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Bowen Greenwood
CLERK OF THE SUPREME COURT
STATE OF MONTANA

Case Number: DA 19-0673

DA 19-0673

IN THE SUPREME COURT OF THE STATE OF MONTANA

2021 MT 28

CASCADE COUNTY,

Plaintiff, Appellant,
and Cross-Appellee,

v.

MONTANA PETROLEUM TANK RELEASE
COMPENSATION BOARD,

Defendant, Appellee,
and Cross Appellant.

APPEAL FROM: District Court of the First Judicial District,
In and For the County of Lewis and Clark, Cause No. ADV 2016-558
Honorable Mike Menahan, Presiding Judge

COUNSEL OF RECORD:

For Appellant:

Jacqueline R. Papez, Jack G. Connors, Doney Crowley P.C., Helena, Montana

For Appellee:

Kyle Chenoweth, Agency Legal Services Bureau, Helena, Montana

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Submitted on Briefs: December 16, 2020

Decided: February 9, 2021

Filed:

Clerk

Justice Ingrid Gustafson delivered the Opinion of the Court.

¶1 This case involves a long-running dispute between Cascade County (the "County") and the Montana Petroleum Tank Release Compensation Board (the "Board") about reimbursement for the cost of remediating petroleum contamination at the County's shop complex first discovered in 1996 and remediated in 2008. The Board issued its Final Decision on June 6, 2016, denying additional reimbursement to the County on the ground the general five-year statute of limitations under § 27-2-231, MCA, time-barred three eligibility applications the County submitted to the Board in 2014. The County sought judicial review of the Board's Final Decision in the First Judicial District Court, Lewis and Clark County. The County now appeals to this Court from the May 28, 2019 Order on Motion to Clarify Order on Petition for Judicial Review and the Board cross-appeals from the December 6, 2017 Order on Petition for Judicial Review. We restate the issue the County raises on appeal:

> *Whether the District Court erred in remanding the case to the Board to reconsider arguments the Board had previously rejected.*

¶2 We restate the issue the Board raises on cross-appeal:

> *Whether the District Court erred when it found the County was not time-barred from submitting eligibility applications to the Board.*

¶3 We affirm in part and reverse in part. We remand with instructions for the District Court to remand the case to the Board to reimburse the County for eligible costs associated with three additional releases.

PROCEDURAL AND FACTUAL BACKGROUND

¶4 In light of the benefits of using petroleum storage tanks on Montanans' economic well-being and quality of life, but also the risks to public and environmental health and safety from leaks, spills, and other releases of petroleum products from those storage tanks, the Legislature created a program to "provide adequate financial resources and effective procedures through which tank owners and operators may undertake and be reimbursed for corrective action and payment to third parties for damages caused by releases from petroleum storage tanks." Section 75-11-301(5)(b), MCA (1995).[1] When a release is discovered, the Montana Department of Environmental Quality (the "DEQ") confirms the release, assigns it a number, and approves a corrective action plan to remediate the damage. The tank owner and operator may request a reimbursement for the costs of the remediation from the Board. The Board oversees the petroleum tank release cleanup fund, which is financed through a petroleum storage tank cleanup fee paid by all users of petroleum products.

¶5 On October 28, 1996, the County discovered petroleum contamination under its shop complex and immediately reported the release to the DEQ. The DEQ assigned the contamination at the site a single release number, Release I.D. No 3051 (Release # 3051). In December 1996, the DEQ informed the Board of four tank operation violations at this

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[1] The County first discovered and reported the petroleum contamination in 1996. This Opinion will rely on the 1995 version of the statute, as eligibility for reimbursement for a release generally "must be determined by the eligibility requirements in effect at the time of the release." *Town Pump, Inc. v. Petroleum Tank Release Comp. Bd.*, 2008 MT 15, ¶¶ 18-21, 341 Mont. 139, 176 P.3d 1017. Neither party has argued for the retroactive application of any later amendments.

