Lawsuit Challenges DEQ's Issuance of a General Construction Permit

The Rock Creek Alliance, and three other conservation organizations, has filed a lawsuit against Montana's Department of Environmental Quality (DEQ) in State District Court in Lewis and Clark County, Montana concerning water quality issues related to the Rock Creek mine. This litigation primarily involves the impacts from sediment introduction to Rock Creek and the subsequent consequences to the threatened bull trout population. The legal proceedings also contest whether the evaluation and construction phase of the mine, the primary source of the sediment, was approved under an applicable permit.

The construction phase of the mine would last for 5-7 years and introduce as much as 1,414 tons of sediment per year into Rock Creek. Most of the sediment produced would be from road construction and maintenance, bridge replacement, and culvert and pipeline deployment. Also contributing to the sediment would be infrastructure construction, including the mill facility at the confluence of the east and west forks of Rock Creek and the evaluation adit adjacent to Cliff Lake.

Bull trout are a threatened species that require clean, cold water to reproduce and survive. The sediment introduced from the proposed mine would be enough to eliminate bull trout from Rock Creek. The stream is still currently able to provide habitat for both migratory and resident bull trout, but is already listed as "impaired for sediment" from past logging practices. The pre-existing impairment from sediment magnifies the plight of Rock Creek and the tenuous hold the bull trout have in the drainage. Any additional sediment would likely end forever the bull trout population in Rock Creek.

Also at issue is the type of permit that was approved by Montana DEQ. The agency may issue two different types of permits: individual permits and general permits. An individual permit covers a discharge to a water body by a particular facility or activity, such as sediment introduced to Rock Creek. In Montana, it is issued as a Montana Pollution Discharge Elimination System (MPDES) permit. To obtain an individual permit, a discharger must submit a detailed application to DEQ describing the proposed activity, the receiving waters, and the precise nature and quantity of the pollutants that will be discharged. DEQ then analyzes the application materials in detail to determine whether the discharge can meet the requirements of the Water Quality Act. If so, DEQ prepares a draft permit which is then released for formal public comment. After the public comment period, DEQ may either modify the conditions of the permit in response to comments received, or explain why it is declining to do so. If members of the affected public are aggrieved by the issuance of a final permit, they may seek review of the permit in court.

General permits apply to entire classes of dischargers over a large geographic area, typically the entire state. Anyone proposing to undertake an activity within the scope of an existing general permit may obtain MPDES coverage simply by sending a notice of intent ("NOI") to DEQ. With the general permit, the public receives no notice or opportunity to comment on the NOI prior to DEQ approval, regardless of the magnitude of the discharge.

Some two decades of environmental review of the Rock Creek mine proposal have produced an extensive record documenting the sensitive condition of Rock Creek and its population of bull trout. This record establishes that the sediment discharges from mine construction are ineligible for general permit coverage under two separate provisions of the Water Quality Act (WQA) regulations governing the proper use of general permits. They are:

1) Rock Creek's fishery is a resource of "unique ecological significance." Therefore, the WQA prohibits coverage of the mine's discharge under a statewide general permit.

2) The generic conditions set forth in general permits are not sufficient to ensure that sediment discharges from mine activity will not violate the water quality standard for sediment in Rock Creek, which already contains all the sediment its fishery can tolerate. Therefore, the project is not eligible for coverage under a general permit.

Other site-specific or individual discharge permits have already been issued for the Rock Creek mine. An MPDES permit was issued for the 3 million gallons/day that were to be discharged to the Clark Fork River. However, in 2008, the Montana Supreme Court revoked the permit to discharge mine wastewater to the Clark Fork River due to the perpetual nature of the discharge. An individual permit for the discharge of tailings seepage to groundwater also was issued by Montana DEQ. A Montana state court subsequently rescinded that permit because the discharge contained arsenic and violated Montana's Water Quality Act.

The Clark Fork River: A River Beleaguered by Mining Past and Present

The Clark Fork River is the artery that connects the Cabinet Mountains Wilderness to Lake Pend Oreille, providing the lake with 90% of its recharge. Named after William Clark of the Lewis and Clark Expedition, the river begins its journey across western Montana near the community of Butte, approximately 360 miles upstream of the Clark Fork delta. There Silver Bow Creek and Warm Springs Creek combine to form its headwaters.

