

3-15-2017

Bitterrooters for Planning, Inc. v. Mont. Dep't of Env'tl. Quality:
**Does Identity Matter? Evaluating the Parameters of the DEQ's
Authority to Investigate Prior to Its Issuance of Groundwater
Discharge Permits**

Tim Brothwell
Alexander Blewett III School of Law

Follow this and additional works at: https://scholarworks.umt.edu/mlr_online

Let us know how access to this document benefits you.

Recommended Citation

Tim Brothwell, Oral Argument Preview, *Bitterrooters for Planning, Inc. v. Mont. Dep't of Env'tl. Quality: Does Identity Matter? Evaluating the Parameters of the DEQ's Authority to Investigate Prior to Its Issuance of Groundwater Discharge Permits*, 78 Mont. L. Rev. Online 28, https://scholarship.law.umt.edu/mlr_online/vol78/iss1/4.

This Oral Argument Preview is brought to you for free and open access by ScholarWorks at University of Montana. It has been accepted for inclusion in Montana Law Review Online by an authorized editor of ScholarWorks at University of Montana. For more information, please contact scholarworks@mso.umt.edu.

PRECAP; Bitterrooters for Planning, Inc. v. Mont. Dep't of Env'tl. Quality: Does Identity Matter? Evaluating the Parameters of the DEQ's Authority to Investigate Prior to Its Issuance of Groundwater Discharge Permits

Tim Brothwell

I. QUESTIONS PRESENTED

(1) Did the District Court err when it determined that the Montana Department of Environmental Quality (hereinafter "DEQ") violated the Montana Environmental Policy Act (hereinafter "MEPA") when it failed to consider the impact of the construction and operation of a proposed grocery-retail facility as a "secondary impact" to the issuance of a groundwater discharge permit?¹

(2) Did the District Court err when it created a "test" for disclosing the identity of the future operator of the permit as a "requirement" of the groundwater discharge permit review process?²

II. INTRODUCTION

On appeal, Appellants argue that when the DEQ issues a groundwater discharge permit it does not need to consider the identity of the future operator of the permit as a secondary impact, or as any part of its analysis, and that this consideration is beyond the scope of the DEQ's authority.³ How the Court decides this case will determine whether the public has the right to know the true identity of the future operator of a groundwater discharge permit prior to its issuance by the DEQ and will clarify the breadth of the DEQ's authority to investigate prior to its issuance of groundwater discharge permits.

III. FACTUAL AND PROCEDURAL BACKGROUND

On April 3 2014, Montana real estate broker Lee Foss applied with the DEQ for a groundwater discharge permit for a proposed large-scale grocery-retail facility that was to be built on a parcel of land located near

¹ Opening Brief of Appellant DEQ at 1, *Bitterrooters for Planning, Inc. v. Mont. Dep't of Env'tl. Quality*, <https://supremecourtdocket.mt.gov/view/DA%2016-0429%20Appellant's%20Opening%20-%20Brief?id={60DF0758-0000-C422-B131-A8A46E8893CD}>, (Mont. October 26, 2016) (No. DA. 16-0429).

² Opening Brief of Appellant Wanderer at 1, *Bitterrooters for Planning, Inc. v. Mont. Dep't of Env'tl. Quality*, <https://supremecourtdocket.mt.gov/view/DA%2016-0429%20Appellant's%20Opening%20-%20Brief?id={90FA0758-0000-CE17-B661-41918784F663}>, (Mont. October 26, 2016) (No. DA. 16-0429).

³ Opening Brief of Appellant DEQ, *supra* note 1, at 8; Opening Brief of Appellant Wanderer, *supra* note 2, at 8.

Hamilton, Montana.⁴ On April 21, 2014, the DEQ returned the application to Foss, noting that there were several deficiencies in the permit.⁵ The DEQ specifically requested confirmation that the correct name of the facility was “Parcel # 698800” and that Foss would be the responsible entity who would be authorized to discharge state water.⁶ The DEQ sought this information because the application was “unique,” in that the facility name was not something more descriptive, such as “Albertsons” or “Ace Hardware.”⁷ On April 29, 2014, a private consulting firm answered on Foss’s behalf and confirmed that Foss would be the holder of the permit and that the name of the parcel was “Parcel # 698800.”⁸ However, Foss acknowledged that he would not be the actual operator of what was to eventually become a large-scale grocery-retail facility.⁹

