

Public Land and Resources Law Review

Volume 0 Case Summaries 2017-2018

Montana Environmental Information Center v. U.S. Office of Surface Mining

Lowell J. Chandler

Alexander Blewett III School of Law at the University of Montana, lowell.chandler@umontana.edu

Follow this and additional works at: <https://scholarship.law.umt.edu/plrlr>

 Part of the [Energy and Utilities Law Commons](#), [Environmental Law Commons](#), [Natural Resources Law Commons](#), [Nonprofit Organizations Law Commons](#), and the [Oil, Gas, and Mineral Law Commons](#)

Recommended Citation

Chandler, Lowell J. (2018) "Montana Environmental Information Center v. U.S. Office of Surface Mining," *Public Land and Resources Law Review*: Vol. 0 , Article 23.

Available at: <https://scholarship.law.umt.edu/plrlr/vol0/iss8/23>

This Case Summary is brought to you for free and open access by The Scholarly Forum @ Montana Law. It has been accepted for inclusion in Public Land and Resources Law Review by an authorized editor of The Scholarly Forum @ Montana Law.

Montana Environmental Information Center v. United States Office of Surface Mining, ___ F. Supp. 3d ___, 2017 U.S. Dist. LEXIS 129018, 2017 WL 3480262 (D. Mont. Aug. 14, 2017)

Lowell J. Chandler

In *MEIC v. U.S. Office of Surface Mining*, the cost of coal mining's climate impacts and the agency's NEPA review obligations are at issue. The United States District Court for the District of Montana found that the Office of Surface Mining and Enforcement failed to adequately consider the need for an EIS and to take a hard look at the indirect, cumulative, and foreseeable impacts of a proposed coal mine expansion in central Montana. In its NEPA analysis, the court concluded that if the benefits of a carbon-intensive project are quantified, then the costs to the climate should be also, using the Social Cost of Carbon Protocol tool. The court held that the Enforcement Office was arbitrary and capricious in its EA of the proposed coal mine expansion and in its consideration of an EIS.

I. INTRODUCTION

Montana Environmental Information Center (MEIC), and two other organizations dismissed for lack of standing, challenged the United States Office of Surface Mining and Enforcement's (Enforcement Office) decision to approve Signal Peak Energy's (Signal Peak) application for a federal coal mining plan modification.¹ The Enforcement Office conducted an Environmental Assessment (EA) of the Bull Mountains Mine No. 1 Federal Mining Plan Modification (Mining Plan EA), concluding with a Finding of No Significant Impact (FONSI).² MEIC, requesting declaratory and injunctive relief, challenged the Mining Plan EA arguing on seven claims that the Enforcement Office violated the National Environmental Policy Act (NEPA).³

The United States District Court for the District of Montana granted summary judgment in favor of three of MEIC's seven claims.⁴ First, the court found that the Enforcement Office's FONSI insufficiently considered the need for an Environmental Impact Statement (EIS).⁵ Next, the court found that the Enforcement Office failed to take a hard look at the indirect and cumulative effects of coal transportation and combustion and the foreseeable greenhouse gas (GHG) emissions.⁶ However, as to MEIC's four other NEPA claims, the court held otherwise.⁷ The court

1. *Montana Environmental Information Center v. United States Office of Surface Mining*, ___ F. Supp. 3d ___, 2017 U.S. Dist. LEXIS 129018, 2017 WL 3480262, at *1 (D. Mont. Aug. 14, 2017).
2. *Id.*
3. *Id.* at *4.
4. *Id.* at *20.
5. *Id.* at *1.
6. *Id.*
7. *Id.*

found the Enforcement Office had discretion to ignore internal NEPA guidance, took a hard look at impacts on waterbodies, and the Mining Plan EA's "purpose and need" statement was adequate.⁸ Additionally, since MEIC did not argue that the Enforcement Office failed to consider reasonable alternatives, the Enforcement Office prevailed on that claim.⁹

II. FACTUAL AND PROCEDURAL BACKGROUND

Under the Mineral Leasing Act, the Secretary of Interior may dispose of federal coal reserves upon approval of a mining operation and reclamation plan.¹⁰ To carry out this process, the Surface Mining Control and Reclamation Act (SMCRA) created the Enforcement Office, which recommends approval or denial of a mining plan to the Secretary.¹¹ Under SMCRA, underground coal mines are also regulated.¹²

Mining at the Bull Mountains Mine No. 1 (Mine) began in the 1990s.¹³ In 2014, international markets received 95% of coal exports.¹⁴ Trains transport the coal via the Broadview Spur, a 35-mile rail line connected to the Burlington Northern/Santa Fe mainline.¹⁵ Under a 1993 permit approved by the Montana Department of Environmental Quality, Signal Peak, owner and Intervenor-Defendant, operates the Mine.¹⁶

