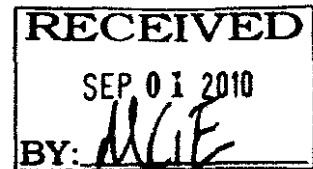


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August 31, 2010

Cynthia Brooks  
Montana Department of Environmental Quality, Legal  
P.O. Box 200901  
Helena, MT 59620-0901

RE: Bozeman Solvent Site and MDEQ Letters Dated July 21, 2010 (MW-42),  
July 21, 2010 (June 2010 Groundwater Monitoring Event Laboratory  
Reports) and July 26, 2010 (June 2010 Indoor Air Sampling Results)  
Our file no: 20028/007

Dear Ms. Brooks:

As you know, the City of Bozeman (the "City") and CVS Pharmacy, Inc. ("CVS") have a long track record of taking all appropriate actions to remediate the Bozeman Solvent Site (the "BSS"). We have done so in the context of a state policy of "command and control" whereby, as potentially responsible parties ("PRPs"), we cannot move forward without the approval of the Montana Department of Environmental Control ("MDEQ") at each step in the process. Equally significant, the MDEQ bills us for the time it incurs in exercising its command and control for the BSS.

Twenty-one years after PCE contamination was first discovered, there is still no Record of Decision and none in sight. Simply put, this failure – and its implications regarding the unreasonable delay in remediating the BSS and any resulting expansion of the plume – falls squarely upon the MDEQ. Because the MDEQ exercises command and control, we are acutely aware that the MDEQ may elect to take over the BSS and then seek to bill us for the costs it incurs.

Nonetheless, we have worked diligently to fulfill our responsibilities as PRPs. As the record shows, the City and CVS have consistently met excessive demands by the MDEQ in a timely fashion. Our efforts have, however, been repeatedly dismissed or devalued by the MDEQ, resulting in unreasonable delays in remediating the BSS and unreasonable directives from the MDEQ to re-write public records and undertake expensive and wasteful activities at our expense.

This course of action – and inaction – by the MDEQ needs to stop. The MDEQ needs to be held accountable for the extensive delays, unreasonable demands and general mismanagement of the BSS. Otherwise, the City and CVS, the two PRPs who have been the most diligent, will have no choice but to contest the unreasonableness of the MDEQ in another forum. To avoid that result, we are willing to meet

with the MDEQ at the earliest time to address (i) MDEQ's unreasonable delays in responding to our submissions; (ii) MDEQ's unreasonable demands and (iii) a realistic timetable for remediating the BSS.

### **MDEQ's Unreasonable Delays**

The failure of the MDEQ to review documents and reports submitted by the City and CVS in a timely fashion is a striking failure of management and has led to excessive delays in remediating the BSS. These delays have been as long as nearly six years. These delays are clearly evidenced by the following:

1. **Feasibility Study** – The Feasibility Study (“FS”) was submitted to MDEQ by Nicklin Earth & Water (“NE&W”) in February of 2006. Comments were received from the MDEQ in December of 2008, nearly three years later. The FS could not be finalized until the Baseline Human Health Risk Assessment was finalized. Over four years after the initial FS was submitted, that process has only recently begun.
2. **Baseline Human Health Risk Assessment** – The initial Baseline Risk Assessment was submitted by Kleinfelder, Inc. (“Kleinfelder”) to the MDEQ in August, 2004. The MDEQ did not respond until February, 2006. Following the MDEQ's delayed response, the Revised Baseline Human Health Risk Assessment was submitted by Kleinfelder in July 2006. The MDEQ provided its review of this document in May of 2010, nearly four years later and approximately six years after the initial Baseline Risk Assessment had been submitted. Due to the MDEQ's delay in its review, additional data were acquired which the MDEQ, at the expense of the City and CVS, then incorporated into the Baseline Human Health Risk Assessment in redline/strikeout format.
3. **Initial Alternative Screening Document** – The IASD was submitted by NE&W in January of 1999. The MDEQ did not provide comments until August of 2004, over five and half years later. Ultimately, the MDEQ agreed the IASD had become outdated and the comments could be addressed within the Feasibility Study.
4. **Monitoring Well MW-42 Installation Report** – MW-42 was required by the MDEQ in a letter dated October 28, 2008. MW-42 was installed and sampled on June 2, 2009 and the three-page MW-42 Installation Report was promptly submitted to the MDEQ on August 10, 2009. MDEQ's review was not completed until July 21, 2010, nearly a year later. Furthermore, there were delays in finalizing the SOW for installation and sampling of this well caused by MDEQ's initially providing four comments on December 18, 2008 in response to ATC Associates, Inc.'s (“ATC”) SOW dated December 10, 2008 and then providing six additional comments on April 15, 2009 to the revised SOW, five of which addressed content set forth in the original December 10, 2008 submission. Obviously, those comments should have been addressed in MDEQ's December 18, 2008 response.
5. **Confirmation Soil Sampling Scope of Work** – The MDEQ required the City and CVS to complete confirmation soil sampling pursuant to a letter dated March 25, 2009. ATC submitted a SOW on July 30, 2009. MDEQ responded in a letter dated September 10, 2009. A Revised SOW was submitted to the MDEQ on October 7, 2009. The MDEQ provided additional revisions to the SOW on May 18, 2010, seven months after the revised SOW was submitted. ATC then submitted the finalized SOW on June 14, 2010, which was subsequently approved by the MDEQ on July 16, 2010. This straightforward process required two revisions and nearly a year for review and approval.

