

**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.

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INTRODUCTION

This case presents the question of whether Montana DEQ may lawfully issue a water pollution discharge permit authorizing a coalbed methane (CBM) producer to discharge millions of gallons of untreated produced water into the high quality waters of the Tongue River when reasonable alternatives exist to this untreated discharge. One would think that the answer to this question would not be subject to reasonable debate. For more than thirty years, the Clean Water Act (CWA or Act) has required existing sources of water pollution to install the Best Available Technology Economically Achievable (BAT), and has required new sources to meet an even higher technology-based standard. The goal of these technology requirements is to progressively *eliminate* discharges of pollution into the waters of the United States. The CWA also includes an “antidegradation policy” designed to protect high quality waters like the Tongue River against further lowering of water quality.

Notwithstanding the clear requirements of the CWA, the defendants in this case, including the state agency charged by law with protecting the quality of Montana’s waters, defend these untreated discharges by proffering a series of convoluted arguments that distort the requirements of the Act beyond recognition. If adopted, these arguments would create huge loopholes in the Act by allowing a whole industry to avoid the Act’s fundamental requirements simply because the

federal Environmental Protection Agency (EPA) has been slow in adopting industry-wide regulations for CBM producers.

The Court should reject the defendants' arguments. The CWA and implementing regulations adopted three decades ago by EPA provide that prior to the adoption of industry-wide technology-based guidelines, state and federal permit writers must incorporate the Act's clean technology requirements into discharge permits on a case-by-case using their best professional judgment. The Act also requires protection of high quality waters *before* these waters become so polluted that beneficial uses of water are affected. In this case, however, DEQ abdicated its responsibilities under the Act and refused to define the best available technology for CBM water discharges or to implement the Act's antidegradation requirements. The Court can and should remedy these errors by setting aside the permits issued by DEQ and remanding to the agency for a case-by case determination of the appropriate technology-based limitations and antidegradation requirements for the CBM discharges at issue.

ARGUMENT

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

The "foremost national goal [of the CWA] is 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)) (emphasis

added). To achieve this end, the CWA and its implementing regulations prohibit all pollutant discharges from point sources unless such discharges adhere to statutorily mandated, technology-based effluent limitations (TBEL) imposed through National Pollutant Discharge Elimination System (NPDES) permits or their state-level equivalent. Tribe's Br. 16-19. NPDES permits must meet specified levels of technology-based controls – BAT for existing sources, 33 U.S.C. § 1311(b)(2), and the 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) (CWA requires that “all sources” employ the prescribed level of technology in 33 U.S.C. § 1311(b)). In short, the Act “command[s] that dischargers” such as Fidelity comply with effluent limitations based on BAT and BADCT. *Chem. Mfrs. Ass'n v. Natural Resources Def. Council, Inc.*, 470 U.S. 116, 118 (1985).

The Act's implementing regulations squarely provide that the “[t]echnology-based treatment requirements under [33 U.S.C. § 1311(b)] represent the *minimum* level of control that *must be imposed*” in an NPDES permit. 40 C.F.R. § 125.3(a) (emphasis added). Where EPA has not established a technology-based effluent guideline for an industrial source category, a “permit writer” must use best professional judgment (BPJ) to impose such a limitation on a case-by-case basis. *Id.* § 125.3(c)(2). In such cases, technology-based standards remain the minimum

requirement for permits, with the permit writer making “[i]ndividual judgments” to determine what effluent limitations can be achieved by applying BAT and BADCT. *Texas Oil & Gas Ass’n v. EPA*, 161 F.3d 923, 928-29 (5th Cir. 1998).

Because DEQ has been delegated permitting authority by EPA, it is obligated to comply with these requirements when issuing Montana Pollutant Discharge Elimination System (MPDES) permits. States issuing discharge permits must impose the Act’s minimum “technology-based treatment requirements.” 40 C.F.R. § 125.3(a). When EPA has not issued nationwide effluent limitation guidelines (ELG) for an industry, state permit writers must determine such effluent limits on a case-by-case basis using the same factors applied by EPA. *Id.* § 125.3(c)(2) & (comment). Montana’s own regulations implementing the Water Quality Act (WQA) expressly incorporate these technology-mandating federal regulations, ARM 17.30.1303(7), making clear that DEQ “stand[s] in the shoes” of EPA and may not issue MPDES permits unless they impose effluent limitations based on BAT and BADCT. *Natural Resources Def. Council v. EPA*, 859 F.2d 156, 183 (D.C. Cir. 1988) (“*NRDC II*”). Because DEQ failed to do so in either of the permits issued to Fidelity, it violated the CWA and the WQA.

