

NANCY SWEENEY
CLERK DISTRICT COURT

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BY *C. Patenaude*

**MONTANA FIRST JUDICIAL DISTRICT COURT
LEWIS AND CLARK COUNTY**

BITTERROOTERS FOR
PLANNING, INC., MONTANA
ENVIRONMENTAL
INFORMATION CENTER, INC.,
and BITTERROOT RIVER
PROTECTION ASSOCIATION,
INC.,

Plaintiffs and Petitioners,

v.

DEPARTMENT OF
ENVIRONMENTAL QUALITY,

Defendant and Respondent.

Cause No. CDV-2014-505

**MEMORANDUM AND ORDER ON
MOTION TO STRIKE AND CROSS-
MOTIONS FOR SUMMARY
JUDGMENT**

Plaintiffs filed this action June 24, 2014 challenging a permit issued by Defendant Montana Department of Environmental Quality (DEQ) on March 28, 2014 for the Grantsdale Addition Subdivision in Bitterroot County,

1 Montana. Plaintiffs allege violation of the Montana Water Quality Act (WQA)
2 by issuance of Permit number MTX000163, effective May 1, 2014.¹ Plaintiffs
3 seek a declaration that the permit is void and illegal as DEQ did not conduct the
4 proper review of the effect of wastewater, including nitrogen discharges, on
5 surface water and did not adequately consider the cumulative effects to the
6 environment of the wastewater.

7 Before the Court are Plaintiffs' motion to strike the affidavit of Chris
8 Boe and the cross-motions for summary judgment of the parties.

9 STANDARD OF REVIEW

10 Neither party asserts that this is a contested case as defined in the
11 Montana Administrative Procedure Act (MAPA) or argues the plain language of
12 Montana Code Annotated §§ 2-4-702(2)(d) or 75-5-303(5). They assert the
13 standard of review of DEQ's administrative decisions set out in *Clark Fork*
14 *Coalition v. Department of Environmental Quality*, 2012 MT 240, ¶¶ 19, 20, 366
15 Mont. 427, 288 P.3d 183:

16 An agency's interpretation of its rule is afforded great weight,
17 and we will defer to that interpretation unless it is plainly inconsistent
18 with the spirit of the rule. *Clark Fork Coalition v. Dep't of Env'tl.*
19 *Quality*, 2008 MT 407, ¶ 20, 347 Mont. 197, 197 P.3d 482. We will
20 sustain an agency's interpretation of a rule so long as it lies within the
21 range of reasonable interpretation permitted by the wording. *Clark*
22 *Fork Coalition*, ¶ 20. Of course, we need not defer to an incorrect
23 agency interpretation. *Clark Fork Coalition*, ¶ 20.

24 We review an agency decision not classified as a contested case
25 under the Montana Administrative Procedure Act to determine
whether the decision was arbitrary, capricious, unlawful or not

¹ The first page of the permit does not state that a prior permit with the same number was issued to Kearns Properties, LLC, on September 1, 2006. That permit was effective October 1, 2006 through September 30, 2011.

1 supported by substantial law. *Clark Fork Coalition*, ¶ 21. In
2 reviewing an agency decision under the arbitrary and capricious
3 standard, we consider whether the decision was “based on a
4 consideration of the relevant factors and whether there has been a
5 clear error of judgment.” *N. Fork Preservation Ass’n v. Dep’t of State*
6 *Lands*, 238 Mont. 451, 465, 778 P.2d 862, 871 (1989) (citing *Marsh v.*
7 *Oregon Natural Resources Council*, 490 U.S. 360, 378, 109 S. Ct.
8 1851, 1861, 104 L. Ed. 2d 377 (1989)). Although our review of
9 agency decisions is narrow, we will not automatically defer to the
10 agency “without carefully reviewing the record and satisfying
[ourselves] that the agency has made a reasoned decision”
Friends of the Wild Swan v. Department of Natural Res. &
Conservation, 2000 MT 209, ¶ 28, 301 Mont. 1, 6 P.3d 972 (quoting
Marsh, 490 U.S. at 378, 109 S. Ct. at 1861).

