John Meyer, MT Bar #11206
Cottonwood Environmental Law Center
P.O. Box 412 Bozeman, MT 59771
(406) 546-0149 | Phone
John@cottonwoodlaw.org

Counsel for Plaintiff

MONTANA THIRTEENTH JUDICIAL DISTRICT COURT
YELLOWSTONE COUNTY

STOP THE SHEPHERD LANDFILL Plaintiff, vs. MONTANA DEPARTMENT OF ENVIRONMENTAL QUALITY Defendant, PACIFIC HIDE & FUR DEPOT, d/b/a PACIFIC STEEL & RECYCLING, Intervenor-Defendant.	Case No. DV-56-2024-0000732-DK Hon. Judge Knisely **PLAINTIFF'S REPLY BRIEF IN SUPPORT OF MOTION FOR PARTIAL SUMMARY JUDGMENT AND IN RESPONSE TO DEFENDANT AND DEFENDANT-INTERVENOR'S MOTIONS FOR SUMMARY JUDGMENT**

TABLE OF CONTENTS

TABLE OF AUTHORITIES

CASES

CONSTITUTIONAL AUTHORITY

STATUTORY AUTHORITY

RULES

TABLE OF EXHIBITS

INTRODUCTION

The Montana Department of Environmental Quality ("DEQ") violated the Montana Constitution and Montana Environmental Policy Act ("MEPA") by failing to take a "hard look" at the potential environmental impacts of the proposed Shepherd landfill. The DEQ's own internal documents say landfills are a "major source of PFAS" pollution and exposure to the "toxic" forever chemicals can cause adverse human health effects, such as cancer. The DEQ violated MEPA and the Montana Constitution by failing to analyze or disclose this information in its MEPA analysis.

The challenged MEPA statute and regulation are facially unconstitutional because they do not require the DEQ to determine whether agency actions "may" have a significant impact, thereby triggering the need to prepare a thorough EIS. The Court should vacate the license and remand to the DEQ to complete an EIS.

The Court should strike as facially unconstitutional the statutory provision that requires a plaintiff that has prevailed on the merits of a MEPA claim to provide a written undertaking to cover the costs of lost profits and wages for one year before the Court can vacate and set aside a license or permit. There is no compelling state interest for depriving a plaintiff of the vacatur remedy after it has prevailed on the merits. The DEQ does not have a compelling reason that is narrowly tailored to require a party to post a bond or seek a waiver after prevailing on the merits of a MEPA claim in order to obtain equitable relief—the DEQ can move for a stay pending appeal if it thinks a license or permit has been improperly vacated and set aside. Allowing an action to move forward after a MEPA

violation has been established violates the statute's constitutional purpose—to ensure an action does not move forward before the agency thoroughly understands the risks involved.

STANDARD

"A [MEPA] decision is not arbitrary or capricious when it relies on consistent, rational, and well-supported agency decision-making. A well-supported decision is one that considers relevant data and can articulate a satisfactory explanation for. . . action, including a rational connection between the facts found and the choice made." *Hillcrest Natural Area Found. v. Mont. Dep't of Envtl. Quality*, 2022 MT 240, ¶9, 411 Mont. 30, 521 P.3d 766 (internal citations and quotations omitted).

ARGUMENT

II. The Challenged MEPA Provisions and Administrative Rule are Unconstitutional.

A. § 75-1-201(1)(b)(iv), MCA and A.R.M. 17.4.608(2) are Facially Unconstitutional Because They Require a Showing of Significant Impact Before the Agency Prepares an Environmental Impact Statement.

DEQ's response brief complains that Plaintiff STSL has not identified which constitutional provisions the challenged statute and rule are violating. DEQ Br. at 16. STSL's amended complaint explicitly alleges § 75-1-201(1)(b)(iv), MCA and A.R.M. 17.4.608(2) are unconstitutional because they violate Art. II, § 3 and Art. IX, § 1 of the Montana Constitution. Am. Compl. at 20, ¶¶106-108. As explained in Plaintiff's opening brief (pp.10-11), the challenged statute and rule are facially unconstitutional because they require a showing that a significant impact will in fact occur before the DEQ is required to prepare an EIS.

The determination that a significant impact will in fact occur before an EIS is required is in direct odds with the Montana Supreme Court's holding that "[a] determination that significant effects on the human environment *will* in fact occur is not essential. . . If substantial questions are raised whether a project *may* have a significant effect upon the environment, and EIS must be prepared." *Ravalli Cnty. Fish & Game Ass'n. Inc. v. Mont. Dep't. of State Lands*, 273 Mont. 371, 381, 903 P.2d 1362 (1995) (citation omitted; emphasis added). The challenged statute and regulation must be struck as facially unconstitutional because there is no set of circumstances in which they can be constitutionally applied. *Broad Reach Power, LLC v. Mont. Dep't of Pub. Serv. Regul., Pub. Serv. Comm'n,* 2022 MT 227, ¶11, 410 Mont. 450, 520 P.3d 301.

"A statute passed by the legislature, which adversely affects inalienable constitutional rights, must be based on a compelling state interest." *Swan Lakers v. Lake County Bd. of Comm'rs*, 2007 Mont. Dist. Lexis 750 at *40 (Lake Cnty). "[T]he rights found in Article II, Section 3, and Article IX, Section 1, of the Montana Constitution are fundamental rights and should be subject to strict scrutiny." *Park Cnty. Envtl. Couns. v. Mont. Dep't of Envtl. Quality*, 2020 MT 303, ¶79, 402 Mont. 168, 477 P.3d 288 (citing *Mont. Envtl. Info. Ctr. v. Dep't of Envtl. Quality*, 1999 MT 248, ¶¶63-64, 296 Mont. 207, 988 P.2d 1236 ("*MEIC I*")). DEQ and Pacific both cite *N. Plains Res. Council, Inc. v. Mont. Bd. of Land Comm'rs*, 2012 MT 234, ¶20, 366 Mont. 399, 288 P.3d 169 for the proposition that the Court should use a "rational basis" standard of review to determine the constitutionality of the statute and administrative rule challenged in this case. DEQ Br. at 15; Pacific Br. at 10. The Montana Supreme Court in *Northern Plains* determined the act of issuing a coal lease did not implicate the plaintiff's

constitutional right to a clean and healthful environment because the DEQ would later prepare a "full environmental review" at the permitting stage. *Id.*, ¶19. Unlike *Northern Plains*, there is no "deferred" MEPA analysis of the challenged landfill that will occur at a later stage. *N. Plains Res. Council,* ¶19. The Montana Supreme Court dismissed the same basic DEQ argument in *Park Cnty.*, ¶ 77.

