

Montana Environmental Policy Act Litigation

TO: EQC AGENCY OVERSIGHT SUBCOMMITTEE
FROM: LARRY MITCHELL, STAFF
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Chapter 4 of the EQC's Senate Joint Resolution 18 Study, *Improving the Montana Environmental Policy Act (MEPA) Process, November 2000*, listed 27 MEPA cases that were decided by state courts in the 29 years between enactment in 1971 and 2000. Seven were Supreme Court cases and the other 20 were heard only in District Court. One of the recommendations of the 1999-2000 EQC was that "The state agencies should routinely notify the EQC of MEPA litigation, and the EQC should systematically monitor MEPA litigation and attempt to address any trends that result from the litigation." The 2001-2002 EQC subcommittee on Agency Oversight and MEPA tracked administrative and judicial cases that included a MEPA issue as a cause of action. As an element of its 2003-2004 workplan the EQC Subcommittee on Agency Oversight intends to continue tracking MEPA cases for this interim.

Last interim there were 4 air quality permit decisions that resulted in the filing of administrative appeals that included a MEPA complaint or cause of action (Rock Creek Mine, Holcim Cement, Continental Energy, and Northwestern Energy Great Falls). All 4 were settled administratively.

There were 4 MEPA cases filed in state district court in which the MEPA cause of action was later dropped, dismissed, waived, settled, or amended into other complaints. (Golden Sunlight Mine, Friends of the Marias, Edens v Sharp, and one coal bed methane case. Two other coal bed methane cases have been combined and are still pending in state court. Two cases were resolved by the courts since last interim.

MONTANA SUPREME COURT

Pompey's Pillar Historical Assoc. v Mt. Dept. of Environmental Quality and United Harvest 313 Mont. 401 (2002)

FACTS:

United Harvest sought to construct a high speed grain loading terminal approximately 1/2 mile from Pompey's Pillar, a national monument east of Billings. The operation would include tall grain silos, grain conveyors and elevators, truck scales and unloading facilities, and a railroad loop siding for the continuous loading of grain cars. The company applied to the DEQ for an air quality permit necessary to address dust and particulate issues from the loading facility. The agency conducted an environmental assessment under MEPA, noted some minor impacts to the area near the national

monument regarding noise and land use aesthetics, and then issued the air permit. The Pompey's Pillar Historical Association appealed the permit decision to the Board of Environmental Review arguing the adequacy of the MEPA document.

A contested case hearing was held in accordance with the Montana Air Quality Act under which the air quality permit was issued and the Montana Administrative Procedure Act (MAPA). The hearing examiner concluded that the DEQ erred in its MEPA compliance by producing an environmental assessment and recommended that a more comprehensive environmental impact statement be prepared. The findings did not address the air quality issues. They focused on the adequacy of the environmental assessment and found it lacking in regard to noise, historical and cultural impacts in particular.

The agency and the applicant filed objections to the findings of the hearings examiner. However, the Board did remand the environmental assessment to the agency for supplemental changes, found them to be adequate, rejected the recommendation for preparation of an environmental impact statement, modified the hearing examiner's findings and conclusions, and affirmed the issuance of the air quality permit.

The plaintiff appealed the Board's decision and final order to District court. The court ruled against Pompey's Pillar which then appealed to the Supreme court which upheld the lower court's ruling.

MEPA ISSUES:

(1) Can an agency decision to issue an air quality permit be appealed to an administrative board on the basis of allegedly inadequate MEPA compliance?

(2) Can an administrative board's decision on appeal of a DEQ decision to issue an air quality permit be appealed to the courts on the basis of allegedly inadequate MEPA compliance?

HOLDING:

No, in both cases.

The District Court ruled that it had no jurisdiction to review the final order of the Board of Environmental Review in this case. The appeal was based on the provisions of the Montana Air Quality Act which also provides for contested case hearings under MAPA. The Air Quality Act pertains exclusively to air quality issues.

The environmental assessment prepared by the agency and revised at the request of the Board of Environmental Review was produced in accordance with the provisions of MEPA. The Montana Administrative Procedure Act (MAPA) does not apply to MEPA, and agency actions under MEPA with respect to preparing an environmental review of a proposed action are not contested case proceedings.

The issues addressed in the MEPA environmental assessment had nothing to do with

air quality and the air quality permit review process. The order of the Board of Environmental Review regarding the sufficiency of the agency's environmental assessment falls under MEPA and not the Air Quality Act. Therefore, it is not subject to judicial review under the Air Quality Act or MAPA.

