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MONTANA EIGHTEENTH JUDICIAL DISTRICT, GALLATIN COUNTY

UPPER MISSOURI WATERKEEPER)	Case No. DV-16-2023-262-DK
)	
Plaintiff,)	BRIEF IN SUPPORT OF PLAINTIFF'S
v.)	MOTION FOR SUMMARY
)	JUDGMENT
MONTANA DEPARTMENT OF)	
ENVIRONMENTAL QUALITY,)	
an agency of the State of Montana)	
)	
Defendant.)	
)	
)	
)	

BACKGROUND

This case challenges the Montana Department of Environmental Quality's (DEQ) February 16, 2023 decision-making authorizing Phase I of the Quarry Subdivision, a new major subdivision reliant on subsurface septic wastewater disposal located approximately 1/4 mile from the Gallatin River, in the Canyon Area of Big Sky, MT. Each of the eight (8x) high-density residential lots proposed in Phase 1 would have their own Level II wastewater treatment and disposal system, capable of discharging at or below 7.5 mg/L nitrogen to groundwater. AR02052. Phase I's eight (8x) septic systems are new sources, as opposed to existing systems, discharging wastewater pollutants to state waters. Groundwater underlying the Quarry, like groundwater underlying adjacent subdivision Lazy J South, flows north by east off the property, with the closest downgradient surface water being the Gallatin River. AR02072

DEQ's evaluation of the Quarry Phase I's wastewater discharges culminated in a draft Environmental Assessment, Nonsignificance Finding, and Narrative issued for public comment on December 8, 2022, all of which found the Quarry's new nutrient pollution discharges 'nonsignificant'. AR02103-2125. Plaintiff Waterkeeper and dozens of citizens submitted comments opposing the Quarry Phase I, largely on the basis of reasonably foreseeable negative impacts from adding new sources of nutrient pollution to the Gallatin River system despite ongoing seasonal algal blooms in surface water, the growth-inducing nature of wastewater pollution to algal blooms, and a preliminary Gallatin impairment determination for nuisance algal blooms. AR 03146, 0299-03279.

Public comment on the Quarry Subdivision included the WGM Group's 2020 "Upper Gallatin Nutrient Assessment", a report documenting numerous existing septic system pollution discharges to groundwater, and thereafter to the Gallatin River, adjacent to and nearby the Quarry in Big Sky's Canyon Area. AR03144-3123; *see also* Exhibits to Complaint. Similarly, Plaintiff provided DEQ a list of known nutrient discharges already identified and known by the agency to discharge nutrient pollution within the same sub-watershed of the Gallatin. *Id.* Plaintiff also provided DEQ specific scientific documents discussing the relationship between anthropogenic nutrient pollution and nuisance algal growth, including how nuisance algal blooms violate water quality standards, in advocating for improved water pollution controls for the Quarry Subdivision. *Id.* Before it authorized the Quarry Subdivision in December 2022, DEQ published a June 2022 "Notice of Intent to List the Middle Segment Gallatin River as an Impaired Waterbody." *See* Exhibit B to Complaint; DEQ Answer ¶ 56. The Notice of Intent determined that "excessive algal growth is diminishing the recreational and aquatic life uses [...] on this segment of the Gallatin River [...]herefore, these uses are not being fully attained." *Id.*

DEQ finalized an EA, Nonsignificance Determination, and Response to Comments approving wastewater disposal for the Quarry Phase I by letters dated February 16, 2023. AR02050-

2102. Plaintiff Waterkeeper filed this lawsuit challenging DEQ's decision-making process approving the Quarry's wastewater discharges under the Water Quality Act, Montana Environmental Policy Act, and Montana Administrative Procedures Act, on March 17, 2023.

During this case's pendency the Court has considered and declined a Rule 12(b)(6) Motion to Dismiss by Defendant DEQ and a Rule 12(c) Motion for Judgment as a Matter of Law by Plaintiff. This case now sits before the Court with an Administrative Record (AR), meaning the facts contained therein are not subject to reasonable dispute. Plaintiff files this Motion for Summary Judgment based on the Administrative Record and pleadings, requesting the Court determine and declare the Department's decision-making authorizing wastewater discharges from the Quarry Subdivision Phase I was arbitrary and capricious, unlawful, and contrary to the Montana Water Quality Act, Montana Administrative Procedures Act, and Montana Environmental Policy Act, and that it declare the Phase I authorization void, reverse and remand to the agency for reconsideration.

STANDARD OF REVIEW

In reviewing an agency decision, Montana courts use a two-part test derived from *North Fork Pres. Ass'n v. Dep't of State Lands*, 238 Mont. 451, 459, 778 P.2d 862 (1989). First the court examines whether the agency's application of the statute or regulation was lawful – within the bounds of the statutory language. In reviewing whether an agency was appropriately interpreting a statute, the court looks first to the plain language. *Mont. Sports Shooting Ass'n v. State*, 2008 MT 190, ¶11, 344 Mont. 1, 185 P.3d 1003. While courts can defer to an Agency's interpretation of its regulations, no deference is required to interpretations which violate the plain language of the law, or the spirit of regulation. *Clark Fork Coalition v. Mont. Dep't of Env'tl. Quality*, 2008 MT 407, ¶20, 347 Mont. 197, 197 P.3d 482.

