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

DEFENDANT-INTERVENOR/APPELLANT WESTERN ENERGY COMPANY'S ADDITIONAL BRIEF IN RESPONSE TO ORDER

JOHN C. MARTIN
HOLLAND & HART LLP
975 F STREET, N.W.
WASHINGTON, D.C. 20004

25 S. WILLOW STREET
P.O. BOX 68
JACKSON, WY 83001
TELEPHONE: (307) 739-9741
FAX: (307) 739-9744
JCMartin@hollandhart.com

WILLIAM W. MERCER
VICTORIA A. MARQUIS
HOLLAND & HART LLP
401 North 31st Street, Suite 1500
P.O. Box 639
Billings, MT 59103-0639
Telephone: (406) 252-2166
Fax: (406) 252-1669
wwmercer@hollandhart.com
vamarquis@hollandhart.com

Counsel for Appellant Western Energy Company

Additional Counsel Information on Following Page

Shiloh Hernandez
Matthew Bishop
Laura King
Western Environmental Law Center
103 Reeder's Alley
Helena, MT 59601

Attorneys for Plaintiffs/Appellees Montana Environmental Information Center and Sierra Club

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

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

Kirsten Bowers
Edward Hayes
Department of Environmental Quality
Legal Unit, Metcalf Building
1520 East Sixth Avenue
P.O. Box 200901
Helena, MT 59620-0901

Attorneys for Defendant-Appellant Montana Department of Environmental Quality

Laura S. Ziemer
Patrick A. Byorth
Meg K. Casey
Trout Unlimited
321 East Main Street, Suite 411
Bozeman, MT 59715

Attorneys for Amicus Curiae Trout Unlimited

Andrew Gorder
Clark Fork Coalition
140 S. 4th St. W, Unit 1
Missoula, MT 59801

Attorney for Amicus Curiae Clark Fork Coalition

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INTRODUCTION

Defendant-Intervenor/Appellant Western Energy Company ("Western Energy") appeals from a District Court Memorandum and Order on Judicial Review ("Order") purporting to vacate two Department of Environmental Quality ("Department") permitting decisions: the 2012 Renewal of Western Energy's Montana Pollutant Discharge Elimination System ("MPDES") permit[1] for the Rosebud Mine, and a 2014 Modification of the 2012 Renewal. The Order also relied upon information related to a subsequent application to modify ("Modification 2") that was pending before the Department.

On April 30, 2019, this Court ordered the parties ("Briefing Order") to file simultaneous "additional briefing regarding monitoring of Rosebud Mine's outfalls" on the following issues:

- The legal basis underlying the use of representative monitoring of outfalls in precipitation-driven events in Montana;
- With specific reference to data in the administrative record, the Department's decision that the 20 outfalls listed in Table 17 represented Rosebud Mine's 82 active outfalls; and
- Western Energy's argument regarding this Court's ability to consider the subsequent modifications of the 2012 Renewal.

[1] Montana Pollutant Discharge Elimination System Permit No. MT0023965 issued September 14, 2012. *See* Opening Br., 17-20 for additional discussion of the three Department actions discussed (2012 Renewal, 2014 Modification, and 2016 Modification).

The answers to these issues further demonstrate that the Order is flawed and must be vacated. Both Montana and federal law strongly support the use of representative monitoring for precipitation-driven discharges from mine outfalls. The arguments raised by Plaintiff-Appellees Montana Environmental Information Center and Sierra Club (collectively, "MEIC"), challenging representative monitoring fail to acknowledge the broad discretion granted to permitting agencies to craft appropriate monitoring requirements. Here, the record shows that the Department designed and applied reasonable criteria to identify outfalls that would produce data representative of the monitored activity – precipitation-driven runoff.

The subsequent modifications of the 2012 Renewal – the 2014 Modification and Modification 2 – are not properly before this Court for the simple reason that MEIC never challenged them. Montana's Rules of Civil Procedure and the Board's regulation governing finality for purposes of judicial review are intended to establish clear rules so that all parties understand the scope of the dispute and the District Court's limited jurisdiction. Because MEIC did not wait for a final agency decision and never amended its Complaint to include anything other than the 2012 Renewal, neither the 2014 Modification nor Modification 2 are properly before this Court.

RELEVANT PROCEDURAL HISTORY

The 2012 Renewal is the only decision MEIC challenged. Nevertheless, two modifications to the 2012 Renewal have been discussed in the case. The initial modification of the 2012 Renewal (2014 Modification) resulted, in part, from the Board-approved Settlement Agreement between the Department and Western Energy. AR0577-0600. The 2014 Modification became effective on September 8, 2014 while this action was pending. AR0016. The second modification of the 2012 Renewal (Modification 2) revised the permit to address previously ephemeral sections of East Fork Armells Creek ("EFAC") that, in 2014, demonstrated intermittent characteristics. *See* Western Energy Opening Br., 19-20. Modification 2 became effective in January 2016.

Application for 2012 Renewal

In 1999, the Department issued a permit for surface water discharges to the Rosebud Mine. AR1413. In 2004, Western Energy timely filed for renewal of the permit and the permit was administratively extended during the review process. AR1413; *see* ARM 17.30.1313. The Department finalized the 2012 Renewal in September 2012 and the permit became effective on November 1, 2012. AR0805 (2012 Renewal at 1) [App.001]; AR0516.

