TUHOLSKE LAW OFFICE, P.C.
Jack R. Tuholske MT Bar # 2906
234 E. Pine St.
P.O. Box 7458
Missoula, MT 59807
Tel: (406) 396-6415
Fax: (406) 728-8445
jtuholske@gmail.com

Erin Farris-Olsen MT Bar #11524
P.O. Box 408
Helena, MT 59624
Tel: (406) 461-8530
elfarris@gmail.com

Attorneys for Plaintiffs

MONTANA FIRST JUDICIAL DISTRICT, LEWIS AND CLARK COUNTY

BITTERROOTERS FOR PLANNING Inc., and BITTERROOT RIVER PROTECTIVE ASSOCIATION Inc.,

Plaintiffs and Petitioners,

vs.

MONTANA DEPARTMENT OF ENVIRONMENTAL QUALITY, an agency of the State of Montana,

Defendant and Respondent.

Cause No. ADV-2015-32
HON MIKE MENAHAN
PRESIDING JUDGE

COMPLAINT

COMES NOW Plaintiffs, Bitterrooters for Planning and Bitterroot River Protective Association (collectively, "Bitterrooters"), through counsel, and in support of their complaint seeking review of the November 17th, 2014 decision of the Montana Department of Environmental Quality (DEQ) granting a groundwater discharge permit for a proposed large-

scale retail store (the Facility) south of Hamilton, declaratory relief, and their other claims and causes of action, state and allege as follows:

Introduction

The Facility is a proposed large-scale retail store on 18 acres on the northeast corner of U.S. Highway 93 and Blood Lane south of Hamilton, Montana in the Bitterroot Valley. Effluent from the Facility's septic system will contribute to pollution in groundwater, which through its hydrologic connection to the Bitterroot River, will increase contamination in the Bitterroot River, a stream already identified by the Defendant as "at risk" for pollutants. Despite repeated requests from the public, including Bitterrooters, DEQ failed to comply with its mandatory, statutory duties under the Montana Water Quality Act to consider whether sewage from the Facility, either alone or cumulatively, would lead to degradation of surface waters, including the Bitterroot River. DEQ failed to consider the cumulative impacts of this facility along with other sewage permits it has recently approved in the Bitterrroot Valley, leaving the river at risk to multiple new pollution sources. The DEQ also the violated Montana Environmental Policy Act for failing to adequately evaluate the environmental impacts of the Facility.

Furthermore, DEQ has failed to require any information regarding the nature of the facility that is being permitted, except that it is potentially a gigantic big box store, the largest in Ravalli County. The public, left in the dark, could not provide meaningful comment on the proposed permit, a violation of the Montana Constitution Article II, Sections 8 and 9 that ensure the public right to information and participation.

Jurisdiction and Venue

1. Jurisdiction is based on, *inter alia*, Article II, Sections 3,4, 16 and 17, Article VII Section 4(1), Article IX Sections 1 and 2, of the Montana Constitution, the Montana Water Quality Act § 75-

5-101 *et seq.*, MCA, and as an informal administrative agency action. Venue is proper in this district under § 25-2-126, MCA, because the Defendant is a state agency located in Helena, Montana.

2. Plaintiff Bitterrooters for Planning Inc., is a non-profit public-benefit corporation pursuant to § 35-2-101, *et seq.*, MCA, dedicated *inter alia,* to water quality protection, sound governance, and wise land use planning.

3. Plaintiff Bitterroot River Protective Association, Inc. is a Montana non-profit, public-benefit organization that works, in part, to protect the surface and ground waters of the Bitterroot River watershed from degradation.

4. Members of each of these organizations live in the state of Montana and in Ravalli County and use the Bitterroot River, including the areas affected by the Facility in Ravalli County, and have an interest in preserving water quality. Members of each Plaintiff organization use the Bitterroot River for recreation and nature appreciation, and those interests will be adversely affected Defendant's actions because of the increased pollution unlawfully permitted by the Defendant, and can be redressed by granting the relief requested herein.

5. The environmental, health, aesthetic, and recreational interests of each Plaintiff's members will be adversely affected by DEQ's actions of permitting at issue herein. Members of the Plaintiff organizations use and enjoy the waters and lands associated with the Bitterroot River that will be adversely affected by the pollution and other negative environmental impacts from the Facility for recreation and aesthetic purposes. Plaintiffs' members intend to use said lands and waters for these purposes in the future. In addition, Plaintiffs' members have interests in sound land use planning, protecting Ravalli County's rural aesthetic character, and promoting orderly, planned growth. Such interests are adversely affected by DEQ's unlawful actions herein.

6. Both Plaintiffs have as their mission the goal of protecting water quality and insuring compliance with the laws and regulations of Montana and the United States. In addition, both Plaintiffs have a history of using public participation opportunities to inform the public about environmental issues in Ravalli County. Plaintiffs and their members participated in the DEQ review process, attended meetings and hearings, and submitted comments on the proposed project. DEQ's actions at issue herein adversely affect Plaintiffs' members' interest in lawful governance and adherence to proper legal procedure. This action is brought on the Plaintiffs' own behalf and on behalf of their members.

FACTUAL BACKROUND

A. Urban Sprawl and Water Pollution

7. The Clark Fork Basin, including the Bitterroot River watershed, has experienced a rapid population growth and associated growth in septic systems from 1990 to present.
8. Conventional septic tank and drainfield systems treat wastewater by settling solids and partly digesting the organic matter, allowing liquid effluent—which still contains nutrients and pathogens (bacteria, protozoa and viruses)—to be discharged into the soil beneath the drainfield.
9. Septic systems are a significant source of water quality degradation in groundwater and surface water in the Clark Fork Basin, including waters comprising the Bitterroot River watershed.
10. Standard septic systems in Montana locations do not effectively remove nitrate from wastewater and therefore contribute to high groundwater nitrate concentrations.
11. Nitrate is a very soluble chemical, which is transported readily in groundwater and can eventually reach surface water. Total nitrogen is comprised of 4 parameters: nitrate, nitrite, ammonia, and organic nitrogen (total nitrogen, also known as TKN, is the sum of the ammonia and organic nitrogen components). The nitrogen in raw wastewater is comprised primarily of

ammonia. Through treatment in the septic tank and drainfield, the ammonia is converted to nitrite and ultimately nitrate. Therefore, all of the nitrogen in the raw wastewater can be transformed into nitrate.

12. Nutrient enrichment, or eutrophication, is the over-fertilization of surface waters by nitrogen and phosphorus, and is one of the leading causes of pollution of lakes, rivers, and coastal bays in the United States. Nutrient enrichment can cause a host of negative ecological effects on streams and lakes, including loss of water clarity, proliferation of aquatic weeds, algae blooms, and drop-offs in dissolved oxygen (a critical factor for fish and other aquatic life).
13. Nitrogen, in its nitrate form, is a direct risk to human and livestock health if it reaches high concentrations in drinking water. The levels of nitrogen and phosphorus that cause ecological damage in lakes and rivers are far lower—usually more than 10 times lower—than the levels which are toxic to humans and livestock.
14. DEQ is responsible for promulgating regulations for discharges to groundwater. The Montana Groundwater Pollution Control System regulates septic systems.
15. The Board of Environmental Review (BER) has adopted rules governing the discharge of wastes into groundwater and established a permit program and water quality standards. The rules define a "source" as any point source or disposal system, which may reasonably be expected to discharge pollutants into groundwater.
16. The water-use classifications and groundwater standards adopted in ARM 17.30.1006 provide a basis for limiting the discharge of pollutants into groundwater. Groundwater standards are based on the human health standards given in Circular DEQ-7 and include a nondegradation criterion based on DEQ's nondegradation policy and rules.

17. Montana's Non Degradation Policy requires DEQ to consider degradation of surface water and nitrogen concentrations at the end of the mixing zone. § 75-5-301(5)(d).

18. Septic systems are required to comply with all applicable water quality standards, including the nondegradation requirements in ARM 17.30.701 et seq. *Id.*

19. In accordance with ARM 17.30.706(2), DEQ is required to determine whether a new or increased source may cause degradation to state waters or whether the discharge from a new or increased source is nonsignificant according to ARM 17.30.715.

B. Hydrology of the Bitterroot Valley

20. The Bitterroot River (Bitterroot) is a tributary of the Clark Fork River in southwestern Montana. The Bitterroot runs for about 75 miles (121 km) south-to-north through the Bitterroot Valley, from the confluence of its west and east forks near Conner to the Clark Fork near Missoula, Montana.

21. The Bitterroot River is a popular destination for fly fishing. Rainbow and brown trout are prevalent, as are smaller populations of westslope cutthroat trout and bull trout. The Bitterroot River is a popular place for viewing wildlife. Many species of ducks and waterfowl are common along with osprey, bald eagles, and heron. Both white-tailed deer and mule deer frequent the river as a source of water and graze near its banks. The most notable wildlife-viewing locale along the river is the famous Lee Metcalf National Wildlife Refuge.

22. The Permit factsheet estimates groundwater flow rate from the Bitterroot at 700 feet per year through the alluvium beneath the flood plain along the Bitterroot River.

23. In general, the water table of the Bitterroot River Basin gradually declines through the winter and early spring, and then rises rapidly in May and June in response to recharge from precipitation and irrigation. The direction of ground water flow in general is from

the mountain fronts along the basin margins toward the center of the basin and diagonally down valley.

24. The surface water and groundwater systems are closely interrelated in the Bitterroot Basin. After entering the basin as precipitation, water may interchange between systems several times and leave as either stream flow, underflow, or water vapor. Groundwater in the Bitterroot Basin moves laterally until it is discharged to the earth's surface through springs, wells, and gaining streams. Groundwater moves toward and into the Bitterroot River.

25. In addition to being responsible for issuing groundwater permits, DEQ is responsible for completing Total maximum Daily Load (TMDL) plans which assess the maximum ability of any stream to hold pollutants without impairing beneficial uses, and allocate pollution from all sources at levels to maintain water quality standards and eliminate pollution from the watershed.

26. Nitrogen and nitrate are both "pollutants" whose discharge to the Bitterroot River and groundwater are regulated by the Montana Water Quality Act.

27. In 2012, the Bitterroot River from Skalkaho Creek south to the Clark Fork River was listed as impaired under the Water Quality Act and § 303(d) of the federal Clean Water Act for nitrogen and nitrate.

28. In 2013, a new model for assessing TMDLs was implemented. Under the new method, the Bitterroot River was delisted, while most of the tributaries included in the Bitterroot basin TMDL study remain listed as impaired.

C. Blood Lane Permit

29. In 2014 Lee Foss, a Ravalli County real estate broker filed an application for a groundwater discharge permit for the Facility. The application fails to identify the real party in interest for the permit.

30. The Bitterooters submitted comments on the proposed permit application. Numerous other individuals and groups also submitted comments. One recurring theme in the comments was concern over the potential impacts to the Bitterroot River from the Facility's wastewater discharges.
31. DEQ concluded that the impact from the Facility was "nonsignificant" because it meets the discharge criteria of "7.5mg/L" at the end of the mixing zone and failed to conduct a non-degradation analysis. Notably, DEQ did not independently evaluate the Facility's discharge value, but rather relied on the value provided by the real estate broker.
32. DEQ did not provide analysis of possible degradation of surface water.
33. DEQ did not provide analysis of impacts on human health.
34. DEQ did not provide analysis of cumulative effects of other discharges such as stormwater discharge from the facility or cumulative impacts from other on-going developments in Ravalli County that will also contribute increased pollution to groundwater and the Bitterroot River.
35. DEQ does not explain the purpose or operation of the proposed facility.
36. DEQ does not explain how industrial or commercial activities, noise, air, visual, and traffic pollution will increase as a result of Facility operations.
37. DEQ does not explain the project impact on quality or distribution of employment.
38. DEQ does not explain projected impacts to tax revenue.
39. DEQ does not explain project impacts on the demand for government services as a result of the Facility.
40. DEQ does not explain its observation that discharges will be "residential in nature."

41. On September 18, 2014, DEQ held a hearing wherein many citizens including Bitterooters, residents, scientists, city commissioners, and local business owners all voiced concern over the approval of the permit without consideration of impacts to the Bitterroot River. As set forth herein, no one knew what facility they were commenting on.

42. On November 17, 2014, DEQ issued the groundwater discharge permit for the Facility.

FIRST CLAIM FOR RELIEF

(Violation of Nondegradation Policy Regarding Nitrogen Pollution)

43. The allegations in the foregoing paragraphs are re-alleged and incorporated herein by reference.

44. The objective of the federal Clean Water Act is to "restore and maintain the chemical, physical, and biological integrity of the Nation's waters." 33 U.S.C. §1251.