Even if the agency's interpretation of statute is lawful, the court also reviews the substance of the agency decision under the second part of the *North Fork* test to determine if the decision was “arbitrary and capricious.” The touchstone inquiry is “whether the decision was “based on a

consideration of the relevant factors and whether there has been a clear error of judgment.” *North Fork*, 238 Mont. 451, 465, 778 P.2d 862, 871 (1989) (quoting *Marsh v. Or. Nat. Resources Council*, 490 U.S. 360, 378 (1989); *Clark Fork Coalition et al v. Montana Dep’t of Env’t Quality*, 2008 MT 407, ¶ 20-27. While the Court’s review of agency decisions is generally narrow, it will not “automatically defer to the agency ‘without carefully reviewing the record’ providing satisfaction that the agency has made a reasoned decision.” *Friends of the Wild Swan v. DNRC*, 2000 MT 209, ¶28, 301 Mont. 1, 6 P.3d 972.

Summary judgment should be rendered if the pleadings, the discovery, and materials on file, show that there is no genuine issue as to any material fact and that the movant is entitled to judgment as a matter of law. *Baumgart v. State*, 2014 MT 194, ¶13, 376 Mont. 1, 332 P.3d 225 (citing M.R. Civ. P. 56(c)(3)). “Summary judgment is particularly appropriate where, as here, review is on the administrative record.” *Montana v. EPA*, 941 F. Supp. 945, 956 (D. Mont. 1996), *aff’d*, 137 F.3d 1135 (9th Cir. 1998); *see Park County Env’t. Council v. Mont. Dep’t of Env’t. Quality*, 2020 MT 303 ¶ 1 (affirming resolution of MEPA case on summary judgment); *Mont. Wildlife Fed’n v. Mont. Bd. of Oil & Gas Conservation*, 2012 MT 128, ¶ 17, 365 Mont. 232, 280 P.3d 877 (same).

ARGUMENT

I. DEQ VIOLATED ARM 17.30.715(2) BY FAILING TO TAKE A HARD LOOK AT CUMULATIVE IMPACTS OR SYNERGISTIC EFFECTS OF NUTRIENT POLLUTION

DEQ's nonsignificance determination for the Quarry subdivision failed entirely to take a hard look at potential degradation of the Gallatin River from cumulative impacts or synergistic effects, at the river scale, as required by ARM §§ 17.30.715(2)(a) and 17.30.637(2). Even when a proposed activity satisfies ARM 17.30.715(1), the activity may nonetheless be significant under (2).

In reviewing the Quarry Phase I wastewater discharges DEQ determined that new nutrient pollution from the use of eight community septic systems met the criteria of ARM 17.30.715(1) (mixing zone effluent concentration) and complied with metrics of its "How to Perform a

Nondegradation Analysis for Subsurface Wastewater Treatment Systems" (Guidance) (revised October 2015). AR02123-2125. Specifically, DEQ determined under ARM 17.30.715(1) that the new pollution discharges would produce effluent concentrations of less than 7.5 mg/L nitrate as nitrogen at the end of mixing zones. AR02070-72. DEQ also relied on > 1/4 mile setbacks of each septic system from the downgradient Gallatin River, a metric of Chapter 5 of its Guidance, as rationale for the Nonsignificance Determination. AR02071-72. DEQ's Nonsignificance Determination also failed to provide any discussion of why it concluded pollution discharges were nonsignificant under 17.30.715(2). AR02072. DEQ's Environmental Analysis (EA) reflects the same conclusory rationale. AR02117 ("[wastewater is treated to] nonsignificance criteria of 7.5 mg/L[.] DEQ did not evaluate cumulative impacts to surface water because no drainfields were within 1/4 mi of surface water, so the adjacent to surface water trigger analysis was not required.")

In *Clark Fork Coal. v. Mont. Dep't. of Env't. Quality*, 2008 MT 407, 347 Mont. 197, 197 P.3d 482, the Supreme Court clarified the agency's responsibility to consider ARM 17.30.715(2) criteria. There, even though DEQ asserted that the exceptions provided in 17.30.715(1) for a nonsignificant determination were sufficient nondegradation analysis, the Montana Supreme Court found the Agency's refusal to address 715(2) factors arbitrary and capricious. *Id.* at ¶ 44. In support of that finding the Court stated:

BER recognized when it adopted sub-division (2) that situations arise where the criteria in Admin. R. M. 17.30.715(1) would be inadequate to protect against degradation. It is unlikely that a set of criteria for non significance can be developed that would sufficiently fulfill the goal of preventing degradation in every instance [...]. In promulgating Admin. R. M. 17.30.715, BER intended 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, ¶ 41 (citing 15 Mont. Admin. Register 2209 (Aug. 11, 1994)). Directly analogous to this case, Judge Ohman of the 18th Judicial District similarly found DEQ's failure to evaluate cumulative impacts and/or synergistic effects of nutrient pollution under 17.30.715(2) during its

decision-making for a groundwater discharge permit issued to Lazy J South, the adjacent subdivision to the Quarry, unlawful because the agency failed to take a hard look at potential cumulative impacts in violation of the WQA. *Upper Missouri Waterkeeper v. DEQ*, DV-21-756A, Nov. 15, 2022 (18th Judicial District). Other district courts have found the same process flaws unlawful. *See Gateway Village, LLC v. Montana DEQ & Gallatin Gateway Water & Sewer District*, Cause No. DV-12-657C (Dec. 29, 2014) (overturning DEQ permit for failure to take a hard look at groundwater pollution); *Bitterrooters for Planning Inc, et al v. DEQ*, Cause No. CDV-2014-505 (Jun 28, 2016) (determining failure to apply 17.30.715(2) unlawful, arbitrary and capricious, and violating MCA 75-5-303).

The facts entitling Plaintiff to judgment as a matter of law on Claim 1 are clear. The Quarry Phase I discharges pollution to groundwater. AR02052. Record evidence, and DEQ's own documents, indicate that receiving groundwater and the Gallatin River are hydrologically connected, including the Gallatin River being the closest downgradient surface water. AR02065-66, 2072, AR03179, AR03199, AR02069 (WGM Group, 2020, Big Sky Nutrient Assessment (identifying existing septic system discharging to shallow groundwater in Canyon Area and flowing to downgradient Gallatin River)). Groundwater flows north by west with a hydraulic conductivity value of 515 feet per day towards the Gallatin River, which is approximately 1,800' downgradient, or just over 1/4 mile away. AR04426, AR04577, AR02072. Public comment and expert reports provided to DEQ demonstrated the scientific reality of groundwater-surface connectivity where the Quarry Phase I lies, and so too documented ongoing nutrient pollution challenges in Big Sky, including specifically nutrient pollution by septic systems proximate to the Quarry. AR02091-3279, *see especially* AR03144-3204; Exhibits E & F to Complaint.

Record evidence also provided notice of recurrent, severe algal blooms in the mainstem Gallatin adjacent to and downstream of Big Sky, notice of DEQ's own authoritative work qualifying the sensitive nature of western Montana surface waters (such as the Gallatin) to nutrient loading

above natural levels, and directly raised concerns about the potential for new septic system discharges to contribute to recurrent seasonal nuisance algal blooms, themselves violations of water quality standards which DEQ had determined qualify the river for an impairment determination. Circular DEQ 12-A; AR03144-3204; Exhibits E & F to Complaint. Plaintiffs' comment letter to DEQ noted "[t]he Gallatin County Health Department database indicates that within Big Sky's traditional Canyon area – from Rainbow Lodge upstream to roughly 1/4 mi downstream past the Conoco and Main Fork-West Fork confluence – at least 62 septic systems are permitted and discharging at least 92,968 gpd)...and a May 2020 scientific study "indicates the Canyon is likely discharging an estimated 115,000 gpd of poorly treated wastewater to local groundwater." AR03148. Nothing in the record shows DEQ meaningfully evaluated this information, reasonably addressed Plaintiffs' concerns, or the requirements of its own rules before authorizing new nutrient pollution discharges to the impaired Gallatin river.

DEQ's approval repeatedly relied on four interrelated rationales: (1) Quarry wastewater discharges satisfied mixing zone nitrate concentration limits, AR2052, 2065-66, 2070-2072; (2) Quarry septic system setbacks and location complied with its nondegradation guidance, AR02071-72; (3) Quarry discharges are not point sources nor require discharge permitting, AR02074, 2078; and (4) a hypothetical direct-discharge model of wastewater concentrations in the Gallatin River provided by the applicant and relied upon by DEQ, allegedly proving no degradation potential, AR02065-66. None of these rationales satisfy the agency's legal burdens under the WQA.

First, compliance with a mixing zone concentration for groundwater discharge is only one of two condition precedents before rendering a nonsignificance determination. *See* ARM 17.30.715(1)-(2); *see also* *MEIC v. DEQ*, 1999 MT 248 at ¶¶ 55-63. DEQ's failure to evaluate the second demonstration under ARM 17.30.715(2) renders its decision arbitrary, capricious, and unlawful.

Clark Fork Coal. ¶ 33; MCA § 75-5-303. As noted *supra*, the record shows DEQ's unlawful interpretation that it is not required to apply 715(2).