6. **Bioremediation Pilot Test Report** – In an effort to move remediation along as quickly as possible by evaluating bioremediation as a potential full-scale remedial response, the City and CVS completed a bioremediation pilot test beginning in the fall of 2008. Following ten months of pilot test monitoring, ATC submitted the Bioremediation Pilot Test Report on September 10, 2009. Although the MDEQ has yet to respond to that report, ATC, on behalf of the City and CVS, recently submitted a SOW for a second phase bioremediation pilot test. In response to ATC's attempt to get a timeline for this key initiative, the MDEQ informed ATC that MDEQ has not yet reviewed the 2009 Bioremediation Pilot Test. The MDEQ's delay is likely to prevent the City and CVS from being able to move forward with a second phase of the bioremediation this construction season. Consistent with the history of the delays at the BSS, we now anticipate that the second phase may not even occur during the 2011 season.
7. **Follow-up Soil Vapor and Indoor Air Survey Field Investigation Report ("Follow-up Report")** – In January of 2007, MDEQ required the City and CVS to conduct a soil vapor indoor air survey at the Hastings Shopping Center. Following submission and approval of a work plan, the work was completed in September of 2007. In an October 22, 2008 letter, the MDEQ required the City and CVS to conduct follow-up soil vapor and indoor air sampling by February 28, 2009, allowing just four months to complete the work. The sampling was completed and the Follow-up Report was submitted on June 10, 2009. Over a year later, the MDEQ provided seventy-eight comments to the Follow-up Report, the vast majority of which were merely editorial in nature.
8. **Second Phase Bioremediation Pilot Testing SOW ("Second Phase SOW")** – On July 20, 2010, the City and CVS submitted a Second Phase SOW. Following its submission, the City and CVS learned, in an email from the MDEQ dated July 29, 2010, that the MDEQ has not yet reviewed the initial September, 2009 Bioremediation Pilot Test Report. In an email dated August 5, 2010, the MDEQ indicated that, because the proposed pilot test was expanded from the initial pilot test, the MDEQ would hire a contractor to assist in reviewing the SOW. This information is extremely alarming because it indicates that, only then, was the MDEQ preparing a task order for the review of the SOW that had been submitted two weeks earlier. Further, the MDEQ has recently issued two letters to the City and CVS, one dated August 13, 2010 regarding the June 10, 2009 follow-up Soil Vapor and Indoor Air Survey Field Investigation Report and the other dated August 17, 2010 regarding the November 16, 2009 Off-site Soil Vapor Survey Field Investigation Report. It appears that MDEQ's delay in addressing these reports has prevented the MDEQ from focusing on the recently submitted Second Phase SOW, which required a timely response in order to undertake work this construction season. As such, it is likely that MDEQ's inability to expeditiously review the SOW will prevent additional pilot testing this fall.

