

GALLATIN COUNTY CLERK
OF DISTRICT COURT
SANDY ERHARDT

2022 NOV 15 PM 4:35

FILED

BY MSA DEPUTY

MONTANA EIGHTEENTH JUDICIAL DISTRICT COURT
GALLATIN COUNTY

UPPER MISSOURI WATERKEEPER)	Cause No. DV-21-756A
and MONTANA ENVIRONMENTAL)	
INFORMATION CENTER)	ORDER ON MOTION TO
)	STRIKE AND CROSS MOTIONS
Plaintiffs,)	FOR SUMMARY JUDGMENT
)	
v.)	
)	
MONTANA DEPARTMENT OF)	
ENVIRONMENTAL QUALITY, an)	
agency of the State of Montana,)	
)	
Defendant,)	
)	
and)	
)	
LAZY J UTILITY ASSOCIATION,)	
INC.)	
)	
Intervenor.)	
_____)	

On January 21, 2022, Plaintiffs filed a Motion for Summary Judgment & Request for Oral Argument. On February 11, 2022, Defendant/Intervenor Lazy J Utility Association, Inc. (Lazy J) filed a Cross-Motion for Summary Judgment. On the same date Defendant Montana Department of Environmental Quality

(DEQ) filed their Cross-Motion for Summary Judgment. Also pending before the Court is Plaintiffs' Motion to Strike Exhibit 1 to Defendant DEQ's Reply Brief. The Court held a hearing on the parties' motions on June 2, 2022.

Both parties and intervenor agree this matter is appropriate for determination on summary judgment.

BACKGROUND

On July 16, 2021, Plaintiffs filed a Complaint against the Defendant DEQ challenging DEQ's renewal of Montana Ground Water Pollutant Control System Permit No. MTX000172 (the Permit) issued to Intervenor Lazy J. Plaintiffs allege DEQ's decision-making in renewing the Permit violates the Montana Environmental Policy Act (MEPA), the Montana Water Quality Act (WQA), and Article II, section 3 and Article IX, section 1 of the Montana Constitution. Plaintiffs seek a declaration that the Permit is void and illegal because DEQ did not conduct proper review of the effect of wastewater, including nitrogen discharges, on state waters and did not adequately consider the cumulative effects to the environment of polluting wastewater.

DEQ responds that its decision to renew the permit satisfied the purposes of the WQA and MEPA to "prevent, mitigate, or eliminate damage to the environment." Sections 75-1-102(2), 75-5-102, MCA. Consequently, DEQ argues no cause of action exists for violation of Article II, section 3 or Article IX, section 1 of the Montana Constitution.

The Permit that is the subject of this proceeding initially was issued by DEQ to Bostwick Properties, Inc. in September of 2006. DEQ approved renewal

of the Permit in January of 2013 to expire in December of 2017. Bostwick completed a renewal application in July of 2017 and DEQ administratively continued the Permit. On May 21, 2021, DEQ renewed the Permit and on November 16, 2021, the Permit was transferred to Lazy J.

The Permit services the Lazy J South Subdivision which is located on US Highway 191, approximately one mile south of the intersection of 191 and State Highway 64 – the spur road to Big Sky, Montana – and where the West Fork of the Gallatin enters the Gallatin River. The Permit authorizes discharges from Lazy J's wastewater treatment facility which services the subdivision. The subdivision consists of 70 lots: 32 single-family residential lots and 38 commercial (non-industrial) lots located near Highway 191. Development of the subdivision is proceeding with a number of residences and commercial units - such as warehouse and storage units - already being built and more to come. The volume of the planned discharge from the permitted wastewater system has not changed since the permit was initially issued in 2006.

The receiving water for the discharge from the Lazy J system is class 1 ground water, which is high quality state water. Drinking water is the most sensitive beneficial use of the receiving water. The closest surface waters to the boundary of the mixing zone are Michener Creek and the Gallatin River. Michener Creek is a losing stream. The Gallatin is approximately 1800 feet from the boundary of the mixing zone and is the closest surface water based on the direction of ground water flow.