2012 Renewal Challenge and Resulting 2014 Modification

Western Energy filed an administrative appeal arguing that the 2012 Renewal inaccurately characterized certain outfalls as "new." *See* AR0585 (Settlement Agreement). The subject outfalls had been previously authorized under a different numbering system and were erroneously identified as "new" outfalls in the 2012 Renewal. AR 0076-77. Pursuant to a settlement between Western Energy and the Department, Western Energy applied for modification of the 2012 Renewal on May 8, 2014. AR0238. The 2012 Renewal was modified effective September 8, 2014 (2014 Modification) to reflect the correct outfall designations.[2] AR0075-91. MEIC did not oppose the Settlement Agreement or the 2014 Modification.[3]

2016 Modification of 2012 Renewal

In 2014, Western Energy and the Department became aware that a portion of EFAC that had previously been considered (and permitted) as ephemeral, was showing characteristics consistent with an intermittent stream. Consequently,

[2] In addition to correcting the "new outfall" issue, the 2014 Modification (1) revised water quality based effluent limitations; (2) transferred fifteen outfalls to Western Alkali standards; (3) revised effluent monitoring requirements; and (6) removed three representative monitoring outfalls. AR0076.

[3] The Department published notice of the 2014 Modification and solicited public comment. AR0096-99. MEIC submitted comments on the 2014 Modification but did not challenge the final agency action. AR0100-0128.

Western Energy applied for a second modification to the 2012 Renewal to account for the new information. Dep't Br. In Supp. of Summ. J. (Feb. 13, 2015), Dkt. 39, Exh. 1, Aff. of Melissa Sjolund (Feb. 13, 2015) at ¶ 11. The Department had not acted on this application for modification prior to the summary judgment briefing in this matter, and Modification 2 only became effective in January 2016. There is no dispute that the record is devoid of any information about Modification 2 beyond Ms. Sjolund's affidavit. Nonetheless, at MEIC's urging, the District Court devoted substantial attention to this new information (see Order at 19 and n.8).

The Litigation Before the District Court

Before the Board's approval of the Settlement Agreement and the effective date of the 2014 Modification, MEIC filed suit challenging DEQ's issuance of the 2012 Renewal. MEIC's Complaint makes no mention of the 2014 Modification, and MEIC never sought to amend its Complaint to account either for the 2014 Modification or Modification 2. The District Court initially stayed MEIC's challenge to the 2012 Renewal pending resolution of Western Energy's administrative appeal. *See* June 13, 2013 Minute Entry, Dkt. 13. However, prior to completion of the administrative process, MEIC sought to lift the District Court

stay. Both Western Energy and the Department objected, but when MEIC pressed its contention that the stay should be lifted, the District Court agreed.[4]

Though MEIC never amended its Complaint to embrace either the 2014 Modification or Modification 2, MEIC interspersed arguments regarding the two modifications in its briefing to the District Court. Given the absence of the requisite administrative record, or in the case of the then-pending Modification 2, even a final decision from the Department, the District Court's holding is at odds with the administrative process.

ARGUMENT

I. MONTANA LAW AUTHORIZES THE DEPARTMENT TO IMPOSE REPRESENTATIVE MONITORING FOR PRECIPITATION-DRIVEN DISCHARGES.

This Court ordered the parties to brief the "legal basis underlying the use of representative monitoring of mining outfalls in precipitation-driven events in Montana." Briefing Order at 2. Montana law mirrors federal law on this point, and both vest the permitting authority – here, the Department – with broad discretion to craft a system that appropriately checks the monitored activity. This discretion extends to requiring representative monitoring for precipitation-driven discharges from mines.

[4] A more detailed procedural history of the District Court action is provided in Western Energy's Opening Brief at 4-5.

This Court recently observed that the Department "has a statutorily broad authority to require monitoring of discharges into state waters." *Upper Missouri Waterkeeper v. DEQ*, 2019 MT 81, ¶ 38 (citing § 75-5-602, MCA). In exercising this broad authority, the Department is empowered by statute to "require the owner or operator of any point source . . . to . . . sample effluents using specified monitoring methods at designated locations and intervals." § 75-5-602, MCA. This section parallels a similar requirement in the federal Clean Water Act. *See* 33 U.S.C. § 1318(a)(A) ("The Administrator shall require the owner or operator to . . . (iv) sample such effluents (in accordance with such methods, at such locations, at such intervals, and in such manner as the Administrator shall prescribe) . . ."). Reviewing that provision, the Ninth Circuit came to the same conclusion this Court did, holding that the federal version of the law gives the Environmental Protection Agency ("EPA") "wide discretion and authority to determine monitoring requirements in NPDES permits." *Natural Res. Def. Council v. EPA*, 863 F.2d 1420, 1434 (1988).

The Department's implementing regulation is an exact copy of the EPA's version. Montana, like EPA, requires that "[s]amples and measurements taken for purpose of monitoring must be representative of the monitored activity." *Compare* ARM 17.30.1342(10)(a) *with* 40 C.F.R. § 122.41(j)(1). Both federal and state regulations also require permits to include monitoring requirements, "including

type, intervals, and frequency sufficient to yield data which are representative of the monitored activity . . ." ARM 17.30.1351; 40 C.F.R. § 122.48(b). These regulations add an important limitation on the agency's discretion in crafting monitoring requirements – that is, the monitoring requirements must be "representative of the monitored activity."

