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MEIC v. DEQ

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Montana Environmental Information Center v. Montana Department of Environmental Quality, 476 P.3d 32 (Mont. 2020)

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I. INTRODUCTION

This case is just one chapter in a long series of legal challenges in which conservation groups want to protect the ecosystems of northwest Montana from industrial mining operations.[1] Pristine, high-elevation streams flow through the Cabinet Mountains Wilderness and adjacent Kootenai National Forest (KNF). According to the United States Forest Service, "Clean and pure are the simplest and most accurate ways to describe the water . . . Past studies have rated this water among the top 5% purest water in the lower 48 states."[2] Endangered, native bull trout, as well as westslope cutthroat trout and other sensitive, cold-water fish thrive in this ecosystem.[3] The area also supports one of the last five grizzly bear populations that persist in the contiguous United States today.[4]

Hecla Mining Company is pressing to develop two industrial mines—the Montanore and Rock Creek projects—beneath this ecosystem to pursue "world class deposits" of silver and copper.[5] A coalition of conservation groups has challenged multiple permits for both projects in state and federal court over the past decade.[6] The Montanore Project, the focus of this case,[7] would bore beneath the Cabinet Mountains Wilderness and pollute multiple streams with copper, zinc, chromium, iron,

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1. *The Future of Mining in Lincoln County*, THE WESTERN NEWS, Feb. 21, 2020; Rob Chaney, *Montana Supreme Court Blocks Permit for Mine near Libby*, MISSOULIAN, Nov. 19, 2020.

2. *Special Places: Cabinet Mountains Wilderness*, U.S. DEP'T OF AGRIC. U.S. FOREST SERVICE (Mar. 31, 2021), https://www.fs.usda.gov/detailfull/kootenai/specialplaces/?cid=stelprdb5200701 [hereinafter *Special Places*].

3. U.S. DEP'T OF AGRIC. U.S. FOREST SERVICE Final Environmental Impact Statement, Montanore Project at S-47 (March 2015) [hereinafter FEIS]; *Special Places*, *supra* note 2.

4. FEIS, *supra* note 3, at S-44; *Special Places*, *supra* note 2.

5. U.S. DEP'T OF AGRIC. U.S. FOREST SERVICE & MONTANA DEP'T OF ENVTL. QUALITY, Joint Final Environmental Impact Statement, Montanore Project at 528 (Dec. 2015) [hereinafter Joint EIS].

6. Mines Mgt., Inc. v. Fus, 453 P.3d 371 (Mont. 2019); Save Our Cabinets v. U.S. Fish and Wildlife Serv., 255 F. Supp. 3d 1035 (D. Mont. 2017), judgment entered *sub nom.* Save Our Cabinets, Earthworks v. U.S. Fish and Wildlife Serv., CV 15-69-M-DWM, 2017 WL 2829679 (D. Mont. 2017); Save Our Cabinets, Earthworks v. U.S. Dept. of Agric., CV 16-53-M-DWM, 2016 WL 9274958 (D. Mont. 2016); Clark Fork Coalition v. Montana Dept. of Envtl. Quality, 197 P.3d 482 (Mont. 2008).

7. Mont. Envtl. Info. Ctr. v. Dep't of Envtl. Quality, 476 P.3d 32, 34 (Mont. 2020) (majority opinion).

manganese, ammonia, sediment, and other pollutants that are harmful to aquatic life.[8]

Montana Environmental Information Center, Save Our Cabinets, and Earthworks (collectively, MEIC) brought the action seeking to invalidate a 2017 Montana Department of Environmental Quality's (DEQ) Montana Pollution Discharge Elimination System (MPDES) permit for the Montanore Project (2017 Permit).[9] In a four-member majority, the Montana Supreme Court affirmed the district court's vacatur of the 2017 Permit to Montanore Minerals Corporation (MMC), and remanded the case to DEQ for further proceedings.[10]

The Court rejected DEQ's issuance of the 2017 Permit, which allowed the company to rely on 1992 pollution standards for its mining operations.[11] The Court held that DEQ unlawfully relied upon a 1992 Board of Health and Environmental Sciences' order (1992 Order) when issuing the 2017 Permit. Specifically, the Supreme Court held: (1) the district court correctly concluded that the 1992 Order expired before DEQ issued the 2017 Permit to MMC; and (2) because DEQ relied on this expired order, the 2017 Permit was not valid and must be vacated.[12]

The dissent took issue with the parties' lack of briefing on the 1992 Order due to its determinative significance to the Court's decision. The dissent also highlighted the belated challenge to the 2017 Permit, given the opportunity and statutory requirement to challenge it during the public notice and comment process in 2006.[13]

Due to the majority opinion, the Court may have muddied the waters when defining the "operational life of a mine" and how reclamation efforts fit within that legal timeframe. Relying on a joint federal and state agency environmental impact statement rather than applicable state law and administrative rules guiding agency oversight of mining operations, the Court's decision left Montana water protection at the mercy of an unclear test to determine if and when the operational life of a mine has ended.

This case note will lay out the applicable sections of the Clean Water Act (CWA), Montana Water Quality Act (WQA), and Montana mining and reclamation laws. Then, it will provide the complicated history of mining operations at the Montanore Project, which has changed hands between several Hecla Mining Company subsidiaries since the 1980s. Finally, this case note will analyze the Court's reasoning and potential impacts of the decision.

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8. Joint EIS, *supra* note 5, at 535.
9. *Mont. Envtl. Info. Ctr.*, 476 P.3d at 34.
10. *Id.*
11. *Id.* at 39.
12. *Id.*
13. *Id.* at 40–42 (Rice, J., dissenting).

II. LEGAL FRAMEWORK FOR PROTECTING MONTANA'S WATER RESOURCES

Both federal and state statutes form the legal framework for water resource protection in Montana. The CWA's National Pollution Discharge Elimination System (NPDES) program provides the framework for federal protections, and the WQA and Montana Constitution establish state protections.[14]

A. CWA & State Delegation

Federal and Montana water quality laws were established to eliminate pollution and to clean up the nation's waters.[15] The CWA implements a two-pronged approach to water quality protection and restoration.[16] The first prong places limits on effluent emissions from point sources.[17] The NPDES enforces these limits by requiring a permit for any pollutant's discharge from a point source into the waters of the United States.[18] This permitting system requires polluters to use the "best available technology" to eliminate discharges as technology improves.[19] The second prong provides additional protections not covered by the technologically-based NPDES requirements.[20]

The CWA's federal-state partnership administers water quality standards.[21] The CWA and EPA regulations require states to develop water quality standards that protect public health and welfare, provide protection for fish and wildlife, and enhance water quality.[22] States develop required standards and programs and then submit them to EPA to ensure CWA compliance.[23] If a state fails to develop adequate water quality standards, EPA must step in and develop standards that meet federal standards.[24] When a state revises or adopts new standards, EPA must review them to ensure compliance.[25]

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14. WATER POLICY INTERIM COMM., A GUIDE TO MONTANA WATER QUALITY REGULATION REVISED, at 2 (Mont. 2015) [hereinafter GUIDE TO MONTANA WATER REGULATIONS].

15. *See* Montana Water Quality Act, MONT. CODE ANN. §§ 75-5-101 to 1112 (1991) and 33 U.S.C. § 1251.

16. Judith M. Brawer, *Antidegradation Policy and Outstanding National Resource Waters in the Northern Rocky Mountain States*, 20 PUB. LAND & RESOURCES L. REV. 13, 14–15 (1999).

