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Northern Cheyenne Tribe v. Montana Department of Environmental Quality,

2010 MT 111, 356 Mont. 296.

Pat Beddow

ABSTRACT

Northern Cheyenne Tribe v. Montana Department of Environmental Quality addressed the supremacy of standards within the Clean Water Act over Montana's state imposed water quality standards. The Montana Supreme Court found the Montana Department of Environmental Quality's water quality standards violated the Clean Water Act's requirement to use pre-discharge treatment for coal bed methane wastewater released into the Tongue River. This decision is likely to be persuasive to other states imposing their own regulations on the discharge of pollutants into waterways.

I. INTRODUCTION

The Northern Cheyenne Tribe is a federally recognized Indian tribe residing in southeastern Montana along the Tongue River.⁵¹ In *Northern Cheyenne Tribe v. Montana Department of Environmental Quality*, the Montana Supreme Court addressed the issue of whether discharge permits issued without requiring any pre-discharge treatment standards violated the Clean Water Act (CWA) or the Montana Water Quality Act (MWQA).

II. FACTUAL BACKGROUND

The Tongue River originates in Wyoming and flows north through southeastern Montana to its confluence with the Yellowstone River near Miles City, Montana.⁵² The Northern Cheyenne Tribe, members of the Tongue River Water Users' Association, and the Northern Plains Resource Council (NPRC) rely on the water from the Tongue River for irrigation,

⁵¹ *Cheyenne Tribe v. Mont. Dept. of Envtl. Quality*, 2010 MT 111, ¶¶ 1, 4, 356 Mont. 296, 234 P.3d 51.

⁵² *Id.* at ¶ 4.

stockwater, recreation, and other uses.⁵³ Fidelity Exploration & Production Company (Fidelity) extracts Coal Bed Methane (CBM) in the vicinity of the Tongue River for commercial sale.⁵⁴

CBM is a form of natural gas that is produced and stored in coal beds.⁵⁵ The pressure from groundwater surrounding the coal bed effectively traps CBM in the coal seam.⁵⁶ When CBM is extracted, a significant amount of water is unavoidably drawn to the surface as a result.⁵⁷ Fidelity disposed of this groundwater by releasing it into the Tongue River.⁵⁸

The groundwater has high saline content.⁵⁹ The salinated water from CBM production is classified as a pollutant in the CWA.⁶⁰ Because of the saline content and nature of the water's disposal, the plaintiffs were concerned about the adverse effects that might result from the agricultural uses of the water and to the river system itself.⁶¹

Due to CBM water's classification as a pollutant, Fidelity was required to obtain a National Pollutant Discharge Elimination System (NPDES) permit before discharging it into the Tongue River.⁶² These permits are issued by the Environmental Protection Agency (EPA) or an EPA-approved state agency.⁶³ The Montana Department of Environmental Quality (DEQ) administers such permits through the Montana Pollutant Discharge Elimination System (MPDES).⁶⁴

⁵³ *Id.*

⁵⁴ *Id.*

⁵⁵ *Id.* at ¶¶ 5-6.

⁵⁶ *Id.* at ¶ 5.

⁵⁷ *Id.*

⁵⁸ *Id.*

⁵⁹ *Id.* at ¶ 6.

⁶⁰ *Id.* (referencing 33 U.S.C. § 1362(6) (2006); *N. Plains Resource Council v. Fidelity Exploration & Dev. Co.*, 325 F.3d 1155, 1160 (9th Cir. 2003)).

⁶¹ *Id.* at ¶ 5.

⁶² *Id.* at ¶ 7.

⁶³ *Id.*

⁶⁴ *Id.* (pursuant to Mont. Code Ann. § 75-5-402 (2009); Admin. R. Mont. 17.30.101 (2009)). Mont. Code Ann. § 75-5-211 authorizes the administration of permits by DEQ through MPDES.

