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.

PLAINTIFFS-APPELLEES MONTANA ENVIRONMENTAL INFORMATION CENTER AND THE SIERRA CLUB'S PETITION FOR REHEARING

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

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INTRODUCTION

Plaintiffs-Appellees (Conservation Groups) respectfully petition this Court to amend its September 11, 2019, ruling (Opinion), as elaborated below.

While the Conservation Groups disagree with elements of the Opinion, they do not object to the bulk of the analysis. Indeed, they agree with and support the Opinion's conclusions that DEQ's decisions regarding ephemeral waters and representative monitoring were neither adequately supported nor consistent.

One portion of the Opinion, however—the remedy—departs sharply from this Court's precedent and should be amended. Specifically, when the administrative record shows, as the Opinion found, that an agency decision lacks sufficient factual support and reasoned basis, the appropriate remedy is vacatur and remand—not to district court for trial—but to the agency for additional proceedings to correct the shortcomings of the agency's analysis.

STANDARD OF REVIEW

This Court may grant a petition for rehearing if the Court's decision "conflicts with a statute or controlling decision not addressed by the supreme court." Mont. R. App. P. 20(1)(a)(iii).

ARGUMENT

The Opinion's closing paragraph remanded "to the District Court for a hearing on the factual issues raised in this Opinion." Slip op., ¶ 101. However, under this Court's unbroken precedent the proper remedy for agency action that lacks evidentiary support or reasoned analysis, as here, is *not* remand *to district court* for trial, but to vacate the decision and remand *to the agency* to either develop evidence and analysis to support its decision, or issue a different decision.

This is because judicial review, like appellate review, is based on a documentary record—the administrative record. Absent unique circumstances, the administrative record cannot be supplemented, and agencies may not offer *post hoc* rationalizations. Thus, the only question on judicial review is whether the agency's decision is rational and lawful in light of the record.

To layer judicial factfinding over the administrative record would undermine the function of judicial review, open the door to improper *post hoc* rationalizations, and cause confusion over the operative standard of review, while simultaneously imposing substantial burdens on district courts, agencies, and litigants.

Accordingly, the Conservation Groups request that this Court amend its remedy to remand, not to district court, but to DEQ to either provide lawful support for its decision or issue a different decision.

I. The appropriate remedy for unsupported agency action is to vacate and remand to the agency.

A. Except in rare circumstances, judicial review of agency action is based on the administrative record.

This Court has long recognized that a "petition for judicial review to the district court is 'analogous to an appeal.'" *Hilands Golf Club v. Ashmore,* 277 Mont. 324, 331, 922 P.2d 469, 474 (1996). As with appeals, judicial review is based on a documentary record—the administrative record before the agency at the time of the decision. *See Clark Fork Coal. v. DEQ* (*Clark Fork I*), 2008 MT 407, ¶21, 347 Mont. 197, 197 P.3d 482 (explaining judicial review of the "record" before the

agency); *Aspen Trails Ranch, LLC v. Simmons*, 2010 MT 79, ¶¶65-67, 356 Mont. 41, 230 P.3d 808 (Rice, J., concurring).[1]

"If the record before the agency does not support the agency action … the proper course, except in rare circumstances, is to remand to the agency for additional investigation or explanation." *Ravalli Cnty. Fish & Game Ass'n v. Mont. Dep't of State Lands*, 273 Mont. 371, 382, 903 P.2d 1362, 1369 (1995) (quoting *Fla. Power & Light Co. v. Lorion*, 470 U.S. 729, 744 (1985)). Vacatur typically accompanies remand. *N. Cheyenne Tribe v. DEQ*, 2010 MT 111, ¶47, 356 Mont. 296, 234 P.3d 51 (voiding permit); *Humane Soc'y v. Locke*, 626 F.3d 1040, 1053 n.7 (9th Cir. 2010) (remand without vacatur only appropriate in "rare circumstances").

