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ANGIE SPARKS, Clerk of District Court
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MONTANA FIRST JUDICIAL DISTRICT COURT
LEWIS AND CLARK COUNTY

MONTANA ENVIRONMENTAL INFORMATION CENTER, SAVE OUR CABINETS, and EARTHWORKS, Plaintiffs, v. MONTANA DEPARTMENT OF ENVIRONMENTAL QUALITY and MONTANORE MINERALS CORP., Defendants.	Cause No. CDV-2017-641 **ORDER ON CROSS-MOTIONS FOR SUMMARY JUDGMENT**

Plaintiffs Montana Environmental Information Center, Save our Cabinets, and Earthworks filed a complaint for declaratory relief against Defendants Department of Environmental Quality (DEQ) and Montanore Minerals Corporation (MMC) challenging DEQ's issuance of a renewed water pollution discharge permit (Permit No. MT0030279) for the MMC copper and

silver mine proposed to be developed in the Cabinet Mountains in northwest Montana.

Plaintiffs moved for summary judgment, arguing the permit should be vacated as a matter of law and remanded to DEQ. DEQ and MMC each filed cross-motions for summary judgment arguing the issuance of the permit should be upheld as a matter of law. The administrative record was submitted, and the motions were orally argued on February 11, 2019. No material facts are in dispute, and the matter can be determined based upon the arguments of the parties and the administrative record.

BACKGROUND

The permitting process for the Montanore Project began in 1989, when Noranda Minerals Corporation (Noranda) obtained an exploration license from the Montana Department of State Lands for construction of an exploration adit in upper Libby Creek.[1] In December 1989, Noranda filed a Petition for Change in Quality of Ambient Waters (Petition) with the Board of Health and Environmental Sciences (BHES or Board) for authorization to lower the ambient surface and ground water quality for discharges from the planned mining project in Sanders County, with the construction of a mill and associated mine waste disposal in Lincoln County.[2] The non-degradation policy in effect at that time required that the water quality in state waters which was higher than established

[1] Joint Final Environmental Impact Statement Montanore Project (Final EIS) December 2015, AR 10B 6224, contains a detailed history of the ownership and leasing of original mining claims. The Final EIS was prepared by the U.S. Department of Agriculture, Kootenai National Forest (KNF) and Montana DEQ.

[2] *In the Matter of the Petition for Modification of Quality of Ambient Waters Submitted by Noranda Mineral Corporation for Montanore Project*, Final Decision and Statement of Reasons, November 20, 1992. AR 7A 4636-4646.

water quality standards be maintained at the higher quality unless it was demonstrated that degradation was justified for necessary economic and social development reasons. In 1991, Noranda ceased construction of the adit at Libby Creek "in response to elevated nitrate concentration in surface water and low mineral prices."[3] The permitting process continued until 1992 when the BHES issued an Order approving Noranda's petition. The Board found that lowering the water quality was justifiable,[4] authorized the requested degradation of the water quality and allowed the mineral exploration to proceed.

In June 1992, the Montana Department of Health and Environmental Sciences (DHES) filed a complaint and request for injunction against Noranda, alleging violations of the Montana Water Quality Act at the "Libby Creek Site." The 19th Judicial District Court in Lincoln County issued a Consent Decree requiring Noranda to pay fines and to apply for a Montana Pollutant Discharge Elimination System (MPDES) permit.[5]

The required MPDES permit was not issued until 1997. The permit allowed discharges from the Libby adit to Libby Creek and permitted three outfalls: Outfall 001 for a "percolation pond discharging to groundwater";

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[3] Final EIS, AR 10B 6224.

[4] "The need for the proposed project is to develop a source of copper and silver for the production of worldwide commodities. . . . Increased direct and indirect employment and increases in local government revenues associated with the mining project will benefit the impacted area [Lincoln and Sanders County]. In addition, the lower water quality associated with the proposed development will be negligible." 1992 Board Decision, AR 7A 4645.

[5] *State of Montana DHES v. Noranda Minerals Corp.*, DV-92-46, Findings of Fact, Conclusions of Law, Judgment and Decree (May 12, 1993). AR 7B 4650-4667.

Outfall 002 for a "drainfield with three infiltration zones discharging to groundwater"; and Outfall 003 for a "pipeline outlet to Libby Creek".[6]

In 2002, Noranda conveyed various interests related to the mining project to Newhi, Inc., a subsidiary of Mines Management, Inc.[7] By 2002, many of Noranda's permits for the Montanore project "were relinquished, terminated or expired.[8] Noranda notified Kootenai National Forest it was "relinquishing the approval to operate and construct the Montanore Project."[9] The MPDES permit remained in effect due to incomplete reclamation of the Libby adit.[10]

In 2004, Mines Management, Inc., submitted an application for a "renewed MPDES permit that covered additional discharges not currently permitted under the existing MPDES permit."[11] On March 21, 2006, a permit was issued allowing discharges with an expiration date of March 31, 2011.[12] The 2006 permit authorized discharges from the Montanore project at the Libby Creek adit and "receiving waters" of Libby Creek with effluent limits, monitoring requirements, and "other conditions" for discharge limited to "outfalls specifically listed in the permit." The specified outfalls are Outfalls 001, 002, and 003 for mine drainage adit water.

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[6] Final EIS, AR 10B 6225.

[7] Previously, Newhi leased the mining claims.

[8] These permits included DEQ's air quality permit, the Corp's 404 permit, KNF's approval, and State's certification of a transmission line. Final EIS, AR 10B 6225.

[9] Id.

[10] Id.

[11] Id., AR 10B 6226.

[12] Minor Industrial Permit No. MT0030279. AR 6C 4548-4585.