At a fundamental level, all monitoring is representative because a sample is taken as a representative of the whole. When the regulations require monitoring to be "representative of the monitored activity" they mean that the monitoring must produce results that fairly represent the character of the activity being monitored, *i.e.*, a selected type of discharge.

Accordingly, courts and agencies have routinely approved a wide variety of monitoring schemes if they are designed such that the samples and measurements taken are representative of the activity for which the permit is sought. *See, e.g.*, *Natural Res. Def. Council v. EPA*, 863 F.2d at 1433-34 (upholding "valid and useful" visual sheen monitoring requirement to monitor for potential presence of oil in discharged drilling muds); *Coastal Environmental Rights Foundation v. California Regional Water Quality Control Board*, 12 Cal. App. 5th 178 (2017) (noting that the permitting authority has "wide discretion in developing and imposing monitoring requirements" and upholding a visual monitoring requirement for overwater firework debris discharges).

Courts and agencies have applied the same standard to mining operations – the monitoring requirements must be representative of the monitored activity. *See e.g.*, *Ohio Valley Environmental Coal. Inc. v. Fola Coal Company, LLC*, No. 2:12-3750 (S.D.W.Va. Dec. 19, 2013) (holding that because samples are required to be "representative of the monitored activity" for monitoring, they are also "representative" for enforcement); *In re Peabody Western Coal Co.*, 15 E.A.D. 406, 425-26 (E.P.A. Aug. 31, 2011), 2011 WL 3881508, *13-14 (rejecting an argument that a provision requiring sampling of 20% of 111 outfalls at the Black Mesa Complex coal mine during precipitation events was a "waiver" of monitoring requirements for the remaining outfalls).

Likewise, when Virginia recently issued a NPDES permit to the Red River Coal Company for "control of surface water runoff resulting from precipitation and/or groundwater discharges from coal mining activities associated with mining," it allowed compliance monitoring at "representative" locations: "The outfalls listed above may be representative of a group of substantially similar outfalls on this mining operation." Virginia, Department of Mines, Minerals and Energy, "Authorization to Discharge Under the Virginia Pollutant Discharge Elimination System and the Virginia State Water Control Law," NPDES Permit Number 0080787 (Expiration Date: 01/06/2021) at 2, at 6 ("monitoring shall begin within six months of completion of construction of the first sedimentation basin

serving any of each of these groups of substantially similar outfall locations, or as soon as a measurable discharge occurs. If the representative outfall is not constructed first or is not the first outfall of the group represented to discharge active mine drainage [Part II Section C NPDES Definitions, (B)], the first discharging outfall within a substantially similar group should be utilized. The sampled outfall will then serve as the representative outfall for this group unless otherwise determined by the Division. The permittee should send notification to the Division prior to sampling if the designated representative outfall is not utilized[,]" and "[s]ampling and analysis of the representative outfalls is also required at permit renewal."), at 8 ("The permittee shall monitor effluent that is representative of Outfall(s) 011 within 6 months of approval of this NPDES permit.").

The monitored activity at issue here is precipitation-driven discharge from active coal mining areas. The primary pollutant in this discharge is suspended sediment accumulated as the precipitation travels across the disturbed mining areas. Stormwater permits, which explicitly require representative monitoring, provide a useful comparison because the "monitored activity" – precipitation-driven discharges from developed areas – is quite similar. In both cases, the discharge occurs in response to precipitation, rather than as a byproduct of operations. And, in both cases, the discharge collects from surface runoff over a

relatively large area. The stormwater permitting system expressly anticipates that monitoring will take place at representative locations and requires permittees to explain why their proposed locations are "representative." *See* 40 C.F.R. § 122.26(d)(2)(iii)(D). Montana's regulations applicable to all MPDES permits do not require applicants to propose and defend representative locations, but, contrary to MEIC's argument (MEIC Reply Br., 44-47), that does not mean that the Department is precluded from selecting such locations. To the contrary, Section 75-5-602, MCA, expressly authorizes the Department to "require the owner or operator of any point source . . . to . . . sample effluents using specified monitoring methods at designated *locations* and intervals." (Emphasis added).

Thus, cases evaluating whether a stormwater monitoring regime is sufficiently "representative" provide highly useful guidance in determining whether monitoring for precipitation-driven discharges at a mine is sufficiently representative of the monitored activity. These cases accept that the purposes of monitoring are effectively achieved if, as here, a "representative" subset of outfalls is monitored. These cases thus focus on both the frequency of monitoring and the locations chosen to determine whether it is "representative of the monitored activity." Noting that pollution monitoring is "squarely within DEQ's area of expertise," this Court upheld representative monitoring in the Department's stormwater general permit where it was "supported by substantial evidence of . . .

improvements from the last general permit." *Upper Missouri Waterkeeper v. DEQ*, 2019 MT 81, ¶ 40. The Maryland Court of Appeals upheld a stormwater permit as "representative" where it included increased monitoring frequency to improve pollution load estimates and where the monitoring site selection was designed to "maintain an adequate number of residential, commercial, and industrial sites for State water chemistry needs" and therefore captured "a continuum of activities (industrial, residential, and commercial)"). *Maryland Dep't of the Environment v. Anacostia Riverkeeper*, 134 A.3d 892, 928-29 (2016). Notably, the Maryland Court looked to whether all land uses within the drainage area were represented in the monitoring locations to determine whether the monitoring system was designed to be "representative of the monitored activity."