"[A]fter-the-fact" justifications for agency action are not permitted on judicial review. *MM & I, LLC v. Bd. of Cnty. Comm'rs of Gallatin Cnty.*, 2010 MT 274, ¶¶20-27, 358 Mont. 420, 246 P.3d 1029; *Kiely*

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[1] While this Court has allowed supplementation of the record "to determine whether the agency took into consideration all relevant factors in reaching its decision," *Skyline Sportsmen's Ass'n v. Bd. of Land Comm'rs*, 286 Mont. 108, 114, 951 P.2d 29, 32 (1997), it has also made clear that, as in federal court, supplementing the administrative record is the exception, not the rule. *MM & I, LLC*, ¶¶20-27.

Const., LLC v. Red Lodge, 2002 MT 241, ¶97, 312 Mont. 52, 57 P.3d 836; *accord Motor Vehicle Mfrs. v. State Farm*, 463 U.S. 29, 50 (1983) (prohibiting "*post hoc* rationalizations").

Indeed, the deference afforded agencies on judicial review is premised on this limited scope of review. *N. Fork Preservation Ass'n v. Dep't of State Lands*, 238 Mont. 451, 457, 778 P.2d 862, 866 (1989). Thus, judicial review raises only *questions of law*, which should be resolved without judicial factfinding. *Id.* ("The appeal from the commission to the district court is for the purpose merely of determining whether upon the evidence and the law the action of the commission is based upon an error of law, or is wholly unsupported by the evidence, or clearly arbitrary and capricious." (quoting *Langen v. Badlands Coop. State Grazing Dist.*, 125 Mont. 302, 234 P.2d 467 (1951)).

If review of the administrative record reveals that the agency's "own records" show "conflicting evidence" or that the agency "ignore[d] 'pertinent data,'" the remedy is to "remand to the agency for additional investigation or explanation." *Ravalli Cnty.*, 273 Mont. at 381-82, 903 P.2d at 1369. So too if the agency's decision was based on conclusory

assertions or perfunctory statements. *Clark Fork I*, ¶48 ("A simple statement that a perpetual discharge of polluted water will always be treated is insufficient to justify a determination that an irreversible discharge is nonsignificant.").

This precedent developed from and is consistent with federal administrative law jurisprudence. *E.g.*, *Fla. Power & Light*, 470 U.S. at 744; *Occidental Eng'g Co. v. INS*, 753 F.2d 766, 770 (9th Cir. 1985); *Olenhouse v. Commodity Credit Corp.*, 42 F.3d 1560, 1579-80 (10th Cir. 1994).

B. Whether agency action is arbitrary and capricious is a question of law that should be resolved at summary judgment.

Because judicial review of agency action operates like an appeal limited to the administrative record, "the factfinding capacity of the district court is thus typically unnecessary." *Fla. Power & Light*, 470 U.S. at 744. The Ninth Circuit explained:

> Occidental contests the district court's grant of summary judgment on the grounds that there exist disputed issues of material fact. But there are no disputed facts that the district court must resolve. That court is not required to resolve any facts in a review of an administrative proceeding. Certainly, there may be issues of fact before the administrative agency. *However, the function of the district court is to determine whether or not as a matter of law the*

> *evidence in the administrative record permitted the agency to make the decision it did. De novo* factfinding by the district court is allowed only in limited circumstances that have not arisen in the present case. The appellant confuses the use of summary judgment in an original district court proceeding with the use of summary judgment where, as here, the district court is reviewing a decision of an administrative agency which is itself the finder of fact. In the former case, summary judgment is appropriate only when the court finds there are no factual issues requiring resolution by trial. In the latter case, summary judgment is an appropriate mechanism for deciding the legal question of whether the agency could reasonably have found the facts as it did.

Occidental Eng'g, 753 F.2d at 769 (emphasis added) (internal citations omitted); *accord Olenhouse*, 42 F.3d at 1579-80. This is the point this Court made in, among other cases, *Ravalli County*, 273 Mont. at 382, 903 P.2d at 1369.

