

IN THE SUPREME COURT
OF THE STATE OF MONTANA

Supreme Court Case No. DA 09-0131

On Appeal from the Montana Twenty-Second Judicial District Court, Big Horn
County, the Honorable W. Blair Jones, Presiding

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

Plaintiffs and 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 and Appellees.

**APPELLEE DEPARTMENT OF ENVIRONMENTAL QUALITY'S
ANSWER BRIEF**

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STATEMENT OF ISSUES

1. Whether the Montana Water Quality Act (WQA), and its implementing regulations, mandate the imposition of technology-based limits in individual discharge permits, in accordance with Section 402(a)(1) of the federal Clean Water Act (CWA), when that provision of the CWA applies solely to the U.S. Environmental Protection Agency (EPA) and is discretionary.

2. Whether the Department of Environmental Quality's use of the 2003 nonsignificance criteria, which were approved by EPA, violated the state and federal antidegradation policies.

3. Whether DEQ's analysis of alternatives under the Montana Environmental Policy Act (MEPA) was reasonable given that DEQ's authority to impose treatment or deny issuing a Montana Pollutant Discharge Elimination System (MPDES) permit is constrained by state law and rules implementing the CWA.

STATEMENT OF THE CASE

This case involves a challenge to DEQ's decision to issue two MPDES permits to Fidelity Exploration & Production Company (Fidelity) on February 3, 2006. These permits were developed by DEQ over a period of five years after being modified in response to comments to ensure that all

applicable nondegradation requirements were met and cumulative impacts addressed. Not satisfied with the outcome, the Northern Cheyenne Tribe (Tribe) filed a complaint on April 3, 2006, alleging violations of the federal CWA, WQA, the Montana Constitution, state and federal nondegradation policies, and MEPA.

Tongue River Water Users' Association and Northern Plains Resource Council (hereafter "Water Users") intervened alleging claims identical to the Tribe. Fidelity intervened as defendant. All parties submitted cross-motions for summary judgment and the Court heard oral argument on February 28, 2007. On December 9, 2008, the Court issued an order granting summary judgment in favor of the Defendants on all claims. Plaintiffs now appeal.

STATEMENT OF FACTS

I. Statutory Background

A. The Clean Water Act

The CWA has been described as a state and federal partnership created by the common goal of "restoring and maintaining" the Nation's waters. *Arkansas v. Oklahoma*, 503 U.S. 91, 101 (1992). To achieve this goal, the CWA divides responsibilities between the federal government and the states for purposes of promulgating two types of water quality measures. *Id*; see also, *PUD No.1 of Jefferson City v. Washington Dep't of Ecology*,

511 U.S. 700, 704 (1994). Under Sections 301 and 304(b) of the Act, EPA is required to "establish and enforce" technology-based effluent limits on individual discharges from point sources. *PUD No.1*, 511 U.S. at 704 (citing, 33 U.S.C. §§ 1311, 1314(b)). In distinction, states are required to adopt "... comprehensive water quality standards (WQS) establishing water quality goals for all intrastate waters." *Id.*

The CWA further divides responsibilities among the state and federal government by establishing two permit programs. Under Section 402(b), states issue permits under the authority of state law, after EPA approves the program meeting the criteria in 402(b). 33 U.S.C. § 1342(b). EPA issues federal permits under the authority of Section 402(a) in states without approved programs. *Id.* § 1342(a). Upon approval of a state program, such as Montana's MPDES program, EPA "suspends" the issuance of federal permits within that state. *Id.* § 1342(c). As Section 402 makes clear, "... once the state has secured approval of its own permit program, its actions in permit matters are those of the state itself." *Washington v. EPA*, 573 F.2d 583, 584 (9th Cir. 1978).

Although states issue permits independent of direct federal regulatory control, the CWA provides EPA with a residual "supervisory" role over states. *Id.* EPA may, if it finds that a permit or program fails to meet federal

requirements, veto individual permits or withdraw approval of the entire state program. 33 U.S.C. § 1342(c)-(d).

B. Technology-based Limitations

The 1972 CWA shifted Congress' efforts to control pollution "... away from the enforcement of water quality standards and toward the enforcement of technological standards." *Natural Resources Defense Council (NRDC) v. EPA*, 915 F.2d 1314, 1316 (9th Cir. 1990).

The new technological standards required under Section 301(b) are promulgated by EPA as regulations, using the guidelines in Section 304(b), and apply to categories or classes of industry. *E.I. Du Pont De Nemours & Co. v. Train*, 430 U.S. 112, 129 (1976); 33 U.S.C. §§ 1311(b), 1314(b). The technological standards were intended to maximize equity among dischargers by establishing uniform standards for each class of industry. *Id.* As explained by Senator Muskie, "... this goal of uniformity required that EPA focus on classes or categories of sources in formulating effluent limitations." *Id.* Thus, the federal standards "... assure that similar point sources with similar characteristics meet similar effluent limitations." *NRDC v. EPA*, 859 F.2d 156, 200 (D.C. Cir. 1988).

In situations where industry-wide standards have not been promulgated, Section 402(a)(1) provides "... that in this situation, EPA *may*

establish effluent limitations on a case-by-case basis according to its 'Best Professional Judgment (BPJ).'" *NRDC v. EPA*, 863 F.2d 1420, 1424 (9th Cir. 1998) (*citing* 33 U.S.C. § 1342(a)(1) (emphasis added). When EPA issues permits using BPJ, it must consider the same factors used to establish national effluent limits under 304(b). *Id.* at 1425.

Despite Congress' high expectations of the new technology-based limits, Congress recognized that the federal standards may be inadequate to protect water quality. *NRDC*, 915 F.2d at 1317. "To deal with this problem, Congress supplemented the 'technology-based' limitations with 'water-quality-based' limitations." *Id.* Consequently, if EPA's technological limits are not sufficient to meet applicable WQS, "... NPDES permit writers were to impose ... any more stringent limitation on discharges necessary to meet the water quality standards." *Id.*, *citing* 33 U.S.C. § 1311(b)(1)(C); *see also*, *PUD No. 1*, 511 U.S. at 704 ("... water quality standards provide 'a supplementary basis ... so that numerous point sources, despite individual compliance with (federal) effluent limitations, may be further regulated to prevent water quality from falling below acceptable levels.'") As candidly explained by EPA, Congress retained the states' WQS as a "back up" measure in the event the new technology limitations failed. 64 Fed. Reg. 37,073 (July 19, 1999).

In short, "effluent limitations" - whether based on technology or water quality - serve the single purpose of eliminating pollution by restricting the "quantities, rates, and concentrations" of pollutants from individual discharges through enforceable permit limits. *EPA v. State Water Resources Control Board (State Board)*, 426 U.S. 200, 204 (1976). "An NPDES permit serves to transform generally applicable effluent limitations and other standards - including those based on water quality - into enforceable permit limits." *Id.* at 205.

C. Water Quality Standards

States have primary responsibility, albeit subject to EPA's review and approval, to adopt WQS that protect the quality of all waters within each state. 33 U.S.C. § 1313(c). Under Section 303(c), the states' WQS consist of two components: (1) the designated uses of waters, such as its use for swimming and fishing; and (2) water quality criteria to protect the uses. 33 U.S.C. § 1313(c)(2)(A).

