

IN THE SUPREME COURT OF THE STATE OF MONTANA

Supreme Court Cause No. DA 18-0110

MONTANA ENVIRONMENTAL INFORMATION CENTER, and
SIERRA CLUB,

Plaintiffs/Appellees,

v.

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

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

Kirsten H. Bowers
Edward Hayes
Special Assistant Attorneys General
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*

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*

John C. Martin
Holland & Hart LLP
975 F. Street, N.W.
Washington, D.C. 20004

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

*Attorneys for Defendant-Appellant
Western Energy Company*

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 Amici Curiae Treasure
State Resource Assoc. of Montana,
Montana Petroleum Assoc., Montana
Coal Council, and Montana Mining
Assoc.*

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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I. INTRODUCTION

In compliance with the Montana Supreme Court's Order dated April 30, 2019, the Montana Department of Environmental Quality (DEQ) submits additional briefing on 1) the legal basis underlying the use of representative monitoring of mining outfalls in precipitation driven events; 2) DEQ's decision that the 20 outfalls selected by DEQ represent the 82 active outfalls at the Rosebud Mine; and 3) whether the administrative record supports the District Court's decision to invalidate the permit as modified in 2014 and whether this Court has the ability to consider the 2014 modification.

II. ADDITIONAL BRIEFING

- A. The Montana Water Quality Act, the Federal Clean Water Act, and rules and regulations adopted under those statutes support representative monitoring of precipitation-driven discharges at the Rosebud Mine.

In order to carry out the objectives of Montana's Water Quality Act and to effectively monitor the discharge of industrial wastes into state waters, Section 75-5-602, MCA, gives DEQ the authority to require the owner or operator of any point source to install, use and maintain monitoring equipment and to sample effluents using specified monitoring methods at designated locations and intervals. In *Upper Missouri Waterkeeper v. Mont. Dep't of Env'tl. Quality*, 2019 MT 81, ¶ 38; 395 Mont. 263, 277; 438 P.3d 792, 801, this Court recognized that Section 75-

5-602, MCA, gives DEQ broad statutory authority to require monitoring of permitted discharges to state waters under the terms and conditions of an MPDES permit.

DEQ properly exercised its authority under the Montana Water Quality Act (WQA) when it outlined a representative monitoring protocol for precipitation-driven discharges from the Rosebud Mine that will provide data representative of the monitored activity as required under both state administrative rules and federal regulations. *See* ARM 17.30.1344(10)(a); 17.30.1351(1); and 40 CFR 122.41(j)(1).

The Permit requires the permittee, Western Energy Company (WEC), to monitor precipitation-driven discharges from the following two distinct classifications of discharge sources at the mine:

Alkaline Mine Drainage, meaning mine drainage having a pH equal to or greater than 6.0 and total iron concentration less than 10 milligrams per liter (mg/L) before treatment, or

Coal Preparation Plants, Storage Areas, and Ancillary Runoff, meaning areas where coal is cleaned, concentrated, or subjected to purification and beneficiation processes, including coal preparation plant yards, immediate access roads, coal refuse piles, coal storage piles, and facilities and areas where coal is loaded for transport to a consuming facility. *See* 40 CFR 434, Subpart B (EPA effluent limit guidelines (ELGs) for coal preparation) and Subpart D (EPA ELGs for alkaline mine drainage), AR 34 – 35 (Table 16); *See also* AR 999 (Response to Comment 16).

Discharges from sources within each of these respective classifications are materially similar in terms of the mining activity that is taking place, the potential pollutants, and required control technologies.

Under the Permit's representative monitoring scheme, WECO is required to sample and to provide reports from precipitation-driven discharges at the outfalls listed in Table 16, on page 20 of the Permit. AR at 35. The outfalls selected in Table 16 represent outfalls from each active mine area; Mine Area A, Mine Area B-East, Mine Area B-West, Mine Area C-East, Mine Area C-North (also designated as C-Central), Mine Area C-West, and Mine Area D. Furthermore, the representative outfalls selected from each active mine area include outfalls in Alkaline Mine Drainage areas that are subject to the effluent limit guidelines at 40 CFR 434 Subpart D and outfalls in Coal Preparation plant areas that are subject to the effluent limit guidelines at 40 CFR 434 Subpart B. The outfalls listed in Table 16 do not include outfalls that are eligible for Western Alkaline Standards at 40 CFR 434 Subpart H because these outfalls are in mine areas that are being reclaimed and are no longer discharging. The representative monitoring applies only to precipitation-driven discharges. All "dry weather" or planned discharges must be monitored. *See* AR at 34.