The Mine has undergone several NEPA reviews since the 1990s.¹⁷ In 1990, the Bureau of Land Management (BLM) issued an EIS (1990 EIS) on the Mine, assessing a maximum development scenario of "2.0 million tons of coal per year."¹⁸ In 1992, the Montana Department of State Lands issued an EIS (1992 EIS), assessing peak production of 3.3 million tons per year for 44 years, equivalent to 145.2 million tons.¹⁹

In 2008, Signal Peak applied with the BLM to lease an additional 2,679.9 acres of federal coal at the Mine (equivalent to 61.4 million tons), which would also allow access to state and private coal.²⁰ In 2011, the BLM concluded its EA (2011 Coal Lease EA), which adopted the 1990 EIS and the 1992 EIS, and issued a FONSI.²¹ In 2012, the BLM leased the federal coal, providing Signal Peak access to a total of 176 million tons, more than doubling their existing lease.²² After preparing a "Checklist

8. *Id.*

9. *Id.*

10. *Id.* (citing 30 U.S.C. §§ 181, 207(c)(2017)).

11. *Id.* (citing 30 U.S.C. § 1211(a)).

12. *Id.* (quoting 30 U.S.C. § 1291(28)).

13. *Id.* at *2.

14. *Id.* at *3 (citing AR 021304).

15. *Id.* at *3.

16. *Id.*

17. *Id.*

18. *Id.*

19. *Id.*

20. *Id.*

21. *Id.*

22. *Id.*

[EA]” supplementing the 20-year old 1992 EIS, the MTDEQ approved Signal Peak’s application to amend its existing 1993 mining permit.²³

As Signal Peak moved forward with its mine expansion plans, federal agencies were developing a tool to account for the climate impact costs of rulemakings.²⁴ In 2011, pursuant to Executive Order 12866, the Social Cost of Carbon Protocol (SCC Protocol) tool was developed.²⁵ The SCC Protocol was developed “for use in cost-benefit analyses of proposed regulations that could impact cumulative global emissions. . . [and] to monetize damages associated with an incremental increase in [annual] carbon emissions. . . .”²⁶ The SCC Protocol was soon found to be a valid tool in regulations and in the NEPA review process.²⁷

In 2013, Signal Peak requested an approval from the Enforcement Office of a “mining plan modification for its federal coal lease. . . .”²⁸ In 2015, the Enforcement Office prepared the Mining Plan EA.²⁹ The Mining Plan EA allowed for an increase in annual coal production from a current 5 million tons to 12 million, with potential for 15 million.³⁰ The Enforcement Office found an EIS was not required and issued a FONSI, which was subsequently challenged by MEIC.³¹

III. ANALYSIS

The court reviewed MEIC’s NEPA challenges under the Administrative Procedures Act’s (APA) “arbitrary and capricious” standard.³² Under NEPA, the standard question is whether the agency took a “hard look at the environmental consequences before taking a major action,” which may necessitate an EIS.³³ If the environmental effects are “highly uncertain,” and uncertainty or speculation “may be resolved by further collection of data,” then NEPA mandates an EIS.³⁴

A. *Count II: Sufficient Consideration Given to an EIS*

MEIC claimed that the Enforcement Office’s NEPA analysis was arbitrary and capricious by failing to adequately analyze “context and

23. *Id.* at *4.

24. *Id.* at *13.

25. *Id.*

26. *Id.*

27. *Id.* at *14.

28. *Id.* at *4.

29. *Id.*

30. *Id.*

31. *Id.*

32. *Id.* (quoting 5 U.S.C. § 706(2)(A)).

33. *Id.* (quoting *Baltimore Gas & Elec. Co. v. NRDC*, 462 U.S. 87, 97 (1983)).

34. *Id.* (quoting *Envtl. Prot. Info. Ctr. v. U.S. Forest Serv.*, 451 F.3d 1005, 1011 (9th Cir. 2006); *Native Ecosystems Council v. U.S. Forest Serv.*, 428 F.3d 1233, 1240 (9th Cir. 2005)).

intensity” in its FONSI decision.³⁵ Adequate analysis of context occurs by analyzing the significance of an action “in several contexts such as society as a whole. . . the affected region, the affected interests, and the locality.”³⁶ To analyze the intensity of a project, NEPA includes ten intensity factors, including the “existence of public controversy over the effect of an agency action. . . , [which is found if] substantial dispute exists as to [its] size, nature, or effect.”³⁷ Substantial dispute arises when prior to the EIS or FONSI, evidence “casts serious doubt upon. . . an agency’s conclusion.”³⁸ In reviewing the FONSI decision, the court found that the Enforcement Office failed to “fully inform itself” of important facts by botching its analysis of the context and intensity of the Mine’s impacts.³⁹