The permit authorizes groundwater discharge from a Level 2, wastewater treatment system as defined by ARM 17.30.702. The Level II system provides for

a centralized wastewater collection and disposal system. The system can remove up to 60% of the Total Nitrogen (TN) or 24 mg/L TN at the outfall – the physical location where the effluent is discharged from the disposal system.

Under § 75-5-301(5)(d), MCA, of the WQA and related ARM 17.30.715(1)(d), the Montana Legislature and DEQ have taken the approach that a nitrate as nitrogen concentration “at the boundary of the ground water mixing zone that does not exceed 7.5 milligrams per liter from sewage discharged from a system using level two treatment” will not cause degradation. Section 75-5-301(5)(d), MCA.

There is a monitoring well MW-1A located downgradient of the outfall at the end of the permitted 500-foot mixing zone. MW-1A will continue to be utilized for sampling groundwater throughout the permit cycle. MW-1A will allow DEQ to ensure the groundwater at the boundary of the mixing zone does not exceed the nitrate to nitrogen limits set forth in § 75-5-301(5)(d) and ARM 17.30.715(d). Monitoring results from MW-1A, before full build out of the subdivision show TN maximum concentration is .48 mg/l and TN average concentration is .33 mg/L. At full build out and a significantly increased flow of wastewater, these levels will obviously increase. The permit requires quarterly reporting of nitrate + nitrite levels from MW-1A. AR00495.

In renewing the Permit, DEQ determined the groundwater discharge from Lazy J’s wastewater treatment system was exempt from nondegradation review under the WQA because it did not constitute a “new or increased source” under ARM 17.30.705(1) and because it satisfied the nondegradation criteria of 7.5 mg/L nitrogen concentration at the end of the mixing zone. DEQ also completed

a checklist Environmental Assessment (EA) pursuant to MEPA, which the DEQ confined in scope to those impacts on the environment resulting from Lazy J's groundwater discharge. DEQ concluded the Permit would not significantly affect the human or physical environment and that DEQ was not required to conduct a more comprehensive analysis.

DEQ conducted a hypothetical mass-balance mixing of the maximum discharge authorized by the permit with the critical low-flow value of the Gallatin River. The scenario mimicked a direct discharge piped directly from the outfall of the system to the River. DEQ asserts this is an impossible and unrealistic scenario, but one that serves to evaluate nitrogen in the Gallatin River without any consideration of dilution, dispersion, and nitrogen attenuation in the subsurface or the receiving aquifer. The hypothetical instream TN concentration resulting from instantaneous mixing of this discharge to the Gallatin River is .046 mg/L. This is an increase of 6 parts per billion and below the DEQ-7 trigger value for TN of 10 parts per billion. Accordingly, DEQ asserts the Lazy J discharge will not cause degradation to the surface water. AR00389. DEQ did not conduct an independent analysis to determine what cumulative effect if any this discharge would have on the downstream surface water of the Gallatin.

Nevertheless, DEQ points out its determination included review of current receiving water quality and analysis of cumulative impacts and synergistic effects. AR00389-390. In support of this contention DEQ cites its mass-balance mixing equation and the conclusion from the equation that the Lazy J discharge will not cause degradation to surface water. AR00389. DEQ also asserts that it evaluates

the potential for changing ground water conditions by considering site specific ground water data collected during the previous permit cycle.

Plaintiffs challenge DEQ's decision to renew the Permit, asserting DEQ 1) failed to take a hard look at potential cumulative impacts in violation of the WQA; 2) failed to undertake the required nondegradation analysis by unlawfully relying on a categorical exemption from pollution permit review; and 3) violated MEPA. DEQ asserts it thoroughly considered all evidence and arguments before making its final decision to renew the Permit and that its decision was not unlawful, arbitrary or capricious.