As these examples illustrate, MDEQ's pattern of unreasonable delay is staggering. The City and CVS last raised the issue of MDEQ's failure to timely respond to submissions regarding the BSS in the fall of 2008. (See attached letters from Jenifer Reece dated October 21, 2008 and November 26, 2008 and letter of Cynthia Brooks dated November 13, 2008). Despite those letters and a meeting held with MDEQ in February of 2009, little progress has been made in moving this site forward to final clean up. Particularly disturbing is that, in the February 2009 meeting, the MDEQ agreed to a timeline whereby the Record of Decision ("ROD") was to be finally issued in July of 2009. (See letter of Ron Waterman dated February 24, 2009). Notwithstanding that commitment, almost immediately following the MDEQ's agreement, MDEQ announced that it would require soil vapor and indoor air analysis in the neighborhood north of the Hastings Shopping Center. This exercise, as a practical matter, resulted in delaying the proposed timeline for the ROD by a year. This action may not have been so troubling except that the data upon which

MDEQ was relying to impose this requirement had been in its possession for nearly a decade. Thus, nothing new had happened between the time we met with the MDEQ in February, 2009 when it agreed to a July, 2009 timetable for the ROD and its decision to require this analysis. These same concerns are not new and have previously been outlined by the City and CVS. (See letter dated March 23, 2009 from Ron Waterman).

Additionally, and consistent with the MDEQ's pattern of delay, the MDEQ failed to issue comments to the revised Baseline Human Health Risk Assessment until May 2010, well over a year after the February 2009 meeting. Accordingly, regardless of any potential delay arguably necessitated by the completed Residential Vapor Intrusion Study, the MDEQ has failed to take the timely and reasonable steps to move this project forward, adding years of delay to achieving a ROD.

### **MDEQ's Unreasonable and Excessive Demands**

In addition to the MDEQ's failure to timely respond to submissions for the BSS, it has also made excessive and unreasonable demands throughout the history of the project. These demands are unreasonably costly and have prevented the site from moving toward remediation and final clean up. Three recent letters received by the City and CVS from the MDEQ regarding Monitoring Well MW-42 (July 21, 2010), the June 2010 Monitoring Event Laboratory Results (July 21, 2010) and the June 2010 Indoor Air Sampling Results for Hair It Is Salon at the Hastings Shopping Center (July 26, 2010), illustrate MDEQ's unreasonable and excessive demands. Each letter, which required a response by September 1, 2010, is addressed below.

1. In a letter dated July 21, 2010, the MDEQ's Project Officer, Kate Fry, provided comments regarding the Monitoring Well MW-42 Installation Report (MW-42 Report). At MDEQ's direction, a work plan was developed for the installation of monitoring well MW-42. MW-42 was installed and sampled in June of 2009. The PCE concentration in the well was 2.8 ug/L. One soil sample was submitted for laboratory analysis and was below detection for all analytes. To date, the installation and sampling of this well has cost the City and CVS \$11,315.23 and that does not include the MDEQ costs that the City and CVS must bear. The MDEQ has provided five comments to the MW-42 Report which the City and CVS cannot accept.

**Comment 1.** The City and CVS will not agree to revise the MW-42 Report to include a table of analytical results and a QA/QC narrative. The MDEQ-approved work plan specified what the MW-42 Report was to include. The work plan was adhered to and the reporting requirements have been met. All necessary data is in the MW-42 Report. Making additional changes would be unreasonable and a complete waste of resources.

**Comment 2.** MDEQ is requiring the City and CVS to delete our evaluation of the data and the key conclusion that the PCE concentration of 2.8 ug/L is far too low to be the source of the 26,000 ug/m<sup>3</sup> measured in sub-slab vapors in March of 2009 and 32,000 ug/m<sup>3</sup> in September of 2007. We are unable to comply with an unreasonable directive that would change the conclusion of the MW-42 Report because the change requested by the MDEQ is not supported by the data and would therefore render the Report inaccurate.

**Comment 3.** Here again, the MDEQ unreasonably demands that the City and CVS change our conclusion that (i) continued monitoring will not provide useful information and (ii) the data from

MW-42 does not support the MDEQ's theory that mounding from the Walton Ditch leakage is the source of sub-slab vapors under Hastings. The City and CVS will not agree to make the requested change and will not agree to any requirement for additional monitoring of this well. Such an exercise is unjustified by the data and would be yet another unreasonable waste of resources.

**Comment 4.** A description of how the location of the well was selected was adequately provided in the work plan. It would be a complete waste of time and resources to revise the MW-42 Report to include that description again.

