

BRIEF IN SUPPORT OF MOTION FOR
TEMPORARY RESTRAINING ORDER/PRELIMINARY INJUNCTION

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11 MONTANA FIRST JUDICIAL DISTRICT COURT, LEWIS AND CLARK COUNTY

12 FRIENDS OF THE WILD SWAN, INC.,)
ALLIANCE FOR THE WILD ROCKIES,)
13 INC., AND CLARK FORK-PEND)
ORIELLE COALITION, INC.)

14 Plaintiffs,)

15 vs.)

16 MONTANA DEPARTMENT OF)
17 ENVIRONMENTAL QUALITY AND)
YELLOWSTONE PIPELINE, INC.)

18 Defendants.)
19

Cause No. _____

BRIEF IN SUPPORT OF MOTION
FOR TEMPORARY RESTRAINING
ORDER/PRELIMINARY INJUNCTION

20 This matter arises from the Defendants' efforts to permit and construct a large trench
21 across the Clark Fork River to bury a pipeline. Construction is set to commence Monday,
22 October 25, 1999. The project will move thousands of cubic feet of sediment, damaging water
23 quality and fish habitat. Defendants did not perform any analysis under the Montana
24 Environmental Policy Act, and did not review the degradation under the Water Quality Act. Fish
25 and aquatic life, including the bull trout, protected under the federal Endangered Species Act, are
26 threatened. Plaintiffs Alliance for the Wild Rockies, Clark Fork-Pend Oreille Coalition, and
27 Friends of the Wild Swan seek a temporary restraining order and offer the following brief in
28 support of their motion.

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I. BACKGROUND

Defendant Yellowstone Pipeline Company ("YPL") owns and operates a pipeline which transports gasoline products across western Montana. For much of its length, this pipeline parallels the Clark Fork River, which begins near Butte, Montana, and flows to the Idaho border.

Some time prior to April 1999, YPL decided to undertake a construction project that would involve replacing a section of the pipeline where it crosses beneath the Clark Fork near Turah Bridge, several miles upstream from the confluence of the Clark Fork and Blackfoot Rivers. *See* Exhibit A at 1 (section 310 permit approved 4/12/99). Attached to this brief as Exhibit A are copies of various materials from state, federal, and local agencies concerning the proposed project.¹

As proposed by YPL, the project will entail the excavation of a 450-foot-long, 25-foot-wide trench across the channel of the river, so that the new section of pipe can be buried beneath the river bed. *Id.* At 6. YPL intends this to be a "wet crossing" of the river, meaning that excavation will occur in the water, while the river is flowing, rather than diverting the river around the site for the duration of the project. *Id.* The trenching activity, which will involve the removal of over 2200 cubic yards of sediment and gravel, will churn up a considerable amount of sediment which will become suspended in the river and be transported downstream. *Id.* at 1, 6. Ordinarily, any such release of sediment has the potential to cause serious impacts to fish and wildlife, both directly and through alteration of habitat components such as stream gravels. *See* Aff. Of Dr. Vicki Watson. In the case of the upper Clark Fork, however, sediment release creates an additional concern, because the river bottom sediments contain concentrations of heavy metals which have accumulated due to many years of mining activity in the Clark Fork basin.

¹Plaintiffs have included the U.S. Fish and Wildlife Service's Biological Assessment of the impacts of the project on bull trout because it is the only document that describes the project. This document is **not** an environmental assessment under the Montana Environmental Policy Act. Its purpose is to determine whether the project will jeopardize (i.e. cause extinction) of the species. Though Plaintiffs dispute the adequacy of this document, it is not subject to challenge in this action; such a challenge would have to be brought against the federal government in federal court. It is provided for informational purposes only.

1 *Id.*; Exhibit A at 1. These metals are toxic to fish and other aquatic life which make up the food
2 chain on which the biologic community of the river depends. *Id.*

3 The release of sediment from the trenching activity will cause a violation of Montana's
4 normal numeric standard for turbidity. *See* Exhibit A at 14. For this reason, it was necessary for
5 YPL to apply for an authorization from the Department of Environmental Quality ("DEQ") to
6 exceed that standard for the duration of the project. *Id.* The Department is empowered to grant
7 such an authorization under MCA § 75-5-318, only if it finds that there are "no reasonable
8 alternatives" to the proposed project that would meet the ordinary numeric standard. MCA § 75-
9 5-318(2).

10 DEQ issued an authorization for YPL to exceed the turbidity standard in a two-page letter
11 dated September 14, 1999. Exhibit A at 14-15. The letter contains no analysis whatsoever of
12 any alternative means of reconstructing the pipeline -- for example creating an overhead
13 crossing, hanging the pipeline from the nearby Turah Bridge, or drilling a tunnel underneath the
14 river -- as opposed to the trenching method proposed by YPL. *Id.* Moreover, DEQ made no
15 attempt to prepare an Environmental Assessment or Environmental Impact Statement analyzing
16 such alternatives, and did not solicit comments from the public on these or any other issues
17 related to the project. Similarly, there is no evidence that DEQ made any effort to perform a
18 nondegradation review of the project pursuant to MCA 75-5-303(3).

