IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MONTANA
BUTTE DIVISION

COTTONWOOD ENVIRONMENTAL LAW CENTER, et al.,

Plaintiffs,

v.

BIG SKY WATER AND SEWER DISTRICT,

Defendant.

CV-20-28-BU-BMM

ORDER

Cottonwood Environmental Law Center, Montana Rivers, and Gallatin Wildlife Association ("Plaintiffs") brought this action against the Big Sky Water and Sewer District ("Big Sky District"). Plaintiffs allege that Big Sky District violated the Clean Water Act ("CWA") when they discharged pollutants into the West Fork of the Gallatin River without a National Pollutant Discharge Elimination System (NPDES) permit. (Doc. 8.) Big Sky District and Plaintiffs previously filed competing motions for summary judgment. (Docs. 72 & 75.) The Court denied Plaintiffs' motion for summary judgment and denied Big Sky District's motion for summary judgment with respect to the alleged point sources in control of Big Sky District. (Doc. 89.) Plaintiffs now bring a second motion for summary judgment.

(Doc. 101.)

The Court will consider Plaintiffs' motion, though the motion demonstrates a failure to comprehend the Court's discussion of Clean Water Act jurisprudence for indirect discharges in the prior order. (*See* Doc. 89 at 12-15.) Plaintiffs need look no further than their own citations, *Northern Plains Resource Council v. Fidelity Exploration and Development Company,* 325 F.3d 1155, 1158 (9th Cir. 2003). and *County of Maui v. Hawaii Wildlife Fund*, __ U.S. __, __, 140 S. Ct. 1462 (2020), to clarify their apparent misapprehension of how the Clean Water Act should be applied to this case.

Northern Plains Resource Council provides an example of a *direct discharge* from a point source. In *Northern Plains Resource Council*, the methane-extraction company would drill conventional wells into a coal seam and pump the trapped water from that seam to the surface to reduce underground pressure. 325 F.3d at 1158. The extracted water contained a litany of pollutants recognized by the Clean Water Act. *Id.* The extraction company would then discharge the extracted water from a pipe directly into a navigable waterway. *Id.* The water trapped in the coal seam had no path to the navigable waterway before Fidelity installed the pipe. *Id.* The Ninth Circuit determined that the extraction company had violated of the Clean Water Act, based on the extraction company's actions in directly discharging a pollutant from a point source into navigable waters of the United States without an NPDES permit.

Id. at 1165. As Plaintiffs note, the Ninth Circuit also recognized that state law could not relieve the permitting requirements the Clean Water Act. *Id.*

Unlike in *Northern Plains Resource Council*, Plaintiffs do not allege a *direct discharge* of pollutants into a navigable waterway. Plaintiffs instead allege an *indirect discharge* of pollutants. Plaintiffs claim that pollutants leak from the Big Sky District's Water Resources Recovery Facility ("WRRF") holding ponds, enter the groundwater system below the holding ponds, and flow either to the West Fork of the Gallatin River directly through the aquifer or via the WRRF underdrain pipe. Either mechanism requires that the initial discharge from the wastewater holding ponds flows to groundwater. Thus, Plaintiffs must demonstrate that the alleged discharge of pollution represents the "functional equivalent of a direct discharge." *Cnty. of Maui,* __ U.S. at ___, 140 S. Ct. at 1476 ("Whether pollutants that arrive at navigable waters after traveling through groundwater are 'from' a point source depends upon how similar to (or different from) the particular discharge is to a direct discharge.").

County of Maui established the factors that district courts must observe to evaluate the functional equivalent of a direct discharge:

> "(1) transit time, (2) distance traveled, (3) the nature of the material through which the pollutant travels, (4) the extent to which the pollutant is diluted or chemically changed as it travels, (5) the amount of pollutant entering the navigable waters relative to the amount of the pollutant that leaves the point source, (6) the manner by or area in which the pollutant enters the navigable waters, (7) the degree to which the

pollution (at that point) has maintained its specific identity."

Id. at 1476-77. Time and distance should be considered the most important factors. *Id.* at 1477.