In May 2006, pursuant to a stock transfer agreement, Newhi, Inc., acquired all the principal shares of Noranda's capital stock. Mines Management, Inc., owned Newhi. Following the stock transfer, by resolution, Noranda Mineral Corporation, Inc., changed its name to Montanore Minerals Corporation.

In May 2008, DEQ modified the permit to reflect a name change from Noranda Mineral Corporation to Montanore Minerals Corporation (MMC). In 2010, MMC asked DEQ to renew the Noranda permit, but with changes, such as authorization for five new outfalls for storm water discharges.[13] The application was considered complete in February 2011. On July 28, 2015, DEQ issued public notice of a tentative determination to renew the permit with the draft permit and associated Fact Sheet. AR 3A, AR 3B, and AR 3C. Public comment was received, and a public hearing held in Libby, Montana, on August 31, 2015. Based on comment received, the draft permit was revised, and the comment period extended. On April 11, 2016, DEQ again issued notice of a tentative determination to renew the permit, with the 2016 draft permit with the associated Fact Sheet. AR 2A, AR 2B, and AR 2C. Public comment was again accepted. On January 17, 2017, DEQ issued the final MPDES permit (MT0030279) to MMC for the Montanore project in Lincoln County for Libby Creek and alluvial ground water, Ramsey Creek, and Poorman Creek,[14] for an effective period of March 1, 2017 through February 28, 2022. AR 1A. On February 16, 2017,

[13] The five new outfalls are 004-008 for regulation of storm water discharges from the project site. The permit approves discharge from outfalls 001 - 003 for surface water discharges, underground mine workings, tailings impoundment, and storm water runoff from mine-related facilities into Libby Creek; Outfalls 004 and 005 allow discharged storm water runoff into Libby Creek; Outfall 006 allows discharge storm water runoff into Ramsey Creek; and Outfalls 007 and 008 authorize discharged storm water runoff into Poorman Creek. AR 2C:201-202.

[14] Libby Creek, Poorman Creek and Ramsey Creek are designated "high quality" streams. Mont. Code Ann. § 75-5-103(13).

MMC appealed several provisions of the permit, requesting a hearing before the Board of Environmental Review (BER). AR 8A:4680. DEQ identified and stayed specific conditions of the permit appealed by MMC. Conditions not appealed went into effect on March 1, 2017 and are now raised in Plaintiffs' motion.

LEGAL STANDARDS

Summary judgment is appropriate when there is no genuine issue as to any material fact and the moving party is entitled to judgment as a matter of law. Mont. R. Civ. P. 56(c)(3). In this matter, the Court is asked to review the challenged MPDES permit to determine whether the decision of the agency to issue the permit was arbitrary, capricious, unlawful or not supported by substantial evidence. *Clark Fork Coalition v. Mont. Dept. of Envt'l Quality*, 2008 MT 407, ¶ 21, 347 Mont. 197, 197 P.3d 482; see also *Upper Missouri Waterkeeper v. Mont. Dept. of Envt'l Quality*, 2019 MT 81, ¶ 14, 395 Mont. 263, 438 P.3d 792.

DEQ's decision must be supported by "substantial" evidence, which is "evidence that a reasonable mind might accept as adequate to support a conclusion." *Blaine Cnty. v. Stricker*, 2017 MT 80, ¶ 26, 387 Mont. 202, 394 P.3d 159. In considering the substantial evidence and relevant factors and rules relied on by the agency, the Court must consider "whether there has been a clear error of judgment." *N. Fork Preservation Assn. v. Dept. of State Lands*, 238 Mont. 451, 465, 778 P.2d 862, 871 (1989) (citation omitted).

While courts defer to an agency's interpretation of its own rules, the court must carefully review the record to ensure the agency has made a "reasoned decision" which is not "plainly inconsistent with the spirit of the rule." *Upper*

Missouri Waterkeeper, ¶ 13; *Clark Fork Coalition*, ¶ 21. Legal conclusions are reviewed for correctness. *N. Cheyenne Tribe v. Mont Dept. of Envt'l Quality*, 2010 MT 111, ¶ 19, 356 Mont. 296, 234 P.3d 51. The Court need not defer to an incorrect agency decision. *Upper Missouri Waterkeeper*, ¶ 13 (citing *Clark Fork Coalition*, ¶ 20).

DISCUSSION

Plaintiffs argue that the permit issued by DEQ for the Montanore mine project violates the Montana Water Quality Act (WQA), Montana Code Annotated §§ 75-5-101 through -1126, the federal Clean Water Act (CWA), 33 U.S.C.S. §§ 1251- 1388, and state and federal implementing regulations. Plaintiffs contend high-quality streams, fish, and wildlife in Montana's Cabinet Mountains are threatened. Specifically, Plaintiffs allege DEQ failed to establish mandatory technology-based effluent limitations; failed to conduct valid analysis to determine the need for water quality-based effluent limitations; unlawfully relied on an expired Authorization to Degrade, thereby failing to conduct non-degradation review and set effluent limitations; and set unlawful compliance schedules in the permit.

The Environmental Protection Agency (EPA) has delegated program authority to DEQ under § 402 of the federal CWA, which includes administration of the MPDES permit program. Admin. R. Mont. 17.30.1301; 33 U.S.C. § 1342(b). The permitting program administered by DEQ is implemented through rules adopted by the Board of Environmental Review. Mont. Code Ann. §§ 75-5-401, -402. The rules are intended to implement the equivalent pollutant discharge elimination requirements established under the CWA. Admin. R. Mont. 17.30.1201.

Montana's WQA incorporates by reference the federal CWA provisions and the implementing regulations promulgated by the EPA. DEQ's administrative rules adopt the EPA's technology-based treatment requirements found at 40 C.F.R. 125.3. Admin. R. Mont. 17.30.1340(10).

