MONTANA EIGHTEENTH JUDICIAL DISTRICT COURT,
GALLATIN COUNTY

UPPER MISSOURI WATERKEEPER, DIAMOND P RANCH AND REX PORTMANN AND BRANDON LEWIS, Plaintiffs, v. MONTANA DEPARTMENT OF ENVIRONMENTAL QUALITY, an agency of the State of Montana, Defendant, WEST YELLOWSTONE CAMPGROUNDS, LLC, a Delaware Limited Liability Company, Intervenor-Defendant.	DV 16.2023.1014D FINDINGS OF FACT, CONCLUSIONS OF LAW AND ORDER ON PRELIMINARY INJUNCTION

THIS MATTER CAME BEFORE THE COURT on June 11, 2024, on Plaintiffs' application for preliminary injunction.

All parties were present with counsel.

Witnesses were called, sworn and testified.

Exhibits were marked and admitted.

Counsel made arguments.

DEQ's Administrative Record is lodged in this case and before the Court.

From these, the Court makes the following:

FINDINGS OF FACT

1. On March 21, 2022, DEQ approved the plans and specifications for the construction of a regional wastewater collection and treatment system called the Deep Well Ranch Regional Wastewater System ("Regional System"). (AR-000962)

2. The purpose of the Regional System is to collect and treat sewage from a portion of the Deep Well Ranch and two (2) commercial campgrounds now owned and operated by Kampgrounds of America's (KOA's) WYC.

3. The Regional System is designed to collect sewage previously sent to outdated lagoons and seepage pits. (AR-000568 – AR-000569)

4. The two (2) campgrounds are located on the north side of Highway 20 several miles west of the Town of West Yellowstone and Yellowstone National Park and in view of Custer Gallatin National Forest lands. As such, they are in an area of natural beauty, unique natural features and wildlife that are internationally popular, attracting hundreds of thousands of visitors each year to recreate, commune with the natural environment, and admire the area's extraordinary natural beauty. The area's ecosystem includes species of concern and endangered species including grizzly bears. Wildlife, including bears, antelope and other animals exist and are found on both the WYC and neighboring Diamond P Ranch properties.

5. The campgrounds provide camping facilities to tens of thousands of visitors and thus are a significant resource for the local economy during the especially popular summer months. According to the June 18, 2024 affidavit of KOA's Chief Operations Officer Darin Uselman, the campgrounds involved here are in a "top 10 market" for the KOA system.

6. Mr. Uselman's testimony on June 11, 2024, plus his affidavit outline losses (between the campgrounds and the West Yellowstone business community) in the millions of dollars if the campgrounds must cancel summer reservations.

7. Mr. Uselman's affidavit states that the campgrounds will generate some 20,000 gallons of wastewater per day. The Gaston engineering report estimates 21,000 gallons per day for the Mountainside campground alone and an additional 33,688 gallons per day for the West Gate campground. (AR-000569)

8. Alternatives to the use of the Regional System such as the use of pump trucks would cost upwards of $8,000 per day but with uncertainty as to service due to limited disposal and treatment options for the area's pump truck vendors.

9. The Regional System, as designed, can treat up to 75,000 gallons per day. The associated hay crop system as approved by DEQ will have the capacity to take up and remove more nitrogen than the Regional System produces through the center pivot land application system.

10. The campgrounds provide an essential sewage disposal resource for campers. Millions of gallons of untreated wastewater are produced each summer. The Regional System replaced an antiquated system and is essential to the current and future operation of the campgrounds. There was significant local public interest in addressing the dated and deteriorating wastewater treatment and disposal system for the campgrounds.

11. WYC purchased the property that includes the Mountainside KOA and West Gate KOA campgrounds from the Linde family more than a full year after the Regional System was approved by DEQ, and construction was underway.

12. The Regional System includes among its features an aerated wastewater treatment lagoon on the former Linde property and a center pivot irrigation system to provide "Land Application

Disposal" by using a hay crop to uptake nitrogen and other nutrients from the reclaimed wastewater. Large pipes transport untreated wastewater to the lagoons from the campgrounds. The pipe from the Mountainside KOA passes under Denny Creek before reaching the lagoons. The lagoons can hold millions of gallons of treated wastewater.

