No. DA 22-0112

IN THE
SUPREME COURT OF THE STATE OF MONTANA

WATER FOR FLATHEAD'S FUTURE INC., AMY WALLER, STEVEN MOORE, AND CYNTHIA EDSTROM,

Plaintiffs/Appellees,

VS.

MONTANA DEPARTMENT OF ENVIRONMENTAL QUALITY, MONTANA DEPARTMENT OF NATURAL RESOURCES, AGENCIES OF THE STATE OF MONTANA, AND MONTANA ARTESIAN WATER COMPANY,

Defendants/Appellants,

ON APPEAL FROM THE MONTANA ELEVENTH JUDICIAL DISTRICT COURT, FLATHEAD COUNTY, HON. AMY EDDY, CASE NO. DV-15-2017-0001109(A)

DEFENDANTS/APPELLANT MONTANA ARTESIAN WATER COMPANY'S REPLY BRIEF

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INTRODUCTION

MEPA is a procedural requirement to be exercised reasonably. MEPA is **not** a decision framework in which every hypothetical scenario must be conclusively proven or disproven. The intent and purpose of MEPA is to "provide for **adequate** review of state actions in order to ensure that … the public is informed of the anticipated impacts." Mont. Code Ann. § 75-1-102(1). "Implicit in the requirement that an agency take a hard look at the environmental consequences of its actions is the obligation to make an **adequate** compilation of relevant information, to analyze it **reasonably**, and to consider all pertinent data." *Bitterrooters for Plan., Inc. v. Montana Dep't of Env't Quality*, 2017 MT 222, ¶ 17, 388 Mont. 453, 461, 401 P.3d 712, 719. Absent from MEPA is a requirement to chase every hypothetical scenario, dive down every rabbit hole, or follow every trail to its very end. To do so, as Appellees desire, would paralyze state agencies.

The statutory language, this Court's holdings, and plain old common sense require a balance – courts defer to state agencies' discretion when the agency has used its technical expertise and conducted a reasonable analysis. *Mont. Envtl. Infor. Ctr. v. Mont. Dep't of Envtl. Quality*, 2019 MT 213, ¶ 20, 397 Mont. 161, 451 P.3d 493. Such is the case here. DEQ did its job and beyond – it poured over pages of robust facility and water quality data. DEQAR-000001 – 000121 (100+ page MPDES Permit application containing narrative details, maps, graphs, and

water quality data). DEQ questioned Montana Artesian's professional consultant multiple times and requested still more data and information. DEQAR-000123 – 000133; DEQAR-000185 – 000194; DEQAR-000274-000275; DEQAR-000288; DEQAR-000290. DEQ inspected the site and gathered information from Montana Artesian and a neighbor.[1] DEQAR-000260 – 000265; DEQAR-000319. DEQ reached out to the state of California, which has experience permitting water bottlers, and reviewed its relevant permits. DEQAR-001518 – 001575. DEQ researched and relied on federal information and guidelines. DEQAR-000201 – 000231(Information from OSHA and EPA). DEQ consulted with the Natural Heritage Program on species of concern and habitat classifications. DEQAR-000232 – 000259. DEQ spoke with many citizens (including some Appellees). DEQAR-000267 – 000273; DEQAR-000276 – 000280. DEQ relied on water quality standards established to protect aquatic life pursuant to the Montana Water Quality Act. DEQAR-000323-000324. And DEQ responded to federal agency comments and requests appropriately. DEQAR-001342 (responding to comments about bull trout and bull trout habitat); DEQAR-001343-001346 (responding to

[1] Photo descriptions at DEQAR-000260 note that Jeanne Carlson was consulted on the location, characteristics, and source of the Unnamed Tributary to which Montana Artesian discharges effluent. Jeanne Carlson has opposed Montana Artesian by participating as an affiant in support of claims against Montana Artesian in *Egan Slough Cmty. v. Flathead Cnty. Bd. of Cnty. Commissioners*, 2022 MT 57, 408 Mont. 81, 506 P.3d 996 (*see* underlying case, Cause No. DA15-2018-0000952-DK in the Eleventh Judicial District, Flathead County, Docket No. 5 (Affidavit of Jeanne Carlson in Support of Application for Mandamus).