Consistently, this Court has long-approved resolving Clean Water Act permit challenges, as here, at summary judgment, without judicial factfinding. *See Upper Mo. Waterkeeper v. DEQ*, 2019 MT 81, ¶42, 395 Mont. 263, 438 P.3d 792; *Clark Fork Coal. v. DEQ*, 2012 MT 240, ¶¶29-30, 366 Mont. 427, 288 P.3d 183; *N. Cheyenne Tribe*, ¶47; *Clark Fork I*, ¶¶49-50. As in other judicial review cases, when the permit is unsupported or inconsistent with information in the record, the Court has vacated the permit and remanded—not to district court for judicial

factfinding—but to the agency. *Clark Fork II*, ¶¶29-30; *N. Cheyenne Tribe*, ¶47; *Clark Fork I*, ¶¶49-50; *accord Ravalli Cnty.*, 273 Mont. at 381, 903 P.2d at 1369 (Montana Environmental Policy Act case).

C. Requiring judicial factfinding to fill gaps in the administrative record would be inconsistent with precedent, duplicative, and burdensome for courts, agencies, and litigants.

Requiring trial and judicial factfinding on judicial review of agency decisions—as the Opinion does here—would undo the foundational premise that agency decisions are reviewed based on the administrative record. *E.g.*, *Clark Fork Coal. I*, ¶21. This would invite *post hoc* rationalizations by the agency, *cf. MM & I*, ¶22; *Motor Vehicle Mfrs.*, 463 U.S. at 50, while undermining the bases for deferential arbitrary-and-capricious review: the agency's initial review of the facts based on its expertise, *cf. N. Fork Preservation Ass'n*, 238 Mont. at 457, 778 P.2d at 866. It would require district courts to duplicate agency factfinding, imposing substantial procedural burdens on courts, agencies, and litigants by requiring trials (and, therefore, likely discovery) in most, if not all, cases seeking review of agency action.

II. Here, the Court should amend its remedy to remand not to district court, but to DEQ, to resolve the outstanding questions.

A. Remand to DEQ is necessary to resolve DEQ's unsupported and contradictory determination that East Fork Armells Creek is ephemeral.

Here, after closely reviewing the administrative record, the Opinion recognized "DEQ's past and present acknowledgement that East Fork Armells Creek is potentially intermittent" and was "troubled that DEQ exempted East Fork Armells Creek from the water quality standards applicable to C-3 waters, including intermittent streams, without more certainty that East Fork Armells Creek was in fact ephemeral." Slip op., ¶67. DEQ's claim that the creek is ephemeral was based on a "generic[] state[ment]" untethered to any scientific assessment. *Id.*, ¶66. Given DEQ's conflicting statements about the creek's hydrology, the Opinion concluded that it was "unclear from the record whether East Fork Armells Creek is in fact hydrologically ephemeral or intermittent." *Id.*, ¶72. This analysis was correct and unobjectionable.

The Opinion departed from precedent, however, when it remanded this issue to *district court* for judicial factfinding. *Id.*, ¶72. When the

administrative record is insufficient to support an agency's decision due to "conflicting evidence" in the agency's "own records," *Ravalli Cnty.*, 273 Mont. at 382-83, 903 P.2d at 1369, or unsubstantiated, conclusory statements, *Clark Fork I*, ¶¶46-48, the proper remedy "is to remand to the agency for additional investigation or explanation." *Ravalli Cnty.*, 273 Mont. at 381, 903 P.2d at 1369; *see Occidental Eng'g*, 753 F.2d at 769. Additional judicial factfinding at district court would undo both the administrative record rule, *Clark Fork I*, ¶21; *Ravalli Cnty.*, 273 Mont. at 381, 903 P.2d at 1369, and the prohibition on *post hoc* rationalizations. *MM & I*, ¶22; *Motor Vehicle Mfrs.*, 463 U.S. at 50.

