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MONTANA FIRST JUDICIAL DISTRICT COURT
LEWIS AND CLARK COUNTY

MONTANA ENVIRONMENTAL
INFORMATION CENTER, SAVE OUR
CABINETS, and EARTHWORKS,

Plaintiffs,

v.

MONTANA DEPARTMENT OF
ENVIRONMENTAL QUALITY and
MONTANORE MINERALS CORP.,

Defendants.

Case No.

**COMPLAINT FOR
DECLARATORY RELIEF**

INTRODUCTION

1. This case challenges the Montana Department of Environmental Quality's issuance of a water pollution discharge permit for the Montanore Mine, a massive copper and silver mining project proposed by the Montanore Minerals Corp. ("MMC") in the Cabinet Mountains of northwest Montana. The proposed mine would tunnel beneath the Cabinet Mountains Wilderness Area of the Kootenai National Forest, which boasts some of the purest waters in the lower-48 and harbors vital populations of bull trout—a threatened species protected by the Endangered Species Act—and other native fish.

2. MMC's project proposal calls for extracting up to 20,000 tons of ore each day, seven days per week, for as long as twenty years. These activities would generate up to 120 million tons of mining waste and pollute streams designated "high quality" under Montana law with metals, sediment, and nutrient pollutants (nitrogen and phosphorous) that are harmful or toxic to aquatic life.

3. Defendant Montana Department of Environmental Quality ("DEQ") is charged with protecting the quality of our state waters and ensuring compliance with the federal Clean Water Act, 33 U.S.C § 1251 et seq., and the Montana Water Quality Act, Mont. Code Ann. § 75-5-101 et seq. Those statutes prohibit any discharge of pollutants into state waters from mining and other industrial operations except as authorized in a Montana Pollution Discharge Elimination System ("MPDES") permit. DEQ is charged with issuing MPDES permits in conformance with the Clean Water Act and Montana Water Quality Act.

4. However, in issuing the challenged permit for MMC's Montanore project, DEQ violated numerous requirements of these statutes and their implementing regulations. These violations include omission of legally required pollutant limitations and reliance on a 25-year-old

authorization issued for another company's long-abandoned project at the Montanore site to excuse MMC from complying with Montana's legal protections for high-quality waters.

5. To safeguard their interests in the waters and native fish threatened by MMC's unlawful discharge permit and the irreplaceable landscape of which they are a part, Plaintiffs seek relief from this Court.

JURISDICTION AND VENUE

6. Plaintiffs bring this action pursuant to the Uniform Declaratory Judgments Act, Mont. Code Ann. §§ 27-8-201, 202; the Montana Water Quality Act, Mont. Code Ann. § 75-5-101 et seq.; and the federal Clean Water Act, 33 U.S.C. § 1251 et seq. See Johansen v. Mont. Dep't of Nat. Res. & Conservation, 1998 MT 51, ¶¶ 25-27, 288 Mont. 39, 955 P.2d 653 (holding district courts possess inherent authority to review state agency decisions that are not classified as contested cases under the Montana Administrative Procedure Act); Tongue River Water Users Ass'n v. Mont. Dep't of Env'tl. Quality, Cause No. BDV-2001-258, 2002 Mont. Dist. LEXIS 1826, at *3-*7, *14 (Mont. 1st Judicial Dist. May 1, 2002) (applying Johansen to review declaratory judgment action challenging DEQ's issuance of MPDES permit).

7. Venue is proper in this district because DEQ is an agency of the State of Montana and plaintiff Montana Environmental Information Center is headquartered in this district. See Mont. Code Ann. § 25-2-126(1).

PARTIES

8. Plaintiff Montana Environmental Information Center ("MEIC") is a member-supported Montana non-profit organization based in Helena, Montana. Founded in 1973, MEIC represents approximately 5,000 members from across Montana and the United States. MEIC is dedicated to, among other things, protecting Montana's water quality and insuring compliance

with the laws and Constitution of Montana. MEIC has litigated numerous water protection cases related to metal mining in Montana. MEIC members live near, recreate in, and otherwise derive benefit from the public lands and waters in the Cabinet Mountains.

9. Plaintiff Save Our Cabinets is a Montana non-profit organization dedicated to protecting wild lands, wildlife, and water quality in the Cabinet Mountains of northwest Montana. Save Our Cabinets is headquartered in Heron, Montana, and its members live and recreate in and around the Cabinet Mountains. Save Our Cabinets has engaged in extensive public education and advocacy to protect the Cabinet Mountains region and its waters, native fish, and wildlife from the adverse effects of MMC's Montanore project.

10. Founded in 1988, Plaintiff Earthworks is a non-profit organization dedicated to protecting communities and the environment from the adverse effects of mineral and energy development while promoting sustainable resource solutions. Earthworks is headquartered in Washington, D.C., and has field offices across the country, including in Missoula, Montana. Earthworks has a long history of advocacy to protect the Cabinet Mountains Wilderness, surrounding National Forest lands and waters, and associated aquatic life from the adverse effects of MMC's Montanore project. Earthworks members live and recreate in northwest Montana, including the Cabinet Mountains area where MMC's Montanore project is proposed.

11. Defendant Montana Department of Environmental Quality is an agency of the State of Montana and is charged with implementing the Montana Water Quality Act and, pursuant to authority delegated by the U.S. Environmental Protection Agency, the water pollution discharge permit program under the federal Clean Water Act. DEQ is headquartered in Helena, Montana.

12. Defendant Montanore Minerals Corp., a wholly-owned subsidiary of Hecla Mining Company, is the proponent of the Montanore project and holds the MPDES permit challenged in this action. Plaintiffs do not seek any relief against MMC. Instead, MMC is named as a necessary party pursuant to the Uniform Declaratory Judgments Act, Mont. Code Ann. § 27-8-301, because its interest in the challenged permit may be affected by the declaration sought in this action.

13. Plaintiffs' members, staff, and volunteers use and enjoy the Cabinet Mountains Wilderness and surrounding National Forest lands for a wide range of activities, including recreational pursuits such as hiking, camping, backpacking, bird watching, and wildlife watching, as well as spiritual renewal and aesthetic enjoyment. Plaintiffs' members, staff, and volunteers have viewed bull trout and their habitat, as well as other native fish and wildlife, in the Cabinet Mountains and have engaged in extensive scientific, educational, and advocacy efforts aimed at maintaining clean water and an intact ecosystem in the Cabinet Mountains that supports native fish and wildlife.

14. Plaintiffs submitted extensive comments on the two drafts of MMC's MPDES permit that DEQ issued for public comment. See Letter from K. O'Brien, Counsel for Save Our Cabinets, Earthworks, and MEIC, to J. Kenning, DEQ Water Protection Bureau Chief, Re. Proposed MPDES Permit for the Montanore Mine Project (Sept. 28, 2015) ("2015 Comments") (attached as Exhibit 4); Letter from K. O'Brien, Counsel for Save Our Cabinets, Earthworks, and MEIC, to J. Kenning, DEQ Water Protection Bureau Chief, Re. Proposed MPDES Permit for the Montanore Mine Project (May 16, 2016) ("2016 Comments") (attached as Exhibit 5).

15. DEQ's issuance of a MPDES permit for MMC's mine project that authorizes unlawful pollution of streams on and near public lands in the Cabinet Mountains, including

irreplaceable bull trout habitat, will harm the interests of Plaintiffs' members, staff, and volunteers in using and enjoying the wild public lands in the Cabinet Mountains and maintaining a healthy and intact ecosystem there. Accordingly, the legal violations alleged in this complaint cause direct injury to the aesthetic, conservation, recreational, scientific, educational, and wildlife preservation interests of Plaintiffs and their members, staff, and volunteers. These are actual, concrete injuries that are traceable to DEQ's conduct and would be redressed by the relief requested here.