11 MOTION TO STRIKE

12 On August 14, 2015, Plaintiffs filed a motion to strike the affidavit of
13 Chris Boe and attached documents.² Boe’s affidavit is attached to “DEQ’s Brief
14 in Opposition to Plaintiff’s Motion for Summary Judgment and in Support of
15 DEQ’s Cross Motion for Summary Judgment” filed July 16, 2015. There are
16 three documents attached to the affidavit: a document regarding a ground water
17 investigation program generated by the Montana Bureau of Mines and Geology
18 at Montana Tech, a newspaper article, and a 52-page document generated by
19 DEQ regarding nondegradation analysis. Plaintiffs argue that Boe’s affidavit
20 with attachments should be stricken from this Court’s consideration, as this
21 Court’s review should be limited to the information before DEQ during its
22 decision to issue Permit MTX000163. DEQ argues the motion to strike is

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24 ² Both Plaintiffs and Defendant have attached documents not found in the administrative
25 record to their pleadings regarding motions for summary judgment. Only Boe’s affidavit, with
attachments, is the subject of the motion to strike.

1 untimely and that Montana law does not preclude this Court's consideration of
2 the additional information.

3 The Montana Supreme Court has not addressed the issue of what
4 evidence is properly considered by a district court in this exact situation.
5 Plaintiffs urge application of the reasoning and conclusion of Justice Rice in his
6 concurrence in *Aspen Trails Ranch v. Simmons*, 2010 MT 79, ¶¶ 61-68, 356
7 Mont. 41, 230 P.3d 808. Justice Rice reviewed earlier court decisions
8 recognizing that a judicial review must, by its very nature, involve a review of
9 agency action only and concluded that review of agency action should be limited
10 to the record considered by the agency. The procedures used by the district court
11 in *Aspen Trails Ranch* are not those at issue here — this case has not involved a
12 hearing of any request other than for judicial review of DEQ's record and
13 issuance of a permit.

14 The Court's function in this case is to review the agency record to
15 determine whether its decision to issue the permit was arbitrary, capricious,
16 unlawful, or not supported by substantial law. In terms of mechanics, the review
17 by this Court is similar to the review of an agency decision in a contested case
18 pursuant to MAPA. The Montana Supreme Court very recently confirmed, with
19 regard to a district court's review of an agency's actions in a contested case, that
20 the review is limited to the record upon which the action was taken. *Peretti v.*
21 *Dep't of Revenue*, 2016 MT 105, ¶¶ 14-15, 383 Mont. 340, __ P.3d __. There is
22 no reason to deviate from the procedure which requires review of agency action
23 by review of the information presented to and considered by the agency. The
24 Court's determination of whether the agency's action was arbitrary, capricious,
25 /////

1 or unlawful should not include consideration of information not presented in the
2 record, including any post-decision statements of the agency.

3 On these bases, the motion to strike shall be granted.

4 JUDICIAL REVIEW

5 Background

6 The Bitterroot River is a tributary of the Clark Fork River. It flows
7 north out of the Bitterroot Valley of Montana. Relative to the Grantsdale
8 Addition Subdivision, the Bitterroot River flows north to the west, and Skalkaho
9 Creek flows northwest to join the Bitterroot River northwest of the Subdivision.

10 Plaintiffs urge application of the federal law that seeks to maintain the
11 highest water quality. DEQ argues that, because there is only ground water at
12 issue, the Clean Water Act (CWA) (found within the Federal Water Pollution
13 Control Act at 33 U.S.C. § 1251 *et seq.*) is inapplicable to Permit MTX000163.
14 DEQ maintains that its procedures in issuing the permit in this case fully
15 complied with Montana's Water Quality Act (WQA).

16 DEQ's consideration of water quality in Montana must involve
17 application of standards, practices, and compliance with both federal and state
18 law. Montana Code Annotated, Title 75, chapter 5, sets out the statutes relevant
19 to water quality. Both Montana statutes and administrative rules refer to
20 applicable federal law. *See* Mont. Admin. R. 17.30.101.

