

FILED

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Tom Powers, Clerk
By *[Signature]*
Deputy Clerk

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**MONTANA SECOND JUDICIAL DISTRICT COURT
SILVER BOW COUNTY**

INGRAHAM ENVIRONMENTAL,
Plaintiff,

v.

MONTANA DEPARTMENT OF
ENVIRONMENTAL QUALITY,
Defendants.

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Cause No. *DU-17-293*

Brad Newman
Judge, Dept. II

NOTICE OF PETITION AND
PETITION FOR WRIT OF
MANDATE (MANDAMUS OR
OTHER APPROPRIATE WRIT)
AND BRIEF IN SUPPORT

**TO: MONTANA DEPARTMENT OF ENVIRONMENTAL QUALITY, P.O. Box
200901 Helena, MT 59620-0901, 1520 E. 6th Avenue, Helena, MT 59601**

**NOTICE IS HEREBY GIVEN that the undersigned applicant will make petition this Court for
a Writ if Mandate (Mandamus or other appropriate writ) on the Judge's Law and Motion day, on
the _____ day of _____, 2017 at the above designated Court.**

LEGAL BASIS

A court should issue a writ of mandate when an entity fails to perform a required act, Section 27-26-102(1), MCA, and the aggrieved party does not have a plain, speedy, and adequate remedy in the ordinary course of law, Section 27-26-102(2), MCA. The party that wants a court to issue a

1 Application for Writ
Ingraham Environmental

writ of mandate must satisfy two requirements: (1) it is entitled to the performance of a clear legal duty by the party against whom the writ is sought and (2) there is no speedy and adequate remedy in the ordinary course of law. *Best v. Police Dep't of Billings*, 2000 MT 97, 1114, 299 Mont. 247, 251, 999 P. 334, 337, 2000 Mont. LEXIS 98, 57 Mont. St. Rep. 396 (2000).

A writ of mandate can only be used to compel action. *Marbut v. Secretary of State*, 231 Mont. 131, 752 P.2d 148, 150, 1988 Mont. LEXIS 39, 45 Mont. St. Rep. 487 (Mont. 1988).

FACTUAL BACKGROUND AND DEQ RESPONSIBILITIES

The Montana Department of Environmental Quality (DEQ) is mandated by the Constitution of the State of Montana, the Montana Code, the Administrative Rules of Montana (ARM) and as delegated by the Environmental Protection Agency in Montana, the Asbestos National Emissions Standard for Hazardous Air Pollutants (NESHAP) to monitor and enforce the collection, processing, packaging, transport, and disposal of materials containing asbestos.

Within the DEQ, the completion of these responsibilities falls to the Waste and Underground Tank Management Bureau (WUTMB). This arm of the DEQ is charged with the "regulation of asbestos abatement control, permitting and compliance of asbestos abatement projects where asbestos containing materials are removed, transported, or disposed and licensing of persons who perform asbestos-related work such as asbestos abatement, inspection, project designing and management planning; oversee the approval and auditing of asbestos training course providers who train persons who conduct asbestos-related work; administer EPA's asbestos National Emission Standard for Hazardous Air Pollutants (NESHAP) which governs asbestos emission sources including building renovation and demolition activities and asbestos landfills." (Taken from the State of Montana website @ <http://deq.mt.gov/Land/wut>)

Under the Montana Constitution, Article II, Section 3, it states, “All persons are born free and have certain inalienable rights. They include the right to a clean and healthful environment...” To further define these rights, Montana’s Legislature has enforced stringent standards for the monitoring, collection, transportation, and disposal of friable and nonfriable asbestos containing material (ACM).

The Asbestos Control Program (ACP) is administered by one of the branches of WUTMB. Through the ACP, inspectors are certified, inspections are authorized and recorded, and enforcement of inspections is mandated. The Solid Waste Management Division (SWM) of WUTMB is responsible for ensuring the safe and monitored disposal of RACM in the twenty-two (22) landfills in Montana approved to accept RACM. While ACP and SWM both have regulatory enforcement authority, neither is effectively ensuring that RACM is being managed appropriately. And while they are each accountable to the Chief of WUTMB, they do not interact with each other to ensure the enforcement of inspections and disposal.

As a result of their failure to manage asbestos waste and the associated demolition debris both at the level of inspection and at the entry to the appropriate landfills, asbestos waste is regularly being dumped in open air in our landfills, endangering landfill workers, transporters, and anyone who breathes air in the area of these dumps. The citizens of Montana, despite the assurances of the Constitution, cannot exercise their right to a clean and healthful environment.

