

NANCY SWEENEY
CLERK DISTRICT COURT

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FILED
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MONTANA FIRST JUDICIAL DISTRICT COURT,
LEWIS AND CLARK COUNTY

<p>DIAMOND V CORPORATION, GRANT AND MARY KUBESH, BARBARA KUBESH, and ZACHARY KUBESH,</p> <p style="text-align: center;">Plaintiffs,</p> <p style="text-align: center;">v.</p> <p>MONTANA DEPARTMENT OF ENVIRONMENTAL QUALITY</p> <p style="text-align: center;">Defendant.</p>	<p>Cause No. <u>DDV 2015-121</u></p> <p style="text-align: center;">COMPLAINT FOR DECLARATORY RELIEF AND MANDAMUS</p> <p style="text-align: center;">JAMES P. REYNOLDS Presiding Judge</p>
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COME NOW the above-named Plaintiffs, through their undersigned counsel, and for their Complaint for Declaratory Judgment and Mandamus state and allege as follows:

I. PARTIES, JURISDICTION AND VENUE

1. Plaintiff Diamond V Corporation is a family-held Montana business corporation active and in good standing with the Montana Secretary of State. It

owns and operates farm and ranch property in Dawson County, Montana. Its business address is 146 Road 454, Glendive, Montana 59330.

2. Plaintiffs Grant, Mary, Barbara, and Zachary Kubesh are the owners of Diamond V Corporation. They work and reside at the family farmstead located at 146 Road 454, Glendive Montana 59330.

3. Defendant Montana Department of Environmental Quality ["MDEQ"] is the Montana state government agency responsible for administering and enforcing the provisions of The Montana Solid Waste Management Act, which is codified at Mont. Code Ann. §§ 75-10-101 to -451, and the Montana Integrated Waste Management Act. Mont. Code Ann. §§ 75-10-801 to -807. [together, "Solid Waste Act"]

4. This Court has jurisdiction over this action pursuant to the Montana Declaratory Judgments Act (Mont. Code Ann. §§ 27-8-101 to -313), the Montana Solid Waste Management Act (Mont. Code Ann. §§ 75-10-201 to -451), the Montana Integrated Waste Management Act. (Mont. Code Ann. §§ 75-10-801 to -807), the mandamus provisions of Montana law (Mont. Code Ann. § 27-26-203), the Montana public records laws (Mont. Code Ann. §§ 2-6-101 to 104), and the Montana Constitution, Article II, Section 3 (Clean and Healthful Environment), Article IX, Section 1 (Duty to Maintain and Improve a Clean and Healthful Environment) and Article II, Section 9 (Right to Know).

5. Venue is proper in this Court under Mont. Code Ann. § 25-2-126(1).

II. FACTS

A. Statutory and Regulatory Framework

6. This case concerns the DEQ's role and responsibilities, and the public's rights, in respect to the licensing of, and the enforcement of license requirements over, the Oaks Disposal Services LLC ["Oaks"] Class II Solid Waste Landfill ["Oaks Landfill"], located in Dawson County approximately 25 miles to the northwest of Glendive.

7. The Oaks Landfill was granted a license to operate (No. 528) ["License"] by the DEQ on February 14, 2014. The License was granted by DEQ pursuant to the provisions of the Solid Waste Act, in particular Mont. Code Ann. § 75-10-802(8) and ARM §§ 17.50.1115 and 509. In operating, the Oaks Landfill Oaks is required to comply with, among other things, the terms of the License, certain conditions set out in DEQ's license-approval decision documents, all applicable laws and regulations, and a DEQ-approved "Operations and Maintenance Plan" (dated May 2013).

8. The Oaks Landfill is a unique type of landfill in that it is designed and operated to accept and manage a specific class of solid waste, commonly known as "Exploration and Production" ["E&P"] waste, from the booming oil and gas activities in the Bakken region of Eastern Montana and Western North Dakota. On information and belief, Plaintiffs allege that the Oaks Landfill is the first and only landfill of its specific type in Montana. Among the E & P waste the Oaks Landfill receives, the Dickinson (North Dakota) Press recently reported that it receives

8,000-12,000 tons of “technologically enhanced naturally occurring radioactive material” (TENORM) per month from North Dakota alone.

