IN THE SUPREME COURT OF THE STATE OF MONTANA
No. DA 16-0429

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

Plaintiffs and Appellees,

v.

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

Defendant and Appellant,

STEPHEN WANDERER and GEORGIA FILCHER,

Defendants, Intervenors and Appellants.

APPELLANTS/INTERVENORS STEPHEN WANDERER AND GEORGIA FILCHER'S OPENING BRIEF

On Appeal from the First Judicial District Court,
Lewis and Clark County, Montana
Cause No. ADV-2015-32
Honorable Mike Menahan

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I. STATEMENT OF ISSUES

A. Did the District Court Err in Creating a Test for Disclosing the Identity of a Future Facility Operator as a Requirement of the Groundwater Discharge Permit Review Process?

B. Did the District Court Err in Expanding the Scope of a Montana Environmental Policy Act ("MEPA") Analysis to Include Impacts Beyond the Realm of the Proposed Facility?

II. STATEMENT OF THE CASE

Bitterrooters for Planinng, Inc. and Bitterroot River Protective Association, Inc. (collectively referenced as "Bitterrooters") filed suit in district court to challenge the Montana Department of Environmental Quality's ("DEQ") decision to approve a groundwater discharge permit. The permit was issued as part of the planned construction and operation of a wastewater treatment facility to serve an approximately 150,000 square foot retail facility near Hamilton, Montana.

The parties agreed there were no issues of material fact and submitted the matter to the district court via motions for summary judgment. Following a hearing on the motions, the district court issued its Order on Petition for Judicial Review on May 16, 2016. In its Order the court granted Bitterrooters' motion for summary judgment and voided the groundwater discharge permit. *See* App. 1: Order Pet. Jud. Rev., May 16, 2016 (Case

Register ("CR") 61).

Intervernors' appeal is directed at this Order. Intervenors and DEQ filed timely notices of appeal on July 18, 2016.

III. STATEMENT OF FACTS

This case addresses the validity of a Montana Ground Water Pollution Control System permit issued by DEQ, known as Permit No. MTX00233 (the "Permit"). The Permit pertains to property located along Blood Lane near Hamilton, Montana. The property is owned by the Intervenors, Stephen Wanderer and Georgia Filcher, who are brother and sister (collectively referenced herein as "Wanderer"). Wanderer has a substantial interest at stake in this litigation because the Permit is necessary for a planned sale of the property. *See* Intervenors' Br. Support Mot. Intervene 1-4, May 12, 2015 (CR 8).

As part of its public review process, DEQ prepared an environmental assessment that provides a summary of the Permit as follows:

> Description of Project: This Environmental Assessment (EA) is for a new permit for Parcel #698800 (facility). The proposed permit authorizes Lee Foss (permittee) to discharge treated wastewater from a subsurface drainfield (designated as one discharge structure, Outfall 001) into Class I ground water.

> Agency Action and Applicable Regulations: The proposed action is to issue an individual MGWPCS permit that contains effluent limits and effluent monitoring requirements. The permit is issued under the authority of the Montana Water Quality Act (MCA 75-5-101 *et seq.),* the Montana Ground Water Pollution Control System (ARM 17.30.1001-1045), and the Montana Numeric Water Quality Standards in the Department Circular DEQ-7 (October 2012).
>
> Summary of Issues: The purpose of this action is to regulate the discharges of pollutants to state waters from the regulated facility. Issuance of an individual permit will require the permittee to implement, monitor, and manage practices to prevent pollution and the degradation of groundwater.

Aff. Thomas Griffeth ¶ 6, Oct. 1, 2015 at Revised Attach. A 606 (CR 26).

DEQ held a public hearing on the proposed permit in Hamilton on September 18, 2014, a transcript of which is included in the administrative record. CR 26 at 658-711. DEQ continued to accept public comments through October 15, 2014. CR 26 at 630. DEQ subsequently provided a written response to all comments it received and made changes to the draft permit based on public comments. CR 26 at 629-653.

DEQ issued the Permit and its associated conditions on November 17, 2014. CR 26 at 1-16. The application for the Permit specified the type of facility, the flow rates and chemical makeup of the wastewater to be generated by the facility, and the type and design of the treatment system to

be installed. CR 26 at 85-95.