The designated uses define the water quality "goals," while the criteria serve as the regulatory basis for limiting permits to achieve these goals. 40 CFR 131.2. EPA's regulation explains that state WQS serve as "... the regulatory basis for the establishment of *water-quality-based treatment controls and strategies beyond the technology-based levels of treatment*

required by sections 301(b) and 306 of the (CWA)." Id. (emphasis added)

D. Federal Antidegradation Policy

By regulation, EPA requires states to adopt and include an antidegradation policy as part of their WQS. 40 CFR § 131.12. Under that regulation, states' antidegradation policies must include three levels or "tiers" of increasingly stringent requirements.

"Tier 1" provides a level of protection that applies to all waters by requiring the protection of existing uses. *Id.* § 131.12(a)(1). "Tier 2" requires that "high quality" waters "be maintained" unless justified by important economic and social reasons and applies to waters whose quality is better than required by the WQS. *Id.* § 131.12(a)(2). "Tier 3" applies to outstanding resource waters, such as waters in national wilderness areas, and prohibits any change in water quality, regardless of social or economic reasons. *Id.* § 131.12(a)(3).

E. Montana's Nondegradation Policy

Montana's nondegradation policy is contained in statute and is the functional equivalent of the federal antidegradation policy.¹ *See* § 75-5-303, MCA. The statute requires the protection of water quality to support existing uses, requires that high-quality-waters "be maintained" unless

¹ Montana has named its antidegradation policy the "nondegradation policy."

degradation is authorized by DEQ after certain findings are made, and prohibits any degradation of outstanding resource waters. The methods for implementing the statute are found in Admin. R. Mont. (ARM) § 17.30.701, *et seq.*

Of relevance here is ARM 17.30.715, which describes the criteria for determining whether certain activities will result in nonsignificant changes in water quality. When an expected change in water quality is determined to be nonsignificant under the rule, the activity is exempt from Tier 2 review under § 75-5-303(3), MCA.

The nonsignificance criteria in the rule contain both numeric and narrative criteria for determining nonsignificance. The numeric criteria apply to parameters that have numeric WQS and are classified as carcinogenic, bioconcentrating, toxic, and harmful parameters. ARM 17.30.715(1)(b)-(f). The narrative criteria in ARM 17.30.715(1)(g) apply only to parameters with narrative WQS. Montana's nondegradation statute and its implementing regulations, including the "nonsignificant" exemptions from Tier 2 review in ARM 17.30.715, were approved by EPA in January 1999. *See* 66 Fed. Reg. 29,951 (June 4, 2001).

II. Administrative Proceedings

A. The 2003 Rulemaking

In 2002, the Montana Board of Environmental Review (BER) initiated rulemaking for the singular purpose of establishing WQS to control and limit the "salty" characteristics of coal bed methane (CBM) water. *Mont. Admin. Reg. (MAR), Notice no. 17-171, Issue No. 6*, at 2269 (Aug. 29, 2002).

DEQ's Ex. 2.² The BER proposed the rules "... to ensure that the designated and existing uses of these waters for agricultural purposes will be protected during the development of CBM currently being proposed in Montana." *Id.* at 2273. As explained by BER, the proposed standards for Electrical Conductivity (EC) and Sodium Adsorption Ratio (SAR) were intended to "... provide a consistent and reliable method of *developing MPDES permit limits* that will protect the designated uses of the affected waters." *Id.* at 2274.

The BER also proposed to adopt a nonsignificance criterion for EC and SAR that applied a narrative threshold. Similar to the narrative criteria in ARM 17.30.715(1)(g), which had previously been approved by EPA in 1999, the 2003 rule prohibited any "measurable effect" on existing uses and any "measurable change" in aquatic life. ARM 17.30.760(6) (2003).

The BER explained that it had considered and rejected proposals

² All of DEQ's Exhibits were submitted with its Motion for Summary Judgment.

recommending a 10% threshold or designating EC and SAR as "harmful" parameters. *DEQ's Ex. 2* at 2278. The BER explained that numeric thresholds for EC and SAR were not justified due to natural fluctuations of water quality in the Tongue and Powder Rivers. *Id.* The BER reasoned that:

"Since the policy of 'maintaining' existing 'high quality' water will not prevent EC and SAR from naturally degrading to the point that standards are exceeded, the alternative of adopting rules that allow only *de minimis* changes in water quality is neither justified nor practical. Regardless of the treatment used by a particular discharger to prevent changes that exceed a *de minimis* threshold, the Tongue, Powder, and Little Powder rivers will naturally and unpredictably exceed any such criteria throughout the year. Furthermore, a *de minimis* requirement, such as 10% of the assimilative capacity, would be impossible to comply with and enforce."

Id.

The BER also rejected comments suggesting that both the WQS and the narrative criteria for EC and SAR violated the Montana constitution and would harm designated uses. *MAR*, Issue No 8, at 797, 798 (April, 24, 2003). *DEQ's Ex. 3*. The BER disagreed by stating that the standards and the narrative criterion were being adopted for the specific purpose of protecting existing uses. Since the nonsignificance rule categorically prohibited any "measurable effect" to an existing use, no harm could result to those uses. *Id.* at 798.

On August 28, 2003, EPA approved the BER's 2003 rules as being consistent with the CWA and federal antidegradation policy. App. I.

B. The 2006 Rulemaking

On May 17, 2005, a petition was filed with BER requesting it to adopt rules that required treatment of all CBM water and designate EC and SAR as "harmful" parameters.

On May 18, 2006, the BER amended the 2003 rule to designate EC and SAR as "harmful," but declined to adopt the petitioners' request for rules mandating treatment or reinjection of all CBM water. App. H. BER found that the data purporting to demonstrate the technical feasibility of treatment or reinjection was "inconclusive." *Id.* at 1262, 1263. Although BER agreed to amend the 2003 rule, BER explained that its reasons for doing so were *not* premised on the belief that the 2003 rule unlawfully exempted EC and SAR from nondegradation review. *Id.* at 1247, 1248. The BER stated it was amending the rule because it was "uncomfortable" with retaining a narrative nonsignificance criterion for EC and SAR, which historically had been used only for parameters that have no numeric WQS. *Id.* at 1251. In order to achieve regulatory consistency, the BER designated EC and SAR as "harmful" so that those parameters would be treated in the same manner as all other parameters that have numeric WQS. *Id.*

In February 2008, EPA approved the 2006 "harmful" designation of EC and SAR after noting that the change "simply makes application of

nondegradation to EC and SAR consistent with Montana's statewide approach." App. J at 4. EPA also noted that, during its review of the 2006 amendment, it had revisited the 2003 rule. *Id.* at 3. Based on its review, EPA concluded that both the 2003 and 2006 nondegradation rules were "within a range of options" considered by EPA to be consistent with the federal antidegradation regulation at 40 CFR 131.12. App. J. at 3, 4.

III. Fidelity's MPDES Permits

A. Renewed Permit No. MT 0030457

In 2000, DEQ issued Permit No. MT 0030457 to Fidelity prior to the adoption of numeric standards for EC and SAR. The permit authorized discharges of untreated CBM water to the Tongue River at a maximum allowed rate of 1,600 gallons per minute (gpm) from 16 outfalls. The permit expired in 2002 but was administratively extended until a new permit could be issued. Tribe's Exs. 26, 27.