45. In furtherance of this objective, the Act imposes a non-degradation requirement upon states, including Montana, by delegating authority. 40 C.F.R. 131.12. The requirements of the Act and its implementing regulations are binding on Montana.

46. In addition, the Montana Constitution Article II, Section 3 and Article IX, Section 1 require the Defendant to be anticipatory and preventative in its duties to protect the state's waters from pollution.

47. DEQ's nondegradation analysis for groundwater discharge permit MTX000233 failed to consider whether nitrogen discharges from the Facility would cause degradation of surface water, as required by MCA § 75-5-301(5)(d), and ARM § 17.30.715(1)(d).

48. DEQ's failure to consider whether the nitrogen discharges authorized by permit MTX000233 would degrade surface water was arbitrary, capricious, and a violation of the nondegradation provisions of the Montana Water Quality Act.

SECOND CLAIM FOR RELIEF

(Violation of Nondegradation Policy: Failure to Take a Hard Look at Cumulative Impacts)

49. The allegations in the foregoing paragraphs are re-alleged and incorporated herein by reference.

50. DEQ's nondegradation analysis for groundwater discharge permit MTX000233 failed entirely to consider the potential cumulative impacts, as required by ARM § 17.30.715(2)(a).

51. DEQ's failure to consider potential cumulative impacts of the wastewater discharges authorized by groundwater discharge permit MTX000233 was arbitrary, capricious, and a violation of the nondegradation provisions of the Montana Water Quality Act.

THIRD CLAIM FOR RELIEF

(Violation of the Montana Environmental Policy Act)

52. The allegations in the foregoing paragraphs are re-alleged and incorporated herein by reference.

53. MEPA is intended to implement the environmental imperatives of Article II, Section 3 and Article IX, Section 1 of the Montana Constitution. § 75-1-102, MCA.

54. MEPA requires state agencies to carefully scrutinize the potential environmental consequences of their actions. § 75-1-101, et seq., MCA; A.R.M. 36.2.524(1).

55. Under A.R.M. 36.2.524 (1), in order to implement MEPA, the agency shall determine the significance of impacts associated with a proposed action. This determination is the basis of the agency's decision concerning the need to prepare an environmental impact statement (EIS), and also refers to the agency's evaluation of individual and cumulative impacts in either an environmental assessment (EA) or EIS.

56. "The agency shall consider (a) the severity, duration, geographic extent, and frequency of occurrence of the impact, (b) the probability that the impact will occur if the proposed action occurs; or conversely, reasonable assurance in keeping with the potential severity of an impact

that the impact will not occur, (c) growth-inducing or growth-inhibiting aspects of the impact, including the relationship or contribution of the impact to cumulative impacts, (d) the quantity and quality of each environmental resource or value that would be affected, including the uniqueness and fragility of those resources or values, (e) the importance to the state and to society of each environmental resource or value that would be affected, (f) any precedent that would be set as a result of an impact of the proposed action that would commit the department to future actions with significant impacts or a decision in principle about such future actions, and (g) potential conflict with local, state, or federal laws, requirements, or formal plans." A.R.M. 36.2.524 (1).

57. An EA must include: (a) a description of the proposed action, including maps and graphs, (b) a description of the benefits and purpose of the proposed action, (c) a listing of any state, local, or federal agencies that have overlapping or additional jurisdiction or environmental review responsibility for the proposed action, (d) an evaluation of the impacts, including cumulative and secondary impacts, on the physical environment, (e) an evaluation of the impacts, including cumulative and secondary impacts, on the human population in the area to be affected by the proposed action, (f) a description and analysis of reasonable alternatives to a proposed action whenever alternatives are reasonably available and prudent to consider and a discussion of how the alternative would be implemented, (g) a listing and appropriate evaluation of mitigation, stipulations, and other controls enforceable by the agency or another government agency, (h) a listing of other agencies or groups that have been contacted or have contributed information, (i) the names of persons responsible for preparation of the EA, and (j) a finding on the need for an EIS and, if appropriate, an explanation of the reasons for preparing the EA. If an EIS is not

required, the EA must describe the reasons the EA is an appropriate level of analysis." A.R.M. 36.2.525 (3).

58. DEQ's environmental assessment for groundwater discharge MTX000233 is insufficient. The permit factsheet and EA are void of a project description and environmental impacts were not assessed in violation of A.R.M. 36.2.524 and 525.

59. The significance of both direct and indirect project impacts identified within the EA were not assessed in violation of A.R.M. 36.2.524 (1) and (2). The lack of adequate assessment includes, but is not limited to, impacts caused by the development on air, water, noise, traffic, wildlife, water quality including stormwater discharges, impacts on existing businesses in the Hamilton area, and cumulative impacts for all of these resources.

60. DEQ's non-significance determination is arbitrary and capricious in violation of the Montana Environmental Policy Act.

FOURTH CLAIM FOR RELIEF

(Violation of the Montana Constitution's Meaningful Public Participation Requirement)

61. Article II, Section 8 of the Montana Constitution guarantees the public a "right to expect governmental agencies to afford such reasonable opportunity for citizen participation in the operation of the agencies prior to the final decision as may be provided by law."

62. Article II, Section 9 of the Montana Constitution guarantees "no person shall be deprived of the right to examine documents or to observe the deliberations of all public bodies or agencies of state government and its subdivisions, except in cases in which the demand of individual privacy clearly exceeds the merits of public disclosure."

63. The permit factsheet fails to describe the purpose or operation of the proposed Facility.

64. The public has been denied information and meaningful opportunity to participate in the issuance of a permit for the Facility.

65. No public hearing will be held on the Facility under County regulations or the Montana Subdivision and Platting Act. Thus the DEQ EA and public process is the only opportunity for public input regarding the decision to approve or deny the Facility's permit, which is a condition precedent for its construction.

66. DEQ's failure to provide for meaningful public participation further implicates Plaintiffs' members' Constitutional environmental rights in Articles II and IX of the Montana Constitution because those rights cannot be effectively protected unless decision-makers give them an adequate opportunity to provide input on the impacts of the Facility before it is approved.

67. The approval of the Facility as outlined herein therefore violates Plaintiffs' fundamental constitutional rights in Article II Sections 8 and 9 of the Montana Constitution.

REQUEST FOR RELIEF

WHEREFORE, Bitterrooters pray for relief against Defendant DEQ as follows:

A. For an order declaring void *ab initio* DEQ's issuance of groundwater discharge permit MTX000233 for discharges at the Facility, and remanding the permit to DEQ for reconsideration in light of its lawful mandates.

B. For a determination and declaration that issuance of groundwater discharge permit MTX000233 is illegal and violates the Montana Water Quality Act for its failure to take a hard look at impacts to surface waters and cumulative impacts.

C. For a determination and declaration that issuance of groundwater discharge permit MTX000233 is illegal and violates the Montana Environmental Policy Act for its failure to sufficiently review the environmental impacts of the proposed Facility.

D. For a determination and declaration that directs DEQ to ensure the public is informed of the purpose and operation of the Facility and afforded opportunity to participate in the environmental review process pursuant to the Montana Constitution.

E. For reasonable attorneys' fees and expenses as damages under mandamus Mont. Code Ann. § 27-26-402; under the Private Attorney General Theory; and as otherwise provided by law.

F. For costs of suit.

G. For such further relief as this Court deems equitable and just.

Dated this 14th day of January, 2015.

Jack R. Tuholske
Tuholske Law Office PC

Erin Farris-Olsen
Law Office of Erin Farris-Olsen

Attorneys for the Petitioners

MONTANA FIRST JUDICIAL DISTRICT COURT
LEWIS AND CLARK COUNTY

BITTERROOTERS FOR PLANNING, INC., BITTERROOT RIVER PROTECTIVE ASSOCIATION, INC., Plaintiffs and Petitioners, v. MONTANA DEPARTMENT OF ENVIRONMENTAL QUALITY, Defendant and Respondent, and STEPHEN WANDERER and GEORGIA FILCHER, individuals, Defendant Intervenors.	Cause No. ADV-2015-32 **ORDER ON PETITION FOR JUDICIAL REVIEW**

On January 14, 2015, Petitioners Bitterrooters for Planning, Inc., and Bitterroot River Protective Association, Inc., (Bitterrooters) filed a complaint and petition for judicial review of a decision of the Montana Department of Environmental Quality (DEQ) granting a groundwater discharge permit. Jack R. Tuholske and David K.W. Wilson, Jr., represent Bitterrooters. Kristen H. Bowers represents DEQ. Alan F. McCormick and Stephen R. Brown represent Intervenors Stephen Wanderer and Georgia Filcher (Intervenors). Before the Court are DEQ's motion to dismiss Bitterrooters' claim for violation of Montana's constitutional public participation provisions, Bitterrooters' motion for summary judgment, and DEQ's cross-motion for summary judgment. The Court heard oral argument on January 26, 2016. Upon review of the record and in consideration of the parties' arguments, the Bitterrooters' request for relief is granted. The DEQ's groundwater discharge permit MTX000233 is void.

FACTUAL AND PROCEDURAL HISTORY

On April 3, 2014, Lee Foss (Foss) applied for a groundwater discharge permit for a proposed retail facility on Parcel #698800 at the corner of Blood Lane and US Highway 93, south of Hamilton, Montana (the Blood Lane Property). Although construction has not begun, the application states the facility will be a 156,159 square foot "retail merchandise and grocery sales" facility. Foss, a real estate broker, is not the party developing or operating the proposed facility. The application does not identify the eventual facility operator. After reviewing Foss's application, DEQ issued permit MTX000233 (the Permit) on November 17, 2014, allowing groundwater discharge subject to effluent limitations, monitoring requirements, and other conditions.

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In issuing the Permit, DEQ found the groundwater discharge is exempt from nondegredation review under the Montana Water Quality Act because it would not significantly change groundwater quality or surface water quality of the nearby Bitterroot River and its tributaries. DEQ also completed a checklist Environmental Assessment (EA) pursuant to the Montana Environmental Policy Act (MEPA). DEQ confined the scope of the EA to those impacts on the environment resulting from groundwater discharge. DEQ did not consider the impacts resulting from constructing and operating a retail facility on the Blood Lane Property. DEQ concluded issuing the Permit would not significantly adversely affect the human and physical environment, thus it was not required to conduct a more comprehensive Environmental Impact Statement (EIS). (Pls.' Ex. App. (Nov. 16, 2015), Ex. 1, at 234.)

Bitterrooters challenged DEQ's decision to issue the Permit claiming DEQ: (1) violated the nondegradation provisions of the Montana Water Quality Act regarding nitrogen pollution; (2) failed to consider potential cumulative impacts of the groundwater discharge, in violation of the Montana Water Quality Act; (3) violated MEPA; and 4) violated the public's constitutional right to participate.

Additional facts are included in the discussion herein.

STANDARD OF REVIEW

In reviewing a motion to dismiss pursuant to Montana Rule of Civil Procedure 12(b)(6), courts must consider the complaint in the light most favorable to the plaintiff and accept the allegations in the complaint as true. *Goodman Realty, Inc. v. Monson*, 267 Mont. 228, 231, 883 P.2d 121, 123 (1994). A complaint should not be dismissed under Rule 12(b)(6) unless it

appears beyond a doubt that the plaintiff can prove no set of facts to support his claim which would entitle him to relief. *McKinnon v. W. Sugar Coop. Corp.*, 2010 MT 24, ¶ 12, 355 Mont. 120, 225 P.3d 1221. In other words, dismissal is justified only when the allegations of the complaint itself clearly demonstrate the plaintiff does not have a claim. *Buttrell v. McBride Land & Livestock Co.*, 170 Mont. 296, 298, 553 P.2d 407, 408 (1976). For these reasons, a trial court rarely grants a motion to dismiss for failure to state a claim upon which relief can be granted.

Summary judgment is appropriate when "the pleadings, the discovery and disclosure materials on file, and any affidavits show that there is no genuine issue as to any material fact and that the movant is entitled to judgment as a matter of law." Mont. R. Civ. P. 56(c)(3). The party moving for summary judgment must establish the absence of any genuine issue of material fact and the party is entitled to judgment as a matter of law. *Tin Cup County Water &/or Sewer Dist. v. Garden City Plumbing, Inc.*, 2008 MT 434, ¶ 22, 347 Mont. 468, 200 P.3d 60. Once the moving party meets its burden, the party opposing summary judgment must present affidavits or other testimony containing material facts which raise a genuine issue as to one or more elements of its case. *Id.* ¶ 54 (citing *Klock v. Town of Cascade*, 284 Mont. 167, 174, 943 P.2d 1262, 1266 (1997)).