FACTUAL BACKGROUND

16. MMC proposes to construct and operate the Montanore Mine project, which would bore beneath the Cabinet Mountains Wilderness approximately 18 miles south of Libby, Montana, to access deposits of copper and silver ore. Today, the Cabinet Mountains Wilderness and surrounding National Forest lands provide incomparable backcountry recreation opportunities and an invaluable block of undisturbed habitat for numerous wildlife species, including grizzly bears, lynx, elk, moose, westslope cutthroat trout, and bull trout—a threatened native fish species that is acutely sensitive to water pollution.

17. In the midst of this wild landscape, MMC's project would involve construction of multiple mine adits, approximately 14 miles of high-voltage transmission line, waste rock storage and ore processing facilities, a wastewater treatment plant, wastewater holding and seepage collection ponds, pipelines for transporting water and mine waste, and a waste storage facility capable of impounding 120 million tons of mine "tailings"; paving and widening approximately 13 miles of roads; and associated clearing of trees and vegetation. The project would physically disturb more than 1,500 acres of land and inflict direct and indirect impacts on

more than 7,800 acres of wilderness, National Forest, and private lands surrounding the project site.

18. MMC's operations would require the discharge of mine wastewater and storm water to streams flowing out of the Cabinet Mountains Wilderness, polluting those waters with metals, nutrient pollutants, sediment, and wastewater that is unacceptably warm for native fish. The challenged MPDES permit authorizes discharges into Libby, Ramsey, and Poorman Creeks, which all are designated "high quality" waters under Montana law; this designation means that the waters are currently of sufficient quality to support all uses designated for them under Montana law. See Mont. Code Ann. § 75-5-103(13) (defining "high-quality waters"). The designated uses of the receiving waters include, inter alia, swimming, recreation, and growth and propagation of salmonid fish species, such as bull trout, and other aquatic life. See Mont. Admin. R. 17.30.623 (establishing designated uses for waters classified "B-1"); Mont. Dep't of Env'tl. Quality, Permit Fact Sheet, Mont. Pollution Discharge Elimination Sys., Montanore Minerals Corp. Permit No. MT0030279, at 22 ("Fact Sheet") (attached as Exhibit 2) (stating water-use classification for receiving waters is B-1).

19. Indeed, the reaches of Libby, Poorman, and Ramsey Creeks that run through the mine project area all are occupied by bull trout and Libby Creek has been designated as "critical habitat" for bull trout under the Endangered Species Act; the very reach of Libby Creek into which MMC proposes to dump its wastewater provides vital bull trout spawning habitat. As the Montana Federal District Court recently determined, MMC's operations would "have serious negative impacts on local populations of bull trout." Save Our Cabinets v. U.S. Fish & Wildlife Serv., No. CV 15-69-M-DWM, ---F. Supp. 3d---, 2017 WL 2345653, at *3 (D. Mont. May 30,

2017) (reviewing federal authorizations for MMC’s Montanore project and holding that those authorizations violate the Endangered Species Act).

20. MMC is not the first entity to propose mining the Montanore ore body. The Noranda Minerals Corporation (“Noranda”) first proposed a project to access the Montanore ore body in 1989. Noranda began constructing an exploration adit in the Libby Creek drainage but ceased work in 1991 due to violations of water quality standards and declining metals prices. Though Noranda continued acquiring permits for its project, including a MPDES permit from DEQ authorizing discharges from the Libby Adit into Libby Creek, it never completed construction or began operations. In 2002, Noranda formally abandoned its project and relinquished the mining authorization it had obtained from the U.S. Forest Service, the federal agency with primary authority for permitting the mine. Because Noranda had outstanding reclamation obligations, however, DEQ left the company’s MPDES permit in effect despite the company’s abandonment of its project.

21. In 2004, MMC’s parent company submitted a new proposal to state and federal regulators to mine the Montanore ore body. Two years later, MMC’s parent company acquired Noranda and its MPDES permit covering discharges from the Libby Adit.

22. In 2010, MMC applied to DEQ to “renew” the MPDES permit it acquired from Noranda. That application requested substantial changes to the Noranda permit consistent with MMC’s plans to develop a new and differently configured mining project at the Montanore site; while the Noranda permit authorized discharges of mine wastewater from the single existing adit into Libby Creek, MMC’s application sought authorization for additional discharges to Libby Creek from multiple mine adits, a tailings storage facility, and other mine facilities as well as

storm water discharges to Libby, Poorman, and Ramsey Creeks from five new storm water-only outfalls.

23. DEQ proposed to grant MMC's requested changes in a draft MPDES permit released for public comment on July 31, 2015. DEQ issued a revised draft permit on April 11, 2016, and a final permit on January 18, 2017 (hereafter the "MPDES Permit" or "Permit") (attached as Exhibit 1). DEQ set forth its rationale for the effluent limitations and other conditions established in the Permit in (1) a supporting Fact Sheet (attached as Exhibit 2), which under governing regulations must "set forth the principal facts and the significant factual, legal, methodological and policy questions considered" in developing the permit, Mont. Admin. R. 17.30.1371, and (2) DEQ's Response to Comments received during the public comment periods on the two public drafts of the permit (attached as Exhibit 3).

24. The final Permit DEQ issued to MMC authorizes discharges from eight outfalls:

a. From Outfall 001, the Permit authorizes MMC to discharge wastewater from the mine adits, underground mine workings, and tailings impoundment, as well as storm water runoff from the Libby Adit facility, into groundwater that flows into Libby Creek;

b. from Outfall 002, the Permit authorizes MMC to discharge wastewater from the mine adits, underground mine workings, and tailings impoundment into groundwater that flows into Libby Creek;

c. from Outfall 003, the Permit authorizes MMC to discharge wastewater from the mine adits, underground mine workings, and tailings impoundment directly into Libby Creek;

d. from Outfalls 004 and 005, the Permit authorizes MMC to discharge storm water runoff into Libby Creek;

e. from Outfall 006, the Permit authorizes MMC to discharge storm water runoff into Ramsey Creek; and

f. from Outfalls 007 and 008, the Permit authorizes MMC to discharge storm water runoff into Poorman Creek.

See Exhibit 2 (Fact Sheet) at 5-6 and Tables 1-3. Depending on the outfall, the effluent discharged is expected to contain some combination of metals, sediment, and nutrient pollutants.

STATUTORY AND REGULATORY BACKGROUND

25. State and federal law prohibit the discharge of pollutants into the waters of our state absent a valid discharge permit issued in conformance with the federal Clean Water Act, 33 U.S.C § 1251 et seq., and the Montana Water Quality Act, Mont. Code Ann. § 75-5-101 et seq. See N. Cheyenne Tribe v. Mont. Dep't of Env'tl. Quality, 2010 MT 111, ¶¶ 7, 21, 356 Mont. 296, 234 P.3d 51.

26. Congress enacted the Clean Water Act “with the goal of eliminating the discharge of pollutants in order to ‘restore and maintain the chemical, physical, and biological integrity of the Nation’s waters.’” Id. ¶ 21 (emphasis in original) (quoting 33 U.S.C. § 1251(a)). Over and above ensuring compliance with applicable requirements of the Clean Water Act and its implementing regulations, the Montana Water Quality Act “provide[s] additional and cumulative remedies to prevent, abate, and control the pollution of state waters” and ensure “the protection of the environmental life support system from degradation.” Mont. Code Ann. § 75-5-102(1).