Referring to a 1974 Memorandum of Agreement between DEQ and the EPA, DEQ asserts that because the EPA did not object to the permit at issue, it concurs with the issuance of a MPDES permit. As Plaintiffs note, the EPA's failure to object to a permit, or even concurring with the issuance of a permit, does not equate to an EPA determination of full compliance with required laws, rules and regulations of the Clean Water Act.[15] Regardless, it is the state-issued permit under review and up to DEQ to justify its decision for issuance. See *S. Cal. Alliance of Publicly Owned Treatment Works v. U.S. EPA*, 853 F.3d 1076, 1081 (9th Cir. 2017).

1. TECHNOLOGY-BASED EFFLUENT LIMITATIONS

a. Technology-Based Effluent Limitations in Outfalls 001-003

In support of their competing arguments for summary judgment, all parties cite *N. Cheyenne Tribe*. That case dealt with the extraction of coal bed methane (CBM) from seams of subterranean coal. Extraction of the CBM requires the release of significant quantities of groundwater with high saline content. DEQ issued Montana Pollutant Discharge Elimination System (MPDES) permits to Fidelity Exploration & Production Company, permitting Fidelity to discharge the extraction wastewater into the Tongue River. The

[15] Plaintiffs provide a letter dated January 19, 2016 from the Deputy Assistant Administrator of the EPA, "confirm[ing] that, in cases when the Agency does not object to an NPDES permit, or specific conditions or lack of conditions in a permit, it should not be read as an affirmation that the EPA has concluded that the permit fully complies with the Clean Water Act."

Northern Cheyenne Tribe, which holds reserved water rights on the Tongue River, challenged the permits for violation of the CWA and WQA by DEQ's failure to include pre-discharge treatment standards in the permits.[16] DEQ and Fidelity successfully moved the district court for summary judgment upholding the permits, but the Montana Supreme Court reversed the lower court and remanded the matter to DEQ for re-evaluation of the permit applications under the appropriate pre-discharge treatment standards. The Supreme Court concluded that DEQ's adoption and incorporation of the federal regulations regarding pre-discharge treatment standards require DEQ to establish pre-discharge treatment standards on a case-by-case basis. *Id.*, ¶ 45 (citing Admin. R. Mont. 17.30.1303[17] and 17.30.1340(10)[18]).

Defendants argue that *N. Cheyenne* is distinguishable because the EPA had not promulgated standards for regulation of wastewater from CBM extraction at the time the decision was rendered. There are, however, formally promulgated regulations relating to technology requirements with specific effluent limitation guidelines (ELGs) for copper and silver mines, such as the Montanore Mine Project. Since *N. Cheyenne*, DEQ has amended its rules allowing DEQ to impose EPA-adopted industry-specific ELGs to fulfill its requirement to impose technology-based treatment requirements:

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[16] Other issues were raised by the Tribe, but were not considered by the Court.

[17] Incorporations by Reference. Repealed 12/21/12, 2012 Mont. Admin. R., at 2604. The current rule, Administrative Rule of Montana 17.30.1207(3) incorporates effluent limitations from the federal Clean Water Act and EPA regulations.

[18] "The board hereby adopts and incorporates herein by reference 40 CFR 125.3, which is a federal agency rule setting forth technology-based treatment requirements for point source dischargers. See ARM 17.30.1303 for complete information about all materials incorporated by reference."

> (1) Technology-based treatment requirements under section 301(b) of the federal Clean Water Act represent the minimum level of control that must be imposed in MPDES permits. Unless a more stringent effluent limitation applies under ARM 17.30.1344, permits issued by the department must contain the applicable technology-based treatment requirements provided in (2) and (3), according to the applicable deadlines.
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> . . .
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> (5) Technology-based treatment requirements may be imposed through one of the following methods provided in (a) through (c):
>
> (a) application of EPA-promulgated effluent limitations guidelines for dischargers by category or subcategory. . . .
>
> (b) on a case-by-case basis using BPJ to the extent that EPA-promulgated effluent limitations are inapplicable. . . .[19]

Admin. R. Mont. 17.30.1203(5).

Plaintiffs argue DEQ must impose pre-discharge TBELS on a case-by-case basis because there are not ELG standards for fourteen pollutants in the discharges from Outfalls 001-003.[20]

For Outfalls 001-003, DEQ imposed the ELGs established by the EPA as applicable to the specific type of industrial discharge containing copper, zinc, lead, mercury, cadmium, pH, and total suspended solids.[21] AR 2C:216. MMC argues that any regulation of discharge water not covered by the applicable ELGs will occur through DEQ establishing water quality based effluent limitations

[19] This language is consistent with Section 40 C.R.F. 125.3(c) which provides: "Technology-based treatment requirements may be imposed through one of the following three methods: (1) Application of EPA-promulgated effluent limitations developed under section 304 of the Act to dischargers by category or subcategory. . . . (2) On a case-by-case basis under section 402(a)(1) of the Act, to the extent that EPA-promulgated effluent limitations are inapplicable. . . ."

[20] The pollutants of concern are total dissolved solids, chromium, iron, manganese, total inorganic nitrogen, total ammonia, nitrate + nitrite, total phosphorous, oil and grease, sulfate, aluminum, barium, antimony, and arsenic. AR 2C:221.

[21] 40 C.F.R. § 440.104(a).