In the DEQ’s own Integrated Waste Management Plan (IWMP) of 2013, they state, in pertinent part,

“State and federal asbestos regulations ... require regulated asbestos-containing material (RACM) be removed from public and commercial buildings prior to demolition. The

impact or removal of RACM during demolition or renovation activities in public and commercial buildings is **tightly regulated**.

“RACM is defined in DEQ rules and EPA regulations as materials containing more than 1 percent asbestos and are either classified as friable or may become friable during demolition or renovation activities. Friable means that the asbestos can be crumbled or reduced to powder by hand pressure.

“Before demolition or renovation of a public or commercial building, a trained and DEQ-accredited asbestos **inspector must conduct an asbestos inspection**. (40 CFR 61, Part M [NESHAP]and ARM Title 17, Chapter 74, subchapters 3 and 4.” DEQ IWMP 2013, p. 18. (emphasis added)

The activities described above are the purview of the ACP and must be inspected and enforced by that group of the WUTMB.

Montana has routinely enacted stricter standards for asbestos detection. While federal standards are looser, the state standard must be upheld here. Any demolition or construction project in the state of Montana that undergoes demolition of and area containing three (3) linear feet or ten (10) square feet is required to obtain an asbestos inspection to ensure that asbestos is not present. If there is no asbestos present, the inspector will provide a certificate to the project manager to be presented to the landfill operator upon presentation of the demolition debris. If there is asbestos present, the procedure is established by the ACP which places restrictions on the project. The collection, containment, processing, packaging, transporting, and disposal of the RACM is tightly controlled by the ARM and the incorporation of 40 CFR 61.145 -154.

NESHAP, ARM, and DEQ ACP further require that only trained and accredited asbestos abatement contractors can perform these activities or handle RACM from collection through disposal. The IWMP provides further instruction for the disposal of RACM:

“Disposal site operators are required to provide information on how they will comply with asbestos waste disposal standards during the licensing process. Information includes a description of the waste disposal site, a description of the method to be used to comply with the asbestos NESHAP if warranted, and methods to be used to prevent asbestos emissions. Disposal site operators are also required to retain copies of the Waste Shipment Record (WSR) which must accompany the waste from generator to disposal site and to document specific cells where waste has been deposited.”

Under 17.74.369 ARM, the transport and disposal of RACM must be managed by landfill operators with the cooperation of disposal services delivering the demolition debris who are required to be accredited asbestos handlers. All asbestos loads are supposed to be screened by the landfill prior to disposal. And disposal of the asbestos debris is, by rule, to be stored in specifically designated areas of the landfill so as to prevent release of the filaments and air-borne pollutants. These rules protect the workers in the area as well as any citizens living in the area and anyone using the landfill. Signage for the designated area is prescribed as well as special handling instructions.

Since 2006 Ingraham Environmental, and significant number of industry professionals, have advocated for increased compliance with Montana Code Annotated (MCA) 75-2-501 to 75-2-519, and Administrative Rules of Montana (ARM) 17.74 subchapter 3. Through individual and

industry-organized public comment, rule change public hearings, state organized asbestos advisory groups, meetings with DEQ Departments, DEQ legal representative meetings with Ingraham Environmental Inc. (IEI's) legal professionals, and endless emails, phone calls, complaints, and requests for information Ingraham Environmental, and many professional members of the asbestos community, challenged the DEQ's failure to adequately and fairly regulate renovation and demolitions of facilities in the state of Montana in order to comply with the long standing asbestos rules of the state of Montana.

While the DEQ is responsible as whole for the regulations above, the DEQ has chosen to divide those regulations and their management across three separate divisions. The DEQ program tasked with management of the asbestos control in the state of Montana is the Asbestos Control Program (ACP).

Beginning with rule changes to the ARM in the 2006 the ACP promised "increased compliance". However, as time passed, and as IEI's understanding of the division of labor in the DEQ grew, it became clear that "increased compliance" was ACP's goal of only the regulated asbestos community. These regulated asbestos community members, like Ingraham Environmental Inc. and other licensed, insured asbestos contractors and consultants, saw regulations wax and wane from regulatory operating guidelines to specific work practices and back to regulatory operating guidelines with no effect on the non-compliant community (general renovation and demolition contractors). The ACP openly admits that they have no stake in construction renovation or demolitions that are illegally conducted, instead deferring these non-complaint projects to the DEQ Enforcement Division.

It is worth noting that regulatory compliance with asbestos regulations in the State of Montana range from an industry estimation of 5-10% to a generous 25% by some state calculations. However, the extremely limited pool of asbestos professionals, the number of projects and the waste generated are not reconcilable. There are disproportionately few accredited inspectors and too many projects with too much waste. And the one thing that is standard to all of these projects is waste.