Defendants argue rational basis applies because STSL has not identified a "specific environmental injury" caused by the challenged statute and rule. Pacific Br. at 10; DEQ Br. at 15. The Montana Supreme Court has explained that the framers of the Constitution "did not intend to merely prohibit that degree of environmental degradation which can be conclusively linked to ill health or physical endangerment." *MEIC I*, ¶ 77. "One of the ways that the Legislature has implemented Article IX, Section 1 is by enacting MEPA." *N. Plains Res. Council,* ¶14. Article IX, Section 1 of the Montana Constitution "guarantees that the government will provide Montanans with remedies adequate to prevent unreasonable degradation of their natural resources. This guarantee includes the assurance that the government will not take actions jeopardizing such unique and treasured facets of Montana's natural environment without first thoroughly understanding the risks involved." *Park Cnty. Envtl. Council*, ¶ 74 (emphasis added). Without an EIS, "there may be little if any information about prospective environmental harms and potential mitigating measures." *Winter v. Nat. Res. Def. Council*, 555 U.S. 7, 23, 129 S. Ct. 365, 172 L. Ed. 249 (2008).

The DEQ attempts to ignore the unconstitutionality of the challenged statute and regulation by claiming STSL does not have to show a proposed action will have significant impacts, but rather that STSL must show that the agency's determination that significant

impacts will not occur is arbitrary and capricious. DEQ Br. at 16. DEQ's distinction ignores Montana Supreme Court case law—neither the agency nor a plaintiff must determine whether significant impacts will occur before an EIS is required. "If substantial questions are raised whether a project *may* have a significant effect upon the environment, an EIS *must* be prepared." *Ravalli Cnty. Fish & Game Ass'n.*, 273 Mont. at 381 (emphasis added). The challenged standard, which requires a determination that significant impacts will occur before an EIS is prepared, is unconstitutional. "A determination that significant effects on the human environment will in fact occur is not essential. . ." *Ravalli Cnty. Fish & Game Ass'n.*, 273 Mont. at 381. The Court must strike § 75-1-201(1)(b)(iv), MCA and A.R.M. 17.4.608(2) as facially unconstitutional because the requirement that significant impacts must be found to occur before an EIS is required is unconstitutional in all applications.

DEQ argues "environmental assessments are an essential part of the MEPA process, and the Montana Supreme Court has long upheld their validity." Br. at 16 citing *Hillcrest Natural Area Found.*, 2022 MT 240. Pacific argues "[a]n EA thus serves as both the initial tool for determining whether a more intensive EIS is necessary and as the mechanism for required environmental review of agency actions that will likely impact the environment but not sufficiently to require an EIS." Br. at 11 (quoting *Bitterrooters for Planning v. MDEQ*, 2017 MT 222, ¶ 20, 388 Mont. 453, 401 P.3d 712). STSL agrees that environmental assessments are an essential part of the MEPA process and now seeks to ensure the DEQ begins to use the correct standard when deciding whether an EIS is required—whether the proposed action "may" have a significant impact. *Ravalli Cnty. Fish & Game Ass'n.*, 273 Mont. at 381. Not every environmental assessment will find that the agency action "may" have a

significant impact, but some will. By failing to make the DEQ determine whether an agency action "may" have a significant impact, the statute and regulation are unconstitutional in all their applications and must be struck as facially unconstitutional. *Broad Reach Power, LLC*, ¶11.

Pacific argues that courts have upheld EAs such as the City of Billings' landfill expansion. Br. at 17 *citing* Hillcrest, ¶3. The Montana Supreme Court in *Hillcrest* did not address the constitutionality of the regulation and statute challenged here, but it did remark that "[a]s a reviewing court, we focus on the validity and appropriateness of the administrative decision[-]making process without intense scrutiny of the decision itself." 2022 MT 240, ¶40 (citation omitted). Defendants did not cite, and Plaintiff could not locate, any case in which a plaintiff challenged the constitutionality of the statute and regulation at issue here. The challenged statute and regulation, which drive the DEQ's decision-making process for determining whether an EIS is required, are unconstitutional because they do not require the agency to prepare an EIS when the agency action "may" have a significant impact. *See Ravalli Cnty. Fish & Game Ass'n.*, 273 Mont. at 381 (citations omitted). The Court must strike the challenged statute and regulation as facially unconstitutional. *Broad Reach Power, LLC*, ¶11.

Neither the DEQ nor Pacific offer any compelling state interest for the challenged regulation and statute. Pacific fears that "if DEQ were required to prepare an EIS for every agency action, it would cause immeasurable delay in permitting and bankrupt Montana industry." Br. at 11. As stated above, not every agency action will require preparation of an EIS because not every agency action "may" have a significant impact on the environment.

Moreover, saving Montana industry time and money is not a compelling state interest for infringing upon all Montanans' constitutional right to a clean and healthful environment. There is no compelling state interest in requiring the DEQ to "ignore or shortchange Montanans' right to a clean and healthful environment in order to further the economic interest" of private entities. *Swan Lakers*, 2007 Mont. Dist. Lexis at *40. The Montana Supreme Court has explained that equitable remedies for a MEPA violation do not substantially interfere with constitutionally protected property rights. *Park Cnty.*, ¶¶82-83. "There is no argument that simply waiting for DEQ to properly review and act upon an application constitutes an infringement upon property rights." *Id.*, ¶82. Had DEQ completed the appropriate analysis before issuing the license, as required by MEPA, Pacific could not have complained that its private property rights were burdened by being forced to wait for that process to be completed. *Id.*

The Court should grant Cottonwood summary judgment on this issue, strike the challenged statute and regulation as unconstitutional, vacate the license, and remand to the agency to prepare an EIS given the substantial questions regarding the landfill's impacts.

