

June 2001

The Contractor's Perspective: The Contractor's Place in TMDL Litigation

Michael Kakuk

Follow this and additional works at: <https://scholarworks.umt.edu/plrlr>

Let us know how access to this document benefits you.

Recommended Citation

22 Pub. Land & Resources L. Rev. 31 (2001)

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

The Contractor's Perspective: The Contractor's Place in TMDL Litigation

Michael Kakuk*

It is spring in Montana. You can tell by looking at the water. Every spring you get this kind of brown-colored water regardless of whether the water body is located in Missoula or Helena or Billings. Regulatory efforts to deal with this discolored water eventually resulted in the enactment of the Total Maximum Daily Loads (TMDLs) program, as well as general storm water discharge permits and authorizations to proceed.¹ But how are contractors involved in this issue?

The goal of this presentation is to provide the perspective of one of the industries in Montana impacted by TMDLs. For contractors, the issue does not revolve around the clean and healthful environment provision of the Montana Constitution.² Contractors are concerned about TMDLs. Therefore, I want to discuss how and why contractors have been impacted, and how the industry hopes to be involved (and not involved) in this issue in the future.

The contractors are the people that own and operate the sand and gravel mines in Montana. The contractors are the people that build the roads. They are the people that put up almost all of the commercial buildings and many of the private residences. Now, when contractors undertake any of these activities, the one thing that all of these activities have in common is that dirt is moved. Despite the last couple of years, it does rain in Montana. And when contractors move dirt and precipitation occurs, sediment contamination results if the dirt enters a water body. Sediment contamination is prohibited under the Clean Water Act (CWA) and the Federal Water Quality Act without a discharge permit from the State.³

* Mr. Kakuk is a member of the law firm of Hoovestal and Kakuk located in Helena. He is a graduate of the University of Wisconsin Law School. Mr. Kakuk was the Staff Attorney for the Environmental Quality Council and also staffed the State Water Policy Committee for the House and Senate for the 1991, 1993 and 1995 legislative sessions. Most recently, he has been the acting counsel for the Montana Contractor's Association.

1. Federal Water Pollution Control Act, 33 U.S.C. § 1313(d)(1)(C) (1994); MONT. CODE ANN. §§ 75-5-701 to -703 (2001). The State defines a TMDL as the sum of the individual waste load allocations for point sources and load allocations for both nonpoint sources and natural background sources established at a level necessary to achieve compliance with applicable surface water quality standards. MONT. CODE ANN. § 75-5-101(32). The Department of Environmental Quality defines a TMDL as the total amount of a pollutant, per day, (including a margin of safety) that a water body may receive from any source (point, nonpoint, or natural background) without exceeding the state water quality standards. What is Total Maximum Daily Load (TMDL)? (2001), at http://www.deq.state.mt.us/ppa/mdm/TMDL/tmdl_definition.asp. MONT. CODE ANN. § 75-5-401. The general discharge permit requires permittees to undertake visual inspections of their discharge at least once every seven days or after each rainfall event. If the water is discolored a water quality problem is deemed to exist.

2. MONT. CONST. art. II, § 3, art. IX, §§ 1(1), 3.

3. MONT. CODE ANN. § 75-5-401; 33 U.S.C. § 1342.

It is important to understand the distinction between point and nonpoint source pollution in this context.⁴ It is easy to comprehend that a pipe from a factory discharging pollutants into a water body is considered a point source. It is equally easy to understand that agricultural activities that generate runoff which eventually enter water bodies are considered nonpoint sources. However, when contractors blade five miles of shoulder, the roadway is considered a construction site and runoff from the site is defined as a point source, even though this activity is more analogous to agricultural runoff, and no outflow pipe exists. In other words, contractors are required to obtain discharge permits prior to undertaking construction activities.⁵

Contracting is a big industry in Montana. Approximately six and a half percent of private industry jobs in Montana are construction-related, generating up to \$700,000,000 and employing over 22,000 persons annually.⁶ Contractors mine 14 million tons of sand and gravel a year, and most of it is used right here in Montana. In other words, a lot of contractors are moving a great deal of dirt, and the potential for lots of contamination exists. In order to address the issue of potential contamination, contractors must obtain a general or individual permit.⁷

General permits for water quality are not explicitly mentioned anywhere in the statute.⁸ This does not mean the Department of Environmental Quality (DEQ) and the Board of Environmental Review does not have the authority to issue such permits since the statute governing discharge permits indicates that such activity is authorized.⁹ In fact, this statute has been used to authorize general storm water discharge permits. But if for some reason a contractor does not fit the terms of a general permit, the contractor must obtain an individual Montana Pollution Discharge Elimination System (MPDES) permit.¹⁰

These facts provide the necessary backdrop for the interesting story which I will now relate. On September 28, 2000, I met with the DEQ water quality staff, the people that actually authorize discharges. On the same

4. 33 U.S.C. §§ 1329, 1342.

