No. 13-35107

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

Montana Environmental Information Center and Sierra Club,
Plaintiffs-Appellants,
v.

Tracy Stone-Manning, in her official capacity as Director of the Montana Department of Environmental Quality,
Defendant-Appellee,
and

Spring Creek Coal Company LLC; Great Northern Properties Limited Partnership; Crow Tribe of Indians; International Union of Operating Engineers, Local 400; Western Energy Company; Westmoreland Resources, Inc.; and Natural Resource Partners L.P.,
Defendants-Intervenors-Appellees.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MONTANA, CASE NO. 6:12-CV-00034-DLC

BRIEF ON BEHALF OF INTERSTATE MINING COMPACT COMMISSION, *AMICUS CURIAE*, IN SUPPORT OF DEFENDANTS-INTERVENORS-APPELLEES

SEEKING AFFIRMANCE OF THE DISTRICT COURT

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NOTE REGARDING RULE 26 DISCLOSURE STATEMENT.

The Interstate Mining Compact Commission is not a corporation, association, joint venture, partnership, syndicate or other similar entity. Accordingly, pursuant to Fed. R. App. P. 26.1(a) and 29(c)(1), it has not filed a Corporate Disclosure Statement.

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I. STATEMENT OF IDENTITY, INTEREST IN CASE, AND AUTHORITY FOR FILING.

The Interstate Mining Compact Commission ("IMCC" or "Commission") is a multistate governmental agency representing the natural resource and environmental protection interests of its member states. An individual state becomes an IMCC member through legislation authorizing its entry into the Interstate Mining Compact ("Compact") and enacting the Compact into state law. The states are officially represented by their governors, who serve as commissioners. The IMCC came into existence in 1970 with the entry of its first four member states. Since that time, seventeen additional states have enacted legislation bringing them into the IMCC and four states have become associate members while they pursue enactment of legislation to bring them in as full members.[1] In 2012, twenty-one IMCC member states accounted for more than 90% of total national coal production.

The Commission represents the interests of its member states with respect to the administration of the federal Surface Mining Control and Reclamation Act of 1977 ("SMCRA"), 30 U.S.C. § 1201 *et seq.*, and the state regulatory programs

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[1] The member states are: Alabama, Alaska, Arkansas, Illinois, Indiana, Kentucky, Louisiana, Maryland, Missouri, New York, North Carolina, North Dakota, Ohio, Oklahoma, Pennsylvania, South Carolina, Tennessee, Texas, Utah, Virginia and West Virginia. Associate members are: Colorado, Nevada, New Mexico, and Wyoming. *See* IMCC Member States, http://www.imcc.isa.us/Members.htm (last visited Sept. 10, 2013) (collectively referred to as "member states").

approved under SMCRA. This is accomplished through interaction with the Office of the Secretary of the U.S. Department of Interior ("Secretary") or its Office of Surface Mining Reclamation and Enforcement ("OSM"). Most IMCC member states regulate active coal mining activities within their borders pursuant to state programs approved by the Secretary in accordance with SMCRA. These approved state programs provide exclusive jurisdiction, or "primacy," for each such state to regulate coal mining, including the issuance of permits and enforcement of performance standards at coal mining operations, under the state laws and regulations that form the approved program. 30 U.S.C. §§ 1253(a) & 1254(a); Bragg v. West Virginia Coal Ass'n, 248 F.3d 275, 289 (4th Cir. 2001).

As primacy states, the Commission's members strongly support the District Court's ruling and have a substantial interest in seeking to have that decision upheld. It is critical that this Court affirm the lower court's holding that after a state program has been approved under SMCRA, *its* provisions apply instead of the federal statutes and regulations that served as the basis for the development of the state program. If a lawsuit seeking to compel a state regulatory official to comply with *federal* regulations was allowed to proceed (as Appellants Montana Environmental Information Center and Sierra Club (collectively, "MEIC") sought to do here), primacy states would be forced to comply with a confusing mix of duplicative federal and state laws, eliminating the carefully designed balance

between the federal government and state regulatory authorities that Congress sought to establish in SMCRA. Likewise, if MEIC's action was permitted to go forward as one seeking to enforce compliance with state mining laws that have purportedly been 'federalized' by virtue of OSM's approval of a state program, the meaning of primacy would be severely diminished. State agencies would be exposed without limit to federal court lawsuits based on alleged violations of individual state laws and regulations, for which state administrative and judicial review is already available. This is something that SMCRA not only does not contemplate, but speaks directly against.

