**No. DA 18-0110**

IN THE

# Supreme Court of the State of Montana

MONTANA ENVIRONMENTAL INFORMATION CENTER, and SIERRA CLUB,

*Plaintiffs/Appellees*,

VS.

MONTANA DEPARTMENT OF ENVIRONMENTAL QUALITY,

*Defendant/Appellant*

AND

WESTERN ENERGY COMPANY,

*Defendant-Intervenor/Appellant.*

ON APPEAL FROM THE MONTANA FIRST JUDICIAL DISTRICT COURT,
LEWIS AND CLARK COUNTY, HON. KATHY SEELEY, PRESIDING
CASE NO. CDV-12-1075

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## INTRODUCTION

The district court's Memorandum and Order on Judicial Review ("Order") applied the wrong standard of review, adopted a regulatory interpretation that excises a provision from the Administrative Rules of Montana, and rendered judgment on matters outside its jurisdiction. These errors should be corrected.

For decades, Western Energy has maintained a permit from the Department of Environmental Quality (the "Department") for discharges to state waters from its Rosebud Mine. The permit has changed over time as conditions and regulations have changed. The iteration of the permit invalidated by the Order – the 2012 Renewal[1] – establishes standards for discharges to ephemeral drainages in compliance with ARM 17.30.637(4), which applies to all surface waters, regardless of classification. The district court, Plaintiff-Appellees (Montana Environmental Information Center and Sierra Club, collectively "MEIC"), and Amici Curiae argue that the Department must disregard this valid and broadly applicable regulation, and instead reclassify the drainage before applying discharge

[1] Montana Pollutant Discharge Elimination System Permit No. MT0023965 issued September 14, 2012 (the "2012 Renewal"). *See* Opening Br., 17-18. The 2012 Renewal is the only decision MEIC challenged. Nevertheless, two modifications to the 2012 Renewal have been discussed in the case. First, the 2014 Modification resulted from the Board-approved settlement agreement between the Department and Western Energy and became effective September 8, 2014 while this action was pending. Second, Western Energy applied for Modification 2 while this action was pending. Modification 2 would revise the permit to address previously ephemeral sections of East Fork Armells Creek that, in 2014, demonstrated intermittent characteristics. *See* Opening Br., 19-20.

standards appropriate for ephemeral portions of the drainage. No authority supports the proposition that a state agency must treat a valid regulation as a dead letter.

The district court erred when it substituted its judgment for the agency's and adopted an interpretation of the Montana Water Quality Act's implementing regulations that renders ARM 17.30.637(4) superfluous. The district court further erred when it (i) substituted its judgment for the agency's technical expertise to determine the appropriate monitoring; (ii) considered post-decisional information and ruled on agency action(s) not properly before the court; and (iii) granted summary judgment and instructed the Department to disregard a valid regulation on remand, with the result that the Department's future permitting action will violate Montana law. To correct these errors of law and procedure, the lower court should be reversed.

## I. THE DEPARTMENT'S INTERPRETATIONS OF THE WATER QUALITY ACT REGULATIONS ARE OWED DEFERENCE.

This Court's case law is clear – Montana courts will defer to an agency's reasonable interpretation of its regulation. *Clark Fork Coal. v. Montana Dept. of Environmental Quality*, 2008 MT 407, ¶ 27, 347 Mont. 197, 197 P.3d 482 (*Clark Fork I*). The Department's interpretation of the water quality regulations applicable to the 2012 Renewal is reasonable and consistent with the "spirit" of the regulations because it gives effect to all portions of the regulations. The

interpretation adopted by the district court and proffered by MEIC does not. This Court should reverse the district court's decision, which failed to accord the proper deference to the agency's interpretation and compounded that failure by adopting an unlawful one. The district court further failed to defer to the Department's technical judgment regarding proper monitoring.

### A. Controlling Authority Requires this Court to Defer to the Department's Interpretation of Regulations Promulgated by the Board of Environmental Review.

