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## **PREVIEW; Park Cty. Env'tl. Council and Greater Yellowstone Coal. v. Montana Dep't of Env'tl. Quality and Lucky Minerals, Inc.: *MEPA and Review of Agency Decisions***

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**PREVIEW; *Park Cty. Env'tl. Council and Greater Yellowstone Coal. v. Montana Dep't of Env'tl. Quality and Lucky Minerals, Inc.*: MEPA and Review of Agency Decisions**

**Lacey Fortin**

The Montana Supreme Court was originally set to hear oral argument on this matter on Thursday, April 30, 2020. However, due to the COVID-19 pandemic, the Court cancelled oral arguments and will decide the matter based on the parties' briefs.

**I. INTRODUCTION**

This case presents the following issues: 1) whether the plaintiffs-appellees have standing to challenge the Montana Department of Environmental Quality's (DEQ) decision to issue Lucky Minerals an exploration license; 2) whether the DEQ violated the Montana Environmental Policy Act (MEPA) by failing to take the required "hard look" at the environmental impacts of Lucky Minerals' proposed mining exploration; and 3) whether Mont. Code Ann. § 75-1-201(6)(c)–(d) (2019) violates plaintiff-appellees' constitutional rights to meaningful participation in agency decision-making and to a clean and healthful environment.

**II. FACTUAL AND PROCEDURAL BACKGROUND**

In February 2015, Lucky Minerals, Inc. (Lucky Minerals) filed an application to conduct mining exploration on its property in the Emigrant Gulch Mining District of the Absaroka Mountains. The DEQ prepared a draft environmental assessment (EA), which was submitted for public review and a 60-day comment period beginning on October 12, 2016.<sup>1</sup> The DEQ ultimately approved Lucky Minerals' application, adopting an agency modified alternative which imposed some additional mitigation measures.<sup>2</sup>

After issuance of the exploration license to Lucky Minerals, Park County Environmental Council and Greater Yellowstone Coalition (PCEC) filed a lawsuit in Park County District Court challenging the DEQ's decision to grant the license.<sup>3</sup>

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<sup>1</sup> Appellant's (State of Montana) Opening Brief at 5, *Park Cty. Env'tl. Council v. Montana Dep't of Env'tl. Quality*, <https://perma.cc/9HLH-DHVN> (November 29, 2019) (No. 19-0492).

<sup>2</sup> *Id.*

<sup>3</sup> Appellant's (Lucky Minerals) Opening Brief at 6, *Park Cty. Env'tl. Council v. Montana Dep't of Env'tl. Quality*, <https://perma.cc/S2E9-B2J4> (November 29, 2019) (No. 19-0492).

PCEC also moved to vacate Lucky Minerals' exploration license.<sup>4</sup> The district court ruled that the DEQ violated MEPA by failing to take the required "hard look" at the environmental impacts of Lucky Minerals' proposed plan, including the impacts on wildlife and water quality.<sup>5</sup> The district court also granted PCEC's motion to vacate the exploration license, holding the remedial measure limitations in Mont. Code Ann. § 75-1-201(6)(c)–(d) violated the plaintiffs' constitutional rights to participation in agency decision-making and to a clean and healthful environment.<sup>6</sup>

Lucky Minerals and DEQ have appealed the district court's rulings. The Office of the Attorney general has intervened on behalf of the State of Montana.

### III. SUMMARY OF ARGUMENTS

#### A. *Appellants' (DEQ, Lucky Minerals, and State of Montana) Arguments*

Lucky Minerals argues that PCEC does not have standing in this matter. Both Lucky Minerals and the DEQ argue that the district court erred in ruling that the DEQ's environmental analysis was inadequate under MEPA. Lucky Minerals and the State of Montana also argue that the district court erroneously concluded that the statute requiring remand to the DEQ was unconstitutional.

First, Lucky Minerals contends that PCEC failed to meet the requirements for standing to challenge the issuance of their exploration license. Because MEPA is barren of a provision conferring an express right of judicial review to private litigants, standing in MEPA actions is based upon prudential standards.<sup>7</sup> Therefore, a plaintiffs' standing to bring this action requires the following: 1) a clear threat to a past, present or threatened injury to a property or civil right; 2) the alleged injury must be an actual "case or controversy";<sup>8</sup> and 3) the injury must be "concrete."<sup>9</sup>

Lucky Minerals argues that PCEC's "vague allegations of non-specific injuries to biking, hiking, and skiing up Emigrant

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<sup>4</sup> *Id.* at 7–8.