For more than 100 years, the Clark Fork River has been beset by mine related degradation, suffering inexcusable abuses at the hands of the mining industry. In the not so distant past, mining operations in Butte and Anaconda used the river and its tributaries as depositories for countless tons of metals and mining waste. Today, the river continues to be plagued by the perpetual impacts of hard rock mining, and the region is considered the largest EPA superfund site in the United States. The Rock Creek mine is only the latest threat to the river, and, ultimately, Montana's treatment of the Clark Fork River will have a large influence on the health of Lake Pend Oreille.

In 2009, the Milltown Dam, situated east of Missoula upstream of the confluence of the Clark Fork and Black Foot Rivers, was removed. A controlled removal was deemed preferable to an inevitable breach of the aging structure. Metals that had been contained behind the dam from past mining operations in the Blackfoot River were released into the Clark Fork River. The metal laden silt began its long journey downstream, settling in the river gravels along the way, becoming suspended in the water column, and likely becoming entrapped in sediment behind the Thompson Falls, Noxon Rapids, and Cabinet Gorge dams on the lower section of the river.

Over $1 billion has been committed to the clean up of mine related degradation in the Clark Fork River and its tributaries by taxpayers, private industry, municipalities, and state and federal governments. In spite of this, the state of Montana readily endorses and promotes the Rock Creek mine and refuses to acknowledge the proposed project's significant and perpetual impacts from

mine related discharges to the Clark Fork River. As they did a century past, Montana continues to promote projects that perpetually degrade the state's environment. Those that refuse to learn from the past are condemned to repeat it.

The Significance of a Perpetual Discharge

In December 2007, we asked the Montana Supreme Court to consider the perpetual nature of the discharge from the Rock Creek mine and determine whether or not it is significant enough to warrant additional analysis. We argued that Montana DEQ did not adequately consider all of the facts and likely impacts from a 3 million gallon daily discharge containing arsenic, ammonia, nitrate-nitrogen, heavy metals, and other pollutants when making its determination of non-significance. Our attorneys argued that this discharge once started could never be stopped, and that it would require vigilant monitoring and treatment in perpetuity.

The high court agreed with us that Montana DEQ did not consider all of the facts and potential consequences of this discharge, and deemed the discharge significant due to the length of time it would occur. The court also strongly suggested that the state agency reexamine the criteria that it used to determine whether the discharge was significant or not. In reaching its decision, the justices agreed with us that the mining company would eventually abandon the project, leaving the responsibility of the perpetual treatment to the state.

A determination of significance for the perpetual discharge by DEQ would trigger additional analysis in the form of a non-degradation review. This review would examine a specific set of criteria including the environmental impacts, best available technology, whether the benefits of the project would warrant degradation of state waters, and lastly, economic impacts to the region that would include Bonner County.

Since the time of the ruling a year ago, Montana DEQ has ignored the high court's recommendation to reevaluate the arbitrary determination of non-significance. It appears that Montana's DEQ may need further urging to follow the court's mandate. That urging may have to come

from Idaho. Indeed, if the mine is built and allowed to create a perpetual discharge, Idaho will have as much to lose as Montana. If you are an Idaho citizen, you can help by asking your elected officials to contact Montana Governor Schweitzer on behalf of Idaho's water quality. Also important, are personal communications from citizens of any state explaining the importance of protecting Lake Pend Oreille.

Governor Schweitzer has publically opposed a Canadian coal mine, the Cline Coal mine that would pollute Montana's Flathead River and Flathead Lake. He understands the problems associated with permitting a mine that impacts the water quality of a downstream state that has no authority to deny the permit, and has asked the U.S. State Department to intervene on Montana's behalf. Governor Schweitzer needs to be consistent in his thinking. He should be willing to consider the impacts to Idaho's water quality from a mine permitted in Montana. It is his DEQ that has issued a permit to pollute while steadfastly refusing to acknowledge the significance of the pollution.

If you have questions before writing your letter or making your phone call, contact us and we can help. Governor Schweitzer needs to hear from all of us!