21 In Montana, we have an additional constitutional mandate regarding
22 our environment:

23 Protection and improvement. (1) The state and each person shall
24 maintain and improve a clean and healthful environment in Montana
25 for present and future generations.

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1 (2) The legislature shall provide for the administration and
2 enforcement of this duty.

3 (3) The legislature shall provide adequate remedies for the
4 protection of the environmental life support system from degradation
5 and provide adequate remedies to prevent unreasonable depletion and
6 degradation of natural resources.

7 Mont. Const. Art. IX, § 1. See *Montana Env'tl. Info. Ctr. v. Dep't of Env'tl.*
8 *Quality*, 1999 MT 248, ¶¶ 64-80, 296 Mont. 207, 988 P.2d 1236.

9 The following timeline is relevant to the issues raised:

10 1. May 8, 2006 - Statement of Basis generated by DEQ regarding
11 "Kent Kearns Subdivision" near Hamilton, Ravalli County, Montana. The
12 statement includes the following description: "This is a new permit for a
13 proposed wastewater treatment system as part of a new subdivision in Hamilton,
14 MT near the confluence of Skalkaho Creek and the Bitterroot River." (Admin.
15 R. 1648.)³

16 2. September 1, 2006 - DEQ Authorization to Discharge⁴ Under
17 the Montana Ground Water Pollution Control System (MGWPCS) issued to
18 Kearns Properties, LLC, for the "Grantsdale Addition at 282 Skalkaho
19 Highway." The twenty-page permit became effective October 1, 2006 and
20 expired at midnight September 30, 2011. (Admin. R. 1728.)

21 ³ References to the administrative record provided by DEQ (in the form of a computer disc)
22 are stated as "Admin. R." with page numbers (shown in the administrative record in the lower
23 right hand corner of each page). The computer disc is Attachment A to an Affidavit of Thomas
24 Griffeth filed February 13, 2015. The record consists of over 2,300 pages of documents.

25 ⁴ "Discharge" is defined in Montana Administrative Rule 17.30.1001(3) as "the addition of
any pollutant to waters of the state." Montana Administrative Rule § 17.30.102(4) defines it as
"the injection, deposition, dumping, spilling, leaking, placing, or failure to remove, of any
pollutant so that it or any constituent of the pollutant may enter into state waters." The 2014
renewed permit mirrors this latter definition.

1 3. April 11, 2011 - DEQ received permit renewal application from
2 Kearns. (Admin. R. 1157-71.) The application showed that the facility
3 described in the permit issued in 2006 had yet to be constructed.

4 4. September 17, 2013 - Permit Fact Sheet regarding renewal of
5 Permit MTX00016 includes:

6 The proposed facility is located about 2.5 miles south of
7 Hamilton on the east and north sides of Skalkaho Highway and south
8 of the Grantsdale Cutoff Road. The proposed facility is about 70
9 acres in size and will serve an estimated 440 individuals in up to 181
10 single-family homes along with two (2) commercial/industrial
11 connections. The proposed facility will discharge treated effluent into
12 Class I ground water . . . via two (2) subsurface drainfields.

13 (Admin. R. 965-66.) The description of the wastewater treatment system
14 includes:

15 The proposed design of the facility consists of individual septic
16 tanks on each lot (provided by each individual lot owner), individual
17 grease traps (provided by each individual commercial/industrial
18 connection), gravity sewer lines with a possible force main,
19 recirculating tank(s), recirculating filter(s), dosing tank(s), distribution
20 lines, and two (2) 30,000 gallon capacity pressure-dosed drainfields.

21 Raw sewage enters the septic tanks where primary treatment
22 (settling) occurs. Effluent from the septic tanks on each of the
23 individual lots will be conveyed via a 4-inch gravity sewer main into a
24 recirculating tank(s) with a 45,000 gallon capacity. Effluent is then
25 pumped from the recirculating tank into the recirculating filters for
 treatment. . . . After treatment, the effluent is either returned to the
 recirculation tank for additional treatment or directed into a dose tank
 for discharge into ground water via two pressure-dosed subsurface
 drainfields. Each drainfield will receive up to 30,000 gpd and
 discharge into Class I ground water. . . . The drainfields are in close
 proximity to each other and receive the same treated wastewater from

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1 the same collection system. As such, the two drainfields are
2 designated as one outfall (Outfall 001).

