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April 11, 2014

Robin Shropshire, Chairperson
Montana Board of Environmental Review
Department of Environmental Quality
1520 E. Sixth Avenue
P.O. Box 200901
Helena, MT 59620-0901

RE: Letter/Petition of Appeal Regarding MPDES Permit 0000035

The Clark Fork Coalition appeals the Department of Environmental Quality's (DEQ) Notice of Final Decision to issue permit MT-0000035 pursuant to the Montana Pollutant Discharge Elimination System (MPDES) Program, Title 75, Chapter 5 of the Montana Water Quality Act and Sections 303 and 402 of the Federal Clean Water Act. The Clark Fork Coalition requests that the permit be declared void.

The closure of one of the largest sources of industrial pollution on the Clark Fork River should have prompted DEQ, as protector of the public's waters, to use that opportunity to further protect the long-term health of the river. Neither the Clean Water Act nor the Montana Water Quality Act require that pollution be allowed up to the limits of water quality standards. Nor do they create permits with rights that "run with the land" or the facility that has the original permit.

The Clark Fork Coalition submitted comments on permit renewal MT-0000035 on August 22, 2013, requesting termination of the permit. DEQ responded to our comments with minor modifications and issued a Notice of Final Decision to issue the permit on March 13, 2014, effective thirty days after service of the notice. The Clark Fork Coalition received the notice on March 17, 2014. DEQ's notice neglected to include reference to procedures for appealing the decision as required by ARM 17.30.1378.

ARM 17.30.1365 (Modification, Revocation and Reissuance of Permits) provides that permits may be terminated at the request of any interested person, and that denials of requests for termination may be appealed to the Board of Environmental Review by a petition or a letter setting forth the relevant facts.

The Clark Fork Coalition's appeal of this decision is based on the following relevant facts, laws and regulations:

1. The Clark Fork Coalition, founded in 1985, is a non-profit river conservation organization dedicated to protecting and restoring clean water throughout the Clark Fork River watershed. It is comprised of 2,700 supporters who are united in the belief that clean water is integral to the health of our rivers and our communities. Clark Fork Coalition members use the Clark

Fork River for agricultural, guiding/outfitting, recreational, aesthetic and scientific purposes, including use of the river that is affected by the MPDES permit at issue in this case.

2. The Clark Fork Coalition has long worked toward reduction of nutrient (nitrogen and phosphorous) concentrations in waters of the Clark Fork River watershed. Our organization has tracked and commented on wastewater discharge at the Frenchtown paper mill site since 1985. It was one of the founding members of the Tri-State Implementation Council in 1993, having mobilized community support and lobbied the EPA and Congress for funding for a comprehensive water quality monitoring program in the Clark Fork watershed. The mission of the Tri-State Implementation Council (later renamed Tri-State Water Quality Council) was to control nuisance algae growth in the Clark Fork River by reducing nutrient concentrations from point and nonpoint sources of pollution. As part of the Tri-State Water Quality Council in 1998, the Clark Fork Coalition was active in development of the 10-year Voluntary Nutrient Reduction Program (VNRP) among the four largest dischargers in the upper 200 miles of the Clark Fork River. The VNRP ultimately resulted in the TMDL (Total Maximum Daily Load) for the Clark Fork River and the first riverine numeric nutrient standards in Montana. Since 2009, the Clark Fork Coalition has been a member of the Department of Environmental Quality's Nutrient Working Group to help develop numeric nutrient standards for all surface waters in Montana.

3. Nitrogen and phosphorous compounds are among the top ten most common types of pollution in Montana's flowing waters. They are the primary cause of excess algal growth in our streams and rivers. Besides creating an aesthetic nuisance, excess algae diminishes natural aquatic habitat and results in low dissolved oxygen levels harmful and potentially fatal to aquatic life.

4. Annual monitoring of nutrients by the Tri-State Water Quality Council and DEQ shows that nutrient concentrations in the Clark Fork River below Missoula have decreased between 1985 and 2007. Statistically significant decreasing trends in total nitrogen and total phosphorous are documented at the Clark Fork below Missoula (below the Missoula Waste Water Treatment Plant (WWTP) and at the Clark Fork below Huson (below the Frenchtown mill) monitoring stations (*Water Quality Status and Trends in the Clark Fork – Pend Oreille Watershed, 1984-2007*, Report for the Tri-State Water Quality Council by PBS&J Consultants). Decreasing concentrations are likely the result of upgrades at the Missoula WWTP, increased sewer hookups (decreased nonpoint source inputs from septic systems), and the phosphate ban in Missoula that took effect in 1989. Currently, total nitrogen and total phosphorous concentrations at these two stations meet nutrient standards most of the time, but not 100% of the time.