19 Construction on the project adjacent to the river channel has already begun. Trenching in
20 the actual river is slated to begin on Monday, October 25, 1999.

21 II. STANDARDS FOR JUDICIAL REVIEW

22 A. PRELIMINARY INJUNCTION STANDARDS

23 Section 27-19-201, MCA, sets forth the standards for issuance of a preliminary
24 injunction. A preliminary injunction may be granted:

- 25 (1) when it appears that the applicant is entitled to the relief demanded and the relief or
26 any part of the relief consists in restraining the commission or continuance of the act
27 complained of, either for a limited period or perpetually;
- 27 (2) when it appears that the commission or continuance of some act during the litigation
28 would produce a great or irreparable injury to the applicant;
- 28 (3) when it appears during the litigation that the adverse party is doing or threatens or is
about to do, or is procuring or suffering to be done some act in violation of the applicant's

1 rights, respecting the subject matter of the action, and tending to render the judgment
2 ineffectual.

3 The subsections of the statute are disjunctive. As such, findings to satisfy one subsection
4 are sufficient. *Stark v. Borner*, 226 Mont. 356, 735 P.2d 314 (1987).

5 The purpose of a preliminary injunction is to prevent irreparable harm and to preserve the
6 status quo pending resolution on the merits. The opinion in *Porter v. K & S Partnership*, 192
7 Mont. 175, 181, 627 P.2d 836 (1981), is instructive:

8 The allowance of a preliminary injunction is vested in the sound legal discretion of the
9 District Court, with the exercise of which the Supreme Court will not interfere except in
10 instances of manifest abuse. *Atkinson v. Roosevelt County*, 66 Mont. 411,
11 421, 214 P. 74, 76-77 (1923); *Parsons v. Mussigbrod*, 59 Mont. 336, 340, 196 P. 528,
12 529 (1921). An applicant for a preliminary injunction must establish a prima facie case,
or show that it is at least doubtful whether or not he will suffer irreparable injury before
his rights can be fully litigated. If either showing is made, then courts are inclined to
issue the preliminary injunction to preserve the status quo pending trial. *Rea Bros. Sheep
Co. v. Rudi*, 46 Mont. 149, 160, 127 P. 85, 87 (1912).

13 Here Plaintiffs establish that they will likely prevail on the merits, that the threat posed by a
14 massive excavation in the stream channel of the Clark Fork may cause irreparable injury, and
15 that the only way to preserve the status quo is for this court to issue a preliminary injunction.

16 Furthermore, in cases under the National Environmental Policy Act (NEPA), MEPA's
17 nearly identical federal counterpart,² it is firmly established that a preliminary injunction is
18 appropriate when NEPA is violated. *See e.g., Sierra Club v. Marsh*, 872 F.2d 497 (1st Cir. 1989)
19 [A]lleged violations of NEPA are themselves irreparable since the purpose of NEPA is to ensure
20 that the agency and the public is aware of consequences of a project **before construction**
21 **commences.**” *Provo River Coalition v. Pena*, 925 F. Supp. 1518, 1524 (D.Ut. 1996) (emphasis
22 added), citing *Marsh*, supra; *Sierra Club v. Hodel*, 848 F.2d 1068, 1097 (10th Cir. 1988). This
23 “procedural harm” is irreparable because NEPA’s required analysis and decision-making
24 structure is rendered meaningless if the project proceeds while the case is being litigated.

25
26 ² The Montana Supreme Court opinion in *Kadillak v. The Anaconda Co.* (1979),
27 184 Mont. 127, 602 P.2d 147 notes the following rule of construction in MEPA
28 cases: because MEPA is modeled after NEPA, it is appropriate to look to the
federal interpretation of NEPA. Federal case law is therefore persuasive authority.

1 In addition to procedural harm, damage to the environment inevitably poses irreparable
2 harm. The United States Supreme Court has enunciated a standard for irreparable harm and
3 injunctive relief in cases involving environmental protection: "[I]f such injury is sufficiently
4 likely, therefore, the balance of harms will usually favor the issuance of an injunction to protect
5 the environment." *Amoco Production Co. v. Village of Gambell*, 480 U.S. 531, 545 (1987).
6 While irreparable damage may not be automatically presumed in these cases, "[e]nvironmental
7 injury, by its nature, can seldom be adequately remedied by money damages," and therefore
8 injunctive relief is usually appropriate. *Id.*

9 III. ARGUMENT

10 A. There is a Substantial Likelihood That Plaintiffs Will Succeed on the Merits.

11 1. Defendants' failure to subject the project to nondegradation review violates MCA 75- 12 5-303 and the Montana Constitution.

13 Montana's nondegradation policy provides that DEQ may not authorize the degradation
14 of high-quality waters without undergoing a rigorous nondegradation review process. *See* MCA
15 § 75-5-303(1), (2) and (3). This process requires a showing, *inter alia*, that there are *no*
16 technologically, economically, and environmentally feasible alternatives to the proposed project
17 that would avoid degradation. § 75-5-301(3)(a).

