COMPLAINT

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MONTANA FIRST JUDICIAL DISTRICT COURT LEWIS AND CLARK COUNTY

TONGUE RIVER WATER USERS' ASSOCIATION Plaintiff, vs. MONTANA DEPARTMENT OF ENVIRONMENTAL QUALITY and REDSTONE GAS PARTNERS, LLC., Defendants.	CAUSE NO. DV-2001-258 COMPLAINT

I. INTRODUCTION

1. By this Complaint, the Tongue River Water Users' Association (TRWU), an association of irrigators with water rights to the use of the waters of the Tongue River for irrigation, and who also have water rights to use of the ground water, challenges the Montana Department of Environmental Quality (DEQ) decision to issue Montana Pollution Discharge Elimination System (MPDES) Permit # MT-0030457 (Permit), to Redstone Gas Partners, LLC (Redstone).

2. The permit allows Redstone to discharge polluted groundwater that is a by-product of its coal bed methane operations into the Tongue River. The groundwater contains contaminants that are harmful to soils, native

plants, cultivated crops, and aquatic life. The pollution permitted by DEQ is significant and should have undergone the rigorous environmental and economic review required by Montana's non-degradation laws. Additionally, the permit and associated discharges constitute a breach of TRWU's contract with the State of Montana for use of the Tongue River Waters for irrigation purposes, violate Montana's water wasting statutes, and violate TRWU's fundamental constitutional right to a clean and healthful environment found at Article II, Section 3 of the Montana Constitution, and violate Article IX, Sections 1 and 3 of the Montana Constitution. Further, this Complaint challenges the DEQ's failure to provide adequate public notice and comment prior to permitting Redstone to discharge the coalbed methane wastewater into the Tongue River. Finally, by this Complaint, TRWU alleges that DEQ violated the Montana Environmental Policy Act (MEPA) by its actions in issuing the Environmental Analysis for Redstone's permits.

II. FACTUAL BACKGROUND

3. The preceding paragraphs are realleged as if set forth in full hereunder.

4. By this Complaint, TRWU challenges DEQ's nonsignificance determination and decision not to perform nondegradation review of Redstone's dumping of approximately 2.3 million gallons of highly saline waste water per day directly into the Tongue River.

5. TRWU has a long-term contract with the State of Montana for the lease of water for irrigation, and has entered into a long-term commitment to pay an additional $3.97 per acre foot of water to help fund the new Tongue River Dam.

6. On February 7, 2000, as a follow-up to a January 25, 2000 meeting with DEQ, TRWU sent written comments to the DEQ expressing concern over the groundwater discharges into the Tongue River from Redstone's coalbed methane wells. TRWU's primary complaint focused on the adverse effects on agricultural lands from discharging groundwater with an extremely high sodic and saline content into the Tongue River. In that letter, TRWU suggested that a more environmentally sound solution for disposal of the groundwater was via deep well injection back into the aquifer. DEQ, in its Checklist Environmental Assessment section providing for a "Description and analysis of reasonable alternatives whenever alternatives are reasonably available and prudent to consider:" responded "[n]one." It is widely known that reinjection of CBM wastewater back into aquifers has been occurring in other parts of the United States for years.

7. Despite the concerns of TRWU and many other parties, on June 16, 2000, DEQ issued MPDES permit # MT-0030457 to Redstone to discharge pollutants into the Tongue River in southeastern Montana. A modified final permit was issued on July 3, 2000 providing for four additional outfall points. No additional notice or time for public comment was provided, even though the permit was modified. The MPDES permit authorizes Redstone to discharge groundwater produced from its coalbed methane (CBM) wells directly into the Tongue River at 11 points.

II. STANDING, JURISDICTION, AND VENUE

8. Plaintiff Tongue River Water Users Association is a Montana non-profit corporation incorporated in accordance with the laws of Montana for the purpose of appropriating, purchasing, marketing, selling, pumping, diverting,

developing, furnishing, distributing, leasing and disposing of the waters of the Tongue River in Montana. TRWU is further incorporated for the purpose of constructing, reconstructing, maintaining, repairing, altering, using, controlling and operating, "dams, reservoirs, irrigation works and systems, drainage works and systems, diversion canals" and other water works systems and appurtenances for storage and distribution of the Tongue River waters. TRWU has at all times pertinent hereto maintained its principal office in Custer County, Montana. This Complaint is brought on the organization's own behalf and on behalf of its members individually.

9. TRWU is a water users' association comprised of ranchers, farmers, and the Northern Cheyenne Tribe, all of whom rely on and pay for the use of the waters of the Tongue River. TRWU pays, based on different contracts with the State and Federal Government, from $1.30 to $2.50 per acre foot to lease the waters of the Tongue River, $1.00 per acre foot for operation and maintenance, of water storage facilities, plus an additional $3.97 per acre foot for a newly constructed dam on the Tongue River located below the Redstone discharge points.

10. TRWU's members reside in Custer, Rosebud, and Big Horn counties, and are dependent on high quality surface and groundwaters for their livelihoods as ranchers and farmers. TRWU members rely on the high quality water not only for irrigation, but also for livestock watering. Members also hunt, fish, and recreate in, and appreciate, Powder River, Rosebud, Big Horn, and Custer Counties for their aesthetic qualities and lifestyle opportunities and have an interest in preserving them. Plaintiff's members are directly and adversely affected by the discharge of pollutants into the waters of

the Tongue River. The environmental, economic, health, aesthetic, and recreational interests of TRWU's members have been, and continue to be adversely affected by Respondant DEQ permitting Redstone's illegal discharges.

11. The Northern Cheyenne Tribe (Tribe) is a member of TRWU. The Tribe has water rights to the use of the waters of the Tongue River pursuant to the Northern Cheyenne-Montana Compact (Compact), a compact between the Northern Cheyenne Tribe, the State of Montana, and the United States of America. The Compact is codified at § 85-20-301, MCA. The Montana legislature ratified and adopted the Compact known as the Northern Cheyenne Indian Reserved Water Rights Settlement Act of 1992 (P.L. 102-374, 102 Stat. 1186). *See* § 85-20-302. MCA. The Redstone discharges into the Tongue River have been, are being, and will continue to substantially and adversely interfere with the Tribes legal right and ability to use the Waters of the Tongue River for irrigation and to market the water as set forth in the Compact. Tribal members also rely on the water to feed livestock and wildlife for their subsistence.

12. Members of TRWU, including the Tribe, use and enjoy the waters and lands in, around, and affected by the discharges from Redstone's wells, including waters in the vicinity of, and downstream from, Redstone's discharges into waters of the United States. Plaintiff has a contract with the State of Montana pursuant to which the State is obligated to Plaintiff to provide water that is suitable for irrigation and agricultural use and is obligated to provide water that is not degraded. The Tribe is also legally entitled to domestic use of the waters that are being degraded. The State is obligated to ensure that the short and long-term quality of the water is maintained.

13. Plaintiff's members, including the Northern Cheyenne Tribe, specifically use, recreate in, and enjoy these areas in the following ways:

TRWU's members live within the watershed impacted by discharges from Redstone's wells;

TRWU's members conduct ranching and farming operations, and irrigate with water impacted by discharges from Redstone's wells;

TRWU's members use the waters impacted by Redstone's discharges for domestic use;

TRWU's members fish, hunt, raft, hike, walk and boat in and around the waters impacted by discharges from Redstone's wells;

TRWU's members observe and enjoy wildlife in the Tongue River watershed around, and downstream from, Redstone's wells;

TRWU's members have economic, aesthetic, and health interests in keeping the waters in the vicinity of, and downstream from, Redstone's wells free from pollutants.

TRWU's members rely on the ground water that is being depleted to recharge rivers and streams and seeps and springs on their land for livestock and wildlife watering.

14. Plaintiff TRWU has standing in this Complaint to protect its own interests and those of its individual members in a representative capacity. TRWU's associational purposes are adversely affected by the Redstone discharges that degrade waters, adjacent lands, and irrigable lands upon which the water is discharged. TRWU is further harmed by the Redstone's discharges in that they impair the habitability, economic value, recreational value, and aesthetic benefits of the watershed.

15. Plaintiff TRWU is an interested party whose substantial interests are adversely affected by the Respondants' actions as required by § 75-5-103(13). Therefore, TRWU may properly Complaint DEQ's final determination of nonsignificance and decision to forego nondegradation review.