13. The excavation under Denny Creek was approved by DEQ in 2021, separate and apart from the balance of the Regional System

14. The WYC property wraps around the east, west and north boundaries of the Diamond P Ranch with the Regional System's center pivot spray irrigation system coming within approximately 200 feet of the Diamond P Ranch property line and approximately 300 feet from the Diamond P Ranch guest and horse facilities. (*See* map at AR-000808; map photo at Plaintiffs' Exhibit 1; and photos at Plaintiffs' Exhibit 2)

15. Just over the property line on the WYC side are a series of signs that advise no entry because of the application of reclaimed wastewater from the center pivot system. These signs are proximate to and clearly visible from the Diamond P Ranch pavilion and other facilities where guests congregate and eat meals.

16. Plaintiff Rex Portmann is a principal of the Diamond P Ranch and has resided there for over 60 years. His ranch manager, Brandon Lewis, has worked on the Diamond P for over a decade and now acts as the ranch's manager. He, like Mr. Portmann, is an individual plaintiff in this matter. They worry that the Regional System's land application disposal system will discourage business at their ranch; lessen the value of the ranch; cause negative human impacts including those related to clean air, food and water; and will harm and discourage the presence of wildlife.

17. Plaintiff Upper Missouri Waterkeeper is an environmental advocacy group that advocates for clean water and associated environmental protections for Montana. Its members utilize and enjoy Montana's rivers, creeks and streams including Hebgen Lake and the Madison River—both downgradient of the Regional System. Waterkeeper alleges that DEQ failed to provide public notice and participation in DEQs assessment of the Regional System. The also claim that the environmental assessments associated with both the excavation under Denny Creek and the balance of the Regional System failed to substantively and meaningfully address impacts of the system on people, the land, water and wildlife.

18. DEQ and WYC describe a number of features that mitigate against any significant risk of negative impacts associated with the Regional System's spray irrigation dispersion. These include:

> a. The water will be treated to Class D wastewater standards, including by aeration and denitrification through the lagoons. AR-000584. The denitrification is designed to produce wastewater with 10mg/L or less total nitrogen. AR-000592. Class D Reclaimed Wastewater is approved by DEQ for "Spray Irrigation of Nonfood Crops." DEQ 2, Ch. 120, Table 121-1.
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> b. The pivot system will only use low trajectory nozzles, which reduce airborne aerosols. AR-000589.
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> c. The pivot system is equipped with a wind sensor that automatically shuts down the system when wind velocity exceeds 25 mph. *Id*. The prevailing winds are to the northwest, away from the Diamond P Ranch. AR-000587.
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> d. The pivot system has been situated to include a 200-foot buffer from the WYC property line. An easement exists between the WYC property and the Diamond P Ranch and buildings; therefore, the edge of the pivot system is nearly 300-feet from the Diamond P Ranch facilities.
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> e. The pivot system is designed to irrigate at a rate that takes into consideration site-specific characteristics of the groundwater, soils, and other agronomic information. *See* DEQ-2, p. 163. It was designed to achieve 100% uptake of total nitrogen with zero contribution of nitrogen to groundwater, taking into account site-specific hydraulic loading, crop uptake, the nitrogen concentration in the

Class D Reclaimed Wastewater, and the ground slope within the application area. DEQ-2, p. 162-169; AR-000590; AR-000595 – AR-000599; AR-000615 – AR-000642.

19. The engineer who originally designed the system for the Linde family, Brent Miller of Gaston Engineering, testified that the irrigation phase of the Regional System is integral to the overall operation because it represents the final treatment phase in which remaining nutrients are taken up by the hay crop. Referring to the Water Balance (beginning at AR-000596) and the Agronomic Report (beginning at AR-000677), he testified that the irrigation schedule is based on the anticipated inflow of wastewater from the WYC campgrounds and facilities, such that if irrigation cannot occur, the Regional System will eventually be unable to contain the wastewater. Therefore, loss of the irrigation component renders the Regional System inoperable.

20. The Agronomic Report and Crop Management Plan are based on a 2-ton per acre yield of hay with irrigation beginning the week of May 18-24 each year. AR-000685; AR-000736. Each week until September 7-13, between one and three irrigation cycles should occur. *Id*.

21. Mr. Miller testified that extensive monitoring and evaluation was conducted across the Linde property in the area, and review of the data indicated that the Regional System's center pivot system could only be placed where it is currently located.

22. According to the Gaston engineering report, the pivot system spray dispersion system can generate 390 gallons per minute. At this rate, a "watering" for the 29 acres of crop area anticipated requires 24 hours at 23,400 gallons per hour. (See AR 000481-482). At this rate, it appears that daily inflows into the Regional System can be depleted in a few hours.

