

IN THE SUPREME COURT OF THE STATE OF MONTANA
Case No. DA 18-0110

MONTANA ENVIRONMENTAL INFORMATION CENTER
and SIERRA CLUB,

Plaintiffs and Appellees,

v.

MONTANA DEPARTMENT OF ENVIRONMENTAL QUALITY,

Defendant and Appellant,

and

WESTERN ENERGY COMPANY,

Defendant/Intervenor and Appellant.

**AMICUS BRIEF OF TREASURE STATE RESOURCES ASSOCIATION OF
MONTANA, MONTANA PETROLEUM ASSOCIATION, MONTANA
COAL COUNCIL, AND MONTANA MINING ASSOCIATION**

On Appeal from Montana First Judicial District Court, Lewis & Clark County,
Cause No. CDV 2012-1075, Hon. Kathy Seeley, Presiding

Steven T. Wade
W. John Tietz
M. Christy S. McCann
Browning, Kaleczyc, Berry, & Hoven
P.C.
800 N. Last Chance Gulch, Ste. 101
P.O. Box 1697
Helena, MT 59624
Attorneys for Amici Curiae

Shiloh Hernandez
Matthew Bishop
Laura King
Western Environmental Law Center
103 Reeder's Alley
Helena, MT 59601
*Attorneys for Montana Environmental
Information Center and Sierra Club*

John C. Martin
Holland & Hart LLP
975 F Street NW, Ste. 900
Washington, D.C. 20004

William W. Mercer
Victoria A. Marquis
Holland & Hart LLP
401 N. 31st St., Ste. 1500
P.O. Box 639
Billings, MT 59103-0639
Attorneys for Western Energy Co.

Kirsten Bowers
Montana Department of
Environmental Quality
P.O. Box 200901
Helena, MT 59620-0901
*Attorney for Defendant Montana
Department of Environmental
Quality*

TABLE OF CONTENTS

	Page
INTEREST OF THE AMICI CURIAE	1
INTRODUCTION AND SUMMARY OF ARGUMENT	5
ARGUMENT	8
CONCLUSION	11

TABLE OF AUTHORITIES

Page

Cases

Clark Fork Coal. v. Dep't of Env'tl. Quality,
2012 MT 240, 366 Mont. 427, 288 P.3d 183.....10

Doull v. Wohlschlager,
141 Mont. 354, 377 P.2d 758 (1963).....11

Rules

Admin. R. Mont. § 17.30.611 7

Admin. R. Mont. § 17.30.62910

Admin. R. Mont. § 17.30.6377, 10

INTEREST OF THE AMICI CURIAE

Treasure State Resources Association of Montana (“TSRA”) is a statewide, non-profit trade association with its office located in Helena, Montana. TSRA was formally incorporated as a Montana non-profit corporation in 1976. TSRA currently represents approximately 89 members, many of whom conduct or work for industrial or agricultural operations in Montana. TSRA’s membership includes labor unions, small and large industrial operations, as well as mining, forest, and agricultural operations. TSRA’s mission is to provide information about the potential impact of proposed legislative and regulatory changes to members, elected officials, and the public; to develop coalitions to engage in legislative or regulatory developments important to members; and to provide a vehicle to help members be informed and involved in regulatory developments.

The Montana Petroleum Association (“MPA”) is also a statewide, non-profit voluntary trade association with its office located in Helena, Montana. The MPA currently represents more than 150 diverse members, including upstream, midstream, and downstream companies in the petroleum industry. The MPA’s mission is to maintain a positive business climate for Montana’s petroleum industry, and foster public awareness of its many economic and ecological contributions to the state and nation. The MPA aims to be the premier voice in Montana’s oil and gas industry, particularly on land use and environmental policy.

The Montana Coal Council (“MCC”) is a non-profit industry association whose membership includes all major coal mine operators, holders of Montana coal reserves, those who ship the coal, utilities who use the coal, and numerous suppliers and businesses directly and indirectly involved in the coal industry. Its office is located in Helena, Montana. The MCC’s mission is to promote and advocate for Montana’s coal industry.

