DA 21-0613

IN THE SUPREME COURT OF THE STATE OF MONTANA

2022 MT 132

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MONTANA RIVERS, GALLATIN WILDLIFE ASSOCIATION, and COTTONWOOD ENVIRONMENTAL LAW CENTER,

Plaintiffs and Appellants,

v.

MONTANA DEPARTMENT OF ENVIRONMENTAL QUALITY,

Defendant and Appellee.

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APPEAL FROM: District Court of the Eighteenth Judicial District,
In and For the County of Gallatin, Cause No. DV-20-200A
Honorable Peter B. Ohman, Presiding Judge

COUNSEL OF RECORD:

For Appellant:

John Meyer, Cottonwood Environmental Law Center, Bozeman, Montana

For Appellee:

Kirsten H. Bowers, Edward Hayes, Montana Department of Environmental Quality, Helena, Montana

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Submitted on Briefs: June 15, 2022
Decided: July 5, 2022

Filed:

Clerk

Chief Justice Mike McGrath delivered the Opinion of the Court.

¶1 Montana Rivers, the Gallatin Wildlife Association, and Cottonwood Environmental Law Center (collectively, "Montana Rivers") appeal a September 20, 2021 order from the Eighteenth Judicial District Court in Gallatin County. Montana Rivers sued the Department of Environmental Quality (DEQ) in February 2020, alleging that it violated the Montana Environmental Policy Act (MEPA) by failing to supplement a 2007 environmental impact statement (EIS) that the agency had once prepared for a contemplated rulemaking by the Board of Environmental Review (the Board). The Board declined to proceed with that rulemaking in 2013 by deciding to end its notice and comment period and let the process expire. The District Court granted summary judgment to DEQ, holding that Montana Rivers had no viable MEPA cause of action since there was no longer any proposed state action for which to supplement the EIS.

¶2 We restate the issue on appeal as follows:

> *Did the District Court err in concluding that there was no proposed state action pending that would obligate DEQ to prepare or supplement a MEPA analysis?*

¶3 We affirm.

## FACTUAL AND PROCEDURAL BACKGROUND

¶4 The Montana Legislature passed a statute in 1995 defining a new protective status for "outstanding resource waters" (ORWs) and providing a process for members of the

public to petition the Board to classify waters in the state as ORWs.[1] *See* § 75-5-316, MCA; 1999 Mont. Laws ch. 501, § 3. Under the law, after the Board received a petition asking it to issue a rule classifying a new ORW, the Board would review the petition and could accept or reject it depending on whether the suggested waters meet certain criteria. Section 75-5-316(3)(c), (4), MCA. If the Board accepted a petition, it then had to initiate an environmental review process following MEPA and prepare an EIS. Section 75-5-316(6)(a), MCA. After the EIS was complete, the Board then had an opportunity to grant or deny the petition. Section 75-5-316(8), MCA. Granting it meant initiating rulemaking to classify the new ORW. A rule, if issued, would later become final only after approval by the Legislature. Section 75-5-316(9), MCA.

¶5 In December 2001, an organization called American Wildlands petitioned the Board to designate a substantial section of the Gallatin River as an ORW. The Board accepted the petition, and DEQ began preparing an EIS to assess the consequences of the proposal. The process took several years. DEQ issued its draft EIS in September 2006 and final EIS in January 2007. Among the options considered in the EIS, DEQ's proposed alternative was to make the ORW designation. The EIS also described, consistent with the typical

[1] The Board of Environmental review is a quasi-judicial administrative body that was also created by statute in 1995. Section 2-15-3502, MCA; 1995 Mont. Laws ch. 418, § 21. Its rulemaking role in the ORW statute was somewhat unique compared to its typical duties of considering appeals in contested cases that arose from DEQ. In 2021, the Legislature modified the ORW statute to remove the Board from the process; the scheme for petitioning and discretionary rulemaking remains the same, but the Board's former role is now filled by DEQ. 2021 Mont. Laws ch. 324, § 46.

MEPA process, how DEQ would follow up on that document with an official "record of decision" recommending a course of action for the Board.

¶6 The Board had issued notice of the proposed rulemaking and initiated a six-month public comment period after DEQ released its draft EIS. In March 2007, the Board extended the comment period for another six months. It did so again in September 2007, and again in March 2008. In July 2008, the Board received a letter from the Greater Yellowstone Coalition. The letter noted that American Wildlands had dropped out of its role promoting the ORW campaign and noted that collaborative efforts were underway to negotiate potential conservation solutions as an alternative to the ORW designation. Greater Yellowstone Coalition urged the Board to continue extending the notice and comment period to keep the ORW designation on the table but to allow time for the collaborative process to play out.

