IN THE SUPREME COURT OF THE STATE OF MONTANA

DA 18-0110

MONTANA ENVIRONMENTAL INFORMATION CENTER AND THE SIERRA CLUB,
Plaintiffs-Appellees,

vs.

MONTANA DEPARTMENT OF ENVIRONMENTAL QUALITY,
Defendant-Appellant,

and

WESTERN ENERGY COMPANY,
Intervenor-Defendant-Appellant.

COMBINED RESPONSE BRIEF OF PLAINTIFFS-APPELLEES MONTANA ENVIRONMENTAL INFORMATION CENTER AND THE SIERRA CLUB

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

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STATEMENT OF ISSUES

1. Whether the District Court correctly ruled that the Department acted unlawfully and arbitrarily when it reclassified all receiving waters into which Western Energy Company's Rosebud strip-mine discharges pollution as ephemeral and thereby removed water quality protections without (a) following the required procedures and (b) without compiling and evaluating any relevant data.

2. Whether the District Court correctly ruled that the Department acted unlawfully and arbitrarily when it exempted Western Energy Company from monitoring precipitation-driven pollution discharges from all but 20 of the Rosebud strip-mine's 151 outfalls.

STATEMENT OF CASE

Plaintiffs-Appellees Montana Environmental Information Center and Sierra Club (collectively, "Conservation Groups") challenged the 2012 water pollution discharge permit (discharge permit) issued by the Montana Department of Environmental Quality (Department) to Western Energy Company (WECo) allowing the coal company, among other things, to discharge unlimited amounts of toxic heavy metals from

its Rosebud strip-mine into already-impaired headwaters streams, with virtually no monitoring requirements. The Conservation Groups claimed the Department improperly omitted water-quality-based protections from the majority of the strip-mine's pollution outfalls by erroneously reclassifying all the receiving waters as ephemeral, without conducting a required study of the waters.

The groups stayed the case pending an administrative appeal filed by WECo. District Court Docket Entry (Doc.) 13. The Department and WECo settled the administrative appeal, the Department agreeing to remove the remaining water-quality-based protections for new outfalls, again on the basis of the supposed ephemeral character of the receiving waters. The Department further reduced the strip-mine's already sparse monitoring requirements. The Department rejected comments from the Conservation Groups repeating concerns about ephemeral waters and monitoring they had raised regarding the original permit. The Department said it addressed the issues in the 2012 permit and would not revisit them. AR11-13.

The District Court lifted the stay and set a briefing schedule. Docs. 17-18. With no objection from any party, the Department

submitted an administrative record, including documents related to the 2012 permit and the 2014 modification. Doc. 22. The parties submitted extensive briefing, including exhibits, to which no party objected. Docs. 33-50. The District Court held the Department's issuance of the permit was arbitrary and unlawful. Dkt. 54 at 24. The court ruled that (1) the Department failed to follow the proper process to reclassify the receiving waters as ephemeral and thereby dramatically weakened pollution limits and (2) the Department arbitrarily reclassified all receiving waters as ephemeral despite possessing evidence to the contrary. *Id.* at 18-19.

The district court faulted the Department's "distinct lack of scientific analysis" to support its decision to require monitoring of precipitation-driven pollution discharges (the most common type of discharge at the mine) at only 20 of the strip-mine's 151 pollution outfalls. *Id.* at 23. The court invalided the permit and remanded the matter to the Department. *Id.* at 24.

STATEMENT OF FACTS

I. The Clean Water Act and the Montana Water Quality Act

A. Purpose

"[T]o restore and maintain the chemical, physical, and biological integrity of the Nation's waters" is the purpose of the Clean Water Act. 33 U.S.C. § 1251(a); *PUD No. 1 of Jefferson County v. Wash. Dep't of Ecology*, 511 U.S. 700, 704 (1994). To achieve this objective, Congress established the goals that "the discharge of pollutants into the navigable waters be eliminated"; that "wherever attainable . . . water quality which provides for the protection and propagation of fish, shellfish, and wildlife and provides for recreation in and on the water be achieved"; and that "the discharge of toxic pollutants in toxic amounts be prohibited." 33 U.S.C. § 1251(a)(1)-(3).

Similarly, Montana Water Quality Act, which implements the Clean Water Act in Montana, is intended to secure Montanans' "inalienable" "right to a clean and healthful environment" by providing "adequate remedies for the protection of the environmental life support system" and "to prevent unreasonable depletion and degradation of natural resources." § 75-5-102(1), MCA; Mont. Const. arts. II, § 3, IX

§ 1(3). These "anticipatory and preventative" rights "do not require that dead fish float on the surface of our state's rivers and streams" before they may be invoked. *MEIC v. DEQ*, 1999 MT 248, ¶ 77, 296 Mont. 207, 988 P.2d 1236.

B. Discharge Permits

To attain its remedial aims, the Clean Water Act prohibits discharge of any pollutant into the waters of the United States unless in compliance with a permit. 33 U.S.C. §§ 1311(a), 1342; *N. Cheyenne Tribe v. DEQ*, 2010 MT 111, ¶ 21, 356 Mont. 296, 234 P.3d 51. A discharge permit "serves to transform generally applicable effluent limits and other standards . . . into the obligations . . . of the individual discharger." *EPA v. California,* 426 U.S. 200, 205 (1976). The Environmental Protection Agency (EPA) has authority to issue discharge permits and may delegate the authority to states. 33 U.S.C. § 1342(b). In Montana, the Department "administers the Montana Pollutant Discharge Elimination System (MPDES) permitting program." *N. Cheyenne Tribe*, ¶ 7; § 75-5-211, MCA.

Discharge permits contain two principle types of pollution limits: technology-based effluent limitations or "TBELs" and called water-

quality-based effluent limitations or "WQBELs." 33 U.S.C. §§ 1311(b), 1312, 1313; *N. Cheyenne Tribe*, ¶¶ 11-12. EPA promulgates guidelines that establish TBELs for various classes of industry, which must be incorporated into discharge permits. *Id.* ¶ 25; 33 U.S.C. § 1311(b)(1)(A); 40 C.F.R. § 125.3(c)(1). Where EPA has not promulgated guidelines, the permitting authority must impose appropriate TBELs based on best professional judgment. *N. Cheyenne Tribe*, ¶ 26; 33 U.S.C. § 1342(a)(1)(B). EPA has established effluent limitation guidelines for different aspects of coal mining, including subparts B (coal preparation plants), D (alkaline mine drainage), and H (western alkaline coal mining). 40 C.F.R. Part 434. Subpart H applies to coal-mining areas in reclamation and does not impose numeric effluent limitations or require monitoring. 40 C.F.R. §§ 434.81, 434.82. If TBELs are insufficient to assure compliance with water quality standards, permits must also include WQBELs. *N. Cheyenne Tribe*, ¶ 41; 33 U.S.C. §§ 1311(b)(1)(C), 1312(a), 1313(e)(3)(A); 40 C.F.R. § 122.44(d)(1); ARM 17.30.1344(2)(b).

C. Water Quality Standards

Water-quality-based effluent limitations are based on water quality standards. Water quality standards "consist of a designated use

or uses for the waters of the United States and water quality criteria for such waters based upon such uses. Water quality standards are to protect the public health or welfare, enhance the quality of water and serve the purposes of the Act." 40 C.F.R. § 130.2(d).[1] The Clean Water Act requires states to designate *uses* for all waterbodies in the state and establish *criteria* necessary to protect the designated uses. 33 U.S.C. § 1313(a), (c); 40 C.F.R. §§ 131.3(b), 131.11(a). Uses that support aquatic life and recreation in the water, i.e., "fishable/swimmable uses," "are favored." *Idaho Mining Ass'n v. Browner*, 90 F. Supp. 2d 1078, 1081 (D. Idaho 2000). In 1983 EPA promulgated rules allowing states to designate uses less stringent than fishable/swimmable or less stringent criteria in limited circumstances following a scientific analysis. 48 Fed. Reg. 51,400, 51,400-02 (Nov. 8, 1983).