27. To implement these objectives, the Clean Water Act and Montana Water Quality Act require the state to establish water quality standards that “define[] the water quality goals of a water body, or portion thereof, by designating the use or uses to be made of the water and by setting criteria that protect the designated uses.” 40 C.F.R. § 131.2. See 33 U.S.C. § 1313;

Mont. Admin. R. 17.30.601, 17.30.603. Water quality criteria may be expressed as numeric or narrative limits on the allowable level of pollutants in the relevant water body, but in either case they “must be based on sound scientific rationale” and must “protect the designated use” of the waters at issue. 40 C.F.R. § 131.11.

28. Pollutant discharge permits are the primary tool for ensuring compliance with the water quality standards established for each water body within the state. The U.S. Environmental Protection Agency (“EPA”) is responsible for issuing discharge permits, which impose conditions and limitations on pollutant discharges from industrial operations and other sources, unless the EPA Administrator has approved a state-run permitting program. N. Cheyenne Tribe, ¶ 7. EPA has authorized DEQ to administer the MPDES permitting program in Montana. Id.

A. Effluent Limitations

29. MPDES permits issued by DEQ must include “effluent limitations” and other terms and conditions that are sufficient to ensure that permitted discharges will not lead to a violation of any applicable water quality standard. See 33 U.S.C. § 1342(b)(1)(A); Mont. Code Ann. § 75-5-401(2); Mont. Admin. R. 17.30.637(2); Mont. Admin. R. 17.30.1344(1) (incorporating federal requirements). Effluent limitations impose restrictions on the quantity of specific pollutants that a permit holder is allowed to discharge. See 33 U.S.C. § 1362(11). To satisfy this fundamental requirement, MPDES permits contain two types of effluent limitations—technology-based effluent limitations and water quality-based effluent limitations.

30. All MPDES permits must contain technology-based effluent limitations, which are based on the level of pollutant-reduction achievable with available pollution control technology that is determined to be cost-effective under the standards of the Clean Water Act.

40 C.F.R. § 125.3(a); Mont. Admin. R. 17.30.1203(1); see 33 U.S.C. § 1311(b) (establishing standards for technology-based effluent limitations). To aid in the development of technology-based effluent limitations for individual permits, EPA has promulgated effluent limitation guidelines (“ELGs”) for many categories of industrial facilities; ELGs establish the technology-based effluent limitations that must be included in discharge permits for facilities in the relevant category. See 40 C.F.R. § 125.3(a), (c)(1). For discharges that are not covered by an applicable ELG, DEQ must develop technology-based effluent limitations on a case-by-case basis using its “best professional judgment.” See id. §§ 122.44(a)(1), 125.3(c)(2); Mont. Admin. R. 17.30.1203(5)(b). Effluent limitations established on a case-by-case basis must satisfy the substantive standards in the Clean Water Act, 33 U.S.C. § 1311(b). See 40 C.F.R. § 125.3(c)(2); Mont. Admin. R. 17.30.1203(5)(b).

31. Because technology-based effluent limitations are not based on the water quality goals for any particular water body, they are not always adequate to ensure that a discharge will comply with all water quality standards that apply to the receiving waters. In such cases, MPDES permits must contain more stringent water quality-based effluent limitations. See 33 U.S.C. § 1312(a); 40 C.F.R. § 122.44(d)(1). DEQ must establish water quality-based effluent limitations for all pollutants that “are or may be discharged at a level which will cause, have the reasonable potential to cause, or contribute to an excursion above any State water quality standard, including State narrative criteria for water quality.” 40 C.F.R. § 122.44(d)(1)(i); see Mont. Admin. R. 17.30.1344 (incorporating federal requirement).

32. In addition to pollutant-specific effluent limitations, in certain circumstances MPDES permits also must contain limitations for “whole effluent toxicity,” which ensure that the combination of pollutants in the effluent will not have harmful effects on water quality even

if no single pollutant is present in a harmful amount. See Edison Elec. Inst. v. EPA, 391 F.3d 1267, 1268-69 (D.C. Cir. 2004). DEQ must establish effluent limitations for whole effluent toxicity when (1) a discharge has the reasonable potential to violate an established numeric criterion for whole effluent toxicity, or (2) a discharge has the reasonable potential to violate a narrative criterion within an applicable state water quality standard and the permitting agency cannot demonstrate that pollutant-specific effluent limitations will ensure compliance. 40 C.F.R. § 122.44(d)(1)(iv)–(v).

33. DEQ must conduct “reasonable potential analyses” to determine whether—in light of the concentration of pollutants expected to be present in the effluent and the existing quality of the receiving waters—water quality-based effluent limitations are required for specific pollutants and for whole effluent toxicity. See 40 C.F.R. § 122.44(d)(1)(i).

B. Nondegradation Requirements

34. Over and above ensuring compliance with applicable water quality standards, MPDES permits also must include any effluent limitations and other conditions that are necessary to comply with the Montana Water Quality Act’s nondegradation policy. The nondegradation provisions establish two key mandates to ensure that the State’s fundamental clean-water goals are not compromised by discharge authorizations: First, they prohibit any discharge that would render the receiving waters unfit for their designated uses (e.g., fish propagation, swimming, or public water supply). See Mont. Code Ann. § 75-5-303(1); see also 40 C.F.R. § 131.12(a)(1) (directing states to adopt policies that ensure protection of existing instream water uses). Second, the nondegradation provisions protect our State’s high-quality waters by prohibiting any significant impairment of such waters unless DEQ concludes, following full public participation, that there is a compelling justification for allowing that

impairment and issues an “authorization to degrade.” See id. § 75-5-303(2)-(3); 40 C.F.R. § 131.12(a)(2).

35. To ensure compliance with the nondegradation policy in issuing MPDES permits, DEQ must conduct a “nondegradation review” to determine whether proposed discharges that will significantly affect high-quality waters qualify for an authorization to degrade. DEQ may issue an authorization to degrade only if the applicant demonstrates by a preponderance of the evidence that

(a) degradation is necessary because there are no economically, environmentally, and technologically feasible modifications to the proposed project that would result in no degradation;

(b) the proposed project will result in important economic or social development and that the benefit of the development exceeds the costs to society of allowing degradation of high-quality waters;

(c) existing and anticipated use[s] of state waters will be fully protected; and

(d) the least degrading water quality protection practices determined by the department to be economically, environmentally, and technologically feasible will be fully implemented by the applicant prior to and during the proposed activity.

Mont. Code Ann. § 75-5-303(3). See also 40 C.F.R. § 131.12(a)(2)(ii) (directing that state permitting agency may authorize degradation of high-quality waters only if it determines, “after an analysis of alternatives, that such a lowering [of water quality] is necessary to accommodate important economic or social development in the area ...”).

36. DEQ may forego nondegradation review only if it rationally determines that the discharges at issue will have only “nonsignificant” impacts on water quality. See Mont. Code Ann. §§ 75-5-301(5)(c), 75-5-303(2); Mont. Admin. R. 17.30.715.

C. Compliance Schedules

37. The Clean Water Act and Montana Water Quality Act generally mandate immediate compliance with effluent limitations established in a discharge permit. This framework ensures that, for example, excessive pollution is not allowed to impair or destroy sensitive fish populations before effective pollution controls are in place. However, in limited circumstances DEQ may include in a MPDES permit a schedule of compliance that grants the permittee a limited time period for attaining compliance with new water quality requirements imposed by the governing statutes or regulations. See 33 U.S.C. § 1362(17); 40 C.F.R. § 122.47; Mont. Admin. R. 17.30.1350. Compliance schedules, where allowed, must ensure that the permittee achieves compliance with all applicable requirements “as soon as possible.” 40 C.F.R. § 122.47(a)(1); Mont. Admin. R. 17.30.1350(1)(a). To that end, compliance schedules lasting more than one year must include interim deadlines leading toward full compliance and the time between interim deadlines may not exceed one year. 40 C.F.R. § 122.47(a)(3); Mont. Admin. R. 17.30.1350(1)(c).