17. *Id.* at 14.

18. 33 U.S.C. § 1311(b)(2)(A) (2021); *see also* § 1311(b)(1)(A).

19. Brawer *supra* note 16, at 15.

20. 33 U.S.C. § 1311.

21. Federal Clean Water Act, 33 U.S.C. §§ 1251–1252 (1988).

22. 33 U.S.C. § 1311(b)(2)(A); *see also* § 1311(b)(1)(A).

23. 33 U.S.C. § 1311(b)(2)(A); *see also* § 1311(b)(1)(A).

24. 33 U.S.C. § 1313(a).

25. 33 U.S.C. § 1313(c)(2)(A).

Through its agencies and laws, Montana executes CWA water quality guidelines, updating its delegated programs to reflect changes at the federal level.[26] In 1974, Montana and EPA signed a memorandum of agreement (MOA) that transferred the duty to issue NPDES permits (referred to as MPDES in Montana)[27] to DEQ, which, in 1992, was the Department of Health and Environmental Sciences.[28] When EPA delegated Montana authority to implement certain CWA programs, such as MPDES permitting, the federal agency's role shifted from direct administration to support and oversight.[29] EPA continues to review, comment on, and make recommendations to DEQ on proposed permits.[30] Under the MOA, if EPA does not object to a proposed permit, its non-objection "shall be considered as concurrence."[31]

The CWA and Montana Constitution form the foundation of the WQA.[32] The WQA provides broader protections than the CWA, as it covers all state waters and provides for more stringent water quality standards.[33] The WQA incorporates both federal and state policies by integrating the directives of the CWA while also codifying the priorities of the Montana Constitution's environmental quality clauses.[34] When the 1972 Montana Constitution was adopted, it included express environmental quality provisions. Article IX, section 1, subsection 3 provides: "The legislature shall provide adequate remedies for the protection of the environmental life support system from degradation and

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26. MONT. CODE ANN. § 75-5-102(1) (2021).

27. Mont. Admin R. 17.30.1202(28) (2021).

28. Mont. Envtl. Info. Ctr. v. Dep't of Envtl. Quality, 476 P.3d 32, 34 (Mont. 2020) (majority opinion). To note, DEQ evolved out of a state public health board in the early 20th century. The Montana State Board of Health was established in 1901; in 1967 the Legislature created the Montana Department of Health. Then, in 1971, the Department of Health became the Department of Health and Environmental Sciences with the passage of Governor Anderson's Executive Reorganization Order. The Environmental Sciences Division of the Department of Health and Environmental Sciences became its own separate department, renamed the Department of Environmental Quality, in 1995. The Montana Board of Health and Environmental Sciences was designed to serve as a quasi-judicial, quasi-legislative advisory body to the Department of Health and Environmental Sciences when Executive branch departments were reorganized in 1971. Executive Reorganization Act of 1971, S. 274, Leg., 42nd Reg. Sess. (Mont. 1971); *Executive Reorganization: Report to the Montana Legislative Assembly*, COMMISSION ON EXECUTIVE REORGANIZATION, (Mont. 1970), http://digitalcommons.mtech.edu/ crucible_materials/1.

29. *Montana Envtl. Info. Ctr.*, 476 P.3d at 34; *see also* GUIDE TO MONTANA WATER REGULATIONS, *supra* note 14, at 2.

30. *Mont. Envtl. Info. Ctr.*, 476 P.3d at 34; *see also* GUIDE TO MONTANA WATER REGULATIONS, *supra* note 14, at 12.

31. *Mont. Envtl. Info. Ctr.*, 476 P.3d at 34.

32. Water Quality Act MONT. CODE ANN. §§ 75-5-101 to 75-5-106; GUIDE TO MONTANA WATER REGULATIONS, *supra* note 14, at 2–3.

33. John L. Horwich, *Water Quality Degradation in Montana: Is Any Deterioration Too Much?* 14 PUB. LAND & RESOURCES L. REV. 145, 152–53 (1993).

34. MONT. CODE ANN. § 75-5-102.

provide adequate remedies to prevent unreasonable depletion and degradation of natural resources."[35]

1. Discharge Permit Process & Nondegradation Review of Montana's Waters

Under the WQA, DEQ issues MPDES permits for surface water discharge.[36] The Board of Environmental Review adopts rules governing the application process for the permits and directs how DEQ issues, denies, revises, or revokes a permit.[37] Anyone proposing to discharge sewage, industrial waste, or other pollutants into regulated state waters must apply for a MPDES permit.[38]

An applicant must complete an "Application for Determination of Significance."[39] Then, DEQ determines if the proposed degradation is significant under the state nondegradation policy.[40] If the discharge is considered significant, the applicant must complete an application to degrade state waters.[41] A water quality permit is valid for up to five years and may be renewed.[42] This reapplication requirement also functions as a form of permit review.[43]

MPDES permits must include effluent limitations that are sufficient to ensure that permitted discharges will not lead to a violation of any applicable water quality standard.[44] Effluent limitations impose restrictions on the quantity of specific pollutants that a permit holder is allowed to discharge.[45] To satisfy this fundamental requirement, MPDES permits contain technology-based effluent limitations and water quality-based effluent limitations.[46]

Beyond ensuring compliance with applicable water quality standards, MPDES permits must also include effluent limitations necessary to comply with the WQA nondegradation policy to protect Montana's water resources.[47] To ensure compliance with the

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35. MONT. CONST. art. IX, § 1(3); MONT. CONST. art. II, § 3.
36. Mont. Admin. R. 17.30.1301.
37. Mont. Admin. R. 17.30.708.
38. 33 U.S.C. § 1251; MONT. CODE ANN. § 75-5-401; Mont. Admin. R. 17.30.1301, 17.30.1322.
39. Mont. Admin. R. 17.30.706.
40. Mont. Admin. R. 17.30.707; MONT. CODE ANN. § 75-5-303.
41. Mont. Admin. R. 17.30.706.
42. Mont. Admin. R. 17.30.1346(1).
43. GUIDE TO MONTANA WATER REGULATIONS, *supra* note 14, at 12.
44. *See* 33 U.S.C § 1324(b)(1)(A); MONT. CODE ANN. § 75-4-401(2); Mont. Admin. R. 17.30.637(2); Mont. Admin. R. 17.30.144(1) (incorporating federal requirements).
45. 33 U.S.C. § 1362(11).
46. 40 C.F.R. § 125.3(a); 40 C.F.R. § 122.44(d)(1); Mont. Admin. R. 17.30.1203(1); *see* 33 U.S.C. § 1311(b); 33 U.S.C. § 1312(a).
47. MONT. CODE ANN. § 75-5-303(1); 40 C.F.R. § 131.12(a)(1).

nondegradation policy when issuing MPDES permits, DEQ must conduct a nondegradation review.[48]

Montana's water quality nondegradation policy was originally based on the federal nondegradation policy, but in 1971, the state adopted a much stricter policy that exceeded the minimum federal requirements.[49] Then, in 1972, the Montana Constitutional Convention wrote a stronger mandate prohibiting air, land, and water quality degradation and promoting enhancement of the environment into the new Constitution.[50] Montana's Constitution and the pre-1993 nondegradation policy prohibited polluters from degrading water quality below the level established by the Montana Legislature in 1971 and prohibited new sources from degrading our high-quality waters entirely.[51] Scholars have interpreted Montana's Constitution as a clear prohibition against degradation of state waters. [52] However, under the constitutional nondegradation requirements, sources existing as of June 1972 were in effect grandfathered in, and under the Montana statutes [53] and administrative rules,[54] could continue discharging into waters at or below historical levels.[55]

Under the pre-1993 policy, the Board of Health and Environmental Sciences (BHES) required:

> (1) that any state waters whose existing quality is higher than the established water quality standards be maintained at that high quality unless it has been affirmatively demonstrated to the board that a change *is justifiable as a result of necessary economic or social development* and will not preclude present and anticipated use of these waters; and
> (2) any industrial, public, or private project or development which would constitute a new source of pollution or an increased source of pollution to high-quality waters, referred to in subsection (1), to provide the degree of waste treatment necessary to maintain that existing high water quality.[56]

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48. Mont. Admin. R. 17.30.707.