A. The CWA and EPA Regulations Require DEQ to Impose Technology-Based Limits in All MPDES Permits.

DEQ disclaims any obligation to impose technology-based limits in the MPDES permits absent federal industry-wide effluent guidelines. DEQ Br. 16-17,

20-23; *see also* Fidelity Br. 18-25. DEQ’s argument is fatally flawed, however, because it ignores Congress’s goal of eliminating the discharge of all pollutants through the CWA’s technology-based standards. *See NRDC I*, 822 F.2d at 123-24 (“most salient characteristic of [CWA’s] statutory scheme . . . is that it is technology-forcing”). DEQ does not explain how allowing *untreated* discharges of CBM water into the Tongue River without imposition of any TBELs complies with Congress’s goal of eliminating the discharge of all pollutants or the means chosen to achieve this goal – the imposition of technology-based limits on all point sources. Indeed, under DEQ’s view, even if a treatment technology removed 100% of the pollutants in CBM produced water and cost only one dollar per day, the agency could still allow discharge of untreated water so long as water quality standards were not exceeded. This position is irreconcilable with Congress’s intent and the CWA’s plain language and structure.

DEQ also attempts to explain away the key federal regulation at issue here, which establishes technology-based limits as the “minimum level of control that must be imposed” in all NPDES permits. 40 C.F.R. § 125.3(a); *see also* Tribe’s Br. 19, 22. After creating this regulatory floor, Section 125.3 establishes three “[m]ethods of imposing technology-based treatment requirements in permits” – (1) incorporating EPA’s industry-wide ELGs, (2) developing case-by-case limitations using BPJ “to the extent that EPA-promulgated effluent limitations are

inapplicable,” or (3) a combination of the two. *Id.* § 125.3(c). Thus, under this regulation, when industry-wide guidelines are inapplicable or non-existent, case-by-case limitations established through BPJ are the *only* lawful means of satisfying the Act’s technology-forcing requirements. *Id.* § 125.3(c)(2). Notably, the regulation refers generically to the obligation of the “permit writer” and provides that the factors for establishing TBELs using BPJ must be considered “regardless of whether the permit is being issued by EPA *or an approved State.*” *Id.* § 125.3(c)(2) & (comment) (emphasis added).

DEQ’s acceptance of (and obligation to comply with) the technology mandates in Section 125.3 is abundantly clear from the repeated incorporation of this and related federal regulations into state law governing the issuance of MPDES permits – a fact which DEQ fails to address in its brief. *See* ARM 17.30.1303(7), .1344, .1345, .1361 (adopting and incorporating 40 C.F.R. §§ 125.3, 122.44).

DEQ contends that case law addressing Section 402(a)(1)(B) of the CWA, 33 U.S.C. § 1342(a)(1)(B), holds that EPA (and presumably DEQ as well) has merely the discretion but not the mandatory duty to impose technology-based standards using BPJ when no EPA guidelines exist. DEQ Br. 21 (citing *Natural Resources Def. Council v. EPA*, 863 F.2d 1420, 1425 (9th Cir. 1988) (“*NRDC III*”) and *Trustees for Alaska v. EPA*, 749 F.2d 549, 553 (9th Cir. 1984)); *see also*

Fidelity Br. 20. In both cases, however, EPA had imposed TBELs based on BPJ, and thus the only issue before the court was the appropriateness of the specific limits adopted by EPA, not EPA's discretion or obligation to impose such limits in NPDES permits. *NRDC III*, 863 F.2d at 1424-25; *Trustees for Alaska*, 749 F.2d at 555-57. Because of the narrow issue presented, neither case analyzed EPA's permitting regulations discussed above. Indeed, *Trustees for Alaska* involved NPDES permits issued before EPA promulgated 40 C.F.R. § 125.3. See 44 Fed. Reg. 32854, 32948-49 (June 7, 1979). In short, DEQ's reliance on these cases, which had no reason to closely examine whether the CWA obligates EPA or a state to use BPJ, is unavailing. See *Trustees for Alaska*, 749 F.2d at 552 (court "review[ing CWA's] provisions only briefly").