EPA comments); DEQAR-001351-001352 (responding to USFWS comments); and DEQAR-001336 (noting the new "Special Conditions" in the MPDES Permit for monitoring and BMP development in response to EPA and USFWS comments).

There is nothing inadequate or unreasonable about DEQ's environmental review of Montana Artesian's Discharge Permit. DEQ's Environmental Assessment (EA) should be upheld, the District Court Order granting Appellees' motion for summary judgment should be reversed and DEQ's motion for summary judgment should be granted.

ARGUMENT

This appeal is not moot, and Appellees' Response Brief admits as much. Appellees' arguments point to irrelevant information, fail to rebut key arguments, raise never-before-voiced conclusory allegations that lack any evidentiary support, and rely on inapposite case law. This appeal should be decided in Montana Artesian's and DEQ's favor.

I. This Appeal is Not Moot.

As Appellees themselves acknowledge, "there is no permit to enjoin." Resp. Br., p. 42. If there is no permit to enjoin, how can there be a permit to renew? There cannot. Vacatur of the permit; however, does not vacate Montana Artesian's permit application, which now remains pending for further analysis and action by

DEQ. That further analysis and action must be informed by the law of this case, including the outcome of this appeal. The District Court order sent DEQ back to the drawing board, not Montana Artesian. Montana Artesian's permit application remains in the cue for agency action.

Additionally, Montana Artesian cannot be expected to pay exorbitant renewal fees (upwards of $6,000)[2] to renew a permit that, according to Appellees and the District Court, no longer exists. Further, it cannot be the case that by achieving their desired remedy (permit vacatur) and the passage of time (due in large part to Appellees' extensive stays of this matter at the District Court) that Appellees destroy their opponents' ability to appeal the decision. That is not justice.

Montana Artesian has done nothing wrong, its permit application remains valid and pending before DEQ for a permit decision, which necessarily must consider the outcome of this appeal. This case is not moot.

II. The Factual Basis of Appellees' Argument is Wrong.

A. Reliance on Facts Related to DNRC's EA is Wrong.

The only fault the court found in DNRC's EA was that DNRC failed to

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[2] DEQAR-000133(identifying the permit as a "major private" permit); Admin. R. Mont. 17.30.201(8)(a); Schedule III.A (assessing $3,000 annual fee for each of the two outfalls).

provide for public comment. Tab A, p. 12. The District Court found no deficiencies in the substance of DNRC's EA. *Id*., pp. 12, 13. Similarly, the District Court did not fault DEQ for relying on the DNRC EA. Instead, the court wanted DEQ to both rely on DNRC's EA and do its own analysis of the full build-out. *Id*., pp. 16, 18 ("DEQ did not assess the cumulative effects of the bull build-out of the facility as permitted for appropriations by the DNRC, even though it relied in part of the DNRC's checklist EA" and "DEQ acted arbitrarily, capriciously and unlawfully when in conducting its environmental review it failed to consider the cumulative impacts of the full build out"). The District Court found no fault with DEQ's public participation process.

Therefore, the substance of the DNRC EA is valid and DEQ's reliance on that substance is valid. Appellees chose not to appeal either of those issues; therefore, facts related to the DNRC EA are irrelevant to Appellees' arguments.

In terms of cumulative impacts, the narrow issue before this Court is whether DEQ should have analyzed impacts related to the full build-out of Montana Artesian. Appellees' factual presentation of DNRC's EA and implications about DEQ's reliance upon it are irrelevant. Resp. Br., pp. 2-3, 6-9, 10, 12, 28. Said another way, DNRC's public participation error does not taint DEQ's EA. DEQ referenced the substance of the DNRC EA (which has not been held unlawful) and conducted its own public review (which also has not been held

unlawful). Appellees failed to challenge either issue, making irrelevant their presentation of facts and arguments that are critical of DEQ's reliance upon the DNRC EA.

