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***Montana Env'tl. Info. Ctr. v. Montana Dept. of Env'tl. Quality:
Stream Classification and Water Quality***

Davis Connelley

Oral arguments are scheduled for Wednesday, March 13, 2019, at 9:30 a.m. in the Courtroom of the Montana Supreme Court, Joseph P. Mazurek Justice Building in Helena, Montana.

I. INTRODUCTION

This case presents the following issues: 1) whether the Montana Department of Environmental Quality (MDEQ) acted unlawfully when it allowed a strip mine to renew its permit with far lower pollution control requirements by recognizing receiving waters as ephemeral streams; and 2) whether the monitoring program MDEQ did require was too lenient and not representative of the total discharges. This appeal presents an opportunity to clarify MDEQ powers and has ramifications sounding in both agency powers and potential environmental quality consequences for Montana's waters and mining industry.

II. FACTUAL AND PROCEDURAL BACKGROUND

Under the Clean Water Act, states are charged with regulating pollution discharge into their waterways.¹ The Montana Water Quality Act (the Act) vitalized the state's responsibility and empowered the MDEQ to administer permits regulating those discharges.² Furthermore, the Act charged the Board of Environmental Review (BER) with classifying the state's waterways, from A-1 to F-1, indicating most beneficial uses to least beneficial uses.³ In 2012, Western Energy (WeCo), operators of the 25,000 acre Rosebud Mine, applied for a renewal of their discharge permit for wastewater into East Armells Creek and its surrounding waters, classified by the BER as C-3 waters. Mont. Admin. R. 17.30.629(1) requires that: "Waters classified C-3 are to be maintained suitable for bathing, swimming, and recreation, and growth and propagation of non-salmonid fishes and associated aquatic life, waterfowl, and furbearers. The quality of these waters is naturally marginal for drinking, culinary, and food processing purposes, agriculture, and industrial water supply."

¹ 33 U.S.C. § 1342(b) (2018).

² MONT. CODE ANN. § 75-5-102(1) (2017).

³ *Id.*

MDEQ ultimately approved the permit and decided that certain discharge standards did not need to be met, determining the waters were ephemeral and therefore outside the purview of otherwise applicable regulations.⁴ Ephemeral streams are those that only flow in response to precipitation or snowmelt and whose entire channel is above the water table.⁵ Because MDEQ made this determination, the permit was exempted from many of the standards applicable to otherwise C-3 designated waters.

In making this determination, MDEQ relied on the language of Mont. Admin. R. 17.30.637(4): “Treatment requirements for discharges to ephemeral streams must be no less than the minimum treatment requirements set forth in ARM 17.30.1203. Ephemeral streams are subject to ARM 17.30.635 through 17.30.637, 17.30.640, 17.30.641, 17.30.645, and 17.30.646 but not to the specific water quality standards of ARM 17.30.620 through 17.30.629.” The permit also allowed for representative testing at only a portion of the 151 outfalls at the discharge site.⁶ MDEQ approved this condition because of perceived difficulties accessing every outfall during a large precipitation event during precipitation-driven discharges.⁷

After the modification and issuance of the renewed permit in 2014, plaintiff-appellees filed suit, alleging that the permit essentially reclassified the waters from C-3 to E-1 and far exceeded MDEQ’s authority.⁸ In 2016, the district court granted summary judgment in favor of the plaintiffs and invalidated the permit, ruling that MDEQ arbitrarily overstepped its authorization both in reclassifying the streams and in the representative monitoring program the permit allowed.⁹ Appellants then filed this appeal on both issues.

III. SUMMARY OF ARGUMENTS

A. Appellants’ (MDEQ and WeCo) Arguments

Appellants argue that the district court applied an incorrect standard when evaluating MDEQ’s decision and that the court

⁴ Appellant’s (MDEQ) Opening Brief at 2, *Montana Env’tl. Info. Ctr. v. Montana Dep’t of Env’tl. Quality*, <https://perma.cc/L3X2-LLM5> (June 13, 2018) (No. DA 18-0110).