III. FACTS

16. The preceding paragraphs are realleged as though set forth in full hereunder.

17. On December 15, 1999, the Montana Department of Natural Resources and Conservation (DNRC) issued a Final Order designating the Powder River Basin Groundwater Area (Groundwater Area) in anticipation of expected groundwater withdrawals associated with coal bed methane (CBM) development in the basin. The DNRC Final Order includes findings of fact that CBM extraction technology requires continuous groundwater removal to lower groundwater levels and to reduce water pressures in coal beds, and this groundwater removal will lower water levels in the aquifer. Other aquifers in a CBM development area may or may not be affected by CBM groundwater withdrawals, depending on the connections between aquifers. Further, the DNRC findings of fact state that "coal aquifers are often the only practical source of fresh water for domestic, stock, and agricultural uses by the people in the area." The DNRC findings of fact also state that assessment of localized effects of CBM developments on water availability would require compiling baseline data from existing wells before CBM development occurs. The findings of fact also state that there is "considerable data available showing significant effects on water levels in coal aquifers from extensive and continuous pumping of water from coal mines in the Decker area."

18. In its findings of fact, the DNRC Final Order also states that the water withdrawn from the coal aquifers is not a desired product of the operation, and must be discharged in some way. To discharge the withdrawn waste water, CBM permit holders must obtain the proper water discharge permits in the Groundwater Area, including a MPDES permit from (DEQ) for discharge to surface water, and/or an Underground Injection Control (UIC) permit from the Board of Oil and Gas Conservation/and or the Environmental Protection Agency (EPA) for re-injecteing discharges to groundwater.

19. In its conclusions of law, the DNRC Final Order states that "[e]xcessive groundwater withdrawals are very likely to occur in the near future because of consistent and significant increases in withdrawals from within the area proposed for controlled ground water designation. By 'excessive,' the Department means that water levels in targeted aquifers could be reduced near project areas for long periods of time in a water-scarce area."

20. Information from a set of data on aquifer groundwater samples collected in the Groundwater Area by CBM developers and analyzed by Inter-Mountain Labs in Sheridan, Wyoming, and information from another set of data collected and analyzed by the DEQ showed that water withdrawn from CBM discharge wells has eighteen times as much sodium as water flowing in the Tongue River, and a Sodium Adsorption Ratio (SAR) forty times greater than the Tongue River water. The SAR is a calculated index of the amount of sodium relative to other elements, primarily calcium and magnesium. High SAR values slow the infiltration and permeability of soils, causing water and nutrients not to effectively penetrate the soils, and increases overland flow and erosion. Obviously, when water is not penetrating the soils, there is less

available for plant and root uptake. Further, high SAR values when combined with high salinity causes salts to build up on soils rather than penetrate and flow through the soils. The combined negative effects are disastrous to soil productivity. The result to Plaintiff will be reduced crop production, meaning adverse economic impacts to Plaintiff and its members. The average SAR for CBM discharge from the Inter-Mountain Lab data set is 51.9. The average SAR from the DEQ data set is 34.8. The waters of the Tongue River have a SAR of 0.79. Most native plants in the Tongue River basin can survive when the SAR is below 3.0. No native plant species can survive when the SAR is 12 or above.

21. As shown in Table 2 of the Statement of Basis in the permit, the median concentration SAR for the CBM discharges is 47. Under any circumstances and soil conditions, and especially in the Tongue River drainage, if the Redstone discharges continue, TRWU members will have to implement special soil management techniques, if such techniques are even technologically or economically available and/or feasible, at great cost to avoid reduced soil productivity. Over time, the discharges will adversely impact Plaintiff and its members, both economically, socially and culturally.

22. Further, the cumulative impacts of discharges occurring upstream in Wyoming combined with Redstone's discharges in Montana were not adequately analyzed prior to allowing Redstone's discharges. New information has become available regarding the cumulative impacts. DEQ's Director, Mark Simonich, sent Wyoming DEQ/WQD a letter and attachment on October 17, 2000 requesting additional analyses before Wyoming permits any further discharges, stating that the study used in permitting the discharges is "inadequate," and suggesting that Montana and Wyoming may want to

"collaborate on a waste load allocation that could be used as a basis for future permit actions in both states." In the attachment to Simonich's letter, DEQ questions Wyoming's data upon which permits are premised, voices concerns about (total maximum daily loads (TMDL's), and states that "**MDEQ believes that, unless the CBM water is treated or re-injected, it will cause greater impacts to salinity and SAR than those predicted by this study because the study did not consider these factors.**"

23. Water withdrawn from coal bed aquifers in the Groundwater Area is not suitable for irrigation, lawn watering, or land spreading. The withdrawn water is unacceptable for irrigation based on its sodium levels. Sodium-rich water will cause all but the coarsest sands that are extremely well-drained to disperse. Sodium and its compounds are electrically charged and will adhere to opposite charged sites on soil particles. When charged sites are occupied, individual particles are separated from other particles, allowing them to be suspended. Suspended soil particles can then be washed away causing the increase of erosion. This dispersion eventually leads to deteriorated soil structure, reduced infiltration, and poor drainage.

24. The Inter-Mountain Labs and DEQ analyses also show that:

a) CBM discharge water has four times the conductivity of Tongue River water. Conductivity is a measure of dissolved solids and salts;

b) CBM discharge water has four times the total dissolved solids of Tongue River water;

c) CBM discharge water is five times as alkaline as Tongue River water;

d) CBM discharge water has five times the bicarbonate as Tongue River water;

e) CBM water has one-and-a-half times as much sulfate as Tongue River water;

f) CBM water has from two to twelve times as much fluoride as Tongue River water;

g) CBM water has four times as much ammonia as Tongue River water;

h) CBM water has increased levels of aluminum, iron, magnesium and other metals compared to Tongue River water.

25. Section 301 of the federal Clean Water Act (CWA), 33 U.S.C. § 1311(a) prohibits the discharge of any pollutant from a point source into waters of the United States unless such discharge is permitted in a National Pollution Discharge Elimination System (NPDES) permit. Because the United States Environmental Protection Agency (EPA) has certified the state of Montana to issue such permits under the Montana Pollution Discharge Elimination System (MPDES), a MPDES permit issued by DEQ may also permit discharge of a pollutant into the waters of the United States in Montana.

26. Redstone, as part of its CX Field, has drilled and pumped in excess of 120 wells that each discharge between 15-30 gallons per minute of water that is polluted as alleged herein. The CX Field and the permitted discharges are located in Big Horn County, Montana. From the time Redstone began pumping groundwater from its CBM wells and discharging this groundwater into the surface waters of the United States until June 16, 2000, Redstone did not have a NPDES or MPDES permit for discharging groundwater produced

from its CBM wells into the surface waters of the Tongue River or its tributaries.

IV. ALLEGATIONS

COUNT 1 -- DEQ FAILED TO PERFORM NONDEGRADATION REVIEW

27. The preceding paragraphs are realleged as though set out in full hereunder.

28. DEQ conducted sampling of the waters of the United States in the region for which the MPDES permit final determination was approved by DEQ. The permit, however, states that DEQ based its determinations on past discharge data for the permit on sampling conducted by Redstone. DEQ did not include sampling information that the department itself collected in Table 2, the effluent quality data chart in the permit. Later samples collected by DEQ should have been analyzed and included in determining parameters in the decision to issue Redstone a MPDES permit, especially under a determination of nonsignificant effect on water quality.

29. DEQ failed to perform a soils analysis in the Tongue River drainge to determine the effects of the discharges on the specific soils, and failed to analyze the long-term cumulative effects of the dumping of saline CBM water on the soils would be.

30. Under A.R.M. 17.30.602, "harmful parameters" means parameters listed as harmful in DEQ circular WQB-7. SAR and sodium are not listed in WQB-7, yet the Redstone MPDES permit sets out a level for both allowed to be discharged by Redstone. Not only does WQB-7 not set ~~out~~ degradation parameters for sodium and SAR, no officially recognized narrative water quality standards exist for SAR.

31. According to footnote 16 of Table 3 of the Redstone permit, DEQ has relied on A.R.M. 17.30.715(1)(g) in setting SAR and sodium levels for the permit. A.R.M. 17.30.715(1)(g) states that changes in water quality are nonsignificant, and do not need to undergo nondegradation review under MCA § 75-5-303 when "changes in the quality of water for any parameter for which there are only narrative water quality standards if the changes will not have a measurable effect on any existing or anticipated use or cause measurable changes in aquatic life or ecological integrity."

