MEIC, et.al. v. Department of Environmental Quality and Cattle Development Center, LLC
CDV 2001-210, 1st Judicial District
Judge Honzel
Decided 2003

FACTS: Pursuant to the Montana Water Quality Act, the DEQ issued a general discharge permit for concentrated animal feeding operations (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, the 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 the DEQ issued the general permit, it prepared an EA to comply with MEPA. In the EA, the 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, the 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. The DEQ reviewed the application and issued the authorization. The 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 the DEQ should have prepared an EIS on the general permit.
(2) Whether the 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 the 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 the 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.

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MONTANA FIRST JUDICIAL DISTRICT COURT
COUNTY OF LEWIS AND CLARK

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MONTANA ENVIRONMENTAL INFORMATION CENTER, INC., WENDELL HARRIS, DEAN JENSEN, DEBBIE JENSEN, ROBERT LOWE, LYNN LOWE, MARK LOWE, R.J. LOWE, JOANNE BERNARD, and STUART LEWIN, Plaintiffs, v. MONTANA DEPARTMENT OF ENVIRONMENTAL QUALITY, Defendant.	Cause No. ADV-2001- 210 **COMPLAINT**

I. INTRODUCTION

1. In this action, the Plaintiffs challenge the Montana Department of Environmental Quality's (DEQ) decision to issue a wastewater discharge authorization to the Cattle Development Center (CDC). The CDC is a concentrated animal feeding operation (CAFO) designed to house up to 20,000 cattle in an 126 acre area outside of Custer,

Montana, near the confluence of the Yellowstone and Bighorn Rivers.

2. The Plaintiffs also challenge Defendant DEQ's decision to issue the state-wide CAFO General Discharge Permit pursuant to which the CDC and other CAFOs throughout Montana receive authorization to discharge pollution into the State's lakes, rivers, streams and groundwater.

3. In deciding to issue the CAFO General Discharge Permit and the CDC's individual Discharge Permit Authorization, the DEQ violated its duties under the Montana Environmental Policy Act (MEPA), §§ 75-1-101 *et seq.*, MCA, to analyze the environmental impacts of its actions. In addition, Defendant DEQ's decisions to issue the CAFO General Permit and the CDC's Discharge Permit Authorization violate Montana water quality law, §§ 75-5-101 *et seq.*, MCA, and the Plaintiffs' right to a clean and healthful environment under Article II, Section 3 of the Montana Constitution.

II. JURISDICTION AND VENUE

4. Jurisdiction is based on the Court's power to hear and decide cases, and to interpret the laws and Constitution of the State of Montana; the Montana Declaratory Judgments Act, §§ 27-8-101 *et seq.*, MCA, whereby this Court has the power to determine and declare the rights, status and other legal relations of the parties; The MEPA; Montana water quality law; and the Montana Constitution Article II, Section 3.

5. Venue is proper in Lewis and Clark County, Montana, Pursuant to Section 25-2-126, MCA.

III. PARTIES

6. Plaintiff Montana Environmental Information Center Inc. (MEIC), is a Montana non-profit, public benefit corporation pursuant to Sections 35-2-101, *et seq.* At all times pertinent hereto, MEIC has had its principle office in Lewis and Clark County, Montana. MEIC and its members work to protect Montana's environment and to disseminate information regarding environmental issues. This action is brought on MEIC's own behalf and on behalf of its members.

7. Plaintiff Wendell Harris resides in Yellowstone County, Montana. Mr. Harris owns and operates a ranch near the Yellowstone River, and the location of the CDC.

8. Plaintiffs Dean and Debbie Jensen are third generation Montana farmers and ranchers. The Jensens own and operate a ranch bordering the Bighorn River in Yellowstone County, Montana. The Jensens' ranch is located about one mile from the CDC.

9. Plaintiffs Lynn and Robert Lowe are both third generation Montana Ranchers who have ranched on the Bighorn River for more than forty years. The Lowes' grown sons, Plaintiffs Mark and R.J. Lowe, were born on the Lowe Ranch near Custer, Montana, and currently live on the property with thier families.

10. Plaintiff Joanne Bernard farmed and outfitted in Montana for nearly thirty years. Ms. Bernard currently resides in Cascade County, Montana.

11. Plaintiff Stuart Lewin has practiced law in Montana for thirty years with a focus on agricultural business planning. Mr. Lewin resides in Cascade County, Montana.

12. Members of MEIC and the individual Plaintiffs named above (collectively "Plaintiffs") reside near Montana communities, land and waters impacted by CAFOs. The Plaintiffs

use and enjoy Montana's land and waters for recreational, scientific, inspirational, business, educational and other purposes on a continuing and regular basis, and intend to do so frequently in the future.

13. The above-described aesthetic, conservational, recreational, scientific, educational and economic interests of the Plaintiffs have been, are being, and, unless the relief prayed for herein is granted, will continue to be adversely and irreparably injured by the DEQ's failure to comply with the Montana Constitution, Montana's water quality laws, the MEPA, and implementing regulations relevant to the permitting of CAFOs in Montana.

14. The Plaintiffs have a strong interest in protecting the quality and ecological integrity of the human environment in Montana. Accordingly, the Plaintiffs have an interest in the enforcement of their constitutional right to a clean and healthful environment and environmental protection laws, including Montana's water quality laws and the MEPA. Many of the Plaintiffs participated in the DEQ's administrative review of the CAFO General Discharge Permit and/or the CDC's authorization to discharge pursuant to the General CAFO Permit. The Plaintiffs have no further administrative remedies available to them.

15. Defendant DEQ is the Montana state agency responsible for administering the environmental protection and policy laws at issue in this action.

IV. BACKGROUND

A. CAFOs Generally.

16. Many stockyards, feedlots and other confined animal husbandry facilities in Montana qualify as CAFOs. Technically, a facility where animals are confined for more than 45 days in any 12-month period is a CAFO when crops, vegetation forage growth, or post-harvest residues are not sustained in the normal growing season over any portion of the facility and:

1) it contains 1,000 or more animal units;[1]

2) it contains between 301 and 1,000 animal units and a discharge occurs through a man-made conveyance, or pollutants are discharged directly into state waters that originate outside of the facility and pass through the facility; or

3) it is designated as a CAFO on a case-by-case basis by the DEQ.

§ 17.30.1330(1), ARM; 40 C.F.R. § 122.23(b)

17. CAFO's often house many thousands of animals and generate enormous amounts of solid and liquid excrement. At facilities which generate liquid waste, lagoons are usually used to store the waste until it can be used to flood irrigate agricultural fields. Solid waste is commonly stored on site and then applied to croplands as fertilizer.

18. Pollutants generated at CAFOs can reach surface or ground water in a number of ways. Pollutants from waste storage lagoons can leach into groundwater. Storage lagoons can fail allowing waste to flow into surface waters. CAFO waste that is used to irrigate crop

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[1]An "animal unit" is a unit of measurement based upon feeder cattle. For example, a steer represents a single animal unit. A sheep, which is smaller and generates less waste than a steer, constitutes only one tenth of an animal unit. A mature dairy cow, which generates more waste than a steer, constitutes 1.5 animal units. (40 C.F.R. § 122, Appendix B.)

land or is applied as dry fertilizer can leach into ground water, or run off of fields into surface water. This type of runoff pollution from land applied waste is especially prevalent where manure is applied to flood irrigated fields near surface waters.

19. The primary water pollutants associated with CAFOs are nutrients (nitrogen and phosphorus), ammonia, bacterial or viral pathogens, and heavy metals. At high levels, phosphorus is acutely toxic to fish. At lower levels, phosphorus and nitrogen can over-enrich water bodies, causing excessive algae growth that is harmful to fish and other aquatic organisms. Pathogens contained in animal waste, including coliform bacteria, can contaminate drinking water and cause gastrointestinal illnesses. Heavy metals such as zinc and copper are commonly added to livestock feed to prevent disease and improve digestion. Plants fertilized with CAFO waste absorb a small amount of these metals, but toxic quantities can accumulate in soil, or run off of agricultural lands into rivers and streams.

20. Across the country CAFOs are notorious sources of pollution. In 1995, an eight-acre hog waste lagoon in North Carolina burst, spilling twenty five million gallons of animal waste into the New River. The spill killed as many as ten million fish and closed 364,000 acres of coastal wetlands to shell fishing. In 1997, animal feedlots were blamed for 2,391 spills of manure in Indiana. According to Missouri's Department of Natural Resources, sixty-three percent of Missouri's factory farms suffered spills between 1990 and 1994. In 1996, forty spills killed close to 700,000 fish in Iowa, Minnesota and Missouri.[2]

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[2]Minority staff of the U.S. Senate Committee on Agriculture, Nutrition and Forestry, *Animal Waste Pollution in America; An Emerging National Problem*, Washington, D.C., p. 5.

21. Montana has not escaped the pattern of devastating water pollution caused by CAFOs. On October 21, 1999, a CAFO permitted by the DEQ dumped approximately 3,000 gallons of animal manure into surface waters above the city of Conrad drinking water supply. That facility operated under a statewide CAFO discharge permit and permitting scheme virtually identical to that at issue in this litigation.

