespass on Gateway's Land.**

35. The mixing zone provided for in the approved discharge permit encompasses large tracts of land that the District does not own, and that otherwise are not overlain with land owned or dedicated to utility corridors, railroad corridors, or road easements.

36. The District does not own any easement or other authority from Gateway to use Gateway's lands to treat its contemplated discharge.

37. MCA § 76-4-104(6)(i), MCA, requires evidence that the mixing zone will be located entirely within the discharger's property, or the discharger will otherwise acquire easements or other appropriate authority from neighbors in instances in which the mixing zone extends to lands of neighbors, where the discharge is within a subdivision. DEQ ignored this standard in its discharge permit based on its belief that there is no subdivision of lands associated with the District's discharge.

38. The permit, as approved by the DEQ, will allow for the trespass of contaminated groundwater under the Gateway property. This result constitutes a trespass.

39. In sum, DEQ ignored its own regulations, used truncated reviews of existing data, and generally failed to take the "required hard look" at the District's application. Approval of the District's application under these facts was, on its face, arbitrary, capricious and unlawful. In addition, the DEQ's failure to require the installation and monitoring of a down gradient monitoring well, coupled with enforcement procedures that it has insisted upon in other similar situations, was also arbitrary and capricious and unnecessarily compromises public health and safety.

40. On or about September 6, 2013, DEQ responded to some, but not all, of the public comments, including those summarized above. Exhibit E. The DEQ's responses were largely cursory and dismissive and in some instances, incomplete and factually incorrect. Moreover, despite calls for a public hearing (including one by the Gallatin County Commissioners) in light of the substantial issues identified above, and the potential adverse impact on the human environment, the DEQ refused to conduct a public hearing on this application.

III.

GROUNDS FOR RELIEF.

41. The Montana legislature, "mindful of its constitutional obligations under Article II, section 3, and Article IX of the Montana constitution, enacted the Montana Water Quality Act. It is the legislature's intent that the requirements of [the Act] provide adequate remedies for the protection of the environmental life support system from degradation and provide adequate remedies to prevent unreasonable depletion and degradation of natural resources." MCA § 75-5-102(1). A purpose of this Act is to "provide additional and cumulative remedies to prevent, abate, and control the pollution of state waters." *Id.*

42. In accordance with these legislative findings and declarations, Gateway states the

following grounds for relief from DEQ's arbitrary, capricious, and unlawful decision to permit the discharge of pollutants into the groundwater when the evidence demonstrates that the discharge will violate Montana's water quality standards and constitute a trespass on Gateway's property.

A.

Violation of MCA Section 75-5-303 and ARM Section 17.30. 701 (Non Degredation)

43. Petitioner incorporates by reference, paragraphs 1-42 of this Petition.

44. MCA § 75-5-303 provides in relevant part:

> **Nondegradation policy.** (1) Existing uses of state waters and the level of water quality necessary to protect those uses must be maintained and protected.
>
> (2) Unless authorized by the department under subsection (3) or exempted from review under 75-5-317, the quality of high-quality waters must be maintained.

45. ARM Section 17.30.701 provides as follows:

> (1) The purpose of this subchapter is to prohibit degradation of high quality state waters except in certain limited circumstances, by implementing the nondegradation policy set forth in 75-5-303, MCA and providing criteria and procedures for:
>
> (a) determining which activities will degrade high quality waters;
>
> (b) department review and decision making;
>
> (c) determining the required water quality protection practiced if degradation is authorized; and
>
> (d) public review and appeal of department decisions.

46. The available data, analyses and studies do not support DEQ's conclusion, as set forth in its "Preliminary Discharge Permit," (now approved) that the District's discharge will not result in unlawful levels of nitrates (7.5mg/L) at the end of the 500 foot mixing zone.