LEGAL STANDARDS OF REVIEW

Summary judgment exists to determine actions or claims without genuine issues of material fact, in order to escape an unnecessary and costly trial. *Berens v. Wilson*, 246 Mont. 269, 270, 806 P.2d 14, 16 (1990). A party is entitled to summary judgment if "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 a judgment as a matter of law." Rule 56(c)(3), M.R.Civ.P. "In a summary judgment proceeding, the evidence must be viewed in the light most favorable to the non-moving party, and all reasonable inferences therefrom will be drawn in favor of the party opposing summary judgment." *Oliver v. Stimson Lumber Co.*, 1999 MT 328, ¶ 22, 297 Mont. 336, 993 P.2d 11.

The moving party must first demonstrate that no genuine issue of material fact exists precluding the entry of summary judgment as a matter of law. *Sunset Point Partnership v. Stuc-O-Flex International, Inc.*, 287 Mont. 388, 954 P.2d

1156 (1998); *Dobrocke v. City of Columbia Falls*, 2000 MT 179, 300 Mont. 348, 8 P.3d. 71. Material issues of fact are identified by looking to the substantive law governing the proceedings.” *Carelli v. Hall*, 279 Mont. 202, 207, 926 P.2d 756, 759 (1996). Once the moving party satisfies its burden, the burden then shifts to the nonmoving party to demonstrate the existence of a genuine issue of material fact. If the Court determines that there is no genuine issue of material fact, then the Court must decide the matter presented as a matter of law. *Bros. v. Gen. Motors Corp.*, 202 Mont. 477, 481, 658 P.2d 1108, 1110 (1983); *Clark v. Eagle Systems, Inc.*, 279 Mont. 279, 287, 927 P.2d 995, 1000 (1996).

While this case is before the Court on cross-motions for summary judgment, the underlying issue presented involves a review of DEQ’s administrative permitting decisions. The Court further observes that this case was not brought as a petition for judicial review of an administrative decision resulting from a contested case proceeding as contemplated under the Montana Administrative Procedures Act. The parties agree that the standard of reviewing such permitting decisions in the manner presented is set forth in *Clark Fork Coalition v. Department of Environmental Quality*, 2012 MT 240, 366 Mont. 427, 288 P.3d 183. The Montana Supreme Court stated that

[w]e review an agency decision not classified as a contested case under the Montana Administrative Procedure Act to determine whether the decision was arbitrary, capricious, unlawful or not supported by substantial law. In reviewing an agency decision under the arbitrary and capricious standard, we consider whether the decision was "based on a consideration of the relevant factors and whether there has been a clear error of judgment." Although our review of agency decisions is narrow, we will not automatically defer to the agency "without carefully reviewing the record and satisfying [ourselves] that the agency has made a reasoned decision"

Clark Fork Coalition, ¶ 20 (internal citations omitted). The Supreme Court further stated that “[a]n agency’s interpretation of its rule is afforded great weight, and we will defer to that interpretation unless it is plainly inconsistent with the spirit of the rule.” *Clark Fork Coalition*, ¶ 19.

Finally, the Court notes that, subsequent to the June 2, 2022 hearing, DEQ released information regarding classification of the Gallatin River as impaired by algal blooms. This decision by DEQ comes subsequent to the development of the administrative record in this proceeding, upon which the Court must base its order. The administrative record references the fact the West Fork of the Gallatin is classified as impaired, but emphasizes the main stem is not and points out the primary source of impairment on the West Fork. AR00386-AR00388. The implication is the small discharge from the subject permit will have such a minimal impact on the river – a river which is not impaired – that there would not be a cumulative impact. That argument is less persuasive now, but the Court is limited to the record before it.

DISCUSSION

Article IX, Section 1 of the Montana Constitution provides as follows:

- 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.

In carrying out the mandates set forth in Article IX, Section 1, the Montana Legislature has enacted statutory provisions such as the WQA and MEPA to provide for administration, enforcement and adequate remedies to implement the right to a clean and healthful environment. With regard to water quality, it is Montana's stated statutory goal that "[e]xisting uses of state waters and the level of water quality necessary to protect those uses must be maintained and protected." Section 75-5-303(21), MCA.

