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**MONTANA FIRST JUDICIAL DISTRICT COURT
LEWIS AND CLARK COUNTY**

MONTANA ENVIRONMENTAL
INFORMATION CENTER and
SIERRA CLUB,

Plaintiffs,

v.

MONTANA DEPARTMENT OF
ENVIRONMENTAL QUALITY,

Defendant,

and

WESTERN ENERGY COMPANY,

Defendant-Intervenor.

Cause No. CDV-2012-1075

**MEMORANDUM AND ORDER ON
JUDICIAL REVIEW**

Plaintiffs filed this action December 21, 2012, challenging a permit issued to Western Energy Company (WEC) by the Montana Department of Environmental Quality (DEQ) on September 14, 2012. Plaintiffs allege violation

1 of both the federal Clean Water Act (CWA) and the Montana Water Quality Act
2 (WQA) by issuance of Final Modified Permit number MT0023965, effective in
3 modified form September 8, 2014. The permit allows the discharge of pollutants
4 by the Rosebud Mine (owned and operated by WEC) into surrounding waters.

5 Plaintiffs also seek a determination and declaration that the Montana
6 system for issuance of the permit is unlawful pursuant to both federal and
7 Montana law, given its failure to ensure water quality standards. Finally,
8 Plaintiffs seek "reasonable attorneys' fees and expenses as damages," as well as
9 the costs of the lawsuit. (Verified Compl. & Application Writ Mandate &
10 Declar. Relief, at 15 (Dec. 21, 2012).)

11 All parties have moved for summary judgment. Plaintiffs seek
12 summary judgment on its assertions stated above. WEC seeks summary
13 judgment, asserting that Plaintiffs do not have standing to bring this lawsuit and
14 that the permit process and resulting permit is not violative of law. DEQ seeks
15 summary judgment on similar bases.

16 STANDARD OF REVIEW

17 The parties agree the Montana Administrative Procedure Act (MAPA)
18 does not apply in this case¹ and assert the standard of review of DEQ's
19 administrative decisions is set out by the Montana Supreme Court in *Clark Fork*
20 *Coalition v. Department of Environmental Quality*, 2012 MT 240, ¶¶ 19-20, 366
21 Mont. 427, 288 P.3d 183:

22 An agency's interpretation of its rule is afforded great weight,
23 and we will defer to that interpretation unless it is plainly inconsistent
24 with the spirit of the rule. *Clark Fork Coalition v. Dep't of Env'tl.*

25 ¹ No party asserts this is a contested case as defined in MAPA or argues the plain language
of Montana Code Annotated § 2-4-702(2)(d).

1 *Quality*, 2008 MT 407, ¶ 20, 347 Mont. 197, 197 P.3d 482. We will
2 sustain an agency's interpretation of a rule so long as it lies within the
3 range of reasonable interpretation permitted by the wording. *Clark*
4 *Fork Coalition*, ¶ 20. Of course, we need not defer to an incorrect
agency interpretation. *Clark Fork Coalition*, ¶ 20.

5 We review an agency decision not classified as a contested case
6 under the Montana Administrative Procedure Act to determine
7 whether the decision was arbitrary, capricious, unlawful or not
8 supported by substantial law. *Clark Fork Coalition*, ¶ 21. In
9 reviewing an agency decision under the arbitrary and capricious
10 standard, we consider whether the decision was "based on a
11 consideration of the relevant factors and whether there has been a
12 clear error of judgment." *N. Fork Preservation Ass'n v. Dep't of State*
13 *Lands*, 238 Mont. 451, 465, 778 P.2d 862, 871 (1989) (citing *Marsh v.*
14 *Oregon Natural Resources Council*, 490 U.S. 360, 378, 109 S. Ct.
15 1851, 1861, 104 L. Ed. 2d 377 (1989)). Although our review of
16 agency decisions is narrow, we will not automatically defer to the
17 agency "without carefully reviewing the record and satisfying
18 [ourselves] that the agency has made a reasoned decision"
19 *Friends of the Wild Swan v. Department of Natural Res. &*
20 *Conservation*, 2000 MT 209, ¶ 28, 301 Mont. 1, 6 P.3d 972 (quoting
21 *Marsh*, 490 U.S. at 378, 109 S. Ct. at 1861).

22 BACKGROUND

23 The applicable federal law regarding water quality is called the Clean
24 Water Act (CWA), found within the Federal Water Pollution Control Act. 33
25 U.S.C. § 1251, et seq. The CWA applies to water flowing out of an area such as
the Rosebud Mine and to the quantities, rates, and concentrations of components
or elements (chemical, physical, biological) in the water.

The federal and state laws in this realm dovetail, as both refer to each
other and state the same goals and similar requirements. For example, both
federal and state law provide for permits for discharges to navigable waters

1 (National Pollutant Discharge Permit System (NPDPS), Montana Pollutant
2 Discharge Elimination System (MPDES)). In this case, the MPDES permit is at
3 issue, but there is applicable and relevant federal law. It is undisputed that the
4 permitting process is meant to control and assure water quality through
5 establishment and maintenance of water quality standards, as well as monitoring
6 of water-affecting activities.