49. Grant D. Parker, *Montana's Nondegradation Laws: Will We Allow Continued Degradation of Montana's Waters? Response to Horwich's Nondegradation Article: Protecting Montana's High Quality Waters from Degradation*, 14 PUB. LAND L. REV. 185, 188 (1993).

50. *Id*. at 190.

51. *Id*. at 187.

52. MONT. CONST. art. IX, § 1, cl. 1.; Parker, *supra* note 49, at 174.

53. MONT. CODE ANN. § 75-5-303.

54. Mont. Admin. R. 17.30.

55. Horwich, *supra* note 33, at 186.

56. MONT. CODE ANN. § 75-5-303 (1991) (emphasis added).

In 1993, the 53rd Montana Legislature reexamined state water quality laws. The legislature adopted a new nondegradation policy under Senate Bill 401 (SB 401), which amended Montana's statutory nondegradation policy by providing an opportunity for all sources of pollution to apply for nondegradation waivers.[57] Even though the Montana Constitution and pre-1993 nondegradation policy prohibited polluters from degrading water quality below the level established in 1972, and prohibited new sources from degrading Montana's high quality waters at all, the 1993 nondegradation legislation established a statutory scheme that allowed waiver of the state's nondegradation policy and degradation of Montana's waters.[58] The new law applies to all requests to degrade Montana's waters filed after the date of enactment, April 29, 1993.[59]

The 1993 policy outlined three levels of water protection and stipulated what degradation, if any, is allowable for each level.[60] Under this new nondegradation policy, dischargers must apply for a permit and undergo a nondegradation review to evaluate the nature of the discharge in relation to the quality of the receiving waters.[61] In accordance with BHES rules and statutes,[62] DEQ may authorize degradation if the discharger demonstrates by a preponderance of the evidence that:

> (a) degradation is necessary because there are no economically, environmentally, and technologically feasible modifications to the proposed project that would result in no degradation;
> (b) the proposed project will result in important economic or social development and that the benefit of the development exceeds the costs to society of allowing degradation of high-quality waters;
> (c) existing and anticipated use of state waters will be fully protected; and
> (d) the least degrading water quality protection practices determined by the department to be economically, environmentally, and technologically feasible will be fully implemented by the applicant prior to and during the proposed activity.[63]

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57. S. 401, 1993 Leg., 53rd Reg. Sess. (Mont. 1993).
58. Parker, *supra* note 49, at 186–87.
59. *Id.* at 186.
60. MONT. CODE ANN. § 75-5-303 (1993).
61. MONT. CODE ANN. § 75-5-303; Mont. Admin. R. 17.30.701; GUIDE TO MONTANA WATER REGULATIONS, *supra* note 14, at 9.
62. MONT. CODE ANN. § 75-5-317(2); Mont. Admin. R. 17.30.715.
60. MONT. CODE ANN. § 75-5-303(1).

Significantly, however, legislative changes for all future requests to degrade state waters were not retroactive.[64] The 1993 nondegradation policy only applied to activities resulting in a "new or increased source which may cause degradation."[65] According to the definitions pertaining to the nondegradation of water quality, "new or increased source" means "an activity resulting in a change of existing water quality occurring on or after April 29, 1993."[66] The term does not include sources from which discharges to state waters have commenced or increased on or after that date; nonpoint sources discharging before or withdrawals of water pursuant to a valid water right existing before April 29, 1993; and activities causing nonsignificant changes in existing water quality.[67]

Overall, the 1993 nondegradation policy weakened protection for Montana water resources.[68] The 1993 policy diminished the strict statutory prohibition against degradation by new and increased sources, and expressly allowed "mixing zones" where degradation may be allowed and water quality standards may be exceeded.[69] The 1993 nondegradation policy is still in effect today.[70]

B. Montana Hard Rock Mining Reclamation Act

Mineral exploration and metal mine development disturbs the surface and subsurface of the earth and produces waste materials. Mine operations usually impact surface water and ground water resources in both quantity and quality.[71] Because mines are often in or near flowing surface waters, placer and dredge operations can contribute to turbidity. Subsurface mines can contact ground water, and mine waste materials and exposed rock may contribute contaminants to water resources.[72]

In addition to MPDES and nondegradation permits, operations such as the Montanore Project must obtain an exploration license and mine

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64. Mont. Envtl. Info. Ctr. v. Dep't of Envtl. Quality, 476 P.3d 32, 37 (Mont. 2020) (majority opinion); Mont. Admin. R. 17.30.705, 17.30.702(17).

65. Mont. Admin. R. 17.30.705.

66. Mont. Admin. R. 17.30.702(17).

67. *Id*.

68. Parker, *supra* note 49, at 197.

69. *Id*.; MONT. CODE ANN. § 75-5-103(21).

70. *See* MONT. CODE ANN. § 75-5-303. To note, SB 401 was opposed by ranchers, environmental groups, and Montana citizens; opponents of SB 401 included: Montana Trout Unlimited, Northern Plains Resource Council, Montana Audubon, Clark Fork-Pende Oreille Coalition, Montana Environmental Information Center, Montana Wildlife Federation, and Montana citizens and cattle ranchers. Opponents testified that SB 401 would "significantly change Montana's 20-year policy to protect and improve water quality, . . . [and] the current water quality act and state policy [were] working to both protect water, and allow reasonable impacts from developments." *Hearing on S. 401, Before the Committee on Natural Resources*, 53rd Leg., Reg. Sess., 4 (Mont. 1993). Whereas, the opponents testified, "SB 401 would gut the intent of the nondegradation policy." *Id*.

71. GUIDE TO MONTANA WATER REGULATIONS, *supra* note 14, at 41.

72. *Id*.

operating permits under the Montana Hard Rock Mining Reclamation Act (Mining Act) and the Strip and Underground Mine Reclamation Act (Underground Mining Act).[73] The Montana Constitution and Mining Act require reclamation of mining operations.[74] Mine operation plans must include information about water resources and plans for monitoring for and mitigating any discharges of materials to ground water or surface water.[75] Specifically, to apply for a permit under the regulations governing the Mining Act, an applicant must include a reclamation plan that accounts for controlling erosion and maintaining water quality at the site.[76]

III. FACTS AND PROCEDURAL HISTORY

Before MMC assumed ownership, the Montanore Project changed hands several times. Noranda Minerals Corporation (Noranda) was the first entity.[77] In 1989, Noranda Minerals Corporation (Noranda) obtained an exploration license from the Montana Department of State Lands to construct an adit to access silver ore deposits in Libby Creek.[78] Noranda then filed a "Petition for Change in Quality of Ambient Waters" with BHES the same year, seeking authorization to legally lower the ambient surface and ground water quality for discharges from the proposed Montanore Project in Sanders and Lincoln counties.[79] At that time, BHES was operating under the more stringent, pre-1993 standard that allowed degradation when it was justified "as a result of necessary economic or social development."[80]

Noranda stopped construction of the adit in 1991 due to elevated nitrate concentration in the surface water and low metal prices, but it continued to seek state and federal permits for the Montanore Project in anticipation of constructing the mine eventually.[81] Meanwhile, BHES continued the permitting process.[82]

In November 1992, BHES issued the 1992 Order on Noranda's petition, authorizing degradation because of the economic and social benefits of the Montanore Project.[83] Significantly, the 1992 Order was to "remain in effect during the operational life of this mine and for so long thereafter as necessary."[84]

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73. Mont. Admin. R. 17.24.101.

