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**MONTANA ELEVENTH JUDICIAL DISTRICT, FLATHEAD COUNTY**

<b>WATER FOR FLATHEAD'S FUTURE</b>	)	Cause No. DV 17-1109A
<b>Inc., AMY WALLER, STEVEN MOORE,</b>	)	
<b>And CYNTHIA EDSTROM,</b>	)	
	)	
Plaintiffs	)	<b>PLAINTIFFS' UNOPPOSED</b>
	)	<b>STATUS REPORT AND</b>
vs.	)	<b>UNOPPOSED MOTION TO</b>
	)	<b>STAY PROCEEDINGS</b>
<b>MONTANA DEPARTMENT OF</b>	)	
<b>ENVIRONMENTAL QUALITY and</b>	)	
<b>MONTANA DEPARTMENT OF</b>	)	
<b>NATURAL RESOURCES, agencies of the</b>	)	
State of Montana,	)	
	)	
Defendants	)	

Plaintiffs hereby file this Unopposed Status Report, pursuant to instructions from the Court following the April 29, 2019 telephonic Status Conference, and Unopposed Motion to Stay Proceedings. Following the Status Conference, and after consultation among the parties, the Court agreed to stay this case until Friday, June 7, 2019 and required the parties to submit this Status Report by that date.

The original stay and the April 29<sup>th</sup> conference resulted from Plaintiffs' April 5, 2019 filing with this Court of a *Notice of Related Case Decision* in which Plaintiffs advised the Court of Judge Seeley's Order on Petition for Judicial Review in *Flathead Lakers Inc. et al. v. DNRC and Montana Artesian Water Company (MAWC)*, Cause No. CDV-2018-135, Montana First Judicial District Court, Lewis and Clark County (*Flathead Lakers*).

On or about Friday, May 31, 2019 Plaintiffs were advised that Defendant Montana Department of Natural Resources (DNRC) and MAWC had each filed a notice of appeal with the Montana Supreme Court, appealing Judge Seeley's Order in *Flathead Lakers*.

On Tuesday, June 4, 2019, counsel for Plaintiffs and Defendants consulted telephonically to prepare a joint Status Report pursuant to instructions from the Court following the April 29, 2019 telephonic Status Conference.

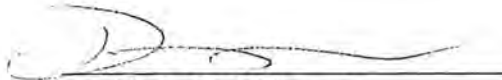
During this conference, Plaintiffs proposed that the parties agree to stay this proceeding pending the Montana Supreme Court's final disposition of the appeal in *Flathead Lakers*.

Plaintiffs so move the Court to stay this proceeding until the Montana Supreme Court rules on the appeal in *Flathead Lakers*. This motion is intended to conserve judicial, state agency and Plaintiffs' resources pending resolution of one of the legal issues at the heart of this Montana Environmental Policy Act (MEPA) matter: whether or not MAWC is entitled to the 710 acre-feet appropriative right to groundwater in order to operate its bottled water facility in Flathead County. As the Court is aware, Judge Seeley's decision voided the preliminary and final determination by DNRC concerning MAWC's water rights permit, and if upheld on appeal, could moot out the MEPA claim against DNRC if DNRC, on remand, requires a new application and MEPA review.

This motion to stay the case is unopposed by counsel for Defendants in this matter. Plaintiffs and Defendants agree that within 30-days of the Supreme Court disposition of the appeal of the *Flathead Lakers* decision, Counsel in this matter will submit a Joint Status Report and proposals for proceedings to resolve this matter in a timely fashion.

Dated this 6<sup>th</sup> day of June, 2019.

MORRISON SHERWOOD WILSON & DEOLA PLLP



David K. W. Wilson, Jr.

CERTIFICATE OF SERVICE

The undersigned hereby certifies that on this 6<sup>th</sup> day of June, 2019, a true and correct copy of the foregoing document was duly served by first-class mail upon the following:

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**MONTANA ELEVENTH JUDICIAL DISTRICT, FLATHEAD COUNTY**

**WATER FOR FLATHEAD'S FUTURE  
Inc., AMY WALLER, STEVEN MOORE,  
and CYNTHIA EDSTROM,**

Plaintiffs

vs.