Accordingly, DEQ had no reliable information that the discharge permit will not violate Montana's nondegradation policy, *see* MCA § 75-5-303, and associated regulations. ARM 17.30.701 *et. seq.* Instead, the data from the well nearest to the discharge site reflected conductivities that will substantially exceed DEQ's nondegradation requirements.

47. The Permit Fact Sheet relied upon by the DEQ reflects many flaws including use of truncated procedures. It also ignores many of its own regulations in evaluating the environmental impacts of the District's application. The evidence before the DEQ established as a fact, that water containing contaminants will be discharged into the ground. Gateway provided documented flaws in the collection and interpretation of data that goes to the very core of the permit at issue: whether the District's site has the suitable hydrogeologic conditions to receive and effectively dilute wastewater effluent. This question raises substantial issues of public health and safety. Because the evidence demonstrated that DEQ's analysis of the impacts of the District's proposal was based upon faulty data and analysis, and in some instances without regard to its own standards, the DEQ's decision to grant a permit that failed to comply with its own regulations was, by definition, arbitrary, capricious and unlawful.

B.

Violation of ARM Section 17.30.508.

48. Petitioner incorporates by reference paragraphs 1-47 of this Petition.

49. ARM Section 17.30.508 states:

> (1) Mixing zones for ground water are to be limited and comply with the following quality standards:
>
> (a) Human health based ground water standards must not be exceeded beyond the boundaries of the mixing zone.

(2) No mixing zone for ground water will be allowed if the zone of influence of an existing drinking water supply well with intercept the mixing zone.

50. The Permit Fact Sheet ignores that there is a public water supply well down gradient of the primary septic field and the replacement drainfield. The zone of influence of this public water supply well intercepts the mixing zone attendant to the replacement drainfield. As a result, the pumping of this well can induce the discharge effluent into the annulus of the public water supply well. This result is inconsistent with DEQ's requirements as set forth in ARM 17.30.508.

C.

MCA §76-4-104(6)(I); Trespass; Sunburst.

51. Petitioner incorporates by reference, paragraphs 1-50.

52. MCA § 76-4-104(6)(i), MCA, requires evidence that the mixing zone will be located entirely within the discharger's property, or the discharger will otherwise acquire easements or other appropriate authority from neighbors in instances in which the mixing zone extends to lands of neighbors, where the discharge is within a subdivision. DEQ ignored this standard in its discharge permit based on its belief that there is no subdivision of lands associated with the District's discharge.

53. Instead, the mixing zone provided for in the approved discharge permit encompasses large tracts of land that the District does not own, and that otherwise are not overlain with land owned or dedicated to utility corridors, railroad corridors, or road easements.

54. The District does not own any easement or other authority from Gateway to use Gateway's lands to treat its contemplated discharge.

55. As a result, the use of lands owned by others, without lawful authority or an

easement, is unlawful. To the extent the permit approved by the DEQ authorizes such discharges in violation of Montana law (statutes, regulation and case law) it is properly declared invalid and the District should be enjoined from discharging its pollutants into the groundwater until it secures the necessary authority. As the Montana Supreme Court advised, in an analogous decision, we do not need to have dead fish floating on the surface of our streams and rivers before the far-reaching environmental laws of this state spring into action.

D.

Violation of Constitutional Provisions.

56. Petitioner incorporates by reference, paragraphs 1-55.

57. Article II, Section 3 of the Montana Constitution establishes Gateway's right to a clean and healthful environment.

58. DEQ's permitting of the District's facility also violates the State's mandates to maintain and improve a clean and healthful environment, pursuant to Article IX, sections 3 and 4 of Montana's Constitution.

59. DEQ's discharge permit authorizing the discharge of pollutants into groundwater at levels that violate DEQ's nondegradation standards violates Gateway's right to a clean and healthful environment and is contrary to the mandate to maintain and improve a healthful environment.

E.

Clearly Erroneous Findings.