County site. On March 9, 1998, the Board denied the County eligibility for reimbursement from the fund for Release # 3051 based on the lack of compliance with laws and rules. The County sought a contested case hearing before a hearing examiner, which resulted in the Board reversing its denial of eligibility for Release # 3051 on June 8, 1999. In its letter approving eligibility for Release # 3051, the Board limited compensability for Release # 3051 to $982,500.

¶6 From 1997 to 2006, the County and the DEQ studied the site and developed a corrective action plan. Investigations in 1998 revealed the presence of contamination from multiple petroleum products at the site. Because the site was a large former petroleum refinery and historic contamination from the refinery's activities would not be reimbursable by the Board, additional investigations were performed to determine the sources of the contamination. A January 2000 remedial investigative report ultimately concluded the contamination designated under Release # 3051 came from four, County-owned and -operated tanks at the site and consisted of four different product types. The DEQ approved the corrective action plan to remediate the contaminations at the site in 2006. In July 2006, the County asked the DEQ to designate the site as a multiple release site for purposes of eligibility for reimbursement from the Board. The DEQ declined to do so. On December 20, 2007, the County filed a petition for a writ of mandamus against the DEQ in district court, asking the court to compel the DEQ to assign multiple release numbers to the site.

¶7 While the County pursued its action against the DEQ, remediation plans for the site continued to progress and remediation was completed from August 2008 to

November 2008. The County submitted receipts for the remediation costs to the Board, but in early 2009, the costs incurred by the County exceeded the statutory maximum reimbursement amount for a single release and the Board staff notified the County that additional requests for reimbursement would be denied. The County continued to submit requests for reimbursement to the Board and asked the Board to reconsider and overrule the decision to deny further reimbursement. The Board tabled the County's requests at a Board meeting in 2009 and wrote a letter to the County in 2010 reiterating it was declining to consider the County's reimbursement claims any further until the mandamus action with the DEQ was resolved.

¶8 The mandamus action dragged on for several more years, until the DEQ and the County stipulated to its dismissal in June 2013. In the stipulated dismissal, the parties acknowledged the DEQ was managing all the petroleum contamination at the site under a single release number, Release # 3051, but the DEQ took "no position on whether there may be multiple 'releases' as the term 'release' is defined in Mont. Code Ann. § 75-11-302."

¶9 On February 27, 2014, the County filed four separate applications for eligibility with the Board. The parties agree the statutory maximum reimbursement had already been paid out on the release described in the first application. The Board voted to deny eligibility for the three additional releases on August 11, 2014, because the DEQ had classified all four contaminations under a single release number and the statutory maximum reimbursement for a single release had been reached in 2009. The County requested a contested case hearing on the issue and a Hearing Examiner was appointed. The County and the Board

stipulated to dispose of the matter on cross-motions for summary judgment with no hearing. Before the Hearing Examiner, the Board argued the County was time-barred from submitting additional applications for eligibility under the general five-year statute of limitations of § 27-2-231, MCA, or, alternatively, by the equitable doctrine of laches, in addition to its continued position that the site consisted of a single release. In its proposed decision, the Hearing Examiner agreed with the County that Release # 3051 consisted of four releases, but concluded the County was time-barred from recovery by § 27-2-231, MCA, and laches, because the County had waited too long to file applications for eligibility for the additional releases. The Board declined to adopt the Hearing Examiner's proposed decision as the agency's final decision. It adopted the Hearing Examiner's findings of fact with few exceptions, but only adopted the Hearing Examiner's conclusion of law relating to the running of the statute of limitations under § 27-2-231, MCA. The Board specifically rejected the Hearing Examiner's conclusions of law relating to the number of releases and laches, declining to consider the remaining issues "[b]ecause the statute of limitations disposes of the County's claims."

¶10 The County filed a Petition for Judicial Review with the District Court. The District Court issued its Order on Petition for Judicial Review on December 6, 2017. The court found the Board erred when it relied on § 27-2-231, MCA, because no statute of limitations is applicable to an agency-created procedure to submit applications for eligibility. Rather, the court determined the procedure for reimbursement is provided in § 75-11-309, MCA, and the only timeline provided in statute is that the owner or operator of the petroleum storage tank must immediately notify the DEQ of a release. The District Court, however,

remanded the case to the Board for additional fact-finding on the issue of when the County became aware of additional potentially eligible releases. Section 75-11-309(4)(b), MCA, provides a 120-day appeal period for challenging board determinations, which the District Court determined would prohibit the County from challenging the Board's June 8, 1999 decision on eligibility for a single release if the County knew about the additional releases at the time of the 1999 decision.