**MONTANA DEPARTMENT OF  
ENVIRONMENTAL QUALITY and  
MONTANA DEPARTMENT OF  
NATURAL RESOURCES,** agencies of the  
State of Montana,

Defendants

Cause No. DV 17-1109A

**PLAINTIFFS' FIRST  
AMENDED COMPLAINT**

COMES NOW Plaintiffs, Water for Flathead's Future (WFF), Amy Waller, Steve Moore and Cindy Edstrom, through counsel, and in support of its complaint seeking review of two State agency decisions: the September 5, 2017 decision of the Montana Department of Environmental Quality (DEQ) granting a Montana Pollutant Discharge Elimination System (MPDES) surface

water discharge permit to Montana Artesian Water Company (MAWC or Applicant) for a proposed bottled-water factory (the Facility) north of Flathead Lake near Creston, Montana; and the January 26, 2018 decision of the Montana Department of Natural Resources and Conservation (DNRC) granting a Beneficial Water Use permit to MAWC for the same bottling plant. The claims against each agency arise under the Montana Environmental Policy Act (MEPA) and its implementing regulations.

## I. INTRODUCTION

1. The Facility is a bottled-water factory located at 1085 Egan Slough Road, Kalispell, MT 59901, in Flathead County. Effluent from the Facility's plastic bottle rinsing system and heating system will, through two outfalls, contribute to pollution in the surface water of an unnamed tributary (UT) of the Flathead River. Despite requests from the public, including WFF and its members, and critical comments from agencies of the federal government, DEQ and DNRC both failed to comply with their mandatory statutory duties under the Montana Environmental Policy Act (MEPA) by failing to adequately evaluate the environmental impacts of this potentially massive Facility.

## II. PARTIES, JURISDICTION AND VENUE

2. Plaintiff WFF is a non-profit public benefit corporation pursuant to § 35-2-101, *et seq.*, MCA, dedicated to water quality protection in the Flathead Valley. Members of WFF live in Flathead County in the vicinity of the Facility, and use the UT of the Flathead River, the Flathead River, area ground water, and transportation infrastructure impacted by the Facility. Members of WFF use the UT and area groundwater for domestic and agricultural applications, and those interests will be adversely impacted by the actions of the Defendant because of the increased pollution unlawfully permitted by the Defendant. The environmental, health, aesthetic,

and commercial interests of each WFF member will be adversely affected by DEQ's actions of MPDES permitting at issue herein. In addition, WFF members have an interest in sound land use planning and protecting the area's rural aesthetic character and promoting sustainable use of surface and groundwater resources, and such interests will be adversely affected by the agencies' unlawful actions herein. These adverse impacts may be redressed by granting the relief requested herein. This action is brought on WFF's own behalf and on behalf of its members.

3. Plaintiff Amy Waller is a resident of Flathead County owning property neighboring the proposed bottling plant. Her water rights, view-shed, property values and ability to farm will be adversely affected by the construction and operation of the water bottling plant. She was an objector in the contested case considering DNRC's approval of Water Use Permit No. 76LJ-30102978.

4. Plaintiffs Steven Moore and Cynthia Edstrom are residents of Flathead County. They were objectors in the contested case considering DNRC's approval of Water Use Permit No. 76LJ-30102978. They own 72-ares to the northwest of the proposed bottling plant. Their irrigation system will be adversely affected if MAWC exercises its full water rights.

5. Defendant DEQ is an agency of the State of Montana. It regulates wastewater discharges to surface waters of the State through the MPDES.

6. Defendant DNRC is an agency of the State of Montana. It regulates water rights in the State of Montana.

7. Jurisdiction is based on: § 75-1-201(5)(a) MCA; Article II, Sections 3,4, 16 and 17 of the Montana Constitution; Article VII Section 4(1); and Article IX Section 1 of the Montana Constitution. Venue is proper in this district under § 75-1-108, MCA.

### III. FACTUAL BACKGROUND

### *The Facility*

8. The Facility is a drinking water bottling factory. Water used by the Facility will be drawn from an onsite public water supply well. Applicant has applied for an annual appropriation of 710.53 acre-feet (af) of water from DNRC in order to operate the Facility. Applicant also applied for an MPDES permit from DEQ to discharge effluent from the Facility by two separate outfalls to the UT of the Flathead River.

9. Polyethylene terephthalate (PET) plastic bottles will be manufactured at the Facility through a blow-molding process. At the planned peak capacity, 20-ounce PET bottles will be manufactured, rinsed, and filled at a rate of up to 140,000 bottles per hour, 24 hours per day, 365 days per year.

