

PETITION FOR JUDICIAL REVIEW

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9 **MONTANA SIXTH JUDICIAL DISTRICT COURT, PARK COUNTY**

10
11 PROTECTING PARADISE, INC.,)
12 Petitioner,)
13 vs.)
14 MONTANA DEPARTMENT OF ENVIRONMENTAL)
QUALITY,)
15 Respondent.)
16

Cause No. DV-12-123
Hon. WM. NELS SWANSON

**PETITION FOR JUDICIAL
REVIEW**

17 Pursuant to the Montana Administrative Procedure Act, section 2-4-702, M.C.A., and the
18 Montana Environmental Policy Act, section 75-1-101, *et seq.*, the Petitioner, Protecting Paradise,
19 Inc. ("Protecting Paradise"), petitions this Court for judicial review of the final decision of the
20 Montana Department of Environmental Quality ("DEQ") to issue a license to Michael and Magdalen
21 Adkins ("Adkins") to operate a Class III Waste Tire Monofill in the Paradise Valley, near Pray,
22 Montana. Copies of the DEQ's Environmental Assessment ("EA") and Response to Public
23 Comments ("Response") are attached as Exhibits 1 and 2. The DEQ's Response includes a section
24 titled Conclusions and Recommendations, which contains the agency's final decision and action:
25 "The Department will issue the Class III license for the Adkins Class III Tire Monofill based upon
26 the approved Operations and Maintenance Plan" *Id.*, p. 10.
27
28

I.

FACTS UPON WHICH JURISDICTION AND VENUE ARE BASED
(MCA 2-4-702(2)(b))

1. Petitioner Protecting Paradise is a Montana nonprofit public benefit corporation. The members and directors of Protecting Paradise live primarily in and around Pray, Montana. The purpose of Protecting Paradise is to safeguard south-central Montana's Paradise Valley from environmental degradation.
2. Respondent DEQ is an administrative agency of the State of Montana, created under section 2-15-3501. § 75-10-103(3).
3. Mr. and Mrs. Adkins are residents of the Paradise Valley seeking licensure of a Class III waste tire disposal operation.
4. DEQ has made a final decision to issue such a license.
5. Protecting Paradise has exhausted all known available administrative remedies and is aggrieved by the final decision of DEQ.
6. Under sections 2-4-702 and 75-1-201, this Court has jurisdiction to review agency actions.
7. This Petition is filed within 60 days of service of DEQ's final decision to issue the license. § 75-1-201(5)(a)(ii).
8. This Court has jurisdiction over the subject matter in this dispute. § 75-1-201(5)(a)(i).
9. Venue is proper because the Petitioner's principal place of business is in Park County. §§ 2-4-702(2)(a); 75-1-108.
10. This action "must take precedence over other cases or matters in the district court unless otherwise provided by law." § 75-1-201(5)(b).

II.

STATEMENT OF THE MANNER IN WHICH
THE PETITIONER IS AGGRIEVED

11. On May 31, 2011 Adkins submitted an application to the DEQ for licensure of a proposed landfill for the disposal of waste tires.
12. The proposed tire dump would be located on Adkins' private property, approximately two

1 miles north of Pray, Montana, in the heart of the Paradise Valley, one of the gateways to
2 Yellowstone National Park.

3 13. The dump would be situated one-half mile south of the Yellowstone River, and one-third
4 mile west of Mill Creek, which flows into the Yellowstone River.

5 14. The Yellowstone River is the longest undammed river in the continental United States. The
6 river is home to numerous trout species, including native cutthroat trout. The section of the
7 river flowing between Yellowstone Park and its confluence with the Boulder River east of
8 Livingston, Montana, is regarded as a blue ribbon trout fishery.

9 15. The proposed site presently contains a large, open pit. Prior to Adkins' application for
10 licensure of a waste tire facility, the pit contained at least the following:

- 11 a. 280 tons of scrap iron, steel tanks and other metals;
- 12 b. More than 1500 waste tire carcasses;
- 13 c. 50 pieces of old construction equipment and farm equipment;
- 14 d. 30 pieces of old farm tractors, farm equipment and construction equipment;
- 15 e. 30 pieces of old trucks;
- 16 f. 50 pieces of out-of-service construction trucks;
- 17 g. 200 wrecked and out-of-service automobiles; and
- 18 h. 50 tons of construction debris and mobile trailer units.

19 16. On information and belief, Adkins did not have a permit to store or dispose of these scrap
20 materials, vehicles, and tires.

21 17. On information and belief, Adkins removed these waste materials in order to create space for
22 the proposed tire dump.

23 18. The proposed dump would be a waste tire monofill—*i. e.*, the dump would only be permitted
24 to contain waste tires.

25 19. The monofill would have a total waste disposal capacity of 700,000 cubic yards—enough to
26 contain approximately 28 million tires.

27 20. Montana produces less than one million tires per year.

- 1 21. Multiple peer-reviewed studies have shown that waste tires are not inert materials; to the
2 contrary, they can leach toxic substances into the soil and groundwater.
- 3 22. The surface of the proposed tire disposal facility is located 75 feet above the river channel
4 elevation.
- 5 23. The pit which will contain the waste tires will be excavated to a depth of 60 feet below the
6 surface of the proposed facility. Thus, the bottom of the pit will only be 15 feet above the
7 river channel elevation. Further, the bottom of the pit will only be 30-40 feet above an
8 alluvial aquifer containing groundwater which is flowing in the general direction of the
9 confluence of Mill Creek and the Yellowstone River.
- 10 24. The DEQ's EA indicates that the soils underlying the pit have "high" permeability.
- 11 25. Storm water and snow melt will collect in the pit, as well as water from sprinklers and other
12 water-based dust control measures. This will facilitate percolation of toxic substances
13 leaching from the buried tires, and toxic substances which may have leached from the waste
14 vehicles and other refuse, through the permeable soil and into the flowing groundwater.
- 15 26. Tire fires are extremely difficult to extinguish. A tire fire at the proposed facility would have
16 potentially catastrophic effects on Paradise Valley air and water quality, and the health of
17 human residents, pets, livestock, wildlife, and vegetation.
- 18 27. The facility will create a large amount of dust, noise, odor, and vibrations.
- 19 28. Tire dumps attract snakes, including rattlesnakes, and disease-carrying pests such as rats and
20 mosquitos.
- 21 29. Maintenance of the dump facility will require use of significant quantities of water for
22 sprinklers and other dust control measures. The EA does not explain where Adkins will get
23 this water, whether he has the water rights and permits to use so much water, and, if a local
24 water source will be used, whether that will impact residential wells or other local water
25 supplies.
- 26 30. The entrance to the dump would be located on East Chicory Road, near where it intersects
27 with State Highway 540. There is a public school bus stop servicing grades K-8 in the
28

1 Arrowhead School District located on Chicory Road. There are numerous mailboxes located
2 at the intersection of Chicory Road and State Highway 540. Chicory Road also provides
3 recreationists with fishing access to the Yellowstone River.