(WQBELS), rather than technology based effluent limitations (TBELS) developed case-by-case. DEQ, however, acknowledges that if the "EPA has not developed industry-wide limits, the permit writer develops TBELs on a case-by-case basis utilizing his or her best professional judgment."[22]

The Montana Supreme Court has found that "Congress intended to impose pre-discharge treatment standards in every permit issued under the CWA." *N. Cheyenne Tribe*, ¶ 31. "The regulation requires the permit writer 'shall apply' pre-discharge treatment standards '[o]n a case-by-case basis under section 402(a)(1) of the Act.'" *Id.*, ¶ 33 (citing 40 C.F.R. 125.3(c)(2)-(d) and *Texas Oil & Gas Ass'n v. U.S. EPA*, 161 F.3d 923, 928-929 (5th Cir. 1998))."[23]

The EPA provides a manual to assist NPDES permit writers.[24] When identifying the need for case-by-case TBELS, the EPA includes situations "[w]hen effluent guidelines are available for the industry category, but no effluent guidelines requirements are available for the pollutant of concern." *Id.* AR 11:8972. This provision issued by the EPA, while not mandatory, is consistent with the *N. Cheyenne* decision to require case-by-case treatment standards in a MPDES permit for all concerning pollutants in the discharge water from Outfalls 001-003. Requiring TBELS on a case-by-case basis for specific

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[22] DEQ Response to Comments, AR 1C:87.

[23] When the EPA must determine effluent limitations on a case-by-case basis because ELG standards have not yet been established, "[i]ndividual judgments . . . take the place of uniform national guidelines, but the technology-based standard remains the same." *Texas Oil,* at 929.

[24] U.S. Environmental Protection Agency, NPDES Permit Writers' Manual.

pollutants for which there are no ELGs within a regulated industry is no more stringent than the federal guidelines.[25]

b. Technology-Based Effluent Limitations in Outfalls 004-008

The discharge from Outfalls 004-008 are characterized as storm water. Defendants assert that such discharge cannot contain other process wastewater of mine drainage and is routine enough to be issued a general permit. DEQ however imposed narrative technology-based effluent limitations (TBELS) in the form of "best management practices (BMPs)" [26] regarding these storm water outfalls. Plaintiffs argue DEQ violated the federal CWA and the Montana WQA by allowing MMC to discharge storm water runoff from the mine site from Outfalls 004-008 without imposing valid, numeric TBELS, and that DEQ did not adequately explain or justify its decision.

In support of its decision regarding Outfalls 004-008, DEQ's Response to Comments and Fact Sheet associated with the permit explain that storm water discharges are unpredictable and cannot be effectively analyzed to develop appropriate numeric TBELS. AR 1C:87-88. Citing *Waterkeeper Alliance, Inc. v. EPA*, 399 F.3d 486 (2d Cir. 2005), DEQ states that BMPs[27] may function as TBELS under the CWA and that it is appropriate to use BMPs as

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[25] Montana Code Annotated § 75-5-203 prohibits the BER to adopt regulations more stringent than federal regulations or guidelines, with exceptions.

[26] Best management practices (BMPS) "means schedules of activities, prohibitions of practices, maintenance procedures, and other management practices to prevent or reduce the pollution of state waters. BMPS also include treatment requirements, operating procedures, and practices to control plant site runoff, spillage or leaks, sludge or waste disposal, or drainage from raw material storage." Admin. R. Mont. 17.30.1102(1).

[27] The DEQ's response also cites *Natural Resources Defense Council v. EPA,* 673 F2d 400, 403 (D.C. Cir. 1982) for the finding that "an 'effluent limitation' is any restriction on the amounts of contaminants discharged, not just a numerical restriction."

"qualitative non-numeric ELGs." AR 1C:88. The permit does not mandate any specific BMPs, but directs MMC to choose BMPs using its "Best Professional Judgment (BPJ)" to reduce pollutants in its storm water discharges and document its choices in a Storm Water Pollution Protection Plan (SWPPP).[28] AR 1A:29; AR 1C:87. Although DEQ states it is unable to effectively analyze storm water discharges, the Fact Sheet identifies "pollutants of concern in Outfalls 004-008 as "TSS [total suspended solids], Oil & Grease, Nitrate (Outfall 004 only), Metals (e.g. Iron, Manganese, and Zinc; Outfall 004 only)." AR 2C:221.

In a recent decision, the Montana Supreme Court considered storm water discharges allowed under "municipal storm sewer systems (MS4s)" permits. *Upper Missouri Waterkeeper*, 2019 MT 81, 395 Mont. 263, 438 P.3d 792. The regulations addressing MS4s discharge permits must include conditions to reduce the discharge of pollutants to the "maximum extent practicable" (MEP). Montana's seven largest cities, Montana State University, University of Montana, Malmstrom Air Force Base, and portions of Yellowstone, Missoula and Cascade Counties are considered "small" MS4s under BER rules implementing EPA regulations. These small MS4s can choose to be regulated as a larger MS4 or include six minimum control measures (MCMs) in their storm management programs. The MCMs are considered narrative effluent limitations requiring implementation of BMPs. With input from a working group for over two years, DEQ developed a general permit for MS4s. The standards required for issuance of a general permit were challenged by plaintiff. The regulations related to MS4s are based on pollutants and considerations for addressing storm water runoff

[28] The BMPs in the SWPPP must address, "at a minimum the following areas: "Good Housekeeping Practices; Minimizing Exposure; Erosion and Sediment Control; and Management of Runoff and Run-on." AR 1A:0029.

from municipalities. Noting the EPA's stated goal of flexibility in small MS4 permitting, the Court found DEQ's decisions regarding the general permit, which "represents a clear improvement from its previous iterations" not to be unlawful, arbitrary or capricious. *Id.*, ¶ 41. Although the Court found no clear error of judgment by the permit issuing agency, in its conclusions, the Court also stated: "We remain mindful of the fact that Montanans have a constitutional right to a clean and healthful environment. Mont. Const. art. II, § 3." *Id.*

The MS4 permits and the MMC permits address storm water discharges, but the MMC permit addresses storm water associated with mining activity with several known pollutants of concern, not a municipal storm water system with a myriad of potential pollutants which must be reduced to the "maximum extent practicable (MEP)." Admin. R. Mont. 17.30.1111(5).