32. Even though WQB-7 does not set out the harmful parameter of SAR, and the calculated index of 6 as the nondegradation criterion is based on no explicit narrative standard for SAR, the SAR nondegradation standard set out in Redstone's MPDES permit is considered toxic. DEQ cannot set the nondegradation standard for SAR at a level known to be toxic. DEQ's anticipated SAR in the Tongue River downstream from the points of discharge would be over twice as high as the previous maximum recorded SAR in the Tongue River. Furthermore, the DEQ is well aware that non-degradation review is required in circumstances such as this.

33. DEQ has not considered the cumulative impacts or synergistic effects of increased sodium and SAR in Tongue River water as required by A.R.M. 17.30.715(2)(a). Plaintiff's members use the surface waters of the Tongue River for irrigation. Further, DEQ failed to factor in the cumulative impacts of CBM development and associated discharges of pollutants upstream in Wyoming where CBM development has been occurring for some time. Montana DEQ was well aware of the massive-scale CBM development upriver in Wyoming prior to issuing Redstone's permit. CBM development in Wyoming

upstream from the permitted discharge sites has proceeded at a pace and scale much greater than CBM development in the CX Field. Taken together, the impacts from all upstream Wyoming discharges and the Redstone CBM discharges create significant adverse impacts to TRWU and its members. Moreover, the long-term impacts, especially in years of low flow, will be especially detrimental to the interests of TRWU and its members.

34. The Tongue River is classified as B-2 waters at Redstone's point of discharge of pollutants. *See* 17.30.611, A.R.M. Waters classified as B-2 are high-quality waters pursuant to § 75-5-102, MCA. Section 75-5-303, MCA, requires that the quality of high-quality waters must be maintained. Further, under § 75-5-303(3), MCA, DEQ may not authorize degradation of high-quality waters unless it has been affirmatively demonstrated by a preponderance of the evidence that:

> (a) degradation is necessary because there are no economically, environmentally, and technologically feasible modifications to the proposed project that would result in no degradation; (b) the proposed project will result in important economic or social development and that the benefit of the development exceeds the costs to society of allowing degradation of high-quality waters; (c) existing and anticipated uses of state waters will be fully protected; and (d) the least degrading water quality protection practices determined by the department to be economically, environmentally, and technologically feasible will be fully implemented by the applicant prior to and during the proposed activity.

35. Nonsignificant activities granted a statutory exception to § 75-5-303, MCA, are set out in §§ 75-5-317 and 301(5)(c), MCA. Regulatory exceptions are also found at A.R.M. 17.30.716. None of the exceptions set forth in § 75-5-317, MCA, or A.R.M. 17.30.716 are applicable here. Sections 75-5-317(2)(j)- (k), MCA, expressly do not exempt discharges to surface water.

Section 75-5-301(5)(c), MCA, states that the DEQ must "establish criteria for determining whether a proposed activity or class of activities, in addition to those activities identified in 75-5-317, will result in nonsignificant changes in water quality for any parameter in order that those activities are not required to undergo review under 75-5-303(3). These criteria must be established in a manner that generally:

> (i) equates significance with the potential for harm to human health, a beneficial use, or the environment;
> (ii) considers both the quantity and the strength of the pollutant;
> (iii) considers the length of time the degradation will occur;
> (iv) considers the character of the pollutant so that greater significance is associated with carcinogens and toxins that bioaccumulate or biomagnify and lesser significance is associated with substances that are less harmful or less persistent.

See § 75-5-301(5)(c), MCA.

36. Even though DEQ has determined that the discharges are nonsignificant and nondegradation review is unnecessary, A.R.M. 17.30.715(1) requires DEQ to determine whether certain activities will result in nonsignificant changes in water quality "due to their low potential to affect human health or the environment." MCA § 75-5-301(5)(c)(i), however, requires DEQ to equate significance "with the potential for harm to human health, a beneficial use, or the environment." A.R.M. 17.30.715(1) is thus inconsistent with MCA § 75-5- 301(5)(c)(i), because DEQ does not consider the impact on beneficial uses in a determination of nonsignificance under A.R.M. 17.30.715(1). Regulations must not conflict with governing statutes, and when the two are in conflict, as they are here, the statute must govern agency behavior. *See Epperson v. Willis Corroon Admin. Svcs. Corp.*, 281 Mont. 373, 934 P.2d 1034 (1997) (citing *Bick v. Department of Justice*, 224 Mont. 455, 730

P.2d 418 (1986). Pursuant to § 75-5-301(5)(c), DEQ must consider the potential for harm to beneficial users, particularly irrigators, when assessing significance, pursuant to § 75-5-303(1), MCA, which provides that "[e]xisting uses of state waters and the level of water quality necessary to protect those uses must be maintained and protected." Because TRWU has a preexisting right to appropriate, store, and use the waters of the Tongue River for irrigation, the State has an obligation to protect TRWU's right to use, and the quality of, the waters of the Tongue River.

37. An increased SAR will have a cumulative and synergistic effect on irrigators, including TRWU members, who withdraw irrigation water from the Tongue River for land application. Irrigation is a beneficial use of Tongue River water. Tongue River water downstream from the permitted discharge of pollutants will have a higher SAR than typical in the Tongue River. Irrigators will thus spread increased levels of sodium on their fields while irrigating. Salting of fields has a well-known harmful effect on the productivity of land in Montana, particluarly in the Tongue River drainage.

38. DEQ has also not shown the effects of the release of pollutants on the reservoir downstream from the permitted discharge site. For example, the Redstone permit allows heightened levels of dissolved solids, yet DEQ has made no attempt to analyze what will happen to these solids when and if they reach the reservoir, the impact of these solids on the reservoir aquatic life, and the impact on irrigators who withdraw water from the reservoir for surface irrigation.

39. In Table 3 of the Redstone permit, DEQ has set the nondegradation criterion for aluminum, according to footnote 12, based on the 75th percentile

of the baseline water quality when the secondary maximum contaminate level of the background water (here the Tongue River) exceeds 0.05 milligrams per liter. This method of assessment does not appear in the Administrative Rules of Montana, and DEQ should set the nondegradation criterion according to the dictates of A.R.M. 17.30.715(1)(c), as DEQ did for many of the metals assessed.

40. Further, DEQ has not revealed the formulaic basis for arriving at a figure of 1600 gallons per minute of total effluent discharge as the basis for the permit. The Redstone MPDES permit, therefore, does not fall within the regulatory and statutory nondegradation exceptions, and DEQ must conduct nondegradation review in accordance with MCA § 75-5-303.

41. The Redstone MPDES permit does not comply with § 75-5-303, MCA, because it has not been demonstrated by a preponderance of evidence that "there are no economically, environmentally, and technologically feasible modifications to the proposed project that would result in no degradation." On the contrary, on site disposal of the produced groundwater, rather than discharge to the waters of the United States, is economically, environmentally, and technologically feasible. Further, DEQ has not shown that Redstone's wells will result in important economic or social development that exceeds the costs of allowing degradation of high-quality waters. Redstone, in fact, employs primarily Wyoming residents in the CX field, as stated in the EA.

42. DEQ has not shown that the existing beneficial uses, including irrigation, will be "fully protected" as required by MCA § 75-5-303(3)(c), or that the water quality necessary to protect existing and anticipated uses will be maintained and protected, as required by A.R.M. 17.30.705. Allowing an increased SAR for irrigation water does not fully protect irrigation use, nor does

it maintain the water quality necessary to protect the irrigated land. Any increase in SAR will have an adverse effect on irrigation as a beneficial use, and a permitted increase of SAR to toxic levels will have a deleterious effect on the land and water both immediately and cumulatively.

43. Finally, the Montana Supreme Court has determined that the state must show a compelling interest that has been narrowly tailored to effectuate such compelling state interest prior to authorizing degradation of state waters. *See Montana Environmental Information Center v. Department of Environmental Quality*, 1999 MT 248. Therefore, DEQ must conduct an adequate and meaningful nondegradation review based on all of the information that is currently available, including information on the cumulative impacts of both Montana and Wyoming discharges and available treatment and reinjection technologies.