4 31. Thus, the proposed facility will significantly increase traffic and safety hazards by
5 introducing several large trucks and tractor-trailers each day to an area with narrow roads
6 being used by residents, recreationists, and local school children.

7 32. On January 31, 2012, DEQ published an EA of the proposed dump.

8 33. The EA concluded that an Environmental Impact Statement ("EIS") was not necessary,
9 despite acknowledging "potential direct or cumulative impacts to human health and the
10 environment from the proposed landfill." EA, p. 19.

11 34. The DEQ requested public comment on the EA. Protecting Paradise submitted extensive
12 comments. DEQ received approximately 230 written comments during the comment period.

13 35. On May 4, 2012, DEQ responded to the comments. The responses were largely cursory, and
14 dismissive. Each response began with "Comment noted." One response was solely
15 "Comment noted." DEQ did not respond to many of Protecting Paradise's comments.

16 36. DEQ concluded its responses to the comments by determining it would issue the requested
17 license. This constituted final agency action by DEQ.

18 III.

19 GROUNDS FOR RELIEF

20 37. The Montana legislature, "mindful of its constitutional obligations under Article II, section
21 3, and Article IX of the Montana constitution, has enacted The Montana Solid Waste
22 Management Act. It is the legislature's intent that the requirements of [the Act] provide
23 adequate remedies for the protection of the environmental life support system from
24 degradation and provide adequate remedies to prevent unreasonable depletion and
25 degradation of natural resources." § 75-10-202(1).

26 38. Further, "[i]t is hereby found and declared that the health and welfare of Montana citizens
27 are being endangered by improperly operated solid waste management systems and by the
28

1 improper and unregulated disposal of wastes. It is declared that the public policy of this state
2 is to control solid waste management systems to protect the public health and safety and to
3 conserve natural resources whenever possible.” § 75-10-202(2).

4 39. In accordance with these legislative findings and declarations, Protecting Paradise states the
5 following grounds for relief from DEQ’s arbitrary, capricious, and unlawful decision to
6 license a tire dump on the edge of the Yellowstone River in the heart of one of the gateways
7 to the nation’s oldest national park.

8 **A.**

9 **Violation of Sections 17.4.607(1) and 17.4.608(1), A.R.M.**

10 40. Section 17.4.607(1)(b), A.R.M., states, “The agency shall prepare an EIS . . . whenever,
11 based on the criteria in ARM 17.4.608, the proposed action is a major action of state
12 government significantly affecting the quality of the human environment.”

13 41. Section 17.4.608(1)(a)-(g) enumerates several criteria which the agency “shall consider
14 . . . in determining the significance of each impact on the quality of the human environment.”

15 42. The EA identified several potential impacts to the physical and human environment. *See* EA,
16 pp. 10-18.

17 43. DEQ did not consider or discuss each of the criteria set forth in section 17.4.608(1)(a)-(g)
18 with respect to each of the potential impacts identified in the EA, in violation of the above
19 Administrative Rules of Montana.

20 **B.**

21 **Violation of Section 17.4.608(2), A.R.M.**

22 44. Section 17.4.608(2) states, “An EIS is required if an impact has a significant adverse effect,
23 even if the agency believes that the effect on balance will be beneficial.” Thus, the DEQ
24 must perform an EIS if any single impact has a significant adverse effect, and cannot base
25 its decision on the overall or combined effects of a given project.

26 45. In its EA, DEQ indicates that it determined not to conduct an EIS based on the “combined
27 effect” of factors that would mitigate “any potential direct or cumulative impacts.” In effect,
28

1 the DEQ determined that the effects of the proposed project would "on balance," be
2 mitigated. This is an improper basis on which to decline to perform an EIS.

3 46. In any event, DEQ failed to evaluate the significance of each impact identified in the EA, by
4 considering the criteria set forth in section 17.4.608(1)(a)-(g). Thus, the DEQ has not yet
5 properly evaluated whether any identified impact has a significant adverse effect. Until it
6 does so, DEQ cannot decline to conduct an EIS.

7 C.

8 **Violation of Section 17.4.609(3)(d)**

9 47. Section 17.4.609(3)(d) states, "[A]n EA must include: . . . an evaluation of the impacts,
10 including cumulative and secondary impacts, on the physical environment."

11 48. Prior to the Adkins' application for a waste tire facility, the pit located on the proposed
12 premises contained a variety of waste materials as described in ¶ 15, *supra*.

13 49. Rainfall, snowmelt, and water from dust-controlling sprinklers will collect in the pit, and
14 percolate into the permeable soil beneath.

15 50. The EA contains no evaluation of the impacts that toxic substances which may have leached
16 from these waste materials into the soil over time will have on the underlying aquifer, the
17 Yellowstone River, or Mill Creek.

18 51. The EA has thus failed to evaluate all potential impacts of the proposed operation, in
19 violation of Montana's administrative rules.

20 D.

21 **Violation of Section 75-1-201(b)(i)(B), M.C.A. and**
22 **Section 17.4.609(3)(f), A.R.M.**

23 52. Section 75-1-201(1)(b)(i)(B) states, "[I]n any environmental review that is not subject to
24 subsection (1)(b)(iv), when an agency considers alternatives, the alternative analysis will be
25 in compliance with the provisions of subsections (1)(b)(iv)(C)(I) and (1)(b)(iv)(C)(II) . . ."

26 53. Section 75-1-201(1)(b)(iv)(C) states that agencies must include a detailed statement on
27 "alternatives to the proposed action." The alternatives must comply with the criteria set forth
28 in section 75-1-201(1)(b)(iv)(C)(I)-(III).

