TUHOLSKE LAW OFFICE, P.C.
Jack R. Tuholske MT Bar # 2906
234 E. Pine St.
P.O. Box 7458
Missoula, MT 59807
Tel: (406) 396-6415
jtuholske@gmail.com

Erin Farris-Olsen
P.O. Box 408
Helena, MT 69624
Tel: (406) 461-8530
elfarris@gmail.com

Attorneys for Plaintiff

MONTANA FIRST JUDICIAL DISTRICT, LEWIS AND CLARK COUNTY

BITTERROOTERS FOR PLANNING Inc., MONTANA ENVIRONMENTAL INFORMATION CENTER Inc., BITTERROOT RIVER PROTECTION ASSOCIATION Inc., Plaintiffs and Petitioners, vs. DEPARTMENT OF ENVIRONMENTAL QUALITY, Defendant and Respondent.	Cause No.CDV-2014-505 Judge Kathy Seeley Presiding PLANTIFFS' RESPONSE TO DEQ'S BRIEF IN OPPOSITION TO SUMMARY JUDGMENT and IN SUPPORT OF CROSS MOTION FOR SUMMARY JUDGMENT

INTRODUCTION

The issue before this Court is whether DEQ's groundwater discharge permit violates Montana Water Quality Act requirements for non-degradation review. Non-degradation review is a critical feature of state and federal water quality laws because the review insures that regulators are pro-actively maintaining and restoring waters even when polluters meet minimum discharge standards. Bitterrooters make two arguments. First, DEQ violated the plain language of MCA §

75-301 (5) which requires two determinations before granting an exemption to non-degradation review: "[a] discharge will not cause degradation of surface water **and** [b] the predicted concentration of nitrate as nitrogen at the boundary of the ground water mixing zone does not exceed [7.5 mg/L]" (emphasis added). Nothing in this record demonstrates that DEQ made an effort to address the first part of the standard, instead relying entirely on subpart 2's mixing zone requirements, which are not at issue here. Second, Bitterrooters allege that DEQ violated Admin. R. M. 17.30.715(2)(a) which imposes other requirements on DEQ before it can exempt a project from non-degradation review. The regulation requires consideration of "cumulative impacts or synergistic effects" as part of its determination to require or exempt a discharge from non-degradation review. Again the record is barren of a DEQ analysis of cumulative impacts for Grantsdale, even though it in the midst of rapidly growing Ravalli County, and a new discharge for a nearby giant retail facility has also been proposed.

DEQ responds to the first argument by blaming Bitterrooters for failing to prove surface water degradation as a prerequisite to DEQ's non-degradation review. But neither law nor policy impose that requirement on the public. DEQ's Fact Sheet indicates that Grantsdale pollution will be discharged in shallow groundwater that flows rapidly towards the Bitterroot. *See* Appendix For Bitterrooters' Brief in Support of Motion for Summary Judgment, Exhibit (hereinafter Pls. Ex.) 3 at AR 0968. The public provided several scientific studies regarding the basic principles of surface-groundwater connectivity and specific studies showing that groundwater nutrient pollution already degrades surface waters in the Clark Fork Basin. Pls. Ex. 7 at AR 0189-92; Ex. 8 at AR- 0316-81; AR 045112; Ex. 12 at AR0868-90; Ex. 17 at AR 0498-502 Ex. 18 at AR 0722. Thus the issue of surface water contamination for this particular permit was raised before the agency. DEQ, as the protector of Montana's waters has the statutory obligation to provide a

reasoned basis why Grantsdale will not degrade surface water allowing it to grant a nondegradation exemption.

DEQ admits it did not perform a cumulative impacts analysis, though the plain language of Admin. R. Mt. 17. 30 715 (2) (a) requires it. DEQ argues that it did not analyze cumulative impacts because it had already determined Grantsdale was entitled to an exemption from non-degradation review. DEQ's circular reasoning should be rejected. The same logic was overruled in *Clark Fork Coal. v. Mont. Dep't of Envtl. Quality*, 2008 MT 407, 347 Mont. 197, 197 P.3d 482. DEQ further compounds its legal error by rejecting its own policy manual, which explains how to conduct the very analysis that is missing here. Pls. Ex. 16.