COUNT 2 – PERMIT CONDITIONS, MIXING ZONES AND MONITORING ARE ARBITRARY AND INSUFFICIENT

44. The preceding paragraphs are realleged as though set out in full hereunder.

45. No mixing zone for any of the eleven permitted discharge points is defined in the permit. Rather the mixing zones are described as "nearly instantaneous." This appellation is overly broad and vague and not in compliance with § 75-5-301, MCA. Allowing Redstone to suggest mixing zones at the time of permit renewal, in approximately two years, is also not in compliance with § 75-5-301, MCA. Moreover, the permit itself states at Section F. on page 6 that "[l]acking field data on mixing efficiency in Tongue River, the permittee will be required to collec field information to develop a site specific

mixing zone at the time the permit is renewed." Such language clearly illustrates that DEQ had no knowledge on which to base its "nearly instantaneous" mixing zone determination.

46. The monitoring requirements set out in the Redstone permit are insufficient to capture the information necessary to assess the efficacy of the permit and the effects of pollutant discharges on the Tongue River and the Tongue River ecosystem. The permit requires Redstone to measure the flow rate of effluent, for example, once per week. Given that wells produce groundwater at varying rates, and not all wells are producing at any given time, a continuous flow meter at the point of discharge to measure the total rate of flow is more appropriate than weekly measurements. Further, given the potential harm associated with sodium, SAR, solids in solution, and various metals, a weekly grab sample is more appropriate, particularly given the long period of before the parameters of the permit are reviewed by DEQ.

COUNT 3 - FAILURE TO PROVIDE FOR ADEQUATE PUBLIC INVOLVEMENT AND ACTUAL NOTICE TO THE TONGUE RIVER WATER USERS' ASSOCIATION PRIOR TO ISSUING PERMIT

47. The preceding paragraphs are realleged as if set forth in full hereunder.

48. State and federal laws governing the issuance of MPDES permits impose an obligation upon DEQ to provide reasonable notice and comment opportunities on draft MDPES permits, including the permit at issue here.

49. Further, the Montana Constitution's Declaration of Rights, Article II, Section 8, provides an inalienable right of participation in the operation of agencies prior to agencies making final decisions, and Article II, Section 9 provides an inalienable right to know and observe deliberations of state

agencies except where individual privacy may be invaded. DEQ failed to provide Plaintiffs the opportunity to participate and the right to know, and therefore violated Plaintiff's fundamental constitutional rights.

50. DEQ failed to provide TRWU and its members with actual notice of its nonsignificance determination and determination to forego nondegradation review. Pursuant to A.R.M. 17.30.1372(5)(c) & (d), DEQ should have provided legal notice under state law and using any method "reasonably calculated to give actual notice of the action in question to the persons potentially affected by it, including press releases, or any other forum or medium to elicit public comment." There is no question that Plaintiff and its members are persons potentially affected by DEQ's action. In this case, Plaintiffs had the right to expect to be provided actual notification of actions that could significantly threaten the waters they use for irrigation, livestock watering and domestic use. However, Plaintiffs were provided no such notification.

51. DEQ acknowledged that the only public notice they provided was via a general mailing. Pers. telephone conversation with DEQ's Tom Reid, Nov. 9, 2000. No public notice was provided through publication in a newspaper, because DEQ determined that the action was not a major permit or a general MPDES permit. *Id.* DEQ based its determination on A.R.M. 17.30.1372(5)(b) which provides that only where major and general MPDES permits are being issued is publication in a daily or weekly newspaper necessary. DEQ did not publish any press releases, or take any other steps to provide Plaintiffs with actual notice as required by A.R.M. 17.30. 1372(5)(c) & (d). *Id.* The EA at p. 6 also states that the only public notice that was provided "was sent to the department's mailing list for those individuals who have expressed an interest

in discharge permits in the Yellowstone drainage or statewide. Had Plaintiffs been provided notice, they unquestionably would have commented, and in fact did provide the DEQ with both oral and written comments as soon as they discovered that the DEQ intended to issue the Redstone MPDES permit. This is evidenced by the letters and comments Plaintiffs sent to DEQ.

52. Further, DEQ did not provide public notice and comment on the modified permit issued July 3, 2000, and wholly failed to follow procedures set forth in A.R.M. 17.30.1365-5 & A.R.M. 17.30.1370-1379. Therefore, the permit is void.

53. DEQ failed to provide the general public, affected landowners and water users of the Tongue River with an adequate opportunity to comment on the draft MPDES permit for Redstone's discharges. Even after Plaintiff wrote DEQ on June 7, 2000 after learning about the draft permit and requesting that the comment period be re-opened, DEQ declined to do so. DEQ's failure to provide adequate notice and comment and to reopen the comment period when requested was arbitrary, capricious, unreasonable, and in violation of applicable law and regulations.

COUNT 4 - AMENDED PERMIT VOID

54. The preceding paragraphs are realleged as though set forth in full hereunder.

55. The amended or revised permit issued by DEQ to Redstone on or about July 3, 2000 providing for additional outfalls is void because of DEQ's failure to follow procedures set forth in ARM 17.30 1364-5 and 17.30.1370-79.

COUNT 5—BREACH OF CONTRACT

56. The preceding paragraphs are realleged as though set forth in full hereunder.

57. Plaintiffs have, since 1937, had "water marketing contracts" with the State of Montana for use of the Tongue River Water pursuant to which they are authorized to use up to 40,000 acre feet of water per year between May 1 and September 30.

58. Pursuant to the original water marketing contract and amendments thereto, the latest of which was entered into in 1997, the water is for irrigation, an existing beneficial use. As such, the quality of the Tongue River must be maintained so as to protect it for irrigation purposes.

59. The pollution of the Tongue River Waters that Plaintiffs are contractually entitled to use pursuant to the water marketing contract constitutes a breach of contract, because the dumping of the CBM wastewater into the Tongue River, and the ultimate mixing and storage of the highly saline and sodic waters in the Tongue River Reservoir, is rendering the Tongue River water and the water stored in the Tongue River Reservoir unfit for irrigation purposes.

COUNT 6--VIOLATION OF MONTANA THE WATER WASTING STATUTE

60. The preceding paragraphs are realleged as though set forth in full hereunder.

61. Section 85-2-505, MCA, prevents the waste of groundwater, and requires that all wells producing waters that contaminate other waters to be plugged or capped, and to equip wells to stop the flow of water when produced water is not being put to beneficial use.

62. Section 85-2-505, MCA, provides certain exceptions when produced groundwater does not have to be put to beneficial use, including draining land to preserve its utility, removing water from a mine to permit mining operations, removing water used in connection with producing, reducing, smelting, and milling metallic ores and industrial minerals or that displaced from an aquifer by the storage of other mineral resources.

63. Redstone's CBM operations remove groundwater and put the groundwater thus produced to no beneficial use in violation of § 85-2-505, MCA.

64. Redstone's CBM operations do not qualify for any of the enumerated exceptions to § 85-2-505, MCA.

65. Redstone's CBM operations remove ground water from an arid region of the state for no beneficial use, where Plaintiff and its members have existing rights to beneficial use of the ground water. Redstone is removing potential future uses of such water for the foreseeable future, in contravention of the laws and policies of Montana. Such removal may have adverse hydrological impacts to existing beneficial uses as well, as recognized in the Environmental Analysis at page 2, wherein it states that "some wells may dry up in the project area," and that "[c]oal extraction has already depleted aquifers in the project area."

66. The MPDES permit that authorizes Redstone to discharge groundwater violates the above-cited provisions of Montana law and implementing regulations, and should be revoked accordingly.

COUNT 7—MONTANA ENVIRONMENTAL POLICY ACT VIOLATIONS

67. The preceding paragraphs are realleged as though set forth in full hereunder.

68. On June 2, 2000, the DEQ issued an Evnironmental Assessment (EA) that it had prepared for Redstone's MPDFES permit No. MT-0030457. The EA was required by the Montana Environmental Policy Act (MEPA), § 75-1-101, MCA, et seq. at its implementing regulations.

69. The DEQ violated MEPA in preparing and issuing the EA in that it failed to adequately analyze all of the impacts assoicated with Redstone's CBM development and authorized by the MPDES permit. The impacts associated with Redstone's CBM development include, but are not limited to: CBM wells, roads to the wells, trenches and pipelines, holding ponds for CBM water, electrical lines, compressor stations, and the accompanying impacts to air and water quality, noise and visual pollution, impacts to soils and agricultural crops and native plants, ground disturbance, increased noxious weed invasions, impacts to terrestrial and aquatic ecosystems, impacts to wildlife, hydro-geological impacts such as depeletion of aquifers and drying up of wells, seeps and springs, possible ground subsidence, underground coalbed fires, socio-economic impacts, and the cumulative effects of other CBM development.