The Permit authorized treated wastewater to be discharged from a proposed wastewater treatment facility to be located on the Wanderer property. CR 26 at 86. The application for the Permit specified the wastewater treatment facility would serve a retail store that would sell groceries and other merchandise. CR 26 at 87. All parties to this litigation agree the expected concentration of nitrate in groundwater from the wastewater discharge will not exceed 7.5 mg/L, thus meeting the definition of "nonsignificant" pursuant to Montana Code Annotated § 75-5-301(5)(d) (2015). CR 61 at 16.

The Permit application identified Lee Foss as the applicant and facility contact person, and the Permit was ultimately issued to Mr. Foss. CR 26 at 1, 86, 105 & 184. Therefore, at the time the Permit was issued, only Mr. Foss was authorized to carry out the terms of the Permit, including ensuring the facility was constructed correctly, operating correctly and monitored correctly. CR 26 at 1-16, 240.

Mr. Foss was the real estate broker working with Wanderer to market and sell the Wanderer property. CR 26 at 86. Mr. Foss was not expected to be the ultimate owner or operator of the wastewater treatment facility, but

nevertheless sought approval from DEQ for a wastewater discharge permit in his name. DEQ's administrative rules allow permits to be transferred to other parties under certain circumstances. *See* Mont. Admin. R. 17.30.1360 (2015).

Bitterrooters filed suit challenging DEQ's decision to approve the Permit. In their Complaint Bitterrooters presented four claims, all of which allege DEQ failed to properly conduct the permitting process in granting the groundwater discharge permit. The First Claim for Relief alleges DEQ failed to consider whether nitrogen discharges from the proposed facility would cause degradation of surface water. Compl. ¶ 47, Jan. 14. 2015 (CR 1). The Second Claim for Relief alleged DEQ failed to consider various unspecified cumulative impacts of authorized wastewater discharges. CR 1 ¶ 51. The Third Claim for Relief alleged DEQ failed to scrutinize the potential environmental consequences of the permit in violation of the Montana Environmental Policy Act. CR 1 ¶ 54. The Fourth Claim for Relief alleged DEQ improperly accepted an application that failed to describe the purpose or operation of the proposed facility, in violation of the constitutional guarantees of the public's right to know and right to participate. CR 1 ¶¶ 61-63; *see also* CR 61 at 3.

DEQ and Intervenors challenged the validity of Bitterrooters' Fourth Claim for Relief, demonstrating it had been filed well after the 30-day statute of limitations for such claims. CR 61 at 5-6. The district court agreed and dismissed Bitterrooters' Fourth Claim for Relief.

Nevertheless, the district court effectively granted the relief Bitterrooters sought pursuant to their Fourth Claim despite having dismissed it. As discussed below, the district court improperly adopted a test requiring an applicant for a permit to disclose the identity of some future operator of the permitted facility, even if such an operator is not known at the time of permitting. This test was adopted without authority or explanation and functions solely as a requirement, not a test.

IV. STATEMENT OF STANDARD OF REVIEW

This Court reviews summary judgment rulings de novo, applying the same criteria as the district court based on Montana Rule of Civil Procedure 56. *Thornton v. Flathead Cnty.*, 2009 MT 367, ¶ 13, 353 Mont. 252, 220 P.3d 395. The moving party must establish both the absence of genuine issues of material fact and entitlement to judgment as a matter of law. *Thornton*, ¶ 13.

An agency's decision not classified as a contested case under the Montana Administrative Procedure Act is reviewed using the same standard as the district court. *Mont. Envtl. Info. Ctr. v. Mont. Dep't of Envtl. Quality*, 2016 MT 9, ¶ 14, 382 Mont. 102, 365 P.3d 454. The court determines whether the agency decision was "arbitrary, capricious, unlawful, or not supported by substantial evidence." *Mont. Envtl. Info. Ctr.*, ¶ 14. When conducting such a review, the court considers whether the decision was based on a consideration of the relevant factors and whether there has been a clear error of judgment. *Mont. Envtl. Info. Ctr.*, ¶ 14.

In this matter the administrative record is not in dispute and, therefore, there are no genuine issues of material fact. The arguments are limited to the district court's application and interpretation of the relevant law.