Specifically, DEQ's representative monitoring protocol for wet weather events requires WECO to collect discharge samples from the following outfalls:

- Four outfalls in Mine Area A, three of these are in coal preparation plant areas and one is in an alkaline mine drainage area;
- Three outfalls from Mine Area B-East, one in a coal preparation plant area, and two in alkaline mine drainage areas;
- Three outfalls from Mine Area B-West, all in alkaline mine drainage areas;
- Four outfalls in Mine Area C-East, one in a coal preparation plant area, and three in alkaline mine drainage areas;
- Three outfalls in Mine Area C-West, all three in alkaline mine drainage areas;
- One outfall in Mine Area C-Central, in an alkaline mine drainage area; and
- Two outfalls in Mine Area D, one in a coal preparation plant area, and one in an alkaline mine drainage area. *See* Table 16, AR 35.

At the time of Permit renewal, the Mine had 82 active outfalls. *See* Table 1; AR 19. The mine covered approximately 25,000 acres (roughly 39 square miles), half of which was actively mined and the other half was being reclaimed. AR 1143. The representative monitoring requires sampling from more than 20 percent of the outfalls in the active mine areas during precipitation-driven discharge events. DEQ's representative monitoring protocol is a reasonable approach, considering the size of the Mine, and ensures samples are collected during precipitation events that are representative of the monitored activity and accurately characterize precipitation-driven discharges from the Mine. 40 CFR 122.41(j)(1).

This approach is consistent with the EPA's representative monitoring protocol at the Black Mesa Complex Mine located near Kayenta, Arizona. NPDES Permit No. NN0022179; AR at 999. The Black Mesa Complex Mine is similar to

the Rosebud Mine in that it is a large (approximately 65,000 acres) surface coal mine, with over 100 active outfalls discharging from Alkaline Mine Drainage and Coal Preparation and Associated Areas. AR 1494; <https://www.epa.gov/npdes-permits/black-mesa-mine-complex-navajo-county-az-nn0022179> (accessed June 16, 2019).

DEQ employs a comparable representative monitoring approach in its General Permit for Storm Water Discharges Associated with Industrial Activity (Permit No. MTR000000) modeled after EPA's Multi-Sector General Permit for Storm Water Discharges Associated with Construction Activity. Under MTR000000, if two or more outfalls discharge substantially identical effluents based on similar industrial activities, similar control measures, and similar exposed materials or pollutant sources, the permittee may request to monitor the effluent of just one rather than each substantially identical outfall (SIO). *See* <http://deq.mt.gov/Portals/112/Water/WPB/MPDES/General%20Permits/MTR000000PER.pdf> (accessed June 16, 2019).

The District Court substituted its judgment for that of DEQ when it invalidated DEQ's representative monitoring protocol for precipitation-driven discharges at the Rosebud Mine. DEQ's representative monitoring approach is lawful because it will provide data that is representative of the monitored activity

as required by federal and state law. ARM 17.30.1342(10)(a); 40 CFR 122.41(j)(1).

- B. The administrative record supports DEQ's selection of the outfalls listed in Table 16 of Modification 1 of MPDES Permit No. MT0023965 as representative of precipitation-driven discharges for monitoring activity at the Rosebud Mine.

During permit development, the location of each outfall, the sources of pollutants, and the quality and quantity of effluent is evaluated. This evaluation starts with information provided by WEC0 in their permit application materials. ARM 17.30.1322; AR 1072 - 1086 (EPA Application Form 1 and Form 2C).

At the Rosebud Mine, waste water treatment consists of sediment control ponds that remove suspended solids from commingled storm water and pit water or coal plant wash water. See AR at 2069 (Application Materials). The sediment control ponds are located upstream of outfalls associated with active mining. AR 2078. There are three sources of influent to the sediment control ponds at the Mine (Alkaline Mine Drainage, Coal Preparation and Associated Areas, and Western Alkaline Reclaimed Areas). *Id.* The primary sources of wastewater are precipitation runoff over disturbed drainages and groundwater inflow to the open pit. AR 241. While runoff from precipitation is variable as to quantity, intensity, duration, and frequency, the quality of wastewater is constant throughout the mine. AR 241, 2079.