When reviewing an agency decision not classified as a contested case, the standard of review is whether the decision was "arbitrary, capricious, unlawful, or not supported by substantial evidence." *Hobble Diamond Ranch, LLC v. State*, 2012 MT 10, ¶ 21, 363 Mont. 310, 208 P.3d 31 (citing *Clark Fork Coal. v. Mont. Dept. of Envtl. Quality*, 2008 MT 407, ¶ 21, 347 Mont. 197, 197

P.3d 482; *Skyline Sportsmen's Assn. v. Bd. of Land Commrs.*, 286 Mont. 108, 113, 951 P.2d 29, 32 (1997)). When making the factual inquiry whether an agency decision was arbitrary or capricious, the standard of review is a narrow one. *N. Fork Preservation Assn. v. Dept. of State Lands*, 238 Mont 451, 465, 778 P.2d 862, 871 (1989) (quoting *Citizens to Preserve Overton Park v. Volpe*, 401 U.S. 402, 416 (1971)). The court must "consider whether the decision was based on a consideration of the relevant factors and whether there has been a clear error in judgment." *Id.*, at 465, 778 P.2d at 871 (quoting *Citizens to Preserve Overton Park*, 401 U.S. at 416). A court cannot substitute its judgment for that of the agency by determining whether the agency's decision was correct. *Id.*

An agency's interpretation of its rule is afforded great weight. A court should defer to the agency's interpretation unless it is plainly inconsistent with the spirit of the rule. Courts will sustain an agency's interpretation of a rule so long as it lies within the range of reasonable interpretation permitted by the wording. *Clark Fork Coal.* ¶ 20. An administrative agency's interpretation of a statute under its administration is entitled to great deference. *Norfolk Holdings, Inc. v. Mont. Dept. of Revenue*, 249 Mont. 40, 44, 813 P.2d 460, 462 (1991). However, Montana courts must interpret statutes by looking at the plain language. *Mont. Sports Shooting Ass'n v. State*, 2008 MT 190, ¶ 11, 344 Mont. 1, 185 P.3d 1003. If the language is clear and unambiguous, the court need not interpret the statute further. *Id.*

ANALYSIS

I. Right to Participate

DEQ and Intervenors argue Bitterrooters' claim for violations of Montana' constitutional public participation requirements is barred by the statute

of limitations pursuant to statutory provisions on public participation in governmental operations, Montana Code Annotated §§ 2-3-101 through -301. Bitterrooters contend their claim arises under the Montana Constitution – the statutory limitations period does not apply.

Article II, section 8, of the Montana Constitution guarantees "[t]he public has the right to expect governmental agencies to afford such reasonable opportunity for citizen participation in the operation of the agencies prior to the final decision *as may be provided by law*." (Emphasis added.) Article II, section 9, provides "[n]o person shall be deprived of the right to examine documents or to observe the deliberations of all public bodies or agencies of state government and its subdivisions, except in cases in which the demand of individual privacy clearly exceeds the merits of public disclosure." These rights are codified and executed by statute. The right to participate is implemented through Montana Code Annotated § 2-3-101, et seq., and the right to know is implemented through Montana Code Annotated § 2-3-201, et seq. Any action challenging an agency decision must be filed within thirty days of the date on which the plaintiff learns, or reasonably should have learned, of the agency's decision. Mont. Code Ann. § 2-3-114 and -213. A party's failure to commence an action within thirty days deprives the district court of jurisdiction to consider the claim. *Kadillak v. Anaconda Co.*, 184 Mont. 127, 140, 602 P.2d 147, 155 (1979).

Bitterrooters cite *Bryan v. Yellowstone County Elementary School District No. 2*, 2002 MT 264, 312 Mont. 257, 60 P.3d 381, for the proposition Montana courts recognize a constitutional right to participate, independent of statutory protections, when a governmental unit only partially discloses information – to the public's detriment. There, the Montana Supreme Court

concluded "[t]he right to a hearing embraces not only the right to present evidence, but also a reasonable opportunity to know the claims of the opposing party and to meet them." *Id.* ¶ 44 (citations omitted.) Because Bryan's claim "hinges on the interpretation of the 'reasonable opportunity' language found in Article II, Section 8 and § 2-3-111, MCA," the Montana Supreme Court held the claim arose under the statutory right to participate. *Id.* ¶¶ 42, 46. There is no authority to support Bitterrooters' argument the public's right to participate under Article II, section 8, is self-executing – that a claim for violating the public's right to participate is not subject to the thirty-day statute of limitations in Montana Code Annotated § 2-3-114. See *Columbia Falls. Elem. Sch. Dist. No. 6 v. State*, 2005 MT 69, ¶¶ 15-16, 326 Mont. 304, 109 P.3d 257.

DEQ made a final agency decision by issuing the Permit on November 17, 2014. DEQ informed Bitterrooters of its decision the following day – November 18, 2014. Bitterrooters did not file their complaint until January 14, 2015, fifty-seven days after learning of DEQ's decision. Accordingly, this Court lacks jurisdiction to hear Bitterrooters' fourth claim for relief and cannot consider whether DEQ violated Bitterrooters' right to participate.

II. Montana Environmental Policy Act

Bitterrooters contend DEQ violated MEPA by failing to consider cumulative impacts resulting from the nearby Grantsdale Addition subdivision. Granstdale is located in the same area as the Blood Lane Property, and DEQ recently issued a groundwater discharge permit to the subdivision. Bitterrooters also argue DEQ failed to consider the impacts arising from constructing and operating the retail facility. Bitterrooters are particularly concerned the facility

may be operated by Walmart, which they allege has a history of violating environmental regulations.

DEQ contends it considered cumulative impacts of the Grantsdale subdivision by calculating allowable discharge under the "mass balance approach." DEQ further argues it properly limited the scope of the EA to the impacts of discharging groundwater and related construction of the wastewater treatment system. According to DEQ, the scope of the EA was appropriate because developing the retail facility is subject to local land use, planning, and zoning laws. DEQ argues the identity of the facility's operator is irrelevant because the operator will be subject to the Permit's conditions and enforcement actions.

MEPA, codified at Montana Code Annotated § 75-1-101, et seq., requires state of Montana government agencies take procedural steps to review agency actions that significantly affect the quality of the human environment to ensure the agency makes informed decisions. *Ravalli Cnty. Fish & Game Ass'n v. Mont. Dep't of State Lands*, 273 Mont. 371, 377-78, 903 P.2d 1362, 1367 (1995). MEPA requires agencies take a "hard look" at the impacts of their actions; it is largely procedural and does not require "that an agency make particular substantive decisions." *Id.* at 377, 903P.2d at 1367. "Implicit in the requirement that an agency take a hard look at the environmental consequences of its actions is the obligation to make an adequate compilation of relevant information, to analyze it reasonably, and to consider all pertinent data." *Clark Fork Coal.* ¶ 47. MEPA also ensures the public is informed of anticipated environmental impacts of an action. Mont. Code Ann. § 75-1-102(1)(b). Because MEPA is modeled after the National Environmental Policy Act (NEPA),

federal NEPA case law is persuasive. *N. Fork Preservation Assn.* at 457, 778 P.2d at 866; *Ravalli Cnty.* at 377, 903 P.2d at 1367.

An agency action, e.g. granting a permit or license, must be accompanied by an EIS. *Kadillak* at 134, 602 P.2d at 152. A comprehensive EIS is not necessary if the agency completes an EA and finds the action will not significantly affect the human environment. *Id.* EAs must consider an action's cumulative and secondary impacts on the physical environment and human population. Mont. Admin. R. 17.4.609(3)(d), (e). Cumulative impacts are defined as:

> [T]he collective impacts on the human environment of the proposed action when considered in conjunction with other past and present actions related to the proposed action by location or generic type. Related future actions must also be considered when these actions are under concurrent consideration by any state agency through preimpact statement studies, separate impact statement evaluation, or permit processing procedures.

Mont. Admin. R. 17.4.603(7). A secondary impact is "a further impact to the human environment that may be stimulated or induced by or otherwise result from a direct impact of the action." Mont. Admin. R. 17.4.603(18).

DEQ cites *Montana Wilderness Association v. Board of Health and Environmental Sciences*, 171 Mont. 477, 559 P.2d 1157 (1976), and *Residents for Sane Trash Solutions, Inc. v. U.S. Army Corps of Engineers*, 31 F.Supp.3d 571 (S.D. N.Y. 2014), for the proposition that an agency should not consider secondary impacts of an action when subsequent developments lie within the control of local entities. *Residents for Sane Trash Solutions* is inapplicable to the present matter. There, the federal district court upheld an Army Corps of Engineers' decision to limit the scope of an environmental review to construction

activity in and over water within its jurisdiction. *Id.* at 588. The court concluded a limited review was warranted because a local governmental entity (New York City sanitation department) had already conducted a comprehensive environmental review of the project under consideration, and a state court found the sanitation department's environmental review was sufficient. *Id.* at 580. "NEPA plainly is not intended to require duplication of work by state and federal agencies." *Id.* at 589 (citing *Ohio Valley Envtl. Coalition v. Aracoma Coal Co.*, 556 F.3d 177, 196 (4th Cir. 2009).

Montana Wilderness is no longer binding authority. In that case, the Department of Health and Environmental Sciences (Department), DEQ's predecessor agency, approved a sewer system for a subdivision south of Big Sky without considering any impact the subdivision would have on the environment. 171 Mont. at 480, 559 P.2d at 1158. The Supreme Court first issued an opinion on July 22, 1976, which held the Department's EIS was insufficient by failing to consider secondary impacts of the subdivision. The Court then granted the Department a rehearing, vacated the previous opinion, and issued a substitute opinion on December 30, 1976, upholding the sufficiency of the EIS. The Supreme Court concluded the Department properly confined its analysis to matters of water supply, sewage, and solid waste disposal – reasoning the legislature placed control of subdivision development solely in the hands of local government under the 1973 Montana Subdivision and Platting Act. *Id.* at 484-85, 559 P.2d at 1161. In his dissent, Justice Haswell noted the Supreme Court initially determined the Subdivision and Platting Act, enacted two years after MEPA, did not repeal MEPA's directive that agencies must mitigate environmental degradation "to the fullest extent possible" and "utilize a

systematic approach to foster sound environmental planning and decision making." *Id.* at 502, 559 P.2d at 1170 (Haswell, Daly, JJ. dissenting). The Department's involvement in the process should trigger "a comprehensive review of the environmental consequences of such decisions which may be of regional or statewide importance." *Id.* at 504, 559 P.2d at 1171. The dissent concluded the majority's opinion "reduced constitutional and statutory protections to a heap of rubble, ignited by the false issue of local control." *Id.* at 486, 559 P.2d at 1161.

Agencies must comply with NEPA's procedural requirements unless a conflicting law expressly prohibits compliance or makes compliance impossible. *Calvert Cliffs' Coordinating Comm., Inc. v. U.S. Atomic Energy Comm'n*, 449 F.2d 1109, 1114 (D.C. Cir. 1971). The phrase "to the fullest extent possible" found in NEPA at Section 102, and in MEPA at Montana Code Annotated § 7-1-201:

> [D]oes not provide an escape hatch for footdragging agencies; it does not make NEPA's procedural requirements somehow "discretionary." Congress did not intend the Act to be such a paper tiger. Indeed, the requirement of environmental consideration "to the fullest extent possible" sets a high standard for the agencies, a standard which must be rigorously enforced by the reviewing courts.

Id. at 1114.

The majority's opinion in *Montana Wilderness* is similarly at odds with subsequent NEPA case law requiring agencies to consider reasonably foreseeable indirect effects of an action, even when local or state entities are authorized to make the ultimate decision. See *Chelsea Neighborhood Ass'n v. U.S. Postal Service*, 516 F.2d 378, 388 (2d Cir. 1975) (EIS must consider new

housing project when it was a "selling point" for proposed postal facility); *City of Davis v. Coleman*, 521 F.2d 661, 676-77 (9th Cir. 1975) (EIS must include consideration of "growth-inducing effects" of proposed highway construction project); *Sierra Club v. Marsh*, 769 F.2d 868, 877-80 (1st Cir. 1985).