B. § 75-1-201(6)(a)(i), MCA is Unconstitutional Because it Makes Montanans Pay a "Fee" to Assert Their Constitutional Rights.

STSL's amended complaint challenges the MEPA provision that requires a party seeking judicial review of an alleged MEPA violation to pay for the Administrative Record ("AR") to be compiled and lodged. Am. Compl. at 21, ¶111. Plaintiff's opening brief argued § 75-1-201(6)(a)(i), MCA is unconstitutional because it infringes upon their constitutional rights. Br. at 12. MEPA effectuates Art. IX, § 1 of the Montana Constitution. *N. Plains Res. Council,* ¶14; *Park Cnty. Envtl. Council,* ¶ 74. In response, DEQ argues STSL's challenge to the

MEPA provision that requires a plaintiff to pay to have an Administrative Record compiled and lodged is moot because the agency has already certified an AR and did not charge STSL. DEQ Br. at 18.

The Montana Supreme Court recognizes the "public interest exception" to the mootness doctrine, which applies when "(1) the case presents an issue of public importance; (2) the issue is likely to recur; and (3) an answer to the issue will guide public officers in the performance of their duties." *In re Big Foot Dumpsters & Containers, LLC*, 2022 MT 67, ¶18, 408 Mont. 187, 507 P.3d 169 (citations omitted). "An issue is of public importance where it implicate[s] fundamental constitutional rights or where the legal power of a public official is in question." *Id.* (citation and quotations omitted).

This issue is of public importance because it implicates all Montanans' Article II, § 6 fundamental constitutional right to petition for redress of governmental actions that violate MEPA. The issue is also of public importance because MEPA effectuates all Montanans' fundamental constitutional right to a clean and healthful environment. *N. Plains Res. Council*, ¶14. Article IX, Section 1 of the Montana Constitution "guarantees that the government will provide Montanans with remedies adequate to prevent unreasonable degradation of their natural resources." *Park Cnty. Envtl. Council*, ¶ 74. Prohibiting a plaintiff from challenging an agency decision unless it can pay for an Administrative Record infringes upon its constitutional right to an adequate remedy. Art. IX, § 1. The government does not have a compelling state interest for infringing upon all Montanans' constitutional right to adequate remedies to prevent unreasonable degradation of their natural resources. The challenged statutory provision is unconstitutional. *Broad Reach Power, LLC*, ¶11.

DEQ argues in a footnote that "agencies are routinely authorized to charge fees reflecting the actual costs to the agency, even in circumstances implicating constitutional rights." DEQ Br. at 18, N.6. DEQ does not provide any case law to support its contention, but instead cites to other fee statutes. DEQ Br. at 18, N.6. DEQ points to § 25-10-201, MCA, for the proposition that there is a filing fee to commence a civil action. DEQ Br. at 18, N.6. What DEQ has failed to mention is that a party can apply for a fee waiver. Ex. A at 16. There is no fee waiver provision in the MEPA statute challenged here. DEQ cites § 2-6-1006, MCA for the proposition that it can charge fees to satisfy Public Information Requests. DEQ Br. at 18, N.6. The cited statute is facially unconstitutional to the extent it does not contain a fee waiver provision. *See* Art. II, § 9 ("No person shall be deprived of the right to examine documents . . . of all public bodies or agencies of state government and its subdivisions.") Absent some type of waiver, the fee provision in the MEPA statute challenged here is facially unconstitutional in all of its applications. *Broad Reach Power, LLC*, ¶11.

C. §§ 75-1-201(6)(a)(i) & (iv), MCA are Unconstitutional Because They Limit Judicial Review to an Arbitrary Administrative Record.

At the time STSL moved for summary judgment, the DEQ had not compiled an Administrative Record ("AR"). As such, STSL moved for summary judgement claiming the challenged MEPA provisions were facially unconstitutional. Opening Br. at 11. Since STSL moved for summary judgment, the DEQ has lodged an Administrative Record, the Court granted one motion by STSL to supplement the AR, and a second motion to supplement the AR is pending before the Court. Pursuant to Montana Rule of Civil Procedure 10(c), STSL now incorporates by reference the opening and reply briefs in support of its second motion

to supplement, which challenges the constitutionality of the statute that allows the DEQ to artificially truncate the AR in such a way as to avoid taking a hard look at impacts of the toxic landfill. The Court can now rule on the constitutionality of the challenged MEPA provision in an "as-applied" challenge as well as facially. *See Park Cnty.*, ¶¶85-86.

III. The Environmental Assessment Violated MEPA and the Montana Constitution by Failing to Take a Hard Look at the Impacts of the Toxic Landfill.

A. The DEQ Violated MEPA by Failing to Compile and Analyze the Relevant Information Regarding PFAS.

Plaintiff's opening brief explained that the DEQ violated MEPA by failing to take the necessary "hard look" at the impacts of the proposed Shepherd landfill. Pl.'s Br. at 13-14. To satisfy its hard look requirement, the agency was required to compile and reasonably analyze the relevant documents regarding the environmental consequences of the landfill. *Clark Fork Coal. v. Mont. Dep't Envt'l Quality*, 2008 MT 407, ¶47, 347 Mont. 197, 197 P.3d 481. DEQ did not satisfy its hard look requirement because it failed to analyze and disclose the relevant information regarding the impacts of PFAS on human health in the EA to the "fullest extent possible." Pl.'s Br. at 13, citing A.R.M. 17.4.601(1).

The EA did not analyze or disclose that some PFAS are "known to have toxic effects." AR 002271. The DEQ did not analyze or disclose the fact that the agency refers to PFAS as "forever chemicals" because they do not break down. AR 002275. The DEQ's own documents discuss the potential health effects from PFAS in landfills. AR 002271; AR 002275. The DEQ's PFAS Fact Sheet states "exposure to certain PFAS may lead to health problems including changes in the liver, cardiovascular effects, reproductive effects in women, immunological and developmental effects in infants and children, and an increased

risk of kidney or testicular cancer." AR 002275. Nowhere in the EA is this information analyzed or disclosed. Without analyzing and disclosing this information, the agency did not take the requisite "hard look." *Clark Fork Coal.*, ¶47.