9. The legal framework for the regulation of the management and disposal of solid and hazardous waste is set out in the federal Resource Conservation and Recovery Act [“RCRA”] 42 U.S.C. § 6901 *et. seq.* Like many other federal environmental laws, RCRA allows for a state to assume “primacy” for the implementation of the provisions of RCRA as long as the state has a program that is no less stringent than the federal one. Conversely, states are free to regulate more stringently if they so choose. The Solid Waste Act is the State of Montana’s analogue to RCRA, and Montana has been recognized to have “primacy” over the implementation of RCRA by EPA.

10. Under the so-called “Bentsen Amendment” to RCRA (42 U.S.C. § 6921(b)(2)(A)), and a 1988 regulatory determination by EPA issued pursuant to that Amendment (*Regulatory Determination for Oil and Gas and Geothermal Exploration, Development, and Production Wastes*, 53 Fed. Reg. 25446 (July 6, 1988)), E&P wastes are exempt from regulation as hazardous waste; and instead are regulated in generally the same way as is non-hazardous solid waste. EPA has broadly defined E&P waste as “drilling fluids, produced waters, and other wastes associated with the exploration, development, or production of crude oil, natural gas, or geothermal energy.” 40 C.F.R. § 261.4(6). In application, this definition allows the following (non-exhaustive) list of waste material to be treated as exempt E&P Waste: “drilling fluids and cuttings, produced water, used hydraulic fracturing fluids, rigwash, workover wastes, tank bottom sludge, glycol-based dehydration wastes,

amine-containing sweetening wastes, hydrocarbon-bearing soil, and many other individual waste products.” *Petition for Rulemaking Pursuant to Section 6974(a) of the Resource Conservation and Recovery Act Concerning the Regulation of Wastes Associated with the Exploration, Development, of Production of Crude Oil or Natural Gas or Geothermal Energy* at p. 7, Sept 8, 2010 (http://docs.nrdc.org/energy/files/ene_10091301a.pdf) [“NRDC Petition”]

11. However, just because E&P waste is exempt from regulation as a hazardous waste does not mean it is benign. An EPA guidance document addresses this common misconception as follows:

Misunderstanding: All exempt wastes are harmless to human health and the environment.

Fact: Certain exempt wastes, while excluded from RCRA Subtitle C hazardous waste control, might still be harmful to human health and the environment **if not properly managed**. The exemption relieves wastes that are uniquely associated with the exploration and production of oil and gas from regulation as hazardous wastes . . . but does not indicate the hazard potential of exempt waste. Additionally, some of these wastes might still be subject to state hazardous or non-hazardous waste regulations

Exemption of Oil and Gas Exploration and Production Wastes from Federal Hazardous Waste Regulations at p. 19, U.S. EPA (October 2002) (<http://www.epa.gov/osw/nonhaz/industrial/special/oil/oil-gas.pdf>) (emphasis added) [“EPA Report”].

Indeed, in its 1988 regulatory determination EPA noted that E&P wastes could contain toxic substances such as benzene, phenanthrene, lead, arsenic, barium, antimony, fluoride and uranium at “levels that exceed 100 times EPA’s health-based standards.” 53 Fed. Reg. at 25448. Similarly, in a study conducted by the West Virginia Department of Environmental Protection, the following list of substances had been found to be present in some E&P wastes:

sulfate, chloride, arsenic, titanium, cobalt, nickel, silver, zinc, vanadium, tin, cadmium, lead, chromium, hexavalent chromium, copper, fluoranthene, cyanide, mercury, selenium, antimony, beryllium, barium, ammonia, nitrogen, fluoride, nitrite nitrogen, nitrate nitrogen, oil and grease, total suspended solids, iron, aluminum, chloroform, benzene, phalate esters, strontium, strontium-90, boron, lithium, gross alpha radiation, gross beta radiation, radium 226 [and] radium 228.

NRDC Report at p. 8.

12. Many of the substances found in E&P waste are carcinogenic to human beings, and can cause adverse impacts to human health and to the health of livestock and wildlife. Exposure of livestock and wildlife to substances in E&P waste is a significant concern due to the potential of bioaccumulation and the potential these animals have to enter the human food chain.