In *Sierra Club v. Marsh*, plaintiffs challenged the Army Corps of Engineers' decision not to prepare an EIS for a series of proposed construction projects on Sears Island in Maine. The Sears Island project involved three components: (1) a solid-fill causeway connecting the island to the mainland; (2) a marine port designed for shipping lumber and agricultural products, containerized cargo, and coal; and (3) an industrial park adjacent to the cargo port. *Id.* at 872. Although plans for the causeway and the port were definite, the nature, shape and location of the industrial park were uncertain. The industrial park was also subject to local zoning and land use laws. The Army Corps of Engineers issued an EA which addressed the impact of constructing the causeway and port, but did not consider impacts resulting from the industrial park. Although the EA concluded the construction project would not significantly impact the environment, the First Circuit Court held the industrial park was a reasonably foreseeable indirect effect of granting permission to build the causeway and port. The Army Corps of Engineers failed to adequately consider the fact that building a port and causeway may lead to further development, which would significantly affect the environment. "Of course, agencies need not consider highly speculative or indefinite impacts. But, here the 'impacts' seem neither speculative nor indefinite." *Id.* at 878 (citations omitted).

These federal cases were decided under NEPA's directive that agencies must consider indirect effects of an action. 40 C.F.R. § 1508.8(b).

Although there is no statute or administrative rule requiring state agencies evaluate indirect effects under MEPA, MEPA does require agencies evaluate secondary impacts. Because the requirements are similar, the Court finds federal authority persuasive on this issue. Montana agencies must consider secondary impacts of an action, even when control of the ultimate decision lies with local entities.

DEQ's failure to consider secondary impacts of constructing and operating the retail facility violates Administrative Rule of Montana 17.4.609(3)(d) and (e). The draft EA, prepared on May 27, 2014, discussed some impacts the underlying facility would have on the environment, e.g. impacts to local employment opportunities, local and state tax revenue, and traffic. (Pls.' Ex. App., Ex. 1, at 136.) The final EA, issued November 17, 2014, addressed the wastewater treatment system's impact on the physical and human environment. The EA did not address any impacts resulting from the construction and operation of the retail facility. (Id. at 230-35.) The main purpose of issuing the Permit is to authorize construction of the proposed retail facility on the Blood Lane Property. Construction of the facility is neither speculative nor indefinite – it is a secondary impact "stimulated or induced by or otherwise result[ing] from a direct impact of the action," i.e., issuing the Permit. Mont. Admin. R. 17.4.603(18). Thus, DEQ must consider impacts from constructing and operating the facility.

When it reconsiders Foss's application, DEQ must compile relevant information, for its own use as well as for the public's use, and must consider all pertinent data. DEQ must identify the facility operator if the operator's identity has the potential to impact vegetation, aesthetics, human health and safety,

industrial and commercial activities, employment, tax revenues, demand for government services, or other environmental resources. DEQ violated Montana Administrative Rule 17.4.609(3)(d) and (e) by failing to consider the cumulative impacts resulting from the Grantsdale subdivision. Grantsdale is in the same area as the Blood Lane Property, it is a related action within the meaning of Montana Administrative Rule 17.4.603(7). The DEQ must consider the cumulative impact of the proposed action in conjunction with the impacts of the Grantsdale subdivision's groundwater discharge permit. Although DEQ claims it addressed the cumulative impacts of the Grantsdale subdivision by calculating allowable discharge using the mass balance approach, MEPA does not allow "mere analysis implicit within [an EA]. The public is not benefited by reviewing an [EA] which does not explicitly set forth the actual cumulative impacts analysis and the facts which form the basis for the analysis." *Friends of the Wild Swan v. Dept. of Natural Res. & Conservation*, 2000 MT 209, ¶ 35, 301 Mont. 1, 9, 6 P.3d 972, 978.

III. Montana Water Quality Act

a. Surface Water Degradation

Bitterrooters argue DEQ failed to perform a nondegradation analysis of the Bitterroot River and its tributaries (by assessing the impacts of discharged groundwater), in violation of Montana Code Annotated § 75-5-301(5)(d) and Montana Administrative Rule 17.30.715(1)(d). DEQ contends the Permit complies with the state's nondegradation policy set forth in the Montana Water Quality Act. Mont. Code Ann. § 75-5-101 through -641. According to DEQ, Bitterrooters failed to provide any evidence to establish adverse impacts to surface water arising from discharges to groundwater authorized by the Permit.

The Bitterroot River and its tributaries are classified as "high quality waters" under the Federal Clean Water Act, 33 U.S.C. § 1251, et seq. The State must maintain and protect its water quality to support propagation of fish, shellfish, wildlife, and recreation unless degradation is necessary to accommodate important economic or social development. 40 C.F.R. § 131.12. Degradation means "a change in water quality that lowers the quality of high-quality waters." Mont. Code Ann. § 75-5-103(7). Pursuant to the Montana Water Quality Act, DEQ must conduct a rigorous nondegradation review before allowing applicants to discharge pollutants into high quality waters from point sources. Mont. Code Ann. § 75-5-303(3); *Clark Fork Coal.* ¶ 11. The nondegradation review examines social and economic costs of an action and determines whether the action is necessary and advisable. *Id.* An application is exempt from nondegradation review if the proposed activity results in nonsignificant changes in water quality. *Id.* ¶ 33.

Montana Code Annotated § 75-5-301(5)(d) directs the Board of Environmental Review to establish rules providing that "changes of nitrate as nitrogen in ground water are nonsignificant if the discharge will not cause degradation of surface water and the predicted concentration of nitrate as nitrogen at the boundary of the ground water mixing zone does not exceed [7.5 milligrams per liter (mg/L).]" Pursuant to this authorization, the Board of Environmental Review adopted Montana Administrative Rule 17.30.715, which provides in relevant part:

> (1) . . . [C]hanges in existing surface or ground water quality resulting from the activities that meet all the criteria listed below are nonsignificant, and are not required to undergo review under 75-5-303, MCA:

. . .

(d) changes in the concentration of nitrate in ground water which will not cause degradation of surface water if the sum of the predicted concentrations of nitrate at the boundary of any applicable mixing zone will not exceed [7.5 mg/L.]

A mixing zone is an area in which water quality standards may be exceeded subject to conditions imposed by DEQ. Mont. Code Ann. § 75-5-103(21).

Under the clear and unambiguous language of Montana Code Annotated § 75-5-301(5)(d) and Montana Administrative Rule 17.30.715(1)(d), a change in groundwater quality is only nonsignificant if it meets two conditions: (1) the change does not cause degradation of surface water; and (2) the concentration of nitrate in the ground water does not exceed 7.5 mg/L at the boundary of the mixing zone. All parties to the present action agree the predicted concentration of nitrate in groundwater will not exceed 7.5mg/L at the boundary of the mixing zone. Thus groundwater discharge under the Permit satisfies the second element. However, DEQ did not analyze the impact from groundwater discharge under the Permit upon the nearby Bitterroot River and its tributaries.

DEQ's interpretation of Montana Code Annotated § 75-5-301(5)(d) and Montana Administrative Rule 17.30.715(1)(d) is inconsistent with the plain language of the statute and the rule. When a party raises a credible concern of a nexus between discharged groundwater and adjacent surface water, the DEQ must examine possible impacts groundwater discharge will have on surface water before declaring the discharge nonsignificant. In the present matter, Bitterrooters raised a credible concern by providing DEQ a Montana Bureau of Mines study which demonstrates a connection between groundwater and surface water near the proposed facility. Moreover, DEQ's own investigation of the site

hydrogeology indicates a similar connection between ground and surface waters. (Pls.' Ex. App., Ex. 1, at 159.) DEQ has a duty to examine what impact, if any, discharge under the Permit will have on nearby surface waters.

Montana Code Annotated § 75-5-301(5)(d) does not require DEQ conduct a full nondegradation review in every case. DEQ need only examine impacts from groundwater discharge upon surface water when a party raises a credible concern of a connection between ground and surface waters. Nonetheless, the Water Quality Act is a reasonable implementation of Montana's constitutional right to clean and healthful environment, which is anticipatory and preventative and "does not require that dead fish float on the surface of our state's rivers and streams before its farsighted environmental protections can be invoked." *Mont. Envtl. Info. Ctr. v. Dept. of Envtl. Quality,* 1999 MT 248, ¶¶ 77-80, 296 Mont. 207, 988 P.2d 1236.

b. Cumulative Impacts

Bitterrooters further argue DEQ failed to consider cumulative impacts of the Permit as required by Montana Administrative Rule 17.30.715(2). DEQ contends its examination of cumulative impacts under this rule is discretionary, and it did not abuse its discretion by declining to consider the impacts. DEQ further argues its calculation of allowable discharge loads implicitly considered cumulative impacts.

Even when a proposed activity complies with Montana Administrative Rule 17.30.715(1), DEQ may find the activity is significant under subsection (2), which provides:

> Notwithstanding compliance with the criteria of (1), the department may determine that the change in water quality resulting

from an activity which meets the criteria in (1) is degradation based upon the following:

(a) cumulative impacts or synergistic effects;

(b) secondary byproducts of decomposition or chemical transformation;

(c) substantive information derived from public input;

(d) changes in flow;

(e) changes in the loading of parameters;

(f) new information regarding the effects of a parameter; or

(g) any other information deemed relevant by the department and that relates to the criteria in (1).

Cumulative impacts include past, present and future actions related to a proposed action. Mont. Admin. R. 17.4.603(7).

In *Clark Fork Coalition*, the Montana Supreme Court examined DEQ's interpretation of Montana Administrative Rule 17.30.715. There, a mining company applied for a permit to discharge wastewater. Although mining operations would last thirty to thirty-seven years, wastewater discharge from the mine was potentially perpetual. *Id.* ¶ 5. DEQ claimed the discharge would be nonsignificant under Rule 17.30.715(1) and refused to exercise its discretion to analyze "any other information deemed relevant by the department which relates to the criteria listed in subsection (1)" under subsection (2)(g). *Id.* ¶¶ 36-38. The Supreme Court concluded DEQ's interpretation of Rule 17.30.715(2) violated the spirit of the rule. *Id.* ¶ 39. Subsection (2) grants DEQ discretion to re-evaluate the significance of an action independently of the criteria found in subsection (1) "in order to fulfill the goal of preventing degradation in every instance." *Id.* ¶ 42. However, "[f]ailure of a district court to exercise discretion is itself an abuse of discretion. Likewise, when an agency, because of a misinterpretation of its rule,

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does not exercise its discretion it abuses its discretion." *Id.* ¶ 43 (citations omitted).

Similarly, in the present case, DEQ's failure to exercise its discretion under Montana Administrative Rule 17.30.715(2) violates the spirit of the rule and constitutes an abuse of discretion. Although the agency has discretion to decide whether a proposed action is significant, the agency must consider the relevant factors when called upon to do so. DEQ's decision to issue a groundwater discharge permit to the Grantsdale subdivision is a related action subject to a cumulative impacts analysis which DEQ must consider under Montana Administrative Rule 17.30.715(2)(a). DEQ must explicitly address the cumulative impacts from these actions. Mere analysis implicit within the calculation of allowable discharge is insufficient. *Friends of the Wild Swan* ¶ 35.

CONCLUSION

DEQ's decision to issue a groundwater discharge permit MTX000233 violates MEPA. DEQ failed to consider explicitly cumulative impacts of the Grantsdale subdivision and failed to consider secondary impacts necessitated by constructing and operating a large retail facility. DEQ's decision also violates the Water Quality Act. DEQ failed to consider impacts to nearby surface waters and the cumulative impacts of the Grantsdale subdivision in violation of Montana Administrative Rule 17.30.715(1) and (2). Bitterrooters failed to file their complaint within thirty days of learning of DEQ's final agency decision. Bitterrooters' claim that DEQ violated their right to participate is barred by the statute of limitations.

Based on the foregoing,

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IT IS HEREBY ORDERED

1. Bitterrooters' motion for summary judgment and petition for judicial review are GRANTED;

2. DEQ's groundwater discharge permit MTX000233 is declared VOID;

3. DEQ's decision granting the Permit is REVERSED.

DATED this 16th day of May 2016.

MIKE MENAHAN
District Court Judge

pc: Jack R. Tuholske, PO Box 7458, Missoula MT 59807
David K.W. Wilson, Jr., PO Box 557, Helena MT 59624
Kirsten H. Bowers, Department of Environmental Quality, PO Box 200901, Helena MT 59620-0901
Alan F. McCormick/Stephen R. Brown, PO Box 7909, Missoula MT 59807-7909

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CLERK OF THE SUPREME COURT
STATE OF MONTANA
Case Number: DA 16-0429

DA 16-0429

IN THE SUPREME COURT OF THE STATE OF MONTANA

2017 MT 222

BITTERROOTERS FOR PLANNING, INC., and
BITTERROOT RIVER PROTECTIVE ASSOCIATION, INC.

