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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.

SUPPLEMENTAL BRIEF OF PLAINTIFFS-APPELLEES MONTANA ENVIRONMENTAL INFORMATION CENTER AND THE SIERRA CLUB IN RESPONSE TO ORDER OF APRIL 30, 2019

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

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INTRODUCTION

The Conservation Groups respectfully respond to this Court's request for supplemental briefing as follows:

DISCUSSION

I. Legally, there is no valid basis for the Department's use of "representative" monitoring of mining outfalls for precipitation-driven events.

In issuing WECo's discharge permit, the Department relied solely on 40 C.F.R. § 122.41(j)(1)[1] to exempt 75 percent of the strip-mine's outfalls from active mining operations from monitoring necessary to gauge pollution discharged during precipitation events. AR999.[2] That provision, which mandates accurate *sampling*, states: "Samples and measurements taken for the purpose of monitoring shall be representative of the monitored activity." 40 C.F.R. § 122.41(j)(1). No court has interpreted this requirement for accurate *sampling* to create a loophole that allows polluters to forego necessary *monitoring*. *E.g.*, *Pub.*

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[1] The parallel Montana regulation is ARM 17.30.1342(10).

[2] On judicial review, the Department may only offer the arguments it articulated during the administrative process and *may not* offer *post hoc* rationalizations. *Motor Vehicle Mfrs. v. State Farm*, 463 U.S. 29, 50 (1983) ("It is well-established that an agency's action must be upheld, if at all, on the basis articulated by the agency itself.").

Interest Research Grp. of N.J., Inc. v. N.J. Dep't of Envtl. Prot. & Energy, No. CIV. 89-5371 (AET), 1993 WL 118195, at *7-8 (D.N.J. Apr. 12, 1993) (finding disputed questions of fact whether samples were representative of monitored activity where plaintiffs alleged sampling occurred upstream of pollution discharges).

"The Clean Water Act demands regulation in fact, not only in principle." *Waterkeeper Alliance, Inc. v. EPA*, 399 F.3d 486, 498 (2d Cir. 2005). To accomplish this, the Act "fundamentally relies on self-monitoring" by polluters. *NRDC v. Cnty. of L.A.* (*NRDC I*), 725 F.3d 1194, 1208 (9th Cir. 2013) (quoting *Sierra Club v. Union Oil*, 813 F.2d 1480, 1491 (9th Cir. 1987)). Thus, "the Clean Water Act *requires* every NPDES[3] 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." *Id.* at 1207 (emphasis in original); 33 U.S.C. § 1342(a)(2) (providing that discharge permits must contain monitoring provisions "to assure compliance" with permit

[3] "National Pollution Discharge Elimination System." The approved Montana program is the "Montana Pollution Discharge Elimination System" or "MPDES."

limitations); *accord* 40 C.F.R. § 122.44(i)(1), *incorporated by reference by* ARM 17.30.1344(2)(b).

"Under the Act, permits authorizing the discharge of pollutants may issue only where such permits *ensure* that *every discharge* of pollutants will comply with all applicable effluent limitations and standards." *Waterkeeper Alliance*, 399 F.3d at 498 (first emphasis in original, second emphasis added). "[A]n NPDES permit is unlawful if a permittee is not required to effectively monitor its permit compliance." *NRDC I*, 725 F.3d at 1208.

With the notable exception of permits that only impose best management practices (BMPs) in lieu of numeric effluent limits at pollution outfalls or permits that regulate internal waste streams, neither of which is the case here,[4] "[a]ll permit effluent limitations, standards, and prohibitions shall be established for *each outfall*." 40

[4] For this reason, *Upper Missouri Waterkeeper v. DEQ*, 2019 MT 81, ___ Mont. ___, 438 P.3d 792, is inapposite. That case involved municipal separate storm sewer systems, pollution from which is regulated via application of a suite of BMPs. *Id.*, ¶ 6. BMPs—for example public education requirements at issue in *Upper Missouri Waterkeeper*, ¶ 6—are not required to apply at *each outfall*. ARM 17.30.1345(1); 40 C.F.R. § 122.44(k); *cf.* 40 C.F.R. § 122.44(i)(1)(ii).