A state must conduct a use attainability analysis or "UAA" if it removes primary contact recreation (swimmable) or aquatic life support (fishable) uses of a water body or if it designates a subcategory of use "which requires less stringent criteria." 40 C.F.R. § 131.10(j)(2). A UAA

[1] Water quality standards also include an antidegradation policy. *PUD No. 1 of Jefferson County*, 511 U.S. at 705, which is not at issue in this case.

is "a structured scientific assessment of the factors affecting the attainment of the use which may include physical, chemical, biological, and economic factors as described in § 131.10(g)." *Id.* § 131.3(g). A State may *not* remove an existing use, which is defined as a use existing in 1975. *Id.* §§ 131.3(e), 131.10(g). "Conversely, a UAA is not required whenever fishable/swimmable uses are designated." *Idaho Mining Ass'n*, 90 F. Supp. 2d at 1081-82.

In Montana, the Montana Board of Environmental Review (Board), a body composed of citizen members, establishes and may modify water quality standards. § 75-5-301(1)-(3), MCA; § 2-15-3502(2), MCA. The Board uses an alpha-numeric system for classifying state waters and designating water quality standards. All state surface waters are classified from A-Closed to G-1. ARM 17.30.621 to .629, .650 to .658. Each classification establishes water quality standards, including designated beneficial uses and specific numeric and narrative criteria. *Id.* The Board rules apply these classifications to the waters of each drainage basin in the State of Montana. ARM 17.30.607 to .614. The Board has sole authority to classify streams, or establish or modify water quality standards through a public rulemaking process. § 75-5-

201(1), MCA; ARM 17.30.606. The receiving waters at issue in this case have been classified as C-3 waters with corresponding water quality standards, including designated uses for supporting non-salmonid (i.e., warm water) fish and associated aquatic life and, among other criteria, numeric standards for pollutants, such as toxics and heavy metals as set forth in the Departments' "Circular DEQ-7." ARM 17.30.611(1)(c); ARM 17.30.629.

In 2002 the Board promulgated specific classifications "for waters in ephemeral streams." ARM 17.30.615(1), .652 to .655; 15 Mont. Admin. Reg. 2196, 2196-209 (Aug. 15, 2002). The Board promulgated the rules because otherwise "point source discharges to surface waters that are not capable of supporting all of their designated uses *are required to meet water quality standards* intended to protect uses that do not exist." 7 Mont. Admin. Reg. 1019, 1024 (Apr. 11, 2002) (emphasis added). Pursuant to the rules, "[p]rior to reclassifying a specific water body" as an "ephemeral stream[]," "a use attainability analysis must be conducted in accordance with 40 C.F.R. 131.10(g), (h), and (j)." ARM 17.30.615(1)-(2). A polluter may only benefit from the less stringent

standards for ephemeral waters *after* the Board reclassifies the water as ephemeral:

> The new rule classifications only establish a "place holder" for a water body to be listed *after a UAA is conducted* and *after the Board adopts a rule* that places the water body under the new classification. Once a particular water body is placed under a new classification through future rule adoption, then an MPDES permit holder on that stream will be subject to less stringent standards than currently used to establish permit limits.

15 Mont. Admin. Reg. at 2202 (emphasis added). Responding to a complaint about the UAA requirement, the Board explained:

> Simply eliminating reference to the UAA requirement in the new rules, however, will not eliminate this federal requirement. Since the [Clean Water Act] requires EPA's approval of the revised water quality standard, including the elimination of use designations, the federal requirement for a UAA prior to eliminating a use will remain regardless of its inclusion or exclusion from the rules . . . .
>
> In order to address the problems identified by the comment, the Department intends to conduct UAAs only as needed to address a particular discharge permit.

Id. at 2200-01.

Ephemeral streams are not subject to specific water quality standards, including numeric criteria on toxic heavy metals. ARM 17.30.637(4). ARM 17.30.637(4) was promulgated in 1980, 14 Mont. Admin. Reg. 2252, 2257 (July 31, 1980), prior to EPA's promulgation of

its rules requiring UAAs. 48 Fed. Reg. 51,400, 51,400-02 (Nov. 8, 1983). The provision was slid into the regulation after public notice and comment at the request of WECo that "[e]phemeral streams should have standards different from the specific water quality standards." 14 Mont. Admin. Reg. at 2257, 2265.

D. Total Maximum Daily Loads

The Clean Water Act requires states to identify water bodies "with insufficient controls"; that is, water bodies for which TBELs are "not stringent enough to implement any water quality standard applicable to such waters." 33 U.S.C. § 1313(d)(1)(A). Such waters are referred to as "impaired waters," *Friends of Pinto Creek v. EPA*, 504 F.3d 1007, 1011 (9th Cir. 2007); § 75-5-103(14), MCA, or "water quality limited segments," *Friends of the Wild Swan v. EPA*, 130 F. Supp. 2d 1184, 1188 (D. Mont. 1999); 40 C.F.R. § 130.2(j). After identifying such impaired waters—the list of which is often referred to as the "303(d)" list—states are required to establish "[p]ollution limits known as 'total daily maximum loads' ('TMDLs')" for each pollutant that is impairing each water body. *Friends of the Wild Swan*, 130 F. Supp. 2d at 1188; 33 U.S.C. § 1313(d)(1)(C). "TMDLs establish the maximum amount of

pollutants (both point source and nonpoint source) a WQLS [impaired water] can receive daily without violating the state's water quality standards." *Friends of the Wild Swan*, 130 F. Supp. 2d at 1188-89; § 75-5-103(37), MCA.

The Clean Water Act *prohibits* regulators from issuing a permit to a new source or new discharger if the discharge will cause or contribute to violation of water quality standards. *Friends of Pinto Creek*, 504 F.3d at 1011-12; 30 C.F.R. § 122.4(i). Noting "Montana's history of delay," the U.S. Federal District Court for the District of Montana prohibited the Department from issuing "new permits or increases in permitted discharges" to impaired waters, pending the Department's completion of required TMDLs, which was affirmed by the Ninth Circuit. *Friends of the Wild Swan v. EPA*, 74 F. App'x 718, 722-24 (9th Cir. 2003).

E. Monitoring Requirements

The limits of the Clean Water Act apply to each point (or "outfall") at which an operation discharges pollution to a water body: "All permit effluent limitations, standards, and prohibitions shall be established for *each outfall* or discharge point of the permitted facility." 40 C.F.R. § 122.45(a) (emphasis added). Permits must "assure compliance" with

the Clean Water Act. 33 U.S.C. § 1342(a)(2). To "assure compliance with permit limitations," the Clean Water Act requires permits to contain provisions to monitor "[t]he volume of effluent discharged from *each outfall*." 40 C.F.R. § 122.44(i)(1)(ii) (emphasis added); ARM 17.30.1344.

The Act further requires "[s]amples and measurements taken for the purpose of monitoring" to be "representative of the monitored activity." 40 C.F.R. § 122.41(j)(1). However, the Act only allows sampling at "representative" "*location*[*s*]" for "large and medium municipal separate storm sewer discharges." *Id.* § 122.26(d)(2)(iii)(D) (emphasis added).