10. Applicant intends to begin operations with a single bottle-filling station capable of filling at a rate of 7,000 20-ounce bottles per hour, approximately 5% of peak capacity sought through the DNRC water rights proceeding. After this system reaches maximum capacity additional bottling stations will be added. The building has been designed to accommodate additions as the company grows. Applicant states that water will be diverted based on the demand of the customers and bottles will be filled as orders come in. The MPDES permit issued by DEQ contemplates Facility initial operation at only 5% of planned peak capacity; however, as noted below, the DNRC application assumes full capacity.

11. Applicant proposes to discharge "non-contact heating water" to the UT by outfall 001. This effluent will be generated by the Facility's use of an open-loop geothermal system with two heat pumps. In this system, water is delivered to the heat pumps between 52°-53° F and is expected to be discharged into the UT at 44.1°-45.1° F with a maximum discharge rate of 60 gallons per minute (gpm).

12. Applicant also proposes to discharge rinse water to the UT by outfall 002. This effluent will be generated by the Facility's rinsing of plastic bottles prior to filling. Rinsing is necessary to remove dust and debris from the bottles. DEQ made no inquiry into the nature of the dust and debris to be removed through rinsing and no analysis of the character of the rinsate effluent. The rinse water will be collected in trench floor drains prior to its discharge through outfall 002 with an expected maximum of 5 gpm for this incremental MPDES permit.

*DNRC Water Rights Proceeding*

13. Appropriations of surface and groundwater for beneficial use in Montana are administered by DNRC. On June 24, 2015, the Montana Artesian Water Company (Applicant) submitted an Application for Beneficial Water Use Permit No. 76LJ 30102978 to the Kalispell Water Resources Office of the Montana Department of DNRC to appropriate groundwater for commercial and geothermal use in a water bottling plant. The Applicant proposes to pump 1 cfs (450 gpm) for up to 710.53 acre-feet (AF) annual diverted volume from a public water supply well located onsite.

14. The proposed geothermal use is for 60 GPM up to 12.28 AF per annum and is planned as a temporary use. The volume appropriated for geothermal use will count against the volume bottled; the maximum combined appropriation of these two uses will be 588.08 AF per annum. Upon full buildout, MAWC plans to bottle this entire volume; however, as the water bottling plant develops, up to 12.28 AF per annum will be used for the geothermal purpose.

15. DNRC issued a Preliminary Determination to Grant Application for Beneficial Water Use Permit on January 14, 2016. The application and the Preliminary Determination received 75 objections of which 39 were deemed valid objections. Because valid objections were received



on the application, the Department was required to conduct a contested case hearing. In September, 2017 a DNRC Hearing Officer held a contested case hearing.

16. At the hearing WFF, along with other affected members of the public, introduced extensive evidence in opposition to the application and the Preliminary Determination. Among other things, opponents and others highlighted the following issues as reasons or bases for denial of the permit.

- Long term impacts to groundwater and groundwater availability;
- Impacts to surface water;
- Improper analysis of impacts.

17. On January 26, 2018, the Hearing Officer issued a Final Order, constituting the DNRC's "final decision" in the matter. He approved the application for a beneficial use permit.

#### *MPDES Permit*

18. Permits to discharge pollutants into the surface or ground waters of the State of Montana are administered by DEQ. The MPDES regulates discharges of pollutants to the surface waters of the State of Montana.

19. On October 26, 2015, DEQ received an application for an MPDES individual surface water permit from the Applicant by which Applicant proposes to discharge effluent from its drinking water bottling facility as outlined above. On November 20, 2015 DEQ requested more information from Applicant, to which the Applicant responded on December 4, 2015. DEQ determined the application was complete on December 9, 2015.

20. This MPDES permit application encompasses operation of the Facility utilizing only a 5% portion of the water right sought by Applicant in the DNRC proceedings. As stated by DEQ in the Response to Comments, the facility operation at "full build out" has not been proposed to

DEQ. DEQ is aware of the full measure of the appropriation sought by MAWC in the DNRC proceeding. DEQ is aware of MAWC's intent to incrementally build capacity of the Facility to utilize the full measure of the appropriative water right sought from DNRC.

21. On May 31, 2016 DEQ issued a draft MPDES permit accompanied by a Fact Sheet and "checklist" Environmental Assessment (EA) pursuant to MEPA. Within this EA, DEQ reviewed 25 potential impacts without any real analysis, finding no significant impacts requiring preparation of an environmental impact statement (EIS) under MEPA. DEQ opened a 35-day public comment period and held an August 1, 2016 public hearing at the Creston School.