1 54. In other words, by statute, all environmental reviews, including EAs, must comply with the
2 EIS requirements for identifying alternatives to the proposed action.

3 55. In addition, section 17.4.609(3)(f) states, “[A]n EA must include: . . . a description and
4 analysis of reasonable alternatives to a proposed action whenever alternatives are reasonably
5 available and prudent to consider and a discussion of how the alternative would be
6 implemented.”

7 56. The discussion of alternatives must be meaningful, and must set forth “those alternatives
8 sufficient to permit a reasoned choice.” *State ex. re. Montana Wilderness Ass’n v. Board of*
9 *Natural Resources and Conservation of State of Mont.*, 200 Mont. 11, 24, 648 P.2d 734, 742
10 (1982) (internal quotations omitted).

11 57. The EA does not include a meaningful analysis of alternatives.

12 58. The EA addresses only three “alternatives”—Alternatives A, B and C. Alternative A is a “no
13 action alternative.” Alternative B is denial of the license. Alternative C is approval of the
14 license.

15 59. Alternatives A and B are essentially the same—*i.e.*, no tire dump. In a few sentences, the EA
16 merely discusses the likelihood of Alternatives A and B occurring. It does not discuss any
17 potential beneficial or detrimental consequences of the “no tire dump” alternative, or provide
18 any explanation why no dump is or is not the preferred choice. In sum, the EA fails to
19 provide an assessment of Alternatives A and B sufficient to permit a reasoned decision about
20 whether to select a “no tire dump” option.

21 60. Alternative C is not an “alternative” at all—it is the proposed action. The purpose of
22 identifying and discussing alternatives is to explore alternate solutions to the proposed action.
23 Alternative C simply summarizes the reasons why the DEQ favors the proposed action.

24 61. The EA contains no meaningful discussion of true alternatives to the proposed action. It
25 does not analyze alternatives such as locating the proposed facility elsewhere, reducing the
26 number of tires the facility would be permitted to accept, or adding more stringent
27 environmental or safety protections such as requiring the pit to be lined, prohibiting smoking
28

1 on the premises, or reducing the number of tires that may be accepted per day.

2 62. The single-page discussion of alternatives in the EA is insufficient and does not satisfy
3 Montana's statutory or administrative requirements.

4 E.

5 **Violation of Section 75-10-216, MCA, and**
6 **Sections 17.50.508(1)(x) and 17.50.540, A.R.M.**

7 63. Section 17.50.508(1)(x) states, "Prior to disposing of solid waste or operating a solid waste
8 management system . . . a person shall submit to the department for approval an application
9 for a license to construct and operate a solid waste management system. . . . The applicant
10 shall provide at least the following information: . . . (x) for a . . . waste tire facility subject
11 to 75-10-216, MCA, a copy of the proposed financial assurance required by ARM 17.50.540
12 or 75-10-216."

13 64. Thus, before a waste management system may be licensed, the DEQ must have approved the
14 proposed financial assurance.

15 65. DEQ has already determined to issue a license for the proposed facility, but has not yet
16 approved Adkins' proposed financial assurance. *See* Response to Public Comments, p. 7
17 (after announcing it will issue the license, DEQ states it will then "review the proposed
18 [financial assurance] . . .").

19 66. DEQ has violated Montana statutory and administrative requirements that a proposed
20 financial assurance for a tire disposal site be approved before issuance of an operating
21 permit.

22 F.

23 **Violation of Section 75-10-212(2), MCA**

24 67. Section 75-10-212(2) states, "It is unlawful to dump or leave any garbage, dead animal, or
25 other debris or refuse: . . . (c) within 200 yards of a public highway, road, street, or alley or
26 public property."

27 68. DEQ has violated this statute by allowing Adkins to dump waste tires within 200 yards of
28 East Chicory Road, and within 200 yards of State Highway 540.

1 G.

2 Violation of Section 17.50.1009(1)(h)

3 69. Section 17.50.1009(1)(h) states, "The owner or operator of a landfill facility shall comply
4 with the following general locational requirements: . . . (h) a Class III landfill may not restrict
5 the flow of the 100-year flood . . . or result in washout of solid waste so as to pose a hazard
6 to human health, wildlife, or land or water resources."

7 70. Although it acknowledges that the proposed tire dump would be located on the alluvial plain
8 of the Yellowstone River, the EA fails to analyze whether the facility could restrict the flow
9 of a 100-year flood, or whether such a flood might reach and wash out the solid waste buried
10 at the site. It must do so.

11 H.

12 Violation of Constitutional Provisions

13 71. DEQ's licensure of the proposed tire dump near the Yellowstone River in the heart of the
14 Paradise Valley violates Protecting Paradise members' right to a clean and healthful
15 environment, pursuant to Article II, section 3 of Montana's Constitution.

16 72. DEQ's licensure of the proposed tire dump also violates the State's mandates to maintain and
17 improve a clean and healthful environment and to restore, enhance and preserve scenic and
18 recreational sites, pursuant to Article IX, sections 3 and 4 of Montana's Constitution.

19 I.

20 Clearly Erroneous Findings

21 73. The EA misleadingly implies there is a need for an additional tire dump in Montana, by
22 asserting that "[t]here are currently only four licensed tire-only disposal facilities in Montana,
23 three of which are located in western Montana." EA, p. 1. However, the EA fails to
24 acknowledge that there are already dozens of landfill facilities scattered throughout Montana
25 that accept waste tires for disposal and recycling.

26 74. Nor does DEQ provide any supporting data for its conclusion that "[l]icensure of this facility
27 will . . . likely reduce the overall disposal costs and provide an additional option for waste
28

1 tire management for individuals and businesses in the region.” *Id.*

2 75. The proposed dump would have a total waste disposal volume of 700,000 cubic
3 yards—enough capacity to dispose of 28,000,000 tires. The entire state of Montana produces
4 less than one million tires per year.

5 76. DEQ’s findings that there is an economic demand for an additional tire disposal facility in
6 the Paradise Valley, with the volume to contain several times as many tires as are produced
7 in the entire state in a year, is without support and clearly erroneous in view of the reliable,
8 probative, and substantial evidence on the whole record.

9 77. DEQ’s decision to license the proposed facility is based, in part, on its finding that a need for
10 such a facility exists.

11 78. DEQ’s decision, based on unsupported and clearly erroneous findings, is arbitrary and
12 capricious.