V. SUMMARY OF ARGUMENT

Without explanation or analysis, the district court created a test for requiring a permit applicant to disclose some future wastewater facility operator as part of the initial application. However, the test is unnecessary and unworkable. As written, the test is capable of multiple interpretations. Under any interpretation the test functions as a requirement, not a test capable of reaching different results.

Regardless, with respect to the Permit at issue here, DEQ correctly determined the applicant for the Permit was Mr. Foss who is the only person authorized to carry out the terms of the Permit, ensure the facility is constructed correctly, and ensure it is operated and monitored correctly. Should Mr. Foss desire to transfer the Permit to another party, such a transfer is only allowed pursuant to DEQ's administrative rules which require the future operator to be identified. Further, DEQ's administrative rules provide DEQ with the authority to attach any necessary conditions to the transfer of a permit as necessary to ensure compliance with the Act. The district court's test is, therefore, unnecessary.

Further, the district court impermissibly expanded the scope of MEPA analysis to include analysis of impacts outside the realm of DEQ's review by misconstruing the definitions of "secondary impacts" and "cumulative impacts."

VI. ARGUMENT

A. The District Court Impermissibly Created an Impossible Test for Requiring an Application to Include Information About a Future Facility Operator.

Bitterrooters' Fourth Claim for Relief, which the district court dismissed and Bitterrooters does not appeal, argued DEQ failed to require

Mr. Foss, as the applicant for the Permit, to provide additional details regarding who the future operator of the wastewater facility might be. CR 1 ¶ 61-67.

The Permit application identified Mr. Foss as the applicant and the facility name as Parcel # 698800 to correspond to the identification number for the real property in the county's records. DEQ asked Mr. Foss to confirm this information and to also confirm the Standard Industrial Code (SIC code) for the facility. CR 26 at 127-128. SIC codes identify the type of operation that will be using the wastewater treatment facility and gives an indication of the type of waste the operation will generate. *See* Pls.' Br. Support Mot. Summ. J., Nov. 16. 2015 (CR 38) at Ex. 2: Dep. Thomas Griffeth 18:15-21:9, Oct. 21, 2015. Additional information on the types of waste generated by the operation is required to be disclosed in the application. *See* CR 38 at Dep. Griffeth 21:2-9; CR 26 at 94.

Mr. Foss, via his technical consultants, confirmed he was the applicant, confirmed the name of the facility was Parcel # 698800 and corrected the SIC code due to a transposing error. CR 26 at 129-132. DEQ confirmed that SIC codes are used to describe the nature of the business to be connected to the wastewater treatment facility and confirmed sufficient

information about the facility was included in the application. CR 26 at 633.

DEQ also confirmed the Permit was being issued to Mr. Foss and that Mr. Foss would be responsible for operating the wastewater treatment facility in accordance with the terms and conditions of the Permit. CR 26 at 633.

Many of the conditions contain monitoring and reporting requirements. CR 26 at 3-8. The permittee must continuously monitor effluent flow and sample a variety of parameters once a month, including total suspended solids, oil and grease, ammonia, nitrogen, and others. CR 26 at 4. DEQ confirmed that self-monitoring is a requirement of all MGWPCS permits. CR 26 at 641. Further, pursuant to the terms of the Permit, DEQ retains the right to inspect the wastewater treatment facility for compliance at any reasonable time. CR 26 at 8.

In sum, the Permit application had all the standard information for a MGWPCS permit, including a description of the type of operation using the wastewater facility and the type of effluent the operation is expected to generate. The application specified the characteristics for the effluent along with the maximum concentration of each. CR 26 at 94. The Permit was issued based on the information in the application and contains specific

monitoring requirements to ensure compliance. CR 26 at 1-16.

Despite this information, Bitterrooters argued the application was insufficient because it did not specify the future operator of the Permit. The district court noted that "Bitterrooters are particularly concerned the facility may be operated by Walmart, which they allege has a history of violating environmental regulations." CR 61 at 7-8.

In support of this concern, Bitterrooters point to one page of the administrative record, a comment from a speaker at the public hearing who simultaneously stated her information should not be trusted. CR 26 at 703. Bitterrooters also point to an emailed comment from a member of the public who conducted a "simple Google search" and turned up a negative story about Walmart. CR 26 at 924. (Incidentally, a search using the same terms turns up positive articles about Walmart's more recent environmental efforts.)

