

IN THE SUPREME COURT OF THE STATE OF MONTANA

Supreme Court Cause 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 and Appellants.

**OPENING BRIEF OF APPELLANT
MONTANA DEPARTMENT OF ENVIRONMENTAL QUALITY**

On Appeal from the Montana First Judicial District Court,
Lewis and Clark County, The Honorable Kathy Seeley, Presiding

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STATEMENT OF THE ISSUES

1. Did the District Court erroneously determine that DEQ's decision to renew Montana Pollutant Discharge Elimination System (MPDES) Permit No. MT0023965 with permit effluent limits based on Administrative Rule of Montana (ARM) 17.30.637(4) applicable to ephemeral streams rather than the specific water quality standards set forth in ARM 17.30.629(2) constituted an unlawful reclassification of the receiving waters?

2. Did the District Court erroneously determine that DEQ's monitoring requirements for precipitation-driven discharges from the Rosebud Mine, authorized under MPDES Permit No. MT0023965, were arbitrary and capricious by allowing monitoring from representative outfalls rather than from all active outfalls that may discharge during a precipitation event?

STATEMENT OF THE CASE

Montana Environmental Information Center and Sierra Club (collectively "MEIC") challenged DEQ's administrative decision to renew MPDES Permit No. MT0023965 (hereinafter "the Permit") to Western Energy Company ("WEC"), effective November 1, 2012. The November 1, 2012 permitting decision was a renewal of the Permit. The Permit authorizes discharges of mine process water and storm water from WEC's Rosebud coal mine near Colstrip, Montana to several tributaries to the Yellowstone River including East Fork Armells Creek.

At the time of the 2012 Permit renewal¹, DEQ had determined that all waters receiving discharges authorized by the Permit met the definition of “ephemeral streams” that flow 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. ARM 17.30.602(10); Administrative Record (A.R.) at 916². In its December 21, 2012 Verified Complaint and Application for Writ of Mandate and Declaratory Relief, MEIC alleged, among other theories, that DEQ: 1) unlawfully downgraded the receiving waters (classified as C-3 pursuant to ARM 17.30.611(1)(c)) without first conducting a Use Attainability Analysis by treating the waters as ephemeral and subject to ARM 17.30.637(4); and 2) failed to require monitoring that ensures compliance with the Permit and water quality standards by allowing representative sampling of outfalls for precipitation-driven discharges.

The parties filed cross motions for summary judgment, the motions were fully

¹ WECO applied for a second modification to the Permit after a hydrologic assessment of East Fork Armells Creek indicated that a portion of that stream, located in Mine Area B East between outfalls 16A and 9 may be intermittent. Modification 2 to the Permit would apply water quality based effluent limits based on ARM 17.30.629(2) to outfalls discharging to the intermittent stream segment for pollutants of concern with reasonable potential to exceed water quality standards.

² DEQ will refer to documents in the record of the District Court by their sequence number in the District Court Register Report, which was transmitted to this Court on March 26, 2018 and amended by stipulation of the parties to this appeal on April 12, 2018. The Administrative Record (“A.R.”) was submitted to the district court on a compact disk and attached to the Affidavit of Melissa Sjolund, Document Seq. No. 22, as Attachment A. The A.R. (Attachment A to Document Seq. No. 22) was submitted to this Court on April 12, 2018, as an amendment to the District Court’s record, which was submitted on March 26, 2018, without the compact disk.

briefed and oral argument was held before the District Court on April 22, 2015. The district court entered its Memorandum and Order on Judicial Review on March 14, 2016 (“Order”), granting MEIC’s motion for summary judgment and denying DEQ and WECO’s motions for summary judgment. *See* Order, Document Seq. No. 54 (a copy of which is included in the Appendix).

The District Court invalidated the Permit and remanded the Permit to DEQ for reconsideration. The District Court further held that the C-3 classified receiving waters could not be treated as ephemeral without reclassification through a use attainability analysis and DEQ’s representative sampling plan for precipitation-driven discharges was arbitrary and capricious and inadequate to ensure compliance with the Permit. *See* Order, Document Seq. No. 54, pages 18, 23 - 24. DEQ timely appealed the district court’s Order and seeks this Court’s determination that the Permit lawfully applied water quality standards set forth in ARM 17.30.637(4) to ephemeral receiving waters and lawfully incorporated a sampling and monitoring program that is representative of the precipitation-driven discharges from the Rosebud Mine.