Contact Information for Governor Schweitzer:

Governor Brian Schweitzer
Office of the Governor
Montana State Capitol Building
P.O. Box 200801
Helena, MT 59620-1901
406-444-3111, FAX 406-444-4648
governor@mt.gov

Pikas of the High Country

The pika has been described by some as "the cutest mammal in the world." Weighing about 5 ounces, pikas have "Mickey Mouse" ears, a hamster-like body, and the face of a rabbit. Although they superficially appear to be related to members of the mammalian Order Rodentia, pikas belong to the Order Lagamorpha, and are closely related to rabbits and hares.

Sometimes referred to as rock rabbits, pikas make their homes in talus slopes found at the highest elevations in western North America. They also are found in Asia and parts of Eastern Europe. In all, there are 30 species of pikas, with two occurring in North America. In the Northern Rockies, including the Cabinet Mountains, the American Pika (Ochotona princeps) can be found scurrying along rock strewn cliff faces that are in some of the wildest and most remote areas of the mountain range.

Like other members of the Order Lagamorpha, pikas are herbivores. Their favorite foods include grasses, sedges, twigs from shrubs commonly found in boulder fields, and flowering plants such as fireweed. Active during the winter months, pikas harvest plant material in the summer and fall and cure it to last through the winter. The "hay" is stashed in piles under overhanging rocks and in crevices. Although some of the plants contain toxins, the toxins help keep the hay from spoiling and break down over time rendering the plants safe to eat. Pikas know which plants contain the highest levels of toxins and these are eaten last. Hay piles are closely guarded from neighboring pikas that occasionally raid each other's stashes.

Pikas live in large colonies and communicate with several types of vocalizations, including a warning call that can accurately be described as "eek." This is given at the approach of aerial predators including hawks, eagles, and owls.

Young pikas are born in May and June. Females produce two litters a year with two to six young per litter. The young mature in less than two months and live an average of three years.

Pikas appear to be intolerant of warm temperatures and their distribution is limited by the occurrence of rock talus and boulder fields at upper elevations. There is evidence that global climate change is pushing them to ever increasing elevations and towards eventual extinction. One researcher has predicted as much as a 59% decline in western US populations if greenhouse gas emissions continue to rise. Pikas currently are candidates for listing under the Endangered Species Act.

On a happier note, if you have not had the pleasure of seeing a pika, there are still plenty of opportunities to see them in the Cabinets Mountains Wilderness. Pikas can be observed in the large boulder fields bordering many of the lakes or at the tops of mountains. Watching these cute cousins of rabbits and hares scurrying among the rocks, sunning themselves on a favorite boulder, perched a top a lookout, or harvesting plant materials for the winter is one of this author's favorite pastimes.

Take A Hike To Rock Lake

Though winter is upon us, it is never too early to begin planning spring and summer hikes. Before you know it, the snow will have receded, the buds will be emerging, and the songbirds will be back, compelling us to experience the rebirth of the backcountry after its long winter's sleep.

A must on the list for 2010 is the hike to Rock Lake in the Cabinet Mountains Wilderness. This walk takes us along the East Fork of Rock Creek and the Rock Lake Meadows, culminating at the alpine gem of Rock Lake nestled between Ojibway and Rock Peaks.

Rock Lake is one of the most spectacular alpine lakes in the Region. Unfortunately, it sits at the epicenter of two massive mining proposals. Both the Rock Creek and Montanore mines threaten Rock Lake and the surrounding region. Visiting Rock Lake is essential for all who want to experience first hand the beautiful country that would be lost by mining in the region.

When spring approaches, call me and we can take the hike together. On our way to the trailhead, we'll drive up Rock Creek Road (F.S. Road 150), stop at the junction of the East Fork and West Fork and sit in the calming silence of the wild. Then we'll imagine a 24/7 rock crushing milling operation that is proposed for that location and the resulting din of industry that would displace the silence of nature.

The walk is moderate, approximately 5 miles, and is essential to fully understand the impacts of the Rock Creek and Montanore mines.

Enjoy winter, and then think spring. See you up Rock Creek.