All parties to this appeal have consented to the filing of this brief *amicus curiae* and the IMCC relies on consent for its authority to file. Fed. R. App. P. 29(a).

II. STATEMENT REGARDING AUTHORSHIP AND FUNDING.

No party's counsel authored this brief in whole or in part. No party or a party's counsel contributed money that was intended to fund preparation or submission of this brief. No person – other than the *amici curiae*, its members or its counsel – contributed money that was intended to fund preparation or submission of this brief.

III. ARGUMENT.

A. The Plain Language of SMCRA Establishes that State Law Applies Exclusively to the Regulation of Mining in Primacy States, and Therefore the *Ex Parte Young* Exception Does Not Deprive Montana of Its Sovereign Immunity from Suit.

MEIC's Complaint was filed under the SMCRA citizens suit provision found at 30 U.S.C. § 1270(a)(2). Complaint, ¶2; ER 0062. That statutory provision allows an adversely affected person to file a civil action against a state regulatory authority "*to the extent permitted by the eleventh amendment to the Constitution*, where there is an alleged failure of…the appropriate State regulatory authority" to perform an act or duty under SMCRA. 30 U.S.C. § 1270(a)(2) (emphasis added). This provision is unambiguous. *See*, *e.g*., Pac. Coast Fedn. of Fishermen's Ass'ns v. Blank, 693 F.3d 1084, 1092 (9th Cir. 2012); Mortensen v. County of Sacramento, 368 F.3d 1082, 1089-1090 (9th Cir. 2004). As a result, if this civil action against the Appellee Director of the Montana Department of Environmental Quality ("DEQ") is not "permitted by the eleventh amendment," the federal courts may not take cognizance of it - both because it is not authorized by SMCRA in the first place, and because the Eleventh Amendment would bar it. There is no need for a *Chevron* "Step Two" analysis because there is no ambiguous statutory enactment to be interpreted. Chevron, U.S.A. v. Nat'l Res. Defense Council, 467 U.S. 837, 842-843 (1984) ("If the intent of Congress is clear, that is

the end of the matter…."); McNeill v. United States, ____ U.S. ___, 131 S. Ct. 2218, 2221-2222, 180 L. Ed. 2d 35 (2011); *Mortensen*, 368 F.3d at 1089-1090.[2]

The Eleventh Amendment establishes that a state (including a state regulatory authority such as the DEQ) enjoys sovereign immunity from suit in federal court except in limited circumstances. Hans v. Louisiana, 134 U.S. 1, 10 (1890); Seminole Tribe v. Fla., 517 U.S. 44, 54 (1996). There are two exceptions to the sovereign immunity doctrine that MEIC asserted as a basis for overcoming this jurisdictional bar – the Ex Parte Young exception for injunctions seeking to compel compliance with federal law, and implied consent. The District Court correctly concluded that neither applies in this instance and the DEQ is therefore immune from MEIC's suit.

First, MEIC argued below that because it is seeking only prospective, injunctive relief to require that DEQ comply with federal law, the exception recognized in Ex Parte Young, 209 U.S. 123 (1908) overrides the Eleventh Amendment and allowed the District Court to entertain jurisdiction over this matter. Based on the plain language of SMCRA, and consistent with the decisions of the Courts of Appeals for the Third and Fourth Circuits, the District Court

[2] Although MEIC goes to great lengths in its Opening Brief in citing selected excerpts of SMCRA's legislative history, there is "no reason to resort to legislative history" where, as here, the statute is clear. *Pac. Coast Fedn. of Fishermen's Ass'ns*, 693 F.3d at 1093; United States v. Gonzales, 520 U.S. 1, 6 (1997); Am. Rivers v. FERC, 201 F.3d 1186, 1204 (9th Cir. 1999).

properly rejected this argument. District Court Order, pp. 11-12 (ER0012 - ER0013); *Bragg*, 248 F.3d at 294-296; Pa. Fed'n of Sportsmen's Clubs v. Hess, 297 F.3d 310 (3rd Cir. 2002).