The court found that “a broader foreseeable impact is possible” from the indirect and cumulative effects from the Mine’s expansion and associated coal transportation than what the Enforcement Office analyzed in its context analysis.⁴⁰ The Enforcement Office limited its context analysis of indirect and cumulative effects of the Mine’s expansion to the “local and regional level,” however, it “compared the amount of [GHG] emissions the mine expansion would create to U.S. [GHG] emissions as a whole. . . .”⁴¹ This “undercuts the argument that a local and regional analysis was sufficient.”⁴² Thus, because the Enforcement Office knew that broader impacts were possible and failed to analyze them, the court concluded the Enforcement Office acted arbitrarily and capriciously.⁴³

Additionally, the court held that the Enforcement Office was arbitrary and capricious in evaluating the intensity of coal transportation and air pollution impacts.⁴⁴ For coal transportation, the court noted that since “vigorous public opposition to coal trains exists. . . ,” and the Enforcement Office failed to consider the non-local effects of coal trains, “the Enforcement Office acted arbitrarily and capriciously by failing to consider an important effect of Mine expansion.”⁴⁵ Regarding the intensity of air pollution, the court refuted that such analysis was too speculative, noting “the level of uncertainty concerning potential impacts of the mine expansion does not rise to speculation, and such uncertainty militates in favor of an EIS, not against it.”⁴⁶

35. *Id.* at *17 (emphasis added).

36. *Id.* (citing 40 C.F.R. § 1508.27(a)(2017)).

37. *Id.* at *18 (citing *N.W. Env. Defense Ctr. v. Bonneville Power Admin.*, 117 F.3d 1520, 1536 (9th Cir. 1997)) (emphasis included).

38. *Id.* at *18 (citing *Nat’l Parks & Cons. Ass’n v. Babbitt*, 241 F.3d 722, 736 (9th Cir. 2001)).

39. *Id.* at *17-19 (citing *Nat’l Parks & Cons. Ass’n v. Babbitt*, 241 F.3d 722, 736 (9th Cir. 2001)).

40. *Id.* at *17.

41. *Id.*

42. *Id.*

43. *Id.*

44. *Id.* at *18-19.

45. *Id.* at *19.

46. *Id.*

B. Count III and IV: Failure to Take a Hard Look at Indirect and Cumulative Effects of Coal Transportation and Combustion

MEIC claimed that the Enforcement Office “failed to take a hard look at the indirect and cumulative effects of coal transportation and combustion.”⁴⁷ Under NEPA, agencies must evaluate “any adverse environmental effects [that] cannot be avoided.”⁴⁸ The court noted these include “reasonably foreseeable indirect and cumulative effects. . . .”⁴⁹ In holding that the Enforcement Office “ignored an important aspect of the problem by unreasonably limiting the scope of its analysis,” the court granted summary judgment to MEIC on this issue.⁵⁰

1. Coal Transportation

MEIC claimed that the Enforcement Office actions were arbitrary and capricious by failing to assess the indirect effects of diesel emissions, coal dust, noise, economic impacts of rail congestion, the environmental effects of coal dust, and the potential cumulative impacts.⁵¹ While the Enforcement Office “calculated the rail miles that [the coal] would travel beyond the Broadview Spur – and the [GHG] emissions that would result – it did not assess [MEIC’s above context and intensity claims].”⁵² The Enforcement Office responded that there was too much uncertainty of coal transportation and combustion locations, and that since no evaluation methods existed to analyze the impacts, any analysis was “speculative.”⁵³ The court found that this did not constitute a “hard look.”⁵⁴

The court refuted the Enforcement Office’s defenses, noting that “[r]easonable forecasting and speculation is implicit in NEPA.”⁵⁵ Further, because the Mining Plan EA analyzed coal transportation GHG emissions with a projection that a majority of the coal will be exported to Asia, the Enforcement Office has “reasonable foreseeability with regard to [coal transportation’s] impacts.”⁵⁶ Additionally, the court found that the “record contains a number of studies on the current and potential impacts of coal trains. . . , [which] show[s] that such analysis is possible.”⁵⁷ Further, while the Enforcement Office need not reanalyze effects of “mere continued operation,” mere continued operation was not the case here because the

47. *Id.* at *9.

48. *Id.*

49. *Id.* at *9-10 (quoting *Center for Env’tl Law & Policy v. U.S Bureau of Reclamation*, 655 F.3d 1000, 1006 (9th Cir. 2011); *Presidio Golf Club v. Nat’l Park Serv.*, 155 F.3d 1153, 1163 (9th Cir. 1998)).

50. *Id.* at *9.

51. *Id.*

52. *Id.*

53. *Id.*

54. *Id.*

55. *Id.*

56. *Id.*

57. *Id.* at *11.