II. RESPONSE TO STATEMENT OF FACTS

Bitterrooters presented a detailed statement of facts, all drawn from the Administrative Record. Bitterrooters' Brief in Support of Motion for Summary Judgment (hereinafter Pls. Brief), pp. 1-5. DEQ responded with a brief procedural summary and some petty criticisms, such as the fact that the caption does not use the full proper name of one of the parties. DEQ's Brief in Opposition to Bitterrooters' Motion For Summary Judgment And Support of DEQ's Cross Motion For Summary Judgment (hereinafter DEQ Response), p. 2. In its "Background Facts," DEQ doesn't rebut, comment upon or point to contrary evidence on the facts that underlie Bitterrooters' arguments. DEQ Response, pp. 1-2. The most salient facts, uncontested for summary judgment, are summarized below.

Ground water discharge to surface waters from the vicinity of the Grantsdale subdivision is "occurring to streams, wetlands and the Bitterroot River flood plain (Norbeck and McDonald, 2000)." Ex. 3 at AR 0968. DEQ's Statement of Basis for the permit also found, that the groundwater "flow direction on the east side of the Bitterroot Valley in the vicinity of the facility is generally northwest toward the Bitterroot River beneath the low terrace along Skalkaho Creek."

Pls. Ex. 3 at AR 0968. Furthermore, groundwater is this area has a high flow rate; water moves through the shallow alluvium at rates of 900-2,300 feet per day. *Id.* Thus groundwater will quickly reach the Bitterroot River and Skalkaho Creek, only 2,800 feet away.

Cumulative impact problems from domestic sewage from septic and other waste water systems is a major source of surface water pollution. *See e.g.* Pls. Ex. 7*,* AR 0189-92. These problems are evident in the Clark Fork Basin. Pls. Ex. 11 at AR 0438; Pls. Ex. 10 at AR 0396-427; Pls. Ex. 11 at AR 0451; Pls. Ex 4 at AR 0530-1; Pls. Ex. 17 at AR 0498-503. Septic systems are a significant source of water quality degradation in groundwater and surface water in the Bitterroot and greater Clark Fork Basin. Pls. Ex. 11 at AR 0438. Nutrient enrichment from sewage pollution can cause a host of negative ecological effects on streams and lakes, including loss of water clarity, proliferation of aquatic weeds, algae blooms, and drop-offs in dissolved oxygen-a critical factor for fish and other aquatic life. Pls. Ex. 10 at AR 0396-400; 0492-3; Pls. Ex. 12 at 0686-0699; AR 186-190. The Bitterroot River, was identified as impaired for these pollutants at the time the permit was approved. Pls. Ex. 13 at AR 0504.

DEQ does not deny nor rebut these facts from the record.

III. ARGUMENT

A. This Court Must Review DEQ's Permit Based on the Evidence in the Administrative Record.

The DEQ agrees that a fundamental principle of judicial review of administrative decisions is that the Court's determination is based first and foremost on the administrative record, which provides the evidence available to the Agency at the time its decision is made. *See* DEQ Response at 8; *North Fork Preservation Ass'n v. Dept. of State Lands*, 238 Mont. 451, 465, 778 P.2d 862, 871 (1989). In the recent words of the Montana Supreme Court, "we look to the administrative record to honor the discretion given to the boards and commissions of the state…" *Aspen Trails*

Ranch v. Simmons, 210 MT 79, ¶ 67, 356 Mont 41, 230 P.3d 808. DEQ then blatantly violates its own legal premise, by appending voluminous non-record materials to its brief. The Court must ignore these documents. Because the Agency's decision and judicial review is generally limited to the information in the record, DEQ's reliance on depositions, affidavits, news articles, and discharge permit summaries are irrelevant and outside the scope of the Court's review in this case. Post hoc rationalizations, such as the Affidavit of Chris Boe (DEQ's Response, Exhibit 2) are also impermissible. *See Aspen Trails Ranch v. Simmons*, 210 MT 79, ¶¶ 60-70, 356 Mont 41, 230 P.3d 808 (discussing numerous federal and state cases forbidding post decision evidence or rationale by agency).[1] The limited exceptions to record review generally allow Bitterrooters, not the government, to add materials to the record when the record provides an inadequate basis for judicial review. *Skyline Sportsmen's Ass'n v. Board of Land Comm'rs,* 286 Mont. 108, 116, 951 P.2d 29, 34 (1997). DEQ's efforts to place documents before this court that were created long after it issued the Grantsdale Permit violates the basic premise of record review. *See e.g.* DEQ Response Ex.2 at ¶ 3 (Chris Boe affidavit citing studies created after the permit was approved). DEQ fails to articulate a basis to expand the record here and has waived the ability to do so at this late juncture. The exceptions to record review are not germane here. Bitterrooters' factual predicate comes entirely from the record; Defendant's must as well.

