

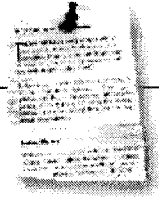
Murphy, et al. v. Department of Health and Environmental Sciences
BDV 92-1204, 1st Judicial District
Judge Sherlock
Decided 1992

MEPA Issue Litigated: Does an environmental assessment require that an agency conduct a public hearing?

Court Decision: No

ORDER ON MOTION TO DISMISS

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Murphy v. DHES
Order granting motion to dismiss Nov. 20, 1992

MONTANA FIRST JUDICIAL DISTRICT COURT

LEWIS AND CLARK COUNTY

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GARY J. MURPHY,)
ALAN A. POLLATH, and)
ARLEN E. MORRILL,)
Petitioners,) Cause No. BDV-92-1204
- v -) ORDER ON
) MOTION TO DISMISS
DEPARTMENT OF HEALTH &)
ENVIRONMENTAL SCIENCES,)
State of Montana,)
Respondent.)

The Court presently has before it Respondent's motion to dismiss the petition for judicial review currently on file. After reviewing the arguments of the parties, the Court concludes that the motion should be granted.

This matter arises out of Respondent's decision to issue a license to the Butte/Silver Bow government. The license was issued by the Solid Waste Management Bureau, an agency of Respondent, on August 7, 1992. On that date, Respondent issued its license number 330 to allow the operation of the landfill pursuant to Section 75-10-221, MCA.

The license allowed the Butte/Silver Bow government to accept only Group III and Group II wastes.

On August 24, 1992, Petitioners filed their amended petition for judicial review. Respondent moves to dismiss the amended petition on the grounds that there was no contested case that gives rise to a right of judicial review.

Section 2-4-702(1) (a), MCA, states as follows:

(1) (a) A person who has exhausted all administrative remedies available within the agency and who is aggrieved by a final decision in a contested case is entitled to judicial review under this chapter. This section does not limit

utilization of or the scope of judicial review available under other means of review, redress, relief, or trial de novo provided by statute.

(Emphasis added)

Thus, there may be a judicial review only after a final decision in a contested case. A contested case is defined in Section 2-4-102(4), MCA, as follows: "'Contested case' means a proceeding before an agency in which a determination of legal rights, duties, or privileges of a party is required by law to be made after an opportunity for hearing. The term includes but is not restricted to ratemaking, price fixing, and licensing." (Emphasis added) The big problem with Respondent's position in this case is that there has been no hearing, nor was one required. The agency action was taken pursuant to Section 75-10-201 et seq., MCA. There is nothing in this statutory enactment that requires that a hearing be held. The only possible hearing under that statutory scheme is contained in Section 75-10-226, MCA, which allows for a hearing in the event that the Department denies or revokes a license to operate a solid waste management system. In a case such as this, the granting of permission to operate a solid waste system, there is no requirement for a hearing.

The Department in this case conducted an environmental assessment but did not conduct an environmental impact statement review. However, contrary to Petitioners' assertions, an environmental assessment does not require a hearing. Nothing in the **Montana Environmental Protection Act**, Section 75-1-101 et seq, MCA, requires a hearing on the production of an environmental assessment. This fact has been recognized by the Montana Supreme Court. In the case of *Titeca v. State Department of Fish and Game*, 194 Mont. 209, 634 P.2d 1156 (1981), the court held that there is no statute or regulation that requires a public hearing, before, during or after the preparation of a preliminary environmental review or an environmental assessment. Id. at 216, 634 P.2d at 1161.

Further, Petitioners makes some allegations that a hearing is required pursuant to Montana's Hazardous Waste and Underground Storage Tank Act, contained in Section 75-10-441, MCA. It may be that a hearing is required under the aforementioned act. However, this is a case where a license was issued pursuant to Section 75-10-221, MCA, which does not require a public hearing. As noted by the attorneys for Respondent, since this disposal facility allows only Group III and Group II types of waste, no regulated waste such as that encompassed by the Hazardous Waste and Underground Storage Tank Act may be deposited in this facility. See 16.14.503 ARM.

Petitioners also take the view that this was a case involving a hearing because they went to Respondent's office on various occasions and talked with Respondent's representatives. This is certainly not the type of hearing that was contemplated by the Montana Administrative Procedure Act. This Court has no idea what it would be reviewing if it agreed to proceed with the judicial review in this case. That is precisely why a hearing is required to be held before judicial review can be obtained, so the reviewing court has something on the record to look at.

Petitioners also seem to take the view that although this is a petition for judicial review, it is actually more in that the petition alleges some constitutional violations. However, any such constitutional violation alleged by

Petitioners herein is clearly set forth as a species of judicial review. Indeed, the various objections to which reference is made in the amended petition for judicial review are those contained in the standards of review under the Administrative Procedure Act for Review of Contested Cases in Section 2-4-704(2), MCA.

The Court is of the view that the present proceeding is clearly one for judicial review. As such, it may not stand and must be dismissed. However, this is not to say that Petitioners do or do not have a remedy. Perhaps they could refile and claim some other sort of relief. However, as the complaint presently stands, it must be dismissed. The Court is of the view that this dismissal should be without prejudice.

Based on the above, IT IS HEREBY ORDERED, ADJUDGED, AND DECREED that the amended petition for judicial review on file herein is hereby dismissed without prejudice.

DATED this 20th day of November, 1992.

S/JEFFREY M. SHERLOCK

DISTRICT COURT JUDGE

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