Thus, the law strongly supports the Department's decision to impose representative monitoring of precipitation-driven discharges from mining outfalls – provided that the resulting data is "representative" of the monitored activity – here, defined by the Department as "precipitation-driven run-off." AR1005.

II. THE RECORD SUPPORTS THE DEPARTMENT'S CHOICE OF REPRESENTATIVE OUTFALLS.

The Court ordered the parties to brief "[w]ith specific reference to data in the administrative record," the Department's decision that "the 20 outfalls listed in Table 17 represented Rosebud Mine's 82 active outfalls." Briefing Order at 2. Table 17 in the 2012 Renewal lists the outfalls in reclamation areas. Western

Energy reads the Court's order to refer to Table 16 of the 2012 Renewal, which lists the 23 outfalls that will be monitored during precipitation-driven discharges as representative of the 97 active outfalls in the 2012 Renewal. AR0825-0828.[5] The 23 outfalls listed in Table 16 of the 2012 Renewal represent more than 20% of the 97 active outfalls at the mine. AR0090.

The 2012 Renewal prescribes that alternate effluent limitations and monitoring requirements are only applicable for discharges caused by qualifying precipitation events and/or snowmelt. AR0818-0826. Western Energy "has the burden of proof that the discharge was a result of a precipitation-driven pond overflow, and that the alternate limitations presented here are applicable." AR0945. Additionally, Western Energy is required to monitor precipitation "in each drainage basin to generate data demonstrating discharges were precipitation driven." AR0945; 0952; 0953. When precipitation-driven discharges occur, monitoring must take place within "the first thirty minutes of discharge from any permitted outfall for any discharges which results from a precipitation related events, at minimum." AR0952. Further, the Department required "the Permittee

[5] The term "active outfalls" refers to all of the outfalls at the mine except the outfalls in reclamation areas. Active outfalls are effectively the outfalls listed in Table 1 minus the outfalls listed in Table 17. For the 2012 Permit, there are 97 active outfalls. For the 2014 Modification, there are 82 active outfalls. Note that Table 16 of the 2014 Modification (which adjusted the number of outfalls to correct for double-counting in the 2012 Renewal Table 16) lists 20 outfalls that will be monitored during precipitation driven discharges as representative of the 82 active outfalls. AR0035.

to install and use flow monitoring and sampling equipment at each representative outfall" because "precipitation events are often localized, high intensity, short duration thunderstorms, and watersheds often cover vast and isolated areas." AR0954. Therefore, the Department limited the circumstances under which a precipitation-driven discharge can occur, required Western Energy to prove that the discharge was precipitation-driven, and imposed automated sampling requirements to effectively monitor the representative outfalls.

Additionally, because of a concern for "the potential for surface runoff to come into contact with coal piles and plant areas" the Department required that all of the outfalls in coal preparation areas be monitored during *any and all* precipitation-driven discharges. AR0825-26; AR 0950. All of the remaining active outfalls are subject to Western Alkaline Mine Drainage effluent limitations based on the type of mining activity taking place upstream of each outfall. *See* AR2069-2073 (table identifying the "influent" to each outfall); AR0825-0826 (Table 16 identifying the relevant subpart of 40 CFR 434 that governs the effluent limitations based on the upstream mining activity for each outfall). Additionally, the Department chose outfalls in each drainage basin of the mine area. AR0825-0826 (Table 16 identifying the receiving water for each outfall.).

Put in non-technical terms, because the mining upstream of each outfall is essentially the same, leading to the same anticipated surface disturbance, each of

these outfalls is subject to the same water quality standards. Therefore, as the Department correctly noted, the outfalls designated in Table 16 appropriately represent all active outfalls because all active outfalls 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 best management practices employed." AR0950; 0999; *see also* Order, p. 9 (citing to the 1999 Permit's Statement of Basis which, for stormwater discharges, concluded that "due to the nature of runoff, the quality of the discharged wastewater is relatively constant between individual outfalls, being more dependent upon retention time prior to discharge than on source location."). The outfalls to be monitored "were chosen based on location, receiving water, contributing drainage area, and accessibility during wet conditions." AR0950; 0999.

The record shows that the Department and Western Energy evaluated whether the similarity in upstream mining activities and resulting similarity in effluent limits, could support a decision to use representative monitoring for precipitation-driven discharges. Relying on three-years' worth of monitoring data, Western Energy noted that "due to the nature of runoff, the quality of the discharged wastewater is relatively constant between individual outfalls," which supports the Department's conclusion that "the expected runoff pollutant

concentrations" are materially similar for all active outfalls. AR2079; *see also* AR2098-2100 (data provided to the Department).

As Western Energy pointed out in its comments to the permit in 2010, a distinction between discharges consisting "solely of storm water from precipitation events" and "controlled pit dewatering events" was necessary. AR1623. Western Energy offered to "monitor selective outfall[s] (which are [accessible] during inclement weather) for the term of the permit to generate a viable data set in which the Department could conduct reasonable potential calculations. AR1623.

The Department and Western Energy discussed the logistics of how to safely obtain the best, and most timely monitoring results. Western Energy pointed out that "it is not *physically* possible for mine site personnel to conduct daily monitoring of all 104 outfalls during sever[e] weather; *nor is it safe* to place monitoring personnel in those situations." AR1623 (emphasis added). Not only is it physically impossible to canvas the entire mined area (approximately 350 acres) during precipitation events, it is also unsafe and puts mine employees at risk by traveling to remote areas on unpaved roads during severe weather. Therefore, Western Energy proposed representative outfalls in each mining area. AR1623.