As explained below, DEQ use of extra-record evidence cannot mask its failure to address its statutory mandate. The DEQ spends an inordinate amount of its response brief citing depositions and information outside of the administrative record to highlight its assertion that "Bitterrooters have not established a direct connection between ground water to surface water." It is well established in administrative law that the agency retains the responsibility to justify its decisions

---

[1] Bitterrooters will file a separate Motion to Strike the Boe Affidavit.

based on information contained in the record. *Friends of the Wild Swan v. Dep't of Nat. Res. & Conservation,* 2000 MT 209, ¶ 28, 301 Mont. 1, 6 P.3d 972 (quoting *Marsh v. Oregon Nat. Res. Council*, 490 U.S. 360, 378, 109 S. Ct. 1851,1861 (1989). DEQ must make a reasoned conclusion why it exempted Grantsdale from non-degradation review based on an assessment of surface impacts from the Grantsdale pollution and cumulative impacts from other sources of nutrient pollution. Since the record is devoid of any analysis regarding potential surface water impacts and does not assess any other sources of pollution, DEQ cannot now try to add information to the record or shift this burden to the Bitterrooters.

B. DEQ Presents the Wrong Legal Standard for Non-degradation Analysis.

DEQ argues that Bitterrooters must establish a direct hydrologic connection between the discharge and surface waters. DEQ Response at pp. 3-4. A "direct hydrologic connection" is not the appropriate standard for assessing the need for non-degradation review under the Montana Water Quality Act (MWQA). The DEQ has confused the State's non-degradation analysis with the Environmental Protection Agency's standard for the issuance of a National Pollutant Discharge Elimination System (NPDES) Permit under the Clean Water Act (CWA). Under Sections 301 and 402 of the CWA, NPDES permits are required for the discharge of pollutants to surface waters. *See generally N. Cheyenne Tribe v. Mont. Dep't of Envtl. Quality,* 2010 MT 111, 356 Mont. 296. But Bitterrooters don't allege a violation of the CWA. While it is true that the CWA requires a "direct hydrologic connection" between ground and surface water for issuance of an NPDES permit for groundwater discharges, *see Greater Yellowstone Coalition v. Larson,* 641 F.Supp. 2d 1120, 1141 (Idaho 2009) (citing *trustees for Alaska v. EPA*, 749 F.2d 549, 558 (9th Cir. 1984), Bitterrooters challenge the issuance of a groundwater discharge permit without a non-degradation review. Therefore, a "direct hydrologic connection" of the type required under the Federal CWA is not required to trigger non-degradation review under state law. The threshold for

non-degradation review is provided by the statutory and regulatory requirements of § 75-5-301and ARM 17.30.715(2) discussed herein.

As well, DEQ's argument that the Grantsdale discharge is not "pollution" by definition is irrelevant to the Plaintiff's challenge. DEQ Response at p.12. Dumping human excrement into water is pollution. Whether it can be done in a manner as to not degrade water beyond certain threshold standards is a separate issue, and demonstrates DEQ's overall ignorance that the very act of permitting the discharge of human waste that may result in nitrogen enrichment to the detriment of receiving waters. Bitterrooters submitted voluminous evidence on the harmful effects of nutrient pollution, Pls. Ex. 4 at AR 0530; Ex. 7 at AR 0189-92; Ex. 10 at AR 0396-420; Ex. 17 at AR 0498-502; Ex.18 at AR 0722, which DEQ did not address during the permit process and does not rebut in its brief. Assuming that DEQ's issuance of a permit was lawful, a permit merely gives the discharge a legal status; a permit does not change the scientific composition of the discharged substance or alter the reality of the discharged pollutant's effects on the environment.

Finally, DEQ fails to acknowledge the purpose of the non-degradation analysis it avoids here. Under § 75-5-303 (2) MCA, DEQ's "the quality of high quality waters must be maintained." The Bitterroot River is a "high quality water" under the state's definition of such waters. Non-degradation review insures that the purpose of the CWA and Montana Water Quality Act – to "maintain and restore"—our nation's waters is met. 33 U.S.C. § 1251 (a).

