IN THE SUPREME COURT OF THE STATE OF MONTANA
Supreme Court No. DA 09-0131

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

Plaintiffs/Appellants,

v.

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

Defendants/Appellees.

APPELLANT'S REVISED OPENING BRIEF

On Appeal from the Montana Twenty-Second Judicial District Court
In and For the County of Big Horn
The Honorable Judge Blair Jones Presiding

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Statutes

Constitutional Provisions

Other Authorities

I. STATEMENT OF THE ISSUES

Plaintiffs/Appellants Tongue River Water Users' Association, Inc. and Northern Plains Resource Council, Inc. (Water Users) state the issues on appeal as follows:

1. Whether the district court erred in concluding that the Montana Department of Environmental Quality (DEQ) does not "stand in the shoes" of the Environmental Protection Agency (EPA) in administering the Clean Water Act (CWA).

2. Whether the district court erred by upholding the DEQ's failure to require readily available pollution prevention technology for the permits at issue when the CWA requires application of technology-based effluent limitations.

3. Whether the district court erred by upholding the DEQ's failure to require nondegradation review before issuing the MPDES permits at issue.

4. Whether the Montana DEQ violated the Montana Environmental Policy Act (MEPA) by failing to consider a reasonable range of alternatives in the Environmental Assessments prepared for the MPDES permits.

II. STATEMENT OF THE CASE

The Water Users adopt the Northern Cheyenne Tribe's Statement of the Case.

III. STATEMENT OF FACTS

A. The Tongue River

Water is the life-blood of the arid West: that well-worn phrase rings especially true in the Tongue River valley, where ranchers and farmers have relied on irrigation to sustain family ranches and farms for over a century. The Tongue River rises in the Bighorn Mountains of Wyoming where heavy snowfall insures a dependable water supply for the 120 miles that the Tongue flows through Montana to its confluence with the Yellowstone River at Miles City. The waters of the Tongue River are designated "high quality" under Montana's Water Quality Act. (A.R.M. 17.30.611; *see also* § 75-5-103(8); Case Reg. Doc. 32.000, Ex. 1 at 40; Ex. 2 at 47.) The Tongue River is naturally low in dissolved salts. (App. F, DEQ Ex. 10.) The Statement of Basis (SOB) for Permit 0030724 (App. III (A)) shows the receiving water, the Tongue River, specific conductance (or EC), the measure of dissolved salts, as low as 180 mS/cm. CBM discharge (raw) water measures 1,964 mS/cm. (*Id.*, App. I.) The Tongue River is essential for irrigation and also provides important fish and wildlife habitat, including for imperiled species.[1]

[1] The Tongue River provides important nesting habitat and migration corridors for waterfowl and winter habitat for bald eagles. (Case Reg. Doc. 32.000, Ex. 2 at 58, 60.) The Tongue supports a major fishery for smallmouth bass, channel catfish. (*Id.*, Ex. 1 at 55 & Ex. 2 at 60.) The lower Tongue provides "vital spawning areas" for Yellowstone River sauger, a Montana species of concern. (*Id.* Ex. 2 at 55 & Ex. 3.)

Appellants have long relied upon the high quality water of the Tongue River and its tributaries to sustain their ranching and farming operations. For example, the Tongue River Water Users' Association (TRWUA) is an association of irrigators and landowners formed in 1937. (Appendix K, Aff. of Art Hayes, Jr., Ex. 1 to TRWUA Opening S.J. Brf.) TRWUA has long relied on the high quality waters of the Tongue River for irrigation and domestic use, and as its name implies, water is its lifeblood. (*Id.*) Clean, high quality water for irrigation is essential to the survival of TRWUA and its members. TRWUA has approximately 75 members who own land in Big Horn, Custer, and Rosebud counties, all of whom have long-vested water rights to the use of the surface waters of the Tongue River. (*Id.*) TRWUA's members, which includes the Northern Cheyenne Tribe, rely on and use the waters of the Tongue River for irrigation, domestic use, livestock watering, wildlife and aquatic life sustenance, for medicinal, cultural, spiritual and religious purposes, for recreational enjoyment, and for their livelihoods in general. (*Id.*) TRWUA has long promoted sustainable irrigation practices to conserve the priceless water resources in southeastern Montana. (*Id.*)

Northern Plains Resource Council (Northern Plains) is a non-profit public benefit organization dedicated to protecting family agriculture and promoting the conservation of southeastern Montana's natural resources, and also has members

who have vested water rights in the Tongue River. (Aff. of Mark Fix, Case Reg. Doc. No. 23.000.) High quality irrigation water is essential to producing irrigated crops that are the backbone of farming and ranching operations in the Tongue River valley. (*Id.*) Together the Tongue River Water Users' Association and Northern Plains, the Water Users, have diligently worked to protect water quality through sustainable irrigation practices, education, political action, and when necessary, legal action.[2]

B. Coal Bed Methane and the Tongue River.

Coalbed methane (CBM) is a form of natural gas trapped in coal seams by hydrostatic pressure. (Case Reg. Doc. 32.000, Ex. 6 at SUM-1, 3-8.) To produce CBM, groundwater must be pumped from the coal seams, a process that produces massive amounts of wastewater in the Powder River Basin. (*Id.* at 3-8 to 3-9, 4-61.) CBM produced water is highly saline, as measured by its "electrical conductivity" (EC) (also called specific conductance). CBM water is also high in sodium, as measured by the relative concentration of sodium to calcium and

[2] In addition to this Court's recent *Pennaco* decision upholding water quality standards for CBM produced water, the Water Users have gone to court to prevent CBM companies from wasting ground water extracted during CBM production. *Diamond Cross et al. v. State of Montana,* 2008 Mont. Dist, Lexis 180, and to insure that when CBM producers seek to put the water to beneficial use, that senior water rights are protected. *Northern Plains Resource Council and Tongue River Water Users' Ass'n v. DNRC,* CDV-2007-425 and CDV-2007-612 (Mont. First Judicial Dist.).

magnesium, the "sodium adsorption ratio" (SAR). This Court recently recognized that CBM water has deleterious effects on irrigation and aquatic ecosystems:

> CBM produced water, which contains naturally high levels of sodium and salts, is frequently discharged by industries to surface waters. As a result, the water quality of the receiving waters can be degraded. Additionally, when land is subsequently irrigated with surface water mixed with CBM produced water, there is a potential threat to the irrigated agriculture as the salt from the water may accumulate in the plants' root systems and impair plant growth. In recognition of this potential impact, the State regulates the discharge of two harmful components of CBM produced water—sodium adsorption ratio (SAR) and electrical conductivity (EC).

Pennaco Energy Company v. Montana Board of Environmental Review, 2008 MT 425, ¶ 2, 347 Mont. 415, ¶ 2, 199 P.3d 191, ¶ 2.

Because CBM water contains pollutants, Montana Pollutant Discharge Elimination System (MPDES) permits (National Pollutant Discharge Elimination System Permits (NPDES) under the federal CWA) are required before discharging it to surface waters. But this was not always true in Montana, and some background is helpful to frame this dispute.

