

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

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

Plaintiffs/Appellants,

v.

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

Defendants/Appellees.

**APPELLANTS TONGUE RIVER WATER USERS' ASSOCIATION
AND
NORTHERN PLAINS RESOURCE COUNCIL'S REPLY BRIEF**

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

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ARGUMENT

Tongue River Water Users' Association and Northern Plains Resource Council (Water Users incorporate the arguments in Appellant Northern Cheyenne Tribe's (Tribe's) Reply Brief. The Water Users focus on nondegradation and the Montana Environmental Policy Act (MEPA).

I. DEQ's Issuance of Permits to Fidelity Without Technology-Based Effluent Limits Violated the CWA and Montana WQA.

Sadly, in defending its actions DEQ doesn't mention the overarching purpose of the federal Clean Water Act (CWA), the "complete elimination of the discharge of pollutants." *Natural Resources Def. Council v. EPA*, 822 F.2d 104, 123 (D.C. Cir. 1987) ("*NRDC I*") (citing 33 U.S.C. § 1251(a)(1)). DEQ tries to justify more pollution for Montana's waters—poor policy for an agency entrusted with protecting Montana's water quality. The magnitude of DEQ's legal error is compounded by the fact that technology is available and used to treat coalbed methane (CBM) wastewater.

The National Pollution Discharge Elimination System (NPDES) permit requirement lies at the forefront of Congress's policy to clean up our Nation's waters. The cornerstone of the NPDES program is technology-based effluent limitations (TBELs) imposed through NPDES permits or their state equivalent. Because a water quality standards-based approach failed to protect and restore our nation's waters, Congress established TBELs as the *minimum* pollution control for

all discharges. Congress required specific levels of technology—“best available technology economically achievable” (BAT) for existing sources, (33 U.S.C. § 1311(b)(2)), and more stringent “best available demonstrated control technology” (BADCT) for new sources. (33 U.S.C. § 1316(a)(1), (b)(1)(B)). *American Petroleum Inst. v. EPA*, 661 F.2d 340, 344 (5th Cir. 1981) (“all sources” must employ the prescribed level of technology in 33 U.S.C. § 1311(b)). In short, the CWA “command[s] that dischargers” such as Fidelity must apply BAT and BADCT. *Chem. Mfrs. Ass’n v. Natural Resources Def. Council, Inc.*, 470 U.S. 116, 118 (1985).

The CWA’s implementing regulations, adopted whole cloth in Montana, provide that “[t]echnology-based treatment requirements [under 33 U.S.C. § 1311(b)] represent the *minimum level of control that must be imposed*” in NPDES permits. (40 C.F.R. § 125.3(a) (emphasis added)). Where EPA has not established TBEL guidelines for an industry, the “permit writer” must use best professional judgment (BPJ) to impose TBELs on a case-by-case basis. (40 C.F.R. § 125.3(c)(2)). TBELs remain the minimum requirement for permits, with permit writers making “[i]ndividual judgments” to determine what effluent limitations can be achieved by applying BAT and BADCT. *Texas Oil and Gas Ass’n v. EPA*, 161 F.3d 923, 928-29 (5th Cir. 1998).

DEQ stands in the shoes of EPA. *Natural Resources Def. Council v. EPA*, 859 F.2d 156, 183 (D.C. Cir. 1988) (“*NRDC II*”). Montana cannot enact laws or regulations implementing the CWA that are less stringent than the CWA without running afoul of the U.S. Constitution’s Supremacy Clause. *Northern Plains v. Fidelity*, 325 F. 3d 1155, 1165 (9th Cir. 2003) (cert. denied) (*citing* U.S. Const. Art. VI, Cl. 2.”). States issuing NPDES permits **must** impose “technology-based treatment requirements,” and when EPA has not issued industry-wide effluent limitation guidelines (ELGs), states must consider the same factors as EPA when determining TBELs on a case-by-case basis. 40 C.F.R. § 125.3(a), 125.3(c)(2) and (comment). DEQ acknowledges that EPA may veto permits or “withdraw an entire state program,” if it fails to meet the requirements of the CWA. (DEQ Br. at 3-4.)

NRDC II squarely addressed the issue before this Court:

Section 1342(a)(1) requires EPA, in approving permits in the absence of formally promulgated effluent limitations guidelines, to exercise its best professional judgment (BPJ) as to proper effluent limits. When issuing permits according to its BPJ, EPA is *required* to adhere to the technology-based standards set out in § 1311(b).