To see why this is so, one must begin by identifying the claims that MEIC asserts. This, however, is no easy task. Apparently unable to choose from among several equally implausible jurisdictional theories, MEIC seems to assert claims based on: (1) alleged violations of solely Montana laws and regulations (Complaint, ¶¶ 44, 48, 52, 56, 60, 64, 68, 72, 76, 80, 84, 88 and 117; ER 0071 - 0085); (2) alleged violations of solely federal laws and regulations (Id., ¶ 36, 45, 49, 53, 57, 61, 65, 69, 73, 77, 81, 85, 89, 118; ER 0071 - 0085); and (3) alleged violations of *both* at the same time (Id., ¶¶ 36-37, ER 0068-0069; Relief Requested, ¶ 7.A; ER 0089). Indeed, MEIC's inability to clearly articulate its claims is revealing proof of the weakness of its position.[3] Ultimately, none of these approaches is availing.

[3] Adding further confusion to the basis for its Complaint, MEIC also alleges that the DEQ has failed to perform its mandatory duty under the federal Clean Water Act, 33 U.S.C. § 1251, et seq., to develop Total Maximum Daily Loads ("TMDLs") for certain streams that are impaired in meeting one or more State water quality standards, and that the U.S. Environmental Protection Agency ("EPA") has failed to perform a mandatory duty imposed upon it by the Clean Water Act, to step in and develop TMDLs when the DEQ did not do so. Complaint, ¶¶ 104-105, 110-111; ER 0083-0084. This action was not brought under the Clean Water Act. Moreover, MEIC never describes how these alleged Clean Water Act omissions support its claim that SMCRA's environmental

If MEIC is suing only for the enforcement of Montana law, then the SMCRA citizens suit provision does not apply, and Eleventh Amendment immunity does. *See* 30 U.S.C. § 1270(a)(2) (allowing suit to enforce a duty "*under [SMCRA]"*) (emphasis added); *Bragg*, 248 F.3d at 293 ("it is difficult to think of a greater intrusion on state sovereignty than when a federal court instructs state officials on how to conform their conduct to state law…") (citing Pennhurst State Sch. & Hosp. v. Halderman, 465 U.S. 89, 106 (1984)). Here, MEIC substantially relies upon alleged violations of *State* water quality standards – that were neither developed nor approved under SMCRA – as a basis for its claim that the DEQ failed to properly conduct comprehensive hydrologic impact assessments ("CHIAs") in reviewing certain mining permit applications. More importantly, however, the duty that is imposed on the DEQ to *conduct* a CHIA arises from *Montana* mine permitting requirements found at §82-4-227(3), MCA[4] and ARM 17.24.314(5)[5] -- *not* federal law. Accordingly, it is clear that MEIC is indeed seeking to enforce only state law duties.

MEIC's statements regarding "Application No. 00184," authorizing an expansion of Intervenor - Defendant - Appellee Western Energy Company's Rosebud Mine, illustrate this point. As MEIC points out, part of the area covered

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protection performance standards or permitting requirements directly apply in primacy states.

[4] *See* MEIC Statutory Addendum Part 1, p. 17.

[5] *See* DEQ Statutory and Rule Addendum, p. 10.

by that expanded permit area is on federal land and is therefore covered by a separate Cooperative Agreement between the DEQ and OSM as authorized by SMCRA's "federal lands" provisions. Complaint, ¶¶ 41-42; ER 0070. As a result, with respect to mining operations on federal lands encompassed within the Rosebud permit expansion, the DEQ has agreed to "enforce the *state* program," subject only to the Secretary's right to approve of any mining plans in his role as lessor of same. 30 U.S.C. § 1273(c); 30 C.F.R. §§ 745.12(a) (emphasis added), 745.13(c). Accordingly, even as to federal lands in Montana, the duties that MEIC seeks to enforce plainly arise under state law.

As to non-federal lands encompassed within the Rosebud permit expansion under Application No. 00184, MEIC concedes that the "Montana state regulatory program" applies. Complaint, ¶ 42; ER 0070. Since that program consists of the "state laws and regulations" that allow the DEQ to administer a mine permitting program and enforce environmental protection performance standards, by definition any duty imposed on the DEQ under that program is a state law duty. *See* 30 C.F.R. § 731.14 ("content requirements for [state] program submissions").[6]

[6] In opposing this conclusion, MEIC asserts that "Congress's reference to violations of the operative law in primacy States as violations of SMCRA demonstrates Congress's intent that each state program become enforceable as federal law…." (Op. Brief at 27). Notably absent from this statement is any reference to SMCRA or any other statute that supports it.