EA anticipated “amounts [between] two to five times greater than those contemplated by the [previous NEPA analyses].”⁵⁸ The court concluded that “with that substantial difference in mind,” the Enforcement Office failed to take a hard look at the effects of coal transportation.⁵⁹

2. *Coal Combustion: Non-Greenhouse Gas Impacts*

MEIC asserted that the Enforcement Office acted arbitrarily and capriciously in its “combustion-related impacts” analysis.⁶⁰ MEIC claimed that while the Mining Plan EA evaluated the impacts associated with foreseeable coal combustion, it failed entirely to assess any non-local non-GHG pollution impacts.⁶¹ The court agreed with MEIC and found that such a failure resulted in “the Enforcement Office arbitrarily and capriciously ignor[ing] an important aspect of the problem. . . .”⁶²

The Enforcement Office claimed that the non-GHG impacts were “speculative.”⁶³ However, the court stated that the Mine’s coal “will be combusted is not so ‘highly speculative’ that *any* analysis” would be impracticable.⁶⁴ The court concluded “non-local non-[GHG combustion] emissions are ‘reasonably foreseeable,’ and require examination.”⁶⁵

3. *Coal Combustion: Climate Change and the SCC Protocol Tool*

MEIC also asserted that the Enforcement Office failed to evaluate the indirect and cumulative impacts of GHG emissions from the Mine expansion.⁶⁶ The court agreed that the Enforcement Office acted arbitrarily and capriciously by quantifying the benefits of the expansion, but not using the SCC Protocol tool to quantify the costs.⁶⁷

MEIC argued that while the Mining Plan EA found that the Mine modification would result in “23.16 million metric tons of GHG emissions” over nine years, it failed to analyze the costs of those emissions.⁶⁸ MEIC claimed that by using the SCC Protocol, the Enforcement Office should have calculated the effect of those emissions.⁶⁹ In response, the Enforcement Office asserted that the SCC Protocol is only required for regulations, not permits, that NEPA does not require a cost-

58. *Id.* at *10.

59. *Id.*

60. *Id.* at *11.

61. *Id.*

62. *Id.* at *12.

63. *Id.*

64. *Id.*

65. *Id.*

66. *Id.*

67. *Id.*

68. *Id.*

69. *Id.*

benefit analysis, and GHG emissions were sufficiently considered by comparing Mine emissions to all U.S. GHG emissions”⁷⁰

However, the court found that while the SCC Protocol was developed for rulemakings, use in NEPA review is not precluded.⁷¹ Additionally, while a cost-benefit analysis was unnecessary, the court found it was arbitrary and capricious to “quantify the benefits of an action” and not the costs using the SCC Protocol tool.⁷²

Furthermore, the court differentiated two district court decisions that conversely applied the SCC Protocol.⁷³ The court found that the district court decision that did not apply the SCC Protocol was distinguishable from this case since it “did not involve a quantitative analysis of either the benefits or the costs. . . [whereas here,] quantified benefits and unanalyzed costs [are involved].”⁷⁴

The court invalidated the Mining Plan EA’s conclusion that there would be “no effects from [GHG] emissions” because coal would be burned regardless.⁷⁵ The court found the conclusion was “illogical, and . . . inflat[ed] the benefits of the action while minimizing its impacts.”⁷⁶

IV. CONCLUSION

The court’s decision in *MEIC v. U.S. Office of Surface Mining* originally resulted in an injunction, pending NEPA compliance, on Signal Peak’s mining of the prospective federal coal.⁷⁷ However, the injunction was later modified to allow mining to continue, with the condition that the federal coal be stockpiled until completion of a new NEPA review.⁷⁸ Despite the Mine’s continued operation, *MEIC v. U.S. Office of Surface Mining* is a major decision that affects how federal agencies must evaluate the environmental impacts of future carbon-intensive projects. The court continued the trend of requiring the application of the SCC Protocol tool to NEPA analyses, specifically when benefits of an action are quantified, but not the costs. Further, this holding requires that NEPA analyses of proposed coal mine expansions cannot be constrained to local and regional impacts if there are broader foreseeable impacts.

70. *Id.*

71. *Id.* at *13.

72. *Id.*

73. *Id.* at *14

74. *Id.* (citing *League of Wilderness Defs./Blue Mountains Biodiversity Project v. Connaughton*, 2014 WL 6977611, at *26 (D. Or. Dec. 9, 2014).

75. *Id.* at *15.

76. *Id.*

77. *Id.* at *21.

78. *See Montana Env’tl. Info. Ctr. v. U.S. Off. of Surface Mining*, 2017 U.S. Dist. LEXIS 182814, 2017 WL 5047901, at *6 (D. Mont. Nov. 3, 2017).