70. DEQ's issuance of Redstone's MPDES permit also violated MEPA by failing to consider reasonable alternatives, and by failing to disclose the irretrievable commitment of resources associated with the CBM development. DEQ further violated MEPA by failing to prepare a supplemental EA when additional significant information became available and the DEQ had

knowledge that the circumstances had changed after the initial EA was prepared.

71. Because the impacts associated with CBM development are significant, DEQ should have prepared an Environmental Impact Statement (EIS). DEQ's failure to prepare and EIS violates MEPA.

COUNT 8—THE ENVIRONMENTAL DEGRADATION IN THIS CASE VIOLATES THE FUNDAMENTAL CONSTITUTIONAL RIGHT TO A CLEAN AND HEALTHFUL ENVIRONMENT AND THE DUTY TO MAINTAIN AND IMPROVE A CLEAN AND HEALTHFUL ENVIRONMENT

72. The preceding paragraphs are reallaged as though set forth in full hereunder.

73. The Montana Constitution, Article II, Section 3, defines Montanans' right to a clean and healthful environment as an inalienable right. Further, Article IX, Section 1 provides that the State and each person must maintian and improve the environment. Thus any action that would abridge these constitutional provisions must pass a strict scrutiny analysis. The state must show a compelling state interest to abridge this fundamental right, and show that the state's interest has been narrowly tailored to effectuate such compelling state interest. Further, the Supreme Court of the State of Montana has ruled that Montanans need not wait for dead fish to float on our rivers, for example, to show harm to our clean and healthful environment.

74. The pollution authorized by the permit as alleged herein is not clean and healthful and is deleterious to the human environment and beneficial use of the Tongue River in violation of the Montana Constitution. DEQ has failed to show any compelling state interest in granting a permit to allow Redstone to degrade the quality of water in Montana without conditioning

said permit to require substantial reduction or elimination of the pollution to protect beneficial uses. The application of any and all regulations or statutes upon which the DEQ based its issuance of the MPDES permit without conducting nondegradation review violate the constitutional right to a clean and healthful environment and the duty to maintain and improve the environment.

PRAYER FOR RELIEF

WHEREFORE, Plaintiff respectfully requests that the board grant Plaintiff the following relief:

A. Issue a declaratory judgment declaring that DEQ violated the law for each and every violation of the law alleged herein, including that the MPDES permit as amended is void and of no effect;

B. Amend ARM 17.30.715(1) to conform it to governing statutes;

C. Determine and declare that the regulatory basis relied upon by DEQ to exempt the permit from non-degradation review as applied in the case at bar violates the Montana Constitution Article II, Section 3 and Article IX Section 1.

D. Order DEQ to perform non-degradation review under § 75-5-303, MCA, before any new MPDES permits to Redstone, its successors or assigns or any other CBM developers are issued.

E. Issue a permanent injunction preventing Defendant Redstone, its successors or assigns or any other CBM developers from discharging coal bed methane water into the Tongue River or any other water of the state of Montana until such time as lawfully issued MPDES permits are issued.

F. Declare that DEQ, and the State of Montana have breached/and continute to be in breach of, the water contracts with TRWU by allowing the degradation caused by the CBM discharges to the waters used by TRWU for irrigation.

G. Declare that pumping of the groundwater assoicated with Redstone's, its successors or assigns CBM development violates the water rights of TRWU and its members, and violates Article IX, Section 3 of the Montana Constitution.

H. Award Plaintiff's costs and attorney's fees and grant such other relief as the Court deems just and proper.

RESPECTFULLY SUBMITTED, this 23rd day of April, 2001.

Brenda Lindlief Hall

Brenda Lindlief Hall
REYNOLDS, MOTL & SHERWOOD
Attorney for the Plaintiff
Tongue River Water Users' Ass'n

ORDER

MONTANA FIRST JUDICIAL DISTRICT COURT
LEWIS AND CLARK COUNTY

TONGUE RIVER WATER USER'S ASSOCIATION; NORTHERN PLANS RESOURCE COUNCIL; MONTANA ENVIRONMENTAL INFORMATION CETNER, INC., Plaintiffs, v. MONTANA DEPARTMENT OF ENVIRONMENTAL QUALITY; FIDELITY EXPLORATION AND PRODUCTION COMPANY; MDU RESOURCES GROUP, INC.; MONTANA DEPARTMENT OF NATURAL RESOURCES; and STATE OF MONTANA, Defendants.	Cause No. BDV-2001-258 **ORDER**

Upon request of Plaintiffs, and no objection being lodged by Defendants,

It is hereby ORDERED, ADJUDGED AND DECREED that this matter is DISMISSED without prejudice.

DATED this 8 day of June, 2006

JEFFREY M. SHERLOCK
District Court Judge

pcs: Brenda Lindlief Hall
Jack Tuholske
Michael Reisner
John North/Claudia Massman
Jon Metropoulos

T/JMS/tongue river v deq ord dismiss wo prejudice.wpd

DA 09-0131

IN THE SUPREME COURT OF THE STATE OF MONTANA

2010 MT 111

NORTHERN CHEYENNE TRIBE, a federally recognized Indian tribe, TONGUE RIVER WATER USERS' ASSOCIATION, and NORTHERN PLAINS RESOURCE COUNCIL, INC.,

Plaintiff-Intervenor and Appellants,

v.

MONTANA DEPARTMENT OF ENVIRONMENTAL QUALITY; RICHARD OPPER, in his official capacity as Director of the Montana Department of Environmental Quality; and FIDELITY EXPLORATION & PRODUCTION COMPANY,

Defendants and Appellees.

APPEAL FROM: District Court of the Twenty-Second Judicial District,
In and For the County of Big Horn, Cause No. DV 06-34
Honorable Blair Jones, Presiding Judge

COUNSEL OF RECORD:

For Appellants:

Brenda Lindlief-Hall, Reynolds, Motl and Sherwood, PLLP, Helena, Montana (Tongue River)

Jack R. Tuholske (argued), Tuholske Law Office, Missoula, Montana (Northern Plains)

James L. Vogel, Vogel & Wald, PLLC, Hardin, Montana (Northern Cheyenne)

John B. Arum and Brian C. Gruber (argued), Ziontz, Chestnut, Varnell, Berley & Slonim, Seattle, Washington (Northern Cheyenne)

For Appellees:

Claudia L. Massman (argued), Special Assistant Attorney General, Helena, Montana (DEQ)

Jon Metropoulos (argued) and Dana L. Hupp, Gough, Shanahan, Johnson & Waterman, PLLP, Helena, Montana (Fidelity)

Argued: January 13, 2010
Submitted: January 14, 2010
Decided: May 18, 2010

Filed:

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Clerk

Justice Brian Morris delivered the Opinion of the Court.

¶1 Northern Cheyenne Tribe (Tribe), a federally recognized Indian tribe, Tongue River Water Users' Association (TRWUA), and Northern Plains Resource Council, Inc. (NPRC) (collectively Appellants), appeal the order of the Twenty-Second Judicial District Court, Big Horn County, granting summary judgment to the Montana Department of Environmental Quality (DEQ), Richard Opper, Director of DEQ, and Fidelity Exploration & Production Company (Fidelity). We reverse and remand.

¶2 We review the following dispositive issue on appeal:

¶3 *Whether DEQ violated the Clean Water Act or the Montana Water Quality Act by issuing discharge permits to Fidelity without imposing pre-discharge treatment standards?*

FACTUAL AND PROCEDURAL BACKGROUND

¶4 Appellants live and work along the Tongue River in southeastern Montana. The Tongue River rises in Wyoming and flows north through Big Horn and Rosebud counties to its confluence with the Yellowstone River. The Tribe holds reserved water rights on the Tongue River and uses this water for irrigation, stockwater, recreation, and cultural uses. Members of TRWUA and NPRC rely on the high quality waters of the Tongue River for irrigation, domestic use, and stockwater. Fidelity extracts Coal Bed Methane (CBM), a form of natural gas, for commercial sale near the Tongue River. Large underground coal seams permeate this part of Montana.

