IN THE SUPREME COURT OF THE STATE OF MONTANA
SUPREME COURT CAUSE NO. DA 21-0032

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EGAN SLOUGH COMMUNITY, YES! FOR FLATHEAD FARMS AND WATER, and AMY WALLER Plaintiffs and Appellants, v. FLATHEAD COUNTY BOARD OF COUNTY COMMISSIONERS, a body politic of Flathead County, FLATHEAD COUNTY PLANNING AND ZONING DEPARTMENT, FLATHEAD CITY-COUNTY HEALTH DEPARMTMENT, and MONTANA ARTESIAN WATER COMPANY, Defendants and Appellees.	**PLAINTIFFS' AND APPELLANTS' NOTICE OF SUPPLEMENTAL AUTHORITY**

Pursuant to Rule 12(6), Mont. Rules of App. Proc., Plaintiffs/Appellants provide the Court with a copy of Judge Amy Eddy's Order on Remedies, issued on December 29, 2021, in *Water for Flathead's Future, et al v. Montana DEQ, et al,* Montana Eleventh Judicial District Court (Cause No. DV-15-2017-1109 (A)). It has been labeled Tab 11. Plaintiffs/Appellants attached to their Combined Answer/Reply herein as Tab 9, Judge Eddy's July 21, 2021, Order Re: Various Motions, in the same case, granting the plaintiffs in that case summary judgment against Montana Department of Natural Resources and Conservation and Montana Department of Environmental Quality under the Montana Environment Policy Act.

Dated: December 30, 2021

MORRISON SHERWOOD WILSON & DEOLA

/s/ David K. W. Wilson, Jr.
David K. W. Wilson, Jr.

TAB 11

Amy Eddy
DISTRICT COURT JUDGE
Department No. 1
Flathead County Justice Center
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THE MONTANA ELEVENTH JUDICIAL DISTRICT COURT
FLATHEAD COUNTY

WATER FOR FLATHEAD'S FUTURE Inc. AMY WALLER, STEVEN MOORE, and CYNTHIA EDSTROM, *Plaintiffs,* vs. MONTANA DEPARTMENT OF ENVIRONMENTAL QUALITY, and MONTANA DEPARTMENT OF NATURAL RESOURCES, and agencies of the State of Montana, *Defendants,* and MONTANA ARTESIAN WATER COMPANY, *Intervenor*	Cause No. DV-15-2017-1109(A) ORDER ON REMEDIES

This case involves Water For Flathead's Future Inc., Amy Waller, Steven Moore, and Cynthia Edstrom (hereinafter "WFF") MEPA challenge to two permits issued by the Montana Department of Environmental Quality (hereinafter "DEQ") and the Montana Department of Natural Resources (hereinafter "DNRC"), allowing the Montana Artesian Water Company (hereinafter "MAWC") to operate a water bottling plant in Flathead County, Montana. WFF sought a declaration that the September 5, 2017, decision of DEQ granting a Montana Pollutant Discharge Elimination System ("MPDES") surface water discharge permit to MAWC, and the January 26, 2017, decision of DNRC granting a Beneficial Water Permit to MWAC, were invalid because the agencies failed to properly assess the environmental impacts of the requested permits as required under MEPA.

On July 21, 2021, the Court issued its *Order on Various Motions* (Doc. 104), finding in pertinent part: (1) the DNRC acted arbitrarily, capriciously and unlawfully in not providing for public comment on the EA; (2) the DEQ failed to reasonably consider and failed to take a "hard look" at the environmental impacts of issuing the MPDES Permit in the context of the specific concerns raised by sister agencies with significant expertise in these areas; and (3) the DEQ acted arbitrarily, capriciously and unlawfully when in conducting its environmental review it failed to consider the cumulative impacts of the full build out—which is a related future action. Accordingly, the Court remanded the matter to the DNRC and DEQ to correct the deficiencies in the environmental review as addressed above.