STATEMENT OF THE FACTS

The following facts are relevant to the issues presented to this Court for review. MEIC challenged DEQ’s 2012 renewal of the Permit, issued on September 14, 2012. *See* Verified Complaint and Application for Writ of Mandate and

Declaratory Relief, Document Seq. No. 1; and the A.R., Document Seq. No. 22, Attachment A, at page 805. The 2012 Permit is a renewal of Permit No. MT0023965, issued November 8, 1999, and effective December 1, 1999. Both the 2012 and the 1999 versions of the Permit authorize WECO to discharge mine process water and storm water from the Rosebud coal mine to state surface waters subject to the limitations and conditions contained in the Permit. *See* A.R., page 805.

The Rosebud coal mine is a surface coal mine where coal is extracted via the strip-mine method including using draglines, overburden removal, and trucks and mechanical shovels. At the time of development of the 2012 Permit, the Rosebud Mine included 25,600 permitted acres. *See* A.R. at 987. The coal seam at the Rosebud mine is approximately 100 feet below the ground surface, and is, on average, twenty-four feet thick. During active coal mining, topsoil is removed and stored for future reclamation of mined areas. The overburden is then blasted and removed, exposing the coal seam. After the coal is mined, the overburden is returned to fill the pit. The overburden is graded to approximate the original land contours and then scarified to reduce compaction. The topsoil is replaced on top of the regraded pit and is revegetated. *See* A.R., page 914 - 915.

De-watering is required during active mining, as groundwater and runoff from precipitation infiltrate the pit. Sediment traps or ponds are used to contain mine process water and storm water on the mine site where the sediment is retained,

providing time for settling of suspended solids before the mine wastewater is discharged to downstream surface water. The settling ponds are designed to detain runoff from a 10-year, 24-hour storm event. *See A.R.*, page 915.

Each permitted outfall is associated with a sediment pond. Influent flow to the sediment ponds consists of mine drainage, drainage from coal preparation and storage areas, and storm water. The sediment ponds collect and provide time for treatment through settling of suspended solids so that the mine's discharges will comply with federal Effluent Limitation Guidelines (ELGs) for the Coal Mining Point Source Category. *See A.R.*, page 915; 40 CFR 434.11(h).

Under the 2012 Permit, discharges from the mine were permitted from 151 outfalls. *See A.R.*, pages 957 - 962. The Permit authorizes discharges from the mine to East Fork Armells Creek, West Fork Armells Creek, Lee Coulee, Stocker Creek, Black Hank Creek, Donley Creek, Pony Creek, Cow Creek, and Spring Creek. West Fork Armells Creek, Stocker Creek, Black Hank Creek, and Donley Creek are tributaries to East Fork Armells Creek, which is a tributary to the Yellowstone River. Lee Coulee, Spring Creek, Cow Creek, and Pony Creek are tributaries to Rosebud Creek, which is also a tributary to the Yellowstone River. *See A.R.* at 916.

Planned discharges may occur from the outfalls at the mine, or unplanned discharges may occur at the mine when precipitation events cause the volume of runoff contained in the sediment ponds to exceed the 10-year, 24-hour storm event

design capacity causing pond overflow. Additionally, residual storm water or mine process water in a pond, may cause pond overflow during a precipitation event that is less than pond design capacity. *See* A.R. at 915 - 916. After active coal mining, the sediment ponds are reclaimed and outfalls are eliminated. *See* A.R., page 916.