After the BER adopted standards for EC and SAR, Fidelity filed supplemental information to support its September 2001 application for a renewed permit. DEQ's Ex. 7. The supplemental information analyzed the maximum discharge rates that could be allowed without violating the new standards for EC and SAR. *Id.* at 56, 57. Since instream concentrations of EC and SAR are relatively low during high flow events, Fidelity proposed a

series of discharge rates that allowed more discharge during high stream flow events. *Id.* at 7, 56, 57. Based on the results of this analysis, Fidelity proposed discharge rates allowing 14,000 gpm during the non-irrigation season and 8,000 gpm during the irrigation season after demonstrating that the standards for EC and SAR would be met at those rates. *Id.* at 57.

B. New Permit No. MT 0030724

In 2004, Fidelity applied for a new permit to discharge 1,700 gpm of partially treated CBM water. DEQ's Ex. 8. Fidelity requested the new permit to "assess the feasibility and costs of operating a full-scale treatment system." *Id.* at 1. Fidelity proposed to blend the treated CBM water with 25% untreated water. By blending at this rate, the discharge would meet the WQS for EC and SAR prior to being discharged into the Tongue River. *Id.* at 2.

C. DEQ's Approval of Fidelity's Permits

In April 2005, DEQ issued a notice of its intent to grant Fidelity's applications for a new and a renewed MPDES permit. Tribe's Exs. 32, 33. DEQ requested comment on the draft permits, which were accompanied by fact sheets supporting the permits, and an environmental assessment (EA). *Id.* After two public hearings on the permits, public comment closed in June 2005. *Id.*

During the comment period, DEQ received comments objecting to any discharge that would "cause or contribute" to the impaired water quality of the Tongue River near Miles City. Tribe's Ex. 32 at 6-7. For this reason, DEQ delayed issuing the permits to conduct an additional analysis of potential effects that the discharges might have on waters that were already impaired by salinity. *Id.* At the conclusion of the analysis, DEQ issued the permits in February 2006.

The final permit for the new discharge authorized one outfall of treated CBM water at a rate of 1,700 gpm throughout the year. App. E. The final permit for the renewed permit imposed flow rates that were significantly lower than those proposed by Fidelity, which would have allowed a maximum rate of 14,000 gpm in the winter and 8,000 gpm in the summer. The final permit also imposed more restrictive flow rates than originally proposed in the draft permit for March through June.

DEQ explained that, due to its recent finding that the lower reach of the Tongue River was impaired for salinity, the agency had conducted an analysis to determine whether the draft permits would "cause or contribute" to the impairment. Tribe's Ex. 32 at 6. Baseline data collected by DEQ indicated that the standards for EC and SAR were not being met at Miles City during March through June. *Id.* at 7. In order to mitigate the

impairment, DEQ reduced the flow rates in the renewed permit during those months from 5,250 gpm to 2,375 gpm. *Id.* The flow rates for the remaining year were restricted to 2,500 gpm during November through February and 1,600 gpm during July through October. App. C at 8.

The flow rates in the final permits implement water-quality-based effluent limits (WQBELs) that were developed for parameters that had the potential to exceed WQS, including the nonsignificance criteria in ARM 17.30.715. App. D at 4-13; App. F at 4-13. In the renewed permit, WQBELs were developed for temperature, flow, total dissolved solids (TDS), ammonia, and fluoride. App. D at 9. For the new permit, WQBELs were developed for temperature, total nitrogen, flow, TDS, EC and SAR. App. F at 9, 13. No WQBELs were developed for EC and SAR in the renewed permit, because there was no potential that there would be exceedances of the WQS and nonsignificance criteria for these parameters due to the flow restrictions imposed in the permits. App. D at 13.

EPA did not object to or veto Fidelity's permits due to the lack of technology-based limits when it submitted written comments on the draft permits. DEQ's Ex. 12.

STANDARD OF REVIEW

In granting summary judgment, the District Court ruled, as a matter of

law, that neither the CWA nor the WQA mandate the imposition of technology-based limits using BPJ in state-issued permits. App. A at 18-19. The District Court also ruled, as a matter of law, that DEQ's reliance on the 2003 nonsignificance rule complied with the state and federal antidegradation policies. *Id.* at 25. Since there are no factual disputes, the Supreme Court reviews the District Court's conclusions of law *de novo*, determining their correctness. *Friends of the Wild Swan v. Dep't of Natural Resources*, 2005 MT 351, ¶ 6, 330 Mont. 186, ¶ 6, 127 P.3d 394, ¶ 6.

An agency's decision implementing MEPA is reviewed by courts to determine if the record establishes that the agency acted "arbitrarily, capriciously, or unlawfully." *Friends of the Wild Swan v. Dep't of Natural Resources*, 2000 MT 209, ¶ 27, 301 Mont. 1, ¶ 27, 6 P.3d 972, ¶ 27. When making this factual determination, "the reviewing court 'must consider whether the decision was based on a consideration of the relevant factors and whether there has been a clear error of judgment.' This inquiry must be 'searching and careful,' but 'the ultimate standard of review is a narrow one.'" *Id.* (quoting *Marsh v. Oregon Natural Resources Council*, 490 U.S. 360, 378 (1989)).

SUMMARY OF ARGUMENT

The District Court correctly ruled that there is nothing in the CWA or

Montana's regulations implementing the MPDES program that expressly and unequivocally command states to develop technology-based limits, using BPJ, when EPA has failed to promulgate industry-wide standards. In an attempt to overcome this lack of an express statutory requirement, the Tribe and Water Users now argue that the overall purpose, structure, and goals of the CWA impose this requirement and also because DEQ "stands in the shoes" of EPA. Nowhere in their briefs, however, have they identified a single provision in the CWA - or case law construing the Act - that supports this argument.

Their argument that the CWA directly controls the content of state permits so that state permits must be identical to EPA's is contrary to the provisions of the CWA. State permits are issued under authority of state law independent of federal law. 33 U.S.C. §1342(b). And while similarity exists, permits issued by EPA are not the same as the states. *See Arkansas*, 503 U.S. at 102-103 (*citing* 33 U.S.C. § 1342(a)). Notably, none of the criteria in 402(b), which a state must meet to obtain program approval, require states to develop technology-based limits using BPJ, as EPA may do under 402(a).

Finally, the argument that DEQ cannot rely on water-quality-based limits because they are independent of technology-based limits misses the

point. The point is there is no express requirement for DEQ to impose technology-based limits when there are no federally promulgated standards. Moreover, 301(b)(1)(C) of the CWA expressly requires "any more stringent" limitation than the technology-based standards necessary to achieve the states' water quality standards. 33 U.S.C. § 1311(b)(1)(C). Given that there is no obligation on states to develop technological standards on a case-by-case basis, and the fact that state law prohibits DEQ from imposing such standards on nonsignificant discharges (§ 75-5-305(1), MCA), DEQ's reliance on water-quality-based limits was appropriate and required by 301(b)(1)(C) of the CWA.

