Northern Cheyenne Tribe, et al. vs. Department of Environmental Quality, et al.
Big Horn County, 2006
Montana Supreme Court case
2010 MT 111

In this case, the Tribe challenged the permit and permit renewal issued to Fidelity for discharges of coal bed methane water on the Tongue River. The alleged errors were: failure to impose technology-based treatment limitations, violation of the nondegradation provisions of the Water Quality Act because the existing significance threshold for EC (electrical conductivity) and SAR (sodium absorption ratio) are unlawful, violation of the right to a clean and healthful environment, abuse of discretion (issuance of permits while new nondegradation rule pending), failure to conduct adequate alternatives analysis under MEPA, failure to prepare an EIS, and inappropriate reliance on an invalid programmatic EIS. The district court granted summary judgment for the Department. The case was appealed to the Montana Supreme Court. The Supreme Court reversed the district court and voided the permit on non MEPA grounds. The Supreme Court did not decide the MEPA issues.

NORTHERN CHEYENNE TRIBE, a Federally recognized Indian tribe Plaintiff, TONGUE RIVER WATER USERS' ASSOCIATION and NORTHERN PLAINS RESOURCE COUNCIL, Plaintiffs-Intervenor, vs. MONTANA DEPARTMENT OF ENVIRONMENTAL QUALITY; and RICHARD OPPER, in his official Capacity as Director of the Montana Department of Environmental Quality Defendants, FIDELITY EXPLORATION & PRODUCTION COMPANY, Defendant-Intervenor.

Cause No. DV 06-34

TWENTY-SECOND JUDICIAL DISTRICT COURT OF MONTANA, BIG HORN COUNTY

2008 Mont. Dist. LEXIS 647

December 8, 2008, Decided

SUBSEQUENT HISTORY: Reversed by, Remanded by *N. Cheyenne Tribe v. Mont. Dep't of Envtl. Quality, 2010 MT 111, 2010 Mont. LEXIS 171 (May 18, 2010)*

PRIOR HISTORY: *Pennaco Energy v. Mont. Bd. of Envtl. Review, 2007 Mont. Dist. LEXIS 513 (2007)*
Northern Plains Res. Council v. Fid. Exploration & Dev. Co., 325 F.3d 1155, 2003 U.S. App. LEXIS 6852 (9th Cir. Mont., 2003)

JUDGES: [*1] BLAIR JONES, District Judge.

OPINION BY: BLAIR JONES

OPINION

Judge: Blair Jones

ORDER ON MOTIONS FOR SUMMARY JUDGMENT

P1. Before the Court are motions for summary judgment filed by Plaintiff Northern Cheyenne Tribe and Plaintiffs-Intervenor Tongue River Water Users' Association and Northern Plains Resource Council and cross-motions for summary judgment filed by Defendants Montana Department of Environmental Quality and Richard Opper and Defendant-Intervenor Fidelity Exploration & Production Company. A hearing on the motions was held on February 28, 2007 at the Stillwater County Courthouse, Columbus, Montana. John B. Arum and Brian C. Gruber of Ziontz, Chestnut, Varnell, Berley & Slonim, Seattle, Washington and James L. Vogel of Hardin, Montana were present representing the Northern Cheyenne Tribe (Tribe). Brenda Lindlief-Hall of Reynolds, Motl & Sherwood, Helena, Montana appeared on behalf of Tongue River Water Users' Association (TRWUA). Jack R. Tuholske of Missoula, Montana appeared on behalf of Northern Plains Resource Council (NPRC). Special Assistant Attorney General Claudia L. Massman appeared on behalf of the Montana Department of Environmental Quality and Mr. Opper (collectively, DEQ). Jon Metropoulos [*2] and Alan L. Joscelyn of Gough, Shanahan, Johnson and Waterman, Helena, Montana appeared on behalf of Fidelity Exploration & Production Company (Fidelity). Upon due consideration of the briefs and argument of counsel, the available record, together with the applicable law, the Court determines that there are no issues of material fact and

judgment as a matter of law in favor of Defendant and Defendant-Intervenor is warranted. Accordingly, for the reasons stated below, the motions for summary judgment of the Tribe, TRWUA and NPRC should be denied and the cross-motions for summary judgment of the DEQ and Fidelity should be granted.

PROCEDURAL BACKGROUND

P2. Plaintiff Northern Cheyenne Tribe filed this lawsuit on April 3, 2006 challenging two water discharge permits issued by DEQ to Fidelity Exploration & Production Company alleging violation of the federal Clean Water Act (CWA) and Montana Water Quality Act (WQA). The Tribe also asserts that the 2003 nondegradation rule incorporated into the permits violates the Montana Constitution. Finally, the Tribe challenges DEQ's environmental assessment supporting the permits under the Montana Environmental Policy Act (MEPA). Tongue River Water [*3] Users' Association and Northern Plains Resource Council sought, and were granted, intervention in May and October of 2006, respectively.

P3. Coal bed methane (CBM) is a form of natural gas whose development involves the production of significant amounts of groundwater. Permits issued by DEQ authorize Fidelity to discharge untreated CBM water into the waters of the Tongue River. Of particular concern to the plaintiffs is the high salinity of CBM water, as measured by electrical conductivity (EC), and sodicity, which is measured by the sodium adsorption ratio (SAR). Water with high EC and SAR, when used for irrigation, causes changes in soil structure that make water less available to crops and reduces the soil's ability to drain water. The quality of irrigation water is of concern to ranchers and farmers in semi-arid southeastern Montana. EC, SAR, and other pollutants in CBM produced water can also adversely affect fish and other aquatic life.

P4. To address concerns about the impact of CBM produced water on water quality, the Montana Board of Environmental Review ("BER") promulgated a rule in April 2003 which established numeric water quality standards for EC and SAR. *ARM 17.30.670(2),* [*4] (3). The Board also promulgated a rule that established a narrative nonsignificance standard for EC and SAR pursuant to the Montana Water Quality Act's nondegradation provisions. Under this provision (the "2003 Rule"), "[c]hanges in existing surface or ground water quality with respect to EC and SAR are nonsignificant . . . provided that the change will not have a measurable effect on any existing or anticipated use or cause measurable changes in aquatic life or ecological integrity." *ARM 17.30.670(6)* (2003).

P5. In May 2005, NPRC and other interested parties filed a petition for rulemaking with the BER, asking it to amend the 2003 Rule to classify EC and SAR as "harmful parameters" under *ARM 17.30.715(1)(f)* and repeal what the Plaintiffs characterize as a de facto exemption from the State's nondegradation requirements afforded to CBM dischargers under the 2003 Rule's narrative standard. The petition also sought to establish uniform technology-based effluent limitation guidelines for the CBM industry requiring treatment or reinjection of all CBM produced water.

P6. Following public hearings and extensive public comment, the BER took action on the petition at its March 23, 2006, meeting. [*5] With DEQ's support, the BER voted to classify EC and SAC as harmful parameters. Under this new standard, discharges of EC and SAC would be "significant" and require nondegradation review under *MCA 75-5-303(3)* if the resulting change in the receiving waters for either parameter was greater than 10 percent of the in-stream water quality standards or the existing quality of the receiving waters was over 40 percent of the standards. See *ARM 17.30.715(1)(f)*. In adopting these amendments, the BER explained that "the intent of Montana's nondegradation policy is to protect the increment of 'high quality' water that exists between ambient water quality and the numeric water quality standards." The BER also acknowledged its obligation to adopt rules protecting "high quality" water where it exists, including the Tongue River.

P7. Fidelity began discharging CBM produced water into the Tongue River in the late 1990s and obtained MPDES Permit MT-0030457 from DEQ on June 16, 2000. This permit allowed Fidelity to discharge up to 1600 gpm of untreated CBM produced water to 16 outfalls over a nine-mile reach of the Tongue River from the first crossing of the Wyoming/Montana border to just above the [*6] Tongue River Reservoir.