<sup>5</sup> Appellant's (DEQ) Opening Brief at 13–14, *Park Cty. Envtl. Council v. Montana Dep't of Envtl. Quality*, <https://perma.cc/C9KS-6ED5> (November 27, 2019) (No. 19-0492).

<sup>6</sup> Appellant's (DEQ) Opening Brief, *supra* note 5, at 8.

<sup>7</sup> *Id.* at 19.

<sup>8</sup> *Schoof v. Nesbit*, 316 P.3d 831, 835 (Mont. 2014).

<sup>9</sup> *Schoof*, 316 P.3d at 836.

Gulch” are insufficient to satisfy those requirements.<sup>10</sup> In fact, they state that PCEC’s claimed standing is simply based on “speculation that legal injury could potentially be visited upon [them] at some unspecified point in the future as a result of [large-scale] industrial mining activity.”<sup>11</sup> As such, Lucky Minerals argues that PCEC’s complaint in the case below should have been dismissed for lack of standing.

Second, the DEQ contends it took the required “hard look” at Lucky Minerals’ proposed plan. In doing so, they state they satisfied their obligation to “make an adequate compilation of relevant information, to analyze it reasonable, and to consider all pertinent data.”<sup>12</sup> The DEQ disagrees with the district court’s finding that they “cherry picked”, or arbitrarily disregarded, pertinent water quality,<sup>13</sup> and argues they were not required to consider the potential effects of a full-scale mining operation as a secondary impact of Lucky Minerals’ proposed plan.<sup>14</sup> Furthermore, because their final EA took a sufficiently “hard look” at the relevant data, they maintain no formal environmental impact (EIS) was required.

Finally, the State of Montana argues that Mont. Code Ann. § 75-1-201(6)(c) and (d) are constitutional, both facially and as applied to the facts of this case. The State of Montana notes that MEPA merely constitutes procedural guidelines designed to complement substantive regulatory environmental law in Montana.<sup>15</sup> In contrast to regulatory laws, MEPA is “intended to inform the legislature and the public whether these substantive environmental protection laws are sufficient [to protect Montana’s environment].”<sup>16</sup>

The State contends the district court erroneously determined MEPA itself should provide remedies to protect the environment.<sup>17</sup> This, they maintain, is antithetical to the Court’s previously “restrained and targeted approach” of reviewing substantive environmental laws in isolation from MEPA.<sup>18</sup> Because PCEC only alleged injuries under MEPA—which does

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<sup>10</sup> Appellant’s (Lucky Minerals) Opening Brief, *supra* note 3, at 22.

<sup>11</sup> *Id.* at 18.

<sup>12</sup> Appellant’s (DEQ) Opening Brief, *supra* note 5, at 12.

<sup>13</sup> *Id.* at 22.

<sup>14</sup> *Id.* at 34 (citing MONT. CODE ANN. § 82-4-335(1) (2019) requiring Lucky Minerals to get additional approval to conduct any future mining).

<sup>15</sup> Appellant’s (State of Montana) Opening Brief, *supra* note 1, at 16.

<sup>16</sup> *Id.* at 17 (citing MONT. CODE ANN. § 75-1-102(1) (2019)).

<sup>17</sup> *Id.* at 23.

<sup>18</sup> *Id.* at 25.

not provide injunctive relief—and PCEC also failed to allege injury under any substantive law, Lucky Minerals contends they are not entitled to relief.

The State also asserts the district court’s ruling that the DEQ should have considered the potential impacts of an expansion into a full-scale mining operation violated the tiered decision-making system of the Metal Mining Reclamation Act (MMRA). The State notes the MMRA would require Lucky Minerals to file a separate application before conducting full-scale mining. The State thus inherently argues the MMRA was the substantive regulatory law on which the district court should have relied in making its decision.