5. The Smurfit-Stone Container mill discharged wastewater to the Clark Fork River under permit MT-0000035, effective on September 1, 2000 and expired by May 31, 2005. The previous permittee, Stone Container Corporation (SC), submitted an MPDES renewal application and fees in November, 2004. DEQ administratively extended the permit until the issuance of a new permit. In November, 2009, DEQ requested that SC submit an updated application, but the mill closed in January 2010. Direct discharge to the river from the mill ended in 2009. Treatment of residual process water ended in mid-summer 2010. Seepage of treated effluent occurred throughout 2010 and to late 2011. By the end of November 2011, the ponds were empty and no further seepage to groundwater occurred. M2Green Redevelopment, LLC (M2Green) acquired the property in May 2011. The sales agreement

contained a non-compete clause, stating, "The Buyer agrees not to sell or lease the Property or the Equipment to, or, directly or indirectly, enter into any business arrangement with, any paper making manufacturer for the purpose of producing paper." Thus it was clear in May of 2011 that the mill would never again produce paper. Demolition and/or sale of all paper-making equipment and many of the mill buildings began shortly thereafter. Thus the facility upon which the previous permit was based no longer exists and never will again exist at the site.

6. Based on information and belief, the facility was first sold to MLR Investments by Smurfit-Stone Container, and then to M2Green. If that is true then the permit cannot be transferred to M2Green as a subsequent purchaser, because the permit was never transferred to MLR Investments.

7. Upon the request of M2Green, DEQ transferred permit MT-0000035 from Smurfit-Stone Container to M2Green on June 16, 2011 as a minor modification pursuant to ARM 17.30.1362. DEQ did not follow the requirements of ARM 17.30.1362, which state that a permit may be transferred as a minor modification only "where the department determines that no other change in the permit is necessary." DEQ explained in its Response to Comments (March 13, 2014) that it transferred the permit, "because the permit was already expired and administratively extended and the paper mill had ceased operations. DEQ transferred the permit and required an updated permit application to reflect the then current and/or proposed activities at the site." Further, DEQ's permit Fact Sheet, dated June 2013, states "Because a condition of the sale required that the site no longer be used as a paper mill, DEQ requested an updated application from M2Green Redevelopment that accurately reflected the expected uses, wastewater treatment and proposed discharges at the site." Therefore DEQ knew that significant changes to the permit would be necessary, not minor modifications.

8. At the time the permit was transferred, the Smurfit-Stone mill had been closed for a year and a half and direct discharge had ceased for at least 2 years. Facilities that had previously discharged wastewater had been demolished or sold. Thus the basis for the permit no longer existed and DEQ should have terminated the permit rather than transfer it.

9. M2Green submitted a permit renewal application in September 2011. DEQ responded with a notice of deficiency in November 2011. M2Green resubmitted its permit application in May 2012 and was issued another notice of deficiency from DEQ in May 2012. M2Green again resubmitted its application in June 2012 and DEQ issued a notice of completeness in July 2012. DEQ issued a draft permit, including a statement of basis and an environmental assessment, for public comment in July 2013.

10. In its renewal application, M2Green developed a hypothetical scenario for discharge of domestic wastewater from a wind-turbine factory that would result in a discharge load of total nitrogen at 2 lbs/day average and 10.8 lbs/day maximum. Total phosphorus discharge load would be 1.3 lbs/day average and 6.4 lbs/day maximum. (This is based on average and maximum effluent discharge of 26,000 gallons per day and 96,000 gallons per day as listed in DEQ's Statement of Basis, and average and maximum effluent concentrations for total nitrogen and phosphorous listed in M2Green's permit application). Nonetheless, in the permit renewal, DEQ grants M2Green the former paper mill's waste load allocation of 66 lbs/day nitrogen and 51 lbs/day phosphorous. This waste load allocation is 30 to 40 times

higher than required by the described scenario in M2Green's application. In M2Green's letter of June 26, 2012 accompanying its revised permit renewal application it states, "During the March 7, 2012 meeting at the DEQ's office in Helena it was agreed that the current Total Maximum Daily Limits (sic) for total nitrogen and total phosphorous would stay with the new permit because they transferred to M2Green with the permit transfer. These limits are 66 lbs/day total nitrogen and 50.6 lbs/day total phosphorous."

11. DEQ made the determination to transfer Smurfit Stone Container's waste load allocations for nitrogen and phosphorous to M2Green before they received an application from M2Green that fully described the proposed facility or passed the completeness criteria. M2Green's first renewal application to DEQ is not available, but the Notice of Deficiency letter from DEQ to M2Green indicates that the application contained many of the same provisions as the former pulp mill. DEQ's deficiency letter of November 8th 2011 states, "The Department needs a clearer indication of the specific processes, and their wastewater generating potential, in this manufacturing category for which you intend to obtain permit coverage… Form 2C appears to be an application for a Kraft pulp and linerboard manufacturing operation." And, "…it remains the Department's understanding that this facility will no longer be operated as a Kraft pulp and linerboard manufacturing operation." DEQ had not received an amended application at the time they agreed to transfer the waste load allocation.