In May 2014, the DEQ created a draft of the Environmental Assessment (hereinafter “EA”) for the proposed permit.¹⁰ In its draft EA, the DEQ concluded that “the project lack[ed] significant adverse effects to the human and physical environment.”¹¹ In reaching its conclusion, the DEQ analyzed certain secondary issues that would be impacted by the permit, such as the potential increase of traffic into the area that the store could generate.¹²

The DEQ held a public hearing to accept comments from the public on September 18, 2014.¹³ The DEQ continued to accept public comments on the permit application process through October 15, 2014.¹⁴ At these meetings, certain members of the public expressed concern over numerous issues, including the fact that the identity of the party that would ultimately operate the permit was not revealed in the permit application.¹⁵ Despite these concerns, the identity of the future operator of the grocery-retail facility was never revealed during the permitting process and on November 17, 2014, the DEQ issued the permit in Lee Foss’s name.¹⁶ When the DEQ issued the permit, it removed from its draft EA any references to secondary impacts the facility may have.¹⁷

⁴ Answer Brief of Appellees at 1, 4–5, *Bitterrooters for Planning, Inc. v. Mont. Dep’t of Env’tl. Quality*, <https://supremecourtdocket.mt.gov/view/DA%2016-0429%20Appellee's%20Response%20-%20Brief?id={A08EB259-0000-C817-A782-285D67733043}>, (Mont. January 17, 2017) (No. DA. 16-0429).

⁵ *Id.* at 5.

⁶ *Id.*

⁷ *Id.* at 6.

⁸ *Id.* at 6.

⁹ Opening Brief of Appellant Wanderer, *supra* note 2, at 4–5.

¹⁰ Answer Brief of Appellees, *supra* note 4, at 7.

¹¹ *Id.*

¹² *Id.*

¹³ Opening Brief of Appellant Wanderer, *supra* note 2, at 3.

¹⁴ *Id.*

¹⁵ Answer Brief of Appellees, *supra* note 4, at 8.

¹⁶ *Id.*

¹⁷ *Id.*

On January 26, 2015, Bitterrooters for Planning Inc. and Bitterroot River Protective Association, Inc. (hereinafter, collectively, “Bitterrooters”) filed a complaint and petition for judicial review against the DEQ in Lewis and Clark County District Court, challenging the DEQ’s issuance of the groundwater discharge permit to Foss.¹⁸ Bitterrooters’ complaint asserted that the DEQ had violated MEPA, the Montana Water Quality Act, and the Montana Constitution when it issued the permit to Foss.¹⁹

The District Court granted summary judgment for the Bitterrooters on all of Bitterrooters’ claims, except one: it dismissed Bitterrooters’ claim that the DEQ had violated Bitterrooters’ constitutional public participation right, on the basis that the 30-day statute of limitations had expired.²⁰

On the other claims, the District Court held that the DEQ violated MEPA by failing to consider the secondary issues resulting from the construction and operation of the proposed grocery-retail facility as a secondary impact and by failing to consider the cumulative impacts of the groundwater discharge permit that had been issued to the Grantsdale subdivision located nearby.²¹ The District Court also held that the DEQ violated the Montana Water Quality Act by: 1) failing to consider the impacts that the permitted groundwater discharge would have on surface water, under Mont. Admin. R. 17.30.715(1)(d) (2015), and 2) failing to consider the cumulative impacts under Mont. Admin. R. 17.30.715(2) (2015) in reaching its determination that the permitted discharge would result in nonsignificant changes to existing water quality.²² Upon these findings, the District Court voided the DEQ’s issuance of the permit to Foss.²³

The DEQ has appealed the District Court’s decision only as it pertains to the District Court’s summary judgment ruling that requires it to consider the construction and operation of the retail facility as a secondary impact under MEPA.²⁴ Appellants/Intervenors, Stephen Wanderer and Georgia Filcher, have joined this appeal, as they are the property owners attempting to sell their property through Mr. Foss and thus have a property interest in the outcome of this decision.²⁵ Intervenors have joined in the DEQ’s appeal challenging the District Court’s analysis of secondary impacts under MEPA²⁶ and also assert that the District Court

¹⁸ Opening Brief of Appellant DEQ, *supra* note 1, at 1.