B. The Absence of Clear and Convincing Evidence is Fatal.

MEPA requires that "the person challenging the decision has the burden of proving the claim by **clear and convincing evidence** contained in the record." Mont. Code Ann. § 75-1-201(6)(a)(i) (emphasis added). This is a heightened standard of proof, as shown by its use in civil commitment proceedings due to the "significant deprivation of liberty" at risk. *In re G.M.*, 2008 MT 200, ¶ 23, 344 Mont. 87, 93, 186 P.3d 229, 233. Clear and convincing evidence is more than "a mere preponderance of evidence" and can only be met by "evidence that is definite, clear and convincing." *Id*.

This Court's opinions have noted specific evidence supporting MEPA challenges to the sufficiency of environmental review. *Park County*, ¶10 (challenge based, in part, on water quality samples with elevated acidity and high Total Dissolved Solids concentrations); *Ravalli County*, 273 Mont. at 375 (EA challenge involved "Evidence in the record [which] suggests that mixing domestic sheep and bighorn can decimate the bighorn population"); *Clark Fork*, ¶ 5 (record evidence confirmed that untreated discharge water would contain "arsenic, ammonia, nitrate-nitrogen, and heavy metals among other pollutants that would

exceed allowable water quality standards"). Unlike those cases, here there is no evidence at all, let alone any clear and convincing evidence. Nor is there even any credible assertion of anything in Montana Artesian's discharge or resulting from the discharge that would cause an adverse impact.

Further, Appellees failed to respond to opening arguments regarding the lack of clear and convincing evidence. Appellees fail to point to any clear and convincing evidence supporting their arguments and cannot explain why the District Court failed to consider DEQ's responses to EPA and USFWS comments. Absent a response argument, arguments made in the opening brief may be well-taken by this Court. Op. Br.[3], pp. 10, 11, 14, 24.

Appellees' arguments and the District Court's rationale are limited to reliance upon comment letters from EPA and USFWS regarding the draft Discharge Permit, not the final Discharge Permit.[4] Neither letter provides clear and convincing evidence. EPA's concerns are limited to the discharge permit, not the EA, and concern only the characterization of the effluent and the receiving water. EPA urges DEQ to provide additional data **or** rationale and to require additional monitoring, but EPA does not point to anything specific about **Montana**

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[3] Citation is to Montana Artesian's Opening Brief.

[4] Neither agency has responded to the final Discharge Permit with any criticism.

Artesian's discharge that evidences an adverse environmental impact. DEQ AR-000355-56. Similarly, the USFWS comment letter requests more information and makes no specific allegations about Montana Artesian's discharge. DEQ AR-000451-452. Despite additional data and rationale provided by DEQ, and despite four years of monitored discharges,[5] neither agency has since come forward with any specific allegations about Montana Artesian's discharge. Nor have Appellees been able to provide any evidence of actual or suspected adverse impacts. Dkt. 94, pp. 5-9 and its Exs. B, C, D, F (pointing to deposition testimony supporting argument that Appellees lacked standing, due in part to lack of past, present or threatened injury).

Appellees spend a great deal of time discussing the importance of Bull Trout and Bull Trout habitat, but never once explain what harm could befall the beloved fish due to Montana Artesian's discharge. Will the water be too warm, too cold, contain pollutants? Appellees never say. Nor does the District Court. In reality, no harm is expected because Montana Artesian's discharge will comply with water quality standards that are designed to protect aquatic life, including Bull Trout. Appellees have not argued and cannot credibly argue otherwise, as evidenced by

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[5] Montana Artesian's MPDES Permit became effective on November 1, 2017 (DEQAR-001412) and was used until vacated by the District Court.

their failure to challenge or even point to any discharge Permit provision as problematic.