In both cases, the permit requires development of a storm water plan that includes BMPs of the permit holder's choosing, subject to DEQ guidance. The *Waterkeeper* decision deferred to the agency's expertise to make decisions within the specific flexibility afforded by EPA regulations and guidelines for small MS4 storm water permits issued to municipalities. The facts unique to MMC's storm water permit, however, justify reaching a different conclusion than the *Waterkeeper* decision.

When establishing limitations, standards and other permit conditions applicable to pollution discharge elimination systems, 40 C.F.R. § 122.44(k) allows best managements practices to be used when numeric effluent limitations are infeasible, as claimed by DEQ in explaining its justification for using BMPs as "technology-based effluents limitations." DEQ considers BMPs to be specific technology-based effluent limitations. MMC's permit requires a "best

management practice," that its facility be "designed, constructed, and maintained to contain the maximum amount of storm water generated during a 10-year, 24-hour precipitation event." AR 1A:0021. No discharge is allowed unless the measured participation exceeds 2.8. inches, or equivalent snowmelt runoff, in a 24-hour period. Based on this measure, DEQ states that storm water from between 90 to 95 percent of all storm events will be captured by MMC and contained. This scenario belies DEQ's statement that development of numeric ELGs is not feasible because "the nature of the storm water . . . can be highly intermittent" and is less predictable than wastewater discharges from a specific industry. AR 1C:0087-0088. While perhaps an accurate statement of typical storm water discharge, the DEQ explains that for this permit, for over 90 percent of storm events, discharged storm water from Outfalls 004-008 will be contained.[29] Outfall 004 has identified pollutants of concern. There is no explanation provided why DEQ cannot develop numeric ELGs for the identified pollutants of concern from Outfall 004, or why storm water contained from Outfalls 005-008 cannot be analyzed for specific, predictable pollutants which will be discharged in a serious storm event. DEQ's legal determination that non-numeric ELGs are appropriate because it is not feasible to calculate numeric TBELs, and that the BMPs are adequately functioning as TBELs pursuant to the CWA,[30] is arbitrary and incorrect.

DEQ's legal conclusion does not demonstrate "a rational connection between the facts found and the determinations made." *Ariz. Cattle Growers'*

[29] DEQ Br. Supp. Cross-Mot. S.J., at 12.

[30] Citing *Natural Res. Def. Council v. EPA*, 673 P.2d 400, 403 (D.C. Cir. 1982), which notes that 33 U.S.C. 1362 (11) proves an "effluent limitation" is any restriction on the amounts of contaminants discharged, not just a numerical restriction.

Ass'n v. Salazar, 606 F.3d 1160, 1163 (9th Cir. 2010). DEQ must reconsider the feasibility of developing numeric ELGs for Outfalls 004-008.

c. Best Management Practices

Plaintiffs also argue the permit's failure to mandate implementation of any particular BMP is illegal because it does not provide for DEQ's review of the measures selected, and further allege that by allowing MMC to select its own storm water controls through BMPs after being issued a MPDES permit, the CWA's public participation requirements are violated.

Although the issue above requires DEQ to reconsider the permitting for Outfalls 004-008 with respect to developing numeric ELGs as appropriate, it is anticipated the permit will also include requirements for selection of BMPs. As such, Plaintiffs' additional concerns regarding BMP requirements in the permit will be addressed.

The issue of public participation was also addressed in *Waterkeeper, supra,* wherein the Montana Supreme Court emphasized that the work groups formed to assist DEQ in compiling a menu of BMPs for small MS4 (municipal storm water) general permitting amounted to significant public participation. The Court noted the permitting flexibility specifically built into the EPA's small MS4 regulations. 64 Fed. Reg. 68,722, 68,754 (Dec. 8, 1999).

The MS4 regulations are not directly applicable to the MPDES permit at issue, but the Court's analysis regarding public participation in the permitting process is instructive. The Court cited *Maryland Department of the Environment v. Anacostia Riverkeeper*, 134 A.3d 892 (Md. 2016) in concluding that "choosing specified BMPs in an MPDES general permit does not constitute a new effluent limit requiring further public participation before the permit can take effect." *Id.*,

¶ 21. The Maryland court found that the BMPs are included in the permits by reference and incorporation of the Storm Water Design Manual and Guidance, which sets forth the menu of best practices.

The BMPs required by MMC are adapted from the EPA's *Industrial Stormwater Fact Sheet, Sector G: Metal M (Ore Mining and Dressing) Facilities* (EPA-833-F-06-022, Dec. 2006), and the Forest Service's *National Best Management Practices for Water Quality Management on National Forest Systems Lands* (USDA, Forest Service, FS-990a, April 2012), both of which are required to be referenced and incorporated into MMC's facilities storm water prevention plan. While not clear what level of public participation was involved in the development of these publications, it is clear that established BMPs for industrial storm water include long-standing practices developed and required by the EPA. The MPDES permit requirements for storm water discharges issued by the Montana DEQ are intended to be compatible with those established by the EPA and incorporate federal CWA regulations. Admin. R. Mont. 17.30.1101 and .1344. Notwithstanding this Court's conclusion that DEQ incorrectly relied on BMPs without considering the feasibility of developing ELGs, the Court cannot find that DEQ acted unlawfully, arbitrarily or capriciously by allowing permittees to choose from the menu of storm water discharge BMPs without additional review by DEQ prior to issuance of the permit nor further public participation after selection.