At the request of the parties, additional briefing was permitted on whether additional remedies beyond remand were available to WFF. On August 13, 2021, WFF filed its *Brief on Remedies* requesting *vacatur* of both permits. (Doc. 106). On August 27, 2021, the DNRC, DEQ and MAWC filed their respective *Response Briefs.* (Docs. 107, 108 and 109). MAWC requested oral argument, which the Court does not find necessary. On September 24, 2021, WFF filed its *Reply Brief.* (Doc. 112). On October 1, 2021, WFF filed its *Notice of Related Case Decision.* (Doc. 113). Having reviewed the file and being fully apprised, the Court hereby finds as follows:

ORDER

WFF's request to vacate the Beneficial Water Use Permit No. 76LJ-30102978 issued by the DNRC is MOOT. On October 1, 2021, in *Flathead Lakers, Inc., et al. v. Montana Department of Natural Resources and Conservation, et al.*, Montana First Judicial District Court, Cause No. CDV-2018-135, *Order on Remand*, Judge Kathy Seeley vacated the permit under the Montana Water Use Act. Accordingly, this Court does not need to reach the issue as to whether *vacatur* of the permit is available to WFF under MEPA.

WFF's request to vacate the MDES Permit No. MT0031861 ("Discharge Permit") issued by the DEQ is GRANTED.

RATIONALE

In 2011 the Montana Legislature amended Mont. Code Ann. §75-1-201, to include the following language in Mont. Code Ann. §75-1-201(6) regarding remedies:

> (c) The remedy in any action brought for failure to comply with or for inadequate compliance with a requirement of parts 1 through 3 of this chapter is limited to remand to the agency to correct deficiencies in the environmental review conducted pursuant to subsection (1).
>
> (d) A permit, license, lease, or other authorization issued by an agency is valid and may not be enjoined, voided, nullified, revoked, modified, or suspended pending the completion of an environmental review that may be remanded by a court.

This language was an attempt to deprive the judiciary of its equitable powers and provide the exclusive remedy when agencies failed to adhere to the requirements of MEPA. However, in

Park County Envtl. Council v. Dep't of Envtl. Quality, 2020 MT 303, ¶89, 402 Mont. 168, 477 P.3d 288, the Montana Supreme Court found these amendments unconstitutional following a facial challenge. *Park County* went on to affirm the district court's *vacatur* of the permit under it's historical equitable power to do so:

> The judiciary's standard remedy for permits or authorizations improperly issued without required procedures is to set them aside. *See Citizens for Responsible Dev. v. Bd. of Cty. Comm'rs*, 2009 MT 182, ¶26, 351 Mont. 40, 208 P.3d 876; *Aspen Trails Ranch*, ¶59; *Kadillak v. Anaconda Co.*, 184 Mont. 127, 144, 602 P.2d 147, 157 (1979); *see also Alsea Valley All. v. Dep't of Commerce*, 358 F.3d 1181, 1185-86 (9th Cir. 2004). Courts only decline to do so in "limited circumstances." *Pollinator Stewardship Council v. EPA*, 806 F.3d 520, 532 (9th Cir. 2015) (internal quotation omitted). The District Court correctly determined that equitable relief should be afforded to Council and Coalition if within the court's authority to grant. The 2011 Amendments to MEPA strip that authority.

Park County, ¶55.

While not addressed in *Park County*, the finding Mont. Code Ann. §75-1-201(6)(c) and (d) were unconstitutional triggered SB233's contingency provision which provides, "If either (6)(c) or (6)(d) of 75-1-201, as included in [section 6], is invalidated or found to be unconstitutional by the Montana supreme court, then the amendments to 75-1-201 contained in [section 6] terminate on the date of the invalidation or the finding of unconstitutionality." 2011 Montana Laws Ch. 396, S.B. 233, §11; *see also* 2011 Montana Laws Ch. 396, S.B. 233, §7(2) ("The amendments to 75-1-201 contained in [section 7] are effective on the date that the contingency provided for in [section 11] occurs.").