At most, Appellees insert a completely unfounded and incredulous assertion that Montana Artesian will not meet the permit limits. Resp. Br., p. 29. Notably, after four years of discharge, Appellees cite no permit violations. Further, this Court recently held that MEPA's directive "does not include speculation about what would happen if the permit was violated or the likelihood of a violation." *Belk v. Mont. DEQ*, 2022 MT 38, ¶ 38, 408 Mont. 1, 504 P.3d 1090.

Appellees make a similar bald assertion that the limits may not be protective. Resp. Br., p. 29. But Appellees have not challenged the Discharge Permit or the water quality standards. The Discharge Permit and the standards are established pursuant to the Montana Water Quality Act to "protect beneficial water uses" including use for "growth and propagation of salmonid fishes [such as Bull Trout] and associated aquatic life." Admin. R. Mont. 17.30.620(1); 17.30.608 (establishing water use classification for the Flathead River drainage as B-1); 17.30.623(1) (establishing water quality standards for B-1waters). Absent facts to support Appellees' bald criticisms, the MPDES Permit limits and water quality standards can be relied upon as compliant with the Montana Water Quality Act. Appellees' assertions to the contrary are meaningless.

Appellees next cite to the presence of small fish in the unnamed tributary to

which Montana Artesian will and has discharged. Resp. Br., p. 31. Appellees do not detail why the identification of the fish is necessary, nor do they claim that the fish (whether they were Bull Trout or some other species) would require any special water quality protection, beyond the protection already afforded by the water quality standards and permit limits provided in accordance with the Montana Water Quality Act.

Appellees' concerns about water rights impacting the receiving water fail for two reasons.[6] First, Appellees fail to cite any specific water rights that would or could impact the unnamed tributary. Appellees mistakenly characterize water right information as "readily obtainable data," but we know better, as evidenced by Appellees' companion case challenging Montana Artesian's water right, which illustrates the complexity, expertise, and time required to investigate groundwater connections. *Flathead Lakers v. DNRC*, DA 21-0535. Appellees provide no good reason why DEQ should engage in that level of review for a hypothetical impact asserted without factual basis.

Contrary to Appellees' bald assertion, DEQ did take a hard look at the flow of the receiving water and verified, based on water quality data, that the flow

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[6] The allegation is first presented in Appellees' response brief in this appeal and is therefore improper. *Flowers v. Bd. of Pers. Appeals*. 2020 MT 150, 400 Mont. 238, 465 P.3d 210. Nonetheless, the issue is a hypothetical situation – another complex and endless rabbit hole that Appellees would have DEQ dive into for no good reason.

derived from groundwater, and, based on a site visit and conversations with a local, that its flow remained consistent year-round – regardless of the exercise of water rights in the vicinity. DEQAR-000319. Given that information, which is adequate and allows DEQ to perform a reasonable analysis, DEQ is not required to chase Appellees' hypothetical, unsupported allegation.

Second, Appellees' assertion fails because it wrongly assumes that dilution and mitigation are necessary to meet the permit limits. Resp. Br., pp. 26, 30. No mitigation is planned or required because no significant impacts have been found. DEQAR-001440. The Discharge Permit is not premised on dilution of pollutants (DEQAR-000324 – 000326) and does not grant a mixing zone (DEQAR-001414). The Discharge Permit only considers mixing in the context of temperature and then only by using the "critical low flow" in the receiving water based on: (1) a conversation with a neighboring landowner (DEQAR-000319); (2) confirmation by DEQ during a site visit (*Id*.); (3) information from Montana Artesian confirming that the receiving water is "in a large groundwater discharge area and that the receiving water acts to drain high groundwater and convey it to the Flathead River" (*Id*.); and (4) flow measurements gathered in the fall after an

exceptionally warm and dry spring and summer (DEQAR-000323).[7] DEQ assessed multiple lines of evidence, gathered and presented by DEQ itself and by other professionals. Appellees raise no contrary data or facts. Their assertions about lack of "independent effort" by DEQ are belied by the record evidence. DEQ gathered adequate information and analyzed it reasonably.