C.F.R. § 122.45(a) (emphasis added); ARM 17.30.1345(1). In these circumstances, to "assure compliance" with limits at *each outfall*, permits must require polluters to monitor the "volume of effluent discharged from *each outfall*." 40 C.F.R. § 122.44(i)(1)(ii) (emphasis added). If a permit "does not contain a mechanism to evaluate compliance with WQBELs [i.e., relevant numeric limits], the monitoring requirements are arbitrary and capricious and not in accordance with law." *NRDC v. EPA* (*NRDC II*), 808 F.3d 556, 583 (2d Cir. 2015).

Here, because it does not require *any* monitoring of precipitation-driven discharges at approximately 75 percent of its outfalls at which numeric pollution limits apply, WECo's water pollution permit is *incapable* of evaluating or ensuring compliance at those outfalls. Further, despite the Department's assertion that its dramatically reduced monitoring scheme is "representative" of unmonitored outfalls, the agency stated precisely the opposite in developing and issuing the permit. The Department's response to comments explained that the few "representative" outfalls where precipitation-driven pollution discharges are monitored are *not intended to represent* any of the unmonitored outfalls:

- "Response 36: Representative outfalls are not linked to or associated with any of the non-representative outfalls." AR1005.
- "Comment 38: If a representative outfall discharges during a precipitation event is it assumed that all outfalls that it represents discharged as well? Response 38: No. Representative outfalls are not used to make any assumption regarding non-representative outfalls." AR1005-1006.
- "Comment 40: Will the non-representative outfalls be held to the sample taken at the representative outfall? Response 40: No. See Responses 36 and 38." AR1006.
- "Comment 42: If a non-representative outfall discharges and its representative outfall does not discharge during the same precipitation-event, is it considered a discharge or not? Response 42: See Responses 36 and 38 [i.e., no]." AR1006.

Thus, while the Department argues on appeal that it somehow "calculat[es] or estimate[es] the volume [of effluent] discharged at [non-representative] outfalls based on monitoring at representative outfalls," DEQ Reply at 17, the administrative record makes clear that the

agency does not, in fact, use so-called "representative outfalls" "to make any assumption regarding non-representative outfalls." AR1005-1006.

As the Second Circuit explained, the Clean Water Act "demands regulation in fact, not only in principle." *Waterkeeper Alliance*, 399 F.3d at 498. Here, because the "non-representative" outfalls are never monitored for precipitation-driven discharges and because the so-called "representative outfalls" *do not*, in fact, operate to *represent* discharges from the non-representative outfalls, WECo's pollution permit does not contain *any* mechanism for ensuring that the non-representative outfalls are complying with applicable numeric limits for pollution-driven discharges. *NRDC II*, 808 F.3d at 583. It is therefore "arbitrary and capricious and not in accordance with law." *Id.*; *accord NRDC I*, 725 F.3d at 1208. It is further arbitrary and capricious for the Department to denominate certain outfalls as "representative" for monitoring purposes, while simultaneously asserting that they *do not represent* the unmonitored, "non-representative" outfalls. *Nat'l Parks Conservation Ass'n v. EPA*, 788 F.3d 1134, 1145 (9th Cir. 2014) (inconsistency is "the hallmark of arbitrary action").

II. Factually, no data in the administrative record supported the Department's decision that the 20 outfalls listed in Table 17 represented the strip-mine's 82 active outfalls.

The Department's decision to require monitoring of precipitation driven discharges at only 20 of the strip-mine's 82 active outfalls was unsupported by *any* data in the record, as the District Court correctly observed. Instead, the permit fact sheet contained only a conclusory statement, unsupported by any citation to data or analysis:

> Due to the number of outfalls at the facility and the inaccessibility of remote outfalls, representative monitoring is allowed for discharges resulting from precipitation events. Discharges 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's Reply at 17; *see Ocean Advocates v. U.S. Army Corps of Eng'rs*, 402 F.3d 846, 870 (9th Cir. 2004) (rejecting "perfunctory and conclusory" findings by agency in suit under National Environmental Policy Act). Conspicuously absent are any data or citations to any scientific analysis.

In response to discovery requests, the Department confirmed that it did not collect or analyze *any data* to demonstrate that the supposedly "representative" outfalls would discharge the same pollutants at the same frequency as unmonitored "non-representative outfalls":

> INTERROGATORY NO. 8:
>
> If you contend that precipitation-driven discharges from the mine are to be monitored at "representative" outfalls as opposed to monitoring all outfalls identified in the permit, *state with particularity the facts or process by which DEQ selected the "representative outfalls*." . . . .
>
> ANSWER:
>
> DEQ selected a minimum of 20% of the outfalls to serve 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.