Western Energy also commented on the required auto-sampling, noting that it would cost "approximately $20,000 per location" not including the operation and maintenance costs. AR1896. Contrary to MEIC's assertions, the cost was not a

deciding factor for the Department, which required the expensive auto-sampling despite Western Energy's objections, in order to "ensure that effluent samples are collected during precipitation events and that accessibility will not be an excuse for missed monitoring opportunities." AR0999.

At a meeting to discuss the issue, the Department articulated the standard that "representative" monitoring at the Rosebud Mine should achieve. It should include at least 20% of the permitted outfalls, and the outfalls "should be chosen to get a good representation of mine areas, receiving waters, and drainage areas." The Department also wanted the outfalls to be "accessible so that samples may be collected from automated equipment ASAP following precipitation."[6] AR1617; *see also* AR0950 (reciting same standards in Permit Fact Sheet). The meeting notes reflect that, based on these standards, Western Energy representatives developed a proposed list of outfalls using "area maps." AR1617-18. The proposed list differs slightly from the list the Department ultimately adopted, but both fulfill the Department's standard. *Compare* AR1618 *with* AR 0825-26 (Table 16). The Department's final list includes outfalls located in Mine Areas A, B-East, B-West, C-East, C-West, C-Central, and D, and which discharge to EFAC,

[6] While the required equipment will take the samples automatically, the samples must be promptly retrieved for processing and analysis. AR0826.

Stocker Creek, West Fork Armells Creek, Black Hank Creek, Spring Creek, and Cow Creek.[7]

In sum, the Department articulated a reasonable standard to obtain samples that would be representative of runoff from the mine: the representative outfalls chosen include all major mine areas, each of the receiving streams, and both major drainages in the mine area. The sites selected are over 20% of the outfalls in active mining areas. They are also located to ensure that samples are timely collected, processed, and analyzed. This is consistent with case law from analogous stormwater permitting challenges, in which courts have upheld monitoring where it is supported by substantial evidence, is designed to improve on past practices, and captures all land uses within the drainage area. *See Upper Missouri Waterkeeper*, 2019 MT 81, ¶ 40, 438 P.3d 792; *Maryland Dep't of the Environment v. Anacostia Riverkeeper*, 134 A.3d at 928-29. Acting "within its area of expertise," the Department appropriately exercised its "broad discretion" to establish a monitoring system that, in its expert opinion, would best capture the "monitored activity" – precipitation-driven discharges from active coal mining areas – and is due deference to its well-reasoned, expert decision. *Upper Missouri Waterkeeper*, 2019 MT 81, ¶ 40.

[7] These outfalls also fall within the two drainages at issue, EFAC (tributaries include West Fork Armells Creek, Stocker Creek, and Black Hank Creek) and Rosebud Creek (tributaries include Spring Creek, and Cow Creek). AR0916.

III. NO AGENCY ACTION POST-DATING THE 2012 RENEWAL WAS PROPERLY BEFORE THE DISTRICT COURT, AND THE RECORD DOES NOT SUPPORT THE ORDER'S DECISION ON SUBSEQUENT AGENCY ACTIONS.

Although MEIC challenged only the 2012 Renewal, at MEIC's urging, the District Court addressed the post-2012 administrative actions. The Court lacked jurisdiction to consider the 2014 Modification and Modification 2 was neither final nor was it within the claims raised in MEIC's Complaint. Accordingly, the Order is procedurally flawed and devoid of record evidence.

A. The 2014 Modification is Not Properly Before the Court.

Western Energy's position is based on the fundamental principle of civil procedure that the parties' pleadings define the scope of civil litigation. Here, no pleading put the 2014 Modification before the District Court.

"[A] civil action is commenced by filing a complaint with the court," Rule 3 Mont. R. Civ. P., and "the rights of the parties are determined at that time." *Craver v. Waste Management Partners of Bozeman*, 265 Mont. 37, 44, 874 P.2d 1, 5 (1994) (overruled on other grounds). Thus, filing the complaint sets a clear marker in the record and prohibits the consideration of later-occurring events absent a subsequent amendment of the complaint. While Montana has liberal pleading standards, *Brilz v. Metropolitan General Ins. Co.*, 2012 MT 184, ¶ 19, 366 Mont. 78, 285 P.3d 494, Western Energy is aware of no authority for the proposition that a complaint challenging a discrete agency action vests the District

Court with jurisdiction to consider and rule on the validity of subsequent agency decisions.

Here, MEIC's Complaint identifies the challenged action in paragraphs 37-38 as the "final Rosebud MPDES permit" issued on September 14, 2012, *i.e.*, the 2012 Renewal. Complaint, Doc. 1, at 5-6. The five claims in the Complaint each reference "the permit" (earlier defined as the 2012 Renewal). *See id.* at 11-15. There can be no question that the Complaint, which was filed in 2012, does not make any reference to the 2014 Modification.