3 (Admin. R. 966; *see also* Admin. R. 1648-50.) As to the discharge points, the
4 Permit Fact Sheet states:

5 The previous permit authorized the discharge of domestic wastewater
6 from two discharge structures (Outfall 001 and Outfall 002).
7 Beginning with this permit renewal, both drainfields will be combined
8 into a single outfall, designated as Outfall 001, since the drainfields
9 are in close proximity of each other and each drainfield receives the
same treated effluent from a single collection and treatment system.

10 (Admin. R. 967.) In its undated response to public comments (with no identified
11 author), DEQ explains that because the wastewater treatment system described in
12 the prior permit had not been built, DEQ changed the monitoring requirements
13 based on the conclusion that “accurate upgradient water quality data better serves
14 the purposes of protecting downgradient water quality and beneficial uses
15 through the implementation of end-of-pipe effluent limits.” (Admin. R. 33.)

16 While the outfall is located after the wastewater treatment system and
17 prior to the subsurface drainfields and mixing zone, DEQ “conservatively
18 estimates the predicted water quality at the end of the authorized mixing zone.”
19 (Admin. R. 28.)

20 Under the heading “Site Hydrogeology,” the Permit Fact Sheet
21 describes the geology of the Bitterroot Valley, the ground water flow rate and
22 direction, and the ground water recharge, including:

23 Ground water flow direction on the east side of the Bitterroot
24 Valley in the vicinity of the facility is generally northwest toward the
25 Bitterroot River beneath the low terrace along Skalkaho Creek.

1 The current application indicates an estimated ground water
2 flow direction of N74°W, a ground water gradient (I) of 0.006 ft/ft,
3 and hydraulic conductivity (k) of 989 ft/day. . . . The results of the
4 analysis agree with studies conducted in the vicinity of the facility
5 estimating bulk hydraulic conductivity values ranging from 900 to
6 2,300 ft/day.

7 (Citations omitted.) It then states:

8 The closest surface waters to the facility, as listed on form GW-
9 1 of the application materials, are the Republican Ditch 600 feet east,
10 an oxbow of the Bitterroot River 2,000 feet west, the Bitterroot River
11 4,000 feet west, and Skalkaho Creek 4,000 feet northeast. Based upon
12 the reported ground water flow direction, the nearest surface water
13 downgradient of the facility are several small farm ponds located
14 about 2,300 feet northwest of the site; this distance to the farm ponds
15 was used in the calculations for the breakthrough of phosphorus to
16 surface water as part of the nonsignificance determination of the
17 2006-issued permit (DEQ, 2006a).

18 (Admin. R. 969.)

19 As to classification of the receiving ground water, the Permit Fact
20 Sheet confirms the Class I designation set out in Montana Administrative Rule
21 17.30.1006(1)(a) and the recognition of the water as a high quality water of the
22 state, as set out in Montana Code Annotated § 75-5-103(13). “The proposed
23 discharge will result in a change in water quality in the receiving water which is
24 high quality; the criteria in ARM 17.30.715(1) apply.” (Admin. R. 974.) The
25 limits for nitrate + nitrite as a water quality standard (10 mg/L) and as a
nondegradation significance criteria (7.5 mg/L) are stated in the permit fact sheet.

5. October 15, 2013 – DEQ Public Notice Number MT-13-25
issued. (Admin. R. 1050-51.)

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6. December 23, 2013 – DEQ Public Notice Number MT-13-34 issued. “This is a reopening of the public comment period, including the notification of a public hearing, for this draft permit.” (Admin. R. 941-42.)

7. January 23, 2014 – Public hearing on draft permit held in Hamilton, Montana. (Admin. R. 105-162.)

8. March 24, 2014 - DEQ Authorization to Discharge Under the Montana Ground Water Pollution Control System issued to Brad Mildenberger for the “Grantsdale Addition Facility.” The sixteen-page permit became effective May 1, 2014 and expires at midnight April 30, 2019. (Admin. R. 1.)