23. The Gaston engineering report also describes how the waterings relate to cuttings, plowing and disking. (See AR 000481-482)

24. DEQ's technical review of the Regional System was conducted to determine compliance and consistency with Circular DEQ-2 ("DEQ-2"), a regulatory mandate. *See* Doc. 36, Ex. "A" (WYC open. Sum Judg. Brief); Hearing Exhibit DEQ-B.

25. Regarding formal public notice of the Regional System application or approval, and the EA associated with it, it is uncontested that DEQ did not publish public notice, although as Mr. Waite testified, all application and review materials were available to the public.

26. Mr. Waite testified that he was unaware of any public notice requirement for the Regional System.

27. Between purchase of the Linde property and completion of the Regional System, KOA spent tens of millions of dollars. Mr. Uselman testified that that KOA would not have purchased the land from the Linde family if he was aware that a public notice requirement had not been followed.

28. DEQ and WYC point to a number of circumstances to show that Rex Portmann had notice of activity on the WYC (formerly Linde) property that provided opportunities to provide input going back to 2019 and through the first half of 2023. These included, among others, construction activities on the WYC property; numerous discussions with his neighbor and prior owner of the WYC Property Steve Linde between 2019 and 2022, which contemplated the installation of the Regional System; Portmann's communication with DEQ in May 2019 where he was directed to a complaint process; and discussions with KOA managerial staff in 2023 about the system which included a walking tour.

29. Plaintiffs argue that Portmann was duly diligent throughout the process including his contact with Plaintiff Lewis in the first half of 2023 because he believed that Lewis possessed the knowledge and contacts to investigate permitting for the Regional System. Lewis began a

serious of requests for information from DEQ in or around May 2023. Lewis testified that answers to his inquiries typically took weeks. Ultimately, he was directed to file a 'right to know' request which he promptly did in July 2023.

30. DEQ's responsive documents were delivered to Lewis in September 2023 and documented both DEQ's consideration and approval of the Regional System as well as the absence of public notice.

31. Upper Missouri Waterkeeper provided affidavits, like the June 18, 2024 Affidavit of Quincey Purcell, its Outreach Director, which show that some Waterkeeper members routinely review public notices on a weekly basis to determine whether there are governmental actions to which Waterkeeper should respond. These inquiries could not and did not identify public notice of any DEQ consideration of the Regional System.

32. The Regional System provides wastewater treatment for the Denny Creek Subdivision, which was approved (without public opposition) by the Gallatin County Commission on November 1, 2022. During their approval of the Denny Creek Subdivision, the Gallatin County Commissioners noted, with approval, the Regional System and expressed confidence in DEQ's approval of it. Doc. 008, Ex. A, ¶ 11; https://media.avcaptureall.cloudimeeting/37a5a39bac2-4e23-9416-eb48d993f440 (audio recording of the Gallatin County Commissioners' deliberations).

CONCLUSIONS OF LAW

1. The purpose of preliminary injunctive relief is "to so protect the rights of all parties to [the] suit, that, whatever may be the ultimate decision of [the] issues, the injury to each may be reduced to the minimum". *Porter v. K&S Partnership*, 192 Mont. 175, 182, 627 P.2d 836, 840 (1981). In

Porter the Court made it clear that the function of a temporary restraining order is to maintain the "status quo" pending a decision on the merits of the controversy.

2. "Status quo" means "'the last actual, peaceable, noncontested condition which preceded the pending controversy.'" *BAM Ventures, LLC v. Schifferman,* 2019 MT 67, ¶ 18 quoting *Benefis Healthcare v. Great Falls Clinic, LLP,* 2006 MT 254, ¶ 14.

3. Here, the Court concludes that the status quo is the Regional System without an active, operational land application disposal system. That is, the Regional System not discharging treated, reclaimed wastewater through the center pivot sprinkler.

4. Both Plaintiffs' Application and the evidence and argument presented at the show cause hearing are aimed squarely at DEQ's MEPA analysis and in the public participation DEQ provided pursuant to MEPA. Therefore, the Court concludes that the preliminary injunction standards in § 75-1-201(6)(c)-(d), MCA, are applicable to Plaintiffs' Application as opposed to the general preliminary injunction statute in Title 27, chapter 19, MCA.

5. Claims under MEPA seeking to enjoying the effectiveness of an authorization under Title 75 are subject to specific preliminary injunction requirements in § 75-1-201(6)(c)-(d), MCA. These MEPA remedies are "exclusive." Section 75-1-201(6)(c)(i), MCA. DEQ's approval of the Regional Wastewater System was made under Title 75, chapter 6, MCA.

