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Montana Environmental Information Center v. Department of Environmental Quality, 2019 MT 213, 397 Mont. 161, 451 P.3d 493

Anthony P. Reed

The DEQ renewed a 1999 MPDES Permit on September 14, 2012 that allowed Western Energy Company to discharge pollutants from the Rosebud Mine into streams. Environmental groups MEIC and the Sierra Club sued, arguing this violated both the Montana Water Quality Act and federal Clean Water Act because the DEQ’s interpretation of its own regulations that exempted waters with ephemeral characteristics from water quality standards was arbitrary and capricious. The district court agreed, but the Montana Supreme Court reversed. It held the DEQ’s interpretation was lawful and remanded for further fact finding to assess how the DEQ applied the interpretation and to require the agency to explain how its representative monitoring of precipitation-driven discharges at the mine were representative of the monitored activity in fact.

I. INTRODUCTION

The Rosebud Mine (“Mine”) sits at the headwaters of the Yellowstone River.¹ Mine owner Western Energy Company (“Western Energy”) obtained a Montana Pollutant Discharge Elimination Systems Permit (“MPDES”) from the Department of Environmental Quality (“DEQ”) to discharge suspended solids from its mining activities into tributaries of the Yellowstone River.² The river is classified as a C-3 water “suitable for bathing, swimming, and recreation, and growth and propagation of non-salmonid fishes and associated aquatic life, waterfowl, and furbearers.”³ Montana Environmental Information Center (“MEIC”) and the Sierra Club challenged the renewal of the MPDES Permit under the Montana Water Quality Act (“WQA”) and federal Clean Water Act (“CWA”).⁴

II. FACTUAL AND PROCEDURAL BACKGROUND

In 1999, the DEQ issued Western Energy a MPDES Permit (“1999 Permit”) for the Mine.⁵ The 1999 Permit expired in 2004 but the DEQ allowed Western Energy to continue mining operations under the same terms and conditions until a new permit could be issued.⁶ In 2012, the DEQ

1. Montana Env’tl. Info. Ctr. v. Dep’t of Env’tl. Quality, 2019 MT 213, ¶ 7, 397 Mont. 161, 451 P.3d 493.

2. *Id.* ¶¶ 1,4.

3. *Id.* ¶ 34 (quoting Mont. Admin. R. 17.30.611(1)(c), 17.30.629 (2019)).

4. *Id.* ¶ 1.

5. *Id.* ¶ 1.

6. *Id.* ¶ 9.

issued a draft permit (“2012 Permit”) which exempted waters with ephemeral characteristics receiving mining discharges from the water quality standards applicable to rivers classified as C-3 waters.⁷ The 2012 Permit allowed Western Energy to representatively monitor precipitation-driven discharges at the Mine’s outfalls.⁸ It also acknowledged that the upper and lower reaches of East Fork Armells Creek were impaired, but did not establish a total maximum daily load (“TMDL”) budget.⁹ MEIC filed a complaint seeking to invalidate the 2012 Permit.¹⁰ In response, the DEQ made five modifications and reissued the 2012 Permit in 2014 (“Modified Permit”), however the modifications did not address the issues raised by MEIC.¹¹ The district court invalidated the Modified Permit and granted summary judgment to MEIC.¹² The DEQ appealed and the Montana Supreme Court reversed.¹³

III. ANALYSIS

The court began by establishing the level of deference given to DEQ interpretations of Montana Board of Environmental Review (the “Board”) rules and regulations.¹⁴ The court then applied this level of deference to the DEQ’s interpretation of Mont. Admin. R. 17.30.637(4), a regulation promulgated by the Board.¹⁵ Next, the court analyzed whether the DEQ’s interpretation of the regulation arbitrarily and capriciously established water quality standards for East Fork Armells Creek during the permitting process.¹⁶ Finally, the court addressed the Modified Permit’s representative monitoring protocol for precipitation-driven discharges at the Mine’s outfalls in alkaline mine drainage and coal preparation areas.¹⁷

A. Deference to an Agency’s Interpretation of a Regulation

The court stated that it defers to agency interpretations when they fit within a range of reasonableness.¹⁸ The court determines whether the

7. *Id.* ¶ 11. Mont. Admin. R. 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.”