In support of the district court's decision to supplant the Department's interpretation of its water quality regulations, MEIC argues that no deference is owed to the Department because the Board of Environmental Review (the "Board" or "BER"), not the Department, adopted the regulation. MEIC Br., 30, 39. This Court rejected precisely that argument over ten years ago, and MEIC provides no reason to overturn that precedent.

In *Clark Fork I*, MEIC "urge[d] this Court to adopt a new standard of review for environmental matters in which no deference is given to DEQ's interpretation of rules adopted by BER." *Clark Fork I*, ¶ 23. This Court "decline[d] to adopt new standards of review for agency decisions which concern environmental matters," explaining that factors requiring a greater degree of scrutiny, such as a challenge to the constitutionality of a statute, are not present in a challenge to an agency's regulatory interpretation as applied in a permitting action. *Clark Fork I*.,

¶¶ 25-26, 28. For such a challenge, the questions before the Court "fall squarely within the established standards": "This Court defers to an agency's interpretation of one of its regulations, unless such interpretation is plainly inconsistent with the spirit of the regulation." *Id.*, ¶ 27. Notably, this Court made no distinction between the Board as the adopting entity and the Department as the implementing entity.

In determining whether an "agency decision applying a regulation was arbitrary or capricious, the courts consider whether the decision was based on a consideration of all relevant factors and whether there has been a clear error in judgment." *Id.* This Court cautioned that, while this inquiry must be searching and careful, the "ultimate standard of review is a narrow one," and courts "do not substitute their judgment for that of the agency by determining whether its decision was correct. Rather, the courts examine the decision to determine if it was made on sufficient information, or whether the decision was so at odds with the information gathered that it could be characterized as arbitrary or a product of caprice." *Id.*

MEIC places the entire weight of its argument on one pronoun, emphasizing that the court described deference to an "agency's interpretation of *its* rule." MEIC

Br., 30 (emphasis in MEIC Br.[2]). But *Clark Fork I* rejected changes to the standard of review, regardless of any distinction between the Department and the Board. *Clark Fork II* applied, and did not change, the standard of review from *Clark Fork I*. *Clark Fork Coal. v. Dept. of Environmental Quality*, 2012 MT 240, 366 Mont. 427, 288 P.3d 183, (*Clark Fork II*). In *Clark Fork II*, this Court was clear that it did not accept the Department position, not because of any distinction between the Department and the Board, but because the Department "failed to consider the relevant factors set forth in the law prior to its decision, and as a result, committed a clear error in judgment." *Clark Fork II*, ¶ 29. This Court's precedent therefore bars MEIC's decade-old argument that the Department's interpretation of Water Quality Act regulations deserves no deference.

MEIC further attacks agency deference, incorrectly alleging that deference is appropriate only after "a long and continued course of consistent interpretation." MEIC Br., 31 (*citing Mont. Power Co. v. Mont. Pub. Serv. Comm'n.*, 2001 MT 102, ¶ 25, 305 Mont. 260, 26 P.3d 91). But MEIC admits that the regulation in question was adopted 40 years ago, does not dispute that prior versions of Western Energy's permit used the same interpretation, and never reconciles these facts with its claim that the Department's long-held interpretation is "newly minted." MEIC

[2] MEIC cites to *Clark Fork II*; however, the language quoted by MEIC is found in *Clark Fork I*, ¶ 20.

Br., 37.[3] Nevertheless, even if MEIC were challenging a new interpretation, the longevity requirement only applies to an agency's interpretation of a *statute*, not to an agency's interpretation of its own rules. *Mont. Power Co*., ¶¶ 24, 25 (discussing the rules of "statutory construction"); *see also City of Great Falls v. Montana Dept. of Public Service Regulation*, 2011 MT 144, ¶ 10, 361 Mont. 69, 254 P.3d 595. In contrast, when considering an agency's rule, this Court has repeatedly and recently "afforded great weight" to the agency's interpretation, sustaining the agency's interpretation "so long as it lies within the range of reasonable interpretation permitted by the wording." *McGee v. State, Dept. of Public Health & Human Services*, 2017 MT 166, ¶ 12, 388 Mont. 129, 398 P.3d 245 (*citing Clark Fork I*). The district court owed deference to the Department's reasonable interpretations of its regulations.