The issue of whether or not the environmental assessment was adequate or whether an environmental impact statement should have been prepared is a question of compliance with MEPA. Those questions are not subject to administrative appeal under the Air Quality Act and are not subject to the contested case provisions of MAPA. They are actionable through MEPA by filing a direct action with district court. This question was the subject of further legislative clarification through SB 377, Chapter 299 (2001 Session) that created Section 75-1-201(6), MCA which provides that challenges to agency actions under MEPA may only be brought against final agency actions and must be filed in district court or federal court if appropriate. Prior to that amendment, the language in Section 75-1-201(3), MCA made multiple references to the court's jurisdiction in MEPA matters.

The Supreme Court upheld the District court's dismissal of the complaint for lack of subject matter jurisdiction reaffirming that had the plaintiff simply challenged air quality issues under the Air Quality Act, it would have been entitled to administrative proceedings. However, the plaintiff's challenge addressed only those issues which pertained to the environmental assessment such as noise and historical and cultural impacts. Since these issues fall under MEPA and since MEPA requires a party to bring a compliance challenge before a court, the administrative law judge and Board did not have jurisdiction to hear the Historical Association's challenge and the court was correct in dismissing the petition for review for lack of subject matter jurisdiction.

SUMMARY: Challenges that an agency should prepare a MEPA document, or that the MEPA document is insufficient must be filed in court, not before an administrative board or administrative law judge.

DECIDED: Dec. 30, 2002.

MONTANA DISTRICT COURT

Montana Environmental Information Center, et.al. vs Dept. of Environmental Quality and Cattle Development Center, LLC, CDV -2001-210 (Judge Honzel)

FACTS:

Pursuant to Montana's water quality act, DEQ issued a general discharge permit for concentrated animal feeding operations or CAFOs in 2000. A person can apply for an authorization by agreeing to abide by the terms of the general permit and by submitting design plans. If the application and designs are adequate, DEQ issues the

authorization. The general permit prohibits discharges that may effect water quality except during a storm greater than the 25-year, 24-hour storm event.

When DEQ issued the general permit, it prepared an EA to comply with MEPA. In the EA, DEQ concluded that impacts of the CAFOs would not be significant because the general permit prohibits discharges except during infrequent large storm events when dilution would be great. However, the plaintiffs pointed out that there had been two violations of the general permit and that in 1994 DEQ issued a report indicating that CAFOs, many of which were operating without a permit, have an impact on water quality and that further work should be done to locate all CAFOs operating in Montana.

In 2000, the Cattle Development Center (CDC) submitted an application for an authorization under the general permit. The CDC operation is located in Yellowstone County. DEQ reviewed the application and issued the authorization. DEQ did not prepare an EA or EIS on the authorization, but instead determined that the impacts of the authorization were within the scope of the EA on the general permit.

Plaintiffs sued, alleging that the DEQ should have prepared an EIS on the general permit and should have prepared a MEPA document on the CDC authorization.

MEPA ISSUES:

- (1) Whether DEQ should have prepared an EIS on the general permit.
- (2) Whether DEQ should have prepared an individual MEPA document on the CDC application.

HOLDING:

- (1) Yes. In view of the previous violations and the report, the plaintiffs raised substantial questions regarding the effectiveness of the general permit provisions, and an EIS should therefore be prepared. The court ordered DEQ to suspend the CDC authorization and to not issue new authorizations pending completion of a programmatic EIS on the general permit.
- (2) The court did not rule on the issue of whether DEQ would be required to prepare individual MEPA documents on authorizations under the general permit after completion of the programmatic EIS.

SUMMARY: When there is a substantial question concerning the effectiveness of mitigation measures to prevent significant impacts, an EIS must be prepared.

DECIDED: October 3, 2003

CURRENT MEPA CASES BEFORE THE COURTS

Tongue River Water Users Assn., Northern Plains Resource Council, and Montana Environmental Information Center v Dept. of Environmental Quality and Fidelity Exploration and Production Co. CDV-2001-258 and BDV 2001-258 are combined 2001 cases before Judge Sherlock currently pending discovery. This is unresolved litigation from last interim. The case currently includes 8 complaint allegations including one MEPA count that an EIS should have been prepared on the department's issuance of a discharge permit. Generally, DEQ has been sued for allegedly violating the Montana Water Quality Act by approving Fidelity's discharge permit that allowed the company to degrade the Tongue River with high sodium discharges. So far, the judge has ruled that a declaratory judgement is an appropriate remedy and that the court has jurisdiction to hear the case even though, as the agency argued, there is no statute authorizing the courts to review DEQ's issuance of a discharge permit. Fidelity has recently submitted an application to the DEQ for renewal of Fidelity's MPDES permit. Depending upon the outcome of Fidelity's permit renewal, DEQ's issuance of the new permit may moot this case or the Plaintiffs may move to dismiss.