P8. On September 24, 2001, Fidelity applied for renewal of its existing MPDES permit, which was set to expire in March 2002. Fidelity filed a supplemental application for permit renewal in June 2004, and DEQ released a draft of the renewal MT-0030457 permit in

April 2005. The draft permit established effluent limits designed to maintain compliance with water quality standards during the lowest flow (7Q10) for particular seasons. Using this approach, the total discharge under the renewal permit would be maintained at 1,600 gpm from July through October, but allowed to increase to 2,375 gpm from March through June, and 2,500 gpm from November through February.

P9. On March 11, 2004, Fidelity applied for a second permit seeking permission to discharge 1,700 gpm of a blend of treated and untreated produced water into the Tongue River. Fidelity's purpose for the proposed project was to assess the feasibility and costs of treating produced water from CBM development. Fidelity proposed to treat produced water utilizing ion exchange technology. According to the application, the ion exchange technology has the capability to reduce EC and SAR concentrations to levels [*7] that are well below both State water quality standards and ambient concentrations in the Tongue River. However, the parties dispute whether the technology is economically feasible. DEQ released an environmental assessment (EA) for the two permit applications pursuant to MEPA. As alternatives, the EA evaluated the proposed issuance of the permits and a "no action" alternative in which the existing permit would remain in effect. The EA concluded that because issuance of the permits would comply with the State's numeric water quality standards, the environmental impacts of the project would be "minor" and "non-significant." The EA did not evaluate an alternative that would require treatment, impoundment or injection of all CBM produced water.

P10. On February 3, 2006, DEQ approved the two permits without additional modifications. After the BER adopted the proposed changes to the State's nondegradation rules, classifying both EC and SAR as "harmful parameters," the Tribe requested that DEQ modify the permits. DEQ declined and the Tribe filed its complaint shortly thereafter.

STATEMENT OF FACTS

I. The BER's 2003 Rule

P11. In 2002, the BER initiated rulemaking for the single purpose of establishing [*8] water quality standards to control and limit the "salty" characteristics of CBM water. Mont. Administrative Register ("MAR"), Notice No. 17-171, Issue No. 16, at 2269 (Aug. 29, 2002). The BER proposed the rules ". to ensure that the designated and existing uses of these waters for agricultural purposes will be protected during the development of coal bed methane (CBM) currently being proposed in Montana." Id. at 2273. The BER was concerned that, if CBM development reached its expected potential of 20,000 wells in the Powder River basin, large quantities of CBM water characterized by high levels of EC and SAR would be discharged into Montana's streams and rivers. Id. For this reason, BER proposed the adoption of numeric water quality standards for EC and SAR to limit the amount of CBM water that could be discharged into streams. As explained by the BER, the "the numeric water quality standards . (will) provide a consistent and reliable method of developing MPDES permit limits that will protect the designated uses of the affected waters." Id. at 2274.

P12. The numeric standards proposed by the BER were established to protect the designated use of the water most sensitive to increases [*9] of EC and SAR, i.e, the waters' use for irrigation. Id. As an added measure of precaution, the BER proposed adopting more stringent standards for EC and SAR during the irrigation season to ensure that the most sensitive crops and soils in the Powder River Basin were protected. Id. at 2275.

P13. In order to protect existing agricultural uses of the water, the BER developed site-specific standards for EC and SAR that would protect the most saline-sensitive crops currently grown in the area using existing irrigation practices. Id. at 2274-2275.

P14. The BER also proposed the adoption of a nonsignificance criterion for EC and SAR. The BER considered and rejected various proposals recommending either a 10% threshold or designating EC and SAR as "harmful." Id. at 2278. The designation of EC and SAR as "harmful" would mean that all discharges would be deemed "significant" if the quality of the receiving stream was at or above 40% of the water quality standards for those parameters. *ARM 17.30.715(1)(f)*.

P15. The BER explained that any proposal to adopt numeric nonsignificance criteria was not justified due to natural fluctuations of EC and SAR in the Tongue and Powder Rivers that often exceed [*10] the BER's proposed water quality standards. Id. at 2278. The Board reasoned that: "Since the policy of 'maintaining' existing 'high quality' water will not prevent EC and SAR from naturally degrading to the point that standards are

exceeded, the alternative of adopting rules that allow only de minimis changes in water quality is neither justified nor practical. Regardless of the treatment used by a particular discharger to prevent changes in water quality that will exceed a de minimis threshold, the Tongue, Powder, and Little Powder rivers will naturally and unpredictably exceed any such criteria throughout the year. Furthermore, a de minimis requirement such as 10% of the assimilative capacity, would be virtually impossible to comply with or enforce ." Id.

P16. Given the BER's conclusion that a numeric criterion was not warranted, the BER adopted a narrative criterion that, similar to the numeric water quality standards, focused on the protection of existing uses. The narrative criterion adopted by BER in April of 2003 prohibited any "measurable effect" on existing uses and any "measurable change" on aquatic life. ARM 17.30.760(6).

P17. During public comment on the rules, some comments [*11] suggested that the proposed water quality standards were too stringent and that greater levels of EC and SAR should be allowed because any harm caused by such increases could be mitigated by adding "soil amendments" at a cost of $ 50.00 to $ 200.00 per acre. MAR, Issue No. 8, at 791 (April 24, 2003). The BER rejected this proposal stating that its statutory obligation to protect existing uses constrained the BER ". from allowing increases in SAR to the point that existing irrigation practices must be modified to accommodate lower water quality." Id.

P18. The BER also received comments arguing that the narrative criterion for EC and SAR violated the "clean and healthful" provisions of the Montana Constitution. Id. at 797-798. These comments were based on the theory that the narrative criterion provided an exemption that allowed changes in water quality that would result in harm to both agriculture and the fisheries. Id.

P19. The BER disagreed with the comment by pointing out that both the numeric water quality standards and the narrative criterion were being adopted for the specific purpose of protecting existing uses. Since the nonsignificance criteria categorically prohibited any "measurable [*12] effect" to an existing use, no harm could result to any use. Id. at 798.

P20. Although the BER conceded that one of its reasons for rejecting a numeric criterion, based upon natural exceedances of the standards for EC and SAR in the Powder River Basin, did not apply to the Tongue, the BER found that its second reason was still valid for the Tongue. The BER relied upon its earlier finding that measuring a 10% increase was technically impractical and difficult to enforce to conclude that a numeric criterion was unacceptable. Id. Consequently, the BER adopted the narrative criterion in March 2003 in the belief that it had fulfilled its obligation to "maintain and improve a clean and healthful environment." Id.

P21. The rules adopted in March became effective under state law on April 25, 2003. On August 28, 2003, EPA approved the rules as being consistent with the CWA. [DEQ's Ex. 1 at 2.]

P22. EPA's letter approving the 2003 rule stated that: ". (EPA) has long recognized the appropriateness of focusing (Tier 2) . evaluations on significant threats to water quality." [Id., Enclosure at 3.] Accordingly, EPA supported Montana's adoption of criteria that exempt de minimis changes from full [*13] nondegradation review so that limited state resources could focus on significant environmental concerns. [Id.] EPA cautioned, however, that Montana's nonsignificance criteria should exempt ". only those regulated activities that will result in truly insignificant water quality effects." [Id. at 4.]

P23. EPA's approval of the 2003 nonsignificance criterion for EC and SAR demonstrated its belief that the rule would only exempt "truly insignificant water quality effects." Notably, EPA also found that the rule's protection of high quality water for agricultural use went beyond "what is minimally required" of the federal antidegradation requirement to protect high quality only for "fishable/swimmable" uses. [Id.]

II. The BER's 2006 Rule

P24. On May 17, 2005, a coalition of groups representing irrigators in southeastern Montana petitioned the BER to adopt rules that accomplished two objectives: (1) require re-injection or treatment of all CBM water; and (2) amend the nonsignificance criterion for EC and SAR to designate those parameters as "harmful." [See DEQ's Ex. 4 at 1-2.]

