IN THE SUPREME COURT OF THE STATE OF MONTANA
No. DA 18-0110

MONTANA ENVIRONMENTAL INFORMATION CENTER and SIERRA CLUB,

Plaintiffs and Appellees,

v.

MONTANA DEPARTMENT OF ENVIRONMENTAL QUALITY and WESTERN ENERGY COMPANY,

Defendants and Appellants.

MOTION OF TROUT UNLIMITED, INC. AND CLARK FORK COALITION FOR LEAVE TO FILE AMICUS CURIAE BRIEF IN SUPPORT OF REHEARING PETITION

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Trout Unlimited, Inc. ("Trout Unlimited") and the Clark Fork Coalition ("CFC")—current amici curiae in this case—request leave of this Court pursuant to Rule 12(7) of the Montana Rules of Appellate Procedure to file an amicus curiae brief in support of Plaintiff-Appellees Montana Environmental Information Center and Sierra Club's (collectively "MEIC") petition for rehearing. Counsel for Trout Unlimited and CFC have consulted with counsel for all parties regarding their position on this motion. The Department of Environmental Quality and MEIC do not oppose. Western Energy Company takes no position on this motion.

If granted leave, Trout Unlimited and CFC will file a brief supporting MEIC's position that rehearing is warranted to modify the remedy portion of the Court's decision because it "conflicts with … controlling decision[s] not addressed by the supreme court." Mont. R. App. P. 20(1)(a)(iii). Trout Unlimited and CFC support MEIC's view that the Court's decision to remand DEQ's decision to the district court for judicial fact-finding cannot be reconciled with the Court's prior precedents holding that the appropriate remedy for insufficiently supported agency decision making is to vacate and remand the challenged decision to the agency, not to the district court.

As discussed in Trout Unlimited's and CFC's motions for leave to file amicus curiae briefs on the merits of this appeal—filed on August 31, 2018 and September 11, 2018, respectively, and incorporated here by reference—each

organization has significant interests in protecting water quality in Montana. To that end, Trout Unlimited and CFC have litigated challenges to state agency decisions under the Montana Water Quality Act and the Montana Environmental Policy Act, which are subject to the "arbitrary or capricious" standard of review applicable to informal agency decisions. Clark Fork Coal. v. DEQ ("Clark Fork Coalition"), 2008 MT 407, 347 Mont. 197, 197 P.2d 482 (plaintiffs include CFC and Trout Unlimited); Clark Fork Coal. v. DEQ, 2012 MT 240, 366 Mont. 427, 288 P.3d 183 (same). In cases such as these, where the Montana Supreme Court has agreed that the agency decision was insufficiently explained in the administrative record, the Court has vacated the challenged decision and remanded it to the agency for a new decision that is rationally based on substantial evidence. See Clark Fork Coalition, ¶ 50 (remanding case "to the District Court for entry of an order remanding consideration of Revett's application for an MPDES permit to DEQ for further proceedings in conformity herewith") (emphasis added).

Because of their experience, Trout Unlimited and CFC believe their participation as amici curiae would aid the Court's resolution of MEIC's rehearing petition. Among other things, Trout Unlimited and CFC will offer their learned perspective on the breadth of this Court's remedy decision, if not modified, and potential consequences for the district courts and litigants.

In light of the October 10, 2019 deadline for seeking rehearing and to permit

timely consideration of Trout Unlimited and CFC's amicus brief should this motion be granted, Trout Unlimited and CFC attach their proposed brief as Exhibit 1 to this motion. If their motion is granted, Trout Unlimited and CFC would consent to the filing of their brief by the Clerk of Court or, in the alternative, would immediately (within one day of the Court's order granting this motion) file a brief identical to Exhibit 1 in support of the petition for rehearing.

For the foregoing reasons, Trout Unlimited and CFC respectfully request that their motion be granted.

Respectfully submitted this 10th day of October, 2019,

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Exhibit 1

Proposed Brief of Amici Curiae Trout Unlimited, Inc. and Clark Fork Coalition in Support of Rehearing Petition

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v.

MONTANA DEPARTMENT OF ENVIRONMENTAL QUALITY and WESTERN ENERGY COMPANY,

Defendants and Appellants.