CBM development began in Montana in 1998, with Fidelity Exploration and Production Company's (Fidelity's) (formerly Redstone Gas Partners) CX Ranch Project. Fidelity began discharging saline wastewater directly into the Tongue River, claiming it was exempt from MPDES permitting requirements. In 2000, Northern Plains sued Fidelity under the federal CWA for illegally discharging CBM wastewater into the Tongue River without a MPDES permit. Northern Plains

alleged the discharges contained pollutants (salts and high SAR) that constituted industrial waste. The Ninth Circuit determined as a matter of law that CBM wastewater is a pollutant and requires a National Pollutant Discharge Elimination System (NPDES) permit before being discharged into surface waters. *Northern Plains Resource Council v. Fidelity Explor. & Prod. Co.* (hereafter *Northern Plains*), 325 F.3d 1155 (9th Cir. 2003) *cert. denied,* 540 U.S. 967 (2003). The Ninth Circuit determined that high SAR water destroys certain soil types found in southeastern Montana by causing soil to lose its water infiltration properties. *Northern Plains*, 325 F.3d at 1158 (high SAR water, such as CBM water, causes soil particles to unbind and disperse, destroying soil structure and reducing or eliminating the ability of the soil to drain water). As the Ninth Circuit concluded:

> Were we to conclude otherwise, and hold that the massive pumping of salty, industrial wastewater into protected waters does not involve discharge of a "pollutant," even though it would degrade the receiving waters to the detriment of farmers and ranchers, we would improperly "undermine the integrity of [the CWA's] prohibitions."

Id. at 1162. The Ninth Circuit's ruling required Fidelity to obtain a MPDES before discharging its industrial wastewater into the Tongue River. The legal requirements underlying those permits, discussed in detail below, are designed to minimize or eliminate the deleterious effects of new sources of water pollution.

C. The MPDES Permits DEQ issued to Fidelity.

At issue in this case are two MPDES permits issued to Fidelity by the DEQ allowing the discharge of pollutants into the Tongue River. Permit No. 0030457 was originally issued in 2000 during the course of the *Northern Plains* Ninth Circuit case cited above and was renewed in 2006. (App. C.) It allows Fidelity to discharge untreated CBM wastewater, and is subject to periodic renewal. The other permit at issue is a new permit, No. 0030724, and requires only partial treatment of CBM wastewater before being discharged into the Tongue River. (App. E.) Even after treatment, the effluent that Fidelity is allowed to discharge under permit No. 0030724 is of much lower quality than the receiving waters of the Tongue River.

1. Permit No. 0030457—the Untreated Wastewater Discharge Permit.

MPDES Permit No. 0030457 was originally issued in June 2000 as a result of Northern Plains' CWA lawsuit discussed above. This permit expired on approximately March 31, 2002, but was administratively extended until DEQ renewed it in 2006. (App. C.) The effluent—untreated CBM wastewater—is discharged from multiple outfalls (pipes) located on the banks of the Tongue River on the Montana/Wyoming border just upstream from the Tongue River Reservoir. The renewed permit authorizes Fidelity to discharge as follows: 2,500 gallons per minute (gpm) may between November 1 through February 28 of each year; 2,357

gpm of untreated wastewater between March 1 and June 30 each year, and; 1,600 gpm between July 1 and October 31 each year. (App. C.) Under MPDES Permit No. 0030457, Fidelity is allowed to dump 31,270 pounds of sodium per day and 79,838 pounds of total dissolved solids (salts) per day into the Tongue River from March through June each year, just as TRWUA is filling the Tongue River Reservoir with water for the irrigation season and during the time that its members are beginning to irrigate with waters stored in the Tongue River Reservoir. (App. C; *see also* App. K, Aff. of Art Hayes. Jr.) From July through October, during the primary irrigation season, the Renewal Permit authorizes dumping 9,624 pounds of sodium and 24,565 pounds of total dissolved solids (salts) per day into the Tongue River. (App. C, Appendix IV (B).) From November through February, the permit authorizes dumping 14,971 pounds of sodium and 38,213 pounds of total dissolved solids (salts) per day into the Tongue River. (App. C, Appendix II (B).) Under Permit No. 0030457 alone, **Fidelity adds nearly 7 million pounds (6,796,310) of sodium and well over 17 million pounds (17,347,291) of salts (TDS) each year into the Tongue River each year.** (App. C.)

DEQ determined that after the discharged effluent mixed with the natural flow extending downriver from each of the outfalls, the "mixing zone," Fidelity's discharges would not exceed the numeric water quality standards approved by the Board of Environmental Review (BER) in 2003. DEQ did not perform a

nondegradation review before permitting this additional pollution of the high quality waters of the Tongue River.

2. Permit No. 0030724—the Partial Treatment Permit

DEQ issued Fidelity a second MPDES Permit in March 2006. (App. E.) The Statement of Basis (SOB) for Permit No. 0030724 states that Fidelity will treat CBM water using ion exchange technology to primarily remove sodium cations from the water, and that **it can treat the water to an SAR of 0.1** or less. (App. F, SOB p. 3.)[3] However, Fidelity is then allowed to blend the treated water with untreated CBM water prior to discharge. (*Id.* SOB p. 2.) The treatment permit allows Fidelity to blend treated with untreated water and discharge water with a daily maximum SAR of 7.5 and monthly average SAR of 5.0 and with a daily maximum EC of 2,500 (specific conductance) and monthly average EC of 1,500 from November 1 through March 1 each year. (App. F., SOB p. 4, Table 1.) From March 2 through October 31 each year, Fidelity is allowed a constant discharge 1700 gpm with a daily maximum SAR of 4.5 and monthly average SAR of 3.0, and a Daily maximum EC of 1,500 and monthly average EC of 1,000. (*Id.*) The daily and monthly allowances are equal to the Montana Water Quality Standards promulgated by the DEQ in 2003. *See* A.R.M. 17.30.670. Thus, Fidelity blends

[3] Keep in mind that the natural SAR of the Tongue River is generally less than 1.0, while the SAR of CBM water is generally in the 45-60 range. Thus the ion exchange treatment process is quite effective, removing over 99% of the pollutants.

its treated water with untreated water so that the water discharged is of much lower quality than the ambient water quality for SAR and EC in the Tongue River. (*Id.*)

3. Fidelity's Treatment Facility.

The record herein demonstrates that Fidelity has an operational treatment facility using ion-exchange technology to remove pollutants from CBM water before discharge. (App. F, SOB Permit 0030724, p. 2.) The ion-exchange treatment process is capable of "removing sodium to less than 0.5mg/L resulting in an SAR of 0.1 or less." (*Id.* p. 3.) The ambient SAR of the Tongue varies between approximately 0.1 and 2.43, depending on flows and times of the year. (*Id.*, Appendices II (A), III (A) and IV (A); average SAR of CBM water (effluent) is 53.1. (*Id.* App. I.) "Due to the effectiveness of the cation removal process" DEQ agreed to let Fidelity blend treated and untreated wastewater, resulting in larger volumes of wastewater discharges. (*Id.*, p. 2; *see also id.*, p. 4, Table 1.)

IV. STANDARD OF REVIEW

This Court's review of the district court's summary judgment ruling is *de novo. Matter of Estate of Lien* (1995), 270 Mont. 295, 298, 892 P.2d 530, 532. This Court reviews the legal determinations made by the district court to see if the court erred. *Seeley v. Davis* (1997), 284 Mont 517, 521, 946 P.2d 119,121. This case presents only legal issues. While the parties will emphasize different parts of the factual record, the basic factual predicate for this case is undisputed. The facts

are derived from DEQ's permits at issue here, the Environmental Assessments, and other documents, and are not in dispute.