Both the 1999 Permit and the 2012 Permit recognized that the waters directly receiving discharges from the mine are ephemeral. *See* A.R. at 2129 (public notice of reissuance of the Permit in 1999); at 2135 (statement of basis for the 1999 Permit); and at 916 (fact sheet for the 2012 Permit). The District Court noted that DEQ issued a tentative decision to renew the Permit on July 12, 2010, but the 2010 renewal was not finalized. *See* Order, Document Seq. No. 54, page 12. Instead, WEC_o submitted updated permit application materials and DEQ issued a revised tentative permit determination on May 11, 2012. The Permit was finalized on September 14, 2012, after public notice and comment. *See* A.R. at 805 (2012 Permit), 1901 (Public notice of tentative decision to renew the 2012 Permit), and 2067 (updated application from WEC_o).

WEC_o appealed the 2012 Permit renewal to the Board of Environmental Review (BER) based on DEQ's identification of twelve new outfalls as new or increased sources for purposes of nondegradation review. The appeal was resolved by a settlement between DEQ and WEC_o that resulted in Modification 1 of the 2012 Permit, effective September 8, 2014. Under Modification 1, four of the twelve new

source outfalls in the 2012 Permit were permitted as new sources, and the other eight were found to have been previously permitted in the 1999 Permit. *See* A.R. at 76, and at 79. After the 2014 modification of the Permit, only four of the 151 outfalls were new source outfalls, not previously permitted under the 1999 Permit, for purposes of nondegradation review.

On March 14, 2016, the District Court declared the Permit, as modified September 14, 2014, invalid. *See* Memorandum and Order on Judicial Review, Document Seq. No. 54, page 24. DEQ appeals: 1) the District Court's determination that recognition of ephemeral waters and application of the water quality standards in ARM 17.30.637(4) requires a use attainability analysis and stream reclassification; and 2) the District Court's determination that DEQ's authorization of representative monitoring of outfalls during precipitation-driven discharges at the Rosebud mine was arbitrary and capricious. Document Seq. No. 54, pages 18 – 24.

STANDARD OF REVIEW

1. Review of Agency Decision.

The standard of review by which the Court must measure a final administrative agency decision that is not the product of a contested case is whether the decision was “arbitrary, capricious, unlawful, or not supported by substantial evidence.” *See* Core-Mark International, Inc. v. Montana Board of Livestock, 2014 MT 197, ¶ 20; 376 Mont 25, 329 P.3d 1278 (July 24, 2014) (*citing* Clark Fork

Coalition v. Mont. Dep't. of Env'tl. Quality, 2008 MT 407, ¶ 21; 347 Mont. 197; 197 P.3d 482). This case involves DEQ's administrative decision to renew the Permit. This matter does not involve rulemaking and is not a contested case. The Court must consider whether DEQ's administrative decision to renew the Permit was based on consideration of the relevant factors and whether there has been clear error of judgment. *See* Core-Mark at ¶ 37. The requirement to consider "relevant factors" relates to factors mandated by the statute and regulation at issue. *Id.* In this case, the Montana Water Quality Act (WQA), § 75-5-101, MCA *et seq.* and administrative rules adopted under the WQA at Title 17, chapter 30 constitute such relevant factors. This Court has further directed that its review of agency decisions is narrow, but the Court does not "automatically defer to the agency without carefully reviewing the record and satisfying themselves that the agency has made a reasoned decision." Clark Fork Coalition v. Mont. Dep't of Env'tl. Quality, 2008 MT 407, ¶ 21; 347 Mont. 197, 203; 197 P.3d 482, 487 (citing Friends of the Wild Swan v. DNRC, 2000 MT 209, ¶ 28; 301 Mont. 1; 6 P.3d 972).

2. Review of District Court Ruling on Motions for Summary Judgment

This Court reviews the grant or denial of summary judgment *de novo*. *See* Clark Fork Coalition v. Dep't of Env'tl. Quality, 2012 MT 240, ¶ 18; 366, Mont. 427, 433; 288 P.3d 183, 188. The Court must apply the same Rule 56, M.R.Civ.P. criteria as the District Court, and review the legal determinations of the District Court to

determine whether the District Court erred. Johansen v. Department of Natural Resources and Conservation, 1998 MT 51, ¶ 15; 288 Mont. 39; 955 P.2d 653 (1998).