13 79. Substantial rights of Protecting Paradise’s members have been prejudiced as a result of
14 DEQ’s erroneous findings and decision.

15 IV.

16 **RELIEF REQUESTED**

- 17 80. Pursuant to section 75-1-201(6)(c), Protecting Paradise requests that the Court:
- 18 a. remand this matter to the DEQ to correct the deficiencies in the EA discussed above;
 - 19 b. once the deficiencies in the EA have been corrected, require the DEQ to perform an
20 EIS; and
 - 21 c. grant such other and further relief as this Court deems just and proper.

22 RESPECTFULLY SUBMITTED this 3rd day of July, 2012.

23 GOETZ, GALLIK & BALDWIN, P.C.

24
25
26 By: 
27 Brian K. Gallik/Zachary K. Strong
28 ATTORNEYS FOR PLAINTIFF

DECISION AND ORDER

1 Hon. Brenda R. Gilbert
2 District Court Judge
3 414 East Callender
4 Livingston, MT 59047
5 (406) 222-4130

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BY *Danuta Perdue*
DEPUTY

6 PROTECTING PARADISE, INC.,)
7)

8 Petitioner,)

9 vs.)

10 MONTANA DEPARTMENT OF)
11 ENVIRONMENTAL QUALITY,)

12 Respondent,)

13 And)

14 MICHAEL AND MAGDALENA)
15 ADKINS,)

16 Intervenor-Respondents.)
17)
18)

Cause No. DV-12-123

DECISION AND ORDER

19 The Petitioner, Protecting Paradise, Inc., (hereinafter referred to as "Protecting Paradise"),
20 filed its Petition for Judicial Review on July 3, 2012. The Petition seeks judicial review of the
21 final decision of the Montana Department of Environmental Quality (hereinafter referred to as
22 "DEQ") to issue a license to Michael and Magdalena Adkins to operate a Class III Waste Tire
23 Monofill in the Paradise Valley, near Pray, Montana. On September 28, 2012, Protecting Paradise
24 filed its Amended Petition for Judicial Review. Michael and Magdalena Adkins were granted
25 leave to intervene. The Court set a briefing schedule and the parties submitted their briefs in
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1 accordance therewith. The Court heard oral arguments in the matter on April 1, 2013. The Court
2 provided for post-hearing briefing. The parties submitted supplemental briefs. The Petitioner
3 filed its Notice of Constitutional Question and provided notice thereof to the Attorney General on
4 May 6, 2013. The Court has not taken any action with respect to this case for the ensuing sixty
5 days, and the Attorney General has not responded. Respondent DEQ filed its Motion to Strike or
6 Stay Pending Notice to the Office of the Attorney General and the Petitioner responded. The
7 Court, having considered the briefs filed by the parties and the oral arguments, now makes the
8 following Decision and Order:
9

10 **BACKGROUND FACTS AND PROCEDURAL HISTORY**

11
12 On June 3, 2011, DEQ received an application for licensure of a Monofill submitted by the
13 engineer working for Michael and Magdalena Adkins. AR6-25-26; AR7-27-310. The requested
14 license was for a proposed landfill to be used for disposal of waste tires. Before the application
15 for the license was submitted, the Adkins' engineer, William E. Smith, met with DEQ Solid Waste
16 Division staff to discuss the project. AR1-2-3. DEQ informed Mr. Smith that the conditions
17 existing at the proposed location of the project, the abandoned gravel pit, consisting of storage of
18 waste tires, scrap metal, and junk vehicles constituted violations of the Solid Waste Management
19 Act. AR1-3. Mr. Smith was informed by DEQ that the site of the proposed Monofill would have
20 to be cleaned up before DEQ would consider an application for licensure of the Monofill. AR1-3.
21

22 DEQ opened an enforcement file to track voluntary clean up of the proposed site for the
23 Monofill. AR-2. The clean-up of the site was completed to the satisfaction of DEQ and it closed
24 the enforcement file. AR4-12. DEQ then proceeded with review of the requested license. DEQ
25 sent Mr. Smith a Notice of Deficiency, to which Mr. Smith responded. AR9-317. Based upon the
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1 application and the response to the deficiency letter, DEQ prepared the Environmental Assessment
2 (hereinafter referred to as "EA") that is the subject of this proceeding. AR-10. The EA was
3 disseminated on January 31, 2012.
4

5 The proposed facility would be located on the Adkins' private property, about two miles
6 north of Pray, Montana. The proposed facility is approximately a third of a mile west of Mill
7 Creek, which flows into the Yellowstone River and about a half of a mile south of the
8 Yellowstone River. AR7-78; AR7-123.
9

10 The proposed Monofill site is not in any zoned area of Park County. Park County has no
11 zoning jurisdiction over the proposed Monofill site.

12 The Yellowstone River is the longest undammed river in the continental United States.
13 The river is home to numerous trout species, including native cutthroat trout. The section of the
14 river flowing between Yellowstone Park and its confluence with the Boulder River east of
15 Livingston, Montana, is regarded as a blue ribbon trout fishery.
16

17 The proposed site presently contains a large, open pit. AR7-7. Prior to the Adkins'
18 application for licensure of a waste tire facility the pit contained at least the following:

- 19 a. 280 tons of scrap iron, steel tanks, and other metals;
- 20 b. More than 1500 waste tires;
- 21 c. 50 pieces of old construction equipment and farm equipment;
- 22 d. 30 pieces of old farm tractors, farm equipment and construction equipment;
- 23 e. 30 pieces of old trucks;
- 24 f. 50 pieces of out-of-service construction trucks;
- 25 g. 200 wrecked and out-of-service automobiles; and
26
27
28

1 h. 50 tons of construction debris and mobile trailer units.