C. Section 75-5-301(d) MCA Requires DEQ to Consider Impacts to Surface Waters Before Granting an Exemption to Non-Degradation Review.

Section 75-5-301(d), MCA contains two distinct requirements before an activity is exempt from non-degradation review. DEQ ignores the plain language of the first part of the statute – whether a discharge to groundwater "will not cause degradation of surface waters," and instead

relies on its compliance with the second part of the statute, which is not at issue here. DEQ opines, without citing a single case, that "Bitterrooters cannot prevail on their motion for summary judgment because they have not established a direct connect [between the discharge and surface waters]." DEQ Response at p. 8. Nothing in the statute Bitterrooters rely on in Count I requires that Plaintiff's prove a "direct connection."

It is axiomatic that courts must give effect to all parts of a statute. Courts must endeavor to avoid a statutory construction that renders any section of the statute superfluous or fails to give effect to all of the words used. *Mattson v. Mont. Power Co.*, 2002 MT 113, ¶ 10, 309 Mont. 506, 48 P.3d 34. It is black letter law that in the construction of a statute, the office of a judge is simply to ascertain and declare what is in terms or in substance contained therein, not to omit what has been inserted or insert what has been omitted. *City of Billings v. Gonzales,* 2006 MT 24, ¶ 8, 331 Mont. 71, 128 P.3d 1014. DEQ ignores Bitterrooters' discussion of these canons of statutory construction that was advanced in Bitterrooters' opening brief. *See* Pl's Brief at pp.10-13.

The statute at issue allows DEQ to determine the pollution discharges are non-significant, and hence exempt from the exacting requirements of non-degradation review under § 75-5-303 MCA, "if the discharge will not cause degradation of surface water ***and*** the predicted concentration of nitrate as nitrogen [meets certain numeric thresholds]." The Legislature's use of the conjunction "and" requires that DEQ must assure that impacts to surface waters and specific thresholds for nitrogen discharges must be met before an action can be exempt from non-degradation review. Interpreting § 75-5-301(5), MCA, to require only predicted nitrogen under 7.5 mg/L to be exempt from non-degradation non-degradation review would render half of the statute a dead letter, thereby, inappropriately omitting what has been inserted.

Bitterrooters' concerns are not idle ones. Even assuming the "mixing zone" works and the

discharge meets the nitrogen standard,[2] DEQ cannot assure that **no** additional pollution to surface waters will occur. In fact the surface water standard for total nitrogen for surface waters is significantly lower than for groundwater. *See* http://deq.mt.gov/wqinfo/circulars.mcpx (Circular 12-A). Thus even if the actual nutrient loadings are 7.5 ppm at the end of the mixing zone, that concentration is still significantly higher than the standard for surface waters. While hydrological conditions in some parts of Montana, where surface waters may be far removed from groundwater (such as eastern Montana), the record here depicts rapidly moving groundwater and surface waters less than one half mile away. The statutory requirement to assess impacts to surface waters cannot be ignored under these circumstances.

Nothing in this record shows that DEQ considered how the 60,000 gallons per day of sewage discharge from Grantsdale might affect nearby surface waters. DEQ thus violates the plain language of the statute. DEQ's attempt to evade the plain words by requiring Bitterrooters to first demonstrate a "direct hydrological connection" is unavailing; the statute contains no such requirement.

D. DEQ Also Violated ARM 17.30.715 by Failing to Assess Cumulative Impacts on Ground and Surface Waters.

Bitterrooters understand that a discharge may potentially avoid non-degradation review if the discharge is determined non-significant under ARM 17.30.715 (1) and (2). However, DEQ again ignores Bitterrooters' analysis that a non-significance determination involves a multitude of factors and that the Montana Supreme Court does not simply accept DEQ's conclusions as a matter of discretion. In fact, the opposite is true: agency discretion is significantly curtailed by

---

[2] DEQ removed the monitoring well requirement down gradient of the discharge, so obtaining actual monitoring data to assess whether the numeric standards have been met is now impossible.

the requirement to fulfill the purpose of the Montana Water Quality Act. *See* Pl's Brief at p.15; *Clark Fork*, supra, ¶ 39.