By contrast, the alleged violations of federal law that MEIC purportedly seeks to enforce are based upon environmental protection performance standards that would apply *only* if there was a federal regulatory program in effect in Montana. *Bragg*, 248 F.3d at 295, 297 (the "federal provisions establishing the minimum national standards…'drop out' as operative law" when a state is granted primacy under SMCRA, because in SMCRA "Congress has reserved to the states the 'exclusive' right to set the rules by which regulation of surface mining will be governed") (internal citations omitted); 30 U.S.C. § 1254(a)(3) ("*After* promulgation and implementation of a Federal program [following revocation of primacy,] the Secretary shall be the regulatory authority") (emphasis added). Here, no such federal regulatory program has been put in place for Montana, and therefore the DEQ cannot be "in violation" of any such program.[7]

[7] Based on a brief filed on behalf of the Secretary in 2001 *opposing* U.S. Supreme Court review of *Bragg*, MEIC contends that the Secretary opposes DEQ's and the other Appellees' positions on this issue, and does not currently support various conclusions set forth in the Fourth Circuit's opinion in *Bragg*. Op. Brief at pp. 15, 31, 33, 42-43. MEIC cites Auer v. Robbins, 519 U.S. 452 (1997) for the proposition that this Court may rely on such statements as representing the Secretary's views. The statement of the Secretary of Labor's position in *Auer*, however, was provided in the context of an *amicus* brief that the Court had specifically requested in order to solicit the agency's views on the issue under consideration in that case. *Auer*, 519 U.S. at 461. Here, the Secretary has not filed an *amicus* brief and there is no reason to believe that the positions as stated in the 2001 petition filed in *Bragg* represent the Secretary's current position on any issue presented in this appeal.

Finally, just as with the promulgation and administration of environmental protection standards, in the issuance of permits for mining operations either federal or state law applies – *not* both. *Bragg*, 248 F.3d at 286-287 (dismissing challenge to state regulatory authority's issuance of mine permits based on alleged "pattern and practice" of failing to make requisite findings under an approved state program, including alleged failure to assure compliance with state water quality standards); *Pa. Fed'n of Sportsmen's Clubs*, 297 F.3d at 325-326 (dismissing counts alleging violations of both SMCRA and the approved state program, and "explicitly reject[ing]" the theory that the state program was "codified" into federal law or otherwise federalized by virtue of approval under SMCRA); *In re. Permanent Surface Mining Regulation Litig.*, 653 F.2d 514, 519 (D.C. Cir. 1981) ("PSMRL") (Congress established in SMCRA that "the state is the sole issuer of permits"). Therefore there could never be violations of both federal and state law in issuing a mine permit.[8]

[8]Indeed, if it were otherwise, a mine permit applicant would have no understanding of which requirements it would have to meet in order to obtain issuance of a permit. *See, e.g.*, United States v. Cinergy Corp., 623 F.3d 455, 458-459 (7th Cir. 2010)(federally approved state permitting provisions under the Clean Air Act continue to apply regardless of federal initiative to change the federal rules and require updating of state programs; otherwise, permit applicants could not rely on a "straightforward reading" of applicable state regulations as to permit requirement).

MEIC's argument that Montana consented to be sued in federal court, and therefore voluntarily waived the protections of the Eleventh Amendment under *Pennhurst*, is equally meritless. As the Fourth Circuit noted in *Bragg*, SMCRA's citizens suit provision compels the exact *opposite* conclusion: by submitting a program for approval under SMCRA, Congress did not intend that a state waive its sovereign immunity but instead provided that a state would be subject to federal suit *only* "to the extent permitted by the eleventh amendment…." 30 U.S.C. § 1270(a)(2); *Bragg*, 248 F.3d at 298 (citing jurisprudence establishing that similar language under three other federal environmental statutes mandated the same conclusion). MEIC cites no authority to overcome this plain reading of the statute.

B. OSM Oversight of Approved State Programs in Primacy States Does Not Vest the Federal Courts with Jurisdiction Over Citizen Suits Seeking to Enforce State Law.