6. While the MEPA preliminary injunctions requirements share similarities to the requirements in Title 27, chapter 19, MCA, the standards are not identical. Section 75-1-201(6)(c), MCA, states that a court:

> 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;
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> (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.

Section 75-1-201(6)(c)(ii), MCA**.**

7. In addition, § 75-1-201(6)(d), MCA, applies to preliminary injunctive relief for MEPA violations and was amended by the Montana Legislature through Senate Bill 557 in the 2023 legislative session to state:

> (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, <u>including but not limited to lost wages of employees and lost project revenues for one year.</u> 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. <u>If a challenge for</u>

> noncompliance or inadequate compliance with a requirement of parts 1 through 3 seeks to vacate, void, or delay a lease, permit, license, certificate, or other entitlement or authority, the party shall, as an initial matter, seek an injunction related to a lease, permit, license, certificate, or other entitlement or authority, and an injunction may only be issued if the challenger:
>
> (i) proves there is a likelihood of succeeding on the merits;
>
> (ii) proves there is a violation of an established law or regulation on which the lease, permit, license, certificate, or other entitlement or authority is based; and
>
> (iii) subject to the demonstration of the inability to pay, posts the appropriate written undertaking.

2023 Mont. Laws ch. 703, § 1 (underlining in original to denote amended text).

8. Plaintiffs' First Claim for Relief alleges that DEQ violated the Montana Constitution's right to public participation in agency decision-making.

9. Plaintiffs' Second Claim for Relief requests mandamus relief on the basis of the constitutional claims. Plaintiffs ask the Court to issue a writ requiring DEQ to execute "non-discretionary" acts addressed to the notice giving and public participation Plaintiffs' claim was missing. For purposes of Plaintiffs' application for a preliminary injunction the Court need not and does not further address this claim.

10. Article II, Section 8 of the Montana Constitution guarantees the public a "right to expect government agencies to afford such reasonable opportunity for citizen participation in the operation of the agencies prior to the final decision as may be provided by law."

11. Article II, Section 9 of the Montana Constitution guarantees "no person shall be deprived of the right to examine documents or to observe the deliberations of all public bodies or agencies of state government and its subdivisions, except in cases in which the demand of individual privacy clearly exceeds the merits of public disclosure."

12. Article II, Sections 8 and 9 are cooperative mechanisms through which concerned citizens can advocate for their right to a clean and healthful environment under Article II, Section 3 of the Montana Constitution.

13. Unlike the Right to Know in Article II, Section 9, the Right of Participation is not self-executing, but rather is applicable "as may be provided by law," requiring enabling statute to effectuate it.

14. MCA 2-3-103(1)(a) requires each state agency, including DEQ, possess procedures that "ensure adequate notice and assist public participation before a final agency action is taken that is of significant interest to the public."

15. DEQ is mandated, along with other state agencies, to comply with MEPA regulations "'to the fullest extent possible.'" ARM 17.4.601(1)

16. The Regional System appears to be a substantial wastewater treatment and disposal project that, as approved, will serve hundreds, if not thousands, of persons over the summer months. Therefore, the Regional System is a "public sewage system" under ARM 17.38.101(3). It is also a system designed to serve a subdivision comprised of camping and other lodging facilities that, together, will accommodate thousands of visitors each year. As such, the Regional System is not exempted from MEPA review and associated decision-making under ARM 17.38.103.

17. The record to date indicates that DEQ understood its review of the Regional System, including the Denny Creek wastewater pipe sub-bed excavation, to be an environmental review process under MEPA which is why environmental assessments (EAs) accompanied its review of these projects. Proper purposes of the EAs under MEPA include application of scientific

principles to issues such as a proposal's impact on the human environment and consideration of alternatives. ARM 17.4.607

18. ARM 17.4.610 mandates an 'adjustable' scale of opportunities for public review based on the characteristics of the proposed action and the public interest in it. ARM 17.4.610(1) and (3). Given the size, scope and importance of the Regional System to the new subdivision, its users, and the local economy, it is clear that the level of public interest was significant. With respect to Rex Portmann specifically, DEQ was aware as early as 2019 that the Diamond P Ranch, a decades old ranching institution, was concerned about plans for the neighboring Linde property. Additionally, the project was replacing an antiquated system whose failures were of public interest as well. As it is, the ability of the greater, general public to see and appreciate the presence of the Regional System is, quite literally limited by the Diamond P Ranch itself which occupies the space between Highway 20 and the system's infrastructure and operation. Finally, the Regional System is situated in an internationally recognized area of natural beauty, popularity, and wildlife diversity.