38. As described below, DEQ violated these federal and state requirements by issuing a MPDES Permit for MMC’s Montanore project that lacks mandatory technology-based effluent limitations, relies on unsubstantiated reasonable potential analyses, excuses compliance with Montana’s nondegradation policy based on an expired twenty-five year-old authorization to degrade that does not apply to MMC’s project, and grants MMC up to seventeen years to achieve compliance with water quality requirements. These violations threaten unwarranted pollution of streams that flow through wild public lands and harbor vital native fish populations, and they render the challenged Permit unlawful.

FIRST CAUSE OF ACTION
Failure to Establish Technology-Based Effluent Limitations
for Discharges from Outfalls 001-003
(33 U.S.C. §§ 1311, 1342; 40 C.F.R. § 125.3; Mont. Admin. R. 17.30.1203)

39. Plaintiffs hereby reallege and reincorporate Paragraphs 1 through 38.

40. Technology-based effluent limitations “represent the minimum level of control that must be imposed” in MPDES permits. N. Cheyenne Tribe, ¶ 33 (emphasis in original) (quoting 40 C.F.R. § 125.3(a)); see also id. ¶ 46 (holding that DEQ violated Clean Water Act and Water Quality Act by issuing MPDES permit that lacked technology-based effluent limitations); Mont. Admin. R. 17.30.1203(1).

41. Despite this clear mandate, DEQ’s MPDES Permit for MMC’s Montanore project does not include technology-based effluent limitations for numerous pollutants expected to be present in the effluent discharged from Outfalls 001-003—namely, dissolved solids, chromium, iron, manganese, total inorganic nitrogen, total ammonia, nitrate + nitrite, total phosphorous, oil and grease, sulfate, aluminum, barium, antimony, and arsenic. Compare Exhibit 2 (Fact Sheet), Table 15 (identifying these pollutants as “pollutants of concern” in discharges from Outfalls 001-003) with id. Tables 11-12 (omitting technology-based effluent limitations for these pollutants). As a result, DEQ’s MPDES Permit authorizes discharges of these harmful pollutants into high-quality waters harboring sensitive fish populations without ensuring that appropriate pollution-control technology is in place.

42. Plaintiffs advised DEQ during the public comment period for MMC’s Permit that DEQ must establish technology-based effluent limitations for these pollutants. See Exhibit 5 (2016 Comments) at 3-4. In response, DEQ asserted that no technology-based limitations are required for these pollutants because they are not covered by the EPA-promulgated effluent

limitation guidelines, or ELGs, that apply to MMC's mine facility. See Exhibit 3 (Response to Comments) at 29.

43. Contrary to DEQ's position, the absence of EPA-promulgated ELGs for specific pollutants the mine is expected to discharge does not excuse DEQ's obligation to establish technology-based effluent limitations. Instead, DEQ must establish such limitations on a case-by-case basis using its best professional judgment. See 40 C.F.R. § 125.3(c)(2), (3) ("Where promulgated effluent limitations guidelines only apply to certain aspects of the discharger's operation, or to certain pollutants, other aspects or activities are subject to regulation on a case-by-case basis"); Mont. Admin. R. 17.30.1203(5)(b)-(c); U.S. EPA, NPDES Permit Writers' Manual § 5.2.3.2 (1996) (available at <https://www.epa.gov/npdes/npdes-permit-writers-manual>) (last visited July 25, 2017).

44. Accordingly, DEQ's failure to include technology-based effluent limitations in the Permit for discharges of dissolved solids, chromium, iron, manganese, total inorganic nitrogen, total ammonia, nitrate + nitrite, total phosphorous, oil and grease, sulfate, aluminum, barium, antimony, and arsenic from Outfalls 001-003 violates the Clean Water Act, 33 U.S.C. §§ 1311, 1342, and federal and state implementing regulations, 40 C.F.R. § 125.3; Mont. Admin. R. 17.30.1203, and renders the Permit unlawful.

SECOND CAUSE OF ACTION

Failure to Establish Technology-Based Effluent Limitations for Outfalls 004-008 and Ensure Adequate Regulatory Oversight and Public Participation (33 U.S.C. §§ 1311, 1342; 40 C.F.R. §§ 125.3, 122.44; Mont. Admin. R. 17.30.1203)

45. Plaintiffs hereby reallege and reincorporate Paragraphs 1 through 44.

46. DEQ also failed to include in the Permit valid technology-based effluent limitations for discharges from Outfalls 004-008, the mine's "storm water-only outfalls." DEQ identified suspended solids, oil and grease, nitrate, and unspecified metals as pollutants of

concern for discharges from Outfall 004; the agency identified suspended solids and oil and grease as pollutants of concern for discharges from Outfalls 005-008. Exhibit 2 (Fact Sheet), Table 15. However, DEQ did not include in the Permit any specific technology-based effluent limitations for these discharges. See id. at 20.

47. In response to Plaintiffs' comments that DEQ must establish technology-based effluent limitations for discharges from Outfalls 004-008, see Exhibit 5 (2016 Comments) at 3-4, DEQ asserted that it satisfied this requirement by directing MMC to select best management practices, or "BMPs," to reduce pollutants in storm water discharges from Outfalls 004-008 and document its choices in a Storm Water Pollution Protection Plan ("Storm Water Plan") following issuance of MMC's MPDES Permit. See Exhibit 3 (Response to Comments) at 30 (DEQ stating that the BMPs MMC chooses to implement will "function here as any necessary [technology-based effluent limitations]" for discharges from Outfalls 004-008); Exhibit 1 (Permit) at 25-26, 33; Exhibit 2 (Fact Sheet) at 58-62 (describing BMPs that "may be applicable to [MMC's] facility" and discussing Storm Water Plan requirement). To justify its substitution of unspecified BMPs for numeric effluent limitations, DEQ claimed that "the derivation of traditional numeric [effluent limitations] is not practical here because of the nature of the storm water discharges" authorized in MMC's Permit. Exhibit 3 (Response to Comments) at 29-30.

48. DEQ's instruction that MMC implement unspecified BMPs for controlling storm water pollution from Outfalls 004-008 does not satisfy the agency's obligation to establish technology-based effluent limitations for all discharges authorized in the Permit. First, though DEQ may include BMP requirements in a MPDES permit where, inter alia, "[n]umeric effluent limitations are infeasible," 40 C.F.R. § 122.44(k)(3), DEQ's assertion that numeric limits are infeasible because of "the nature of the storm water discharges" at issue is insufficient to support

the agency's action. See Clark Fork Coal. v. Mont. Dep't of Env'tl. Quality, 2008 MT 407, ¶ 47, 347 Mont. 197, 197 P.3d 482 (in establishing MPDES permit requirements, DEQ must “articulate a satisfactory explanation for its action, including a rational connection between the facts found and the choice made”) (citing Motor Vehicle Mfrs. Ass'n v. State Farm Mut. Auto. Ins. Co., 463 U.S. 29, 43 (1983)). Because DEQ did not support its assertion with any information specific to the authorized discharges from Outfalls 004-008, see Exhibit 3 (Response to Comments) at 29-30 (generically describing challenge of establishing numeric effluent limitations for storm water discharges), its rationale could apply with equal force to any storm water discharges authorized in a MPDES permit. However, storm water discharges are not categorically exempt from the general requirement to establish numeric technology-based effluent limitations and, indeed, permitting agencies in other states have established numeric effluent limitations for storm water discharges. See, e.g., Wash. State Dep't of Ecology, Nat'l Pollutant Discharge Elimination Sys. Waste Discharge Permit No. WA0040991, at 5 (April 25, 2008) (attached as Exhibit 6) (establishing numeric effluent limitations for storm water discharges from automobile shredding facility). Accordingly, DEQ failed to justify its omission of numeric technology-based effluent limitations for Outfalls 004-008.