II. The Rosebud Strip-Mine and Impaired Waters

The Rosebud Mine is a 25,000-acre coal strip-mine located in Colstrip, Montana. AR914-915. The strip-mine sprawls across the headwaters basin of Armells Creek and the headwaters of various tributaries of Rosebud Creek, AR768; AR913 (receiving streams), and discharges pollution into these headwaters from 151 outfalls. AR19-22.

WECo has a history of non-compliance with requirements of the Clean Water Act, including the Department's finding in 2009 of "significant non-compliance" for, among other things, failure to monitor

its pollution discharges. AR918. The strip-mine has repeatedly discharged pollution such as boron, iron, sulfate, and suspended solids in excess of its discharge limits, including some discharges that were 10 to 100 times greater than discharge limits. AR917 (effluent characteristics), 993 (identifying exceedances). Citing "enforcement discretion," the Department has not held the coal company liable for these violations. AR993.

Strip-mining has exacted a heavy toll on the receiving waters since the late 1970s. East Fork Armells Creek has suffered the most. The Department has determined that upper and lower segments of the creek are impaired and not meeting applicable water quality standards for aquatic life. AR1524-25, 1540-42. The Department identified "surface mining" and "coal mining" as respective sources of impairment. AR1526, 1542.

The upper segment of the creek, which runs from the headwaters to Colstrip, is impaired due to "[a]lteration in stream-side or littoral vegetative covers." AR1542. In layman's terms, "[a] huge open pit mine cutting through a stream channel is clear evidence of habitat impairment." AR1535. Because this impairment was attributed to

habitat destruction but not any specific pollutants, the Department did not require a TMDL. AR1543. The lower segment of East Fork Armells Creek, which runs from Colstrip to the confluence with the Yellowstone River, is impaired due to excessive salinity (as measured by total dissolved solids (TDS) and specific conductance (SC)) and nutrients (measured by total kjehldahl nitrogen and nitrate/nitrite). AR1526. The Department identified "coal mining" as a source of the excess salinity pollution. AR1526. A TMDL is required to recover the creek. AR1527. Although the Department recognized the need for a TMDL in 2008, AR1527, no TMDL has been prepared and none is in sight.

III. The Discharge Permit

The Department issued WECo's prior discharge permit in 1999. AR916. That permit expired in 2004, but was extended administratively for eight years, while the Department prepared the new permit. During this process, the Department repeatedly weakened the permit in response to intense lobbying by WECo. The district court correctly set aside the unlawful permit, which did nothing to restore the integrity of the receiving waters.

A. The 2010 draft permit contained WQBELs and monitoring requirements for all 151 outfalls.

The Department initially issued a draft permit and accompanying fact sheet in 2010. Doc. 35, Exs. 2-3. The draft included water-quality-based effluent limitations (WQBELs) on multiple toxic heavy metals, including aluminum, iron, and selenium. Doc. 35, Ex. 2 at 6-12. The Department developed these limitations after finding anticipated discharges of these pollutants were reasonably likely to violate water quality standards for aquatic life. Doc. 35, Ex. 3 at 19-26. The Department proposed a generous three-year compliance schedule for WECo to install necessary pollution controls, during which time the coal company would not have to comply with these pollution limits. Doc. 35, Ex. 3 at 31-32.

Prior to issuance of the permit, at a meeting in July 2009, WECo lobbied the Department to omit any numeric WQBELs from the permit pursuant to ARM 17.30.637(4), which, as noted, removes specific water quality standards from ephemeral streams. AR1708 (item 1). The Department declined and informed WECo that "EPA" was "pushing to go away from the ephemeral drainages provision," in reference to ARM 17.30.637(4). Doc. 35, Ex. 5 at WECO2-3 (referencing item 1). Instead,

the Department told WECo that for less stringent ephemeral standards to apply, the C-3 water classification would have to be changed to "E" (ephemeral) and the Department would have to conduct a use attainability analysis. AR1792 (noting discussion of "ephemeral stds [standards] applicability," "water use classification" and need for "UAA"); Doc. 35, Ex. 5 at WECO2-3. The Department never conducted a UAA. Consequently, consistent with the Department's then-current interpretation of the regulations, the draft 2010 permit asserted (albeit without citation to any study) that the receiving waters were "ephemeral," but nevertheless imposed numeric WQBELs for heavy metal pollution based on the receiving waters' C-3 classification. Doc. 35, Ex. at 3, 14-15, 19-31.

The draft permit required monitoring at *all* outfalls. Doc. 35, Ex. 2 at 15-20; Doc. 35, Ex. 3 at 32-35. The draft had alternative monitoring requirements for precipitation events, but still required monitoring "for discharges at all outfalls." Doc. 35, Ex. 3 at 32, 34. Monitoring at "each outfall" was "necessary" because precipitation events (which often lead to pollution discharges) are "often localized" and "short duration," affecting only portions of the mammoth mine. Doc. 35, Ex. 3 at 36. The

draft permit noted (somewhat repetitiously) that WECo could use automated equipment to monitor discharges at distant outfalls: a "[r]emote sampling unit can sample a representative sample of the discharged effluent when discharge occurs." Doc. 35, Ex. 3 at 36.

B. The final 2012 permit contained WQBELs for just 13 of 151 outfalls and required complete monitoring at only 23 of 151 outfalls.

WECo objected strenuously to WQBELs and monitoring requirements in the draft permit and threatened to get the Montana "Coal Council" involved. AR1793. The Department ultimately acquiesced and dramatically weakened WECo's discharge permit, omitting WQBELs and virtually all monitoring requirements.

1. Controlling toxic heavy metals was too expensive for WECo.

WECo sought to avoid the expense of complying with the numeric water quality standards and criteria for C-3 waters. WECo wrote to the Department: "One of the most problematic issues is the classification of the ephemeral outfalls in these permits as C-3 and the beneficial uses associated with that classification. This triggers many additional water quality standards . . . ." AR1783. After the Department issued the 2010 draft, WECo inveighed:

> WECo is requesting the WPB [the Department's Water Protection Bureau] to re-evaluate the development and implementation of WQBEL to the ephemeral watercourses the outfalls discharge to. In all cases the WQBEL are based on aquatic life standards, which is ridiculous based on there is no aquatic life present to protect.

AR1622-1623.

In WECo's calculus, installing pollution controls to limit toxic heavy metal pollution (aluminum, iron, and selenium) discharges to headwaters streams would not be worth it: "[W]ECo asserts that it would be an undue economic burden to establish individual treatment units at remote outfalls to achieve water quality standards for effluent discharged to ephemeral waters." AR1621. WECo had previously complained about its inability to limit iron pollution: "Iron—is big issue—because it is assoc[iated] w/ sediments; cannot meet WQBEL." AR1793.

The Department again informed WECo that it had to conduct a UAA before the receiving waters could be reclassified (by the Board) as ephemeral and thus not subject to water quality standards (uses and criteria) for C-3 waters that limit heavy metal pollution. Agency notes from an August 2010 meeting read:

> WQS [water quality standards]—ephemeral streams—Al [aluminum], Fe [iron], Se [selenium]? Discharge infiltrates—no aquatic life use[.] C-3 water-use classification problematic. TR [Tom Ried, of the Department] . . . talked about UAA [use attainability analysis]—downgrade to E-1 [ephemeral], [E-]2 . . . ?

AR1644; Doc. 35, Ex. 5 at WECO9 (WECo's notes from same meeting).

Furthermore, both the Department and WECo recognized that the Board, not the Department, would be required to change water quality standards for the receiving headwaters creeks, including stream classifications and applicable criteria. Internal Department notes observed that reclassifying a stream as ephemeral must be done by "BER [the Board]," "not [in] [a] permit" issued by the Department. Doc. 35, Ex. 4 at pdf. 1; Doc. 35, Ex. 5 at WECO4 (changing water quality standards "applies to the Board").