Second, DEQ argues the Quarry's septic systems' design and setbacks comply with its Nondegradation Guidance, yet that guidance is non-binding and, as-applied, does not provide lawful additional grounds for determining wastewater discharges nonsignificant contrary to the plain mandates of 75-5-303. DEQ's Nonsignificance Determination states that based on the proposed drainfield location more than 1/4 mile from the closest downgradient high-quality surface water and site-specific soil characteristics, an analysis of the individual, aggregate, or cumulative impacts to surface water was not necessary pursuant to Chapter 5 of the Nondegradation Guidance. AR2071-72. Nothing in the WQA supports the presumption that placing a Level II septic system more than 1/4 mile from a surface water assures that "[e]xisting uses of state waters and the level of water quality necessary to protect those uses [.] be maintained and protected." MCA § 75-5-303(1); ARM 17.30.705(2)(a). DEQ acted contrary to the WQA's unambiguous mandates in applying non-binding guidance metrics to exclude the Quarry's new discharges from the mandatory evaluation of degradation potential. As DEQ has admitted, degradation can be caused by individual sources, or caused cumulatively by a diversity of sources that themselves may be nonsignificant, but together function to incite prohibited degradation. DEQ Answer, ¶ 101. The agency's reliance on its guidance to exempt discharges from the requisite evaluation under 75-5-303 was arbitrary, capricious, and an abuse of discretion, and portions of nondegradation guidance that determine subsurface wastewater treatment systems to be nonsignificant based on "threshold distances" are contrary to the WQA's explicit focus on preventing surface water degradation except as authorized under 75-5-303.

Third, DEQ committed legal error in determining Quarry septic systems are not "point sources" as another rationale for exempting those new pollution sources from Nondegradation Policy review. Commercial scale septic systems that discharge pollution to state waters are discrete

conveyances from which pollutants are discharged. MCA § 75-5-103(27). Similarly, the Quarry's septic system discharges are plainly an "activity of man resulting in a new [...] source which may cause degradation." ARM 17.30.705(1), 17.30.702(17). DEQ's attempt to distinguish the holding of *Upper Mo. Waterkeeper v. DEQ* also fail. AR02075-76. There is no difference between DEQ considering 8x septic systems totaling approximately 22,000 gpd, or a single system with the same effluent limits producing approximately 22,000 gpd. Tellingly, the agency itself recognized that "nonsignificance criteria for a permitted versus non-permitted [sewage system] are identical." AR02076, Response #15. This rationale was legal error, and arbitrary and capricious.

Last, the Record does not show the agency evaluated cumulative impacts or synergistic effects of nutrient pollution. Nor did the agency perform any type of assessment of the Gallatin River's assimilative capacity to handle more nutrient pollution against the existing, degraded baseline and the agency's impairment determination. The applicant's evaluation of a hypothetical discharge from the Quarry Phase I septic systems to the Gallatin River estimates a potential direct nitrogen concentration in the river, but does not evaluate how Quarry discharges, in conjunction with cumulative nutrient pollution from the Canyon Area and the downstream addition of the nutrient-impaired West Fork Gallatin, could synergistically cause, contribute to, or exacerbate undisputed, recurrent nuisance algal blooms in the Gallatin River. ARM 17.30.715(2). DEQ's decision-making failed to consider record evidence of numerous septic systems and nutrient pollution sources known to exist within Big Sky, all of which are cumulatively discharging pollution to, ultimately, the Gallatin River, and reconcile how adding more pollution could incite degradation and harm.

Charged with implementing the unambiguous mandate of Nondegradation Policy to protect existing water quality and uses of the river, DEQ was required to reasonably consider record evidence of cumulative nutrient pollution challenges and take a hard look to examine whether the Quarry's discharges would cause or contribute to pollution impacts - including cumulative impacts

or synergistic effects - beyond a mixing zone, including downstream in the mainstem Gallatin River, and evaluate whether new discharges to an impaired river system were 'significant' new sources of pollution requiring evaluation under MCA § 75-5-303. In failing to do so DEQ violated the requirements of ARM 17.30.715(2) and committed the same flawed decision-making process the 18th Judicial District previously found unlawful. *Clark Fork Coalition* ¶ 47; *North Fork*, 238 Mont. 451; *Upper Mo. Waterkeeper v. DEQ*, DV-21-756A (18th Jud. Dist.).

II. DEQ VIOLATED NONDEGRADATION POLICY MCA §§ 75-5-303/301

The Gallatin River is classified as a "high-quality water" under the Clean Water Act and WQA, 33 U.S.C. § 1251, et seq., MCA § 75-5-303. The State must maintain and protect its water quality to support propagation of fish, shellfish, wildlife, and recreation unless degradation is necessary to accommodate important economic or social development. MCA § 75-5-303; 40 C.F.R. § 131.12; ARM 17.30.705. Degradation means a change in water quality that lowers the quality of high-quality water. MCA § 75-5-103(6). Pursuant to the WQA, DEQ must conduct a rigorous nondegradation review before allowing applicants to discharge pollutants into high-quality waters with the potential to cause or contribute to degradation. MCA § 75-5-303(3); *Clark Fork Coal. v. DEQ*, 2008 MT 407, ¶ 11, 347 Mont. 197, 197 P.3d 482. An activity is exempt from Nondegradation only if excluded under MCA § 75-5-317 (not applicable here), or the activity results in nonsignificant change in water quality. *Clark Fork Coal.* ¶ 33; MCA § 75-5-303.