18 In the present case, the proposed project would indisputably result in the release of
19 pollutants into the river -- including both sediment and toxic metals -- and is therefore is plainly
20 subject to the requirement of nondegradation review. *Id.* The only thing that would preclude the
21 necessity of nondegradation review is the exemption found at § 75-5-317(q), which purports to
22 create an exemption to the nondegradation review policy for any "stream-related construction
23 project" that will result in "temporary changes to water quality but [does] not result in long-term
24 detrimental effects" and has been "authorized pursuant to 75-5-318". *See* MCA § 75-5-317(q).
25 However, in light of a Montana Supreme Court decision handed down only two days ago,
26 § 317(q) is clearly unconstitutional.

27 In *Montana Environmental Information Center v. DEQ*, 1999 MT 248, (copy attached)
28 the Supreme Court addressed the constitutionality of MCA 75-5-317(j), another broad

1 categorical exemption from nondegradation review very similar to the one at issue here. The
2 court found that, absent a showing of a compelling state interest, that section violated the
3 Montana constitutional right to a “clean and healthful environment”. *See id.* The court began its
4 reasoning by declaring that the “right to a clean and healthful environment is a fundamental right
5 because it is guaranteed by the Declaration of Rights...”. *Id.* at ¶ 63. As such, the Court found
6 that “...any statute or rule which implicates the right must be strictly scrutinized and can only
7 survive scrutiny if the State establishes a compelling state interest and that its action is closely
8 tailored to effectuate that interest and is the least onerous path that can be taken to achieve the
9 State’s objective.”³ *Id.* at ¶ 64. Based upon this analysis, the *MEIC* Court stated “to the extent
10 that [the exemption] arbitrarily excludes certain ‘activities’ from nondegradation review without
11 regard to the nature or volume of the substances being discharged, it violates those
12 environmental rights guaranteed by Article II, Section 3 and Article IX, Section 1 of the
13 Montana Constitution. *Id.*, at ¶ 80.

14 Crucially, the *MEIC* Court found that the language of the Constitution is both
15 “anticipatory and preventative” with regard to potential pollution. *Id.* At ¶ 77. The court stated:

16 Our Constitution does not require dead fish floating on the surface of our state’s rivers
17 and streams before its farsighted environmental protections can be invoked. *Id.*

18 In *MEIC*, therefore, the Court found that the **potential** for an environmental harm was sufficient
19 to implicate the constitutional right to clean and healthful environment.

20 In the present case, the categorical exemption at issue, § -317(q), purports to exempt *all*
21 stream-related construction projects – regardless of the quantity of pollutants they release -- from
22 nondegradation review, so long as the department approves an exemption from the turbidity
23 standard under § -318.⁴ This categorical exemption is certainly no less sweeping and arbitrary

24 ³ The Court also noted that Article II, Section 3 and Article IX, Section 1 are
25 interdependent, and that any state or private action which implicates either
26 provision, “must be scrutinized consistently”. *Id.* at ¶ 64.

27 ⁴ The analysis required by § -318 addresses only one water quality parameter --
28 turbidity -- and requires only a finding that there are no “reasonable” alternatives
that would avoid the need for an exemption to the turbidity standard. Thus, that
section is a far cry from the more-stringent non-degradation review, which

1 than the well-test exemption at issue in *MEIC*, which is contained in the same statute. Indeed,
2 the harm caused by the project in this case – which will indisputably cause a violation of the
3 numeric water quality standard for turbidity – is, if anything, more clear-cut than the harm in
4 *MEIC*, where the releases of groundwater from pump tests had no measurable effect on the
5 quality of the surface waters of the Blackfoot River. *See MEIC* at paragraph 16. Since the harm
6 in *MEIC* was sufficient to trigger strict scrutiny of the statute on an “as-applied” basis, there can
7 be no doubt that the release of a massive sediment plume in the present case also rises to this
8 level. Unless it can be shown that the Legislature had a compelling state interest in exempting
9 all stream-related construction projects from nondegradation review – an exceedingly difficult
10 standard to meet – the statute is unconstitutional. *See id.* at paragraphs 78-81.

11 In the absence of MCA § 75-5-317(q), which is now plainly unconstitutional, nothing
12 insulates the pipeline project from the requirements of nondegradation review. Such review is
13 plainly required under MCA § 75-5-303. For these reasons, Plaintiffs are likely to prevail on this
14 claim. The Court should therefore grant a preliminary injunction on this ground alone.

15 2. Defendants violated MEPA in determining that this action was not subject to MEPA
16 regulatory provisions.

17 Because of intense concern over the manner in which the federal government affected our
18 nation's environmental quality, Congress passed the National Environmental Policy Act, or
19 NEPA, in 1969. NEPA was designed to give "all agencies a mandate, a responsibility, and a
20 meaningful tool to insure that the quality of America's future environment is as good or better
21 than today's." 115 Cong. Rec. 29055 through 29056 (1969) (remarks of Senator Jackson). That
22 tool -- preparation of an environmental impact statement -- requires the government to assess
23 impacts and inform the public about those impacts before environmentally destructive activities
24 occur.