Further, despite its assertions that the receiving waters were ephemeral and could not support aquatic life, AR1622-23 ("ridiculous" that water could support aquatic life), WECo—its internal documents show—was uncertain of this and opposed studying the streams' actual condition. On a conference call in 2014, WECo management identified "the big question 'is there aquatic life in Armells Creek?'" Doc. 35, Ex. 9 at WECO463. WECo resisted surveying Armells Creek for aquatic life,

noting in an internal email: "Do we have a leg to stand on if we refuse to conduct these studies? If we give in are we setting ourselves up for disaster on the other end?" Doc. 35, Ex. 8 at WECO513; Doc. 35, Ex. 10 at WECO559-600 (asking Department to "reconsider" request for aquatic life survey). Recall the Department's report that the strip-mine "obliterated the channel" of East Fork Armells Creek and questioned whether the stream was "intermittent prior to mining activities." AR1540; *see* 40 C.F.R. § 131.10(g) (uses existing in 1975 cannot be removed).

In fact, decades of studies by the Department had identified multiple segments of the receiving headwater streams that were fed by groundwater and were, therefore, not ephemeral. *See* ARM 17.30.602(10) (ephemeral stream flows only in response to rain or snowmelt); ARM 17.30.602(13) (intermittent stream receives some groundwater discharge). The Department had identified intermittent stream segments in East Fork Armells Creek, West Fork Armells Creek, Stocker Creek, Lee Coulee, Spring Creek, and Pony Creek. Doc. 35, Ex. 1 at 5-6 (noting "intermittent" and "perennial surface water resources"), Ex. 6 at pdf. 4 (noting "two miles" of "intermittent" flow in

East Fork Armells Creek and "intermittent/perennial wet reach" in Lee Coulee), Ex. 7 at 5-6 (noting "intermittent" and "perennial" reaches). Indeed, in its discovery responses in this case, the Department admitted not all receiving waters were ephemeral: "DEQ does not contend that all receiving waters which the MPDES permit authorizes WECo to discharge into are ephemeral." Doc. 35, Ex. 11 at 8.

Despite its prior assertions that it would have to prepare a UAA before classifying the receiving waters as ephemeral, despite recognizing that only the Board has authority to reclassify waters and modify water quality standards, and despite its own prior findings that not all receiving waters were ephemeral, the Department acquiesced to WECo's desire to avoid paying for pollution controls, decreed *all* receiving waters "ephemeral" without conducting *any* studies, and issued WECo a permit in 2012 that removed WQBELs from all but 13 of the strip-mine's 151 pollution outfalls on the basis of the waters' ephemeral condition. AR930; AR938; *see also* AR80.

In response to the Conservation Groups' comments, the Department reasoned: "The receiving waters meet the definition of ephemeral stream in ARM 17.30.602 and are therefore by definition

ephemeral. Ephemeral stream[s] do not support beneficial uses and therefore a UAA is not necessary. The standards for ephemeral streams are given in ARM 17.30.637 and summarized in the Permit Fact Sheet." AR993.

2. Monitoring the pollution it dumps into Montana's waters was also too expensive for WECo.

Nor did WECo believe monitoring its many pollution outfalls was worth the expense. Historically, WECo has been in "significant non-compliance" for failing to properly monitor its pollution. AR918. Reflecting WECo's failure, the Department noted that it was "not confident that every precipitation-driven discharge was identified and sampled," as required by the prior permit. AR1007. Unsurprisingly, WECo found monitoring requirements "burdensome" and wanted relief. AR1793. WECo complained that monitoring pollution at all outfalls "could not be done at current staffing levels" and worried that the monitoring data could "be[] used inappropriately," presumably for enforcement or requiring additional pollution controls. AR1783-84.

Again, despite its refusal to study whether the receiving waters supported aquatic life, Doc. 35, Ex. 8 at WECO513, Ex. 9 at WECO463,

Ex. 10 at WECO599, AR11, the coal company insisted in response to the draft 2010 permit that monitoring all outfalls was too expensive because the receiving waters were ephemeral and did not support aquatic life. AR1624. Plus, WECo did not want to hire an additional employee to monitor the outfalls: "The costs estimated above do not include the additional FTE required to monitor all 104 outfall[s] on a daily basis." AR1624.

Rather than monitor all outfalls, WECo proposed "representative monitoring" of precipitation-driven pollution discharges at 12 of its 151 outfall locations, three in each of the permitted-mine areas (Areas A, B, C, and D). AR1623. The majority of pollution discharges from the strip-mine occur as a result of precipitation. AR94, 229, 2098 ("unplanned" discharges result from precipitation). WECo presented no scientific analysis that the selected outfalls would be representative of other outfalls, i.e., no analysis that they would discharge with the same frequency or that the pollution would be the same. *See* AR1623. WECo merely offered that the selected locations "are all weather accessible." AR1623.

Also without analysis, the Department acquiesced to the coal company's proposal and required monitoring of precipitation-driven discharges at only 20% of outfalls from active mining areas. AR950-52. Inconsistently, the only "representative" outfall (outfall 83) on the Rosebud Creek tributaries was in a *reclamation* area, not an area of active mining. AR35-36. The failure to monitor in these tributaries is troubling because WECo had complained that salinity limits for Rosebud Creek tributaries "would not be attainable." AR1891. The Department further asserted that the "representative" outfalls "are not linked to or associated with any of the non-representative outfalls" and would not be used to assess compliance at non-representative outfalls. AR1005-06.

When asked in discovery to provide its methodology and basis for selecting so-called representative outfalls, the Department simply stated: "DEQ selected a minimum of 20% of the outfalls as representative outfalls for monitoring precipitation-driven discharges. The goal was to select outfalls that are spatially representative and easily accessible by mine personnel during heavy precipitation events." Doc. 35, Ex. 11 at 11.

C. The 2014 revision contained zero WQBELs and required complete monitoring at 20 of 151 outfalls.

After the Department issued the 2012 permit, in October 2012 the coal company appealed to the Board. In December of that year, the Conservation Groups sued in district court. The groups stayed the District Court case pending WECo's appeal. The Department and WECo settled the appeal, and in 2014 the Department issued a modified permit. In the modified permit, the Department removed all WQBELs on toxic heavy metal pollution on the basis that all receiving waters were ephemeral. AR80.

Thus, under the modified permit, WECo could discharge unlimited amounts of aluminium and selenium, AR23-34, despite the Department's prior analysis that such discharges were likely to lead to violations of water quality standards. Doc. 35, Ex. 3 at 19-26. The modified permit also contained only weak TBELs for iron in planned discharges and no limitations on iron in precipitation-driven discharges. AR23-34. This, despite the Department's prior scientific analysis that WQBELs were required on iron pollution to prevent violations of water

quality standards, Doc. 35, Ex. 3 at 19-26, and despite WECo's statement that it could not comply with WQBELs for iron. AR1793.

In declaring all receiving waters ephemeral, the Department disregarded the Conservation Groups' comments which cited the Clean Water Act's requirement to prepare a UAA prior to reclassifying the receiving waters as ephemeral along with decades' worth of studies by the Department, as well as representations by WECo, that numerous receiving waters were not ephemeral. AR10-11. The Department said it would not revisit this aspect of the 2012 permit. AR11.

The modified permit further reduced to 20 the number outfalls that WECo must monitor for precipitation-driven discharges. AR90. The Department did not provide any scientific analysis to support its selection of outfalls. The Department rejected the Conservation Groups' comments on the basis that it was not reopening the issue from the 2012 permit. AR12-13.

IV. The District Court overturns the permit and remands to the Department

The district court subsequently declared the 2012 permit, including the 2014 modification, invalid and remanded the matter to the Department to issue a lawful permit. Doc. 54 at 24.