¹⁹ *Id.*

²⁰ *Id.* at 2.

²¹ *Id.*

²² *Id.*

²³ Answer Brief of Appellees, *supra* note 4, at 3.

²⁴ Opening Brief of Appellant DEQ, *supra* note 1, at 2.

²⁵ Opening Brief of Appellant Wanderer, *supra* note 2, at 2.

²⁶ *Id.* at 16.

created an unworkable test when it held that the DEQ must consider the identity of the future operator of the permit prior to its issuance.²⁷

IV. SUMMARY OF ARGUMENTS

A. Appellant Department of Environmental Quality

1. *The District Court erred when it determined that the consideration of the construction and operation of a grocery-retail facility is a secondary impact requiring analysis under MEPA.*

The DEQ argues on appeal that the District Court “misconstrued the definition of ‘secondary impact’ set forth in ARM 17.4.603(18).”²⁸ The DEQ argues that direct impacts are “impacts arising from the authorized discharge to groundwater and impacts related to the construction of a subsurface wastewater treatment system.”²⁹ Secondary impacts are those impacts that “are stimulated, induced or otherwise result from a direct impact of the action.”³⁰ In order to qualify as a secondary impact, there must be a direct causal link between the direct impacts of the DEQ’s actions and the secondary impacts on the environment.³¹ The DEQ argues that the construction and operation of a grocery-retail facility does not meet the definition of secondary impacts and is thus beyond the scope of the DEQ’s required analysis.³²

The DEQ further asserts that the District Court erred in concluding that “the main purpose of issuing the permit is to authorize the construction of the proposed retail facility.”³³ The DEQ argues that it has no legal authority to authorize the construction or operation of the grocery-retail facility.³⁴ Rather, the DEQ is only required to analyze the direct and secondary impacts of the groundwater discharge permit itself, and the proper direct impacts are those outlined in the EA, such as the groundwater quality that will result from the issuance of the permit.³⁵ A proper secondary impact would be the impact this groundwater may potentially have on direct, causally-related issues such as surface water quality.³⁶ Thus, the construction of the grocery-retail facility does not stem from the direct impact of the groundwater quality and thus does not qualify as a secondary impact that needed analysis under MEPA.³⁷

²⁷ *Id.* at 8.

²⁸ Opening Brief of Appellant DEQ, *supra* note 1, at 6.

²⁹ *Id.*

³⁰ *Id.*

³¹ *Id.* at 7.

³² *Id.*

³³ *Id.* at 10.

³⁴ *Id.* at 11.

³⁵ *Id.*

³⁶ *Id.*

³⁷ *Id.*

The DEQ cited to a number of “small handle” cases in support its position.³⁸ These “small handle” cases generally stand for the proposition that when an agency such as the DEQ considers only a small part of a larger project, it lacks the authority to consider the potential environmental impacts of the larger project.³⁹ The DEQ asserts that the construction of a grocery-retail facility falls under this category of “small handle” issues, over which the DEQ has no authority.⁴⁰ The DEQ thus concludes that the construction and operation of the grocery-retail facility was not a secondary impact that required its analysis.⁴¹

2. *The DEQ does not have the authority to consider the identity of the Retailer and only needs to know the identity of the Permit Applicant, which it knows is Foss.*

The DEQ joins in Intervenors’ argument that the DEQ is not required to consider the identity of the future operator of the permit when it considers issuing a groundwater discharge permit.⁴² The DEQ asserts that the identity of the future operator of the permit has no real or potential impact on the environment and consideration of this is thus beyond the scope of its authority.⁴³ The DEQ argues that, because it has the authority to ultimately enforce the permit,⁴⁴ should the future operator violate the conditions of the permit, the future operator’s identity is irrelevant during the initial permitting process.⁴⁵ Thus, the District Court should be reversed, and the DEQ should not be required to determine or consider the identity of the future operator of the permit prior to its issuance.⁴⁶