25 The Montana legislature had similar intentions in enacting the Montana Environmental
26 Policy Act, or MEPA, which was adopted "whole cloth" from NEPA just two years later.

27 _____
28 requires a showing of absolute technical infeasibility before degradation may be
allowed. *See* § 75-5-303.

1 MEPA's profound purpose is stated in the Act:

2 to promote efforts which will prevent or eliminate damage to the environment and
3 biosphere and stimulate the health and welfare of man, to enrich the ecological
4 systems and natural resources important to the state...

5 75-1-102 M.C.A. (1993). The importance of MEPA is further underscored by its relationship to
6 Montana's unique Constitutional provisions for environmental protection. Mont. Const. Article
7 II Sec. 3; Article IX Sec. 1., (1972).

8 Under MEPA, the duty of environmental protection is carried forth through preparation
9 of an Environmental Impact Statement (EIS). This duty is non-discretionary; an EIS must be
10 prepared for state actions that significantly affect the environment. 75-1-201 (1)(b)(iii) M.C.A.
11 (1999). The legislature directed state agencies to comply with this mandate "**to the fullest
12 extent possible**". 75-1-201 (1) M.C.A. (1999) (emphasis added). The Montana Supreme Court
13 requires state agencies to strictly adhere to MEPA's procedural prerequisites. *Ravalli County
14 Fish and Game Assoc. v. Department of State Lands*, 273 Mont. 371, 377, 903 P.2d 1361 (1995).

15 MEPA assures that, by following the procedures that it prescribes, "agencies will be fully
16 aware of the impacts of their decisions when they make them." *Montana Wilderness Assoc. v.
17 Department of Natural Resources*, 200 Mont. 11, 21, 648 P.2d 734 (1982). In addition to
18 promoting informed governmental decision-making, MEPA is designed to "make available to the
19 public information on the proposed project's environmental impact and to encourage public
20 participation in the development of that information." *Montana Wilderness*, supra, 200 Mont. at
21 24. (Emphasis added). MEPA alone does not prevent the state from taking actions that will
22 adversely impact the environment. What MEPA requires -- indeed absolutely requires -- is that
23 the agency and the public be fully informed about all facets of those environmental impacts
24 **before the proposed action occurs**. As the U.S. Supreme Court opined;

25 NEPA ensures that important effects will not be overlooked or underestimated only to be
26 discovered after resources have been committed or the die otherwise cast.

27 *Robertson v. Methow Valley*, 490 U.S. 332 (1989).

28 The Department has enacted regulations to aid in its fulfillment of MEPA's obligations.
See generally A.R.M. 17.4.601 et seq. These regulations are binding upon the agency and are

1 judicially enforceable. *Ravalli County, supra*. Under the Department's regulations, if the
2 agency does not prepare an EIS when state action is proposed, it generally must prepare an
3 Environmental Assessment to see if the impacts of a project are significant and require a full EIS.
4 A.R.M. 17.4.608.

5 Whether the agency prepares an EA or an EIS, it is **required** to assess the significance of
6 the environmental impacts. This duty is unequivocal: "In order to implement 75-1-201 MCA,
7 the agency **shall** determine the significance of the impacts associated with a proposed action."
8 ARM 17.4.608 (1) (emphasis added). The duty to assess the significance of impacts is
9 "mandatory." *Ravalli County, supra*, 273 Mont. at 380. In addition to assessing the significance
10 of the impacts of a proposed action, the agency is required to consider "reasonable alternatives"
11 to the proposed action. *See e.g.* 17.4.608 (2) (f).

12 The term "state actions" is defined very broadly to include any "entitlement for use or
13 permission to act by the agency, either singly or in combination with other state agencies."
14 ARM 17.4.603(1). In the case at bar, DEQ is required to comply with MEPA because there is
15 state action - the grant of an exemption of a water quality standard to a private party - that may
16 have significant environmental impacts. But for DEQ's action, the excavation could not occur.
17 Therefore MEPA applies and the Department must prepare an EA - or if the impacts may be
18 significant, a full EIS.

19 Though DEQ granted an exemption to Yellowstone that allows the excavation to occur,
20 DEQ did not prepare an EIS or an EA to address the environmental impacts of constructing a
21 400-500 foot long trench in the middle of the Clark Fork River. It is undeniable that a project of
22 this magnitude will have some environmental consequences. The Clark Fork is inhabited by bull
23 trout, a species that is federally protected under the Endangered Species Act, as well as rainbow,
24 cutthroat and brown trout. The release of sediment from the excavation may cause significant
25 impacts to these fish. Affidavit of Vicki Watson. Accumulations of sediment can destroy fish
26 habitat by filling in the gravel where young fish reside, and by filling in deep pools that provide
27 essential over-wintering habitat. The impacts in this case are exacerbated by the fact that the
28 sediment in the Clark Fork River is laden with heavy metals, which are deleterious to fish. These

1 metals may be released when the sediment is disturbed, posing a potentially lethal threat to the
2 aquatic ecosystem of the Clark Fork. Affidavit of Vicki Watson. It is important to understand
3 that Plaintiffs need not prove that significant impacts will occur, only that "substantial questions
4 are raised." *Ravalli County, supra*, 273 Mont. at 381 quoting with approval *Foundation for*
5 *North American Sheep v. U.S. Dept. of Agriculture*, 681 F.2d 1172, 1178 (9th Cir. 1982).