74. MONT. CONST. art. IX, sec. 1(3), 2(1); MONT. CODE ANN. § 82-4-302.

75. Mont. Admin. R. 17.24.103; Mont. Admin. R. 17.24.116.

76. Mont. Admin. R. 17.24.116; *see also* GUIDE TO MONTANA WATER REGULATIONS, *supra* note 14, at 41.

77. Mont. Envtl. Info. Ctr. v. Dep't of Envtl. Quality, 476 P.3d 32, 34 (Mont. 2020) (majority opinion).

78. *Id*. An adit is a horizontal entrance to an underground mine.

79. *Id*.

80. *Id*.; MONT. CODE ANN. § 75-5-303(1) (1989).

81. *Mont. Envtl. Info. Ctr.*, 476 P.3d at 34.

82. *Id*.

83. *Id*.

84. *Id*. (internal quotation marks omitted).

In June 1992, EPA notified DHES that Noranda had violated the CWA at the Libby Creek site, and DHES filed suit against Noranda alleging the company had violated Montana's WQA.[85] In May 1993, the District Court for the 19th Judicial District of Montana ordered the company to apply for a MPDES permit.[86] By this time, the Legislature had adopted the new nondegradation review policy.[87] In 1997, Noranda obtained its MPDES permit (1997 Permit), which allowed discharges from the Libby adit to Libby Creek and nearby groundwater.[88] The 1997 Permit allowed three outfalls.[89] Then, Noranda stopped discharging in 1998 without providing a reason.[90]

In 2001, Noranda applied to renew the 1997 Permit, which was set to expire in February 2002. DEQ administratively extended the 1997 Permit while it reviewed the renewal application.[91] Yet, by September 2002, Noranda had informed DEQ and KNF that it was relinquishing approval to operate and construct the Montanore Project. Noranda had closed the adit and started reclamation work.[92] Except for the 1997 Permit and a DEQ-issued Hard Rock Operating Permit,[93] Noranda's permits had either expired or were terminated.[94] Notably, although Noranda requested termination of its extended 1997 Permit in 2003, DEQ denied the request because reclamation work at the site was not complete.[95] On the DEQ termination request form, DEQ stated: "Submission of this form shall in no way relieve the permittee of current permit requirements. The Department will notify the permittee in writing of the date termination is effective. The permittee is required to comply with all permit provisions and reporting requirements until the termination is granted."[96] Therefore, Noranda was never relieved of its permit requirements because DEQ never terminated the 1997 Permit.[97]

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85. *Id*.

86. *Id*.

87. S. COMM. ON NATURAL RESOURCES, S. 401, MONT. LEG. HISTORY, 1993 HISTORY AND FINAL STATUS, CH. 595, L. at 1 (Mont. 1993).

88. *Mont. Envtl. Info. Ctr.*, 476 P.3d at 34.

89. *Id*. Outfall 001 for a percolation pond discharging to groundwater; Outfall 002 for a drain field with three infiltration zones discharging to groundwater; and Outfall 003 for a pipeline outlet to Libby Creek.

90. *Mont. Envtl. Info. Ctr.*, 476 P.3d at 38.

91. *Id*. at 35.

92. *Id*.

93. Also referred to as DEQ Operating Permit #00150 in the Joint EIS and the *Mines Mgmt., Inc*. decision. Joint EIS, *supra* note 5, at 499; Mines Mgt., Inc. v. Fus, 453 P.3d 371, 374 n.6 (Mont. 2019).

94. *Mont. Envtl. Info. Ctr.*, 476 P.3d at 35; *Mines Mgt., Inc.*, 453 P.3d at 374 n.6.

95. *Mont. Envtl. Info. Ctr.*, 476 P.3d at 35, 38.

96. MONT. DEP'T OF ENVTL. QUAL. WATER PROT. BUREAU, *Request for Termination Individual MPDES Permits and Non-Storm Water General Permit Authorization*, https://deq.mt.gov/Portals/112/Water/Forms/RTF.pdf (last visited May 3, 2021).

97. *Mont. Envtl. Info. Ctr.*, 476 P.3d at 35.

In 2004, Mines Management, Inc. (MMI), MMC's parent company, submitted a new plan of operations and reclamation to revive the Montanore Project to KNF.[98] DEQ renewed Noranda's extended 1997 Permit in March 2006, which went into effect on April 1, 2006 (2006 Renewed Permit).[99] The 2006 Renewed Permit authorized the same three outfalls as the 1997 Permit, and DEQ's environmental assessment noted that the "adit [had] been closed and the facility [was] in its final reclamation stages."[100] DEQ also observed that no discharge had been reported since 1998.[101]

About one month after Noranda received the 2006 Renewed Permit, Newhi, Inc., a wholly owned subsidiary of MMI, acquired all issued and outstanding shares of Noranda and changed Noranda's name to MMC.[102] MMC reversed course from reclamation work to constructing and operating the mine.[103] DEQ modified the 2006 Renewed Permit in May 2008 to reflect the name change from Noranda to MMC but did not conduct any other review.[104] The 2006 Renewed Permit's expiration date remained March 31, 2011.[105]

In August 2010, as the expiration date approached, MMC applied to renew the 2006 Renewed Permit. MMC requested five new stormwater-only outfalls.[106] In February 2011, DEQ administratively extended the 2006 Renewed Permit pending issuance of MMC's 2010 application.[107] In 2015, DEQ conducted a full notice and comment period.[108] The agency issued a draft permit, fact sheet, and public notice in 2016.[109] On December 15, 2015, KNF and DEQ issued a Joint Final Environmental Impact Statement (EIS) for the Montanore Project.[110] The EIS noted MMC's proposal was "considered as a new proposed Plan of Operations by the KNF because [Noranda] relinquished the federal approval to construct and operate the Montanore Project in 2002."[111]

DEQ approved MMC's renewal application on January 17, 2017, and issued a new MPDES permit (2017 Permit). The 2017 Permit added MMC's five new requested stormwater outfalls allowing discharges directly into two creeks.[112]

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98. *Id*.
99. *Id*.
100. *Id*. (internal quotations omitted).
101. *Id*.
102. *Id*.
103. *Id*. at 38.
104. *Id*. at 35.
105. *Id*.
106. *Id*.
107. *Id*.
108. *Id*. at 35–36.
109. *Id*.
110. *Id*. at 36.
111. *Id*. (internal quotations omitted).
112. *Id*.