The Montana PFAS Action Plan states it is a "living document" that will be updated as the agency gets more information and science progresses. AR 002271. The DEQ's "FAQ" tab on its website points the public to the EPA's PFAS website to learn more about the pollutant. Ex. 2[1]. The EPA website, in turn, points to "peer-reviewed scientific studies" that show exposure to PFAS may cause adverse health effects. Ex. 4 at 3-4. Importantly, the EPA website contains information about the impacts of PFAS that is not contained in the DEQ's PFAS documents. *Compare* Ex. 4 at 3-4 *with* AR 002275. For instance, the EPA information states exposure to PFAS may lead to increased risk of prostate cancer, a reduced ability of the body's immune system to fight infections, interference with the body's natural hormones, and increased cholesterol levels and/or risk of obesity as health effects of PFAS. Ex. 4 at 3-4. The EA didn't analyze or disclose this information. The DEQ failed to satisfy its hard look requirement because it directed the public to this relevant EPA information regarding possible impacts of PFAS, but did not compile and analyze the same information in its Environmental Assessment. *Clark Fork Coal.*, ¶47. The DEQ failed to take a hard look at the potential impacts of PFAS because the EA does not consider the relevant data and then articulate a rational connection between the facts found and the choice made. *Hillcrest Natural Area Found.*, ¶9. The agency decision to issue the license is arbitrary and capricious

[1] Available at: https://www.epa.gov/pfas/our-current-understanding-human-healthand-environmental-risks-pfas (last visited October 20, 2024).

because it was made without consideration of all relevant factors. *Bitterrooters for Planning, Inc.*, ¶ 16, (citation omitted).

The "References" page in the EA does not cite Montana's PFAS Fact Sheet or the EPA's information. Pl.'s Opening Br. at 14, citing Ex. 1 at 42 (AR 002047). DEQ says neither the Montana PFAS Action Plan nor DEQ's PFAS Fact Sheet discusses potential health effects from PFAS at a Class II [Solid Waste Management System (SWMS)]. *See* Br. at 9. The DEQ is wrong. To be clear, SWMS is another way of saying "landfill." DEQ Br. at 1. The Montana PFAS Action Plan states "landfills" are "major sources of PFAS." AR 002271. If the Shepherd landfill was not going to contain PFAS, the DEQ would have said as much. Instead, the agency admitted the Shepherd landfill will contain PFAS by claiming the DEQ does not have PFAS standards in place. DEQ Br. at 8 citing AR 002070 ("[t]here are no current rules regarding PFAS and waste disposal.")

B. The DEQ Violated MEPA by Failing to Adequately Evaluate Mitigation Measures.

STSL's opening brief explained that the DEQ violated MEPA by failing to evaluate mitigation measures. Pl.'s Br. at 14. In particular, the EA failed to acknowledge that PFAS are carried by wind and dust. *Id.* at 15. The EA failed to explain at what speeds winds can carry PFAS from Auto Shredder Residue ("ASR"). *Id.* The EA failed to explain how far winds can carry PFAS off-site. *Id.*

DEQ responds that it "fully considered the potential for wind-blown litter to leave the facility and determined that multiple layers of design and operational controls to be implemented by Pacific would contain the waste on-site, limiting potential impacts from wind-blown litter." DEQ Br. at 10. The Administrative Record contradicts the DEQ and

Pacific's claims that design and operational controls ensure containment of PFAS. DEQ Br. at 10; Pacific Br. at 15.

The EA states "[a]pplications of water and chemical dust suppressants *could* reduce fugitive dust emissions by *up to* 50 to 80 percent if correctly applied." AR 002039 (emphasis added). The qualifiers "could" and "up to" mean 80% is the maximum amount of fugitive dust that can be reduced. In other words, at a *minimum*, 20 percent of fugitive dust will leave the landfill. Contrary to the DEQ's argument, the agency did not "rationally conclude that design and operational controls would *ensure containment* of the ASR." DEQ Br. at 8 (emphasis added). Allowing at least 20 percent of fugitive dust containing PFAS to leave the landfill is not "containment." DEQ Br. at 8. "While it is true that mitigation measures can justify an agency's conclusions that a project's impact is not significant, an agency must explain exactly how the measures will mitigate the project's impact." *Ravalli Cnty. Fish & Game*, 273 Mont. at 383 (citation omitted). The agency has not done that here and therefore an EIS is required.

Pacific states it will use a "Dust Boss" to capture dust and drop it to the ground. Pacific Br. at 4. The EA does not provide any analysis or background about the effectiveness of using the Dust Boss to capture PFAS. Does the Dust Boss spray the roads, the actual ASR, or both? The fact that the EA states 20 to 50 percent of fugitive dust will escape is not addressed in the context of the effectiveness of the Dust Boss. The DEQ violated MEPA by failing to explain this mitigation measure. *Ravalli Cnty. Fish & Game*, 273 Mont. at 383 (citation omitted).

DEQ and Pacific argue that 6-inches of soil will be placed over the ASR at the end of each working day to limit dust transport. DEQ Br. at 10; Pacific Br. at 15. This fails to address the fact that the toxic forever chemicals contained in the piles of auto shredder residue will sit out in the open exposed to the wind all day. AR 002040. Pacific and DEQ point to measuring the wind speed at the facility and compacting the toxic forever chemicals if continuous wind speeds exceed 35 mph. Pacific Br. at 16; DEQ Br. at 11. STSL's opening brief states, "[t]he DEQ failed to explain why stopping activities when continuous wind speeds reached 35 mph would prevent significant environmental impacts, but why PFAS would not be carried off site by winds at 25, 30, or 34 mph." Br. at 15. Neither DEQ nor Pacific address this dispositive point. The DEQ violated MEPA by failing to explain exactly how the mitigation measures will mitigate the landfill's impact. *Ravalli Cnty. Fish & Game*, 273 Mont. at 383 (citation omitted). The DEQ violated MEPA because the agency did not explain exactly how this measure mitigates the project's impacts. *Id.*

The DEQ's contention that there is no "record evidence that calls into question DEQ's conclusions" is simply incorrect. DEQ Br. at 11. STSL member Luanne Mauch told the DEQ during public comments:

> KEEP IN MIND! ACCORDING TO THE "BEAUFORT WIND SCALE": WIND SPEEDS FROM 13-18 MPH IS ENOUGH TO "RAISE DUST, LEAVES, PAPER"

AR 1768; 1172 (emphasis in original); *see also* Mauch Decl. at 1. The DEQ's determination that potential impacts from wind-blown PFAS would not be significant is arbitrary and capricious. The DEQ failed to consider the relevant data and articulate a rational connection between the facts found the choice made. *Hillcrest Natural Area Found.,* ¶9. The agency failed

to explain how its mitigation measures will mitigate the project's impact. *Ravalli Cnty. Fish & Game*, 273 Mont. at 383 (citation omitted).