2 AR1-2-3; AR2-7; AR-7-95; AR19-828.

3 The proposed dump would be a waste tire Monofill situated on an 11.7 acre property,
4 consisting of four separate tracts. AR7-95. The dump would only be permitted to contain waste
5 tires. AR6-25; AR7-30. The Monofill would have a total waste disposal capacity of 700,000 cubic
6 yards, enough to contain approximately 28 million tires. AR7-30; AR7-102. The Monofill would
7 be capable of receiving a maximum of 5,000 waste tires per day.
8

9 There is a dispute between the Petitioner and DEQ as to whether tires are inert materials.
10 However, Petitioner relies upon multiple peer-reviewed studies that have shown that waste tires are
11 not inert materials and that, to the contrary, they can leach toxic substances into the soil and
12 groundwater. AR 19-937; AR 19-1053; AR-19-1064.
13

14 The surface of the proposed tire disposal facility is located 70 feet above the Yellowstone
15 River channel elevation. AR-7-97. The pit which would contain the waste tires would be
16 excavated to a depth of 60 feet below the surface of the proposed facility. AR7-78; AR7-95. Thus
17 the bottom of the pit will only be 15 feet above the river channel elevation. *Id.* Further, the bottom
18 of the pit will be only 30-40 feet above an alluvial aquifer containing groundwater which is flowing
19 in the general direction of the confluence of Mill Creek and the Yellowstone River. AR7-100.
20

21 The DEQ's EA indicates that the soils underlying the pit have "high" permeability.
22 Petitioner asserts that storm water and snow melt will collect in the pit, as well as water from
23 sprinklers and other water-based dust control measures. AR7-111. Petitioner asserts that this will
24 facilitate percolation of toxins. The Adkins' engineer, Mr. Smith set forth a plan for the
25 compaction of the tire pieces, the covering of the tire pieces with sand, and the management of
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27
28

1 storm water runoff. Mr. Smith opined that “no adverse affects [sic] on groundwater quality are
2 anticipated due to operation of this proposed landfill.” AR9-326.

3 The site includes an inactive gravel pit that currently occupies approximately 40% of the
4 project property. AR7-78. During waste tire disposal, active gravel mining will occur and the area
5 of the pit will expand, but the depth will not increase. AR7-79.

6 Petitioner also asserts that the proposed facility presents a potential fire risk such that a fire
7 would be extremely difficult to extinguish if started. Petitioners assert that a tire fire at the
8 proposed facility would have potentially catastrophic effects on Paradise Valley air and water
9 quality, and the health of human residents, pets, livestock, wildlife and vegetation. The Adkins’
10 engineer provided a fire suppression plan that included prohibiting smoking except in designated
11 areas, keeping sources of ignition in a designated enclosure, and fire extinguishers. AR9-328.

12 The Petitioner asserts that the facility would create a large amount of dust, noise, odor, and
13 vibrations and further that it would attract snakes, including rattlesnakes and disease-carrying pests,
14 such as rats and mosquitoes.

15 Maintaining the dump would require the use of significant quantities of water for sprinklers
16 and other dust control measures. The EA does not explain where the Adkins would get this water,
17 whether the Adkins have water rights and permits to use this amount of much water, and, if a local
18 water source would be used, whether that would impact residential wells or other local water
19 supplies.

20 The Petitioner asserts that the proposed facility would significantly increase traffic and
21 safety hazards by introducing large trucks and tractor-trailers each day to an area with narrow roads
22 being used by residents, recreationists and local school children.

1 The EA concluded that an Environmental Impact Statement was not necessary, despite
2 acknowledging, "potential direct or cumulative impacts to human health and the environment from
3 the proposed landfill." Exhibit 1, AR10-341-363.
4

5 The DEQ requested public comment on the EA. Petitioner submitted extensive comments.
6 The Park County Commissioners, the Director of Environmental Health for Park County, the Park
7 County Montana Planning and Development Board, and the Montana Mosquito & Vector Control
8 Association (MMVCA) also all submitted comments. DEQ received approximately 230 written
9 comments during the comment period. The overwhelming majority of the comments indicated
10 opposition to the application and urged the DEQ to perform an EIS. AR 19.
11

12 The Park County Commissioners stated that the EA was inadequate and additional
13 investigation of the impact of the proposed facility was required. In particular, the Commissioners
14 expressed concern about the impact of the facility on county roads, water, social structures, human
15 health and safety, property values and transportation. AR19-596-97.
16

17 Barbara Woodbury, Director of Environmental Health for Park County, expressed many of
18 the same concerns identified by the Commissioners in addition to other significant deficiencies
19 with the EA, including transportation and traffic concerns, air quality, aesthetics, social structures,
20 health and safety and fiduciary assurance. AR19-610-611.
21

22 The Park County Planning Development Board advised DEQ of the inadequacy of the EA
23 coupled with deficiencies on "such basic issues as human health and safety, groundwater
24 contamination, noise and dust pollution, vermin, insect and noxious weeds infestation, wear and
25 tear on county roads and aesthetic degradation." AR19-1223-1229.
26
27
28

1 The MMVCA objected to DEQ's conclusion that the tire dump would likely "not pose a
2 risk to human health". That Association believes the tire dump does pose a risk to human and
3 animal health because of the increased potential for mosquito breeding. AR19-453.
4

5 Protecting Paradise had a traffic engineer, Bob Marvin, of Marvin and Associates in
6 Billings, evaluate the EA. Mr. Marvin strenuously disagreed with the DEQ's conclusion that there
7 would be no impacts to the existing transportation systems. He noted that there would be an 83%
8 increase in traffic on Mill Creek Road. He asserted that the existing data indicate that, "there
9 would be potential impacts to Mill Creek Road and Secondary 540 in terms of added traffic
10 volumes, safety and structural integrity of the transportation structures, while the EA indicated that
11 there would be no impacts to the Transportation System." AR19-113.
12

13 DEQ contacted the DOT after publishing the EA with questions about traffic count
14 information, legal load limits and the like. DEQ has admitted that the local fire district had not
15 been notified before the EA was issued and it is ill-equipped to respond in the event of a fire at the
16 facility.
17

18 On May 4, 2012, DEQ responded to the comments. AR14-378-387. DEQ concluded its
19 responses to the comments by determining it intended to issue the requested license. AR15-391
20

21 Thereafter, by its letter of May 4, 2012, the DEQ sent a copy of the proposed license to Dr.
22 Wadle, the Park County Health Officer. He reviewed the application and proposed license from a
23 public health perspective and concluded the EA contained multiple deficiencies. Thus, he "was
24 unable to validate this license without further evaluation in the form of an Environmental Impact
25 Statement or additional mitigating processes to protect that groundwater in the event of a fire."
26 AR18-404. Dr. Wadle also expressed concerns with the West Nile disease and the failure of DEQ
27
28

1 to address the contingency of, "the very real threat of a tire fire." Dr. Wadle refused to sign the
2 license. The Adkins appealed that decision to the Board of Environmental Review. That Board
3 voted to stay that action until this Court rules on the Petition for Judicial Review.
4

5 The May 4, decision by DEQ constituted a final agency action. The Petition for Judicial
6 Review before the Court followed.