In 2017, MEIC filed a Complaint for Declaratory Relief in the District Court of the First Judicial District of Montana, seeking a judicial declaration that DEQ's issuance of the 2017 Permit to MMC was unlawful and must be vacated.[113] In 2018, MEIC moved for summary judgment on four issues asserting that: (1) DEQ failed to establish mandatory technology-based effluent limitations; (2) DEQ failed to conduct a valid reasonable potential analysis to determine the need for water quality-based effluent limitations; (3) DEQ unlawfully relied on the 1992 Order; and (4) the 2017 Permit contained unlawful compliance schedules.[114] DEQ and MMC each filed cross-motions for summary judgment, seeking to uphold DEQ's issuance of the 2017 Permit.[115] In 2019, the district court granted MEIC's motion in most respects. The district court denied DEQ and MMC's cross motions and vacated the 2017 Permit. The parties then cross-appealed.[116]

IV. MONTANA SUPREME COURT DECISION

The Court addressed the sole issue of whether DEQ unlawfully relied on the 1992 Order when issuing the 2017 Permit.[117] The majority held that the 2017 Permit was not valid because DEQ relied upon an expired BHES Order when it issued the permit to MMC, and thus, vacated the 2017 Permit.[118] The dissent disagreed, concluding that DEQ did not have authority to disregard the 1992 Order because it was not only set by its terms, but also by SB 401, which effectively "grandfathered" existing permits under the former, pre-1993 policy.[119]

A. Majority Opinion

In a four-member majority opinion, the Montana Supreme Court affirmed the district court's decision that DEQ's issuance of the 2017 Permit was unlawful.[120] Although the majority found that the operational life of the mine did not end in 1991, as the district court had found, the Court did affirm the district court's ultimate conclusion that the operational life of the mine ended and the BHES Order expired before DEQ issued the 2017 Permit.[121]

The Court held that the 2017 Permit was not valid because DEQ relied upon an expired BHES Order when it issued the permit to MMC,

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113. *Id.*
114. *Id.*
115. *Id.*
116. *Id.*
117. *Id.* at 39.
118. *Id.*
119. *Id.* at 41 (Rice, J., dissenting); Mont. Admin. R. 17.30.705; Mont. Admin R. 17.30.702(17).
120. *Mont. Envtl. Info. Ctr.*, 476 P.3d at 39.
121. *Id.*

and thus, vacated the 2017 Permit.[122] The Court remanded the matter to DEQ to conduct the proper degradation review under the 1993 standard.[123] Then, if DEQ determines it is appropriate to authorize degradation for the Montanore Project, the agency can proceed to MPDES permitting.[124]

1. The "Operational Life of the Mine" Ended in 2002

The majority first addressed the 1974 MOA between EPA and Montana that transferred the responsibility of issuing NPDES permits from EPA to DEQ.[125] EPA commented on the draft 2017 Permit but did not object.[126] The Court determined that DEQ alone must justify its permitting decisions because EPA's non-objection to the issuance "cannot overcome decisions made by DEQ which are arbitrary, capricious, or unlawful."[127] Thus, the Court determined that since it was DEQ's ultimate decision to issue the 2017 Permit, the Court would review DEQ's 2017 Permit decision.[128]

Next, the Court addressed whether DEQ unlawfully relied upon the 1992 Order when issuing the 2017 Permit.[129] The Court looked to the BHES Order, which was to "remain in effect during the operational life of this mine and for so long thereafter as necessary"[130] with respect to the 2017 Permit for the Montanore Project.[131]

The district court found that the Montanore Project's operational life ended in 1991 when Noranda abandoned mining operations and began reclamation.[132] However, DEQ and MMC argued on appeal that the operational life of the mine never ended. MEIC, on the other hand, argued that it ended in 2002, suggesting that the district court's order referencing 1991 was a "typographical or harmless error."[133]

The Montana Supreme Court majority determined that the operational life of the mine ended in 2002 when Noranda abandoned the project.[134] Ultimately, the Court found that the district court's ruling that the Montanore Project's operational life had ended in 1991 was incorrect, but nonetheless affirmed the district court's conclusion that the operational life of the mine had ended before 2017. Therefore, the district court's

122. *Id.*
123. *Id.*
124. *Id.*
125. *Id.* at 36.
126. *Id.*
127. *Id.*
128. *Id.*
129. *Id.* at 37.
130. *Id.*
131. *Id.*
132. *Id.*
133. *Id.*
134. *Id.*

ruling that the 1992 Order expired before DEQ issued the 2017 Permit was affirmed.[135]

The majority held that the "operational life" referred to in the 1992 Order ended in 2002 because that is the year Noranda abandoned the Montanore Project and relinquished or attempted to relinquish its permits.[136] Accordingly, the mine "could no longer be considered 'operational' in any sense."[137]

Relying on the 2015 KNF and DEQ EIS for the proposed Montanore Project, the Court found that since the EIS identified the end of the operational life of one mine and the initiation of a new operational life of a proposed mine that the relevant 1992 BHES Order had then expired.[138] The EIS noted that MMC's plan was "considered as a new proposed Plan of Operations by the KNF because [Noranda] relinquished the federal approval to construct and operate the Montanore Project in 2002."[139] Although the Court noted the change in ownership from Noranda to MMC, it did not find this change determinative for purposes of defining the "operational life."[140]

The BHES Order was to be in effect beyond the operational life of the mine "for so long thereafter as necessary."[141] Yet, the majority rejected MMC's argument that Noranda's on-going reclamation work between 2002 and 2006 qualified "as necessary."[142] The Court noted Noranda's delay in completing the reclamation work.[143] DEQ could force Noranda to maintain its MPDES Permit to complete the slow-going reclamation work, the Court decided, but the agency "could not later issue an MPDES permit with degradation standards" from 1992 because the BHES Order "expired as soon as the project transitioned to reclamation."[144] In short, according to the Court, the reclamation of a mining site does not fall within the bounds of the "operational life of the mine and so long thereafter as is necessary." Thus, the Court ruled, it "would be absurd to interpret the BHES Order's 'as necessary' language to include Noranda's abandonment of the project and nearly-complete reclamation work to extend to MMC's proposed new mine project."[145]

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135. *Id*. at 39.
136. *Id*. at 38.
137. *Id*. at 39.
138. *Id*. at 35–36.
139. *Id*.
140. *Id*.
141. *Id*. at 34.
142. *Id*. at 39.
143. *Id*. ("Noranda's reclamation work was apparently somehow still not completed by the time it was acquired and became MMC in 2006.").
144. *Id*.
145. *Id*.