22. In 1997, after 22 citizen complaints, the Montana DEQ inspected an Agri-Systems, Inc., hog farm on the Big Horn River. This DEQ-permitted CAFO has a three million gallon hog waste lagoon on its property less than one quarter mile from the Big Horn River. The inspection revealed that animal waste was leaking from the lagoon and contaminating groundwater. Later measurements at the lagoon monitoring wells showed nitrate levels in groundwater 18 times the amount allowed by law.

23. The DEQ is aware that CAFOs are significant sources of water pollution in Montana. In 1994, the Montana Department of Health and Environmental Sciences (now the DEQ) commissioned a private consulting firm to conduct a study regarding whether CAFOs were impacting Montana's water quality. (Land and Water Consulting Inc., *Inventory and Characterization of Confined Animal Feeding Operations in Montana*, p. 1, Nov. 1994.) The State's consultant compiled information regarding animal numbers, hydrogelogic settings, waste management, and water quality considerations for approximately 86 CAFOs in Montana. This information was then used to evaluate the potential for CAFOs to cause surface and ground water contamination. The study

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December 1997.

identified 32% of the CAFOs considered as presenting a high or medium risk for contaminating surface water. 65% of the CAFOs considered were found to present a high risk of ground water contamination. *Id.* at p. 7.

24. The study's authors also investigated twelve CAFO's that volunteered to undergo on-site inspections. The investigators conducted surface water sampling at seven of these twelve facilities. Surface water contamination was evident at four of the Seven sites sampled. *Id.* at 9. The study's authors were careful to point out that "[s]ince it is unlikely that CAFOs with obvious water quality problems would volunteer for a site assessment, the results of this study may represent a conservative view of the impacts to state waters." *Id.* at 7. The authors further cautioned that "[s]ince site assessments were not timed to detect all surface water impacts, the results from this sampling should be considered conservative." *Id.* at 9. The State's consultant reported that "[b]ased on the data compiled during this study, it appears that CAFOs operating in Montana are having an impact on surface and ground water quality." *Id.* at p. 13.

25. In July of 2000, the DEQ acknowledged that "[S]torm water runoff from agricultural activities, including storm water runoff from animal feeding operations, continues to degrade the environment and puts drinking water supplies at risk." (Montana DEQ, *Strategy for Improving Water Quality Compliance from CAFOs*, p. 4., July 2000.)

B. The Clean Water Act and Montana Water Quality Law.

26. Congress passed the Clean Water Act (CWA) in 1972 to "restore and maintain the chemical, physical and biological integrity of the Nation's waters." 33 U.S.C. § 1251(a).

In the CWA, Congress set out a two-pronged strategy for controlling water pollution. This two-part strategy is based on two very different pollution prevention paradigms. The first part is a technology-based program focused on controlling point source pollution. Point sources of pollution include "any discernable, confined and discrete conveyance," including pipes, ditches, conduits or vessels "from which pollutants are or may be discharged." 33 U.S.C. § 1362 (14). Point sources are contrasted with non-point sources which include non-discrete sources of pollution such as runoff from agriculture, forestry or construction activity. The second prong of the CWA's pollution prevention strategy is a water quality-based system which is capable of setting limits on non-point source pollution.

27. Point source pollution is subject to controls set out in the CWA under the National Pollution Discharge Elimination System (NPDES), which requires individual point sources to obtain permits limiting the amount of pollutants they may discharge. While the federal Environmental Protection Agency (EPA) is ultimately responsible for overseeing the implementation of the NPDES, the EPA has in most cases delegated authority to the individual states to oversee the permitting of point source polluters within their own boundaries.

28. The EPA delegated authority to regulate non-point source pollution to the State of Montana on June 10, 1974. In Montana, point source pollution is regulated under the Montana Pollution Discharge Elimination System (MPDES) which is the Montana State analogue of the NPDES. § 17.30.1303, ARM. The MPDES is essentially equivalent to the NPDES, and Montana has incorporated and adopted by reference most of the NPDES

requirements set forth in the CWA and in the NPDES implementing regulations. *Id.* Montana's point source permitting program is administered by the DEQ. Under the MPDES, facilities or activities that will result in the discharge of point source pollution are required to obtain MPDES permits prior to commencing operation. These permits are commonly known as a wastewater discharge permits. The CAFO General Permit and the CDC's Discharge Permit Authorization at issue in this case are MPDES dicharge permits.

29. The second prong of the CWA's two-part water pollution prevention strategy is a water quality-based program embodied primarily by the "total maximum daily load" (TMDL) provisions set out in Section 303 of the Act. 33 U.S.C. § 1313. Under Section 303, states must establish water quality standards designed to protect the uses of state waters, enhance water quality, and serve the purposes of the CWA. 33 U.S.C. § 1313(c)(2)(A). These water quality standards can be numerical or narrative. Numerical standards set quantitative limits on the amount of a pollutant that may exist in certain waters. For example, a numeric water quality standard might preclude heavy metal concentrations in a water body above five parts per billion.

30. Narrative water quality standards include both "designated uses" and qualitative statements about the cleanliness of a water body. Designated uses set out the activities which a water body must remain clean enough to support. For example, a river might be designated as habitat for spawning and rearing trout. Qualitative water quality standards might include restrictions such as "no toxic chemicals may be present in toxic amounts," or "no oily film may be visible on the water's surface."

31. Under Section 303(d), once states have drafted water quality standards, they must then identify all waters for which point source controls alone are insufficient to implement those standards. 33 U.S.C. § 1313(d)(1)(A). These impaired waters that do not meet applicable water quality standards are called "water quality limited segments" (WQLSs).

32. States are required to develop TMDLs for all WQLSs.[3] TMDLs establish the maximum amount of point and non-point source pollutants a water body can receive on a daily basis without violating applicable water quality standards. The component of a TMDL which actually sets out the amount of a pollutant that a water body can absorb each day is termed a "load allocation." TMDLs are critical for protecting waterbodies which continue to violate water quality standards even after the imposition of NPDES type restrictions, because, unlike NPDES permits, TMDLs take into account non-point source pollution.

33. One of the only places where the separate pollution prevention strategies of the MPDES and water quality-based programs come together in Montana water quality law is under Administrative Rule of Montana § 17.30.1311(7). This Rule precludes the DEQ from

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[3]Under Section 303(d) of the CWA, the state of Montana was to submit its first TMDLs and a list of WQLS by June 26, 1979. Eighteen years later, when Montana had only submitted one TMDL to the EPA, a coalition of environmental groups sued the EPA under the CWA and the Administrative Procedures Act for not requiring the DEQ to comply with its WQLS listing and TMDL development duties. (CV No. 97-35-M-DWM, U.S. District Court for the District of Montana, Missoula Div.) On November 4, 1999, United States District Court Judge Donald Molloy found that the EPA had acted arbitrarily and capriciously in not requiring the DEQ to promptly promulgate adequate TMDL's for Montana's impaired waters. As a remedy, Judge Molloy issued an Order on September 20, 2000, requiring the EPA and DEQ to establish TMDLs for all water bodies on Montana's 1996 list of WQLS by May 5, 2007. The defendants and intervenors in the TMDL litigation appealed Judge Molloy's ruling, and the case is currently pending before the Ninth Circuit Court of Appeals.

issuing an MPDES permit to a new source or new discharger "if the discharge from its construction or operation will cause or contribute to the violation of water quality standards." If a new source or discharger receives a permit to discharge a type of pollutant which is already causing a water body to violate water quality standards, that authorization, by definition, violates Administrative Rule of Montana § 17.30.1311(7).

34. Administrative Rule of Montana § 17.30.1311(7) also sets out two requirements for permit applicants who wish to discharge pollutants into a WQLS that is impaired due to the presence of pollutants other than the pollutant which the applicant proposes to discharge. In cases where the DEQ has drafted a wasteload allocation for the non-impairing pollutant that the applicant wishes to discharge, the Department may not issue a discharge permit until the applicant demonstrates that there is enough room within the applicable waste load allocation to absorb the discharge without violating water quality standards. § 17.30.1311(7)(a), ARM. In addition, the DEQ may not issue a discharge permit until the applicant demonstrates that the existing dischargers on the WQLS are subject to compliance schedules designed to bring the WQLS into compliance with applicable water quality standards. § 17.30.1311(7)(b), ARM.

C. The MEPA Statutory Framework.

35. The MEPA requires State agencies to carefully scrutinize the potential environmental consequences of their actions. § 17.4.608(2), ARM (state agencies "*shall* determine the significance of impacts associated with a proposed action.")(emphasis added).

36. If a State agency undertakes an action significantly affecting the environment, it must

prepare an environmental impact statement (EIS) in order to evaluate the environmental impacts. § 17.4.607(1)(b), ARM.