49. Second, even assuming for the sake of argument that numeric effluent limitations are infeasible here, the Permit's BMP requirements—such as they are—are not valid effluent limitations because the Permit does not mandate implementation of any specific measures as BMPs. Instead, it allows MMC to choose its own BMPs—after MMC obtains its Permit—subject to generalized guidance from DEQ. “The Clean Water Act unquestionably provides that all applicable effluent limitations must be included in each [discharge] permit.” Waterkeeper All. v. EPA, 399 F.3d 486, 502 (2d Cir. 2005) (citations omitted). Accordingly, DEQ cannot

rely on BMPs to “function as any necessary [technology-based effluent limitations]” for Outfalls 004-008, Exhibit 3 (Resp. to Comments) at 30, while granting MMC the discretion to select its own BMPs in a Storm Water Plan developed after issuance of its Permit. See Waterkeeper All., 399 F.3d at 502-03 (holding that, under Clean Water Act, agency may not rely on nutrient management plan developed separately from discharge permit to establish effluent limitations). If DEQ wants to rely on BMPs as a substitute for numeric effluent limitations, it must (1) rationally demonstrate that numeric limits are infeasible, and (2) include specific BMP requirements as enforceable conditions in the Permit.

50. Third, DEQ’s approach violates the Clean Water Act because, under the terms of the Permit, MMC’s selection of BMPs will not be subject to formal review and approval by DEQ or meaningful public scrutiny. The Permit directs MMC to submit a Storm Water Plan describing its selected BMPs and related information to DEQ sixty days prior to commencement of construction or surface disturbance at the project site—a deadline that will post-date issuance of the Permit by months at least—and the Permit provides no mechanism for formal DEQ review of the Plan before MMC can commence activities at the site. See Exhibit 1 (Permit) at 26-32 & Table 10 (describing Storm Water Plan requirements and submission deadline). This scheme constitutes impermissible self-regulation because there is no mechanism for DEQ review of the Storm Water Plan to ensure that the BMPs satisfy legal requirements for technology-based effluent limitations before MMC obtains its Permit and can commence discharges. See Waterkeeper All., 399 F.3d at 498-500 (holding that permitting scheme that relied on BMPs in nutrient management plans to function as effluent limitations violated Clean Water Act because it did not provide for agency review of BMPs’ sufficiency); see also Env’tl Def. Ctr. v. EPA, 344 F.3d 832, 854-55 & n.32 (9th Cir. 2003) (holding that permitting scheme that failed to provide

for agency review of polluters' storm water controls to ensure consistency with statutory mandates created impermissible self-regulatory scheme in violation of Clean Water Act). "The Clean Water Act demands regulation in fact, not only in principle." Waterkeeper All., 399 F.3d at 498. Thus, DEQ may not rely on BMPs selected by MMC after issuance of the Permit, and without substantive DEQ review, to function as effluent limitations.

51. DEQ's scheme for "regulating" storm water discharges from Outfalls 004-008 also violates the Clean Water Act's public participation requirements because the public, like the agency itself, is not granted an opportunity to scrutinize the selected BMPs before MMC is authorized to discharge. See 33 U.S.C. § 1342(a)(1), (b)(3), (j) (requiring that applications for state- and federally-issued discharge permits be available for public inspection and hearing); Env'tl Def. Ctr., 344 F.3d at 856-57 (holding that permitting scheme that failed to provide for public comment on polluters' storm water control plans violated Clean Water Act's public participation requirements).

52. In sum, DEQ's failure to establish valid technology-based effluent limitations for authorized discharges from Outfalls 004-008 and substitution of non-specific BMP requirements violates the Clean Water Act, 33 U.S.C. §§ 1311, 1342, and federal and state implementing regulations, 40 C.F.R. §§ 125.3, 122.44; Mont. Admin. R. 17.30.1203, and renders the Permit invalid.

THIRD CAUSE OF ACTION
Arbitrary and Unsupported Reasonable Potential Analyses for Pollutant Discharges from
Outfalls 001-003
(40 C.F.R. § 122.44(d), Mont. Admin. R. 17.30.1344)

53. Plaintiffs hereby reallege and reincorporate Paragraphs 1 through 52.

54. Under the Clean Water Act, a reasonable potential analysis "is used to determine whether a discharge, alone or in combination with other sources of pollutants to a waterbody ... ,

could lead to an excursion above an applicable water quality standard.” EPA Permit Writers’ Manual, supra, § 6.3.1. Reasonable potential analyses play a vital role in protecting water quality because they determine whether more stringent water quality-based effluent limitations are necessary to ensure that a discharge will not violate water quality standards. See id.; 40 C.F.R. § 122.44(d); Exhibit 2 (Fact Sheet) at 34 (discussing function of reasonable potential analyses).

55. Accordingly, DEQ’s reasonable potential analyses must rest on valid and representative data characterizing the concentration of pollutants that will be present in the effluent. See 40 C.F.R. § 122.44(d)(1)(ii), (v); U.S. EPA, Improving EPA Review of Appalachian Surface Coal Min. Operations Under the Clean Water Act, Nat’l Env’tl. Policy Act, and the Env’tl. Justice Executive Ord., 14 (July 21, 2011) (attached as Exhibit 7) (“EPA NPDES Guidance”) (affirming that reasonable potential analyses must be based on “valid representative qualitative and quantitative information regarding the effluent”). Without an accurate understanding of the level of pollutants that will be present in the effluent, DEQ cannot rationally determine whether a proposed discharge threatens to violate applicable water quality standards.

56. Based on its reasonable potential analyses, DEQ concluded that MMC’s discharges of aluminum, arsenic, barium, cadmium, copper, manganese, sulfate, total inorganic nitrogen, total ammonia, and total phosphorous from Outfalls 001-003 do not have the potential to cause or contribute to a violation of applicable water quality standards. See Exhibit 2 (Fact Sheet), Table 22. Accordingly, DEQ did not develop water quality-based effluent limitations for these pollutants based on applicable water quality standards. See id., Tables 26–27, Appendix 4; Exhibit 1 (Permit) Tables 3–4.

57. During the public comment period, Plaintiffs alerted DEQ that its reasonable potential analyses were deficient because the agency's supporting fact sheet did not disclose the specific data DEQ relied upon to estimate pollutant concentrations in the effluent. See Exhibit 5 (2016 Comments) at 5. Instead, DEQ's Fact Sheet stated only that "[e]ffluent characteristics ... are based on the information provided by the applicant in the MPDES permit renewal application Forms 2C and 2F as well as any supplemental application materials." Exhibit 2 (Fact Sheet) at 8. Plaintiffs underscored that DEQ must demonstrate that it collected and evaluated data that accurately reflect the concentration of pollutants in the effluent MMC is authorized to discharge under the Permit, which will differ substantially from any past discharges at the site that occurred prior to mine facility construction and operation. See Exhibit 5 (2016) Comments at 5-6 and attached Myers Memorandum at 2-6 (attached as Exhibit 8). In response to Plaintiffs' comments, DEQ reiterated the vague explanation from its fact sheet that "[d]ata characterizing [the] effluent were provided by [the] permittee in application and supplemental materials." Exhibit 3 (Response to Comments) at 30. DEQ further asserted that the Permit "requires submission of discharge data" going forward, which DEQ claimed it will "use[] to perform [reasonable potential analyses] and update (if necessary) effluent limits" at an unspecified future date. Id.