Dist. Ct. Docket Entry (Doc.) 35, Ex. 11 at 10-11 (emphasis added).[5]

Having failed to identify *any data* supporting its "representative"

[5] The Department only resorted to its unlawful monitoring scheme after WECo—which has a history of "significant non-compliance" with monitoring requirements, AR918—complained that monitoring all outfalls could lead to more enforcement and would require hiring additional personnel. AR1783-1784; AR1624. As the District Court noted, these are not valid basis for eliminating required monitoring.

monitoring scheme in response to the Conservation Groups' discovery request, the Department is estopped from now attempting to identify additional data that it did not previously produce to the Conservation Groups. *Nelson v. Nelson*, 2002 MT 151, ¶ 20, 310 Mont. 329, 50 P.3d 139 (explaining that judicial estoppel "seeks to prevent a litigant from asserting a position that is inconsistent, conflicts with, or is contrary to one that she has previously asserted in the same or in a previous proceeding" (internal bracket omitted) (quoting 28 Am. Jur. 2d Estoppel and Waiver § 74 (2000))).

Indeed, the Department *could not have possessed* any data in the record to show that the so-called "representative" outfalls would discharge the same pollutants at the same frequency as unmonitored "non-representative outfalls" (i.e., ensure compliance)—because, in issuing the 2012 Permit, the Department proclaimed that the "representative" outfalls "are not linked to or associated with" and "are not used to make any assumption regarding non-representative outfalls." AR1005-1006. That is, they are not representative.

Ultimately, the Department's failure to gather or analyze *any* data to support its "representative" monitoring scheme was arbitrary and

capricious. *Clark Fork Coal. v. DEQ*, 2008 MT 407, ¶ 47, 347 Mont. 197, 197 P.3d 482 (in issuing discharge permit, Department must "make an adequate compilation of relevant information, [] analyze it reasonably, and [] consider all pertinent data").

III. The District Court correctly vacated WECo's permit, including the 2014 modification, which was not severable from the 2012 permit and which WECo never sought to sever.

A. Having not objected to—but instead *supported*—the Department's inclusion of the 2014 modification in the administrative record, WECo may not now allege error on appeal.

It is foundational that "[t]his Court will not put a district court in error for a ruling or procedure in which the appellant participated, acquiesced, or did not object." *In re Marriage of Lewton*, 2012 MT 114, ¶ 17, 365 Mont. 152, 281 P.3d 181; *accord McDonald v. McNinch*, 63 Mont. 308, 316, 206 P. 1096, 1098 (1922) ("A party who participates in or contributes to an error cannot complain of it."). "[I]t is unfair to fault the trial court on an issue it was never given an opportunity to consider." *In re Marriage of O'Moore*, 2002 MT 31, ¶ 3, 308 Mont. 258, 42 P.3d 767.

Here, the Department—WECo's co-defendant—compiled and filed with the District Court an administrative record that included both WECo's 2012 permit and the 2014 amendment to the permit. All parties relied on this administrative record during merits briefing. For example, in its brief in support of its motion for summary judgment, WECo cited the record for the 2014 amendment: "[T]he Complaint presents no genuine issues of material fact when viewed in light of the administrative record of the 2012 permit (*as confirmed by the record underlying the 2014 Modification*)." Doc. 37 at 6 (emphasis added); *see also id.* at 15 n.9 (citing 2014 modification to support argument); *id.* at 19 n.13, 21 n. 14 (same); Doc. 43 at 13-15 (repeatedly citing record for 2014 modification to support arguments).

Thus, before the District Court, WECo made the strategic calculation that the record for the 2014 modification would benefit its position. Accordingly, the coal company not only failed to object to the District Court's consideration of the record associated with the 2014 modification, but in fact attempted to use the 2014 modification to its advantage. Having thus urged the District Court to consider the 2014 amendment, WECo may not now be heard to argue that the District

Court erred in doing so. *State v. Kaarma*, 2017 MT 24, ¶ 51, 386 Mont. 243, 390 P.3d 609 (defendant could not claim error on appeal about district court's sealing of proceedings because defendant had moved to seal proceedings); *accord In re Marriage of O'Moore*, ¶ 3 (unfair to fault district court for failing to address issue that was never raised).