37. In determining whether an action will give rise to the significant effects that trigger the need for an EIS, agencies must consider the following criteria:

> (a) the severity, duration, geographic extent, and frequency of occurrence of the impact;
>
> (b) the probability that the impact will occur if the proposed action occurs; or conversely, reasonable assurance in keeping with the potential severity of an impact that the impact will not occur;
>
> (c) growth-inducing or growth-inhibiting aspects of the impact, including the relationship or contribution of the impact to cumulative impacts;
>
> (d) the quantity and quality of each environmental resource or value that would be affected, including the uniqueness and fragility of those resources or values;
>
> (e) the importance to the state and to society of each environmental resource or value that would be affected;
>
> (f) any precedent that would be set as a result of an impact of the proposed action that would commit the department to future actions with significant impacts or a decision in principle about such future actions; and
>
> (g) potential conflict with local, state, or federal laws, requirements, or formal plans.

§ 17.4.608(1), ARM.

38. If it is not clear whether an action may significantly effect the environment, the agency contemplating the action must prepare an environmental assessment (EA) to determine whether the potential environmental effects of the proposed action constitute the type of significant impacts which trigger the need for an EIS. § 17.4.607(3)(a), ARM.

39. EAs prepared by State agencies are generally required to include the following:

(a) a description of the proposed action, including maps and graphs;

(b) a description of the benefits and purpose of the proposed action;

(c) a listing of any state, local, or federal agencies that have overlapping or additional jurisdiction or environmental review responsibility for the proposed action and the permits, licenses, and other authorizations required;

(d) an evaluation of the impacts, including cumulative and secondary impacts, on the physical environment;

(e) an evaluation of the impacts, including cumulative and secondary impacts, on the human population in the area to be affected by the proposed action;

(f) a description and analysis of reasonable alternatives to a proposed action whenever alternatives are reasonably available and prudent to consider and a discussion of how the alternative would be implemented;

(g) a listing and appropriate evaluation of mitigation, stipulations, and other controls enforceable by the agency or another government agency;

(h) a listing of other agencies or groups that have been contacted or have contributed information;

(i) the names of persons responsible for preparation of the EA; and

(j) a finding on the need for an EIS and, if appropriate, an explanation of the reasons for preparing the EA. If an EIS is not required, the EA must describe the reasons the EA is an appropriate level of analysis.

§ 17.4.609(3), ARM.

40. If an agency's analysis of potential environmental effects in an EA reveals that an action significantly affects the environment, the MEPA and its implementing regulations require the agency to prepare an EIS. § 17.4.607(1)(b), ARM; § 17.4.608(2), ARM.

41. In addition, the MEPA and its implementing regulations require that an agency

contemplating a series of actions, programs or policies which in part or in total may significantly affect the environment, must prepare a "programmatic review" discussing the combined impacts of the actions. § 17.4.628(1), ARM. The programmatic review may take the form of an EIS or an EA, and must include a concise, analytical discussion of alternatives and the cumulative environmental effects of these alternatives on the environment. § 17.4.628(4), ARM. Programmatic reviews must also contain the information normally required for EISs or EAs, as applicable. *Id.*

42. Finally, under the MEPA, State agencies are required to provide the public with notice and opportunity to review and comment on any EAs that they prepare. § 17.4.610, ARM.

D. Montana's CAFO Permitting Scheme.

43. CAFOs are defined as point sources of pollution under the regulations implementing Montana water quality law. § 17.30.1330(2), ARM. As point sources, all CAFOs must be permitted under the MPDES. § 17.30.1330, ARM.

44. Under Montana's current CAFO permitting scheme, almost all permitted CAFOs are regulated under a single state-wide CAFO MPDES permit [hereinafter the "CAFO General Permit"]. This blanket permitting scheme allows owners of CAFOs to receive the DEQ's authorization to discharge pollutants into Montana waters simply by filling out an application and obtaining a discharge permit authorization under the CAFO General Permit.

45. MPDES permits such as the CAFO General Permit remain in affect for five years from their date of issuance. Montana's previous CAFO General Permit expired in June of

1999. Shortly after the expiration of that Permit, the DEQ issued a new Draft CAFO General Permit for public comment.

46. The DEQ's decision whether to formally issue a new state-wide MPDES permit such as the CAFO General Permit is subject to the requirements of the MEPA. The DEQ prepared a cursory, fourteen page EA to evaluate the potential environmental consequences of issuing the new state-wide CAFO General Permit.

47. The Plaintiffs in this case and other members of the public submitted extensive comments to the DEQ regarding the EA for the new CAFO General permit. These comments specifically explained the ways in which the DEQ had failed to adequately evaluate the potential environmental impacts associated with its issuance of the new CAFO General Permit. The public comments pointed out *inter alia* that the EA was inconsistent with MEPA requirements set out in Section 17.4.609(3), ARM, because it failed to:

> 1) Include necessary maps, graphs and statement of purpose to describe the proposed action;
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> 2) Evaluate the impacts, including cumulative and secondary impacts, on the physical environment;
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> 3) Evaluate the impacts, including cumulative and secondary impacts, on the human population in the area to be affected by the proposed action;
>
> 4) Identify all state, local and federal agencies with overlapping or additional jurisdiction;
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> 5) Provide a meaningful consideration of alternatives; and
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> 6) Document the reasons for selecting the chosen level of environmental review.

48. Public comments also pointed out a host of glaring information gaps in the CAFO

General Permit EA such as the fact that the DEQ does not even know how many CAFOs there are in Montana. In the Draft EA, the DEQ explained:

> DEQ staff and financial limitations preclude a comprehensive field inventory of animal feeding operations and DEQ does not, therefore, have comprehensive information on the total number and location of Montana's livestock operations.

(CAFO General Permit Draft EA, p. 2, July 7, 1999.) It is difficult to comprehend how the DEQ's EA for the CAFO General Permit can thoroughly evaluate the environmental impacts of CAFO's throughout Montana when the Agency does not even know the current number and location of such facilities.

49. In their comments, the public requested that the DEQ conduct a programmatic EIS to assess the potential environmental effects of its decision to issue the new CAFO General Permit. The DEQ declined to conduct such an EIS. (General Permit for CAFOs, Responses to Public Comments, p. 1.) On July 11, 2000, the DEQ formally issued the new CAFO General Discharge Permit. This Permit became effective on August 15, 2000.

50. Under the CAFO General Permit, a CAFO operator applies for a discharge permit authorization by filling out an application known as "short form B," and paying a $200 application fee to the DEQ. Short Form B requests information regarding facility ownership, location, size, physical surroundings, waste control and general plans for the land application of waste. Short Form B does not request any: 1) evaluation of potential cumulative or secondary impacts on the physical environment; 2) evaluation of potential cumulative or secondary impacts on the human population in the area; 3) analysis of

alternatives; 4) listing of local, state or federal agencies having additional or overlapping jurisdiction or environmental review responsibilities for the proposed CAFO; 5) listing of other agencies or groups that have been contacted or have contributed information; or 6) finding of the need for preparation of an EIS. Under the DEQ's current CAFO permitting scheme, these mandatory MEPA considerations are addressed neither under the General Permit EA, nor during the site specific discharge authorization process. Thus, the DEQ effectively avoids its obligation under the MEPA to fully evaluate the potential environmental impacts of its permitting decisions.

51. Under the CAFO General Permit, CAFOs are not required to draft waste management plans -- the plans which outline how individual CAFOs will dispose of animal waste -- until a full year after they have received the DEQ's authorization to discharge. (CAFO General Permit, Part III(A)(1)). Under this system, it is impossible for the DEQ to adequately evaluate the potential environmental impacts of most individual CAFOs prior to permitting their operation, because the plans for two of the primary sources of impacts, animal waste flood irrigation and land application, do not even have to be drafted until a full year after the DEQ issues a discharge permit authorization.

52. Finally, the CAFO General Permit and site-specific authorization application protocol provide no process whereby Montanans receive notice and an opportunity to comment on the DEQ's issuance of authorizations to discharge under the General Permit.

D. The Cattle Development Center.

53. On June 23, 2000, the Cattle Development Center (CDC), a CAFO east of Custer, Montana, applied for a permit to discharge under the CAFO General Permit. The CDC, which will house as many as 20,000 cattle in an 126 acre area, is located in Yellowstone County, upgradient of the confluence of the Yellowstone and Bighorn Rivers. The nearest portion of the Yellowstone River is located about one mile from the CDC and is known as the Pompeys Pillar reach.

54. The Yellowstone River is one of the last free-flowing rivers among prominent rivers in the lower-48 United States. Both the Bighorn and Yellowstone Rivers downstream of the CDC retain the constellation of native species that were present at the time of the Lewis and Clark Expedition. These rivers are warm-water prairie rivers that provide critical water fowl and wetland functions in addition to supporting important fisheries. The confluence of the Bighorn and Yellowstone Rivers is also an important historic, scenic and recreational area. The Bureau of Land Management's Lewis and Clark National Historic Trail Special Recreation Area, located at the confluence, is a popular area for hiking, fishing, boating and hunting.

55. The Pompeys Pillar reach of the Yellowstone River is the watershed with the highest permitted CAFO concentration in Montana. In July of 1999, when the DEQ drafted the EA for the CAFO General Permit, the CAFO's along this reach of the Yellowstone River had the capacity for approximately 48,000 animal units on 170 acres. The DEQ acknowledges in the General Permit EA that discharges from these facilities "could contribute to cumulative nutrient loading from other industrial point sources and

agricultural nonpoint sources." (CAFO General Permit EA, p. 13.)