The district court stated that its review was guided by the deferential review standard enunciated by this Court in *Johansen v. State*, 1999 MT 187, ¶ 9, 295 Mont 339, ¶ 9, 983 P. 2d 962 ¶ 9 (*citing Johansen v. Dep't of Nat. Res. & Cons.* 1998 MT 51, ¶ 29, 288 Mont 39, ¶ 29, 955 P.2d 653 ¶ 29 (*Johansen I*) (*citing North Fork Preservation Ass'n v. Dep't of State Lands* (1989), 238 Mont. 451, 778 P.2d 862, 866. The district court further relied on *Marsh v. Oregon Natural Resources Council,* 490 U.S. 360, 378, (1989). There, the U.S. Supreme Court held that "[w]hen specialists express conflicting views, an agency must have discretion to rely on the reasonable opinions of its own qualified expert even if, as an original matter, a court might find contrary views more persuasive." *Marsh v. Oregon Natural Resources Council,* 490 U.S. 360 *at* 378. The deferential standard under *Johansen, North Fork Preservation, and Marsh* is inapplicable to the case at bar, and the district court erred in relying on it. This case does not involve a "battle of experts" or a scientific dispute.[4] The questions presented are purely legal: whether the district court correctly interpreted the requirements of the CWA.

[4] *Marsh* deference would be appropriate, for example, if DEQ had selected a particular technology to address CBM pollution, and the Water Users felt that DEQ selected the wrong technology. But this case does not present such a dispute because DEQ failed to require any technology-based standards when it issued the permit, averring that it was not compelled to do so under the law.

V. SUMMARY OF ARGUMENT

The district court erred by failing to require the DEQ to include technology-based effluent limitations in the permits issued to Fidelity. This error was two-fold. First, the district court failed to find that the DEQ "stands in the shoes" of EPA when it administers the CWA NPDES permitting program, and second, the district court erred in failing to find that all of the CWA requirements apply to the DEQ as well as to the EPA. CWA § 402 (33 U.S.C. § 1342(b)). The structure, history, and plain language of the CWA impose a mandatory duty on the EPA *and* DEQ when it administers the CWA to incorporate technology-based effluent limits (such as treatment technology) into all NPDES permits. CWA §§ 301 and 302 (33 U.S.C. §§ 1311(b)(1)(c) and 1312(a)). New sources of pollution, such as Fidelity's CBM wastewater discharges, are required to use the "best available demonstrated control technology," or BADCT. CWA § 306 (33 U.S.C. § 1316(a)(1)); 40 C.F.R. § 125.3(a). No court has ever held otherwise.

Federal courts have unanimously held that technology-based effluent limitations are mandatory, even when EPA has not promulgated nationwide effluent limitation guidelines (ELGs). *See e.g. Texas Oil and Gas Ass'n v. USEPA*, 161 F.3d 923, 928-29 (5th Cir. 1998) ("[i]ndividual judgments thus take the place of uniform national guidelines, but the technology-based standard remains the same."); *see also Natural Resources Defense Council. v. U.S.E.P.A.*, 859 F.2d 156,

183 (D.C. Cir. 1988) ("States issuing permits pursuant to § 1342(b) stand in the shoes of the agency, and thus must similarly pay heed to § 1311(b)'s technology-based standards when exercising their BPJ. . . . States are required to compel adherence to the Act's technology-based standards regardless of whether EPA has specified their content pursuant to § 1314(b).") The district court's conclusion that DEQ can ignore technology-based limitations when national effluent limitations have not been established is wrong. *Id.; see also* 40 C.F.R. § 125.3(c)-(d).

The district court also erred in failing to require DEQ to subject Fidelity's permits to nondegradation review. The undisputed facts show that Fidelity's permits allow significant additional quantities of salts, sodium, and other pollutants to be added to the Tongue River. The CWA and the Montana Water Quality Act (WQA) require such review for all new pollutants discharged into "High Quality" waters like the Tongue River. § 75-5-303, MCA; 40 C.F.R. § 131.12(a)(2). The district court wrongly allowed DEQ to exempt Fidelity's discharges from non-degradation review. The loophole created by A.R.M. 17.30.670(6) (2003) was unlawful when DEQ approved the permit, and was closed by the Board of Environmental Review (BER) in March 2006 when it amended the rule. This Court subsequently upheld the 2006 nondegradation review requirement for CBM wastewater. *Pennaco Energy, Inc. v. Montana Bd. of Env. Review*, 2008 MT 425, 347 Mont. 415, 199 P.3d 191, ¶ 9.

Finally, DEQ failed to address a reasonable range of alternatives in its Environmental Assessments (EA) drafted to assess the impacts of Fidelity's MPDES permits under the Montana Environmental Policy Act (MEPA). DEQ refused to consider an alternative requiring full treatment of CBM effluent, even though Fidelity was using technology that can remove nearly 100% of the pollutants. MEPA requires DEQ to at least consider such an alternative.

VI. ARGUMENT

A. The Federal Clean Water Act and the Montana Water Quality Act Require that all MPDES Permits Must Include Technology-Based Pollution Limitations.

The CWA is a complex statute. Multiple, inter-related provisions govern the water pollution prevention and permitting process. States and the EPA share overlapping responsibilities. A fundamental canon of statutory construction requires that courts must give effect to a statute's overall purpose. *State v. Letasky,* 2007 MT 51, ¶ 11, 336 Mont. 178, ¶ 11, 152 P.3d 1288, ¶ 11 ("[w]e construe a statute to ascertain the legislative intent and give effect to the legislative will . . .") (citations omitted). A brief digression into the CWA's structure is helpful.

The CWA's lofty purpose is "**to restore and maintain the chemical, physical, and biological integrity of the Nation's waters.**" CWA § 101 (33 U.S.C. § 1251) (emphasis added). "This objective incorporated a broad, systematic view of maintaining and improving water quality: as the House Report on the

legislation put it, "the word 'integrity'. . . refers to a condition in which the natural structure and functions of ecosystems [are] maintained.'" *United States v. Riverside Bayview Homes, Inc.*, 474 U.S. 121, 132 (1985) (citation omitted). Congress intended to "eliminate pollution from the nation's waters by 1985." *E.I. du Pont de Nemours & Co. v. Train,* 430 U.S. 112, 116 (1977). Of paramount concern was that the "discharge of pollutants be controlled **at the source**." *Riverside,* 474 U.S. at 132, *citing* S. Rep. No. 92-414, p. 77 (1972) (emphasis added). The clearly articulated legislative intent of the CWA is to eliminate water pollution.[5]

The CWA creates a two-pronged pollution prevention scheme. Prior to 1972, the CWA relied exclusively on water quality standards to prevent pollution of waterways: if a source of pollution reduced the quality of a water body below the standards, the polluter would be liable. Over time, this approach alone was ineffective. It was difficult to prove that an individual polluter was degrading the water body, even with good water quality standards. While the water quality standards program in CWA § 303 (33 U.S.C. § 1313) remains an important part of the CWA, in 1972 Congress added more specific and stringent limitations to regulate the discharges of individual polluters at the source of the pollution.

[5] In Montana, the legislative intent is stated even more boldly. The Montana Water Quality Act's purpose is to implement our fundamental right to a clean and healthful environment. § 75-5-102, MCA.