8. *Id.* ¶ 11.

9. *Id.* ¶¶ 1, 11.

10. *Id.* ¶ 11.

11. *Id.* ¶¶ 14, 15.

12. *Id.* ¶ 15.

13. *Id.* ¶ 99.

14. *Id.* ¶ 22.

15. *Id.* ¶ 42.

16. *Id.* ¶ 61.

17. *Id.* ¶ 73.

18. *Id.* ¶ 22.

wording of the regulation and the agency's interpretation is consistent with the spirit of the regulation.¹⁹ And the court will not hold lawful an agency's interpretation clearly inconsistent with the spirit of the regulation.²⁰

Additionally, because the DEQ had statutory authority to implement the Board's regulations under the WQA, the court gave the DEQ's interpretation great weight.²¹

1. DEQ's Interpretation of the Term "Ephemeral" Pursuant to Admin. R. M. 17.30.637(4)

Water quality standards for ephemeral streams are not subject to the treatment standards of their downstream receiving waters.²² The DEQ argued this regulation provided the flexibility to exempt portions of ephemeral streams, or the streams in their entirety, from the water quality standards of downstream receiving waters without reclassifying those downstream waters.²³

MEIC did not challenge the regulations' compliance with the WQA.²⁴ Instead, MEIC argued the DEQ circumvented the usual public hearing process and effectively reclassified the receiving waters through the permitting process.²⁵ MEIC further argued this process violated the spirit of the rule because it degraded high quality waters and skirted the opportunity for public input.²⁶ The Board's own regulations state that a river may be reclassified, but the Board must give notice, receive comments from the water pollution control advisory council, hold a public hearing, and adhere to Admin. R. M. 17.30.606,²⁷ which describes how a notice is to be made public and how direct notice is to be delivered to persons potentially affected by the proposed action.²⁸

The court held the DEQ's interpretation of Admin. R. M. 17.30.637(4) was consistent with the spirit of WQA.²⁹ The DEQ's decision to exempt ephemeral streams was "technical and required specialized scientific expertise."³⁰ The court noted that the term "ephemeral" referred to a water body's hydrological characteristics, not classification.³¹ Accordingly, the court agreed with the DEQ that it had not reclassified the Yellowstone River through application of the term and, under the

19. *Id.* ¶ 23.
 20. *Id.* ¶ 23.
 21. *Id.* ¶ 25.
 22. *Id.* ¶ 43; Mont. Admin. R. 17.30.637(4) (2019).
 23. *Mont. Env'tl. Info. Ctr.*, ¶ 54.
 24. *Id.* ¶ 44.
 25. *Id.* ¶ 51.
 26. *Id.* ¶ 51.
 27. *Id.* ¶ 51.
 28. Mont. Admin. R. 17.30.606.
 29. *Mont. Env'tl. Info. Ctr.*, ¶ 58.
 30. *Id.* ¶ 58.
 31. *Id.* ¶ 53.

Modified Permit, the river remained C-3 waters.³² The court therefore held the DEQ's interpretation was lawful.³³

2. DEQ's Application of its Interpretation to East Fork Armells Creek During the Permitting Process

East Fork Armells Creek receives discharges from the vast majority of the Mine's outfalls, forty-three outfalls associated with alkaline mine drainage, and six outfalls associated with coal preparation.³⁴ In 2010, the DEQ placed East Fork Armells Creek on Montana's Section 303(d) list of impaired waters, meaning the agency had reliable data which showed the upper and lower reaches of East Fork Armells Creek had failed to achieve compliance with designated water quality standards.³⁵

The court noted that scientific documents indicated East Fork Armells Creek was potentially intermittent and not ephemeral.³⁶ In fact, the DEQ had access to such documents prior to issuing the Modified Permit.³⁷ Accordingly, the court stated that DEQ should not have exempted the creek from the water quality standards applicable to C-3 waters without a higher level of certainty it was ephemeral.³⁸

