

DA 18-0110

IN THE SUPREME COURT OF THE STATE OF MONTANA

2019 MT 213

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MONTANA ENVIRONMENTAL INFORMATION  
CENTER and SIERRA CLUB,

Plaintiffs and Appellees,

v.

MONTANA DEPARTMENT OF ENVIRONMENTAL QUALITY,

Defendant and Appellant,

and

WESTERN ENERGY COMPANY,

Defendant, Intervenor, and Appellant.

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APPEAL FROM: District Court of the First Judicial District,  
In and For the County of Lewis and Clark, Cause No. CDV 2012-1075  
Honorable Kathy Seeley, Presiding Judge

COUNSEL OF RECORD:

For Appellant Montana Department of Environmental Quality:

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For Appellees:

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For Amicus Treasure State Resources Association of Montana, Petroleum Association, Montana Coal Council, and Montana Mining Association:

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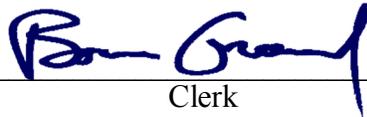
For Amicus Clark Fork Coalition:

Andrew Gorder, Clark Fork Coalition, Missoula, Montana

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Argued: March 13, 2019  
Submitted: March 19, 2019  
Decided: September 10, 2019

Filed:

  
Clerk

Chief Justice Mike McGrath delivered the Opinion of the Court.

¶1 On September 14, 2012, the Montana Department of Environmental Quality (DEQ) issued Western Energy Company (Western Energy) a Montana Pollutant Discharge Elimination System Permit (MPDES) MT0023965 (2012 Permit), renewing its 1999 MPDES Permit (1999 Permit), to discharge pollutants from the Rosebud Mine adjacent to Colstrip, Montana, into Montana waters tributary to the Yellowstone River. Appellees, the Montana Environmental Information Center (MEIC) and the Sierra Club, filed suit arguing, inter alia, that DEQ's permit renewal violated both the Montana Water Quality Act (WQA) and federal Clean Water Act (CWA). DEQ modified the 2012 Permit in 2014. DEQ and Western Energy presently appeal from a First Judicial District Memorandum and Order on Judicial Review granting summary judgment to MEIC and the Sierra Club and invalidating DEQ's issuance of Western Energy's final modified MPDES Permit MT0023965 (Modified Permit), effective in modified form September 8, 2014. We reverse and remand for a hearing on the factual allegations.

¶2 This Court consolidates and restates the issues on appeal as follows:

*1. Whether DEQ's permitting decision exempting receiving waters with ephemeral characteristics from the water quality standards set forth in Admin. R. M. 17.30.629 is: (a) unlawful; or (b) arbitrary and capricious.*

*a. Whether DEQ unlawfully interpreted the term "ephemeral" pursuant to Admin. R. M. 17.30.637(4) and reclassified state waters such that DEQ exceeded its authority under the Water Quality Act.*

*b. Whether DEQ applied its interpretation of Admin. R. M. 17.30.637(4) during the permitting process to arbitrarily and capriciously establish water quality standards for East Fork Armells Creek.*

*2. Whether the Modified Permit's representative monitoring protocol for precipitation-driven discharges at the Mine's outfalls in alkaline mine drainage and coal preparation areas is unlawful or arbitrary and capricious.*

## **FACTUAL AND PROCEDURAL BACKGROUND**

### The Rosebud Mine

¶3 The Rosebud Mine (Mine) is a 25,600-acre<sup>1</sup> surface sub-bituminous coal mine owned by Western Energy, a subsidiary of Westmoreland Coal Company, adjacent to Colstrip, Montana. The Mine sits in the uplands area of the East Fork Armells Creek and Rosebud Creek drainages, which flow into the Yellowstone River. The 2012 Permit states that the Mine includes approximately 17,276 acres disturbed by mining, requires around 400 acres of surface disturbance each year, and is segregated into Areas A, B, C, D, and E. These designations include areas where coal is actively mined, areas where coal is washed and prepared for shipment, and areas in various stages of reclamation.

¶4 In areas of active mining, topsoil and overburden are removed, exposing the Rosebud coal seam, which is located roughly 100 feet below the surface. Western Energy mines the coal seam using four draglines. An active mining area includes groundwater infiltration into the pit left by the extracted coal, storm water that collects in the pit, and storm water run-off over active mining areas. Pits require de-watering through pumping or siphoning. Mine drainage from active mining areas and drainage

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<sup>1</sup> The Mine was 25,600 acres in 2012, when DEQ issued its order renewing Western Energy's 2012 Permit. The facts in this section relate to the state of the Mine in 2012.

from coal preparation and storage areas carry suspended solids. Discharges<sup>2</sup> of suspended solids entrained in water impacted by the Mine are the primary pollutants associated with the Mine.

¶5 To minimize discharges of pollution from the Mine into surrounding waters in excess of effluent limitations established by state and federal law, Western Energy collects and treats water impacted by its coal mining processes in storage ponds. The ponds provide time for suspended solids to settle, such that discharges comply with applicable effluent limitations. The storage ponds are designed to hold the volume of run-off equivalent to that from a ten-year, twenty-four-hour-storm event during active mining operations. Storm events exceeding design capacity cause overflow or unscheduled discharges from the storage ponds and require monitoring. Additionally, accumulation of residual storm water and other mine drainage in excess of design capacity cause unscheduled discharges from storage ponds.

¶6 To reclaim an actively-mined area, overburden is placed in the empty pit where coal was previously removed. The replaced overburden is graded to approximate the original land contour and scarified to relieve compaction. Soil is redistributed and revegetated for reclamation. Storage ponds are further reclaimed as suspended solids settle and water is discharged in compliance with water quality effluent limitations.

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<sup>2</sup> “‘Discharge’ means the injection, deposit, dumping, spilling, leaking, placing, or failing to remove any pollutant so that it or any constituent thereof may enter into state waters, including ground water.” Admin. R. M. 17.30.602(8).

¶7 Outfalls<sup>3</sup> are associated with each storage pond. Throughout the mining process, outfalls must be monitored. The Mine has 151 permitted outfalls. However, discharges from outfalls in reclamation areas are monitored subject to different standards than discharges from outfalls associated with active mine drainage and coal preparation areas. A DEQ-approved Sediment Control Plan governs the monitoring of outfalls in reclamation areas consistent with federal regulations. Under the Modified Permit, sixty-nine of the Mine's 151 outfalls are in reclamation areas, monitored subject to the Sediment Control Plan.

¶8 The Mine discharges water from its outfalls into East Fork Armells Creek, West Fork Armells Creek, Lee Coulee, Stocker Creek, Black Hank Creek, Donley Creek, Pony Creek, Cow Creek, and Spring Creek, each considered state waters.<sup>4</sup> West Fork Armells Creek, Stocker Creek, Black Hank Creek, and Donley Creek are tributaries of East Fork Armells Creek, which is tributary to the Yellowstone River. Lee Coulee, Spring Creek, Cow Creek, and Pony Creek are tributaries of Rosebud Creek, which is tributary to the Tongue River, which then flows into the Yellowstone River. All receiving waters are classified as C-3 waters, subject to water quality standards set forth in Admin. R. M. 17.30.629.

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<sup>3</sup> “‘Outfall’ means a disposal system through which effluent or waste leaves the facility or site.” Admin. R. M. 17.30.201(2)(k).

<sup>4</sup> “‘State waters’ means a body of water, irrigation system, and drainage system, either surface or underground.” Section 75-5-103(34)(a), MCA.

## Procedural Background

¶9 On April 14, 2004, Western Energy applied to DEQ for renewal of its 1999 Permit, due to expire on September 30, 2004. MPDES permits expire every five years. DEQ automatically continued the terms and conditions of the 1999 Permit until a new permit could be issued. *See* Admin. R. M. 17.30.1313. From September 2004 until September 2012, Western Energy continued to mine coal under the terms of its 1999 Permit.

¶10 On August 24, 2010, DEQ issued a proposed draft permit and accompanying fact sheet for public comment. Western Energy and MEIC submitted comments. The Department subsequently requested and received updated application materials from Western Energy. On May 14, 2012, DEQ issued a revised draft permit and accompanying fact sheet for public comment. Western Energy and MEIC again submitted comments.

¶11 On September 14, 2012, DEQ renewed Western Energy's 1999 Permit. The 2012 Permit exempted receiving waters with ephemeral characteristics from the water quality standards applicable to C-3 waters. The 2012 Permit also allowed Western Energy to representatively monitor precipitation-driven discharges at the Mine's outfalls in alkaline mine drainage and coal preparation areas. Finally, the 2012 Permit acknowledged that the upper and lower reaches of East Fork Armells Creek were impaired and had no established total maximum daily load (TMDL) budget. DEQ stated it could issue the 2012 Permit before it established a TMDL budget because the 2012 Permit was not new

and did not permit “increased discharges” of pollution into an impaired stream. *See Friends of the Wild Swan v. United States EPA*, 74 F. App’x 718, 724 (9th Cir. 2003). On December 21, 2012, MEIC filed its complaint in District Court seeking a declaratory judgment invalidating the 2012 Permit.

¶12 Western Energy administratively appealed DEQ’s issuance of the 2012 Permit to the Board of Environmental Review (Board),<sup>5</sup> arguing that eight of the twelve new outfalls identified by the 2012 Permit had previously existed for purposes of nondegradation review.<sup>6</sup> On April 10, 2014, the Board granted DEQ and Western Energy’s joint and unopposed motion for partial remand of the 2012 Permit to DEQ for modification consistent with a settlement agreed to by DEQ and Western Energy. The Board stayed the present proceeding pending finalization of the Modified Permit.