58. DEQ's failure to disclose the data it relied upon to conduct its reasonable potential analyses renders those analyses invalid, as the agency cannot demonstrate in the record that its reasonable potential analyses are supported by valid and representative data. DEQ's vague promise to conduct reasonable potential analyses based on valid data at a later date does not cure this defect, as valid reasonable potential analyses and associated effluent limitations are required before MMC's Permit can take effect. See 40 C.F.R. § 122.44(d)(1) (mandating

inclusion of all necessary water quality-based effluent limitations, as determined from reasonable potential analyses, in discharge permits); Mont. Admin. R. 17.30.1344 (incorporating federal requirement); Exhibit 7 (EPA NPDES Guidance) at 14 (to satisfy Clean Water Act and applicable regulations, “permitting authorities should not defer reasonable potential analyses until after permit issuance”).

59. Further, DEQ’s failure to respond to Plaintiffs’ comment explicitly asking DEQ to clarify what data it relied upon violates applicable public participation regulations and DEQ’s obligation to justify its permitting decision in the record. See Mont. Admin. R. 17.30.1377(1)(b) (requiring DEQ to respond to all significant public comments on draft MPDES permit); N. 93 Neighbors v. Bd. of Cty. Comm’rs of Flathead Cty., 2006 MT 132, ¶¶ 34-35, 332 Mont. 327, 137 P.3d 557 (to facilitate judicial review, decision making body must articulate response to public comments in the record supporting its decision).

FOURTH CAUSE OF ACTION
Failure to Conduct Valid Reasonable Potential Analysis for Whole Effluent Toxicity
(40 C.F.R. § 122.44(d), Mont. Admin. R. 17.30.1344)

60. Plaintiffs hereby reallege and reincorporate Paragraphs 1 through 59.

61. In developing a MPDES permit, DEQ must conduct a reasonable potential analysis for whole effluent toxicity. See 40 C.F.R. § 122.44(d)(1)(iv)-(v) (requiring discharge permits to include effluent limitations for whole effluent toxicity when discharge has the reasonable potential to violate (1) a numeric criterion for whole effluent toxicity, or (2) a narrative criterion and pollutant-specific effluent limitations are insufficient to ensure compliance); Mont. Admin. R. 17.30.1344(1) (incorporating federal requirement). This analysis is necessary to ensure that the combination of pollutants in the effluent will not have harmful effects on water quality even if no single pollutant is present in a harmful amount.

62. Contrary to this requirement, DEQ's Fact Sheet supporting the Permit states that DEQ did not conduct a reasonable potential analysis for whole effluent toxicity for discharges from any of the permitted outfalls. See Exhibit 2 at 38 (stating that a reasonable potential analysis for whole effluent toxicity "has not been performed" for discharges from Outfalls 001-003 and describing none for discharges from Outfalls 004-008). Plaintiffs advised DEQ in comments on the draft permit that it must conduct this analysis. See Exhibit 5 (2016 Comments) at 10. In its Response to Comments, DEQ asserted that it received "additional information" during the comment period and "determined there is no reasonable potential to create concentrations or combinations of materials which are toxic or harmful to human, animal, plant, or aquatic life; making [whole effluent toxicity] limits not necessary." Exhibit 3 at 31. This "additional information" apparently consists of six whole effluent toxicity tests conducted at the Montanore project site between 2008 and 2013 that allegedly "indicated no acute toxicity for [whole effluent toxicity] in the effluent discharged by the facility during this time period." Id. at 26.

63. DEQ's explanation does not constitute or dispense with the need for a reasonable potential analysis for whole effluent toxicity. The whole effluent toxicity tests referenced in DEQ's Response to Comments were conducted during a period when no construction activity or active mining was occurring at the Montanore site, so the results do not reflect the character of the effluent MMC is authorized to discharge under the challenged Permit. Indeed, on information and belief, Outfalls 003-008 have not even been constructed yet, so prior toxicity testing alone cannot be relied upon to conclude that limitations on whole effluent toxicity are not required for these outfalls.

64. DEQ's failure to conduct a valid reasonable potential analysis for whole effluent toxicity violates federal and state regulations, see 40 C.F.R. § 122.44(d)(1); Mont. Admin. R. 17.30.1344(1), and renders the Permit unlawful.

FIFTH CAUSE OF ACTION

Reliance on Invalid Authorization to Degrade

(Mont. Code Ann. § 75-5-303; 40 C.F.R. § 131.12; Mont. Const. art. II, § 3 and art. IX, § 1)

65. Plaintiffs hereby reallege and reincorporate Paragraphs 1 through 64.

66. The Montana Water Quality Act's nondegradation policy mandates that "[e]xisting uses of state waters and the level of water quality necessary to protect those uses must be maintained and protected." Mont. Code Ann. § 75-5-303(1); see also 40 C.F.R. § 131.12(a) (directing states to adopt policies that ensure protection of existing instream water uses).

Further, the nondegradation provisions prohibit discharges that would significantly impair high-quality waters unless DEQ issues a valid authorization to degrade. See Mont. Code Ann. § 75-5-303(2)-(3); 40 C.F.R. § 131.12(a)(2). See also Mont. Admin. R. 17.30.715 (defining "nonsignificant" changes in water quality that are exempt from nondegradation review).

67. To ensure compliance with these statutory requirements, "[t]he [Water Quality Act] generally requires DEQ to conduct a nondegradation review prior to issuing an MPDES permit." Clark Fork Coal., ¶ 11. "Nondegradation review is a rigorous process designed to examine the various alternatives available to complete a specific proposed project that will diminish water quality"; it involves examination of social and economic costs associated with a project and "whether a particular project is necessary and advisable." Id.; see also Mont. Code Ann. § 75-5-303(3) (establishing statutory criteria for authorizations to degrade).

68. DEQ acknowledged that MMC's proposed discharges are subject to the Water Quality Act's nondegradation requirements and, absent a valid authorization to degrade, DEQ

must establish effluent limitations in MMC's Permit that will ensure no significant impairment of the receiving waters. See Exhibit 2 (Fact Sheet) at 26-27. Accordingly, DEQ explained that in the absence of a valid authorization to degrade, it would establish water quality based effluent limitations in the Permit that "comply with the criteria for determining nonsignificant changes in water quality" under the governing regulation. Id. at 27; see Mont. Admin. R. 17.30.715(1) (establishing nonsignificance criteria).

69. However, in the challenged Permit, DEQ did not establish effluent limitations based on the nonsignificance criteria for numerous pollutant discharges from Outfalls 001-003, asserting that those discharges are subject to a valid authorization to degrade. See Exhibit 2 (Fact Sheet) at 28 & Tables 23-24 (stating that water quality-based effluent limitations for dissolved solids, total ammonia, nitrate + nitrite, total inorganic nitrogen, total nitrogen, chromium, copper, iron, manganese, and zinc are based on limits established in an authorization to degrade). However, DEQ did not conduct nondegradation review in developing MMC's MPDES Permit and has not issued MMC an authorization to degrade; instead, DEQ relied on an authorization to degrade issued in 1992 by DEQ's predecessor, the Montana Board of Health and Environmental Sciences, to Noranda for the mine project Noranda planned—but never constructed—at the Montanore site. See In the Matter of the Petition for Modification of Quality of Ambient Waters Submitted by Noranda Minerals Corp. for the Montanore Project, Dkt. No. BHES-93-001-WQB (Mont. Bd. of Health & Env'tl. Scis., Nov. 20, 1992) (the "BHES Order") (attached as Exhibit 9); Exhibit 2 (Fact Sheet) at 28-30.