**Comment 5.** Including the names of field personnel on field logs is a new requirement which we will follow in the future. It serves no purpose, however, to have the field personnel go back and sign his or her name to the field notes and resubmit the report. Additionally, the work plan clearly states that the well would be developed by pumping until the water ran clear. Again, the work plan adequately addresses this comment and the City and CVS will not further revise the MW-42 Report on this issue.

2. In a letter dated July 21, 2010, regarding the June 2010 Groundwater Monitoring Event Laboratory Reports, the MDEQ sets forth some additional monitoring requirements. The City and CVS agree to the additional monitoring of R-57R, R-74 and B-13. However, as indicated above, the City and CVS will not agree to additional monitoring of MW-42. In this July 21 letter, MDEQ requires that the City and CVS monitor MW-42 in December 2010, June 2011, and December 2012. These monitoring requirements differ from the monitoring requirements provided in MDEQ's other July 21, 2010 letter regarding the MW-42 Report. The City and CVS will not agree to any additional monitoring of MW-42 as no useful information will be obtained from this monitoring and it is another waste of resources.
3. In a letter dated July 26, 2010, regarding the June 2010 Indoor Air Sampling Results for Hair It Is Salon at the Hastings Shopping Center, the MDEQ is requiring the City and CVS to conduct additional sampling at the Salon including indoor air and sub-slab samples. The requirement to do additional subslab and indoor air sampling is inappropriate and without sound technical basis. A sufficient amount of data has already been collected over a two year period for the Hastings Shopping Center. These data were collected in the fall and winter months, which are recognized as the "worst case" seasons. The MDEQ has accepted these data as valid and reliable. Additionally, and perhaps more importantly, the new data do not raise any concern of a health hazard existing in the Salon. The recently collected data are consistent with previous investigations and are well below the MDEQ-calculated site-specific clean-up levels ("SSCL") for commercial indoor air. For the foregoing reasons, the City and CVS will not agree to complete the additional sampling required by the MDEQ in its July 26, 2010 letter.

As indicated above, we recognize that MDEQ may hire other contractors to perform the required work and bill the City and CVS for such expense. Given the unreasonableness of any such demands, we urge the MDEQ to reconsider these issues and not take such an extreme position as any such action will result in litigation contesting the reasonableness of such action. Simply stated, the City and CVS will no longer accept management behavior from the MDEQ which does nothing more than provide lengthy delays and abusive, arbitrary demands, while imposing unreasonable costs upon the taxpayers of the City of Bozeman and CVS. To reiterate, the City and CVS remain committed to implementing the ROD.

Accordingly, the City and CVS have made every effort to be responsible, cooperative parties working in collaboration with the MDEQ. Unfortunately, MDEQ's failure to properly manage this site has prevented progress and severely impeded reaching final clean up.

It is equally important to emphasize that, by significantly delaying remediation, MDEQ may be responsible for allowing the PCE plume to spread, thereby unreasonably increasing the cost and scope of remediation. In that event, the MDEQ may bear responsibility for such increased costs. Adhering to the CERCA process is no excuse for the MDEQ's inability to provide timely document review and proper oversight. Moreover, the BSS's history is in stark contrast to the Idaho Pole Superfund Site which was placed on the National Priorities List in 1986, just three years before the BSS was identified. There the ROD was issued in 1992, soil clean-up was completed in 2005 and the comment period on the third five-year review recently ended. But for MDEQ's arbitrary and unreasonable behavior, the BSS could easily have met a similar timetable.

As is evident from the foregoing, a constructive meeting with the MDEQ, the City and CVS is long overdue. In the event a mutually agreeable solution cannot be reached regarding these issues, the City and CVS will not hesitate to maintain and defend their position even if that leads to litigation. Please contact Ron Waterman to confirm the date, time and attendees for what we hope will be a productive meeting.

Sincerely,



JENIFER S. REECE



RONALD F. WATERMAN

jsr

cc: Tim Cooper, City of Bozeman  
Debbie Arkell, City of Bozeman  
Susan Phillips, Mintz, Levin, Cohn, Ferris, Glovsky and Popeo, P.C.  
Michael Ellerd, ATC Associates, Inc.  
Kate Fry, MDEQ Project Officer  
Allan English, Gallatin Local Water Quality District  
Matt Kelley, Gallatin City-County Board of Health

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