6 In addition to not assessing the impacts of the project under MEPA, DEQ did not provide
7 an on-the-record evaluation of alternatives to excavating the massive in-stream trench. Clearly
8 such alternatives exist. Yellowstone has constructed above the river pipeline crossings just a few
9 miles from the proposed excavation. There may be other, less harmful alternatives.

10 Consideration of alternatives is at the heart of the MEPA process. The Seventh Circuit summed
11 up NEPA's requirement to consider all reasonable alternatives: "If NEPA mandates anything, it
12 mandates this: a federal agency cannot ram through a project before first weighing the pros and
13 cons of the alternatives." *Simmons v. Army Corps of Engineers*, 120 F.3d 664, 669 (7th Cir.
14 1998). Yet that is precisely what occurred here; DEQ has attempted to "ram through" the
15 project without weighing the pros and cons of various alternatives in a MEPA document.

16 Though Defendants may argue that they examined the impacts of the project, none of the
17 review has been the subject of a public process. As the Montana Court noted in *Montana*
18 *Wilderness Assoc. v. Department of Natural Resources*, 200 Mont. 11, 24, 648 P.2d 734. (1982),
19 in addition to promoting informed governmental decision-making, MEPA is designed to "make
20 available to the public information on the proposed project's environmental impact and to
21 encourage public participation in the development of that information." Because DEQ failed to
22 conduct a MEPA assessment, the public was left out of the process until after the decision to
23 allow the excavation was made.

24 B. Plaintiffs Will Suffer Irreparable Harm Absent an Injunction.

25 Plaintiffs seek a preliminary injunction to prevent the proposed project from moving
26 forward in contravention of the Montana Water Quality Act, the Montana Constitution and
27 MEPA. While Plaintiffs believe they will prevail on the merits, and thereby satisfy the
28 requirements of MCA § 27-1-201, if the project moves forward, they will suffer irreparable harm

1 as well. Thus under the second subsection of 27-1-201, Plaintiffs are entitled to a preliminary
2 injunction.

3 As the Supreme Court noted, environmental damage is often irreparable. While
4 Defendants will argue that any harm caused by the excavation will be temporary, the impacts
5 have never been studied in depth. Plaintiffs have not uncovered any calculations of the amount
6 of sediment that will be permanently added to the river, or the concentration of toxic metals that
7 may be released. It is beyond dispute that federally protected fish - bull trout - inhabit the Clark
8 Fork. It is beyond dispute that increased sediment and increased concentrations of heavy metals
9 can harm bull trout and all other salmonids and their habitat. Until DEQ undertakes the required
10 MEPA and non-degradation analysis, DEQ cannot demonstrate that its actions will not cause
11 such harm. That is why it is essential to preserve the status quo until the matter can be resolved
12 on the merits -- a policy long recognized by the Montana Supreme Court as favoring a
13 preliminary injunction. *Porter v. K & S Partnership*, 192 Mont. 175, 181, 627 P.2d 836 (1981).

14 The harm to Plaintiffs' interests in the integrity of the public decision-making process will
15 also be irreparably harmed if the project proceeds. If Plaintiffs prevail on the merits, compliance
16 with the nondegradation review process and MEPA will have little meaning if construction is
17 underway. "[A]lleged violations of NEPA are themselves irreparable since the purpose of NEPA
18 is to ensure that the agency and the public is aware of consequences of a project **before**
19 **construction commences.**" *Provo River Coalition v. Pena*, 925 F. Supp. 1518, 1524 (D.UT.
20 1996) citing *Marsh*, supra; (emphasis added). Indeed, the Ninth Circuit has repeatedly held that
21 an injunction is the appropriate remedy for a violation of NEPA's procedural requirements
22 absent "unusual circumstances". *Forest Conservation Council v. United States Forest Service*,
23 66 F.3d 1489, 1496 (9th Cir. 1995) [quoting *Thomas v. Peterson*, 753 F.2d 754, 764 (9th Cir.
24 1985)].

25 Defendants may argue that the project has already been approved and that further delay
26 will prejudice the project. That an agency has, or is about to, enter into a particular project is not
27 grounds for denying a preliminary injunction against the project. Monetary loss from delay of
28 the project or potential damages from a contract claim is not grounds to deny an injunction when

1 valid NEPA claims are alleged. *Puerto Rico Conservation Foundation v. Larson*, 797 F.Supp.
2 1066, 1072 (D. P.R. 1992). The "loss of the opportunity" argument has been consistently
3 rejected in the federal courts. As the First Circuit observed,

4 The difficulty in stopping a bureaucratic steamroller, once started, still seems to us, after
5 reading *Amoco Production Co. v. Village of Gambell*, 480 U.S. 531 (1987) a perfectly
6 proper factor for a district court to take into account in assessing that risk (implied by a
7 violation of NEPA) on a motion for a preliminary injunction.