56. Both the Pompeys Pillar Reach and the downstream reach of the Big Horn River were listed on Montana's 1998 list of water quality impaired waterbodies. The 1998 list identified these rivers as impaired by nutrients, metals and pathogens - the same pollutants that will be released from the CDC and the adjacent CAFOs when discharges occur.

57. The DEQ has promulgated TMDLs for fecal coliform, ammonia, and other pollutants on the Pompeys Pillar Reach of the Yellowstone River.

58. In applying for its authorization to discharge under the CAFO General Permit, the CDC submitted the standard Short Form B application and additional analysis addressing some of the topics set out in Short Form B.

59. On September 15, 2000, the DEQ issued the CDC a Discharge Permit Authorization under the new CAFO General Permit for the Pompeys Pillar reach of the Yellowstone River. The DEQ's authorization of the CDC increased the potential number of animals in CAFOs along this stretch of River more than 40 percent by adding up to another 20,000 animal units.

60. The DEQ performed no adequate, site specific MEPA analysis regarding the environmental impacts of its decision to grant the CDC's Discharge Permit Authorization prior to issuing that authorization. The DEQ also failed to ensure that discharges from the CDC would not contribute to the Yellowstone River's violation of water quality standards in the Pompeys Pillar Reach. The DEQ never required the CDC to demonstrate that there is sufficient room for its pollutants within current waste load allocations in

place for the Pompeys Pillar Reach. The DEQ did not require the CDC to demonstrate that the existing discharges on the Pompeys Pillar reach are subject to a compliance schedule designed to bring the Reach into compliance with applicable water quality standards. The DEQ did not even ascertain whether land application of the CDC's waste on croplands near the Yellowstone River presented a danger of polluting the River. Finally, the DEQ failed to provide the public any formal notice or opportunity to comment upon the Agency's issuance of the CDC's Discharge Permit Authorization.

V. LEGAL CLAIMS

FIRST CAUSE OF ACTION
(MEPA - Failure to Conduct an Adequate EA and/or EIS on the CDC's Discharge Permit Authorization)

61. Each and every allegation set forth in this Complaint is incorporated herein by reference.

62. The DEQ had a duty under the MEPA to preparation an adequate EA and/or an EIS in order to assess the potential environmental impacts associated with its decision to grant the CDC a MPDES discharge permit authorization. § 17.4.607(3)(a), ARM; § 17.4.607(1), ARM; § 17.4.608(2), ARM.

63. The DEQ conducted no adequate EA or EIS regarding its issuance of the CDC's Discharge Permit Authorization.

64. The DEQ's failure to assess the potential environmental impacts of it decision to grant the CDC's Discharge Permit Authorization is not justified under any adequate programmatic review conducted for the CAFO General Permit.

65. The Defendant's decision to grant the CDC's Discharge Permit Authorization without

conducting an adequate EA and/or EIS violates the MEPA and its implementing regulations.

66. The DEQ's conduct described in this count is arbitrary, capricious, and otherwise not in accordance with the law.

SECOND CAUSE OF ACTION
(MEPA - Failure to Conduct an EIS on the General CAFO Permit)

67. Each and every allegation set forth in this Complaint is incorporated herein by reference.

68. The DEQ had a duty to conduct an EIS and programmatic review in order to assess the environmental effects of its decision to issue the CAFO General Permit. § 17.4.608(2), ARM; § 17.4.607(1), ARM; § 17.4.628(1), ARM.

69. The DEQ has conducted no EIS or adequate programmatic review for the CAFO General Permit.

70. The DEQ violated the MEPA and its implementing regulations by failing to conduct an EIS and adequate programmatic review for the CAFO General Permit.

71. The DEQ's conduct described in this count is arbitrary, capricious, and otherwise not in accordance with the law.

THIRD CAUSE OF ACTION
(Montana Water Quality Law - DEQ's Issuance of the CAFO General Permit and the CDC's Discharge Permit Authorization Violates The MPDES Regulations)

72. Each and every allegation set forth in this Complaint is incorporated herein by reference.

73. The MPDES implementing regulations prohibit the DEQ from issuing permits to new

sources whose discharges will cause or contribute to the violation of water quality standards in water quality impaired water bodies. § 17.30.1311(7), ARM.

74. The MPDES implementing regulations further prohibit the DEQ from issuing permits to new sources on waterbodies subject to pollutant load allocations when the permit applicant has not demonstrated: 1) that there are sufficient remaining pollutant load allocations to allow for the discharge; and 2) the existing dischargers into that segment are subject to compliance schedules designed to bring the segment into compliance with applicable water quality standards. § 17.30.1311(7)(a) and (b), ARM.

75. Discharges authorized under the CAFO General Permit and site-specific discharge permit authorizations issued pursuant to the CAFO General Permit will cause or contribute to the violation of water quality standards in impaired Montana water bodies. The DEQ violated Administrative Rule of Montana § 17.30.1311(7) by issuing the CAFO General Permit and site-specific discharge permit authorizations to CAFOs located on WQLSs, including, but not limited to, the CDC.

76. The DEQ violated Administrative Rule of Montana § 17.30.1311(7)(a) by granting the CDC and other CAFOs in Montana authorizations to discharge non-impairing pollutants into WQLSs without requiring the permit applicants to demonstrate that, where pollutant load allocations have been developed, there is sufficient room within applicable pollutant load allocations to allow for the discharges.

77. Finally, the DEQ violated Administrative Rule of Montana 17.30.1311(7)(b) by granting the CDC and other CAFOs in Montana authorizations to discharge non-impairing pollutants into WQLSs without requiring the permit applicants to demonstrate that the

existing dischargers on the WQLSs are subject to compliance schedules designed to bring the WQLSs into compliance with applicable water quality standards.

78. The DEQ's conduct described in this count is arbitrary, capricious, and otherwise not in accordance with the law.

FOURTH CAUSE OF ACTION

(Montana Constitution - Violation of the Right to a Clean and Healthful Environment)

79. Each and every allegation set forth in this Complaint is incorporated herein by reference.

80. Article II, Section 3 of the Montana Constitution gives all Montanans, including the Plaintiffs, certain "inalienable rights," including the right to a clean and healthful environment.

81. Article II, Section 3 of the Montana Constitution provides that the state and each person "shall maintain and improve a clean and healthful environment." This Section further requires the legislature to provide adequate remedies for the "protection of the environmental life support system from degradation and provide adequate remedies to prevent unreasonable depletion and degradation of natural resources." Montana's ground water, lakes, rivers and streams are critical components of the environmental life support system.

82. The DEQ has a constitutional duty, distinct from its duties under the MEPA, to conduct adequate environmental reviews, and to ensure that its actions maintain and improve the natural environment and prevent unreasonable depletion and degradation of Montana's natural resources.

83. The DEQ's failure to ensure that its decision to issue the general CAFO discharge permit will not result in unreasonable depletion and degradation of Montana's natural resources violates Article II, Section 3 of the Montana Constitution.

84. The DEQ's failure to ensure that its decision to issue the CDC's Discharge Permit Authorization will not result in unreasonable depletion and degradation of Montana's natural resources also violates Article II, Section 3 of the Montana Constitution.

WHEREFORE, the Plaintiffs pray for relief as follows:

1. For an order suspending the CDC's Discharge Permit Authorization under the CAFO General Permit, until such time as the DEQ conducts an EIS in order to assess the environmental impacts of issuing the CDC such an authorization;

2. For an order compelling the DEQ to conduct an EIS and adequate programmatic review to assess the environment impacts associated with its decision to issue the new CAFO General Permit;

3. For an order precluding the DEQ from authorizing any new CAFOs to discharge under the CAFO General Permit until such time as an EIS and adequate programmatic review for the CAFO General Permit is completed.

4. For an order suspending any discharge permit authorizations currently held by CAFOs where discharges would contribute to ongoing violations of water quality standards.

5. For an order suspending any discharge permit authorizations issued to CAFOs on WQLSs within 90 days of the order's issuance, unless the CAFO operators demonstrate: 1) that there is room within applicable pollutant load allocations to absorb their discharges; and 2) that existing dischargers on the WQLSs are subject to compliance schedules designed to bring the

WQLSs into compliance with applicable water quality standards.

5. For attorneys' fees and litigation expenses;

6. For costs of suit; and

7. For such further relief as the Court deems just.

DATED this 23rd day of March, 2001.

JORY RUGGIERO
1700 West Koch, Suite 2
Bozeman, MT 59715

Attorney for Plaintiffs

Mt. Environmental Info. Center v. Mt. Dept. of Environmental Quality
Decided Oct. 5, 2001
Judge Honzel
First Judicial District
Docket No. CDV-2001-210
2001 ML 3473 (1st Jud. Dist.)

NOTE: This case has the following related cases (same docket number):
23 Oct 2002 - Montana Environmental Info. Center v. Dept. of Environ. Quality [2002 ML 3158 (1st Jud. Dist.)]
03 Oct 2003 - MEIC v. DEQ [2003 ML 3093 (1st Jud. Dist.)]
03 Oct 2003 - Montana Environmental Info. Center v. Mt. Dept. of Environ. Quality [2003 ML 3167 (1st Jud. Dist.)]