13. Under Montana law E&P waste is considered to be "Special Waste," which is defined as "solid waste that has unique handling, transportation, or disposal requirements to ensure protection of the public health, safety, and welfare and the environment." Mont. Code Ann. § 75-10-802(8). DEQ's rules specify that "[t]he owner or operator of a solid waste management facility shall manage the following special wastes according to the plan in ARM 17.50.509 and the following criteria . . . (c) any other special waste, in the manner determined by the department to be necessary to protect human health or the environment." ARM § 17.50.1115.

14. DEQ's substantive regulation of facilities accepting E&P "special waste" is based primarily on two sources: (a) ARM § 17.50.509, which sets out the parameters of operation and maintenance plans for E&P waste facilities; and (b) a May 2012 DEQ guidance document entitled "*Requirements for the Management of*

Special Wastes Associated With the Development of Oil and Gas Resources, Montana DEQ - Solid Waste Program." (May 12) (www.deq.mt.gov/SolidWaste/docs/DisposalRegsOilGasClass2Landfills.pdf) ["DEQ Guidance"]. Among other specific requirements applicable to E&P waste facilities in the Solid Waste Act and its implementing rules is the requirement that liquid waste (as defined in ARM 17.50.1102(20)) may not be placed in a Class II landfill unit. ARM § 17.50.1111.

15. In addition to the above, the Solid Waste Act also provides DEQ with the "authority **and responsibility**" (emphasis added) to inspect licensed facilities (Mont. Code Ann. § 75-10-205); to require operation and maintenance plans to be updated "to reflect changed conditions and requirements [as] necessary to protect human health or the environment" (ARM § 17.50.509(4)); and to initiate administrative and judicial enforcement proceedings and assess penalties. Mont. Code Ann. §§ 75-10-227, -228, -231, and -232. The Solid Waste Act also prohibits the dumping of any "garbage . . . or other debris or refuse . . . in or upon any highway, road, street, or alley of this state" (Mont. Code Ann. § 75-10-212(2)), and provides that "[a] person in violation of this section is absolutely liable" for the same. *Id.* at 212(3).

16. The importance of DEQ's enforcement of its own regulatory scheme is highlighted by problems that have occurred in neighboring North Dakota, which is at the center of the hydraulic fracturing ("Fracking") oil and gas boom, recently highlighted in a *New York Times* investigation. That investigation documented the massive amount of waste generated by oilfield activities, insufficient or indifferent regulatory responses, and the overwhelming economic pressures on oil field

operators to “cut corners” on waste disposal activities. These pressures led to incidents such as the recent discovery of an abandoned gas station in Noonan, North Dakota, where a large number of used, radioactive filter “socks”, such as those allowed to be disposed of at Oaks Landfill, were found to have been dumped.

B. Oaks Landfill Permit

17. On or about June 7, 2012 Oaks submitted an application to DEQ for a solid waste management system license for the Oaks Landfill. Subsequent to that date additional information was supplied by Oaks to DEQ, including without limitation an Operation and Management Plan, Groundwater Monitoring Plan, and a Closure/Post Closure Plan.

18. On or about December 21, 2012 the DEQ published an Environmental Assessment [“EA”] of the application. In the EA DEQ determined that the “licensure of the Oaks Disposal Landfill will meet the minimum requirement of the Montana Solid Waste Management Act and administrative rules regulating solid waste disposal” (EA, p. 22) and set forth a list of conditions that Oaks would be required to comply with under its license. *Id.*

19. The publication of the EA triggered a 30-day public comment period. Plaintiffs, and many others, submitted comments to DEQ during that period. On February 14, 2013 DEQ published its responses to public comments. In that document DEQ reaffirmed its determination that a license could be granted to Oaks that was sufficiently “protective of human health and the environment.”

20. Insofar as is relevant here, the EA set out the following conditions that Oaks was required to comply with as part of its license:

(1) The Oaks Disposal Landfill will accept only RCRA-exempt non-hazardous solid waste generated by oil and gas exploration and production activities.

(2) Wastes delivered to the site may not exceed 5% Total Petroleum Hydrocarbons.