Finally, MEIC overlooks the Board's action in this case. The Board approved, without objection from MEIC, a settlement that implemented this interpretation of the regulation. *See* Opening Br., 19.

[3] MEIC contends that an interpretation in a draft permit – that was not included in the final – became the Department's interpretation. MEIC Br., 5. MEIC provides no authority for the proposition that a non-final agency document – that is at odds with the agency's final decision – dictates what an agency must decide.

## B. The Department's Regulatory Interpretation in the 2012 Renewal Deserves Deference.

The primary issue in this appeal is the interpretation of the Water Quality Act's implementing regulations governing the 2012 Renewal,[4] and on that issue the Department's interpretation should be sustained because it "lies within the range of reasonable interpretation permitted by the wording." *Clark Fork I*, ¶ 27. The district court erred in supplanting the Department's reasonable interpretation with an unlawful one.

### 1. The Department's As-Applied Interpretation in the 2012 Permit is Reasonable.

The regulations implementing the Water Quality Act protect state waters and their beneficial uses by requiring dischargers to comply with standards specific to water use classifications and with broadly applicable provisions. ARM 17.30.620 ("Specific surface water quality standards, *along with* general provisions in ARM 17.30.635 through 17.30.637, 17.30.641, 17.30.645, and 17.30.646, protect the beneficial water uses set forth in the water use descriptions for the following classifications of water." (emphasis added)). The Department must issue discharge permits "consistently with rules made by the board" and therefore cannot ignore

[4] The Order identifies multiple disagreements with the Department's regulatory interpretations. MEIC appears to disavow some of the district court's positions, including the Order's assertion that the Department was "arbitrary and not supported by law" (Order, 19) when it concluded that development of a Total Maximum Daily Load was not required. *See* MEIC Br., 43-44. Western Energy responds here to the positions that MEIC defended and reasserts its full critique of the Order in its Opening Brief.

any of the specific water quality standards or the general provisions. § 75-5-402(1), MCA; *cf. Montana Trout Unlimited v. Montana Dept. of Nat. Res. and Cons.*, 2006 MT 72, ¶ 23, 331 Mont. 483, 133 P.3d 224 ("We must endeavor to avoid a statutory construction that renders any section of the statute superfluous or fails to give effect to all of the words used.").

The Department has interpreted the "general provisions" required to protect beneficial uses (including ARM 17.30.637(4)[5]) as applying to all surface waters, regardless of classification. Significantly, when the Board adopted classifications E-1 and E-2, providing "water-use classification[s] for waters in ephemeral streams," it chose not to withdraw or revise ARM 17.30.637(4). Because ARM 17.30.637(4) is a "rule made by the board" and therefore a "relevant factor[] set forth in law," the Department is required to apply it. § 75-5-402(1), MCA; *Clark Fork I*, ¶ 27; *Clark Fork II*, ¶ 29. Failure to do so would be clear error.