Appellees raise no evidence at all, let alone any clear and convincing evidence required to succeed in a MEPA challenge. This Court need go no further and may overrule the District Court order based on the lack of clear and convincing evidence.

III. The District Court Erred in Determining that DEQ Failed to Take a 'Hard Look' at Comments Submitted by Federal Agencies.

A. DEQ's Factual Determination Does Not Fall to Oblique Federal Agency Comments.

Appellees also fail to defend the EPA and USFWS comments as being specific enough to undermine DEQ's factual determination. Instead, Appellees agree that EPA and USFWS "asked for more detailed information." Resp. Br., p. 26. A request for more information is not specific and not supported by any facts. Therefore, it is insufficient to undermine DEQ's determination, which, as

[7] Citations are to the MPDES Permit (Tab F) and its Fact Sheet (Tab C). Appellees have not challenged either document, directly or indirectly through this action. Both documents comply with the Montana Water Quality Act.

illustrated in the Opening Briefs and above, was based on detailed, factual analysis.

In *Park County*, this Court held that the Montana Bureau of Mines and Geology's comment that groundwater flow was "unknown and may be of some concern" was insufficient to undermine DEQ's factual determination. *Park County*, ¶ 42. Here, the same is true. EPA noted that the effluent was not well characterized (i.e.: "unknown") and requested additional monitoring of both the groundwater and the effluent during the term of the permit. Both requests were met. DEQAR-001343-001346 (response to EPA); DEQAR-001351-001352 (response to USFWS); DEQAR-001336 (informing permittee of new requirements); *Compare* DEQAR-001417 (Final MPDES Permit, with Special Conditions) *with* DEQAR-000296-000297 (Draft MPDES Permit without Special Conditions).

Similarly, USFWS stated its concern with a "lack of detail" about the chemical makeup of the discharge water, concern about a lack of information about turbidity and temperature impacts, and potential for "accidental release of hazardous materials" which it conceded "may be beyond the scope of the discharge permitting process." DEQAR-000452. Here again, DEQ responded. DEQAR-001351-001352. Like its response to EPA, DEQ went even further than necessary and put additional "Special Conditions" in the permit to require development of Best Management Practices extending to portions of the facility and events that are

not subject to DEQ's permitting decision. DEQAR-001336 (informing permittee of new requirements); *Compare* DEQAR-001417 (Final MPDES Permit, with Special Conditions) *with* DEQAR-000296-000297 (Draft MPDES Permit without Special Conditions).

Not only were the agencies' comments nonspecific and included requests for information rather than factual assertions, DEQ responded appropriately. The District Court erred by not acknowledging DEQ's response at all and by relying on nonspecific, non-factual comments to undermine DEQ's well supported determination. *Park County*, ¶ 42.

This case is even more obvious than *Park County* because in *Park County*, the project opponents pointed to MBMG's statement about unknown effects of groundwater flow **and** to the existence of localized mineral formations in the area that could create acidity. *Park County*, ¶ 42. Here, EPA and USFWS only point to "unknown" issues and ask for more information. Neither agency (nor the Appellees) points to any fact that substantiates any concern about adverse impacts.

B. Appellees' and the District Court's Case Law is Inapposite.

Appellees' reliance on *Ravalli County* is confusing and misplaced. The issue in *Ravalli County* was whether "an environmental review document is necessary for the renewal or assignment of a grazing lease" and whether a voluntary EA required a significance determination when the agency conceded that

it had not made one. *Ravalli County*, 273 Mont. at 378, 380. Neither issue is relevant here because an EA was completed and significance determinations were made. DEQAR-001433 - 001443. Additionally, neither Appellees nor the District Court point to any suspected adverse impacts at all, let alone any significant adverse impacts. Further, this Court recently upheld the use of EAs with "narrative descriptions of evaluated impacts" – specifically when opponents fail to explain what is missing. *Belk*, ¶ 29. Here, the 8-page EA included more than sufficient narrative descriptions of impacts and as noted above, Appellees fail to bring any clear or convincing evidence to the contrary or point out what is missing. Just as in *Belk*, here too, Montana's Artesian's neighbors "may take issue with the outcome DEQ reached, but DEQ's assessment process was procedurally sound and comported with MEPA's 'hard-look' directive." *Belk*, ¶ 31.