P25. The Petition provided two reasons for amending the 2003 rule. The first reason was to ". restore the state's [*14] power to protect Montana rivers from pollution caused by CBM development in Wyoming." [Id. at 2.]

The second and perhaps more critical reason was premised on the BER's lack of authority to adopt the Petitioner's proposed treatment requirements unless discharges of CBM water are deemed "significant." [Id. at 28.] Accordingly, the Petition requested the BER to designate EC and SAR as "harmful" so that discharges of CBM water would no longer be deemed "nonsignificant" and would be subject to full nondegradation review under *§75-5-303, MCA*. [Id. at 28-29.]

P26. In its statement of reasons for initiating rulemaking, the BER appeared to accept the Petitioner's rationale for amending the 2003 criteria by finding that the current rule "effectively exempts" CBM discharges from full Tier 2 review under Montana's nondegradation policy. [Tribe's Ex. 19 at 4.] However, on May 18, 2006, the BER amended the 2003 rule, but declined to adopt the treatment requirements requested by the Petitioners. MAR, Issue No. 10, at 1247 (May 18, 2006). In the notice of amendment, the BER emphatically stated that its reasons for amending the rule were not based upon the Petitioners' argument that the 2003 rule exempt [*15] EC and SAR from Montana's nondegradation requirements. Id. As explained by the BER: "Under the current rules, discharges of EC and SAR may not have a 'measurable effect on existing or anticipated uses or cause measurable changes in aquatic life.' This means, that in addition to requiring compliance with the nondegradation criteria for all other parameters that are present in CBNG wastewater, the department will impose any additional restriction necessary to prevent a measurable change to existing or anticipated uses . (consequently) the current rule does not exempt CBNG discharges from all review under Montana's nondegradation policy as did the rule at issue in MEIC v. DEQ. Nonetheless, the Board is changing the current rule . as explained in the following responses." Id. at 1247-1248.

P27. The primary reason provided by the BER for amending the 2003 rule was based on the BER's desire for consistency. The BER explained that it was "uncomfortable" using a narrative nonsignificance criteria for EC and SAR given that the narrative designation under *ARM 17.30.715(g)* is ". used solely for parameters for which no numeric standards have been adopted." Id. at 1251. Since EC and SAR have numeric [*16] water quality standards, the BER believed that EC and SAR should be classified as either carcinogenic, toxic, or harmful, in the same manner as all other parameters with numeric standards. Id.; see also 1251-1252 (response to Comment No. 11); 1253 (response to Comment No 16); 1256 (response to Comment No.22).

P28. The BER declined to adopt the technology-based treatment requirements because the evidence presented to the BER was "inconclusive." That is, the BER found that the Petitioners had failed to demonstrate that their proposed treatment requirements were technologically, economically, and environmentally feasible, as required by *§75-5-305(1), MCA*. Id., at 12671269 (response to Comment Nos. 51, 52, 53, 54, 56, 57).

P29. The amended nonsignificance criterion for EC and SAR became effective under state law on May 15, 2006. DEQ submitted the rule to EPA for review and approval on June 5, 2006. [DEQ's Ex. 6.] The amended criterion had no legal effect for purposes of imposing permit conditions under the CWA until approved by the *EPA. 65 Fed.Reg. 24,641 (April 27, 2000)*.

III. Fidelity's MPDES Permits A. Existing MPDES Permit No. MT-00300457

P30. Fidelity's MPDES Permit No. MT-00300457 [*17] was originally issued by DEQ in 2000. [DEQ's Ex. 7 at 1.] The original permit allowed discharges of untreated CBM water into the Tongue River at a rate of 1,600 gallons per minute (gpm) from 16 different locations (i.e., "outfalls"). [Id. at 2.] These outfalls discharge along a nine-mile stretch of the Tongue River beginning at the Wyoming border. [Id.] The original permit terminated on March 31, 2002, but was administratively extended until a new permit could be issued, as requested by Fidelity in September 2001. [Tribe's Exs. 26, 27.]

P31. After the adoption of standards for EC and SAR, Fidelity submitted supplemental information to support its application to renew the existing MPDES permit in June 2004. [DEQ's Ex. 7.] In its application, Fidelity analyzed whether the 1,600 gpm flow rate, which was imposed as an enforceable permit limit in its existing permit, had been adequate to ensure compliance with the standards for EC and SAR adopted after the permit had been issued. [Id. at 7.] Fidelity's analysis concluded that the 1,600 flow limitation adequately complied with the water quality standards for EC and SAR in the Tongue River even though no permit limits had specifically restricted [*18] those parameters in the original permit.

[Id. at v and 7.]

P32. Fidelity also conducted an analysis to determine the maximum allowable discharge rates of CBM water that could occur under the renewed permit without violating the standards for EC and SAR. [Id. at 56, 57.] Since instream concentrations of EC and SAR are relatively low during high flow events, Fidelity proposed a series of discharge rates that allowed higher discharge rates of CBM water during high stream flows. [Id. at 7, 56-57.] As a result of its analysis, Fidelity proposed discharge rates as high as 14,000 gpm during the non-irrigation season and as high as 8,000 gpm during the irrigation season after demonstrating that EC and SAR standards would be met at those rates. [Id. at 57.]

B. New MPDES Permit No. MT- 00307724

P33. On March 11, 2004, Fidelity submitted an application for a new MPDES permit to discharge 1,700 gpm of treated CBM water. [DEQ's Ex. 8.] Fidelity requested the new permit in order to "assess the feasibility and costs of operating a full-scale treatment system" using ion exchange as treatment. [Id. at 1`.] Under its proposal, Fidelity would blend the treated CBM water with up to 25% of untreated CBM [*19] water so that the water quality standards for EC and SAR would be met before the treated water was discharged into the Tongue River. [Id. at 2.] Since EC and SAR standards would be met prior to discharge, Fidelity did not propose flowbased limits for those parameters. [Id. at 9.]

C. DEQ's Approval of Fidelity's New and Renewed MPDES Permits

P34. On April 27, 2005, DEQ issued a notice of intent to grant Fidelity's applications for a new and renewed MPDES permit. [Tribe's Exs. 32, 33.] In the notice, DEQ requested public comment on the draft permits, which were accompanied by "fact sheets" supporting the draft permits, and an environmental assessment ("EA"). [Id.] After two public hearings were held, public comment closed in June of 2005. [Id.]

P35. During the comment period, DEQ received comments objecting to any discharge that would cause or "contribute" to the impaired water quality of the Tongue River near Miles city. [Tribe's Ex. 32 at 6.] For this reason, DEQ delayed issuing the permits to conduct an additional analysis. [Id.] After concluding an analysis of potential water quality effects near Miles City that might result from discharge allowed by the two permits, DEQ issued the [*20] permits on February 3, 2006.

P36. The final permit for the new discharge authorized one outfall of treated CBM water at rate proposed by Fidelity of up to 1,700 gpm throughout the year. [DEQ's Ex. 9 at 4.] The final permit for the existing discharge imposed flow rates that were significantly more stringent than those proposed by Fidelity, which would have allowed up to 14,000 gpm in the winter and up to 8,000 gpm in the summer. The final permit also imposed more restrictive flow rates than contained in the draft permit for the months of March through June.

P37. DEQ explained that, due to its recent determination that the lower reach of the Tongue River was impaired for salinity, the agency conducted an analysis to determine whether the draft permits would "cause or contribute" to the impairment. [Tribe's Ex. 32 at 6.] Baseline data collected by the agency indicated that the standards for EC and SAR were not being met at Miles City during March through June. [Id. at 7.] In order to mitigate the impaired quality of the water in the lower Tongue, the DEQ reduced the flow rates contained in the draft renewal permit during the months of March through June from 5,250 gpm to 2,375 gpm. [Id.] [*21] The flow rates for the remaining year remained the same as provided in the draft permit. Those rates allow 2,500 gpm from November through February and restrict rates to 1,600 gpm from July through October. [Tribe's Ex. 34 at 13.]