The court held it was 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).³⁹ The court remanded to the district court for a determination of whether the creek is ephemeral or intermittent.⁴⁰ This will help assess whether the DEQ's previous decision to classify East Fork Armells Creek as ephemeral was arbitrary and capricious.⁴¹

B. Modified Permit's Representative Monitoring Protocol for Precipitation-Driven Discharges

Due to the Mine's size and numerous inaccessible, remote outfalls, the DEQ argued that monitoring them all with automated sampling devices would be prohibitively expensive.⁴² As an alternative, Western Energy proposed representative monitoring—a method that samples the effluent levels of a few outfalls and uses that data to

32. *Id.* ¶ 54.

33. *Id.* ¶ 60.

34. *Id.* ¶ 62.

35. *Id.* ¶ 63 (citing Mont. Code Ann. § 75-5-103(14) (2019)).

36. *Id.* ¶ 66.

37. *Id.*

38. *Id.* ¶ 67.

39. *Id.* ¶ 72.

40. *Id.* ¶ 72.

41. *Id.* ¶ 72.

42. *Id.* ¶ 82.

extrapolate effluent levels for the rest—as the most reasonable way to comply with the WQA’s monitoring requirements.⁴³

When the DEQ has permitted an owner or operator of a point source to monitor precipitation-driven discharges from mining outfalls in a representative manner, the owner or operator must adhere to the conditions established in their MPDES permit.⁴⁴ Although the DEQ has “statutorily broad authority to require monitoring of discharges into state waters,”⁴⁵ its discretion in crafting the monitoring requirements in a MPDES permit is limited by both federal and state law.⁴⁶ These laws require the DEQ to craft monitoring requirements for precipitation-driven discharges that are “representative of the monitored activity.”⁴⁷

The court reasoned Western Energy’s monitoring was not representative because only fourteen of seventy-six outfalls were being monitored and the DEQ should have required a higher percentage of the outfalls to be actually monitored.⁴⁸ Furthermore, the criteria for monitoring the outfalls described by the Modified Permit were not sufficient to yield representative data of the precipitation-driven discharges.⁴⁹

The court stated the DEQ may lawfully permit representative monitoring.⁵⁰ However, the court declined to determine the adequacy of the permitting process without a more detailed explanation of how the outfalls selected represent the Mine’s total outfalls and precipitation-driven discharges.⁵¹ The court determined that because the DEQ’s assertions about its representative monitoring were unsupported, the issue should be remanded for trial.⁵²

IV. CONCLUSION

The court reversed the district court’s decision on three points. The court deferred to the DEQ’s interpretation of Mont. Admin. R. 17.30.637(4) as allowing the DEQ to exempt waters that receive mine discharges from the water quality standards of their downstream receiving waters without a formal reclassification process. The district court’s summary judgment for MEIC was reversed on two issues: whether East Fork Armells Creek was intermittent or ephemeral, and whether the representative monitoring protocols were truly representative of the actual

43. *Id.* ¶ 82.

44. *Id.* ¶ 77.

45. *Id.* ¶ 75 (citing *Upper Mo. Waterkeeper v. Mont. Dep’t of Env’tl. Quality*, 2019 MT 81, ¶ 38, 395 Mont. 263, 438 P.3d 792).

46. *Id.* ¶ 77.

47. *Id.* ¶ 77 (quoting Mont. Admin. R. 17.30.1342(10)(a), 17.30.1351(1)(b); 40 CFR § 122.41(j)(1)).

48. *Id.* ¶ 87.

49. *Id.* ¶ 87.

50. *Id.* ¶ 98.

51. *Id.* ¶ 91.

52. *Id.* ¶ 98.

effluent discharges. The issues were remanded for further fact finding because there were genuine issues of material fact. Despite the court's ruling, this case essentially gave the DEQ the power to skirt the public process, the federal CWA, and Montana's WQA. The best available science is clear that the pollution of headwaters can have drastic effects on downstream water quality. This case potentially jeopardizes the future health of Montana's rivers and streams.