¶13 On June 9, 2014, DEQ published notice of the proposed modification, stating that it was a “major modification” of the 2012 Permit and that only the permit conditions described were reopened. All other provisions of the 2012 Permit remained in effect. *See* Admin. R. M. 17.30.1361, 17.30.1365(4)(b). MEIC and the Sierra Club again commented but did not initiate a separate legal action challenging the proposed modifications. Thereafter, MEIC filed a motion in District Court requesting a scheduling

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<sup>5</sup> The Board is a quasi-judicial, seven-member body appointed by the Governor to provide policy guidance to DEQ. Board members must represent the geographic areas of the state and consist of members with mandatory expertise in hydrology, local government planning, environmental sciences, and county health or medicine. Section 2-15-3502, MCA.

<sup>6</sup> Montana’s nondegradation policy applies during permitting to all new or increased discharges after April 1993. This policy outlines three levels of water protection and stipulates what degradation, if any, is allowable in each level. Section 75-5-303, MCA; Admin. R. M. 17.30.701 through 17.30.718.

order, which was granted against DEQ and Western Energy's opposition. The District Court noted, "Any relevant change in the [2012 Permit] resulting from [Western Energy's administrative] appeal will be considered as necessary."

¶14 On September 8, 2014, DEQ issued the Modified Permit, which contained five major modifications to the 2012 Permit. The Modified Permit: (1) corrected eight outfalls identified by the 2012 Permit as new to existing sources of pollution for purposes of nondegradation review; (2) transferred fifteen outfalls to federal western alkaline standards—applicable to outfalls in reclamation areas and subject to the Mine's Sediment Control Plan; (3) removed water quality-based effluent limitations applicable to new source outfalls; (4) removed effluent monitoring requirements applicable to the monitoring of new source outfalls; and (5) removed three representative monitoring outfalls now associated with reclamation areas.

¶15 At an April 22, 2015 hearing, the District Court heard oral argument from MEIC, DEQ, and Western Energy on their respective motions for summary judgment. On March 14, 2016, the District Court invalidated Western Energy's Modified Permit and remanded it to DEQ for reconsideration. Applying the standard of review from *Clark Fork Coalition v. Dep't of Env'tl. Quality*, 2008 MT 407, ¶ 20, 347 Mont. 197, 197 P.3d 482, the District Court held that DEQ unlawfully reclassified C-3 waters as ephemeral, that only the Board had authority to do so, and that re-classification required a public hearing and DEQ's preparation of a use attainability analysis, which did not occur. Additionally, the District Court found that DEQ's approval of Western Energy's protocol

for monitoring precipitation-driven discharges at representative outfalls was arbitrary and capricious, unsupported, and unlawful. The District Court further noted procedural irregularities, including DEQ's decision not to prepare a TMDL for the impaired portions of East Fork Armells Creek and the fact that East Fork Armells Creek may be intermittent, in its decision invalidating Western Energy's Modified Permit.

¶16 DEQ states it became aware that a portion of East Fork Armells Creek was not hydrologically ephemeral, but potentially intermittent at some point after issuing the Modified Permit on September 8, 2014. Intermittent streams are “stream[s] or reach[es] of a stream that [are] below the local water table for at least some part of the year, and obtain [their] flow from both surface run-off and ground water discharge.” Admin. R. M. 17.30.602(13). In contrast, ephemeral streams flow only in direct response to precipitation in the immediate watershed or snow-melt; the channel bottom of ephemeral streams is always above the local water table. Admin. R. M. 17.30.602(10). Unlike ephemeral streams, Admin. R. M. 17.30.637(4) does not exempt intermittent streams from the more stringent water quality standards associated with C-3 waters pursuant to Admin. R. M. 17.30.629. The drafter of the 2012 Permit stated in an affidavit found in the administrative record that Western Energy again applied to modify the Modified Permit with the understanding that East Fork Armells Creek was potentially intermittent and subject to more stringent water quality standards. Western Energy claims this modification (2016 Modification) became effective in January 2016, after MEIC and Western Energy had already filed simultaneous motions for summary judgment and

completed summary judgment briefing in this proceeding. The administrative record is devoid of any information concerning the 2016 Modification beyond the drafter's affidavit.

¶17 DEQ and Western Energy presently appeal. Trout Unlimited and the Clark Fork Coalition filed amicus briefs in support of the District Court's decision, while the Treasure State Resources Association of Montana, Montana Petroleum Association, Montana Coal Council, and Montana Mining Association filed an amicus brief in support of DEQ and Western Energy. This Court heard oral argument from the parties on March 13, 2019, and requested additional briefing on representative monitoring, which the Court received on June 19, 2019.

#### **STANDARD OF REVIEW**

¶18 This Court reviews a district court's grant or denial of summary judgment de novo using the same M. R. Civ. P. 56(c) criteria applied by the district court. *N. Cheyenne Tribe v. Mont. Dep't of Env'tl. Quality*, 2010 MT 111, ¶ 18, 356 Mont. 296, 234 P.3d 51. Summary judgment is appropriate where there is no genuine issue of material fact and the moving party is entitled to judgment as a matter of law. *N. Cheyenne Tribe*, ¶ 18; M. R. Civ. P. 56(c)(3).

¶19 This proceeding does not involve a contested case.<sup>7</sup> Therefore, the standards of review set forth by the Montana Administrative Procedure Act (MAPA), § 2-4-704,

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<sup>7</sup> Pursuant to the Montana Administrative Procedure Act, a contested case is "a proceeding before an agency in which a determination of legal rights, duties, or privileges of a party is required by law to be made after an opportunity for hearing." Section 2-4-102(4), MCA.

MCA, are inapplicable; MAPA, § 2-4-704, MCA, applies only to contested cases. *N. Fork Pres. Ass'n v. Dep't of State Lands*, 238 Mont. 451, 456-57, 778 P.2d 862, 865-66 (1989). However, simply because an administrative decision is not a contested case pursuant to MAPA does not mean judicial review is not available. Many of the bases listed in § 2-4-704, MCA, are echoed in the common-law standard of review for non-MAPA cases.<sup>8</sup> This Court therefore reviews non-MAPA administrative decisions “to determine whether the decision was arbitrary, capricious, unlawful, or not supported by substantial evidence.” *Clark Fork Coal.*, ¶ 21 (internal quotations omitted); *Upper Mo. Waterkeeper v. Mont. Dep't of Env'tl. Quality*, 2019 MT 81, ¶ 13, 395 Mont. 263, 438 P.3d 792; *Mont. Env'tl. Info. Ctr. v. Mont. Dep't of Env'tl. Quality*, 2016 MT 9, ¶ 13, 382 Mont. 102, 365 P.3d 454.

¶20 The Legislature has authorized DEQ to administer the WQA and the judiciary may not substitute its judgment for that of an agency carrying out a statutory duty assigned to it. Section 75-5-211(1), MCA; *Johansen v. Dep't of Nat. Res. & Conservation*, 1998 MT 51, ¶ 27, 288 Mont. 39, 955 P.2d 653. This Court acknowledges that it is not comprised of hydrologists, geologists, or engineers, and that protecting the quality of Montana's water requires significant technical and scientific expertise beyond the grasp of the Court. However, the judiciary has an inherent power to review administrative decisions and to interpret the law. *Johansen*, ¶ 25. To balance these constitutional concepts and to ensure

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<sup>8</sup> Indeed, “the arbitrary and capricious standard was used prior to the enactment of MAPA,” and logically applies to non-contested cases involving agency decisions. *N. Fork Pres. Ass'n*, 238 Mont. at 457, 778 P.2d at 866.

that agency decision-making is scientifically-driven and well-reasoned, this Court affords “great deference” to agency decisions implicating substantial agency expertise. *Winchell v. Mont. Dep’t of Nat. Res. & Conservation*, 1999 MT 11, ¶ 11, 293 Mont. 89, 972 P.2d 1132; *Johansen*, ¶ 29 (the courts do not afford any special deference to agency decisions not involving high levels of technical agency expertise).

¶21 Our de novo review of a non-MAPA administrative decision is therefore narrow and limited to: (1) whether the agency erred in law; or (2) whether the agency’s decision is wholly unsupported by the evidence or clearly arbitrary or capricious. *Winchell*, ¶ 11; *Johansen*, ¶ 26; *Upper Mo. Waterkeeper*, ¶ 14; *North Fork Pres. Ass’n*, 238 Mont. at 458-59, 778 P.2d at 867.

#### (1) Unlawful Agency Action

¶22 Montana courts do not defer to incorrect or unlawful agency decisions; an agency’s action within permissible statutory bounds is lawful and deserves deference. *Clark Fork Coal.*, ¶ 20; *Winchell*, ¶ 11; *North Fork Pres. Ass’n*, 238 at 459, 778 P.2d at 867 (an agency “is both empowered and constrained by a set of statutes and regulations relevant to its actions”). Here, DEQ’s permitting action includes DEQ’s interpretation of a regulation—Admin. R. M. 17.30.637(4). Thus, to determine whether DEQ’s decision to issue the Modified Permit was within permissible boundaries, this Court must also consider whether DEQ’s interpretation of Admin. R. M. 17.30.637(4) was lawful. Where the agency’s interpretation of its rule or regulation is within the range of reasonable interpretation, it is lawful and deserves deference. *Clark Fork Coal.*, ¶¶ 20, 27.

¶23 This Court affords an agency’s interpretation of its rule “great weight,” and will “defer to that interpretation unless it is plainly inconsistent with the spirit of the rule.” *Clark Fork Coal.*, ¶ 20. In its review, this Court considers the range of reasonable interpretation permitted by the regulation’s wording. An agency’s interpretation of its regulation that is plainly inconsistent with the spirit of the rule is not lawful. *Clark Fork Coal.*, ¶ 39.

¶24 This Court is more deferential to an agency’s interpretation of its own regulation than it is to an agency’s interpretation of a statute.<sup>9</sup> In reviewing an agency’s interpretation of its regulation, the Court does not begin its analysis by determining whether the language of the rule or regulation is clear and unambiguous. MAPA, § 2-4-305(6), MCA, requires the language of an agency-promulgated rule to be “consistent and not in conflict with the statute” and “reasonably necessary to effectuate the purpose of the statute.” *Tubbs*, ¶ 25; *Gold Creek Cellular of Mont. Ltd. P’ship*, ¶ 12.