Fidelity discharged untreated CBM water into the Tongue River without a permit in August 1998 and continued until June of 2000.⁶⁵ DEQ approved this practice pursuant to Section 75-5-401(1)(b) of the Montana Code Annotated, which allows for the discharge of CBM water as long as it does not alter the ambient water quality so as to exceed the concentration parameters for a particular body of water.⁶⁶ In 1998, the EPA notified DEQ that the Montana statute conflicted with the CWA and demanded that the exemptions be revoked; DEQ did not take any action.⁶⁷ Nonetheless, Fidelity filed for MPDES permits in January of 1999.⁶⁸ NPRC filed an action against Fidelity in June of 2000, challenging Fidelity's compliance with the NPDES permitting requirements.⁶⁹ Soon after, DEQ issued Fidelity a permit to release untreated CBM water into the Tongue River despite earlier decisions that a permit was not required.⁷⁰ In 2004, Fidelity applied for a second permit and a renewal of the 2000 permit.⁷¹ DEQ approved both of Fidelity's applications in 2006.⁷²

Under the second permit, Fidelity was required to treat part of the wastewater and blend it with untreated wastewater prior to discharge.⁷³ DEQ enforced discharge limitations by imposing water quality standards.⁷⁴ The water quality standards were based on the change in ambient water quality downstream from the discharge site.⁷⁵ Water quality standards under the MWQA are created by the Montana Board of Environmental Review (BER).⁷⁶ In 2003, BER set a water quality standard specifically for the discharge of the water produced as a result of CBM, stating

⁶⁵ *Id.* at ¶ 8.

⁶⁶ *Id.* (discussing Mont. Code Ann. § 75-5-401(1)(b)).

⁶⁷ *Id.*

⁶⁸ *Id.* at ¶ 9.

⁶⁹ *Id.*

⁷⁰ *Id.*

⁷¹ *Id.*

⁷² *Id.* at ¶ 10.

⁷³ *Id.*

⁷⁴ *Id.* at ¶ 11.

⁷⁵ *Id.*

⁷⁶ *Id.* at ¶ 13. The Board is authorized to set these standards under Mont. Code Ann. §§ 75-5-201, 75-5-305.

that the discharge was considered “nonsignificant” if it did not have a measureable effect on the existing uses of the receiving waterway.⁷⁷ Both 2006 permits were evaluated and approved using this 2003 rule.⁷⁸ At the time, BER was revamping its standards, however, it did not impose pre-discharge, technology based standards because they would be too costly and unfeasible; instead BER established “harmful parameters” of discharge in the waterways.⁷⁹ BER adopted the new rule one month after the permits were issued to Fidelity.⁸⁰

III. PROCEDURAL BACKGROUND

The plaintiffs filed this lawsuit on April 3, 2006, challenging DEQ’s issuance of the discharge permits to Fidelity, claiming DEQ violated the CWA and the MWQA by not imposing pre-discharge standards on both permits.⁸¹ Both parties filed motions for summary judgment in the Montana Twenty-Second Judicial District Court, Big Horn County.⁸² The court concluded that the water quality standards were in compliance with the MWQA and entered summary judgment in favor of the defendants, DEQ and Fidelity, on all counts.⁸³ The primary issue on appeal was whether DEQ violated the CWA or the MWQA by issuing discharge permits without imposing pre-discharge treatment standards.⁸⁴

IV. ANALYSIS

The Montana Supreme Court analyzed the issue in two parts. First, the Court analyzed the CWA to determine whether its application was discretionary by states.⁸⁵ Next, the Court

⁷⁷ *Id.* at ¶¶ 13-14 (discussing 40 C.F.R. § 131.12(a)(2) (2010); Mont. Code Ann. §75-5-303).

⁷⁸ *Id.* at ¶ 15.

⁷⁹ *Id.*

⁸⁰ *Id.*

⁸¹ *N. Cheyenne Tribe v. Mont. Dept. of Envtl. Quality*, 2008 Mont. Dist. LEXIS 647 (Mont. 22d Dist. Big Horn Co. Dec. 8, 2008).

⁸² *Id.* at ¶ 17.

⁸³ *Id.*

⁸⁴ *Id.* at ¶ 20.