### *B. Appellees’ (PCEC) Arguments*

Appellees argue that the district court’s decision should be affirmed in all respects. Specifically, they contend the district court was correct in determining they had standing to challenge the grant to Lucky Minerals of a mining exploration license, and that the DEQ arbitrarily failed to consider pertinent data on potential adverse environmental impacts. As such, PCEC contends the DEQ’s Final EA was flawed, and should have resulted in a finding of significant environmental impacts and called for an EIS. Finally, PCEC argues the remedial measure restrictions in Mont. Code Ann. § 75-1-201(6)(c)–(d) fail to satisfy strict scrutiny and are therefore unconstitutional both facially and as applied here.

PCEC contends they have standing to challenge the DEQ’s approval of Lucky Mineral’s mining exploration license. Consistent with precedent, the individual plaintiffs filed affidavits in the district court alleging “injuries sufficient to confer standing by documenting harm to their business, property, recreational or aesthetic interests if the exploration project proceeds.”<sup>19</sup> PCEC argues their injuries are sufficient to establish standing because, as nearby landowners and frequent recreationists in the Emigrant Gulch area, the proposed exploration project will be more harmful to them than the public generally.<sup>20</sup>

PCEC also argues the DEQ violated MEPA by failing to take the requisite “hard look” at the pertinent information in its environmental assessment of Lucky Minerals’ proposed mining

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<sup>19</sup> Plaintiffs-Appellees’ (PCEC) Response Brief at 14, *Park Cty. Envtl. Council v. Montana Dep’t of Envtl. Quality*, <https://perma.cc/HE62-RNCH> (January 27, 2020) (No. 19-0492).

<sup>20</sup> *Id.* at 16.

exploration project. Specifically, PCEC contends the DEQ's final EA was insufficient because it arbitrarily dismissed potential harm to wildlife and water quality, and it failed to properly evaluate feasible project alternatives that contemplated a reduced scale of Lucky Minerals' exploration project.<sup>21</sup> As a result, PCEC asserts that the DEQ erroneously determined no EIS was required and therefore improperly issued Lucky Minerals the exploration license.

Specifically, PCEC contends information gaps, selective reliance on data, and a vague "plan to make a plan" to mitigate potential adverse environmental impacts constitute an arbitrary analysis.<sup>22</sup> In PCEC's view, these failings resulted in an analysis that should have found significant environmental impacts, which would have required an EIS pursuant to Mont. Code Ann. § 75-1-201(1)(b)(iv) and Mont. Admin. R. 17.4.607.<sup>23</sup> Additionally, PCEC asserts the DEQ violated MEPA by "failing to conduct an independent analysis" of alternative methods of meeting Lucky Minerals' project goals and by failing to seriously consider how to reduce potential adverse environmental impacts.<sup>24</sup>

Finally, PCEC argues the 2011 Legislature's "prohibition against district courts' vacating or enjoining of unlawful state agency decisions violates the public's fundamental rights to be free from unreasonable environmental degradation, Mont Const. art. II, § 3; art. IX, § 1, and participate in agency decision-making before final decisions are made, Mont. Const. art. II, § 8."<sup>25</sup> In other words, PCEC contends the restrictions on remedial measures provided in the statute infringe on their constitutional rights to a clean and healthful environment and to participate in agency decision-making.

They argue that, because these provisions infringe on fundamental rights, they must satisfy strict scrutiny by being narrowly tailored to a compelling state interest.<sup>26</sup> PCEC's position is that, with respect to Lucky Minerals' exploration permit, Mont. Code Ann. § 75-1-201(6)(c)-(d) are not narrowly tailored to a compelling state interest, and therefore do not pass strict scrutiny.

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<sup>21</sup> *Id.* at 17–22.

<sup>22</sup> *Id.* at 27–28.

<sup>23</sup> *Id.* at 28.

<sup>24</sup> Plaintiffs-Appellees' (PCEC) Response Brief, *supra* note 20, at 32 (citing Southern Utah Wilderness Alliance v. Norton, 237 F.Supp.2d 48, 53 (D.C., 2002), applying National Environmental Policy Act).

<sup>25</sup> *Id.* at 37.

<sup>26</sup> *Id.* at 51.

Thus, they assert the Supreme Court should affirm the district court's ruling that the provision is unconstitutional.