In *Clark Fork*, the Montana Supreme Court held that the Agency was arbitrary and capricious for failing to address the discretionary factors in ARM 17.30.715(2). *Id.* at ¶ 44. ARM 17.30.715 (2)(a) specifically includes the consideration of "cumulative and synergistic effects." The issue here is not whether the cumulative impacts of domestic sewage in conjunction with the additional sewage load from Grantsdale are significant; the issue is DEQ's failure to even evaluate them.

While DEQ initially admits that it did not consider cumulative effects in analyzing permit impacts, DEQ now asserts that it "considered cumulative effects in development of permit limitations." *See* Pl's Ex. 6, Response to Request for Admission #2. p. 6; Pls. Ex. 2 at AR 0023 (illustrating that DEQ did not consider cumulative effects); *see also* DEQ's Response at p.15 (DEQ's new interpretation of cumulative effects analysis). This justification is not presented at any place in the record and offers only a post-hoc rationalization that is unacceptable. The U.S. Supreme Court overruled such practices when a court is reviewing an administrative action 45 years ago. *Citizens to Preserve Overton Park v. Volpe,* 401 U.S. 402, 419-420, 91 S. Ct. 814, 825 (1970). Furthermore, DEQ's assertion that an effluent concentration prediction is equivalent to considering cumulative effects is wrong. A reasonable cumulative impacts analysis requires the evaluation of other past, present and future activities "seemingly tied" to the project at issue. *See* Pls. Brief at p. 17; *See e.g. North Cascades Conservation Council v. U.S. Forest Service*, 98 F.Supp.2d 1193, 1198 (W.D.Wash. 1999). DEQ has done nothing to evaluate these other, tied, activities, despite public comments raising the issue.

DEQ's interpretation of its obligations to assess cumulative impacts in issuing groundwater permits places its individual decisions in a vacuum. Under DEQ's theory, it could approve an unlimited number of discharge permits and never consider the effect of combined pollutants on

surface waters as long as each permit meet numeric standards at the end of its mixing zone. As a consequence, the Agency would never be required to actually measure and evaluate cumulative or synergistic effects rendering ARM 17.30.715 (2) (a) useless.

There is no evidence that the mass balance equation used for non-degradation analysis in Grantsdale was developed in consideration of other discharge permits or septic pollution loadings. The effluent limitations proposed by DEQ are not even unique to Grantsdale; 7.5 mg/L is simply the maximum effluent concentration allowed by statute per permit. Section 75-5-301(d), MCA. DEQ ignores Bitterrooters' charge that even if the mixing zone "works" and actual nutrient loadings are 7.5 ppm at its end, that concentration is significantly higher than the nitrogen standard for surface waters. *See* Pls' SJ Brief at 12. Such an interpretation is illogical, contrary to the purpose of the statute, and an abandonment of DEQ's mission to "maintain and protect" water quality.

DEQ attempts to distinguish Bitterrooters' reference to DEQ internal guidance on "How to Perform a Nondegradation Analysis for Subsurface Wastewater Treatment Systems (SWTS) Under the Subdivision Review Process at 2.12 (Revised Feb. 2009)" are unconvincing. The Guidance regarding the subdivision review process demonstrates how other review processes have complied with the statutory and regulatory requirements that DEQ is avoiding here. Non-degradation review of subsurface waste water treatment systems must require a consideration of cumulative impacts in subdivision review as well as groundwater permitting. Consideration of cumulative effects from groundwater discharge are particularly important because many discharges are approved without undergoing subdivision review. *See* §§ 76-4-101 et seq.; *see also* Pls. Ex. 6 at p. 4 and reference to "Attachment 2", (MTX 000233 is a groundwater discharge permit for a large commercial building that is not required to undergo subdivision review).

Once again, DEQ failed to address public concerns about cumulative nutrient pollution and offered only an equation for predicted nitrogen concentration and the assumption that this permit will not impact the nearby Bitterroot River. Bitterrooters' concern that the Grantsdale permit may negatively impact the Bitterroot River was grounded in specific facts and established science. The public provided: references to information in the Permit Fact Sheet that paints a clear picture of the connection between groundwater and surface water in the Bitterroot Basin; TMDL records from 2012 which listed the Bitterroot River as contaminated for Nitrogen; sophisticated scientific literature regarding the connection of groundwater to surface water; community observations of nitrogen contamination in the Bitterroot River; and evidence of the significant increase in residential and commercial development in the Bitterroot Basin and Hamilton area in particular.