⁸⁵ *Id.* at ¶ 24.

considered whether the CWA imposed the same requirements on states that implemented their own permitting systems for discharge.⁸⁶

A. Discretion in the CWA

The Court noted that the CWA was enacted in 1948 with the goal of restoring “the chemical, physical, and biological integrity of the Nation’s waters” by eliminating the discharge of pollutants.⁸⁷ The Court found that the NPDES delegated the authority to regulate the discharge of pollutants through permitting.⁸⁸ In 1972, Congress amended the CWA and implemented pre-discharge treatment standards for the discharge of pollutants into waterways.⁸⁹ This commitment was reaffirmed in 1985, when the CWA was again amended.⁹⁰ Congress reasoned that pre-discharge standards would serve to better regulate individual polluters, and in turn provide for more adequate control over the discharge of pollutants.⁹¹

The Court determined that Section 402(a) of the CWA⁹² grants the administrator of the NPDES the authority to issue permits subject to the limitations imposed by Section 301.⁹³ Section 1311 states that the discharge of pollutants is unlawful unless otherwise accepted within the Section.⁹⁴ Pre-discharge treatment standards are required in the absence of federal guidelines.⁹⁵ Furthermore, new sources of pollution must use the best available technology (BAT) to control the discharge of pollutants.⁹⁶

⁸⁶ *Id.* at ¶ 32.

⁸⁷ *Id.* at ¶ 21 (citing 33 U.S.C. § 1251(a)).

⁸⁸ *Id.* (citing 33 U.S.C. § 1342). Although the discharge of pollutants is generally unlawful under 33 U.S.C. § 1311, § 1342 provides an exception where NPDES may authorize discharge as long as it falls within other limitations imposed by the CWA.

⁸⁹ *Id.* at ¶ 22.

⁹⁰ *Id.* at ¶ 23.

⁹¹ *Id.* at ¶¶ 22-23.

⁹² Found at 33 U.S.C. § 1342.

⁹³ *N. Cheyenne Tribe*, ¶ 28.

⁹⁴ *Id.* at ¶ 29 (citing 33 U.S.C. § 1311(a)).

⁹⁵ *Id.* (citing 33 U.S.C. § 1311(b)(1)(A)-(2)(A)).

⁹⁶ *Id.* (citing 33 U.S.C. § 1316(a)(1)-(2)).

The administrator may set effluent limitations for either an entire industry, or on an individual basis for each permit issued.⁹⁷ In the individual situations where the EPA has not designated any discharge standards, the administrator’s “best professional judgment” determines the BAT for pre-discharge treatment standards.⁹⁸ The administrator considers case-by-case, the costs and benefits of the BAT, as well as the other environmental impacts of implementing the technology to determine appropriate control measures and standards.⁹⁹ The administrator then has a non-discretionary duty to enforce the standards.¹⁰⁰

The Court noted that during the entire period in which Fidelity had applied for and received discharge permits, the EPA had not established any guidelines for CBM.¹⁰¹ Therefore, the administrator was to make a case-by-case determination of the BAT and standards for pre-discharge treatment.¹⁰² The Court again emphasized that Section 1311 of the CWA required pre-discharge treatment standards in every NPDES permit issued under Section 1342.¹⁰³

B. State Mandates

The Court found that the plain language in the CWA stated that Section 1311 represented the minimum requirements necessary to issue a permit under Section 1342.¹⁰⁴ Fidelity, however, contended that *Washington v. EPA*,¹⁰⁵ held that states did not have to follow pre-discharge treatment standards until the EPA established industry wide standards.¹⁰⁶ The Court noted that in 1979, the EPA reacted to *Washington*, and provided that “permit writers” impose pre-

⁹⁷ *Id.* at ¶ 25 (citing 33 U.S.C. § 1342(a)(1)(A)-(B)).

⁹⁸ *Id.* (citing *Texas Oil & Gas Assn. v. EPA*, 161 F.3d 923, 928-29 (5th Cir. 1998)).

⁹⁹ *Id.* at ¶ 26 (citing 33U.S.C. § 1314(b)(1)(B); *Texas Oil & Gas*, 161 F.3d at 928-29). Factors including the age of the equipment, process employed, engineering aspects, process changes, and non-water quality environmental impact are to be considered regardless of whether the EPA or a State issues a permit. 40 C.F.R. § 125.3(c)-(d) (2010).