The outfall location is described as “[s]ubsurface drainfields” with geographic coordinates. (Admin. R. 3.) Monitoring is to occur as follows: “Samples representative of the effluent quality at the outfall must be individually collected from the last point of control: at the dose tank prior to discharge into the drainfields.” (Admin. R. 4.)

The permit expires April 30, 2019.

DISCUSSION

It is the stated statutory goal that Montana maintain the existing uses of state waters and the level of water quality necessary to protect those uses, i.e., to avoid degradation. Mont. Code Ann. § 75-5-303. While degradation of state waters may be allowed in certain circumstances, the overarching goals set out in that statute must be met. The state’s degradation policy applies equally to surface and ground waters. “Existing uses of state waters and level of water quality necessary to protect those uses must be maintained and protected.” Mont. Code Ann. § 75-5-303(1).

1 DEQ must determine initially whether certain degradation review is
2 necessary. Mont. Code Ann. 75-5-303(2). Procedurally, if DEQ determines, as
3 it did in this case, that there would be a lack of significant changes in water
4 quality caused by the activity allowed by the permit, it need not implement the
5 public process regarding degradation and need not show the need for the
6 degradation by a preponderance of evidence.

7 Substantively, the determination that there need not be full
8 degradation review could have long-term, momentous effects on the quality of
9 the water affected by the activity allowed by the permit. Montana law gives
10 guidance as to what should be considered by DEQ in determining the effects of
11 such activity on our water quality.

12 Montana Code Annotated § 75-5-301 authorizes the Board of
13 Environmental Review to:

14 (5) adopt rules implementing the nondegradation policy
15 established in 75-5-303, including but not limited to rules that:

16 (a) provide a procedure for department review and
17 authorization of degradation;

18 (b) establish **criteria** for the following:

19 (i) determining important economic or social development; and

20 (ii) **weighing the social and economic importance to the**
21 **public of allowing the proposed project against the cost to society**
22 **associated with a loss of water quality;**

23 (c) establish criteria for determining whether a proposed
24 activity or class of activities, in addition to those activities identified
25 in 75-5-317, will result in nonsignificant changes in water quality for
any parameter in order that those activities are not required to undergo
review under 75-5-303(3). These **criteria** must be established in a
manner that generally:

(i) equates significance with the potential for harm to human
health, a beneficial use, or the environment;

1 (ii) considers both the quantity and the strength of the
2 pollutant;

3 (iii) considers the length of time the degradation will occur;

4 (iv) considers the character of the pollutant so that greater
5 significance is associated with carcinogens and toxins that
6 bioaccumulate or biomagnify and lesser significance is associated
7 with substances that are less harmful or less persistent.

8 (d) **provide that changes of nitrate as nitrogen in ground
9 water are nonsignificant if the discharge will not cause
10 degradation of surface water and the predicted concentration of
11 nitrate as nitrogen at the boundary of the ground water mixing
12 zone does not exceed:**

13 ...

14 (iii) 7.5 milligrams per liter from sewage discharged from a
15 system using level two treatment, which must be defined in the rules.

16 ...

17 (Emphasis added.) Additional criteria are found in Administrative Rule of
18 Montana 17.30.715 (Criteria for Determining Nonsignificant Changes in Water
19 Quality), a rule adopted to implement Montana Code Annotated § 75-5-303. The
20 rule sets forth criteria to be used to determine whether activities will result in
21 nonsignificant changes in existing water quality because of their low potential to
22 affect human health or the environment. The criteria “consider the quantity and
23 strength of the pollutant, the length of time the changes will occur, and the
24 character of the pollutant.” Activities that result in nonsignificant changes in
25 ground water are not required to undergo review under 75-5-303 with the
following exceptions:

26 (2) **Notwithstanding compliance with the criteria of [Mont.
27 Admin. R. 17.30.715] (1), the department may determine that the
28 change in water quality resulting from an activity which meets the
29 criteria in (1) is degradation based upon the following:**

30 (a) **cumulative impacts or synergistic effects;**

1 (b) secondary byproducts of decomposition or chemical
2 transformation;
3 (c) **substantive information derived from public input;**
4 (d) changes in flow;
5 (e) changes in the loading of parameters;
6 (f) new information regarding the effects of a parameter; or
7 (g) any other information deemed relevant by the department
8 and that relates to the criteria in (1).