Taking a "hard look" at the environmental consequences of its actions requires an adequate compilation of relevant information and careful analysis, to consider all pertinent data. *Ravalli Cty. Fish & Game Ass'n, Inc. v. Mont. Dep't of State Lands*, 273 Mont. 371, 381, 903 P.2d 1362, 1369 (1995). Gallatin County District Court Judge John Brown's recent opinion in *Gateway Village, LLC v. Mont. Dep't of Env. Quality and Gallatin Gateway Water & Sewer Dist.*, Cause No. DV-13-657C (Slip Opinion filed December 29, 2014) affirmed the "hard look" requirement that DEQ must take before it exempts a groundwater discharge from non-degradation analysis. *Id. Slip Op.* at 9-10.

In attempting to distinguish *Mont. Trout Unlimited v. Mont. Dep't of Nat. Res. & Conservation*, 2006 MT 72, ¶ 33, 331 Mont. 483, 133 P.3d 224, DEQ argues that the DNRC had some evidence to establish connectivity and justified the Court's holding. DEQ is correct. *Trout Unlimited* identified that the DNRC had the vested responsibility of determining the connectivity of groundwater and surface water before issuing groundwater permits. *Id.* In the present case, the DEQ has made no attempt to evaluate the connectivity of groundwater to surface water and

presents no evidence on which to base its conclusion that groundwater discharge at Grantsdale will not affect the Bitterroot River.

In its Response to Summary Judgment, DEQ attempts to cite an ongoing United States Geological Survey (USGS) study that was not included in the record and outside the scope of review. *See* DEQ Response, Exhibit 2, attachments 1-2. The study itself is not even complete and is not in the Administrative Record. If anything, the USGS study serves as an example of information DEQ should have gathered in response to public concern.

DEQ's Responses to Bitterrooters' Second Combined Discovery Requests, Response to Interrogatory #2, Attachment 2, proves there were at least two other discharge permits, "Wildflower Subdivision" and "Lee Foss-Hamilton Store Parcel" in the immediate vicinity of Grantsdale that were recently approved or under consideration. Additionally, there were at least two more discharge permits issued along a lower reach of the Bitterroot River. *Id*.[3] DEQ's assertion that there are no related future actions under concurrent consideration is false. *See* DEQ's Response at p. 15. Furthermore, cumulative effects include an evaluation of past, present, and foreseeable future activities. *See North Cascades Conservation Council v. United States Forest Serv.,* 98 F.Supp.2d 1193, 1198 (W.D.Wash. 1999). A full list of ground water permits under agency consideration may also be found online at: http://www.deq.mt.gov/wqinfo/mgwpcs >"Ground Water Permits" which DEQ referenced in its discovery responses. An agency cannot make informed decisions if it does not consider all relevant information at its disposal. Nor can

---

[3] Bitterrooters acknowledge that DEQ's answers to discovery are outside of the record. Bitterrooters submit this information to illustrate that DEQ had information in its position to assess cumulative impacts. This type of "extra-record" evidence is permissible under *Aspen Trails Ranch v. Simmons*, 210 MT 79, ¶ 67, 356 Mont 41, 230 P.3d 808, and *Mont. Trout Unlimited*, 2006 MT 72, to show this Court the type of relevant information that DEQ could have assessed. The public raised this issue repeatedly in comments to DEQ. Pls. Ex. 6 at p. 7; Pls. Ex. 7; Pls. Ex. 9 at AR 0052-58; Pls. Ex. 15 at AR 0112-0145; *see also* AR 0186-190.

the public evaluate Agency decision making without being fully informed. *Clark Fork, supra*, 2012 MT 240 ¶ 20.

The groundwater permits that DEQ provided during discovery were not part of the administrative record or the Agency's cumulative effects analysis and serve as further evidence of DEQ's failure to consider all relevant factors in approving the Grantsdale permit.

DEQ's final arguments border on the absurd. Bitterrooters' do not request that DEQ limit population growth. *See* DEQ Response at p.17. Bitterrooters' merely request that DEQ fulfill its responsibility (as the ultimate protector of Montana's waters) under the law to consider cumulative impacts, a relevant factor in the Bitterroot Basin of which DEQ is well aware.