Under the 1972 CWA framework, the newer means to target pollution at the source is the National Pollution Discharge Elimination System (NPDES) permit program. This framework regulates the discharge of pollutants at their source by setting "effluent limitations" (ELs) based on the leading or best available pollution control technology, regardless of the receiving water's quality. *Weyerhauser Co. v. Costle*, 509 F.2d 1011, 1041-42 (D.C. Cir. 1978); *Bethlehem Steel Corp. v. EPA*, 538 F.2d 513, 514-15 (2d Cir. 1976). As the Ninth Circuit recently explained, the goal of the Act "was to be accomplished through ambitious technological improvements, because the previous water-quality based approach to pollutant control had been 'limited in its success.'" *Our Children's Earth Found.v. EPA*, 527 F.3d 842, 847-48 (9th Cir. 2008). The foundation of the permit system is technology-based, not harm-based. That is, permits must reflect the capabilities of available pollution control technologies to prevent or limit point source discharges rather than the impact that those discharges have on the waters. *E.I. du Pont de Nemours & Co. v. Train*, 430 U.S. at 130-31. These requirements are enforced through the NPDES permit system under CWA § 402 (33 U.S.C. § 1342). Although water quality standards are still a vital part of the regulatory scheme, they can only be used to set standards even higher, or more stringent, than technology-based limitations. Technology-based standards must be included in a permit, irrespective of the quality of the receiving water. CWA §§ 301 and 302 (33

U.S.C. §§ 1311(b)(1)(c), 1312(a); *EPA v. California ex. Rel. State Water Res. Control Bd.*, 426 U.S. 200, 205, n. 12 (1976); *American Petroleum Institute v. EPA,* 661 F.2d 340, 344 (5th Cir. 1981).

The CWA's technology-based requirements are found at §§ 301, 304 and 306 of the CWA. 33 U.S.C. §§ 1311, 1314, and 1316. The technology-based permit requirements are further refined in 40 C.F.R. § 125.3. These requirements are discussed in greater detail below. The critical point, however—and one that the district court missed—is that technology-based requirements for NPDES permits **are mandatory,** and operate independently of water quality standards. NPDES permits issued under CWA § 402 (33 U.S.C. § 1342), such as Fidelity's permits at issue here, must contain technology-based effluent limitations. CWA § 301 (33 U.S.C. § 1311); 40 C.F.R. § 125.3. Water quality standards remain an important part of the CWA and supplement the permit program. Sections 301 and 303 of the CWA require states to adopt and enforce comprehensive water quality standards. 33 U.S.C. §§ 1311(b)(1)(c) and 1313. Water quality standards are critical when technology-based permits alone do not protect water quality. *PUD No. 1 of Jefferson City v. Wash. Dept. of Ecology*, 511 U.S. 700, 704 (water quality standards provide "a supplementary basis . . . so that numerous point sources, despite individual compliance with effluent limitations" do not cause overall water

quality to fall "below acceptable levels"); *Columbus & Franklin County Metro. Park Dist. v. Shank*, 600 N.E.2d 1042, 1070 (Ohio 1992).

In addition to technology-based effluent limitations and water quality standards, the 1987 CWA amendments clarified that Section 303 of the Act contains an "antidegradation policy" requiring further measures to insure that water quality is not degraded. *Id.*; 33 U.S.C. § 1313(d)(4); *see also PUD No. 1*, 511 U.S. at 705. Federal regulations **require** states to "develop and adopt a statewide antidegradation policy." 40 C.F.R. § 131.12(a). Where the quality of the waters is better than levels necessary to support existing uses (as is the case in much of the Tongue River), the regulations prevent additional pollution except under limited circumstances. *Id.* § 131.12(a)(2). States may not permit degradation of high quality waters unless the state finds that "allowing lower water quality is necessary to accommodate important economic or social development in the area in which the waters are located." *Id.* Even if a state chooses to allow degradation for these reasons, it must still protect existing uses and "assure" that "the highest statutory and regulatory requirements for all new and existing point sources" will be applied. *Id.* Montana implements the EPA's antidegradation policy through the Montana Water Quality Act's nondegradation policy. § 75-5-303, MCA.

Both the NPDES permit program and the water quality standards program may be delegated to states. CWA § 402 (33 U.S.C. § 1342(b)). Once delegated to a state, the state "stands in the shoes" of EPA, and states are obligated to implement all of the CWA's requirements for the NPDES program. *Natural Resources Defense Council. v. U.S.E.P.A.,* 859 F.2d 156 at 183 ("[s]tates issuing permits pursuant to § 1342(b) stand in the shoes of the agency . . . ."); 40 C.F.R. §123.25. State laws or actions contrary to the CWA are unlawful. *Northern Plains,* 325 F. 3d at 1158, 1164-65. Montana is a delegated program and has adopted by regulation all of the critical features of the CWA for both permits and water quality standards. *See* A.R.M. 17.30.1340(10); 17.30.1303; 17.30.1203, and; 17.30.1344.

B. The District Court Erred by Failing to Require Technology-Based Effluent Limitations for Fidelity's Permits.

The district court committed two errors of law in upholding Fidelity's permits. First the district court failed to acknowledge that Montana must "stand in the shoes" of EPA when issuing MPDES permits. All of the CWA's requirements apply whole cloth to the state. *Northern Plains* 325 F.3d at 1158, 1164-65. Second, the district court misread the CWA's technology-based requirements and concluded that they did not apply.

The district court intimated in its opinion that state obligations under the NDPES program are different from federal obligations. For example, the district court stated that "Plaintiffs cite to no authority for the proposition that the CWA

mandates state permit-writers to do the same (as EPA must do)." (App. A, Order at 19. But the Water Users and the Tribe repeatedly cited to such authority—the same statutes and cases cited above were presented to the district court. As well, the district court dismissed the Tribe's and Water Users' citation to the Ohio Supreme Court decision in *Shank,* because that case was interpreting Ohio law, not Montana law. The case was "of little relevance." (App. A, Order at 21-22.) The district court missed the crucial point that Ohio, as a delegated state like Montana, was required to impose the same technology-based requirements as Montana; the analysis in *Shank* is directly applicable to the analysis this Court must undertake.

This Court should first hold as a matter of law that Montana, as a delegated state program under the CWA, must adhere to all of the CWA's requirements when issuing MPDES permits. CWA § 402 (33 U.S.C. § 1342(b)). It makes little sense that Congress would allow the EPA to delegate its authority under the CWA to states, yet not hold states to the same mandatory permitting requirements as the EPA. Moreover, Montana's regulations incorporate by reference all of the provisions at issue here. *See* A.R.M. 17.30.1340(10); 17.30.1303; 17.30.1203; 17.30.1344.

Not only did the district court err in failing to recognize that Montana stands in the shoes of EPA, the district court then misread the technology-based requirements of the CWA. The district court dismissed the Water Users' and

Tribe's argument that technology-based limits are required by concluding that "this argument fails to address the discretionary authority given to EPA under the CWA and incorrectly identifies the imposition of technology-based effluent limitations as a mandatory duty applicable to the states." (App. A, Order at 17-18.) This holding is at odds with the law and must be reversed.