8 *Sierra Club v. Marsh*, 872 F.2d 497, 504 (1st Cir. 1989).

9 Plaintiffs seek to stop the bureaucratic steamroller before it begins by enjoining the
10 project to preserve the status quo while this Court makes a reasoned decision on the merits.

11 C. If the Excavation is Not Enjoined, a Future Judgment Will be Ineffective.

12 Under Section 27-19-201, MCA, a preliminary injunction may be granted:

13 (3) when it appears during the litigation that the adverse party is doing or threatens or is
14 about to do, or is procuring or suffering to be done some act in violation of the applicant's
15 rights, respecting the subject matter of the action, and tending to render the judgment
16 ineffectual.

17 Here it is beyond dispute that if the excavation proceeds as planned next week, any future
18 judgment will be largely ineffective. Plaintiffs seek both a non-degradation review under the
19 Montana Water Quality Act and compliance with MEPA. If the action proceeds, there will be
20 little value in the Court ordering a review of the project. Such an exercise will be largely
21 meaningless given the harm the review is intended to prevent will have already occurred.

22 Because the tests for granting an injunction under 27-19-201 are disjunctive, *Stark v.*
23 *Borner, supra*, the fact that the final judgment will be rendered largely ineffective if the
24 excavation proceeds is an independent ground for issuing a preliminary injunction.

25 Dated this 22nd day of October, 1999.

26 _____
27 Jack R. Tuholske

28 _____
29 Matthew O. Clifford
30 Attorneys for the Plaintiffs

31 Michael D. Wood
32 Attorney for the Alliance for the Wild Rockies

COMPLAINT

Pages missing from original.

1 to Mont. Code Ann § 75-5-318, which allows it to authorize short-term narrative water quality
2 standards for turbidity related to construction activities. Without this authorization from DEQ,
3 the construction project could not proceed.

4 10. Prior to its decision to authorize the project, DEQ did not send notices to the
5 groups or individuals known to have an interest in the environment of the project area, describing
6 the proposed project and the actions being contemplated by the agency.

7 11. Prior to authorizing the project, DEQ did not perform the nondegradation review
8 required by Mont. Code Ann. § 75-5-303(3).

9 12. Prior to authorizing the project, DEQ did not analyze and disclose the potential
10 effects of the project in either an Environmental Assessment ("EA") or Environmental Impact
11 Statement ("EIS").

12 13. If implemented, the project has the potential to cause significant impacts to the
13 environment of the Clark Fork River, including harm to fish, macroinvertebrates, and other
14 organisms which live in the river.

15 14. In-stream construction on the project is scheduled to begin on Monday, October
16 25, 1999.

17 **COUNT ONE**
18 **(Failure to Perform Nondegradation Review Under MCA 75-5-303)**

19 15. Plaintiffs re-allege paragraphs 1- 14, set forth above.

20 16. The Clark Fork River in the area of the proposed project is classified as a high-
21 quality water body pursuant to Mont. Code Ann. § 75-5-301.

22 17. Mont. Code Ann. § 75-5-303 provides that DEQ may not authorize the
23 degradation of high-quality waters without undergoing the review process set forth in § 75-5-
24 303(3).

25 18. By authorizing the release of pollutants into the river without conducting a
26 nondegradation review, DEQ violated Mont. Code Ann. § 75-5-303(3).

27 19. Mont. Code Ann. § 75-5-317(q), which purports to exempt certain in-stream

1 construction projects from nondegradation review, violates the Montana Constitution.

2 **COUNT TWO**
3 **(Violation of MEPA)**

4 20. Plaintiffs re-allege paragraphs 1- 14, set forth above.

5 21. Mont. Code Ann. § 75-5-201(1)(b) requires state agencies to analyze and disclose
6 to the public, in an Environmental Impact Statement ("EIS"), the environmental effects of any
7 state actions which have a significant effect on the quality of the environment.

8 22. A.R.M. § 17.4.607 requires DEQ to prepare an Environmental Assessment ("EA")
9 which analyzes and disclose the potential effects of actions which may have a significant effect on
10 the quality of the environment.

11 23. DEQ's decision to issue YPL an exemption for the turbidity standard for the
12 project is a state action with the potential to cause significant effects to the environment of the
13 Clark Fork River.

14 24. DEQ's authorization of the pipeline construction project without preparing an EA
15 or EIS was arbitrary, capricious, or otherwise not in compliance with law.

16 **REQUESTED RELIEF**

17 Based on the foregoing, plaintiffs request that the Court grant the following relief:

18 1. Enter a judgment declaring DEQ's authorization of the project to be contrary to
19 MEPA and the nondegradation provisions of the Water Quality Act.