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<sup>9</sup> This Court affords a different level of deference to a state agency’s interpretation of a statute. In reviewing a state agency’s interpretation of a Montana statute for correctness, this Court applies a two-step analysis similar to *Chevron* deference in *Chevron, U.S.A., Inc. v. NRDC, Inc.*, 467 U.S. 837, 104 S. Ct. 2778 (1984), but much less deferential. *Gold Creek Cellular of Mont. Ltd. P’ship v. State*, 2013 MT 273, ¶ 12, 372 Mont. 71, 310 P.3d 533; *Mont. Power Co. v. Mont. PSC*, 2001 MT 102, ¶¶ 25-26, 305 Mont. 260, 26 P.3d 91. Consistent with the first step of analysis in *Chevron*, the first step in Montana’s two-step analysis is to determine whether the language of the statute is ambiguous. *Util. Air Regulatory Grp. v. EPA*, 573 U.S. 302, 315, 134 S. Ct. 2427, 2439 (2014) (internal citations omitted); *Mont. Power Co.*, ¶ 26; *Clark Fork Coal. v. Tubbs*, 2016 MT 229, ¶ 20, 384 Mont. 503, 380 P.3d 771 (if “the intent of the Legislature can be determined from the plain meaning of the words used in the statute, the plain meaning controls”). Where the language of the statute is ambiguous, Montana courts proceed to the second step in Montana’s two-step analysis. *Mont. Power Co.*, ¶ 26. Under *Chevron*, courts defer to reasonable agency interpretations. *Util. Air Regulatory Grp.*, 573 U.S. at 315, 134 S. Ct. at 2439. In contrast, courts in Montana give only “respectful consideration” to agency interpretations meeting the requirements of the second step. *Mont. Power Co.*, ¶ 25. Administrative interpretations of statutory language are not binding on Montana courts. *Mont. Power Co.*, ¶ 25.

¶25 While DEQ here interprets Admin. R. M. 17.30.637(4), a regulation promulgated by the Board, this Court has previously afforded great weight to DEQ interpretations of Board-promulgated rules. *See Clark Fork Coal.*, ¶¶ 26-27. The WQA statutorily empowers DEQ to implement rules adopted by the Board. Section 75-5-211(1), MCA. As such, this Court affords the same level of deference to DEQ’s interpretation of Admin. R. M. 17.30.637(4) as if DEQ promulgated the regulation itself.

### (2) Arbitrary and Capricious Agency Action

¶26 This Court acknowledges that agencies have specific, technical, and scientific knowledge surpassing that of the Court’s. We therefore defer to consistent, rational, and well-supported agency decision-making. However, this Court will not “automatically defer to the agency ‘without carefully reviewing the record and satisfying [itself] that the agency has made a reasoned decision.’” *Clark Fork Coal.*, ¶ 21 (quoting *Friends of the Wild Swan v. Dep’t. of Nat. Res. Conservation*, 2000 MT 209, ¶ 28, 301 Mont. 1, 6 P.3d 972). An agency has an obligation to “examine the relevant data and articulate a satisfactory explanation for its action, including a rational connection between the facts found and the choice made.” *Clark Fork Coal.*, ¶ 47 (citing *Motor Vehicle Mfrs. Ass’n v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 43, 103 S. Ct. 2856, 2866 (1983)). An agency’s decision “so at odds with the information gathered” in the record is arbitrary and the product of caprice. *Clark Fork Coal.*, ¶ 27. Agency “actions must also be consistent; an internally inconsistent analysis” signals arbitrary and capricious action.

*Nat'l Parks Conservation Ass'n v. United States EPA*, 788 F.3d 1134, 1141 (9th Cir. 2015).

¶27 In the present instance, this Court is asked to examine whether DEQ's interpretation of Admin. R. M. 17.30.637(4) is correct, such that DEQ's decision to renew Western Energy's Permit is lawful, and whether DEQ's application of its interpretation of Admin. R. M. 17.30.637(4) is arbitrary and capricious or unsupported by the record. *See Clark Fork Coal.*, ¶ 26. Likewise, this Court is asked to examine whether DEQ can lawfully allow the Mine to representatively monitor precipitation-driven discharges of pollution from its outfalls, and whether the representative monitoring permitted by DEQ was arbitrary and capricious or unsupported by the record.

### **BACKGROUND**

¶28 To contextualize the issues presented, we provide a framework detailing the operation of Montana's WQA, and implementing regulations, in conjunction with the federal CWA.

#### Montana's Water Quality Act

¶29 In 1972, Congress enacted the CWA to "restore and maintain the chemical, physical, and biological integrity of the Nation's waters." *N. Cheyenne Tribe*, ¶ 21 (citing 33 U.S.C. § 1251(a)). Through the CWA, Congress enacted a system of cooperative federalism, whereby the CWA and the Environmental Protection Agency (EPA) set minimum water quality standards, which state governments individually

implement and enforce. In 1974, the EPA, the agency responsible for administering the CWA, delegated to Montana the authority to implement CWA programs within the State.<sup>10</sup> *Upper Mo. Waterkeeper*, ¶ 4. Consistent with federal standards, the Montana Legislature passed the WQA, Title 75, chapter 5, MCA, to:

(1) conserve water by protecting, maintaining, and improving the quality and potability of water for public water supplies, wildlife, fish and aquatic life, agriculture, industry, recreation, and other beneficial uses;

(2) provide a comprehensive program for the prevention, abatement, and control of water pollution; and

(3) balance the inalienable rights to pursue life's basic necessities and possess and use property in lawful ways with the policy of preventing, abating, and controlling water pollution in implementing the program referred to in subsection (2).

Section 75-5-101, MCA. The WQA integrates national and state policy by codifying the directives of the CWA and the environmental priorities uniquely set forth in Montana's Constitution, including the constitutional mandate that "the state and each person shall maintain and improve a clean and healthful environment in Montana for present and future generations." Mont. Const. art. IX, § 1.

¶30 Montana's comprehensive program to prevent, abate, and control water pollution includes three primary programs consistent with federal standards: (1) water classification and establishment of water quality standards (33 U.S.C. § 1313(c); § 75-5-301, MCA); (2) permitting for point-source discharges (33 U.S.C. § 1342;

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<sup>10</sup> At this point, the EPA's role shifted from direct administration to support and oversight. However, the EPA retains the ultimate authority to administer aspects of the CWA on a case-by-case basis. *Upper Mo. Waterkeeper*, ¶ 4.

§ 75-5-402, MCA); and (3) listing of impaired waters subject to additional water quality protections (33 U.S.C. § 1313(d); § 75-5-703, MCA). *Clark Fork Coal.*, ¶¶ 30-31; *Friends of the Wild Swan*, 74 F. App'x at 722.

¶31 DEQ is primarily responsible for the administration of the WQA. Section 75-5-211(1), MCA. To enable DEQ's implementation of the CWA, the Board classifies state waters and formulates water quality standards applicable to those classifications, adopts administrative rules related to the administration of pollution discharge permits, and adopts rules related to Montana's nondegradation policy. Sections 75-5-201(1)(a), -301, -302, -303(8), -401, MCA.

#### (1) Water Classification and Water Quality Standards

¶32 The classification of Montana's waters is the starting point to determine applicable water quality standards. The CWA requires every state to develop water quality standards applicable to all water bodies or segments of water bodies within each state. 33 U.S.C. § 1313. States failing to submit water quality standards to the EPA before April 16, 1973, were subject to federal water quality standards. 33 U.S.C. § 1313(b)(1)(A).

¶33 To meet the timeline established by the CWA, the Board classified Montana's surface water uses by basin. Federal regulations establish categories of beneficial use, including whether the surface water is suitable for drinking, culinary, and food processing purposes, swimming and recreation, protection and propagation of fish, shellfish, and wildlife, and agricultural, industrial, and navigational water supply. 40 C.F.R.

§ 131.10(a). Using an alphanumeric system, the Board classified all state surface waters based on the beneficial uses supported by each water body. Section 75-5-301(1), MCA. The Board then formulated numeric and narrative water quality standards necessary to support the beneficial uses corresponding to the water's classification. Numeric water quality standards define precise, measurable concentrations of pollutants that if exceeded would harm the uses protected by the classification. Narrative water quality standards apply to certain pollutants and describe desired water quality in terms of allowable ranges and maximums or specific variation from natural conditions. Montana's water quality standards are set forth in Admin. R. M. 17.30.601 through 17.30.670 and in the Circular DEQ-7.<sup>11</sup> These water quality standards, based on beneficial use and water classification, dictate water quality-based effluent limitations set forth in MPDES permits.

¶34 The Mine discharges water impacted by the coal-mining process into waters within the Yellowstone River drainage between the Billings water supply intake and the North Dakota state line. All waters within this portion of the Yellowstone River drainage are classified as C-3 waters and are maintained to be "suitable for bathing, swimming, and recreation, and growth and propagation of non-salmonid fishes and associated aquatic life, waterfowl, and furbearers." Admin. R. M. 17.30.611(1)(c), 17.30.629. The

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<sup>11</sup> The Circular DEQ-7, adopted and incorporated by reference in Admin. R. M. 17.30.619, is DEQ's circular that establishes water quality standards for toxic, carcinogenic, bioconcentrating, radioactive, and harmful parameters. Admin. R. M. 17.30.602(39).

water quality standards that apply to C-3 waters are set forth in Admin. R. M. 17.30.629 and in the Circular DEQ-7.