Under the clear and unambiguous language of MCA § 75-5-301(5)(d) and ARM 17.30.715(1)(d), a groundwater discharge is only nonsignificant if it meets two conditions: "[a] discharge will not cause degradation of surface water **and** [b] the predicted concentration of nitrate as nitrogen at the boundary of the ground water mixing zone does not exceed [7.5 mg/L]". (Emphasis added). Because DEQ only applied part "b" of the statute, and not the law as a whole,

DEQ's approval of the Quarry's 8x (eight) new septic system discharges was unlawful and contrary to the WQA. Nothing in this case shows that DEQ examined whether the Quarry's new pollution discharges will cause prohibited degradation in light of the agency's own nuisance algal bloom impairment determination and admission that the middle segment Gallatin River was failing to attain aquatic life or recreation beneficial uses.

In response to public comment identifying hydrologic connectivity between receiving groundwater and the Gallatin River, including the agency's own determination that groundwater receiving discharges at the adjacent subdivision - Lazy J South - also flow towards and discharge into the Gallatin River, DEQ replied that "[h]ydrologic connectivity does not necessarily equate to degradation", AR02066, without adequately examining said degradation potential. The Quarry's application also presented data showing that its wastewater discharges flowed into receiving groundwater heading to the Gallatin River, including use of the same datasets as DEQ. AR04412-44; AR04566-68. The agency concluded that by satisfying nutrient concentrations at the end of a groundwater mixing zone, each Quarry wastewater discharge in Phase 1 of the subdivision was exempted from Nondegradation Policy as nonsignificant. AR02065-6, 2070-72. DEQ's conclusions fail to provide a reasoned basis ensuring new pollution discharges proposed for exclusion from nondegradation review will not degrade surface water, nor do these rationales provide an evidentiary basis for concluding that "existing uses" of the Gallatin River will be "maintained and protected." *See* MCA §§ 75-5-301(5)(d), 75-5-303(1).

DEQ's approval of the Quarry's new pollution discharges also fails to reconcile its own impairment determination, which recognized that water quality standards in the downgradient Gallatin River are being violated due to excessive algal blooms. Nor does the Response to Comments, Nonsignificance Determination, or EA evaluate how adding more pollution scientifically linked to eutrophication events may cause or contribute to degradation of the Gallatin

River. In fact, DEQ admits that it "has not yet conducted a nutrient source assessment for the middle segment Gallatin River", AR02073, "Response #4", meaning the agency unreasonably approved new nutrient pollution discharges to the river system without recognizing baseline river health. The WQA's plain language required DEQ to evaluate and address the question of whether adding new nutrient pollution will cause degradation aside from satisfying a mixing zone concentration, an inquiry that required the agency to determine whether any assimilative capacity¹ remained in the middle segment Gallatin River for nutrient pollution. When DEQ failed to examine the Gallatin's assimilative capacity for new nutrient pollution given its impairment determination, the agency failed to ensure no degradation will occur, and improperly excluded the Quarry's new pollution discharges from Nondegradation review under 75-5-303.

Plaintiff is entitled to judgment as a matter of law on its WQA claim because DEQ did not apply Nondegradation Policy to evaluate new sources of nutrient pollution discharging to state waters against the mandate to protect high quality waters and water quality necessary to support beneficial uses. MCA § 75-5-303. DEQ failed to evaluate whether the Quarry's discharges could cause degradation in the Gallatin River in light of recurrent, nuisance algal blooms that, by the agency's own determination, impair uses of that waterbody and harm beneficial uses. "Impaired water body" means a waterbody is failing to achieve compliance with applicable water quality standards. MCA § 75-5-103(13). The agency was bound to comprehensively evaluate the Quarry's discharges in conjunction with other sources of pollution in determining whether "degradation" of surface water would occur based on the plain language of the 75-5-303. Implementing rule ARM

¹ EPA, Office of Water, Memorandum to All Regions: Tier 2 Antidegradation Reviews and Significance Thresholds, p.2, available online: <https://www.epa.gov/sites/default/files/2014-10/documents/tier2.pdf> (last accessed Oct. 4, 2023). "Evaluations of significance based solely on the magnitude of the propose [discharge] without reference to the amount of change in the ambient condition of the waterbody need to be very carefully evaluated to determine how they translate to reduction in assimilative capacity in order to understand whether a significant decrease in assimilative capacity will occur."

17.30.637 plainly prohibits "discharg[ing wastes that] either alone, or in combination with other wastes or activities, will violate, or can reasonably be expected to violate, any of the standards", yet the record reflects zero evaluative process of how DEQ's approval of the Quarry's pollution discharges complies with such unambiguous mandates.

The penultimate command of the WQA is that "existing and anticipated uses and the water quality necessary to protect those uses [...] be maintained and protected", and "degradation may be allowed only [under a Nondegradation Policy Authorization to Degrade]. See ARM 17.30.705(2). As the Court noted during the hearing on Defendant's Motion to Dismiss in this case, the Quarry's discharges by themselves may appear nonsignificant at first blush, but in conjunction with the impairment of the Gallatin River and taken with other pollution discharges in the same river system, they may in-fact become significant. Indeed, for this very reason the WQA places the burden on DEQ to affirmatively demonstrate - in a preventative manner - that new pollution inputs will not incite degradation before making a nonsignificance determination. See MCA §§ 75-5-301(5)(d), 303(1)-(3) (nonsignificant discharges are only those established to not cause degradation; "[e]xisting uses of state waters and the level of water quality necessary to protect those uses must be maintained and protected."); *MEIC v. DEQ*, 1999 MT 248 at ¶¶ 55-63.