5. MONT. CODE ANN. § 75-5-401; 33 U.S.C. § 1342.

6. Brief of Amicus Curiae of the Montana Contractors' Association in Support of the State of Montana's Motion for Partial Stay at 3-4, *Friends of the Wild Swan, Inc. v. EPA*, 130 F. Supp. 2d 1207 (D. Mont. 2000) (No. CV 97-35-M-DWM).

7. MONT. CODE ANN. § 75-5-401.

8. *Id.* A computer word search for "general discharge permits" did not appear in the water quality code. However, the air quality code specifically states that the board may, by rule, provide for general operating permits covering numerous similar sources." *Id.* § 75-2-217.

9. *Id.* § 75-5-401(c).

10. *Id.* § 75-5-401(a).

day, I met with the DEQ Planning and Prevention Department, the people with the foresight who try to prevent problems. Our discussion focused on TMDLs and the recent *Friends of the Wild Swan* decision in which Judge Molloy held that no new discharge permits were to be issued by DEQ until all necessary TMDLs were completed.¹¹ I asked DEQ what the decision meant for contractors. Obviously, contractors needed discharge permits. But did the general authorization serve as the permit? Are these authorizations actually permits themselves?

On September 29, 2000, I called the Executive Director of the Montana Contractors Association (MCA) and said, "I talked to DEQ. I think we are gold on this. Just keep going ahead and getting your authorizations to proceed and we should be all right." Later that afternoon I received a frantic phone call from my boss, the Executive Director at MCA. He said, "What did you do to those guys at DEQ? I just got a call from one of my contractors in Glendive. The Montana Transportation Commission (MTC) pulled all of the bids they let yesterday." The guy that writes my checks is obviously less than pleased.

Let me go back and explain what happened in greater detail. On September 28, 2000, while I met with DEQ, the MTC was letting \$28 million dollars in bids half a state away. On the morning of September 29, 2000, DEQ calls the MTC and tells the Agency to pull back the bids because of the *Friends of the Wild Swan* decision.¹² After an emergency telephone conference, the MTC pulled their \$28 million in bids, and by 3:00 pm on September 29th my boss is wondering what I told DEQ and how this could have happened. Since this incident, I was informed by DEQ staff that this was not my fault. Mike Foster, the Executive Director of MCA at that time, also believes it was not my fault. Apparently, it was just a coincidence. Now, I do not usually believe in coincidences, but this one time I am willing to make an exception.

But how could DEQ look the judge's ruling and interpret it to mean that the general permits that were already issued had to be revoked? How could DEQ rescind an authorization to proceed under a permit that was already issued? Ultimately, the judge clarified that his order did not apply to these existing permits.¹³ I believe that one of the reasons that it was so easy for the judge to find that contractors were not covered under his decision was because the judge focused on EPA's authorization process.¹⁴

11. *Friends of the Wild Swan, Inc. v. EPA*, 130 F. Supp. 2d 1199, 1203 (D. Mont. 2000).

12. *Id.*

13. *Friends of the Wild Swan, Inc. v. EPA*, 130 F. Supp. 2d 1207, 1211 (D. Mont. 2001).

14. The previous orders prohibited EPA and the State from issuing new permits or increasing the permitted discharge for existing permittees. EPA is not ordinary the party responsible for issuing gen-

To obtain authorization from EPA, contractors submit a half-page Notice of Intent (NOI).¹⁵ The NOI specifies the name of the company, the activity to be undertaken and a pledge that a pollution prevention program or a storm water erosion control plan will be on site and available for inspection.¹⁶ Once the NOI is sent to EPA, the contractor is automatically authorized to proceed under the Federal General Storm Water Discharge Permit for construction activities. Based upon the federal NOI procedure, the judge's order does not apply to contractors because a new permit is not being issued.¹⁷

Unfortunately, in Montana the process is different. Contractors cannot submit a NOI to proceed and then just assume they can automatically go forward with their projects. Contractors must submit an application that specifies where the project is located, and explains exactly what the contractor plans to undertake.¹⁸ In addition, erosion control plans must be submitted with all applications. The erosion control plan is submitted to DEQ, who has 30 days to review these plans and make any necessary changes.¹⁹ This process is not simply a notification of intent. In my opinion, in Montana, an authorization to proceed under a general storm water discharge permit is the functional equivalent of a new discharge permit.²⁰ DEQ really analyzes what is going to happen to that stream body. It is not simply record-keeping like the general permits issued by EPA. Therefore, had I tried to make the argument to the judge in November that the contractors were not covered by the decision because the general permit was already issued, I could not have made this argument in good faith because I did not believe it. Luckily, I was wrong on this point and the judge was right. Contractors were not covered because a new permit was not being issued.²¹ Instead, the general permit could serve as an authorization to proceed.