Pacific claims it will adhere to industry standards, which call for "installation of litter control fences along the property boundary; and placement of portable litter screens downwind of the active working area." Pacific Br. at 4. The EA states litter that is collected in the fences would be picked up by the staff. AR 002040. The EA failed to explain whether Pacific's fences and screens can catch the chemical PFAS pollutants. The EA fails to address the effectiveness of litter control fences or litter screens blocking the transport of PFAS. The EA failed to explain whether Pacific's employees will pick the toxic PFAS out of the fences, assuming they can even collect the airborne chemical pollutants. The agency failed to explain how its mitigation measures will mitigate the project's impact. *Ravalli Cnty. Fish & Game*, 273 Mont. at 383 (citation omitted).

Pacific states it will "implement site-specific measures to ensure containment, including planting trees and stockpiling vegetated soil to serve as a wind block." Br. at 4 citing AR 002048-49. The EA states Figure 12 is a rendering of what the area will look like. AR 002049. There is no Figure 12 in the Final EA. More importantly, these activities will not happen on all sides of the landfill, only on the "east" side to "enhance community aesthetics while also serving as a wind break and visual barrier." AR 002048. As one commenter stated:

> Our Schools are directly downwind. Our children deserve clean air to breathe at recess and football or track practices.

AR-001683. The EA does not state what happens when the wind blows in other directions—will PFAS reach the school? The DEQ violated MEPA by failing to take a hard look at the potential impacts to the "fullest extent possible." A.R.M. 17.4.601(1).

Plaintiff's opening brief explained the DEQ violated MEPA by allowing Pacific to submit final design documents for the leachate collection system after the MEPA process was completed. Br. at 16. Pacific did not respond to this issue. DEQ first responds that STSL waived the argument by failing to raise it during the comment period. DEQ Br. at 12. The public told the DEQ, "[T]he application does not describe the plan or what [Best Management Practices] would be." AR-002058. The DEQ responded that "Section 4.2 in the O&M plan in the license application. . . outlines surface water drainage, culverts, ditches, detention ponds, leachate collection, and final cover maintenance." AR-002058.

According to the Operation & Maintenance Plan, "leachate collection system final design documents will be completed at a later date and submitted to the Montana DEQ for approval." AR-000281. This would allow Pacific to submit the design documents *after* the MEPA analysis presupposes there will be no significant impacts. "Mitigation measures may help alleviate impact after construction, but do not help to evaluate and understand the impact before construction." *N. Plains Res. Council v. Surface Trans. Bd.*, 689 F.3d 1067, 1084-85 (9th Cir. 2011). The DEQ violated MEPA by having a "plan to make a plan." *Park Cnty.*, ¶ 44.

DEQ argues that it analyzed the leachate collection system in the context of potential groundwater impacts in the Final EA. DEQ Br. at 12. The DEQ did not analyze the leachate collection system in the context of potential PFAS becoming airborne and leaving the facility. *See* AR—002062 ("wind of a Montana summer[] would rapidly evaporate any leachate that makes it to the leachate pond.") By delaying approval of the leachate collection system until after the MEPA process was completed, the DEQ prevented the public from

participating in the process and failed to take a hard look at whether there was an alternative to the collection system that did not allow PFAS to become airborne. The DEQ admitted in its response to Plaintiff's second motion to supplement the AR that "humans can be exposed to PFAS by breathing air containing PFAS." DEQ Br. at 6 (citation omitted).

C. The DEQ Violated MEPA by Failing to Complete an Environmental Impact Statement for the Toxic Landfill.

Plaintiff's opening brief explained that the DEQ violated MEPA because Plaintiff has raised substantial questions as to whether the Shepherd landfill may have significant impacts. Pl.'s Br. at 16-17. The Court must remand back to the DEQ because the agency never analyzed whether the challenged landfill "may" have a significant impact when applying the significance criteria. AR 002045. The Montana Supreme Court has previously remanded back to a state agency to prepare an EIS when there was a "record of conflicting evidence" that left substantial questions about whether the action "may" have a significant impact on the environment. *Ravalli*, 273 at 381 (citations omitted).

The DEQ was required to consider the severity of the impact in its significance determination. ARM 17.4.608(1)(a). The DEQ violated MEPA by failing to consider the toxicity of the Auto Shredder Residue in the severity portion of the significance analysis. AR 002045. The DEQ's internal documents acknowledge that some PFAS are "toxic" (AR 002271), but the EA failed to consider this in the "severity" portion of the significance determination. AR 002045. The significance analysis in the EA did not analyze or disclose the fact that exposure to the toxic forever chemicals increases cancer, cardiovascular effects, reproductive effects in women, immunological and developmental effects in infants and children. AR 002045. Pacific, on the other hand, argues the ASR is not "hazardous,

radioactive, or otherwise toxic." Pacific Br. at 2 citing AR 002051. The paged cited by Pacific states:

> Generally, ASR is not a hazardous waste as defined in Montana and by EPA. However, ASR may occasionally test as characteristically hazardous for toxicity as defined in the CFR and state hazardous waste rules. If any waste is determined to be hazardous via periodic sampling, it is handled as a hazardous waste, and would not be disposed at PSR's landfill.

AR 002051. The next page in the AR states:

> ASR may be characteristically hazardous for toxicity. Toxicity is determined by the Toxicity Characteristic Leaching Procedure (TCLP) analysis. Therefore, ASR must be evaluated for toxicity by the generator prior to disposal.