SUMMARY OF THE ARGUMENTS

The District Court erroneously determined that renewal of the Permit was unlawful because DEQ recognized the ephemeral nature of the C-3 classified waters receiving discharges from the Rosebud Mine without first conducting a use attainability analysis. DEQ's recognition of the ephemeral nature of receiving waters and application of its longstanding rule, ARM 17.30.637(4), is not a use reclassification. Under the plain language of ARM 17.30.637(4), DEQ is authorized to apply minimum treatment requirements and general prohibitions to discharges to ephemeral streams and the specific water quality standards set forth in ARM 17.30.620 through 17.30.629 do not apply.

Conditions and limitations in the Permit are based on the general prohibitions and treatment requirements in ARM 17.30.637 and applicable technology-based effluent limits. The Permit, as modified, contains numeric and narrative standards, minimum treatment requirements, standards of operation, and general prohibitions to restore and maintain water quality and protect existing and anticipated uses of the receiving water.

After considering the relevant information in the record, DEQ reasonably required representative monitoring of precipitation driven discharges from 20

percent of active outfalls at the Mine. DEQ renewed the Permit in accordance with the Montana WQA, consistent with rules adopted by the BER, and federal requirements. The Permit should be upheld and the District Court's Memorandum and Order on Judicial Review should be vacated.

ARGUMENTS

- I. The District Court erred to the extent it found DEQ's permitting decision under the Montana Water Quality Act applying water quality standards in ARM 17.30.637(4) to ephemeral receiving waters rather than the specific water quality standards set forth in ARM 17.30.629(2) to constitute an unlawful reclassification of C-3 waters.**

- A. DEQ's recognition of the ephemeral nature of the receiving water is not a use reclassification.

Pursuant to Section 402 of the federal Clean Water Act (33 U.S.C. §1342), the United States Environmental Protection Agency (EPA) approved the State of Montana's discharge permitting program and delegated authority to Montana, acting through DEQ, to issue discharge permits (MPDES permits) to control point source discharges of pollutants to surface water that are consistent and compatible with the Clean Water Act and federal regulations. 40 CFR Part 123; ARM 17.30.1301, *et seq.*; see also Memorandum of Agreement Between the State of Montana Department of Health and Environmental Sciences and the United States Environmental Protection Agency Region VIII (Memorandum of Agreement)

available at: <https://www.epa.gov/sites/production/files/2013-09/documents/mt-moa-npdes.pdf> (accessed June 12, 2018). Under Section 402 of the federal Clean Water Act, federal regulations, and the Memorandum of Agreement, EPA retains the right to review, comment on, or object to state-issued discharge permits. *See* 33 U.S.C. §1342, 40 CFR § 123.44, and the Memorandum of Agreement at page 6. The Memorandum of Agreement further provides that if the EPA fails to notify DEQ of objections to a permit within 90 days of EPA's receipt of a proposed permit from DEQ, the EPA is deemed to concur in the permit. *See* Memorandum of Agreement, pages 6 -7.

DEQ is entrusted with the authority to issue Montana Pollutant Discharge Elimination System permits under the Montana Water Quality Act. *See* §§ 75-5-211 & 75-5-401, MCA. DEQ must issue discharge permits in conformance with rules adopted by the BER. §§ 75-5-201, 75-5-401, MCA. As the District Court observed, the Montana WQA parallels many of the goals and requirements of the federal Clean Water Act (CWA). *See* Document Seq. No. 54, pages 3 - 4.

Under the Clean Water Act, there are two sets of water quality measures designed to “restore and maintain the chemical, physical, and biological integrity of the Nation’s waters.” Arkansas v. Oklahoma, 503 U.S. 91, 101 (1992); 33 U.S.C. 1251(a). EPA promulgates technology-based effluent limits (TBELs) imposing restrictions that are specific to point source dischargers on the “quantities, rates, and

concentrations” of specific pollutants that are discharged. *Id.*; 33 U.S.C. 1311, 1314(b). The states are responsible for the adoption of water quality standards designed to protect the beneficial uses of state waters. 33 U.S.C. § 1313(c).