STANDARD OF REVIEW

I. Appellate Review

This Court "review[s] a district court's grant of summary judgment de novo, applying the same criteria as the district court." *Clark Fork Coal. v. DEQ* (*Clark Fork II*), 2012 MT 240, ¶ 18, 366 Mont. 427, 288 P.3d 183. "A district court properly grants summary judgment only when no genuine issues of material fact exist and the moving party is entitled to judgment as a matter of law." *Id.* The Court "may uphold a judgment on any basis supported by the record, even if the district court applied a different rationale." *Rooney v. City of Cut Bank*, 2012 MT 149, ¶ 25, 365 Mont. 375, 286 P.3d 241. However, the Court "will not address an issue raised for the first time on appeal." *Nelson v. Davis*, 2018 MT 113, ¶ 13, 391 Mont. 280, 417 P.3d 333.

II. Review of Agency Action

This Court reviews "an agency decision not classified as a contested case under the Montana Administrative Procedure Act"—as here—"to determine whether the decision was arbitrary, capricious, unlawful, or not supported by substantial law." *Clark Fork II*, ¶ 20. The Court "consider[s] whether the decision was based on a consideration of the relevant factors and whether there has been a clear error in

judgment." *Id.* (internal quotation omitted) (quoting *N. Fork Preservation Ass'n v. Dep't of State Lands*, 238 Mont. 451, 465, 778 P.2d 862, 871 (1989)). "It is well-established that an agency's action must be upheld, if at all, on the basis articulate by the agency itself"—post hoc rationalizations do not suffice. *Motor Vehicle Mfrs. v. State Farm*, 463 U.S. 29, 50 (1983).

In issuing a discharge permit, the Department "must take a 'hard look' at the environmental impacts." *Clark Fork Coal. v. DEQ* (*Clark Fork I*), 2008 MT 407, ¶ 47, 347 Mont. 197, 197 P.3d 482. The hard look includes "the obligation to make an adequate compilation of relevant information, to analyze it reasonably, and to consider all pertinent data." *Id.*

III. Statutory Construction

This Court "review[s] for correctness an agency's conclusions of law." *N. Cheyenne Tribe*, ¶ 19. "The same standard of review—correctness—applies to the district court's review of the administrative agency's decision, and our subsequent review of the district court's decision." *Id.* "[N]either this Court nor the district court must defer to an incorrect agency decision." *Clark Fork I*, ¶ 20.

While this Court may afford "great weight" to an "agency's interpretation of *its rule*." *Clark Fork II*, ¶ 20 (emphasis added), here it is not the Department, but the Board of Environmental Review (Board) that "adopt[s] rules for the administration" of the Water Quality Act. § 75-5-201, MCA. As such, the *Department* is *not* entitled to any deference in its interpretation of the *Board's* rules. *See Miccosukee Tribe v. United States*, No. 04-21448-CIV, 2008 WL 2967654, at *31 n.60 (S.D. Fla. July 29, 2008) (refusing to defer to agency interpretation of regulation where agency was not "standards setting body").

Similarly, when, a state agency interprets regulations under the authority of a federally created program, like the Clean Water Act, deference "applies only to the extent that the agency's rules are not contrary to the statute or regulation, and that question is one of law for the courts to determine *de novo*." *Ritter v. Cecil County Office of Housing*, 33 F.3d 323, 328 (4th Cir. 1994); *accord N. Cheyenne Tribe*, ¶¶ 25-45 (not deferring to the Department's interpretation of Clean Water Act and related regulations).

An agency's interpretation is also not due deference if the purported interpretation has *not* been "ascribed to a statute by an

agency through a long and continued course of consistent interpretation." *Mont. Power Co. v. Mont. Pub. Serv. Comm'n*, 2001 MT 102, ¶ 25, 305 Mont. 260, 26 P.3d 91. This Court will not even defer to an agency interpretation of the agency's own rule if "it is plainly inconsistent with the spirit of the rule." *Clark Fork I*, ¶ 20.

"The goal of statutory interpretation is to give effect to the purpose of the statute. A statute will not be interpreted to defeat its object or purpose, and the objects to be achieved by the legislature are of prime consideration in interpreting it." *Dover Ranch v. County of Yellowstone*, 187 Mont. 276, 283, 609 P.2d 711, 715 (1980) (internal citations omitted); *see Dubois v. U.S. Dep't of Agric.*, 102 F.3d 1273, 1299 (1st Cir. 1996) (rejecting interpretation that would undermine goals of Clean Water Act). Remedial statutes, like the Clean Water Act, 33 U.S.C. § 1251(a), "should be liberally construed to achieve their purpose." *In re C.H.*, 2003 MT 308, ¶ 20, 318 Mont. 208, 79 P.3d 822.

SUMMARY OF ARGUMENT

1. The Department unlawfully reclassified to ephemeral all receiving waters into which WECo discharges pollution and thereby modified the applicable water quality standards to eliminate aquatic

life use and remove numeric criteria, including all criteria for toxic heavy metals. The decision was unlawful because it did not follow the mandated process for reclassifying waters as ephemeral, removing uses, or weakening criteria, including preparation of a use attainability analysis and a rulemaking by the Board. The Department's decision was also arbitrary because it failed to take a hard look at the actual character of the receiving waters. The Department did not compile and analyze *any* pertinent information and ignored numerous of its own studies showing receiving waters were intermittent or perennial, not ephemeral.

2. The Department also acted unlawfully and arbitrarily by exempting the vast majority (131 of 151) of the strip-mine's outfalls from monitoring pollution from precipitation-driven discharges. The Department is mandated to require monitoring at each outfall in order to assure compliance with pollution limitations. The Department's decision was also arbitrary because it did not compile *any* information or conduct *any* analysis on which it could rationally conclude that the 20 selected "representative" outfalls could accurately represent the frequency and quality of discharges from unmonitored outfalls.

ARGUMENT

I. The District Court correctly ruled that the Department acted arbitrarily when it classified all receiving waters as ephemeral without following the required procedure and without compiling and evaluating any relevant data.

A. The Department had no authority to weaken water quality standards and could not do so without conducting a use attainability analysis.

1. The district court correctly explained that (1) only the Board, not the Department, has authority to classify streams or establish or modify water quality standards, and (2) before the Board can reclassify a water body as ephemeral, it must conduct a use attainability analysis (UAA). Doc. 54 at 18 (citing ARM 17.30.606 and ARM 17.30.615(2)).

Only the Board has authority to "classif[y]" "streams" or "establish[] or modif[y]" water quality "standards." ARM 17.30.606(1). Before any stream may be "reclassif[ied]" as an "ephemeral stream[]," the Department must conduct a UAA. ARM 17.30.615(2); 40 C.F.R. § 131.3(g). The Department must also conduct a UAA before (1) removing any designated use supporting aquatic life or (2) creating any subcategory of use with "less stringent criteria." 40 C.F.R. § 131.10(j)(2); *Kan. Natural Res. Def. Council v. Whitman*, 255 F. Supp. 2d 1208, 1217

(D. Kan. 2003); *Mo. Coal. for the Env't v. Jackson*, 853 F. Supp. 2d 903, 907-08 (W.D. Mo. 2012).