9 (3) The department may determine that a change in water
10 quality resulting from an activity or category of activities is
11 nonsignificant based on information submitted by an applicant that
12 demonstrates conformance with the guidance found in 75-5-301(5)(c),
13 MCA. In making a determination under this subsection, the
14 department shall allow for public comment prior to a decision
15 pursuant to the public notice procedures in ARM 17.30.1372. . . .

16 (Emphasis added.)

17 Plaintiffs argue that DEQ misapplied this law to conclude that there
18 will be nonsignificant changes in water quality due to the activity covered by the
19 permit issued for the Grantsdale Addition Subdivision. Part of their argument is
20 that DEQ did not adequately consider the cumulative impacts of the subdivision
21 wastewater and the information from the public.

22 DEQ maintains that it properly concluded there would be
23 nonsignificant changes in water quality. One basis for DEQ's argument is the
24 contention that the record in this case does not establish a "direct hydraulic
25 connection between ground water and surface water." (DEQ's Br. Opp'n Pls.'
Mot. S.J. & Supp. DEQ's Cross-Mot. S.J., at 10 (July 16, 2015).)

DEQ's characterization of the record regarding evidence of a
connection between the relevant ground water and surface waters fails to

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1 recognize the numerous documents discussing the well-established conclusion
2 that there is a connection between groundwater and surface water. For example:

3 Surface water bodies are hydraulically connected to ground
4 water in most types of landscapes; as a result, surface-water bodies are
5 integral parts of ground-water flow systems. Even if a surface water
6 body is separated from the ground-water system by an unsaturated
7 zone, seepage from the surface water may recharge ground water.
8 Because of the interchange of water between these two components of
the hydrologic system, development or contamination of one
commonly affects the other.

9 (Admin. R. 254; *see also* Admin. R. 692-698.) Specific to the drainage at issue
10 here, the Tri-State Water Quality Council in 2005 stated:

11 Most of the broad inter-mountain valleys of western Montana,
12 northern Idaho, and northeastern Washington are underlain by
13 aquifers made up of silt, sand, gravel, and cobbles that were deposited
14 by receding glaciers and the streams that flowed from them. These
15 aquifers tend to be shallow, and produce abundant water for domestic,
16 municipal and irrigation water supply wells. The high permeability of
17 many of these aquifers permits relatively rapid infiltration of recharge
waters from precipitation, flooding, irrigation, and septic systems.
Examples include the Missoula valley aquifer, the Bitterroot valley
aquifers. . . .

18 Groundwater and surface water interact in complex and
19 dynamic ways. The important concept is that surface water and
20 groundwater are not separate, but rather consist of the same water
21 circulating through the hydrologic system. Consequently, any impact
22 to groundwater, such as the discharge from septic systems, will
23 ultimately impact surface water. Managers of septic systems and
24 other sources of groundwater contamination need to recognize that –
25 in many of the geologic settings, such as basin-fill river valleys and
lakeshores undergoing intense development pressure -- groundwater
contamination can have an impact on our surface waters, and vice
versa.

. . .

1 [W]e know that groundwater in most intermountain valleys of the
2 Northwest generally flows toward surface water and ultimately
3 discharges to streams, river and lakes. This, one would expect to find
4 that, in some cases, septic systems are contributing significant
5 amounts of nutrients to surface water, and causing negative impacts to
6 area waters. This indeed turns out to be the case.

6 (Admin. R. 408.)

7 The information presented to DEQ established the connection and
8 interaction between groundwater and surface water generally. Although there is
9 no map of the underground flow and seepage of water through every inch of the
10 ground between the proposed subdivision and surface water potentially affected
11 by wastewater added to the groundwater, there is a wealth of information in the
12 administrative record regarding the natural and known interaction. The lengthy
13 written results of the Environmental Protection Agency's Ground-Water/Surface-
14 Water Interactions Workshop establish, among other things, the need to pay
15 attention to and study the effects of groundwater on surface waters to avoid
16 negative water quality effects. (*See* Admin. R. 236-307.)