³⁸ *Id.* at 12–17 (citing *Mont. Wilderness Ass’n v. Bd. Of Health*, 559 P.2d 1157 (Mont. 1976); *Residents for Sane Trash Solutions v. U. S. Army Corps of Engineers*, 31 F. Supp. 3d 571 (S.D. N.Y. 2014); *Winnebago Tribe of Neb. v. Ray*, 621 F.2d 269 (8th Cir. 1980); *Save the Bay, Inc. v. U.S. Corps of Engineers*, 610 F.2d 322, 327 (5th Cir. 1980)); Reply Brief of Appellant DEQ at 15, 17, 18, *Bitterrooters for Planning, Inc. v. Mont. Dep’t of Env’tl. Quality*, <https://supremecourtdocket.mt.gov/view/DA%2016-0429%20Appellant%20Reply%20-%20Brief?id={10A8FB59-0000-C81E-866D-D56D72E19EA7}>, (Mont. January 31, 2017) (No. DA. 16-0429) (citing *Sylvester v. U.S. Army Corps of Engineers*, 884 F.2d 394 (9th Cir. 1989); *Dep’t of Transp. v. Pub. Citizen*, 541 U.S. 752 (U.S. 2004); *Save our Sonoran, Inc. v. Flowers*, 408 F.3d 1113 (9th Cir. 2005)).

³⁹ *Id.* at 15.

⁴⁰ *Id.* at 17.

⁴¹ *Id.*

⁴² Reply Brief of Appellant DEQ, *supra* note 38, at 7–8.

⁴³ *Id.* at 8.

⁴⁴ See MONT. CODE ANN. §§ 75–5–601–641 (2015).

⁴⁵ Reply Brief of Appellant DEQ, *supra* note 38, at 8.

⁴⁶ *Id.*

B. Appellant/Intervenors Stephen Wanderer and Georgia Filcher

1. *Intervenors join in the DEQ's argument that the District Court erred when it determined that the consideration of the construction and operation of a grocery-retail facility is a secondary impact requiring analysis under MEPA.*

Intervenors add that requiring the DEQ to consider the impact of the grocery-retail facility as a secondary impact would impermissibly expand the scope of the DEQ into areas that are not of its concern, such as impacts on traffic, that are properly regulated by the Montana Department of Transportation.⁴⁷

2. *The District Court erred in creating a "requirement" that the ultimate user of a groundwater discharge permit be revealed to the public at the time that the permit is issued.*

The thrust of Intervenors' argument is that the District Court created an unworkable and "impossible test" when it held that the DEQ must identify the future facility operator if the operator's identity has the potential to impact various secondary issues such as human health and safety.⁴⁸ Intervenors argue that this "test" is not required by MEPA and is so broad that in actuality, it is more of a "requirement" that the District Court impermissibly created on its own.⁴⁹

Intervenors argue that the permit contained all of the required information about Lee Foss and speculation about the future operator's identity is unnecessary and unrequired.⁵⁰ Furthermore, because the application revealed the kind of facility it was going to be (grocery-retail facility), the DEQ was substantially aware of the impact the facility could have when it considered issuing the permit.⁵¹ Thus, the DEQ had all of the information it required, even though it knew Foss would eventually transfer the permit, because the identity of the grocery-retail facility operator has no impact on its analysis, so long as the actual application is in compliance with the law.⁵²

Intervenors assert that the District Court's requirement is unnecessary because once Foss goes to transfer the permit, the DEQ will learn the identity of the actual operator of the facility and the transfer will

⁴⁷ *Id.*

⁴⁸ *Id.* at 8, 11.

⁴⁹ *Id.* at 12.

⁵⁰ Reply Brief of Appellant Wanderer at 5, *Bitterrooters for Planning, Inc. v. Mont. Dep't of Env'tl. Quality*, <https://supremecourtdocket.mt.gov/view/DA%2016-0429%20Appellant%20Reply%20-%20Brief?id={3083FA59-0000-CC1A-AA00-7BBF766863C4}>, (Mont. January 31, 2017) (No. DA. 16-0429).

⁵¹ *Id.* at 7.

