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Article published May 2, 2008

DEQ asks court to reconsider gravel pit decision

By JOHN S. ADAMS Tribune Capitol Bureau

HELENA — Officials with the Montana Department of Environmental Quality said Thursday that they will ask two Helena judges to reconsider recent rulings ordering the agency to issue gravel pit permits even though the necessary environmental analyses were not completed.

District Judge Jeffery Sherlock ruled last week that the DEQ must follow state law and issue an open-cut mining permit to a gravel pit operator near Belgrade, even though the department had not begun to prepare the environmental analysis required under the Montana Environmental Policy Act.

On Tuesday, District Judge Dorothy McCarter granted two more "writ of mandates" for gravel pits, bringing the number of Gallatin County gravel pits allowed to move forward without environmental analyses to three.

DEQ Deputy Director Tom Livers said Thursday that the agency plans to file court papers today asking the two judges to reconsider those decisions.

Specific details of the motion to reconsider were not available Thursday.

If the judges refuse to reconsider, the agency will appeal the decisions to the Montana Supreme Court, DEQ officials said. That appeal also could come today, Livers said.

John North, DEQ's chief legal counsel, said if the agency appeals to the state Supreme Court, it will argue that one of the key pieces of case law on which the district judges based their decisions was decided by the state Supreme Court prior to relevant amendments to the MEPA. MEPA provides a public process ensuring that before any state agency makes a decision that could have significant impacts on the human environment, a deliberate effort is made to identify those impacts through an environmental impact statement. MEPA, adopted in 1971, predated the adoption of the state constitution by two years, and thus did not include any constitutional language or provisions.

In 1979, the state Supreme Court decided in the case of *Kadillak v. Anaconda Co.* that when a statutory time limit precludes the statutory duty of preparing an environmental impact statement, the EIS must yield to the statute.

However, North said, the MEPA was amended in 2003, after the Kadillak ruling. The state Environmental Policy Act now implements a constitutional provision that states, in part, that all Montanans have "the right to a clean and healthful environment." North argues that the constitutional provisions referenced in the MEPA trump the statutory time limits.

"And so that means that the Supreme Court should revisit its previous ruling that time limits in a permitting statute prevail over the requirements to prepare an (environmental assessment) or an EIS in MEPA," North said.

Livers said the DEQ is appealing because it wants to have enough time to conduct environmental reviews, with public involvement, before issuing environmental permits.

"To accomplish that, we ultimately are going to have to challenge existing case law and hopefully have some of that overturned," Livers said. "We're not just trying to buy time. We don't want to issue permits without environmental review and without public involvement. We don't think it's appropriate to issue (permits) without those. The only way we can really do that is to challenge some of the case law in this issue."