¶7 The Board did so and continued extending the notice and comment period in six-month increments up through 2012. During a hearing in December 2012, the Board considered the decade-old ORW petition one last time. The Chief Legal Counsel for DEQ appeared and noted that there was still no resolution on the negotiation and exploration of ORW alternatives for which the Board had stalled. DEQ recommended that the Board simply let the pending rulemaking expire by declining to further extend its notice and comment period. Under § 2-4-305(7), MCA, agency rules are only valid if issued within six months of a public notice publication, meaning that allowing the clock to run out would effectively jettison the old 2001 petition. DEQ noted that if the Board considered another ORW rule for the Gallatin in the future, the agency would be able re-use some of the

material prepared for the first environmental analysis. The Board heeded DEQ's recommendation and finally rejected the proposed rule from the 2001 petition by letting its pending process expire with no action.

¶8 In 2018, Cottonwood Environmental Law Center and the Gallatin Wildlife Association filed a new petition to create a Gallatin ORW rule. The Board discussed whether to accept or reject the petition at a meeting held that October. An attorney for DEQ advocated that the Board reject the petition, focusing discussion on one of the factors that § 75-5-316(3), MCA, directs the Board to consider: whether "classification as an outstanding resource water is necessary because of a finding that there is no other effective process available that will achieve the necessary protection." Section 75-5-316(3)(c)(iii), MCA. The DEQ attorney noted that the agency's discharge permitting process already imposed a stringent water quality standard in the Gallatin.

¶9 Pursuant to its discretion under § 75-5-316(3)(b), MCA, the Board rejected the 2018 petition. The Board adopted a memo written by a DEQ attorney to detail the reasons for its rejection, describing how the present measures in place through enforcement of water quality standards provided effective protection to preclude the need for ORW designation. The consequence of the Board's 2018 decision was that, as had been the case since the 2001 process expired in 2013, no proposed rulemaking to designate the Gallatin an ORW was in place. The Board did not advance into the notice-and-comment procedure that would have followed acceptance of the petition.

¶10 In February 2020, Montana Rivers and the two organizations from the 2018 petition (collectively "Montana Rivers") filed the present lawsuit in the Gallatin County District

Court. They alleged that DEQ was violating MEPA by failing to supplement the EIS prepared for the 2001 ORW petition. Montana Rivers described what it considered threats to the Gallatin that had emerged since the earlier analysis completed in 2007, particularly emerging science and concerns about pharmaceuticals in wastewater. Montana Rivers cited acknowledgments by DEQ, such as at the hearing in 2018, that pharmaceutical pollution was a novel issue for water quality regulators to begin tackling.

¶11 The parties exchanged summary judgment motions. Montana Rivers argued essentially that the process involving the 2007 EIS had never concluded and was still pending because DEQ never issued an official "record of decision." Thus, Montana Rivers argued, DEQ had an obligation to supplement the analysis given the changed circumstances over the intervening years. The District Court construed DEQ's comments at the 2012 hearing to count as DEQ's "record of decision." The court noted that challenges to final agency action under MEPA must be filed within 60 days,[2] which for the EIS at issue here would have passed in early 2013. The District Court also noted that after the 2001 ORW process expired in 2013—and after the 2018 ORW petition was rejected—no pending proposed action existed with a MEPA analysis to supplement. The District Court granted summary judgment to DEQ.

¶12 Montana Rivers appeals.

[2] *See* § 75-1-201(5)(a)(ii), MCA.

## STANDARD OF REVIEW

¶13 We review summary judgment rulings de novo. *Thornton v. Flathead Cty.*, 2009 MT 367, ¶ 13, 353 Mont. 252, 220 P.3d 395. For summary judgment to be appropriate, there must be no genuine issues of material fact in dispute, and one party must be entitled to judgment as a matter of law. M. R. Civ. P. 56(c)(3).

## DISCUSSION

¶14 *Did the District Court err in concluding that there was no proposed state action pending that would obligate DEQ to prepare or supplement a MEPA analysis?*

¶15 We need not reach the merits of Montana Rivers' substantive arguments under MEPA, regarding environmental matters that could warrant EIS supplementation. We also need not reach or address the question of what sort of DEQ communications can qualify as a "record of decision" under MEPA.[3] This case is easily resolved by the fact that without a pending rulemaking—a proposed state action—to analyze under MEPA, there exists no analysis to supplement.

¶16 Following the 2001 ORW petition, the Board initiated notice-and-comment on a proposed rulemaking, as well as the accompanying preparation of an EIS required by § 75-5-316(6)(a), MCA. That process languished for years with continual extensions by the Board. After DEQ finished preparing its EIS in 2007, the subsequent step of recording its decision in a formal recommendation to the Board also languished unfinished. Interested parties in the Gallatin area negotiated and explored potential alternatives to

[3] *See generally* Admin R. M. 17.4.629 (2021) (describing rules for a "record of decision for actions requiring environmental impact statements").