⁵² *Id.*

be subject to the DEQ's administrative rules.⁵³ Furthermore, once this transfer takes place, the DEQ has the right to incorporate additional requirements if it determines that is necessary.⁵⁴

Intervenors further argue that this "requirement" would be unworkable if the DEQ was forced to do it for every permit because there are many instances where the landowner would want to obtain a permit to develop their land in preparation for a future sale, without knowing to whom they would ultimately sell.⁵⁵ Thus, this "requirement" created by the District Court will have long-lasting, negative repercussions on the ability of landowners to transfer their own property.⁵⁶

C. Appellee Bitterrooters

1. *The District Court properly concluded that the construction and operation of a grocery-retail facility qualifies as a secondary impact and required analysis by the DEQ.*

Appellees argue that the DEQ is mistaken as to the breadth of its authority.⁵⁷ Appellees contend that MEPA does not require the DEQ to have actual regulatory control over the impacts that it addresses in its EA.⁵⁸ Rather, what MEPA requires is that the DEQ gather and reveal this information to the public so that the public can weigh in on the DEQ's decision to issue the permit.⁵⁹ MEPA specifically requires the DEQ to consider both direct and secondary impacts prior to its issuance of groundwater discharge permits.⁶⁰

Appellees state that a secondary impact "means a further impact to the *human environment* that may be stimulated or induced by or otherwise result from a direct impact of the action."⁶¹ MEPA requires that the state (DEQ in this instance) comply with its terms "to the fullest extent possible."⁶² Thus, secondary impacts must be broadly defined, and in considering "the impact to the *human environment*," it is impermissibly narrow to fail to consider causally-connected occurrences such as changes to traffic flow and impacts on vegetation because these occurrences clearly would impact the human environment.⁶³

⁵³ Opening Brief of Appellant Wanderer, *supra* note 2, at 15.

⁵⁴ *Id.* at 16.

⁵⁵ *Id.* at 15.

⁵⁶ *Id.* at 16.

⁵⁷ Answer Brief of Appellees, *supra* note 4, at 24–25.

⁵⁸ *Id.* at 25.

⁵⁹ *Id.* at 27.

⁶⁰ *Id.*

⁶¹ *Id.* (citing Mont. Admin. R. 17.4.603(18) (2015)).

⁶² *Id.*

⁶³ *Id.*

Appellees argue that in this instance the DEQ conducted no secondary impact analysis at all.⁶⁴ Appellees also state that “the construction of the largest retail facility in Ravalli County” will clearly have an impact on the human environment.⁶⁵ Thus, the DEQ impermissibly narrowed the scope of its authority when it failed to consider the secondary impact the proposed grocery-retail facility would have on the human environment.⁶⁶

Appellees cite to many of the same cases that the DEQ cited (along with several other cases)⁶⁷ regarding whether or not this is a “small handle” issue.⁶⁸ Appellees argue that this is not a “small handle” issue because, here, the permit is “for the entire project.”⁶⁹ Contrary to Appellants’ interpretation of “small handle” case law, Appellees argue that in this case the DEQ had the responsibility to analyze the environmental consequences of the project, even those consequences that are outside of its control.⁷⁰ The DEQ is not actually regulating these secondary impacts, and thus this is not a “small handle” issue, as the DEQ is merely supposed to gather the information and inform the public.⁷¹ Accordingly, the DEQ’s issuance of this permit does not qualify as a “small handle” issue that is beyond the scope of its authority, and some level of secondary analysis should have been performed.⁷²

2. *The District Court did not err in holding that the DEQ must identify the future operator of the permit to the public for its consideration prior to its issuance of the permit.*

Appellees argue that MEPA requires the DEQ to identify and disclose to the public the identity of the future operator of the permit when it knows that the current applicant will not be actually operating the permit.⁷³ Appellees note that it is extremely unusual for the DEQ to approve a permit to someone that is not going to actually use the permit and cite to numerous examples where the permit applicant revealed the true nature of the business.⁷⁴ Appellees argue that reversing the District Court would amount to silent approval of a “shell game” that allows permit applicants to act as front men to intentionally hide the true identity of the actual permit operator.⁷⁵

⁶⁴ *Id.* at 25.

⁶⁵ *Id.* at 27.

⁶⁶ *Id.*

⁶⁷ *Id.* at 27–31; *See supra* note 38.

⁶⁸ Answer Brief of Appellees, *supra* note 4, at 31.

⁶⁹ *Id.* at 32.

⁷⁰ *Id.*

⁷¹ *Id.* at 33.

⁷² *Id.* at 34.

⁷³ *Id.* at 18.

⁷⁴ *Id.* at 20.

⁷⁵ *Id.* at 18.