¶11 The parties jointly moved for clarification of the District Court's order, along with a stipulated statement of facts, explaining there were no material factual issues to be determined on remand. The parties asked the court to address and answer whether the County was entitled to reimbursement for three additional releases.

¶12 The District Court issued its Order on Motion to Clarify Order on Petition for Judicial Review on May 28, 2019. The court explained a two-step process to determine eligibility for reimbursement under § 75-11-308, MCA. The first step is to determine whether the spill constitutes a "release" under § 75-11-302(24), MCA. If that definition is met, the next step is to determine whether the release meets the criteria of § 75-11-308, MCA. The court determined the County was not aware of the additional potentially eligible releases until after the January 2000 report's conclusion that "the contamination emanated from qualifying petroleum storage tanks and thus constituted 'releases' that could be eligible for reimbursement." The District Court thus concluded the 120-day rule of § 75-11-309(4)(b), MCA, did not time-bar the County from applying for reimbursement for the additional three releases. The court then remanded the case "to the Board to rule on the unaddressed issues listed in the Board's June 6, 2016 Final Decision," such as "the

question of how many releases were present at the Site and whether those releases are eligible for reimbursement." The parties appeal to this Court.

STANDARD OF REVIEW

¶13 Section 2-4-704, MCA, sets forth the standards for judicial review of an administrative decision: "The court may not substitute its judgment for that of the agency as to the weight of the evidence on questions of fact. The court may affirm the decision of the agency or remand the case for further proceedings. The court may reverse or modify" an agency decision if the substantial rights of the appellant have been prejudiced because the agency's findings, inferences, conclusions, or decisions are in violation of constitutional or statutory provisions; in excess of statutory authority; made upon unlawful procedure; based upon an error of law; clearly erroneous in light of the evidence as a whole; or arbitrary, capricious, or characterized by abuse of discretion. Section 2-4-704(2)(a), MCA. Conclusions of law are reviewed for correctness. *Williams Insulation Co. v. Dep't of Labor & Indus.*, 2003 MT 72, ¶ 22, 314 Mont. 523, 67 P.3d 262.

DISCUSSION

Introduction and Statutory Procedural Requirements for Reimbursement

¶14 Title 75, chapter 11, part 3, establishes the petroleum storage tank cleanup fund, along with the statutory eligibility requirements and reimbursement procedures for reimbursing the costs owners and operators of petroleum storage tanks incur remediating releases from petroleum storage tanks. The statutes divide the authority for overseeing remediation and reimbursement between the DEQ and the Board. Before addressing the

issues raised by the parties on appeal, it is important to lay out the statutes governing remediation and reimbursement relevant to this case.

¶15 Section 75-11-308, MCA (1995), provides the eligibility requirements for reimbursement. An owner or operator is eligible for reimbursement of eligible costs caused by a release only if: (a) the release was discovered on or after April 13, 1989; (b) the DEQ is notified of the release in the manner and within the time provided by law or rule; (c) the DEQ has been notified of the existence of the tank in the manner required by DEQ rule or has waived the requirement for notification; (d) the release was an accidental release; and (e) with the exception of the release, the operation and management of the tank complied with applicable state and federal laws and rules when the release occurred and remained in compliance following detection of the release. Section 75-11-308(1), MCA (1995).[2] Section 75-11-302(24), MCA (1995), defines "release" as "any spilling, leaking, emitting, discharging, escaping, leaching, or disposing of petroleum or petroleum products from a petroleum storage tank into ground water, surface water, surface soils, or subsurface soils."