## (2) Permitting

¶35 The CWA “prohibits the discharge of a pollutant by any person from any point source to navigable waters except when authorized by a permit issued under the National Pollution Discharge Elimination System” (NPDES). *Waterkeeper All, Inc. v. U.S. EPA*, 399 F.3d 486, 491 (2d Cir. 2005) (citing 33 U.S.C. §§ 1311(a), 1342) (internal quotations omitted). NPDES permits are issued by the EPA, or by the states in a federally-approved permitting system. *Waterkeeper All., Inc.*, 399 F.3d at 491 (citing 33 U.S.C. § 1342). In 1974, the EPA transferred the responsibility of issuing NPDES permits within Montana to DEQ, which issues permits under MPDES. *Upper Mo. Waterkeeper*, ¶ 4. DEQ issues, suspends, revokes, modifies, or denies MPDES permits to discharge sewage, industrial wastes, or other wastes into state waters, consistent with the administrative rules promulgated by the Board. Section 75-5-402, MCA. Montana’s regulations governing MPDES permits are set forth in Admin. R. M. 17.30.1301 through 17.30.1387.

¶36 In Montana, MPDES permits require the owners or operators of point sources to control discharges of pollution through established effluent limitations, and other requirements, like nondegradation review, set forth in the permit. A point source is “a discernible, confined, and discrete conveyance, including but not limited to any pipe, ditch, channel, tunnel, conduit, well, discrete fissure, container, rolling stock, or vessel or other floating craft, from which pollutants are or may be discharged.” Section

75-5-103(29), MCA. The Mine's outfalls are point sources subject to established effluent limitations.

¶37 There are two principal bases for the effluent limitations set forth in MPDES permits: (1) technology-based effluent limitations; and (2) water quality-based effluent limitations derived from the water quality standards discussed above. Technology-based effluent limitations implement available technologies to reduce or treat pollutants in water and reflect a minimum level of treatment or control for point-source discharges consistent with federal requirements. 40 C.F.R. § 122.44(a); Admin. R. M. 17.30.1344, 17.30.1207; *Waterkeeper All., Inc.*, 399 F.3d at 491. “[W]here technology-based effluent limitations prove insufficient to attain or maintain certain water quality standards, the [CWA] requires NPDES [and MPDES] permits to include additional water [quality-based] effluent limitations.” *Waterkeeper All., Inc.*, 399 F.3d at 492 (citing 33 U.S.C. §§ 1311(b)(1), 1312(a)). Water quality-based effluent limitations “provide an additional layer of protection” to receiving waters. *N. Cheyenne Tribe*, ¶ 41.

¶38 Additionally, specific federal effluent guidelines apply to the coal mining industry and limit effluent discharges at outfalls based on the type of mining occurring upland of the outfall. 40 CFR § 434. The federal regulations set forth in 40 CFR § 434, Subpart B, apply to outfalls in coal preparation areas,<sup>12</sup> the federal regulations set forth in 40 CFR

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<sup>12</sup> Coal preparation areas are where coal is cleaned, concentrated, or subjected to purification and beneficiation processes.

§ 434, Subpart D, apply to outfalls in alkaline mine drainage areas,<sup>13</sup> and the federal regulations set forth in 40 CFR § 434, Subpart H, apply to outfalls in reclamation areas. The Rosebud Mine contains outfalls in coal preparation, alkaline mine drainage, and reclamation areas. Accordingly, the federal regulations set forth in 40 CFR § 434, Subparts B, D, and H, apply respectively and are reflected in the Modified Permit.

¶39 Through permitting, DEQ identifies each outfall where pollution may be discharged into receiving waters, sets technology-based and water quality-based effluent limitations for each outfall, and mandates a monitoring regime to ensure compliance with the effluent limitations set forth in the MPDES permit. Admin. R. M. 17.30.1344, 13.30.1345(1). Effluent limitations for outfalls associated with reclamation areas are separately governed by a Sediment Control Plan consistent with the federal regulations in 40 CFR § 434, Subpart H.

### (3) Impaired Waters

¶40 Additional effluent limitations apply to impaired waters, which are waters not meeting a water quality standard required by the water's classification. Section 75-5-103(14), MCA. The CWA requires DEQ to include impaired streams on a prioritized list (Section 303(d) List) and to develop a timely TMDL budget for each impaired stream. 33 U.S.C. § 1313(d)(2); §§ 75-5-103(4), -702(1), -703(1), (3), MCA. The Section 303(d) List and TMDLs must be incorporated into the State's continued planning process under 33 U.S.C. § 1313(e), which must be approved by the EPA.

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<sup>13</sup> Alkaline mine drainage is mine drainage having a pH equal to or greater than 6.0 and total iron concentration less than ten milligrams per liter before treatment.

Without an EPA-approved continued planning process, MPDES permits cannot issue. 33 U.S.C. § 1313(e)(2). A TMDL is a budget of the pollution a stream may receive from all point sources and non-point sources to comply with water quality standards. Section 75-5-703, MCA. In establishing TMDLs, DEQ may establish waste load allocations for point sources. Section 75-5-703(2), MCA. These waste load allocations are reflected in the permitting process, and limit discharges of pollution in addition to effluent limitations to improve the quality of the impaired water.

### DISCUSSION

¶41 The District Court considered the five modifications made to the 2012 Permit in 2014 in its decision to invalidate Western Energy’s Modified Permit. Both parties referred to these modifications and cited the Modified Permit in their respective arguments throughout this proceeding. Accordingly, and consistent with the District Court’s approach, this Court considers whether the Modified Permit was unlawfully or arbitrarily and capriciously issued.

¶42 *1. Whether DEQ’s permitting decision exempting receiving waters with ephemeral characteristics from the water quality standards set forth in Admin. R. M. 17.30.629 is: (a) unlawful; or (b) arbitrary and capricious.*

*a. Whether DEQ unlawfully interpreted the term “ephemeral” pursuant to Admin. R. M. 17.30.637(4) and reclassified state waters such that DEQ exceeded its authority under the Water Quality Act.*

¶43 Admin. R. M. 17.30.637(4) provides: “Ephemeral streams are subject to ARM 17.30.635 through 17.30.637, 17.30.640, 17.30.641, 17.30.645, and 17.30.646 but not to

the specific water quality standards of ARM 17.30.620 through 17.30.629.” This provision is central to the issues reviewed throughout this proceeding.

¶44 DEQ’s interpretation of this regulation exempted waters receiving discharges from the Mine’s outfalls with hydrologically ephemeral characteristics from the water quality standards applicable to C-3 waters set forth in Admin. R. M. 17.30.629, including those found in the Circular DEQ-7. MEIC and the Sierra Club urge this Court to find DEQ’s interpretation inconsistent with the spirit of the regulations regarding surface water quality and therefore unlawful. Because MEIC challenges only DEQ’s interpretation of Admin. R. M. 17.30.637(4), this Court assumes the regulation is consistent with and reasonably necessary to effectuate the purpose of the WQA. *See* § 2-4-305(6), MCA. We thus consider whether DEQ’s interpretation of Admin. R. M. 17.30.637(4) is within a reasonable range of interpretation and entitled to deference.

¶45 Admin. R. M. 17.30.637(4) exists within the subchapter titled “Surface Water Quality Standards and Procedures” of the chapter titled “Water Quality” in Montana’s Administrative Rules. The Board promulgated the standards set forth in Admin. R. M. 17.30.601 through 17.30.670 with the stated purpose “to conserve water by protecting, maintaining, and improving the quality and potability of water for public water supplies, wildlife, fish and aquatic life, agriculture, industry, recreation, and other beneficial uses” consistent with state and federal law. Admin. R. M. 17.30.601. Specifically, the standards were “adopted to establish maximum allowable changes in surface water

quality and to establish a basis for limiting the discharge of pollutants which affect prescribed beneficial uses of surface waters.” Admin. R. M. 17. 30.603.

¶46 To determine whether DEQ’s interpretation of Admin. R. M. 17.30.637(4) is consistent with the spirit of the regulation and entitled to deference, this Court reads Montana’s surface water quality regulations in relationship to one another with the purpose for their promulgation in mind. Similar to this Court’s approach to statutory interpretation, this Court cannot read regulations in a vacuum. *See Dep’t of Revenue v. Priceline.com, Inc.*, 2015 MT 241, ¶ 28, 380 Mont. 352, 354 P.3d 631 (“When more than one statute applies to a given situation, such construction, if possible, is to be adopted as will give effect to all.”).

¶47 The surface water quality regulations read logically. The regulations set forth in Admin. R. M. 17.30.606 through 17.30.613 classify Montana’s specific water bodies by drainage and sub-drainage, applying specific alphanumeric classifications (A-Closed, A-1, B-1 through B-3, and C-1 through C-3) to each based on their beneficial uses. Additionally, the regulations set forth in Admin. R. M. 17.30.614 and 17.30.615 apply alphanumeric classifications to waters with certain geographical and hydrological characteristics, including national park, wilderness and primitive area waters (A-1), waters in constructed ditches (D-1 and D-2), ephemeral streams (E-1 and E-2), seasonal and semi-permanent lakes (E-3 through E-5), and streams with low or sporadic flow that, because of natural hydro-geomorphic and hydrologic conditions, are not able to support fish (F-1).

¶48 The regulations set forth in Admin. R. M. 17.30.620 through 17.30.629 detail the specific water quality standards applying to waters classified as A, B, or C. These specific water quality standards protect the beneficial uses associated with the alphanumeric classification. Admin. R. M. 17.30.620(1). Additionally, Admin. R. M. 17.30.619(1)(a) incorporates the numeric water quality standards in the Circular DEQ-7 by reference. The regulations set forth in Admin. R. M. 17.30.650 through Admin. R. M. 17.30.658 detail the specific water quality standards applying to waters classified as D, E, F, and G.

¶49 Significantly, the regulations set forth in Admin. R. M. 17.30.635 through 17.30.637 apply generally to state surface waters, and outline general treatment standards, general operation standards, and general prohibitions applicable to all water classifications. Admin. R. M. 17.30.603 instructs DEQ how to apply these general water quality standards in relation to the specific water quality standards found set forth in Admin. R. M. 17.30.620 through 17.30.629. It states:

[t]he provisions of ARM 17.30.635 through 17.30.637, 17.30.640, 17.30.641, 17.30.645, and 17.30.646 apply to all surface waters unless they conflict with ARM 17.30.620 through 17.30.629 in which case the requirements of ARM 17.30.620 through 17.30.629 prevail.