P38. The flow rates in the final permits implement water-quality-based effluent limits ("WQBELs") that were developed for parameters that had the potential to exceed their applicable water quality standards and nondegradation criteria. [DEQ's Exs. 10, 11 at 9.] The fact sheet for the renewed permit explains that WQBELs were developed for temperature, flow, total dissolved solids (TDS), ammonia, and fluoride. [DEQ's Ex. 11 at 9.] For the new permit, WQBELs were developed for temperature, total nitrogen and flow. [DEQ's Ex. 10 at 9.] DEQ contends that no WQBELs were developed for EC and SAR in the permits, because there was no potential for violations of the water quality standards and nonsignificance criteria for those parameters due to the flow restrictions imposed to ensure compliance with the parameters listed above. [Id., DEQ's Exs. 10,11 at 9.]

SUMMARY OF ARGUMENT

P39. Essentially, this case involves a challenge to DEQ's decision to issue two MPDES permits [*22] to Fidelity. Plaintiffs' arguments, however, go beyond the DEQ's permitting decisions and challenge a rule that is no longer in existence. The now repealed rule established thresholds for determining "nonsignificance" levels of EC and SAR. Although Plaintiffs did not challenge the rule when adopted by the Montana Board of Environmental Review ("BER") in 2003, Plaintiffs now contend that the 2003 rule violated both state and federal water quality laws and the Montana Constitution, as well. Accordingly, Plaintiffs argue that DEQ's reliance on the 2003 rule, which was in existence at the time the permits were developed and issued, was unlawful. Plaintiffs further argue that DEQ violated the federal Clean Water Act (CWA) and the Montana Water Quality Act (WQA) by failing to impose technology-based treatment requirements in the permits.

P40. On October 17, 2007 this Court affirmed both the 2003 and 2006 water quality rules as they relate to coal bed methane development, generally, and to EC and SAR levels, in particular. See Pennaco Energy, Inc. v. Montana Board of Environmental Review, Big Horn County, Cause No. DV 06-68, Order dated 10/17/07, 2007 Mont. Dist. LEXIS 513. The issues presented here are closely related [*23] to that earlier opinion and the Court sees no reason to revisit them in this case. Additionally, during the pendency of this ruling, the EPA announced its approval of the BER's revised 2006 rules designating EC and SAR as "harmful parameters" for the purposes of making nonsignificance determinations for high quality waters. See EPA Water Quality Standards Action Letter, Region 8, dated 02/29/08. Accordingly, any argument directed toward either a challenge to the BER's promulgation of the 2003 or 2006 water quality rules or toward final EPA approval of these rules under the federal Clean Water Act are moot. This conclusion is based on this Court's prior ruling affirming the 2003 and 2006 water quality rules and the Court's lack of authority to review the EPA approval of such rules under the CWA.

STANDARD OF REVIEW

P41. A district court evaluates a motion for summary judgment under Rule 56, M.R.Civ.P., using the following analysis: Initially, "the movant must demonstrate that no genuine issues of material fact exist. Once this has been accomplished, the burden shifts to the non-moving party to prove, by more than mere denial and speculation, that a genuine issue does exist." *CapeFrance Enterprise v. Estate of Peed, 2001 MT 139, P 13, 305 Mont. 513, P 13, 29 P.3d 1011, P 13.* [*24]

P42. While ordinarily, the district court must "first determine whether the moving party met its burden of establishing both the absence of genuine issues of material fact and entitlement to judgment as a matter of law," cross-motions for summary judgment typically request only that the court rule on matters of law. Cape France, P 14. In these cases, when each party is asserting entitlement to judgment as a matter of law, the district court may presume the facts are not in dispute and issue judgment based upon its interpretation of the law. Id.

ISSUES

P43. The Court restates the issues to be decided as follows: 1. Whether issuance of the MPDES permits violated the federal Clean Water Act and the Montana Water Quality Act. 2. Whether issuance of the MPDES permits complied with State and federal nondegradation policies. 3. Whether issuance of the MPDES permits violated the clean and healthful environment clause of the Montana Constitution 4. Whether issuance of the MPDES permits complied with MEPA.

DISCUSSION

1. Whether issuance of the MPDES permits violated the federal Clean Water Act and the Montana Water Quality Act.

P44. Principally, the Tribe, TRWUA and NPRC argue that DEQ violated [*25] both the federal CWA and the Montana WQA when it failed to impose technology-based effluent limits in Fidelity's MPDES permits. However, this argument fails to address the discretionary authority given to EPA under the CWA and incorrectly identifies the imposition of technology-based effluent limits as a mandatory duty applicable to the State. Similarly, Plaintiffs' attempt to construe Montana's WQA as requiring the imposition of technology-based effluent limits using best professional judgment (BPJ) fails for the same reason. Rather, the state-adopted regulations implementing the federal NPDES permit program in Montana do not, as Plaintiffs suggest, impose any duty on DEQ to develop technology-based treatment requirements in the absence of federal requirements.

P45. Plaintiffs' insistence that *§402(a)(1) of the CWA* imposes a duty on both EPA and the states to impose technology-based limits is not supported by the plain language of the statute. Nowhere in *§402(a)(1)* or in cases construing that provision is there any mandate for EPA or the states to impose treatment on a case-by-case basis. Instead, *§402(a)(1)* provides EPA with the discretion to do so.

P46. *Section 402(a)(1) of the CWA* [*26] provides that "the Administrator may . issue a permit ." after ensuring that all the federally promulgated technology-based standards are met by the discharge, *§402(a)(1)(A)*, and, in the event federal standards have not been promulgated, impose ". such conditions as the Administrator determines are necessary to carry out the provisions of (the CWA)," *§402(a)(1)(B). 33 U.S.C. §1342(a)(1)(A)-(B)* (emphasis added.)

P47. Courts have construed this language as providing EPA with the discretion to impose technology-based limits using BPJ in the event there are no nation-wide technology-based effluent limits to apply. See *NRDC v. EPA, 863 F.2d 1420, 1425 (9th Cir. 1988)* ("In the absence of national standards, the Act authorizes the Administrator to issue permits on 'such conditions as the Administrator determines are necessary to carry out the provisions of [the Act].'"); *Trustees for Alaska v. EPA, 749 F.2d 549, 553 (9th Cir. 1984)* ("the Act authorizes the EPA to issue permits on a case-by-case basis 'upon such conditions as the Administrator determines are necessary to carry out the provisions of this [Act]'"). Plaintiffs cite to no authority for the proposition that the CWA mandates state [*27] permit-writers to do the same. To the contrary, the weight of authority supports DEQ's position that there is no mandatory duty to develop technology-based limits using BPJ. See, e.g., *E.I. du Pont de Nemours & Co. v. Train, 430 U.S. 112, 120, 97 S. Ct. 965, 51 L. Ed. 2d 204 (1976)* (". although *[§402*] authorizes the imposition of limitations on individual permits, the section itself does not mandate either the Administrator or the States to use permits as the method of prescribing effluent limitations.")

P48. Federal regulations implementing the CWA do not support Plaintiffs' argument. Under *40 CFR §122.44*, "each NPDES permit shall include conditions meeting the following requirements when applicable." Under *section (a)(1)* of the rule, any technology-based limit imposed in a permit must be based on the following: (1) nation-wide technology-based effluent limits promulgated by EPA for new or existing sources; or (2) effluent limitations developed under *§402(a)(1) of the CWA*; or (3) a combination of the two." Id. *§122.44(a)(1)*. Applying the rule in the context of Fidelity's permit leads to one conclusion - no effluent limitations are required because no basis for establishing effluent limitations under [*28] the rule apply. As Plaintiffs admit, there are currently no nation-wide effluent standards for the CBM industry. Furthermore, even though EPA has authority under *§402 of the CWA to* develop technology-based limits on a case-by-case basis, Congress has not yet mandated that states must do the same. Consequently, DEQ did not violate the rule when it declined to use BPJ when issuing Fidelity's permits.