While degradation of state waters may be allowed in certain circumstances as authorized by the DEQ, the overarching goals set out in § 75-5-303, MCA, must be met. Section 75-5-303(2), MCA. Thus, DEQ

may not authorize degradation of high-quality waters unless it has been affirmatively demonstrated by a preponderance of evidence to the department that:

- (a) degradation is necessary because there are no economically, environmentally, and technologically feasible modifications 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 use 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 Legislature further has tasked DEQ with adopting administrative rules pertaining to Montana's goal of maintaining its water quality, including that DEQ shall

(5) adopt rules implementing the nondegradation policy established in 75-5-303, including but not limited to rules that:

(a) provide a procedure for department review and authorization of degradation;

(b) establish criteria for the following:

(i) determining important economic or social development; and

(ii) weighing the social and economic importance to the public of allowing the proposed project against the cost to society associated with a loss of water quality;

(c) establish criteria for determining whether a proposed activity or class of activities, in addition to those activities identified in 75-5-317, will result in nonsignificant changes in water quality for any parameter in order that those activities are not required to undergo review under 75-5-303(3). These criteria must be established in a manner that generally:

(i) equates significance with the potential for harm to human health, a beneficial use, or the environment;

(ii) considers both the quantity and the strength of the pollutant;

(iii) considers the length of time the degradation will occur;

(iv) considers the character of the pollutant so that greater significance is associated with carcinogens and toxins that bioaccumulate or biomagnify and lesser significance is associated with substances that are less harmful or less persistent.

(d) provide 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:

(i) 7.5 milligrams per liter from sources other than sewage;

(ii) 5.0 milligrams per liter from sewage discharged from a system that does not use level two treatment in

an area where the ground water nitrate as nitrogen is 5.0 milligrams per liter or less;

(iii) 7.5 milligrams per liter from sewage discharged from a system using level two treatment, which must be defined in the rules; or

(iv) 7.5 milligrams per liter from sewage discharged from a system in areas where the ground water nitrate as nitrogen level exceeds 5.0 milligrams per liter primarily from sources other than human waste.

(6) to the extent practicable, ensure that the rules adopted under subsection (5) establish objective and quantifiable criteria for various parameters. These criteria must, to the extent practicable, constitute guidelines for granting or denying applications for authorization to degrade high-quality waters under the policy established in 75-5-303(2) and (3).

(7) adopt rules to implement this section.

Section 75-5-301(5) –(7), MCA.

DEQ has adopted rules in conformance with the Montana Legislature's statutory directives. Of particular import to the issues raised in this case is ARM 17.30.715, which sets forth criteria by which the DEQ may determine that an activity "will result in nonsignificant changes in existing water quality due to their low potential to affect the human health or the environment," such that the activity is not required to undergo the nondegradation review contained in § 75-5-303(2), MCA. The Rule further states, in pertinent part:

These criteria consider the quantity and strength of the pollutant, the length of time the changes will occur, and the character of the pollutant. Except as provided in (2), changes 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:

(a) activities that would increase or decrease the mean monthly flow of a surface water by less than 15% or the 7-day 10 year low flow by less than 10%;

(b) discharges containing carcinogenic parameters or parameters with a bioconcentration factor greater than 300 at concentrations less than or equal to the concentrations of those parameters in the receiving water;

(c) discharges containing toxic parameters, inorganic nitrogen, or inorganic phosphorus, except as specified in (1)(d) and (e), which will not cause changes that equal or exceed the trigger values in Department Circular DEQ-7. Whenever the change exceeds the trigger value, the change is not significant if the resulting concentration outside of a mixing zone designated by the department does not exceed 15% of the lowest applicable standard;

(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 the following values:

(i) 7.5 mg/L for nitrate sources other than domestic sewage;

(ii) 5.0 mg/L for domestic sewage effluent discharged from a conventional septic system;

(iii) 7.5 mg/L for domestic sewage effluent discharged from a septic system using level two treatment, as defined in ARM 17.30.702; or