7 As stated by the Eighth Circuit Court of Appeals:

8 Since 1972, the states and the federal government have worked
9 together "to restore and maintain the chemical, physical, and
10 biological integrity of the Nation's waters," in a partnership governed
11 by the Clean Water Act (CWA). 33 U.S.C. § 1251(a). With this goal
12 in mind, the CWA authorizes states to establish water quality
13 standards for bodies of water within its borders. 33 U.S.C. § 1313(a)-
14 (c). Water quality standards "define[] the water quality goals of a
15 water body, or portion thereof, by designating the use or uses to be
16 made of the water and by setting criteria necessary to protect the
17 uses." 40 C.F.R. § 131.2. **They comprise (1) the designated use(s)
18 of the waters (e.g., water supply, propagation of fish, or
19 recreation), 40 C.F.R. § 131.10; (2) the water quality criteria
20 necessary to safely permit those designated uses, 40 C.F.R. §
21 131.11; and (3) antidegradation requirements to protect waters
22 whose quality is better than required, 40 C.F.R. § 131.12. 40
23 C.F.R. § 131.6. States must review their water quality standards at
24 least every three years. 33 U.S.C. § 1313(c)(1). And under the CWA,
25 each state must create a "continuing planning process" (CPP) to,
among other things, govern the process for revising its water quality
standards. 40 C.F.R. § 130.5(a). "In designating uses of a water body
and the appropriate criteria for those uses, the State shall take into
consideration the water quality standards of downstream waters and
shall ensure that its water quality standards provide for the attainment**

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1 and maintenance of the water quality standards of downstream
2 waters." 40 C.F.R. § 131.10(b).

3 *El Dorado Chem. Co. v. United States EPA*, 763 F.3d 950, 952-53 (8th Cir. 2014)
4 (footnote omitted; emphasis added); *see also PUD No. 1 v. Wash. Dep't of*
5 *Ecology*, 511 U.S. 700, 704-05; *Pennaco Energy, Inc. v. Mont. Bd. of Envtl.*
6 *Review*, 2008 MT 425, ¶ 10, 347 Mont. 415, 199 P.3d 191.

7 DEQ's consideration of water quality in Montana must involve
8 application of standards, practices, and compliance with both federal and state
9 law. Title 75, chapter 5, of the Montana Code Annotated sets out the statutes
10 relevant to water quality. Montana Code Annotated § 75-5-103(30) (a) defines
11 "pollution" as:

12 (i) contamination or other alteration of the physical, chemical,
13 or biological properties of state waters that exceeds that permitted by
14 Montana water quality standards, including but not limited to
15 standards relating to change in temperature, taste, color, turbidity, or
16 odor; or

17 (ii) the discharge, seepage, drainage, infiltration, or flow of
18 liquid, gaseous, solid, radioactive, or other substance into state water
19 that will or is likely to create a nuisance or render the waters harmful,
20 detrimental, or injurious to public health, recreation, safety, or
21 welfare, to livestock, or to wild animals, birds, fish, or other wildlife.

22 Title 17, Chapter 30 of the Administrative Rules of Montana relate to water
23 quality. Both Montana statutes and administrative rules refer to applicable
24 federal law.

25 In Montana, we also have a constitutional mandate regarding our
environment:

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1 **Protection and improvement.** (1) The state and each person
2 shall maintain and improve a clean and healthful environment in
3 Montana for present and future generations.

4 (2) The legislature shall provide for the administration and
5 enforcement of this duty.

6 (3) The legislature shall provide adequate remedies for the
7 protection of the environmental life support system from degradation
8 and provide adequate remedies to prevent unreasonable depletion and
9 degradation of natural resources.

10 Mont. Const. art. IX, § 1. *See Montana Envtl. Info. Ctr. v. Dep't of Envtl.*
11 *Quality*, 1999 MT 248, ¶¶ 64-80, 296 Mont. 207, 988 P.2d 1236.

12 The administrative record in this case establishes there has been and
13 will be water quality concerns related to the large geographic area disturbed by
14 the Rosebud Mine and the affected surface waters. By its very nature, the
15 practice of disturbing large tracts of land as described in the permit increases the
16 probability of discharge of pollutants.

17 While the study and implementation of water quality standards
18 involves a high level of scientific analysis, common sense has a role in the
19 application of the legal standards. For example, review of the maps included in
20 the administrative record reveals that a segment of East Fork Armells Creek is
21 surrounded by the Rosebud Mine. There are many claims and much argument in
22 the parties' briefs regarding this segment of the stream, but it is undisputed that
23 the downstream segment of the stream is impaired. DEQ's responsibility for
24 maintaining Montana water quality requires full study and recognition of the
25 effect of the Rosebud Mine on the entire East Fork Armells Creek and the waters
into which it flows.