17 Given the connection between ground water and surface water, it is
18 clear that this permit would allow discharge to ground water headed to the
19 Bitterroot River. The Bitterroot River was listed as impaired in 2014 pursuant to
20 state and federal water quality standards and law. DEQ's failure to recognize the
21 connection between ground water and surface water in this case is a failure to

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1 adequately protect the water quality of the Bitterroot River. This, in turn,
2 violates DEQ's responsibility to protect the water quality of the state.⁵

3 The public comments taken by DEQ over the course of presenting and
4 issuing the permit in 2014 well establish the value and significance of the surface
5 waters potentially affected by discharges into the nearby groundwater. This is
6 primarily true of the Bitterroot River, which was described by numerous citizens
7 as a source of various benefits in their lives, including recreational, natural, and
8 aesthetic opportunities.

9 In this case the cumulative effects on groundwater from numerous
10 septic discharges are well documented in the record. (Admin. R. at 186, 191,
11 396-425, 524-555, 596- 616.) Montana Code Annotated § 75-3-303 and
12 Montana Administrative Rule 17.30.715 require full consideration by DEQ of
13 this scientific documentation regarding the effect of increased septic discharges,
14 as well as public concerns as to the increase in residential water use and
15 wastewater and the characteristics of the landscape (including the proximity of
16 drinking water wells).

17 Finally, DEQ did not evaluate the cumulative and synergistic effects
18 of issuance of the permit allowing the additional sewage load of the Grantsdale
19 subdivision. *See* Mont. Admin. R. 17.30.715(2)(a). DEQ must explicitly address
20 the cumulative impacts of issuance of this permit, other discharge permits, and
21 other sources of nitrogen contamination to the Bitterroot River.

22
23 ⁵ "In designating uses of a water body and the appropriate criteria for those uses, the State
24 shall take into consideration the water quality standards of downstream waters and shall ensure
25 that its water quality standards provide for the attainment and maintenance of the water quality
standards of downstream waters." 40 C.F.R. § 131.10(b), *El Dorado Chem. Co. v. United*
States EPA, 763 F.3d 950, 952-53 (8th Cir. 2014)

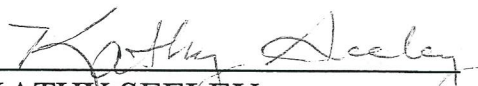
1 DEQ's permit process is integral to protection of Montana's water
2 quality. In this case, its issuance of Permit number MTX000163, effective May
3 1, 2014, was unlawful and arbitrary and unsupported by law because its
4 conclusions were not supported by the relevant objective and scientific data in
5 the administrative record. *See Ravalli Co. Fish & Game Ass'n v. Mont. Dep't of*
6 *State Lands*, 273 Mont. 371, 381, 903 P.2d 1362, 1369 (1995). While this Court
7 cannot substitute its opinion for DEQ's determination regarding the requested
8 permit, it hereby requires application of Montana Code Annotation§ 75-5-303
9 regarding full degradation review and the public process that is set forth therein.

10 **ORDER**

11 Based on the foregoing, Plaintiffs' motion to strike is GRANTED.
12 Plaintiffs' motion for summary judgment is GRANTED. DEQ'S motion for
13 summary judgment is DENIED. The issuance of Permit number MTX00000163,
14 effective May 1, 2014 is hereby declared invalid, and this matter remanded for
15 full degradation review.

16 **IT IS SO ORDERED.**

17 DATED this 28 day of June 2016.

18
19 
20 KATHY SEELEY
21 District Court Judge

22 pc: Jack R. Tuholske, PO Box 7458, Missoula MT 59807
23 Erin Farris-Olsen, PO Box 408, Helena MT 59624
24 Kristen Bowers, PO Box 200901, Helena MT 59620-0901
25

KS/t/bitterrooters for planning v deq m&o mot strike and x-mots sj.doc