The 2014 Modification, thus, could be properly before the court *only* if MEIC received permission to amend its Complaint and then did so. It did not. Rule 15 describes when and how a pleading may be amended. Relevant here, Rule 15(a)(2) provides that after the period for amendments as a matter of course has elapsed and before trial, "a party may amend its pleading only with the opposing party's written consent or the court's leave. The court should freely give leave when justice so requires."[8] Notably, Rule 15 puts the onus on the *party* to amend its complaint. While the court must "freely give leave," the party must request it and must actually file an amended pleading. The District Court's assertion that it would "consider[] as necessary" any "relevant change in the permit

[8] Rule 13 provides an example of when justice might require: the court "may permit the party for a supplemental pleading asserting a counterclaim that matured or was acquired by the party after serving an earlier pleading." Rule 13(e) Mont. R. Civ. P.

resulting from" the then-pending administrative review (that would ultimately lead to the 2014 Modification) cannot substitute for the process Rule 15 requires. Doc. 17, p.3. This was not a trial where the court could determine by the request or actions of the parties that an issue outside the pleadings was tried by consent, or a trial where the parties listed a new issue in the Final Pretrial Order. *See* Mont. R. Civ. P. 15(b)(1) and (2); 16(e). It was a summary judgment proceeding, where parties are entitled to notice of what will be addressed and other process due under the requirements of Rule 56(c).

In its Reply, MEIC attempted to paper over its failure to amend its Complaint, arguing that Western Energy did not object to the District Court's statement. This argument is unavailing for two reasons. First, it is false. Western Energy opposed the resumption of the judicial proceeding before the 2014 Modification was complete (and well before Modification 2) and reasonably noted in briefing that "[t]he 2014 Permit is not the subject of this litigation." Dkt. 43 at 13, FN8. The District Court rejected Western Energy and the Department's position. Second, and perhaps more importantly, Western Energy cannot vest the District Court with the ability to consider an issue not raised in the Complaint. The Rules of Civil Procedure provide simple and straightforward means to open a civil action and to incorporate new issues into the action after it has commenced. These rules are balanced to protect the rights of plaintiffs to expand the case if necessary,

in the interests of justice as it advances, and the rights of defendants to know the full scope of the dispute. MEIC upset this balance by arguing new claims during litigation.

The Order acknowledges the 2014 Modification but does not address how the decision comports with ARM 17.30.1379(1), the regulation that stays judicial review pending the completion of an administrative review, such as the Settlement Agreement and resultant 2014 Modification. *See* Order at 7-15 (procedural timeline). ARM 17.30.1379(1) is intended to promote judicial economy, and this case is a poster child for its wisdom. Here, as Western Energy explained in its earlier briefing, it did not understand the District Court to have expanded the scope of the case to include the 2014 Modification or Modification 2. *See* Op. Br., 48. Indeed, the record before the District Court contained only a single reference to Modification 2. *See* Dkt. 39, Exh. 1, Aff. of Melissa Sjolund, ¶ 11. The District Court's decision to press forward with MEIC's challenge to the 2012 Renewal in the face of the pending administrative actions (on which the District Court would ultimately rely), together with the resulting Order, based largely on improperly intermingled documents from an incomplete record, demonstrate the fundamental importance of ARM 17.30.1379(1) in limiting the District Court's ability to consider the subsequent modifications of the 2012 Renewal.

B. Western Energy's Application for Further Modification Was Neither Final Agency Action, Nor Properly Included in MEIC's Complaint.

MEIC compounded the confusion in this litigation by arguing elements of a subsequent modification sought by Western Energy. MEIC advanced arguments grounded on changes to the permit that were being *considered* by the Department during summary judgment briefing (Modification 2). As a result, the District Court appears to have been under the mistaken impression that the Department's disclosure that it was undertaking Modification 2 to address the new "intermittent" characteristics in a segment of EFAC was an admission "within the context of [the] lawsuit" that the segment had always been designated as intermittent. *See* Order at 19. Had the issues been properly before the court at the appropriate time pursuant to ARM 17.30.1379(1) using the processes required by Rule 15, Western Energy and the Department would have known the scope of the District Court's intended review, and they could have briefed the issues appropriately to prevent the District Court's confusion. Perhaps more importantly, if the District Court had the benefit of a final agency decision and a complete administrative record for Modification 2, it would have recognized that the Department was addressing a reasonable request to modify the 2012 Renewal to account for a portion of the stream that was no longer ephemeral.

C. The Record Does Not Support the District Court's Decision to Invalidate the Permit.

"As to the modifications of the permit in 2014," the Court ordered the parties to "address the data in the record and the arguments before the Board of Environmental Review that either support or contradict the District Court's decision to invalidate the permit as modified in 2014." Briefing Order at 2. The District Court Order does not distinguish whether holdings are specific to the 2012 Renewal or the 2014 Modification. Nevertheless, the following two holdings appear to apply to the 2014 Modification:[9]

1) "Given the importance of outfall locations and monitoring, DEQ's procedures that do not specify and confirm the location of outfalls appear indefensible." Order at 21.

2) The Department's "lack of consideration of the evidence in the administrative record showing that a portion of [EFAC] is not ephemeral during the renewal process at issue shows a clear error of judgment by DEQ during the permitting process. . . . There is no basis to find the situation could not have been addressed at some point between the September 30, 2004 expiration of the permit and the modification that became effective November 1, 2014." Order at 19.

[9] The Order implies a possible third holding, stating of the 2014 Modification, "[i]t is undisputed that the four new outfalls permitted by DEQ in 2014 involve new discharge points and potentially new discharge of pollutants points [sic]. It is also undisputed that nondegradation review is applicable. Admin. R. Mont. 17.30.701-08." Order at 21. The Order does not address the nondegradation review further, but to the extent it implies that the appropriate review was not performed for the four new outfalls, it is incorrect. The record reflects that the Department performed the appropriate nondegradation review for the new outfalls. *See* AR12, AR14 (explaining the nondegradation review performed in the Response to Comments on the 2014 Modification).