Here, the Department usurped the Board's authority by *reclassifying* all receiving waters as ephemeral and thereby *modifying* applicable C-3 water quality standards and exempting WECo from all numeric criteria for toxic heavy metal pollution. AR930, 938; AR80; *contra* ARM 17.30.606(1), 615(1)-(2). The Department admitted (and may not now dispute post hoc[2]) that it effectively *removed aquatic life use* support as a designated use. AR993 ("The receiving waters meet the definition of ephemeral stream in ARM 17.30.602 and are therefore by definition ephemeral. Ephemeral stream [sic] *do not support beneficial uses and therefore a UAA is not necessary*." (emphasis added)); *contra* ARM 17.30.615(1)-(2); 40 C.F.R. § 131.10(j)(2). And by effectively designating the receiving waters "C-3 ephemeral" and thereby removing all applicable water quality criteria, including numeric limits on heavy metal pollution, *see* ARM 17.30.629(2), the Department, at minimum, *created a subcategory* of uses which "require less stringent criteria." AR930, 938 (removing numeric criteria and omitting WQBELs); AR80

[2] *Motor Vehicle Mfrs.*, 463 U.S. at 50.

(same); *contra* 40 C.F.R. § 131.10(j)(2). The District Court correctly ruled that this may not be done by the Department and may not be done without a UAA.

2. The Department mistakenly argues that because the receiving waters remain, nominally, classified as C-3, the UAA process was not required. DEQ Br. at 13-15; WECo Br. 28-29. But because the undeniable *effect* of the Department's actions was to reclassify the receiving waters as ephemeral and thereby modify applicable water quality standards (remove uses and weaken criteria), a Board rule and UAA were required. As the Eleventh Circuit explained in an analogous case where Florida attempted to use a back-door means to alter water quality standards:

> Florida's decision not to describe its own regulations as new or revised water quality standards simply cannot 'circumvent the purposes of the Clean Water Act' if in *effect* the [rule] established new or revised standards. If it could, Florida could radically modify its water quality standards, simply disavow that a change had taken place, and the EPA could rely on Florida's disavowal to avoid its mandatory review of the modified standards.

Fla. Pub. Interest Research Group v. EPA, 386 F.3d 1070, 1089 (11th Cir. 2004) (quoting *Miccusokee Tribe v. United States*, 105 F.3d 599, 602 (11th Cir. 1997)) (emphasis in original).

Where an agency action has the *effect* of modifying a water quality standard by removing a use or requiring less stringent criteria, it must comply with the procedures for modifying water quality standards. *Miccusokee Tribe v. United States*, No. 04-21448-CIV, 2008 WL 2967654, at *20, *31 (S.D. Fla. July 28, 2008) (holding that where the "effect" of agency rule was to create an "escape clause" from numeric pollution criteria agency was required to "conduct a use attainability analysis"). So too here. That the Department "did not follow the mandated procedures to amend its water quality standards" does not insulate the agency's action, but rather reveals its unlawfulness. *Fla. Pub. Interest Research Group*, 386 F.3d at 1089-90.

3. The Department is also mistaken to rely on ARM 17.30.637(4). That rule, which establishes a different class with less stringent water quality standards for "ephemeral streams," was promulgated in 1980, before EPA's 1983 rule established the UAA process for weakening water quality standards. 14 Mont. Admin. Reg. 2252 (July 31, 1980); 48 Fed. Reg. 51,400 (Nov. 8, 1983). It was precisely in recognition that a UAA is required before reclassifying a stream as ephemeral and thereby weakening applicable water quality standards—as ARM 17.30.637(4)

does—that the Board adopted its 2002 rules creating the process for reclassifying ephemeral streams. 15 Mont. Admin. Reg. 2196, 2196-209 (Aug. 15, 2002). The Board specifically cautioned that "less stringent standards" for ephemeral streams would only apply to discharge permits "after a UAA is conducted and after the Board adopts a rule." *Id.* at 2202.

Indeed, here, the Department repeatedly told WECo that a UAA and stream reclassification to ephemeral would be required before the relaxed standards in ARM 17.30.637(4) would apply. AR1644; AR1708; AR1792; Doc. 35, Ex. 5 at WECO2-3, WECO9. When WECo suggested in 2009 that the Department could use ARM 17.30.637(4) to evade WQBELs on heavy metals, the Department disagreed, noting that EPA was "pushing to go away from the ephemeral drainages provision [ARM 17.30.637(4)]." AR1708 (item 1); Doc. 35, Ex. 5 at WECO2-3 (referencing item 1).

The Department's newly minted interpretation of ARM 17.30.637(4) improperly renders the regulations established by the 2002 rule (ARM 17.30.615(1)-(2) and ephemeral water classifications ARM 17.30.650 to 658) superfluous. *Mont. Trout Unlimited v. Mont. Dep't of*

Natural Res., 2006 MT 72, ¶ 23, 331 Mont. 483, 133 P.3d 224 (court rejects interpretations that render provisions superfluous); *see Organized Vill. of Kake v. U.S. Dep't of Agric.*, 795 F.3d 956, 966 (9th Cir. 2015) (agency reversal arbitrary absent "reasoned explanation"). If accepted, there would never be a need for Board rulemaking or a UAA. The Department could simply decree certain waters ephemeral (without analysis) under ARM 17.30.637(4) and water quality standards would go away. The Board, which promulgated the rules, did not intend to allow the Department to "circumvent the purposes of the Clean Water Act" and, thereby, "radically modify water quality standards." *Fla. Pub. Interest Research Group*, 386 F.3d at 1089.

4. All relevant case law supports the District Court's sound reasoning. If the Department or WECo desires to weaken water quality standards (by removing uses and weakening criteria, as here), the Department must prepare a UAA and the Board must reclassify the waters as ephemeral. In *California Ass'n of Sanitation Agencies v. State Water Resources Control Board*, 208 Cal. App. 4th 1438, 1455-56, 1457-59 (2012), EPA rejected, as inconsistent with its UAA rules, a proposed state rule analogous to ARM 17.30.637(4), which allowed state

regulators to modify water quality standards for headwater streams without first completing the UAA process. *Id.* at 1447. State regulators then refused the request of polluters to impose weaker permit limits on discharges to headwaters streams without first completing the UAA process. *Id.* at 1455-56. The court of appeals affirmed the reasoning of EPA and the state regulators. *Id.* at 1457-59. The court noted that if the receiving waters in question did not support certain uses, regulators could "expeditiously" initiate the process to reclassify the waters. *Id.* at 1450-51; *accord Kan. Natural Res. Def. Council*, 255 F. Supp. 2d at 1217; *Miccusoke Tribe*, 2008 WL 2967654, at *20, *31; *Mo. Coal. for the Env't*, 853 F. Supp. 2d at 907-08. So too here.

5. Last, the Department's erroneous interpretation of the applicable rules is entitled to no deference. First, no deference is due an incorrect interpretation of law. *Clark Fork I*, ¶ 20. Second, the relevant rules were promulgated by the Board and EPA, not the Department; thus, no deference is due. *Miccosukee Tribe*, 2008 WL 2967654, at *31 n.60; *Ritter*, 33 F.3d at 327-28; *accord N. Cheyenne Tribe*, ¶¶ 25-45. Third, and most importantly, this Court should not defer to an interpretation that would defeat the Clean Water Act's objective of

restoring the integrity of our Nation's waters. *Clark Fork I*, ¶ 20; *Dover Ranch*, 187 Mont. at 283, 609 P.2d at 715; *Dubois*, 102 F.3d at 1299.

The Department's interpretation would exempt a polluter (WECo) from *any* water-quality-based pollution limitations where (1) receiving waters (East Fork Armells Creek) are impaired; (2) the polluter (WECo) is causing the impairment (indeed, WECo "obliterated" the creek); and (3) the Department's own analysis concluded that WQBELs on heavy metals were necessary to prevent further violations of water quality standards. AR1525-26, 1540-42; Doc. 35, Ex. 3 at 19-26. Instead, this Court should construe the law to further the remedial objectives of the Clean Water Act. *In re C.H.*, 2003 MT 308, ¶ 20, 318 Mont. 208, 79 P.3d 822.