Quoting and selectively editing an excerpt of a footnote in its response brief before the District Court, WECo misleadingly asserts that it "clearly stated its position" to the District Court about the 2014 amendment. WECo Br. at 48 (citing Doc. 43 at 13 n.8); *see also* WECo Reply at 21. But passing statements in footnotes do not preserve arguments for appellate review. *United States v. Restrepo*, 986 F.2d 1462, 1463 (2d Cir. 1993) ("We do not consider an argument mentioned only in a footnote to be adequately raised or preserved for appellate review."). Moreover, the footnote merely observed that the 2014 modification repeated the (erroneous) reasoning of the 2012 permit:

> The 2014 Permit [modification] is not the subject of this litigation, and, *even if it were there is no difference between the 2012 Permit and the 2014 Permit [modification] in the applicable limitations during precipitation-driven discharges for discharges to ephemeral streams, regardless of whether outfalls are new or old.*

Doc. 43 at 13 n.8 (emphasis added). This equivocal footnote distinctly did not apprise the District Court of WECo's new-found concerns about "serious procedural and jurisdictional errors," related to the inclusion of the 2014 amendment in the administrative record. WECo Reply at 20. Indeed, the footnote indicates WECo found the inclusion of the 2014 amendment in the record to be irrelevant. *Id.* ("even if it were, there is no difference"); *see* Doc. 37 at 6 (indicating belief that 2014 modification supported WECo's position); *see also* Mont. R. Civ. P. 61 (harmless error is disregarded).

B. WECo may not argue that consideration of post-decisional information was error because WECo has repeatedly urged this Court to consider post-decisional and extra-record information on appeal.

The doctrines of judicial estoppel and unclean hands foreclose WECo's gamesmanship over the District Court's supposedly improper reliance on post-decisional information. *Nelson*, ¶ 20 (judicial estoppel prevents parties from taking inconsistent positions in litigation); *Cowan v. Cowan*, 2004 MT 97, ¶ 16, 321 Mont. 13, 89 P.3d 6 (unclean hands doctrine "provides that parties must not expect relief in equity, unless they come into court with clean hands." (internal quotations omitted)

(quoting *Kauffman-Harmon v. Kauffman*, 2001 MT 238, ¶ 19, 307 Mont. 45, 36 P.3d 408)).

Here, not only did WECo acquiesce to and participate in the Department's inclusion of the 2014 modification in the administrative record provided to the District Court, *see supra* Part III.A, on appeal WECo has also *repeatedly* urged this Court to consider *post-decisional* and extra-record information that was never presented to the District Court. *E.g.*, WECo Reply at 18 n. 9 (requesting Court to take judicial notice of 2018 water quality standards assessment report); WECo Notice of Supp. Authority (Apr. 24, 2019) (asking Court to consider 248 extra-record, proposed findings from 2019); WECo Notice of Supp. Authority (June 13, 2019) (presenting additional extra-record information and argument).

The coal company cannot have it both ways. Given WECo's repeated maneuvering to present this Court with post-decisional and extra-record information, the coal company should not be heard to argue that it was improper for the District Court to consider information related to the 2014 modification. *Nelson*, ¶ 20; *Cowan*, ¶ 16. This is particularly so, given that it was the Department—WECo's own

co-defendant—that included the information in the administrative record and given that WECo never objected to this information and, in fact, relied on it in its arguments to the District Court.

C. The 2014 modification was not severable because it addressed only 12 outfalls, repeated the errors of the 2012 permit, and could not operate independently of the 2012 permit.

It was not error for the District Court to vacate WECo's entire permit, including the narrow 2014 modification, which was not severable and which WECo did not request to sever.

Although WECo appealed the 2012 permit to the Montana Board of Environmental Review (Board), no merits arguments were ever presented to the Board, and the Board never issued a merits ruling (despite WECo's statements to the contrary, *see* WECo Reply at 6). Instead, WECo and the Department reached a settlement and moved to remand the matter to the Department to address the settled issues. AR581-583. The hearing examiner, Katherine Orr, granted the motion to remand. AR577-578.