P49. The two permits issued by DEQ employed WQBELs to restrict discharge rates to ensure compliance with all water quality standards and nonsignificance criteria for pollutants in the discharges. Accordingly, DEQ's reliance on WQBELs, when no federally promulgated standards exist, was an appropriate method of developing enforceable permit limits consistent with the CWA and under the discretion of the administrator.

P50. When the agency decision is within its delegated area of expertise, as it is in this case, and when it is based on scientific or technical data, the Supreme Court has held that judicial review is even narrower. In *Johansen v. State, 1999 MT 187, P9, 295 Mont. 339, 983 P.2d 962 (Johansen II)*, the Supreme Court affirmed its earlier ruling in Johansen I that "district courts [*29] should defer to an agency's decision where substantial agency expertise is involved." *Id., P9*, quoting *Johansen v. Dep't of Natural Resources & Conservation, 1998 MT 51, P29, 288 Mont. 39, 955 P.2d 653 (Johansen I)*. Moreover, "[n]either the district court nor the Supreme Court may substitute their discretion for the discretion reposed in boards and commissions by the legislative acts." *Johansen I, P26*, quoting *North Fork Preservation Ass'n v. Dep't of State Lands, 238 Mont. 451, 778 P.2d 862, 866 (1989)*.

P51. The U.S. Supreme Court has stated: "When specialists express conflicting views, an agency must have discretion to rely on the reasonable opinions of its own qualified expert even if, as an original matter, a court might find contrary views more persuasive." *Marsh v. Oregon Natural Resources Council, 490 U.S. 360, 378,*

109 S. Ct. 1851, 104 L. Ed. 2d 377 (1989). The Montana Supreme Court endorsed this deferential standard in *North Fork, supra*, which involved judicial review of an agency decision to forego an EIS: This decision necessarily involved expertise not possessed by courts and is part of a duty assigned to [the agency], not the courts. In light of this, and the cases cited above, we hold [*30] that the standard of review to be applied by the trial court and this Court is whether the record establishes that the agency acted arbitrarily, capriciously, or unlawfully. *Id., 238 Mont. at 458-59, 778 P.2d at 867*.

P52. In the complete absence of federal limitations for CBM discharges, DEQ correctly imposed WQBELs on Fidelity's proposed discharges in an effort to ensure that existing water quality standards were protected in the Tongue River. See *NRDC v. EPA, 915 F.2d at 1317* ("NPDES permit writers were to impose . any more stringent limitation on discharges necessary to meet the water quality standards."); see also, *33 U.S.C. §1311 (b)(1)(C)*, which requires that, in addition to meeting all federally promulgated effluent limitations, discharges must meet ". any more stringent limitation, including those necessary to meet water quality standards."; *40 CFR 131.2*, which provides that water quality standards serve as a ". regulatory basis for the establishment of water-quality-based treatment controls and strategies beyond the technology-based levels of treatment required by . the [CWA]."')

P53. The Tribe's reliance on one state court decision and a selective reading of federal case law [*31] is misplaced. In *Columbus & Franklin County Metro. Park Dist. v. Shank, 65 Ohio St. 3d 86, 600 N.E.2d 1042 (1992)*, the Ohio Supreme Court was interpreting the state's antidegradation [nondegradation] statutes when it held that those statutes required Ohio to develop the ". most stringent statutory and regulatory controls for waste treatment" in situations where no national treatment standards exist. *Shank, 600 N.E.2d at 1061*. Since the instant case does not involve an interpretation of Ohio's antidegradation laws, the holding of Shank has little relevance here.

P54. Similarly, *NRDC v. EPA, 273 U.S. App. D.C. 180, 859 F.2d 156 (D.C. Cir. 1988)* does not, as the Tribe suggests, support the theory that the use of BPJ by the states is mandated by the CWA. Unlike here, NRDC involved a challenge to EPA's veto authority over state permits based upon EPA's determination that the state incorrectly developed effluent limits using BPJ. *NRDC, 859 F. 2d at 184*. The Court's finding that states must "pay heed" to the technology-based standards was stated in the context of upholding EPA's ultimate power to override the state's judgment as to what constitutes an adequate technology-based limit under the CWA. *Id. at 183-186*. [*32] Since the Court was interpreting EPA's power to override state permits under the CWA, NRDC does not stand for the proposition that states are required to exercise BPJ. For the reasons stated, this Court concludes that the issuance of Fidelity's permits complied with the CWA and state regulations implementing Montana's WQA. 2. Whether issuance of the MPDES permits complied with State and federal nondegradation policies.

P55. The Plaintiffs argue that DEQ violated the CWA and the Montana WQA when it authorized the degradation of high quality waters by issuing the permits without undertaking the rigorous review required by *40 CFR 131.12* and *§75-5-303(3)*, MCA. This argument, however, is premised entirely on the assumption that the 2003 nonsignificance criterion for EC and SAR, which was in effect when the permits were developed and issued, was ultra vires and unlawful. In addition, Plaintiffs have provided no authority to support their contention that DEQ should have ignored the 2003 rule in effect at the time the permit was issued based on their belief that the rule was unlawful. However, there is no dispute that when the two permits were issued on February 3, 2006, the nondegradation [*33] criterion adopted by the BER in 2003 was the existing law later affirmed by this Court. Accordingly, DEQ lacked authority to deny a MPDES permit meeting current legal requirements pending the adoption or even an anticipated adoption of subsequent nondegradation rules. Moreover, Plaintiffs have cited to no authority supporting their argument that DEQ may delay issuing a permit while waiting for a change in law.

P56. According to the Tribe, the 2003 regulation was ultra vires and unlawful since it exempted EC and SAC from Tier-2 review under *§75-5-303(3),MCA*. [Tribe's Br. at 19.] This argument presumes that: (1) DEQ can ignore duly enacted statutes and regulations based on an opinion that the laws are not valid; and (2) the 2003 rule violated federal antidegradation requirements.

P57. As an executive branch agency, DEQ cannot choose to ignore duly enacted statutes and regulations

based upon an opinion that the laws are not valid. *Merlin Myers Revocable Trust v. Yellowstone County (Merlin Meyers), 2002 MT 201, P 25, 311 Mont. 194, 53 P.2d 1268*. In Merlin Meyers, the Montana Supreme Court upheld the finding of the district court that the County Commissioners had violated the separation [*34] of powers doctrine in the Montana Constitution by acting as if a statute ". was either unconstitutional or did not exist." *Id. at PP 10, 13, 20*. The Merlin Meyers Court held: "The District Court held that as an arm of the executive branch, the County Commissioners were required to faithfully execute the laws of Montana and that they failed to do so. Instead, the Commissioners refused to comply with the provisions of *§76-6-209, MCA*, stating that it was in conflict with the Montana Constitution. For the reasons expressed by the District Court, we agree. [It is] not the County Commissioner's function to ignore the plain provisions of a duly enacted statute." *Id., at PP 22,25* (emphasis added).

P58. In this case, it was not the function of DEQ to ignore a rule having the force and effect of law when it issued Fidelity's permits. See *§2-4-102(13)(a), MCA*. This is true despite comments received by DEQ objecting to the application of the 2003 rule in the permits as being unlawful. [Tribe's Ex. 32 at 9.] Given that the 2003 rule was in effect at the time it issued the permit, DEQ had no discretion to simply ignore the rule based upon comments arguing that the rule was unlawful.

P59. The Tribe's [*35] reliance on the BER's statement that the 2003 rule "effectively exempts" CBM from nondegradation review is misplaced. [Tribe's Ex. 19 at 4.] The BER's statement reflects the arguments made by the Petitioners at the time the Petition was filed and, consequently, served as one of BER's reasons for initiating rulemaking. When the BER amended the rule in 2006, it did not rely on the Petitioners' argument that the 2003 rule violated state and federal antidegradation requirements. To the contrary, the BER rejected that argument as a rationale for amending the rule. [DEQ's Ex. 5 at 1247-1248.] According to the BER, the 2003 rule allowed DEQ to ". impose any additional restriction necessary to prevent a measurable change to existing or anticipated uses" that may be necessary after imposing all other conditions on CBM discharges based on the BER's criteria in *ARM 17.30.715*. [Id.] For that reason, the BER concluded that the 2003 rule properly implemented Montana's nondegradation policy. [Id.]