DEQ and Fidelity convinced the district court that the CWA only gives EPA discretionary authority to impose technology-based effluent limits. (App. A, Order at 18.) Relying solely on CWA § 402 (and not once discussing §§ 301, 304 or 40 C.F.R. § 125.3), the district court reasoned that the plain language of the statute and applicable case law does not require DEQ to impose treatment on a case-by-case basis in the absence of federally promulgated ELGs for the CBM industry. (*Id.*) The district court also accepted DEQ's rationale (not contained in the permit but made only in court) that technology-based limits effluent limitations were not necessary because DEQ was protecting the Tongue River's water quality by imposing "more stringent" water quality-based effluent limits (WQBELs). (*Id.* at 20-21.)[6] Again, the district court erred in accepting DEQ's logic, because water quality-based effluent limitations do not supplant technology-based effluent limits.

[6]DEQ did not articulate this rationale when it issued the permit, raising it for the first time in briefing at the district court. This too is legal error, because an agency's decision must stand on the rationale stated during the administrative process, not as explained by counsel on appeal.

To understand how the technology-based requirements work, it is useful to review the CWA's graduated technology-based approach to pollution control. These requirements apply to all dischargers, though the stringency of the controls depends on whether the polluter is an existing or new source. Existing dischargers are required to meet the "best available technology economically achievable," or BAT by 1989. CWA § 301 (33 U.S.C. § 1311(b)(2)). BAT is "based on the performance of the single best-performing plant in an industrial field," *Chemical Mfrs. Ass'n v. U.S.E.P.A.*, 870 F.2d 177, 226 (5th Cir. 1989), and is intended to "push[] industries toward the goal of zero discharge as quickly as possible." *Kennecott v. EPA*, 780 F.2d 445, 448 (4th Cir. 1985).

In contrast, **new** sources of pollution, such as Fidelity's CBM discharges, are required to use the "best available demonstrated control technology," or BADCT. CWA § 306(a)(1) (33 U.S.C. § 1316(a)(1)). BADCT is more stringent than BAT, requiring the greatest degree of effluent reduction technologically feasible, including, "where practicable, a standard permitting no discharge of pollutants." *Id.*; *E.I. du Pont de Nemours & Co. v. Train*, 430 U.S. 112, 120-21 (1977); *see also Chemical Mfrs.*, 870 F.2d at 196 ("[n]ew plants . . . that discharge directly into navigable waters are subject to separate standards referred to as "new source performance standards" (NSPS). The new source performance standards are based on the "best available demonstrated control technology . . .").

Technology-based effluent limitations can be set in two ways. EPA may promulgate ELGs applicable to a class of industry, and has done so for many industries. CWA § 304(b) (33 U.S.C. § 1314(b)); 40 C.F.R. § 125.3(c)(1). No ELGs have been promulgated for CBM discharges, although EPA is considering doing so. (*See e.g.* 71 Fed. Reg. 76,644). The lack of EPA-promulgated ELGs does not mean that technology-based controls are not required. In the absence of uniform guidelines, EPA (or a state administering the NPDES permit program) must incorporate technology-based effluent limits on a case-by-case basis using the permit writer's "best professional judgment" (BPJ). CWA § 402(a)(1)(B) (33 U.S.C. § 1342(a)(1)(B)); 40 C.F.R. § 125.3(c)(2). Montana's water pollution control regulations incorporate these federal requirements by reference. *See* ARM 17.30.1344, 1345 and 1361. Indeed the CWA's technology-based effluent limitations "shall be applied to all point sources of discharge of pollutants . . ." CWA § 301(e) (33 U.S.C. § 1311(e)). EPA regulations similarly provide that "[t]echnology-based treatment requirements under [33 U.S.C. § 1311(b)] represent the **minimum level of control that must be imposed** in a permit issued under [33 U.S.C. § 1342]." 40 C.F.R. § 125.3(a) (emphasis added). As explained by the Fifth Circuit:

> In situations where the EPA has not yet promulgated any [ELGs] for the point source category or subcategory, NPDES permits must incorporate "such conditions as the Administrator determines are necessary to carry out the provisions of the Act." 33 U.S.C.

> § 1342(a)(1). In practice, this means that the EPA must determine on a case-by-case basis what effluent limitations represent the BAT level, using its "best professional judgment." 40 C.F.R. § 125.3(c)-(d). Individual judgments thus take the place of uniform national guidelines, but the technology-based standard remains the same.

Texas Oil and Gas Ass'n v. U.S.E.P.A., 161 F.3d 923, 928-29 (5th Cir. 1998) (internal citation omitted).

The district court never explained why 33 U.S.C. §§ 1311 and 1316, 40 C.F.R. § 123.5, or the above-cited cases do not apply. The district court never explained how mandatory technology-based requirements disappear simply because ELGs have not been promulgated. Instead the district court looked narrowly at Section 402, and held that Section 402 creates only a "discretionary duty to impose technology-based limits using BPJ in the event there are no nation-wide effluent guidelines." (App. A, *Order* at 18.) The district court's conclusion is wrong, because it ignores other applicable parts of the CWA, EPA promulgated regulations, and well established case law.

The district court cited two cases provided by DEQ as support for its conclusion. Those cases provide no support to conclude that technology-based controls are discretionary in the absence of ELGs. For example, *Natural Resources Defense Council v. EPA*, 863 F.2d 1420 (9th Cir. 1988), does not stand for the proposition that BADCT is not required for new point sources even when EPA has not established national effluent guidelines. (App. A, Order at 18-19.)

That case concerned a nation-wide permit for existing sources, not new sources of pollution like Fidelity's. *Natural Resources Defense Council v. EPA*, (hereinafter NRDC) 863 F.2d at 1424 n2. In fact, the Ninth Circuit noted that the CWA requires both water quality standards **and** technology-based controls. The *NRDC* court further explained that the permit at issue—a nation-wide permit for off-shore oil and gas waste water—**required** reinjection as BADCT for new sources. *Id.* at 1425.[7]

Trustees for Alaska v. U.S.E.P.A., 749 F.2d 549 (9th Cir. 1984) is also unavailing. That case too recognizes that the CWA's technology-based requirements must be implemented as BPJ in cases where ELGs have not been established. Indeed the Ninth Circuit noted that EPA promulgates technology-based requirements on a case-by-case basis in the absence of industry-wide ELGs. *Id.* at 553. The NPDES permit at issue in *Trustees for Alaska* and upheld by the court "required the miners to treat waste water." *Id.* at 554. The Ninth Circuit not only upheld the use of technology-based limits in the absence of ELGs (in this case, none had been established for placer mining), it stated in dicta that

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[7]As EPA explained in the Rule at issue in *NRDC*: "**The basis for new source performance standards under Section 306 of the Act is the best available demonstrated technology.** New facilities have the opportunity to design and implement the best and most efficient processes and waste treatment technologies. Therefore, Congress directed EPA to consider the best demonstrated process changes, in-plant controls, and end-of-process control and treatment technologies that reduce pollution to the maximum extent feasible." 50 Fed. Reg. 34,605.

technology-based permitting is a legally required mandate. "Under the [1972] amendments, **a discharger's performance is measured against strict technology-based effluent limitations** rather than against limitations based on collective water quality standards. *Id.* at 556-7 (*citing EPA v. State Water Resources Control Board*, 426 U.S. 200, 204-05 (1976).). Rather than support the district court's conclusions, the reasoning in *Trustees* (a case repeatedly cited by DEQ) is fatal to the district court's conclusion.