Appellees note that Mont. Admin. R. 17.4.609 (2015) sets out an extensive list of the things that the DEQ should consider when performing an EA, such as impacts on human health and demands for government services.⁷⁶ When the DEQ drafts its EA, the DEQ must evaluate “not only environmental impacts that are certain to occur, but also those that have the potential to occur.”⁷⁷ In this instance, the identity of the future operator of the permit has the potential to have an impact on the environment if the operator has a history of polluting the environment because it could then be predicted that the operator is likely to pollute again.⁷⁸ This makes the identity of the applicant not only relevant but a required part of the DEQ’s analysis.⁷⁹

Appellees further argue that the DEQ’s actions in this case are also plainly in violation of the spirit of MEPA and public policy.⁸⁰ Secretive planning that deprives the public of its ability to fully comment on a permit application serves no legitimate public policy.⁸¹

D. Appellee Amicus Curiae Montana Environmental Information Center

1. The DEQ has violated the constitutional rights of Montanans by issuing this permit without determining the true identity of the party that will ultimately operate the permit.

Amici argue that the DEQ has impermissibly narrowed its own authority and in doing so has violated the constitutional rights of Montanans to a clean and healthful environment.⁸² MEPA requires the DEQ to carefully scrutinize the potential environmental consequences of its actions.⁸³ The DEQ’s interpretation of secondary impacts impermissibly narrows its scope of authority because it does not conform with the DEQ’s requirement to take a “hard look” at the impact its actions will have on the environment.⁸⁴

Amici argues that the DEQ’s interpretation of secondary impacts amounts to a “leap before you fully look” mentality that ignores the impacts associated with issuing the permit to someone who will not

⁷⁶ *Id.* at 21–22.

⁷⁷ *Id.* at 22.

⁷⁸ *Id.* at 23–24.

⁷⁹ *Id.*

⁸⁰ *Id.* at 24.

⁸¹ *Id.*

⁸² Brief of Amicus Curiae at 4, *Bitterrooters for Planning, Inc. v. Mont. Dep’t of Env’tl. Quality*, <https://supremecourtdocket.mt.gov/view/DA%2016-0429%20Amicus%20--%20Brief?id={E097B259-0000-C32F-BB06-A6DEA998F7C2}>, (Mont. January 17, 2017) (No. DA. 16-0429).

⁸³ *Id.* at 3.

⁸⁴ *Id.* at 5.

actually operate the permit.⁸⁵ Amici asserts that the District Court should be affirmed because the DEQ failed to properly consider the secondary impacts associated with the permit and in doing so violated Montanans constitutional right to a clean and healthful environment.⁸⁶

V. ANALYSIS

Under the Montana Constitution, Montanans have a right to a clean and healthful environment.⁸⁷ The Montana Legislature incorporated this constitutional right into MEPA.⁸⁸ When a state actor is acting on behalf of the state on a matter that falls under the authority of MEPA, the act requires that the public be informed of the anticipated impacts of the potential state actions.⁸⁹ Thus, the ultimate purpose of MEPA is to protect the State of Montana from environmental destruction and to keep the public informed of the state's actions that are taken in furtherance of this goal.

Montana has been deeply-scarred throughout its history by environmental abuse and destruction.⁹⁰ MEPA was enacted to prevent the continuance of this historical environmental destruction.⁹¹ The plain language contained in MEPA requires that the public be informed of potential state actions, such as those taken by the DEQ in this case.⁹²

MEPA furthermore requires the DEQ to carefully scrutinize the potential consequences of its actions in granting permits for groundwater discharge.⁹³ This process requires the DEQ to analyze the direct impacts of its actions and the secondary impacts of its actions.⁹⁴ While the parties disagree as to the definition of "secondary impacts," all parties agree that MEPA requires the DEQ to take a "hard look" at the environmental consequences of its actions.⁹⁵ Thus, all parties to this action acknowledge that under MEPA, the DEQ's legal obligation is to protect the environment and keep the public informed of the anticipated impacts of its actions.

Appellants have argued that, in issuing a groundwater discharge permit, it is unnecessary to determine the identity of the party who will ultimately operate the permit and that the unknown entity's identity does not have any potential impact on the environment. Under this theory, the DEQ's only obligation is to look at the snap-shot of time when the permit application is submitted and nothing else. This theory leads to the DEQ's

⁸⁵ *Id.* at 5–6.

⁸⁶ *Id.* at 6.

⁸⁷ MONT. CONST. ART. II, § 3.

