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Agency's Interpretation of Coal Mine Regulations Affirmed

Montana Environmental Information Center, et al. v. Montana Dept. of Environmental Quality, et al., 2019 MT 213 (Decided September 10, 2019).

In *M.E.I.C. v. Mont. D.E.Q.*, the Montana Supreme Court held that the Montana Department of Environmental Quality's ("DEQ") interpretation of two regulations, which allowed a coal mine to discharge wastewater into hydrologically ephemeral receiving waters, and to representatively monitor precipitation driven discharges from its outfalls. Although it deferred to DEQ's interpretation of the regulations, the Court remanded the case for further fact-finding, noting the record before it was insufficient to establish whether the DEQ's factual determinations were arbitrary and capricious or supported by the administrative record.

At issue in this case was the renewal of Western Energy Company's Montana Pollutant Discharge Elimination System Permit ("MPDES") for the Rosebud Mine (the "Mine"), located in Colstrip, Montana. The Mine's MPDES permit establishes the guidelines for wastewater discharges from mining operations and assures compliance with state and federal water quality laws. The case was long in developing. Plaintiffs objected to the DEQ's 2012 renewal of the Mine's MPDES permit, which had been administratively extended since 2004. Plaintiffs alleged the new permit violated both Montana's Water Quality Act and the federal Clean Water Act, as to water quality classifications that are used to determine discharge standards. The district court granted summary judgment in MEIC's favor, concluding the DEQ's interpretation of two regulations was unlawful.

The Montana Supreme Court first found that the lower court incorrectly reasoned that DEQ had unlawfully reclassified waters beyond its statutory authority. In Montana, all state waters are classified by the Board of Environmental Review (the "Board"), and each classification is assigned an alpha numeric designation. Water quality standards are then defined in the regulations for each classification, setting the allowable ranges for certain pollutants. These standards are based on the beneficial uses that are attributable to the classification. In this case, the Mine's location, upland of two tributaries of the Yellowstone River, dictated that the waters in the region are classified as C-3. C-3 waters are "suitable for bathing, swimming, and recreation, and growth and propagation of non-salmonid fishes and associated aquatic life, waterfowl, and furbearers."

Ephemeral streams and other seasonal or semi-permanent bodies of water can also receive distinct

alpha numeric designations under the Board's classification scheme. However, only the Board is authorized to change the classification of state waters, following a clear administrative process outlined in Montana's regulations. Reclassification of surface water is clearly outside DEQ's authority. Plaintiffs and the district court determined that when DEQ issued the Mine's MPDES permit, it, necessarily and illegally, reclassified the waters into which the Mine's outfalls would discharge.

With respect to the ephemeral waters at issue in this case, however, the relevant regulation DEQ employed is Admin. R. M. 17.30.637(4), not the classification regulations. This regulation states that the regulations specifying water quality standards for each of the Board's alpha numeric classifications do not apply to "ephemeral" waters. DEQ interpreted that the regulation uses the term "ephemeral" under its generic hydrologic definition, which is contained in the regulation's definition section, and not in relation to the ephemeral classifications the Board has the power to assign. This interpretation gives DEQ more flexibility in the permitting process, by allowing the DEQ to exempt ephemeral waters from broader regional classifications when, because of their ephemeral nature, they are not capable of supporting the beneficial use the classification is based on. DEQ applied this interpretation to exempt the Mine's discharges because the receiving waters were ephemeral in nature and not capable of supporting fish or aquatic life.

The legal standard applied by the Court to review DEQ's interpretation of its own regulation was whether the interpretation is within the "range of reasonable interpretation[s] permitted by the regulation's wording" and not "plainly inconsistent with the spirit of the rule." Employing this standard, the Court determined that DEQ's interpretation of the Admin. R. M. 17.30.637(4) was lawful, as it gave effect to all relevant provisions of Montana's Water Quality Act and was within the reasonable range of interpretations. Conversely, upholding plaintiffs' interpretation would have made the regulation superfluous, contrary to established tenets of statutory construction. On remand, the district court is tasked with resolving a discrepancy of material fact, as the record reflects that these waters may have been previously designated as intermittent rather than ephemeral, which would preclude DEQ's implementation of this statute.

Plaintiffs also contended that DEQ's allowance for representative monitoring at outfalls in alkaline mine drainages and coal preparation areas during precipitation-driven events was unlawful or arbitrary and capricious. While the contention seemingly mounted another attack on the DEQ's interpretation of its own regulations, the Court's discussion quickly acknowledged that the DEQ possesses clear authority to allow representative monitoring. The Court then focused on whether DEQ's monitoring scheme yielded data that was truly representative of each monitored activity. Having narrowed the question before it to a fact-based examination of the record, the Court began by acknowledging that monitoring decisions are "science-driven," requiring "highly specialized agency expertise deserving judicial deference. Following a detailed discussion of the locations of the selected monitoring sites, how DEQ interprets data from the sites, and DEQ's rationale for selecting the representative sites, the Court concluded that the DEQ's did not "cogently explain" its rationale. The Court found that the record did not reflect a factually based science driven explanation why the permit's representative monitoring scheme was actually representative of the outfalls at the Mine. As the case was before the Court on a motion for summary judgment, the issue was remanded to the district court for critical fact finding.

This case is somewhat of a mixed message. On one hand, it affirms that the Montana Supreme Court will in some circumstances back agency interpretations that are reasonable and pragmatic, giving DEQ flexibility to issue permits that account for widely varying climatic and hydrological conditions that exist in Montana. On the other hand, it signals a willingness to dive deep into an administrative record, and not simply defer to the agency's technical justification for its decision.

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