The District Court's conclusion that DEQ had no choice but to use the 2003 rule, having the force and effect of law when the permits were issued, is correct. App. A, 23-24, *citing Merlin Meyers Revocable Trust v. Yellowstone County (Merlin Meyers)*, 2002 MT 201, ¶¶ 22, 25, 311 Mont. 194, ¶¶ 22, 25, 53 P.2d 1268, ¶¶ 22, 25. Despite the Tribe's and Water Users' disagreement with the 2003 rule, there is no merit to the argument that the BER believed the 2003 rule was unlawful. As noted by the District Court, BER expressly rejected that contention in its response to comments during the 2006 rulemaking. *Id.*, 24. Given that EPA approved the 2003 rule as going beyond "what is minimally required" under the federal

antidegradation policy, the District Court correctly found that the permits fully complied with both state and federal antidegradation policies. *Id.*, 25.

Finally, the range of alternatives considered by DEQ in the EA accompanying the permits was reasonable given the constraints imposed by state and federal law. DEQ did not consider treatment alternatives, because DEQ lacks authority to develop and impose technology-based limits under § 75-5-305(1), MCA. In addition, DEQ could not deny the permits unless "cause" existed, as defined by state rules implementing the MPDES program. Given DEQ's lack of authority to impose the above alternatives, the alternatives were not "reasonably available" and therefore did not need to be considered in the EA.

ARGUMENT

I. Fidelity's Permits Comply with the Clean Water Act and Montana's Water Quality Act by Imposing Effluent Limits that Protect Water Quality

The entire argument of the Tribe and Water Users consists of inferences, derived from a conglomeration of statutes, rules, and Congressional goals, to support the theory that states must impose technology-based limits using BPJ when no promulgated standard exists. Rather than identify an express statutory requirement commanding states to use BPJ, they argue that the CWA's purpose, history, and structure impose

this obligation. *See e.g.*, Tribe's Br. at 27, 29; Water Users' at 26, 27.

The issue, however, is not whether technology-based-limits are important or desirable, but whether the *law* requires states to develop such limits when there are no federally promulgated standards. *See e.g.*, *Friends of the Wild Swan*, 330 Mont. at 194, ¶ 28 ["... the question here is *not* whether more specific accounting is preferable or even desirable ... the question is whether harvest-level accounting ... *is required by law.*"] (emphasis added).

Despite the numerous citations to statutes and regulations describing the technological standards promulgated by EPA, the Tribe and Water Users have failed to identify a single statute or rule that clearly and unambiguously requires states to develop technology-based limits when no promulgated standard exists. Moreover, since no court has directly addressed the issue presented here, none of the cases relied upon by the Tribe and Water Users support their argument.

A. The CWA Does Not Mandate the Development of Technology-Based Limits by States When There Are No Federal Standards

The sole authority for developing technology-based limits using BPJ

is in 402(a)(1) of the CWA.³ That provision applies only to EPA and is discretionary. Section 402(a)(1) provides that "the Administrator *may* ... issue a permit ..." after ensuring that all federally promulgated technology-based standards are met (§ 402(a)(1)(A)), and, in the event federal standards have not been adopted, impose "... such conditions as *the Administrator determines are necessary* to carry out the provisions of (the CWA)" [§ 402(a)(1)(B)]. 33 U.S.C. § 1342(a)(1)(A)-(B). (emphasis added).

Courts have construed this language as providing EPA with the discretion to impose technology-based limits, using BPJ, prior to the adoption of federal standards. *See NRDC v. EPA*, 863 F.2d 1420, 1425 (9th Cir. 1988) ("In the absence of national standards, the Act authorizes the Administrator to issue permits on 'such conditions as the Administrator determines are necessary to carry out the provisions of [the Act].'"); *see also Trustees for Alaska v. EPA*, 749 F.2d 549, 553 (9th Cir. 1984).

Despite the plain language of 402(a)(1), the Tribe and Water Users argue that 402(a)(1) is mandatory and applies equally to EPA and the states. Tribe's Br. at 26; Water Users' Br. at 17. That same argument, however, was

³ Section 402(a)(1) is cited in EPA's regulations as the only authority for case-by-case effluent limits described in 40 CFR 122.44(a)(1) and 40 CFR 125.3(a)(2). *See also, EPA's NPDES Permit Writers' Manual*, which may be found at www.epa.gov/npdes/pubs, Chapter 5, § 5.1.4 ("The authority for BPJ is contained in Section 402(a)(1) of the CWA.").

made and rejected in *E.I. du Pont Nemours & Co. v. Train*, 430 U.S. 112 (1976). In that case, industry argued that EPA had no authority to adopt national standards under 301(b). *Id.* at 124. Rather, industry contended that § 402 of the CWA required state and federal permit writers to develop technological standards for individual discharges. *Id.* As framed by the Court, the issue of whether technology standards were to be promulgated as rules or developed in permits on a case-by-case basis "... is tied to the question of *whether the Act requires the Administrator or the permit issuer to establish the limitations.*" *Id.* at 128 (emphasis added).

In upholding EPA's authority to promulgate national standards under 301(b), the Court dismissed the contention that 402 provided the only mechanism for establishing and enforcing technological limits. The Court found that "... [402] *does not mandate either the Administrator or the States to use permits as the method of prescribing effluent limitations.*" *Id.* at 120 (emphasis added). Given the Court's construction of 402 as lacking any mandate to develop technology-based limits in individual permits, the Tribe's and Water Users' argument must fail. Nothing in 402(a) mandates either EPA or the states to impose technology-based limits in individual permits using BPJ when there are no national standards to apply.

Similarly, the argument that sections 301, 304, and 306 of the CWA

mandate case-by-case promulgation of technological standards is not supported by the plain language in those statutes. *See e.g.*, Tribe's Br. at 33; Water Users' Br. at 16, 17, 20-24 (*citing* 33 U.S.C. §§ 1311, 1314, 1316). When construing those provisions, the U.S. Supreme Court concluded that, "301 limitations are to be adopted by the Administrator, ... based primarily on classes or categories, and ... take the form of regulation." *Train*, 430 U.S. at 129. In turn, the 301 regulations rely on guidelines, promulgated by EPA under 304, to determine the appropriate technology for the 301 regulations. *Id.* at 131. Finally, 306 requires EPA to promulgate rules establishing "Federal standards of performance" for new industries. 33 U.S.C. § 1316(b)(1)(B). In short, all of the technology-based provisions of the CWA instruct EPA, not the states, to develop and promulgate national standards.

After reviewing the same statutes, the Ninth Circuit reached the same conclusion. *Washington v. EPA*, 573 F.2d 583 (9th Cir. 1978). Similar to the arguments made here, the Ninth Circuit rejected the contention that 301(b) required an *ad hoc* determination of technology standards using BPT in the absence of federally promulgated standards. *Id.* at 591. As explained by the Ninth Circuit, "The express language of § 301(b) does not require ... BPT [best practicable control technology] no matter how expressed or determined. Rather, it calls for the achievement of 'effluent limitations ...

which shall require the application of [BPT] as *defined by the Administrator pursuant to Section 304(b) of (the CWA)*" *Id.* (quoting 301(b)(1)(A))

Just as the CWA is bare of any express command requiring BPJ limits, so are the federal regulations. For example, 40 CFR 125.3(a) states: "Technology-based treatment requirements *under section 301(b)* represent the minimum level of control that *must* be imposed in a permit issued under section 402 of the Act." (emphasis added). Since 301(b) refers to regulations promulgated by EPA, the "minimum level of control" specified by the rule does not require BPJ limits for individual permits under 402(a). Moreover, since the second sentence of the rule directs the permit writer to other regulations for "additional or more stringent limitations," it is also apparent that the minimum controls promulgated under 301(b) will not always be required if a more stringent limitation applies.