The District Court rightly rejected MEIC's argument that OSM's oversight authority somehow vests federal courts with jurisdiction over a citizen suit seeking an injunction to require a state agency to comply with an approved state law – a concept squarely at odds with the Eleventh Amendment as the Supreme Court ruled in *Pennhurst*. 465 U.S. at 89. To support its argument, MEIC selectively excises language from SMCRA's oversight provision to give the illusion that federal enforcement of SMCRA is somehow concurrent or parallel with a primacy state's enforcement of an approved state program. Op. Brief at 26. In doing so,

MEIC invites this Court to effectively ignore the clear and unambiguous statutory language declaring that when a state obtains primacy under SMCRA, it obtains "exclusive jurisdiction" over the regulation of surface coal mining in the state subject only to federal oversight of the state program. 30 U.S.C. § 1253(a).

MEIC concedes as much: "no State exercises truly 'exclusive jurisdiction' under SMCRA, and no state program may properly be treated exclusively as state law." Op. Brief at 29. In other words, MEIC maintains that when Congress used the phrase "exclusive jurisdiction," Congress did not really mean it. Rather, according to MEIC, Congress must have meant the exact opposite; that OSM and primacy states not only have concurrent jurisdiction over state programs, but OSM's oversight authority means that state programs are really federal programs subject to enforcement as federal law. The only other circuit courts of appeal to address this argument have soundly rejected it because the language of SMCRA belies this strained construction. *Bragg*, 248 F.3d at 293-295; *Pa. Fed'n of Sportsmen's Clubs*, 297 F.3d at 328-329.[9]

Unlike other environmental statutes such as the Clean Water Act that create a sort of "cooperative federalism" where state and federal authorities share concurrent jurisdiction, SMCRA "provides for enforcement of either a federal

[9] Apparently in the alternative, MEIC claims that Congress was "silent" on the issue of whether a primacy state's authority was intended to be exclusive or concurrent. Op. Brief at 39. That, of course, is patently incorrect.

program or a State program, but not both." *Bragg*, 248 F.3d at 293. As *Bragg* noted, "[t]o make this point absolutely clear, SMCRA provides explicitly that when States regulate, they do so exclusively, and when the Secretary regulates, he does so exclusively." *Id.* at 294 (citations omitted). OSM's oversight authority in primacy states does not change this reality.

While OSM does have authority to inspect and issue violations at specific mines in primacy states, OSM must give notice to the state authority so the state can take appropriate action in the first instance. 30 U.S.C. § 1271(a)(1).[10] "SMCRA itself is not violated by an operator's violation of a permit condition even though the SMCRA requires that the condition be imposed." *Haydo v. Amerikohl Mining, Inc.*, 830 F.2d 494, 498 (3d. Cir. 1987). "This deference to the state's authority clearly indicates that enforcement by the federal government is a last resort; jurisdiction is hardly shared." *Pa. Fed'n of Sportsmen's Clubs*, 297 F.3d at 328.

Beyond this, OSM's role is relegated to ensuring that primacy state programs enforce the minimum national standards required for a state to obtain, and maintain, its exclusive regulatory authority. "[W]hen a State's program has been approved by [OSM], we can look only to State law on matters involving the

[10] "Appropriate action" is defined as "enforcement or other action authorized *under the State program* to cause the violation to be corrected." 30. C.F.R. § 842.11(b)(3) (emphasis added).

enforcement of the minimum national standards; whereas, on matters relating to the good standing of a State program, SMCRA remains directly applicable." *Bragg*, 248 F.3d at 295. In other words, OSM's power to ensure that state programs continue to meet the minimum national standards necessary to obtain primacy (described in *Bragg* as SMCRA's "structural provisions" (248 F.3d at 295)) does not deprive state programs of their exclusive jurisdiction granted under SMCRA or otherwise transform state law into federal law.[11]

IMCC and its members are acutely concerned with MEIC's position on the meaning of OSM's oversight because adoption of that position would turn 30 years of settled practice on its proverbial ear. Rather than enjoying the exclusive jurisdiction afforded to them under SMCRA, permitting decisions by IMCC's member states under their respective state laws would suddenly be subject to federal court review through citizen suits. Moreover, a ruling in MEIC's favor would create a split of authority between IMCC's members located within the boundaries of this Circuit and those members located within the boundaries of the Third and Fourth Circuits. As mentioned above, the Third and Fourth Circuits

[11] Thus, MEIC is wrong in asserting (Op. Brief at 33) that there would be no duties to "compel" a state regulatory authority to perform under the SMCRA citizens suit provision if the minimum national standards are not directly applicable in primacy states . State regulatory authorities in primacy states may be (and have been) subject to such suits for failing to comply with the structural duties imposed upon them by SMCRA. *Pa. Fed'n of Sportsmen's Clubs*, 297 F.3d at 331-332.

have both resoundingly rejected the same arguments presented by MEIC here. For obvious reasons, this Court should do the same.