⁵ Mont. Admin. R. 17.30.602(10).

⁶ *Id.* at 17.30.637(4).

⁷ Appellant’s (MDEQ) Opening Brief, *supra* note 4, at 2.

⁸ *Id.* at 7.

⁹ *Id.*

wrongly decided the reclassification of waters was outside MDEQ's purview. Appellants also argue that the representative monitoring program the department required was both within MDEQ's authority and supported by relevant data.

1. Stream Reclassification

MDEQ and WeCo contend that Mont. Admin. R. 17.30.637(4) vests MDEQ with authority to lessen treatment requirements for streams it determines to be ephemeral and therefore outside the scope of some of the permitting process requirements. In fact, WeCo argues that MDEQ is not reclassifying at all, but is instead simply recognizing the already ephemeral nature of the waters at issue.¹⁰ They see a distinction between water types and classifications.¹¹ Instead of ephemeral referring solely to a classification, they assert that ephemeral refers to a type of water body independent of the classifications, which they allege are basin-wide uses.¹² Therefore, when MDEQ allowed the permit, it simply took note of the waters' existing characteristics rather than reclassifying the streams.

They state that without allowing this discretion, the permitting process will be over-cumbersome and strip MDEQ of the ability to make reasonable determinations.¹³ They view MDEQ's mandate from the Board as flexible in order to account for individual stream variations that may not be reflected through the basin-wide classifications.¹⁴ They argue that by not adopting this view, the district court has rendered Mont. Admin. R. 17.30.637(4) superfluous and contrary to the principles of statutory interpretation.¹⁵

2. Representative Outfall Monitoring

¹⁰ *Id.* at 11.

¹¹ Appellant's (WeCo) Opening Brief at 29, *Montana Env'tl. Info. Ctr. v. Montana Dep't of Env'tl. Quality*, <https://perma.cc/W53M-5V57> (June 13, 2018) (No. DA 18-0110).

¹² *Id.* at 29–30.

¹³ Appellant's (MDEQ) Reply Brief at 13, *Montana Env'tl. Info. Ctr. v. Montana Dep't of Env'tl. Quality*, <https://perma.cc/C6RR-U8M6> (Jan. 11, 2019) (No. DA 18-0110); Appellant's (WeCO) Opening Brief, *supra* note 11, at 26 (if decision is affirmed “permits (from all types of industry as well as from public utilities) will be upended”).

¹⁴ Appellant's (WeCo) Reply Brief at 9, *Montana Env'tl. Info. Ctr. v. Montana Dep't of Env'tl. Quality*, <https://perma.cc/6KCA-TT9Z> (Jan. 11, 2019) (No. DA 18-0110).

¹⁵ *Id.* at 14.

Appellants assert that the representative program adopted in the permit was fully within MDEQ's discretion.¹⁶ So long as that decision is not random and unreasonable, MDEQ can issue permits with monitoring requirements that do not sample every single outfall.¹⁷ They assert that the decision is not unreasonable and cite as an example a similar Maryland monitoring program where such monitoring was allowed so long as the sampled locations represented the total discharge activity.¹⁸

They also argue that the program adopted was, in fact, representative of the total outfalls.¹⁹ 40 C.F.R. § 122.41(j)(1) provides that when monitoring the use of samples, those samples "shall be representative of the monitored activity."²⁰ So long as the samples are materially like the outfalls they represent, these samples meet these requirements.²¹ Therefore, because the system adopted has representative value, according to WeCo, MDEQ should be afforded discretion, and the Court should allow the monitoring program the permit adopted.²² Furthermore, WeCo argues that the system actually prevents "arbitrary and capricious regulation of dry gullies where no life occurs."²³

B. Appellees' (MEIC) Argument

Appellees argue that the decision should be affirmed because MDEQ's decision to reclassify the receiving waters was not within the Department's authority, as the decision to reclassify lies with the BER. Further, reclassification requires a use attainability analysis (UAA) as part of the rule-making process. Appellees assert that the process followed ignored the Department's own studies and included no analysis of the water's actual character.²⁴ Appellants further argue that the Department's monitoring program for the permit was arbitrary and without any information or analysis regarding the monitoring program.²⁵

¹⁶ Appellant's (MDEQ) Opening Brief, *supra* note 4, at 22.