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1 It is also clear that compliance issues arise regularly with regard to
2 discharges by the Rosebud Mine, which are handled or not handled by state and
3 federal regulators. This is a permit case, rather than a compliance case, but there
4 is a general issue regarding the cumulative effect of the mine on Montana's water
5 quality in the streams (ephemeral or not) into which the Rosebud Mine
6 discharges. The renewal process is consistent with the requirement that DEQ
7 regularly revisit our water quality. Yet the years taken by DEQ to renew this
8 permit negate these requirements, or at least the effectiveness of the required
9 procedures.²

10 The following timeline is relevant to the issues raised:

11 1. December 1, 1999 - DEQ Authorization to Discharge Under the
12 Montana Pollutant Discharge Elimination System (MPDES) issued to WEC for
13 the Rosebud Mine in or near Colstrip, Montana. The 17-page permit was a
14 renewal of a permit issued in 1989. The named receiving waters include nine
15 creeks, two coulees, and one reservoir. Admin. R. at 1836-52.³ The permit
16 expired at midnight September 30, 2004. Admin. R. at 1836.

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19 ² "It is the national policy that to the maximum extent possible the procedures utilized for
20 implementing this Act [33 USCS §§ 1251 et seq.] shall encourage the drastic minimization of
21 paperwork and interagency decision procedures, and the best use of available manpower and
22 funds, so as to prevent needless duplication and unnecessary delays at all levels of
23 government." 33 USCS §§ 1251(f).

24 ³ References to the administrative record provided by DEQ (in the form of a computer disc)
25 are to "Admin. R." and page numbers shown in the administrative record in the lower right
hand corner of each page. The computer disc is Exhibit A to an Affidavit of Melissa Sjolund
filed October 10, 2014. The record consists of documents and attachments totaling over 2,300
pages. It was provided in only moderately organized fashion and with confusing labels. And
rather than providing a single, succinct chronology of events related to the process used by
DEQ, the parties filed multiple briefs on the three motions for summary judgment.

1 2. The five-page Statement of Basis relevant to the 1999 permit
2 renewal (dated July 1, 1999) describes the processes by which discharges⁴
3 happened at the Rosebud Mine:

4 Western Energy Company is a surface coal producer, with an
5 average annual production rate of approximately 8 million tons of
6 sub-bituminous coal from the Rosebud Mine, located adjacent to the
7 town of Colstrip. Coal is surface mined through dragline-
8 implemented overburden removal, followed by a truck and shovel
9 coal extraction operation.

10 The coal mining process at the Rosebud mine requires surface
11 disturbance of approximately 400 acres annually. The surface runoff
12 generated by precipitation events occurring over these disturbed
13 drainages is the primary source of wastewater involved in Western
14 Energy's mining operation. Secondary sources of wastewater include
15 groundwater inflow into the open mine pits from bisected overburden,
16 coal and alluvial aquifers, and municipal (Colstrip) water used to
17 wash coal dust from coal handling and loadout facilities. Under
18 typical operational scenarios, these secondary sources provide limited
19 quantities of water, representing only a nominal percentage of most
20 discharges.

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⁴ "Discharge" is defined in Administrative Rule of Montana 17.30.1304(21) as follows:
"[W]hen used without qualification, means the discharge of a pollutant."

"Discharge of a pollutant" and "discharge of pollutants" mean any addition of any
pollutant or combination of pollutants to state waters from any point source. This
definition includes additions of pollutants into water of the state from: surface
runoff which is collected or channeled by man; discharges through pipes, sewers,
or other conveyances owned by a state, municipality, or other person which do
not lead to a treatment works. This term does not include an addition of
pollutants by any "indirect discharger."

Admin. R. Mont. 17.30.1304(22). In the 2010 draft permit, the permit dated
September 14, 2012, and the modified permit dated September 8, 2014, "discharge" is defined
as "the injection, deposit, dumping, spilling, leaking, placing, or failing to remove any
pollutant so that it or any constituent thereof may enter in to state waters, including ground
water." Admin. R. at 1397, 1702. This mirrors the definition stated in Administrative Rule of
Montana 17.30.602(8).

1 Sediment Ponds and traps located upstream of outfalls are
2 designed to contain a volume of water equivalent to the runoff volume
3 associated with the 10-Year, 24-Hour design precipitation event
4 within an individual sub-watershed.

5 Mine pits bisect adjacent sub-watersheds at various locations,
6 combining runoff intercepted from multiple sub-watersheds and any
7 groundwater inflow present. Pit dewatering is performed as
8 operationally required, by pumping water into sediment control
9 facilities, or loading water directly into water wagons for haulroad
10 dust suppression.

11 With storm runoff being the main component of WECO's
12 wastewater and operational requirements largely dictating the
13 disposition of this water, discharge volumes from specific outfalls are
14 variable, and difficult to predict. However, due to the nature of
15 runoff, the quality of the discharged wastewater is relatively constant
16 between individual outfalls, being more dependent upon retention
17 time prior to discharge than on source location.

18 Admin. R. at 2134-35. The Statement of Basis notes "sediment control facilities"
19 which are on the perimeter of active mine area and 170 outfall⁵ locations
20 identified in the original permit. Some outfall locations were downstream of land
21 disturbed by the mine and some were associated with future mining areas.