Appellees' and the District Court's reliance on the *Western Watersheds* case is equally unpersuasive. There, the court found the agency's environmental review inadequate because it offered "no reasoned analysis" for conclusions that were "in direct conflict with the conclusion of its own experts and sister agency." *Western Watersheds Project v. Kraayenbrink*, 632 F.3d 472, 492 (9th Cir. 2010). Here, as noted above, DEQ gathered more data and provided more rationale as requested by EPA and USFWS. Importantly, neither federal agency reached any "conclusion" that was contrary to DEQ's conclusion. In fact, neither agency reached any

conclusion at all – they only sought additional explanation, which DEQ provided. *Western Watersheds* is therefore inapposite.

IV. The District Court Erred in Determining that MEPA Requires DEQ to Consider Environmental Impacts of Montana Artesian's Full-Scale Facility when Conducting Environment Review of its Decision to Issue the Discharge Permit that is Limited to the Start-up Operation at 0.4% Capacity.

A. The District Court's Order is Contrary to MEPA - DEQ May Not Base Environmental Review on Speculation about What Montana Artesian Might Do in the Future.

Appellees seek review of a hypothetical permit, not the Discharge Permit actually before DEQ for agency action. Montana Artesian pointed this out (Op. Br., p. 26) and Appellees have not countered. The only agency action before DEQ for environmental review is the Discharge Permit designed for start-up operations at 0.4% of capacity. Op. Br., p. 5. Appellees' Complaint makes clear that they criticize DEQ's cumulative impacts decision only because it does not consider discharge of more water than allowed pursuant to that Discharge Permit. Dkt. 68, ¶¶ 9, 19, 35. The District Court also acknowledges that the Discharge Permit is limited to discharging a much lower volume of water than would be discharged at full build-out. The court also agrees that discharging a larger volume would trigger the need for a permit modification with new environmental review. Tab A, pp. 6, 18.

The only way DEQ would have to evaluate a discharge commensurate with

the full build-out is if the agency assumed that Montana Artesian was going to: (1) complete full build-out; (2) that full build-out would require proportionately larger volumes of discharge water, and (3) that Montana Artesian would violate the law by discharging more water than currently allowed without applying for the requisite permit modification. But MEPA's "directive **does not include speculation** about what would happen if the permit was violated or the likelihood of violation." *Belk*, ¶ 38 (emphasis added). DEQ has no information about how Montana Artesian's facility might (or might not) change or how the discharge water would be handled as the facility expands. Any information DEQ might develop would be purely speculative and liable to change dramatically. This is an illusory rabbit hole that DEQ need not and may not dive into. *Belk*, ¶ 38.

Much like *N. Plains Res. Council, Inc. v. Montana Bd. Of Land Com'rs*, 2012 MT 234, 366 Mont. 399, 288 P.3d 169, here too, DNRC's decision to grant a water right to Montana Artesian does not remove any future permit action "from any environmental review or regulation provided by Montana law." *NPRC*, ¶ 19. In *NPRC*, the State Land Board entered into mineral leases with Arch Coal for state lands located within a coal reserve "covering almost 20,000 acres." *NPRC*, ¶ 3. The leases themselves did not authorize or permit any mining activity. The State pointed out that environmental review under MEPA would occur "at least twice before any coal is mined." *NPRC*, ¶ 4. Opponents argued that

environmental review was required at the leasing stage and that "deferral of environmental review until the mine permitting stage" was wrong. *NPRC,* ¶ 8. This Court disagreed because environmental review would come later; environmental review at the leasing stage was not required. *NPRC,* ¶ 8.