¹⁷ *Id.* at 22.

¹⁸ *Id.* (citing Maryland Dep't of the Env't v. Riverkeeper, 134 A.3d 892 (Md. 2016)).

¹⁹ *Id.* at 22.

²⁰ Appellant's (WeCo) Opening Brief, *supra* note 11, at 42.

²¹ *Id.* at 43.

²² *Id.* at 44.

²³ Appellant's (WeCo) Reply Brief, *supra* note 14, at 9.

²⁴ Appellees' Combined Response Brief at 31–32, *Montana Env'tl. Info. Ctr. v. Mont. Dep't of Env'tl. Quality*, <https://perma.cc/KHN4-V8CY> (Sept. 11, 2018) (No. DA 18-0110).

²⁵ *Id.* at 32.

1. Stream Reclassification

Appellees primarily rely upon Mont. Admin. R. 17.30.615(2), which states that the BER has the sole authority to classify streams and change water quality standards.²⁶ Specifically, the BER must conduct a UAA, even when changing a stream’s designation to ephemeral.²⁷ Because MDEQ’s decision functionally reclassifies the receiving waters, it impedes upon the BER process and the public’s right to notice and comment.²⁸ Because MDEQ ignored these limitations on its authority, Appellees argue that it failed to take the “hard look” required and did not consider and reasonably analyze relevant data.²⁹

Likewise, Appellees argue that MDEQ is not entitled to deference because the rule at issue was promulgated by the EPA and BER, and not the Department. Appellees view the rule at issue as BER’s, rather than MDEQ’s.³⁰ Because it is not MDEQ’s rule the Department is interpreting, MDEQ cannot determine how it should be applied and must follow BER’s interpretation and the purpose of the rule.³¹

Appellees also contend that, even if it is MDEQ’s rule to interpret, according to *Clark Fork I*³² the Department deserves no deference where its interpretation of law is incorrect.³³ They argue that MDEQ is incorrectly interpreting Mont. Admin. R. 17.30.637(4) in a way that is contrary to both the purposes of the BER process and the Clean Water Act as a whole.³⁴ Because MDEQ’s interpretation defeats the broader statutory purpose, it cannot be interpreted that way.³⁵ The change effectively exempts pollution requirements and if those waters are not in fact ephemeral, then pollutants are flowing unrestricted into Montana’s headwaters.³⁶

2. Representative Outfall Monitoring

²⁶ *Id.* at 9.

²⁷ *Id.* at 9 (citing Mont. Admin. R. 17.30.615 (1)–(2)).

²⁸ *Id.* at 10.

²⁹ *Id.* at 29 (citing *Clark Fork Coalition v. Mont. Dep’t of Env’tl. Quality*, 197 P.3d 482 (Mont. 2008)) [hereinafter *Clark Fork I*].

³⁰ Appellees’ Response Brief, *supra* note 24, at 30.

³¹ *Id.* at 39.

³² 197 P.3d at 482.

³³ Appellees’ Response Brief, *supra* note 24, at 39.

³⁴ *Id.* at 38, 40.

³⁵ *Id.* at 30.

³⁶ *Id.* at 40.

Appellees argue that the monitoring program allowed under the permit whereby 20 of 151 outfalls will be examined is outside MDEQ's scope and contrary to MDEQ's own data. They assert the program is outside MDEQ's scope because the representative scheme is not allowed by governing regulations.³⁷ They also assert that representative monitoring programs have only been authorized where the discharger was a large municipal water system, rather than a private actor, such as is the case here.³⁸

Appellees argue that the representative monitoring, even if allowed, was selected in an unreasonable and arbitrary manner because the 20 outfalls were not chosen in a manner supported with data.³⁹ Appellees claim that none of the selected outfalls are representative on any level other than ease of access.⁴⁰ They also claim that none of the selected outfalls are in areas where active mining is occurring (and where risk of pollution is highest), but are only in reclamation areas where active mining has ceased and therefore results at those outfalls will not be demonstrative.⁴¹