P60. In EPA's letter approving the 2003 rule, EPA noted that the requirement in the rule to prevent "measurable changes" in "existing uses" was similar to the criteria in *ARM 17.30.715(g)*, which had previously [*36] been approved by EPA. [DEQ's Ex. 1, Enclosure at 4.] EPA found that since the 2003 rule protected high quality waters for an existing use (i.e., agriculture) that was not a "fishable/swimmable" use protected by EPA's antidegradation policy, the 2003 rule went beyond "what is minimally required" of the federal antidegradation policy. [Id.]

P61. Based on the above, this Court concludes that DEQ's reliance on the 2003 rule was lawful and that the resulting discharge from the permits fully complies with State and federal antidegradation requirements.

3. Whether issuance of the MPDES permits violated the clean and healthful environment clause of the Montana Constitution.

P62. Plaintiffs argue that, because the 2003 rule "effectively exempts" discharges of EC and SAR from nondegradation review, both the rule and DEQ's application of the rule to Fidelity's permits violate the fundamental right to a "clean and healthful" environment embodied in *Article II, Section 3* and *Article IX, Section 1, of the Montana Constitution*. In support, Plaintiffs cite *Mont. Envtl. Inf. Ctr. v. Dept. of Envtl. Quality (MEIC), 1999 MT 248, 296 Mont. 207, 988 P.2d 1236*. The Plaintiffs' argument fails because, unlike [*37] the statutory exemption challenged in MEIC, the 2003 rule did not categorically exempt CBM discharges from the State's nondegradation requirements. As discussed in the preceding section, DEQ developed WQBELs for the permits to ensure compliance with applicable water quality standards, including the BER's nonsignificance criteria, and restricted flows to meet those requirements. [DEQ's Ex. 10 at 7-12, 19; DEQ's Ex. 11 at 6-15, 19.] Consequently, the Plaintiffs' right to a clean and healthful environment is not implicated because permitted discharges, subject to approved water quality standards, do not cause "significant impacts." See, *MEIC, P 79*.

P63. Plaintiffs submit that the Montana Constitution is relevant to the standard of review insofar as it guarantees to all citizens the right to a clean and healthful environment, *Mont. Const. art. II, §3*, and imposes a duty on the State and each person to maintain and improve a clean and healthful environment for present and future generations, *Mont. Const. art. IX, §1*. As noted

previously, this Court has affirmed the 2003 water quality standards in the face of a constitutional challenge mounted by the oil and gas industry. See Pennaco, supra. [*38]

P64. While admittedly the challenge here is based on the argument that the 2003 standards do not adequately protect the environment, rather than being too stringent as previously argued by industry, the Court nevertheless affirms the validity of the 2003 rules. The Court maintains this position based on its determination that BER's exercise of rulemaking authority was consistent with authorizing legislation, including laws implicating environmental protection and was not an arbitrary nor capricious exercise of BER's discretion. Moreover, the 2003 rules allowed DEQ to impose permitting restrictions necessary to prevent "measurable changes" to existing or anticipated uses of the resource. Therefore, any measurable change detrimental to existing or anticipated use of the Tongue River would be a permit violation, not a constitutional violation, and subject to remedy by appropriate agency enforcement.

P65. Additionally, the record reflects that, in order to ensure that all water quality standards were met, DEQ developed the permits using a more conservative approach to flow-based permitting than proposed by Fidelity. [Tribe's Ex. 9 at 3.] Whereas, Fidelity proposed discharge rates as high [*39] as 8,000 gpm in the irrigation season and 14,000 gpm in the winter, DEQ drafted the renewed permit with maximum discharge rates of 1,600 gpm for the irrigation season and 2,500 for the winter. [Infra. at 17-18.] DEQ further restricted the discharge rates during March through June to 2,350 gpm to mitigate water quality impairment in the lower Tongue River. [Id.] Such agency action displays an environmental sensitivity consistent with constitutional environmental protections.

P66. Given the above, the 2003 rules and agency implementation pursuant thereto, are not violative of the clean and healthful environment clause of the Montana Constitution. Based on DEQ's determination that the allowed discharge would result in nonsignificant impacts, DEQ was entitled to rely on the 2003 rule in issuing the permits under consideration here.

4. Whether issuance of the MPDES permits complied with MEPA.

P67. The Tribe argues that DEQ violated MEPA in two ways when it issued Fidelity's permits. First, the Tribe argues that DEQ failed to provide an adequate analysis of alternatives and, second, that DEQ failed to prepare an EIS when there was potential conflict with laws protecting the quality of the [*40] Tongue River.

EA Alternative Analysis

P68. When preparing an EA, an agency need only consider those alternatives that are "reasonably available and prudent to consider." *ARM 17.30.609(3)(f)*. The record adequately reflects that DEQ considered only those alternatives that were "reasonably available" given the statutory and regulatory constraints governing its permit decisions. DEQ had no obligation under MEPA to consider alternatives beyond its power to impose and no obligation to consider alternatives that were not adopted by the Bureau of Land Management (BLM) and the Montana Board of Oil and Gas Conservation (MBOGC) when those agencies approved Fidelity's plans for its proposed project.

P69. In 2003, the BLM, MBOGC, and DEQ issued a Final Environmental Impact Statement (FEIS) that analyzed potential impacts from future CBM exploration and development. [DEQ's Ex. 13 at 1-1.] The FEIS was prepared by the state and federal agencies for the specific purpose of amending the BLM's resource management plan to allow for CBM production. [Id.] In anticipation of future leasing, drilling, and permitting decisions associated with CBM development, the state and federal agencies jointly prepared [*41] the FEIS to ensure compliance with the National Environmental Policy Act (NEPA) and MEPA. [Id.] The FEIS noted that, although the agencies were evaluating CBM development from a "broad, wide, planning perspective," any future environmental analysis of CBM activities under NEPA or MEPA would incorporate or "tier from" the analysis in the 2003 FEIS. [Id.] Of import, the Court notes that no party challenged the 2003 FEIS in state court, under applicable state law.

P70. The FEIS analyzed a range of alternatives that included a "no action" alternative and the agencies' preferred alternative, Alternative E. [Id. at 2-5 through 2-13.] The agencies selected Alternative E because it provided a wide range of options for managing CBM produced water. [Id. at 2-13.] The FEIS explained that the preferred option for managing CBM produced water was to put it to a beneficial use; however, other water management options included disposal into

impoundments, reinjection, and discharging into surface waters. [Id. at 2-13, 2-14.]

P71. Alternative E established a hierarchy of priorities for the management of CBM water. The agencies first assumed that 20% of produced water would be put to a beneficial use. [*42] [Id. at 4-77.] Then, where it was physically possible to do so, the agencies assumed that produced water would be reinjected either through infiltration or injection wells. [Id.] The FEIS noted that the geology necessary for conducting injection would not be available at all sites. In that event, the agencies assumed that the next preferred method would be discharging the water to surface waters to the extent allowed by DEQ's permitting process. [Id.] Finally, the agencies assumed that produced water would be impounded or treated prior to discharge in the event that treatment was necessary to meet state water quality standards. [Id.]

P72. Alternative E also established a hierarchy for approval of a CBM developer's plans to manage water. Under Alternative E, no leasing decisions or drilling permits would be issued by the BLM or MBOGC until a plan of development (POD), including a water management plan, was submitted to those agencies and approved. [Id. at 2-13.] The BLM and MBOGC subsequently selected Alternative E in their respective Records of Decision (ROD), which included the requirement for the agencies' approval of PODs and associated water management plans prior to drilling. [*43] [DEQ's Exs. 14 at 1- 4; 15 at 13.]