70. DEQ's reliance on the BHES Order to dispense with nondegradation review and establish effluent limitations in the challenged Permit violates the Montana Water Quality Act and the Montana Constitution. The Water Quality Act prohibits degradation of high-quality

waters absent a compelling justification established through a fact-specific inquiry into the affected project's social and economic benefits and environmental costs. Specifically, the statute allows DEQ to issue an authorization to degrade only if the permit applicant proves that (a) there are no feasible alternatives that would avoid degradation; (b) the social and economic benefits of the project outweigh the costs of allowing degradation of high-quality waters; (c) all existing and anticipated uses of the receiving waters will be protected; and (d) the applicant will implement the least degrading practices feasible based on prevailing economic, environmental, and technological conditions. Mont. Code Ann. § 75-5-303(3). Further, the Supreme Court has held that DEQ's arbitrary exemption of a polluting activity from this rigorous review violates the Montana Constitution's Clean and Healthful Environment Provisions, Mont. Const. art. II, § 3 and art. IX, § 1. See Mont. Env'tl. Info. Ctr. v. Mont. Dep't of Env'tl. Quality, 1999 MT 248, ¶ 80, 296 Mont. 207, 988 P.2d 1236.

71. MMC has never made the required showing that its project qualifies for an authorization to degrade and, as a matter of law and common sense, the BHES Order issued twenty-five years ago for Noranda's project does not establish that allowing MMC to degrade high-quality waters is justified under the statutory standards. See id.; Clark Fork Coal., ¶ 47 (in establishing MPDES permit requirements, DEQ must "articulate a satisfactory explanation for its action, including a rational connection between the facts found and the choice made") (citation omitted). For example, what constitutes the "least degrading water quality protection practices ... feasible" in the hard rock mining industry, Mont. Code Ann. § 75-5-303(3)(d), has changed in the decades since Noranda requested an authorization to degrade. The relevant environmental conditions also have changed; for example, bull trout in the Columbia River Basin, where MMC's project is proposed, were listed as a threatened species pursuant to the Endangered

Species Act in 1998. See Final Rule, U.S. Fish & Wildlife Serv., Determination of Threatened Status for the Klamath River and Columbia River Distinct Populations of Bull Trout, 63 Fed. Reg. 31,647 (June 10, 1998). By allowing MMC to evade nondegradation review based on an authorization issued twenty-five years ago for a different company's project, DEQ has converted a narrow exception in the Water Quality Act's nondegradation policy into a blank check that would allow degradation by any proponent of a project to access the Montanore ore body at any point in the future, regardless of the environmental cost. This approach subverts the fundamental purpose of the Water Quality Act's nondegradation policy and violates the Montana Constitution.

72. DEQ's reliance on the BHES Order also is arbitrary and unlawful because the Order has expired by its own terms. The BHES Order states that the Order remains in effect only "during the operational life of this mine," i.e., the mine project Noranda proposed in 1989, or "for so long thereafter as necessary." Exhibit 9 (BHES Order) at 6 (emphasis added). The "operational life" of Noranda's project ended in 2002 when Noranda advised the Forest Service that the company had "decided to abandon the Montanore copper-silver project" and therefore was formally "relinquishing the authorization to construct and operate the Montanore Project as set forth in the Plan of Operations which was never implemented." Letter from M. Patterson, Reg'l Reclamation Mgr., Noranda Minerals Corp., to J. McKay, Kootenai Nat'l Forest Geologist, Re. Notice of Project Abandonment (Sept. 9, 2002) (attached as Exhibit 10). Based on that affirmative abandonment, neither Noranda nor its successors possessed legal authorization to develop a mine at the Montanore site.

73. Further, DEQ has not asserted or established that it is "necessary" for the BHES Order to remain in effect following the end of the Noranda project's operational life. Because

the operational life of the Noranda project ended nearly fifteen years ago, the BHES Order issued for that project is no longer valid and cannot be relied upon to satisfy DEQ's nondegradation review obligations or establish effluent limitations for MMC's project.

74. In sum, DEQ's arbitrary reliance on the BHES Order to avoid nondegradation review of and establish effluent limitations for discharges from Outfalls 001-003 violates the Montana Water Quality Act's nondegradation policy, Mont. Code Ann. § 75-5-303, and the Montana Constitution's Clean and Healthful Environment provisions, Mont. Const. art. II, § 3 and art. IX, § 1, and renders the challenged Permit unlawful.

SIXTH CAUSE OF ACTION
Arbitrary and Unlawful Compliance Schedules (40 C.F.R. § 122.47(a)(1); Mont. Admin. R. 17.30.1350(1)(a))

75. Plaintiffs hereby reallege and reincorporate Paragraphs 1 through 74.

76. The Clean Water Act and Montana Water Quality Act generally mandate immediate compliance with effluent limitations established in a discharge permit to ensure prompt implementation of protective measures so that pollution does not inflict severe or even irreparable impacts on affected waters before necessary controls are applied. Federal and state implementing regulations allow a permitting agency to extend the deadline for compliance with new water quality requirements pursuant to a "compliance schedule" only in limited circumstances and subject to prescribed conditions.

77. First, as relevant here, a compliance schedule is permissible only if the permitting agency rationally determines that delayed compliance is "appropriate" and the schedule established will "require compliance as soon as possible." 40 C.F.R. § 122.47(a)(1); Mont. Admin. R. 17.30.1350(1)(a).

78. Second, for new sources or new dischargers, a compliance schedule may be granted “only when necessary to allow a reasonable opportunity to attain compliance with requirements issued or revised after commencement of construction but less than three years before commencement of the relevant discharge.” 40 C.F.R. § 122.47(a)(2); Mont. Admin. R. 17.30.1350(1)(b).

79. Third, any compliance schedule lasting more than one year must include a series of interim requirements and deadlines for meeting the interim requirements. 40 C.F.R. § 122.47(a)(3); Mont. Admin. R. 17.30.1350(1)(c); see also 33 U.S.C. § 1362(17) (Clean Water Act defining “schedule of compliance” as “a schedule of remedial measures including an enforceable sequence of actions or operations leading to compliance with an effluent limitation ...”).

80. The challenged Permit contains compliance schedules that excuse MMC from immediately complying with applicable water quality standards and water quality-based effluent limitations for numerous pollutants. Specifically, the Permit allows MMC to violate Montana’s numeric water quality standards for total nitrogen for approximately seventeen years—until August 7, 2034. See Exhibit 1 (Permit), Table 10; Exhibit 2 (Fact Sheet) at 23-24, 48 & Table 31. The Permit further allows MMC to violate for a period of nearly three years the final water quality-based effluent limitations for Outfalls 001-003 for the pollutants total dissolved solids, total ammonia, nitrate + nitrite, total inorganic nitrogen, total nitrogen, antimony, cadmium, chromium, copper, iron, lead, manganese, mercury, and zinc. See Exhibit 1 (Permit), Tables 1-4. These compliance schedules authorize prolonged, excessive pollution of high-quality waters with sediment, metals, and nutrient pollutants that are harmful or toxic to aquatic life.