The district court failed to cite one case, statute, or regulation standing for the proposition that technology-based effluent limits are not required for new sources of pollution. No case has reached such a conclusion. The plain language of the CWA, its implementing regulations, and the unanimous holding of the federal courts, all confirm that technology-based limitations are required. Appropriate technology-based "BPJ" effluent limitations ***must*** be placed in the permits in accordance with 40 C.F.R. § 122.44. This is true ***regardless*** of whether EPA or Montana issues the NPDES permit.

The district court's reasoning and holding has no basis in any law, regulation or case. DEQ, the agency that is charged with administering the CWA, acted illegally when it issued Fidelity's permits without BPJ analysis or technology-based effluent limits. Had the district court examined the whole structure and

purpose of the CWA as amended in 1972, it would have been apparent that Congress focused on the need for technology-based controls, and included those requirements CWA §§ 301 and 306. Instead, the district court, at DEQ's urging, focused on selective provisions of CWA § 402 that use discretionary language and took that language out of context. (App. A, *Order* at 18-20.) The result was not only unfortunate in this case, but potentially devastating for southeastern Montana given projections for up to 26,000 new CBM wells in the next two decades. The Water Users' arguments stand cleanly on the CWA's plain wording and the weight of judicial interpretations behind it. The district court's decision must be reversed and remanded, with instructions to DEQ issue new technology-based permits within 180 days.

C. DEQ Unlawfully Permitted Further Degradation of the Tongue River without Conducting a Nondegradation Analysis.

The Water Users also allege that Fidelity's permits violate the CWA's and Montana WQA's nondegradation law. The CWA's "antidegradation" requirement must be a component of a state's water quality program. Just like states must incorporate the CWA's technology-based requirements into state law, they must also incorporate antidegradation requirements into their permitting programs. Antidegradation is rooted in the CWA's mandate to "maintain and restore" the nation's waters. CWA § 101(a) (33 U.S.C. § 1251(a)). The antidegradation policy imposes a higher burden on polluters to prevent further degradation of high quality

waters, unless the additional pollution is a social or economic necessity, and pollution prevention technologies are unavailable. 40 C.F.R. § 131.12. "EPA's regulations implementing the CWA require that state water quality standards include 'a statewide antidegradation policy' to ensure that 'existing instream water uses and the level of water quality necessary to protect the existing uses shall be maintained and protected.'" *PUD No. 1,* 511 U.S. at 724. EPA explains that a state's procedure to allow degradation of high quality waters under the anti-degradation program, "is intended to provide relief in only a few extraordinary circumstances. . . ." EPA, Office of Water Quality Regulations, Water Quality Standards Handbook, 2nd Ed. 4-1, 4-7 (Aug, 1994).

Montana's nondegradation program (a term interchangeable with "antidegradation) is codified at Mont. Code Ann. § 75-5-303(3):

> DEQ **shall** not authorize degradation of high-quality waters," which includes the issuance of MPDES permits, "unless it has been affirmatively demonstrated by a preponderance of the evidence that:
>
> (a) degradation is necessary because there are no economically, environmentally, and technologically feasible medications to the proposed project that would result in no degradation;
>
> (b) the proposed project will result in important economic or social development and that the benefit of the development exceeds the costs to society of allowing degradation of high-quality waters;
>
> (c) existing and anticipated uses of state waters will be fully protected; and
>
> (d) the least degrading water quality protection practices determined by the department to be economically, environmentally,

and technologically feasible will be fully implemented by the applicant prior to and during the proposed activity."

The overriding policy of the nondegradation program is that new sources of pollution in high quality waters are not permitted. The burden rests with the state and the polluter to justify the additional pollution based upon the criteria in the statute. Montana's non-degradation law "**prohibits** degradation" of such high quality waters "except in certain **limited** circumstances." A.R.M. 17.30.701(1) (emphasis added). When a polluter seeks to add a new source of pollution, the proposed activity must undergo review under the criteria in § 75-5-303(3), MCA, quoted above. The nondegradation review process is not a ban on all new discharges; MPDES permits can still allow additional pollution after nondegradation review is completed. But it does insure that additional pollution is necessary for important economic or social reasons, and that all pollution-reducing technologies have been considered.

For the case at bar, it is critical to understand how the BER developed non-degradation standards for CBM dischargers. In June 2002, the Water Users and others petitioned the BER to establish numeric water quality standards for EC and SAR and classify EC and SAR as "harmful parameters" for the purposes of the nonsignificance criteria in Montana's nondegradation provisions, A.R.M. 17.30.715(1)(f). BER did establish new water quality standards in April 2003,

implementing a two-tiered limit for the CBM dischargers to the Tongue. Standards are more restrictive during the irrigation season (March 2 through October 31) than other times of the year. *Id.*

However, for purposes of nondegradation review, the BER declined to classify SAR and EC as "harmful parameters," and instead promulgated a narrative standard that declared "[c]hanges in existing surface or ground water quality with respect to EC and SAR" to be "nonsignificant" if the changes "will not have a measurable effect on any existing or anticipated use or cause measurable changes in aquatic life or ecological integrity." A.R.M. 17.30.670(6) (2003). BER also adopted, at industry's urging, an unusual non-severability clause (a "poison pill" approach) providing that the numeric standards would become invalid if either the nondegradation exemption or flow-based permitting provisions were successfully challenged. A.R.M. 17.30.670(7)-(8) (2003); *see also* Case Reg. Doc. No. 32.000, 8 Mont. Admin. Reg. at 799, Tribe's S.J. Ex. 17. The Water Users protested the nondegradation approach, because it effectively exempted all CBM discharges from nondegradation review; as long as the discharges did not exceed the water quality standards (which they never lawfully could) then they were automatically "nonsignificant" and exempt from nondegradation review. But the Water Users did not challenge the nonsignificance rule in court, because the poison pill

provision may have caused the entire standards package to become void, meaning a reversion to less protective narrative standards.

The Water Users instead petitioned the BER to eliminate this exemption. On March 23, 2006, the BER responded to the above-discussed problems and amended the administrative rule, such that *inter alia*, EC and SAR were designated as "harmful pollutants" and set numeric specific limits that would trigger non-degradation review. (App. A Order at 11-12; *see also* Case Reg. Doc. No. 29.000, Ex. 10 to TRWUA opening S.J. Brf.)

In addition, this Court rebuked the CBM industry's attack on the 2006 Rule (as well as the underlying water quality standards for EC and SAR approved in 2003). *Pennaco Energy Co. et al. v. Montana Board of Environmental Review*, 2008 MT 425, 347 Mont. 415, 199 P.3d 191.[8] Thus the 2006 Rule's designation of EC and SAR as harmful parameters and requirement that discharges increasing these pollutants must undergo nondegradation review is now the law of the state.

By issuing the MPDES permits in question, DEQ authorized Fidelity to lower the quality of the Tongue River for SAR, EC and other pollutants. DEQ's own documents prove this undisputed fact; Permit No. 0030457 will increase SAR levels in the Tongue River by 158 to 228 percent, and Permit No. 0030724 will

[8] The Water Users were parties to the *Pennaco* case. This Court found that the 2006 Rule designating EC and SAR as harmful pollutants was justified on both scientific grounds and on policy grounds. *Id.* at ¶ 40.

raise the SAR of the Tongue River by as much as 51 percent. (Apps. C and E). Moreover, under the BER's 2006 Rule classifying EC and SAR as harmful parameters, the permitted discharge levels exceed the numerical criteria that should trigger nondegradation review; the permitted EC level is above 40 percent of the seasonal standard. (*Id.*) In addition, the change in SAR levels under Permit No. 0030457 is also greater than 10 percent of the seasonal standard. (*Id.*). Fidelity's permits together raise the ambient levels of SAR in the Tongue River to *double or triple.* Yet despite these undisputed facts, DEQ failed to conduct nondegradation review before issuing the permits, and the district court found DEQ's actions lawful.