B. Remand to DEQ is also necessary to correct its unsupported and irrational representative monitoring scheme.

The Opinion's close evaluation of DEQ's "representative monitoring" scheme concluded:

> [A] comprehensive search of the administrative record, including the 2012 Permit and Modified Permit, reveals no satisfactory explanation that the twenty selected outfalls are representative of precipitation-driven discharges at the Mine's eighty-two outfalls in alkaline mine drainage and coal preparation areas.

Slip Op., ¶83. The Opinion explained: "[O]ur examination of the record before us reveals no factually-driven explanation connected to DEQ's

conclusion that monitoring at the fourteen selected outfalls is representative of precipitation-driven discharges at the Mine's seventy-six outfalls in alkaline mine drainage areas." *Id.*, ¶87.

Regarding DEQ's decision to use a reclamation outfall to represent active-mining outfalls, the Opinion concluded: "It defies logic that one outfall located in a reclamation area can meaningfully represent the precipitation-driven discharges from eight outfalls located in alkaline mine drainage areas." *Id.*, ¶89.

Citing the Department's statements that the "representative" outfalls do not in fact "represent" other outfalls, the Opinion found: "Absent a more detailed explanation of how and why the fourteen outfalls selected are representative of precipitation-driven discharges at the seventy-six outfalls in alkaline mine drainage areas, it is impossible to determine what exactly DEQ's selective monitoring protocol represents." *Id.*, ¶91.

The Opinion observed that from the administrative record, "[i]t appears the way in which DEQ implements representative monitoring is not representative of the monitored activity—precipitation driven discharges. As noted, DEQ's selective sampling protocol does not

represent the amount or rate at which non-representative outfalls discharge." *Id.*, ¶92. The Opinion queried: "The question arises whether DEQ learns anything from its monitoring protocol about the cumulative amount of pollution from precipitation-driven discharges in the Mine's receiving waters." *Id.*, ¶94.

In light of the complete absence of empirical data in the record to support DEQ's "representative" monitoring scheme, the Opinion noted: "We would rather DEQ prove that its decision to selectively monitor 20% of its alkaline mine drainage outfalls is motivated by scientific data reasonably supporting its conclusion." *Id.*, ¶95.

In light of these multiple failings, the Opinion concluded:

> While this Court would like to defer to DEQ's expertise on this issue, after oral argument and additional briefing on representative monitoring, this Court has nothing more than conclusory legal statements from DEQ stating that its monitoring protocol is representative….This Court remains unsure what exactly the sampling conducted at the selective outfalls is representative of, especially considering DEQ's statements that "[r]epresentative outfalls are not linked to or associated with any of the non-representative outfalls," and "[r]epresentative outfalls are not used to make any assumption regarding non-representative outfalls."

Id., ¶97. This analysis also was correct and unobjectionable.

The Opinion's remedy, however, departed from established precedent by remanding to district court for trial. *Id.*, ¶98. When, as the Opinion found, an agency fails to articulate a "rational connection between the facts found and the choice made," but instead bases its decision on unsupported and conclusory assertions, *Clark Fork I*, ¶46-48, the appropriate remedy is "an order remanding consideration of [the coal company's] application for an MPDES permit to DEQ for further proceedings." *Id.*, ¶50; *Ravalli Cnty.*, 273 Mont. at 382-83, 903 P.2d at 1369.

CONCLUSION

While the Opinion's merits analysis is detailed and sound, the remedy—remand to district court for judicial factfinding and trial—sharply departs from established precedent. If uncorrected, this ruling would undo the administrative record rule and invite *post hoc* rationalizations by agencies, while substantially increasing the burdens on district courts, agencies, and litigants in cases seeking judicial review.

The Conservation Groups respectfully petition this Court to amend the Opinion's remedy to vacate the permit and remand to DEQ

to either support its decisions with evidence and analysis, or change its decisions.

Dated this 10th day of October, 2019.

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CERTIFICATE OF COMPLIANCE

Pursuant to Montana Rules of Appellate Procedure 11 and 20, 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 2,490 words, excluding caption, signature block, tables and certificates.

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