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Federal Court Rejects Challenge to Montana's Coal Regulatory Program

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On January 22, 2013, the U.S. District Court for the District of Montana dismissed a citizen suit brought by environmental groups against the Montana Department of Environmental Quality (MDEQ) alleging that MDEQ violated the federal Surface Mining Control and Reclamation Act (SMCRA) by permitting surface coal mines without first ensuring that the mining operations would not materially damage the State's water quality. *Montana Environmental Information Center v. Opper*, No. 6:12-cv-34. In dismissing the case, the court held that the plaintiffs' suit against MDEQ was barred by the State of Montana's Eleventh Amendment sovereign immunity. The court also held that plaintiffs' suit could not proceed since MDEQ's material damage determination is a discretionary assessment under Montana's state coal permitting program and could not be challenged under SMCRA's federal citizen suit provision. Finally, the court determined that plaintiffs' challenge was not ripe for review because MDEQ had not yet issued the only pending permit for coal mining identified by plaintiffs in their complaint.

In their citizen suit, the Montana Environmental Information Center and the Sierra Club alleged that Richard Opper, in his official capacity as the Director of MDEQ, failed to comply with mandatory, non-discretionary duties under SMCRA when preparing Cumulative Hydrologic Impact Statements (CHIAs)—site specific evaluations of whether the proposed mining operation would prevent material damage to the hydrologic balance outside the mine permit area. Plaintiffs argued that MDEQ had an obligation to: (1) formulate and apply what plaintiffs called "meaningful, objective material damage criteria" to determine whether a proposed mining operation would cause material damage to the hydrologic balance; (2) expressly analyze whether the proposed operation would contribute to excursions from each applicable Montana water quality standard; and (3) forego approving applications without first determining whether the proposed operation had been designed to prevent material damage outside the permit area.

In granting MDEQ's motion to dismiss and the motion for judgment on the pleadings filed by a consortium of intervening coal and mine owners, operators, as well as a labor union and Indian Tribe, the District Court agreed with MDEQ and intervenors that SMCRA empowered states with federally-approved coal regulatory programs "exclusive jurisdiction over the regulation of surface coal mining and reclamation operations" which in turn barred citizen suits against states (or State officers) under the

Eleventh Amendment. Relying on precedent from two federal appellate courts, *Bragg v. West Virginia Coal Ass'n*, 248 F.3d 275 (4th Cir. 2001) and *Pennsylvania Federation of Sportsmen's Clubs v. Hess*, 297 F.3d 310 (3d Cir. 2002), the Montana District Court found that when a state obtains exclusive jurisdiction, state law governs matters involving the enforcement of SMCRA's minimum national standards. The Court in turn rejected the argument that plaintiffs' suit represented a request for prospective relief against a state officer for the violation of federal law, holding instead that Montana's state program became state law (rather than federal law) once it was approved by both Montana and the Department of Interior in 1982.

The court also concluded that MDEQ's preparation of a CHIA and corresponding material damage finding in the context of an individual coal permit review is a matter of agency discretion based on case-by-case factual findings and analysis, and could not be challenged as a violation of a "non-discretionary" duty. Lastly, the court found that even if plaintiffs could state a claim for relief, their action was not yet ripe since the only pending permit application identified by plaintiffs had not yet been approved by MDEQ.

The court in *Opper* not only extended the Third and Fourth Circuit's Eleventh Amendment immunity holdings, but also clarified for the first time that CHIA assessments made under Montana's coal regulatory program are discretionary determinations that may not be challenged under SMCRA's citizen suit provision.

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