P73. DEQ also issued a ROD explaining that its participation in the FEIS was solely in anticipation of the "potential need for air and water permitting" associated with CBM production. [DEQ's Ex. 15 at 11.] DEQ maintains that its authority to select among the alternatives in the FEIS was more limited than BLM and MBOGC, because DEQ's authority only extended to ensuring ". compliance with air and water quality standards through its permitting, compliance assurance, and enforcement programs." [Id. at 13.] Consequently, DEQ did not select Alternative E, but rather concurred in the selection of that alternative as an appropriate method for DEQ to ensure compliance with air and water quality standards. [Id.]

P74. In accordance with the requirements of the RODs, Fidelity submitted PODs to BLM and MBOGC outlining its plans for the Badger Hills Project, the Dry Creek Project, and the Coal Creek Project. BLM and MBOGC, with the participation of DEQ, issued EAs analyzing alternatives to each project. [See e.g., DEQ's Exs. 16, 17, 18.] The BLM and MBOGC issued RODs for each project finding that no significant impacts would occur and approving the PODs and associated [*44] water management plans as modified by conditions imposed by the two agencies. [Id.]

P75. At the time DEQ prepared the EA for Fidelity's two discharge permits, Fidelity had 437 producing wells and approval from BLM and MBOGC to drill 234 new wells. [Tribe's Ex. 9 at 2.] According to the approved water management plans for those projects, 20% of the produced water would be put to a beneficial use such as, dust suppression at a mine, livestock watering, and managed irrigation. [Id. at 3-4.] The primary method of managing the water under the approved plans, however, was to discharge the water into the Tongue River subject to an MPDES permit. [DEQ's Exs. 16 at 3; 17 at 1; 18 at 1.] Accordingly, the proposed action being considered by DEQ when it prepared the EA was the issuance of MPDES permits for Fidelity's discharges into the Tongue River according to the approved water management plans for the projects. [Tribe's Ex. 9 at 5.]

P76. MEPA's requirement that an agency take a "hard look" at environmental impacts and consider alternatives to a proposed project is "essentially procedural." *Ravalli County Fish & Game Ass'n v. Mont. Dep't of State Lands, 273 Mont. 371, 377, 903 P.2d 1362, 1367 (1995)*. [*45] Accordingly, MEPA does not dictate that an agency make a particular decision. Id. Further, since the statute is procedural, MEPA does not change nor augment the statutory authority of an agency to ". withhold, deny, or impose conditions on any permit .". *§75-1-201(5)(a), MCA*. The MEPA procedure challenged here is the requirement to consider alternatives. That requirement is governed by feasibility. As the United States Supreme Court explained, ". the term 'alternatives' is not self defining. To make an impact statement something more than an exercise in frivolous boilerplate the concept of alternatives must be bounded by some notion of feasibility." *Vermont Yankee Nuclear Power Corp. v. Natural Resources Defense Council, 435 U.S. 519, 551, 98 S. Ct. 1197, 55 L. Ed. 2d 460 (1978)*. According to Vermont Yankee, alternatives are not feasible, and therefore do not need to be considered if they are not presently available to an agency due to statutory constraints. Id. In the words of the United States

Supreme Court, alternatives do not need to be considered, if they are ". remote and speculative possibilities, in view of basic changes required in statutes and policies of other agencies _ making them available, if at all, [*46] only after protracted debate and litigation.." Id. (citations omitted). Montana rules implementing MEPA contain similar concepts of feasibility by instructing agencies to consider only those alternatives in an EA that are "reasonably available and prudent to consider." *ARM 17.4.609(3)(f)*.

P77. When preparing an EA, such as the one challenged here, ". the agency's obligation to consider alternatives under an EA is a lesser one than under an EIS." *Native Ecosystems Council v. U.S. Forest Service, 428 F.3d 1233, 1246 (9th Cir. 2005)*. In either case, the range of alternatives considered by an agency is dependent on the purpose of the proposal. Id. That is, an alternative does not need to be considered if it does not advance the project's purpose. *Id. at 1246-1247*.

P78. In this case, the purpose of the proposal considered by DEQ was Fidelity's plan to discharge produced water into the Tongue River under MPDES permits according to approved water management plans. [Tribe's Ex. 9 at 5; DEQ's Exs. 16,17,18.] Other water management options approved in the plans, such as dust suppression and livestock watering, did not need DEQ's approval because no MPDES permits are required for non-discharging [*47] activities. Consequently, the only decision pending before DEQ was whether to issue final MPDES permits for Fidelity's discharges to the Tongue River pursuant to the MPDES rules. [Tribe's Ex. 9 at 5.] Under those rules, DEQ has three choices at the time it makes a decision on a draft permit _ 1) it may issue the permits as drafted, 2) issue the permits as modified in response to comments, or 3) deny the permits. *ARM 17.30. 1377*-1378. If DEQ denies a permit, it must demonstrate "cause" as specified in *ARM 17.30.1363*. That rule authorizes DEQ to deny or terminate a permit for a limited number of causes, none of which apply here. Since no cause to deny the permits was present, DEQ's remaining choices were to issue the permits as drafted or modify the permits in response to comments. DEQ chose the latter.

P79. The Tribe's argument that DEQ's should have considered other alternatives to discharge, such as treatment of all CBM water and reinjection, is unavailing. [Tribe's Op. Br. at 37.] First, none of the options promoted by the Tribe advance the purpose of the proposal being considered by DEQ - i.e., the discharge of CBM water into the Tongue River pursuant to rules implementing the MPDES [*48] program. Therefore, those options did not need to be considered by DEQ in an EA for the permits. *Native Ecosystems Council, 428 F.3d at 1246-1247*. Moreover, DEQ's authority to select alternative water management options simply does not exist under the statutes it administers. See *NRDC v. EPA, 273 U.S. App. D.C. 180, 859 F.2d 156, 169 (D.C.Cir. 1988)* (NEPA does not provide "supplemental authority" to "expand the range of final decisions an agency is authorized to make.")

P80. As previously noted, DEQ's role is limited by statutory constraints that prevent it from selecting alternatives for managing CBM produced water. [DEQ's Ex. 15 at 11.] The scope of DEQ's authority over CBM development consists of ensuring that any discharge of CBM water to surface waters will comply with state water quality standards promulgated by BER. [Id.] Consequently, if BLM and MBOGC approve water management plans that include the discharge of CBM water to surface waters, then DEQ's limited role is to ensure that the discharge meets water quality standards and nondegradation requirements.

P81. At the time DEQ issued the EA and draft permits, BLM and MBOGC had approved Fidelity's water management plans, which included discharges via [*49] an MPDES permit. [Tribe's Ex. 9 at 8.] DEQ did not consider other water management options in the EA, such as treatment of all CBM water or reinjection, because DEQ had no authority to impose those alternatives. See *NRDC, 859 F.2d at 169* (After evaluating environmental impacts, "EPA can properly take only those actions authorized by the CWA---allowing, prohibiting, or conditioning the pollutant.") The Tribe's assertion that the CWA imposes a duty on DEQ to require treatment using BPJ assumes that DEQ has authority under the WQA to impose treatment. However, DEQ has no duty under the CWA to develop technology-based limits on a case-by-case basis. Contrary to the Tribe's contention, DEQ lacks authority under the WQA to impose treatment when no federal requirements exist. Instead, the Montana Legislature has given that authority exclusively to BER. See *§75-5-305(1), MCA*.

P82. The Court concludes that the above-cited statute expressly grants to BER the authority to adopt treatment

standards for an industry and, by its exclusion, denies to DEQ the same authority. The Court relies on the maxim of statutory construction that provides - "the inclusion of one is the exclusion of the other." [*50] See *American Wildlands v. Browner, 94 F. Supp. 2d 1150, 1160 (D.Col. 2006)* (explaining the maxim by stating: "Where the law expressly describes a particular situation to which it shall apply, an irrefutable inference must be drawn that what is excluded was intended to be excluded.") Applying that maxim here, the law authorizing BER to impose treatment standards on an industry in the absence of federal standards implies that the Montana Legislature did not intend DEQ to impose treatment requirements under the same circumstance.