The Montana Mining Association (“MMA”) was founded in 1919 and is a voluntary trade association comprised of members from every sector of the mining industry. The MMA is committed to helping all parties involved in mining endeavors, from large companies to small and independent miners and service providers, navigate through a complex regulatory environment to succeed in Montana’s business climate. The MMA’s primary purpose is to protect, preserve, and promote mining—an important contributor to Montana’s economic fabric dating back to its territorial days. The MMA closely monitors issues of concern for its members and provides industry representation before Montana’s decision makers, and it provides information to its members and distributes educational information to the general public, through a variety of outlets, about the many contributions of mining to Montana’s economic well-being. MMA also promotes and enhances the public perception of mining by sharing the compelling story of the industry’s longevity and modern advancement.

Rosebud County desires to join the TSRA, MPA, MCC, and MMA (collectively the “Trade Groups”), as an amicus in this appeal. The effects to Rosebud County should the district court’s order stand would be disastrous. The Western Energy mine and the four generating plants located in Rosebud County currently generate approximately 85% of the taxes used to fund Rosebud County’s public works. The owners of these operations are nine of the top ten taxpayers in the County. Rosebud County believes the Order could eventually cause the shutdown of all mining activity as well as power generation within the County, causing serious economic hardship and job loss in Rosebud County. The ruling could also have a major detrimental effect on agriculture as well as small towns within Rosebud County and across the State.

The Montana Association of Oil, Gas, and Coal Counties (“MAOGCC”) also seeks to join the Trade Groups in filing this Amicus Brief.¹ The MAOGCC is a Montana non-profit corporation composed of 34 Montana counties and a number of Montana municipalities, Montana school districts, and resource industry representatives. All of the members of the MAOGCC directly benefit from the activities of businesses that commonly obtain Montana Pollutant Discharge Elimination System (“MPDES”) permits and whose business operations require

¹ Rosebud County and the MAOGCC have filed a Motion for Leave to Appear in this matter, but that motion was opposed by Appellees. Accordingly, their participation in this brief is provisional upon the Court’s grant of leave.

MPDES permits. Changes to the ability of these businesses to obtain MPDES permits will have broad and lasting negative impacts to the budgets of local communities, including county governments, municipal governments, and Montana public school districts, many of which are members of MAOGCC

The Trade Groups and their members, along with the MAOGCC and Rosebud County,² have a special interest in the issues presented in this appeal. In particular, the Amici have an interest in the Montana Department of Environmental Quality's ("MDEQ") interpretation and application of water quality statutes and regulations to ephemeral drainages. MDEQ issues MPDES permits regularly to many of the Trade Groups' members, some of which include discharges to ephemeral drainages.³

This appeal involves the interpretation and evaluation of the Montana system for issuance of MPDES Permits under both federal and Montana law. The potential consequences of the district court's order will have far-reaching effects on a significant number of Montana businesses and operations. The interpretation of water quality statutes and case law has a direct impact on the Trade Groups'

² Because the Court has not yet granted MAOGCC and Rosebud County leave to participate in this appeal, the remainder of this Brief will refer only to the Trade Groups.

³ The Trade Groups have thus far identified members' systems, including public waste water systems, discharging to ephemeral drainages that are currently regulated by MPDES permits in Chester, Ekalaka, Rygate, White Sulpher, the Kootenai Business Park, Belt, Hobson, Sunburst, Hysham, Valier, Willow Creek, Kevin, Shelby, Eagles Landing, and Wibaux, Montana.

respective members who currently possess or who will need future MPDES Permits. Water quality statutes and their application to ephemeral drainages, as applied when MDEQ issues MPDES Permits, have a direct impact on the operation of many regulated Montana operations and their ability to operate and provide goods and services to Montana citizens.