Plaintiffs and Appellees,

v.

MONTANA DEPARTMENT OF ENVIRONMENTAL
QUALITY, an agency of the State of Montana,

Defendant and Appellant,

STEPHEN WANDERER and GEORGIA FILCHER,

Defendants, Intervenors and Appellants.

APPEAL FROM: District Court of the First Judicial District,
In and For the County of Lewis and Clark, Cause No. ADV 15-32
Honorable Mike Menahan, Presiding Judge

COUNSEL OF RECORD:

For Appellant:

Alan F. McCormick (argued), Stephen R. Brown, Garlington, Lohn, Robinson, Missoula, Montana

Edward Hayes (argued), Kirsten H. Bowers, Special Assistant Attorneys General, Helena, Montana

For Appellees:

Jack R. Tuholske (argued), Tuholske Law Office, P.C., Missoula, Montana

David K. W. Wilson, Jr., Morrison, Sherwood, Wilson, & Deola, Helena, Montana

For Amicus:

Derf L. Johnson, Montana Environmental Information Center, Helena, Montana

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Argued and Submitted: March 29, 2017
Decided: September 5, 2017

Filed:

Clerk

Justice Dirk Sandefur delivered the Opinion of the Court.

¶1 The Montana Department of Environmental Quality (DEQ) appeals from an order of the Montana First Judicial District Court granting summary judgment to Bitterrooters for Planning, Inc., and Bitterroot River Protective Association, Inc., (collectively Bitterrooters) that DEQ violated the Montana Environmental Policy Act[1] (MEPA) by issuing a wastewater discharge permit for an unnamed "big box" retail merchandise store near Hamilton, Montana, without considering environmental impacts of the construction and operation of the facility other than water quality impacts and impacts of the construction of the required wastewater treatment system. Intervenors and current owners of the site, Stephen Wanderer and Georgia Filcher (Landowners), join that appeal and further appeal the District Court's related summary judgment that MEPA requires DEQ to identify the owner or operator of the contemplated retail store. We reverse, in part, and affirm, in part.

ISSUES

1. *Does MEPA require DEQ to consider non-water quality related environmental impacts of the construction and operation of a retail store facility as secondary impacts of the issuance of a Montana Water Quality Act (MWQA) permit to discharge facility wastewater into the ground from an onsite wastewater treatment system?*

2. *Does MEPA require DEQ to identify the actual owner or operator of a wastewater treatment facility prior to issuing a MWQA groundwater discharge permit?*

[1] Title 75, Chapters 1-3, MCA.

BACKGROUND

¶2 On April 3, 2014, DEQ received an application for a Montana groundwater pollution control system (MGWPCS) permit[2] to discharge Level 2 wastewater[3] into Class 1 groundwater on the site of a contemplated commercial development at the intersection of U.S. Highway 93 and Blood Lane near Hamilton, Montana. The contemplated discharge would occur via a proposed onsite wastewater treatment facility and drainfield designed to treat sanitary and floor drain discharges from a 156,529 square-foot retail store facility to be constructed on the site. The groundwater discharge would eventually migrate down-gradient to the nearby Bitterroot River in Ravalli County.

¶3 DEQ received the application under submittal letter, dated March 31, 2014, from CT Consultants, an engineering firm in Columbus, Ohio. The letter bore the signature of John D. Zaleha, E.I., "Project Engineer." The application consisted of DEQ standard Forms 1 and GW-1 with referenced attachments. As supplemented at DEQ's request, the application identified the type and nature of the contemplated facility or operation by reference to a Standard Industrial Code (SIC 5311) indicating a retail merchandise and grocery facility. An included project site map indicated a large retail facility and parking lot that would together cover approximately half of the 16.54 acre site. The application

[2] Sections 75-5-401 through -405, MCA (DEQ duty to regulate wastewater discharge pursuant to Board of Environmental Review rules), and Admin. R. M. Title 17, chapter 30, parts 1 and 10 (MGWPCS rules).

[3] A "Level 2 treatment" system is a subsurface wastewater treatment system that "(a) removes at least 60% of total nitrogen as measured from the raw sewage load to the system or systems or (b) discharges a total nitrogen effluent concentration of 24 mg/L or less." Admin. R. M. 17.30.702(11). The proposed wastewater treatment facility was designed to remove greater than 90 percent of total nitrogen.

listed the various types of contemplated effluents with their respective characteristics. As proposed, the treatment system would on average handle 5,100 gallons of effluent from sanitary wastes (95%) and floor drains (5%). As supplemented, except for identification of the contemplated facility name and the actual contemplated owner or operator, the application included all standard information typically required by DEQ for issuance of a MGWPCS permit.

¶4 The certification and signature sections of both DEQ application forms listed Ravalli County real estate broker Lee Foss (Foss) as the permit applicant. Section C of Form 1 also listed Foss as the "Facility Contact." The "Facility Information" sections of both forms listed the property's state property tax identification number (Parcel #698800) as the "Facility Name." Section F of Form 1 listed Foss as the "Applicant (Operator)" of the contemplated facility and that the listed "Operator" was not the property owner.

¶5 By correspondence to Foss dated April 21, 2014, DEQ identified and requested additional information regarding various application "deficiencies" including, *inter alia*, clarification of the name of the facility and the name of the permitee who would be "the responsible entity" to insure compliance with permit conditions for the authorized discharge. By subsequent correspondence, CT Consultants, through Project Engineer Zaleha, reiterated that the facility name was Parcel #698800 and that Foss would be the permitee, as originally listed. DEQ's Supplemental Responses to Plaintiffs' First Discovery Requests indicated that the agency's Director specifically "asked Mr. Foss to disclose the identity of the developer of the property" but "Mr. Foss declined to do so."

¶6 It is undisputed on the record that real estate broker Lee Foss had no intention of actually owning or operating the contemplated facility. He requested the MGWPCS permit to facilitate the sale of the property to a particular third-party known to Foss and Landowners. Upon sale of the property, Foss would transfer the permit to the intended owner or operator who would construct and operate the retail store.[4]

¶7 In May 2014, DEQ issued a Draft Checklist Environmental Assessment (draft EA), a draft wastewater discharge permit, and a permit fact sheet. The draft EA identified the proposed agency action as the issuance of a permit authorizing "discharge of treated domestic water via a subsurface drainfield [pursuant to] the Montana Groundwater Pollution Control System (MGWPCS) permit program" established by Admin. R. M. Title 17, chapter 30, part 10. The draft EA stated that the limited purpose of the permit was:

> to regulate the discharges of pollutants to state waters from the regulated facility. Issuance of an individual permit will require the applicant to implement, monitor and manage practices to prevent pollution and the degradation of ground water.

The draft permit specified allowable discharge limits for total nitrogen and total phosphorus and specified ongoing water quality monitoring and reporting measures required by DEQ. The permit fact sheet described the wastewater treatment system, point of discharge effluent limits, site hydrogeology, and vicinity groundwater quality issues.

[4] Opposition comments in the administrative record presume that the contemplated retail store will be a Walmart store.

The fact sheet further explained DEQ's rationale for the proposed terms and conditions of the permit.

¶8 The draft EA concluded that, as treated and discharged beyond the "approved mixing zone" on the property, the contemplated wastewater discharge would not exceed applicable water quality standards and thus would have no "significant adverse effects [on] the human and physical environment." The draft EA referenced a similar lack of significant impact on various standard physical environment checklist factors. *Inter alia*, the draft EA included a statement that "construction of the facility will alter" the existing undeveloped use of the land but not impact any "listed vegetative species." Though finding no significant adverse impact on various standard human environment checklist factors, the draft EA concluded that the construction and operation of "the facility" would have the potential to increase commercial activity in the area, increase traffic in the area, create temporary jobs during construction, create permanent jobs post-construction, and increase local tax revenue.

¶9 DEQ received written comments from approximately 160 individuals and members of local organizations. More than 80 people attended a public hearing on September 18, 2014. Due to the high level of public interest and technical difficulties with its electronic public comment submission system, DEQ extended the public comment period until October 15, 2014. On November 17, 2014, DEQ released a final EA and associated fact sheet and concurrently issued the requested wastewater discharge permit to Foss as originally recommended in the draft EA.

¶10 With a few exceptions, the final EA mirrored the draft EA. Based on new information provided by commenters regarding the existence of a down-gradient natural spring near the project area, the final EA noted that DEQ lowered the permissible level of phosphorous discharge from the proposed wastewater treatment facility. *Inter alia*, the document concluded that the treatment system and expected wastewater discharges to groundwater would result in "no potential adverse impact to elk winter range."

¶11 DEQ organized public comments by topic and prepared 106 formal responses to address public concerns. The agency noted that most issues raised by commenters were "beyond the scope" of the agency's EA analysis, and declined to address various stated public concerns about non-water quality related impacts of the construction and operation of the larger retail facility, including the potential spread of noxious weeds, "light pollution," noise pollution, air pollution, soil pollution, permanent traffic increases, traffic safety, building aesthetics, scenic degradation, the risk of decreases in nearby residential property values, and the effect of marketplace competition on other local businesses and employees. The final EA further stated that DEQ had no authority to require the developer to build at an alternative site in Hamilton to allow connection to the city sewage treatment system and thereby eliminate the need for the contemplated groundwater discharge. The final EA did address questions regarding the adequacy of self-monitoring of the treatment facility by the owner or operator and public perception of a need for additional down-gradient water quality monitoring.

¶12 The final EA referenced various secondary impacts identified in the draft EA, but this time more narrowly characterized them as impacts resulting from the construction of

the subject wastewater treatment system rather than impacts of the larger construction and operation of the retail facility. The final EA ultimately concluded that MEPA did not require a formal environmental impact statement (EIS) "because the project lacks significant adverse effects to the human or physical environment." With reference to DEQ's limited authority to regulate groundwater discharges "to ensure the protection of the beneficial uses of state waters and compliance with the applicable water quality standards," the EA concluded that DEQ complied with all applicable MEPA requirements.

¶13 On January 14, 2015, Bitterrooters petitioned the Montana First Judicial District Court for judicial review on the asserted grounds that DEQ's wastewater discharge permitting process violated the Montana Water Quality Act (MWQA), MEPA, and the public's right to participate in governmental deliberations under Article II, Section 8 of the Montana Constitution and § 2-3-101, MCA, et seq. Bitterrooters alleged that the issuance of the wastewater discharge permit violated MWQA by failing to adequately consider the impact of the contemplated wastewater discharge on the water quality of the nearby Bitterroot River and tributaries. They alleged that the permit violated both MWQA and MEPA by failing to adequately consider the cumulative water quality impacts of wastewater discharges from the contemplated retail facility in conjunction with previously permitted discharges from the nearby Grantsdale subdivision. Bitterrooters asserted that the process further violated MEPA by failing to adequately consider the secondary impacts of the larger construction and operation of the retail facility unrelated to water quality. On May 16, 2016, on consideration of the parties' respective motions to dismiss and for summary judgment pursuant to M. R. Civ. P. 12(b)(6) and 56, the District Court:

(1) dismissed Bitterrooters' right-to-participate claim as time-barred by the applicable statute of limitations, §§ 2-3-114 and -213, MCA;

(2) granted summary judgment that DEQ violated MWQA by failing to adequately consider:

(A) the effect of the contemplated discharge of nitrate-contaminated groundwater on the quality of nearby surface waters in violation of § 75-5-301(5)(d), MCA, and Admin. R. M. 17.30.715(1)(d); and

(B) the cumulative water quality effects of wastewater discharges from the contemplated retail facility and the nearby Grantsdale subdivision in violation of Admin. R. M. 17.30.715(2)(a);

(3) granted summary judgment that DEQ violated MEPA by failing to adequately consider:

(A) the cumulative water quality effects of wastewater discharges from the contemplated retail facility and the nearby Grantsdale subdivision as required by § 75-1-208(11), MCA, and Admin. R. M. 17.4.603(7) and (12); .609(3)(d) and (e);

(B) impacts of the construction and operation of the contemplated retail facility as secondary impacts of issuance of the wastewater discharge permit in violation of Admin. R. M. 17.4.603(12) and (18) and .609(3)(d) and (e); and

(4) granted summary judgment that Admin. R. M. 17.4.609(3)(d) (criteria for evaluation of cumulative and secondary impacts of state action on physical environment) required DEQ to identify the "facility operator if the operator's identity has the potential to impact vegetation, aesthetics, human health and safety, industrial and commercial activities, employment, tax revenues, demand for government services, or other environmental resources."