The WQA is a reasonable implementation of Montanan's constitutional right to clean and healthful environment, which requires DEQ to act in an "anticipatory and preventative" manner, and "does not require that dead fish float on the surface of our state's rivers and streams before its farsighted environmental protections can be invoked." *MEIC v. DEQ*, 1999 MT 248, ¶¶ 77-80, 296 Mont. 207, 988 P.2d 1236). Nondegradation Policy implements those imperatives by requiring DEQ to evaluate degradation potential of new pollution sources before exempting a project from the stringent review under MCA § 75-5-303. The plain constitutional and statutory mandates and the aforementioned "relevant factors" should have prompted DEQ to take a hard look at surface water

degradation in light of the Gallatin's impairment determination. *North Fork*, 238 Mont. 451, 465 (1989). Two other District Court cases have also found DEQ authorizations of wastewater discharges from new development to impaired waterways, without the review proscribed by MCA §§ 75-5-301/303 and the failure to assess cumulative impacts or synergistic effects under ARM 17.30.715(2), contrary to the WQA and unlawful, arbitrary and capricious. *See Bitterrooters for Planning v. DEQ*, CDV-2014-505 (Order, Jun 28, 2016, First Judicial District); *Bitterrooters for Planning v. DEQ*, ADV-2015-32 (Order, May 16, 2016, First Judicial District).

III. DEQ VIOLATED MEPA BY FAILING TO APPLY ITS OWN CRITERIA OR TAKE A 'HARD LOOK'

DEQ's EA is devoid of any consideration of the mandatory elements under ARM 17.4.608(1)(a)-(g), such as the "severity, duration, geographic extent, and frequency" of nutrient pollution impacts, discussion of the "quality" of the affected resource, its "uniqueness and fragility" and "importance to the state and to society", or the "precedent that would be set as a result of the proposed action that would commit the department to future actions [...] or a decision in principle [...]"

Here, the Quarry Phase I EA and Response to Comments do not identify or discuss rampant septic system use in the Big Sky community, unnaturally elevated nitrate levels in groundwater as high as 4 mg/L, or the fact that the middle segment Gallatin's primary tributary - the West Fork Gallatin - is already nutrient-impaired related to intensive land use and widespread wastewater disposal practices. AR02056 (#2 "Water Quality, Quantity, Distribution"); AR02059 (#6 "Fragile or Limited Envtl Resources"); AR02061 (#11 "Impacts on Other Envtl Resources"). The EA does not identify the Gallatin as a blue-ribbon trout stream, identify or discuss its socio-economic importance in SW Montana (despite enormous public comment on this point), reconcile the agency's preliminary determination that the middle segment Gallatin is impaired by excessive algal blooms, or address the causal relationship between anthropogenic discharges of wastewater and

eutrophication. AR02056-2067. Lastly, the EA does not identify or address the fact that approval of the Quarry Phase I wastewater discharges is the first new commercial-scale build out in Big Sky's Canyon Area in more than a decade, and that approval of 8x community septic systems without a discharge permit sets a 'precedent in principle' for how the agency will consider, and potentially approve, future development and related wastewater disposal without traditional permitting scrutiny under the WQA. *Id.*

Similarly, the EA fails to apply the mandatory criteria of ARM 17.4.609(2) or (3). There is no identification or discussion of the "environmental sensitivity of the area affected by the proposed action" or "the degree of uncertainty that the proposed action will have a significant impact" despite the socio-economic importance of the downgradient Gallatin River, existing septic system and nutrient pollution challenges in Big Sky, and the agency's own preliminary impairment determination for the river due to excessive algal blooms and degraded aquatic life and recreational uses. *See* AR02056-67; ARM 17.4.609(2)(b)-(c). The EA also fails to provide an adequate evaluation of "cumulative impacts" pursuant to ARM 17.4.609(3)(d), instead relying on alleged categorical exemptions under ARM 17.30.715(1) and its Guidance. *See* AR02065-66. The cursory checklist EA failed to identify any impacts to surface water, concluding the Quarry's impact on the environment was nonsignificant without even mentioning - much less applying - the agency's own definition of "cumulative impact." The agency plainly did not evaluate the "collective impacts on the human environment of the proposed action when considered in conjunction with other past and present actions related [.] by location or generic type." *See* ARM 17.4.603(7). Nor did the agency provide an adequate description of relevant baseline conditions, a critical inquiry to an EA. *See Oregon Nat. Desert Ass'n v. Jewell*, 840 F.3d 562, 568 (9th Cir. 2016); *Half Moon Bay Fisherman's Mktg. Ass'n v. Carlucci*, 857 F.2d 505, 510 (9th Cir. 1988) ("Without establishing the baseline conditions which exist" before the project begins, "there is simply no way to determine what effect the proposed [action] will have on the

environment and, consequently, no way to comply with NEPA.”)