12. The application is void on its face for failing to describe with specificity an actual facility with real discharges needing a permit. M2Green has since stated that it might build a residential development on the site (see *Missoulian*, March 16th, 2014, "New Frenchtown millsite redevelopment director envisions 'a small city'), demonstrating the wholly speculative nature of any development at the site. M2Green has not demonstrated that a wind-turbine factory will be constructed on the site or that it needs the permit that it was issued.

13. The Federal Clean Water Act (CWA), 33 U.S.C. 1251 (a) establishes a national goal for waters of the U.S., which includes the Clark Fork River, as follows: "The objective of this chapter is to restore and maintain the chemical, physical, and biological integrity of the Nation's waters. In order to achieve this objective it is hereby declared that, consistent with the provisions of this chapter—
    (1) it is the national goal that the discharge of pollutants into the navigable waters be eliminated by 1985.

14. The DEQ stands in the shoes of the EPA and is bound by all of EPA's regulations and policies regarding MPDES permits.

15. Final permit authorizations, including an amendment or modification due to a change in waste stream, require submission of an application to the permitting agency, preparation of a draft permit and fact sheet or statement of basis by the agency, a public notice and comment period, and agency consideration of public comment, all of which must be based upon actual plans for discharge by a facility. 33 U.S.C. § 1342(b)(3); 40 C.F.R. §§ 122.44, 124.6, 124.8, 124.11, 124.56. The permit is void on its face because the application was based on a hypothetical facility that lacks any actual plans.

16. ARM 17.30.1363 (1)(d) provides for termination of permits or denial of permit renewal:

> *(1)* The *following are causes for terminating a permit during its term, or for denying a permit renewal application:*
>
> *(d) a change in any condition that requires either a temporary or a permanent reduction or elimination of any discharge controlled by the permit (for example, plant closure or termination of discharge by connection to a POTW).*

17. ARM 17.30.1363 (1)(d) mirrors 40 C.F.R. 122.64, which states that causes for termination include a "change in any condition that requires either a temporary or permanent reduction or elimination of any discharge or sludge use or disposal practice controlled by the permit." 40 C.F.R. § 122.64(a)(4).

18. These two regulations require termination of the Smurfit-Stone/M2Green permit because one of the enumerated "causes for termination" – a permanent reduction of the waste stream – has occurred. Based on this regulation, the lawful process in this case would have been to terminate the permit and allow M2Green to apply for a new permit.

19. ARM 17.30.1342(7) includes a condition applicable to all permits: "(7) This permit does not convey any property rights of any sort, or any exclusive privilege." DEQ has nonetheless treated both the permit and the waste load allocation (WLA) as a property right by asserting in the Response to Comments (March 13, 2014), "The TMDL WLA is the allocated load for discharges from this site. Pursuant to 40 CFR 122.44(d)(1)(vii)(B), MPDES permits must include effluent limitations developed consistent with the assumptions and requirements of any WLA assigned in a TMDL. Until the TMDL is revised and a new WLA adopted, the permit must incorporate the current WLA." However, the WLA in the TMDL for this site was developed for the existing paper mill at that time, and paper mills are large dischargers of nitrogen and phosphorous. Mill closure and demolition should trigger reevaluation of the waste load allocation in the TMDL before a permit is issued for a new and different type of facility. The waste load allocation under a TMDL is based upon the specific use for which it was intended; neither the federal Clean Water Act nor the Montana Water Quality Act permit an MPDES permit to be permanently tied to a particular site.

20. EPA's regulation at 40 C.F.R. 145 (b) (2) (i) states:

> Except in the case of POTWs (Publicly Owned Treatment Works) or as provided in paragraph (b)(2)(ii) of this section, calculation of any permit limitations, standards, or prohibitions which are based on production (or other measure of operation) shall be based not upon the designed production capacity but rather upon a reasonable measure of actual production of the facility. For new sources or new dischargers, actual production shall be estimated using projected production. The time period of the measure of production shall correspond to the time period of the calculated permit limitations; for example, monthly production shall be used to calculate average monthly discharge limitations.

The permit issued to M2Green violates this regulation in two ways. First, the lack of any facility at the site means that no "actual production" exists. Second, no projected production exists because there is no projected facility at the site that has been designed to the point that production figures can be estimated.