Friends of the Wild Swan vs Dept. of Natural Resources and Conservation and Mont. Board of Land Commissioners, CDV-2003-527

In September 2003, the Friends of the Wild Swan filed suit against DNRC over the Goat Squeezer timber sale. The case includes 6 complaint allegations including 2 MEPA counts. The agency prepared an EIS for the proposed timber sale. The plaintiffs claim that the DNRC should have considered an alternative that took into account the cumulative impacts on game winter range from nearby Plum Creek and US Forest Service harvests that have already reduced thermal cover on wildlife winter range. The complaint also alleges that the DNRC has an obligation to manage for wildlife and protect biodiversity as well as to harvest timber. A hearing before Judge Sherlock on the state's motion to dismiss is scheduled for Feb. 12, 2004.

Montana Environmental Information Center and Environmental Defense vs Montana Dept. of Envir. Quality and Bull Mountain Development, DV-03-62

The DEQ produced an EIS on Bull Mountain Development's application for an air quality permit for its proposed coal-fired generation plant on January 10, 2003. Following a contested case hearing, the Board of Environmental Review issued an air quality permit to Bull Mountain Development on July 21, 2003. In this legal action, the plaintiffs challenge the issuance of the air quality permit on various grounds. In Count I, plaintiffs allege that the final EIS was inadequate and is in violation of MEPA.

Counts II and III allege that the issuance of the air quality permit violates the provisions of the state and federal Clean Air acts, and also allege that the issuance of the permit and construction and operation of the Roundup Power Project violates the clean and healthful environment provisions of the Montana constitution.

Count IV alleges that to the extent the Clean Air Act permits the issuance of the air quality permit or construction of the Roundup Power Project, the statute conflicts with the constitution and is therefore unconstitutional.

Count V alleges that the defendants failed to comply with the requirements of the Montana Major Facilities Siting Act, Sections 75-20-101, et seq., MCA (MFSA). Count V further alleges that amendments to the MFSA in 2001 which exempted the Roundup Power Project from review under the MFSA violate the Montana constitution. At the request of Bull Mountain Development, the case has been transferred from the 1st Judicial District in Helena to the 14th Judicial District in Roundup. However, Judge Spaulding has been substituted and 7th District Judge Simonton from Glendive is presiding in Roundup.

A scheduling conference for the case is set for January 12, 2004.

Clark Fork Coalition v Dept. of Environmental Quality, BVD 2002-724

In 1988, the Department of State Lands issued a metal mine operating permit to Beal Mountain Mining, Inc., a subsidiary of Pegasus Gold Corporation. Mining at the site ceased in 1998. In that year Beal Mountain Mining filed for bankruptcy. In 1999 the bankruptcy trustee began reclamation of the site. One aspect of the reclamation is treatment of water from various portions of the mine site. Water from the heap leach pads was to be treated and land applied. In October of 2002, DEQ prepared an EA and issued a discharge permit for the expansion of the land application area. That permit also authorizes discharge of water from the waste rock dump and pit. The Clark Fork Coalition filed suit alleging, among other things, that DEQ violated MEPA by preparing an inadequate EA and by not preparing an EIS on the discharge permit. The court has taken under advisement a motion to dismiss the case filed by DEQ. DEQ's grounds for the motion are that the case is moot because the discharge permit is no longer necessary. The U.S. Forest Service is now conducting remediation of the site under the federal superfund law. Under the federal law, DEQ may not require a discharge permit for federal superfund activities.

UPDATE - On December 31, 2003 Judge Sherlock granted DEQ's motion to dismiss the case.

CASE	ISSUE	AGENCY	ADMINISTRATIVE	COURT	MEPA ISSUE DISMISSED	MEPA ISSUE WITHDRAWN	CASE SETTLED
FIDELITY COAL BED METHANE BVD-2001-258	MEPA, CONSTITUTION, WATER QUALITY PERMIT, NON- DEGRADATION, MORE.	DEQ,		DISTRICT COURT - Judge Sherlock	NO	NO	NO
GOAT SQUEEZER TIMBER SALE BVD-2003-527	MEPA, CONSTITUTIONAL TRUST, MULTIPLE USE	DNRC		DISTRICT COURT- Judge Sherlock	NO	NO	NO
BULL MTN DEVELOPMENT DV-03-62	MEPA, AIR PERMIT, CONSTITUTION	DEQ		DISTRICT COURT - ROUNDUP - Judge Simonton	NO	NO	NO
BEAL MOUNTAIN MINE BVD -2002-724	MEPA, WATER QUALITY	DEQ		DISTRICT COURT - Judge Sherlock	YES	NO	YES - Now a federal superfund site - exempt from state permits.