The Board's retention of the narrative standard for discharges to ephemeral streams maintains the efficiency and effectiveness of classifying an entire drainage area to protect beneficial uses, as well as downstream uses, while allowing adjustments for segments of individual drainages when monitoring reveals trending increased or decreased flows. This regulatory scheme prevents arbitrary and

[5] ARM 17.30.637(4) requires discharges to ephemeral drainages to meet minimum treatment requirements and provides that ephemeral streams are subject to narrative standards.

capricious regulation of dry gullies where no aquatic life occurs. It also ensures appropriate protection if monitoring later reveals changed flow that can support aquatic life.[6]

Regardless, there is no inherent conflict between ARM 17.30.637(4), which imposes water quality standards for ephemeral drainages within all classifications, and the E-1 and E-2 classifications, which allow separate classification of ephemeral drainages. Nor does ARM 17.30.637(4) render the E-1 and E-2 classifications "superfluous" because the regulations impose different water quality standards and protocols. *Compare* ARM 17.30.637(4) (requiring compliance with technology-based treatment requirements and narrative aquatic life standards) *with* ARM 17.30.652 (E-1) (exempting discharges from compliance with narrative aquatic life standards). Notably, the narrative standards for aquatic life, required for ephemeral drainages (but *not* for E-1 streams), prevent any discharge of "unlimited amounts of toxic heavy metals" that MEIC and Amici Curiae Trout Unlimited falsely claim could occur in this case. MEIC Br., 1; TU Br., 19.

[6] Modification 2 is a perfect example. Had the segment been classified as E-1, it could not have been regulated to protect aquatic life, without a time-consuming reclassification, when the flow patterns changed from ephemeral to intermittent. Relying on the definition of ephemeral and ARM 17.30.637(4), the Department can easily adjust regulation of that segment to protect all C-3 beneficial uses found in non-ephemeral streams.

*a. The Department appropriately considered the actual condition of the receiving drainage.*

MEIC attempts to undermine the Department's interpretation, claiming that, contrary to the Department's determination, some portions of the receiving drainages are not ephemeral. However, whereas MEIC misreads stale reports, the Department used updated information to issue the 2012 Renewal.

The Department evaluated "flow data collected at surface water monitoring stations," and "water elevation data collected at groundwater monitoring wells" from "Annual Hydrology Reports," in addition to the 2010 water quality assessment, when characterizing the receiving drainages. Doc. 35, Ex. 11, pp.8-9. Conclusions from that data were consistent with conclusions from similar data dating back to "at least July 1, 1999." *Id.* In contrast, MEIC selectively cites material ranging from 10 to 20 years old. *See* Doc. 35, Exs. 1, 6, and 7. Moreover, MEIC neither identifies the allegedly non-ephemeral waterbodies, nor explains how the documents support its allegation. Indeed, the outdated documents corroborate the Department's conclusion by demonstrating that streams in the area were historically characterized as "primarily ephemeral tributaries of [West Fork Armells Creek]" with "generally ephemeral streamflow," "ephemeral tributaries of [East Fork Armells Creek and Lee Coulee]" with streamflow that "generally occurs in response to storm and snowmelt runoff," and "primarily ephemeral tributary

drainages of East Fork Armells Creek, Spring Creek, Pony Creek and Cow Creek." Doc. 35, Ex. 1, pp.5, 6; Ex. 6, pdf.4; Ex. 7, p.5.

MEIC emphasizes one sentence from the Department's discovery responses ("the Department admitted in discovery it knew not all the receiving waters were ephemeral," MEIC Br., 41) but omits critical context. The Department explained why it concluded that the receiving drainages are ephemeral, and, further, that information obtained *after* issuance of the 2012 Renewal indicated that "the easternmost segment of East Fork Armells Creek transitions from ephemeral to intermittent." Doc. 35, Ex. 11, p.8. The new information regarding one segment of East Fork Armells Creek prompted Modification 2, which addresses the intermittent reach and is not part of this action. *See* Opening Br., 19-20. Because the new information was developed *after* the 2012 Renewal, it is exactly the type of post-decisional information that MEIC agrees may not support a judicial determination regarding the 2012 Renewal. MEIC Br., 29, 34; *see also* Opening Br., 45-47.