2. WATER QUALITY-BASED EFFLUENT LIMITATIONS ANALYSIS

a. Reasonable Potential Analysis

DEQ must establish water quality-based effluent limitations (WQBELS) to ensure that any specific pollutants expected to be in the water

discharges do not have the "reasonable potential" to cause the receiving waters to exceed any applicable water quality standards. 40 C.F.R. § 122.44(d)(1)(iv)-(v);[31] Admin. R. Mont. 17.30.1344 (incorporating 40 C.F.R. § 122.44) and 17.30.637(2).[32] DEQ must also conduct a "reasonable potential analysis" for whole effluent toxicity to ensure the combination of pollutants in the effluent does not contribute or cause to a standards violation. Id.

Plaintiffs allege DEQ failed to conduct reasonable potential analyses (RPA) for the specific pollutants or concern for Outfalls 001-003 and for whole effluent toxicity. Specifically, Plaintiffs argue that DEQ's RPAs for aluminum, arsenic, barium, copper, manganese, sulfate, total inorganic nitrogen, total ammonia, and total phosphorus from Outfalls 001-003 were flawed. DEQ

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[31] § 122.44 Establishing limitations, standards, and other permit conditions.

(d) *Water quality standards and State requirements:* any requirements in addition to or more stringent than promulgated effluent limitations guidelines or standards under sections 301, 304, 306, 307, 318 and 405 of CWA necessary to: (1) Achieve water quality standards established under section 303 of the CWA, including State narrative criteria for water quality. (iv) When the permitting authority determines, using the procedures in paragraph (d)(1)(ii) of this section, that a discharge causes, has the reasonable potential to cause, or contributes to an in-stream excursion above the numeric criterion for whole effluent toxicity, the permit must contain effluent limits for whole effluent toxicity.

. . .

(v) Except as provided in this subparagraph, when the permitting authority determines, using the procedures in paragraph (d)(1)(ii) of this section, toxicity testing data, or other information, that a discharge causes, has the reasonable potential to cause, or contributes to an in-stream excursion above a narrative criterion within an applicable State water quality standard, the permit must contain effluent limits for whole effluent toxicity. Limits on whole effluent toxicity are not necessary where the permitting authority demonstrates in the Fact Sheet or statement of basis of the NPDES permit, using the procedures in paragraph (d)(1)(ii) of this section, that chemical-specific limits for the effluent are sufficient to attain and maintain applicable numeric and narrative State water quality standards.

[32] "No wastes may be discharged and no activities conducted such that the wastes or activities, either alone or in combination with other wastes or activities, will violate, or can reasonably be expected to violate, any of the standards."

decided to not develop water quality-based effluent limitations for these pollutants based on applicable water quality standards. Plaintiffs assert this decision was arbitrary and unlawful.

DEQ counters that there is no valid data from which to conduct such analyses and asserts neither the CWA and the Montana WQA, nor the related regulations, require such an analysis in the absence of data or other quantitative information. DEQ states that if quantitative data is available, DEQ will use it "to conduct a more traditional reasonable potential analysis based upon concentration data."[33]

Plaintiffs argue DEQ was remiss in not identifying the specific data it relied upon in the supporting Fact Sheet or Response to Comments. Comment 114 and DEQ's response state:

> Comment 114: DEQ's RPA's must rely on valid and representative data characterizing pollutant concentration in the effluent.
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> Response: The data used by DEQ is summarized in Appendices 1-3. DEQ's RPA is summarized in Appendix 4. DEQ performed both quantitative and qualitative RPAs; see Sections 2.2.8 of the Fact Sheet. Data characterizing effluent were provided by permittee in application and supplemental materials. Permit requires submission of discharge data: these data will be used to perform RPA and update (if necessary) effluent limits. See Response to Comment 117.

AR 1C:0088.

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[33] DEQ brief in support of cross-motion for summary judgment.

Fact Sheet Section 2.2.8 provides DEQ's analyses of the data. In the Fact Sheet's RPA summary, the determination that no WQBELS are necessary for certain pollutants of concern states:

> With respect to the parameters Total Dissolved Solids and Total Suspended Solids at Outfalls 001-003, it is expected that the wastewater treatment system will significantly reduce or eliminate the concentrations of these parameters in the effluent. Additionally, with respect to Total Suspended
>
> Solids, it is expected that additional treatment in either the percolation pond or drainfield prior to discharge into ground water will significantly reduce or eliminate the concentration of Total Suspended Solids found in the effluent.

Regarding "Total Suspended Solids, Nitrate, Oil & Grease, Iron, Manganese, Zinc,[34] and Total Suspended Solids, Oil & Grease,[35] the summary explains that "the RPA indicates that these types of discharges are not expected to have the potential to cause or contribute to an exceedance of a water quality standard since TBELs that require the selection and installation of BMPs that minimize or eliminate sediment from any discharges prior to the start of any discharge(s) is a condition of the MPDES permit." AR 2C:0235, Table 22.

Appendix 4 of the Fact Sheet referenced above in DEQ's response to Comment 114, repeats much of the required formulaic analysis required to make an RPA determination. It does not provide the input values for the calculations, but refers the reader to other sources of information, including Fact Sheet Sections 2.2.7 (Mixing Zones) and 2.2.8 (Reasonable Potential Analysis and Design Conditions). AR 2C: 0225-234.

[34] For Outfall 004.

[35] For Outfalls 005-008.

While not simple to navigate, DEQ provided significant information and references used to make its RPA decisions, all available to the public. There is no requirement that the DEQ provide more detailed information in its Fact Sheet[36] or Response to Comments.[37] Regardless of the adequacy of the explanation of the decision, Plaintiffs also challenge the substance of the RPA decision.