The district court's analysis focused on the nondegradation requirements of the 2003 Rule. (App. A, Order at 22-26.) It is undisputed that the 2003 Rule did not have a numeric nondegradation requirement. New MPDES permits for CBM discharges were effectively exempt from nondegradation review, and in fact nondegradation review was not conducted for either of Fidelity's permits at issue here. The 2003 Rule clearly did not comply with the CWA because it allowed degradation of the Tongue River's natural background water quality, while exempting such permits from nondegradation review.

The district court was correct in stating that DEQ, as an administrative agency of the state of Montana, was not free to ignore or change the law, or

presume its unconstitutionality. (App. A, Order at 23 (*citing Merlin Myers Revocable Trust v. Board of Comm'rs,* 2002 MT 201, ¶ 25, 311 Mont. 194, ¶ 25, 53 P.3d 1268, ¶ 25).) But the district court, as the final arbiter of the law and the constitution, is not bound to accept DEQ's decision. As argued below, the 2003 Rule's effective exemption from nondegradation review violated the CWA and the Montana Constitution. The district court was wrong in holding to the contrary.

First, the 2003 Rule conflicts with federal law because it allows increases in SAR and EC to degrade the ***quality*** of high quality waters without nondegradation review as long as designated *uses* are not impaired. But the issue for nondegradation review is not whether uses are impaired, but only whether degradation occurs. The now-defunct 2003 Rule, which was grandfathered in by its inclusion in the permits, authorized the discharge of CBM effluent up to the in-stream water quality standards for SAR and EC, provided that no measurable effects on any existing or anticipated uses were observed. ARM 17.30.670(6) (2003). Thus, the 2003 rule essentially reduced the protection afforded to high-quality waters under 40 C.F.R. § 131.12(a)(2) to the level of protection afforded to lower quality waters under 40 C.F.R. § 131.12(a)(1) because it merely purports to protect water ***uses***, not water ***quality***. The state regulation was therefore a *prima facie* violation of the CWA, a fact that was repeatedly noted by the Water Users in their successful campaign to change the law.

The Ohio Supreme Court's decision in *Shank*, 600 N.E.2d 1042, illustrates the same point. *Shank* involved challenges to NPDES permits issued by the Ohio EPA allowing discharges into a high quality stream. *Id.* at 1046-47. The State argued that its permits were lawful because Ohio's antidegradation regulation supposedly permitted adverse changes in water quality unless such changes interfered with designated uses, or caused exceedances of numerical water quality standards. *Id.* at 1056. The Ohio EPA's approach is identical to Montana's approach here. The Ohio Supreme Court set aside the permits, holding that the Ohio EPA's "interpretation [of the Ohio regulation] conflicts with federal law." *Id.* at 1954. The Ohio Court explained that "this interpretation . . . would eviscerate the rule **because it allows a clear degradation of water quality to be considered nondegradation.**" *Id.* at 1056 (emphasis added). Noting the structure and purpose of the CWA, the Court further noted that Ohio's approach was also unlawful because it "render[ed] meaningless the requirement that degradation be allowed only after" the rigorous antidegradation review process. *Id.*

The district court dismissed *Shank* because it is an Ohio case, as if Ohio was not applying the same provisions of the CWA that Montana must apply. (App. A, Order at 21-22 ("[s]ince the instant case does not involve an interpretation of Ohio's antidegradation laws, the holding of Shank has little relevance here.").

Shank cannot be dismissed so lightly. It is a well-reasoned opinion on a similar point of law under the CWA. The district court did not cite any contrary authority.

As in the Ohio EPA's interpretation of the antidegradation policy in *Shank*, Montana's protection of uses rather than water quality under the 2003 Rule conflicted with federal law and was therefore *ultra vires* and unlawful. Because background water quality in the Tongue River is much higher than the 2003 water quality standards,[9] the 2003 Rule effectively authorizes substantial degradation of high quality waters without the antidegradation review or the strict regulatory requirements mandated by the CWA. *See* 40 C.F.R. § 131.12. Exemptions from antidegradation review are unlawful. *Id.*

Based on the requirements of the CWA's antidegradation provisions and the holding in *Shank,* 600 N.E.2d 1042, this Court must rule that DEQ's use of the 2003 Rule exempting Fidelity's permits from any antidegradation review is a violation of the CWA. The fact that the Rule still serves as the basis for Fidelity's permits gives this Court jurisdiction to so rule.

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[9]Again using DEQ's data from the permits, the SAR varies seasonally, but is often in the range of 0.5-1.5. The water quality standard is 3.0. Thus a polluter can add SAR right up to the limit, and presume that the water quality standard is protective. The antidegradation policy is designed to avoid that result, by imposing a rigorous review of any additional pollution of high quality waters. The pollution may ultimately be permitted, but only if it justified on socio-economic grounds after alternatives have been examined. *See* § 75-5-303(3)(a)-(d), MCA.

BER's 2006 Rule is further evidence that the District Court erred in holding that the 2003 Rule is consistent with state nondegradation policies. The district court's holding is now directly at odds with even the BER's understanding of the policy. When BER repealed the 2003 Rule, it recognized that classifying EC and SAR as harmful parameters was necessary "for the purpose of implementing Montana's nondegradation policy." (Case Reg. Doc. No. 32.000, Ex. 21 at 1251.) BER further explained that "the intent of Montana's nondegradation policy is to protect the increment of 'high quality' water that exists between ambient water quality and the numeric water quality standards." (*Id.*) BER recognized the infirmities of the 2003 Rule, which failed to protect the "increment of 'high quality' water" as required by Montana's nondegradation policy. BER's adoption of the 2006 Rule is an acknowledgment of the 2003 Rule's legal shortcomings. (Case Reg. Doc. No. 32.000, Ex. 19, p. 4 (initiating rulemaking because the 2003 Rule "effectively exempts methane discharges . . . from the State of Montana's nondegradation policy").)

Finally, though this Court is reluctant to unnecessarily reach constitutional issues, the 2003 Rule cannot be sustained as an exemption to nondegradation review. Bear in mind that the Montana WQA is necessarily more stringent than the federal CWA because it also implements and fulfills the constitutional

mandates of the Article II, Section 3 and Article IX, Section 1, the Montana Constitution's provisions giving Montanans the right to a clean environment:

> The legislature, mindful of its constitutional obligations under Article II, Section 3, and Article IX of the Montana constitution, has enacted this chapter [the WQA]. It is the legislature's intent that the requirements of this chapter provide adequate remedies for the protection of the environmental life support system from degradation and provide adequate remedies to prevent unreasonable depletion and degradation of natural resources.

§ 75-5-102(1), MCA.