*b. The Department accurately determined that no use attainability analysis was needed.*

MEIC further attacks the Department's interpretation by confusing the E-1 and E-2 classifications with the definitional term "ephemeral." The inclusion of ephemeral streams in the E-1 and E-2 classifications does not support MEIC's assertion that the Department has "reclassified" the receiving drainages. *Contra*

MEIC Br., 34. Nowhere in the record does the Department use any classification other than C-3. Because no reclassification occurred, no use attainability analysis was required. *See* Opening Br., 29-30.

MEIC next argues that the Department's interpretation had the "effect" of reclassifying the receiving waters and modifying applicable water quality standards. MEIC Br., 35. Yet MEIC acknowledges that ARM 17.30.637(4), itself a water quality standard, "was promulgated in 1980."[7] MEIC Br., 10. The Department's continued application of a nearly 40-year-old standard cannot be construed as modifying any water quality standards. The Eleventh Circuit cases MEIC cites do not support its untenable position because there the court criticized EPA for failing to adequately review the impact of *new* water quality provisions. *See* MEIC Br., 35-36 (*citing Fla. Pub. Interest Research Group v. EPA*, 386 F.3d 1070, 1089 (11th Cir. 2004) and *Miccusokee Tribe v. United States*, No. 04-21448-CIV, 2008 WL 2967654 at *20, *31 (S.D. Fla. July 28, 2008). Here, nothing new in Montana's water quality provisions triggers a need to review any impact.

[7] Contrary to MEIC's bald allegation that the provision was "slid into the regulation after public notice and comment at the request of WECo," *several* entities submitted comments that the Board summarized as "Ephemeral streams should have standards different from the specific water quality standards." MEIC Br., 11; 14 Mont. Admin. Reg. 2257 at 2265. Notably, the Board also responded to a contrasting comment that "The quality of ephemeral streams should be protected." *Id*. The Board considered and agreed with both, stating that it had "protected the quality of the ephemeral streams by the requirements set forth in the 'General Provisions.'" *Id*.

### 2. The Interpretation Adopted by the District Court and Supported by MEIC is Unlawful.

Because the Department's interpretation is within the range of plausible interpretations and consistent with the spirit of the regulations, the analysis can and should stop there. The Court need not inquire into interpretations that it or advocacy groups would prefer.

Even if the Court's task were to impose the "best" interpretation, the only lawful interpretation before the Court is the Department's. The alternative adopted by the district court and asserted by MEIC is fatally flawed – it renders ARM 17.30.637(4) superfluous. The district court held that the Department must reclassify a stream as E-1 or E-2 before applying narrative standards to an ephemeral drainage. Order, 18. MEIC argues – citing hearsay – that the Department's interpretation is incompatible with the federal Clean Water Act. *See* MEIC Br., 37 (*citing* Doc. 35, Ex. 5, WECO2-3 (Western Energy notes from meeting with the Department)).

MEIC is incorrect for four reasons. First, MEIC does not identify any federal authority contrary to the Department's interpretation of ARM 17.30.637(4). Second, there are serious questions regarding whether the federal government can assert jurisdiction over ephemeral drainages. *See Rapanos v. United States*, 547 U.S. 715, 723-29, 731-39 (2006) (J. Scalia) (rejecting arguments for asserting jurisdiction over ephemeral or intermittent drainages); EPA, Press Release, "EPA

and Army Propose New 'Waters of the United States' Definition" (Dec. 11, 2018). Third, even if the federal Clean Water Act extends to ephemeral drainages, Montana has been delegated authority to administer the Clean Water Act pursuant to its approved program – the Montana Water Quality Act. *See Save Our Cabinets v. U.S. Dep't of Agriculture*, 254 F. Supp. 3d 1241, 1250 (D. Mont. 2017). Finally, though the Clean Water Act grants EPA authority over state programs and individual permits, *see e.g.*, 33 U.S.C. §§ 1333(c), 1342(c), 1342(d), no evidence suggests EPA has exercised this authority to require a change in text or a different interpretation of this 40-year-old regulation. Thus, the relevant point of reference is the Montana Water Quality Act and its implementing regulations.