MONTANA FIRST JUDICIAL DISTRICT COURT
COUNTY OF LEWIS AND CLARK

MONTANA ENVIRONMENTAL INFORMATION CENTER, INC., WENDELL HARRIS, DEAN JENSEN, DEBBIE JENSEN, ROBERT LOWE, LYNN LOWE, MARK LOWE, R.J. LOWE, JOANNE BERNARD, and STUART LEWIN,
Plaintiffs,
vs.
MONTANA DEPARTMENT OF ENVIRONMENTAL QUALITY,
Defendant.

Cause No. CDV-2001-210
MEMORANDUM AND ORDER

¶1 Before the Court are:

¶2 1. The motion of Cattle Development Center, LLC (CDC), to intervene; and

¶3 2. The motion of Montana Stockgrowers' Association (MSGA), Montana Cattle Feeders Association (MCFA), and Montana Farm Bureau Federation (MFBF) to intervene.
Both motions are ready for decision.

BACKGROUND

¶4 CDC operates a concentrated animal feeding operation (CAFO) outside Custer, Montana, near the confluence of the Yellowstone and Big Horn Rivers. On July 11, 2000, Defendant Department of Environmental Quality (DEQ) issued a statewide CAFO General Discharge Permit under which the CDC and other CAFOs in the state can receive authorization to discharge wastewater into lakes, rivers, streams and groundwater. The CAFO General Discharge Permit became effective August 15, 2000. On September 15, 2000, DEQ issued a Discharge Permit Authorization to CDC.

¶5 In this action, Plaintiffs are challenging both DEQ's decision to issue the statewide CAFO General Discharge Permit and its decision to issue the wastewater discharge authorization to CDC. Plaintiffs assert four causes of action:

¶6 1. Violation of the Montana Environmental Policy Act (MEPA) by failing to conduct an adequate Environmental Assessment (EA) and/or Environmental Impact Statement (EIS) on CDC's Discharge Permit Authorization;

¶7 2. Violation of the Montana Environmental Policy Act by failing to conduct an EIS on the CAFO General Permit;

¶8 3. Violation of the Montana Water Quality Act and Montana Pollution Discharge Elimination System (MPDES) regulations by issuing the CAFO General Permit and the CDC's Discharge Permit Authorization, and;

¶9 4. Violation of the right to a clean and healthful environment as set forth by the Montana Constitution, Article II, Section 3.

STANDARD

¶10 Rule 24(a), M.R.Civ.P., allows an applicant to intervene as a matter of right if:

¶11 1) the applicant's motion for intervention is timely;

¶12 2) the applicant asserts an interest in relation to the property or transaction which is the subject matter of the action;

¶13 3) the applicant is so situated that without intervention disposition of the action may, as a practical matter, impair or impede the ability to protect the applicant's interest, and;

¶14 4) the applicant's interest is inadequately represented by other parties. ***See*Estate of Schwenke**, 252 Mont. 127, 131, 827 P.2d 808, 811 (1992). ***See also*Marriage of Aniballi**, 255 Mont. 384, 387, 842 P.2d 342, 344 (1992).

¶15 Case law mandates that the applicant bears the burden of showing that it satisfies each of the four criteria and that the rule be liberally construed in favor of the proposed intervener.

¶16 Rule 24(b)(2), M.R.Civ.P., allows for permissive intervention where there are common issues of law or fact. The Court must also consider whether the proposed intervention will unduly delay the proceedings or prejudice the rights of a party.

I. CDC'S MOTION TO INTERVENE

¶17 CDC asserts it meets all four criteria necessary to intervene as a matter of right. In particular, CDC points out that it has a direct interest in the subject matter of the lawsuit since Plaintiffs have requested an order suspending CDC's Discharge Permit Authorization until DEQ conducts an EIS to assess the environmental impacts of issuing CDC a Discharge Permit Authorization. CDC contends this would require it to suspend its feedlot operation.

¶18 Plaintiffs contend that this action against DEQ does not implicate any legally protected right of CDC. In support of their argument, Plaintiffs cite the recent Ninth Circuit decision in **Wetlands Action Network v. U.S. Army Corps of Eng'rs**, 222 F.3d 1105 (9th Cir. 2000). In that case, an environmental group sued the Corps of Engineers under the National Environmental Policy Act (NEPA), the federal counterpart to MEPA, over the Corps' decision to grant a developer a permit to drain a wetland. The district court denied the developer's motion to intervene as a matter of right, but did allow the developer to participate in the remedial phase of the action. In upholding the district court's decision, the court

stated:

> As a general rule, "the federal government is the only proper defendant in an action to compel compliance with NEPA. The rationale for our rule is that, because NEPA requires action only by the government, only the government can be liable under NEPA." Because a private party can not violate NEPA, it can not be a defendant in a NEPA compliance action."

¶19 **Id.** at 1114 (citations omitted).

¶20 Although Plaintiffs argue that the **Wetlands** case is strikingly similar to this case, an earlier Ninth Circuit decision, **Sierra Club v. U.S. Envtl. Prot. Agency**, 995 F.2d 1478 (9th Cir. 1993), is more on point. The **Wetlands** court cited the **Sierra Club** decision for the proper test to be applied. 222 F.3d at 1113.

¶21 In the **Sierra Club** case, the Sierra Club had sued the Environmental Protection Agency (EPA) under the Clean Water Act to require the EPA to change the terms of permits issued to the city of Phoenix for two of its wastewater treatment plants. The district court denied the city's motion to intervene, but the Ninth Circuit reversed, holding that the city had a right to intervene. The court stated the general rule that government bodies charged with compliance can be the only defendants, but went on to carve out an exception:

> In the case before us, though, the lawsuit would affect the use of real property owned by the intervener by requiring the defendant to change the terms of permits it issues to the would-be intervenor, which permits regulate the use of that real property. These interests are squarely in the class of interests traditionally protected by law.

¶22 995 F.2d at 1483. The court further stated:

> It is one thing to hold that only the government can be a defendant in a NEPA suit, where the statute regulates only government action, but quite another to exclude permit-holding property owners from a Clean Water Act suit, where the statute directly regulates their conduct.

¶23 995 F.2d at 1485. The Court concluded by stating:

> The relief sought in Sierra Club's lawsuit would necessarily "result in practical impairment of the [City's] interests."

¶24 995 F.2d at 1486 (citation omitted).

¶25 Here, CDC, like the city of Phoenix, has been issued a permit to discharge wastewater into the Yellowstone River. Plaintiffs' complaint asserts a claim for violation of the Montana Water Quality Act and the relief sought by Plaintiffs would necessarily result in the practical impairment of CDC's interests.

¶26 Plaintiffs also assert that CDC has failed to show that DEQ will not adequately represent its interests. As noted, Plaintiffs have challenged both the CAFO General Permit and the specific permit issued to CDC. DEQ's principal concern may be with the general permit and not CDC's permit. DEQ also could enter into a settlement agreement which might impair CDC's interests. Furthermore, DEQ

would be under no obligation to pursue appellate review if the court were to rule against it.

¶27 For the foregoing reasons, the Court concludes that CDC's motion to intervene should be granted.

II. MOTION OF MSGA, MCFA AND MFBF TO INTERVENE

¶28 The Montana Supreme Court has held that intervention as a matter of right requires a "direct, substantial, legally protectable interest in the proceedings." **Marriage of Aniballi**, 255 Mont. 384, 387, 842 P.2d 342, 344 (1992). Further, "in ruling on a motion to intervene, a district court properly considers whether a prima facie case has been made to support the claim." **Id.**

¶29 MSGA, MCFA and MFBF (hereinafter the Associations) claim they have a legally protectable interest in the subject matter of this lawsuit because Plaintiffs have challenged the legality of the CAFO General Discharge Permit and they have members whose livestock and agricultural operations require authorization under the CAFO General Permit.

¶30 However, the Associations have not shown how they would be affected by changes to the CAFO program nor have they informed the Court as to how many of their members would be affected by changes. Furthermore, DEQ has not issued any discharge permits to the Associations.

¶31 The Associations note that they have worked with the legislature and state agencies on various water quality issues, including the CAFO program, which establishes their interest in the subject matter of this litigation. Courts which have looked at this have held that "the status of lobbyist [does] not alone create a direct and substantial interest sufficient to support intervention as of right." **Keith v. Daley**, 764 F.2d 1265, 1269 (7th Cir. 1985) *cert denied,* 474 U.S. 980 (1985).

¶32 Plaintiffs argue that governmental agencies are the only proper defendants in a MEPA action. Although that is the general rule, there is an exception to the rule which, as set out above, the Court has concluded applies to CDC. Unlike CDC, the Associations have not been issued discharge permits and the Court concludes that the exception does not apply to them.

¶33 The Associations argue that Plaintiffs have raised not only MEPA claims but also claims based on violations of the Montana Water Quality Act and Article II, Section 3 of the Montana Constitution. However, the Associations still must establish that they have a direct, substantial, legally protectable interest as set forth in **Aniballi**, *supra*, which the Court concludes they have not done.