¶16 Section 75-11-309, MCA (1995), lays out the statutory procedure for reimbursement of eligible costs. Relevant here, the statute lays out six procedural steps an owner or operator must take to be reimbursed by the Board. First, an owner or operator must "immediately notify" the DEQ of a release and conduct an initial response to the release. Section 75-11-309(1)(a), MCA (1995). Second, the owner or operator must

[2] Subsection 2 of § 75-11-308, MCA (1995), excepts releases from certain petroleum storage tanks from reimbursement from the fund, including a tank located at a refinery.

"conduct a thorough investigation of the release, report the findings to the [DEQ], and, as determined necessary by the [DEQ], prepare and submit" a corrective action plan to the DEQ for approval. Section 75-11-309(1)(b), MCA (1995). Third, the DEQ can approve the corrective action plan or request modifications to the plan or prepare its own plan. Section 75-11-309(1)(c), MCA (1995). Fourth, the DEQ must notify the owner or operator and the Board of its approval of a corrective action plan. Section 75-11-309(1)(d), MCA (1995). Fifth, the owner or operator must implement the approved plan, overseen by the DEQ. Section 75-11-309(1)(e), MCA. Finally, the owner or operator must "document in the manner required by the board all expenses incurred in preparing and implementing the corrective action plan" and "submit claims and substantiating documents to the board in the form and manner required by the board." Section 75-11-309(1)(f), MCA (1995).

¶17 Section 75-11-309(2), MCA (1995), requires the Board to review each claim for reimbursement received under § 75-11-309(1)(f), MCA (1995), and affirmatively determine: (1) the expenses for which reimbursement is claimed are eligible costs and were actually, necessarily, and reasonably incurred for the preparation or implementation of a corrective action plan approved by the DEQ; and (2) the owner or operator is eligible for reimbursement under § 75-1-308, MCA, and has complied with § 75-1-309, MCA, and any rules adopted by the Board pursuant to that section. An owner or operator who disagrees with a board determination under subsection (2) may submit a written request for a contested hearing before the Board. Section 75-11-309(3), MCA (1995).

¶18 An owner or operator who is eligible under § 75-11-308, MCA (1995), and complies with § 75-11-309, MCA (1995), "must be reimbursed by the board from the fund for . . .

eligible costs caused by a release from a petroleum storage tank." Section 75-11-307(1), MCA (1995). An owner or operator may not be reimbursed from the fund for "expenses for work completed by or on behalf of the owner or operator more than 2 years prior to the owner's or operator's request for reimbursement." Section 75-11-307(2)(h), MCA (1995). Under the statute, the Board will reimburse 50 percent of the first $35,000 of eligible costs and 100 percent of subsequent eligible costs, up to a maximum total reimbursement of $982,500. Section 75-11-307(4)(b)(i), MCA (1995).

¶19 Under these statutes, the DEQ is charged with overseeing the investigation and remediation of contamination caused by releases from petroleum storage tanks. The Board determines whether the costs submitted for reimbursement are eligible costs and whether the owner or operator is eligible for reimbursement from the fund.

¶20 The issue in this case involves the Board's determination the County is not eligible for reimbursement from the fund for three additional releases. Before the Hearing Examiner, the Board relied on three grounds to deny the County's eligibility for reimbursement for three additional releases: (1) the site consisted of a single release; (2) the County's additional applications for eligibility were time-barred by § 27-2-231, MCA; and (3) the County's additional applications were prohibited by the equitable doctrine of laches. In its final decision, the Board relied on § 27-2-231, MCA, as the sole basis for denying the County's eligibility for reimbursement. On a petition for judicial review, the District Court determined § 27-2-231, MCA, did not apply to the County's applications for eligibility and remanded for additional proceedings before the Board to address the issues the Board listed and left unaddressed in its final decision. We first

address the Board's cross-appeal of the District Court's determination that § 27-2-231, MCA, does not apply to the County's applications for eligibility[3] and then turn to whether the District Court erred in remanding the case to the Board to address issues the Board rejected.