B. The Department's complete failure to take a hard look at the actual condition of the receiving waters before deeming them ephemeral was arbitrary and capricious.

1. The District Court correctly found that the Department's action was arbitrary because it failed to compile and analyze all relevant scientific data about the condition of the receiving waters. Doc. 54 at 19. This is an independent basis for affirming the District Court.

The Department must take a "hard look" at the environmental consequences of issuing a permit, which includes "mak[ing] an adequate compilation of relevant information, . . . analyz[ing] it reasonably, and . . . consider[ing] all pertinent data." *Clark Fork I*, ¶ 47. In issuing WECo's permit, the Department merely asserted, without citing evidence, that "all permitted outfalls discharge to receiving streams that hydrologically meet the definition of ephemeral." AR80; AR930 (same). Therefore, the Department concluded, the streams "do not support beneficial uses." AR993. Yet the Department possessed decades' worth of studies *dating from the 1980s*, showing significant portions of these waters were not ephemeral. Doc. 35, Ex. 1 at 5-6, Ex. 6 at pdf. 4, Ex. 7 at 5-6; AR10-11. Then, after issuing the permit, the Department admitted in discovery it knew not all the receiving waters were ephemeral. Doc. 35, Ex. 11 at 8. Discovery further revealed WECo's pressuring the Department to declare the receiving waters ephemeral *without conducting any study*, for fear that a study would harm its strip-mining operations (i.e., lead to enforcement or pollution controls). Doc. 35, Ex. 8 at WECO513; Doc. 35, Ex. 10 at WECO599-600.

Ultimately, intentional or not, the Department's decision to deem all receiving waters ephemeral without conducting *any* study, compiling *any* evidence, or analyzing the abundant, contrary information in its own files was, like *Clark Fork I*, ¶ 47, arbitrary.

2. The Department's post hoc effort to point to one document (a water quality standards attainment record) that describes one receiving water, East Fork Armells Creek, as being ephemeral in 1992 cannot save the Department's arbitrary analysis. First, the post hoc argument—which appears nowhere in the record—is improper. *Motor Vehicle Mfrs.*, 463 U.S. at 50. Second, cherry-picking one document is not a "hard look"—which requires compiling and analyzing "all pertinent" information. *Clark Fork I*, ¶ 47. Third, the attainment record that the Department now cites states that the strip-mine "obliterated" portions of East Fork Armells Creek, which may have cause ephemeral conditions. AR1540. If the creek had been intermittent (and supporting aquatic life) before the mine destroyed it, aquatic life support would be an "existing use," 40 C.F.R. § 131.3(e) (existing uses are uses extant in 1975), which even the Board could not remove after completion of a UAA. *Id.* § 131.10(g) (existing uses may not be removed). Consequently,

even if the Department had relied on the attainment report prior to issuing the permit (it did not), it could not have served as a basis for reclassifying East Fork Armells Creek (let alone the other receiving waters) without further compilation and analysis of information. *Clark Fork I*, ¶ 47.

3. The Department's repeatedly shifting positions regarding the nature of East Fork Armells Creek demonstrate the wisdom of the UAA process and the District Court's ruling. A "structured scientific assessment" of receiving waters prior to any weakening of water quality standards assures that the integrity of Montana's waters is restored and maintained.

II. The District Court correctly held that the Department's unlawful declaration that all receiving waters were ephemeral undermined the Department's establishment of all WQBELs.

The Department and WECo make much of the District Court's passing reference to TMDLs, but their criticisms miss the mark. While the Conservation Groups raised arguments regarding TMDLs and the Department's decision to allow WECo to discharge more pollution to impaired streams, the District Court *avoided ruling on the issue*. The District Court correctly recognized that because the erroneous

ephemeral reclassification undermined all pollution limits, it did not need to go any farther. Doc. 54 at 19. This was a deft display of judicial avoidance. The District Court committed no error.

III. The District Court correctly ruled that the Department acted unlawfully and arbitrarily when it did not require WECo to monitor precipitation-driven pollution discharges from 131 of the strip-mine's 151 outfalls.

A. By not requiring monitoring at each outfall, the permit cannot assure that pollution discharged from unmonitored outfalls will comply with pollution limits under the Clean Water Act.

1. "First and foremost, the Clean Water Act *requires* every NPDES permittee to monitor its discharges into the navigable waters of the United States in a manner sufficient to determine whether it is in compliance with the relevant NPDES permit." *NRDC v. County of Los Angeles*, 725 F.3d 1194, 1207 (9th Cir. 2013) (emphasis in original); 33 U.S.C. § 1342(a)(2). To assure compliance, Clean Water Act requires monitoring at "each outfall." 40 C.F.R. §§ 122.44(i)(1)(ii), 122.45(a).

The Department's decision to exempt WECo from monitoring precipitation-driven pollution discharges—the most common type of discharge at the strip-mine, AR94, AR229, AR2098—at 131 of 151 outfalls makes the permit *incapable* of assuring compliance, in violation

of both the plain language and the spirit of the Clean Water Act. *See N. Cheyenne Tribe*, ¶ 19; *Clark Fork I*, ¶ 20.

2. The Department's reliance on regulations requiring that "[s]amples and measurements taken for the purpose of monitoring must be representative of the monitored activity" is misplaced. DEQ Br. at 22 (citing ARM 17.30.1342(10)); *see also* 40 C.F.R. § 122.41(j). That provision about accurate *sampling* says nothing about allowing monitoring at *representative locations*.

Clean Water Act regulations permit sampling at "representative" "*locations*," (i.e., not every location) *only* for "large and medium municipal separate storm sewer discharges," which must submit information explaining why locations are representative. *Id.* § 122.26(d)(2)(iii)(D) (emphasis added). This allowance is justified for large municipal sewer systems, like that of Los Angeles, where "no one knows the exact size" of the system and the "number and location of storm drains and outfalls are too numerous to catalog." *NRDC*, 725 F.3d at 1198. This express allowance of monitoring at representative locations for large municipal sewers indicates that it is not allowed for other dischargers, like WECo. *See Dukes v. City of Missoula*, 2005 MT

196, ¶ 15, 328 Mont. 115, 119 P.3d 61 ("*expresio unius est exclusio alterius*"). For this reason, the Department's reliance (DEQ Br. at 21-22) on *Maryland Department of the Environment v. Riverkeeper* is inapposite, as that case involved the unique regulations that allow monitoring at representative *locations* for *large municipal sewer systems*, not strip-mines. 134 A.3d 892, 896, 923-24 (Md. 2016).

3. WECo's argument about the "need to obtain reliable data" is disingenuous. WECo Br. at 41. WECo has a record of "significant noncompliance" with monitoring requirements. AR913, 918. Moreover, the record shows WECo *could* monitor precipitation-driven discharges from *all* outfalls by hiring an employee, AR1624, AR1783, or installing remote sampling equipment, Doc. 35, Ex. 3 at 36, or both. But the coal company was worried that monitoring would lead to enforcement, AR1783-84, and expense, AR1624. Not obtaining data by not monitoring does not lead to the "obtain[ing] [of] reliable data." As the District Court explained, "deference . . . to the logistical issues raised by WEC[o]" was not a lawful basis for exempting the strip-mine from monitoring pollution at over 80% of its outfalls. Doc. 54 at 23.