The regulation at issue, Admin. R. M. 17.30.637(4), appears under the heading “General Prohibitions” and states that the specific water quality standards in Admin. R. M. 17.30.620 through 17.30.629 do not apply to ephemeral waters. One issue before us is to determine whether DEQ’s interpretation of Admin. R. M. 17.30.637(4) conflicts with Admin. R. M. 17.30.629, such that Admin. R. M. 17.30.629 prevails.

¶50 Importantly, the term ephemeral appears several places throughout the surface water quality regulations. Admin. R. M. 17.30.602(10) defines an ephemeral stream as “a stream or part of a stream which flows only in direct response to precipitation in the immediate watershed or in response to the melting of a cover of snow and ice and whose channel bottom is always above the local water table.” Admin. R. M. 17.30.615 specifies additional alphanumeric classifications (D, E, and F) for waters with certain hydrological or geographical characteristics. Admin. R. M. 17.30.615(1)(c) states that “ephemeral streams including ephemeral streams with flows that are periodically augmented by discharges from point sources” are classified as E-1 waters, and Admin. R. M. 17.30.615(1)(d) states that “ephemeral streams with flows that are augmented by continuous discharges from point sources” are classified as E-2 waters. The water quality standards that apply to E-1 and E-2 waters are found in Admin. R. M. 17.30.652 and 17.30.653, respectively.

¶51 MEIC and the Sierra Club argue that DEQ’s interpretation of Admin. R. M. 17.30.637(4) effectively reclassified the Mine’s receiving waters from C-3 waters to ephemeral waters—classified E-1 and E-2—in violation of the WQA’s procedure for stream reclassification. The WQA authorizes only the Board to “establish the classification of all state waters in accordance with their present and future most beneficial uses, creating an appropriate classification for streams that, due to sporadic flow, do not support an aquatic ecosystem that includes salmonid or nonsalmonid fish.” Sections 75-5-301(1), -201(1)(a), MCA. And, before the Board may reclassify or modify

its existing stream classifications, the Board must give notice, receive comments from the water pollution control advisory council, hold a public hearing, and follow the general procedures for rule-making set forth in Admin. R. M. 17.4.101. Admin. R. M. 17.30.606.<sup>14</sup> Additionally, Admin. R. M. 17.30.615(2) states that:

Prior to reclassifying a specific water body classified in ARM 17.30.607 through 17.30.614 [including the Yellowstone River Drainage] under one of the water-use classifications identified in [17.30.615](1)(a) through (h) [including ephemeral waters] and before the [EPA]'s approval of the water body's revised classification, a use attainability analysis must be conducted in accordance with 40 CFR 131.10(g), (h), and (j).

¶52 The main thrust of MEIC and Sierra Club's argument is that DEQ essentially reclassified C-3 waters that the WQA authorizes only the Board to reclassify. Where the Board sub-classifies waters within classified river drainages as E-1 or E-2 ephemeral waters, the regulations expressly require a use attainability analysis, which DEQ failed to complete. MEIC and the Sierra Club argue that the use of the term ephemeral in Admin. R. M. 17.30.615(c) and (d) requires ephemeral streams to be classified E-1 or E-2 through the regulatory process before DEQ may exempt ephemeral streams from C-3 water quality standards pursuant to Admin. R. M. 17.30.637(4).

¶53 MEIC and the Sierra Club correctly note the statutory process to reclassify Montana's waters. However, DEQ argues it did not reclassify the C-3 receiving waters; the use of the term ephemeral in Admin. R. M. 17.30.637(4) refers to the water's hydrological characteristics rather than to the water's specific classification based on use.

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<sup>14</sup> While the Board has authority to reclassify ephemeral streams within specific river drainages as E-1 or E-2, it does not appear that it has ever done so.

¶54 The Modified Permit notes that the Mine’s receiving waters are classified as C-3 waters. DEQ argues that Admin. R. M. 17.30.637(4) affords the agency flexibility, through which it can exempt streams or portions of streams that are ephemeral in a hydrological sense from water quality standards designed to protect the uses of an entire river drainage or sub-drainage without reclassification. Hydrologically ephemeral streams can be incapable of supporting fish and aquatic life. The water quality standards applicable to C-3 waters are designed to support fish and aquatic life. In essence, where the Mine discharges effluent into ditches in eastern Montana that run dry for the majority of the year, DEQ has flexibility pursuant to Admin. R. M. 17.30.637(4) to exempt the Mine from meeting the water quality standards applicable to receiving streams capable of supporting fish and aquatic life.

¶55 The term “ephemeral stream” is defined at the outset of the Water Quality regulations alongside terms like “intermittent stream,” “seasonal lake or pond,” and “semi-permanent lake or pond,” generically describing the hydrological characteristics of certain water bodies. Waterbodies with certain hydrological characteristics, like ephemeral and intermittent streams, exist throughout Montana’s classified river drainages and sub-drainages. Because Admin. R. M. 17.30.637(4) is a “General Prohibition” applicable to all surface waters across all classifications, DEQ argues that the regulation’s use of the term ephemeral refers to its hydrological definition, not to its specific classification as E-1 or E-2. While the Board has the authority to sub-classify ephemeral waters as E-1 or E-2, ephemeral waters within certain river drainages need not be

reclassified E-1 or E-2 to be exempt from certain water quality standards pursuant to Admin. R. M. 17.30.637(4).

¶56 DEQ's interpretation of Admin. R. M. 17.30.637(4) is within the range of reasonable interpretation permitted by the regulation's wording. This Court gives effect to all provisions of a statute or regulation if possible. *See Bullock v. Fox*, 2019 MT 50, ¶ 53, 395 Mont. 35, 435 P.3d 1187. While MEIC and the Sierra Club argue that DEQ cannot exempt ephemeral waters from the water quality standards applicable to C-3 waters unless the Board reclassifies the waters E-1 or E-2, such an interpretation would render Admin. R. M. 17.30.637(4) meaningless. Admin. R. M. 17.30.637(4) cannot apply generally to all surface waters if the term ephemeral refers only to E-1 or E-2 classified waters.<sup>15</sup> The Board promulgated Admin. R. M. 17.30.637(4) in 1980. The Board promulgated the regulations classifying ephemeral waters as E-1 and E-2 in 2002, without modification to Admin. R. M. 17.30.637(4). DEQ's interpretation that Admin. R. M. 17.30.637(4) affords DEQ flexibility to exempt certain hydrologically ephemeral waters not classified as E-1 or E-2 from the water quality standards applicable to the wider classification gives effect to each of the water quality regulations in a reasonable manner.

¶57 While Admin. R. M. 17.30.637(4) affords DEQ flexibility, federal regulations mandate that DEQ consider downstream water quality, and ensure that DEQ's decisions

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<sup>15</sup> Admin. R. M. 17.30.652 and 17.30.653 set forth the water quality standards applicable to E-1 and E-2 classified waters, respectively. E-1 and E-2 classified waters are already exempt from the water quality standards applicable to C-3 classified waters because they are not classified as C-3 waters.

provide for the attainment and maintenance of the water quality standards of downstream waters; DEQ must apply its interpretation of Admin. R. M. 17.30.637(4) with the beneficial uses of the greater classification and downstream waters in mind. 40 C.F.R. § 131.10(b). Where DEQ's implementation of Admin. R. M. 17.30.637(4) adversely impacts the classified uses of downstream waters within the classification, it conflicts with Admin. R. M. 17.30.629. In such cases, the water quality-based effluent limitations set forth in Admin. R. M. 17.30.629 do prevail. *See* Admin. R. M. 17.30.603.

¶58 DEQ's interpretation of Admin. R. M. 17.30.637(4) is consistent with the spirit of the WQA and accompanying regulations. The decision to exempt ephemeral streams pursuant to Admin. R. M. 17.30.637(4) is technical and requires the agency's specialized scientific expertise. This Court therefore defers to DEQ's lawful interpretation of Admin. R. M. 17.30.637(4).

¶59 However, we take the opportunity to note the importance of headwaters streams to the health of our collective state waters. Because decisions pertaining to headwaters streams impact downstream water quality and quantity, DEQ's decisions to exempt ephemeral streams should be motivated by the health of the river drainage or sub-drainage as a whole, not by a specific permittee. *See Cal. Ass'n of Sanitation Agencies v. State Water Res. Control Bd.*, 208 Cal. App. 4th 1438, 1456, (2012). Indeed, the courts and the people of the state of Montana rely on DEQ's expertise to protect the quality of Montana's waters as a whole in accordance with the WQA and CWA.

¶60 This Court defers to DEQ’s interpretation of Admin. R. M. 17.30.637(4); DEQ’s interpretation is lawful. The District Court opinion holding as a matter of law that DEQ must go through a reclassification process before permitting water quality-based effluent limitations for certain portions of streams with ephemeral characteristics pursuant to Admin. R. M. 17.30.637(4) is reversed.

¶61 *b. Whether DEQ applied its interpretation of Admin. R. M. 17.30.637(4) during the permitting process to arbitrarily and capriciously establish water quality standards for East Fork Armells Creek.*

¶62 The Mine’s outfalls discharge into two major basins—the East Fork Armells Creek basin and the Rosebud Creek basin. This proceeding largely pertains to the East Fork Armells Creek basin because it receives discharges from the vast majority—seventy-four of eighty-two—of the Mine’s total outfalls associated with alkaline mine drainage and coal preparation areas. Notwithstanding the cumulative receipt of discharges from West Fork Armells Creek, Stocker Creek, Black Hank Creek, and Donley Creek, East Fork Armells Creek directly receives discharges from forty-three outfalls associated with alkaline mine drainage and six outfalls associated with coal preparation, totaling discharges from forty-nine outfalls.

¶63 The District Court found it undisputed that in 2010, DEQ listed the upper and lower reaches of East Fork Armells Creek on Montana’s Section 303(d) List of impaired waters. Impaired means that “sufficient credible data shows that [the upper and lower reaches of East Fork Armells Creek] are failing to achieve compliance with applicable water quality standards.” *See* § 75-5-103(14), MCA.