NRDC II, 859 F.2d at 183. States with an EPA approved NDPEs program must comply with the CWA:

States issuing permits pursuant to § 1342(b) stand in the shoes of the agency, and thus must similarly pay heed to § 1311(b)’s technology-based standards when exercising their BPJ . . . states are required to compel adherence to the Act’s technology-based standards regardless of whether EPA has specified their content pursuant to § 1314(b).

Id. DEQ asserts that the court’s interpretation was dicta. (DEQ Br. 26.) But had industry prevailed, EPA’s ability to control state programs would collapse.

EPA addressed the question in this case in technical support documents:

[B]ecause the discharge of produced water from CBM extraction is not subject to an existing ELG, permit writers must develop technology-based limits on a case-by case basis using their BPJ. See 40 CFR 122.44(a)(1). In developing the BPJ-based limits, the permit writer must take into account the same statutory factors EPA would use See 40 CFR 125.3(d).

(App. M (6-3))¹. EPA’s interpretation of the CWA is entitled to substantial deference. *Chevron v. N.R.D.C.*, 467 U.S. 837, 843-4 (1984), and its technical and policy guidance is likewise accorded deference. *U.S. v. Mead Corp.* 523 U.S. 218, 228-9 (2001).

II. The Permits Violated the CWA’s Antidegradation Requirements.

In implementing the CWA’s primary objective to “restore and maintain” the integrity of the Nation’s waters (33 U.S.C. § 1251(a)), states must prevent degradation of high-quality waters like the Tongue River. Where a river’s quality “exceed[s] levels necessary to support propagation of fish, shellfish, and wildlife and recreation,” no additional pollution is permitted unless it is justified by important economic or societal needs. 40 C.F.R. § 131.12(a)(2). Montana has adopted “nondegradation.” § 75-5-303, MCA. *Clark Fork Coalition v. DEQ*, 2008 MT 407, ¶ 32 (requiring nondegradation review before allowing new pollution to

¹ References to Appendices are to the Northern Cheyenne Tribe’s (NCT) Appendix.

high-quality waters). The Tongue River's quality is far better than state water quality standards (WQS). Therefore, DEQ cannot authorize Fidelity to degrade the *quality* of the Tongue River, regardless of the impact on its *uses*, without undertaking nondegradation review. If it authorizes degradation, DEQ must impose the strictest requirements on discharges. § 75-5-303 (1) (d); 40 C.F.R. § 131.12(a)(2).

The Board of Environmental Review's (Board) 2003 Rule deeming CBM discharges nonsignificant for EC and SAR if they did not affect "existing or anticipated use" or the "ecological integrity" of the receiving waters (A.R.M. 17.30.670(6) (2003)), cannot be a defense for DEQ's failure to undertake nondegradation review. State and federal law require nondegradation review before degradation of high-quality waters.

A. Antidegradation Policy Provides Separate, More Stringent Protections for the Quality of the Tongue River.

Nondegradation protects "high-quality" waters like the Tongue River from additional pollution unless the polluter survives the nondegradation review. § 75-5-303, MCA. The Tongue River is high-quality. A.R.M. 17.30.611. DEQ argues it correctly applied nondegradation because the permits conform to the EPA-approved 2003 Rule and do not exceed water quality standards (WQS) for the Tongue River and protect its designated uses. (DEQ Br. 32-39.) DEQ fails to distinguish between degradation protection of designated uses. This Court has

already recognized that nondegradation review applies as a matter of law to high-quality waters. *Clark Fork Coalition v. DEQ*, 2008 MT 407 ¶ 31.

The Ohio Supreme Court addressed the issue presented here in *Columbus & Franklin County Metropolitan Park District v. Shank*, 600 N.E.2d 1042, 1054, 1074-75 (Ohio 1992) (analyzing 40 C.F.R. § 131.12(1)-(2) and 48 Fed. Reg. 51400, 51402). *Shank* involved state-issued permits authorizing discharges to high-quality waters. *Id.* at 1046-47. Like DEQ, Ohio defended the permits based on a regulation that allowed changes in water quality until such changes interfered with designated uses or caused exceedances of WQS. *Id.* at 1056. After reviewing the CWA and the history of antidegradation law, the court ruled that the permits conflicted with the CWA’s antidegradation policy because they “allow[ed] a clear degradation of water quality to be considered nondegradation,” *Id.* at 1054-56. This Court should carefully examine that opinion and the CWA’s antidegradation policy contained in an appendix thereto. *Id.* 600 N.E.2d at 1063-65, 1073-76. The court’s interpretation of the CWA’s antidegradation policy was central to its opinion. *Shank*, 600 N.E.2d at 1054-55, 1074-75. That interpretation should be adopted here because Ohio, like Montana, “stands in the shoes” of EPA.