4. WECo's citation to *In re Peabody Western Coal Co.*, 15 E.A.D. 406, 2011 WL 3881508, **13-14 (EPA Aug. 31, 2011), is inapposite. WECo Br. at 44-45. That case addressed *only* whether EPA had improperly granted a "monitoring waiver" under 40 C.F.R. § 122.44(a)(2)(iii)-(iv). EPA's Environmental Appeals Board (EAB) ruled that EPA had not granted a waiver, but noted that it was *not addressing* the argument the Department and WECo offer here: whether the requirement that sampling be "representative" allows monitoring at *representative locations*. 2011 WL 3881508 at *14 & n.29.

Monitoring is the principal way the Clean Water Act assures compliance. *See NRDC*, 725 F.3d at 1207. By exempting WECo from monitoring precipitation-driven pollution discharges at 131 of 151 outfalls, the Department effectively and unlawfully exempted the vast majority of the strip-mine from compliance with the Clean Water Act. This is an independent basis for affirming the District Court.

B. The Department's unsupported and incoherent "representative" monitoring scheme was arbitrary and capricious.

1. The District Court correctly rejected the Department's representative monitoring scheme as unsupported by information or

analysis. Doc. 54 at 23. On appeal, the Department cites only the permit fact sheet's conclusory statement that

> [d]ischarges consisting of stormwater runoff from areas classified as "Alkaline Mine Drainage" (40 CFR 434 Subpart D) are materially similar in terms of activities taking place in each area, the characteristics of soil types present, the expected runoff pollutant concentrations, the type of stormwater treatment, and the best management practices employed.

AR90, *cited in* DEQ Br. at 20-21. Neither the Department nor WECo presented *any* evidence or *any* analysis to support these bare-bones assertions.

2. In fact, the statements from the permit fact sheet about the supposed similarity of discharges are *contradicted* by the record. First, not all outfalls selected to be "representative" are from areas "classified as 'Alkaline Mine Drainage,'" i.e., from areas of active mining. Outfall 83, the only outfall selected for monitoring precipitation-driven discharges in *any* of the four tributaries to Rosebud Creek (WECo has eight pollution outfalls from active mining to these tributaries),[3] is not an outfall from active mining operations (but from reclamation

[3] Outfalls 80, 130, 130A, 130B, 131, 131A, 132, 134 discharge pollution from active mining operations into Spring Creek and Lee Coulee. AR20-21, 36-38.

operations) and, illogically, is not even subject to *monitoring* under the permit. AR35. WECo asserted it cannot comply with salinity limits for the Rosebud Creek tributaries—yet its pollution there is unmonitored. AR1891.

Second, "representative" and non-representative, unmonitored outfalls do not discharge at the same frequency, and discharges are not the same quality. The 2010 draft permit, which required monitoring at all outfalls, recognized this when it noted that isolated rainstorms might only affect small portions of the sprawling mine. Doc. 35, Ex. 3 at 36. Historic monitoring in the record illustrates this. From 2008 to 2011, there were numerous discharges from outfalls 30, 32, 70, and 119 in Stocker Creek, occasionally violating permit limits. AR808-10, AR1841; AR:2098-100. However, during this same period, there were zero discharges from outfalls 35 and 75, the two "representative outfalls" located in Stocker Creek. AR35, AR2098-2100. The record similarly shows that pollution concentrations at outfalls vary dramatically. In May 2011, outfall 95, which is supposedly "representative," and outfall 100, which would not be monitored, both had precipitation-driven discharges from Area C West into West Fork

Armells Creek. AR810; AR2099. The level of iron pollution in non-representative outfall 100 (88.8 mg/L), which violated pollution limits, was an order of magnitude higher than the level in "representative" outfall 95 (5.4 mg/L), which did not violate pollution limits (7.0 mg/L). AR1840, AR2099. There was plainly a problem at outfall 100, but monitoring at outfall 95 would not have identified it, demonstrating that the Department's "representative" monitoring scheme cannot assure compliance. *Contra* 33 U.S.C. § 1342(a)(2).

3. The Department does not, in fact, intend for the "representative" outfalls to be a means of ensuring compliance. In the Department's words, discharges from "representative" outfalls "are not linked to or associated with any of the non-representative outfalls." AR1005. Thus, the Department does not consider a violation at a representative outfall to indicate a violation at any non-representative outfalls. AR1006. This defeats the purpose of monitoring—to assure compliance and assure measures are taken to correct non-compliance. It also creates a loophole that would allow WECo to evade the requirements of the Clean Water Act—the company could pump water from settling ponds behind representative outfalls and store it in

settling ponds behind non-representative outfalls so that during precipitation events the former monitored outfalls do not discharge, but the latter unmonitored outfalls do. The representative monitoring requirement of 40 C.F.R. § 122.41(j) should not be interpreted to defeat the goals of the Clean Water Act. *Or. State Pub. Interest Research Grp., Inc. v. Pac. Coast Seafoods Co.*, No. CIV 02-924-HA, 2006 WL 2938834, at *1 (D. Or. Sept. 26, 2006) (refusing to construe representative monitoring to allow permittee to "manipulate the sampling" to evade pollution limitations); *Dubois*, 102 F.3d at 1299 (refusing to interpret Clean Water Act in way that undermines its goals).

IV. WECo's remaining arguments have no merit.

A. WECo's mootness argument has not merit.

At no point below did WECo argue about mootness. Having not raised the issue below, WECo may not raise it now. *Nelson*, ¶ 13. Moreover, the permit modification in 2014 only *modified* the 2012 permit—it did not replace it. Further, the 2014 modification did not address the issues the Conservation Groups raised with the 2012 permit (though the groups dutifully raised them again), and the Department refused to address those issues on the basis that they were

not part of the 2014 modification. AR10-11 (regarding ephemeral reclassification), 12-13 (regarding monitoring). Because the underlying 2012 permit was unlawful, the District Court appropriately set aside the 2012 permit and the 2014 modification, which repeated the errors of the 2012 permit and could not stand on its own.

B. WECo's belated objections to the administrative record are improper.

Nor may WECo raise for the first time on appeal objections to the administrative record compiled by the Department. *Nelson*, ¶ 13. WECo did not object to the record or any evidence below, but instead moved for summary judgment. Having lost summary judgment, WECo should not now get a second bite at the apple by claiming that the administrative record was inadequate. *Ryffel Family P'ship v. Alpine Country Constr., Inc.*, 2016 MT 350, ¶ 24, 386 Mont. 165, 386 P.3d 971 ("We will not unfairly fault a trial court for failing to rule correctly on an issue that it was not asked to consider.").

C. The District Court did not impose any discharge limits, but remanded to the Department.

WECo's contention that the District Court imposed pollution limits on WECo's strip-mine is mistaken. The District Court declared

the current permit invalid and "remanded to DEQ for consideration consistent" with its opinion. Doc. 54 at 24. Because no revised permit has been issued and no revised pollution limits have been established, WECo's argument about hypothetical pollution limits in relation to natural background levels continues to be unripe. *Reichert v. State ex rel. McCulloch*, 2012 MT 111, ¶ 22, 365 Mont. 92, 278 P.3d 455 ("[O]ur courts do not . . . advise what the law would be upon a hypothetical state of facts.").

CONCLUSION

The Clean Water Act tasks the Department with administering a program to restore and maintain the integrity of the waters of the United States. In Montana the Department has the further duty of protecting Montana's fundamental right to a clean and healthful environment. The District Court correctly held that the Department's permit for the Rosebud strip-mine fell short of this duty. For the reasons elaborated above, the District Court's decision should be affirmed.

Respectfully submitted this 11th day of September 2018.

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Pursuant to Montana Rule of Appellate Procedure 11, I hereby certify that this brief is printed with a proportionally spaced Century Schoolbook text typeface of 14 points; is double-spaced, except for footnotes and block quotations; and the word count calculated by Microsoft Word is 9,997 words, excluding caption, tables and certificates.

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