The 1972 Constitution provides that "[a]ll persons are born free and have certain inalienable rights. They include the right to a clean and healthful environment . . . ." Mont. Const., Art. II, Section 3. The Constitution further provides in Article IX, Section 1 that:

> (1) The state and each person shall maintain and improve a clean and healthful environment in Montana for present and future generations.
>
> (2) The legislature shall provide for the administration and enforcement of this duty.
>
> (3) The legislature shall provide adequate remedies for the protection of the environmental life support system from degradation and provide adequate remedies to prevent unreasonable depletion and degradation of natural resources.

This Court recognizes these constitutional duties as proactive, requiring the state to err on the side of imposing stricter, rather than more lenient, water quality standards. *Montana Environmental Information Center v. Montana Depart. of Env. Quality (MEIC),* 1999 Mont. 248, ¶ 77, 988 P.2d 1236, ¶ 77 (holding that the right to a clean and healthful environment is "both anticipatory and preventative.");

see also Cape France Enterprises v. Estate of Lola Peed (*Cape France*), 2001 MT 139; 305 Mont. 513; 29 P.3d 1011. Further, this Court has found that the nondegradation review process is a "reasonable legislative implementation of the mandate provided for in Article IX, Section 1." *MEIC,* 1999 MT 248, ¶ 80.

The constitutional dimensions of BER's duty to protect the environment are further heightened in cases where BER is setting water quality standards. Montana has trusteeship responsibilities for water quality. Under the state constitution, all Montana water belongs to the people, held in trust by the state. Mont. Const. Art. IX, Section 3(3). Water may be put to beneficial uses, including fish, wildlife, and recreation. § 85-2-102(2)(a), MCA. Once again citing its constitutional mandates, the legislature recognizes its duty to use water "for the maximum benefit of [Montana's] people with the *least possible degradation of the natural aquatic ecosystems*." § 85-2-101(3), MCA, (emphasis added). Underscoring the special significance of water in the context of our constitutional environmental protections, both *MEIC* and *Cape France* were water quality protection cases. Moreover *MEIC* held that a different exemption to nondegradation review was unconstitutional because it permitted environmental degradation without appropriate review. That is precisely what occurred when DEQ approved Fidelity's permits here. In the event that the Court is not persuaded that the permits violated the CWA

notwithstanding the DEQ's 2003 attempt to evade those requirements, then the constitutional provisions discussed above tip the balance in favor of invalidating the permits for lack of nondegradation review.

D. The DEQ Violated the Montana Environmental Policy Act by Failing to Address a Reasonable Range of Alternatives

In its Environmental Assessment (EA), the Montana DEQ failed to satisfy its Montana Environmental Policy Act (MEPA) duties by not seriously considering other sound alternatives to the proposed permits at issue. Specifically, the DEQ did not consider an alternative requiring the treatment of CBM discharge water with technology already in use by Fidelity, technology that can remove nearly 100% of the pollutants in CBM wastewater. Further, the cursory treatment DEQ gave the "no-action" alternative does not satisfy the depth of analysis required for alternatives under MEPA. Thus, the DEQ violated MEPA by not adequately evaluating viable alternatives before issuing the MPDES permits to Fidelity.

Though it is primarily a procedural statute, MEPA is not satisfied by *any* procedures an agency implements, but rather requires agencies to take a "hard look" at the environmental consequences of the state's actions. *Ravalli County Fish and Game Ass'n v. Montana Dep't of State Lands*, 273 Mont. 371, 377, (1995). This hard look is tempered by the common sense approach that only alternatives which are "reasonably available and prudent to consider" are included

in an EA. A.R.M. 17.4.609(f). The district court found that the EA completed by the DEQ satisfied MEPA because the court erroneously concluded that requiring technology-based effluent guidelines on a case-by-case basis was not "reasonably available" to the DEQ. The court concluded that "[g]iven DEQ's lack of authority to impose treatment on a case-by-case basis, MEPA does not require DEQ to consider an alternative that is not 'reasonably available' in an EA." (App. A, Order at 33.) Thus, according to the court, because DEQ had no authority to impose those alternatives, DEQ did not need to "consider other water management options in the EA, such as treatment of all CBM water or reinjection . . . ." (App. A, Order at 33.)

However, the lack of authority the court speaks of is based on an erroneous interpretation of both the CWA and the Montana WQA. Because Montana has incorporated EPA's regulations regarding the adoption of technology-based effluent limitations into its WQA, Montana stands in place of the EPA and therefore has the duty and authority to include technology-based limitations in its MPDES permits. A.R.M. 17.30.1340(10), A.R.M. 17.30.1303, and A.R.M. 17.30.1203. EPA has not implemented any ELGs for the CBM industry as of yet. Thus, each NPDES permit must include a BPJ and application of the appropriate technology-based effluent limitations, regardless of whether EPA or the State is

issuing the permit. In this case, the appropriate level of technology is that applied to new sources of pollution, BADCT.

DEQ is mandated to implement technology-based effluent limitations on a case-by-case basis. Because "[a]n agency must look at every reasonable alternative within the range dictated by the project's purpose and need that 'is sufficient to permit a reasoned choice'" and DEQ did not include an evaluation of an alternative requiring treatment of CBM water, MEPA was clearly violated. *Alaska Wilderness Recreation and Tourism Ass'n v. Morrison*, 67 F.3d 723, 729 (9th Cir. 1995).

Further, "[t]he duty to examine alternatives applies even where the environmental consequences of the proposed actions require preparation of an EA rather than an EIS." A.R.M. 17.4.607(2)(b), 609(3)(f); *see also Bob Marshall Alliance v. Hodel*, 852 F.2d 1223, 1228-29 (9th Cir. 1988). Even though DEQ was preparing an EA and not an EIS, the "hard look" requirement still stands. DEQ only considered two alternatives in its EA: (1) the proposed action (as modified by DEQ), and (2) a so-called "no action" alternative. (Case Reg. Doc. No. 32.000, Tribe's Ex. 9 at 13-14.) Not only was the DEQ required to include more alternatives, such as the treatment of the wastewater previously discussed, but the limited discussion of the "no action" alternative hardly satisfies the "detailed

statement" required under Montana law. § 75-1-201(1)(b)(iv), MCA. Even if the third alternative were not required, MEPA would still have been violated by the inadequacies of the EA prepared by the DEQ.

VII. CONCLUSION

Based on the foregoing, the District Court's decision should be reversed on the issues raised herein. The permits must be declared void, and remanded to DEQ to proceed with re-evaluation, including technology-based effluent limitations and nondegradation review. Further, given the years of delay in processing the current permits (permit no. 0030457 expired in 2002 and was not renewed until 2006), the Water Users respectfully request that this Court directly remand the permits in question to the DEQ with instructions to address the matter within 6 months of this Court's decision in order to expeditiously halt the unlawful pollution of the Tongue River.

RESPECTFULLY SUBMITTED this 24th day of June, 2009.

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CERTIFICATE OF COMPLIANCE

Pursuant to Rule 27 of the Montana Rules of Appellate Procedure, I certify that this Brief is printed with a proportionately spaced Times New Roman text typeface of 14 points; is double spaced; and the word count calculated by Microsoft Word 2004 for Mac is 9,992, not averaging more than 280 words per page, excluding caption, certificate of compliance, and certificate of service.

By Brenda Lindlief

CERTIFICATE OF SERVICE

I certify that on June 24, 2009 a true and correct copy of the foregoing was sent by U.S. mail, first class postage prepaid, to the following:

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