Likewise, *E.I. du Pont de Nemours and Co. v. Train*, 430 U.S. 112 (1977), fails to support DEQ's position that neither EPA nor DEQ is required to establish TBELs in discharge permits when no applicable federal ELGs have been promulgated. DEQ Br. 21-23; Fidelity Br. 20-21. In *Train*, the petitioners argued that the *only* means of setting effluent limitations¹ under the CWA was for EPA to do so on a permit-by-permit basis, rather than through the nationwide regulations

¹ In *Train*, the Court considered EPA's effluent limitation regulations under Section 301(b) as separate from Section 304(b) guidelines. 430 U.S. at 130-32. Under current EPA practice, however, 301(b) regulations and 304(b) guidelines are typically combined in formal "effluent limitation guidelines," or ELGs. See *Weyerhaeuser Co. v. Costle*, 590 F.2d 1011, 1019 n.2 (D.C. Cir. 1978).

challenged in the case. *Id.* at 120, 124. Had petitioners' view prevailed, it would have subjected EPA to the "impossible burden" of applying BPJ to "each of the more than 42,000 dischargers who have applied for permits." *Id.* at 132. Faced with this practical reality of achieving the CWA's objectives, the Court found that Section 301(b) provided EPA with the necessary authority to promulgate regulations establishing effluent limitations for broad categories of industry. In doing so, the Court upheld the Act's fundamental requirement that all discharges of pollutants are prohibited unless they are authorized by discharge permits applying the level of technology control specified in Section 301. *Id.* at 118-19.

The Court in *Train* did not address the continued use of BPJ permitting by the EPA or approved states prior to the issuance of uniform effluent limitations. On the contrary, the Court *presumed* that until EPA issued such industry-wide limitations, permit writers would continue to implement the Act's required TBELs on a case-by-case basis. *Id.* at 131-32 & n.23 (noting that non-binding guidelines issued under Section 304(b) would provide "guidance to permit issuers prior to" the promulgation of formal effluent limitation regulations under Section 301); *see also Natural Resources Def. Council v. EPA*, 437 F. Supp. 2d 1137, 1160 (C.D. Cal. 2006) (BPJ permits an important interim measure pending promulgation of ELGs).

Train fails to support the argument that EPA and DEQ are not obligated to use BPJ in the absence of ELGs for another significant reason. The case was decided before EPA’s promulgation of Section 125.3 in 1979, which implemented the CWA’s requirement that all discharge of pollutants from point sources – whether permitted by EPA or a state – be subject to the Act’s minimum technology-based standards. Because Section 125.3 settled the issue left unresolved in *Train* – namely a permit writer’s obligation to impose technology based limits on a case-by-case basis prior to the promulgation of federal ELGs – DEQ’s attempt to cobble together dicta from *Train* to support its argument here is unconvincing.²

DEQ also makes much of the permissive “may” in 33 U.S.C. § 1342(a)(1). DEQ Br. 21, 30. However, this misreads the statutory language, which gives discretion to EPA (and approved states) to *issue permits* in light of the prohibition on the discharge of “any pollutant” in Section 301(a), 33 U.S.C. § 1311(a). *See Natural Resources Def. Council v. Costle*, 568 F.2d 1369, 1374-75 (D.C. Cir. 1977). Under Section 402(a)(1), once the decision to issue a permit is made, it

²For the same reason, DEQ’s reliance on *Washington v. EPA*, 573 F.2d 583 (9th Cir. 1978), is without merit. DEQ Br. 23-24. In promulgating Section 125.3, EPA specifically addressed this case, and found that its new regulation provided the authority and requirements the court found lacking. 44 Fed. Reg. at 32893. In addition, the D.C. Circuit came to the opposite conclusion when addressing the same veto issue a decade later and rejected the Ninth Circuit’s reasoning as incomplete and unfaithful to Congress’s intent. *NRDC II*, 859 F.2d at 183, 187.