⁸⁸ MONT. CODE ANN. § 75–1–102(1).

⁸⁹ MONT. CODE ANN. § 75–1–102(1)(b).

⁹⁰ Brief of Amicus Curiae, *supra* note 82, at 1.

⁹¹ *Id.*

⁹² MONT. CODE ANN. § 75–1–102(1)(b).

⁹³ Brief of Amicus Curiae, *supra* note 82, at 3.

⁹⁴ *Id.*

⁹⁵ Ravalli Cnty. Fish & Game v. Dep't of State Lands, 903 P.2d 1362, 1366 (Mont. 1995).

conclusion that investigating a party's environmental record is beyond the scope of its authority, so long as that party is one step removed from the immediate permit application.

In this case, the DEQ argues that, even though Foss has confirmed he will eventually transfer this permit to another unknown party, this fact is irrelevant to its analysis because, *when* the transfer occurs, Appellants will *then* know the identity of the true permit holder. Appellants argue that at this point the DEQ can sanction the new permit holder if the new permit holder were to violate the law.

Appellees argue that this analysis ignores the reality that some corporations (such as companies that have tract records of violating environmental laws) will simply add to their cost of doing business the cost of an environmental clean-up years down the road. Appellees argue that alleviating existing pollution that a company has caused is not the same thing as preventing the pollution from occurring in the first place. It is thus relevant whether the party applying for the permit has a history of violating environmental laws. A policy that promotes the DEQ's ability to sanction a company only *after* the company has polluted Montana is far less protective of Montana's environment than a policy that would promote the DEQ acting with due diligence prior to the issuance of the permit.

Furthermore, Appellants seem to downplay their obligation under MEPA to keep the public informed of its actions. If Appellants argument is upheld, it would effectively subvert democracy because this later portion of the permitting process would not involve the public,⁹⁶ and thus the use of Foss would effectively prevent the public from commenting on any matter related to the actual entity moving into Ravalli County.

Appellees have argued that it is required by MEPA that the public be given *all* of the necessary information prior to the issuance of a groundwater discharge permit, including the identity of the party and its environmental record. If Appellees' argument is upheld, the DEQ's authority will be clarified as broad, and it will be granted the authority to more fully consider the impacts of its actions.

On the one hand, allowing the DEQ this broad authority to investigate permit applicants would likely result in potential polluters shying away from Montana's strict scrutiny of their environmental record. This policy would comply with both Montanans right to a clean and healthful environment and with the overarching purpose of MEPA.⁹⁷

⁹⁶ See MONT. ADMIN. R. 17.30.1360 (2015). Although under Mont. Admin. R. 17.30.1361(1) certain circumstances *may* trigger a complete re-application, where the public could then re-weigh in on the permit, it is *highly* unlikely that this will occur. Unless the new entity drastically alters the site plans, prior to the time of transfer, there would be no legal obligation on the DEQ to conduct a re-application process, and the public will have no say in re-analyzing the permit after the entity's identity is revealed. See MONT. ADMIN. R. 17.30.1361.

⁹⁷ MONT. CONST. ART. II, § 3; MONT. CODE ANN. § 75-1-102(1) (2015).

On the other hand, Appellants' argument is not without merit. Giving the DEQ this vast authority may at times make the process cumbersome and difficult to comply with, as Intervenors have asserted. Although it *may* not be the case here, there are certainly times when the applicant will need to be a different person than the ultimate user of the permit, not because of its desire to shroud its identity but for marketability purposes. There will likely be times when an individual landowner will want to obtain a permit in anticipation of a sale, and the District Court's holding could unduly complicate matters for the landowner, even when the landowner's intentions are completely benign. In these circumstances, the District Court's holding may in fact prove to be overly broad, making the process unduly burdensome and unworkable.

The Court's decision in this case will have a lasting impact on the authority of the DEQ to fully investigate the circumstances of a permit application. If the Court upholds the decision of the district court, it will send the message that the DEQ's authority is broad and that Montana does not approve of parties hiding behind front men to deprive Montanans of their constitutional right to fully weigh in on the decision to ultimately grant a party a permit. If the Court rejects the decision of the district court, it will send the message that the DEQ's authority is limited to investigating the current circumstances surrounding a permit and that determining the identity of the future operator of a permit is beyond the scope of the DEQ's authority, regardless of the future operators' intentions.