60. Petitioner incorporates by reference, paragraphs 1-59.

61. DEQ's Permit Fact Sheet relied upon data and analyses derived by Dr. Nicklin

from wells located on Gateway's lands, without noting that the aquifer test that defined a permeability of 608 ft/day came from a well located approximately 2,000 feet from the District's proposed outfall. The DEQ, in its Permit Fact Sheet, then obscured the fact that the permeability data and analysis from the well located adjacent to the proposed outfall yielded a permeability of 37.7ft/day. DEQ, like the District, believed it was appropriate to simply average these values, *see* Permit Fact Sheet, Exhibit C, p. 4, to arrive at a conductivity of 327 ft/day. The Permit Fact Sheet suggested that Dr. Nicklin believes that averaging the two values is appropriate. However, the District failed to understand Dr. Nicklin's comments. Moreover, 327 ft/day is not the average of 608 ft/day and 37.7 ft/day. DEQ's findings in this regard are clearly erroneous.

62. DEQ relied upon data from a five hour test well, instead of the standard 24-hour test. The test data showed that groundwater recharge skewed the data collected from the test. The District's engineers acknowledged this difficulty, but erroneously attributed it to the slope of the water table. The flaw resulted from putting the outflow from the well being pumped too close to the observation well. As a result the pumped water infiltrated the aquifer penetrated by the observation well. This resulted in inflated conductivity values, because the water levels in the observation well are higher than they otherwise would have been, and the reduced draw downs therefore record an inflated permeability. *Id.* The results are thus clearly erroneous.

63. The mixing zone provided for in the approved discharge permit encompasses large tracts of land that the District does not own, and that otherwise are not overlain with land owned or dedicated to utility corridors, railroad corridors, or road easements. Accordingly, granting a permit under these facts is clearly erroneous.

64. The DEQ's findings that the discharge permit will not violate the State's non-degradation standards was clearly erroneous.

65. The DEQ's finding that the mixing zone for the District's discharge will be entirely on the District's property is clearly erroneous.

66. The DEQ's determination that the discharge contemplated by the District would not result in unlawful levels of nitrates (7.5mg/L) at the end of the 500 foot mixing zone is clearly erroneous.

67. The DEQ's decision to approve the Permit was also clearly erroneous because DEQ had no meaningful data on the central characteristic of conductivity at the site of the proposed outfall, and what data it had significantly overstated this central characteristic of groundwater.

68. The DEQ's decision was clearly erroneous in light of the documented flaws in the DEQ's collection and interpretation of data relating to whether the District's proposed discharge site reflected suitable hydrogeologic conditions to receive and effectively dilute wastewater effluent. Because the evidence demonstrated that DEQ's analysis of the impacts of the District's proposal was based upon faulty data and analysis, and in some instances without regard to its own standards, the DEQ's decision to grant a permit that failed to comply with its own regulations was clearly erroneous, arbitrary, capricious and unlawful.

F.

Violation of MCA Section 75-5-402(1).

69. Gateway incorporates by reference, paragraphs 1-68 of this Petition.

70. MCA Section 75-5-402(1) provides in part that it is the "duty" of the DEQ to "[i]ssue or deny permits to discharge sewage, industrial wastes or other wastes into state waters consistently with rules made by the board."

71. Issuance of a permit under facts set forth above is a violation of the DEQ's duties

under Montana law.

IV.

RELIEF REQUESTED.

Gateway requests that the Court:

A. Find, as a matter of law and fact, that the DEQ's decision to grant the discharge permit at issue, was clearly erroneous, arbitrary, capricious and unlawful;;

B. declare that the permit issued to the District is unlawful and therefore invalid;

C. In the alternative, require that DEQ and the District undertake a full and complete onsite investigation (EIS) of the impacted soils and aquifer to address the DEQ's failures as set forth above and/or to require the installation of down gradient monitoring with strict enforcement provisions, to protect public health and safety;

D. enjoin the District from discharging any pollutants into the groundwater;

E. Award the District its attorneys' fees and costs, to the extent allowed by law; and

F. Grant such other and further relief as this Court deems just and proper.

RESPECTFULLY SUBMITTED this 27th day of September, 2013.