22. On September 5, 2017 DEQ issued MPDES Permit No. MT0031851 to Applicant authorizing the discharge of effluent from the Facility. Also on September 5, 2017, DEQ published a Final EA document and a Response to Public Comment document (DEQ Response).

#### *DEQ Environmental Assessment*

23. Plaintiff WWF, members of WWF individually and other interested parties, including the US Environmental Protection Agency (USEPA) and the US Fish and Wildlife Service (USFWS), submitted comment during the comment period. DEQ received comments from approximately 280 individuals during the comment period. Commenters objected to a wide range of impacts facilitated through DEQ's granting of the MPDES permit.

24. In the DEQ Response to public comments, included with the final decision, DEQ included a "summary of all significant comments" and responded to parts of comments submitted by only 13 commenters as "representative of the substantive comments received on the fact sheet and draft permit." DEQ included a listing of all commenters but did not publish the text of all comments within the DEQ Response.

25. Objections to the direct impacts of the MPDES permit included impacts from the discharge of PET plastic particles and chemical leachate arising from the rinsing of PET plastic bottles manufactured on site, and thermal pollution to the UT of the Flathead River arising from discharge of geothermal heating system water.

26. A representative of the USFWS submitted comments expressing concerns about the impacts of effluent from the facility on surface water quality, including unknown pollutants in the PET bottle rinsate, the lack of characterization of the rinsate, increased turbidity of the stream, and temperature effects of the effluent on the tributary.

27. A representative of the USEPA submitted several concerns about the impacts of effluent from the facility on surface water quality stating that the fact sheet seeks to characterize the effluent based on a very small data set with a number of assumptions that are not explained or justified.

28. USEPA expressed the concern that the Fact Sheet relies upon two sample analyses of raw well water to characterize the effluent from the plant and that the Fact Sheet does not provide any information to support the assumption that non-contact heating water and process rinse water for plastic bottle manufacturing do not contain pollutants.

29. USEPA also expressed concern that the maximum expected discharge under the MPDES permit may cause a 30% increase over the critical low flow of the UT, that changing the flow regime of a stream can potentially affect its physical, chemical and biological characteristics, and that the Fact Sheet has no analysis demonstrating why DEQ has concluded this change in streamflow is nonsignificant.

30. WFF members and several other commenters objected to the direct impacts of the discharge of PET bottle manufacturing rinse water, including concerns regarding the potential

for toxic compounds, including endocrine disrupting chemicals, to leach from bottles manufactured from PET and subsequently released into the environment via the Facility rinsate wastewater. Commenters also expressed concerns about the discharge of PET plastic “dust or detritus” and the release of toxic compounds, including endocrine disruption chemicals, due to the breakdown of PET plastic particles after release into the UT.

31. WFF and its members also expressed concerns regarding a number of secondary impacts facilitated by DEQ’s granting of the MPDES permit and Facility operation. These concerns include: drawdown of area domestic and irrigation wells; increased truck traffic, dust, noise, light pollution; the export of Montana water for sale outside of the state; the disposal of PET plastic bottles; and climate change impacts of using a petroleum based plastic for drinking water sales.

32. Commenters also objected to the incremental and segmented nature of DEQ’s EA regarding DEQ’s failure to incorporate the planned build-out of the Facility to full production capacity in its analysis of impacts.

33. In response to concerns expressed about PET plastic leachate and decomposition by-products of PET after discharge in rinsate effluent, DEQ only responded that PET bottles are approved for drinking water use without undertaking any analyses of available peer-reviewed scientific literature on leachate and decomposition by-products of PET which had been submitted with public comments. DEQ stated that it examined one source of effluent data from a water bottling facility that uses PET bottles. DEQ further stated that endocrine disruptors are emerging contaminants of concern, that it is working to update standards to address emerging issues, and that if new information becomes available it will evaluate the need for new effluent limits after the 5-year term of the MPDES permit.

34. In response to concerns about thermal pollution and volumetric additions to the UT, DEQ stated that the discharge does not have a reasonable potential to cause or contribute to the exceedance of the water quality standard for temperature. DEQ relied on the non-scientific opinion of one un-named resident who stated the UT flow remained constant all year.