19. There is nothing in ARM 17.4.610 that suggests that the Regional System is the kind of project that would have justified a complete absence of public notice and participation beyond the de minimis inspection "upon request" in ARM 17.4.610(2). Rather, the Regional System required "additional opportunities" for public participation such as news releases, public comment solicitations and public meetings. ARM 17.4.610(3)

20. The project activities that DEQ and WYC argue should have put Portmann on notice (exaction, equipment, infrastructure etc.) are the kinds of things that would have alerted him and others such as Waterkeeper members to look out for public notices. Here, no such notices occurred. The fact that Portmann was instructed about a 'complaint' process seems unavailing to

DEQ and WYC insofar as there was, effectively, nothing to complain about or public notices that would have provided further direction.

21. In addition, DEQ's evaluation of the Regional System included a variety of technical expertise, including a variety of engineering metrics and calculations about which the lay citizen would likely not be educated. However, the crux issue under the discovery rule is not the technical nature of DEQ's engineering, but when Plaintiffs discovered the facts constituting the claim, and did Plaintiffs act reasonably in seeking to discover the type and basis of the claims now at-issue. For purposes of Plaintiffs' application here, the Court finds that they did.

22. DEQ's implementing rules for its Public Water Supply, Distribution, and Treatment Act authority only speak to narrow circumstances where public participation would not apply, none of which are applicable here. *See* ARM 17.38.103

23. DEQ's implementing rules for MEPA, and the statute's own test, explicitly reference public participation as both a key utility of MEPA reviews, and of public participation's importance as a criterion for determining whether a proposed action is 'significant' and requires more probing review. *See* MCA §§ 75-2-102, 103; and ARM 17.4.610.

24. The Court is not persuaded by DEQ's argument that the agency possesses wide discretion under the law to determine when and whether to provide for public participation opportunities or—as is the case here—not to provide any at all. The Court's independent duty to interpret DEQ's compliance with constitutional requirements and MEPA is consistent Montana's limited reliance on "Chevron deference", *Mont. Envtl. Info. Cntr. v. DEQ,* 2019 MT.161, ¶ 24, fn. 9 citing *Montana Power Co. v. Public Service Comm'n,* 2001 MT 102, ¶ 25 (stating that unlike the federal doctrine articulated in *Chevron U.S.A., Inc. v. NRDC, Inc.* 467 U.S. 837 (1984), "courts in Montana only give 'respectful consideration' to agency interpretations" of statutory language and are not bound

by the same), as well as the 'Chevron Doctrine's' recent rejection by the United States Supreme Court in *Loper Bright Enders v. Raimondo,* -- U.S. --, 2024 LEXIS 2882, overruling *Chevron U.S.A*. Rather, the Court must independently assess the likelihood that DEQ's decision to forgo a public notice for its consideration of the Denny Creek wastewater pipe sub-bed excavation and associated Regional System violate the public participation mandates of the Montana Constitution and MEPA.

25. Were the Court only assessing the adequacy of public notice and participation, the task of measuring the likelihood of the Plaintiffs prevailing on its Constitutional claims might be more difficult. However, in the complete absence of any notice of its review of either the Denny Creek wastewater pipe sub-bed excavation project or Regional System, the Court can only conclude that the Plaintiffs are, pending assessment of statute of limitations bars discussed below, more likely than not to succeed on the merits of their Montana Constitution and MEPA-based public notice and participation claims.

26. This conclusion is underscored by the fact that DEQ approval of the Regional System was admittedly used by the Linde family to obtain approval of the Denny Creek subdivision by the Gallatin County Commission—an approval which itself required public notice. The Court concludes that the principles of the Montana Constitution's public participation guarantees are likely violated when the approval of a project that lacked lawful public notice is used to obtain a county's subdivision approval that required the same.

27. Because MEPA required some measure of public notice and participation in its review of the Regional System and there was, by DEQ's own admission, none, the Court need not consider whether notice was mandated under Title 2, Chapter 3.

28. Plaintiff's Third Cause of Action that the substance of DEQ's review of the Regional System and associated Denny Creek wastewater pipe sub-bed excavation were inadequate under MEPA.