AR 002052. How often will Pacific test the ASR to determine if it is toxic? If Pacific finds the ASR to be toxic, what does Pacific plan to do with all the toxic ASR that is has already covered since the last test? Given the record of conflicting evidence and the substantial questions that remain as to whether the proposed landfill may have a significant impact, an EIS must be prepared. *Ravalli*, 273 at 381.

DEQ argues that it does not have rules regarding PFAS and waste disposal, the liners would protect the groundwater, and there is low potential for impacts given the design of the facility. Br. at 13-14 (citing AR 002070). [2] A lack of rules regarding PFAS does not mean they may not have significant impacts—on the contrary; it underscores the need for further explanation of why the toxic forever chemicals may not have significant environmental impacts. *See* ARM 17.4.609(2)(c). At bottom, the DEQ cannot rely on a lack of regulations to avoid a discussion of the severity of the impacts from PFAS when its own internal

[2] The DEQ has acknowledged "the number of possible defects in the HDPE geomembrane [liner] is highly variable and remains essentially unknown." AR 002062.

documents show the agency knows exposure to the toxic forever chemicals may cause significant impacts such as cancer. AR 002271.

The DEQ was required to consider the "duration" of the impacts of the forever chemicals. ARM 17.4.608(1)(a). STSL submitted comments stating, "[t]here are forever chemicals in the [ASR] that cause the liner to break down over time. What happens when this happens?" AR 002069-70. In response, the DEQ cites the EA, which claims "protections 'such as liners, groundwater and surface water controls, and operations would prevent contamination.'" DEQ's Resp. Br. at 13 (citing AR 002070). The EA is is arbitrary, capricious, and unlawful on this point.

When asked about the liners breaking down and potentially releasing PFAS into the environment, the DEQ pointed to operations that would prevent contamination. AR 002070. Groundwater monitoring will only occur for thirty years after the landfill is closed. AR 002070. "When relying on mitigation measures to support a conclusion that impacts are not significant, an agency is further obliged to explain how those mitigation measures serve to reduce impacts below the level of significance." *Nat'l Wildlife Fed'n. v. State Lands*, 1994 Mont. Dist. Lexis 716 at *34 (1st Jud. Dist.) (citations omitted).

The DEQ did not explain why it will only require thirty years of post-closure monitoring when the DEQ's own internal documents state the toxic "forever chemicals" do not break down. Ex. 2 at 1; AR 002275. DEQ also failed to explain why it did not require Pacific to monitor for as long as the forever chemical pollutants exist—forever. ARM 17.4.608(1)(b). The DEQ acknowledged in a footnote that it can require Pacific to monitor the groundwater in perpetuity to ensure the forever chemicals do not impact the

groundwater. *See* DEQ Br. at 2, N.2 (citing ARM 17.50.1404.2). Given the arbitrary monitoring timeline, the DEQ failed to explain why there may not be significant impacts considering the severity of the impacts that may occur—cancer, etc. ARM 17.4.608(1)(b). The DEQ's failure to prepare an EIS to evaluate the environmental impacts associated with perpetual monitoring, or lack thereof, was arbitrary and capricious. *Nat'l Wildlife Fed'n.* at *35-36. Further, the DEQ failed to disclose and analyze the fact that some PFAS are toxic and do not break down in its significance analysis, and then failed to explain why post-closure monitoring will only last 30 years. AR 002070; Ex. 2 at 1; AR 002275. Objective 5 in Montana's PFAS Action Plan is to prevent creation of new PFAS sites through better sampling and planning. AR 002274. The Court must remand back to the DEQ to prepare a more thorough EIS to plan for perpetual groundwater monitoring to ensure the toxic chemicals do not have a significant impact on the environment.

IV. Vacatur is the Appropriate Remedy.

STSL challenges as facially unconstitutional the MEPA provision that requires a party seeking to vacate a license or permit to first seek injunctive relief and provide a written undertaking for lost project revenues and wages for one year. Pl.'s Am. Compl. at 21-22, ¶¶112; 115 (citing § 75-1-201(6)(d), MCA)). DEQ complains that STSL has not explained how the requirement violates its members' constitutional rights. DEQ's Br. at 18-19. The challenged statute is subject to strict scrutiny because it infringes upon STSL and all Montanans' fundamental constitutional right to adequate remedies to protect their constitutional right to a clean and healthful environment. Requiring a party that has prevailed on the merits of a MEPA claim to pay or seek a financial wavier to protect its Art. II, § 3

constitutional right to a clean and healthful environment implicates all Montanans' constitutional right to adequate remedies. Art. IX, § 1.

The DEQ has not shown a compelling interest in requiring a party to provide a written undertaking for lost profits and wages *after* a plaintiff has prevailed on the merits to secure equitable relief. The Montana Supreme Court has stated the judiciary's standard remedy for permits or authorizations improperly issued without required procedures is to vacate and set them aside. *Park Cnty.*, ¶55 (citations omitted). Courts only decline to do so in "limited circumstances." *Id.* (citing *Pollinator Stewardship Council v. United States EPA*, 806 F.3d 520, 532 (9th Cir. 2015). Those limited circumstances are when vacating a license or rule will cause more environmental harm than not vacating the license or rule. *See id.* There is no compelling state interest in protecting profits and wages founded on unlawful agency action. *See, e.g., Swan Lakers*, 2007 Mont. Dist. Lexis at *40 (no compelling state interest in requiring the DEQ to "ignore or shortchange Montanans' right to a clean and healthful environment in order to further the economic interest" of a private landowner.)

DEQ cites (Br. at 20) the Montana Supreme Court in *Water for Flathead's Future, Inc. v. Mont. Dep't of Envtl. Quality,* for the proposition that the district court erred when it acknowledged vacatur was improper until § 75-1-201(6)(c), MCA, but nevertheless vacated the permit. 2023 MT 86, ¶35 412 Mont. 258 530 P.3d 790. The Court pointed determined that the district court erred by departing from the statutory framework and vacating the

permit because the injunction provision was not constitutionally challenged. *Id.*, ¶ 36. In sharp contrast, STSL is challenging the statutory injunction provision as unconstitutional.[3]

V. Summary Judgment is not appropriate on the Solid Waste Management Act claim because material questions of fact remain.