Apparently based on these concerns, the district court created the following test:

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

CR 61 at 13-14. The district court included no analysis or explanation for this test.

The district court did not explain why the information in the application, including the description of the type of operation, the chemical characteristics of the effluent, the characteristics of the land and nature of the groundwater, and the method of treatment, would be insufficient to allow DEQ to properly evaluate the proposed wastewater treatment facility.

Instead, the district court created a "test" that appears to always result in an affirmative answer. Or, perhaps no answer at all. The test is capable of multiple interpretations and is impossible to decipher.

For example, is the test referring to the impact from issuing the permit? Any permit for a new wastewater treatment facility will result in the "potential to impact vegetation" due to the obvious nature of construction activities. Thus, applying the test in that regard would always result in a requirement to disclose some future facility operator.

Perhaps the test is intended to be an inquiry into the worthiness of the facility operator? Read literally, the test considers only a future facility operator's "identity." In that regard it requires DEQ to determine if the specific operator (i.e. the "identity") itself will impact vegetation, aesthetics,

human health and safety, industrial and commercial activities, employment, tax revenues, demand for government services, or other environmental resources differently than some other operator/identity.

Read either way, DEQ could only exercise this impossible task if the identity of the future operator has been disclosed. Thus, it is not a test, but a requirement which immediately makes the information available to anyone.

Bitterooters' Complaint contained two allegations relating to the description of the operation intending to utilize the wastewater treatment facility. First, Bitterrooters alleged "DEQ does not explain the purpose or operation of the proposed facility." CR 1 ¶ 35. Second, Bitterrooters alleged the "permit factsheet fails to describe the purpose or operation of the proposed Facility." CR 1 ¶ 63.

Perhaps after realizing the application did, in fact, describe the purpose and operation of the facility via the SIC code, Bitterrooters' changed its arguments in its briefing before the district court. There, Bitterrooters took the tact of arguing the identity of the future facility operator must be disclosed. *See, e.g.,* CR 38 at 2 ("Finally, Bitterrooters allege that DEQ's failure to identify the party intending to develop the retail project, despite repeated requests by the public, violates Constitutional rights

to participate in government decisions.").

As noted by the district court, the purpose for Bitterrooters' request can be summarized as merely a desire to know whether the future operator can be accused of having committed prior bad acts. However, Bitterrooters can point to no statute or administrative rule requiring such information to be submitted with an application. Nor is there any justification regarding why such information should affect the outcome of a permit review process designed to address the technical nature of the effluent and the corresponding ability of the wastewater treatment system to treat it. Rather, in this instance Bitterrooters apparently sought such information in the hopes of being able to mount a campaign to disparage some future operator of the facility.

The standard of review for administrative decisions such as those subject to the Montana Environmental Policy Act is "whether the record establishes that the agency acted arbitrarily, capriciously or unlawfully." *Ravalli Cnty. Fish & Game Ass'n v. Mont. Dep't of State Lands*, 273 Mont. 371, 377, 903 P.2d 1362, 1366 (1995) (citation omitted).

Here, DEQ determined the applicant for the Permit was Mr. Foss. DEQ correctly noted Mr. Foss is solely authorized to carry out the terms of

the Permit, including ensuring the facility was constructed correctly, operating correctly and monitored correctly. These decisions are not arbitrary, capricious, or unlawful.

No other party is authorized to do any of the above, and therefore, any other party's potential impact on the permit authorization is immaterial. Should Mr. Foss desire to transfer the permit to another party, such a transfer is only allowed pursuant to DEQ's administrative rules. *See* Mont. Admin. R. 17.30.1360.

Therefore, the test created by the district court is unnecessary. All parties to the proceeding knew the identity of the applicant, knew the nature and location of the operation intending to utilize the wastewater facility, and had an opportunity to scrutinize the application and participate in the process.

Further, the test is unworkable. It is entirely common for a landowner to obtain entitlements to develop a property to prepare the property for sale, whether or not the ultimate purchaser is known, or wishes to be disclosed. The district court's test nevertheless requires information on some future operator to be disclosed even though such information has no bearing on the outcome of the Permit. Regardless, should the permittee (here, Mr. Foss)

desire to transfer the permit to another party, that party would then need to be identified via a modification to the permit. *See* Mont. Admin. R. 17.30.1360(1). Further, for any such transfer, DEQ has the right to incorporate any requirements it deems necessary under the Act to allow the transfer to occur. *See* Mont. Admin. R. 17.30.1360(1).