must conform to either: (A) “all applicable requirements,” including the minimum technology standards in Section 301(b); or (B) “prior to the taking of necessary implementing actions” relating to these requirements, “such conditions as the Administrator determines are necessary to carry out the provisions of [the Act].” 33 U.S.C. § 1342(a)(1). In other words, all NPDES permits must *either* incorporate ELGs promulgated by EPA or ensure compliance with the Act’s technology-forcing requirements on a case-by-case basis. In short, while the authority to *issue* permits is discretionary, the permit writer is obligated to ensure compliance with BAT and other technology-forcing requirements specified in the Act. Any other result would severely undermine the clear intent of the CWA.

Unlike the cases cited by DEQ and Fidelity, *NRDC II* squarely addresses the issue presently before this Court. In that case, industry challenged EPA’s regulation authorizing it to veto NPDES permits issued by states on the basis of BPJ when no industry-wide guidelines applied. *NRDC II*, 859 F.2d at 182-83. Taking a position remarkably similar to the defendants here, industry argued that “until EPA has formally promulgated [industry-wide] guidelines, the States are not required to adhere to the vague technology-based standards set forth in [Section 1311(b) of] the statute.” *Id.* at 183. Industry further argued that the Act’s technology-based standards were intended to “remain dormant until activated by the promulgation of EPA guidelines.” *Id.*

The Court of Appeals for the D.C. Circuit flatly rejected these arguments. It first held that the duties imposed on EPA by Section 402(a)(1)(B) are *mandatory*:

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 (emphasis added). Next, the court held that states with EPA approval to administer the NPDES permit program assume the same mandatory duties:

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. Thus, notwithstanding Industry's contrary assertions, *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. (emphasis added). Given that both EPA and the states have the same duty to craft technology based limits using BPJ when there are no applicable ELGs, the court held that EPA had the authority to review and veto a state permit issued on the basis of the permit writer's BPJ. *Id.* at 186. Contrary to DEQ's assertion that the court's interpretation of the CWA was dicta, DEQ Br. 26, it was in fact necessary to the outcome of that case because had industry's view prevailed, EPA's veto regulations would have been invalid. Thus, the court's holding is directly contrary to DEQ's argument that states are not required to include

technology-based limits in permits where EPA has yet to promulgate industry-wide effluent regulations.

Finally, DEQ's assertion that neither EPA nor DEQ must develop technology-based limits based on BPJ also runs afoul of EPA's own interpretation of the Act and its implementing regulations. Such interpretations are owed "considerable deference" because EPA is the "agency charged with interpreting the complicated statutory provisions that comprise the CWA." *NRDC II*, 859 F.2d at 202. Furthermore, an agency's interpretation of its *own* regulations must be given "controlling weight . . . unless an alternative reading is compelled by the regulation's plain language or by other indications of the [agency's] intent at the time of the regulation's promulgation." *Thomas Jefferson Univ. v. Shalala*, 512 U.S. 504, 512 (1994).

In this case, when EPA promulgated 40 C.F.R. § 125.3, it "clarifie[d] and set[] forth in regulatory form the long-standing EPA policy that these technology-based treatment requirements represent the minimum levels of controls under section 402." 44 Fed. Reg. at 32,893 (describing Section 125.3 as "criteria and standards for imposing technology-based treatment requirements of the [CWA] into permits under section 301(b)"). EPA flatly rejected the position that state-issued permits need not include technology-based limits in the absence of formal industry-wide effluent guidelines. According to EPA:

[Section] 125.3 contains a clear and explicit requirement that even if effluent limitations guidelines have not been promulgated for a class or category of point sources, *State and Federal permit issuers* are obligated to establish technology-based permit requirements.

Id. (emphasis added).