29. The Court initially observes that an agency's admitted failure to provide lawful public notice and participation as discussed above are germane to the substance of the underling assessment and decision-making, because a process that lacks necessary public input is arguably offensive to due process guarantees against arbitrary and capricious government action.

30. Before authorizing a project, DEQ must determine the significance of impacts associated with a proposed action. This determination is the basis of the agency's decision concerning the need to prepare an environmental impact study, and also refers to the agency's evaluation of individual and cumulative impacts in either an environmental assessment (EA) or environmental impacts statement (EIS). ARM 17.4.608(1)-(2).

31. DEQ is also required to, at a minimum, reconcile the criteria of ARM 17.4.609(2)-(3) as applied to a project.

32. DEQ's checklist EAs for the Regional System appear to be insufficient as they are devoid of an adequate analysis of impacts in violation of the criteria in ARM 17.4.608-609. Regarding the EA for the wastewater treatment works, for nearly every resource category the EA states that "Analysis of this impact is not applicable to the action being reviewed by the Public Water Plan Review Section or the Section has no review authority. If other agency approval(s) are necessary, this impact may be analyzed by those agencies." These conclusions were never submitted for public comment even though MEPA's criteria are applicable to DEQ's Public Water Supply Law and Water Quality Act.

33. In relation to the EA for the new sewer main collection system, the agency apparently failed to adequately apply its own criteria to identify or evaluate impacts, including cumulative impacts; instead, as testified to by DEQ staffer Mr. Waite, the agency engineer, applied engineering criteria under DEQ Circulars. As Mr. Waite admitted, he is not a certified ecologist or biologist by training, and his completion of the EAs did not entail a review of baseline criteria, or any assessment of the surrounding environment. Conversely, as testified to by Mr. Johnson, a certified wildlife biologist by trade and experience, an assessment of potential impacts on the environment would necessarily require identification of an ecological baseline, and assessment of project components against this baseline.

34. Mr. Waite did not perform any of these evaluative reviews and testified that it was agency policy within his department to never perform environmental assessments. In fact, Mr. Waite testified that if a criterion was not contained in the relevant DEQ Circular, it was not applied in his decision-making.

35. The Court's review of DEQ Circulars submitted to the record show that DEQ's evaluation of the Regional System was an exercise in engineering and not an evaluation of potential impacts on the surrounding environment as required by MEPA.

36. As such, it appears evident that neither EA for the Regional System or associated Denny Creek wastewater pipe sub-bed excavation faithfully applied mandatory MEPA criteria.

37. Thus, as with Plaintiffs' Montana Constitution-based First Claim for Relief, the Court finds it is more likely than not Plaintiffs' will prevail as to their Third Claim for Relief pending assessment of statute of limitations bars discussed next.

38. MEPA contains a strict 60-day statute of limitations based solely on the date of DEQ's approval, which was March 21, 2022. MCA § 75-1-201(5)(a)(ii). Plaintiffs' claims were not filed

until October 13, 2023. DEQ and WYC argue that notwithstanding the merits of Plaintiffs' claims, the Court is unlikely to reach the merits of Plaintiffs' claims because they have not met the 60-day MEPA statute of limitations. MCA §§ 75-1-201(6)(c)(ii) and 75-1-201(6)(d)(i).

39. An exception to the general statutes of limitation is the discovery rule. Under the discovery rule, the limitations period does not start to run until the plaintiff discovers the facts constituting the claim, or in the "exercise of due diligence, should have discovered the facts constituting the claim if the facts constituting the claim are by their nature concealed or self-concealing or a defendant has taken actions preventing plaintiff from discovering the facts." *Norbeck v. Flathead Cty.,* 2019 MT. 6, ¶ 19 ; MCA § 27-2-102(3).

40. Similarly, "the doctrine of equitable tolling arrests the running of the limitations period after a claim has accrued, allowing 'in limited circumstances for an action to be pursued despite the failure to comply with relevant statutory filing deadlines.'" *Schoof v. Nesbit,* 2014 Mont. 226, ¶ 33, (2014) quoting *Lozeau v. GEICO Indem. Co.,* 2009 MT 136, ¶ 14.

41. "The policy behind the doctrine of equitable tolling is … to 'avoid forfeitures and allow good faith litigants their day in court.'" *Brilz v. Metro. Gen. Ins. Co.,* 2012 MT 184, ¶ 16 quoting *Addison v. State,* 21 Cal.3d 313, 146 Cal.Rptr. 224, 578 P.2d 941, 945 (1978).