As discussed above regarding Fact Sheet section 2.2.8, with respect to Outfalls 004-008, DEQ decided that no WQBELS are required by relying on the "selection and installation of [best management practices]" as required as a condition of the MPDES permit. The data relied upon by DEQ to make its RPA decision appears to come from analysis of the quality of the historic discharge at the site of Outfalls 001-003, where there is no current construction or mining operations. It is not unreasonable to include BMPs and future monitoring of the selected practices' impact on effluent discharges, but total reliance on future monitoring of BMPs is problematic. The permit requirements also include a "reopener" condition, allowing future WQBELs, as warranted from monitoring. While BMPs, monitoring, and a reopener condition are acceptable requirements, the decision to exclude WQBELS is fatal to DEQ's RPA. The decision fails to address the "reasonable potential" of pollutants projected and authorized to be in the discharge to cause or contribute to an exceedance of a state water quality standard. As stated by MMC, "If there is reasonable potential, then DEQ must

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[36] Administrative Rule of Montana 17.30.1371(1) provides: "The Fact Sheet must briefly set forth the principal facts and the significant factual, legal, methodological and policy questions considered in preparing the draft permit."

[37] Administrative Rule of Montana 17.30.1377(1)(b) requires the agency's response to comments "briefly describe and respond to all significant comments on the draft permit, or during any hearing."

establish a WQBEL for that pollutant."[38] DEQ's RPA decision, that no WQBELS are needed for Outfalls 001-003 regarding projected pollutants that will be present in the effluent MMC is authorized to discharge in the current permit, does not reflect "reasoned decision-making"[39] and is not consistent with the requirements of 40 C.F.R. § 122(d)(1). As such, this decision is arbitrary and unlawful.

b. Whole Effluent Toxicity

Plaintiffs claim DEQ also failed to complete a valid "reasonable potential analysis" for whole effluent toxicity (WET), which is required to ensure the combination of pollutants in the effluent will not be harmful to water quality or aquatic life. 40 C.F.R. § 122.44(d)(1)(iv)-(v); Admin. R. Mont. 17.30.1344(2)(b); EPA Permits Writer's Manual AR 11:8987.

DEQ admits it did not conduct an RPA as required prior to issuance of the Fact Sheet, but asserts that analysis done during the public comment period complied with the standard delineated in Administrative Rule of Montana 17.30.637(1)(d).[40] DEQ looked at information provided by six acute, two-species WET tests on Outfalls 001-003 conducted by MMC from 2008-2013. DEQ asserts there is no numeric criterion for WET, and WET analysis may be based on a narrative standard reported as pass or fail. DEQ found that the MMC acute, two-species tests passed the WET tests, and therefore there is no requirement for

[38] MMC's brief in support of cross-motion for summary judgment and in response to Plaintiff's motion for summary judgment.

[39] See *Nathan Katz Realty LLC v. NLRB*, 251 F.3d 981, 994 (D.C. Cir. 2001) and *Motor Vehicle Mfrs. Ass'n v. State Farm Mut. Auto Ins. Co.*, 463 U.S. 29, 43 (1983).

[40] "(1) State surface waters must be free from substances attributable to municipal, industrial, agricultural practices or other discharges that will: . . . (d) create concentrations or combinations of materials which are toxic or harmful to human, animal, plant, or aquatic life."

specific effluent limits for WET at Outfalls 001-003. With respect to future monitoring, the permit requires MMC to test quarterly for water flea and fathead minnow. If future tests fail and toxicity continues, DEQ may reopen the permit to incorporate additional limitations or modify the WET testing protocol.

DEQ admits the tests were conducted when the mining operation was not active. Further, the results of the test do not reflect the expected nature of the effluent MMC is authorized to discharge under the permit, nor did the tests evaluate chronic toxicity and the impact of chronic toxicity on aquatic life. DEQ's determination that no limits are needed for whole effluent toxicity potentially caused by the identified pollutants, based on only acute testing at Outfalls 001-003, is arbitrary and capricious.

DEQ admits it did not conduct any RPA for WET for Outfalls 004-008, explaining that WET testing is not required "due to the expected nature and characteristics of any discharges from these outfalls as well as the design of the storm water controls." The decision also relies on BMPs, as well as monitoring and reporting requirements for storm water discharges.

As discussed above in Section I.B., DEQ incorrectly determined that BMPs (as TBELS) were a sufficient method of storm water pollution control for discharge from Outfalls 004-008. Reliance on these same requirements in the permit to address WET testing compounds the error and does not address DEQ's failure to conduct valid reasonable potential analyses for whole effluent toxicity. Failure to do so violates 40 C.F.R. § 122.44(d)(1) and Administrative Rule of Montana 17.30.1344.

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3. RELIANCE ON ORIGINAL NON-DEGRADATION REVIEW

As detailed in the background section above, in 1992, the Board of Health and Environmental Sciences issued an order to Noranda authorizing the degradation of the quality of water for the Montanore Project. Plaintiffs assert the 1992 authorization to degrade has expired. The 1992 authorization to degrade remained in effect "during the life of this mine and for so long thereafter as necessary." AR 7A: 4641. The operational life of Noranda's project ended in 1991, when Noranda abandoned the project, relinquished its federal mining authorization, and began reclamation. After that time, there was no "life of the mine" or necessity to have authorization to degrade. In 2002, after Noranda ceased mining operations and allowed permits associated with the project expire or terminate, the MPDES permit remained in effect by DEQ to oversee reclamation, not to regulate mining operations. Arguably, the permit issued in 1997 either was abandoned by the permittee or was not renewed by the permittee as required by Administrative Rule of Montana 17.30.1346.