Both the Clean Water Act and WQA require point source dischargers to control pollutant discharges through compliance with effluent limitations and other conditions and requirements contained in discharge permits. § 75-5-401(1)(a), MCA; 33 U.S.C. § 1342; *See also* A.R., page 920. Technology-based treatment requirements, which form the basis of TBELs, represent the minimum level of control that must be imposed in a discharge permit. 40 CFR § 125.3. TBELs are designed to meet technology based standards and limitations set forth in federal regulations. Water quality based effluent limitations (WQBELs) are designed to meet state water quality standards. *See* 40 CFR § 122.44(a)(1); ARM 17.30.1344(2)(b). Dischargers are required to meet the applicable TBELs, which require implementation of technologies to treat pollutants, and any WQBELS necessary to protect beneficial uses of the receiving water if TBELs are not enough to meet applicable water quality standards. Natural Resources Defense Council v. United States EPA, 915 F.2d 1314, 1317 (9th Cir. 1990); 33 U.S.C. §§ 1312, 1313; 40 CFR § 122.44(d); ARM 17.30.1344(2)(b); *See also* A.R., page 929.

The applicable technology based effluent limit guidelines (ELGs) for coal mines are at 40 CFR Part 434. The ELGs found at 40 CFR 434 include: Subpart B

(coal preparation plants and areas associated with coal preparation plants); Subpart D (alkaline mine drainage exhibiting a pH greater than 6.0); Subpart F (miscellaneous including precipitation-driven discharges); and subpart H (western alkaline coal mining). A.R., pages 920 – 929.

The Rosebud mine discharges to receiving waters that are within the Yellowstone River drainage, between the Billings water supply intake and the North Dakota state line. A.R., page 80. The District Court found the record inconsistent as to applicable stream classification, but the receiving waters at issue are classified by Montana as C-3 and the administrative record consistently acknowledges and reflects this classification. Document Seq. No. 54, page 18; ARM 17.30.611(1)(c); A.R., pages 80, 930.

Waters classified by the state of Montana as C-3 are to be maintained to support the following beneficial uses: “bathing, swimming, and recreation, and growth and propagation of non-salmonid fishes and associated aquatic life, waterfowl and furbearers. The quality of these waters is naturally marginal for drinking, culinary, and food processing purposes, agriculture and industrial water supply.” ARM 17.30.629(1).

The water quality criteria for C-3 waters is set forth in ARM 17.30.629(2). These water quality criteria serve as the basis for state permits incorporating WQBELs to support beneficial uses. 40 CFR § 131.2. However, where the

receiving waters meet the definition of “ephemeral” at ARM 17.30.602(12), the following water quality standards prescribed at ARM 17.30.637(4) apply regardless of the C-3 classification:

Treatment requirements for discharges to ephemeral streams must be no less than the minimum treatment requirements set forth in ARM 17.30.1203. Ephemeral streams are subject to ARM 17.30.635 through 17.30.637, 17.30.640, 17.30.641, 17.30.645, and 17.30.646 but not to the specific water quality standards of ARM 17.30.620 through 17.30.629.

ARM 17.30.637(4) (emphasis added).

DEQ’s determination that waters receiving discharges authorized under the Permit are ephemeral is reasonably based, in part, on conclusions set forth in the State of Montana Water Quality Standards Attainment Records. For East Fork Armells Creek, (stream segment MT42K002_170), from the headwaters to Colstrip, the attainment record states: “(t)he 1992 and 2005 assessments indicated this segment is ephemeral.” *See* A.R. at 1534.

DEQ applied the water quality standards in ARM 17.30.637(4) to ephemeral receiving waters. By recognizing the ephemeral nature of the receiving waters, DEQ is not changing the C-3 classification as the District Court charged. Document Seq. No. 54, page 18. Because application of ARM 17.30.637(4) does not modify designated uses, a use attainability analysis, pursuant to ARM 17.30.606 and 17.30.615(2), is not required.