¶5 The pressure of groundwater in these underground coal seams traps CBM. Fidelity draws groundwater from the subterranean coal seams in order to extract CBM. CBM

extraction releases significant amounts of groundwater to the surface of the earth. Fidelity must dispose of the groundwater drawn to the surface. CBM producers dispose of the groundwater in a variety of ways. Fidelity discharges the groundwater at issue into the Tongue River.

¶6 The groundwater associated with CBM extraction contains a naturally high saline content. The highly saline groundwater may degrade the quality of the receiving surface waterway. Surface waters degraded by CBM discharge water, in turn, may have an adverse affect on irrigated agriculture and aquatic life. In fact, federal law defines the discharge water associated with CBM extraction as a "pollutant" under the Clean Water Act (CWA). *Northern Plains Resource Council v. Fidelity Exploration & Dev. Co*., 325 F.3d 1155, 1160 (9th Cir. 2003).

¶7 This designation as a "pollutant" requires a CBM producer to obtain a National Pollutant Discharge Elimination System (NPDES) permit in order to release the water into receiving waters. *Northern Plains Resource Council*, 325 F.3d at 1160; 33 U.S.C. § 1342 (§ 402). NPDES permits impose conditions and limitations on the discharge of pollutants. The Environmental Protection Agency (EPA) administers NPDES permits unless a state has enacted its own enforcement program, in which case EPA's Administrator (the Administrator) must have approved the state's program. 33 U.S.C. §§ 1341, 1342 (§§ 401, 402). Montana has chosen to administer its own permit program. Section 75-5-402, MCA; Mont. Admin. Rule 17.30.101. DEQ administers the Montana Pollutant Discharge

Elimination System (MPDES) permitting program. Section 75-5-211, MCA; Admin. R. M. 17.30.1201.

¶8 Fidelity began discharging untreated CBM water into the Tongue River without a permit in August 1998. *Northern Plains Resource Council*, 325 F.3d at 1158-59. DEQ authorized the discharge without a permit pursuant to § 75-5-401(1)(b), MCA, between August 1998 and when DEQ issued Fidelity a permit in June 2000. Section 75-5-401(1)(b), MCA, allows unpermitted discharge to surface waters if the discharge does not alter the ambient water quality. EPA notified DEQ in 1998 that § 75-5-401(1)(b), MCA, conflicts with the CWA, and that DEQ must follow NPDES permitting requirements for Fidelity's discharge. *Northern Plains Resource Council*, 325 F.3d at 1159. DEQ resisted EPA's attempt to revoke the exemption under § 75-5-401(1)(b), MCA, and continued to allow Fidelity to discharge into the Tongue River.

¶9 Fidelity filed for MPDES permits in January 1999 despite DEQ's advisement. *Northern Plains Resource Council*, 325 F.3d at 1159. NPRC filed an action in federal district court in June 2000 in which it challenged Fidelity's lack of compliance with the NPDES permitting requirements. DEQ altered its position and issued Fidelity an MPDES permit for the discharge of CBM water into the Tongue River. DEQ issued the permit to Fidelity in 2000 shortly after NPRC had filed its action. *Northern Plains Resource Council*, 325 F.3d at 1159. The permit allowed Fidelity to discharge untreated CBM water into the Tongue River. Fidelity applied to renew this permit in 2004 in conjunction with its application for a second permit.

¶10 DEQ issued Fidelity its second MPDES permit in 2006 along with the renewed permit for the original discharge. The second permit required Fidelity to treat a portion of its CBM discharge water and "blend" this treated wastewater with untreated wastewater before discharging it into the Tongue River. DEQ measures the salinity levels of CBM discharge water by its electric conductivity (EC) and its sodium absorption ratio (SAR). Admin. R. M. 17.30.602(9) and (27). DEQ imposes conditions on MPDES permits based upon EC and SAR measurements. DEQ imposed effluent limitations on Fidelity's MPDES permits in the form of water quality standards.

¶11 DEQ's water quality standards impose *discharge* rate restrictions based upon EC and SAR calculations. Water quality standards look to the change in ambient water quality in the receiving waterway to ascertain acceptable levels of pollutant discharge under the CWA. *EPA v. Cal. ex rel. State Water Resources Control Bd.*, 426 U.S. 200, 202, 96 S. Ct. 2022, 2023-24 (1976). These water quality standards guide polluter performance based upon "tolerable effects" of pollutant discharge. *EPA*, 426 U.S. at 202, 96 S. Ct. at 2023. In other words, water quality standards allow producers to discharge pollutants into a waterway up to a tolerable level. DEQ opted to impose these water quality discharge rate restrictions rather than to impose uniform pre-discharge treatment standards.

¶12 Pre-discharge treatment standards—often referred to as technology-based effluent limitations—focus on "preventable causes" and *treatment* of pollutants before discharge into a receiving waterway. *EPA*, 426 U.S. at 202, 96 S. Ct. at 2024. Producers treat wastewater before discharging it into a receiving waterway under pre-discharge treatment standards.

Pre-discharge treatment standards seek to minimize effluent discharge through specified levels of treatment. This pre-discharge treatment system makes it "unnecessary to work backward from an overpolluted body of water to determine which point sources are responsible." *EPA*, 426 U.S. at 204, 96 S. Ct. at 2024.

¶13 The Montana Board of Environmental Review (BER) promulgates rules related to water quality standards and industry-wide effluent limitations. Section 75-5-201, MCA; § 75-5-305, MCA. BER created a Water Quality Standard in 2003 specifically to control and limit CBM discharge water's saline characteristics and its negative impacts on Montana's waters and water users.

¶14 BER promulgated a narrative "nonsignificance" threshold for EC and SAR during the 2003 rulemaking process. DEQ considered the discharge nonsignificant under this narrative standard if the EC and SAR did not have a "measurable effect" on existing uses in the receiving waterway and there was no "measurable change" in aquatic life in the receiving waterway. Admin. R. M. 17.30.760(6) (2003). These rules exempted the MPDES permit from nondegradation review, though otherwise required by Federal and Montana law, if the EC and SAR fell below the nonsignificance threshold. See 40 C.F.R. § 131.12(a)(2); § 75-5-303, MCA; Admin. R. M. 17.30.701 *et seq*.

¶15 DEQ evaluated both of Fidelity's MPDES permit applications under the 2003 rule that classified the discharge as nonsignificant thereby avoiding nondegradation review. DEQ finally approved both of Fidelity's MPDES permits in 2006. BER was in the process of revising its 2003 rule at the time. BER declined entreaties to adopt pre-discharge treatment

standards for CBM. BER concluded that pre-discharge treatment standards would not be "technologically, economically, and environmentally feasible, as required by § 75-5-305(1), MCA." BER's 2006 revisions of the nonsignificance rule instead designated EC and SAR as "harmful parameters." BER classified EC and SAR as harmful parameters to implement Montana's nondegradation policy to protect Montana's "high quality" waters. The Montana Water Quality Act (WQA) designates the Tongue River a "high quality" waterway. Section 75-5-103(13), MCA. BER adopted the new rule one month after DEQ had approved Fidelity's permits.

¶16 Appellants challenged DEQ's issuance of the MPDES permits. Appellants alleged that DEQ had violated the CWA and the WQA by failing to include pre-discharge treatment standards in both permits. Appellants further alleged that DEQ had failed to undertake a nondegradation review, and that DEQ and Fidelity had violated their right to a clean and healthful environment under the Montana Constitution. Finally, Appellants claimed that the environmental assessment prepared for Fidelity's permits had failed to comply with the Montana Environmental Policy Act's (MEPA) requirement of considering a range of alternatives, including a no action alternative.

¶17 The parties submitted cross-motions for summary judgment and the District Court heard oral argument on February 28, 2007. The court granted summary judgment to DEQ and Fidelity on all four claims on December 9, 2008. The District Court determined that DEQ properly had used water quality standards instead of pre-discharge treatment standards in evaluating Fidelity's permits. The court reasoned that the water quality standards ensured

compliance with Montana's Water Quality Standard and the 2003 nonsignificance rule. The court noted that the CWA afforded DEQ discretion to use pre-discharge treatment standards or water quality standards in the absence of adoption of federal standards by EPA. Appellants appeal.