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

BRIEF OF AMICI CURIAE TROUT UNLIMITED, INC. AND CLARK FORK COALITION IN SUPPORT OF REHEARING PETITION

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Amici Curiae Clark Fork Coalition and Trout Unlimited support the rehearing petition of Plaintiffs-Appellees Montana Environmental Information Center and Sierra Club. Rehearing is warranted under the unusual circumstances of this case because the remedy ordered by this Court—a remand to the district court for an evidentiary hearing on factual issues essential to the challenged DEQ decision but insufficiently explicated in the administrative record—"conflicts with … controlling decision[s] not addressed by the supreme court." Mont. R. App. P. 20(1)(a)(iii). Those decisions establish that vacatur of the challenged decision and remand to the agency is the appropriate remedy where the agency's decision is not rationally supported by the administrative record. If left uncorrected, the remedy portion of this Court's opinion threatens to sow confusion in the district courts and unduly burden both district courts and litigants. To avoid this, amici respectfully request that this Court amend the remedy portion of its opinion to vacate and remand the challenged DEQ decision to the agency for further deliberation and fact-finding, rather than to the district court.

I. THIS COURT'S REMAND TO THE DISTRICT COURT FOR AN EVIDENTIARY HEARING CONTRAVENES CONTROLLING PRECEDENT

Rehearing is warranted because the remedy of remand to the district court to fill gaps in DEQ's administrative record irreconcilably conflicts with this Court's prior precedent.

As this Court correctly stated in the opinion at issue, judicial review of informal agency decisions such as DEQ's decision to renew a MPDES permit is governed by the "arbitrary or capricious" standard that is well established in Montana and federal case law. Montana Environmental Information Center v. Montana Department of Environmental Quality, 2019 MT 213, ¶ 19, --- Mont. ---, --- P.3d --- ("MEIC"). Applying that standard, this Court evaluated the justification for DEQ's decision in the administrative record and found it deficient in two material respects:

First, the Court concluded that "it is unclear from the record" whether one of the receiving waters for discharges from the Rosebud Mine, East Fork Armells Creek, "is in fact hydrologically ephemeral or intermittent," which dictates whether DEQ lawfully exempted that waterway from otherwise-applicable water quality standards and nondegradation protections. Id., ¶ 72. Relatedly, the Court concluded that "it is unclear from the record … whether it is necessary for DEQ to adopt a [total maximum daily load] budget" for East Fork Armells Creek before approving discharges to it because that waterway is classified as "impaired." Id.

Second, the Court concluded that "a comprehensive search of the administrative record … reveals no satisfactory explanation" for DEQ's determination that the permit's representative-monitoring protocol for precipitation-driven discharges is in fact representative of all such discharges from

the mine, as state and federal law require. Id., ¶ 83; see also id., ¶ 87 ("our examination of the record before us reveals no factually-driven explanation connected to DEQ's conclusion" that approved protocol will yield representative data), ¶ 91 ("Absent a more detailed explanation of how and why the … outfalls selected are representative … it is impossible to determine what exactly DEQ's selective monitoring protocol represents."). Indeed, the Court's review of the record suggested that "the way in which DEQ implements representative monitoring is not representative of the monitored activity," id., ¶ 92, which would render DEQ's decision unlawful, see id., ¶ 77 (explaining that, under governing regulations, "the limit to DEQ's discretion in crafting the monitoring requirements for precipitation-driven discharges is whether the monitoring requirements are representative of the monitored activity") (quotation omitted). Ultimately, the Court concluded that DEQ had not "'cogently explain[ed] why it has exercised its discretion in a given manner.'" Id., ¶ 97 (quoting Motor Vehicle Mfrs. Ass'n v. State Farm Mut. Auto. Ins. Co., 463 U.S. 29, 48 (1983)) (citations omitted).

However, as a remedy for those deficiencies, this Court reversed the district court's grant of summary judgment to MEIC and remanded to the district court for a hearing to resolve the factual issues that DEQ failed to explain cogently in the record. See id., ¶¶ 100-101. In ordering that remedy, the Court did not address its

multiple precedents which foreclose fact-finding in the district court to fill gaps in the administrative record supporting the agency's decision.

In Clark Fork Coalition v. DEQ, this Court reviewed, as here, DEQ's approval of a MPDES permit under the arbitrary-or-capricious standard. 2008 MT 407, ¶ 21, 347 Mont. 197, 197 P.2d 482 ("Clark Fork Coalition"). This Court affirmed that under that standard, reviewing courts must not "substitute their judgment for that of the agency by determining whether its decision was correct." Id., ¶ 27. At the same time, courts must not "automatically defer to the agency 'without carefully reviewing the record and satisfying themselves that the agency has made a reasoned decision.'" Id., ¶ 21 (emphasis added) (quoting Friends of the Wild Swan v. DNRC, 2000 MT 209, ¶ 28, 301 Mont. 1, 6 P.3d 972). Accord Clark Fork Coal. v. DEQ, 2012 MT 240, ¶ 20, 366 Mont. 427, 288 P.3d 183. The Court held that DEQ had arbitrarily and capriciously authorized pollution discharges without nondegradation review based on a misinterpretation of the governing regulation. Clark Fork Coalition, ¶¶ 43-44, 48. Importantly, the Court "d[id] not hold that the discharge … cannot, under any circumstances" be exempted from nondegradation review as DEQ had done; the Court held open the possibility that DEQ might defensibly reach the same conclusion it had in the challenged decision after full consideration of the relevant evidence. Id., ¶ 49. Nevertheless, the Court held that DEQ's failure to undertake and document in the record the necessary