22 3. As to water quality, the 1999 Statement of Basis states:

23 The limits set in the permit were based on baseline concentrations
24 collected in the 1980's and incorporated in to the original permit
25 issued in 1989. These limits were considered Water Quality Based
Nondegradation Limits because they allowed no increase over
background conditions (MCA, 75-5-306). Water Quality Based
Nondegradation Limits (iron, oil and grease, sulfate, and boron) will
remain in effect during stormwater events. The stream segments were

⁵ The word "outfall" does not appear in Title 75, chapter 5, regarding water quality.
Administrative Rule of Montana 17.30.201 states "[f]or purposes of this rule, the definitions
contained in ARM Title 17, chapter 30, subchapter 10 and subchapter 13 are incorporated by
reference. The following definitions also apply in this rule: ... (k) 'outfall' means a disposal
system through which effluent or waste leaves the facility or site."

1 [sic] discharge takes place are ephemeral which not considered "high
2 quality waters" (MCA, 75-5-103(10)(b)(ii)) and as such
3 nondegradation does not apply (ARM, 17.30.705(2)(b)). This is not a
4 new or increased source of pollution so again the nondegradation [sic]
rules do not apply (ARM, 17.30.705(1)).

5 Admin. R. at 2135.

6 4. April 15, 2004 - DEQ received WEC's permit renewal
7 application. Admin. R. at 1719.

8 5. September 19, 2004 - Letter from the DEQ environmental
9 engineer specialist to WEC stated that its application "is substantially complete."
10 "Under ARM 17.30.1313, since you have submitted a complete renewal
11 application, your present permit is administratively extended and remains in full
12 force and effect until the effective date of the new permit." Admin. R. at 171

13 6. 2010⁶ - Segment of East Fork Armells Creek from Colstrip,
14 Montana, north to the mouth of Armells Creek was listed on State of Montana
15 2010 list of impaired waters. Admin. R. at 1511.

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20 ⁶ The administrative record provided by DEQ shows no action by DEQ regarding the renewal of the
21 permit between the letter of September 2004 and June 2009. At that point, DEQ notified WEC that
22 the draft permit and fact sheet were available to them "pre-public notice." Admin. R. at 1710. In
23 August 2009, DEQ granted WEC's request for deferral of public notice regarding a draft permit.
24 (The request, stated in a letter to DEQ, expressed concern regarding water classification,
"appropriateness of the data used to characterize water discharged from the mine," and sampling
equipment at outfalls.) Admin. R. at 1781-84. DEQ states in its brief that it developed the renewed
permit in March 2010. (Br. Supp. Pls.' Mot. S.J. at 10 (Feb. 13, 2016).)

25 The DEQ "MPDES - Administrative Record Tracking Sheet & Checklist" shows
April 18, 2011, as the date the application for a renewed permit was received and
November 18, 2011, as the date the application was deemed complete. Admin. R. at 1116.

1 7. August 24, 2010 - DEQ issued a 41-page draft permit.⁷ The
2 maps included in the administrative record show the location of the Rosebud
3 Mine, surrounded by the creeks and coulees into which discharges are allowed by
4 the permit. East Fork Armells Creek flows east through or between property
5 owned by the Rosebud Mine before it reaches Colstrip, Montana, and flows
6 north/northwest thereafter.

7 8. August 26, 2010 - Written comments from Plaintiff's counsel
8 include, among other claims, the claims made in this action.

9 9. September and October 2010 - The water quality documents
10 added to the administrative record in this case during this time note the following
11 regarding the segment of East Fork Armells Creek from Colstrip, Montana, north
12 to the mouth of Armells Creek: "One or more uses are impaired and a TMDL
13 [total maximum daily load] is required." Admin. R. at 1511. While the
14 assessment had not been started, there was no description of the segment as
15 ephemeral and the category titled "Overall Condition of Segment" includes the
16 following:

17 Physical/Chemical: East fork Armells is typical of most streams in
18 this region. The water is very hard, saline, and high in sulfates.
19 Where TSS data was available (2005), concentrations were low.
20 Mining activities (including water pumped from the Yellowstone
21 River to seeping ponds) likely have contributed to increased TDS
22 concentrations and "water logging" below Colstrip. DEQ
23 correspondence in 1998 estimated a 50% increase in TSC
24 concentrations in the EFAC alluvium from 1977 to 1997. Water
logging may not currently be occurring. The elevated SC
concentrations make this water unsuitable for irrigation under

25 ⁷ No public notice regarding this draft permit was found by the Court in the administrative record. Plaintiffs' comments dated August 26, 2010 note a public notice dated July 12, 2010 which failed to recognize the waters listed as impaired. Admin. R. at 1630.

1 ordinary circumstances. This water is acceptable for use with
2 livestock accustomed to its use, but is not recommended for pregnant
3 or lactating cows. Data from the 1970's show the NO₂+NO₃
4 regularly exceeded criteria, although this was not the case in 2005.

5 In 2005, TKN at the lower site moderately exceeded the contact
6 recreation criteria, and slightly exceeded the contact recreation
7 criteria, and slightly exceeded the aquatic life criteria. At the middle
8 site, contact recreation and aquatic life criteria were slightly exceeded.
9 The most reliable metals data is from the 2005 assessment, which
10 showed no exceedences [sic].