42. Here, the Court is not persuaded that Rex Portmann's observations of activity on the Linde property; email correspondence with DEQ in 2019; conversations with Steve Linde and KOA staff between 2019 and early 2023, provided notice that a MEPA review of and decision regarding the Regional System were underway. This is principally because even to the extent that these events persuaded Portmann to be on the lookout for public meetings or other opportunities for public input, DEQ concedes there were none for him find.

43. Waterkeeper submitted affidavits that represent that its employees and members do look for such notices on a weekly basis. And unlike Portmann, Waterkeeper, its members and the interests it represents, had no opportunity or reason to make observations of activities on the Linde property.

44. Here, the Court finds that Plaintiff Lewis appears to have exercised due diligence in pursuing information about the Regional System and, having reviewed the documents in response to his right to know request, timely filed a complaint along with his co-plaintiffs.

45. Therefore, contrary to DEQ's assertion that Plaintiffs' likelihood of succeeding on the merits is undermined by the applicable statute of limitations, the Court finds that discovery doctrine and equitable tolling considerations do not, for purposes of the application for preliminary injunction at issue here, prove decisive. Plaintiffs are still more likely than not to prevail on the underlying claims addressed above, and the Court must apply the preliminary injunction requirements under MEPA as quoted above in MCA § 75-1-201.

46. The first requirement is "more likely than not" success on the merits. MCA § 75-1-201(6)(c)(ii). For the reasons articulated above, and, in particular, DEQ's admitted failure to provide any public notice of its environmental review of the Regional System, the Court concludes that this requirement is satisfied in Plaintiffs' favor as to its first and third causes of action.

47. The second requirement is that the party seeking relief will suffer "irreparable" harm in the absence of injunctive relief. MCA § 75-1-201(6)(c)(ii)(A). "'For the purposes of a preliminary injunction, the loss of a constitutional right constitutes irreparable injury.'" *Planned Parenthood of Montana v. State,* 2022 MT 157, ¶ 6 quoting *Driscoll v. Stapleton,* 2020 MT 247, ¶ 15. In this regard, the Court disagrees with the assertion that decisions such as these are distinguishable because the irreparable harm in these cases was anticipatory and enjoined by the Court not

allowing new laws to take effect. While the claimed constitutional injuries at issue here may be historical, they are also on-going and aggravated were the permitted activity to actually take place as planned and approved. Additionally, while harm to humans, wildlife, surface waters and the environment caused by the land application disposal system may be unknown, the uncertainty itself cannot be mitigated in the absence of some injunctive relief. This is especially the case where there are precautions linked to the Class D water (signage; not for human consumption; buffer zone, etc.) The Court concludes that the irreparable injury requirement is satisfied in the Plaintiffs' favor as well.

48. The third requirement is whether the injunctive relief sought is in the public interest and without regard to the "legal nature or character" of any party and in consideration of economic impacts. MCA § 75-1-201(6)(c)(ii)(B)(I) and (II). The public has an interest in safeguarding constitutionally guaranteed right to notice and participation in matters related to clean air, water and protection of the environment. These are, without question, particularly significant in an area and ecosystem as unique as the area in and around Yellowstone National Park and other public lands like the Custer Gallatin National Forest. In addition, the economy of West Yellowstone, Gallatin County and other Montana communities are economically dependent on visitors coming to Montana to enjoy these natural wonders. This appears particularly true because MEPA is the primary means by which Montanans exercise their inalienable right under the Montana Constitution to a "clean and healthful environment." Mont. Const. Art II, § 3.

49. Rex Portmann testified that operation of the Regional System could cause him to lose clients who stay at the Diamond P Ranch, ride horses, hike, and assemble and enjoy foods prepared at the pavilion facilities just across the property line from the center pivot and warning signs. In addition, the discharge of reclaimed wastewater into the air and carried by the wind could impact

humans as well as the prepared foods they consume. Operation of the Regional System could also negatively impact the wildlife people visit the ranch to enjoy.

50. WYC, through its Chief Operations Officer Darin Uselman, testified that the Regional System is integral to the operation of the campgrounds and that enjoining its operation would cost WYC and the surrounding economy millions of dollars. With respect to the campgrounds specifically, Mr. Uselman has calculated losses in revenue of upwards of $500,000 for cancelling the upcoming July 29th to August 11th reservations. According to Mr. Uselman, those cancellations would have to be initiated on July 15, 2024.