¶14 DEQ appeals only the District Court's ruling that it violated MEPA by failing to consider environmental impacts of the construction and operation of the facility other than water quality impacts and impacts of the related construction of the required wastewater treatment system. Landowners join DEQ's appeal and further separately appeal the District

Court's ruling that Admin. R. M. 17.4.609(3)(d) requires disclosure of the identity of the actual contemplated owner or operator of the retail facility.

STANDARDS OF REVIEW

¶15 We review a district court's grant or denial of summary judgment, and related conclusions of law, de novo for correctness. *Smith v. BNSF Railway*, 2008 MT 225, ¶ 10, 344 Mont. 278, 187 P.3d 639; *Montana Trout Unlimited v. Montana Dep't of Nat. Res. & Conserv.*, 2006 MT 72, ¶ 17, 331 Mont. 483, 133 P.3d 224. The standard of review of the sufficiency of an agency's environmental review under MEPA is whether the decision was unlawful or arbitrary and capricious. Section 75-1-201(6)(a)(iii), MCA; *Montana Wildlife Fed. v. Mont. Bd. of Oil & Gas Conserv.*, 2012 MT 128, ¶ 25, 365 Mont. 232, 280 P.3d 877. An agency decision is unlawful if it does not comply with governing laws and administrative rules. *North Fork Preservation Ass'n v. Dep't of State Lands*, 238 Mont 451, 459, 778 P.2d 862, 867 (1989). We will sustain an agency's interpretation of its rule "so long as it lies within the range of reasonable interpretation permitted by" the language of the rule. *Clark Fork Coal. v. Montana Dep't of Envt'l Quality*, 2008 MT 407, ¶ 20, 347 Mont. 197, 197 P.3d 482.

¶16 An agency decision is arbitrary and capricious if made without consideration of all relevant factors or based on a clearly erroneous judgment. *Clark Fork Coal.*, ¶ 21; *North Fork Preservation Ass'n*, 238 Mont at 465, 778 P.2d at 871. However, the arbitrary and capricious standard does not permit reversal "merely because the record contains inconsistent evidence or evidence which might support a different result." *Montana Wildlife Fed.*, ¶ 25. Rather, the decision "must appear to be random, unreasonable or

seemingly unmotivated based on the existing record." *Montana Wildlife Fed.*, ¶ 25. We cannot substitute our judgment for that of the agency but will not defer to an agency decision without a searching and careful review of the record to verify that the agency made a reasoned decision. *Friends of the Wild Swan v. Dep't of Nat. Res. & Conservation*, 2000 MT 209, ¶ 28, 301 Mont. 1, 6 P.3d 972; *North Fork Preservation Ass'n*, 238 Mont. at 465, 778 P.2d at 871.

DISCUSSION

¶17 Mindful of the Legislature's constitutional duty to maintain and provide for a clean and healthful environment,[5] and for the purpose of protecting our environment in balance with the right to use and enjoy private property free from undue government regulation, MEPA requires state agencies to conduct an environmental review of any contemplated agency action that may have an impact on the human environment. Sections 75-1-102, -201(1), and -220(5), MCA. Within the required scope of review, MEPA requires agencies "to take a hard look" at the environmental impacts of contemplated agency action. *Montana Wildlife Fed.*, ¶ 43. "Implicit in the requirement that an agency take a hard look at the environmental consequences of its actions is the obligation to make

[5] Montana Constitution, Article IX, Section 1, provides:

> (1) The state and each person shall maintain and improve a clean and healthful environment in Montana for present and future generations.
>
> (2) The legislature shall provide for the administration and enforcement of this duty.
>
> (3) The legislature shall provide adequate remedies for the protection of the environmental life support system from degradation and provide adequate remedies to prevent unreasonable depletion and degradation of natural resources.

See also, Mont. Const. art. II, § 3 (individual right to a clean and healthful environment).

an adequate compilation of relevant information, to analyze it reasonably, and to consider all pertinent data." *Clark Fork Coal.*, ¶ 47.

¶18 However, MEPA requirements are merely "procedural" and do not require an agency to reach any particular decision in the exercise of its independent authority. Section 75-1-102(1), MCA; *Montana Wildlife Fed.*, ¶ 32. *See also*, § 75-1-102(3)(b), MCA (MEPA provides no additional regulatory authority to an agency and does not affect an agency's specific statutory duties to comply with environmental quality standards); § 75-1-201(4)(a), MCA (reviewing "agency may not withhold, deny, or impose conditions on any permit or other authority to act based on" MEPA). The essential purpose of MEPA is to aid in the agency decision-making process otherwise provided by law by informing the agency and the interested public of environmental impacts that will likely result from agency actions or decisions. Sections 75-2-102(1)(b) and (3)(a), MCA. Because the Legislature modeled MEPA on the National Environmental Policy Act (NEPA),[6] federal authority construing NEPA is generally persuasive guidance in the construction of similar provisions of MEPA. *North Fork Preservation Ass'n*, 238 Mont. at 457, 778 P.2d at 866; *Ravalli County Fish & Game Ass'n v. Montana Dep't of State Lands*, 273 Mont. 371, 377, 903 P.2d 1362, 1367 (1995).

¶19 *Issue 1: Does MEPA require DEQ to consider non-water quality related environmental impacts of the construction and operation of a retail store facility as secondary impacts of the issuance of a Montana Water Quality Act (MWQA) permit to discharge facility wastewater into the ground from an onsite wastewater treatment system?*

[6] 42 U.S.C. § 4321, et seq.

¶20 MEPA requires an agency to produce a formal environmental impact statement (EIS) if an agency action will significantly affect the quality of the human environment. Section 75-1-201(1)(b)(iv), MCA; *Montana Wildlife Fed.*, ¶ 43. However, MEPA does not require an EIS if a preliminary EA determines that the agency action will *not* significantly affect the quality of the human environment. Section 75-1-201(1)(b)(iv), MCA; Admin. R. M. 17.4.607(2) and .608 (general environmental review requirements); *Kadillak v. Anaconda Co.*, 184 Mont. 127, 134, 602 P.2d 147, 152 (1979). An EA thus serves as both the initial tool for determining whether a more intensive EIS is necessary and as the mechanism for required environmental review of agency actions that will likely impact the environment but not sufficiently to require an EIS. Sections 75-1-102(1) and (3)(a), -201(1)(a) and (b)(i)(B), and -220(5), MCA (EIS/EA purposes, definitions, legislative intent, and general requirements for "adequate review" of environmental impact of "state actions"); Admin. R. M. 17.4.607(2) through (4) and 17.4.608, (environmental review requirements and significant impact evaluation criteria). On appeal, Bitterrooters do not contest DEQ's determination that an EA would suffice as the mechanism for required environmental review based on its threshold determination that issuance of the contemplated wastewater discharge permit will not significantly affect the quality of the human environment.[7] Bitterrooters similarly do not challenge DEQ's identification and evaluation of alternatives to the issuance of a discharge permit as required by §§ 75-1-

[7] It is undisputed on the record that the contemplated wastewater discharge will not exceed a 7.5 mg/L nitrate concentration thus effecting a "nonsignificant change" in groundwater quality that will not cause degradation to surface water under § 75-5-301(5)(d), MCA (MWQA water quality standards).

201(1)(b)(i)(B) and -220(1), MCA. Therefore, we review Bitterrooters' assertion of error only as it relates to the sufficiency of the final EA as the mechanism of required MEPA review.

¶21 Except for requiring evaluation of cumulative impacts of a proposed project "when appropriate," § 75-1-208(11), MCA, MEPA does not specify the required contents or scope of a preliminary EA. *See*, *e.g.*, §§ 75-1-102(1) and (3), -201(1)(b)(i)(B), and -220(5), MCA. In this context, the Legislature has directed the Montana Board of Environmental Review (BER) to promulgate rules specifying the general MEPA requirements for DEQ actions. Sections 75-5-103(3) and -201, MCA (BER rulemaking authority under MWQA); Admin. R. M. 17.4.102, .607(2) through (4), .608, and .609. An EA may be in a "standard checklist" form for "routine action with limited environmental impact." Admin. R. M. 17.4.609(2). For other actions, an EA must be in a narrative form "containing a more detailed analysis of specified criteria." Admin. R. M. 17.4.609(2) and (3). In either form, an EA must include, *inter alia*, "an evaluation of the impacts, including cumulative and secondary impacts," on the "physical environment" and on the "human population in the area to be affected by the proposed action." Admin. R. M. 17.4.609(3)(d) and (e); *see also*, §§ 75-1-102(1) and (3)(a), -201(1)(a), -208(11), and -220(5), MCA (*in re* cumulative impacts). Impacts may be adverse, beneficial, or both. Admin. R. M. 17.4.608(2).

¶22 Relevant criteria for evaluation of secondary impacts of the proposed action on the physical environment include, "*where appropriate*[,] terrestrial and aquatic life and habitats; water quality, quantity, and distribution; geology; soil quality, stability, and moisture; vegetation cover, quantity and quality; aesthetics; air quality; unique,

endangered, fragile, or limited environmental resources; historical and archaeological sites; and demands on environmental resources of land, water, air and energy." Admin. R. M. 17.4.609(3)(d) (emphasis added). The term "human environment" includes "biological, physical, social, economic, cultural, and aesthetic factors that interrelate to form the environment." Admin. R. M. 17.4.603(12). Relevant criteria for evaluation of secondary impacts of a proposed action *on the affected human population* include, "*where appropriate*, social structures and mores; cultural uniqueness and diversity; access to and quality of recreational and wilderness activities; local and state tax base and tax revenues; agricultural or industrial production; human health; quantity and distribution of employment; distribution and density of population and housing; demands for government services; industrial and commercial activity; locally adopted environmental plans and goals; and other appropriate social and economic circumstances." Admin. R. M. 17.4.609(3)(e) (emphasis added). By operation of the qualifying language "where appropriate," the laundry lists of secondary impact evaluation criteria in Admin. R. M. 17.4.609(3)(d) and (e), are not mandatory evaluation criteria in every case. Rather, the relevance or propriety of particular criterion, if any, depends on the nature of the proposed state action in each particular case.

¶23 Though it mandates "adequate review" of potential environmental impacts of state actions, MEPA does not specifically define what constitutes a triggering state action. *See*, *e.g.*, §§ 75-1-102(1), -201(1)(b)(iv), -220(5), MCA. *See also*, § 75-1-220(8), MCA (defining "state-sponsored project" and distinguishing state-sponsored projects from projects or activities involving the issuance of a state permit). In the current absence of a

statutory definition, administrative rule defines state "action" to include an "activity involving the issuance of a . . . permit . . . for use or permission to act by the agency." Admin. R. M. 17.4.603(1); *see also*, § 75-1-102(3)(a), MCA (MEPA applies to state agency "decisions"). In this case, the state action triggering MEPA review was the proposed issuance of a DEQ MGWPCS groundwater discharge permit pursuant to Title 75, chapter 5, part 4, MCA, and Admin. R. M. Title 17, chapter 30, part 10.

¶24 For purposes of MEPA, "secondary impact" means "a further impact to the human environment that may be stimulated or induced by or otherwise result from a direct impact of the action." Admin. R. M. 17.4.603(18). MEPA statutes and rules do not define the term "direct impact." By comparison, NEPA does not define a "direct impact" but defines "direct effects" as effects or impacts "*caused by the action* . . . at the same time and place." 40 C.F.R. § 1508.8(a) (emphasis added). In concluding that Admin. R. M. 17.4.609(3)(d) and (e) required DEQ to consider impacts of the construction and operation of the facility beyond those merely related to water quality or the construction of the required wastewater system, the District Court essentially concluded that those other impacts were secondary impacts of the issuance of the permit itself rather than of the permitted activity. In other words, the construction and operation of the retail store would not occur "*but for*" the issuance of the wastewater permit. Thus, the District Court expansively shifted the focus of MEPA on impacts caused by the permitted action to the much broader and more attenuated action and resulting impacts that would not occur "but for" the issuance of the permit.

¶25 The District Court's expansive tail-wagging-the-dog reasoning is backwards as a matter of fact and erroneous as a matter of law. Logically, the permitted wastewater discharge from the facility, and the related construction of its component wastewater treatment system, are not the causes-in-fact of the larger construction and operation of the retail store. Rather, the construction and operation of the retail store are the causes-in-fact of the wastewater discharge and related treatment system. MEPA, like NEPA, requires "a reasonably close causal relationship" between the subject government action and the particular environmental effect. *Department of Transportation v. Public Citizen*, 541 U.S. 752, 767, 124 S. Ct. 2204, 2215 (2004); *Metropolitan Edison Co. v. People Against Nuclear Energy*, 460 U.S. 766, 773, 103 S. Ct. 1556, 1561 (1983) (NEPA requires a "reasonably close causal relationship between a change in the physical environment and the effect at issue"); *see also*, Admin. R. M. 17.4.603(1) (defining state "action" in terms of the permitted activity); 40 C.F.R. § 1508.8(a) (defining "direct effect" as an impact "caused by the action").