11 Other: TSS does not appear to be an accurate cause of
12 impairment. The macroinvertebrate samples, field observations, and
13 historical and 2005 water chemistry data indicate that nutrients may
14 be a source of impairment. The SC values do not appear to be vastly
15 different from other drainages in the region; however, the probable
16 impact from municipal sources and industrial pond seepage cannot be
17 ignored. The past and present impacts from changes in groundwater
18 chemistry, surface flow, and atmospheric deposition merits further
19 investigation. Salinity/TDS/chlorides will remain a cause of
20 impairment.

21 Admin. R. at 1524. The same Water Quality Standards Attainment Record ends
22 with reference to the stream segment as "Waters where one or more applicable
23 beneficial uses have been assessed as being impaired or threatened, and a TMDL
24 is required to address the factors causing the impairment or threat." Admin. R. at
25 1527.

10. May 14, 2012 - A public notice was issued by DEQ regarding
MPDES MT0023965. In the notice, DEQ claimed there was no need to set
TMDL standards, as the permit was not new.

11. September 14, 2012 - DEQ issued the renewed permit Number
0023965 for the Rosebud Mine. The permit had been changed from the 2010
draft permit, as outlined in a letter to the vice president and general manager of

1 WEC dated the same day. Admin. R. at 1348-50. The 2012 permit is 59-pages
2 long. The related permit fact sheet is 73-pages long. Although it makes
3 reference to it as an attachment to the renewed permit, the administrative record
4 does not include any statement of basis attached to the 2012 permit.

5 12. The Permit Fact Sheet related to the 2012 permit (dated March
6 2012) "identifies the legal requirements and technical rationale that serve as the
7 basis for the requirements" of the permit. Admin. R. at 1411. As stated by DEQ
8 in this fact sheet, the coal seam accessed and removed by WEC "is
9 approximately 100 feet below the surface, with an average thickness of 24 feet."
10 Admin. R. at 1411. "The average annual production rate of the mine is
11 approximately 10-12 million tons of coal, requiring about 400 acres of surface
12 disturbance per year." Admin. R. at 1412.

13 13. As to the characteristics of East Fork of Armells Creek, the
14 2012 fact sheet states:

15 The State of Montana 2010 integrated 303(d) list and 305(b)
16 Water Quality Report lists . . . East Fork Armells Creek segment
17 MT42K002_110 from Colstrip to the mouth is listed as a category 5
18 water body, indicating that one or more beneficial uses have been
19 assessed as being impaired or threatened and a TMDL is required.
20 This segment of East Fork Armells Creek is listed as partially
21 supportive of aquatic life and of warm water fisheries. The probable
22 causes of impairment are nitrate plus nitrite, electrical conductivity,
23 TDS, and total Kjehldahl nitrogen, with agriculture and coal mining
24 transfer of waters as probable sources of impairment. As this segment
25 is directly downstream of the mine, the permit contains monitoring
requirements or limitations for electrical conductivity, TDS, and
nitrate plus nitrite to address the discharge of these pollutants from the
Facility. It is not anticipated that the Facility is a source of total
Kjehldahl nitrogen. If a TMDL is adopted an approved for these
pollutants, the Permit may be re-opened to include effluent limitations

1 based on appropriate wasteload allocations (WLAs) from the TMDL
2 for this parameter.

3 Admin. R. at 1429.

4 As to the new outfalls in the permit, the Permit Fact Sheet states that 12
5 outfalls "constitute new or increased sources; accordingly, the discharge is subject to
6 Montana Nondegradation Policy (75-5-303, MCA; ARM 17.30.705)." Admin. R. at
7 1452.

8 14. June 13, 2012 - Written comments from Plaintiff's counsel include,
9 among other claims, the claims made in this action. Admin. R. at 109-26.

10 15. In its undated "Response to Public Comment," DEQ maintains the
11 positions it now defends in this Court. Admin. R. at 1488-1510.

12 16. May 8, 2014 - Permit renewal application received by DEQ. WEC
13 stated that its average annual coal production rate is approximately 10 to 12 million tons
14 of sub-bituminous coal at the Rosebud Mine. It asserts that the mine disturbs
15 approximately 350 acres per year. Admin. R. at 241.

16 17. May 2014 - Permit Fact Sheet states:

17 The following modifications are included:

- 18 A. Correct the identification of certain "new" source outfalls
19 that were previously permitted and are "existing" sources;
20 B. Transfer fifteen outfalls to Western Alkaline Standards;
21 C. Revise water quality-based effluent limitations
22 D. Revise effluent monitoring requirements; and
23 E. Remove three representative monitoring outfalls.

24 Admin. R. at 76. The fact sheet states the new outfalls or sources either do not require
25 the setting of new standards, or the discharges involved do not violate the applicable
standards. Admin. R. at 79-80.

1 18. June 9, 2014 - Public notice by DEQ regarding modification of the
2 2012 permit. It includes the following language:

3 This is a major modification of the MPDES permit for the
4 Western Energy company rosebud Mine. The facility discharges to
5 East Fork Armells Creek, Stocker Creek, Lee Coulee, west fork
6 Armells Creek, Black Hank Creek, Donley Creek, Cow Creek, Spring
7 Creek, and Pony Creek. The modification includes the following
8 actions; correct the identification of certain "new" source outfalls that
9 were previously permitted and are "existing" sources; transfer fifteen
10 outfalls to Western Alkaline Standards; revise water quality-based
11 effluent limitations; revise effluent monitoring requirements; and
12 remove three representative monitoring outfalls.