For example, 40 CFR 125.3(a) directs the permit writer to 40 CFR 122.44 for other "more stringent limitations." Under subsection (d)(1) of that rule, permit writers are to impose any "more stringent limitation" necessary to achieve state water quality standards. 40 CFR 122.44(d)(1). When there are no promulgated "minimum" standards to apply, 301(b)(1)(C) and 40 CFR 125.3 support DEQ's position that achieving state water quality standards is the "more stringent" limitation that must be imposed in permits.

33 U.S.C. § 1311(b)(1)(C).

And while 40 CFR 122.44 begins by boldly declaring that "each NPDES permit shall include" a laundry list of conditions, including BPJ limits, those conditions "shall" be included only "when applicable." In reading this regulation, the District Court correctly construed 40 CFR 122.44 to provide DEQ the discretion to determine that BPJ limits are not applicable under the plain language of the rule. App. A at 19. First, the District Court found that the technological standards under subsection (a)(1) of the rule were not applicable, because there was no basis for establishing technology-based limits pursuant to that subsection. *Id.* The District Court further reasoned that, since there were no promulgated standards, and 402(a)(1) did not command states to use BPJ, DEQ's reliance on water-quality based limits to control Fidelity's discharge was consistent with the CWA. *Id.* at 19, 20.

Finally, none of the cases relied upon by the Tribe and Water Users in district court and in this proceeding address the specific issue presented here - i.e., whether 402(a)(1) mandates the development of technology-based standards when no federal standards exist. As demonstrated below, *Texas Oil & Gas Ass'n v. EPA (Texas Oil)*, 161 F.3d 923 (5th Cir. 1988) and *NRDC v. EPA*, 859 F.2d 156 (D.C. Cir. 1988), do not support the theory that the exercise of BPJ under 402(a) is mandatory and applies equally to EPA

and the states.

Texas Oil did not involve a dispute over BPJ limitations. Instead, *Texas Oil* involved a dispute over technology-based standards promulgated by EPA under 301(b), 304(b), and 306 of the CWA. Consequently, the only issue before the court was whether the national standards met the requirements of the CWA. *Texas Oil*, 161 F.3d at 927. The court's explanation of how EPA's promulgated standards are enforced through NPDES permits, including EPA's authority to impose and enforce BPJ limits, is therefore merely dicta.

Similarly, *NRDC* involved a challenge to various rules promulgated by EPA, including a rule authorizing EPA to veto state permits whenever EPA determined that the state's BPJ limits were inadequate. *NRDC*, 859 F.2d at 181. Like *Texas Oil*, the issue before the court was *not* whether 402(a) mandated BPJ, but rather whether Congress intended EPA's veto authority to extend to state permits that choose to impose BPJ limits. *Id.* at 181. Since the *NRDC* court did not squarely address the issue presented here, its pronouncement that 402(a) requires BPJ is again only dicta. Read in context, the D.C. Circuit was explaining that, if state permit writers choose to exercise BPJ, they must follow the same statutory factors that EPA

must adhere to when using BPJ under 402(a).⁴ *Id.* at 183.

The complete lack of any express statutory or regulatory mandate to use BPJ is underscored by the Tribe's resort to EPA's guidance for support. Tribe's Br. at 30, *citing NPDES Permit Writer's Manual (Manual)*. But even EPA's guidance fails to clearly say that BPJ is mandatory. Although the *Manual* suggests that the "derivation" of technology-based limits is the first-step in writing a permit, it is questionable whether *deriving* technological standards includes *developing* technological standards using BPJ, as argued by the Tribe. Other sections of the *Manual* suggest that "deriving" technology-based limits requires permit writers to determine which promulgated standard (i.e., ELG) applies. *See, e.g., Manual*, Chapter 5, p. 56 ("Derivation of effluent limits based on ELGs requires that the permit writer have a general understanding of the ELGs for all industrial categories, and detailed knowledge of the ELGs applicable to the permittee.")

Even when the *Manual* actually discusses BPJ, the guidance does not say that BPJ is mandatory. Instead, EPA's guidance cautions permit writers to clearly explain the need for BPJ limits in order to avoid challenges to the permit limits. *Id.*, p. 69. This cautionary advice strongly implies that the use

⁴ Similarly, the "comment" cited by the Tribe and the Water Users found in 40 CFR 125.3(c)(2)(ii) simply explains that, *if BPJ is used*, the statutory factors listed in the rule "must be considered in all cases, regardless of whether the permit is being issued by EPA or an approved State."

of BPJ is not mandatory, but discretionary. In any event, since EPA's guidance cannot substitute for an express statutory requirement to use BPJ, the *Manual* fails to support Appellants' argument.

B. States Permit Programs Approved by EPA under 402(b) of the CWA, Are Not Required to Have the Same Terms and Conditions as Federal Permits Issued Under 402(a)

The Tribe's and Water Users' repeated assertion that DEQ "stands in the shoes" of EPA so that DEQ's permits must be the same as EPA's ignores the two distinct permit programs established by the CWA. Tribe's Br., 23, 24, 26, 27; Water Users' Br. 12, 19, 20. Moreover, if the CWA applies "whole cloth" to states, as argued by Water Users, this imposition of federal law would amount to an unconstitutional coercion of states prohibited by the Tenth Amendment. *See e.g., Printz v. United States*, 521 U.S. 898, 925 (1997) ("... the Federal Government cannot compel States to implement, by legislation or executive action, federal regulatory programs.").

As explained earlier, the "partnership" established by the CWA anticipates separate roles for the state and federal government. *Arkansas*, 503 U.S. at 101. Under 402(a), Congress has directed EPA to issue federal permits in compliance with 402(a)(1)-(5). 33 U.S.C. § 1342(a). In distinction, Congress has allowed states to issue permits under the authority of state law provided EPA approves the state program based upon a

demonstration that state permits will meet the nine criteria under 402(b)(1)-(9). *Id.* § 1342(b). Notably, although the 402(b) criteria require the application of national technological standards in state permits, none of the criteria require the application of technology-based limits using BPJ under 402(a)(1). *See* 33 U.S.C. § 1342(b)(1)(A) *citing* § 1311 (301) and § 1316 (306).

The omission of 402(a) from the list of specific CWA provisions that are applicable to state programs under 402(b) indicates that Congress did not intend to mandate the use of BPJ by states. As a matter of statutory construction, when "Congress includes particular language in one section of a statute but omits it in another section of the same Act, it is generally presumed that Congress acts intentionally and purposely in the disparate inclusion or exclusion." *Colorado Gas Compression Inc. v. Comm'r of Internal Revenue*, 366 F.3d 863, 867 (10th Cir. 2004) (citations omitted).