¶26 In *Public Citizen*, various unions and environmental groups asserted that a sub-agency of the U.S. Department of Transportation (USDOT) responsible for regulating motor carrier safety violated NEPA by failing to consider potential environmental impacts of increased Mexican commercial truck traffic in the U.S. when it adopted safety regulations applicable to Mexican trucks independently authorized to operate in the U.S. by the controversial North American Free Trade Agreement (NAFTA). *Public Citizen*, 541 U.S. at 758-62, 124 S. Ct. at 2210-12. The sub-agency's EA narrowly focused on environmental impacts of the increase in roadside safety inspections that would result from

its more stringent vehicle safety regulations. *Public Citizen*, 541 U.S. at 761, 124 S. Ct. at 2212. The EA concluded that NEPA did not require the sub-agency to consider the broader environmental impacts of increased Mexican truck traffic in the U.S. because NAFTA, and related presidential action, was the cause of the traffic increase, not the sub-agency's safety regulations. *Public Citizen*, 541 U.S. at 761, 124 S. Ct. at 2212. On review, the U.S. Ninth Circuit Court of Appeals agreed with the environmental groups and unions that the sub-agency EA violated NEPA because, even though NAFTA was the cause of the traffic increase, Mexican trucks could not operate here unless they complied with the sub-agency's safety regulations. *Public Citizen*, 541 U.S. at 761, 124 S. Ct. at 2212.

¶27 On appeal, the United States Supreme Court characterized the Ninth Circuit's expansive construction of NEPA as "a particularly unyielding variation of 'but for' causation, where an agency's action is considered a cause of an environmental effect even when the agency has no authority to prevent the effect." *Public Citizen*, 541 U.S. at 767, 124 S. Ct. at 2215. The Supreme Court held that the Ninth Circuit's expansive "but for" standard of causation was "insufficient to make an agency responsible for a particular effect" because "NEPA requires 'a reasonably close causal relationship' between the environmental effect and the alleged cause." *Public Citizen*, 541 U.S. at 767, 124 S. Ct. at 2215 (quoting *Metropolitan Edison Co.*, 460 U.S. at 773-74, 103 S. Ct. at 1561). By analogy to the "familiar doctrine of proximate cause from tort law," the Court characterized NEPA's more demanding causation standard as drawing a "manageable line between those causal changes that may make an actor responsible for an effect and those that do not." *Public Citizen*, 541 U.S. at 767, 124 S. Ct. at 2215. The Supreme Court thus analyzed the

requisite causal connection triggering NEPA review as a function of NEPA's essential purposes to ensure that (1) agencies adequately consider environmental impacts of their actions and (2) the interested public can monitor agency proceedings and "play a role" in the agency decision-making process and the implementation of the decisions. *Public Citizen*, 541 U.S. at 768, 124 S. Ct. at 2216. The Court emphasized NEPA's essential informational purpose to allow the interested public to "provide input as necessary *to the agency* making the relevant decisions." *Public Citizen*, 541 U.S. at 768, 124 S. Ct. at 2216 (emphasis added).

¶28 Noting that the USDOT motor carrier safety sub-agency had no authority to regulate the increase in Mexican truck traffic caused by NAFTA, the Supreme Court concluded that requiring the sub-agency to consider impacts it could not prevent would not serve NEPA's essential purposes. *Public Citizen*, 541 U.S. at 768-69, 124 S. Ct. at 2216. Thus, the Court held that an "agency cannot be considered a legally relevant 'cause'" of an effect when the agency cannot prevent the effect in the lawful exercise of its limited authority. *Public Citizen*, 541 U.S. at 770, 124 S. Ct. at 2217. *See also*, *Winnebago Tribe of Neb. v. Ray*, 621 F.2d 269, 273 (8th Cir. 1980) (Corps of Engineers' NEPA review authority limited to review of matters within its regulatory jurisdiction notwithstanding that larger power line project was necessarily contingent on water-crossing permit); *Save the Bay, Inc. v. U.S. Army Corps of Engineers*, 610 F.2d 322, 327 (5th Cir. 1980) (Corps of Engineers' NEPA review authority limited to review of matters within its regulatory jurisdiction notwithstanding that larger pipeline project was necessarily contingent on water-crossing permit); *Residents for Sane Trash Solutions v. U.S. Army Corps of Engineers*, 31 F. Supp.

3d 571, 588-90 (S.D. N.Y. 2014) (Corps of Engineers' NEPA review authority limited to review of matters within its regulatory jurisdiction notwithstanding that larger garbage plant project was contingent on harbor dredging permit).

¶29 We reached a similar result under MEPA in *Montana Wilderness Ass'n v. Montana Bd. of Health & Env'tl Sciences*, 171 Mont. 477, 559 P.2d 1157 (1976). In that case, wilderness and environmental protection groups challenged the sufficiency of an EIS issued by DEQ's predecessor agency, the Department of Health and Environmental Services (DHES), incident to issuance of a certificate of approval of a proposed 95-acre subdivision in the Big Sky resort area for compliance with applicable water supply, sewage, and solid waste disposal regulations. *Montana Wilderness Ass'n*, 171 Mont. at 478-82, 559 P.2d at 1158-59. The plaintiffs asserted that DHES violated MEPA by failing to consider the potential environmental impacts of the proposed subdivision beyond the impacts of the water supply, sewage, and solid waste disposal issues within the scope of DHES' regulatory authority. *Montana Wilderness Ass'n*, 171 Mont. at 480-82, 559 P.2d at 1159. Reasoning that the proposed subdivision could not proceed without the requested water supply, sewage, and solid waste disposal regulation compliance certificate, the District Court concluded that MEPA required DHES to consider all potential environmental impacts of the subdivision regardless of the limited scope of its regulatory authority. *Montana Wilderness Ass'n*, 171 Mont. at 482-83, 559 P.2d at 1160. We reversed, holding that the District Court's reasoning erroneously extended DHES "control over subdivisions beyond" the scope of its limited authority to enforce applicable water supply, sewage, and solid waste disposal regulations. *Montana Wilderness Ass'n*, 171

Mont. at 484-85, 559 P.2d at 1161. In so holding, we noted that the Legislature placed general regulatory control over subdivisions in the hands of local governments rather than agencies of the State. *Montana Wilderness Ass'n*, 171 Mont. at 485-86, 559 P.2d at 1161 (citing 1973 Montana Subdivision and Platting Act); *see also*, §§ 75-1-102(1) and -201(1)(b), MCA (MEPA applicable to state agencies only).

¶30 In this case, the District Court concluded that "*Montana Wilderness* is no longer binding authority" on the asserted grounds that it is contrary to MEPA's statutory command that agencies comply with the environmental review requirements "to the fullest extent possible" and similarly "at odds with subsequent NEPA case law requiring agencies to consider reasonably foreseeable indirect effects of an action, even when local or state entities are authorized to make the ultimate decision." However, as pertinent, MEPA remains substantially unchanged and this Court has not overruled or limited *Montana Wilderness* in the 40 years since we issued it. More significantly, while MEPA and NEPA do indeed command agencies to comply with applicable environmental review requirements "to the fullest extent possible," we cannot properly construe MEPA in isolation. MEPA and NEPA must be construed in harmony with the substantive limitations of an agency's applicable regulatory authority. *Public Citizen*, 541 U.S. at 769, 124 S. Ct. at 2217; *Montana Wilderness Ass'n*, 171 Mont. at 484-85, 559 P.2d at 1161; §§ 75-1-102(3)(b) and -104(1), MCA (MEPA provides no additional regulatory authority to an agency and does not affect an agency's specific statutory duties to comply with environmental quality standards). *See also*, §§ 75-1-102(1) and -201(4)(a), MCA (reviewing "agency may not withhold, deny, or impose conditions on any permit or other

authority to act based on" MEPA); *Flint Ridge Development Co. v. Scenic Rivers Ass'n*, 426 U.S. 776, 787, 96 S. Ct. 2430, 2438 (1976) (quoting NEPA legislative history indicating Congressional intent that federal agencies comply with NEPA requirements "'to the fullest extent possible' under their statutory authorizations"); *Calvert Cliffs Coord. Comm. v. U.S. Atomic Energy Comm.*, 449 F.2d 1109, 1115 (D.C. Cir. 1971) (noting NEPA § 102 intent to require agency compliance with NEPA requirements to fullest extent possible within scope of independent agency authority).

¶31 In support of its ruling, the District Court cited *Chelsea Neighborhood Ass'n v. U.S. Postal Service*, 516 F.2d 378 (2nd Cir. 1975) (requiring U.S. Postal Service to consider impacts of contemplated third-party construction of multi-story housing project on top of a contemplated ground floor postal vehicle maintenance facility as a secondary impact of construction of the postal facility); *City of Davis v. Coleman*, 521 F.2d 661, 679-82 (9th Cir. 1975) (requiring USDOT to consider environmental, economic, and social effects of future urban development as indirect impacts of contemplated construction of a new interstate freeway interchange); and *Sierra Club v. Marsh*, 769 F.2d 868 (1st Cir. 1985) (requiring Federal Highway Administration and Corps of Engineers to consider environment impacts of contemplated heavy industrial development as indirect impacts of issuance of federal funding and permits for construction of a cargo ship port and causeway on an undeveloped island adjacent to an industrialized seaport). With some variations and distinctions, the cases cited by the District Court are arguably consistent with Bitterrooters' expansive "but for" theory of MEPA causation insofar as they focused on potential impacts of contemplated future development that would result beyond the agency authority over

the action that triggered NEPA review in the first place. However, the federal Circuit Courts decided those cases long before the U.S. Supreme Court clarified the appropriate standard of NEPA causation in *Public Citizen*. Thus, in light of *Public Citizen*, prior inconsistent lower court decisions in *Chelsea*, *Davis*, and *Sierra Club* are distinguishable and insufficiently persuasive to overrule or limit *Montana Wilderness*.

¶32 In apparent recognition of this problem, Bitterrooters cite *Save Our Sonoran, Inc. (SOS) v. Flowers*, 408 F.3d 1113 (9th Cir. 2005) (requiring Corps of Engineers to consider impacts of private construction of gated community in Arizona desert as secondary impacts of issuance of permit to dredge and fill dry streambeds that collected and carried occasional heavy rain runoff) as additional support for the District Court's ruling. However, *SOS* is factually distinguishable because: (1) the Corps had authority to regulate the filling of dry streambeds in the Arizona desert; (2) dry capillaries to the streambeds inextricably permeated the entirety of the subdivision site; and (3) extensive filling of the entirety of the system on the subdivision site would impact plants and animals dependent on water collected by the system. *SOS*, 408 F.3d at 1118-23. Despite loose dictum that NEPA required the Corps to consider environmental impacts "with no impact on [its] jurisdictional waters," the Ninth Circuit actually recognized *Public Citizen*'s more stringent NEPA causation standard and merely held that the requisite "causal nexus" existed on the unique facts of the case between the Corps' independent regulatory authority and the subject environmental impacts. *SOS*, 408 F.3d at 1121-23. Consequently, *SOS* is

not persuasive authority upon which to distinguish *Public Citizen* or overrule or limit *Montana Wilderness*.[8]

¶33 We hold that MEPA, like NEPA, requires a reasonably close causal relationship between the triggering state action and the subject environmental effect. We reject the unyielding "but for" causation standard asserted by Bitterrooters to the effect that a state action is a cause of an environmental impact regardless of whether the agency, in the lawful exercise of its independent authority, can avoid or mitigate the effect. We hold that, for purposes of MEPA, an agency action is a legal cause of an environmental effect only if the agency can prevent the effect through the lawful exercise of its independent authority. As in *Public Citizen*, requiring a state agency to consider environmental impacts it has no authority to lawfully prevent would not serve MEPA's purposes of ensuring that agencies and the interested public have sufficient information regarding relevant environmental impacts to inform the lawful exercise of agency authority. Sections 75-1-102(3), -104(1), -201(4)(a), MCA. Section 75-1-201(1), MCA, merely requires state

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[8] Eliminating any doubt as to its adherence to *Public Citizen*, the Ninth Circuit more recently observed:

> Even when a major federal action occurs, however, NEPA remains subject to a "rule of reason" that frees agencies from preparing a full EIS on "the environmental impact of an action it could not refuse to perform." *Pub. Citizen*, 541 U.S. at 769, 124 S. Ct. 2204. Thus, "where an agency has no ability to prevent a certain effect due to its limited statutory authority over the relevant actions," the agency "[does] not need to consider the environmental effects arising from" those actions. *Id.* at 770, 124 S. Ct. 2204.