EPA's interpretation of Section 125.3 has remained remarkably consistent since the rule was promulgated three decades ago. *See, e.g.*, 51 Fed. Reg. 24897, 24915 (July 9, 1986) (response to comment 24) ("EPA must establish permit conditions using BPJ procedures in the absence of [ELGs]"); 65 Fed. Reg. 37783, 37787 (June 16, 2000) ("In the absence of these [ELGs], permit writers [*i.e.* authorized States and Tribes or EPA] must determine technology-based limitations using their [BPJ]."); 72 Fed. Reg. 61335, 61351 (Oct. 30, 2007) ("To ensure appropriate regulation of such new subcategories prior to EPA's promulgation of new [applicable ELGs], under EPA's regulations at 40 CFR part 125.3(c), a permit writer is required to establish technology-based effluent limitations for these processes on a case by case, [BPJ] basis.").

In terms of CBM produced water, EPA has been equally clear. In its Technical Support Document for the 2006 Effluent Guidelines Program Plan, EPA addressed the precise question in this case:

[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 in promulgating a national categorical ELG, as they apply to the particular facility. See 40 CFR 125.3(d).

App. M (6-3).

DEQ has failed to show that the plain language of 40 C.F.R. § 125.3 compels a different reading than that consistently afforded the regulation by EPA. In light of the “controlling weight” this Court must afford EPA’s interpretation of this regulation and the CWA, DEQ’s legal position is simply untenable.

B. Water Quality-Based Effluent Limitations Are Insufficient to Achieve Compliance with the CWA.

In an effort to demonstrate compliance with the mandates of 40 C.F.R. § 125.3, DEQ asserts that its inclusion of WQBELs in Fidelity’s permits is sufficient because such effluent limitations are “more stringent” than technology-based limits. DEQ Br. 24-25; *see also* Fidelity Br. 28-29. However, DEQ’s argument, which was never advanced in the permitting process, is contrary to case law and the structure and intent of the CWA. Given the CWA’s primacy of TBELs to reduce pollution discharges, WQBELs function as a backstop for pollution control and are employed only where pollution from many point sources, despite adherence to TBELs, would still result in a violation of state water quality standards. Tribe’s Br. 20, 29-30; *see also NRDC I*, 822 F.2d at 110 (WQBELs apply when technology-based limits are “insufficient to make a particular body of water fit for” existing uses); *Riverkeeper v. EPA*, 358 F.3d 174, 185 n.10 (2d Cir.

2004).³ With Fidelity as the sole commercial producer of CBM discharging to the Tongue River in Montana, the need for supplemental WQBELs would appear remote if TBELs were properly included in the permits. However, contrary to guidance from EPA directing permit writers to develop both TBELs and WQBELs, compare them, and apply the “more stringent” limitation, DEQ skipped straight to WQBELs in the Fidelity permits. *See* Tribe’s Br. 29-30 (quoting NPDES Permit Writer’s Manual). Because DEQ never developed technology-based limits using BPJ in the first place – as required by the CWA and WQA – the agency’s first resort to water quality-based standards to limit pollution undermines its “more stringent” claim and renders the permits unlawful.

C. State Law Does Not Preclude DEQ’s Use of BPJ.

DEQ maintains that its MPDES permit program is separate and distinct from EPA’s NPDES permit program. DEQ Br. 28-30. While this statement is true, it is irrelevant in light of the clear application of the CWA’s implementing regulations to state permitting processes and the State’s express incorporation of these regulations into Montana law. *See* 40 C.F.R. §§ 125.3, 122.44(a)(1); ARM 17.30.1303(1)-(3) (equivalence of programs); ARM 17.30.1303(7).

³ Contrary to Fidelity’s claims, Fidelity Br. 19, 28, the NPDES Permit Writer’s Manual and *Catskill Mountains Chapter of Trout Unlimited, Inc. v. City of New York*, 451 F.3d 77, 85 (2d Cir. 2006), make clear that WQBELs are supplemental and only are included in discharge permits when TBELs “prove insufficient to achieve the [state’s] water quality standards.”

DEQ also erroneously interprets the plain language of state law to prohibit it from including technology-based limits in MPDES permits when no ELG applies to the industry in question. DEQ Br. 30-32. Under MCA 75-5-305(1) only the Board of Environmental Review (“Board”) may promulgate an *industry-wide* technology standard. However, the provision cannot be interpreted to prohibit DEQ from establishing technology-based limits on a case-by-case basis when issuing an individual MPDES permit.⁴ Such an interpretation would place Montana law in conflict with EPA regulations, and seriously call into question the viability of Montana’s permitting program under the Act’s minimum standards for delegation of NPDES permitting authority. *See* 33 U.S.C. § 1342(b)(1)(A) (state permit programs must “insure compliance” with Section 301 of the Act).