E. The Decision to Issue the Grantsdale Permit was Arbitrary and Capricious.

Even if the Court finds that DEQ did not violate the letter of applicable laws by failing to assess impacts to surface waters and consider cumulative impacts, its decision can still be overturned as arbitrary and capricious. Pursuant to *North Fork,* 238 Mont. at 459, "[t]he standard of review "breaks down into two basic parts. One part concerns whether the agency action could be held unlawful, and the other concerns whether it could be held arbitrary or capricious." Bitterrooters' initial argument is that DEQ decision was unlawful for not following statutory and regulatory requirements. A second basis for overturning the decisions is under the arbitrary and capricious part of the *North Fork* test.

Bitterrooters will not repeat arguments raised in their opening brief. Bitterrooters focus on DEQ's failure to adequately address public comments, which alone renders its decision arbitrary and capricious. As the D.C. Circuit explained under the same arbitrary and capricious analysis, "[w]e will reverse when ….the agency did not "engage the arguments raised before it." *Delaware Dept. of Nat. Resources v. EPA,* 785 F.3d 1, 11 (D.C. Cir. 2015) *citing NorAm Gas Transmission Co. v. FERC,* 148 F.3d 1158, 1165 (D.C.Cir.1998). In the *Delaware* case the D.C. Circuit found

EPA violated the arbitrary and capricious standard when it ignored or minimized public comments that raised issues germane to the core of the decision at hand. While every fact or opinion in public comment need not be addressed, an "agency must respond sufficiently to enable us to see what major issues of policy were ventilated ... and why the agency reacted to them as it did. *Id.* at 15 (other citations omitted). A thorough response to comments dovetails with the obligation of the agency to take a "hard look" at the relevant issues before it exercises its discretion. *See Clark Fork Coalition,* ¶¶ 47-48.

Judge Brown made the same analysis in the *Gallatin Wastewater* case. The plaintiff submitted extensive public comments that DEQ ignored, or provide obtuse responses that essentially ducked the issues raised. *Gallatin Wastewater, supra, slip op.* at pp. 18-20. In Judge Brown's words, "again, the DEQ has failed to provide this court with any explanation of why Dr. Nicklin's comments in this regard can be safely disregarded." *Id.* at p. 24.

This record is replete with comments from a wide swath of the public requesting that DEQ take a look at groundwater/surface water impacts from Grantsdale along with the cumulative impacts of nutrient pollution. *See* Pls' Ex. 4; Pls' Ex. 7, 8; Pls' Ex. 12; Pls' Ex. 15; Pls' Ex. 17-18. Despite DEQ's assertion that it responded to all significant comments received during the public comment period, DEQ's summary and response to comments are overly broad and dismissive. *See* Pls' Ex. 14 (where hundreds of pages of public comment are summarized in only a few sentences and summarily dismissed without discussion.).

DEQ's approval of this permit flies in the face of science, law, and the public's reasonable expectation that a government agency will analyze community concerns that are brought to its attention during the public process. DEQ's only response to the immense record constructed by the public in the public comment process is that a groundwater-surface water connection is "site specific." *See* DEQ Response at p.8. DEQ's response is insufficient because the Agency must

base its decision on evidence and not the lack of evidence in reaching a conclusion and it is not the Plaintiff's burden to establish a hydrologic connection.

IV. CONCLUSION

Bitterrooters ask that the Court determine DEQ acted unlawfully by failing to follow the statute and regulations in granting an exemption to non-degradation review. DEQ's decision was arbitrary and capricious in light of the voluminous public comments raising concerns about nutrient pollution that DEQ failed to address in its decision-making process. Failing to complete a non-degradation analysis that includes the consideration of cumulative impacts from increased groundwater discharge in the Bitterroot Basin. The Court should find the DEQ's approval of the Grantsdale groundwater discharge permit both arbitrary and capricious, and violation of § 75-5-301(5), MCA, and Admin. R. M. 17.30.715(2). Bitterrooters request the Court declare the Permit void and remand the matter to DEQ for consideration of impacts to surface waters as required by statute cumulative effects and degradation of the Bitterroot River.

Dated this 10th day of August, 2015.

_____
Jack R. Tuholske

_____
Erin Farris-Olsen
Attorneys for the Bitterrooters

CERTIFICATE OF SERVICE

A copy of the foregoing was served on August 10, 2015 by postage prepaid U.S. mail addressed to the following: Kirsten H. Bowers Department of Environmental Quality P.O. Box 200901, Helena, MT 59620-0901

_____