Here, the situation is the same. Where Arch Coal had been granted expansive mining leases, here, Montana Artesian has been granted a large water right. Just as Arch Coal's expansive lease did not permit mining; likewise, Montana Artesian's large water right does not permit water discharge. Just as Arch Coal's mining was contingent on a successful permitting process that includes environmental review, here too the District Court noted that Montana Artesian's future water discharges are contingent on a successful permit modification process that includes environmental review. Tab A, p. 6 (Montana Artesian "cannot increase this flow rate without requesting a major modification of the permit" which "triggers issuance of a new draft permit, permit fact sheet, **new environmental analysis**, and public comment period" (emphasis added)). The result is the same – no action has been removed from environmental review and DNRC's issuance of a large water right does not implicate the need for environmental review of a water discharge permit for the full build-out. *NPRC,* ¶ 8.

B. The District Court's Order is Contrary to *Park County*.

Appellees fail to address the crux of the issue – whether the Discharge Permit is the "'go/no go juncture,' beyond which lies an 'irretrievable commitment of resources' or 'successive steps set into irreversible motion.'" *Park County*, ¶ 32 (*citing North Fork Preservation Ass'n v. Dep't of State Lands*, 238 Mont. 451, 461-462, 778 P.2d 862, 868-69 (1989)). Appellees point out differences between secondary impacts and cumulative impacts, but the *Park County* reasoning was not limited to secondary impacts. This Court reiterated the holding in *Bitterrooters*, that "**MEPA** 'requires a reasonably close causal relationship between the triggering state action and the subject environmental effect.'" *Park County*, ¶ 32 (emphasis added). The "reasonably close causal relationship" is required for all MEPA considerations – whether they be secondary or cumulative impacts.

Because Appellees failed to rebut Montana Artesian's analysis of the "reasonably close causal relationship" as presented in its Opening Brief (pp. 27-29) is not repeated here and may be well-taken by the Court. The only point at which DEQ must consider the environmental impacts from the full build-out is if and when DEQ is presented with an application for a permit commensurate with the full build-out. That has not happened; therefore, DEQ has no authority to review the full build-out beyond the impacts of the Discharge Permit. *Park County*, ¶ 34; Op. Br., pp. 28-29.

C. The District Court's Reasoning is Contrary to *Bitterrooters*.

Appellees bring the same failed argument to the *Bitterrooters* case as they did for the *Park County* case – arguing only that those cases involved secondary, not cumulative impacts. As pointed about above, the *Park County* decision is not so limited and applies the "close causal relationship" requirement to all environmental effects considered in MEPA, not limited to secondary impacts. *See also Bitterrooters*, ¶ 33 ("We hold that MEPA, like NEPA, requires a reasonably close causal relationship between the triggering state action and the **subject environmental effect**" (emphasis added)).

Because Appellees failed to rebut Montana Artesian's analysis of the "reasonably close causal relationship" and the requirement to have legal authority sufficient to prevent the impacts, as presented in Montana Artesian's Opening Brief (pp. 29-31), the argument is not repeated here and may be well-taken by the Court. Appellees failed to explain how DEQ's review of the full build-out would not violate the law announced in *Bitterrooters* that "requiring a state agency to consider environmental impacts it has no authority to lawfully prevent would not serve MEPA's purposes […] to inform the lawful exercise of agency authority." *Bitterrooters*, ¶ 33. DEQ has no authority to lawfully prevent impacts related to the full build-out beyond the Discharge Permit; therefore, DEQ's review of the impacts of the full build-out does not serve MEPA's purposes and is not required.

Id., Op. Br., pp. 30-31.

D. The District Court's Order is Internally Inconsistent.

Appellees did not address the inconsistent application of *Bitterrooters* within the District Court's Order. Rather than repeat the argument here, Montana Artesian relies upon its Opening Brief (pp. 32-33), noting that Appellees' failure to rebut the argument means that it may be well-taken by the Court. The District Court got the analysis right regarding DNRC, recognizing that DNRC "has limited authority" such that it may only review the "impacts of the permitted appropriation of water." Tab A, p. 13. Likewise, the District Court should have recognized that DEQ also "has limited authority" and it may only review the impacts of the permitted discharge, which is limited to the start-up facility at 0.4% capacity. Op. Br., pp. 32-33.