¶64 The District Court found the potential cumulative impact of precipitation-driven discharges to the quality of East Fork Armells Creek concerning, especially considering that East Fork Armells Creek is already impaired and potentially intermittent, and that DEQ's implementation of the CWA and WQA circularly exempt it from a majority of the mechanisms statutorily designed to protect it from impairment. We note that DEQ: designated East Fork Armells Creek ephemeral and exempted it from the water quality standards set forth in Admin. R. M. 17.30.629 and the Circular DEQ-7; permitted four new outfalls to discharge into the impaired lower East Fork Armells Creek without completion of a TMDL; concluded that while nondegradation review applied to the new outfalls, no non-significance determination or reasonable potential analysis was necessary because East Fork Armells Creek was ephemeral; and implemented a representative monitoring protocol enabling thirty-six alkaline mine drainage outfalls to directly discharge into East Fork Armells Creek without any meaningful monitoring during unplanned precipitation events. While each action viewed alone has some basis in law, taken in sum, the District Court determined that DEQ's permitting decisions regarding the water quality of East Fork Armells Creek demonstrate inconsistent and arbitrary and capricious implementation of the law.

¶65 Consistent with the CWA and WQA, nondegradation review and the development of TMDL budgets for impaired streams protect the quality of Montana's waters in addition to technology-based and water quality-based effluent limitations. The permitting process is critical to the implementation of these statutory mechanisms,

because the MPDES permit facilitates compliance with the CWA and WQA. *See Waterkeeper All., Inc.*, 399 F.3d at 492.

¶66 DEQ is presently aware that East Fork Armells Creek is potentially intermittent. While DEQ states it was not aware of this fact when it issued the Modified Permit, our review of the comments received by DEQ prior to its issuance of the Modified Permit reveals that DEQ had citations to scientific documents suggesting that East Fork Armells Creek was potentially intermittent.

**Comment 3.** Further, the historical record suggests that East Fork Armells Creek was an “intermittent,” rather than ephemeral, stream before being dewatered by the Rosebud Mine. Mont. Dep’t of Health & Env’tl. Sciences, Environmental Impact Statement on the Proposed Montana Power Company Electrical Generating Plant at Colstrip, Montana at A-14 (noting that East Fork Armells is “intermittent”). . . . The 1985 Draft EIS for the Area D expansion states that while some of the tributaries of Cow Creek, Spring Creek, Pony Creek, and East Fork Armells Creek are ephemeral, East Fork Armells Creek “flows most of the year.” 11-10 to -11. Draft Environmental Impact Statement, Western Energy Company Rosebud Mine Area D (1985). . . . In the 1992 permit renewal, neither the applicant nor the agency asserted that the receiving waters were ephemeral. . . . Further [Western Energy’s] 1986 application to amend its permit for Area B noted regular flows in East Fork Armells Creek, including one small section with perennial flow. WECo, Amendment to Surface Mining Permit No. 84-003B, at 52 (Vol. 11986).

In response, DEQ stated: “Comment 3 addresses a portion of the [2012 Permit] that was not reopened by the modification, and [is] not subject to public comment at this time.” DEQ then referred the commenter to responses from 2012, which generically state that the Mine’s receiving waters are ephemeral.

¶67 In light of DEQ’s past and present acknowledgement that East Fork Armells Creek is potentially intermittent, this Court is 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. *See Nat'l Parks Conservation Ass'n*, 788 F.3d at 1141 (“actions must also be consistent; an internally inconsistent analysis is arbitrary and capricious”). Further, DEQ applied its interpretation that East Fork Armells Creek was ephemeral in a manner reducing the effectiveness of additional statutory mechanisms designed to protect East Fork Armells Creek from pollution. As a result, only the technology-based effluent limitations and the general prohibitions set forth in Admin. R. M. 17.30.637 protect the already impaired water quality of East Fork Armells Creek from further impairment.

¶68 Pursuant to Montana’s nondegradation policy, the “[e]xisting uses of state waters and the level of water quality necessary to protect those uses must be maintained and protected.” Section 75-5-303(1), MCA. The policy applies during the permit application process “to any activity of man resulting in a new or increased source which may cause degradation.” Admin. R. M. 17.30.705(1).

¶69 The Modified Permit indicates that Outfalls 10C, 128A, 128B, and 128C are new or increased source outfalls, subject to nondegradation review. The fact sheet for the modification made in 2014 states that Tier 1 protections apply to the four new source outfalls. Tier 1 protections require DEQ to develop numeric and narrative water quality-based effluent standards to protect the existing uses of the receiving waters. Although exempt from the water quality-based standards set forth in Admin. R. M. 17.30.629 and the Circular DEQ-7, the fact sheet for the Modified Permit asserts that the

“effluent limitations in [the Modified Permit] are derived from and comply with applicable water quality-based standards, thus ensuring the level of water quality necessary to attain and maintain existing and anticipated uses.” Tier 2 protections, like the nonsignificance determination, do not apply because East Fork Armells Creek is ephemeral and does not meet the definition of high-quality water set forth in § 75-5-103(13), MCA. DEQ concluded it did not need to consider whether the changes in existing water quality resulting from the four new source outfalls were nonsignificant pursuant to Admin. R. M. 17.30.715.

¶70 Consistent with federal and state regulations, MPDES permits additionally must establish limitations to control all pollutants or pollutant parameters that DEQ determines “may be discharged at a level which will cause, have the *reasonable potential* to cause, or contribute to an excursion above any state water quality standard.” 40 CFR § 122.44(d)(1)(i) (incorporated into Admin. R. M. 17.30.1344 by reference) (emphasis added). DEQ determined it did not need to complete a reasonable potential analysis for purposes of nondegradation review because East Fork Armells Creek is hydrologically ephemeral.

¶71 In short, the Modified Permit appears to remove water quality-based effluent limitations for new or increased sources because DEQ determined that East Fork Armells Creek was ephemeral. Due to the removal of water quality-based effluent limitations for new or increased sources, the Modified Permit additionally revised monitoring requirements for new and increased source outfalls. Although the 2012 Permit notes the

reasonable potential for violation of water quality standards for dissolved aluminum, total recoverable selenium, and total copper, and requires monitoring, the Modified Permit requires monitoring of these pollutants on a report only basis. Again, agency actions should be consistent and well-reasoned. *See Nat'l Parks Conservation Ass'n*, 788 F.3d at 1141.

¶72 While these arguments were initially raised in the pleadings, the District Court avoided ruling on this issue, which MEIC characterizes on appeal as “a deft display of judicial avoidance.” While we have determined that it is legally unnecessary for DEQ to reclassify the hydrologically ephemeral portions of East Fork Armells Creek pursuant to its interpretation of Admin. R. M. 17.30.637(4), it is unclear from the record whether East Fork Armells Creek is in fact hydrologically ephemeral or intermittent. It is therefore unclear whether DEQ’s determination that East Fork Armells Creek is ephemeral is arbitrary and capricious. Where it is apparent that issues of material fact are undecided, summary judgment is not available. Further it is unclear from the record before us whether it is necessary for DEQ to adopt a TMDL budget as East Fork Armells Creek is impaired. Consequently, we remand these issues to the District Court for a hearing on the facts as noted herein. *See N. Cheyenne Tribe*, ¶ 18.

¶73 2. *Whether the Modified Permit’s representative monitoring protocol for precipitation-driven discharges at the Mine’s outfalls in alkaline mine drainage and coal preparation areas is unlawful or arbitrary and capricious.*

¶74 DEQ advances the objectives of the WQA and CWA, “including the ambitious goal that water pollution be not only reduced, but eliminated,” using MPDES permits that

place important restrictions on the quality and character of pollution into Montana’s waters. *Waterkeeper All., Inc.*, 399 F.3d at 491. The MPDES “permit is critical to the successful implementation of the [WQA and CWA] because—by setting forth technology-based effluent limitations and, in certain cases, additional water quality-based effluent limitations—the [MPDES] permit defines, and facilitates compliance with, and enforcement of, a preponderance of a discharger’s obligations under the [WQA and CWA].” *Waterkeeper All., Inc.*, 399 F.3d at 492 (internal quotations omitted).

¶75 To effectively carry out the objectives of Montana’s WQA, DEQ has “statutorily broad authority to require monitoring of discharges into state waters.” *Upper Mo. Waterkeeper*, ¶ 38. The WQA empowers DEQ to require owners and operators of point sources to “install, use, and maintain monitoring equipment and methods, including biological monitoring techniques,” and to “sample effluents using specified monitoring methods at designated locations and intervals.” Section 75-5-602(3), (4), MCA.

¶76 While this statutory discretion allows DEQ to lawfully permit selective monitoring in certain circumstances, “[s]amples and measurements taken for the purpose of monitoring must be *representative of the monitored activity*.” Admin. R. M. 17.30.1342(10)(a) (emphasis added). This language applies to all MPDES permits, and mirrors the federal language set forth in 40 CFR § 122.41(j)(1), which applies to state programs. *See* 40 CFR § 123.25(12). The regulations describing the requirements for recording and reporting of monitoring results state that all permits must specify:

(a) requirements concerning the proper use, maintenance, and installation, when appropriate, of monitoring equipment or methods (including biological monitoring methods when appropriate);

(b) required monitoring including type, intervals, and frequency sufficient to yield data which are representative of the monitored activity including, when appropriate, continuous monitoring;

(c) applicable reporting requirements based upon the impact of the regulated activity and as specified in ARM 17.30.1344. Reporting may be no less frequent than specified in that rule.

Admin. R. M. 17.30.1351(1)(a)-(c). Additionally:

(2) [DEQ] may require monitoring of storm water discharges at a facility or activity covered under an MPDES general permit. Such requirements may include storm water sampling, analytical testing, evaluation of monitoring results, recording, and reporting. Monitoring requirements identified by [DEQ] must be stated in the MPDES general permit, except that [DEQ] may require a discharger to comply with monitoring requirements in addition to those in the general permit.