factual analysis to support its decision rendered the decision arbitrary and capricious. Id. The Court ordered a remand to the district court with instructions to remand the matter to DEQ for reconsideration consistent with this Court's opinion. Id., ¶ 50.

This Court's conclusions that significant aspects of DEQ's permitting decision in MEIC lack support in the record dictate the same remedy the Court ordered in Clark Fork Coalition. See, e.g., MEIC, ¶¶ 72, 91 (concluding that record lacks adequate explanation for DEQ's decisions to treat receiving waters as ephemeral and approve representative-monitoring protocol). It is blackletter law that when "the administrative record provides inadequate support for an agency decision, the usual remedy is to vacate and remand that action for further agency proceedings." Charles A. Koch & Richard Murphy, 3 Admin. L. & Prac. § 8:27 (3d. ed., Feb. 2019 update) (emphasis added). Indeed, in the "canonical administrative law case" of Citizens to Preserve Overton Park v. Volpe, 401 U.S. 402 (1971), abrogation on other grounds recognized by Califano v. Sanders, 430 U.S. 99 (1977), the U.S. Supreme Court "definitively rejected" the remedy this Court ordered in MEIC, i.e., open-ended evidentiary development in the district court to fill gaps in the administrative record. 3 Admin. L. & Prac. § 8:27.

This Court has adopted the fundamental principles of arbitrary-or-capricious review established by the U.S. Supreme Court in Overton Park and its progeny in

articulating the standard for such review of informal decisions by Montana's agencies. See N. Fork Preservation Ass'n v. Dep't of State Lands, 238 Mont. 451, 465, 778 P.2d 862, 871 (1989) (quoting discussion of Overton Park's explication of arbitrary-or-capricious standard from Marsh v. Oregon Natural Resources Council, 490 U.S. 360, 378 (1989)); Aspen Trails Ranch v. Simmons, 2010 MT 79, ¶¶ 61-66, 356 Mont. 41, 230 P.3d 808 (Rice, J., concurring) (summarizing Overton Park and other principal federal authorities on this issue and their incorporation in this Court's precedents). And in Ravalli County Fish & Game Association v. Montana Department of State Lands, this Court affirmed that "'remand to the agency for additional investigation or explanation'" is "'the proper course'" where, as here, "'the record before the agency does not support the agency action.'" 273 Mont. 371, 382, 903 P.2d 1362, 1369 (1995) (quoting Florida Power & Light Co. v. Lorion, 470 U.S. 729, 744 (1985)) (emphasis added). The remedy ordered in MEIC contravenes this Court's decision in Clark Fork Coalition and the federal administrative law principles adopted in North Fork and Ravalli County Fish & Game Association.

This Court's order remanding to the district court for fact-finding in MEIC also contravenes controlling precedent holding that courts may not consider evidence outside the administrative record "'to determine the correctness or wisdom of the agency's decision.'" Heffernan v. Missoula City Council, 2011 MT

91, ¶ 66, 360 Mont. 207, 255 P.3d 80 (quoting Asarco, Inc. v. EPA, 616 F.2d 1153, 1160 (9th Cir. 1980)). This is not to say the district court never may supplement the administrative record; to the contrary, this Court has approved such supplementation when necessary to admit important background information, determine whether the agency considered all relevant factors, or ascertain whether the agency "fully explicated its course of conduct or grounds of decision." Id. (citing Asarco, 616 F.2d at 1160). But such discrete supplementation is fundamentally different from the district court's conducting an evidentiary hearing at which the agency can offer new evidence to fill gaps in the record and challenging parties can introduce evidence they failed to provide during the administrative process for the purpose of rebutting the agency's rationale. An open-ended evidentiary hearing of the type ordered in MEIC impermissibly invites the district court to independently weigh the conflicting evidence and substitute its judgment for that of the agency. See Clark Fork Coalition, ¶ 47 ("[A] court is not to substitute its judgment for that of the agency …. In other words, the Court looks closely at whether the agency has taken a hard look at the question presented. The Court does not take a hard look itself but requires the agency to do so."). It also invites the agency to concoct new rationales for its decision in response to a lawsuit, contrary to the principle that agency decisions "must … stand or fall on

the propriety of th[e] finding[s]" articulated by the agency in the record at the time it made its decision. Camp v. Pitts, 411 U.S. 138, 143 (1973) (citation omitted).