To aid the Court in deciding Plaintiffs' motion and to narrow the factual disputes for trial, if necessary, the Court will follow the lead of the district court in *County of Maui*. *See Hawaii Wildlife Fund v. Cnty. of Maui*, 1:12-cv-00198-SOM-KJM, Doc. 456. The parties shall file answers to the following questions. The parties shall use 30 words or less for each answer, to be submitted no later than February 28, 2022. If a party does not know or cannot provide the exact answer to a question, the party shall provide the most accurate answer it can in light of the record currently before the Court. Answers should respond directly to the questions, rather than viewing the questions as inviting discussion of related matters. The Court will hold the parties to their answers.

In answering each question, the parties shall provide the title or name of material on which they rely, along with the ECF number and the page number of evidence currently in the record that supports each answer. Parties are invited to provide record citations to every piece of evidence in the record supporting any fact. Parties shall not cite anything not currently in the record.

Question	Answer (30 words or less)	Title of Material	ECF No. and page #
Transit Time: 1a. What is the minimum documented time (in days) for leaking wastewater to travel from the WRRF holding ponds to the West Fork of the Gallatin River?			
1b. What is the average (mean) time required for leaking wastewater to travel from the holding ponds to the West Fork of the Gallatin River?			
1c. Would nitrogen pollutants leaking from the WRRF holding ponds travel at a different rate to the West Fork of the Gallatin River in comparison to the fluorescein dye tracer?			
Distance traveled:			

2a. What is the minimum distance that leaking wastewater travels from the WRRF holding ponds to the West Fork of the Gallatin River?			
2b. What is the approximate distance traveled by at least half of the wastewater leaking from the WRRF holding ponds to the West Fork of the Gallatin River?			
2c. What is the minimum distance traveled by wastewater that leaks from the WRRF holding ponds and transports through the WRRF underdrain to the West Fork of the Gallatin River?			
2d. What is the minimum distance traveled by wastewater that leaks from the WRRF holding ponds to reach the beginning of the			

WRRF underdrain?			
2e. What percentage of wastewater leaking from the WRRF holding ponds emerges in the West Fork of the Gallatin River within 0.5 mile of Station 106?			
2f. What percentage of leaking wastewater from the WRRF emerges in the West Fork of the Gallatin River from within 2 miles of the WRRF holding ponds?			
3. Nature of the material through which the treated wastewater travels: 3a. What is the nature of the material through which the leaking wastewater travels from the WRRF holding ponds to the West Fork of the Gallatin River?			

4. Dilution or chemical change of pollutant: 4a. To what extent has the leaking wastewater been diluted as it travels from the WRRF to the West Fork of the Gallatin River?			
4b. Leaving aside any chemical change occurring at the holding ponds themselves, to what extent has the leaking wastewater been chemically changed as it travels from the WRRF to the West Fork of the Gallatin River?			
4c. What is the nature of any chemical changes to nitrogen as it travels from the WRRF holding ponds to the West Fork of the Gallatin River?			
4d. What percentage of nitrogen pollutants are removed by chemical			

processes or agronomic uptake while traveling between the WRRF holding ponds and the West Fork of the Gallatin River?			
4e. Would transport through the WRRF underdrain effect different chemical changes to nitrogen in comparison to transport through the aquifer alone?			
5. Amount of pollutant: 5a. What is the amount of wastewater leaking from the WRRF holding ponds that enters the West Fork of the Gallatin River relative to the total amount of treated wastewater leaking from WRRF holding ponds?			
5b. What is the minimum number of total gallons of wastewater that leaks from the			

WRRF holding pond each day?			
5c. Does any pollutant leak from the WRRF holding ponds and reach the West Fork of the Gallatin River? If so, in what quantity?			
6. Manner by or areas in which pollutant enters the West Fork of the Gallatin River: 6a. Describe the manner by or areas in which the leaking wastewater from WWRF enters the West Fork of the Gallatin River.			
7. Degree pollutant maintains its specific identity: 7a. Describe the degree to which the treated wastewater from the WRRF emerging in the West Fork of the Gallatin River has maintained its			

specific identity.			
8. Could additional sources of nitrogen other than leakage at the WRRF holding ponds account for some or all of the nitrogen observed in the West Fork of the Gallatin River?			
9. Each party may address 2 additional fact issues relevant to the *County of Maui* factors that the Court did not highlight, but the party's position must be stated in 30 words or less.			

IT IS HEREBY ORDERED that the parties shall respond to the above questions by no later than February 28, 2022.

DATED this 18th day of February, 2022.

Brian Morris, Chief District Judge
United States District Court