35. In response to concerns raised about secondary impacts of operation of the Facility pursuant to the MPDES permit, DEQ stated that impacts resulting from operation of the Facility are not secondary impacts because they are not stimulated, induced by, or otherwise result from a direct impact of issuing the permit.

36. In response to concerns raised about the piecemeal segmentation of its environmental analysis of a small portion of the intended Facility operations, DEQ stated that it cannot presume that MAWC will discharge an increased volume under its MPDES permit if granted the full water right by DNRC, and that MAWC would need to apply for additional permission from DEQ if it sought to exceed the scope of the work allowed under this permit. DEQ relied on a previously published DNRC "checklist" EA (discussed below), whose author subsequently admitted he assumed there would be no impact without any actual assessment.

#### *DNRC Environmental Assessment*

37. In January, 2016, prior to the Preliminary Determination, and prior to the Contested Case hearing, DNRC issued a "checklist" EA. The EA is cursory and conclusory. It is labeled "For Routine Actions With Limited Environmental Impact", even though the Facility being permitted will be a large industrial bottling plant, the largest one of its size in the State of Montana (by a factor of ten) and is unique in that it will operate round the clock, 365-days a year, producing 1.22 billion bottles a year at the rate of 140,000 every hour.

38. The EA also contains a number of factual errors. For instance, it states incorrectly that Flathead Lake does not support aquatic life. It also states incorrectly that the MAWC proposal is not "inconsistent with any locally adopted environmental plans or goals", notwithstanding the fact that the siting of the Facility in prime agricultural land is contrary to the goals and objectives of the Flathead County Growth Policy.

39. The EA disclaims any impacts from the permit and the Facility on a range of environmental and human environmental issues. The EA acknowledged that the "development of the water bottling plant will increase local trucking traffic in the surrounding area due to shipping of the product." Yet it then concluded "it is unknown what impact the increased trucking traffic could have on roads and transportation in the area", and did no further inquiry, effectively concluding that there would be no impact. While the EA discussed this one impact from the Facility in the context of transportation, it did not do so on a wide range of other human environmental attributes, such as existing land uses, demands on government services and safety that indisputably will also be impacted.

40. Accordingly, the EA determined that an environmental impact statement (EIS) was not necessary. No public comment was solicited or taken.

41. The EA which purports to document DNRC's decision in this matter predates the Contested Case Hearing by over a year and a half, and does not benefit from, or address, new environmental issues raised at the hearing. DNRC has not supplemented the EA following the Contested Case Hearing.

42. As an example of the information that came out at the hearing concerning adverse impacts from the issuance of the permit was the following assertion by the United States Fish and Wildlife Service in post-contested case briefing:

The [MAWC] application is unique because the applicant will be pumping 24 hours a day, 7 days a week, 365 days a year. The depletions caused by this type of pumping do not allow the aquifer to recover and the result is a drawdown extending many miles out that will continually grow with time. The Service expressed its concerns that the long-term impacts from the MAWC well will cease artesian flow wells that the Hatchery as relied upon since 1957. The Service and other Objectors demonstrated during the hearing the poor quality of the MAWC aquifer pump test, the errors located throughout the DNRC analysis, and the potential harm to not only the Hatchery, but all neighbors nearby. The result is an inaccurate conclusion on Adverse Effects.

A glaring example of the DNRC failing to follow the ARM requirements, and therefore putting the whole application analysis into question, is the lack of properly characterized observation wells of proper depth, screened interval, and subsurface well lithology.

43. Evidence also showed that DNRC failed to show that the water quality of prior appropriators would not be adversely impacted or diminished; the aquifer test done in support of the application was unreliable: the final decision ignored Department and other testimony demonstrating that surface waters could be impacted by the permitted water use.

44. Plaintiff and its members have been harmed by both Agencies' failure to fully evaluate the impacts from the project, in violation of MEPA. Plaintiffs will experience additional and irreparable harm to their environmental and health, their water and their water rights, when the bottling plant starts operation and expands as permitted to produce 1.22 billion bottles of water each year. Moreover, many of the Plaintiffs' members' property will be significantly de-valued by the change from agricultural to industrial use of this neighboring property.

#### **IV. FIRST CLAIM FOR RELIEF -- DEQ**

##### **(Violation of the Montana Environmental Policy Act)**

45. The previous paragraphs are realleged as set forth in full hereunder.

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

47. MEPA requires state agencies to carefully scrutinize the potential environmental consequences of their actions. § 75-1-101 et seq., MCA; A.R.M. 17.4.607.