Accordingly, following the ruling in *Park County*, the following contingency statutory language became effective:

> (c)
> (i) The remedies provided in this section for successful challenges to a decision of the agency or the adequacy of the statement are exclusive.
> (ii) Notwithstanding the provisions of 27-19-201 and 27-19-314, a court having considered the pleadings of parties and intervenors opposing a request for a temporary restraining order, preliminary injunction, permanent injunction, or other equitable relief may not enjoin the issuance or effectiveness of a license or permit or a part of a license or permit issued pursuant to Title 75 or Title 82 unless the court specifically finds that the party requesting the relief is more likely than not to prevail on the merits of its complaint given the uncontroverted facts in the record and applicable law and, in the absence of a temporary restraining order, a preliminary injunction, a permanent injunction, or other equitable relief, that the:
> (A) party requesting the relief will suffer irreparable harm in the absence of the relief;

(B) issuance of the relief is in the public interest. In determining whether the grant of the relief is in the public interest, a court:
  (I) may not consider the legal nature or character of any party; and
  (II) shall consider the implications of the relief on the local and state economy and make written findings with respect to both.

(C) relief is as narrowly tailored as the facts allow to address both the alleged noncompliance and the irreparable harm the party asking for the relief will suffer. In tailoring the relief, the court shall ensure, to the extent possible, that the project or as much of the project as possible can go forward while also providing the relief to which the applicant has been determined to be entitled.

(d) The court may issue a temporary restraining order, preliminary injunction, permanent injunction, or other injunctive relief only if the party seeking the relief provides a written undertaking to the court in an amount reasonably calculated by the court as adequate to pay the costs and damages sustained by any party that may be found to have been wrongfully enjoined or restrained by a court through a subsequent judicial decision in the case. If the party seeking an injunction or a temporary restraining order objects to the amount of the written undertaking for any reason, including but not limited to its asserted inability to pay, that party shall file an affidavit with the court that states the party's income, assets, and liabilities in order to facilitate the court's consideration of the amount of the written undertaking that is required. The affidavit must be served on the party enjoined.

Mont. Code Ann. §75-1-201(6) (*effective on occurrence of contingency*).

Based on *Park County*, WFF argues *vacatur* of the DEQ permit, in addition to the remand, is an appropriate remedy, and that the contingency statute does not apply. In contrast, the DEQ and MAWC assert remand is sufficient. First, they argue that, unlike in *Park County*, their violation of MEPA is much more minor and does not justify the harsh remedy of *vacatur*. The DEQ and MAWC also argue that the contingent provision contained in Mont. Code Ann. §75-1-201was triggered following *Park County*, and this Court is constrained by those remedy provisions. The Court will consider these arguments in turn:

(A) Applicability of Mont. Code Ann. §75-1-201(6) (*effective on occurrence of contingency*)[1]

WFF's argument that *Park County* did not trigger the contingency statute is unpersuasive and contrary to the plain language of the statute as articulated above. Moreover, the fact the contingency statute was not applied in *Park County* is immaterial as the issue was not before that court.

[1] This is the current version of the statute.

(1) Mont. Code Ann. §75-1-201(6)(c)(ii)

While WFF spends considerable time distinguishing the remedy of *vacatur* from the remedy of an injunction, that distinction is not dispositive as to the applicability of the contingency statute. It cannot seriously be argued that WFF's request to vacate the MPDES Permit does not trigger Mont. Code Ann. §75-1-201(6)(c)(ii), as to do so would obviously "enjoin the effectiveness" of the permit. Accordingly, the Court will consider the Mont. Code Ann. §75-1-201(6)(c)(ii) factors in turn.

As a preliminary matter, the Court finds that WFF, the party requesting the relief, is more likely than not to prevail on the merits of its complaint, and has in fact prevailed. Mont. Code Ann. §75-1-201(6)(c)(ii).

The Court cannot find WFF will suffer irreparable harm in the absence of *vacatur*, particularly as the DNRC permit has been vacated, thereby severely curtailing MAWC's operations. Mont. Code Ann. §75-1-201(6)(c)(ii)(A).