The record is barren of any consideration of how Quarry discharges may, cumulatively or synergistically with other existing sources of nutrient pollution, cause, contribute to, or exacerbate the Gallatin's recurrent algal blooms. Based on the record, DEQ's failure to identify the unique and fragile nature of the Gallatin River, its socio-economic importance, adequately analyze cumulative nutrient pollution in the project area much less identify baseline conditions, or reconcile the Gallatin's impairment determination was unlawful, arbitrary and capricious.

Furthermore, DEQ's failure to use MEPA's own regulatory criteria to inform its decision-making means the agency did not adequately evaluate the significance of the Quarry's new nutrient pollution discharges within the ecological context at-hand. DEQ's flawed EA provides the basis for this Court to determine that DEQ failed to take a "hard look" at the environmental consequences of authorizing additional nutrient pollution to already degraded local water resources of the Gallatin. *Ravalli Cty. Fish & Game Ass'n, Inc. v. Mont. Dep't of State Lands*, 273 Mont. 371, 381, 903 P.2d 1362, 1369 (1995). "Implicit in the requirement that an agency take a hard look at the environmental consequences of its actions is the obligation to make an adequate compilation of relevant information, to analyze it reasonably, and to consider all pertinent data." *Clark Fork Coal.*, 2008 MT at ¶ 47.

IV. DEQ VIOLATED MAPA BY APPLYING ITS GUIDANCE AS A LEGISLATIVE RULE

The Montana Administrative Procedures Act (MAPA) requires that before an agency adopts a rule, it must publish notice of the proposed rule and provide interested persons the opportunity to comment. MCA §§ 2-4-302, 305, *State v. Vainio*, 2001 MT 220, ¶ 27, 306 Mont. 439, 35 P.3d 948. MAPA defines a "rule" as "each agency regulation, standard, or statement of general applicability that implements, interprets, or prescribes law or policy." MCA § 2-4-102(11)(a). "Legislative rules"

are subject to notice and comment procedures (and are invalid without), whereas interpretative rules and policy statements are not. MCA § 2-4-102(14). "Unless a rule is adopted in substantial compliance with these procedures, the rule is not valid." *Vainio*, ¶ 27.

There is no dispute that DEQ has not followed MAPA's rulemaking procedures for its "How to Perform a Nondegradation Analysis for Subsurface Wastewater Treatment Systems (SWTS) Under the Subdivision Review Process" (October 2015) ("Nondegradation Guidance"). And, DEQ explicitly relies on its Nondegradation Guidance in approving the Quarry subdivision's wastewater discharges and determining those discharges nonsignificant and excluded from review under MCA § 75-5-303. AR02066. In its Nonsignificance Determination DEQ again explicitly relies on criteria from its Guidance to exclude consideration of surface water degradation potential: "Based on the soil types and corresponding application rate for each drainfield, the drainfields for this project did not have to address trigger value to surface water (the unnamed ponds or the Gallatin River) if they were at least 1/4 mile upgradient of the those surface waters per section 5.0 of the nondegradation guideline (2015)." AR02072, Nonsignificance Determination, #8.

The Response to Comments document consistently refers public comments expressing concern about the agency's failure to holistically evaluate the subdivision's pollution discharges in light of the Gallatin River's impairment and cumulative nutrient pollution challenges back to the agencies' reliance on its guidance. *See, e.g.*, AR02073-2102, Response #2; Response #9; Response #12, 13; Response #19; Response #21; Response #23; Response #35; Response #39; Response #46. By DEQ's own words, compliance with requirements of Chapter 5 of its Nondegradation Guidance means "an analysis of impacts to surface water was not necessary" and the project was nonsignificant. DEQ's approval, and statements, show it applied its Guidance as a legislative rule.

In *American Mining Congress v. Mine Safety & Health Admin.*, the D.C. Circuit outlined a series of questions for determining if an action is a rule subject to notice and comment: (1) whether in the

absence of the rule there would not be an adequate legislative basis for enforcement action or other agency action to confer benefits or ensure the performance of duties; (2) whether the agency published the rule in the Code of Federal Regulations; (3) whether the agency has explicitly invoked its general legislative authority; or (4) whether the rule effectively amends a prior legislative rule. 995 F.2d 1106, 1112 (D.C. Cir. 1993). The Court explained if the answer to any of these questions is "yes" the action is a legislative rule. *Id.* "[T]he crucial distinction between [a legislative rule] and the other two techniques is that a [legislative] rule *modifies* or *adds* to a legal norm based on the agency's *own authority*..." *Syncor Int'l Corp. v. Shalala*, 127 F.3d 90, 95 (D.C. Cir. 1997) (emphasis in original).