(3) ***Wastes delivered to the site may not contain free liquids.***

(8) Dust emissions from the site must be controlled.

EA at. p. 22 (emphasis added).

21. In addition, in its public comment responses DEQ made the following representations to the public:

Comment:

The increase in truck traffic on the roads will create additional dust, noise, and cause wear and tear from loaded vehicles. . . .

Response:

Comment noted. . . . [A] maximum speed limit of 35 miles per hour will be required on all trucks hauling to and from the facility.

Comment:

The Department should allow the area residents to assist the state and monitor the site for compliance.

Response:

Comment noted. The Department is responsible for the inspection of each licensed solid waste management facility in the state. The Department places no expectations on nor gives any authority to local residents to perform inspections or to ensure that facility operations are conducted in accordance with the laws and rules. When member of the community have a concerns about operations at licensed facilities, they typically contact the Department to determine whether there is cause for concern or they file a complaint.

Complaints for licensed facilities are followed up by Department staff, not local residents or by county environmental health authorities. However, local county environmental health authorities do have a right to inspect facilities as a result of a complaint if they are the first to receive such a complaint.

MDEQ Response to Public Comments Received for the Proposed Oaks Disposal Landfill at pp. 2 and 3 (February 14, 2103) (emphasis added).

22. In addition, under the MDEQ-approved Operation and Maintenance Plan ["O&M Plan"], each shipment of waste was to be accompanied by a form ("Waste Profile Form") prepared by the waste generator and transporter evidencing its derivation, characteristics, and transportation details. Under the Plan, no loads of waste could be accepted without adequate documentation or which fail the screening criteria contained therein. In addition, the landfill attendant is responsible for certain verification activities (primarily checking for radiation-monitoring), and one subcategory of accepted waste (drill cuttings from the horizontal and deep-vertical drilling zones) was to be treated and tested differently. If a load was rejected Oaks was responsible to notify MDEQ within 24 hours. However, other than the rejection notifications, nothing in the O&M Plan or the License conditions require Oaks to provide copies of any load or testing forms or data to MDEQ or the public. Rather, Oaks was responsible to maintain records of all shipments and testing, which records were anticipated to be inspected periodically by MDEQ personnel.

23. On or about February 14, 2013, DEQ granted License No. 528 to Oaks.

24. Sometime after that date, construction of the landfill commenced and was completed in early 2014. After the landfill construction was completed deliveries of loads of waste to the landfill commenced.

C. Plaintiffs' Complaints

25. Kubeshes live on County Road 454, which is one of the DEQ-designated access routes to the Oaks Landfill.¹ County Road 454 is a county road by prescription that has historically been used only for local landowner access and farm-to-market purposes. Road 454 also goes through the Kubeshes' farmyard, with the house and barn on one side of the road, and shop buildings and other structures on the other side. Prior to the opening of the Oaks Landfill the volume of traffic on the road 454 near the Kubeshes' land averaged less than 20 vehicle trips per day, mainly pickup trucks and a few cattle or grain trucks. Almost immediately upon the opening of the Oaks Landfill, Kubeshes noticed a significant increase in in the volume and character of the traffic. Kubeshes conservatively estimate that the frequency of traffic on the road past their house has increased by a factor of three or more, or to at least 60 trips per day. In addition, the type of vehicle and type of driver has changed. In the past most vehicles were pickup trucks driven by neighbors and an occasional farm truck. Now, overloaded oilfield semis with lost and speeding drivers are the norm, and traffic occurs all twenty-four hours of the day. Almost all of the Oaks Landfill-bound traffic on Road 454 exceeds 35 miles per hour, in violation of the permit. This increase in the amount and type of traffic due to the opening of the new industrial facility on Road 454 – the Oaks Landfill - has adversely affected Kubeshes' use and enjoyment of their property and has caused damage to Kubeshes' property. This changes in the volume and type of traffic has caused significantly increased vibrations in Kubeshes' house and buildings, as well as constant dust, noise, disruptions in the middle of the night, and other adverse

¹ The Plaintiffs will collectively be referred to as the Kubeshes.

effects. In addition, to keep up with the increased traffic, the County has had to increase the amount of magnesium chloride applied to the road to control dust. This compound migrates off the road and is corrosive to Kubeshes' equipment and property.