ORW designation, and stalling the proposed rule was a response to that ongoing engagement. Ultimately, in 2012, the Board ceased its extension of the proposal at the recommendation of DEQ, and after six months passed, the process for creating a valid rule expired. *See* § 2-4-305(7), MCA ("A rule is not valid unless . . . notice of adoption of the rule is published within 6 months of the publishing of notice of the proposed rule[.]").

¶17 Regardless of whether DEQ ever formally concluded its MEPA analysis with a record of decision, the Board's decision not to extend the process for the proposed ORW rule caused that process to evaporate. Montana law creates no valid cause of action to challenge an agency's proposed rulemaking if the agency abandons the proposal.[4] Similarly, there is no valid cause of action to challenge an unfinished MEPA analysis accompanying a proposed action after that proposal is abandoned and no longer valid.

¶18 As counsel for DEQ pointed out in the 2012 hearing, if a *new* ORW rulemaking process began, the agency could take the material from its 2007 EIS, update it with contemporary data and other material as necessary, and refashion it into the EIS to support the new proposal. When the petitioners in 2018 again asked the Board to consider designating the Gallatin, their hope was to initiate the process that would do just that. Instead, however, under the statutory discretion afforded to it, the Board declined to advance further into the stages of EIS preparation and notice-and-comment rulemaking. *See* § 75-5-316(3)(b), MCA ("The department [formerly the Board] may reject a petition

[4] There may be some instances in which it is appropriate to challenge, via a writ of mandamus, a violation of a "clear legal duty" to engage in rulemaking, if there is no "plain, speedy, and adequate remedy in the ordinary course of law." *See Common Cause v. Argenbright*, 276 Mont. 382, 917 P.2d 425 (1996).

without further review if it determines that the petition does not contain the sufficient credible information required . . . .").

¶19 Montana Rivers' lawsuit here is an attempt to work around the fact that Montana law creates no avenue to challenge an agency's discretionary decision *not* to issue a contemplated rule. Litigants may challenge final agency actions that fail to comply with MEPA, within 60 days of such actions. *See* § 75-1-201(5)(a)(ii), MCA. They may file actions to declare rules invalid. *See* § 2-4-506, MCA. They may challenge agency decisions if their rights to notice and participation were prejudiced. *See* § 2-3-114(1), MCA. They may appeal agency decisions in contested cases within 30 days.[5] *See* § 2-4-702(2), MCA. What no statute allows them to do, however, is sue an agency for failing to supplement a long-since-abandoned process.

¶20 Montana Rivers argues that DEQ must supplement its 2007 analysis under Admin. R. M. 17.4.621 (2021). That rule requires that DEQ "prepare supplements to either draft or final environmental impact statements whenever . . . there are significant new circumstances, discovered prior to final agency decision[.]" The "final agency decision" contemplated by that rule is a decision on a "proposed action." *See* Admin. R. M. 17.4.629(1) (2021) (Records of decision on an EIS are "concerning a

[5] The District Court commented in its order that the statute of limitations for a challenge by the petitioners in 2018 was 30 days under the contested case provisions at § 2-4-702(2), MCA. This was incorrect. Contested cases are those determining the "legal rights, duties, or privileges of a party." Section 2-4-102(4), MCA. A general rulemaking is not subject to that provision; instead, parties may challenge agency rules—after they have been issued—under § 2-4-506, MCA. *See Core-Mark Int'l, Inc. v. Mont. Bd. of Livestock*, 2014 MT 197, ¶ 23, 376 Mont. 25, 329 P.3d 1278 ("Judicial review of rulemaking proceedings is not governed by Part 7. Rather, a party may seek a declaratory judgment that an administrative rule is invalid or inapplicable under Part 5. *See* § 2-4-506, MCA.").

proposed action for which an EIS was prepared."). Here, the Board had a proposed action under consideration from 2001 to 2013. Then, after it abandoned the process and the opportunity to act expired, so did the proposed action. The period of "prior to final agency decision" must end when it ceases to be possible for the agency to act on the proposal.

**CONCLUSION**

¶21 The Department of Environmental Quality was entitled to summary judgment as a matter of law. The District Court's September 20, 2021 order is affirmed.

/S/ MIKE McGRATH

We Concur:

/S/ JAMES JEREMIAH SHEA
/S/ LAURIE McKINNON
/S/ BETH BAKER
/S/ INGRID GUSTAFSON
/S/ DIRK M. SANDEFUR
/S/ JIM RICE