Alaska Wilderness League v. Jewell, 788 F.3d 1212, 1225-26 (9th Cir. 2015) (holding that federal agency approval of oil and gas lease for off-shore drilling on Alaska's Arctic coastline did not trigger NEPA consideration of sufficiency of oil company's oil spill response plan where company otherwise satisfied legal criteria for lease approval within scope of agency authority).

agencies to comply with applicable MEPA requirements "to the fullest extent possible" within the scope of the lawful exercise of their independent authority. *Accord*, §§ 75-1-102(3), -104(1), -201(4)(a), MCA.

¶34 Contrary to the assertions of the dissent in *Montana Wilderness* and Bitterrooters here, our holdings in these cases do not gut MEPA. In accordance with its express language, MEPA still requires state agencies to adequately consider, "to the fullest extent possible" within the scope of their independent authority, all direct and secondary environmental impacts that will likely result from the specific activity conducted or permitted by the agency. The problem for Bitterrooters is that the broader environmental impacts of the larger construction and operation of the retail store are not subject to MEPA review because the Legislature has not placed general land use control in the hands of a state agency. As recognized in *Montana Wilderness* over 40 years ago, the Legislature has, with limited exceptions, placed general land use control beyond the reach of MEPA in the hands of local governments. *See*, Title 76, chapters 1-3, MCA (Subdivision and Platting Act and local zoning enabling Acts). Regardless of MEPA's manifest beneficial purpose and Bitterrooters' otherwise compelling public policy arguments, we simply cannot properly stretch MEPA beyond the limits of its language and stated purpose to fill an environmental review gap created by the Legislature and remaining within its domain to remedy if so inclined.

¶35 In this case, the District Court did not conclude that DEQ failed to adequately consider the secondary environmental impacts, as defined by Admin. R. M. 17.4.609(3)(d) and (e), of the permitted wastewater discharge or related construction of the required

wastewater treatment system. Rather, the District Court concluded that DEQ violated Admin. R. M. 17.4.609(3)(d) and (e) by failing to consider other non-water quality related impacts of the larger construction and operation of the facility as secondary impacts of issuance of the contemplated MWQA wastewater discharge permit. Bitterrooters acknowledge that, had DEQ expanded the scope of its EA beyond its water quality regulatory authority to consider those impacts as demanded, it would have had no authority to deny or limit the requested MWQA wastewater discharge permit to prevent or mitigate those impacts. *See*, §§ 75-1-102(3)(b), -104(1), and -201(4)(a), MCA. Thus, issuance of the requested MWQA wastewater permit was not a legal cause of environmental impacts of the larger construction and operation of the retail facility unrelated to water quality or the construction of the required wastewater treatment system. We hold that the District Court erroneously concluded that DEQ violated MEPA, in contravention of Admin. R. M. 17.4.609(3)(d) and (e), by failing to further consider the environmental impacts of the construction and operation of the facility other than water quality impacts and impacts of the related construction of the required wastewater treatment system.

¶36 *Issue 2: Does MEPA require DEQ to identify the actual owner or operator of a wastewater treatment facility prior to issuing a MWQA groundwater discharge permit?*

¶37 Incident to its MEPA secondary impacts ruling, the District Court further ruled:

> When it reconsiders Foss' application, . . . DEQ must identify the facility operator if the operator's identity has the potential to impact vegetation, aesthetics, human health and safety, industrial and commercial activities, employment, tax revenues, demand for government services, or other environmental resources.

In context, and by comparison of similar language, we infer the unattributed source of the referenced criteria to be Admin. R. M. 17.4.603(12) and .609(3)(d) and (e) (cumulative and secondary impact evaluation criteria). Thus, the District Court essentially ruled that MEPA requires DEQ to identify the contemplated facility operator if the facility operator, in conjunction with the nature of the operation, is predisposed to operate the facility in a manner that has the potential to impact any of the evaluation criteria referenced in Admin. R. M. 17.4.609(3)(d) and (e).

¶38 Landowners assert that the District Court improperly crafted an unnecessary and unworkable test from whole cloth. They further assert that District Court's test is no test at all because it will always require DEQ to speculatively assess potential environmental impacts of a subject activity based on the identity, reputation, and past practices of the contemplated facility owner and operator. Landowners finally assert that the test is unnecessary in any event because all interested parties now know the identity of the contemplated owner and operator of the subject facility, *i.e.*, Walmart, and that Admin. R. M. 17.30.1360 will ultimately require identification, and afford DEQ an opportunity for subsequent review of permit conditions, upon the eventual transfer of the permit to the actual contemplated owner or operator.

¶39 Bitterrooters contrarily assert that the identity of the contemplated owner and operator of a permitted facility is information directly relevant to consideration of the potential environmental impacts of the construction and operation of the facility as a whole. Without citation to any statutory or administrative provision of MEPA or MWQA, Bitterrooters assert that "secretive planning serves no legitimate public policy purpose"

and "leaving the identity of the true applicant a secret violates the letter and spirit of MEPA." DEQ is strangely silent on the issue.

¶40 At the crux of the matter, contrary to Landowners' assertion, the transfer of an agency permit to a new owner or operator generally will "not trigger [MEPA] review." Section 75-1-201(1)(d), MCA (permit transfer triggers MEPA only upon "a material change in terms or conditions" of the permit or as otherwise provided by law). Page 13, Section M, of the subject DEQ-Foss MGWPCS permit expressly provides that "[t]his permit may be automatically transferred" to a new permitee on thirty-day notice to DEQ, payment of applicable fees, and submittal of a written transfer agreement between Foss and the transferee "containing a specific date for transfer of permit responsibility, coverage, and liability between them." Thus, Landowners' assertion that subsequent identification of the actual owner or operator on transfer of the permit will remedy any legitimate environmental concern is somewhat disingenuous given that the contemplated transfer will not likely trigger MEPA review. By the same token, despite the facial appeal of Bitterrooters' concern that non-disclosure of the identity of the contemplated owner or operator of a facility could potentially result in inadequate review of an agency action otherwise subject to MEPA, the concern is unsubstantiated on the factual record in this case. More significantly, Bitterrooters' assertion, and the District Court's resulting ruling, is unsupported by any legal authority other than the general principle that MEPA requires an agency to adequately compile and assess all environmental data relevant to a particular agency action. *See*, *Clark Fork Coal.*, ¶ 47; *Ravalli County Fish & Game Ass'n*, 273 Mont. at 381, 903 P.2d at 1369. Rather than follow the parties down the garden path into the

public policy realm of the Legislature while DEQ stands quietly by, we more fundamentally and appropriately look to the largely overlooked governing requirements for MWQA permits.

¶41 With its limited focus on identification and assessment of relevant environmental impacts of proposed state agency actions, MEPA does not govern what information an application must contain for issuance of an agency permit subject to MEPA review. For the sole purpose of determining the deadlines for agency completion of required environmental review under § 75-1-208(4)(a), MCA, and Admin. R. M. 17.4.620, MEPA defines a "complete application" as:

> an application for a permit, license, or other authorization that contains all data, studies, plans, information, forms, fees, and signatures *required* to be included with the application sufficient *for the agency to approve the application under the applicable statutes and rules*.

Section 75-1-220(3), MCA (emphasis added). As contemplated by the highlighted language of § 75-1-220(3), MCA, MWQA governs what information an application must contain for issuance of an MGWPCS discharge permit. Sections 75-5-401 and -402, MCA (DEQ duty under MWQA to regulate wastewater discharge pursuant to BER rules); Admin. R. M. Title 17, chapter 30, parts 1 and 10 (BER groundwater discharge rules).

¶42 As pertinent, MWQA rules expressly provide that the "*owner or operator* of any proposed source . . . which may discharge pollutants into state ground waters *shall file* a *completed* MGWPCS permit *application*" at least 180 days prior to the proposed operation. Admin. R. M. 17.30.1023(3) (emphasis added). All MGWPCS permit applications "must be submitted on [DEQ] forms . . . and must contain" certain enumerated information "as

deemed necessary by" DEQ. Admin. R. M. 17.30.1023(4). Pursuant to its "one common system for issuing permits for point sources[9] discharging pollutants into state waters," DEQ requires MGWPCS permit applicants to submit applications on DEQ standard Forms 1 and G-W. Admin. R. M. 17.30.1023(4), and (6), .1301(1). *See also*, DEQ Form GW-1 ("this form must be accompanied by DEQ Form 1") and Admin. R. M. 17.30.1304(5) and .1322(1)(a) and (b) ("all applicants shall submit applications" on DEQ standard Form 1 available at http://perma.cc/MD4G-2XPW). For purposes of the applicable MWQA regulations and DEQ Form 1, the term "'owner or operator' means any person *who owns . . ., operates*, *controls*, *or supervises* a point source." Admin. R. M. 17.30.1304(48). MGWPCS rules specifically command that:

> No application will be processed by [DEQ] until *all* of the requested information is supplied and the application is complete. [DEQ] shall make a determination of the completeness of the information with 30 calendar days of receipt of an application.

Admin. R. M. 17.30.1024(1) (emphasis added).

¶43 Here, the subject wastewater permit application identified real estate broker Lee Foss as the applicant and contemplated operator of the proposed retail facility and required wastewater treatment system. However, it is undisputed on the record that Foss was never going to be the actual owner or operator of the facility. He requested the MGWPCS permit to facilitate the sale of the property to a particular third-party known to Foss and

[9] "'Point source' means a discernible, confined, and discrete conveyance, including but not limited to any pipe, ditch, channel, tunnel, conduit, well, discrete fissure, container, rolling stock, or vessel or other floating craft, from which pollutants are or may be discharged." Section 75-5-103(29), MCA; Admin. R. M. 17.30.1304(51).

Landowners who would then construct and operate the facility. Upon sale of the property, Foss would transfer the permit to the intended owner and operator. Thus, Foss was not the owner or operator, or even the contemplated owner or operator, of the subject facility as referenced in Admin. R. M. 17.30.1023(3) and DEQ Form 1.

¶44 DEQ's April 29, 2014 notice of application deficiencies and its Director's subsequent inquiry of Foss, clearly manifest that DEQ was aware of the standard requirement that a MGWPCS application identify the actual owner or operator of the subject facility responsible for the contemplated wastewater discharge. DEQ must "issue, suspend, revoke, modify, or deny permits to discharge sewage . . . into state waters . . . *consistently with* [BER] *rules*." Section 75-5-402(1), MCA (emphasis added). Why or on what basis DEQ acquiesced to Foss' refusal to identify the actual contemplated owner or operator of the facility is unclear from the record on appeal. Regardless, we hold that, as implemented by DEQ Form 1 (Ver. 1.2 – Rev. 5/12), Admin. R. M. 17.30.1023(3) and .1024(1), requires DEQ to identify the actual owner or operator of the contemplated facility for which an applicant seeks the subject wastewater discharge permit.[10] We will affirm a district court ruling that reaches the right result even if for the wrong reason. *Earth Resources Ltd. Partnership v. North Blaine Estates, Inc.*, 1998 MT 254, ¶ 29, 291 Mont. 216, 967 P.2d 376. For the foregoing reasons, we affirm the District Court's summary

[10] Except as otherwise warranted upon balancing of Montana Constitution, Article II, Sections 9 and 10 (public's right to know and right to individual privacy), this information "is a matter of public record and open to public use." Section 75-5-105, MCA.

judgment that DEQ must identify and disclose the actual contemplated owner or operator of the facility for which the applicant seeks the subject wastewater discharge permit.

CONCLUSION

¶45 We hereby reverse the District Court's summary judgment that DEQ violated MEPA, in contravention of Admin. R. M. 17.4.609(3)(d) and (e), by failing to further consider environmental impacts of the construction and operation of the facility other than water quality impacts and impacts of the related construction of the required wastewater treatment system. We further hereby affirm the District Court's summary judgment that DEQ must identify and disclose the actual contemplated owner or operator of the subject retail store facility.

/S/ DIRK M. SANDEFUR

We concur:

/S/ MIKE McGRATH
/S/ LAURIE McKINNON
/S/ MICHAEL E WHEAT
/S/ BETH BAKER
/S/ JAMES JEREMIAH SHEA
/S/ JIM RICE