26. On a number of occasions in the summer of 2014, the Kubeshes witnessed a large amount of airborne dust being emitted by the Oaks Landfill.

27. On or about October 18, 2014, a truck transporting material to the Oaks Landfill apparently took the corner on Dawson County Road 454 too fast and spilled a large quantity of a liquid matter all over the roadbed. The incident was not witnessed directly but instead was discovered by local landowners some time later. Based on that discovery, Zach Kubesh filed a "Compliance/Spill Report" with DEQ, asking that DEQ investigate and to provide him with documentation of that investigation and any determination and corrective action taken by DEQ.

28. After Kubesh submitted that complaint, neither Zach Kubesh nor his counsel heard anything for a period of several weeks. Finally, after almost three weeks had passed, counsel e-mailed Ed Thamke in the Solid Waste Management Program. Despite Mr. Thamke's assurance that Kubesh would hear from someone, he again heard nothing from DEQ for another couple of weeks. More than five weeks after the original complaint, DEQ's counsel sent counsel an e-mail containing what he represented was "the one Department document that is responsive to your request." The attached document was a two-page investigatory report -- *prepared by the Dawson County District Sanitarian*. (Attached hereto as Exhibit A)

29. Thus, in response to Kubeshes' complaint regarding the October 18, 2014 incident (and among other things) DEQ apparently: (a) did not send someone from its staff to investigate, rather relying upon the local health department in violation of the permit; (b) did not request or secure any copies of the Waste Profile Forms required to be kept by Oaks under the Operation and Maintenance Plan to determine the source and content of the load that contained the free liquid substance that was spilled all over the highway; (c) did not determine the identity of the generator or transporter responsible for the unauthorized disposal; and (d) did not generate a single internal or external communication pertaining to that incident.

30. On or about December 12, 2014, another spill occurred, this time consisting of a liquid material that contained a strong petrochemical odor. Because it was a liquid, it quickly seeped into the road-bed and/or evaporated. The Kubeshes filed a second complaint on December 16, 2014 after viewing the spill. The photographs attached to the complaint and request for public documents filed with MDEQ by Kubesh provide sufficient evidence to demonstrate what occurred and to trigger an investigation.

31. MDEQ did not take any action on the December 16, 2014 complaint until at least January 2, 2015. At that time (three weeks after the incident), MDEQ again contacted the Dawson County Sanitarian ,who "examined the site that same day and was unable to see any evidence of a spill." MDEQ Director Tom Livers Letter to Harley R. Harris dated February 2, 2015 at p. 1, ["Livers Letter"], attached hereto as Exhibit B. Director Livers acknowledged that MDEQ did not send its own personnel to investigate, nor did it obtain copies of the relevant Waste Profile Forms.

32. In his letter, addressing the October, 2014 incident, Director Livers also acknowledged that MDEQ did not have MDEQ staff investigate, did not obtain records of the shipments, and “did not determine the identify of the shipper who spilled the wet waste”; in essence admitting that the shipment was in violation of the permit because it contained liquids.

33. Subsequent to the above incidents and complaints, Plaintiff Zach Kubesh has observed a number of truckloads of what appears to be sorbent material being shipped to the Oaks Landfill, ostensibly to mix with the free liquids appearing in shipments to make those liquids solid. Under the Operation & Maintenance Plan non-compliant waste (in this case waste containing free liquids) is to be rejected and there are no provisions in that Plan for treating or processing non-compliant waste at the facility. Moreover, on-site treatment does not address the problem of free liquids being transported in open truck-beds over, and spilled upon, roadways in the vicinity of the Oaks Landfill.

34. The Kubeshes have been damaged, and continue to be damaged, by DEQ’s arbitrary failure to enforce the provisions of the License and the Solid Waste Act and to properly manage the Special Waste being transported to and deposited at the Oaks Landfill.

III. CLAIMS FOR RELIEF

Count One -- Declaratory Judgment - Public Records.

35. Plaintiffs incorporate the allegations in the previous paragraphs as if fully set forth herein.

36. In response to the Kubeshes' first complaint, DEQ only provided one document, provided to it by an outside agency. It provided no evidence of its own investigation, notes, emails or phone calls to the outside agency, or any other documents. DEQ has provided no documents in response to the Kubeshes' second complaint.

