

CLIENT ALERT

Federal Court Dismisses Surface Coal Mining Citizen Suit

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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 alleging that the Department of Environmental Quality (DEQ) had engaged in an ongoing practice of failing to ensure that Montana coal mining did not harm water quality or damage the hydrology of streams and groundwater, in violation of the Surface Mining Control and Reclamation Act (SMCRA). In *Montana Environmental Information Center v. Opper*, No. 6:12-cv-34, plaintiffs alleged that DEQ had prepared deficient Cumulative Hydrologic Impact Assessments (CHIAs) – evaluations used to determine whether a proposed mining operation would prevent material damage to the hydrologic balance outside the proposed permit area.

The district court granted the State's motion to dismiss and the motion for judgment on the pleadings filed by a group of coal mine owners, operators, and employee representatives that had intervened in the case, Western Energy Company, Westmoreland Resources, Inc., Spring Creek Coal LLC, Great Northern Properties Limited Partnership, Natural Resources Partners L.P., Crow Tribe of Indians, and the International Union of Operating Engineers, Local 400. Finding that the case was barred by principles of sovereign immunity, that a material damage determination is a discretionary duty which may not be challenged under SMCRA's citizen-suit provision, and that the case was not ripe for review, the court dismissed the case without prejudice to any future action in state court. Crowell and Moring attorneys John Martin, Kirsten Nathanson, and Sherrie Armstrong served as counsel to five of the defendant-intervenors.

Case Background

This case involved the State of Montana's exclusive regulation of coal mining and reclamation under the system of cooperative federalism established by SMCRA. On April 17, 2012, the Montana Environmental Information Center (MEIC) and Sierra Club brought suit against Opper, in his official capacity as DEQ director, alleging that DEQ had engaged in a pattern and practice of failing to comply with non-discretionary duties imposed by SMCRA and the Montana Strip and Underground Mining Reclamation Act in preparing CHIAs, which are used to determine whether a proposed mining operation is designed to prevent material damage to the hydrologic balance outside the proposed permit area.

Plaintiffs asserted that DEQ had failed to prepare adequate CHIAs in its approval of mining permits over a number of years. They asserted that DEQ would likely continue that pattern and practice for Western Energy Company's pending permit application for an expansion of its mining operations at the Rosebud Mine near Colstrip, Montana. More specifically, the plaintiffs alleged that DEQ had violated and would continue to violate SMCRA and the Montana Strip and Underground Mining Reclamation Act by: (1) not formulating and applying what plaintiffs called "meaningful, objective material damage criteria" to determine whether a proposed mining operation would cause material damage to the hydrologic balance; (2) not expressly analyzing whether the proposed operation would contribute to excursions from each applicable Montana water quality standard; and (3) approving applications without "rationally and reasonably" determining whether the proposed operation had been designed to prevent material damage. Plaintiffs sought declaratory and injunctive relief, along with fees and costs.

On August 3, 2012, the court permitted a group of operators and owners of Montana coal mines and a union representing mine employees to intervene in the action. The State filed a motion to dismiss and defendant-intervenors filed a motion for judgment on the pleadings. The court granted both motions on January 22, 2013.

District Court Decision

In an opinion reflecting the court's ready grasp of the complex state and federal relationships established under SMCRA's system of cooperative federalism, the court held that plaintiffs' claims should be dismissed because (i) their claims were barred by the Eleventh Amendment and were not subject to the exemption from that bar set forth in *Ex Parte Young*, 209 U.S. 123 (1908), (ii) a material damage determination is a discretionary duty that may not be challenged under SMCRA's citizen-suit provision, and (iii) the case was not ripe for review.

The court initially addressed an issue of first impression in the Ninth Circuit: whether SMCRA's exclusivity clause prohibits suits against states that have assumed primary jurisdiction over the regulation of coal mining and reclamation (called "primacy states"). Montana obtained federal approval for its regulatory program in 1982 and also regulates coal mining on federal lands in the state pursuant to a Cooperative Agreement with the U.S. Department of the Interior's Office of Surface Mining Reclamation and Enforcement. The court agreed with the State and defendant-intervenors that plaintiffs' claims were barred by the Eleventh Amendment, based on the plain language of the statute's exclusive jurisdiction provision and opinions by the U.S. Courts of Appeals in *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 court explained that, in contrast to other cooperative federalism programs, SMCRA exhibits extraordinary deference to the states and imposes mutually exclusive federal and state regulatory schemes for coal mining. The court also determined that the *Ex Parte Young* exception to the sovereign immunity bar did not apply because plaintiffs sought to compel Opper to comply with state law, holding that "[a] suit against Opper would, in essence, be a suit against the State of Montana." Slip op. at 11. The court declined to "meddle in Montana's coal permitting process" and noted that plaintiffs had appropriate state remedies under which they could seek state administrative and judicial review. *Id.*

The court also agreed with defendant-intervenors that dismissal was warranted because SMCRA's citizen-suit provision permits federal court lawsuits only for failure to perform clear-cut or ministerial functions, and a material damage determination is a discretionary duty that requires agency technical knowledge and judgment. Recognizing that a CHIA involves case-by-case factual findings and analysis, the court found that preparation of a CHIA is discretionary and could not be challenged in a SMCRA citizen suit.

Finally, the court held that even if plaintiffs could state a claim for relief, their action was not yet ripe for review – DEQ had not yet issued a CHIA in connection with the challenged expansion of Western Energy's Rosebud Mine and plaintiffs had not exhausted their administrative remedies before the state agency for the permits challenged in the complaint. The court therefore dismissed plaintiffs' suit without prejudice to plaintiffs' right to seek available relief in state court.

Implications

MEIC v. Opper marks the first time a court within the Ninth Circuit has addressed the issue of whether SMCRA's exclusivity clause prohibits citizen suits against a state regulator in federal court, expanding the reach of Third and Fourth Circuit precedent. The court's ruling also went one step beyond *Bragg* and *Pennsylvania Federation of Sportsmen's Clubs* in holding that the sovereign immunity bar also applies to state regulation of mining on federal lands under a cooperative agreement with the federal government, a particularly important issue for western states that regulate coal mining.

Moreover, the court's ruling on the types of duties that are discretionary under SMCRA and that cannot be challenged under its citizen suit provision could have wide-reaching implications for SMCRA citizen suits across the country, countermending contrary district court decisions in West Virginia prior to *Bragg*. The court's ripeness holding could also resonate, clarifying that one must exhaust administrative remedies before filing a citizen suit under SMCRA or other environmental statutes.

To read a complete copy of this decision, [click here](#).

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