48. Under A.R.M. 17.4.608 and 17.4.609(3)(d), in order to implement MEPA, the agency shall determine the significance of impacts, including secondary and cumulative impacts associated with a proposed action. This determination is the basis of the agency's decision concerning the need to prepare an EIS.

49. The agency shall consider (a) the severity, duration, geographic extent, and frequency of occurrence of the impact, (b) the probability that the impact will occur if the proposed action occurs; or conversely, reasonable assurance in keeping with the potential severity of an impact that the impact will not occur, (c) growth-inducing or growth-inhibiting aspects of the impact, including the relationship or contribution of the impact to cumulative impacts, (d) the quantity and quality of each environmental resource or value that would be affected, including the uniqueness and fragility of those resources or values, (e) the importance to the state and to society of each environmental resource or value that would be affected, (f) any precedent that would be set as a result of an impact of the proposed action that would commit the department to future actions with significant impacts or a decision in principle about such future actions, and (g) potential conflict with local, state, or federal laws, requirements or formal plans. A.R.M. 17.4.608(1)

50. An EA must include: (a) a description of the proposed action, including maps and graphs, (b) a description of the benefits and purpose of the proposed action, (c) a listing of any state, local, or federal agencies that have overlapping or additional jurisdiction or environmental review responsibility for the proposed action, (d) an evaluation of the impacts, including cumulative and secondary impacts, on the physical environment, (e) an evaluation of the



impacts, including cumulative and secondary impacts, on the human population in the area to be affected by the proposed action, (f) a description and analysis of reasonable alternatives to a proposed action whenever alternatives are reasonably available and prudent to consider and a discussion of how the alternative would be implemented, (g) a listing and appropriate evaluation of mitigation, stipulations, or other controls enforceable by the agency or another government agency, (h) a listing of other agencies or groups that have been contacted or have contributed information, (i) the names of persons responsible for preparation of the EA, and (j) a finding on the need for an EIS and, if appropriate, an explanation of the reasons for preparing the EA. If an EIS is not required, the EA must describe the reasons the EA is an appropriate level of analysis. A.R.M. 17.4.609(3).

51. DEQ's checklist EA purportedly evaluating surface water discharge by Permit No. MT0031861 is insufficient. The permit fact sheet and EA are void of a description of process wastewater effluent and analyses of environmental impacts flowing therefrom in violation of A.R.M. 17.2.524 and 525. Although the public and agencies raised significant concerns, DEQ failed to provide additional analysis or fully respond to the concerns in its response to public comment.

52. The significance of both direct and indirect impacts identified within the EA were not assessed in violation of A.R.M. 17.4.609(3). The lack of adequate assessment includes but is not limited to direct impacts caused by rinse water effluent contaminants and thermal pollution on surface water quality and aquatic life, as well as impacts caused by the operation of the facility on air, water, noise, traffic, wildlife, quiet enjoyment and value of private property and existing homes and businesses in the vicinity of the Facility.

53. DEQ's issuance of MPDES Permit No. MT0031851 without taking a hard look at direct, indirect and cumulative impacts is arbitrary and capricious and in violation of the Montana Environmental Policy Act.

**V. SECOND CLAIM FOR RELIEF -- DNRC**

**(Violation of the Montana Environmental Policy Act)**

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

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

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

55. Under A.R.M. 36.2.525 & 526 in order to implement MEPA, the agency shall determine the significance of impacts, including secondary and cumulative impacts associated with a proposed action. This determination is the basis of the agency's decision concerning the need to prepare an EIS.

57. The agency shall consider (a) the severity, duration, geographic extent, and frequency of occurrence of the impact, (b) the probability that the impact will occur if the proposed action occurs; or conversely, reasonable assurance in keeping with the potential severity of an impact that the impact will not occur, (c) growth-inducing or growth-inhibiting aspects of the impact, including the relationship or contribution of the impact to cumulative impacts, (d) the quantity and quality of each environmental resource or value that would be affected, including the uniqueness and fragility of those resources or values, (e) the importance to the state and to society of each environmental resource or value that would be affected, (f) any precedent that would be set as a result of an impact of the proposed action that would commit the department to

future actions with significant impacts or a decision in principle about such future actions, and (g) potential conflict with local, state, or federal laws, requirements or formal plans. A.R.M. 36.2.524.