Statute of limitations

¶21 Section 75-11-309(2), MCA (1995), requires the Board to make two eligibility determinations: (1) whether costs incurred by the owner or operator are eligible costs under § 75-11-307, MCA (1995); and (2) whether the owner or operator is eligible for reimbursement under § 75-11-308, MCA (1995). The Board requires as a matter of Board policy that owners or operators submit an eligibility application to the Board for a determination whether an owner or operator is eligible for reimbursement under § 75-11-308, MCA (1995). The Board argues the generally applicable statute of limitations statute, § 27-2-231, MCA, provides a five-year time limit for an owner or operator to submit this application for eligibility for reimbursement to the Board, because Title 75, chapter 11, part 3, does not otherwise provide a statute of limitations for such application.

¶22 Section 27-2-231, MCA, provides: "An action for relief not otherwise provided for must be commenced within 5 years after the cause of action accrues." By its own terms,

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[3] The Board also appeals the District Court's determination that the requirement to contest a decision from the Board within 120 days under § 75-11-309(4)(b), MCA, does not time-bar the County's applications. Both parties agree this requirement was added to the statute in 2009, *see* 2009 Mont. Laws ch. 396, § 3, and does not apply to the contamination at this site discovered in 1996. *See Town Pump, Inc.*, ¶ 18. We reverse the District Court's application of § 75-11-309(4)(b), MCA, to this case.

the generally applicable statute of limitations in § 27-2-231, MCA, only applies when a statute does not otherwise provide for time limitations on an action for relief. Title 75, chapter 11, part 3, however, provides two specific time limitations on owners and operators seeking reimbursement from the Board: (1) the owner or operator of a petroleum tank must immediately notify the DEQ of a release and conduct an initial response to the release in accordance with state and federal laws and rules to protect public health and safety and the environment, § 75-11-309(1)(a), MCA (1995); and (2) the owner or operator may not be reimbursed for expenses incurred more than two years before the request for reimbursement, § 75-11-307(2)(h), MCA (1995).

¶23 These statutes provide reasonable time limits on owners and operators to act. First, they must immediately involve the DEQ to oversee the remediation process and second, they must timely submit requests for reimbursement to the Board after they incur costs. These time parameters are especially reasonable in this area given the need to address releases from petroleum storage tanks promptly to prevent further contamination, but also the reality that investigation into the cause of a release and remediation of the resulting contamination can take years to complete. The statute does not provide a separate process for applications for eligibility, but rather requires the Board to review each reimbursement claim submitted and determine that both the costs and the owner or operator are eligible for reimbursement "[b]efore approving a reimbursement." *See* § 75-11-309(2), MCA (1995). Given the process and time limits provided for in the statute, the general five-year statute of limitations of § 27-2-231, MCA, does not apply to any portion of the proceedings before the Board for reimbursement under Title 75, chapter 11, part 3. We affirm the

District Court's determination that § 27-2-231, MCA, does not time bar the County from submitting additional applications for eligibility to the Board.

Remand

¶24 The County appeals the District Court's order to remand the case back to the Board to rule on the "unaddressed issues" in the Board's Final Decision, including the number of releases that occurred at the site. The County maintains the definition of "release" at § 75-11-302(24), MCA (1995), is clear that multiple releases may occur at a single site, because the definition references "spilling, leaking, emitting, discharging, escaping, leaching, or disposing . . . *from a petroleum storage tank*" and not a "release" onto a particular parcel of land. The County argues the Board is bound by both the stipulated facts submitted to the District Court and its prior adoption of the Hearing Examiner's findings of fact that petroleum products were released from at least four different petroleum storage tanks at the site. The County maintains the issue of the number of releases should not have been remanded back to the Board because based on the stipulated facts and the clear definition of "release" at § 75-11-302(24), MCA (1995), there is nothing left for the Board to consider on this issue. Further, the County argues the Board waived the ability to dispute any remaining grounds to reject the County's eligibility for reimbursement for the additional releases by rejecting the Hearing Examiner's conclusions of law on laches and the number of releases.

¶25 The Board argues it appropriately chose not to address several issues in its Final Decision. After reversing the Board's statute of limitations decision, the District Court properly remanded the case for the Board to rule on the remaining issues in the first

instance. Further, the Board maintains the matter must be remanded back to it because whether multiple releases occurred will require additional findings of fact.