(3) For storm water discharges that are associated with industrial, mining, oil and gas, and construction activity and that are subject to an effluent limitation guideline, [DEQ] shall establish case-by-case requirements to report monitoring results.

Admin. R. M. 17.30.1351(2), (3).

¶77 Both Montana and federal law provide that DEQ may lawfully permit owners and operators of point sources to monitor precipitation-driven discharges from mining outfalls in a representative manner pursuant to conditions set forth in the MPDES permit. However, 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." Admin. R. M. 17.30.1342(10)(a), 17.30.1351(1)(b); 40 CFR § 122.41(j)(1).

¶78 The District Court correctly noted that the Modified Permit allows representative monitoring only for discharges resulting from precipitation-driven events. The broad purpose of the MPDES permitting program is to reduce and eventually eliminate pollution into Montana's waters. The monitored activity here is the precipitation-driven discharge of suspended solids from outfalls associated with the Mine's storage ponds in alkaline mine drainage and coal preparation areas. The salient question before this Court is not whether DEQ can lawfully permit representative monitoring of precipitation-driven discharges from the Mine's outfalls—it can—but whether the selective monitoring permitted by DEQ, including type, intervals, and frequency, is sufficient to yield data representative of the monitored activity, precipitation-driven discharges. *See* Admin. R. M. 17.30.1351(1)(b).

¶79 We therefore consider whether the twenty outfalls selected by Western Energy and DEQ for monitoring indeed represent or serve as a typical or characteristic example of the precipitation-driven discharges of pollution from the Mine's total eighty-two outfalls in alkaline mine drainage and coal preparation areas. This Court appreciates that monitoring decisions reflected in MPDES permits are science-driven and require highly specialized agency expertise deserving of judicial deference. Therefore, we review whether DEQ examined the relevant data and explained the basis for selecting the representative outfalls, such that DEQ's monitoring protocol is not arbitrary and capricious or unsupported by the record. *See Clark Fork Coal.*, ¶ 21. We now consider whether DEQ made a reasoned decision. *See Clark Fork Coal.*, ¶ 21.

¶80 The Modified Permit states: “Discharges consisting of storm water runoff from areas classified as ‘Alkaline Mine Drainage’ and ‘Coal Preparation Plants and Coal Preparation Plant Associated Areas’ (40 CFR 434 Subparts B and D) may be sampled at the representative outfalls listed in Table 16, corresponding to 20% of total outfalls.”

**Table 16. Summary of Representative Monitoring Outfalls – Precipitation-Driven Discharges**

Outfall	40 CFR 434 Subpart	Mine Area	Receiving Water
009	B	A	E. Fork Armells Creek
09A	B	A	E. Fork Armells Creek
16A	B	A	E. Fork Armells Creek
075	D	A	Stocker Creek
10C	D	B-East	E. Fork Armells Creek
011	D	B-East	E. Fork Armells Creek
021	B	B-East	E. Fork Armells Creek
128	D	B-West	E. Fork Armells Creek
133	D	B-West	E. Fork Armells Creek
139	D	B-West	E. Fork Armells Creek
035	D	C-East	Stocker Creek
043	B	C-East	E. Fork Armells Creek
046	D	C-East	E. Fork Armells Creek
058	D	C-East	E. Fork Armells Creek
095	D	C-West	W. Fork Armells Creek
096	D	C-West	Black Hank Creek
105	D	C-West	W. Fork Armells Creek
109	D	C-Central	W. Fork Armells Creek
083	D	D	Spring Creek
194	B	D	E. Fork Armells Creek

¶81 The Mine has 151 outfalls. The Modified Permit’s monitoring scheme does not apply to the Mine’s sixty-nine outfalls associated with reclamation areas and subject to the Sediment Control Plan. Likewise, representative monitoring does not apply to dry-weather discharges, which must be monitored and sampled at every outfall. Representative monitoring applies only to precipitation-driven discharges from the Mine’s eighty-two outfalls subject to the Modified Permit’s monitoring scheme. The

Modified Permit requires representative monitoring in each drainage basin and that sampling equipment “be installed at representative monitoring locations to ensure flow measurement and automatic sample collection regardless of weather and/or site conditions.”

¶82 It is clear from the administrative record that Western Energy and DEQ pursued representative monitoring because the Mine is large and has many remote outfalls, monitoring at every outfall is prohibitively expensive for Western Energy, and Western Energy has a long and documented history of monitoring non-compliance. Notes from a December 14, 2011 meeting attended by DEQ and Western Energy representatives state that Western Energy proposed to implement representative sampling “due to the fact that many remote outfalls are inaccessible during (and after) rainfall, and [due to] the financial infeasibility of installing automated sampling devices at every outfall.” Both the 2012 Permit and the Modified Permit state: “Due to the number of outfalls at the facility and inaccessibility of remote outfalls, representative monitoring will be allowed.” In response to public comment in 2012, DEQ stated that “a representative monitoring program is the most reasonable way to ensure that effluent samples are collected during precipitation events and that accessibility will not be an excuse for missed monitoring opportunities.” While factors like cost and the quantity and remoteness of the Mine’s outfalls make it a practical candidate for representative monitoring, these factors do not legally justify representative monitoring. Representative monitoring is legally justified

where monitoring is, in fact, “representative of the monitored activity.” *See* Admin. R. M. 17.30.1342(10)(a).

¶83 On appeal, Western Energy argues that “representative of the monitored activity” means that “monitoring must produce results that fairly represent the character of the activity being monitored”—precipitation-driven discharges from outfalls in alkaline mine drainage and coal preparation areas. We agree. However, 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.

¶84 Six outfalls at the Mine are associated with coal preparation areas. The 2012 Permit states: “Due to the potential for surface runoff to come into contact with coal piles and plant areas, all [o]utfalls [associated with coal preparation areas] were chosen for representative monitoring.” Outfalls 009, 09A, 16A, 021, 043, and 194 are associated with coal preparation areas and appear in Table 16, the Modified Permit’s “Summary of Representative Monitoring Outfalls—Precipitation-Driven Discharges.” Because Table 16 includes all six outfalls associated with coal preparation areas, they are not representative of discharges from coal preparation area outfalls; every outfall is monitored. On appeal, DEQ explains that representative monitoring is not appropriate for outfalls associated with coal preparation areas, because surface runoff is variable as to quantity, intensity, duration, and frequency. DEQ further explains that representative

monitoring is appropriate for outfalls associated with alkaline mine drainage because “the quality of wastewater is constant throughout the [M]ine.”

¶85 Therefore, the Mine’s seventy-six outfalls associated with alkaline mine drainage are represented by fourteen selected outfalls—Outfalls 075, 10C, 011, 128, 133, 139, 035, 046, 058, 095, 096, 105, 109, 083—or 18.4% of the total seventy-six outfalls associated with alkaline mine drainage. This distinction is clear in the 2012 Permit. Separate paragraphs describe the monitoring protocol for each.

Alternate monitoring requirements for **Alkaline Mine Drainage** discharges caused by precipitation events are summarized in Table FS-36, below. The frequency of monitoring for settleable solids, pH, and oil and grease is changed from that of the previous permit to clarify that sampling shall occur once per discharge event. Due to the number of outfalls at the facility and inaccessibility of remote outfalls, representative monitoring will be allowed for discharges resulting from precipitation events. Discharges consisting of stormwater runoff from areas classified as “Alkaline Mine Drainage” (40 CFR 434 Subpart D) are materially similar in terms of activities taking place in each area, the characteristics of soil types present, the expected runoff pollutant concentrations, the type of stormwater treatment and best management practices employed. Therefore, the Department has determined representative sampling may be obtained at 20% of outfalls to obtain representative samples of precipitation-driven discharge.

Outfalls receiving runoff from areas classified as “**Coal Preparation Plants, Storage Areas and Ancillary Areas**” (40 CFR 434 Subpart B) are also subject to the alternate monitoring requirements for precipitation events listed in Table FS-36. Due to the potential for surface runoff to come into contact with coal piles and plant areas, all Outfalls classified as Subpart B were chosen for representative monitoring. A complete list of outfalls chosen for representative monitoring can be found in Table FS-37, below. These outfalls were chosen based on location, receiving water, contributing drainage area, and accessibility during wet conditions. Sampling equipment must be installed at representative monitoring locations to ensure flow measurement and automatic sample collection regardless of weather and/or site conditions.

(Emphasis added.)

¶86 This distinction is lost in the Modified Permit, which states only that: “Discharges consisting of storm water runoff from areas classified as ‘Alkaline Mine Drainage’ and ‘Coal Preparation Plants and Coal Preparation Plant Associated Areas’ (40 CFR 434 Subparts B and D) may be sampled at the representative outfalls listed in Table 16, corresponding to 20% of total outfalls.” However, the fact sheet for the modification in 2014 states:

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

¶87 It is unclear from the inconsistent language used in the 2012 Permit and Modified Permit whether representative sampling at 20% of outfalls was meant to refer only to outfalls associated with alkaline mine drainage, or to all outfalls not subject to the Sediment Control Plan, including both outfalls in areas of alkaline mine drainage and coal preparation. In either case, our 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.

¶88 On appeal, DEQ argues: “The representative outfalls were chosen based on mine area and location, mining activity, receiving water, contributing drainage area, and accessibility during wet weather.” Our review of the record before us reveals that the outfalls selected in Table 16 represent each active area of the Mine, except for Area E. In terms of outfalls receiving alkaline mine drainage: one outfall (075) in Mine Area A represents the monitored activity of eleven outfalls discharging into Stocker Creek and East Fork Armells Creek; two outfalls (10C and 011) in Mine Area B-East represent nine outfalls discharging into East Fork Armells Creek; three outfalls (128, 133, and 139) in Mine Area B-West represent twenty-two outfalls, including three of the new outfalls (128A, 128B, and 128C) not previously permitted, discharging into Lee Coulee and East Fork Armells Creek; three outfalls (035, 046, and 058) in Mine Area C-East represent seventeen outfalls discharging into Stocker Creek and East Fork Armells Creek; one outfall (109) in Mine Area C-North represents one outfall discharging into West Fork Armells Creek; three outfalls (096, 095, and 105) in Mine Area C-West represent thirteen outfalls discharging into Black Hank Creek, Donley Creek, and West Fork Armells Creek; and no outfall in Area E represents Outfall 10A discharging into East Fork Armells Creek.