Waste, including asbestos, is disposed of at landfills managed by the DEQ Solid Waste Program (SWP). SWP is tasked with ensuring that demolition and renovation debris from structures is properly profiled and disposed of. SWP is governed both by a wide range of MCA and ARM's in addition to the sections above; as well as referenced federal regulations and the individual landfill plan submitted by each landfill to guide operations of the facility. Those plans and was approved by the DEQ SWP.

Montana DEQ SWP is currently failing the state of Montana and violating the right each citizen has to expect clean air. Further, that the regulations enacted, and recently reaffirmed, by our elected representatives is failing to be managed in a way to protect the health of the citizens of Montana from a known carcinogen with widely recognized health effects and in state dealing with steep fiscal penalties imposed in court settlements stemming from asbestos exposure.

SAFE-MT has filed numerous Report Inquiries (Facility Asbestos Renovation or Demolition Report Inquiry) through the Montana DEQ ACP. Each of these projects involved demolition of buildings clearly covered by the ACP and despite this, there are no records of asbestos inspections for any of the reported properties. Without an inspection certificate, the process of screening at the landfills does not get triggered and as a result, asbestos is being

removed, transported, and dumped freely in the landfill without concern or regard for the danger and hazards it presents. The Montana Code and ARM do not provide any further avenue for review of the inquiries nor do they seem to exercise capability related to enforcement of these “tightly regulated” activities.

With abundant state asbestos and disposal regulations, including many of the enacted state regulations which are considerably stricter than most comparable federal regulations, as well as the numerous federal statutes regarding asbestos disposal and worker protection, it is not only IEI’s belief, but local landfill management policy, state regulation and federal statute that all demolition and renovation debris must be properly profiled for asbestos when entering the landfill. The burden to do this falls on the owner of the property.

This profiling should include the waste generation location, inspector’s credentials, identified asbestos, inspection date and non-asbestos materials. Uniform reporting is already designed by the ACP and modeled after the EPA NESHAP (Environmental Protection Agency – National Emission Standard for Hazardous Air Pollutants) form; a document which is nationally recognized, and already customized for Montana by ACP for Montana property owners, their contractors and landfills. Further, in accordance with individual local landfill plans, all asbestos must be handled according to that same landfill plan. These plans, which are considered public record because their stipulations are to be treated as law when the operating plan is approved by the DEQ Solid Waste Program thus requiring all asbestos waste to be identified.

The domino effect of the absence of enforcement of inspections at the outset of demolition or construction is that an inspection certificate from an asbestos-accredited inspector does not exist. Without the presence of this certificate, the operators at the landfill do not

question the transporters of demolition debris. Materials which may contain asbestos are therefore routinely dumped into open-air spaces in the landfills.

Even in those instances when an inspection certificate is available, operators are ill-suited to comply with the ARM/NESHAP regulations. In 2007, The Missoulian reported that the DEQ by its own reports had less than 25% compliance with the inspection and disposal process.

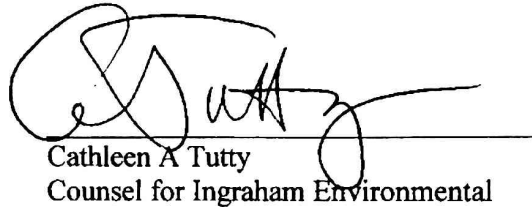
CONCLUSION

Clearly, the Petitioners have an expectation in the performance of the mandated duties of the ACP and the SWM divisions of the DEQ. They have, therefore, met the first standard for a writ. As there is no avenue nor venue for appealing the omission of performance of responsibilities beyond the Inquiry Process which the Petitioner has exhausted, the second prong of the standard has been met.

Finally, “a writ of mandate can only be used to compel action. *Marbut v. Secretary of State*, 231 Mont. 131, 752 P.2d 148, 150, 1988 Mont. LEXIS 39, 45 Mont. St. Rep. 487 (Mont. 1988). In the instant case, the petitioners are requesting the Court to compel the DEQ to act in accordance with their state and federal duties in this tightly regulated industry. Failure to do so is tantamount to inviting the reintroduction of asbestos and vermiculite in Montana’s air, which has been proven to cause death and disease in the forms of asbestosis and mesothelioma. Further, it has resulted in fiscal penalties to the State of Montana for the Libby asbestos failures in the amounts of \$20 million and \$25 million.

WHEREFORE, Plaintiffs request that this Court order a Writ of Mandamus to be issued to the State of Montana Department of Environmental Quality ordering compliance with the statutes, codes, and rules referenced above, and
FURTHER, ordering that the DEQ implement and enforce a process for ensuring the strict and consistent application of the process directed by the same statutes, codes, and rules.

SUBMITTED THIS 8th day of August 2017



Cathleen A Tutty
Counsel for Ingraham Environmental