37. The MDEQ's response, or lack thereof, to Plaintiffs request for public records in connection with the October 18, 2014 and December 12, 2014 incidents, and the MDEQ's investigation and follow-up with respect thereto, is legally inadequate and violates the provisions of the Montana Public Records Law (Mont. Code Ann. §§ 2-6-101 to -104) and Mont. Const. Art. II, Sec. 9.

38. Plaintiffs are entitled to a declaratory judgment that determines MDEQ to be in violation of those provisions and which orders MDEQ to comply with its obligations under the same and produce its entire file concerning the two complaints.

Count Two -- Declaratory Judgment -- Failure to Investigate Environmental Violation.

39. Plaintiffs incorporate the allegations in the previous paragraphs as if fully set forth herein.

40. As set forth herein, MDEQ utterly failed to independently investigate the Kubeshes' two complaints. MDEQ's failure to independently investigate the incidents and to take appropriate enforcement action: (i) violates its duties to regulate the transportation and disposal of special or solid or hazardous waste under the Waste Disposal Act and its own rules; (ii) is inconsistent with its

representations to the public during the MEPA process that it - *and not local health authorities* - would investigate complaints and take appropriate action; and i) violates its constitutional and statutory duty to protect the public health and ensure a clean and healthful environment for Kubeshes and other members of the public.

41. Plaintiffs are entitled to a declaratory judgment that determines MDEQ to be in violation of the above provisions and which orders MDEQ to comply with its obligations under the same.

Count Three -- Declaratory Judgment -- Failure to Adequately Enforce the Waste Disposal Act and to Protect the Public Health and the Environment.

42. Plaintiffs incorporate the allegations in the previous paragraphs as if fully set forth herein.

43. In respect to Plaintiffs, specifically, and the public more generally, the effect of the MDEQ's licensure of Oaks is to facilitate the movement of significant quantities of potentially harmful substances on specific routes, including a road which passes closely by Plaintiffs' home. For all practical purposes the License allows Oaks and its clients to self-police with virtually no oversight by MDEQ and absolutely no ability on the part of affected persons such as Plaintiffs to know what is contained in the shipments and how they are being handled. This authorization does not comply with MDEQ's duties under the Waste Disposal Act, including § 75-10-106, MCA, and Mont. Const. Art. II, Sec. 3 and Article IX, Section 1. DEQ's inaction, as set forth above, is arbitrary, capricious an abuse of discretion and is unlawful.

44. Plaintiffs are entitled to a declaratory judgment that determines MDEQ to be in violation of the above provisions and which orders MDEQ to comply with its obligations under the same.

Count Four -- Declaratory Judgment – Determination of Changed Conditions and the Requirement to Update the Operation and Maintenance Plan.

45. Plaintiffs incorporate the allegations in the previous paragraphs as if fully set forth herein.

46. Under ARM § 17.50.509(4), MDEQ has the power and responsibility to monitor the operation and maintenance plan of a licensee, and to notify the licensee of the need to update the same to reflect changed conditions and requirements.

47. In light of the above facts, including without limitation the twice-reported violations of the permit associated with the transportation of waste to the Oaks Landfill, the inability or unwillingness of MDEQ to thoroughly investigate complaints, and the inability of the public and affected persons to secure any information about potentially hazardous material being shipped through their farms and by their houses, it is clear that the terms and conditions applicable to the Oaks Landfill are not adequate to implement the Solid Waste Act and Mont. Const. Art. II, Sec. 3 and Article IX, Section 1 and to protect public health and safety.

48. DEQ's actions and inaction as set forth above are arbitrary, capricious, an abuse of discretion and unlawful.

49. Plaintiffs are entitled to a declaratory judgment that determines MDEQ to be in violation of the above provisions and which orders MDEQ to comply with its obligations under the same. This order should specifically provide that

MDEQ be required to instruct Oaks to update its Operations and Maintenance Plan to reflect the requirements set forth below.

A That all loads being brought to the Oaks Landfill should be covered or otherwise contained in a vehicle that is configured so as to not allow *any* of the contents to spill onto the roadway.