Due to the number of outfalls at the mine, the inaccessibility of some of the outfalls during storm events, safety of mine personnel in a storm, the limited time to collect samples after precipitation-driven discharges over a large area, and short holding time requirements to get samples to a lab, DEQ chose representative outfalls to monitor discharges from precipitation events. The chosen outfalls are accessible within a timely manner during or immediately after a storm event and are representative of the activity and the type of discharge being monitored. AR 950 and 952. The representative outfalls were chosen based on mine area and location, mining activity, receiving water, contributing drainage area, and accessibility during wet weather. AR 950 and 953 (Table FS-37).

DEQ reasonably determined discharges consisting of runoff from areas classified as Alkaline Mine Drainage are materially similar in terms of activity taking place, alkaline characteristic of soils, expected runoff pollutant concentrations, treatment requirements, and best management practices. AR 950. Likewise, outfalls receiving runoff from Coal Preparation Plant Areas are materially similar in terms of activity, expected pollutant concentrations and treatment requirements. However, DEQ determined that all outfalls in Coal Preparation Plant Areas must be monitored for potential impacts to water quality resulting from storm water coming in to contact with coal piles and processing areas. AR at 950.

As mining progresses at the Rosebud Mine, the selected representative outfalls are reevaluated by DEQ. As a result of reevaluation, DEQ may remove some representative outfalls and replaced them with other outfalls that are representative of the monitored activity. AR 90.

In consideration of the large number and remote locations of the permitted outfalls, the Permit's monitoring requirements are reasonable and will provide representative data. The District Court erred by ignoring substantial evidence in the record that supports DEQ's protocol for representative monitoring of precipitation-driven discharges at the Mine when it invalidated DEQ's representative monitoring protocol.

- C. The administrative record, including the record before the Board of Environmental Review, does not support the District Court's decision to invalidate MPDES Permit No. MT0023965, as modified, and the District Court should not have undertaken review of the Permit until the Permit Modifications were complete.

On September 14, 2012, DEQ issued a renewal of the Permit authorizing discharges of waste water and storm water from 151 outfalls at the Rosebud Mine. AR 1351. Under the 2012 Permit renewal, twelve of the 151 permitted outfalls were determined to be new source outfalls that were subject to nondegradation analysis and water quality based effluent limits.

WECO timely appealed the 2012 Permit renewal to the Board of Environmental Review (the Board). Meanwhile, MEIC filed a Complaint

requesting Judicial Review of the 2012 Permit renewal on December 21, 2012.

District Court Docket No. 1. MEIC's Complaint was stayed pending resolution of WEC's administrative appeal to the Board. MEIC intervened in the administrative proceeding.

WEC's administrative appeal was resolved with a settlement agreement between DEQ and WEC. Pursuant to the settlement agreement, the Board partially remanded the Permit to DEQ to correctly identify eight of the previously identified twelve new source outfalls that, because they had been previously permitted, actually were not new sources. AR 241, 577 (Board Order Granting Joint Unopposed Motion for Partial Remand of Permit to Department of Environmental Quality and for Suspension of Proceedings), AR 581 (Settlement Agreement), AR 1990, 2078. WEC's appeal before the Board was stayed pending finalization of the Permit modification and resolution of any other pending administrative or judicial proceedings. AR 577 – 578, 581 – 600 (Settlement Agreement). Counsel for MEIC was contacted and did not oppose the Motion for Partial Remand of the Permit to DEQ. AR 582.

On March 18, 2014, MEIC moved for a scheduling order stating that the stay of the District Court action was no longer necessary because the administrative appeal had been resolved. In the interest of judicial economy and the parties' resources, MEIC's motion for scheduling order was opposed by WEC and DEQ.

WECO and DEQ pointed out in their opposition to the scheduling order that Modification 1 of the Permit was still pending and finalization of the Permit modification would address some of the same legal and factual issues raised by MEIC before the District Court. District Court Docket No. 15. The District Court found that the Permit modification would only address a subset of the issues raised in MEIC's Complaint and proceeded with the Scheduling Conference. District Court Docket No. 17. Modification 1 of the Permit was issued on September 8, 2014. AR 16. The administrative record supporting the September 4, 2012 Permit renewal and the first modification of the Permit on September 8, 2014, was transmitted to the District Court on October 9, 2014. District Court Docket No. 22.