(iv) 7.5 mg/L for domestic sewage effluent discharged from a conventional septic system in areas where the groundwater nitrate level exceeds 5.0 mg/L primarily from sources other than human waste. For purposes of this subsection (d), the word "nitrate" means nitrate as nitrogen; and

(e) changes in concentration of total inorganic phosphorus in ground water if water quality protection practices approved by the department have been fully implemented and if an evaluation of the phosphorus adsorptive capacity of the soils in the area of the activity indicates that phosphorus will be removed for a period of 50 years prior to a discharge to any surface waters;

(f) changes in the quality of water for any harmful parameter, nutrients listed at ARM 17.30.631, and parameters listed in Department Circular DEQ-12A, for which water quality standards have been adopted other than

carcinogenic, bioconcentrating, or toxic parameters, in either surface or ground water, if the changes outside of a mixing zone designated by the department are less than 10% of the applicable standard and the existing water quality level is less than 40% of the standard;

(g) changes in the quality of water for any parameter for which there are only narrative water quality standards 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.

(2) 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).

The criteria listed in ARM 17.30.715(1) are used to determine whether certain activities will result in nonsignificant changes in existing water quality due to their low potential to affect human health or the environment. As stated in the Rule, except as provided in subsection (2), activities which meet all the criteria listed in ARM 17.30.715(1) are nonsignificant and are not required to undergo review under § 75-5-303, MCA. However, notwithstanding a determination of nonsignificance under 17.30.715(1), DEQ may exercise its

discretion under 715(2) to determine that water quality changes caused by an activity constitute degradation and must undergo nondegradation review.

In reviewing the request for renewal of the Permit at issue here, DEQ determined that Lazy J's wastewater treatment system met the criteria of ARM 17.30.715(1) and, as a result, was a nonsignificant activity which did not require nondegradation review under § 75-5-303, MCA. Specifically, DEQ determined under ARM 17.30.715(1)(d) that the activity in question would produce a ground water concentration of less than 7.5 mg/L nitrate as nitrogen at the end of the designated mixing zone, which would not cause degradation of surface water.

In their Motion requesting summary judgment, Plaintiffs assert, in part, that DEQ's renewal of the Permit was unlawful because "DEQ failed to analyze the cumulative impacts associated with issuing an additional nutrient discharge permit within a river system that is already unduly stressed by nutrient pollution." In other words, Plaintiffs contend DEQ failed to properly consider and apply the criteria listed in ARM 17.30.715(2). DEQ responds that it did adequately consider the criteria in 715(2), including potential cumulative effects of discharge from Lazy J's wastewater treatment system. DEQ states that it

assessed potential impacts to the Gallatin River through a hypothetical mass-balance mixing of the maximum discharge authorized by the Permit with the critical low-flow value of the Gallatin River. This would assume a direct discharge from Outfall 001 to the Gallatin River without any consideration of dilution, dispersion, and nitrogen attenuation in the receiving aquifer. The hypothetical instream TN concentration resulting from instantaneous mixing of this discharge to the Gallatin River is 0.046 mg/L, a concentration that is unlikely to cause a significant change to or degradation of surface water quality.

The parties have discussed various Montana cases in presenting their arguments to the Court, including *Klamath-Siskiyou Wildlands Center v. BLM*, 387 F.3d 989 (2004); *Clark Fork Coalition v. Montana Department of Environmental Quality*, 2008 MT 407, 347 Mont. 197, 197 P.3d 482 (*Clark Fork Coalition* (2008)); and *Bitterrooters for Planning, et al v. DEQ*, First Judicial District Court, CDV-2014-505. Plaintiffs contend these cases demonstrate DEQ's action in this case was arbitrary and capricious, while DEQ asserts these cases are factually distinguishable and, therefore, not determinative. The Court determines that, although not factually analogous to the present case, *Clark Fork Coalition* (2008) provides the clearest analysis of DEQ's obligations in applying ARM 17.30.715.