The record contradicts the District Court's assumptions underlying each of these holdings.

1. The 2014 Modification Appropriately Corrected Outfall Identification Errors in the 2012 Renewal.

The Order notes that "during the modification process between 2102 and 2014, public comment was made regarding the fact that some of the outfalls set out in the renewal application by [Western Energy] were the same as previous outfalls, but identified in the 2012 permit as new outfalls." Order at 20-21. The District Court faulted the mislabeling as "indefensible." *Id.* at 21. However, the primary purpose of the 2014 Modification (to which MEIC commented but did not object, *see* AR0100-0128) was to rectify that error. *See* AR0076-0077(2014 Fact Sheet); AR0585-0600 (Settlement Agreement between Department and Western Energy to resolve error); AR0577-0578 (Board of Environmental Review Order approving Settlement Agreement). There was no basis to fault the Department for the mislabeling error in the 2012 Renewal because that error was properly resolved in the 2014 Modification.

MEIC attempts to cast a simple correction and clarification as some sort of nefarious plot to remove water quality based protections for new outfalls. MEIC Reply Br., 2. In reality, the Settlement Agreement and the resulting 2014 Modification "correct the identification of certain 'new' source outfalls that were previously permitted and are 'existing' sources" and clarify effluent limitation and

monitoring changes. AR0098 (public notice of 2014 Modification); AR0585 (articulating the Boards' scope of remand).

2. There is No Credible Evidence in the Record Supporting the District Court's Assertion That Receiving Segments of EFAC Were Intermittent Before the 2014 Modification.

In faulting the Department for its treatment of the intermittent segment of EFAC in the 2014 Modification, the District Court claimed that there was "evidence in the administrative record showing that a portion of EFAC *is* not ephemeral" and that "[t]here is no basis to find the situation could not have been addressed at some point" before the 2014 Modification was approved. The holding is incorrect on both points.

A thorough review of the record shows no evidence that the any segment of Upper EFAC was not ephemeral between 2004 and 2014.[10] To the contrary, the record shows that all evidence before the Department consistently indicated that the relevant parts of Upper EFAC *were* ephemeral:

- **2010 Attainment Record.** The Department's then-current attainment record for Upper EFAC states that the "[s]tream is ephemeral" and clarifies that "flow begins at or near hwy. 39," which is downstream

[10] Indeed, the only such evidence comes from the February 13, 2015 Affidavit of Melissa Sjolund, which states that a "*recent* hydrological assessment of East Fork Armells Creek indicated that a portion of that stream . . . may be intermittent." *See* Order at 19 n.8 (emphasis added).

of the mine. AR1535. The Department makes a practice of evaluating the data it uses to make judgments, and as to the assertion that the "stream is ephemeral," the Department determined it had "Sufficient Credible Data" and notes that documentation includes photographs. AR1536. The attainment record further notes that Upper EFAC was also found to be ephemeral in 2004 and 2005. AR1540. The only question raised in the report is whether the stream was "intermittent prior to mining activities, which began in the 1920s." *Id.* But questions about historic status are not relevant to the Department's determination of the character of the existing stream.

- **2012 Permit Fact Sheet.** "The receiving waters are ephemeral streams that flow in response to precipitation (snowmelt or rain events)." AR916.
- **2012 Checklist EA.** "All nine receiving waters that receive direct discharges from permitted outfalls are ephemeral streams." AR987.
- **2012 Response to Comments.** Notes that the receiving waters meet the definition of ephemeral stream in ARM 17.30.629. AR993 (Response to Comment 1), AR997 (Response to Comment 10).

Indeed, *prior* to 2014, the ephemeral/intermittent question was raised only by MEIC, in a misguided legal argument.[11] First, in its comment letter on the 2012 Renewal it argued that EFAC could not, *by law*, be "ephemeral" because it was classified C-3. AR1040-1041. In its letter, MEIC provided no evidence about the conditions of the stream, but merely argued based on the stream's classification. Later, in its comment letter on the 2014 Modification it argued that historical documentation indicated that parts of Upper EFAC may have been intermittent in the past. AR0102-0103. But this information (if true) is irrelevant to the stream's conditions at the time the Department was preparing the permit and does not apply to that portion of the stream that was the subject of Modification 2.

There simply was no evidence in the record prior to 2014 indicating that part of Upper EFAC to which the mine would discharge could be intermittent. Thus, the District Court was incorrect in the assertion that there was "no basis" for the Department not to address the intermittency prior to receiving the information that prompted the Department to undertake Modification 2.

[11] The record includes meeting notes from a Department employee who noted a prior belief that the mine was located on a perennial stretch of EFAC, but it appears that the employee was simply misinformed as to the point at which EFAC becomes perennial. AR1644. The notes do not appear to dispute the Department's approximately contemporaneous determination using "Substantial Credible Evidence" that Upper EFAC was, at that time, deemed to be ephemeral.

D. The Procedural Irregularities Yielded Conclusions Contrary What Would Have Been Determined with the Benefit of the Requisite Pleading and a Complete Administrative Record.