51. The Court concludes that while injunctive relief is in the public interest, there is also a public interest in supporting the local economy and in providing adequate facilities for visitors to the Yellowstone National Park and surrounding areas. This public interest also includes facilitating access to and enjoyment of the national park and in equitably mitigating against cancelled trips and the important family and recreational interests involved.

52. In this way, the public interest considerations inform MCA § 75-1-201(6)(c)(ii)(C) which requires that the injunctive relief "is as narrowly tailored as the facts allow to address both the alleged noncompliance and the irreparable harm the party asking for relief will suffer."

53. This 'tailoring' includes allowing the challenged project to go forward "to the extent possible" in consideration of the relief the district court has determined is required for the applicant. MCA § 75-1-201(6)(c)(ii)(C). In this regard, the Court makes a number of observations of the equities involved.

54. These include the reality that even if public notice and participation had been fully afforded, there is no guarantee that rejection of the Regional System would have been the

conclusion. There are indications that the Regional System is a marked and environmentally friendly solution to the antiquated system it is replacing.

55. Though enjoinment of the Regional System is in the public interest for the reasons described, it is not the case that an injunction can remedy or alter the constitutional violations that appear to have been consummated, i.e., approval of the Regional System without public notice or participation—or that the ultimate remedy is, even if a final judgment is adverse to DEQ and WYC, shutting down the Regional System.

56. While WYCs need to cancel reservations at some significant level appears inevitable if the Regional System is completely enjoined, both the environmental harms (including potential harm to human activity at the Diamond P Ranch) are speculative to a degree.

57. While WYC has explored and determined that at least one alternative to wastewater disposal, i.e., the use of pump trucks, to remove and dispose of wastewater is both expensive and potentially unavailable, there was less discussion as to the options reasonably available to the Diamond P Ranch to continue operations while the legal status of the Regional System is pending.

58. Finally, the Court believes that while the TRO was properly issued, the Plaintiffs unnecessarily (though not fatally) delayed their application for injunctive relief. Had Plaintiffs filed as late as early April, for example, any disruptive impact of injunctive relief on WYC and its visitors would very likely have been significantly mitigated.

59. Ultimately, the Court concludes that the Plaintiffs' application for preliminary injunction should be granted—though within the MEPA framework and the economic and other equitable factors discussed above. In this regard, it appears that the limited spray irrigation schedule ordered below should more than cover inflows from the two (2) campgrounds—though WYC will have to navigate any impact on crop production from the restrictions.

60. The injunctive relief ordered below necessarily requires the undertaking mandated by 75-1-201(6)(d). However, the Court does not find that its Order should cause the economic loss WYC describes were there a complete shutdown of the system.

61. The Court's decision to grant preliminary injunctive relief should "'in no manner anticipate the ultimate determination of the questions'" before the Court when fully litigated and finally decided. *Sweet Grass Farms, Ltd. V. Bd. of Cnty Comm'rs,* 2000 MT 147, ¶ 38 quoting *Porter v. K&S Partnership* (1981), 192 Mont. 175, 183, 627 P.2d 836, 840.

Based on these Findings of Fact and Conclusions of Law, the Court issues the following:

ORDER

1. Plaintiffs' application for a preliminary injunction is GRANTED IN PART. Use of the Regional System as it relates to discharging water from the center pivot sprinkler system is ENJOINED with the following exceptions:

a. The Regional System as approved by DEQ may be operated from July 15, 2024 to September 6, 2024 between the hours of 9:30 p.m. and 5:30 a.m. Mountain Time.

b. Use of the Regional System shall be limited to that which is necessary to accommodate inflows from the two (2) camps and to maintain a functioning crop system.

c. All mitigating features (e.g., Class D water; wind speed shutoff; low-trajectory sprinkler drop array; no end sprayer) will be employed.

d. Additionally, the center pivot sprinklers shall be shutoff if northerly winds (NW, N, NE or any variation thereof) exceed 15 miles per hour. These are winds that blow to

the SE, S, and SW respectively. The system may be reactivated if and when the wind changes direction or reduces to an acceptable speed (i.e., at or below 15 mph).

e. Use of the Regional System shall not be extended to new uses beyond the two (2) campgrounds.

DATED: July 2, 2024

ANDY BREUNER
DISTRICT JUDGE

cc: G. Alsentzer, Esq.
A. Pettis, Esq.
M. Stermitz, Esq.

Electronically Signed By:
Hon. Judge Andrew Breuner
Tue, Jul 02 2024 09:25:14 AM