The Trade Groups seek to uphold their members' important property and financial interests that are directly impacted by MDEQ's application of water quality statutes to its issuance of MPDES Permits. Many of the Trade Groups' members hold these permits or will need permits in the future, and modifying MDEQ's application of the water quality statutes to ephemeral drainages would require their members to implement changes to their businesses and operations that may in some cases be either infeasible, technologically impracticable, or cost prohibitive. The Trade Groups therefore file this brief expressing their views regarding an issue of critical importance to this appeal and to the business interests of their members.

INTRODUCTION AND SUMMARY OF ARGUMENT

The Order appealed in this case, at best, creates confusion regarding what legal requirements MDEQ will apply when issuing MPDES permits that discharge to ephemeral drainages. At worst, the Order upends the regulation, classification, and application of standards for MPDES permits on ephemeral drainages, which

do not and have never supported aquatic life. Either interpretation leaves the Trade Groups with grave concerns regarding the future viability of their members' operations, which rely on predictability and achievability in the issuance of MPDES permits that allow for discharges into ephemeral drainages.

In the Order appealed, the district court based part of its ruling on its conclusion that the ephemeral drainage at issue eventually became an intermittent and/or perennial stream that is classified as impaired. *See* Order, at 6 (noting “it is undisputed that the downstream segment of the stream is impaired [such that] DEQ’s responsibility for maintaining Montana water quality requires full study and recognition of the effect of the Rosebud Mine on the entire East Fork Arnells Creek and the waters into which it flows”). The district court appears to have based its legal conclusions in large part on this “fact” taken from the record, extrapolating from it at least an implication that MDEQ’s failure to treat the upstream, ephemeral drainages as if they were perennial waterways that could support aquatic life was arbitrary and capricious, solely based on the fact that discharges into these ephemeral drainages may eventually end up in downstream, intermittent or perennial waterways. *See id.* at 7 (identifying the “general issue regarding the cumulative effect of the mine on Montana’s water quality in the streams (ephemeral or not) into which the Rosebud Mine discharges”). Of course, virtually all ephemeral drainages eventually lead to intermittent or perennial

waterways, so the district court's reasoning may be extrapolated to drainages other than the one at issue in this appeal. The potential broad application of the district court's ruling has engendered confusion and grave concern among the Trade Groups' members.

The district court also misapprehends the distinction between a water body classification and the character of a water body as ephemeral. *See* Order, at 18. While the entire Yellowstone River drainage below Billings has been classified as C-3 (*see* Admin. R. Mont. § 17.30.611(1)(c)), the water quality standards applicable to C-3 classified water bodies expressly do not apply to ephemeral drainages. Admin. R. Mont. § 17.30.637(4).

The district court's interpretation of Montana and federal water quality statutes as they apply to ephemeral drainages is incorrect, confusing, and places an undue burden on the regulated community. Further, the district court's treatment of ephemeral drainages in the same manner as intermittent or perennial drainages renders the regulations specific to ephemeral streams a nullity. This Court should not adopt the district court's position, but should instead permit MDEQ to continue to regulate ephemeral drainages as it has historically, which comports with applicable state and federal law.

//

//

ARGUMENT

In its Order, the district court correctly noted that “[t]he classification of Montana’s waters was and is the starting point for determination of applicable water quality standards.” Order, at 18. However, the district court proceeded in its Order to contradict MDEQ’s determination that the water quality based standards in Admin. R. Mont. §§ 17.30.620 through .629 expressly do not apply to ephemeral drainages under the MDEQ’s regulations. *See id.* at 18, 19. The district court also hinted that MDEQ may be required to determine Total Maximum Daily Loads (“TMDLs”) and apply all regulatory standards applicable to surface water discharges to discharges that only occur into ephemeral drainages. *See id.* at 19.