GALLIK LAW FIRM, P.C.

and

WILLIAMS AND JENT, PLLP

By: _____
Brian K. Gallik
ATTORNEYS FOR PLAINTIFF/PETITIONER

NEWS ARTICLE

Developer sues DEQ, Gallatin Gateway Water and Sewer District

JODI HAUSEN, Chronicle Staff Writer | Posted: Thursday, October 3, 2013 10:30 pm

A local developer is suing the Montana Department of Environmental Quality and Gallatin Gateway Water and Sewer District, claiming DEQ approved a permit for a wastewater treatment plant in September that threatens nearby water and property.

Gateway Village LLC attorneys Brian Gallik and Matthew Williams of Bozeman filed the lawsuit in Gallatin County District Court last week. The lawsuit challenges the wastewater discharge permit and the reliability of an engineering study submitted for the permit's application. It claims DEQ ignored its own regulations regarding environmental impacts.

For one, the lawsuit questions whether conditions in the area would effectively dilute treated wastewater released into the ground.

“This question raises substantial issues of public health and safety,” the lawsuit states. “DEQ's analysis of the impacts of the district's proposal was based upon faulty data and analysis and, in some instances, without regard to its own standards.”

Gateway Village commissioned another engineering analysis that found the DEQ's permit had “several unresolved issues that need to be addressed,” engineer Michael Nicklin wrote in the report.

Concerns include inadequate data in the analysis the DEQ relied on and the facility's treatment capacity. The system is designed to handle 27,000 gallons of wastewater daily, but the permit allows 40,000 gallons daily discharge, Nicklin wrote.

The system could also harm nearby property and an existing public water supply, namely the Buffalo Jump Gentlemen's Club's, which is downhill from the proposed discharge area, making it vulnerable to contamination, the lawsuit alleges.

Gateway Village developer David Loseff plans to build a subdivision adjacent to Buffalo Jump, which sold part of its property to the district for wastewater treatment.

Nicklin's report was submitted to DEQ through the comment process, and the state agency stated it considered the report before approving the discharge permit.

Plaintiffs also say DEQ's public comment process was less than satisfactory.

“DEQ responded to some, but not all, of the public comments,” the lawsuit states, calling the agency's responses dismissive, incomplete and factually incorrect. And despite calls for a public hearing, including one by Gallatin County commissioners, DEQ refused to conduct a public hearing.

DEQ did, however, send representatives to a Gallatin Gateway School Board meeting Aug. 19, said Terry Threlkeld, an engineer and former water and sewer district trustee who also works for Loseff.

But, he said, at that meeting DEQ officials refused to answer questions specific to the permit and would only field general inquiries on the permitting process.

“DEQ is supposed to be the people that protect the public's health and safety,” he said. “They've failed completely.”

The lawsuit also contends treated wastewater would flow onto Loseff's property without a legal easement and implied it could be detrimental to the nearby Gallatin River.

“We do not need to have dead fish floating on the surface of our streams and rivers before the far-reaching environmental laws of this state spring into action,” Gallik wrote.

Gallatin Village is asking the court to find DEQ's wastewater discharge permit unlawful and to require it to do a full study to determine impacts the proposed wastewater system will have on groundwater. It also asks a judge to stop the district from putting pollutants in the groundwater.

Neither the DEQ nor the district had yet seen the lawsuit and wouldn't comment.

However, the district has secured millions of dollars in government grants to build the wastewater facility, which would replace many failing septic systems in the town's center.

The status of those grants could change if construction on the facility doesn't begin soon, said Susan Swimley, the district's attorney.

“We don't know,” she said of grant deadlines. “We would have to apply for extensions. If this (lawsuit) delays it, then it can cause a lot of other issues.”

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