7 STANDARD OF REVIEW

8 The standard of review is set forth in Section 75-1-201(6)(a). In an action involving a claim
9 that the Environmental Assessment is inadequate, the person or entity challenging the decision has
10 the burden of proving the claim by clear and convincing evidence contained in the record. A Court
11 can overturn an agency's decision if the decision was arbitrary and capricious or was otherwise not
12 in accordance with law. An agency decision is arbitrary and capricious if it was not "based on a
13 consideration of the relevant factors." *Clark Fork Coalition v. DEQ*, 2012 MT 240, 366 MT 427,
14 288 P.3d 183; *North Fork Pres. Assn. v. Dept. of State Lands*, 238 Mont. 451, 465, 778 P.2d 862,
15 871 (1989).
16
17

18 An agency is required to take a "hard look" at the environmental impacts of a project or
19 proposal. *Clark Fork Coalition v. Montana DEQ (Clark Fork I)*, 2008 MT 407, 197 P.3d 482, 47,
20 347 Mont. 197, ¶47.
21

22 Pursuant to Section 75-1-201(6)(c), MCA (Eff. May 12, 2011):

23 The remedy in any action brought for failure to comply with
24 or for inadequate compliance with a requirement of parts 1
25 through 3 of this chapter is limited to remand to the agency
26 to correct deficiencies in the environmental review
27 conducted pursuant to subsection (1).
28

In the context of judicial review of an agency decision under MEPA,

1 In making the factual inquiry concerning whether an agency
2 decision was "arbitrary or capricious," the reviewing court
3 must consider whether the decision was based on a
4 consideration of the relevant factors and whether there has
5 been a clear error of judgment." This inquiry must "be
6 searching and careful," but "the ultimate standard of review
7 is a narrow one.

8 *North Fork Pres. Assn. v. Department of State Lands*, 238 Mont. 451, 465, 778 P.2d 862, 871
9 (1989).

10 THE STATUTORY FRAMEWORK

11 Pursuant to ARM 17.4.607(1), the agency shall prepare an EIS. . .

- 12 (a) whenever an EA indicates that an EIS is necessary; or
- 13 (b) whenever, based on the criteria in ARM 17.4.608, the
14 proposed action is a major action of state government
15 significantly affecting the quality of the human
16 environment.

17 ARM 17.4.608(1), in turn provides that,

18 In order to implement 75-1-201, MCA, the agency shall
19 determine the significance of impacts associated with a
20 proposed action. This determination is the basis of the
21 agency's decision concerning the need to prepare an EIS and
22 also refers to the agency's evaluation of the individual and
23 cumulative impacts in either EAs or EISs. The agency shall
24 consider the following criteria in determining the
25 significance of each impact on the quality of the human
26 environment:

- 27 (a) the severity, duration, geographic extent, and frequency
28 of occurrence of the impact;
- (b) The probability that the impact will occur if the
proposed action occurs; or conversely, reasonable
assurance in keeping with the potential severity of an
impact that the impact will not occur;

- 1 (c) growth-inducing or growth-inhibiting aspects of the
2 impact, including the relationship or contribution of the
3 impact to cumulative impacts
- 4 (d) the quantity and quality of each environmental resource
5 or value that would be affected, including the uniqueness
6 and fragility of those resources or values;
- 7 (e) the importance to the state and to society of each
8 environmental resource or value that would be affected;
- 9 (f) any precedent that would be set as a result of an impact
10 of the proposed action that would commit the
11 department to future actions with significant impacts or a
12 decision in principle about such future actions; and
- 13 (g) potential conflict with local, state, or federal laws,
14 requirements, or formal plans.

15 **THE SIGNIFICANCE OF THE CONTROVERSY**
16 **WARRANTS AN EIS**

17 The proposed tire dump in this case presents a licensing issue that is highly controversial.
18 There were over 250 comments submitted to DEQ that reflected opposition to the project. Many
19 requested the preparation of an EIS due to conflicting evidence on the nature of the project. The
20 concerns raised by public comment included concerns about the environment, about impacts upon
21 water quality, the West Nile Virus and fire hazards.

22 Our Ninth Circuit has held that:

23 Agencies must prepare environmental impact statements whenever
24 a federal action is "controversial," that is, when "substantial
25 questions are raised as to whether a project... may cause significant
26 degradation of some human environmental factor," or there is "a
27 substantial dispute [about] the size, nature, or effect of the major
28 Federal action." A substantial dispute exists when evidence, raised
prior to the preparation of an EIS or FONSI, casts serious doubt
upon the reasonableness of an agency's conclusions. NEPA then
places the burden on the agency to come forward with a "well-
reasoned explanation" demonstrating why those responses disputing

1 the EA's conclusions" do not suffice to create a public controversy
2 based on potential environmental consequences. The term, "well
3 reasoned explanation" is simply a less direct way of saying that the
4 explanation must be "convincing." (internal citations omitted)

5 *National Parks & Conservation Ass'n v. Babbitt*, 241 F.3d, 736 (9th Cir. 2001), abrogated on other
6 grounds by *Monsanto Co. v. Geertson Seed Farms*, 130 S. Ct. 2743 (2010) The Court, in *Babbitt*,
7 addressed a situation where 450 public comments had been received after the EA was initially
8 published. Of those, 85% were opposed to the project. The Court held that this made the project
9 sufficiently controversial so as to require a full EIS. In terms of the agency's response to public
10 comments, the standard is whether the agency's "responses provide a convincing explanation of
11 why the comments do not suffice to constitute a public controversy. *Border Power Plant Working*
12 *Group v. Dept of Energy*, 260 F. Supp.2d 997, 1025 (S.D. Cal. 2003)

13
14 In this case, the comments received by DEQ in response to the EA overwhelmingly oppose
15 the agency's final decision and/or request further study of the proposed license and its
16 ramifications. The Court concludes that, based upon this controversy together with all of the
17 specific areas of deficiency in the EA, as discussed below, that an EIS should be required.