¶34 The Associations also assert that their interests will not be adequately represented by DEQ. Regardless of whether the Associations are correct in that assertion, the Court is granting the motion of CDC to intervene and it appears that the Associations' interests and CDC's interests are essentially the same. Moreover, the Associations have agreed with CDC that if allowed to intervene, they would file consolidated pleadings and briefs. Thus, it appears that the Associations' interests will be adequately represented.

¶35 As an alternative to intervention as a matter of right, the Associations have requested that they be granted permissive intervention, asserting only that there are common issues or law or fact. While the Associations and their members may have an interest in the issues raised by the litigation, it is the Court's conclusion that permissive intervention should not be granted, particularly since the Associations' position would be the same as CDC's.

¶36 For the foregoing reasons,

¶37 **IT IS ORDERED:**

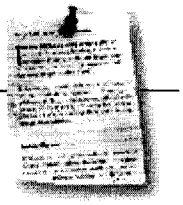
¶38 1. The motion of CDC to intervene **IS GRANTED**.

¶39 2. The motion of MSGA, MCFA, and MFBF to intervene **IS DENIED**.

DATED this 5th day of October, 2001.

Thomas C. Honzel
District Court Judge

Document



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Montana Environmental Info. Center v. Dept. of Environ. Quality
Decided Oct. 23, 2002
Judge Honzel
First Judicial District
Docket No. CDV-2001-210
2002 ML 3158 (1st Jud. Dist.)

NOTE: This case has the following related cases (same docket number):
05 Oct 2001 - Mt. Environmental Info. **Center** v. Mt. Dept. of Environmental Quality [2001 ML 3473 (1st Jud. Dist.)]

MONTANA FIRST JUDICIAL DISTRICT COURT
COUNTY OF LEWIS AND CLARK

MONTANA ENVIRONMENTAL INFORMATION
CENTER, INC., WENDELL HARRIS,
DEAN JENSEN, DEBBIE JENSEN,
ROBERT LOWE, LYNN LOWE, MARK LOWE,
R.J. LOWE, JOANNE BERNARD, and
STUART LEWIN,
Plaintiffs,
vs.
MONTANA DEPARTMENT OF
ENVIRONMENTAL QUALITY,
Defendant,
and
CATTLE DEVELOPMENT CENTER, LLC,
Defendant/Intervenor.

Cause No. CDV-2001-210
MEMORANDUM AND ORDER

¶1 Before the Court are the motions for summary judgment filed by Plaintiff Montana Environmental Information **Center**, Inc. (MEIC), Defendant Montana Department of Environmental Quality (DEQ), and Intervenor Cattle **Development Center**, LLC (CDC). The motions were heard June 13, 2002, and are ready for decision.

BACKGROUND

¶2 This case concerns the permitting process utilized by DEQ for confined animal feeding operations (CAFOs). Animal waste generated at CAFOs are potential sources of pollution to surface and ground water. A 1994 report entitled *Inventory and Characterization of Confined Animal Feeding Operations in Montana*, prepared for DEQ, approximated

the number of CAFOs in Montana at 150. The CAFOs are concentrated primarily in Yellowstone, Beaverhead, Blaine, Cascade, Flathead, and Teton counties. The report concluded that CAFOs operating in Montana have an impact on surface and ground water quality and that further work will be needed to evaluate CAFO water quality impacts in Montana. The report recommended that additional efforts, such as ground and air searches, be made to identify all CAFOs in Montana. However, DEQ contends that locating every CAFO in Montana is not feasible.

¶3 In an effort to regulate the impacts of CAFOs on surface and ground waters, DEQ utilizes a general permitting process under the Montana Pollution Discharge Elimination System (MPDES). DEQ issues general permits pursuantto a public notice and comment process for categories of point sources that involve similar types of operations, such as CAFOs. After DEQ issues the general permit, individuals proposing to operate under that permit must file an application with DEQ and receive an authorization letter. Once DEQ issues the authorization letter, the applicant is bound by the requirements and conditions of the general permit.

¶4 In this case, the CAFO general permit became effective August 15, 2000. Before issuing the general permit, DEQ prepared a 14-page Environmental Assessment (EA) to evaluate the potential environmental consequences of issuing the general permit. In the EA, DEQ assumed that individual CAFOs authorized to operate under the permit would comply with certain conditions and requirements referred to as mitigation measures. These mitigation measures preclude permitted CAFOs from discharging animal wastes into ground and surface waters unless there is a chronic or catastrophic rainfall event exceeding the maximum amount of rain in a 24-hour period during the last 25 years asdetermined by precipitation records for the area of the permitted CAFO. Therefore, DEQ characterizes the CAFO general permit as a "nodischarge permit." As a result of including the mitigation measures in the general permit, DEQ determined that the issuance of the permit would have no significant impacts to the quality of waters in the state of Montana and concluded that a comprehensive Environmental Impact Statement (EIS) was unnecessary.

¶5 In June of 2000, CDC submitted an application to operate under the DEQ general permit. CDC requestedauthorization for a large CAFO outside of Custer, Montana, near the confluence of the Yellowstone and Bighorn Rivers. This area has a high concentration of CAFOs. After two on-site inspections and requests for further information, DEQ concluded that CDC's operation was within the scope of the general permit EA. Therefore, DEQ issued an authorization letter to CDCwithout conducting an individual EA or EIS.

¶6 MEIC objected to DEQ's failure to conduct an individual EA for the CDC project and filed this action. Specifically, MEIC objects to DEQ's failure to consider the cumulative effects of the concentration of CAFOs in the area surrounding the CDC site, failure to conduct an extensive EIS for the general permit, and failure to conduct individual EAs for every permitted CAFO.

STANDARD OF MEPA REVIEW

¶7 The Montana Supreme Court has held:

> The proper standard of review of an administrative decision pursuant to the Montana Environmental Protection Act (MEPA), is whether the agency decision was arbitrary or capricious.
>
> . . . .
>
> "[I]n making a factual inquiry concerning whether an agency decision was 'arbitrary or capricious,' the reviewing court 'must consider whether the decision was based on a consideration of the relevant factors and whether there has been a clear error of judgment.' This inquiry must be 'searching and careful,' but 'the ultimate standard of review is a narrow one.'

¶8 **Montana Envtl. Info. Ctr. v. Montana Dep't of Transp.,** 2000 MT 5, ¶ 12, 298 Mont. 1, ¶ 12, 994 P.2d 676, ¶ 12 (citations omitted).

SUMMARY JUDGMENT STANDARD

¶9 Summary judgment is proper only when no genuine issue of material fact exists and the moving party is entitled to judgment as a matter of law. Rule 56(c), M.R.Civ.P. The movant has the initial burden to show that there is a complete absence of any genuine issue of material fact. To satisfy thisburden, the movant must make a clear showing as to what the truth is so as to exclude any real doubt as to the existence of any genuine issue of material fact. **Minnie v. City of Roundup,** 257 Mont. 429, 431, 849 P.2d 212, 214 (1993). The burden then shifts to the party opposing the motion to show, by more than mere denial and speculation, that there are genuine issues for trial. **Sunset Point v. Stuc-O-Flex Int'l,** 287 Mont. 388, 392, 954 P.2d 1156, 1159 (1998). The party opposing the summary judgment is entitled to have any inferences drawn from the factual record resolved in his or her favor. Rule 56(c), M.R.Civ.P.

DISCUSSION

¶10 DEQ's reliance on the mitigation measures in the general permit forms the basis for this dispute. DEQ contends that issuing the general permit will not have significant environmental impacts because those CAFOs operating under the general permit are precluded from discharging pollutants into the waters of Montana. DEQ concludes that a comprehensive environmental impact statement is not required.

¶11 MEIC argues that there is no guarantee that permitted CAFO operators will abide by the terms and conditions of the general permit. As evidence, MEIC points to the permitted CAFO that dumped approximately 3,000 gallons of animal manure into surface waters above the city of Conrad's drinking water supply on October 21, 1999. Furthermore, animal waste leaked from a permitted CAFO in 1997, contaminating groundwater adjacent to the Bighorn River. DEQ acknowledges these spills but contends that violations of the permit are enforcement issues outside the scope of the general permit EA.

¶12 Because MEPA is modeled after the National Environmental Policy Act (NEPA), the Montana Supreme Court finds federal case law construing NEPA persuasive. **Ravalli Co. Fish & Game Ass'n v. Montana Dep't of State Lands**, 273 Mont. 371, 377, 903 P.2d 1362, 1366 (1995).