Moreover, there is no merit to the argument that 402(a)(3) requires state permits to meet the same "minimum standards" as federal permits. Tribe's Br. at 27. A plain reading of that provision results in the opposite conclusion. Under 402(a)(3), federal permits issued by EPA "... shall be subject to the same terms, conditions, and requirements" as state permits issued under 402(b). 33 U.S.C. § 1342(a)(3). There is no reciprocal

requirement in Section 402(b). For this reason, the D.C. Circuit concluded that the mandate in 402(a)(3) is a one way street - "This provision on its face applies in only one direction: the federal program must meet specific requirements set out in subsection (b), such as a five year fixed permit term and incorporation of effluent limitations." *NRDC*, 859 F.2d at 176; *see also, Arkansas*, 503 U.S. at 103 (Finding that, although federal permits are subject to the "same terms, conditions, and requirements" of state permits, permits issued by EPA must also comply with 401(a) of the CWA).

Given the separate and distinct state and federal permit programs established by the CWA, the simple fact that Montana adopts by reference EPA's regulations does not mean that the state is an agent of EPA or that it must issue permits with the same conditions that EPA may choose to impose. As discussed earlier, neither 402(a) of the CWA nor the federal regulations mandate the use of BPJ, but provide permit writers the discretion to use BPJ when deemed "applicable." In Montana, the permit writer's discretion to impose BPJ is constrained by statute.

Under § 75-5-305(1), MCA, the Montana Legislature has granted the BER the exclusive authority to adopt technology-based requirements for an industry when there are no federal standards. In addition, except for the technology-based standards promulgated by EPA, the statute prohibits the

imposition of technology-based limits on an individual discharge "... when the discharge is considered nonsignificant under rules adopted ..." by BER.

§ 75-5-305(1), MCA.

Specifically, § 75-5-305(1), MCA, provides:

"... For cases in which the federal government has adopted technology-based treatment requirements for a particular industry or activity in 40 CFR, chapter I, subchapter N, the board shall adopt those requirements by reference. *To the extent the federal government has not adopted minimum treatment requirements ... the board may do so through rulemaking ...* ensuring that the requirements are cost-effective and economically, environmentally, and technologically feasible. Except for the technology-based treatment requirements set forth in 40 CFR, chapter I, subchapter N, *minimum treatment may not be required to address the discharge of a parameter when the discharge is considered nonsignificant* under rules adopted pursuant to 75-5-301."

Id. (emphasis added).

The above statute expressly grants BER the authority to adopt technology-based standards for an industry and, by its exclusion, denies DEQ the same authority. DEQ bases its interpretation on the maxim of statutory construction that provides - "the inclusion of one is the exclusion of the other." *See American Wildlands v. Browner*, 94 F.Supp.2d 1150, 1160 (D.Col. 2006) ("Where the law expressly describes a particular situation to which it shall apply, an irrefutable inference must be drawn that what is excluded was intended to be excluded.") Applying that maxim here, the law authorizing BER to adopt technology-based standards for an industry in the

absence of federal standards establishes a Legislative intent that DEQ is without authority to do the same.

Although the Tribe argues that DEQ is not precluded from using BPJ since DEQ's authority to issue permits is independent from BER's rulemaking authority (*see* Tribe's Br. 39), the last sentence in § 75-5-305(1), MCA, applies to both DEQ and BER and clearly forbids the imposition of technology-based limits whenever the discharge is nonsignificant.⁵ Since Fidelity's discharges are nonsignificant under BER's rules, the statute prohibits DEQ from imposing technological limits using BPJ. Consequently, DEQ's reliance on water-quality-based limits to impose "more stringent" limitations when no federal standard exists is reasonable and required by 301(b)(1)(C) of the CWA. 33 U.S.C. § 1311(b)(1)(C).

II. The 2003 Rule Complied with State and Federal Nondegradation Policies

Despite EPA's approval of the 2003 rule, the Tribe and Water Users' strenuously assert that the rule constitutes a *prima facie* violation of the CWA. Although Appellants clearly disagree with the rule, they have not

⁵ In testimony before the Senate Natural Resources Committee, DEQ's water quality specialist, Abe Horpestad, explained the meaning of the last sentence in § 75-5-305(1), as follows:

"It also says if it is nonsignificant under the nondegradation rules, the department cannot require minimum treatment, except where required by the federal requirements." Page 21, Minutes, Senate Natural Resources Committee, February 18, 1995.

identified a single statutory or regulatory provision supporting their argument. To say that all "exemptions from antidegradation review are unlawful" (Water Users' Br., 35) and further assert that the 2003 rule "is less stringent than required by federal law" (Tribe's Br., 36) assumes that EPA has promulgated rules specifying implementation requirements for state antidegradation policies. This assumption is incorrect.

The CWA's antidegradation policy is set forth in its entirety in 40 CFR 131.12. EPA interprets that regulation as providing states with "a great deal of flexibility" in implementing Tier 2 requirements. *See*, EPA's Advanced Notice of Proposed Rulemaking for Water Quality Standards Regulation (ANPRM), 63 Fed. Reg. 36,742, 36,783 (July 7, 1998). Courts have relied on EPA's interpretation of the rule to conclude that "the regulation does not include specific guidelines" for implementing state antidegradation policies. *See e.g., Kentucky Waterways Alliance v. Johnson*, 540 F.3d 466, 476 (6th Cir. 2008) (quoting EPA's ANPRM).

Since the rule does not proscribe implementation guidelines, states have, with EPA's approval, adopted a variety of implementation measures for exempting nonsignificant changes from Tier 2 review. *See*, EPA's ANPRM, 63 Fed. Reg. at 36,783. As explained by EPA, a state's decision to exempt nonsignificant changes in water quality from Tier 2 review "... is a

useful approach that allows States and Tribes to focus limited resources where they may result in the greatest environmental protection." *Id.*

In Montana, the Legislature has expressly authorized BER to adopt criteria exempting "nonsignificant changes in water quality" from Tier 2 review under § 75-5-303, MCA. § 75-5-301(5)(c), MCA. Under this authority, BER adopted the criteria in ARM 17.30.715, which were approved by EPA in 1999. 66 Fed. Reg. 29,951 (June 4, 2001). One of the criteria approved by EPA - applicable to parameters for which only a narrative water quality standard applies - provides an exemption from Tier 2 review if the discharge "... will not have a measurable effect on any existing or anticipated use or cause measurable changes in aquatic life or ecological integrity." ARM 17.30.715(1)(g). In 2003, BER adopted a similar criteria for EC and SAR. App. L.

EPA approved the 2003 rule on August 28, 2003. App. I. In its approval letter, EPA once again explained that it "... has long recognized the appropriateness of focusing antidegradation (nondegradation) evaluations on significant threats to water quality, and the [EPA] believes that nonsignificance thresholds provide a valuable means of maximizing limited State resources." *Id.* at 3. EPA cautioned, however, that its approval would focus on ensuring that the 2003 criteria would exempt "only those regulated

activities that will result in truly insignificant water quality effects." *Id.* at 4.

EPA explained that the 2003 criteria for EC and SAR, like Montana's previously approved narrative criteria in ARM 17.30.715(1)(g), prohibited any measurable change in existing uses, including agriculture uses. *Id.* After noting that the federal requirement to protect "high quality" waters applied solely to the protection of "fishable/swimmable" uses (i.e., aquatic life and recreation), EPA concluded that the 2003 rule went beyond the minimal requirements in 40 CFR 131.12(a)(2) since it also protected agricultural uses. *Id.*

Given EPA's finding that the 2003 rule went beyond the requirements of its own regulation, there is no basis for contending that the 2003 rule violates the federal antidegradation policy. Moreover, the Tribe's belief that EPA's approval is "immaterial," because EPA "cannot rewrite a statute and reshape a policy judgment Congress itself has made," ignores the fact that Congress did not enact the federal antidegradation policy. Tribe's Br. at 36. The requirement that states adopt antidegradation policies is - and always has been - a requirement found only in EPA's regulations. *See* 40 CFR 131.12.