IV. ANALYSIS

The Court will likely affirm the district court's decision. On the stream reclassification issue, the relatively small weight Mont. Admin. R. 17.30.637(4) carries cannot overcome the weight afforded to the BER's UAA process, particularly in light of MDEQ's decision not to analyze the water's actual nature. Even if the Court overturns the decision on reclassification, it is unlikely the Court would do the same with representative monitoring. While representative monitoring could be allowed, the program adopted by MDEQ in this instance lacks analytic support.

In this instance, data seems to support the contention that at least some of the waters were not ephemeral.⁴² It is hard to imagine that the permitting decision survives that error. Even if the department has the authority to recognize the ephemeral nature of specific waters, that authority does not apply to situations where the waters at issue do not meet the definition of such waters under Mont. Admin. R. 17.30.602(10), as at least some of the waters surrounding

³⁷ *Id.* at 40.

³⁸ *Id.* at 45–46.

³⁹ Appellees' Response Brief, *supra* note 24, at 47–48.

⁴⁰ *Id.* at 25.

⁴¹ *Id.*

⁴² *Id.* at 21.

East Armells Creek do not meet the definition of ephemeral.⁴³ It would be a smoother process if MDEQ could simply claim that the permitting action did not reclassify because they exempted the waters from C-3 standards, rather than newly designating them as E-1 or E-2.⁴⁴ But this approach ignores the process already afforded by law and would render at least some part of the classification system pointless, and meets the “clear error in judgment” standard required.⁴⁵

Additionally, even if the Court does find that MDEQ was within its powers to re-recognize the waters, it will likely affirm summary judgment on the outfall issue. The law likely supports MDEQ’s authority to authorize representative monitoring as it sees fit and rightly deserves deference on its representing monitoring decisions because those decisions are within the agency mandate as contemplated in *Clark Fork I*. However, this deference does not extend to situations where the program adopted is not supported by analysis or a representative standard.⁴⁶ Such a program would be arbitrary by definition and therefore would be disallowed.

V. CONCLUSION

The Court will likely affirm the district court’s grant of summary judgment, invalidating the permit entirely due to either the reclassification or on the narrower issue of non-representative sampling. The Court’s decision will impact water quality and the permitting process no matter what it decides. Allowing MDEQ such wide discretion would streamline regulatory matters for both the Department and the permittees but could have negative effects on downstream water quality.⁴⁷ Limiting MDEQ’s authority slows the process, restricts flexibility for changed conditions, and places more of a burden on the BER, but ensures the greatest amount of public participation and compliance with the Clean Water Act.⁴⁸ However, the procedural and analytical irregularities relating to the actual

⁴³ *Id.*; but see Appellant’s (WeCo) Reply Brief, *supra* note 14, at 10 (disagreeing with the contention that any of the waters are more than ephemeral).

⁴⁴ Appellant’s (WeCo) Reply Brief, *supra* note 14, at 11–12.

⁴⁵ *Clark Fork Coal. v. Dept. of Env’tl. Qual.*, 288 P.3d 183, 190 (Mont. 2012) [hereinafter *Clark Fork II*].

⁴⁶ *Id.* at 189–90.

⁴⁷ See *Clark Fork Coalition’s Amicus Brief* at 3–4, *Montana Env’tl. Info. Ctr. v. Mont. Dep’t of Env’tl. Quality*, <https://perma.cc/9NGC-A3A2> (Sept. 12, 2018) (No. DA 18-0110).

⁴⁸ See *Treasure State Resources’ Amicus Brief* at 2–5, *Montana Env’tl. Info. Ctr. v. Mont. Dep’t of Env’tl. Quality*, <https://perma.cc/2MY3-4PMR> (June 13, 2018) (No. DA 18-0110).

condition of the “ephemeral” waters and the representative outfalls make this a challenging test case for those broader issues.