DEQ reasonably developed permit effluent limitations, including numeric criteria and narrative standards, to protect the existing and designated beneficial uses of the ephemeral receiving water based on its long-standing interpretation of ARM 17.30.637(4). *See* A.R. at 12, 80. By treating the receiving waters as ephemeral and applying the standards in ARM 17.30.637, the Department is not reclassifying the streams and a Use Attainability Analysis is not required. *See* 40 CFR 131.10 incorporated in ARM 17.30.619.

By its plain language, ARM 17.30.637(4) exempts ephemeral streams from the specific water quality standards of 17.30.620-629. The Permit contains effluent limitations including numeric and narrative standards to protect the existing and designated beneficial uses of the receiving water. The applicable water quality standards for discharges from the Rosebud Mine to ephemeral receiving waters include the prohibitions and treatment requirements in ARM 17.30.637, and applicable technology based effluent limits. *See* A.R. at 93.

“An agency’s interpretation of its rule is afforded great weight, and we will defer to that interpretation unless it is plainly inconsistent with the spirit of the rule.” Clark Fork Coalition v. Department of Environmental Quality, 2012 MT 240, ¶ 19; 366 Mont. 427, 433; 288 P.3d 183, 188. Although the District Court referred to Clark Fork Coalition v. Department of Environmental Quality, in determining the

applicable standard of review in this case, it failed to look at DEQ's interpretation of ARM 17.30.637(4) or apply the rule to the facts in this case.

Montana water quality standards include both specific water quality standards for each use classification and general provisions. *See* ARM 17.30.603(2). (State surface water quality standards are composed of all rules in ARM Title 17, chapter 30, subchapter 6). For surface waters that are classified C-3, the specific water quality standards set forth in ARM 17.30.629(2) apply along with general treatment requirements in ARM 17.30.635 and general prohibitions in ARM 17.30.637. Regardless of the use classification, receiving waters that are hydrologically ephemeral are subject to the water quality standards specified in ARM 17.30.637(4). *See* A.R. at 80 and at 930 (reference to 17.30.637(6) on page 930 should be to 17.30.637(4)).

Based on the plain language of ARM 17.30.637(4), DEQ's application of that rule to hydrologically ephemeral waters as it evaluated the need for WQBELs in the Permit was reasonable, not inconsistent with the spirit of the rule, and entitled to great weight. Clark Fork Coalition, 2012 MT at ¶ 19; 366 Mont. at 433; 288 P.3d at 188. ARM 17.30.637(4) allows DEQ to treat ephemeral streams differently than perennially or intermittently flowing streams by not basing WQBELs on water quality standards designed to protect uses, such as non-salmonid fish and other aquatic life, that do not exist in an ephemeral drainage.

The District Court found that, by acknowledging the hydrologic condition of ephemeral waters in determining the need for WQBELs, DEQ unlawfully reclassified waters without performing a use attainability analysis in accordance with ARM 17.30.615. *See* Document Seq. No. 54, page 18. The District Court misconstrues DEQ's recognition of the hydrologic condition of the receiving waters as use reclassification. If the water were reclassified, designated beneficial uses would be permanently removed. This action would not allow DEQ to protect removed designated uses by recognizing changes in the hydrologic condition of a water body as it did when it modified the Permit to account for an intermittent stretch of East Fork Armells Creek discovered after a hydrologic assessment conducted by DEQ's coal program. *See* Document Seq. 42, Exhibit 1 (affidavit of Melissa Sjolund at ¶ 12).

The Clean Water Act expressly recognizes, protects and preserves the State's primary responsibility "to prevent, reduce, and eliminate pollution, to plan the development and use (including restoration, preservation, and enhancement) of land and water resources. . . ." 33 USC § 1251. DEQ is authorized to renew the Permit under the Montana WQA consistent with rules adopted by the Board. DEQ's decision to renew the Permit is within the bounds of the agency's statutory authority. The legislature has authorized DEQ to use its discretion when developing MPDES permits. The decision to renew the Permit should be upheld unless this Court

determines that DEQ acted “arbitrarily, capriciously, or unlawfully.” Johansen, 1998 MT at ¶ 27, 288 Mont. 39, 955 P.2d 653 at 659; North Fork Preservation Assoc. v. DSL (1989), 238 Mont. 451, 459, 778 P.2d 862; Langen v. Badlands Co-op State Grazing District (1951), 125 Mont. 302, 234 P.2d 467.