Turning to the governing Montana regime, the interpretation adopted by the district court is unlawful because it gives no meaning to ARM 17.30.637(4). MEIC argues the regulation should not be enforced because it was adopted in 1980, before the "use attainment analysis" requirement was promulgated. MEIC Br., 36. This argument fails because legislators and regulators are presumed to have full knowledge of existing regulations when acting and, where they do not expressly repeal a regulation, courts are obligated to apply it. *Montana Trout Unlimited*, ¶ 23. The district court and MEIC may not agree with the Board's decision to retain ARM 17.30.637(4) (and EPA's decision not to overrule the Board's choice), but they lack the authority to excise it. Any interpretation of the

regulations must give meaning to this provision. And the only interpretation before the Court that does so is the Department's.

### C. The Department's Monitoring Decision Deserves Deference.

The 2012 Renewal includes stricter monitoring than the previous version of the permit. Nevertheless, the district court faulted the Department for requiring representative monitoring. In doing so, the district court improperly substituted its judgment for the agency's.

In technical matters, involving "substantial agency expertise," the Court will "defer to an agency's decision." *Johansen v. State, Dept. of Natural Resources and Conservation*, 1998 MT 51, ¶ 29, 288 Mont. 39, 955 P.2d 653; *see also NorthWestern Corp. v. Dept. of Pub. Serv. Reg.*, 2016 MT 239, ¶ 27, 385 Mont. 33, 380 P.3d 787 (reviewing a contested case, "the court should give deference to an agency's evaluation of evidence insofar as the agency utilized its experience, technical competence, and specialized knowledge in making that evaluation."). This Court has identified "cancel[ling] a lease due to mismanagement of State land" as an agency decision involving a "high level of technical expertise." *Id.* Such a decision involves agency evaluations of the existence and circumstances of mismanagement and the appropriate sanction. Imposing monitoring requirements to protect state waters involves analogous decisions. The agency must evaluate whether the possibility for exceedances, including the circumstances of any prior

exceedances, and the appropriate monitoring to identify and correct future exceedances. Therefore, the Department's monitoring decisions involve technical determinations that deserve deference.

The Department's monitoring requirements also deserve deference because they are based on relevant factors in the governing regulations and are aligned with similar decisions, proving their reasonableness. Consistent with regulatory requirements, the 2012 Renewal requires monitoring for all discharges *not* caused by precipitation. AR0812/APP008;[8] AR0922/APP069 (complying with 40 C.F.R. § 434.40, incorporated by ARM 17.30.1345(12)(e)). But the Department may use alternate limitations for precipitation-driven discharges. *Compare* 40 C.F.R. § 434.63(a)(1)(i) *with* 40 C.F.R. § 434.63(a)(2) and (d)(2) (limitations apply to "*[a]ll* discharges of alkaline mine drainage" but "*any* discharge" that is precipitation driven "*may* comply with" alternate limitations. (emphasis added)).

MEIC inappropriately relies on regulations governing municipalities and confuses effluent limitations and monitoring requirements. MEIC Br., 44-45. While effluent limitations apply to all outfalls, the Department designs monitoring to "be representative of the monitored activity." ARM

[8] Where the document appears in both the Appendix and the Administrative Record ("AR"), parallel citations are provided. Citations to the AR are to Doc. 22, Ex. A.

17.30.1342(10)(a). Nothing about the monitoring regime exempts any outfall from the effluent limitations. Where monitoring is left to the agency's expertise, and the agency implements alternate monitoring for stormwater, the agency's decision does not violate the state or federal pollution control statutes and rules. *Minnesota Center for Env. Advocacy v. Minnesota Pollution Control Agency*, 660 N.W.2d 427, 438, 33 Envtl. L. Rep. 20, 191 (Minn. App. 2003).