¶13 The Ninth Circuit Court of Appeals has addressed the use of mitigation measures in connection with environmental review of oil and gas leases in national forests:

> We understand that the mitigation stipulations enable the government to regulate many of the adverse environmental impacts of oil and gas activities. We seriously question, however, whether the ability to subject such highly intrusive activities to reasonable regulation can reduce their effects to insignificance. NEPA does not require that mitigation measures *completely* compensate for the adverse environmental effects of post-leasing oil and gas activities, *see Friends of Endangered Species v. Jantzen*, 760 F.2d 976, 987 (9th Cir. 1985), but an EIS must be prepared as long as "substantial questions" remain as to whether the measures will completely preclude significant environmental effects. *Friends of the Earth v. Hintz*, 800 F.2d 822, 836 (9th Cir. 1986); *Foundation for North Am. Wild Sheep v. United States*, 681 F.2d 1172, 1180-81 (9th Cir. 1982). Thus, even if there is a chance that regulation of surface-disturbing activities will render insignificant the impacts of those activ-ities, that possibility does not dispel substantial questions regarding the government's ability to adequately regulate activities which it cannot absolutely preclude. . . .
>
> . . . Appellants' suggestion that we approve now and ask questions later is precisely the type of environmentally blind decision-making NEPA was designed to avoid.

¶14 **Conner v. Burford**, 848 F.2d 1441, 1450-51 (9th Cir. 1988), *cert. denied*, **Sun Exploration & Prod. Co. v. Lujan**, 489 U.S. 1012 (1989).

¶15 Thus, DEQ could rely on the mitigation measures when drafting the EA only if there were no substantial questions

as to whether the measures would completely preclude significant environmental effects. MEIC has raised such substantial questions. Indeed, the 1994 report raises such questions.

¶16 The same result applies to DEQ's cumulative effects analysis. DEQ cannot rely on the permit mitigation measures to analyze the cumulative effects of CAFOs when previously permitted CAFOs violated such measures. Those violations alone raise substantial questions as to whether the measures will completely preclude significant environmental effects. Furthermore, "'The plaintiff need not show that significant effects *will in fact occur*, but if the plaintiff raises substantial questions whether a project may have a significant effect, an EIS *must* be prepared.'" **Ravalli Co. Fish & Game**, at 379, 903 P.2d at 1368 (quoting **LaFlamme v. Fed. Energy Regulatory Comm'n** (9th Cir. 1988), 852 F. 2d 389, 397). Because DEQ failed to engage in a significant impacts analysis regard to the mitigation measures, the matter must be remanded for preparation of an EIS. **Ravalli Co. Fish and Game**, at 380, 903 P.2d at 1368.

¶17 Finally, MEIC also contends that an individual EA must be prepared for the CDC operation. MEIC relies on language in the general permit EA which states, "Individual environmental assessments completed for the permitted operations are of sufficient scope to identify and mitigate the adverse water quality consequences of concentrated animal feeding operations." EA, p. 14. DEQ claims it is not required to prepare an individual EA if the operation falls within the scope of the programmatic EA for the general permit, citing ARM 17.4.628(2). However, the general permit EA is ineffective because of faulty reliance on the mitigation measures in the permit, as discussed above. It may be that the CDC operation would fall within the scope of a properly prepared EIS, but until that time an operation the size of CDC (10,000-20,000 head of **cattle**) should be subject to the ordinary rules of public notice, comment, and response.

¶18 In **Ravalli Co. Fish & Game**, the supreme court stated: "Implicit in the requirement that an agency take a hard look at the environmental consequences of its actions is the obligation to make adequate compilation of relevant information, to analyze it reasonably and, perhaps most importantly, not to ignore 'pertinent data.'" 273 Mont. at 381, 903 P.2d at 1369. Here, DEQ's reliance on the mitigation measures ignored previous instances of environmental degradation by permitted CAFOs. The Court concludes DEQ's actions were arbitrary and capricious and MEIC's motion for summary judgment should be granted. Therefore, this matter should be remanded to DEQ for completion of a programmatic EIS which considers the impact of CAFOs on water quality.

ORDER

¶19 **NOW, THEREFORE, IT IS ORDERED:**

¶20 1. MEIC's motion for summary judgment **IS GRANTED**.

¶21 2. DEQ's motion for summary judgment **IS DENIED**.

¶22 3. CDC's motion for summary judgment **IS DENIED**.

¶23 4. This matter **IS REMANDED** to DEQ for completion of a programmatic EIS which considers the impacts of CAFOs on water quality.

DATED this 23rd day of October, 2002.

Thomas C. Honzel
District Court Judge

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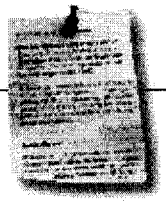

Montana Environmental Info. Center v. Mt. Dept. of Environ. Quality
Decided Oct. 3, 2003
Judge Honzel
First Judicial District
Docket No. CDV-2001-210
2003 ML 3167 (1st Jud. Dist.)

NOTE: This case has the following related cases (same docket number):
05 Oct 2001 - Mt. Environmental Info. Center v. Mt. Dept. of Environmental Quality [2001 ML 3473 (1st Jud. Dist.)]
23 Oct 2002 - Montana Environmental Info. Center v. Dept. of Environ. Quality [2002 ML 3158 (1st Jud. Dist.)]
03 Oct 2003 - MEIC v. DEQ [2003 ML 3093 (1st Jud. Dist.)]

MONTANA FIRST JUDICIAL DISTRICT COURT
COUNTY OF LEWIS AND CLARK

MONTANA ENVIRONMENTAL INFORMATION CENTER, INC., WENDELL HARRIS, DEAN JENSEN, DEBBIE JENSEN, ROBERT LOWE, LYNN LOWE, MARK LOWE, R.J. LOWE, JOANNE BERNARD, and STUART LEWIN,
Plaintiffs,
vs.
MONTANA DEPARTMENT OF ENVIRONMENTAL QUALITY,
Defendant,
and
CATTLE DEVELOPMENT CENTER, LLC,
Intervenor and Defendant.

Cause No. CDV-2001-210
MEMORANDUM AND ORDER

¶1 Before the Court are: (1) the motion of Defendant Montana Department of Environmental Quality (DEQ) to alter or amend this Court's Memorandum and Order entered October 23, 2002; (2) Plaintiffs' motion for entry of judgment; and (3) Plaintiffs' motion for attorney fees.

¶2 This case concerns the permitting process utilized by DEQ for confined animal feeding operations (CAFOs). In its October 23, 2002, Order, the Court determined that DEQ had failed to engage in the significant impacts analysis regarding mitigation measures and, therefore, it remanded the case to DEQ for completion of a programmatic environmental impact study (EIS) which considers the impacts of CAFOs on water quality.

A. Motion to Alter or Amend

¶3 Rule 59(g), M.R.Civ.P., has certain time require-ments, including that the motion is to be filed within ten days after the date of the entry of judgment. Plaintiffs argue that because no judgment has been has been entered, the motion is premature. Because the motion could be refiled after judgment is entered, the Court will consider it now in order to avoid revisiting it later.

¶4 Rule 59(g), M.R.Civ.P., does not specify the grounds on which a motion to alter or amend can be granted. However, the Montana Supreme Court has identified four areas in which such a motion is appropriate:

> 1) to correct manifest errors of law or fact upon which the judgment was based; 2) to raise newly discovered or previously unavailable evidence; 3) to prevent manifest injustice from, among other things, serious misconduct of counsel; or 4) to bring to the court's attention an intervening change in controlling law.

¶5 **Nelson v. Driscoll**, 285 Mont. 355, 360, 948 P.2d 256, 259 (1997) (citing 11 Charles Alan Wright et al., Federal Practice and Procedure § 2810.1 (1995)).

¶6 DEQ argues its motion should be granted because "due to the lack of a full briefing by the parties on the dispositive issue, the Court's ruling is not supported by law." However, DEQ does not provide any explanation for this sentence, and therefore no reasoning to support its motion. The lack of full briefing on an issue by the parties is not one of the situations set forth in **Nelson** to support a motion to alter or amend.

¶7 DEQ argues an EIS is not necessary in the case of a "no-discharge" permit because "the conditions are legally enforceable terms", not factual mitigation measures to be studied. DEQ cites a number of federal cases for the proposition that courts need not consider violations of permits or agency enforcement as effects to be analyzed in an EIS.

¶8 The no-discharge issue was before this court on cross-motions for summary judgment. DEQ fails to explain how this issue motion was not "fully briefed." Moreover, no case cited by DEQ represents an intervening change in controlling law and there is no indication of manifest errors of law or fact, newly discovered or previously unavailable evidence, or manifest injustice. Therefore, the Court concludes that DEQ's motion to alter or amend should be denied.

B. Entry of Judgment

¶9 Plaintiffs' request that the Court enter a judgment to provide that: (1) DEQ immediately begin preparation of a programmatic EIS; (2) that until the EIS is completed, DEQ not authorize any new CAFOs under the 2000 CAFO general permit; and that DEQ suspend the authorization granted to Defendant/Intervenor Cattle Development Center (CDC), pending completion of MEPA review of the CDC operation through the programmatic EIS or through appropriate approval of an individual Montana Pollution Discharge E limination Program permit.

¶10 DEQ and CDC object to entry of judgment as proposed. They contend that the proposed judgment goes beyond the findings the Court made and contains matters not ordered by the Court.

¶11 DEQ is concerned about the requirement that it immediately do an EIS, claiming it does not have the funding at this time to do an EIS. DEQ also argues that any judgment the Court might enter does not need to be expanded to identify specific rules DEQ must comply with.