The analysis begins with Congress’s explicit ratification in 1987 of the “antidegradation policy established under this section [40 C.F.R. § 131.12]. 33 U.S.C. § 1313(d)(4)(B)].” *Shank*, 600 N.E.2d at 1054; *see also* Van Putten &

Jackson, *The Dilution of the Clean Water Act*, 19 Mich. J. L. Ref. 863, 900, nn. 153-54 (1986)). The requirement that states cannot exceed WQS is additional, not a substitute. 40 C.F.R. § 131.12(a)(1); *Shank*, 600 N.E.2d at 1055; *American Petroleum Inst.*, 661 F.2d at 344 (citing 33 U.S.C. § 1313). Existing water quality is the benchmark. A permitting agency may not degrade existing quality without first conducting the review required by 40 C.F.R. § 131.12. *Shank*, 600 N.E.2d at 1055; *see also id.* at 1075 (footnote r). Because Ohio failed to undertake antidegradation review, the court remanded the permits.

DEQ discounts the reasoning in *Shank*. (DEQ Br. 38; App. A (21-22)). But DEQ cannot distinguish Montana and Ohio antidegradation law, because Ohio's rule also provides for categorical exclusions and exemptions from antidegradation review. *See* Ohio Admin. Code 3745:1-05(B)(2), (D), (F). *Shank* is also persuasive because it is consistent with EPA's interpretation of the CWA antidegradation policy.

After promulgating 40 C.F.R. §131.12(a)(2), EPA provided implementation guidance. *See* <http://www.epa.gov/waterscience/standards/library/antidegqa.pdf> ("Antidegradation Q&A"). EPA described how antidegradation works for high-quality waters like the Tongue River:

Section 131.12(a)(2) applies to waters whose quality exceeds that necessary to protect the Section 101(a)(2) goals of the Act. In this case, water quality may not be lowered to less than the level necessary to fully protect the 'fishable/swimmable' uses and other existing uses

and may be lowered even to those levels only after following all the provisions described in § 131.12(a)(2).

Antidegradation Q&A at 4 (Question 10); EPA Water Quality Handbook (2d Ed. July 3, 2007) §§ 4.2, 4.5,

<http://www.epa.gov/waterscience/standards/handbook/chapter04.html>. EPA's interpretation is entitled to substantial deference under *Chevron* and *Mead*.

EPA's policy is consistent with this Court's understanding of the mandatory requirements of the nondegradation process in *Clark Fork Coalition*.

B. DEQ is Obligated to Follow Federal Requirements.

DEQ attempts to evade federal antidegradation policy by arguing it is merely a regulation, not part of the CWA. (DEQ Br. 35, 39.) But Congress ratified and incorporated antidegradation into the CWA in 1987. 33 U.S.C. § 1313 (d)(4)(B); *see also* Van Putten & Jackson, 19 Mich. J. L. Ref. at 900 & nn. 153-54; *Shank*, 600 N.E.2d at 1065-66.

DEQ's reliance on *Arkansas v. Oklahoma*, 503 U.S. 91, 110 (1992), is also unavailing. EPA issued a permit in Arkansas that potentially violated downstream Oklahoma WQS. The Supreme Court limited the "federal character" of Oklahoma's standards to situations that "affect the issuance of a permit in another State." *Id.* This is not a case of interstate water pollution. EPA's approval does not shield DEQ. The 2003 Rule exempting CBM discharges from nondegradation was inconsistent with the CWA from its adoption. Because EPA lacked authority

to supersede the CWA in approving the Rule, DEQ and this Court are obligated to apply controlling federal law where, as here, it conflicts with state law.

C. The Permits Authorize Significant Degradation of Water Quality.

DEQ urges that the 2003 Rule complies with federal and state antidegradation policies because Permit MT-0030724 (treatment permit) allows changes in water quality that meet Montana's numeric WQS. (DEQ Br. 36-37.) DEQ misses the point. Nondegradation requirements are additional. *See* 40 C.F.R. § 131.12(a)(1)-(2); *Shank*, 600 N.E.2d at 1057. DEQ's reliance on the 2003 Rule nullified the antidegradation policy protecting uses instead of the high-quality water of the Tongue River.