**1. The Department's Evaluation of Western Energy's Past Compliance is Reasonable.**

Here, the Department evaluated the circumstances of past compliance issues, required appropriate sanctions, and implemented monitoring requirements designed to promptly identify and correct future exceedances. MEIC faults the Department's enforcement decisions for two reasons, neither of which justifies second-guessing the agency.

First, MEIC implies that mining has impaired East Fork Armells Creek, relying solely on a water quality assessment from 2010. MEIC Br., 14-15. However, a water quality assessment merely identifies waterbodies that are "threatened or impaired." § 75-5-702(1), MCA. It does not determine the *source* of the pollution; that is a subsequent process. *See* § 75-5-703, MCA. Indeed,

recent investigation revealed that the mine likely *is not*, and *has not been*, the cause of any impairment of East Fork Armells Creek.[9]

Second, MEIC notes a 2010 failure to monitor violation and water quality exceedances from 2011, complaining that they demonstrate a history of non-compliance to which the Department did not react appropriately. MEIC Br., 13-14, 46. But Western Energy timely and satisfactorily responded to the 2010 monitoring failure; therefore, per the Department's violation letter and the governing statute, no further enforcement action could be taken. AR1133-1138; § 75-5-617(2), MCA.

Due to Western Energy's commitment to monitoring, records of unusual water levels and resulting discharges were promptly transmitted to the Department during the historically wet spring and summer of 2011. AR1120-1131. Early 2011 was one of the wettest periods in recent Montana history. Using its prosecutorial discretion, the Department chose to forego enforcement for the highly unusual precipitation-driven discharges. Instead, the Department required automated monitoring at representative outfalls to ensure that discharges would be accurately

[9] Pursuant to § 26-10-201, MCA, Western Energy moves the Court to take judicial notice of the 2018 Water Quality Assessment Report. APP156-172. As the Department explained under oath in a hearing in which MEIC participated, the 2018 Report corrects erroneous "anecdotal" information in the 2010 Report – now cited by MEIC. MEIC Br., 14-15; APP163, 167, 175. Although the incorrect information is formally part of the administrative record, Western Energy requests that the Court take judicial notice of the correction and exclude the erroneous information from its consideration.

monitored and that samples would be collected. AR1783-84; AR1624. This regime goes beyond the requirements of the Clean Water Act, but, in the Department's judgment, is necessary due to the remote locations of some outfalls and the Department's concern that not "every precipitation-driven discharge was identified and sampled" in the past. AR1007/APP147. The Department's conclusion is similar to (but more stringent than) EPA's approach at a similar mine. *See* Opening Br., 43-45. While precedent from EPA is not binding, it is strong evidence that the Department's technical conclusions were not unreasonable.

**2. The Department's Imposition of Representative Monitoring Was Reasonable.**

MEIC echoes the Order's assertion that the Department did not adequately support the representative sampling requirement for precipitation-driven discharges. MEIC Br., 48. But the Order applied the wrong standard of review and relied on incorrect facts.

The district court inappropriately considered the 2014 Modification post-decisional information and incorrectly assumed it corresponded to the 2012 Fact Sheet. *See* Opening Br., 47-49. The district court ignored the Department's well-reasoned explanation provided in response to comments on the 2012 Renewal. Order, 22-23; AR0999/APP139; *see* Opening Br., 41-42. Contrary to the Order's claim, the 2012 Renewal expressly limits representative monitoring to

"precipitation-driven discharges" and does not apply to "the large-scale activity of the mine." AR0999/APP139, Order, 23. The Order cites nothing showing the Department's analysis is "at odds with the information gathered." *Clark Fork I*, ¶ 27. Because the Department's decision is reasonable, and because the district court failed to consider the Department's analysis and cited no evidence contrary to the Department's decision, the Order fails to comply with the "ultimate standard of review [which] is a narrow one." *Id.; Johansen*, ¶ 29.