B. The terms and conditions of the Permit assure protection of water quality.

Because the district court confused total maximum daily loads (TMDLs) with water quality standards, it erroneously concluded that DEQ avoided the need to determine TMDLs and apply water quality standards to new discharges by treating the receiving waters as ephemeral. Document Seq. No. 54, page 19. A TMDL is a planning tool used to allocate pollutant loads and address impairments to a water body. A TMDL allocates pollutant loads (to nonpoint sources of pollution) and pollutant waste loads (to point sources of pollution) for pollutants of concern in a water body. 33 U.S.C. §1313. A TMDL to address impaired stream segments receiving discharges from the mine is developed through a separate administrative process, the administrative action at issue is renewal of the discharge permit.

In contrast to a TMDL, a water quality standard consists of criteria designed to protect the beneficial uses of state waters. 33 U.S.C. § 1313(c); §75-5-103(37), MCA; 40 CFR §§130.7; 131.2; ARM 17.30.603. A water quality standard defines the water quality goals for a water body by designating the use and setting criteria to protect that use. 40 CFR §131.2; ARM 17.30.603. While developing a discharge

permit, DEQ develops WQBELs based on the applicable water quality standards for the receiving water.

As for the new discharges authorized under the Permit, nondegradation review is not avoided by treating the waters as ephemeral. *See* A.R. at 214 and at 932. Most discharges authorized under the Permit are from existing outfalls that were permitted in the 1999 permit. After the 2014 modification of the Permit, discharges from four new outfalls were permitted as new sources and subject to nondegradation review under ARM 17.30.705. The State's nondegradation policy requires protection of existing and anticipated future uses of the receiving water. Water quality necessary to protect those uses must be maintained. *See* 75-5-303(1), MCA. Because the receiving water for discharges from the mine meets the definition of ephemeral and is not high-quality water, ARM 17.30.637(4) prescribes the standards necessary to protect the uses of the receiving water. *See* A.R. at 215 and at 933.

Because the specific water quality standards of ARM 17.30.620 through 17.30.629 are not applicable to ephemeral streams, DEQ's determination that the receiving waters are ephemeral affected the calculation and development of water quality based permit effluent limits. *See* ARM 17.30.637(4); Document Seq. No. 54, page 18. However, the Permit, as modified, applies numeric and narrative standards including the general standards and prohibitions in ARM 17.30.635 - 637, minimum treatment requirements, standards of operation, and general prohibitions

to restore and maintain water quality and protect existing and anticipated uses of the receiving water. *See* A.R. at 932 - 933. Permit limitations including the general prohibitions and treatment requirements in ARM 17.30.637 and applicable technology-based effluent limits are sufficient to protect the designated beneficial uses of the receiving water.

II. The District Court's decision and order should be VACATED, to the extent it erroneously determined that DEQ arbitrarily authorized representative sampling of precipitation driven discharges.

Due to the large number of outfalls at the Rosebud Mine and limited accessibility of some of the outfalls during rain events, the Department authorized representative monitoring for discharges resulting from precipitation events. *See* A.R. at 34. The Permit provides that discharges consisting of storm water runoff from areas classified as "Alkaline Mine Drainage" and "Coal Preparation Plants and Coal Preparation Plant Associated Areas" (40 CFR 434 Subparts B and D) may be sampled at the representative outfalls listed in Table 16. *See* A.R. at 35.

The District Court found "inadequate or inaccurate bases for the monitoring types, locations and frequencies" and no scientific basis for DEQ's determination that sampling 20 percent of outfalls is sufficient to monitor precipitation-driven discharges. Document Seq. No. 54, page 23. The Fact Sheet for Modification 1 to the Permit explains that DEQ selected representative outfalls from areas where similar mining activity was taking place, where alkaline characteristics of the soils

were similar, where runoff pollutant concentrations were expected to be similar, where the type of storm water treatment and best management practices were similar, and where the effluent limitations applicable to the discharge were similar. *See* A.R. at 90. Additionally, under permit special condition C, DEQ required installation of automated sampling equipment at representative monitoring locations to ensure flow measurement and automatic sample collection. *See* A.R. at 551. DEQ also explained, in response to comment, that the requirement to sample 20 percent of outfalls, that are not subject to Western Alkaline Standards, was based on National Pollutant Discharge Elimination System (NPDES) permit, issued by EPA to the Black Mesa Mine (NPDES Permit No. NN0022179). *See* A.R. at 999.