81. The compliance schedules in the Permit are invalid because they do not comply with state and federal regulatory requirements. First, DEQ failed to demonstrate that the compliance schedules in the Permit are “appropriate” and “require compliance as soon as possible.” 40 C.F.R. § 122.47(a), (a)(1); Mont. Admin. R. 17.30.1350(1), (1)(a). “In order to grant a compliance schedule in a[] [discharge] permit, the permitting authority has to make a reasonable finding, adequately supported by the administrative record and described in the fact sheet (40 C.F.R. § 124.8), that a compliance schedule is ‘appropriate’ and that compliance with the final [water quality-based effluent limitation] is required ‘as soon as possible.’” Mem. from J. Hanlon, Dir., EPA Office of Wastewater Mgmt., to A. Strauss, Dir., EPA Region 9 Water Div., Re. Compliance Schedules for Water Quality-Based Effluent Limitations in NPDES Permits at 2 (May 10, 2007) (“EPA Compliance Schedule Guidance”) (quoting 40 C.F.R. §§ 122.47(a), (a)(1)) (attached as Exhibit 11).

82. Here, there is no analysis in the Fact Sheet demonstrating that the compliance schedules in the Permit are appropriate and require compliance as soon as possible. See Exhibit 2 (Fact Sheet) at 48 (asserting without explanation that “the compliance schedule in this MPDES permit requires compliance as soon as possible”). In its response to comments, DEQ asserted that compliance schedules are necessary because “[t]he final permit contains effluent limitations for many parameters that are more stringent than the corresponding effluent limitations found in the 2006-issued MPDES permit” that MMC inherited from Noranda, and the roughly three-year compliance schedules in the Permit are “appropriate and consistent with other MPDES permits for similar facilities approved by EPA and [provide] a reasonable amount of time for the permittee to identify, select, design, install, and start up any additional treatment processes

identified as necessary to meet the more stringent final effluent limits in the final permit.”

Exhibit 3 at 22.

83. That rationale is insufficient; neither the fact that the three-year schedule purportedly is consistent with other MPDES permits, nor DEQ’s unsupported judgment that the three-year schedule provides “a reasonable amount of time” to achieve compliance demonstrates that, for the specific water quality-based effluent limitations at issue, delayed compliance is justified or that three years represents the minimum amount of time necessary to achieve compliance. See Exhibit 11 (EPA Compliance Schedule Guidance) at 3 (in determining whether proposed duration of compliance schedule requires compliance “as soon as possible,” agency must consider the specific “steps needed to modify or install treatment facilities, operations or other measures and the time those steps would take”). More fundamentally, DEQ’s suggestion that a three-year compliance schedule is appropriate simply because the Permit contains more stringent effluent limitations than the prior MPDES permit is not persuasive because MMC has not begun operations and, according to DEQ’s Environmental Impact Statement for the project, MMC is contemplating upgrades to the existing wastewater treatment plant to satisfy effluent limitations established in the Permit. See U.S. Forest Serv. & Mont. Dep’t of Env’tl. Quality, Joint Final Env’tl. Impact Statement, Montanore Project, at 173 (Dec. 2015) (excerpt attached as Exhibit 12) (stating that DEQ and the Forest Service “anticipate that the Water Treatment Plant would be modified ... as necessary to treat parameters such as nutrients or metals to meet MPDES permitted effluent limits”). Under these circumstances, there is no justification for giving MMC a free pass to violate effluent limitations for three years.

84. Regarding the seventeen-year compliance schedule DEQ granted for MMC to satisfy applicable numeric water quality standards for total nitrogen, DEQ asserted in response to

comments that this compliance schedule “is also considered appropriate given the need to develop technology that can consistently treat to the final limit, install such technology, and optimize it down to the extremely low [total nitrogen] criteria.” Exhibit 3 (Response to Comments) at 22. This explanation equally fails to demonstrate that the roughly seventeen-year compliance schedule is appropriate and will ensure compliance as soon as possible. DEQ’s Fact Sheet and Response to Comments do not explain why MMC cannot timely install suitable nitrogen treatment technology as part of its planned upgrades to the wastewater treatment plant or why, if delayed compliance is in fact necessary, a schedule of approximately seventeen years constitutes compliance “as soon as possible.” 40 C.F.R. § 122.47(a)(1); Mont. Admin. R. 17.30.1350(1)(a). The governing regulations do not permit DEQ to allow years-long violations of applicable water quality standards based on a conclusory assertion that such delay is necessary. See Exhibit 11 (EPA Compliance Schedule Guidance) at 2-3 (summarizing factors permitting agency must consider in determining whether compliance schedule is appropriate and time period provided ensures compliance as soon as possible).

85. Second, DEQ failed to demonstrate that MMC needs compliance schedules to attain compliance with new statutory or regulatory requirements. The authorized discharges via Outfalls 001-003 constitute “new sources” under federal and state regulations. See 40 C.F.R. § 122.2; Mont. Admin. R. 17.30.1304(47). Indeed, because the permit authorizes a change in the wastewater sources for Outfalls 001-003, and because Outfall 003 has not even been constructed yet, the permitted discharges from these outfalls could not rationally be classified as existing sources. Accordingly, DEQ was required to demonstrate that the compliance schedules it granted are “necessary to allow a reasonable opportunity” for MMC “to attain compliance with requirements issued or revised after commencement of construction but less than three years

before commencement of the relevant discharge.” 40 C.F.R. § 122.47(a)(2); Mont. Admin. R. 17.30.1350(1)(b). DEQ failed to make such a showing in the record supporting the permit and, given that MMC has not commenced construction, it would not be possible for DEQ to do so.

86. Third, DEQ failed to include in the multi-year compliance schedules it authorized adequate interim requirements, and associated deadlines, that will lead to timely compliance with the final water quality-based effluent limitations and applicable numeric standards. To satisfy the Clean Water Act, a compliance schedule must include “an enforceable sequence of actions or operations leading to compliance with an effluent limitation.” 33 U.S.C. § 1362(17). Implementing regulations further require that compliance schedules lasting more than one year include interim requirements and associated deadlines, and that the time between deadlines not exceed one year. 40 C.F.R. § 122.47(a)(3); Mont. Admin. R. 17.30.1350(1)(c). But during the course of the compliance schedules established in the Permit, DEQ requires only that MMC (1) prepare annual reports at the end of 2017, 2018, and 2019 “documenting any action(s) taken towards meeting the final effluent limits of this MPDES permit” and “the numeric Total Nitrogen standards as listed in Circular DEQ-12A”; and (2) “[c]omplete a Facility Optimization Study for the Total Nitrogen parameter” within two years after the Permit takes effect. Exhibit 1 (Permit), Table 10 (emphasis added).

87. These “interim requirements” are insufficient, first, because the bare direction to submit reports documenting any actions MMC chooses to take to move toward compliance with final effluent limitations and standards does not constitute “an enforceable sequence of actions or operations leading to compliance ...” 33 U.S.C. § 1362(17). Further, the seventeen-year compliance schedule for total nitrogen includes no interim requirements whatsoever between January 28, 2020, when MMC must submit its last annual report to DEQ, and August 7, 2034,

when MMC must attain compliance with the applicable numeric water quality standards. Exhibit 1, Table 10. This more than fourteen-year stretch without any enforceable interim requirements violates the plain language of applicable federal and state regulations mandating that the time between interim requirements cannot exceed one year. 40 C.F.R. § 122.47(a)(3)(i); Mont. Admin. R. 17.30.1350(1)(c)(i).

88. In sum, the Permit's compliance schedules, which allow MMC to violate applicable effluent limitations and standards for up to seventeen years, fail to satisfy governing statutory and regulatory requirements and render the Permit unlawful.

REQUEST FOR RELIEF

THEREFORE, Plaintiffs respectfully request that this Court:

1. Declare unlawful and set aside the MPDES Permit for MMC's Montanore project, Permit No. MT0030279;
2. Require DEQ to pay Plaintiffs their reasonable costs, fees, and expenses, including attorneys fees, associated with this litigation; and
3. Grant Plaintiffs such additional relief as the Court may deem just and proper.

Respectfully submitted this 14th day of August, 2017.


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