MEIC's concern that representative monitoring "creates a loophole" ignores the terms of the permit. MEIC Br., 50. Presumably, MEIC believes Western Energy would pump discharges away from outfalls selected for monitoring. Ignoring the obvious logistical and financial prohibitions of pumping water across a 25,600-acre mine, MEIC's unrealistic water-moving scenario would not avoid compliance because such discharges would not be "precipitation-driven" – and the 2012 Renewal requires Western Energy to prove a discharge is "caused by precipitation" before the representative monitoring regime applies. AR0945/APP092; AR0922/APP069.

## II. THE DISTRICT COURT'S DECISION IS PROCEDURALLY FLAWED.

The Order reflects serious procedural and jurisdictional errors. The Order rules on a decision not before the court, and it does so based on improper

consideration of post-decisional information. This Court should restore compliance with Montana's Rules of Civil Procedure.

MEIC dismisses these flaws with the erroneous claim that Western Energy did not object and therefore acquiesced in the district court's extra-jurisdictional review. MEIC Br., 51-52. Even if Western Energy had been silent (which it was not), Western Energy lacks authority to vest the district court with jurisdiction.

The facts of the district court's lack of jurisdiction remain unrefuted. First, the record indisputably shows: (i) MEIC never filed an amended complaint adding the 2014 Modification (or Modification 2); (ii) Western Energy objected to the district court proceeding with summary judgment before the 2014 Modification was complete; and (iii) Western Energy clearly stated its position that the 2014 Modification was not before the district court. *See* Opening Br., 48.

Second, a complaint challenging a permit vests the district court with jurisdiction to resolve the disputes identified in the complaint. It does not render the district court an ombudsman of all subsequent permitting actions. *See* Rule 15(a) Mont. R. Civ. P. (rules for amending pleadings). Yet that is precisely how the district court acted. The district court expressed an intent to "consider[] as necessary" any "relevant change in the permit resulting from" the then-pending administrative review, despite MEIC's failure to amend its complaint to challenge anything other than the 2012 Renewal. Doc. 17, p.3.

The significant problems caused by the district court's failure to comply with the principles of civil procedure are manifest in the Order. The district court's confusion about the administrative record is so profound that it cites the Department's ignorance *in 2012* of events that would take place *in 2014* as evidence of the Department's failure to take a "hard look." *See* Opening Br., 24, 47-48. This is no mere quibble regarding the administrative record. This is prejudicial and reversible error.

## III. THE DISTRICT COURT CANNOT REQUIRE UNLAWFUL PERMIT CONDITIONS.

Compliance with the Order requires imposing limits to protect aquatic life in dry washes that cannot, by definition, support aquatic life. It also requires treating waters to levels "purer" than the natural background, in violation of the law. Opening Br., 50-51. In an argument it did not raise below, MEIC now claims such impacts are hypothetical. MEIC Br., 53. But the C-3 standards and narrative standards for ephemeral drainages are established and have obvious consequences for permitting. The impacts of applying one standard but not the other are real and discernable; therefore, Western Energy's argument is properly before the Court. *See Montana Immigrant Justice Alliance v. Bullock*, 2016 MT 104, ¶¶ 22-26, 383 Mont. 318, 371 P.3d 430 (case is ripe when plaintiffs challenge a regulation based upon "a threat of future injury").

## CONCLUSION

For the foregoing reasons, Western Energy requests that this Court reverse the Order.

Dated this 11th day of January, 2019.

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## CERTIFICATE OF COMPLIANCE

The undersigned, Victoria A. Marquis, certifies that the foregoing complies with the requirements of Rule 7.1(d)(2). The lines in this document are double spaced, except for footnotes and quoted and indented material, and the document is proportionately spaced with Times New Roman Font typeface consisting of fourteen characters per inch. The total word count is 5,000 words or fewer, excluding caption, table of contents, table of authorities, index of exhibits, signature blocks and certificate of compliance. The undersigned relies on the word count of the word processing system used to prepare this document.

*/s/ Victoria A. Marquis*
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