The impact of DEQ's now clearly erroneous interpretation of the judge's order was that \$28 million in bids were cut. Approximately 1,000 contractors, my clients, were out of work.²² I had seven affidavits from local governments and federal agencies involved with installing pipelines to

eral permits. The EPA delegated that task to the State unless the contractor is in Indian country. *Id.* at 1208-09.

15. Storm Water Discharges 40 C.F.R. § 122.21 (2001).

16. *Id.*

17. *Friends of the Wild Swan*, 130 F. Supp. 2d at 1211.

18. MONT. ADMIN. R. 17.30.1341 (1996).

19. *Id.*

20. My views do not necessarily represent those of the MCA.

21. *Friends of the Wild Swan*, 130 F. Supp. 2d at 1211.

22. Montana Contractors' Association Brief at 6, *Friends of the Wild Swan, Inc. v. EPA*, 130 F. Supp. 2d 1207 (D. Mont. 2000) (No. CV 97-35-M-DWM).

provide clean water to areas in eastern Montana, all voicing their concern because their projects were stopped. We had people sitting and machines going cold. This lasted from September until November when the judge clarified that the contractors were not covered.²³ The judge explained that if contractors had a general permit, they could obtain their authorization to proceed.²⁴

In other words, the judge found that the highway construction projects contemplated by the State do not require new permits.²⁵ Although the general permits allow for increased discharge, these discharges were covered by routine authorizations under existing general storm water MPDES permits.²⁶ Since the general permit was issued in 1997, theoretically it accommodates a certain total quantity of unintended discharge of sediment from nonpoint sources over a five-year period.²⁷ Forgetting the fact that contractors generate point, as opposed to nonpoint sources, authorization letters and not individual permits, are issued under the general storm water permit.²⁸ Based upon this ruling, contractors are able to obtain authorizations to proceed and continue working as long as they do not need individual permits.²⁹ However, the judge specifically noted that the general storm water permit was a five-year permit issued in 1997.³⁰ Therefore, the general permit expired on midnight, August 31, 2002. So the issue now becomes how do we proceed? With a deadline of August 2002 approaching, we did not have a lot of time left. We were looking at the next construction season, and realizing that we would be right back where we were in September if this problem was not addressed in a timely fashion.

At this point, the contractors had three options, depending on how DEQ and environmental groups proceeded. The first option was to administratively extend the permit which had never been done before although the Board of Environmental Review possesses such authority.³¹ The second option involved issuing an entirely new permit. But a new permit would have been covered by the judge's order.³² The third option, which is standard operating procedure in the industry, is to reissue an authorization to

23. *Friends of the Wild Swan*, 130 F. Supp. 2d at 1211.

24. *Id.*

25. *Id.*

26. MONT. CODE ANN. § 75-5-401 (2001).

27. *Friends of the Wild Swan*, 130 F. Supp. 2d at 1211.

28. *Id.*; See Storm Water Discharges 40 C.F.R. § 122.26 (2001).

29. MONT. ADMIN. R. 17.30.1322 (1996).

30. *Friends of the Wild Swan*, 130 F. Supp. 2d at 1211.

31. See MONT. CODE ANN. §§ 75-5-401 to -404.

32. *Friends of the Wild Swan*, 130 F. Supp. 2d at 1210.

operate under the general permit.³³ We kept our options open and waited to see what the new general permit process and terms developed by the State would involve. Some environmental groups thought that a reissuance under the State system would be considered a new permit, which obviously concerned my clients. So we had a little over a year and a half to get this problem fixed. We had to either get all of the “necessary TMDLs”³⁴ done or we needed to reach some kind of an agreement on how the renewal process was going to work.

After analyzing the NOI issue, the judge’s argument made more sense in light of EPA’s (rather than the State’s) method of handling general permits. So it seemed logical that we should attempt to change the law in the 2001 session and adopt the EPA’s approach at the State level, thereby eliminating the 30-day review period on authorizations to proceed.³⁵ Such a legislative change would make things much simpler.