Clark Fork Coalition (2008) involved approval of a Montana Pollution Discharge Elimination System (MPDES) permit for a proposed copper and silver mine in the Cabinet Mountains. The proposed permit would have involved discharging water from the mine into the Clark Fork River. The life of the mine was estimated to be thirty to thirty-seven years, and the discharge into the river after the mine closed would have potentially continued in perpetuity. *Clark Fork Coalition* (2008), ¶ 5. The discharged water was expected to contain arsenic, ammonia, nitrate-nitrogen, and heavy metals among other pollutants. *Id.* While there was a plan to treat the water there was not a plan for closure of the mine nor any realistic plan for treating the water for hundreds of years after the mine owners were long gone.

DEQ eventually determined under ARM 17.30.715(1) that would not cause significant degradation to the Clark Fork River and issued the permit. *Clark Fork*

Coalition (2008), ¶ 14. Plaintiffs challenged the decision in district court, the district court granted summary judgment to DEQ and plaintiffs appealed. *Clark Fork Coalition* (2008), ¶ 18.

The Montana Supreme Court set forth the standard of review for an agency decision which did not result from a contested case proceeding, which this Court has set forth above, and specifically noted that

an agency's interpretation of its rule is afforded great weight, and the court should defer to that interpretation unless it is plainly inconsistent with the spirit of the rule. The agency's interpretation of the rule will be sustained so long as it lies within the range of reasonable interpretation permitted by the wording.

Clark Fork Coalition (2008), ¶ 20. The Supreme Court further stated that

this Court defers to an agency's interpretation of one of its regulations, unless such interpretation is plainly inconsistent with the spirit of the regulation. The agency's interpretation of a regulation "will be sustained so long as it lies within the range of reasonable interpretation permitted by the wording." However, we will not defer to an incorrect agency decision. Likewise, in examining whether an agency decision applying a regulation was arbitrary or capricious, the courts consider whether the decision was based on a consideration of the relevant factors and whether there has been a clear error of judgment. The inquiry must be searching and careful, but the ultimate standard of review is a narrow one. The courts do not substitute their judgment for that of the agency by determining whether its decision was correct. Rather, the courts examine the decision to determine if it was made on sufficient information, or whether the decision was so at odds with the information gathered that it could be characterized as arbitrary or the product of caprice.

Clark Fork Coalition (2008), ¶ 27 (internal citations omitted).

In *Clark Fork Coalition* (2008), plaintiffs challenged the DEQ's decision to issue the permit based in DEQ's failure to consider adequately the length of time the proposed discharge would continue as other relevant information under ARM 17.30.715(2)(g). DEQ asserted it did consider the length of time of the proposed

discharge under ARM 17.30.715(1), because (1) expressly states that the criteria thereunder consider, in part, “the length of time the changes will occur . . .,” and that, in applying the (1) criteria, it assumed the proposed discharge would be perpetual. The Supreme Court summarized DEQ’s position as follows:

DEQ interprets Admin. R. M. 17.30.715(2)(g), which provides that it has discretion to consider any other information which relates to the criteria in sub-division (1) of the regulation, as limited in application to those few instances where the specific criteria in sub-division (1) fail to account for site-specific conditions or newly acquired information. Based on this interpretation, DEQ refused to exercise its discretion under sub-section (2)(g) of Admin. R. M. 17.30.715 to consider independently of Revett’s proposal that the polluted water discharged from Outfall 001: (a) cannot be stopped; (b) will likely discharge up to 3.3 million gallons of water per day into the Clark Fork River; and (c) will require treatment in perpetuity.

Clark Fork Coalition (2008), ¶ 38. The Supreme Court concluded that DEQ’s interpretation of the Rule in this regard was incorrect, not within the range of reasonable interpretation permitted by the Rule’s wording, and plainly was inconsistent with the spirit of the Rule. *Clark Fork Coalition* (2008), ¶ 39.