In any event, the limitation in the last sentence of MCA 75-5-305(1) can reasonably be read to apply only to the Board. The entire sub-section preceding the last sentence refers expressly to the Board’s authority to adopt industry-wide treatment requirements. By contrast, other parts of the same section expressly reference DEQ. *See* MCA 75-5-305(3)-(5). If the legislature had intended that MCA 75-5-305(1) apply to DEQ’s permit-writing functions, it would have expressly mentioned DEQ in that sub-section. *See, e.g.*, MCA 75-5-302(1)

⁴ Even if the provision was generally applicable to DEQ, it would not apply here because the discharges in question are not “nonsignificant” under a proper application of antidegradation policy. *See* Part II, below.

(referencing “board or department”). In light of the fact the Legislature did not expressly apply the restrictions of MCA 75-5-305(1) to DEQ’s permit writing functions, and the fact that DEQ’s reading of the statute would put the Montana’s permit program out of compliance with federal regulations, the Court should not extend the reach of MCA 75-5-305(1) beyond its plain language.⁵

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

In reply to the defendants’ argument that an antidegradation review was not required, the Tribe adopts the arguments on this issue propounded by the Water Users in their joint reply brief.

III. DEQ Violated the Montana Environmental Policy Act.

The Tribe contends that DEQ violated MEPA by failing to analyze “reasonably feasible” alternatives to the proposed action, including the imposition of technology-based limits based on treatment of all discharges and denial of the permit applications. Tribe’s Br. 37-44. In response, DEQ maintains that it lacks authority to implement either of these alternatives. Neither assertion is correct.

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

DEQ’s Environmental Assessment (EA) failed to comply with MEPA’s basic requirement to consider “reasonably available and prudent” alternatives to

⁵ DEQ cannot overcome this straightforward statutory interpretation with the summary of a DEQ staffperson’s testimony at a legislative hearing unconnected to the Legislature’s enactment of MCA 75-5-305(1). DEQ Br. 32 n.5.

the proposed action – including effluent limitations in the permits based on the level of control achievable through treatment of all discharges. ARM

17.4.609(3)(f). DEQ defends its failure to analyze alternatives to discharge of untreated CBM water on the basis that such alternatives were not “presently available due to statutory constraints.” DEQ Br. 40-43. DEQ’s denial of its own authority lacks merit.

As discussed above in Part I.C, MCA 75-5-305(1) only prohibits the Board, not DEQ, from imposing industry-wide treatment requirements. It says nothing about DEQ’s authority to impose TBELs in permits on a case-by-case basis.

Indeed, as the Tribe explained at length above, DEQ is *required* to include such limitations under the CWA, its implementing regulations and the numerous state regulations that incorporate by reference these requirements of federal law. 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. 33 U.S.C. § 1342(b)(1)(A) (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 (BLM) and the Montana Board of Oil and Gas Conservation (BOGC) when those agencies approved Fidelity’s

development plans. DEQ Br. 40-41. However, as the agency that administers the NPDES program, DEQ is charged with overseeing compliance with applicable provisions of the CWA, including its technology-forcing mandates. BLM and BOGC cannot, through their approval of Fidelity's CBM development and associated water management plans, dictate the alternatives DEQ must consider in carrying out its independent statutory duty to regulate discharges of CBM water. Indeed, DEQ acknowledges that its statutory authority over CBM development extends to ensuring compliance with the CWA and WQA. DEQ Br. 40; *see also* DEQ Ex. 16 (3). Here, compliance with these statutes required DEQ to modify the permit applications to include TBELs based on the appropriate level of pollution control technology.⁶ *See* ARM 17.30.1377(1)(a) (changes to draft permits); App. G (14) (modification of Fidelity's applications). Therefore, the EA should have evaluated such an alternative.

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

The EA was also inadequate because it failed to adequately analyze a “no action” alternative – in this case, the denial of Fidelity's permit applications.