DEQ further asserts that the permits only authorize "*de minimis* increases of SAR and EC." (DEQ Br. 36.) DEQ's support for this assertion is an unrepresentative selection of the projected water quality impacts of Permit 0030724. DEQ's analysis glosses over the significant impacts predicted in both permits. (App. D (App. V); App. F (App. V)). This partial treatment permit authorizes Fidelity to increase the ambient levels of SAR in the Tongue River by as much as 51%. (App. F (SAR for March to June). This is clear degradation of high-quality waters, regardless of whether existing uses are met.

Projected changes in water quality authorized by Permit MT-0030457, which requires no treatment, demonstrate even greater impacts on existing quality,

including increases in ambient levels of SAR ranging between 158 and 228% depending on the season. (App. D (App. V)).

Such significant degradation of high-quality water is prohibited by the CWA. *Shank*, 600 N.E.2d at 1056. DEQ cannot argue that permits collectively allowing ambient levels of SAR in the Tongue River to double or triple are not significant degradation. Moreover, the discharges in all seasons would require nondegradation review under the Board's *current* nonsignificance rule. A.R.M. 17.30.670(2)(a), (3)(a). The obvious potential for such degradation was among the reasons the Board adopted the numeric nondegradation criteria in the 2006 Rule. *Pennaco Energy, Inc. v. Montana Bd. of Env'tl. Review*, 2008 MT 425, ¶ 38, 347 Mont. 415, ¶ 38, 199 P.3d 191, ¶ 38 (Board's defense of rule included its obligation to "protect high-quality waters in Montana"); *see also id.* ¶ 39 (noting Board's desire to "protect the Basin's water" from 2003 Rule which potentially allowed discharges up to the numeric standards regardless of the background level of SAR and EC in the Tongue River). The Board's desire to comply with federal antidegradation requirements is also reflected in its May 18, 2006, Notice of Amendment, where it made clear that one of the reasons it changed the SAR and EC nonsignificance criteria was "not to protect existing uses, but to prevent the degradation of 'high-quality' waters." (App. H (1248) (Response to Comment No. 2); *see also id.* ("board does not agree that the 'high-quality' waters in the Powder

River Basin are being adequately protected from degradation under the current rules”); Tribe’s Br. 9 (quoting App. H (1251, 1253)). In short, the Board recognized, as the Water Users argue here, that Montana’s nondegradation policy must protect the *quality* of the Tongue River, not just its beneficial *uses*.

III. DEQ Violated the Montana Environmental Policy Act.

MEPA is our state’s premier environmental disclosure law. Underscoring MEPA’s importance, the Montana Legislature has proclaimed that MEPA is central to implementing our Constitutional guarantees to a clean and healthful environment contain in Article II section 3 and Article IX section 1. § 75-1-102, MCA. This Court has holds that environmental review requires a “hard look” at the consequences of the state’s actions. *See e.g. Ravalli County Fish and Game Assn. v. Department of State Lands*, 273 Mont. 371, 903 P.2d 1362 (1995); *Clark Fork Coalition, supra* at ¶ 47. Here DEQ did not take a hard look, through MEPA, at applying existing technology to treat Fidelity’s discharges, despite the undisputed fact that such technology is readily available.

While this Court has not yet addressed what constitutes a reasonable range of alternatives under MEPA, federal decisions under the federal National Environmental Policy Act are persuasive. *See generally Ravalli County Fish and Game Assn. v. Department of State Lands*, 273 Mont. 371, 903 P.2d 1362 (1995).

The Water Users draw upon well-developed federal law to explain why DEQ's Environmental Assessment is legally deficient.

An EIS must “rigorously explore and objectively evaluate all reasonable alternatives” to the proposed action. *City of Carmel-by-the-Sea v. U.S. Dept. of Transp.*, 123 F.3d 1142, 1155 (9th Cir. 1997). Consideration of alternatives is “the heart” of the EIS, and “should present the environmental impacts of the proposal and the alternatives in comparative form, thus sharply defining the issues and providing a clear basis for choice among options by the decision maker and the public.” *See City of Carmel*, 123 F.3d at 1155; *Friends of Southeast's Future v. Morrison*, 153 F.3d 1059, 1065 (9th Cir. 1998). In addition to the “no-action” alternative, 40 C.F.R. § 1502.14(d), an agency must look at every reasonable alternative within the range dictated by the nature and scope of the proposed action that is sufficient to permit a reasoned choice. *Morrison*, 153 F.3d at 1065; *Idaho Conservation League v. Mumma*, 956 F.2d 1508, 1520 (9th Cir. 1992); *see also Colorado Environmental Coalition v. Dombeck*, 185 F.3d 1162, 1175 (10th Cir. 1999) (EIS must “provide legitimate consideration to alternatives that fall between the obvious extremes”). The existence of a “reasonable” or “viable” alternative that an agency failed to examine renders an EIS inadequate. *Morrison*, 153 F.3d at 1065. Given that technology to treat CBM wastewater to existing water quality of