2. DEQ's Issuance of the 2017 Permit was Unlawful

In 1993, the legislature revised the water quality nondegradation policy under which Noranda had initially sought and received a Petition for Change in Quality of Ambient Waters in 1989 for the Montanore Project.[146] However, the 1993 standards were less stringent than the pre-1993 standards on which BHES's 1992 Order was based.[147] Under the new policy, new dischargers must apply for a permit and undergo a nondegradation review to evaluate the nature of the discharge in relation to the quality of the receiving waters.[148]

The Court found that DEQ did not conduct the required full nondegradation review because the agency incorrectly determined that the 1992 Order already authorized MMC to degrade waters at the levels referred to in the 1992 Order under the pre-1993 nondegradation policy.[149] Noranda first applied for authorization to degrade in 1989, and ultimately obtained the BHES Order in 1992. Using, in part, the effluent limitations set by the 1992 Order, DEQ issued that first MPDES permit to Noranda in 1997.[150]

Accordingly, DEQ could force Noranda to maintain its MPDES permit to complete reclamation work, but the agency could not later issue a MPDES permit with degradation standards from the 1992 Order in 2017 because the 1992 Order had expired as soon as the Montanore Project transitioned to reclamation.[151] Thus, the 1992 nondegradation standards and effluent limitations no longer applied. Instead, DEQ was required to conduct a full nondegradation review under current standards as required by the WQA.[152]

Referencing Montanans' constitutional right to a clean and healthful environment to provide the applicable standard of review, the Court found that DEQ's interpretation of the 1992 Order was not a "reasoned decision." As such, the majority ruled that DEQ's issuance of the 2017 Permit was unlawful, affirming the district court's holding.[153] Discharging pollutants into state waters without a valid MPDES permit is illegal under the CWA.[154] Without a valid MPDES permit, MMC would need to apply for a new permit from DEQ to pursue mining operations at the Montanore Project.[155]

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146. *Id.* at 37.
147. Parker, *supra* note 49, at 186–87.
148. MONT. CODE ANN. § 75-5-303; Mont. Admin. R. 17.30.705, Mont. Admin. R. 17.30.702(17).
149. *Mont. Envtl. Info. Ctr.*, 476 P.3d at 37.
150. *Id.*
151. *Id.*
152. *Id.*
153. *Id.*
154. Mont. Admin. R. 17.30.1201(1).
155. *Mont. Envtl. Info. Ctr.*, 476 P.3d at 37.

B. DISSENTING OPINION

In a lone dissent, Justice Jim Rice raised several issues with the majority opinion. First, as an issue of judicial discretion, the dissent stated that supplemental briefing was needed regarding the 2017 Permit's reliance on the BHES Order because the parties had not provided adequate briefing specific to that significant, dispositive issue.[156]

Next, the dissent disagreed with the majority's ruling on the operational life of the mine referred to in the BHES Order. Justice Rice pointed to contradictions in the record regarding the Montanore Project's alleged abandonment and operational purpose.[157] The dissent found that DEQ did not have authority to disregard the 1992 Order because, as a matter of SB 401, the changes to the law effectively "grandfathered" existing permits under the former policy.[158]

Finally, the dissent noted MEIC's challenge was brought 14 years too late.[159] Justice Rice stated that DEQ's reliance upon the BHES Order could have been challenged in 2006 after MMI applied to renew the MPDES permit and DEQ undertook a full notice and comment process before issuing the 2006 Renewed Permit.[160] Yet, no party appealed at that time.[161] In Justice Rice's words, the majority's decision "results in the loss of 14 years of effort, a tremendous waste, and demonstrates the necessity of proper application of the governing rules and of waiver."[162]

V. CASE ANALYSIS

This decision is considered a major win by environmental groups to hold DEQ and mining corporations accountable to adhere to contemporary water quality standards.[163] Both MEIC and the Court frame DEQ's attempt to rely on the 1992 Order as a way to "sidestep Montana's enhanced nondegradation policies."[164] And, the majority stated Montana's

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156. *Id*. at 40 (Rice, J., dissenting).

157. *Id*.

158. *Mont. Envtl. Info. Ctr.*, 476 P.3d at 41; Mont. Admin. R. 17.30.705, Mont. Admin R. 17.30.702(17).

159. *Mont. Envtl. Info. Ctr.*, 476 P.3d at 40–41.

160. *Id*. Indeed, legal challenges to the permit were required to have been brought in 2006 when DEQ underwent full notice and comment review pursuant to MONT. CODE ANN. § 75-5-303(5).

161. *Mont. Envtl. Info. Ctr.*, 476 P.3d at 41.

162. *Id*. at 42.

163. *Victory for Clean Water: Montana Supreme Court Blocks Montanore Mine Pollution Permit*, EARTHJUSTICE, https://earthjustice.org/news/press/2020/victory-for-clean-water-montana-supreme-court-blocks-montanore-mine-pollution-permit (last visited April 21, 2021).

164. *Mont. Envtl. Info. Ctr.*, 476 P.3d at 39 (majority opinion); EARTHJUSTICE, *supra* note 163.

post-1993 nondegradation policy was "enhanced" compared to the pre-1993 policy under which the 1992 Order was issued.[165]

Yet, there is a central irony in this framing and the Court's ruling. MEIC likely brought the case challenging the permit in order to delay the mining operations—a strategy common in environmental litigation. However, as the briefing demonstrates, none of the parties anticipated the Court would focus on the 1992 Order as dispositive.[166] Further, the pre-1993 nondegradation policy provides *greater* protections with more stringent standards for Montana's high-quality resource waters than the contemporary law.[167] In other words, authorization under the pre-1993 policy may have provided increased protections for the waters impacted by the Montanore Project than the 1993 nondegradation policy.

Additionally, the majority opinion may have muddied the waters regarding how reclamation efforts affect the "operational life of a mine." Notably, this phrase has already been defined in Montana law.[168] However, the Court extended beyond the statutory and regulatory language when it found that reclamation of a mining site does not fall within the bounds of the "operational life of the mine and so long thereafter as necessary."[169] Rather than applying relevant mining laws and regulations and providing statutory interpretation, the majority looked to evidence in the record to define this key phrase.

First, this section will explain why the Court inaccurately determined the operational life of the Montanore Project when it found that Noranda's on-going reclamation was not within the operational life of the Montanore Project. Second, based on the Mining Act and the Underground Mining Act, this case note will explore how the Court inaccurately defined Noranda's "abandonment" of the Montanore Project using relevant state mining law. The Court's ruling creates a problematic gray area—not a bright-line test—by which DEQ, mining companies, and environmental advocates can ensure mining operations and permitting decisions adhere to Montana's water quality regulations in the future.

A. Operational Life in the Context of Montana Mining Laws

The WQA and nondegradation policy are not the only relevant laws related to the central issue of this case. As explained above, the Mining Act and Underground Mining Act direct DEQ to regulate underground mineral exploration and metal mining through issuing exploration licenses and mine operating permits.[170] The laws and related administrative rules provide statutory and regulatory guidance on what

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165. *Mont. Envtl. Info. Ctr.*, 476 P.3d at 38.
166. *Mont. Envtl. Info. Ctr.*, 476 P.3d at 40 (Rice, J., dissenting).
167. Parker, *supra* note 49, at 197.
168. Mont. Admin. R. 17.24.150.
169. *Mont. Envtl. Info. Ctr.*, 476 P.3d at 38–39 (majority opinion).
170. MONT. CODE ANN. §§ 82-4-301; §§ 82-4-101; Mont. Admin. R. 17.24.101.

constitutes the life of an operational mine in Montana.[171] They are relevant and determinative here because Noranda, MMI, and MMC obtained a Hard Rock Operating Permit for the Montanore Project.[172]

In analyzing the 1992 Order and whether it expired prior to DEQ's issuance of the 2017 Permit, the Court does not cite to state laws nor administrative rules governing DEQ's mine permitting beyond the MPDES permit and water quality nondegradation policy.[173] Yet, the relevant law and administrative rules make clear that the operational life of a mine includes reclamation work.[174] Therefore, reclamation work does not indicate that the mine's operational life has ended.