58. An EA must include: (a) a description of the proposed action, including maps and graphs, (b) a description of the benefits and purpose of the proposed action, (c) a listing of any state, local, or federal agencies that have overlapping or additional jurisdiction or environmental review responsibility for the proposed action, (d) an evaluation of the impacts, including cumulative and secondary impacts, on the physical environment, (e) an evaluation of the impacts, including cumulative and secondary impacts, on the human population in the area to be affected by the proposed action, (f) a description and analysis of reasonable alternatives to a proposed action whenever alternatives are reasonably available and prudent to consider and a discussion of how the alternative would be implemented, (g) a listing and appropriate evaluation of mitigation, stipulations, or other controls enforceable by the agency or another government agency, (h) a listing of other agencies or groups that have been contacted or have contributed information, (i) the names of persons responsible for preparation of the EA, and (j) a finding on the need for an EIS and, if appropriate, an explanation of the reasons for preparing the EA. If an EIS is not required, the EA must describe the reasons the EA is an appropriate level of analysis. A.R.M. 36.2.525.

59. DNRC's checklist EA is woefully inadequate. As noted above, it contains inaccurate information: it fails to adequately and completely evaluate all impacts as required by the Rules; and it fails to take into account reams of testimony and evidence introduced at the subsequent contested case hearing which demonstrate that the issuance of this permit is a major state action significantly affecting the quality of the human environment.

60. The January 26, 2018 "Final Order" is "the action" triggering this MEPA challenge under § 75-1-201 (5) (a) (ii), MCA.

61. The issuance of the DNRC permit, in light of the size and scope of the MAWC facility, is a major state action significantly affecting the human environment. DNRC erred, under MEPA and the MEPA rules, in failing to prepare an environmental impact statement (EIS).

## **VI. THIRD CLAIM FOR RELIEF – DEQ AND DNRC**

### **(Violation of Montana Constitution)**

62. The previous paragraphs are realleged as set forth in full hereunder.

63. Article II, Section 3 of the Montana Constitution guarantees all persons the right to a clean and healthful environment; Article IX, Section of the Montana Constitution imposes on DEQ and DNRC the duty to maintain and improve a clean and healthful environment, and imposes on the Legislature the duty to provide adequate remedies for the protection of the environmental life support system from degradation and to provide adequate remedies to prevent unreasonable depletion and degradation of natural resources.

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

65. Plaintiffs seek a declaration that the above-cited provisions of the Montana Constitution require DNRC and DEQ to interpret MEPA to the broadest degree possible, and, when one major project is triggering distinct MEPA review and separate permitting decisions by several state agencies, to cooperate in ensuring a comprehensive environmental review of all direct, indirect, secondary and cumulative impacts of the entire project.

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### REQUEST FOR RELIEF

WHEREFORE, Plaintiff WFF request relief against Defendants DEQ and DNRC as follows:

A. For an order declaring void *ab initio* DEQ's issuance of MPDES Permit No. MT0031861 for discharges at the Facility, and remanding the permit to DEQ for reconsideration in light of its lawful mandates.

B. For a determination and declaration that issuance of MPDES Permit No. MT0031861 is illegal and violates the Montana Environmental Policy Act for its failure to sufficiently review the environmental impacts of the proposed Facility and the issuance of the permit.

C. For a determination and declaration that EA for the issuance of Beneficial Water Use Permit No. 761J 30102978 is illegal and violates the Montana Environmental Policy Act for its failure to sufficiently review the environmental impacts of the proposed Facility and the issuance of the permit.

D. For a declaratory judgment, pursuant to § 27-8-101, *et seq.*, MCA, that based on Article II, Section 3 and Article IX, Section 1 of the Montana Constitution, MEPA requires State agencies, when confronted with multiple different permit requests arising out of a major state action significantly impacting the environment, to cooperate in ensuring a comprehensive environmental of all direct, indirect, secondary and cumulative impacts of the entire project.


E. For reasonable attorneys' fees and expenses as damages under the private attorney general theory and as otherwise provided by law.

F. For costs of suit.

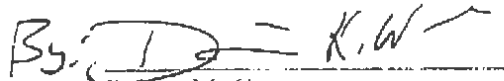
G. For such further relief as this Court deems equitable and just.

Dated this 26th day of March, 2018.

MORRISON SHERWOOD WILSON & DEOLA PLLP

  
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David K. W. Wilson, Jr.

GENTRY & NELSON MERRILL LAW GROUP PLLC

By:   
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For Robert M. Gentry