21. EPA does not permit transfer of a permit's discharge allowances "whole cloth" when the transferee is a new facility and the previous facility has been permanently closed. See attached Exhibit A, EPA letter to Oregon DEQ, September 13, 2013. The above-cited regulation prevents the blanket transfer of a permit from a closed facility to a new facility, especially to a new facility that has no concrete plans to develop a project that even needs an MPDES permit.

22. The EPA Permit Writer's Manual (1996) constitutes EPA regulatory authority that is binding on the state of Montana's MPDES program. Section 11.3.3 states that permit termination is required when:

    "A temporary or permanent reduction or elimination of a discharge (e.g. plant closure)."

    "Once the permit is terminated, it can be placed into effect again only by the reissuance process, which requires a new permit application. All of the above situations [including plant closures] may also be addressed through the permit modification process on a case-by-case determination."

    DEQ violated the EPA Permit Writer's Manual by failing to terminate the permit and failing to require M2Green to apply for a new permit.

23. The fact that the actual use of the premises is unknown means that the permit was also issued in violation of the Best Available Technology Requirements of the CWA. In the absence of uniform guidelines, EPA (or a state administering the NPDES permit program) must incorporate technology-based effluent limits on a case-by-case basis using the permit writer's "best professional judgment" (BPJ). 33 U.S.C. § 1342(a)(1)(B); 40 C.F.R. § 125.3(c)(2). Montana's water pollution control regulations incorporate these federal requirements by reference. *See* ARM §§ 17.30.1344, 1345, 1361. Indeed the CWA's technology-based effluent limitation "shall be applied to all point sources of discharge of pollutants" in accordance with the Act's requirements. 33 U.S.C. § 1311(e). EPA regulations similarly provide that "[t]echnology-based treatment requirements under [33 U.S.C. § 1311(b)] represent the *minimum level of control that must be imposed* in a permit issued under [33 U.S.C. § 1342]." 40 C.F.R. § 125.3(a). Section 5 of the EPA Permit Writer's Manual makes clear that the imposition of BPJ must be based on an actual evaluation of an industrial site, not a hypothetical guess of what might be built. It is impossible for DEQ to apply BPJ and meet technology-based treatment standards in this permit because no one knows what the actual discharge will be.

24. If and when a facility is developed at the Smurfit-Stone site, the need for a new permit will arise under CWA Section 306 and the more restrictive technology-based standards will apply.

25. The permit is also improper under EPA regulations because it was not properly drafted to reflect the conditions of an actual, proposed waste stream. A change in waste stream, including alteration in concentrations of pollutants in a waste stream, requires approval from the permitting agency and public participation in the permitting process before commencement of the discharge. 40 C.F.R. §§ 122.62, 122.63, 123.25(a)(25), 124.5. MPDES permits must include evaluations and verification that permit limits are based on current operations and discharges presently on-site. 40 C.F.R. § 122.45(d).

26. The permit also grants a large mixing zone that is unnecessary and unlawful under A.R.M. 17.30.517-518. DEQ failed to follow the procedures for designating a mixing zone and instead simply grandfathered in the previous mixing zone based on the property boundaries of a facility that no longer exists and is no longer owned by Smurfit Stone Container. A new permit would require re-calculation of the mixing zone and trigger non-degradation review, all of which DEQ has avoided by the procedure used here.

27. The permit issued here allows discharge from the four outfalls permitted for the Smurfit-Stone operation. There is no evidence that M2Green needs four outfalls (or any outfalls for that matter) and thus DEQ had no basis to approve the outfalls.

28. The Permit issued by DEQ to M2Green violates the purpose of the CWA by retarding the restoration of the Clark Fork River and furthering, not eliminating, the discharge of pollutants. The cessation of a major polluting facility on the already-impaired Clark Fork River should be grounds for retiring the permit, not maintaining the degraded status quo.

29. In addition, the Montana Constitution Art, II, sec. 3 and Art. IX, sec. 1 create both a right and a duty to maintain and improve the environment. The Constitution should further inform and require DEQ to cancel the permit upon closure of the facility.

30. The proper decision for DEQ, in view of the policy of the CWA and MWQA, and the relevant implementing regulations, would be to revoke the permit issued to Smurfit Stone Container and wait until M2Green submits an application for a new facility with specific discharge requirements.

31. For the reasons stated herein the decision by DEQ to issue Permit 0000035 to M2Green is arbitrary, capricious, unsupported by the facts, unlawful and an abuse of discretion.

32. The Clark Fork Coalition hereby requests that the Board proceed to hearing on this matter, after setting an appropriate pre-hearing schedule for discovery and pre-trial matters, and to ultimately determine that Permit 0000035 is void and of no effect.

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Attorney for the Clark for Coalition