13 As specified in the Administrative Rules of Montana at ARM
14 17.30.1361 and ARM 17.30.1365(4)(b) only the permit conditions
15 described above are reopened and subject to this public notice and
16 comment period. All other provisions of the permit remain in effect
17 and are not reopened.

18 Admin. R. at 149-50.

19 19. September 8, 2014 - DEQ issued the 2012 permit Number
20 0023965 in modified form for the Rosebud Mine. There is a decrease in the
21 number of outfalls designated as "new" from twelve to four. The permit expires
22 October 31, 2017.

23 DISCUSSION

24 A. Plaintiffs' Standing

25 Plaintiff MEIC relies on the facts related by Steve Gilbert, a member
of MEIC and outdoor recreationalist in Montana, to establish its standing to bring
this lawsuit. The facts are set out in a deposition taken by the parties on
February 13, 2014, as well as an affidavit of Gilbert filed February 13, 2015.
Gilbert lives in Helena, Montana, and has been a resident of Montana since 1967.

1 He describes his employment as a "biological consultant," and for 25 years he
2 was "part owner and president of an environmental consulting company that
3 specialized in wildlife, aquatics/fisheries, soils, vegetation, forestry, range and
4 hydrology." With regard to the area of the Rosebud Mine, Gilbert has traveled
5 regularly to the area for various purposes. He worked in the area for years and
6 has personal knowledge of East Fork Armells Creek, Cow Creek, and Rosebud
7 Creek. He hunted in relevant areas during the time the renewal application was
8 before DEQ.

9 Gilbert's recreational use and enjoyment of the area near the Rosebud
10 Mine has been affected and will be affected, partially because of the water
11 pollution caused by the mining activity. He has knowledge relevant to the
12 environmental impacts of the mine based on his personal observations and his
13 MEIC connections. Gilbert was a member of MEIC during the years that it was
14 involved in the administrative processes associated with this permit. He was a
15 voting member of the MEIC council when the decision was made to file this
16 lawsuit.

17 Gilbert's more recent visits to the area of Rosebud Mine have been to
18 hunt upland game birds and to visit friends. He intends to continue those
19 activities and is concerned regarding the degradation and pollution of the waters
20 in the area due to the Rosebud Mine.

21 The standard for determining whether Plaintiffs have standing is set
22 out in *Friends of the Earth, Inc., v. Laidlaw Environmental Services (TOC), Inc.*,
23 528 U.S. 167, 183-85 (2000):

24 We have held that environmental plaintiffs adequately allege
25 injury in fact when they aver that they use the affected area and are
persons "for whom the aesthetic and recreational values of the area

1 will be lessened" by the challenged activity. *Sierra Club v. Morton*,
2 405 U.S. 727, 735, 31 L. Ed. 2d 636, 92 S. Ct. 1361 (1972). See also
3 *Defenders of Wildlife*, 504 U.S. at 562-563 ("Of course, the desire to
4 use or observe an animal species, even for purely esthetic purposes, is
undeniably a cognizable interest for purposes of standing.")

5 [The] affidavits and testimony presented by FOE in this case
6 assert that Laidlaw's discharges, and the affiant members' reasonable
7 concerns about the effects of those discharges, directly affected those
8 affiants' recreational, aesthetic, and economic interests. These
9 submissions present dispositively more than the mere "general
10 averments" and "conclusory allegations" found inadequate in
11 *National Wildlife Federation*, 497 U.S. at 888. Nor can the affiants'
12 conditional statements -- that they would use the nearby North Tyger
13 River for recreation if Laidlaw were not discharging pollutants into it
14 -- be equated with the speculative "'some day' intentions" to visit
15 endangered species halfway around the world that we held insufficient
16 to show injury in fact in *Defenders of Wildlife*, 504 U.S. at 564. . . .
17 [W]e see nothing "improbable" about the proposition that a
18 company's continuous and pervasive illegal discharges of pollutants
into a river would cause nearby residents to curtail their recreational
use of that waterway and would subject them to other economic and
aesthetic harms. The proposition is entirely reasonable, the District
Court found it was true in this case, and that is enough for injury in
fact.

19 See also *Mont. Envtl. Info. Ctr. v. Dept. of Envtl. Quality*, 1999 MT 248, ¶¶ 41 -
20 45, 296 Mont. 207, 988 P.2d 1236.

21 Gilbert's contact with the streams and land in the area of the Rosebud
22 Mine, together with the effect of the mine on his use and enjoyment of the area,
23 establish injury in fact. Therefore, MEIC's standing is established. One party
24 with standing satisfies the standing requirements for other parties. *Aspen Trails*
25 *Ranch v. Simmons*, 2010 MT 79, ¶ 45, 356 Mont. 41, 230 P.3d 808.

1 **B. Classification of Streams**

2 The record before this Court is not consistent as to the classification of
3 waters involved. While much of the record lists waters as "C-3" pursuant to
4 Administrative Rule of Montana 17.30.611(1)(c), DEQ also states that the waters
5 are ephemeral pursuant to Administrative Rule of Montana 17.30.615 and
6 .637(4). The classification of Montana's waters was and is the starting point for
7 determination of applicable water quality standards.