The requirement to amend the Complaint and abide by regulatory requirements for finalizing the Permit are more than procedural niceties. Perhaps because MEIC neglected to differentiate between the initial 2012 Renewal and its modifications, the District Court concluded that because "not all of the relevant streams (sic) are ephemeral this conclusion [that the stream is ephemeral] is arbitrary and capricious." *Id*. Had the District Court been able to address the 2014 modification and Modification 2 with the proper pleading and the accompanying administrative record, the District Court could have recognized the newly discovered facts regarding the ephemeral and intermittent reaches of EFAC. The administrative record for Modification 2 would presumably have reflected that information brought forth by Western Energy indicated that a portion of EFAC was intermittent and therefore the outfalls discharging into that intermittent stretch are properly subject to different permit limits. *See* Board Order, *In the Matter of Appeal Amendment AM4, Western Energy Company, Rosebud Strip Mine Area B, Permit No. C1984003B*, Case No. BER 2016-03-SM, pp. 81-82, ¶ 30 (June 6, 2019) (Attachment 1) (Board concurring with the Department that ephemeral streams are "not subject to the specific water quality standards" of ARM 17.30.620 through 17.30.629, but that intermittent streams are subject to these provisions). In

turn, the District Court would have been provided an opportunity to review a full administrative record that applied regulatory principles distinguishing between the "general prohibitions" applicable to ephemeral reaches that prevent "toxic or harmful levels" of pollutants, and the numeric water quality standards that apply to the intermittent portions of the stream.

Instead, in the absence of both a final decision and a properly plead complaint, the only record of Modification 2 is in the Department's affidavit: "Modification 2 to [the 2012 Renewal] will apply water quality based effluent limits … to outfalls discharging to intermittent receiving waters." Dkt. 39, Exh. 1, Aff. of Melissa Sjolund, ¶ 11. From this single statement, the District Court reached erroneous conclusions about the permitting process.

Further, MEIC's current position on Modification 2 appears to contradict its prior position on the same issue.[12] The result of this information is that the discharges to this intermittent portion of the stream are subject to the numeric water quality standards of ARM 17.30.629. Thus, one would have expected MEIC to support Modification 2, which did exactly what MEIC asked – it recognized the intermittent nature of a reach of EFAC and set numeric limitations for outfalls discharging to that intermittent reach. The District Court's Order is therefore

[12] MEIC even cites to the same hydrologic report that Western Energy provided to the Department. AR0102-0103, FN1.

contrary to the administrative record, to the Board's administrative ruling, and even to MEIC's previous position.

CONCLUSION

The Department's technical expertise is entitled to deference and the record fully supports its judgment as to representative monitoring. While MEIC may differ with the Department's technical assessment, the District Court does not have the authority to substitute MEIC's preference for the decision of the Department. Without the benefit of an amended complaint or the requisite administrative record, the District Court mistakenly concluded that the Department's permitting was flawed. Accordingly, Western Energy respectfully requests that this Court reverse the Order.

Dated this 17th day of June, 2019.

/s/ John C. Martin
John C. Martin
Holland & Hart LLP
25 S. Willow Street
P.O. Box 68
Jackson, WY 83001

/s/ Victoria A. Marquis
William W. Mercer
Victoria A. Marquis
Holland & Hart LLP
401 North 31st Street
Suite 1500
P.O. Box 639
Billings, MT 59103-0639

Counsel for Appellant
Western Energy Company

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 7,500 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
Victoria A. Marquis

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CERTIFICATE OF SERVICE

I, Victoria A. Marquis, hereby certify that I have served true and accurate copies of the foregoing Brief - Supplemental to the following on 06-17-2019:

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

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

Shiloh Silvan Hernandez (Attorney)
103 Reeder's Alley
Helena MT 59601
Representing: Montana Environmental Information Center, Sierra Club
Service Method: eService

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

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

Edward Hayes (Attorney)
Department of Environmental Quality

1520 E. 6th Avenue
Helena MT 59601
Representing: Environmental Quality, Montana Department of
Service Method: eService

Mary Christina Surr McCann (Attorney)
201 W. Railroad St., Suite 300
Missoula MT 59802
Representing: Treasure State Resource Association of Montana, Montana Petroleum Association (MPA), Montana Coal Council, Montana Mining Assoc., et al., Montana Association of Oil, Gas, and Coal Counties, Rosebud County
Service Method: eService

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

Steven T. Wade (Attorney)
PO Box 1697
Helena MT 59624
Representing: Treasure State Resource Association of Montana, Montana Petroleum Association (MPA), Montana Coal Council, Montana Mining Assoc., et al., Montana Association of Oil, Gas, and Coal Counties, Rosebud County
Service Method: eService

Laura S. Ziemer (Attorney)
317 North Ida Avenue
Bozeman MT 59715
Representing: Trout Unlimited, Montana Council of
Service Method: eService

Megan Casey (Attorney)
321 E Main Street
no. 411
Bozeman MT 59715
Representing: Trout Unlimited, Montana Council of
Service Method: eService

Andrew Scott Gorder (Attorney)
140 S. 4th St. W Unit #1
Missoula MT 59801
Representing: Clark Fork Coalition
Service Method: eService

John C. Martin (Attorney)
P.O. Box 68
25 S. Willow Street
Suite 200
Jackson WY 83001
Representing: Western Energy Company
Service Method: eService

Patrick Arthur Byorth (Attorney)
321 E. Main Street, Suite 411
Bozeman MT 59715
Representing: Trout Unlimited, Montana Council of
Service Method: Conventional

Electronically signed by Arlene Forney on behalf of Victoria A. Marquis
Dated: 06-17-2019