I talked to DEQ regarding this change, and the Agency stated that they were thinking about lobbying for the same legislative amendment since the new rules issued by EPA would require contractors disturbing more than five acres or disturbing at least one acre within 100 feet of a stream or water body, to get a new permit.³⁶ These new rules from EPA would exponentially increase the number of permits that would be required. DEQ realized that they could not quadruple the size of the program to review all of these new permits. Therefore, DEQ was trying to find a way out of reviewing all of these new permits, and the Agency came up with the same idea as we did in order to reduce its workload to a manageable level.

After some discussions with DEQ, we drafted Senate Bill 379.³⁷ The Bill, sponsored by Senator Tash, addressed one small part of this puzzle by making DEQ’s permit system similar to that of EPA for filing authorizations to proceed. Specifically, the Senate Bill 379 added one paragraph to the section pertaining to the Board of Environmental Review and the requirements under the Water Quality Act.³⁸ The Bill starts out, “Except as provided in subsection (5), the Board shall adopt rules governing the authorization to discharge under a general permit for storm water associated with construction activity.”³⁹ The general permit is now explicitly mentioned in the State Water Quality Act, whereas prior to Senate Bill 379,

33. MONT. ADMIN. R. 17.30.1341(10).

34. The judge ordered that all “necessary TMDLs” be completed, but the term necessary was not specifically defined. See *Friends of the Wild Swan*, 130 F. Supp. 2d at 1210.

35. MONT. ADMIN. R. 17.30.1341(4).

36. Storm Water Discharges 40 C.F.R. § 122.26 (2001).

37. S. 379, Mont. Leg. (2001).

38. *Id.*

39. *Id.*

general permits were not mentioned.⁴⁰ The Bill further states,

“These rules must allow an owner or operator to notify the department of the intent to be covered under the general permit. This notice of intent must include a signed pollution prevention plan that requires the applicant to implement best management practices in accordance with the general permit. The rules must authorize the owner or operator to discharge under the general permit on receipt of the notice and plan by the department.”⁴¹

Based upon Senate Bill 379, the distinctions between EPA and DEQ start to blur, although Montana is still stricter than EPA. The State requires a contractor to send out a NOI with a signed pollution prevention plan that will be kept on file.⁴² Once the NOI and plan is received and certified by DEQ, the contractor is then covered and may proceed.⁴³ In theory, the Department could do a random inspection of 10 to 25 percent of the plans.⁴⁴ If DEQ found problems with a plan during an inspection, the Department could stop the project before a problem occurred.⁴⁵ Based on Senate Bill 379, if a contractor is caught violating the terms of the general permit, the contractor cannot look to DEQ to take any of the heat, even though the Agency reviewed and signed off on the NOI. The liability for violating a permit now rests squarely with the contractors. Therefore, contractors must be more vigilant in complying with their pollution prevention plans because their liability has increased. Contractors understood this when they supported this legislative change.

Based on Senate Bill 379, an entirely new subsection will be added to the Administrative Rules of Montana which will deal with general storm water permits for the discharge of storm water from construction activities. As part of this rule-making process a set of rules will be drafted. The draft rules will be sent out to a working group comprised of contractors and representatives from municipalities, as well as other major dischargers, for comments. The working group will draft something they feel comfortable with before presenting their comments to the Water Pollution Control Advisory Council (WPCAC).⁴⁶ After changes are made, the rules will eventually end up before the Board of Environmental Review, perhaps as early as

40. MONT. CODE ANN. § 75-5-401 (2001).

41. S. 379, Mont. Leg.

42. *Id.*

43. *Id.*

44. *See* MONT. CODE ANN. § 75-5-404.

45. *Id.*

46. The WPCAC acts only in an advisory capacity to DEQ on matters relating to water pollution. *Id.* § 75-5-221(4).

next year.⁴⁷ With any luck, this new law will be enacted and fully implemented for the 2002 construction season.

Finally, how are contractors going to be involved with TMDLs in the future? By and large, the contractors are familiar with the areas, as well as the watershed groups, where they work. Some of them have offices all over the State, but each specific office works in a fairly defined geographic area. So if TMDLs are going to be developed in Montana, it is my hope that contractors will work with watershed groups and become proactively involved in watershed planning since this holistic approach is clearly the most efficient way to manage nonpoint sources. Moreover, DEQ cannot sit in their office and just crank out TMDL numbers, although some states do take this approach.⁴⁸ Instead, DEQ must go out into the hinterland and work with watershed groups, the landowners, and the dischargers, including the contractors.⁴⁹ Therefore, it is important that contractors have a seat at the table when TMDLs are discussed and ultimately developed.

47. The Board is responsible for adopting rules to administer the water quality statutes promulgated by the State. *Id.* § 75-5-201.

48. *See id.* § 75-5-702 to -404.

49. *Id.*