When BER amended the rule in 2006, it did not do so on the belief that the rule was unlawful. As this Court recognized, the BER's primary

reason for amending the rule was "... to achieve regulatory consistency" with existing criteria, which impose numeric criteria on all parameters with numeric water quality standards. *Pennaco Energy Inc. v. BER*, 2008 MT 425, ¶ 40, 347 Mont. 415, ¶ 40, 199 P.3d 191, ¶ 40.⁶ Moreover, BER specifically rejected the notion that the 2003 rule was unlawful. DEQ's Ex. 5 at 1247, 1248. As explained by BER, the 2003 rule allowed DEQ to "... impose any additional restrictions necessary to prevent a measurable change to existing or anticipated uses" in addition to the restrictions in ARM 17.30.715. *Id.* For this reason, the BER concluded that the 2003 rule properly implemented the state and federal antidegradation requirements. *Id.*

The BER's conclusion that the 2003 rule, in combination with the criteria in ARM 17.30.715, adequately protects high quality water is supported by the *de minimis* increases of SAR and EC actually allowed under the permits. The calculations in Appendix V in the Fact Sheet for each permit show the actual increase above ambient concentrations in the Tongue River resulting from the discharge. App. D and F.

In the new permit, the ambient in-stream concentration of SAR will

⁶ Similarly, EPA's approval letter of the 2006 rule also recognized that the amendment of the 2003 rule "simply makes application of nondegradation to EC and SAR consistent with Montana's statewide approach." App. J at 4.

increase from 0.60 to 0.76 during November through February as a result of the discharge. App. F., Appendix V. Although the resulting concentration of 0.76 represents a 26.7% increase of SAR above ambient conditions, it is well below the standard of 5.0 for the non-irrigation season. *See* ARM 17.30.670(2)(a). The above change in ambient concentrations is a small fraction of the change that would occur if the discharge were allowed up to the standard of 5.0 - an 833% increase above ambient conditions. Since the resulting concentration of 0.76 is only 15% of the standard, the water quality of the Tongue River remains better than the standard, i.e., it remains "high quality" in terms of SAR.

For EC, the new permit allows an increase in ambient concentrations from 716 to 719 during November through February. App. F, Appendix V. This is a 0.4% increase in the existing concentration of EC and is well below the non-irrigation standard of 1,500. *See* ARM 17.30.670(2)(a). These same nonsignificant changes occur in the irrigation season. For example, from March through June, EC increases from 584 to 631 (an 8% increase) and, during July through October, the ambient concentrations actually *decrease* from 688 to 659 (a 4% decrease). App. F, Appendix V. Since the monthly irrigation season standard for EC is 1,000, the resulting concentrations are well below the standard. ARM 17.30.670(3)(a).

Consequently, the permit maintains "high quality" water in terms of EC throughout the year.

Although the renewed permit for untreated discharges allows more increases of EC and SAR, the resulting concentrations in the Tongue River throughout the year remain well below the numeric standards. App. D. Consequently, there is no merit to the contention that the 2003 rule merely protects the uses of water by allowing degradation up to the standards.

Appellants' reliance on *Columbus & Franklin County Metro. Park Dist. v. Shank*, 600 N.E.2d 1042 (Ohio 1992) to argue that any degradation is unlawful without Tier 2 review is misplaced. Unlike Montana, Ohio does not provide exemptions for nonsignificant changes in water quality. Instead, Ohio statutes require Tier 2 review whenever there is *any* change, no matter how small the effect. *Shank*, at 1055. For this reason, the *Shank* court's interpretation of Ohio law has little relevance here.

Finally, the District Court correctly ruled that DEQ could not ignore duly enacted statutes and regulations based upon an opinion that the laws are not valid. App. A at 23, citing *Merlin Meyers*. The Appellants' contention that the *supremacy clause* or the Montana Constitution requires a different result should be rejected.

Unlike the water well tests in *Montana Environmental Information*

Center (MEIC) v. DEQ, 1999 Mont. 248, 988 P.2d 1236, Fidelity's discharges are not categorically exempt from all review. Instead, DEQ developed permit limits meeting all of the nonsignificance criteria in ARM 17.30.715 to ensure that the discharge caused only *de minimis* changes in water quality. Consequently, there are no "significant impacts" that implicate Montana's Constitution. *MEIC*, ¶ 79.

Finally, the Tribe's contention that the *supremacy clause* invalidates the 2003 rule misapprehends the legal consequence of EPA's approval. As explained in *Arkansas*, state standards that are approved by EPA "... are part of the federal law of water pollution control" and are effectively incorporated into federal law by EPA regulation as the "applicable" standards. *Arkansas*, 503 U.S. at 110. EPA's regulations reflect the *Arkansas* ruling by specifying that, once EPA approves a state water quality standard, including its antidegradation policy, the standard becomes the "applicable standard" for purposes of implementing the federal CWA. 40 CFR 131.21(c)-(e).

It is undisputed that, at the time the permits were issued, the 2003 rule was the "applicable standard" under the CWA. The Tribe's argument that the *supremacy clause* somehow invalidates the federally applicable rule should be rejected.

III. The Permits Complied with MEPA

The Appellants' criticism of the alternatives in the EA fails to acknowledge that the EA incorporated and "tiered from" a broad range of alternatives in a Final Environmental Impact Statement (FEIS) for CBM development prepared by the Bureau of Land Management (BLM), the Montana Board of Oil and Gas Commission (BOGC), and DEQ. DEQ's Ex. 13 at 1-1. Their argument also ignores DEQ's statement in its Record of Decision (ROD) for the FEIS explaining the agency's limited role in selecting alternatives. Specifically, DEQ explained that its authority to select alternatives for CBM activities was more limited than BLM's or BOGC's, because DEQ's statutory authority over CBM development extended only to ensure "... compliance with air and water quality standards." DEQ's Ex. 15 at 13. Due to these statutory constraints, DEQ did not select an alternative, but rather concurred in the selection of "Alternative E" by the other agencies. *Id.*

In contrast, BLM's and BOGC's statutory authorities allowed those agencies to select from a wide range of options for managing CBM water. For example, the agencies' preferred "Alternative E" included various management options such as using CBM water for beneficial uses, disposing the water into impoundments, re-injecting it beneath the surface, or

discharging it to surface waters. DEQ's Ex. 13, at 2-13, 2-14. "Alternative E" also included a requirement for the submission of detailed Plans of Development (POD) and associated water management plans to BLM and BOGC for approval prior to any decision to issue leases or drilling permits. *Id.* at 2-13.

Ultimately, BLM and BOGC selected "Alternative E" in their respective RODs, including the requirement for the agencies' approval of PODs and water management plans prior to drilling. *See e.g.*, DEQ's Ex. 14. Notably, DEQ did not impose a similar requirement in its ROD, since it has no authority under the WQA to dictate the manner in which a CBM developer manages produced water. DEQ's Ex. 15.