the Tongue River is currently available, it was arbitrary for DEQ to not at least analyze such an alternative in its EA.

A. DEQ Failed to Analyze a Reasonable Range of Alternatives.

DEQ failed to comply with MEPA's basic requirement to consider "reasonably available and prudent" alternatives to the proposed action. A.R.M. 17.4.609(3)(f). The combined EA for Permits 0030457 (untreated discharge) and 0030724 (partial treatment) contained only two alternatives: issue the permit sought by Fidelity or leave the same permit in place (DEQ's no action alternative). (App. G, EA, p. 14-15). The EA did not contain an alternative addressing the benefits and drawbacks of requiring full treatment of the discharge for either permit. The record demonstrates that Fidelity has an operational treatment facility using ion-exchange technology to remove salts from CBM water before discharge. (App. F, Statement of Basis Permit 0030724, p. 2). The ion-exchange treatment process is capable of "removing sodium to less than 0.5mg/L resulting in an SAR of 0.1 or less." (*Id.* p. 3.) Ion-exchange treatment thus can treat CBM pollution to the ambient (and generally excellent) water quality of the Tongue. Such an alternative is "reasonable," "achievable under current technology" and "economically feasible" under MEPA. § 75-1-201(1)(C)(I). Under the plain language of MEPA it was arbitrary for DEQ to reject consideration of a full treatment alternative.

DEQ defends its failure to analyze alternatives to discharging untreated CBM wastewater into the Tongue River on the basis that it was powerless to do so and therefore such alternatives were not “presently available due to statutory constraints.” (DEQ Br. 40-43.) DEQ’s denial of its own authority lacks merit.

First, DEQ’s obligation to explore and compare all reasonable alternatives is separate and apart from its duties under the WQA. The above quoted section from MEPA proves that it is well within DEQ’s MEPA authority to consider a treatment alternative. This Court requires that DEQ take a “hard look” at the environmental impacts of issuing an MPDES permit. *Clark Fork Coalition v. DEQ*, 2008 MT 407 ¶ 47. The hard look necessarily includes developing alternatives that are more protective of the environment.

As discussed in the Tribe’s brief in Part I.A.3, § 75-5-305(1), MCA only prohibits the Board, not DEQ, from imposing industry-wide treatment requirements when the Board’s rules deem a discharge to be nonsignificant under nondegradation principles. DEQ’s—and the district court’s—interpretation of this statute is contrary to its plain language, which applies solely to the Board. Moreover, the district court’s interpretation of the provision was overbroad. (App. A, pp. 33-34). While the district court was correct to conclude that the Board is the only state agency empowered to “adopt treatment standards for an industry,” this provision says nothing about DEQ’s authority to impose TBELs on a case-by-case

basis using its BPJ. *Id.* (34). As discussed above, DEQ is **required** to include such limitations under the CWA. If DEQ lacked authority to consider alternative methods of pollution control when issuing an MPDES permit as it now claims, EPA could never have transferred authority to DEQ to administer the discharge permit program. *See* 33 U.S.C. § 1342(b)(1)(A) (prior to delegation of permitting authority, the state must have authority to issue permits which “insure compliance with” the technology-forcing standards of 33 U.S.C. § 1311).

DEQ also argues that its consideration of alternatives is limited to those adopted by the Bureau of Land Management and Board of Oil and Gas Conservation through the Programmatic CBM Record of Decision (ROD). (DEQ Br. 40-41.) DEQ’s argument is wrong. The ROD states Water Management Plans must include “management and mitigation options so there will be **no degradation**, as defined by MDEQ to water quality in any watershed. Degradation as defined in 75-5-103(5) Montana Code annotated means a change in water quality that lowers the quality of high-quality waters . . .” The ROD then states that “**water management options include . . . injection [and] treatment.**” (ROD, p. 8, attached to DEQ Summary Judgment Br. as Ex. 14). DEQ has explicit authority to include a treatment alternative. Additionally, Fidelity’s permit 0030724 proves that at least consideration of a treatment alternative is “prudent” to

treat its CBM water in Permit Number 0030457. Therefore, the EA should have evaluated such an alternative.