V. The District Court Erred in Ordering Vacatur of the Discharge Permit.

Here, the District Court Order on Remedies presents inconsistency – clearly holding that *Park County* triggered the MEPA remedy contingency statute but then failing to abide by the results of its own application of that very statute. Tab B (Remedy Order), p. 4 (Appellees' "argument that *Park County* did not trigger the contingency statute is unpersuasive and contrary to the plain language of the statute") and p. 5 ("the remedy of vacatur is not available to [Appellees] under Mont. Code Ann. § 75-1-206(6)(c)"). Part of those holdings (which Appellees

have not appealed) is the District Court's decision that vacatur "would obviously enjoin the effectiveness of the permit." *Id*. Plaintiffs have not appealed any of those decisions; therefore, they may not be heard now to quibble about whether permit vacatur is or is not an equitable remedy that triggers application of the MEPA contingency statute. Resp. Br., pp. 41-42, 44.

Appellees bring no challenge to the MEPA contingency statute. They challenge neither the statute itself nor the District Court's application of it. Therefore, the statute governs this case and the District Court's application of the statute stands.

The only remaining issue then is whether the District Court properly found a remedy entirely separate from the statute, based on the reasoning in *Park County*, and in direct conflict with the statute. Resp. Br., p. 44; Tab B, pp. 5-6 (finding "inherent authority to order vacatur"). Said another way, may the District Court reach the correct statutory holding, then ignore it (and the law upon which it is based) to order the exact opposite? The answer is an obvious and resounding "no."

Absent finding error in the law such that it is void (i.e.: the unconstitutionality found in *Park County*), courts may not ignore a law or order remedies contrary to the law. *Morrison v. City of Butte*, 150 Mont. 106, 114, 431 P.2d 79, 83 (1967). This Court's review is "de novo for correctness." *Bitterrooters*, ¶ 15. Here, the District Court's failure to abide by the law was

incorrect and should be reversed.

Park County did not eliminate all constraints on MEPA remedies or open the door for MEPA's contingent remedy statute to be ignored. Instead, *Park County* found that the previous remedy statute was unconstitutional because it "categorically remove[d] the Plaintiffs' only available remedy adequate to prevent potential constitutionally-proscribed environmental harms." *Park County*, ¶ 88. Here, the MEPA remedy statute does not "categorically remove" any remedies. It prescribes the conditions that must be met prior to a remedy of permit vacatur, but it does not omit such a remedy entirely. Nothing in the statute or in *Park County* leaves space for the District Court to ignore the statute and fashion its own remedy. The District Court was wrong to do so. Should this Court not find the Remedy Order moot, it should overturn it and order remand to DEQ.

CONCLUSION

This Court should overturn the District Court's decisions regarding DEQ's consideration of comments raised by EPA and USFWS and DEQ's consideration of cumulative impacts. Summary judgment should be granted in DEQ's favor. Therefore, the remedy issue should be moot. However, if this Court determines otherwise, it should overturn the District Court's remedy order and instead order that the remedy is remand to the agency, as supported in the District Court's analysis pursuant to the applicable contingency MEPA remedy statute.

WHEREFORE, Defendant/Appellant Montana Artesian Water Company respectfully request this Court to enter judgment in Montana Artesian's and DEQ's favor.

Dated this 23rd day of September 2022.

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CERTIFICATE OF COMPLIANCE

Pursuant to Rule 11 of the Montana Rules of Appellate Procedure, I certify that this brief is printed with a proportionately spaced Times New Roman text typeface of 14 points; is double spaced; and the word count calculated by Microsoft Word is 4988 words, excluding Table of Contents, Table of Authorities, Certificate of Compliance and Certificate of Service.

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