A. The Alternatives Analysis in the EA Was Adequate

MEPA's requirement to take a "hard look" at impacts and consider alternatives is "essentially procedural." *Ravalli County Fish & Game Ass'n v. Mont. Dep't of State Lands*, 273 Mont. 371, 377, 903 P.2d 1362, 1367 (1995). Since it is procedural, MEPA does not change or augment the statutory authority of an agency to "... withhold, deny, or impose conditions on any permit ..." § 75-1-201(5)(a), MCA.

The MEPA procedure to consider alternatives in an EA is governed by feasibility. As explained long ago, "To make an impact statement

something more than an exercise in frivolous boilerplate the concept of alternatives must be bounded by some notion of feasibility." *Vermont Yankee Nuclear Power Corp. v. Natural Resources Defense Council*, 435 U.S. 519, 551 (1978). According to that case, alternatives are not feasible, and therefore do not need to be considered, if they are not *presently available* due to statutory constraints. *Id.* MEPA's implementing regulations contain the same concept of feasibility by instructing agencies to consider only those alternatives in an EA that are "reasonably available and prudent to consider." ARM 17.4.609(3)(f).

In district court, DEQ argued that the agency had no authority to require treatment or re-injection pursuant to § 75-5-305(1), MCA, because BER's authority to impose treatment under the statute indicated a legislative intent that DEQ had no authority to do the same. Due to its lack of authority, DEQ argued that treatment and reinjection did not need to be considered in the EA, because those alternatives were not "reasonably available or prudent to consider" under ARM 17.4.609(3)(f). After upholding DEQ's interpretation of § 75-5-305(1), MCA, the District Court held that MEPA did not require an analysis of treatment or reinjection, since those alternatives were not "reasonably available" without a statutory change. App. A. at 34. The Tribe and Water Users dispute this holding,

because they contend that the CWA and WQA require technology-based limits, including treatment or reinjection.

As previously explained, neither the CWA nor the WQA mandates the imposition of technological limits using BPJ. *See Part A.1 infra.* Moreover, DEQ has no authority to impose technology-based treatment requirements on individual permits. That is because DEQ interprets § 75-5-305(1), MCA, as granting BER the exclusive authority to impose treatment to the exclusion of DEQ. *See Part A.2 infra.*

Although the Tribe contends that the District Court incorrectly applied a maxim of statutory construction that would preclude DEQ's exercise of BPJ, the remaining text of subsection (1) in § 75-5-305, MCA, supports the District Court's conclusion. That language provides that, except for the technology-based treatment requirements promulgated by EPA, neither BER nor DEQ may impose technology-based treatment limits on any discharge that is considered nonsignificant under BER's rules. § 75-5-305(1), MCA. Since Fidelity's discharges were determined to be nonsignificant, DEQ had no authority to require treatment or reinjection when it issued the permits. Consequently, the District Court's holding that MEPA did not require an analysis of alternatives that were not "readily available" without a change in statutes is correct.

B. The Analysis of the "No Action" Alternative Was Adequate

In district court the Tribe argued that DEQ's "no action" alternative violated MEPA because it did not consider the impacts of a "project's noncompletion" pursuant to § 75-1-201(1)(b)(iv)(C)(IV), MCA. The District Court disagreed with the Tribe's interpretation of MEPA in two ways: (1) the requirement to consider the impacts of a project's noncompletion do not apply to an EA; and (2) since no cause existed to deny the permits, the alternative of "noncompletion" was not "reasonably available and prudent to consider." App. A at 35 (citing ARM 17.4.609(3)(f)).

The Tribe now contends that DEQ "implicitly" determined that an analysis of a project's noncompletion was necessary, because it included a "no action" alternative in the EA. *See* 75-1-201(1)(b)(i)(B), MCA. This argument is not supported by the plain language of § 75-1-201(1)(b)(i)(B), MCA, and the facts in the record. Under the plain language of that provision, an EA does not need to consider the impacts of a "project's noncompletion" pursuant to subsection (1)(b)(iv)(C)(IV), unless that analysis is requested by the project sponsor or *determined necessary by the agency*. § 75-1-201(1)(b)(i)(B). It is undisputed that DEQ's "no action" alternative did not consider denying the permits, but rather proposed taking

no action to issue the permits. DEQ's inaction, however, would not result in the termination of Fidelity's proposal to drill CBM wells. As explained in the EA, despite DEQ's inaction - discharges from Fidelity's existing permit would remain authorized and any excess CBM water could be impounded away from surface waters. App. G at 13. Since DEQ's "no action" alternative did not consider the impacts of denying the permits or Fidelity's proposed activity, the facts do not support the Tribe's theory that DEQ "implicitly determined" that analyzing the impacts of a project's noncompletion under subsection (1)(b)(iv)(C)(IV) was necessary.

The Tribe also criticizes the court for applying an "unduly restrictive interpretation" of DEQ's authority to deny Fidelity's permits under ARM 17.30.1363. A plain reading of that provision, however, supports the court's conclusion.

ARM 17.30.1363 allows DEQ to deny or terminate a permit only for the "causes" specified by the rule. Those "causes" include: (1) the permit holder's noncompliance with an existing permit; (2) failure to disclose or misrepresent relevant facts; (3) the discharge endangers human health or the environment; or (4) a change in conditions at the permitted facility or a permanent reduction of the discharge. *Id.* Since no cause to deny the permits existed, DEQ had only two remaining choices under its MPDES

regulations: (1) issue the permits as drafted; or (2) modify the permits in response to comments. *See* ARM 17.30.1377, 1378.

Although the Tribe argues that DEQ could have denied Fidelity's new permit, because ARM 17.30.1363 applies only to renewed permits, there is no principled reason or legal basis for DEQ to deny the new permit.

Contrary to the Tribe's assertion, delegated states are not required to deny a permit based upon the discharger's failure to comply with federal standards when EPA has failed to promulgate standards for the industry. Tribe's Br. at 42 *citing* 33 U.S.C. § 1342(b)(1)(A). Since Fidelity's permits fully complied with all of the requirements of the CWA incorporated into state rules, and met all of the nonsignificance criteria applicable to the discharge, DEQ had no authority to deny the permits. Consequently, the EA did not need to consider the alternative of denying the permits, because that alternative was not "reasonably available and prudent to consider." ARM 17.4.609(3)(f).

CONCLUSION

For all of the reasons given above, the Court should affirm the District Court's judgment.

Respectfully submitted this _____ day of August, 2009.

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CERTIFICATE OF COMPLIANCE

Pursuant to Rules 17 and 27 of the Montana Rules of Appellate Procedure, as modified by Order dated June 28, 2000, I certify that this Answer Brief of Appellee Montana Department of Environmental Quality is printed with a proportionately spaced Times New Roman text typeface of 14 points and is double-spaced. The word count calculated by Word is 9,865 words excluding the Certificate of Compliance and Certificate of Service.

CERTIFICATE OF SERVICE

I hereby certify that on the _____ day of August, 2009, I filed a true and accurate copy of the foregoing APPELLEE DEPARTMENT OF ENVIRONMENTAL QUALITY'S ANSWER BRIEF with the Clerk of the Montana Supreme Court and that I served true and accurate copies upon each attorney of record by first class mail, postage prepaid, addressed as follows:

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