¶26 When an agency utilizes a hearing examiner to conduct a contested case under the Montana Administrative Procedures Act (MAPA), § 2-4-621(2), MCA, requires the hearing examiner to submit a proposal for decision, containing "a statement of the reasons for the decision and of each issue of fact or law necessary to the proposed decision." Section 2-4-621(3), MCA, allows the agency to "adopt the proposal as the agency's final order" or "reject or modify the conclusions of law and interpretation of administrative rules in the proposal for decision."

¶27 Here the Board specifically rejected the Hearing Examiner's conclusions of law that related to the number of eligible releases, the Board's ability to rely on DEQ release numbering to determine the number of releases, and laches, "[b]ecause the statute of limitations disposes of the County's claims." The parties litigated and the Hearing Examiner addressed each of these issues, however. Section 2-4-621(3), MCA, limits the Board's review of a Hearing Examiner's proposed decision. *See, e.g.*, *Mont. Dep't of Transp. v. Mont. Dep't of Labor & Indus.*, 2016 MT 282, ¶ 23, 385 Mont. 274, 384 P.3d 49 (explaining while an agency "may correct a hearing examiner's incorrect conclusions of law," the agency "does not have authority to take the record compiled by a hearing examiner and exercise its independent judgment about the proper remedy"). The Board has not cited to—and we have not found—any Montana case law to support its position that an agency may decline to address issues resolved by a hearing examiner and thereby reserve those issues for later proceedings after judicial review. We conclude that while

§ 2-4-621(3), MCA, allows the Board to reject the Hearing Examiner's conclusions of law, it does not allow the Board to choose not to address the Hearing Examiner's conclusions of law and reserve those issues for later proceedings. Those issues were already fully litigated and presented to the Board. The issues should not be remanded back to the Board for further analysis. Neither party challenged the rejection of the laches defense on judicial review, and it cannot be resuscitated on remand. But the County did challenge the Board's rejection of the number of releases at the site in its petition for judicial review, so we address that issue.

¶28 We disagree with the Board that the issue of the number of releases must be remanded to the Board for further factfinding. The Board and the County submitted stipulated facts to the District Court, including the stipulation that "The January 2000 Report found four primary profiles occurring at the site . . ., and concluded that all sources emanated from the main fueling structure on the property." This aligns with the finding of the Hearing Examiner, adopted by the Board in its Final Decision that "The contamination under #3051 was ultimately determined to have come from more than one tank at the Site and was more than one product type" and the "uncontested testimony" of the only expert offered by the parties "establishes at least four different contaminations" from four different storage tanks at the site. No additional factfinding is required to determine whether the three additional releases for which the County has applied for reimbursement occurred. Having never contested the findings of the January 2000 report, the Board cannot reasonably contest the existence of three additional releases under § 75-11-302(24), MCA (1995). Based on the stipulated facts and the definition of "release" under § 75-11-302(24),

MCA (1995), the four releases, for which the County seeks reimbursement, occurred at the site as a matter of law. The Board erred in rejecting the Hearing Examiner's conclusions of law relating to the number of releases present at the site.

¶29 In the contested proceedings below, the Board relied on three reasons to deny the County's eligibility for reimbursement: (1) there was only one release; (2) the statute of limitations under § 27-2-231, MCA, time barred the eligibility applications; and (3) laches. In its final decision, however, the Board relied solely on the running of the purported statute of limitations to deny the County's claims, rejecting the other conclusions of law made by the Hearing Examiner. Having raised no other issues, the Board has waived any further challenges to the County's eligibility for three additional releases under § 72-11-302(24) and -308, MCA (1995). We agree with the County the case should not be remanded to the Board to rule on the issues it rejected in its Final Decision. Based on the stipulated facts in the record, the County has established four releases occurred at the site.

CONCLUSION

¶30 The District Court is affirmed in part and reversed in part and the case is remanded with instructions to remand the case to the Board to reimburse the County's eligible costs for three additional releases.

/S/ INGRID GUSTAFSON

We concur:

/S/ MIKE McGRATH
/S/ JAMES JEREMIAH SHEA
/S/ LAURIE McKINNON
/S/ DIRK M. SANDEFUR