The Supreme Court observed that DEQ’s own statement regarding the promulgation of ARM 17.30.715 recognized that situations could arise in which subsection (1) of the Rule would be inadequate to protect against degradation and that “[g]iven that implementation of the policy under the rules has yet to be tested, it is important that the [DEQ] have discretion to make a determination of significance independent of the criteria in [17.30.715(1)].” *Clark Fork Coalition* (2008), ¶ 41 (quoting 15 Mont. Admin. Register 2209(Aug. 11, 1994)). Thus, the Court observed that, in promulgating the Rule, it was intended that “DEQ exercise its discretion granted by sub-division (2) to re-evaluate a decision made under sub-division (1) in order to fulfill the goal of preventing degradation in

every instance.” *Clark Fork Coalition* (2008), ¶ 42. The Supreme Court then concluded that DEQ’s misinterpretation of its own Rule was an abuse of discretion because “an agency, ‘vested with discretion, abuses that discretion when it behaves as if it has no other choice than the one it has taken, as well as when it makes a decision for which there is not adequate support.” *Clark Fork Coalition* (2008), ¶ 43 (citation omitted). In other words, DEQ’s failure or refusal to consider, independently of the criteria in ARM 17.30.715(1), whether to exercise its discretion under 715(2) was arbitrary and capricious and, therefore, an abuse of discretion. *Clark Fork Coalition* (2008), ¶ 43.

An agency must take a "hard look" at the environmental impacts of a given project or proposal. 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. Admittedly, court review of an agency decision, including an environmental decision, is limited. Still, while a court is not to substitute its judgment for that of the agency, the agency must examine the relevant data and articulate a satisfactory explanation for its action, including a rational connection between the facts found and the choice made. In other words, the Court looks closely at whether the agency has taken a hard look at the question presented. The Court does not take a hard look itself but requires that the agency does so. The Court focuses on the validity and appropriateness of the administrative decision making process without intense scrutiny of the decision itself. In this way, the Court examines the elements of the decision without interfering with the administrative authority over the decision itself.

An agency must supply a statement of reasons why potential impacts of a proposed action such as Outfall 001 are nonsignificant. A simple statement that a perpetual discharge of polluted water will always be treated is insufficient to justify a determination that an irreversible discharge is nonsignificant. DEQ has misinterpreted its own regulation and has not taken a hard look at what will be required to maintain the quality of the Clark Fork River after the mine closes and Outfall 001 continues to discharge polluted water, perhaps forever.

Clark Fork Coalition (2008), ¶¶ 47-48.

Thus, in taking the required "hard look" at the environmental impacts of a given project or proposal, DEQ must consider the criteria in both subsections (1) and (2) of ARM 17.30.715. While DEQ may determine not to exercise its discretion under ARM 17.30.715(2) to declare the proposed activity is significant, it "must examine the relevant data and articulate a satisfactory explanation for its action, including a rational connection between the facts found and the choice made." *Clark Fork Coalition* (2008), ¶ 47.

The only discussion in the final Permit issued to Lazy J regarding the criteria set forth in ARM 17.30.715(2) is contained in the section of the Permit wherein DEQ responds to public comment. Comment 3, which is the Comment submitted by Plaintiffs, asserted that the proposed Permit failed, among other things, to consider the potential cumulative impacts of the discharge from Lazy J's wastewater treatment facility, which is the criterion to be considered under ARM 17.30.715(2)(a). In its Response to Comment 3, DEQ stated its analysis of the hypothetical mass-balance mixing of the maximum discharge authorized by the permit with the critical low-flow value of the Gallatin River was sufficient to determine that discharge from the Lazy J subdivision would not cause degradation of surface water. Additionally, DEQ stated that it

evaluates cumulative impacts and synergistic effects in each permit decision. DEQ evaluated the potential for changing conditions in this permit renewal by requiring current samples of the ambient receiving water. DEQ requires analysis of the receiving ground water to identify any reductions in the assimilative capacity. If total nitrogen concentrations are found to be rising, DEQ establishes more stringent effluent limits. The permit establishes water quality limitations to control pollutants of concern that are or may be discharged at a level which will cause, have reasonable potential to cause or contribute to an excursion above any state water quality

standard. The permittee must comply with the permit developed by the DEQ

AR00389-00390.