18 **FAILURE TO COMPLY WITH ARM 17.4.608(1)(a)-(g)**

19
20 Although the EA does raise a number of potential impacts to the environment, DEQ did
21 not, as required, consider and discuss each impact in light of the criteria set forth in 17.4.608(1)(a)
22 through (g) in the EA. Rather than reviewing each potential impact and showing that it gave
23 meaningful consideration to each of the factors in subsections (a) through (g), the DEQ relied
24 upon conclusory statements that did not even purport to address each factor.

25
26 The record demonstrates clear and convincing evidence of DEQ's failure to adequately
27 address the impacts in light of these criteria. The record further demonstrates that the DEQ's
28

1 analysis of the environmental impacts in light of the criteria of ARM 17.4.608 (1)(a) through (g)
2 was arbitrary and capricious. Further, the DEQ's analysis of the impacts was not in compliance
3 with the applicable requirements of MEPA and pertinent administrative regulations. The failed
4 analysis as to at least some of those impacts is discussed below.
5

6 **FAILURE TO ADEQUATELY CONSIDER WATER QUALITY IMPACTS**

7 There is no dispute regarding the proximity of the proposed Monofill to crucial water
8 resources. The proposed site is situated over an unconfined and very productive aquifer, per the
9 EA. The groundwater flows from the site, downhill toward the confluence of Mill Creek and the
10 Yellowstone River. The EA acknowledges that this aquifer provides a significant source for most
11 of the drinking water in the vicinity of the proposed facility.
12

13 Moreover, the soil is porous and would allow any contaminants to percolate through the
14 soil. As the EA explains, "the alluvium at the facility is characterized by sand and gravel." Table
15 3.2 of the EA demonstrates that the soils located in the pit are highly permeable.
16

17 The DEQ dismisses the water quality impacts, resting on its conclusion that the tires are
18 inert and would not allow for leaching given their treatment at the proposed facility. There is
19 clear and convincing evidence that this conclusion is arbitrary and capricious in light of the
20 studies cited by the Plaintiff including the Crumb Rubber Report, Groundwater Effects from
21 Highway Tire Shred Use, and a scientific article entitled Bacterial Communities of Tyre Monofill
22 Sites: Growth on Tyre Shreds and Leachate. The DEQ's response to these studies is inadequate,
23 particularly given the concern about exposure of the tire waste to percolating water.
24

25 There is no evidence in the EA that DEQ considered any of these studies in any meaningful
26 way. The DEQ failed to take a "hard look" at the water quality issue. The potential ramifications
27
28

1 of its conclusion being erroneous are tremendous in terms of impact to water quality, the human
2 environment, and the economy of the region. For example, the studies advanced by the Plaintiffs
3 present serious concerns about harm to the fish population from waste tire leaching, as well as
4 general water quality concerns for the human population.
5

6 The DEA has failed to adequately consider the science underlying this issue and has failed
7 to apply the factors set forth in ARM 17.4.608(1)(a) through (g) to the water quality issue.

8 **THE EA FAILS TO ADEQUATELY CONSIDER THE IMPACT OF**
9 **A POTENTIAL TIRE FIRE**

10 The DEQ recognizes “the risks to human health and the environment as a result of a tire
11 fire.” (AR14-0000380) The EA gives cursory treatment to this issue by stating that the risk of
12 fires would be reduced by covering the waste tires every few weeks and limiting nearby ignition
13 sources. The EA states that portable fire extinguishers would be available and that at least one
14 facility employee would be a trained member of the rural volunteer fire department.
15

16 The Court concludes that there is clear and convincing evidence that the DEQ’s treatment
17 of this issue in the EA is arbitrary and capricious. There is no evaluation in the EA of the impact
18 of a tire fire in light of the factors set forth in ARM 17.4.608(1)(a) through (g). If a fire started at
19 the Monofill, the results could be devastating to air quality, human health, livestock and wildlife.
20 Tire fires have burned at other such facilities for days or months, when entire fire departments
21 have been unable to put them out. The smoke emissions from tire fires are toxic.
22

23 The threat of a fire at the proposed facility needs to be fully addressed in an EIS, with a
24 comprehensive evaluation of the risks and a reasonable plan for addressing such a contingency.
25
26
27
28

1 **THE EA FAILS TO CONSIDER THE IMPACT UPON TRAFFIC SAFETY**

2 The EA concludes that the proposed project will have no impact on local transportation
3 networks and traffic flows and that it will add only minor traffic to existing roads. The Court
4 concludes that there is clear and convincing evidence that the DEQ's treatment of this issue in the
5 EA is arbitrary and capricious. There is no evaluation in the EA of the impact upon traffic safety
6 in light of the factors set forth in ARM 17.4.608(1)(a) through (g).
7

8 The Petitioner submitted the report of a traffic consultant, Robert Marvin. In his report,
9 Mr. Marvin concluded that the proposed facility would cause an increase of traffic by 83% on
10 Mill Creek Road and by 28% on East River Road. These roads are both narrow and winding. The
11 increased traffic presents increased safety hazards to all using the roads, particularly in light of the
12 facility increasing traffic in the form of large trucks bringing loads of tires to the facility. There is
13 a significant issue as to whether the Mill Creek Bridge can safely accommodate the increased
14 traffic in the form of more commercial trucks as it is so narrow that even passenger vehicles cross
15 the center line when crossing the bridge.
16
17

18 To conclude, as the EA has, that this magnitude of an increase in traffic on these types of
19 roads is a "minor" impact defies logic. An EIS is needed to carefully study the potential impacts
20 of the increase in commercial truck traffic that would accompany the operation of the proposed
21 facility.
22

23 **THE EA FAILED TO ADDRESS THE IMPACTS OF PESTS AND DISEASE**

24 The EA addressed the impact of pests and disease in a conclusory sentence. The EA states
25 that "Rules governing the application of cover will control mosquitoes, rodents or other vectors by
26 hindering the collection of rainwater and access into the waste tires."
27
28

1 The record reflects that the tires will be covered every three weeks with six inches of soil.
2 The Petitioner asserts its concern that there has been no analysis in the EA as to whether the
3 interim periods where tires are exposed will prevent mosquito eggs from hatching. Its additional
4 concern is whether this thin layer of soil is sufficient to deter rattlesnakes and small mammals
5 from burrowing into and inhabiting the tire dump. Finally, the Petitioner asserts that the EA fails
6 to consider the possibility that whole tires (which will be allowed to be dumped into the pit
7 indefinitely until or unless the tire shredder becomes operational), can trap air and methane and
8 float to the surface of the pit, breaking through the surface layer of cover. There is nothing in the
9 EA reflecting that these concerns have been evaluated.
10
11