Under the settlement, the Department reclassified as "existing sources" 8 outfalls that were classified as "new sources" in 2012. AR76-77. Then based on its unsupported and erroneous assumption first

announced in the 2012 permit that all receiving waters were ephemeral,[6] the Department removed water quality based effluent limitations (WQBELs) for heavy metals (aluminum, selenium, copper, and iron) from the 12[7] erstwhile "new" outfalls on which it had imposed such limitations in the 2012 permit. AR79-81 (fact sheet); AR585 (settlement agreement). Thus, with the 2014 modification, the Department extended the unlawful and unsupported ephemeral waters exemption announced in the 2012 permit to 12 additional outfalls. The remaining 139 outfalls—which had no WQBELs—were unaltered.

On remand to the Department, the Conservation Groups again submitted comments explaining that the Department could not reclassify the receiving waters as ephemeral without first conducting a use attainability analysis (UAA). AR10-11. The groups further

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[6] *E.g.*, Doc. 35, Ex. 11 at 8 (admitting that "DEQ does not contend that all receiving waters which the MPDES Permit authorizes WECo to discharge into are ephemeral").

[7] The Conservation Groups incorrectly stated in their response brief that the 2012 permit established WQBELs for *13* outfalls. Resp. Br. at 18. In fact, the 2012 permit only established WQBELs for 12 outfalls. AR812-813 (identifying 11 new outfalls to East Fork Armells Creek); AR814-815 (identifying 1 new outfall to Stocker Creek).

identified historical studies from the Department's own files indicating that not all receiving waters were ephemeral. AR10-11. The Department responded that it was only taking comment with respect to the 12 outfalls for which it was removing WQBELs and that it would not revisit its 2012 decision to reclassify all receiving waters as ephemeral (without studying the receiving waters and without preparing a UAA). AR12.

Because the 2014 modification merely extended the erroneous ephemeral waters reclassification of the 2012 permit to 12 additional outfalls (the only remaining outfalls with WQBELs) and because the Department refused to revisit its 2012 determination that it could unilaterally remove applicable water quality standards from streams that it deems ephemeral, there was no need for the Conservation Groups to separately challenge the 2014 modification.

WECo's suggestion—raised for the first time on appeal—that the District Court should have severed the provisions of the 2014 modification relating to the 12 outfalls from the unlawful 2012 permit has no merit. First, if WECo had wanted to sever the 12 outfalls subject to the 2014 modification, it should have raised the issue with the

District Court. Having failed to do so, the coal company may not now raise the issue on appeal. *In re Marriage of O'Moore*, ¶ 3.

Moreover, the narrow 2014 modification could not be severed from the 2012 permit. "A regulation is severable if the severed parts 'operate entirely independently of one another.'" *Ariz. Pub. Serv. Co. v. EPA*, 562 F.3d 1116, 1122 (10th Cir. 2009) (quoting *Davis Cnty. Solid Waste Mgmt. v. EPA,* 108 F.3d 1454, 1459 (D.C.Cir.1997)). However, if the part to be severed is "intertwined" with the unlawful provisions being vacated, "*vacatur* of the whole [administrative decision] would be proper." *Tel. & Data Sys., Inc. v. FCC*, 19 F.3d 42, 50 (D.C. Cir. 1994) (emphasis in original). In the context of the Clean Water Act, it is proper for a court to vacate or declare void a discharge permit with impermissibly lax pollution limitations. *E.g.*, *N. Cheyenne Tribe v. DEQ*, 2010 MT 111, ¶ 47, 356 Mont. 296, 234 P.3d 51.

Here, the 2014 modification was intertwined with and could not operate independently of the 2012 permit. The 2014 modification applied to only 12 of the strip-mine's 151 outfalls, and it repeated the same improper reclassification of receiving waters as the 2012 permit. Moreover, in issuing the 2014 modification, the Department refused to

revisit its improper reclassification of receiving waters as ephemeral. It was therefore appropriate, as in *Northern Cheyenne Tribe*, for the District Court to vacate the permit in its entirety, without severing the provisions relating to the 12 outfalls subject to the 2014 modification. The Department will be able to reassess appropriate WQBELs for all outfalls on remand.

CONCLUSION

The District Court correctly held that the permit's monitoring requirements were arbitrary and unsupported. WECo's arguments about the 2014 modification have no merit. The District Court's ruling should be affirmed.

Respectfully submitted this 17th day of June, 2019.

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CERTIFICATE OF COMPLIANCE

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 3,545 words, excluding caption, tables and certificates.

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