Subsequently, the Mine conducted a hydrologic assessment of East Fork Armells Creek, which indicated that a portion of that stream may be intermittent. *See* District Court Docket No. 42, Exhibit 1 at page 4. WECO then applied for Modification 2 to the Permit to address the intermittent stretch of East Fork Armells Creek, which resulted in the application of water quality based effluent limits to outfalls discharging to that intermittent stretch for pollutants of concern with reasonable potential to cause or contribute to an exceedance of water quality standards. *See* District Court Docket No. 42 at page 13.

Although Modification 2 of the Permit was not before the District Court and was initiated in response to information that was not available to DEQ until after

MEIC sought the District Court's review, the District Court faulted DEQ for not considering the intermittent stretch of East Fork Armells Creek during the permit renewal process. *See* District Court Docket No. 54 at page 19. The District Court erred by expanding the scope of judicial review beyond the administrative record that was before DEQ at the time of the 2012 Permit renewal and the first 2014 Permit modification. *Richards v. County of Missoula*, 2012 MT 236, ¶ 18; 366 Mont. 416, 420; 288 P.3d 175, 179. Because Modification 2 is outside the administrative record that was under review by the District Court, Modification 2 is likewise not subject to this Court's review.

III. CONCLUSION

DEQ's representative monitoring approach is lawful because it provides data that is representative of the monitored activity as required by state and federal law. The District Court's invalidation of DEQ's representative monitoring protocol should be reversed because the District Court disregarded substantial evidence in the record that supports representative monitoring of precipitation-driven discharges at the Mine. The District Court erred by expanding the scope of judicial review beyond the administrative record that was before DEQ at the time of the 2012 Permit renewal and the first Permit modification in 2014. For all the reasons stated herein, in DEQ's briefing, and in arguments submitted to this Court, DEQ's administrative decision to renew the Permit and issue the 2014 Permit

modifications should be upheld and the District Court's Memorandum and Order on Judicial Review should be vacated.

DATED this 17th day of June, 2019.

MONTANA DEPARTMENT OF
ENVIRONMENTAL QUALITY



Kirsten H. Bowers

Edward Hayes

Attorneys for Defendant/Appellant

Montana Department of Environmental Quality

CERTIFICATE OF COMPLIANCE

Pursuant to Montana Rule of Appellate Procedure 11(4)(d), I certify that APPELLANT MONTANA DEPARTMENT OF ENVIRONMENTAL QUALITY'S ADDITIONAL BRIEF is printed with proportionately spaced Times New Roman text typeface of 14 points; is double spaced; and the word count, calculated by Microsoft Word 2016, is not more than 7,500 words, excluding Table of Contents, Table of Citations, Certificate of Service, and Certificate of Compliance.

Dated this 17th day of June, 2019.

A handwritten signature in blue ink, reading "Kirsten H. Bowers", is written over a horizontal line.

Kirsten H. Bowers

Edward Hayes

Attorneys for Defendant/Appellant

Montana Department of Environmental Quality

CERTIFICATE OF SERVICE

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

By E-service

Kirsten H. Bowers
Edward Hayes
Montana Department of Environmental Quality
1520 E. 6th Avenue
Helena, MT 59620
Attorneys for Defendant/Appellant Montana Department of Environmental Quality

Shiloh S. Hernandez
Western Environmental Law Center
103 Reeder's Alley
Helena, MT 59601
Attorney for Plaintiff/Appellee

John C. Martin
Holland & Hart LLP
975 F Street NW, Suite 900
Washington, D.C. 20004

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

Attorneys for Defendant/Appellant Western Energy Company
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 Amici Curiae
Treasure State Resource Assoc. of Montana,
Montana Petroleum Assoc.,
Montana Coal Council, and
Montana Mining Assoc.

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

Attorneys for Amici Curiae
Trout Unlimited

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

Attorneys for Amici Curiae
Clark Fork Coalition

Dated this 17th day of June, 2019.



Kirsten H. Bowers

Attorney for Defendant/Appellant
Montana Department of Environmental Quality

CERTIFICATE OF SERVICE

I, Kirsten Hughes Bowers, hereby certify that I have served true and accurate copies of the foregoing Brief - Other to the following on 06-17-2019:

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

Victoria A. Marquis (Attorney)

401 North 31st Street

Suite 1500

P.O. Box 639

Billings MT 59103-0639

Representing: Western Energy Company

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

Electronically Signed By: Kirsten Hughes Bowers
Dated: 06-17-2019