B That all Waste Profile Forms and all forms evidencing testing of loads and waste by Oaks Landfill shall be electronically provided to MDEQ and made available to the public on an accessible website.

C. That MDEQ be required to inspect the Oaks Landfill facility more frequently than currently provided..

D That on-site treatment of non-compliant loads of waste (specifically, loads containing free liquids) is prohibited.

E. That MDEQ work with Dawson County and the permitted to devise a traffic management plan for the roads accessing the Oaks Landfill to better manage and control the spills, dust, vibrations, chemicals, and other nuisances (including without limitation a plan to manage the time-of-day that traffic uses those roads to access the Oaks Landfill) and address the adverse effects to local residents caused by the same.

Count Five – Montana Environmental Policy Act

50. Plaintiffs incorporate the allegations in the previous paragraphs as if fully set forth herein.

51. To the extent that the Court determines that MDEQ is not required to make changes to the permitting program for Oaks to reflect representations made in the environmental assessment (EA), that MDEQ be required to perform another EA or environmental impact statement (EIS) pursuant to MEPA, § 75-1-101, *et seq*, MCA, and regulations promulgated thereunder, to reflect the actual permitting and enforcement scheme as it exists, not as MDEQ represented it would be in the EA.

Count Six – Mandamus

52. Plaintiffs incorporate the allegations in the previous paragraphs as if fully set forth herein.

53. DEQ has a clear legal duty under the Montana Solid Waste Management Act, as well as Article II, Section 3 and Article IX, Section 1 of the Montana Constitution, to (a) assure compliance with permits issued by it under the Act; (b) to promptly and fully investigate credible complaints of non-compliance with permit requirements; (c) to promptly obtain pertinent records from the operator upon notification of a credible complaint; and (d) to utilize the enforcement provisions of the Act, rules promulgated thereunder and the permit to ensure the public that the permit is being enforced.

54. As set forth herein, DEQ has failed in these clear legal duties by, in effect, doing nothing to ensure permit compliance and to protect the Kubeshes', and the public's, health.

55. Plaintiffs have no plain, speedy or adequate remedy at law, DEQ's actions and inaction is capable of repetition yet evading review, and the Plaintiffs are entitled to alternative, peremptory and/or permanent writs of mandate.

Count Seven – Constitutional Challenge

56. Plaintiffs incorporate the allegations in the previous paragraphs as if fully set forth herein.

57. Plaintiffs have a fundamental right to a clean and healthful environment. Montana Constitution, Art. II, Sec. 3.

58. MDEQ has a constitutional duty to maintain and improve a clean and healthful environment, and the Legislature is tasked with the responsibility to “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.” Art. IX, Sec. 1.

59. MDEQ’s failure and refusal to enforce the terms of the permit for the Oaks Landfill, including but not limited to its refusal to address the issue of the transportation of such waste to the Oaks Landfill , refusal to ensure compliance with the requirements prohibiting the shipment and receipt of liquid waste, and its manifest refusal to even nominally investigate the complaints in this matter has harmed the Kubeshes.

60. To the extent that the facts of this case show that the Montana Solid Waste Management Act, and rules promulgated thereunder, allow the Oaks Landfill to essentially operate without regulatory oversight, and to potentially impact the Plaintiffs’ and the public’s right to a clean and healthful environment, those provisions should be found unconstitutional.

IV. PRAYER FOR RELIEF

Based on the foregoing, Plaintiffs pray as follows:

1. For declaratory relief as set forth in Counts One through Five, above;
2. For mandamus as set forth in Count Six above;
3. Alternatively, for a declaration that the Montana Solid Waste Management Act, as applied, is unconstitutional as requested in Count Seven;
4. For Plaintiffs' costs;
5. For Plaintiffs' attorney's fees, pursuant to the Uniform Declaratory Judgment Act; § 27-26-402, MCA; and/or under the Private Attorney General theory; and
6. For whatever other and further relief the Court deems just and proper.

DATED this 20th day of Feb, 2015.

MORRISON, SHERWOOD, WILSON & DEOLA

BY: 

Harley R. Harris
Attorneys for Plaintiff