#### IV. ANALYSIS

The Court will likely affirm the district court's order that plaintiffs-appellees have standing to challenge Lucky Minerals' exploration license based on alleged past, present, or threatened injury to property and business interests, as well as infringement on their constitutional rights.<sup>27</sup> The individual plaintiffs include property owners, business owners, and frequent recreationists in the area.<sup>28</sup> The Court has, in other instances, affirmed plaintiffs' standing to challenge activities based on potential impacts to wildlife, noise and traffic, and property values.<sup>29</sup> It is therefore likely the Court will agree with the district court that plaintiffs' alleged injuries to property values, business operations, and recreational interests based on disturbance of wildlife, threats to water quality, and increased traffic and noise are sufficient to establish a "past, present, or threatened injury" to property rights that are "distinguishable from . . . injury to the public generally."<sup>30</sup>

If the Court finds the plaintiffs-appellees have standing to challenge the DEQ's decision to issue Lucky Minerals' exploration license, it is likely to find the procedural limitations under Mont. Code Ann. § 75-1-201(6)(c)–(d) do not infringe on the constitutional right to participate in agency decision-making.

The Montana Constitution guarantees citizens the right to "expect governmental agencies to afford such reasonable opportunity for citizen participation in the operation of the agencies prior to the final decision."<sup>31</sup> Here, the DEQ provided notice and opportunity to participate by submitting the proposal for public review and comment pursuant to this requirement.<sup>32</sup> It appears the plaintiffs-appellees participated enthusiastically in this process.

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<sup>27</sup> *Id.* at 14 (citing *Aspen Trails Ranch, LLC v. Simmons*, 230 P.3d 808 (Mont. 2010) (subsequent citations omitted)).

<sup>28</sup> *Id.*

<sup>29</sup> Plaintiffs-Appellees' (PCEC) Response Brief, *supra* note 19, at 14 (citing *Aspen Trails Ranch*, 230 P.3d 808; *Heffernan v. Missoula City Council*, 255 P.3d 80 (Mont. 2011)).

<sup>30</sup> *Id.* at 12–13 (citing *Heffernan*, 255 P.3d at 92).

<sup>31</sup> MONT. CONST. art. II, § 8.

<sup>32</sup> Appellant's (DEQ) Opening Brief, *supra* note 5, at 8.

However, regardless of whether PCEC actually participated in the DEQ's *original* decision-making process, a claim for infringement of their right to participate is essentially rendered moot upon a court remanding the decision for reconsideration. Furthermore, any future violation by the agency of the plaintiffs-appellees' right to participate in the *new* decision-making process would be directly actionable under MEPA. In short, it seems improbable the Court would find the procedural limitations of the statute, alone, create an actionable injury to the constitutional right to participate.

Finally, the Court will likely find that the district court erroneously determined the DEQ's environmental analysis was insufficient and improperly voided Lucky Minerals' exploration license in violation of the procedural limitations of Mont. Code Ann. § 75-1-201(6)(c)–(d). As defendant-appellants Lucky Minerals point out, courts review agency actions under MEPA to determine whether the agency acted arbitrarily, capriciously, or unlawfully.<sup>33</sup> When courts review an executive agency's interpretation of its own governing laws or regulations, substantial deference is paid to the agency's decisions rendered pursuant to its own expertise "unless such interpretation is plainly inconsistent with the spirit of the regulation."<sup>34</sup> The Court will afford the DEQ the appropriate level of deference here. In doing so, it is likely to find the environmental analysis was sufficient to warrant the issuance of an exploration license to Lucky Minerals.

## V. CONCLUSION

It is likely that the Court will affirm the district court's order that PCEC has standing to challenge Lucky Minerals' mining exploration permit based on concrete and personal alleged injuries. In doing so, the Court will likely find Mont. Code Ann. § 75-1-201(6)(c)–(d) do not unconstitutionally infringe on the right to participate in agency decision-making, and instead merely serve as a procedural complement to substantive regulatory laws. Furthermore, the Court will afford the DEQ deference on its environmental assessment and hold the analysis of potential environmental impacts was sufficient. As a result, the Court will likely reverse the district court's order voiding Lucky Minerals' exploration license.

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<sup>33</sup> Ravalli County Fish and Game Ass'n, Inc. v. Mont. Dept. of State Lands, 903 P.2d 1362, 1366 (Mont. 1995) (internal citation omitted).

<sup>34</sup> Clark Fork Coalition v. Montana Dept. of Environmental Quality, 197 P.3d 482, 488 (Mont. 2008).