B. DEQ Failed to Adequately Analyze the No Action Alternative.

DEQ's alternatives analysis was also inadequate for failing to analyze a true "no action" alternative—in this case, the denial of Fidelity's permit applications. DEQ argues that its cursory analysis of the no action alternative did not violate MEPA because the statute does not require analysis of a no action alternative in an EA and DEQ never determined that such an alternative was necessary under § 75-1-201(1)(b)(i)(B), MCA. (DEQ Br. at 44-46.)

DEQ claims that the alternative the EA labels "No Action" is in fact an "inaction" alternative and therefore the agency never "determined" that a no action alternative was necessary to its analysis. (DEQ Br. at 45 (citing App. G (13))). This resort to semantics underscores the weakness of DEQ's argument. DEQ contends that the "inaction" alternative is different from a denial of the permit applications because Fidelity would remain authorized to discharge untreated water under its existing permit. There is simply no substance to this purported distinction. By declining to act on Fidelity's renewal permit application, DEQ would be doing nothing different than denying it. Thus, DEQ has implicitly "determined" that the no action alternative is necessary to its analysis. Indeed, without it, the EA would plainly be inadequate. *See EPIC v. U.S. Forest Serv.*, 234 Fed. App. 440, 442-433 (9th Cir. 2007) (holding EA's analysis of no action and a

single action alternative inadequate and distinguishing *Native Ecosystems Council v. U.S. Forest Serv.*, 428 F.3d1233, 1249 (9th Cir. 2005)). Finally, DEQ has no response to the Tribe’s argument that §75-1-201(1)(b)(v), requires a no action analysis because the alternative analysis it requires is not restricted by § 75-1-201(1)(b)(i)(B), MCA. (See Tribe’s Opening Br. at 41.)

DEQ never defends the merits of its one-paragraph no action analysis. Instead, it contends that the district court, which held that a true no action alternative (denial of the permit) was not available because no cause existed to deny the permit under ARM 17.30.1363, was correct. (DEQ Br. at 45-46; App. A, at 35-36)). DEQ’s argument that it has virtually no authority to deny an MPDES permit application is wrong for several reasons, including that A.R.M. 17.30.1363 only applies to renewal applications, so it does not control DEQ’s decision on the new application for Permit MT-0030724. (Tribe’s Opening Br. at 42-43.) Thus, the EA’s failure to include a full analysis of the true no action alternative—denial of both permits—renders it inadequate.

Fidelity contends that DEQ satisfied MEPA because “no action” is the same as preserving the status quo. (Fidelity Br. at 36-37 (citing *American Rivers v. FERC*, 201 F.3d 1186, 1201 (9th Cir. 2000))). However, MEPA equates no-action with “noncompletion” or “denial” of the proposed action. § 75-1-201(1)(b)(iv)(C)(IV), MCA; A.R.M. 17.4.603(2)(a)(iii). Unlike the ongoing

hydropower sales in *American Rivers*, the extension of Permit 0030457 would have expired if the renewal application was denied. *See* A.R.M. 17.30.1313. A perpetual extension after permit denial would also violate both the WQA's and CWA's five-year limit on discharge permits. A.R.M. 17.30.1346(1); 33 U.S.C. § 1342(b)(1)(B).

CONCLUSION

Based on the foregoing, the judgment of the district court should be reversed on all counts, and the MPDES Permits should be voided and remanded to DEQ.

RESPECTFULLY SUBMITTED this 16th day of October, 2009.

REYNOLDS, MOTL & SHERWOOD

By _____
Brenda Lindlief Hall

CERTIFICATE OF COMPLIANCE

Pursuant to Rule 27 of the Montana Rules of Appellate Procedure, I certify that this Brief is printed with a proportionately spaced Times New Roman text typeface of 14 points; is double spaced; and the word count calculated by Microsoft Word 2004 for Mac is 4,000, not averaging more than 280 words per page, excluding caption, certificate of compliance, and certificate of service.

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I certify that on October 16, 2009 a true and correct copy of the foregoing was sent by U.S. mail, first class postage prepaid, to the following:

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