STANDARD OF REVIEW

¶18 We review *de novo* a district court's grant of summary judgment and apply the same criteria applied by the district court under M.R. Civ. P. 56(c). *Pennaco Energy, Inc. v. Mont. Bd. of Envtl. Review*, 2008 MT 425, ¶ 17, 347 Mont. 415, 199 P.3d 191. A district court properly grants summary judgment only when no genuine issues of material fact exist and the moving party is entitled to judgment as a matter of law. *Pennaco*, ¶ 17.

¶19 We review for correctness an agency's conclusions of law. *Pennaco*, ¶ 18. The same standard of review—correctness—applies to the district court's review of the administrative agency's decision, and our subsequent review of the district court's decision. *Pennaco*, ¶ 18.

DISCUSSION

¶20 *Whether DEQ violated the Clean Water Act or the Montana Water Quality Act by issuing discharge permits to Fidelity without imposing pre-discharge treatment standards?*

The CWA – Structure and Intent

¶21 Congress enacted the CWA in 1948 with the goal of *eliminating* the discharge of pollutants in order to "restore and maintain the chemical, physical, and biological integrity of the Nation's waters." 33 U.S.C. 1251(a) (§ 101). Congress developed the NPDES permit system to achieve this goal. 33 U.S.C. §§ 1342 and 1311 (§§ 402 and 301).

¶22 Congress amended the CWA in 1972 to make pre-discharge treatment standards the centerpiece of the NPDES permit system. Sen. Rpt. 92-414 at 3675 (Oct. 28, 1971). Pre-discharge treatment standards prevent degradation of water quality by requiring treatment before discharging wastewater into the receiving waterways. The 1972 revisions sought to achieve enforcement through implementation of pre-discharge treatment standards "because the previous water-quality based approach to pollutant control had been 'limited in its success.'" *Our Children's Earth Found. v. EPA*, 527 F.3d 842, 847-48 (9th Cir. 2008); Sen. Rpt. 92-414 at 3675. Congress determined that water quality standards had proven ineffective because they did not govern adequately the conduct of individual polluters. *EPA*, 426 U.S. at 202, 96 S. Ct. at 2023-24.

¶23 Congress reaffirmed its commitment to pre-discharge treatment standards as the foundation of water quality regulation in the 1985 amendments to the CWA. Congress cited the "historical ineffectiveness of the previous water-quality-based approach" and the "immediate and effective method of achieving the goals of the Act" through the use of pre-discharge treatment standards. *Our Children's Earth Found.*, 527 F.3d at 848 (citing Sen. Comm. Print 3-4 (1985)).

¶24 We review the District Court's determination that the Administrator possesses discretion whether to impose pre-discharge treatment standards against this backdrop. The District Court agreed with DEQ's claim that § 402(a)(1) of the CWA grants discretionary authority to the Administrator. The court determined further that § 402 imposes no

mandatory duty on the Administrator or the states to require pre-discharge treatment standards.

The Non-Discretionary Requirements of Sections 402 and 301

¶25 The Administrator establishes effluent limitations in one of two ways once the Administrator decides to grant a permit under § 402(a)(1)(A) or (B). The Administrator may promulgate guidelines for an entire class of industry when operating under § 402(a)(1)(A). 33 U.S.C. § 1314(b) (§ 304(b)). In the alternative, the Administrator may establish effluent limitations geared to the particular exigency of an individual permit application under § 402(a)(1)(B). The Fifth Circuit in *Texas Oil & Gas Assn v. EPA*, 161 F.3d 923 (5th Cir. 1998), determined that, "in practice," compliance with the language of § 402(a)(1)(B) "means that EPA must determine on a case-by-case basis what effluent limitations represent the BAT [best available technology] level." *Texas Oil*, 161 F.3d at 928-29.

¶26 The Administrator must use its "best professional judgment" in determining the BAT on a case-by-case basis. *Texas Oil*, 161 F.3d at 928-29. EPA's best professional judgment in determining the BAT "thus take[s] the place of uniform national guidelines" otherwise promulgated under § 402(a)(1)(A). *Texas Oil*, 161 F.3d at 929. The technology-based standard under § 402(a)(1)(B) "remains the same," however, even in the absence of uniform national standards. *Texas Oil*, 161 F.3d at 929. As a result, individual NPDES permits must adhere to § 402(a)(1)(B) when EPA has not yet promulgated these industry-wide guidelines. *Texas Oil*, 161 F.3d at 928-29.

¶27 EPA has yet to promulgate industry-wide guidelines for CBM. 74 Fed. Reg. 68599, 68607 (Dec. 28, 2009). In the interim, EPA must incorporate pre-discharge treatment standards on a case-by-case basis for the CBM industry pursuant to the mandate under § 402(a)(1)(B) that require the use of BAT. *Texas Oil*, 161 F.3d at 928-29. DEQ argues, nevertheless, that the absence of industry-wide standards for CBM leaves the actual use of pre-discharge treatment standards in the NPDES permitting process to the discretion of the Administrator.

¶28 DEQ correctly notes that the language in § 402 of the CWA allows that the Administrator "may" issue permits for pollutant discharge. 33 U.S.C. § 1342. Once the Administrator decides to issue a permit, however, it may be granted only upon condition that such discharge will meet all applicable requirements under §§ 301, 302, 306, 307, 308, and 403, or "such conditions as the Administrator determines are necessary to carry out the provisions of the Act." 33 U.S.C. § 1342(a)(1)(A)-(B). Sections 402 and 301 operate in tandem: § 402 grants the Administrator authority to issue NPDES permits and § 301 enumerates the conditions and limitations that each permit must contain. *E.P.A. v. National Crushed Stone Assn*, 449 U.S. 64, 71, 101 S. Ct. 295, 301 (1980).

¶29 Section 301 provides that the discharge of any pollutant shall be unlawful unless otherwise provided by the section. 33 U.S.C. § 1311(a). Section 301 requires the implementation of "effluent limitations" to carry out the objective of minimizing pollutant discharge. 33 U.S.C. § 1311(b)(1)(A)-(2)(A). The plain language of § 301(b)(1)(A)-(2)(A) requires the effluent limitations to use pre-discharge treatment standards in the absence of

federal guidelines. 33 U.S.C. § 1311(b)(1)(A)-(2)(A). Further, § 306 of the CWA requires that new sources of pollution, such as Fidelity's, use the "best available demonstrated control technology." 33 U.S.C. § 1316(a)(1)-(2).

¶30 The statutory framework of the CWA "requires" the Administrator to enforce pre-discharge treatment standards on individual discharges from point sources when granting NPDES permits. *PUD No. 1 of Jefferson Co. v. Wash. Dept. of Ecology*, 511 U.S. 700, 704, 114 S. Ct. 1900, 1905 (1994). This duty to impose pre-discharge treatment standards remains non-discretionary. *PUD No. 1*, 511 U.S. at 704, 114 S. Ct. at 1905. Courts have interpreted § 402(a)(1)(B) to require the Administrator to impose pre-discharge treatment standards on a case-by-case basis for industries such as CBM. *Texas Oil*, 161 F.3d at 928-29.

¶31 Section 301 ensures that the Administrator impose pre-discharge treatment standards under § 402's permitting system. It becomes apparent from our review of the CWA and decisions interpreting it that Congress intended to impose pre-discharge treatment standards in every NPDES permit issued under the CWA. This requirement furthers the CWA's goal of "eliminating" pollutant discharge into our Nation's waterways. 33 U.S.C. 1251(a)(1).

State Mandates Under the CWA and Its Implementing Regulations

¶32 We now must determine whether the CWA imposes the same pre-discharge treatment requirement on those states that administer their own permitting systems. EPA has promulgated pre-discharge treatment regulations pursuant to the mandate from § 301(b). *National Crushed Stone Assn*, 449 U.S. at 71, 101 S. Ct. at 301. Implementation of the

CWA's enforcement provisions involves a "complex statutory and regulatory scheme" that implicates both federal and state administrative responsibilities. *PUD No. 1*, 511 U.S. at 704, 114 S. Ct. at 1905. EPA's regulations explain the related duties of states and the Administrator in the permitting process.

¶33 Any NPDES permit granted under § 402 requires the discharger to "meet all the applicable requirements specified in the regulations issued under § 301." *National Crushed Stone Assn*, 449 U.S. at 71, 101 S. Ct. at 301. EPA regulations mandate that the pre-discharge treatment requirements under § 301(b) of the CWA "represent the *minimum* level of control that *must* be imposed in a permit issued under section 402 of the Act." 40 C.F.R. § 125.3(a) (emphasis added). The regulation requires that the permit writer "shall apply" pre-discharge treatment standards "[o]n a case-by-case basis under section 402(a)(1) of the Act." 40 C.F.R. § 125.3(c)(2)-(d); *See also Texas Oil*, 161 F.3d at 928-29.