Montana has very specific provisions that address ephemeral drainages such as coulees, gullies, washes, and other drainages that are dry most of the year. These regulations specific to discharges to “ephemeral streams” are distinct from those applicable to intermittent or perennial streams and drainages that support aquatic life. “Ephemeral stream” is defined under Admin. R. Mont. § 17.30.602(10) as “a stream or part of a stream which flows only in direct response to precipitation in the immediate watershed or in response to the melting of a cover of snow and ice and whose channel bottom is always above the local water table.” Ephemeral drainages are subject to different requirements and regulatory burdens from waters with other classifications, as set forth in Admin. R. Mont. §

17.30.637(4) (noting ephemeral streams are subject to certain regulations, but not to Admin. R. Mont. §§ 17.30.620 through 17.30.629).

The district court creates confusion in its Order by picking through the administrative record to emphasize those instances where MDEQ discussed the C-3 classified waters, downstream of the permitted area, but ignores MDEQ's conclusion that the water quality standards applicable to C-3 waters do not apply to ephemeral drainages. While the district court recognized that "storm runoff [is] the main component of WECO's wastewater" (Order, at 9), and that MDEQ "states that the waters are ephemeral pursuant to Administrative Rule of Montana 17.30.615 and .637(4)" (Order, at 18), the district court further states that the "determination that the waters are C-3 waters cannot be changed without compliance with applicable law." *Id.* at 18. The district court goes on to conclude that MDEQ cannot treat C-3 waters as ephemeral without reclassifying the waters as ephemeral. *Id.* The district court's conclusion, however, directly contravenes Admin. R. Mont. § 17.30.637(4), which expressly states the specified water quality standards do not apply to mostly dry ephemeral drainages.

The Trade Groups, along with their members, rely on MDEQ's classification of drainages as ephemeral and the regulations that govern discharges to those drainages. While ephemeral drainages are subject to technology-based treatment requirements, operational standards, sampling methods, radiological criteria, and

bioassay procedures, they are not subject to the specific water quality standards such as those that apply to waters classified as C-3. *See* Admin. R. Mont. § 17.30.637(4). C-3 waters “are to be maintained suitable for bathing, swimming, and recreation, and growth and propagation of non-salmonid fishes and associated aquatic life, waterfowl, and furbearers.” Admin. R. Mont. § 17.30.629(1).

In spite of the specific regulations expressly stating the requirements imposed on C-3 waters do not apply to ephemeral drainages, the district court’s order can be read to require the imposition of C-3 water quality standards on the ephemeral drainages, directly contradicting established law. Since its enactment, MDEQ has correctly applied the regulatory exclusion in Admin. R. Mont. § 17.30.637(4) to usually dry ephemeral drainages, which by definition could not support aquatic life, and the Trade Groups’ members have relied on this consistent application. MDEQ’s interpretation of its own rule “is afforded great weight and [Montana courts] will defer to that interpretation unless it is plainly inconsistent with the spirit of the rule.” *Clark Fork Coal. v. Dep’t of Env’tl. Quality*, 2012 MT 240, ¶19, 366 Mont. 427, 288 P.3d 183 (citation omitted).

In issuing the MPDES permit to Appellant Western Energy Company, MDEQ was not required to seek to change any stream classifications, as the district court seems to imply. Order, at 18-19. Instead, MDEQ correctly applied the regulations appropriate for those ephemeral drainages into which the permitted

outfalls flow. Simply because ephemeral drainages, when flowing after storm events, may eventually flow into intermittent or perennial drainages that may be impaired is not justification to ignore the character of the drainage at the outfalls. By requiring MDEQ to consider all cumulative effects of discharges to ephemeral streams, the district court rendered meaningless Admin. R. Mont. § 17.30.637(4) and other regulations governing ephemeral drainages. Statutes and regulations are not to be interpreted to defeat their object or purpose. *See Doull v. Wohlschlager*, 141 Mont. 354, 364, 377 P.2d 758, 763 (1963) (citations omitted).