Three leading cases from the Montana Supreme Court likewise illustrate that where an agency applies a metric in binding fashion to constrain its decision-making, and such criteria have not undergone MAPA process, the agency acts unlawfully. *See S. Mont. Tel. Co. v. Mont. Pub. Serv. Comm'n*, 387 Mont. 415, 395 P.3d 473 (Mont. 2017) (reliance on binding but unpromulgated metrics unlawful under MAPA); *Northwest Airlines v. State Tax Appeal Board*, 221 Mont. 441, 720 P.2d 676 (1986) (application of binding tax formula constituted unpromulgated MAPA rule); *Rosebud County v. Department of Revenue*, 257 Mont. 306, 849 P.2d 177 (1993) (use of new market assessment method constituted unpromulgated MAPA rule). The record provides the undisputed roadmap of how DEQ, time and again, explicitly relies on metrics of its Guidance to support its decision finding the Quarry's new wastewater discharges nonsignificant and exempt from Nondegradation Policy. Thus, the task before this Court is to evaluate the record and discern - based on the agency's own documents - whether it unlawfully applied its Guidance as a legislative rule contrary to MAPA.

DEQ's application of its Nondegradation Guidance to the Quarry Phase I wastewater discharges *modified* the plain statutory requirements of the WQA by invoking DEQ's own authority to determine the applicability of Nondegradation Policy for new sources of pollution discharging to high-quality waters. *I.e.*, the agency's Guidance places its finger on the scale of which type of

subdivision septic systems are excluded from Nondegradation Policy as nonsignificant in addition to statutory exceptions at MCA 75-5-317, and in conflict with purported agency discretion under ARM 17.30.715(2). Doing so fits squarely within the Montana Supreme Court's precedent of an agency utilizing unpromulgated legislative rules, the D.C. Circuit's description of a legislative rule, and the tests of *American Mining Congress* only reinforce this conclusion.

First, in the absence of the Guidance there would be no basis for the agency to conclude under the WQA that a 1/4 mile setback and soil profiles magically make new septic pollution discharges 'nonsignificant' or support a finding of no surface water degradation, particularly where, as here, there is a river impairment determination related to the very pollutants being discharged. The Guidance also runs afoul of the fourth test in *American Mining Congress*. To accomplish the purpose of Nondegradation Guidance, criteria in subchapter 5 effectively modify requirements under ARM 17.30.705(2)(2) and 17.30.715(2). The Guidance cannot be defended as a policy statement because it is intended to bind the Agency to its legal positions, a fact DEQ's Response to Comments and final EA makes clear. *See Syncor*, 127 F.3d at 94 ("The primary distinction between a substantive rule...and a general statement of policy...turns on whether an agency intends to bind itself to a particular legal position.") The record demonstrates DEQ applied its Guidance as a legislative rule modifying (*i.e.*, expanding) nonsignificance criteria, thereby affecting how the agency applies MCA § 75-5-303.

DEQ's application of its Guidance as a legislative rule without following MAPA's procedures renders the Guidance unlawful under MCA § 2-4-301 et seq. Even if DEQ's Guidance is exempt from notice and comment rulemaking, DEQ's application to the Quarry Subdivision was unlawful because the agency lacks authority to sanction water pollution nonsignificance determinations contrary to the WQA, MCA §§ 75-5-301(5), 75-5-303. DEQ can point to no legal authority showing the agency possesses unfettered discretion to supplant statutory Nondegradation

requirements with additional nonsignificance criteria that expand the scope of exclusions for subdivision wastewater pollution, without undergoing rulemaking. To the contrary, case law and statutory language show clear intent to mandate a specific pollution control scheme to "maintain and protect" beneficial uses of state waters. *See* MCA § 75-5-303, *MEIC v. DEQ*, 1999 MT 248, ¶¶ 77-80, *Clark Fork Coal*. ¶ 42 (2008).

DEQ's approval of the Quarry Subdivision explicitly applied its Guidance as a legislative rule without complying with MAPA procedures. Doing so was unlawful and the decision should be set aside. Further, to the extent criteria in the Guidance conflict with requirements of the WQA they are invalid, unlawful, and should also be set aside.

CONCLUSION

The Court should find DEQ's approval of the Quarry's groundwater pollution discharges unlawful, arbitrary and capricious, in violation of MCA §§ 75-5-30(5), 303, ARM 17.30.715(2), ARM 17.30.637, ARM 17.4.608/609, and find that DEQ failed to take a hard look at water resource impacts. The Court should also find DEQ's reliance on its Nondegradation Guidance, as-applied, constituted a legislative rule and violated requirements of MAPA, MCA § 2-4-302, and hold that the Guidance is unlawful to the extent its metrics are contrary to requirements of the WQA. The Court should declare the agency decision void and remand to DEQ for reconsider of impacts to surface waters, cumulative impacts, and degradation of the Gallatin River.

Respectfully submitted on this 30th day of May 2024.

/s/ Guy Alsentzer, Esq.

Attorney for Plaintiff

CERTIFICATE OF SERVICE

I the undersigned hereby certify that this 30 day of May 2024, I caused to be served a true and correct copy of the foregoing document and any attachments to all parties or their counsel of record as set forth below:

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