The Permit does not authorize representative sampling for dry weather or planned discharges. Dry weather discharges must be sampled and monitored at each outfall from which they occur under the Permit. *See* A.R. at 23 – 28 (tables 2 through 8). Alternate monitoring requirements for precipitation events are provided in Tables 9 through 15, and Table 16 summarizes the representative outfalls to be monitored during precipitation-driven discharges. *See* A.R. at 29 – 35.

Representative compliance monitoring for precipitation-driven discharges is often incorporated in storm water discharge permits covering a large area where there are multiple outfalls such as Municipal Separate Storm Sewer Systems (MS4) permits. *See* Md. Dep't of the Env't v. Riverkeeper, 447 Md. 88, 145; 134 A.3d 892,

926 (Ct. of Appeals MD, March 11, 2016) (representative monitoring is sufficient where monitoring locations represent an adequate range of land uses and the monitoring frequency yields representative information). It is within DEQ's discretion to ensure that the monitoring requirements incorporated within MPDES permits require monitoring that is representative of the monitored activity. ARM 17.30.1342(10). DEQ's monitoring requirements under the Permit were determined within the bounds of its authority under the WQA and rules adopted thereunder. The standard for determining whether DEQ's decision was arbitrary is whether the decision appears "random, unreasonable or seemingly unmotivated, based on the existing record." Core-Mark International, Inc., 2014 MT at ¶ 38; 376 Mont at 38; 329 P.3d at 1288 (citing Hobble Diamond Ranch LLC v. State, 2012 MT 10, ¶ 24; 363 Mont. 310; 268 P.3d 31). Reversal of DEQ's decision is not warranted simply because there may be inconsistent evidence in the record or evidence that may support a different result. *Id.* DEQ considered the relevant information in the record and its decision to require representative monitoring of precipitation driven discharges must be upheld unless this Court determines that the DEQ's decision is "so at odds with that information that it could be characterized as arbitrary or the product of caprice." *Id.* (citing N. Fork Preservation Ass'n, 238 Mont. at 465; 778 P.2d at 871 (1981)).

CONCLUSION

The Court should VACATE the District Court's Memorandum and Order on Judicial Review. DEQ renewed the Permit in accordance with the Montana Water Quality Act and applicable rules adopted by the BER including ARM 17.30.637(4). DEQ acted within the bounds of its authority in determining that authorizing discharges from the Rosebud mine under the terms, limitations and conditions set forth in the Permit would comply with the Montana Water Quality Act, rules adopted thereunder, and federal requirements. The Court should defer to the Agency's decision where it involves interpretation of the statutes and rules it administers and where substantial agency expertise is involved unless this Court determines that DEQ issuance of the Permit was arbitrary, capricious, or unlawful.

DATED this 13th day of June, 2018.

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CERTIFICATE OF COMPLIANCE

Pursuant to Montana Rule of Appellate Procedure 11(4)(d), I certify that MONTANA DEPARTMENT OF ENVIRONMENTAL QUALITY'S OPENING BRIEF is printed with proportionately spaced Times New Roman text typeface of 14 points; is double spaced; and the word count, calculated by Microsoft Word 2016, is not more than 10,000 words, excluding Certificate of Compliance and Certificate of Service.

DATED this 13th day of June, 2018.

By:


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Attorney for Montana DEQ

CERTIFICATE OF SERVICE

I hereby certify that I have filed a true and accurate copy of the foregoing with the Clerk of the Montana Supreme Court, and that I have served true and accurate copies of the foregoing upon each attorney of record in the above referenced District Court action, as follows:

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