CONCLUSION

For the reasons stated by MDEQ, Western Energy Company, and for those reasons stated above, the Trade Groups ask the Court to reverse the district court's decision. The members of the Trade Groups rely on MDEQ's ability to permit discharges into ephemeral drainages as the regulations contemplate. The district court's ruling, as it currently stands, creates confusion regarding whether those regulations continue to apply to ephemeral drainages. Uncertainty in this area is bad for the regulated community, which also includes cities, towns, and county water and sewer districts, as is the interpretation of the district court's Order requiring MDEQ to consider the cumulative effect of discharges to ephemeral drainages on their downstream intermittent or perennial waters. This more restrictive interpretation of the district court's ruling will have disastrous impacts

on businesses and agricultural operations throughout the State of Montana that currently discharge to ephemeral drainages. Accordingly, the Trade Groups ask the Court to reverse the district court, give deference to MDEQ, and conclude that MDEQ's renewal of the MPDES permit to Western Energy Company was not arbitrary, capricious, or otherwise unlawful.

Dated this 13th day of June, 2018.

BROWNING, KALECZYC, BERRY & HOVEN, P.C.

By /s/ M. Christy S. McCann

Steven T. Wade

W. John Tietz

M. Christy S. McCann

Attorneys for Treasure State Resource Association of Montana, Montana Petroleum Association, Montana Coal Council, and Montana Mining Association

CERTIFICATE OF COMPLIANCE

Pursuant to Rule 11(4), Mont.R.App.P., I certify that *Amicus Brief of Treasure State Resources Association Of Montana, Montana Petroleum Association, Montana Coal Council, and Montana Mining Association*, is double spaced, is a proportionately spaced 14 point Times New Roman typeface, and contains 2,555 words.

/s/ M. Christy S. McCann

BROWNING, KALECZYC, BERRY & HOVEN, P.C.

CERTIFICATE OF SERVICE

I, Mary Christina Surr McCann, hereby certify that I have served true and accurate copies of the foregoing Brief - Amicus to the following on 06-13-2018:

Kirsten Hughes Bowers (Attorney)
1520 E. 6th Ave.
P.O. 200901
Helena MT 59620
Representing: Environmental Quality, Montana Department of
Service Method: eService

Matthew Kellogg Bishop (Attorney)
Western Environmental Law Center
103 Reeder's Alley
Helena MT 59601
Representing: Montana Environmental Information Center, Sierra Club
Service Method: eService

Laura Helen King (Attorney)
103 Reeder's Alley
Helena MT 59601
Representing: Montana Environmental Information Center, Sierra Club
Service Method: eService

William W. Mercer (Attorney)
401 North 31st Street
Suite 1500
PO Box 639
Billings MT 59103-0639
Representing: Western Energy Company
Service Method: eService

Victoria A. Marquis (Attorney)
401 North 31st Street
Suite 1500
P.O. Box 639
Billings MT 59103-0639
Representing: Western Energy Company
Service Method: eService

Shiloh Silvan Hernandez (Attorney)
Office of the State Public Defender
P.O. Box 200145
Helena MT 59620
Representing: Montana Environmental Information Center, Sierra Club
Service Method: Conventional

John C. Martin (Attorney)
25 S. Willow Street
P.O. Box 68
Jackson WY 83001
Representing: Western Energy Company
Service Method: Conventional

Edward Hayes (Attorney)
P.O. Box 200901
Helena MT 59620-0901
Representing: Environmental Quality, Montana Department of
Service Method: Conventional

William John Tietz (Attorney)
800 N. Last Chance Gulch, Suite 101
P.O. Box 1697
Helena MT 59624-1697
Representing: Treasure State Resource Association of Montana, Montana Petroleum Association (MPA), Montana Coal Council, Montana Mining Assoc., et al., Montana Association of Oil, Gas, and Coal Counties, Rosebud County
Service Method: Conventional

Steven T. Wade (Attorney)
800 N. Last Chance Gulch, Suite 101
P.O. Box 1697
Helena MT 59624-1697
Representing: Treasure State Resource Association of Montana, Montana Petroleum Association (MPA), Montana Coal Council, Montana Mining Assoc., et al., Montana Association of Oil, Gas, and Coal Counties, Rosebud County
Service Method: Conventional

Electronically Signed By: Mary Christina Surr McCann
Dated: 06-13-2018