¹⁰⁰ *Id.* at ¶ 30 (citing *PUD No. 1 of Jefferson Co. v. Wash. Dept. of Ecology*, 511 U.S. 700, 704 (1994)).

¹⁰¹ *Id.* at ¶ 27 (citing 74 Fed. Reg. 68599, 68607 (Dec. 28, 2009)).

¹⁰² *Id.* at ¶ 30.

¹⁰³ *Id.* at ¶ 31.

¹⁰⁴ *Id.* at ¶ 33.

¹⁰⁵ 573 F.2d 583 (9th Cir. 1978).

¹⁰⁶ *N. Cheyenne Tribe*, ¶ 34.

discharge treatment standards on a case-by-case basis.¹⁰⁷ The EPA specifically stated that it intended the pre-discharge standards to apply to states, believing that it had been misinterpreted in the past, so as to only apply to NPDES permits.¹⁰⁸ Furthermore, the comment to 40 C.F.R § 125.3(c) stated that the “permit writer” may be either the EPA or a state.¹⁰⁹ The Court found that the clear intent of the EPA’s promulgations was that DEQ “stand in the shoes” of the administrator and adhere to the same requirements in issuing discharge permits.¹¹⁰

Despite DEQ’s arguments that “more stringent” water quality standards may be used in place of pre-discharge standards, the Court found that the two represented clearly distinct functions.¹¹¹ The Court declined to accept that water quality standards could be more stringent than pre-discharge standards, especially in light of the EPA’s mandate that a state must, at a minimum, impose pre-discharge standards.¹¹² The Court found that in addition to the EPA’s requirement that states adopt their standards, DEQ had specifically done so in the Administrative Rules of Montana.¹¹³

Lastly, the Court declined to accept DEQ’s contention that only BER could adopt technology based limitations on discharge.¹¹⁴ However, the Court found that BER could only adopt industry-wide technology based limitations when they had not yet been established by the EPA.¹¹⁵ For that reason, nothing was found to prohibit DEQ from establishing pre-discharge

¹⁰⁷ *Id.* at ¶ 35 (citing 40 C.F.R. § 125.3 (2010)).

¹⁰⁸ *Id.* (citing 44 Fed. Reg. 32854, 32893 (Jun. 7, 1979)).

¹⁰⁹ *Id.* (citing 40 C.F.R. § 125.3(c) (2010)).

¹¹⁰ *Id.* at ¶ 37.

¹¹¹ *Id.* at ¶ 40.

¹¹² *Id.* at ¶ 42-43 (citing 40 C.F.R. § 125.3(a) (2010)).

¹¹³ *Id.* at ¶ 44 (referencing Admin. R. Mont. 17.30.1303, 17.30.1340(10) (2009)).

¹¹⁴ *Id.* at ¶ 45. DEQ based this presumption on Mont. Code Ann. § 75-5-305(1).

¹¹⁵ *Id.*

treatment standards on a case-by-case basis.¹¹⁶ Fidelity's permits were declared void, and DEQ was given 90 days to re-evaluate the applications under pre-discharge standards.¹¹⁷

V. CONCLUSION

Ultimately, the decision in *Northern Cheyenne Tribe v. Montana Department of Environmental Quality* delivers a definitive resolution to those seeking a more concrete measure of the discharge limitations into Montana waterways. This decision enunciates the requirement that states follow the CWA by standing in the shoes of the EPA while issuing permits for the discharge of pollutants. The pre-discharge standards represent a compromise for both the producers and those affected by CBM production. Tracing pollutants back to a single source may be done with a more competent approach because pre-discharge standards are easier to measure than water quality standards. Through pre-discharge standards, CBM producers must now actively pre-determine their discharges, as opposed to reacting to water quality standards. As technology improves, the standards for pre-discharge treatment are likely to result in more stringent criterion. For that reason, producers can anticipate tightening restrictions and plan accordingly when applying for discharge permits.

¹¹⁶ *Id.*

¹¹⁷ *Id.* at ¶ 47.