Under the Mining Act, reclamation work is a key element of an operational mine because operation plans must include information about water resources and must include plans for monitoring and mitigating any discharges of materials to ground or surface water.[175] DEQ does not grant operating permits until reclamation plans are provided that address how water quality will be maintained at the site.[176] Further, the "reclamation plan must provide that reclamation activities . . . must be conducted simultaneously with the operation and in any case must be initiated promptly after completion or abandonment of the operation on those portions of the complex that will not be subject to further disturbance."[177] In other words, a permitted, operating mine must include reclamation plans in order to pursue active mining operations and it must effectuate those plans, during the active mining operations to the extent possible.[178]

Reclamation activities do not effectively or legally end the life of an operational mine.[179] This conclusion is the most logical given that no operational mine permits would be authorized by DEQ *without* a reclamation plan in the first place. MMC and its predecessors had obtained the appropriate Hard Rock Operating Permit and held it from 1989 onward.[180]

Additionally, pursuant to the Underground Mining Act and related Montana Administrative Rules, "[a]ctive mining operation" means "an operation at which mining and reclamation activities are regularly occurring on an ongoing basis."[181] Reclamation activities are therefore, by definition, included in an active mining operation. Thus, the Montanore

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171. MONT. CODE ANN. §§ 82-4-301; §§ 82-4-101; Mont. Admin. R. 17.24.101.

172. Joint EIS, *supra* note 5, at 649; Montana Envtl. Info. Ctr. v. Dep't of Envtl. Quality, 476 P.3d 32, 35 (Mont. 2020) (majority opinion).

173. *Mont. Envtl. Info. Ctr.*, 476 P.3d at 35.

174. Mont. Admin. R. 17.24.116(5); MONT. CODE ANN. § 82-4-336.

175. Mont. Admin. R. 17.24.116(5).

176. *Id.*

177. MONT. CODE ANN. § 82-4-336(2).

178. MONT. CODE ANN. §§ 82-4-203(43), 84-4-336(2).

179. MONT. CODE ANN. § 82-4-336(2).

180. Joint EIS, *supra* note 5, at 649; Mont. Envtl. Info. Ctr. v. Dep't of Envtl. Quality, 476 P.3d 32, 35 (Mont. 2020) (majority opinion).

181. Mont. Admin. R. 17.24.301(5).

Project would be appropriately defined as an "active mining operation" because both mining and reclamation activities were regularly occurring on and off since the early 1990s. As the majority details, the various operators of the Montanore Project conducted mining and reclamation activities for nearly twenty years.[182]

Taken all together, the existing state laws and administrative rules point to a different conclusion than what the majority found. According to both the Mining Act and Underground Mining Act, reclamation is a required component of active mining operations. Consequently, Noranda's reclamation, initiated around 2001 or 2002,[183] was not the end of the Montanore Project's operational life.

B. Abandonment in the Context of Montana Mining Laws

In the context of the 1992 Order and the phrase "operational life of the mine," the Court did not clearly answer what determines the end—is it abandoning the project, relinquishing the necessary state and federal permits to pursue the project, or both? The Court relied almost exclusively on the EIS to conclude that the operational life of the Montanore Project had ended, noting Noranda's abandonment of the project[184] and Noranda's relinquishment of federal permits.[185]

However, the Mining Act and the Underground Mining Act again provide helpful guidance by which to determine the end of the operational life of a mine—and whether it has been abandoned.[186] According to the Underground Mining Act, "abandoned" means "an operation in which a mineral is not being produced and that [DEQ] determines will not continue or resume operation."[187] Under the Mining Act, "abandonment of surface or underground mining" is presumed "when it is shown that continued operation will not resume."[188] The rules and regulations governing the Mining Act state that abandonment (or completion of mining) is presumed "as soon as ore ceases to be extracted for future use or processing."[189]

A mine operator can show that the operations have not in fact been abandoned or completed based on several criteria.[190] Relevant criteria to the Montanore Project include: the mine is seasonally shut down due to changes in the mined product's market; the mine is shut down for maintenance or the construction of new facilities; and the mine must

182. *Mont. Envtl. Info. Ctr.*, 476 P.3d at 34–39.
183. *Id.* at 35.
184. *Id.* at 35 n.5, 29 n.9, 37, 38 n.7, 39.
185. *Id.* at 38, 39, 39 n.8.
186. MONT. CODE ANN. §§ 82-4-201; §§ 82-4-301.
187. MONT. CODE ANN. § 82-4-203(1).
188. MONT. CODE ANN. § 82-4-303(1).
189. Mont. Admin. R. 17.24.150(1).
190. Mont. Admin. R. 17.24.150(2).

temporarily shut down because of state or federal legal challenge and efforts are being made to remedy the cause of the violation.[191]

The Montanore Project, throughout its various stages experienced the above temporary or seasonal shutdowns. For example, Noranda ceased construction of the adit in 1991 due, in part, to low metal prices.[192] Also, Noranda was the subject of a legal challenge for violating the CWA in 1992 and the Nineteenth Judicial District Court enjoined the mining activity. [193] Conceivably, Noranda did not resume mining until the company obtained its court-ordered 1997 Permit.[194]

Additionally, the Board's comment imbedded in the rules governing the Mining Act states that abandonment under the Hard Rock Operating Permit is an action generally based on complex and changing economic circumstances.[195] As a result, "cessation of mining need not mean abandonment or completion; and that *short of obtaining an operator's records and examining the mine development drill core, [DEQ] may be unable to determine the operator's true intent*."[196] Therefore, the DEQ's determination of whether a mine operator plans to continue pursuing mining is a central feature of abandonment. Here, according to the record discussed by the Court, DEQ never determined that the Montanore Project had been abandoned. [197] In the opposite, DEQ continued to administratively extend the MPDES permit, and the Hard Rock Operating Permit was still in effect.[198] Further, based on DEQ's decision to renew Noranda's MPDES Permit in 2006, it appears that DEQ assumed Noranda would continue or resume operation—whether actively mining or pursuing reclamation.[199]

"In determining "abandonment," the Court conflates Noranda's decision to relinquish its federal and state permits with the question of whether the mine will reopen or continue operations."[200] Abandonment of operations and relinquishment of permits, for the purposes of the rules governing the relevant state mining laws, however, are different because they have different definitions, requirements, and criteria. The Underground Mining Act provides further guidance on mine abandonment, revealing that the Montanore Project never legally qualified as an "inactive" mine.

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191. Mont. Admin. R. 17.24.150(2)(d)–(f).

192. Mont. Envtl. Info. Ctr. v. Dep't of Envtl. Quality, 476 P.3d 32, 34 (Mont. 2020) (majority opinion).

193. *Id*.

194. *Id*. at 35.

195. Mont. Admin. R. 17.24.150(3)(c) Board Comment.

196. *Id*. (emphasis added).

197. *Mont. Envtl. Info. Ctr.*, 476 P.3d at 34–39.

198. *Id*. at 34–35.

199. *Id*.

200. *Id*. at 35 n.5, 29 n.9, 37, 38 n.7, 39.

The statute defines "inactive mining operation" as an "operation where:

> (a) the permit has been suspended for a period of two or more months,
> (b) neither mining nor reclamation activity has ever occurred,
> (c) the department has been informed that operations are temporarily suspended pursuant to administrative rule 17.24.521, or
> (d) permanent cessation of operations has occurred pursuant to administrative rule 17.24.522, but bond has not yet been released."[201]

Subsection (a) refers to a hard rock mining operating permit—not an MPDES permit.[202] Here, based on the record and the Court's reference to *Mines Mgmt., Inc.*, the Hard Rock Operating Permit had not been suspended.[203] The Court found that "Noranda's other permits for the proposed mine, outside of the MPDES permit and DEQ-issued Hard Rock permit #00150, either expired or were terminated by 2002."[204] The Court noted in *Mines Mgmt. Inc*. that "by 2002, some of Noranda's permits for the Montanore Project expired or terminated, *although a Hard Rock permit and [MPDES] permit continued*."[205] The Court should not have overlooked the significance of the Hard Rock Operating Permit because it provides guidance on how to interpret the operational lifetime of the mine.