¶34 DEQ cites to *Washington v. EPA*, 573 F.2d 583 (9th Cir. 1978), to support its argument that imposition of pre-discharge treatment standards in MPDES permits remains discretionary despite the regulation's mandatory language. The court in *Washington* refused to impose effluent limitations through pre-discharge treatment standards until EPA first had established industry-wide guidelines under § 304(b). *Wash.*, 573 F.2d at 591.

¶35 The Ninth Circuit decided *Washington* before EPA had promulgated 40 C.F.R. § 125.3 in 1979. EPA addressed *Washington* specifically when it promulgated 40 C.F.R. § 125.3. EPA determined that 40 C.F.R. § 125.3 provided what the court in *Washington* had found lacking—the authority and requirements for permit writers to impose pre-discharge

treatment standards on a case-by-case basis. 44 Fed. Reg. 32854, 32893 (June 7, 1979). EPA concluded that its new regulation required either the Administrator or the states to enforce pre-discharge treatment standards. 44 Fed. Reg. at 32893.

¶36 The District Court determined that state agencies implementing their own permitting programs, such as DEQ, do not "stand in the shoes" of the Administrator. EPA's regulation defines the "permit writer," however, as either the Administrator or a state. 40 C.F.R. § 125.3(c). DEQ administers MPDES permits for the CBM industry in Montana on a case-by-case basis.

¶37 Contrary to DEQ's claim that it does not "stand in the shoes" of the Administrator, DEQ—as a "permit writer"—must adhere to the same requirement as the Administrator of implementing pre-discharge treatment standards as the minimum level of control required in all permits. *NRDC v. EPA*, 859 F.2d 156 (D.C. Cir. 1988). The *NRDC* court determined that states issuing permits under § 402 "stand in the shoes of the agency" and thus must adhere to the federal requirement to use pre-discharge treatment standards. *NRDC*, 859 F.2d at 183, 187. Further, the court deemed the Ninth Circuit's analysis in *Washington* unconvincing in light of the fact that the court had decided *Washington* before EPA had promulgated regulations. *NRDC*, 859 F.2d at 187.

¶38 The industry defendants in *NRDC* had challenged the Administrator's authority to veto a state-administered NPDES permit. *NRDC*, 859 F.2d at 182. Specifically, the defendants argued that nothing required the states to "adhere to vague technology-based standards set forth in the statute" until EPA had promulgated industry-wide guidelines.

NRDC, 859 F.2d at 183. The court rejected outright this idea. The court determined that "states are required to compel adherence to the Act's technology-based standards regardless of whether EPA has specified their content" through industry-wide regulations. *NRDC*, 859 F.2d at 183.

¶39 The court concluded that § 402 requires EPA to exercise its best professional judgment in setting effluent limitations in considering permits in the absence of formally promulgated industry-wide guidelines. *NRDC*, 859 F.2d at 183. EPA's best professional judgment requires it to use pre-discharge treatment standards to set effluent limitations, as mandated under § 301(b). The court also concluded that EPA's implementing regulations obligated states to impose pre-discharge treatment standards when standing in the shoes of the Administrator. *NRDC*, 859 F.2d at 183.

¶40 DEQ still maintains, however, that EPA's regulations allow it to enforce effluent limitations in MPDES permits by imposing water quality standards instead of pre-discharge treatment standards as long as the water quality standards are "more stringent." 40 C.F.R §§ 122.44(d), 125.3(a). Section 303 requires states to institute water quality standards that remain subject to federal approval. 33 U.S.C. § 1313. Pre-discharge treatment standards and state-administered water quality standards represent separate and distinct functions of the CWA. *EPA*, 426 U.S. at 204, 96 S. Ct. at 2024.

¶41 State water quality standards "supplement" the protections offered by pre-discharge treatment standards. *EPA*, 426 U.S. at 205, 96 S. Ct. at 2025, FN12. Neither the Administrator, nor states, may supplant pre-discharge treatment standards with water quality

standards. *PUD No. 1*, 511 U.S. at 704, 114 S. Ct. at 1905. State water quality standards provide an additional layer of protection when pre-discharge treatment standards alone would not protect water quality. *PUD No. 1*, 511 U.S. at 704, 114 S. Ct. at 1905.

¶42 DEQ argues that it complied with the "more stringent" criteria when it imposed the water quality standards on Fidelity's permits rather than pre-discharge treatment standards. We struggle to conceive how water quality standards could be more stringent than pre-discharge treatment in light of the capability of pre-discharge treatment to clean CBM wastewater. DEQ issued Fidelity's permits based upon a finding that high salinity levels already had impaired the Tongue River. DEQ still chose to administer Fidelity's permits by imposing water quality standards that allowed Fidelity to discharge into the Tongue River nearly seven million pounds of sodium and seventeen million pounds of salts each year under one permit alone.

¶43 The parties do not dispute that Fidelity had a pre-discharge treatment facility already in place that could reduce the CBM wastewater's SAR level to 0.1 or less. DEQ's claim that water quality standards would be more stringent than pre-discharge treatment rings hollow given these facts. We also cannot ignore the fact that EPA's regulations mandate that the Administrator or a state "must" impose pre-discharge treatment standards at a minimum. 40 C.F.R §125.3(a).

¶44 Moreover, DEQ—under the implementing authority of Montana's WQA—has "incorporated by reference" the CWA provisions and EPA's regulations that require use of pre-discharge treatment standards in all MPDES permits. Admin. R. M. 17.30.1303. DEQ's

own regulations expressly adopt 40 C.F.R. § 125.3, "setting forth technology-based treatment requirements." Admin. R. M. 17.30.1340(10). EPA's implementing regulations impose a nondiscretionary duty on states to implement pre-discharge treatment standards. Montana's WQA, in turn, imposes a corresponding duty on DEQ to implement pre-discharge treatment standards.

¶45 Finally, DEQ argues that § 75-5-305(1), MCA, prohibits imposition of technology-based limits on an individual discharge when the discharge is considered "nonsignificant." DEQ contends that only BER can adopt technology-based limitations. Appellants correctly point out, however, that § 75-5-305(1), MCA, confines BER's authority to promulgating "industry-wide" technology-based controls in the absence of EPA-promulgated industry-wide guidelines. Nothing in this provision prohibits DEQ from establishing pre-discharge treatment standards on a case-by-case basis. Section 75-5-305, MCA. DEQ's own regulations require it. Admin. R. M. 17.30.1303 and 17.30.1340(10).

CONCLUSION

¶46 To summarize, the 1972 amendments to the CWA refocused its purpose to eliminating pollutant discharge through the use of pre-discharge treatment standards in the NPDES program. The CWA imposes a duty to apply pre-discharge treatment standards when granting an NPDES permit. CWA §§ 402 and 301. EPA's regulations promulgated under § 301(b) require states to use pre-discharge treatment standards. 40 C.F.R. §§ 122.44, 123.25, and 125.3. Montana has adopted these EPA regulations. Admin. R. M. 17.30.1303. Courts routinely have interpreted the CWA's pre-discharge treatment standards to apply to

states since EPA's adoption of regulations in 1979. We, too, determine that the CWA's pre-discharge treatment standards apply to states. DEQ violated the CWA and Montana's WQA by issuing discharge permits to Fidelity without imposing pre-discharge treatment standards.

¶47 We reverse the District Court's decision granting summary judgment to DEQ and declare Fidelity's permits void. We remand to DEQ and direct the agency to re-evaluate Fidelity's permit applications under the appropriate pre-discharge treatment standards within 90 days of this Court's decision, during which time Fidelity may continue operating under its current permits. We need not address other issues raised by Appellants in light of our determination regarding the use of pre-discharge treatment standards in MPDES permits.

/S/ BRIAN MORRIS

We Concur:

/S/ W. WILLIAM LEAPHART
/S/ JAMES C. NELSON
/S/ MICHAEL E WHEAT
/S/ PATRICIA O. COTTER
/S/ JIM RICE
/S/ ROBERT L. DESCHAMPS, III
The Hon. Robert L. Deschamps, III, District Court Judge, sitting for Chief Justice Mike McGrath