¶12 In its Memorandum and Order, the Court granted Plaintiffs' motion for summary judgment and remanded the case to DEQ for completion of a programmatic EIS which considers the impacts of CAFOs on water quality. In preparing the EIS, DEQ must comply with all applicable statutes and rules. Therefore, the Court agrees that in the judgment it is not necessary to list specific rules which must be complied with.

¶13 In its Memorandum and Order, the Court did not discuss a timeline DEQ must follow in preparing the EIS. If DEQ is unable to immediately begin work on an EIS because of lack of funding, the Court is not sure what action it would need to take. As the Court stated in its Memorandum and Order, the general permit environmental assessment (EA) is not effective, which means that the general permit is not effective. Thus, until a programmatic EIS is prepared, DEQ cannot rely on the general permit to authorize CAFOs.

¶14 In this same vein, DEQ and CDC argue that the failure to prepare an EIS should not preclude the ongoing CAFO general permit program. DEQ also asks whether it can continue to issue authorizations under the CAFO general permit. As noted, the general permit is not effective and DEQ cannot rely on it.

¶15 DEQ also asks whether it can use site specific review as an alternative. This may be an option as long as DEQ complies with all applicable statutes and rules.

¶16 DEQ and CDC argue that the Court should not suspend the authorization issued to CDC. They argue that suspension of CDC's authorization was not addressed in the Court's Memorandum and Order and that suspension of the authorization would in effect be an injunction. Although "suspension" of CDC's authorization was not specifically mentioned in the Court's Memorandum and Order, the Court did discuss CDC's operation and whether an individual EA would need to be prepared. DEQ claimed it was not required to prepare an individual EA if the operation falls within the scope of the programmatic EA for the general permit. However, the Court found that the general permit EA was ineffective. The Court went on to say that CDC's operation might fall within the scope of a properly prepared EIS, but until that time CDC's operation should be subject to the ordinary rules of public notice, comment and response.

¶17 CDC's authorization is directly tied to the general permit which the Court has determined to be ineffective. Because the general permit is ineffective, DEQ and CDC cannot use it as a basis for CDC's authorization. Therefore, CDC's authorization should be suspended until such time as the EIS is prepared and it is determined that the CDC operation comes within its scope. CDC, of course, can apply for authorization through other available means such as the Montana Pollution Discharge Elimination Program.

¶18 For these reasons, judgment should be entered in accordance with the October 23, 2002, Memorandum and Order and this Memorandum and Order.

C. Attorney Fees

¶19 Montana follows the American Rule which provides that "'a party in a civil action is generally not entitled to [attorney] fees absent a specific contractual or statutory provision.'" **Montanans for the Responsible Use of the School Trust v. State (Montrust)**, 1999 MT 263, ¶ 62, 296 Mont. 402, ¶ 62, 989 P.2d 800, ¶ 62, (quoting **Matter of Dearborn Drainage Area**, 240 Mont. 39, 42, 782, P.2d 898, 899 (1989)). However, the supreme court has recognized the certain exceptions to the rule, including the doctrine of private attorney general. **Id.**

¶20 In Montana, three factors must be considered in awarding attorney fees under the private attorney general theory: (1) the importance to society of the public policy vindicated by the litigation; (2) the necessity for private enforcement of the action and the magnitude of the burden on the plaintiff; and (3) the number of people who stand to benefit from the decision. **M ontrust**, at ¶¶ 66-67 (relying on **Seranno v. Priest**, 569 P.2d 1303 (Cal. 1977). In **Seranno**, the public policy involved was grounded in the California constitution).

¶21 In **Montrust**, the Court concluded:

> First, Montrust has litigated important public policies that are **grounded in Montana's Constitu-tion**. Second, the State argues that it had a duty to defend the statutes in the present case; thus, the State does not dispute the necessity of private enforcement of Montana's Constitution. Nor does the State dispute the magnitude of Montrust's consequent burden. Third, Montrust's litigation has clearly benefited a large class: all Montana citizens interested in Montana's public schools.

¶22 **Montrust**, at ¶ 67 (emphasis added).

¶23 Here, the Court did not decide any constitutional issue. It determined only that DEQ could not rely on the EA and that it should have prepared an EIS.

¶24 Although in **Seranno** and in **Montrust** the courts decided significant constitutional questions, **Montrust** does not appear to restrict the application of the private attorney general theory to constitutional claims and, depending on the facts, an award of attorney fees might be appropriate even though the Court does not decide a constitutional issue.

¶25 Following the hearing, Plaintiffs referred the Court to House Bill 437 which was passed by the 2003 Montana legislature and was enacted as Chapter 361, Laws 2003, which they contend supports their claim for attorney fees. DEQ contends that a full reading of the legislation shows that Plaintiffs are not entitled to attorney fees on their Montana Environmental Policy Act (MEPA) claim.

¶26 Chapter 361, Laws 2003, is an act generally revising the laws governing the environment. It addresses a number of environmental laws, including MEPA. Among other things, the Act provides that if the Court finds that challenge to a permit, license or certificate issued pursuant to the air quality laws, the open cut mining reclamation laws, the mine metal reclamation laws, or the Montana Major Facilities Siting Act was without merit or was for an improper purpose, the Court may award attorney fees incurred in defending the action. Although the Act does amend MEPA, it does not provide for attorney fees on a MEPA claim.

¶27 Other than being provided a copy of the bill, the Court has not been provided with the legislative history of the Act nor has it looked at the history. However, from the title of the bill, it appears to be the intent of the legislature to provide for attorney fees in cases involving environmental laws only in limited circumstances. The Act does raise the question of what if a defendant defends on improper

grounds but this is a MEPA claim and that issue is not before the Court.

¶28 For these reasons, the Court concludes that Plaintiffs' motion for attorney fees should be denied.

¶29 **NOW, THEREFORE, IT IS ORDERED:**

¶30 1. DEQ'S motion to alter or amend **IS DENIED**;

¶31 2. Plaintiffs' motion for entry of judgment **IS GRANTED** in accordance with the Court's Memorandum; and

¶32 3. Plaintiffs' motion for attorney fees **IS DENIED**.

DATED this 3rd day of October, 2003.

Thomas C. Honzel
District Court Judge

pc:
Jory C. Ruggiero
David K. W. Wilson, Jr.
James M. Madden
John R. Christensen/James M. Ragain
John E. Bloomquist

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MEIC v. DEQ
Decided Oct. 3, 2003
Judge Honzel
First Judicial District
Docket No. CDV-2001-210
2003 ML 3093 (1st Jud. Dist.)

NOTE: This case has the following related cases (same docket number):
05 Oct 2001 - Mt. Environmental Info. Center v. Mt. Dept. of Environmental Quality [2001 ML 3473 (1st Jud. Dist.)]
23 Oct 2002 - Montana Environmental Info. Center v. Dept. of Environ. Quality [2002 ML 3158 (1st Jud. Dist.)]
03 Oct 2003 - Montana Environmental Info. Center v. Mt. Dept. of Environ. Quality [2003 ML 3167 (1st Jud. Dist.)]

MONTANA FIRST JUDICIAL DISTRICT COURT
LEWIS AND CLARK COUNTY

MONTANA ENVIRONMENTAL INFORMATION CENTER, INC., WENDELL HARRIS, DEAN JENSEN, DEBBIE JENSEN, ROBERT LOWE, LYNN LOWE, MARK LOWE, R.J. LOWE, JOANNE BERNARD, and STUART LEWIN,
Plaintiffs,
v.
MONTANA DEPARTMENT OF ENVIRONMENTAL QUALITY,
Defendant,
and
CATTLE DEVELOPMENT CENTER, LLC,
Intervenor and Defendant.

Cause No. CDV-2001-210
JUDGMENT

¶1 Pursuant to the Memorandum and Order entered October 23, 2002, and the Memorandum and Order entered October 3, 2003,

¶2 IT IS HEREBY ORDERED, ADJUDGED AND DECREED:

¶3 1. The October 23, 2002, Memorandum and Order is adopted and fully incorporated into this Judgment.

¶4 2. DEQ shall prepare a programmatic environmental impact statement (EIS) to determine the environmental impacts of the general permit program for confined animal feeding operations (CAFOs), including a consideration of the water quality impacts of CAFOs on water quality.

¶5 3. Until the preparation and completion of the programmatic EIS required in paragraph 2 above, and the issuance of a record of decision (ROD) following the EIS, DEQ may not authorize any new CAFOs

in the state of Montana under the 2000 CAFO General Permit.

¶6 4. DEQ is directed to suspend the Cattle Development Center (CDC) water quality act CAFO authorization, pending either completion of MEPA review of the CDC operation through DEQ's programmatic CAFO EIS on the general permit program, and approval of a specific authorization thereunder, or through appropriate approval of an individual Montana Pollution Discharge Elimination Program (MPDES) permit, following individual MEPA review of the CDC.

¶7 5. Plaintiffs are awarded their costs of suit as allowed by statute.

DATED this 3rd day of October, 2003.

THOMAS C. HONZEL
District Court Judge

pc:
Jory C. Ruggiero
David K. W. Wilson, Jr.
James M. Madden
John R. Christensen/James M. Ragain
John E. Bloomquist