Administrative Rule of Montana 17.50.1116(2)(f) requires that all landfills "must be designed, constructed, and operated in a manner to prevent harm to human health and the environment." A.R.M. 17.50.1116(2)(f). DEQ responds that there is "zero evidence" that the proposed landfill was designed to harm human health. DEQ Br. at 14. STSL has never claimed the landfill was designed to harm human health—that would be criminal. Instead, STSL has claimed "[t]he proposed Shepherd landfill will harm human health and the environment by allowing wind and dust to carry PFAS off-site." Am. Comp. at 24, ¶ 129.

The Montana PFAS Action Plan identifies landfills as a "major source of PFAS" and notes that "exposure to PFAS can lead to human health effects." AR 002271. "Current research has shown that people can be exposed to PFAS by . . . [b]reathing air containing PFAS." Ex. 4 at 4. "[T]he most common sources of human exposure to PFAS include . . . breathing in dust." Ex. 2 at 2.

[3] Plaintiff's opening brief (p. 18) addressed the unconstitutionality of § 75-1-201(6)(c), MCA, but that section is not applicable after a plaintiff has prevailed on the merits of a case. Instead, § 75-1-201(6)(d), which requires a written underwriting, is applicable after a party prevails and is now being challenged. *See* Am. Compl. at 21, ¶ 112. Under § 75-1-201(6)(d), a party seeking to vacate a license after prevailing on the merits does not have to show irreparable harm and the Court does not have to consider the impacts on the local and state economy. STSL now seeks to strike as unconstitutional the requirement to provide a written underwriting for lost wages and profits and/or to seek a waiver before a license is vacated. § 75-1-201(6)(d), MCA.

STSL members provided the DEQ with information showing wind speeds at 15 mph can carry dust and the area frequently experiences these wind speeds. AR 1768-1172. The DEQ did not address the information. Plaintiff has not yet moved for summary judgment on this claim and the Court must deny DEQ's motion for summary judgment on this claim because there is a material question of fact as to whether construction and operation of the landfill violate 17.50.1116(2)(f).[4]

CONCLUSION

For the foregoing reasons, Plaintiff STSL respectfully requests that the Court grant its motion for summary judgment, deny DEQ and Pacific's motions for summary judgment, strike as unconstitutional the challenged sections of 75-1-201(1); strike A.R.M. 17.4.608(2) as unconstitutional, vacate the license to construct and operate the Shepherd Landfill, order the DEQ to determine whether the Shepherd landfill "may" have a significant impact on the environment thereby requiring preparation of an EIS, and order the DEQ to prepare an Environmental Impact Statement.

Respectfully submitted this 4th day of November, 2024.

/s/ John Meyer
JOHN MEYER

Attorney for Plaintiff

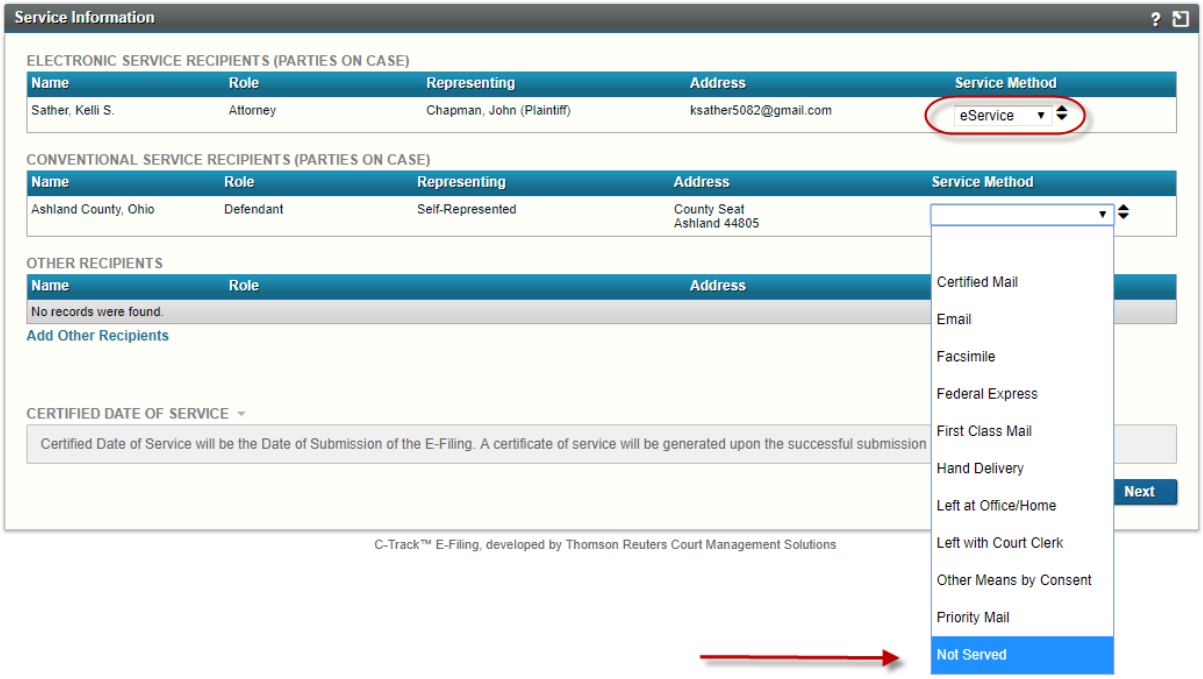
[4] Pacific did not move for summary judgment on this claim.

EXHIBIT A

E-Filing Civil Cases at Montana's Trial Courts

Table of Contents

Note that in this example opposing counsel will be automatically served via eService when you submit this filing. The date on the COS will be the date you submit this filing. eService is performed at the time you click on the Submit button.



When you have the service information prepared accurately, click “Next.”

Filing Summary Page

Check your work as described in the previous Filing Summary section.