The district court's test is unnecessary and unworkable and unsupported by any analysis or explanation. Therefore, the district court's decision must be reversed.

B. The District Court's Order Expands the Scope of MEPA Analysis Beyond the Level Required by the Act.

The district court held that DEQ's decision to issue the Groundwater Discharge Permit violated MEPA by not considering the future impacts of constructing and operating the retail and grocery development that would be connected to the wastewater treatment facility. However, in reaching this conclusion, the district court misconstrued the definitions of "secondary impacts" and "cumulative impacts." The result of the district court's error requires DEQ to evaluate a range of impacts the Department has no ability to control or regulate and which cannot form the basis of a decision to deny the permit.

There is no doubt the retail and grocery facility is associated with the wastewater treatment facility. Yet, the district court's order requires, for example, DEQ to step into the shoes of the Montana Department of Transportation and evaluate traffic impacts. We no more want, need or value DEQ's ability to evaluate and regulate traffic impacts any more than we want the Department of Transportation making decisions on wastewater treatment. DEQ's action with regard to the Permit does not approve a new approach onto Highway 93. It does not approve electrical permits, storm water discharge permits or any number of other permits which might be necessary to construct the retail and grocery operation.

Therefore, the district court improperly expanded the scope of the required MEPA analysis. Wanderer hereby joins in and incorporates herein the arguments presented in DEQ's Opening Brief.

VII. CONCLUSION

The district court cannot create a test for determining whether some future facility operator must be identified in an application for a Montana Ground Water Pollution Control System permit with a single comment and no explanation or analysis. Further, the test created by the district court is not a test. There is no feasible manner in which the answer could be

anything other than affirmative.

The district court improperly expanded the scope of the required MEPA analysis to consider impacts which are well beyond the realm of DEQ's analysis and outside its regulatory control.

For the reasons stated herein, the district court's decision should be reversed.

DATED this 26th day of October, 2016.

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CERTIFICATE OF COMPLIANCE

Pursuant to Montana Rule of Appellate Procedure 11(4)(e), I certify that this Brief is printed with proportionately spaced Times New Roman text typeface of 14 points; is double-spaced; and the word count, calculated by Microsoft Office Word 2010 is 3,473 words, excluding Certificate of Service and Certificate of Compliance.

Alan F. McCormick

CERTIFICATE OF SERVICE

I hereby certify that I served true and accurate copies of the foregoing APPELLANTS/INTERVENORS STEPHEN WANDERER AND GEORGIA FILCHER'S OPENING BRIEF by depositing said copies into the U.S. mail, postage prepaid, addressed to the following:

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DATED this 26th day of October, 2016.

Joan L. Feeley
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APPENDIX
APPELLANTS/INTERVENORS STEPHEN WANDERER AND GEORGIA FILCHER'S OPENING BRIEF

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MONTANA FIRST JUDICIAL DISTRICT COURT
LEWIS AND CLARK COUNTY

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

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

FACTUAL AND PROCEDURAL HISTORY

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

/////

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

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

Additional facts are included in the discussion herein.

STANDARD OF REVIEW

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

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

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

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

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

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

ANALYSIS

I. Right to Participate

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

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

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

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

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

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

II. Montana Environmental Policy Act

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

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

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

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

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

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

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

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

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

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

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

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

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

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

Id. at 1114.

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

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

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

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

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

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

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

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

III. Montana Water Quality Act

a. Surface Water Degradation

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

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

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

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

. . .

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

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

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

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

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

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

b. Cumulative Impacts

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

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

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

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

(a) cumulative impacts or synergistic effects;

(b) secondary byproducts of decomposition or chemical transformation;

(c) substantive information derived from public input;

(d) changes in flow;

(e) changes in the loading of parameters;

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

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

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

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

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

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

CONCLUSION

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

Based on the foregoing,

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IT IS HEREBY ORDERED

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

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

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

DATED this 16th day of May 2016.

MIKE MENAHAN
District Court Judge

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