Next, subsection (b), is inapplicable since mining and reclamation activity both occurred at the Montanore Project. Finally, under subsections (c) and (d), the record shows these factors were not met. Taken altogether, the Montanore Project was never a legally inactive mine for the purposes of the Strip and Underground Mine Reclamation Act.

Relevant to the question of permit relinquishment, DEQ provides clear direction. On the DEQ termination request form itself, DEQ warns permittees: "Submission of this form shall in no way relieve the permittee of current permit requirements. The Department will notify the permittee in writing of the date termination is effective. The permittee is required to comply with all permit provisions and reporting requirements until the termination is granted."[206] Thus, although Noranda requested termination

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201. Mont. Admin. R. 17.24.301(59).

202. Mont. Admin. R. 17.24.301(59); *see also* MONT. CODE ANN. § 82-4-335.

203. *Mont. Envtl. Info. Ctr.*, 476 P.3d at 35; *see also Mines Mgt., Inc.*, 453 P.3d at 374 n.6.

204. *Mont. Envtl. Info. Ctr.*, 476 P.3d at 35 (citing *Mines Mgt., Inc.*, 453 P.3d at 374 n.6).

205. *Mines Mgt., Inc.*, 453 P.3d at 374 n.6 (emphasis added).

206. MONT. DEPT. OF ENVTL. QUAL. WATER PROT. BUREAU, *Request for Termination Individual MPDES Permits and Non-Storm Water General Permit*

of its extended 1997 Permit in 2003, DEQ denied its request because reclamation work at the site was not entirely complete.[207] DEQ never relieved Noranda of its permit requirements since DEQ never terminated the1997 Permit.[208]

VI. IMPACTS OF THE CASE

The scope of the Court's decision is limited to the 1992 Order and Montanore Project. However, the decision sets precedent for the Court to look beyond the statutory and regulatory framework when defining key aspects of mining permits. Had the Court analyzed the Hard Rock Operating Permit in conjunction with the MPDES permit, this decision could have provided a better, bright-line test to uphold Montana's water quality protections. Instead, the Court's test rests on finding magic words within a project's environmental impact statement, which can be a difficult task for DEQ, mining companies, and environmental organizations.

The scope of the Court's decision is likely narrow. DEQ reports that no other mine operations in Montana have been permitted under a pre-1993 nondegradation review, nor have other mines been permitted with nondegradation orders that include the same language as the 1992 Order.[209] Therefore, the scope of the Court's decision is limited to the Montanore Project itself.

Even so, this decision is important for corporate mining entities facing liability and seeking permits, or renewing permits, for industrial mining operations and reclamation in Montana. Based on the Court's ruling, mining companies that want to renew expiring permits when dealing with operations that have alternatively conducted mining construction and reclamation work under MPDES permitting cannot rely on a previously granted, pre-1992 permit. Those companies, as well as DEQ, are now on notice to conduct a full nondegradation review under current standards as required by the WQA when reviewing MPDES permit applications. Additionally, both DEQ and mining entities may seek to clarify their rules and communications regarding mining operations so that no assumptions are made or inferences drawn by DEQ or the courts about a given project's operational life, abandonment, or termination.

As for the Montanore Project, DEQ will conduct a degradation review to determine if it is appropriate to authorize degradation, and if so, proceed to MPDES permitting. The new state administration and DEQ leadership seeks to streamline environmental permitting and roll back regulations to spur on natural resource extraction and economic

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Authorization, https://deq.mt.gov/Portals/112/Water/Forms/RTF.pdf (last visited May 4, 2021).

207. *Mont. Envtl. Info. Ctr.*, 476 P.3d at 35, 38.

208. *Id*. at 35.

209. Email from Montana DEQ Public Records Exchange System, Public Records Request R001196-040421 BHES Orders (April 8, 2021, 11:28 AM MST) (copy on file with author).

development in rural communities.[210] Therefore, there is no guarantee that DEQ's review will result in a denial of a MPDES permit for MCC.

VII. CONCLUSION

The future of the Cabinet Mountains Wilderness is still in a precarious position, as recent state and federal legal challenges to protect this pristine ecosystem have resulted in various rulings.

Just months after the Montana Supreme Court ruled to vacate DEQ's permit issued for the Montanore Project, the Court issued a ruling on a challenge to the Rock Creek Project, which is just ten miles away and also bores under the Cabinet Mountains Wilderness.[211] In February 2021, the Court upheld a decision of the Montana Department of Natural Resources and Conservation (DNRC) granting a water use permit for the Rock Creek Project's proposed Phase 2.[212] Though environmental groups claimed Montana officials failed to consider how the Rock Creek Project's water use might damage and potentially dewater the underground sources that feed springs and creeks in the Cabinet Mountains Wilderness—and the district court agreed, ruling that DNRC had not complied with the WQA—the Court focused the state agency's required steps to grant a permit and found that DEQ had failed to raise a particular objection.[213]

In federal court, a coalition of environmental groups and a tribal entity linked to the Ksanka Band of the Ktunaxa (Kootenai) Nation challenged the U.S. Fish and Wildlife Service and U.S. Forest Service's approval of the first phase of the Rock Creek Project.[214] In April 2021, the U.S. District Court for the District of Montana ruled that the federal agencies violated the Endangered Species Act because they unlawfully the full mine proposal's impacts on federally-protected grizzly bears and bull trout.[215] This ruling halts further mining exploration since the district court vacated the federal agencies' Record of Decision for the Rock Creek Project and ordered that the agencies address "gaps in the data, . . . countervailing evidence, and adequately explain any new, different, or amended conclusion" based on a new environmental impact statement.[216]

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210. Pete Zimmerman, *A New Day at DNRC and DEQ,* MONTANA FREE PRESS, Jan. 9, 2021.

211. Rob Chaney, *Justices OK Rock Creek Mine Water Permit*, MISSOULIAN, Feb. 18, 2021.

212. Clark Fork Coalition v. Mont. Dept. of Nat. Resources and Conservation, 481 P.3d 198 (Mont. 2021).

213. *Id.*

214. *Federal Court Halts Proposed Rock Creek Mine in Montana's Cabinet Mountains*, EARTHJUSTICE, https://earthjustice.org/news/press/2021/federal-court-halts-proposed-rock-creek-mine-in-montanas-cabinet-mountains (last visited May 12, 2021).

215. Ksanka Kupaqa Xa'lcin v. U.S. Fish and Wildlife Serv., No. 19-20-M-DWM, slip op. at 2 (D. Mont. filed April 14, 2021).

216. *Id*. at 25–26.

Now, for the neighboring Montanore Project, MMC—or any future entity—must seek new permission from DEQ if it wants to continue pursuing the silver and copper mineral deposits under the Cabinet Mountains Wilderness. The next chapter of this contentious litigation to save the last pristine habitat for native, threatened fish and bear species in Montana will likely unfold over the next two years, as the new DEQ administration reviews Montanore Project applications for required permitting and the U.S. Fish and Wildlife Service and U.S. Forest Service revisit their environmental analysis of the Rock Creek Project's impacts.