Tribe's Br. 41-44. Although the EA contains a cursory one-paragraph analysis of a

⁶ Fidelity's argument regarding “DEQ's role in the applicable regulatory scheme” misunderstands the operation of the CWA. Fidelity Br. 31-32. In imposing TBELs, DEQ would set numerical limits restricting the amount of pollutants in the permitted discharges. It would then be up to Fidelity to choose a technology that complied with the prescribed limitation. *See NRDC I*, 822 F.2d at 123 (TBELs not a “national prescription of a specific, uniform ‘best technology’”).

so-called “no action” alternative, DEQ now argues that it was not required to analyze this alternative because the agency never actually determined that analysis of such an alternative was necessary under MCA 75-1-201(1)(b)(i)(B). DEQ Br. 44-46.

DEQ’s argument is without merit because the agency did choose to analyze a no action alternative in the EA, however inadequately. DEQ now claims that the no action alternative in the EA was actually an “inaction” alternative and therefore the agency never “determined” that a “no action” alternative was necessary to its analysis. DEQ Br. 45 (citing App. G (13)). This semantic jujitsu underscores the weakness of DEQ’s argument. A decision declining to act on Fidelity’s renewal permit application is no different than a decision to deny the application.⁷ In either case, Fidelity would lack legal authority to discharge pollutants into the Tongue River. 33 U.S.C. § 1311(a). By purporting to analyze this alternative in the EA, DEQ implicitly “determined” that analysis of the “no action” alternative was necessary to its analysis. Indeed, without it, the EA would plainly be inadequate as there would have been *no* alternatives to the proposed action.⁸ *See EPIC v. U.S.*

⁷ An indefinite administrative extension after DEQ declined to act on a renewal application would violate both the WQA’s and CWA’s five-year limit on discharge permits. ARM 17.30.1346(1); 33 U.S.C. § 1342(b)(1)(B).

⁸ DEQ has no response to the Tribe’s argument that analysis of the no action alternative was required under MCA 75-1-201(1)(b)(v). Tribe’s Br. 41.

Forest Serv., 234 Fed. Appx. 440, 442-433 (9th Cir. 2007) (holding EA's analysis of no action and a single action alternative inadequate).

DEQ never defends the merits of its one-paragraph no action analysis. Instead, it relies on the rationale advanced by the District Court, which held that a no action alternative (denial of the permit) was not available because no cause existed to deny the permit under ARM 17.30.1363. DEQ Br. 45-46; App. A (35-36). DEQ's argument that it has virtually no authority to deny an MPDES permit application is wrong for several reasons, including that ARM 17.30.1363 only applies to renewal applications and therefore does not control DEQ's decision on Fidelity's new application. Tribe's Br. 42-43. In addition, DEQ plainly has the authority to deny permit applications that fail to comply with state and federal requirements relating to technology-based limits. *See* 33 U.S.C. § 1342(b)(1)(A); 40 C.F.R. § 123.25; ARM 17.30.1303(1)-(3). Thus, the EA's failure to include a full analysis of the true no action alternative – denial of both permits – renders it inadequate.

CONCLUSION

For all of the reasons stated above and in the Tribe's Opening Brief, the Court should reverse the District Court's judgment, set aside Permit No. 30457 and Permit No. 30724 and the supporting Environmental Assessment, and remand the matter to DEQ for further proceedings consistent with state and federal law –


including application of the CWA's technology-forcing mandates, a full nondegradation review under the WQA and a complete MEPA review.

Dated this 30th day of September, 2009.



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CERTIFICATE OF COMPLIANCE

Pursuant to Montana Rules of Appellate Procedure 11(4)(a) and 11(4)(d), I certify that this Brief is printed with proportionately spaced Times New Roman text typeface of 14 points; is double spaced; and the word count calculated by Microsoft Word is 4,980 words, excluding the certificate of service and this certificate of compliance.

Dated this 30th day of September, 2009.



Brian C. Gruber

CERTIFICATE OF SERVICE

I hereby certify that I have filed the original and nine true and correct copies of the foregoing APPELLANT NORTHERN CHEYENNE TRIBE'S REPLY BRIEF with the Clerk of the Montana Supreme Court and that I served a true and correct copy upon each attorney of record by electronic mail and by first class mail, postage prepaid, addressed as follows:

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