20 2. Declare the short-term water quality standard issued by DEQ to be null and void.

21 3. Enjoin defendant YPL from proceeding with any further construction on the
22 project until such a time as defendants comply with the law.

23 4. Grant further relief as the Court deems just.

STIPULATION

MONTANA FIRST JUDICIAL DISTRICT COURT, LEWIS & CLARK COUNTY

FRIENDS OF THE WILD SWAN, INC.,
ALLIANCE FOR THE WILD ROCKIES,
INC., AND CLARK FORK-PEND OREILLE
COALITION, INC.

Plaintiffs,

vs.

MONTANA DEPARTMENT OF
ENVIRONMENTAL QUALITY AND
YELLOWSTONE PIPELINE, INC.

Defendants.

Case No.: BDV 1999-670

STIPULATION

WHEREAS, in this action, Plaintiffs have challenged the decision of Defendant Montana Department of Environmental Quality ("Department") to allow Defendant Yellowstone Pipeline Company ("YPL") to replace an existing petroleum products pipeline crossing in the Clark Fork River (the "Project"). On September 14, 1999, the Department authorized a short-term water quality standard for the Project pursuant to § 75-5-318, MCA. Plaintiffs have alleged that the Department's authorization under § 75-5-318, MCA, failed to comply with the Montana Environmental Policy Act (MEPA) and associated administrative rules ("MEPA claim"). Plaintiffs also have alleged that the Department was required to conduct a nondegradation review for the Project pursuant to § 75-5-303, MCA, and that § 75-5-317(q), MCA, which exempts

1 short-term water quality authorizations from nondegradation review, is unconstitutional
2 ("Constitutional nondegradation claim").

3 The Department and YPL acknowledge and agree that YPL has acted reasonably and in
4 good faith in seeking the necessary permits and applications which it was required to obtain as a
5 condition precedent for conducting the Project. The Department and YPL also acknowledge and
6 agree that the Department has acted reasonably and in good faith in issuing the authorization for
7 this Project, consistent with past practice of not requiring a MEPA review.

8 The Plaintiffs, the Department, and YPL (hereinafter referred to collectively as the
9 "Parties") acknowledge that it is desirable to resolve the Plaintiffs' MEPA claim without costly
10 and prolonged litigation.

11 NOW THEREFORE the Parties hereby stipulate and agree to settle this matter as
12 follows:

13 1. The Department agrees that, under the circumstances of this case, MEPA requires
14 that an environmental assessment (EA) be conducted for the Department's proposed
15 authorization, pursuant to § 75-5-318, MCA, of short-term water quality standards. The
16 Department shall conduct an EA for this Project pursuant to the Montana Environmental Policy
17 Act, Title 75, Chapter 1, Parts 1 through 3, and the Department's MEPA rules at ARM Title 17,
18 Chapter 4, Subchapter 6. The Parties agree that the EA shall utilize the standard checklist
19 format, with supplemental information attached as appropriate, for the purpose of evaluating
20 whether there are any significant impacts of the Department's authorization on the human
21 environment. The EA shall also evaluate reasonable alternatives.

22 2. Prior to the Department's preparation of an EA, the Parties agree to meet for the
23 purpose of discussing the scope of the impacts and alternatives to be addressed in the EA. The
24 Parties agree that the purpose of the scoping meeting is to prevent, to the extent possible,
25 subsequent challenges to adequacy of the EA by any of the Parties.

1 3. After the scoping meeting, the Department shall prepare an EA for the
2 Department's proposed authorization of the Project. The Department shall issue public notice of
3 the availability of the EA not later than December 3, 1999. The public notice shall give a
4 description of the Project and the Department's proposed action, shall provide for a 15-calendar
5 day public comment period, and shall provide for a public comment hearing to be held in
6 Missoula. Public notice shall consist of an advertisement or legal notice in three newspapers of
7 general circulation in Montana, including the Missoulian. The Department shall make copies of
8 the EA available to the Plaintiffs and YPL and to any other persons upon request. The Parties
9 agree that none of them shall seek any extension of the 15-day comment period for any reason
10 whatsoever nor shall any of the Parties encourage, recommend, or cause others to request any
11 such extension.

12 4. The Department shall review and consider the public comments received on the
13 EA and shall subsequently issue a revised EA. The Department shall use best efforts to issue a
14 revised EA within 30 days of the close of the public comment period, and shall issue the revised
15 EA not later than January 31, 2000. The revised EA must contain any and all changes that the
16 Department considers appropriate after its consideration of public comment. Public notice of
17 availability of the revised EA is not required, but the Department shall provide the revised EA to
18 the Plaintiffs and YPL as soon as it is available, and shall provide the revised EA to any other
19 person on request.