P83. Given DEQ's lack of authority to impose treatment on a case-by-case basis, MEPA does not require DEQ to consider an alternative that is not "reasonably available" in an EA. *ARM 17.4.609(3)(f)*. Since DEQ had no authority to impose treatment or reinjection without the power to change the statutes it administers, those alternatives were not "reasonably available and prudent to consider" when the EA was prepared. Id.

P84. For the above reasons, this Court concludes that MEPA does not require DEQ to consider alternatives, such as treatment and reinjection, pending its decision to issue an MPDES permit.

No Action Alternative

P85. The Tribe further argues that [*51] DEQ's analysis of the "no action" alternative violated MEPA because it did not consider the "projected beneficial and adverse environmental, social, and economic impact of a project's noncompletion," pursuant to *§75-1-201(1)(b)(iv)(C)(IV), MCA*. The Tribe misapprehends the law in two respects: (1) the requirement to consider beneficial and adverse impacts of a project's noncompletion do not apply to an EA; and (2) since no cause was presented to deny the permits, the alternative of "noncompletion" of the project was not "reasonably available and prudent to consider" under *ARM 17.4.609(3)(f)*.

P86. The analysis of alternatives required in an EIS is set forth in *§75-1-201(1)(b)(iv)(C)(I) through (IV), MCA*. Those provisions apply whenever an agency action may have a significant impact on the human environment thereby triggering the requirement for a "detailed statement" of environmental impacts (i.e., an EIS). See *§75-1-201(1)(b)(iv), MCA*. For any environmental review that is not an EIS, such as the EA at issue here, the analysis of alternatives need only comply with *subsections (b)(iv)(C)(I) through (b)(iv)(C)(III)*. See *§75-1-201(1)(b)(i)(B), MCA*. Since those subsections of MEPA do not [*52] require an analysis of impacts from a project's noncompletion, as required for an EIS in *subsection (b)(iv)(C)(IV)*, DEQ was not required to consider the impacts of denying the permits in its EA.

P87. The Tribe criticizes DEQ's analysis of the "no action" alternative because it does not include an analysis of denying the permits. As noted by the Tribe, the "no action" alternative in the EA explains that DEQ would take no action to approve Fidelity's applications for a new or renewed permit; however, DEQ's inaction would result in the continued discharge of 1,600 gpm untreated water under Fidelity's existing permit. [Tribe's Ex. 9 at 13.] The Tribe argues that, since DEQ has "broad authority" to deny permits, the EA should have considered that alternative. The Tribe's presumption that DEQ has broad authority to deny permits is incorrect. As stated earlier, DEQ may only deny a permit if a cause for denial exists. *ARM 17.30.1363*. Since no reason for denial under that rule was presented when DEQ drafted the permits, DEQ had no authority to deny Fidelity's request for the permits. Consequently, the alternative of denying the permits was not "reasonably available" and therefore not "prudent" [*53] for DEQ to consider when it issued the permits. *ARM 17.4.609(3)(f)*.

Necessity for Environmental Impact Statement (EIS)

P88. The Tribe contends that an EIS was required because the permits raised substantial questions regarding the potential for significant impacts. The Tribe relies on *ARM 17.30.608*, arguing that several of the criteria for determining significance under that rule warranted the preparation of an EIS. One of the criteria that warrants the preparation of an EIS advanced by the Tribe is the "unique and fragile" resource of the Tongue River's "high quality" waters.

P89. The fact that the Tongue River is designated "high quality" water does not, without more, qualify the river as a "unique and fragile" resource. As explained earlier, the only waters in Montana that are not "high quality" are rivers that fail to support a single designated use. Since nearly all surface waters in Montana are considered "high quality" under the State's broad

definition of that term, the single fact that the Tongue River is a "high quality" water does not mean that it is "unique" or "fragile" for purposes of determining significance. Consequently, DEQ acted reasonably when it concluded that [*54] no EIS was required for the permitted discharges under that criterion.

P90. The second criterion advanced by the Tribe is one pertaining to potential conflicts with state and local laws. The Tribe argues that an EIS should have been prepared because the permits "posed serious potential conflicts" with the Tribe's water quality standards and the 2006 rule then pending before BER.

P91. It is undisputed that, at the time the permits were issued in February 2006, there were no state or local laws that conflicted with the permits. For this reason, the Tribe's argument in this respect fails. The Tribe's assertion that there were potential conflicts with the Tribe's water quality standards and the 2006 rule then pending before the BER assumes that those state and local laws were effective for purposes of further regulating Fidelity's MPDES permits. However, according to EPA's regulations, a state's or tribe's new or revised water quality standards have no effect for purposes of the CWA, unless and until those standards are approved by EPA. See, *65 Fed.Reg. 24,641-24,644 (April 2000)*. Since EPA had not approved the Tribe's water quality standards at the time the final permits were issued, [*55] there was no potential conflict with local laws protecting the quality of the Tongue River. [Tribe's Ex. 23.] Further, since the BER had not yet adopted the 2006 rule when the final permits were issued, DEQ followed then existing state water quality laws protecting the Tongue River.

P92. It is also undisputed that, when the final permits were issued, there were no potential violations of the Tribe's water quality standards. [Tribe's Ex. 32 at 14.] Although DEQ concludes that the five percent (5%) increase allowed by the Tribe's nondegradation requirements may be exceeded in some month, the DEQ correctly notes that the Tribe's standards and nondegradation requirements were "not recognized under the CWA as legally enforceable." [Tribe's Ex. 32 at 14.] Although the permits did not always require conformity with the Tribe's nondegradation requirements, the nonsignificant changes in water quality resulting from the permitted discharge were found not to result in significant impacts that would warrant the preparation of an EIS. Again, the permits do not allow for significant impacts and should significant impacts occur, agency enforcement, not an EIS, would be the appropriate response. Therefore, [*56] the Court concludes that there were no conflicts with local laws nor significant impacts associated with the issuance of the permits here under review that would require the preparation of an EIS. DEQ's permitting fully complied with MEPA requirements.

ORDER

P93. For the reasons stated above,

P94. IT IS ORDERED as follows:

P95. 1. The respective Motions for Summary Judgment filed by the Plaintiff Northern Cheyenne Tribe and Plaintiffs-Intervenor Tongue River Water Users' Association and Northern Plains Resource Council are DENIED.

P96. 2. The respective Cross-Motions for Summary Judgment filed by Defendants' Montana Department of Environmental Quality and Richard Opper and Defendant-Intervenor Fidelity Exploration & Production Company are GRANTED.

P97. LET JUDGMENT BE PREPARED AND ENTERED ACCORDINGLY.

DATED this 8th day of December, 2008.

BLAIR JONES District Judge

FILED
May 18 2010
Ed Smith
CLERK OF THE SUPREME COURT
STATE OF MONTANA

DA 09-0131

IN THE SUPREME COURT OF THE STATE OF MONTANA

2010 MT 111

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

Plaintiff-Intervenor and Appellants,

v.

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

Defendants and Appellees.

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

COUNSEL OF RECORD:

For Appellants:

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

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

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

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

For Appellees:

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

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

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

Filed:

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Clerk

Justice Brian Morris delivered the Opinion of the Court.

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

¶2 We review the following dispositive issue on appeal:

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

FACTUAL AND PROCEDURAL BACKGROUND

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

STANDARD OF REVIEW

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

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

DISCUSSION

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

The CWA – Structure and Intent

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

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

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

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

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

The Non-Discretionary Requirements of Sections 402 and 301

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

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

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

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

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

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

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

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

State Mandates Under the CWA and Its Implementing Regulations

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

CONCLUSION

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

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

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

/S/ BRIAN MORRIS

We Concur:

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