The current permit issued on January 17, 2017 (effective March 1, 2017) has been referred to as a renewal of the original Noranda MPDES permit. Noranda changed ownership via stock transfer to MMC in 2006. MMC received a permit for a new, expanded mining project which included changes in wastewater sources and five new outfalls. Whether Noranda's original permit was appropriately issued to MMC as a renewal rather than a new permit,[41] and

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[41] In evaluating activities associated with revisions to DEQ Operating Permit for reopening the Libby Adit in 2006, the Kootenai National Forest determined the activities contemplated by MMC constituted a new proposed Plan of Operation, needing new approval for dewatering and continued excavation, drilling, and development work at the Libby Adit. Final EIS AR 10B: 6227.

regardless how characterized,[42] the mining operation to which the BHES gave authority to degrade in 1992 was abandoned by Noranda before the current owners filed an application for renewal. Restriction on degradation of high-quality waters have changed since the 1992 authorization.[43]

While the Court cannot substitute its opinion for DEQ's determination regarding the requested permit, it must require application of current law at Montana Code Annotated § 75-5-303(3) regarding full degradation review and the process set forth therein, and implementing regulations at Administrative Rule of Montana 17.30.706-.708.

DEQ's decision to rely on the BHES's 1992 authorization violates the WQA and implementing regulations.

4. COMPLIANCE SCHEDULES

Lastly, Plaintiffs contend that the permit should be set aside because it establishes unlawful compliance schedules. Specifically, the permit allows three years for compliance with effluent limitations. AC2C:0242, 0244.

DEQ justifies the three-year compliance schedule for effluent limitations because they "are more stringent than the corresponding effluent limitations found in the 2006-issued MPDES permit. . . and is a reasonable amount of time for the permittee to identify, select, design, install, and start up any additional treatment processes necessary to meet the more stringent final

[42] MMC argues the Montanore Project has been continuously permitted for almost 30 years. In DEQ's brief in support of cross-motion for summary judgment, at page 24, however, the agency sites Administrative Rule of Montana 17.30.1346 and 33 U.S.C. § 1342(b)(1)(B), stating that MPDES permits may only be issued for a fixed five-year term.

[43] DEQ notes that the legislatively revised nondegradation requirements of 1993 were not applicable to requests to degrade filed before the effective date. However, once no longer for an active mining operation, the BHES Order was no longer valid as to the degradation authorization and the higher degradation requirements are applicable.

effluent limits in the final permit." AR1C:0080. The 18-year compliance schedule for total nitrogen is "also considered appropriate given the need to develop technology that consistently treat to the final limit, install such technology, and optimize it down to the extremely low TN criteria." Id.

DEQ argues the compliance schedule is complimented with required reports detailing progress in achieving final effluent limits and act as interim requirements under Administrative Rule of Montana 17.30.1350(1)(c) and 40 C.F.R. § 122.47(a)(1). The reports must address "any steps taken towards meeting the final effluent limitations for [pollutants of concern]." The reports must provide other mitigation, elimination and/or treatment options to meet final effluent limits. "The enforceable compliance schedule will lead to compliance with final effluent limits as soon as possible." AC1C:0080; 40 C.F.R. § 122.47(a)(1)

The requiring reporting does not, in and of itself, lead to enforceable effluent limits for three years. DEQ justification that MMC needs that time to "identify, select, design, install, and start up any additional treatment processes" to deal with more stringent limitations belies the fact that the mine is not currently operating. There is no explanation why MMC cannot identify, select, design, and install the MPDES permit limitations before or as the mine starts operations. See *Clark Fork Coalition, supra,* ¶ 47.

Administrative Rule of Montana 17.30.1350 provides:

> (a) Any schedules of compliance under this rule must require compliance as soon as possible, but not later than the applicable statutory deadline under the Act or under the federal Clean Water Act, as codified at 33 USC 1311(b) (2) (A), (C), (D), (E), and (F).
>
> (b) The first MPDES permit issued to a new source or a new discharger must contain a schedule of compliance only when

> necessary to allow a reasonable opportunity to attain compliance with requirements issued or revised after commencement of construction but less than three years before commencement of the relevant discharge. For recommencing dischargers, a schedule of compliance must be available only when necessary to allow a reasonable opportunity to attain compliance with requirements issued or revised less than three years before recommencement of discharge.

DEQ asserts the extended compliance schedule reflects interim requirements for achievement of compliance, and asserts the reporting requirements satisfy the requirements of regulation.

> [I]f a permit establishes a schedule of compliance which exceeds one year from the date of permit issuance, the schedule must set forth interim requirements and the dates for their achievement.
>
> (i) The time between interim dates may not exceed one year.
>
> (ii) If the time necessary for completion of any interim requirement (such as the construction of a control facility) is more than one year and is not readily divisible into stages for completion, the permit must specify interim dates for the submission of reports of progress toward completion of the interim requirements and indicate a projected completion date.

Admin. R. Mont. 17.30.1350(1)(c).

Whether MMC is considered a "new discharger" from Outfalls 004-008, or a "recommencing discharger" for Outfalls 001-003, DEQ must demonstrate in the record why the specific duration of the compliance schedule constitutes the minimum necessary. If the compliance schedules are interim requirements for over a year, the permit must specify why "stages for completion" are not readily divisible into an indicated, projected completion date. Failure to comply with the regulatory requirements is error.

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CONCLUSION

DEQ's permitting process is integral to the protection of water quality in Montana. As the Montana Supreme Court recently recognized, "We remain mindful of the fact that Montanans have a constitutional right to a clean and healthful environment. Mont. Const. art. II, § 3." *Upper Missouri Waterkeeper*, ¶ 41. "[W]hile 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." *Clark Fork Coalition*, ¶ 47.

In this case, DEQ's issuance of Permit number MTX000163, effective May 1, 2014, was based, in part, on arbitrary and capricious decisions and is in violation of provisions in the federal Clean Water Act, the Montana Water Quality Act, and implementing regulations.

ORDER

Based on the foregoing, IT IS HEREBY ORDERED that MPDES Permit No. MT0030279 is VACATED and the matter remanded to DEQ for further action consistent with this decision.

DATED this 24 day of July 2019.

KATHY SEELEY
District Court Judge

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