¶89 The Modified Permit requires precipitation-driven discharges to “be monitored and recorded in each of the drainage basins where regulated outfalls are located.” All but eight outfalls associated with alkaline mine drainage exist in the East Fork Armells Creek basin. Accordingly, DEQ and Western Energy selected thirteen outfalls to represent

precipitation-driven discharges from sixty-eight outfalls associated with alkaline mine drainage in the East Fork Armells Creek basin. Select outfalls are located on each tributary to East Fork Armells Creek, except Donley Creek. Eight outfalls associated with alkaline mine drainage exist in the Rosebud Creek basin, including seven outfalls discharging into Lee Coulee, none of which were selected by DEQ and Western Energy for representative monitoring. Instead, DEQ and Western Energy selected Outfall 083 discharging into Spring Creek as the sole outfall representative of precipitation-driven discharges in the Rosebud Creek basin. Pursuant to the Modified Permit, Outfall 083 is subject to the Sediment Control Plan. 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.

¶90 Furthermore, in response to comments received in 2012, DEQ provided the following responses:

**Comment 36.** Does a representative outfall represent a defined number of non-representative outfalls? If so, which representative outfall represents which non-representative outfall?

**Response 36.** Representative outfalls are not linked to or associated with any of the non-representative outfalls. They are intended to provide samples that are “representative of the monitored activity” per federal regulations at 40 CFR 122.41(j)(1). In this instance the monitored activity is precipitation-driven runoff. Sampling continues to be required at all outfalls during any “dry weather” discharge.

**Comment 37.** What is the relationship between representative and non-representative outfalls?

**Response 37.** See Response 36.

**Comment 38.** If a representative outfall discharges during a precipitation event is it assumed that all the outfalls that it represents discharged as well?

**Response 38.** No. Representative outfalls are not used to make any assumption regarding non-representative outfalls.

**Comment 39.** Will the non-representative outfalls need to be inspected during or after a precipitation event?

**Response 39.** While the Permittee is not required to collect samples from precipitation-driven discharges at non-representative outfalls, it is assumed that inspections would be necessary at the discretion of the operator to assess and maintain adequate storage capacity following precipitation events.

**Comment 40.** Will the non-representative outfalls be held to the sample taken at the representative outfall?

**Response 40.** No. See Responses 36 and 38.

**Comment 41.** If a non-representative outfall, which is inaccessible during a precipitation event, is accessed after the precipitation event and is found to be discharging does a sample need to be taken? Or does the representative outfalls sample over-rule?

**Response 41.** If the Permittee can demonstrate that the discharge is the result of precipitation, then sampling would not be required. If the discharge is not precipitation driven, it must be sampled.

**Comment 42.** If a non-representative outfall discharges and its representative outfall does not discharge during the same precipitation event, is it considered a discharge or not?

**Response 42.** See Responses 36 and 38.

**Comment 43.** What if a sample cannot be taken due to inaccessibility? (Ex. Outfall 083 is very inaccessible during precipitation events).

**Response 43.** Automated flow measurement and sampling equipment is required at representative outfalls to prevent such violations from occurring.

**Comment 44.** If a representative outfall and at least one of the non-representative outfalls that it represents discharges during a precipitation event and a violation occurs because of the sample at the representative outfall, what are our options of contesting the violation for the non-representative outfall?

**Response 44.** See Responses 36 and 38.<sup>16</sup>

¶91 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. DEQ argues that samples of precipitation-driven discharges from selected outfalls are representative simply because "the quality of the wastewater [associated with alkaline mine drainage] is constant throughout the [M]ine," and all alkaline mine drainage is "materially similar in terms of activity taking place, alkaline characteristics of soils, expected runoff pollutant concentrations, treatment requirements, and best management practices." Western Energy echoes DEQ's argument, stating: "At a fundamental level, all monitoring is representative because a sample is taken as a representative of the whole."

¶92 The trigger for representative sampling occurs when the sample is discharged from an outfall associated with alkaline mine drainage, which is the monitored activity. *See* Admin. R. M. 17.30.1342(10)(a) ("samples and measurements taken for the purpose of monitoring must be representative of the monitored activity"). DEQ and Western Energy

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<sup>16</sup> In 2014, prior to modifying the 2012 Permit, DEQ took comments from the public regarding the proposed modifications. Portions of the 2012 Permit not reopened by the modification were not subject to public comment.

seem to argue that because the quality of the sample before it discharges is relatively constant from outfall to outfall, all samples are representative. To support this conclusion, Western Energy cites the Court to its 2011 permit renewal application, which states:

With storm runoff being the main component of [Western Energy's] wastewater and operational requirements largely dictating the disposition of this water, discharge volumes from specific outfalls are variable, and difficult to predict. However, due to the nature of runoff, the quality of the discharged wastewater is relatively constant between individual outfalls. On this basis, discharges from one MPDES outfall can be assumed to provide a representative estimate of wastewater quality of discharges from all outfalls under this permit.

It 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.

¶93 DEQ's response that "[r]epresentative outfalls are not linked to or associated with any of the non-representative outfalls" is perhaps explained by the fact that unplanned precipitation-driven discharges vary outfall to outfall, depending on the accumulation of water in the storage pond and the location and intensity of a particular storm. As stated by the 2012 Permit: "Precipitation events are often localized, high intensity, short duration thunderstorms, and watersheds often cover vast and isolated areas. Ponds may retain water from previous events."

¶94 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. If a non-selected outfall discharges due to a precipitation event, the Modified Permit does not require the discharge to be monitored, even if an allegedly representative outfall does not discharge. If a non-selected outfall discharges pollution from a precipitation-driven event in excess of permitted limitations, it is unclear whether the represented outfalls give DEQ the necessary information to enforce the Modified Permit's requirements.

¶95 DEQ further cites this Court to the NPDES Permit issued by EPA to the Black Mesa Complex Mine near Kayenta, Arizona. The Black Mesa Complex Mine's representative monitoring protocol allows selective monitoring at 20% of its active outfalls. Noting that the Black Mesa Complex Mine is a large surface coal mine with over 100 outfalls discharging from active mining areas, DEQ argues that its representative monitoring protocol, also permitting selective monitoring at 20% of the Mine's outfalls, is reasonable. This Court is not compelled. 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.

¶96 DEQ has broad statutory authority to craft monitoring requirements that effectively carry out the purposes of the WQA and CWA—the reduction and eventual elimination of pollution in state waters. Monitoring is critical to the successful implementation of the WQA. It facilitates Western Energy's compliance with the Modified Permit and DEQ's enforcement of the Modified Permit. The remaining question is whether the way in which DEQ permits “representative monitoring” enables

Western Energy's non-selected outfalls in alkaline mine drainage areas to discharge pollution from precipitation-driven events without any monitoring. We note that: forty-three outfalls in alkaline mine drainage areas discharge directly into East Fork Armells Creek, not including the discharges into streams tributary to East Fork Armells Creek; segments of East Fork Armells Creek are impaired but have no established TMDLs; and East Fork Armells Creek is exempt from the more stringent water quality standards associated with C-3 waters but is potentially intermittent.

¶97 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. DEQ concludes: "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"; and, "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." This Court remains unsure what exactly the sampling conducted at the selected 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." DEQ must "cogently explain why it has exercised its discretion in a given manner." *See Motor*

*Vehicle Mfrs. Ass'n*, 463 U.S. at 48, 103 S. Ct. at 2869; *Nat'l Parks Conservation Ass'n*, 788 F.3d at 1142-43 (internal quotations omitted); *Greater Yellowstone Coalition, Inc. v. Servheen*, 665 F.3d 1015, 1030 (9th Cir. 2011).

¶98 Therefore, while this Court concludes that DEQ may lawfully permit representative monitoring, DEQ's unexplained assertions that its monitoring protocol is "representative of the monitored activity" are unsupported by fact-finding in the District Court. *See N. Cheyenne Tribe*, ¶ 18. The decision to grant summary judgment to the Sierra Club and MEIC on the monitoring issue is reversed, and this question is also remanded to the District Court for a trial on the critical issues of fact.

#### CONCLUSION

¶99 This Court defers to DEQ's interpretation of Admin. R. M. 17.30.637(4), exempting waters with ephemeral characteristics from the water quality standards set forth in Admin. R. M. 17.30.629 without changing the classification of the stream. DEQ's interpretation is lawful, and the District Court is reversed.

¶100 However, whether DEQ arbitrarily and capriciously applied this interpretation to impaired and potentially intermittent segments of East Fork Armells Creek must be determined following a hearing on the questions of fact involved. Further, it is unclear whether it is necessary for DEQ to adopt a TMDL budget for the impaired segments of East Fork Armells Creek. The District Court's grant of summary judgment to the Sierra Club and MEIC is reversed, and the matter is remanded to the District Court for fact-finding consistent with this Opinion.

¶101 Finally, while DEQ can lawfully permit representative monitoring of precipitation-driven discharges, the law requires selective sampling to be representative of the monitored activity in fact. The record before us does not support that the outfalls selected for representative monitoring are representative of precipitation-driven discharges at the Mine. The record does not explain how DEQ examined the relevant data or articulated a satisfactory explanation for its action. The District Court's grant of summary judgment to the Sierra Club and MEIC is reversed, and the matter is remanded to the District Court for a hearing on the factual questions raised in this Opinion.

/S/ MIKE McGRATH

We Concur:

/S/ JAMES JEREMIAH SHEA

/S/ INGRID GUSTAFSON

/S/ BETH BAKER

/S/ LAURIE McKINNON

/S/ DIRK M. SANDEFUR

/S/ JIM RICE