12 The threat of increased mosquito populations is a significant consideration in light of the
13 West Nile Virus. Likewise, creating an environment that fosters an increase in the rattlesnake
14 population is a threat to health and safety. The Court concludes that there is clear and convincing
15 evidence that the DEQ's treatment of this issue in the EA is arbitrary and capricious. There is no
16 evaluation in the EA of the potential impact of increased habitat for mosquitoes and rattlesnakes
17 in light of the factors set forth in ARM 17.4.608(1) (a) through (g).
18

19 **THE EA FAILS TO ADEQUATELY ADDRESS AIR QUALITY**

20 There is no dispute over the fact that the proposed facility will involve excavation,
21 construction, maintenance, material screening, placement of cover material, increased road and
22 internal landfill traffic and the like. This will increase particulate matter in the air, which can
23 negatively impact human health and the environment. There is a known factor of wind in the
24 Paradise Valley. The EA fails to consider the impact of this increased dust-producing activity,
25 combined with hot, dry summer months and wind.
26
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28

1 Given that this impact of dust upon air quality has been identified, the DEQ had an
2 obligation to consider, “the severity, duration, geographic extent and frequency of the impact”,
3 under the provisions of ARM 17.4.608(1) (a). The EA should have considered the quantity and
4 quality of each environmental resource or value that would be affected, including the uniqueness
5 and fragility of those resources or values and the importance to the state and to society of each
6 environmental resource or value that would be affected. In this case, the EA should have
7 addressed how and to what degree dust would affect air quality, Mill Creek, the Yellowstone
8 River, vegetation, wildlife, livestock, and human health.
9
10

11 The Court concludes that there is clear and convincing evidence that DEQ’s treatment of
12 this issue in the EA is arbitrary and capricious. There is no evaluation in the EA of the potential
13 impact of increased dust in light of the factors set forth in ARM 17.4.608(1)(a) through (g).
14

15 **THE EA FAILS TO ADEQUATELY CONSIDER AESTHETICS**

16 The EA states, in a conclusory fashion, that “the proposed landfill will likely have only
17 minor, if any, impact on aesthetics.” The EA concludes that the project is not located such that it
18 will “be visible from populated or scenic areas.” The DEQ did not adequately study this issue
19 prior to drawing such a conclusion. The East River Road, is frequented by local residents,
20 provides access to Chico Hot Springs, and is a route for many visitors to Yellowstone National
21 Park. The East River Road passes directly by the proposed facility. The proposed project is
22 within one-half of a mile from the Yellowstone River and one of the most prominent stretches of
23 blue ribbon, class one trout fisheries in Montana and the U.S.
24

25 The Park County Planning Board stated in its comments that the “Paradise Valley is truly
26 representative of the quality and characteristics that make this area one of the crown jewels of the
27
28

1 State of Montana.” The proposed tire dump is located in the heart of Paradise Valley, near the
2 junction of Mill Creek and the Yellowstone River, all prominent topographical features.

3
4 The Court concludes that there is clear and convincing evidence that the DEQ’s treatment
5 of the aesthetics issue in the EA is arbitrary and capricious. There is no evaluation in the EA of
6 the potential impact of the proposed facility upon the aesthetics of the area in light of the factors
7 set forth in ARM 17.4.608(1)(a) through (g).

8
9 **OTHER IMPACTS DESERVING STUDY IN THE EIS PROCESS**

10 Without addressing them individually, there are a number of other issues that need to be
11 addressed in an EIS. They include the economic impacts of the project, inclusive of property
12 values, tourism, and the possibility of some increase in job availability due to the proposed
13 facility. Further, the issue of increased noise and odor as potential impacts, needs to be addressed
14 in the EIS process. The potential impact of this facility in light of the restrictions imposed by the
15 100 year flood plain should also be addressed. The available alternatives to granting the license
16 for the proposed facility need to be addressed in an EIS, more comprehensively than the treatment
17 given this issue in the EA.
18

19 The EA does not adequately evaluate the cumulative and secondary impacts upon the
20 physical environment as required by ARM 17.4.609(3)(d). The pit on the Adkins’ property where
21 the facility would be located has been the site of a dumping ground for a variety of junk vehicles
22 and waste materials. The pit was unlicensed and unregulated. There is no evidence that the DEQ
23 considered the existing impacts to the site from that activity and the cumulative and/or secondary
24 impact they may have when added to the impacts generated by the Monofill at issue. There is
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1 and convincing evidence that the DEQ's lack of evaluation of these cumulative and secondary
2 factors was arbitrary and capricious.

3 **THE ALLEGED VIOLATION OF SECTION 75-10-212(2) MCA**

4
5 The Petitioner raised the issue of the proposed facility violating Section 75-10-212 MCA in
6 its initial briefing. At the conclusion of the hearing in this matter, the Court requested further
7 briefing on this issue. The Court finds the legislative history of the relevant statutes and the
8 argument offered by DEQ on this issue to be persuasive. The Court concludes that in the pending
9 licensing issue under review, Section 75-10-212(2) is inapplicable.
10

11 **THE CONSTITUTIONAL QUESTION RAISED BY PETITIONER**

12 In its post-hearing filings, the Petitioner raised a constitutional issue regarding Section 75-
13 1-201(6)(d). Notice was given by Petitioner's counsel to the Office of the Attorney General for
14 the State of Montana. For this reason, the Court has declined to take any action regarding the
15 pending judicial review in the ensuing sixty day period. The Attorney General has not responded
16 to the notice of a constitutional question being raised.
17

18 Nonetheless, this Court, in the exercise of judicial restraint, will not, at this time, address
19 the constitutional issue raised by the Petitioner. It is not necessary to reach the constitutional
20 question, given that the DEQ has proposed issuance of a permit and the relief sought by the
21 Petitioner's Amended Petition and granted by the Court herein is a remand of the matter to DEQ.
22

23 The Court retains jurisdiction to address the constitutional issue in the event that DEQ fails
24 to comply with the directives on remand and injunctive relief therefore becomes an issue.
25
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