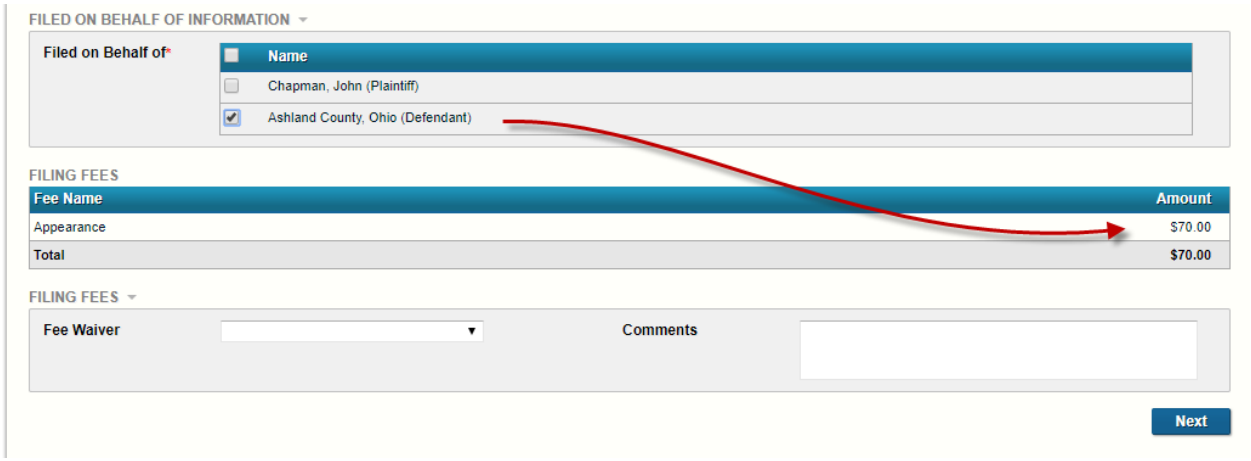
Cart

“Submit Filings” from the cart and pay the statutory filing fees as described in the previous Cart section.

Filing with a Fee Waiver (new or existing case)

Follow the instructions above for filing on a new or existing case. Be sure that you are selecting the right Filing Types/Subtypes to display the filing fee bundles on the Filing Information Page. If the filing fee bundles are not displayed, start over with the filing and select the appropriate Filing Types/Subtypes. It is important that appropriate filing types are used, even if a fee is waived.

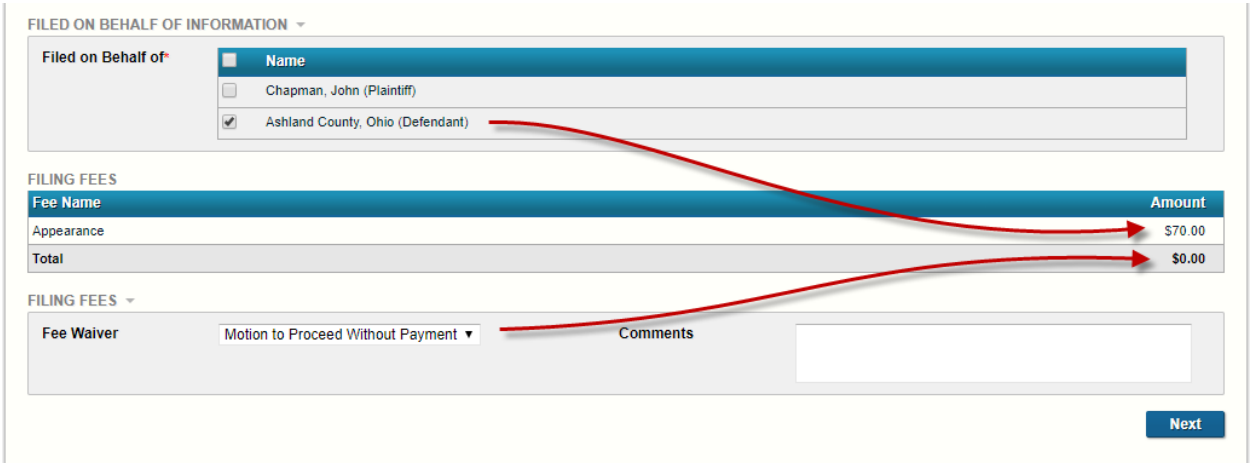
On the Filing Information Page, be certain to select the party(ies) on whose behalf you are filing. At first, as you select the parties, fees will be assessed. Then, when you fill in the fee waiver bundle, the total fees assessed will change to $0.00.



Select the most appropriate Fee Waiver description:

- Not Required by Statute
- Motion to Proceed Without Payment (attach the motion on the document upload page)
- Court Order
- Government Agency
- Already Paid (see additional information in next section)

Use the Comments box to further describe your fee waiver. For instance, if you select "Not Required by Statute," list the statute in the Comments field. It will assist the clerk in making the appropriate decision to accept or reject the filing.



Special Instructions for resubmitting a filing that has already been paid

On occasion, you will submit and pay filing fees and the clerk will reject your filing for some critical reason (such as a missing signature). The clerk may instruct you to enter specific information (such as a receipt number or date of previous submission) when you resubmit your filing. You must do so, or risk having your filing rejected again.

CERTIFICATE OF SERVICE

I, John Phillip Meyer, hereby certify that I have served true and accurate copies of the foregoing Answer/Brief - Reply Brief to the following on 11-04-2024:

Nicholas A. Whitaker (Govt Attorney)
Department of Environmental Quality
Director's Office
1520 E Sixth Avenue
Helena MT 59601
Representing: DEPARTMENT OF ENVIRONMENTAL QUALITY
Service Method: eService

Marisa Lee Heiling (Attorney)
2801 Connery Way
Missoula MT 59808
Representing: DEPARTMENT OF ENVIRONMENTAL QUALITY
Service Method: eService

Kathryn Marian Brautigam (Attorney)
401 North 31st Street
Suite 1500
P.O. Box 639
Billings MT 59103-0639
Representing: Pacific Steel & Recycling
Service Method: eService

Kyle Anne Gray (Attorney)
P.O. Box 639
Billings MT 59103
Representing: Pacific Steel & Recycling
Service Method: eService

Matthew Herman Dolphay (Attorney)
401 N. 31st Street, Suite 1500
P.O. Box 639
Billings MT 59103-0639
Representing: Pacific Steel & Recycling
Service Method: eService

Electronically Signed By: John Phillip Meyer
Dated: 11-04-2024