While the Court generally finds vacating the permit is in the public interest as it was issued unlawfully, neither party provided the Court with any analysis. Nevertheless, in so finding, the Court has not considered the legal nature or character of any party. The Court can *imagine* the implications of vacating the permit on the local and state economy—including the economic impact on MAWC, as well as the potential environmental impacts on the recreational industry—but again, neither party presented any analysis as to this issue. Mont. Code Ann. §75-1-201(6)(c)(ii)(B).

Finally, *vacatur* in this instance is "not narrowly tailored as the facts allow" as "the project or as much of the project as possible" cannot go forward without the permit. Mont. Code Ann. §75-1-201(6)(c)(ii)(C).

Based on the above statutory analysis, the Court finds the remedy of *vacatur* is not available to WFF under Mont. Code Ann. §75-1-206(6)(c).

(2) Mont. Code Ann. §75-1-201(6)(d)

In the present case, the Court has not ordered any injunctive relief, which is distinct from the remedy of *vacatur*. Hence, the written undertaking provisions of Mont. Code Ann. §75-1-201(6)(d) do not apply based on the plain language of the statute.

(B) Inherent Authority to Order *Vacatur*

Despite not having the authority under Mont. Code Ann. §75-1-201(6) to vacate the permit, the question remains whether the Court has inherent authority to vacate the permit under the reasoning in *Park County*. The DEQ appears to concede that even if the Court does not have the authority to vacate the permit under the language of Mont. Code Ann. §75-1-201(6)(c), the Court "has judicial discretion to fashion an equitable remedy that is appropriate on the particular facts and equitable considerations in this case." *DEQ Resp. Brf.*, p. 8 (Doc. 107). As

acknowledged in *Park County*, "the judiciary's standard remedy for permits or authorizations improperly issued without required procedures is to set them aside . . . Courts only decline to do so in "limited circumstances." *Park County*, ¶55.

The question in this case then is whether it reflects the "limited circumstance" in which the Court should not vacate the permit for failing to comply with MEPA. In determining whether *vacatur* is appropriate, *Park County* cited with approval the legal framework of *Pollinator Stewardship Council v. United States EPA*, 806 F.3d 520, 532 (2015), which found in relevant part:

> We leave an invalid rule in place only "when equity demands" that we do so. When determining whether to leave an agency action in place on remand, we weigh the seriousness of the agency's errors against "the disruptive consequences of an interim change that may itself be changed."

Pollinator Stewardship, 806 F.3d at 532 (internal citations omitted).

The Court has already found the DEQ acted arbitrarily, capriciously and unlawfully in issuing the MPDES Permit. Having been issued unlawfully, there must be some principle of equity that nonetheless demands the permit should not be vacated. The Court finds no such principle exists in this case when considering the *Pollinator Stewardship* factors, especially in the context of Montana's constitutional protections.

First, while the DEQ argues the errors it made (which is does not conceded) are not serious, the Court disagrees. The DEQ failed to take a "hard look" at the environmental impacts of issuing the MPDES Permit in the context of the specific concerns raised by sister agencies with significant expertise in these areas—including missing aquifer information, bull trout habitat, effluent content, etc. Moreover, while the full build-out has not yet occurred, it is certainly not hypothetical considering the scope of the physical building and permit granted by the DNRC and the DEQ failed to consider the cumulative effects of the project.

Second, while the Court acknowledges the disruptive consequences of vacating the MDPES permit, considering the DNRC permit has similarly been vacated, the disruptive consequences of vacating the MPDES Permit are limited.

Accordingly, the Court finds the remedy of *vacatur* is appropriate in this case and the MPDES Permit issued by the DEQ to MAWC is hereby VACATED.

DATED AND ELECTRONICALLY SIGNED AS NOTED BELOW.

Electronically Signed By:
Hon. Judge Amy Poehling Eddy
Wed, Dec 29 2021 02:00:16 PM

CERTIFICATE OF SERVICE

I, David Kim Wilson, hereby certify that I have served true and accurate copies of the foregoing Notice - Supplemental Authority to the following on 12-30-2021:

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