8 The determination that the waters are C-3 waters cannot be changed
9 without compliance with applicable law. Administrative Rule of Montana
10 17.30.615 requires:

11 (2) Prior to reclassifying a specific water body classified in
12 ARM 17.30.607 through 17.30.614 under one of the water-use
13 classifications identified in (1)(a) through (h) and before the U.S.
14 Environmental Protection Agency's approval of the water body's
15 revised classification, a use attainability analysis must be conducted in
accordance with 40 CFR 131.10(g), (h), and (j).

16 This clearly applies to the waters that are currently classified as C-3
17 waters and which DEQ now wishes to treat as ephemeral (with reduced water
18 quality standards). Any reclassification regarding the waters must be pursuant to
19 statutory requirements (Mont. Code Ann §§ 75-5-103, -301), including the
20 required public process. *See* Admin. R. Mont. 17.30.606.

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1 While DEQ now admits within the context of this lawsuit that a
2 portion of East Fork Armells Creek is not ephemeral,⁸ its lack of consideration of
3 the evidence in the administrative record showing that a portion of East Fork
4 Armells Creek is not ephemeral during the renewal process at issue shows a clear
5 error of judgment by DEQ during the permitting process.

6 DEQ maintains further modification of the permit (due for
7 consideration in the year 2016) will address the situation as to the applicable
8 water quality standards. There is no basis to find the situation could not have
9 been addressed at some point between the September 30, 2004 expiration of the
10 permit and the modification that became effective November 1, 2014. In the end,
11 this is one example of the overall failure by DEQ to protect the relevant waters
12 by engaging in a lengthy, arbitrary process of permitting.

13 DEQ's determination in the current permit that all applicable waters
14 are ephemeral also affects the agency's conclusions regarding the need for
15 determining TMDLs and all standards applicable to the new discharges through
16 new outfalls. For example, it appears the agency relies on the conclusion
17 regarding streams being ephemeral to ignore the water quality records noting that
18 TMDLs need to be determined for a segment of East Fork Armells Creek. Given
19 DEQ's concession that not all of the relevant streams are ephemeral, this
20 conclusion is arbitrary and not supported by the applicable law. Mont. Code Ann.
21 §§ 75-5-103, -301; Admin. R. Mont. 17.30.615. And, as noted by DEQ in its
22 notices and briefs, the law applicable to the system of classification of streams,

23 ⁸ In an affidavit signed February 13, 2015, Melissa Sjolund, DEQ employee and author of the
24 permit issued in 2012 and modified in 2014, states that since the 2014 permit modification,
25 another modification is being sought because "a recent hydrologic assessment of East Fork
Armells Creek indicated that a portion of that stream . . . may be intermittent." (Br. Supp. P's.
Mot. S.J. (Feb. 13, 2016), Ex. 1, Aff. Melissa Sjolund, at 4.)

1 setting of water quality standards, and issuance of permits presumes a
2 determination of standards such as TMDLs as prerequisite to determining
3 whether water quality standards will be violated by discharges to any identified
4 surface water.

5 Given the undisputed fact that DEQ's permit process is integral to
6 protection of Montana's water quality, its conclusions that are not supported by
7 the relevant objective and scientific data in the administrative record must be
8 deemed arbitrary and unsupported and, thus, unlawful. *See Ravalli County Fish*
9 *& Game Ass'n v. Mont. Dep't of State Lands*, 273 Mont. 371, 381, 903 P.2d
10 1362, 1369 (1995).

11 **C. Use and Monitoring of Outfalls**

12 The significance of the location and monitoring of outfalls at the
13 Rosebud Mine is clearly established in the record. The outfalls are the locations
14 where mine pollutants may touch the earth. In fact, if there is a discharge of a
15 pollutant, it may only be at an outfall. The language of the 2012 permit, as
16 modified in 2014, is that "[t]he authorization to discharge provided under this
17 permit is limited to those outfalls specially designated below as discharge
18 locations. Discharges at any location not authorized under an MPDES permit is a
19 violation of the Montana Water Quality Act. . . ." Admin. R. at 19. "The
20 location of each outfall regulated by this permit shall be permanently identified in
21 the field." Admin. R. at 28.

22 Yet DEQ seems inconsistent in its approach to outfalls. For example,
23 during the modification process between 2012 and 2014, public comment was
24 made regarding the fact that some of the outfalls set out in the renewal
25

1 application by WEC were the same as previous outfalls, but identified in the
2 2012 permit as new outfalls. The response by DEQ was:

3 Neither the permit writer nor the permittee cross referenced the
4 geographic coordinates of the 151 outfalls contained in the renewal
5 application with coordinates of outfalls contained in previous MPDES
6 permits issued to WEC for the Rosebud Mine. Such cross
7 referencing would not routinely be a part of MPDES permit
8 application review.

9 Admin. R. at 8. Given the importance of outfall locations and monitoring,
10 DEQ's procedures that do not specify and confirm the location of outfalls appear
11 indefensible.