20 5. The Department agrees to conduct environmental review under MEPA for all
21 future short-term water quality authorizations issued pursuant to § 75-5-318, MCA. The extent
22 and nature of such MEPA review shall be determined by the Department consistent with the
23 terms of MEPA and the Department's administrative MEPA rules. Plaintiffs and YPL
24 acknowledge that, for some projects, MEPA exemptions may preclude the necessity for
25 performing an EA. Plaintiffs and YPL also agree that MEPA environmental review may be

1 accomplished, in appropriate cases, through a programmatic review, a categorical exclusion
2 pursuant to administrative rule, or by interagency EAs.

3 6. The Department agrees to issue public notice and to allow for public comment on
4 the MEPA environmental review for future short-term water quality authorizations relating to
5 pipeline crossings of the Clark Fork River.

6 7. In consideration of the Parties' compliance with the terms of this Stipulation:

7 a. The Parties agree that the show-cause hearing in this matter, scheduled for
8 Tuesday, November 16, 1999, shall be vacated:

9 b. The Department agrees to withdraw its September 14, 1999, authorization for
10 short-term water quality standards for the Project until after the completion of the EA process as
11 provided herein;

12 c. YPL agrees to not proceed with the Project until such time as the Department
13 reissues its authorization;

14 d. Plaintiffs agree to dismiss their MEPA claim without prejudice concurrently with
15 the filing of this Stipulation; and

16 e. Plaintiffs agree to not seek an injunction of the Project based upon the
17 Constitutional nondegradation claim set out in their Complaint.

18 8. Plaintiffs and YPL reserve any and all rights that may exist under applicable law
19 to challenge the adequacy of the EA issued pursuant to this Stipulation.

20 9. The Plaintiffs reserve their rights to pursue, in this or another action, a declaratory
21 judgment on the Constitutional nondegradation claim. The Department and YPL agree to waive
22 any defense in this action based on the grounds that the Constitutional nondegradation claim is
23 moot.

24 10. In order to minimize the Project delay resulting from this Stipulation, the Parties
25 agree to the following time schedule:

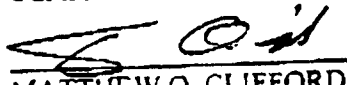
1 a. The Department shall issue an EA on or before December 3, 1999;

2 b. The Department shall allow fifteen (15) calendar days from the date of
3 publication of the notice described in Paragraph 3 for the purpose of receiving public comment
4 on the EA;

5 c. The Department shall use best efforts to issue a revised EA within 30 days of the
6 close of the public comment period, and shall issue the revised EA not later than January 31,
7 2000.

8 11. Upon notice from YPL, which YPL agrees to provide, the Plaintiffs also agree to
9 meet with YPL in the early phases of future YPL stream or river crossing projects. The purpose
10 of such meetings is to promote mutual understanding of the concerns of YPL and the Plaintiffs
11 with respect to such proposed activities and to avoid the necessity of litigation or other judicial or
12 administrative challenges to such activities whenever possible.

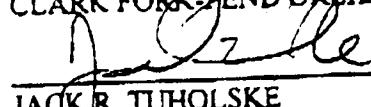
FRIENDS OF THE WILD SWAN, INC.
ALLIANCE FOR THE WILD ROCKIES, INC.
CLARK FORK-PEND OREILLE COALITION, INC.



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13
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15 11/16/99
Date

FRIENDS OF THE WILD SWAN, INC.
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FRIENDS OF THE WILD SWAN, INC.
ALLIANCE FOR THE WILD ROCKIES, INC.
CLARK FORK-PEND OREILLE COALITION, INC.

11/16/99
Date

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STATE OF MONTANA
Department of Environmental Quality

11-16-99
Date

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YELLOWSTONE PIPELINE COMPANY

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Date

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ORDER

1 HON. JEFFREY M. SHERLOCK
 2 228 Broadway
 3 Helena, Montana 59601
 4 (406) 447-8205

NOV 17 2 32
 SUSAN CHISHOLM

8 MONTANA FIRST JUDICIAL DISTRICT COURT, LEWIS AND CLARK COUNTY

9 FRIENDS OF THE WILD SWAN, INC.)
 10 ALLIANCE FOR THE WILD ROCKIES,)
 11 INC., AND CLARK FORK-PEND)
 12 OREILLE COALITION, INC.)

Cause No. BDV-1999-670

11 Plaintiffs,

ORDER

12 vs.

13 MONTANA DEPARTMENT OF)
 14 ENVIRONMENTAL QUALITY AND)
 15 YELLOWSTONE PIPELINE, INC.)

15 Defendants.

17 Based upon the Stipulation of the parties, and for good cause appearing, IT IS HEREBY

18 ORDERED:

19 1. That the terms of the stipulation, dated November 15, 1999, are hereby approved by the Court
 20 and all of said terms except paragraph 11 are incorporated into this Order.

21 2. That Count II of Plaintiffs' Complaint is dismissed without prejudice.

22 3. That the Temporary Restraining Order shall expire upon the signing of this Order and shall be
 23 replaced by the terms and conditions of this Stipulation.

24 IT IS SO ORDERED.

25 DATED this 17 day of November, 1999.

26 JEFFREY SHERLOCK

27 JEFFREY M. SHERLOCK
 District Judge