Plaintiffs point out that DEQ's hypothetical mass-balance mixing scenario, shows only the direct impact on the water of discharges from Lazy J's wastewater treatment facility but it does not show the cumulative impact. Indeed, DEQ noted in its briefing that the "mass balance calculation is not intended to address cumulative effects. Cumulative effects are evaluated by considering the assimilative capacity of the receiving water as explained above." DEQ's Reply to Plaintiff's Response to DEQ's Cross Motion for Summary Judgment, pg. 13. With specific regard to cumulative impacts and synergistic effects of discharge from Lazy J's wastewater treatment facility, the Permit issued by DEQ merely states that DEQ evaluates such criteria in each permit decision, but does not expand on what information regarding cumulative/synergistic impacts it gathered or considered, and does not evaluate why it concluded there were no cumulative/synergistic impacts sufficient to exercise its discretion to determine the proposed activity was not nonsignificant.

The Court concludes the Permit renewal issued by DEQ fails to "articulate a satisfactory explanation for its action, including a rational connection between the facts found and the choice made," with regard to the analysis of cumulative impacts or synergistic effects under ARM 17.30.715(2)(A). *See Clark Fork Coalition* (2008), ¶ 47. Thus, the Court further concludes that DEQ failed to take the requisite "hard look" at the environmental impacts of proposed activity, which includes the obligation to make an adequate compilation of relevant information, to analyze it reasonably, and to consider all pertinent data. DEQ's


failure in this regard resulted in a decision which was arbitrary and capricious. *See Clark Fork Coalition* (2008), ¶ 49. Therefore, the Court ultimately concludes that Plaintiffs are entitled to summary judgment in their favor on their claim that DEQ failed to take a hard look at potential cumulative impacts in violation of the WQA.

As discussed by the Montana Supreme Court in *Clark Fork Coalition* (2008), this conclusion by the Court does not result in a determination that the proposed activity at issue cannot be nonsignificant and it is possible that DEQ could determine the proposed activity is nonsignificant after further consideration of all criteria. *See Clark Fork Coalition* (2008), ¶ 49. The Court simply determines that DEQ has not sufficiently reviewed the criteria contained in ARM 17.30.715(1) and (2), and has not provided sufficient explanation for its action in approving renewal of the Permit. It should be required to do so.

Plaintiffs also asserted claims that DEQ's renewal of the Permit was in violation of MEPA and the Montana Constitution. As the Court is ordering DEQ to perform a new assessment of the Permit renewal which fully addresses the criteria of ARM 17.30.715, and specifically 715(2)(a), the Court declines to rule on these additional issues at this time. DEQ's reassessment of the Permit renewal potentially may change its analysis to a degree that these issues may resolve or change substantially. In that regard, the Court again notes that, subsequent to the June 2, 2022 hearing, DEQ released information regarding classification of the Gallatin River as impaired by algal blooms. Thus, the factors and information available to DEQ in reassessing the Permit renewal may have changed significantly from what was available previously.

Therefore, based on the above, **IT IS HEREBY ORDERED** that Plaintiffs' Motion for Summary Judgment is **GRANTED** to the extent that judgment is entered in their favor on their claim that DEQ failed to take a hard look at potential cumulative impacts in violation of the WQA. Plaintiffs' Motion is **DENIED** in all other respects. The Motions for Summary Judgment filed by Defendant DEQ and Intervenor Lazy J are **DENIED**. The Court orders DEQ to perform a new assessment of the Permit renewal which fully addresses the criteria of ARM 17.30.715, and specifically 715(2)(a). Plaintiffs' Motion to Strike is **DENIED**.

DATED this 15th day of November, 2022.



Hon. Peter B. Ohman
District Court Judge

cc: Guy Alsentzer/Derf Johnson
Kirsten Bowers/Kurt Moser
William Tietz/Hallee Frandsen