12 It is undisputed that the four new outfalls permitted by DEQ in 2014
13 involve new discharge points and potentially new discharge of pollutants points.
14 It is also undisputed that nondegradation review is applicable. Admin. R. Mont.
15 17.30.701-08.

16 The current permit does not require that all outfalls be monitored in
17 the same way or on the same schedule. The permit first identifies 151 outfalls to
18 the relevant receiving waters or mixing zones. It then lists "Final Effluent
19 Limitations and Monitoring Requirements" for each of the creeks and coulee,
20 with the monitoring requirements set at the frequency of once per day, week,
21 month, or year. The monitoring is to occur "at the overflow structure where
22 effluent discharges as overflow from the sediment control structure, or at the end
23 of the discharge pipe when pumped or drained, and prior to contact with the
24 receiving water." Outfalls are associated with each creek and the coulee. This
25 monitoring relates to 136 outfalls. Admin. R. at 23-28,

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1 The permit then sets out "Alternate Numeric Effluent Limitations and
2 Monitoring Requirements" applicable to the same 136 outfalls "applied to
3 discharges driven by precipitation events and/or snowmelt." Admin. R. at 29-34.
4 These appear to be in addition to the initial monitoring requirements.

5 But then the permit states:

6 Due to the number of outfalls at the facility and inaccessibility of
7 remote outfalls, representative monitoring will be allowed only for
8 discharges resulting from precipitation events. Discharges consisting
9 of stormwater runoff from areas . . . may be sampled at the
10 representative outfalls listed in Table 16, corresponding to 20% of
11 total outfalls.

12 Admin. R. at 34. Table 16 lists 20 outfalls, four of which are not within the 136
13 listed in the first two sections regarding monitoring. The relevant permit fact
14 sheet adds:

15 Discharges consisting of stormwater runoff from areas classified as
16 "Alkaline Mine Drainage" (40 CFR 434 Subpart D) are materially
17 similar in terms of activities taking place in each area, the
18 characteristics of soil types present, the expected runoff pollutant
19 concentrations, the type of stormwater treatment and best
20 management practices. Therefore, the Department has determined
21 representative sampling may be obtained at 20% of outfalls to obtain
22 representative samples of precipitation-driven discharge.

23 Admin. R. at 1447. Finally, the permit lists 69 outfalls subject to "Western
24 Alkaline Coal Mining Standards." Admin. R. at 35-38.

25 The language of the permit (before and after modification)
leaves the permit reader with no firm knowledge regarding what monitoring
practices will be applied in any given situation. Even with consideration of the
administrative record in this case, there is inadequate or inaccurate bases for the

1 monitoring types, locations, and frequencies. As to DEQ's conclusion that
2 monitoring of 20 percent of the outfalls is sufficient, there is only a conclusory
3 statement regarding soil types, runoff, and treatment. There is a distinct lack of
4 scientific analysis supporting the conclusion that the remaining 80 percent of the
5 outfalls previously deemed necessary no longer will be used as "representative"
6 of the large-scale activity of the mine. There seems to be as much deference by
7 DEQ to the logistical issues of monitoring raised by WEC as there are to the need
8 to monitor the affected surface waters.

9 Plaintiffs claim the permit allows monitoring by WEC that does not
10 adequately protect Montana's water in that it allows monitoring tailored to
11 WEC's claims of circumstances making monitoring difficult. DEQ and WEC
12 respond that federal regulations allow representative monitoring. DEQ and WEC
13 assert the language of 40 CFR 122.41(j)(1) that "[s]amples and measurements
14 taken for the purpose of monitoring shall be representative of the monitored
15 activity." Plaintiffs cite 40 CFR 122.44 (i)(1)(ii), which provides, with regard to
16 similar federal permits, the monitoring requirements include "[t]he volume of
17 effluent discharged from each outfall."

18 Given the lack of analysis present in the record as to DEQ's decision
19 to reduce the monitoring of outfalls, the decision is unsupportable. Failure to
20 monitor will certainly reduce the chances of finding discharges and will certainly
21 reduce the regulation of the water quality in an active mining area. The size of
22 the mine, the number of outfalls, and the logistics of monitoring are relevant
23 circumstances, but are not found within the law applicable to the ultimate goal of
24 adequately protecting surface waters and do not mitigate DEQ's responsibilities

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1 for regulation. In this case, the reduced monitoring and modified standards for
2 the waters at issue are arbitrary.

3 **SUMMARY**

4 When viewed in its totality, the record of DEQ's decisions as to Final
5 Modified Permit number MT0023965 show clear errors of judgment regarding
6 the protection of the waters into which the Rosebud Mine discharges. Rather
7 than making reasoned decisions, the decisions are arbitrary and not supported by
8 the law applicable to the permitting process.

9 Based on the foregoing, the issuance of Final Modified Permit number
10 MT0023965, effective November 1, 2012 and modified September 14, 2014, is
11 hereby declared invalid, and this matter is remanded to DEQ for consideration
12 consistent with this opinion.

13 **IT IS SO ORDERED.**

14 DATED this 14 day of March 2016.

15
16 
17 KATHY SEELEY
18 District Court Judge

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