Finally, it is unclear how the district court can follow this Court's direction in MEIC to function as a fact-finder while also giving appropriate deference to the agency. An evidentiary hearing involves creating the record in the first instance and calls on the district court to independently, and evenhandedly, weigh the evidence presented by both sides. In contrast, deferential judicial review of agency action presupposes the existence of an administrative record and an already-adopted rationale for the agency's decision to which the court can defer; the reviewing court functions essentially as an appellate tribunal, "determin[ing] whether or not as a matter of law the evidence in the administrative record permitted the agency to make the decision it did." Occidental Eng'g Co. v. INS, 753 F.2d 766, 769-70 (9th Cir. 1985). The remedy ordered in MEIC demands that the district court do both distinct tasks simultaneously, giving due deference to the agency's decision (or the version of it reflected in the administrative record) while also functioning as an independent fact-finder. Amici are not aware of any precedent that would guide the district court in attempting to accomplish this.

II. THE REMEDY ORDERED BY THIS COURT WOULD UNDULY BURDEN DISTRICT COURTS AND LITIGANTS

In addition, if not amended, the Court's remedy order threatens to impose significant and unnecessary burdens on district courts and litigants. At the outset,

the impact of the Court's remedy decision does not appear to be limited to situations in which the Supreme Court reviews a district court's grant of summary judgment. Instead, the Court's determination that unsupported agency decisions give rise to factual disputes precluding summary judgment could be construed to require a trial de novo in the district court in nearly every challenge to agency action as arbitrary or capricious.

That result would substantially increase burdens on district courts, which until now have routinely resolved challenges to informal agency decisions based on summary judgment briefs and oral argument predicated on a closed administrative record. Under MEIC, such cases now may require time-intensive management of discovery disputes, motions practice, and potentially multi-day trials. Because the venue for challenges to informal agency actions is often Lewis and Clark County, the decision will disproportionately encumber the First Judicial District Court, which already is in need of additional resources due to its heavy civil caseload.[1]

The Court's remedy order also will burden state and local agencies, who have no choice but to defend their decisions in district court and now may face onerous evidentiary proceedings. Agency resources will be diverted to the

[1] See Nat'l Ctr. for State Courts, Montana District Court Judicial Weighted Caseload Study, 2014, at 20 (App. G) (Oct. 2014), at https://courts.mt.gov/portals/189/dcourt/stats/workload/caseload-study2014.pdf.

production and review of written discovery and agency staff may routinely be subjected to depositions and cross-examination. In addition to increasing the costs of defending administrative decisions, the rule in MEIC may require agencies to redirect staff time to litigation that would otherwise be spent on other essential functions, such as environmental permitting and enforcement. In addition, the prospect of costly evidentiary proceedings would erect a substantial barrier to judicial review for private litigants who seek to challenge irrational agency decisions—particularly where such litigants already have invested significant resources in advocating their position during the administrative process.[2]

This Court may avoid these undesirable consequences by amending its remedy order on rehearing to affirm its longstanding line of precedent requiring agencies to justify their decisions in the administrative record, rather than through trial in the district court.

[2] Notably, in cases alleging that an agency arbitrarily failed to justify its decision, an agency could prevail on summary judgment by demonstrating that it offered a sufficient justification in the administrative record. But under MEIC, plaintiffs never could prevail on summary judgment for such a claim, because any demonstration that the agency failed to adequately explain or support its decision in the record would preclude summary judgment and necessitate a trial.

CONCLUSION

For the foregoing reasons, amici curiae respectfully urge the Court to grant rehearing for the limited purpose of revising its opinion to order remand to DEQ, instead of the district court, and vacatur of DEQ's inadequately supported decision.

Respectfully submitted this 10th day of October, 2019.

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CERTIFICATE OF COMPLIANCE

Pursuant to Mont. R. App. P. 20(3) and (4), I certify that this brief in support of Appellees' petition for rehearing is printed with a proportionately spaced Times New Roman typeface of 14 points; is double-spaced; and contains 2,355 words, as counted by Microsoft Word for Windows.

/s/ Katherine K. O'Brien
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CERTIFICATE OF SERVICE

I, Katherine Kirklin O'Brien, hereby certify that I have served true and accurate copies of the foregoing Motion - Amicus - Leave to Participate to the following on 10-10-2019:

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