C. Even If Montana's Sovereign Immunity Did Not Bar this Action, MEIC Has Not Alleged a Failure to Perform a Nondiscretionary Duty.

SMCRA's citizens suit provision only allows suits against OSM or a State based on an alleged failure "to perform any act or duty under [SMCRA] which is not discretionary[.]" 30 U.S.C. § 1270(a)(2). A duty that is "not discretionary" is one that imposes purely ministerial acts as opposed to judgmental decisions. Environmental Defense Fund v. Thomas, 870 F.2d 892, 899 (2d. Cir. 1989). Performance of a duty that calls for application of scientific judgment in reaching a decision is discretionary. "[T]he fusion of technical knowledge and skills with judgment . . . is the hallmark of duties which are discretionary." Kennecott Copper Corp., Nevada Mines Div. v. Costle, 572 F.2d 1349, 1354 (9th Cir. 1978).

Before a mining permit may be issued under either SMCRA or Montana's approved program, DEQ is required to perform an "assessment of the probable cumulative impact of all anticipated mining in the area on the hydrologic balance" and determine that the proposed operation "has been designed to prevent material damage to the hydrologic balance outside the permit area[.]" 30 U.S.C. § 1260(b)(3); Mont. Code Ann. § 82-4-227(3). As noted, this is known as the "cumulative hydrologic impact assessment" or "CHIA." MEIC does not allege that DEQ has failed to conduct CHIAs before issuing mining permits. Rather,

MEIC challenges the *way* in which DEQ conducts CHIAs and the scientific judgments rendered as a result. In other words, MEIC challenges DEQ's methodology used to perform CHIAs; not whether DEQ performs CHIAs before issuing permits under Montana's mining program.

Specifically, MEIC contends that "SMCRA's structure and purpose require interpretation of the 'CHIA duty' to encompass the preliminary, nondiscretionary duty to formulate and apply criteria that define 'material damage' with respect to the water resources pertinent to each permit application, thus allowing [DEQ] to make a reasoned material damage determination for each proposed mine." Op. Brief at 50. MEIC does not, however, cite a single provision of SMCRA or its implementing regulations that requires DEQ "to formulate and apply criteria that define 'material damage.'' That is because none exist. Neither SMCRA nor its implementing regulations define the phrase "material damage to the hydrologic balance outside the permit area." *Ohio River Valley Envtl. Coalition, Inc. v. Salazar*, 466 Fed. Appx. 161, 164 (4th Cir. 2012) ("neither the Act nor its implementing regulations defines this phrase").

In the absence of a statutory or regulatory mandate of the specific methodology to be used by a state authority when performing a CHIA, DEQ must perforce exercise its discretion in performing this duty. In other words, there is absolutely no basis to claim that DEQ has a non-discretionary duty to conduct a

CHIA in the way demanded by MEIC. As explained more fully by DEQ in its brief, the CHIA process is complex and requires the agency to exercise its skill and judgment in evaluating the information submitted as a part of the permit application to determine whether a proposed mining operation, based on its necessarily unique characteristics, is designed to prevent "material damage to the hydrologic balance outside the permit area." Stone-Manning's Answering Brief at 9-14 (Dkt. 18-1). This is undeniably a discretionary function, which Congress expressly excluded from the scope of a SMCRA citizens suit.

MEIC attempts to manufacture a non-discretionary duty to perform CHIAs in the particular manner MEIC demands by resorting to the principle that administrative agencies "must engage in a rational decisionmaking [sic] process." Op. Brief at 50-52. What MEIC fails to explain, however, is why DEQ has a non-discretionary duty to perform that decision-making process in the particular manner MEIC demands. Again, MEIC cannot dispute that DEQ performs CHIAs before issuing mining permits by applying the criteria formulated in the definition of "material damage" to reach a scientific judgment as to whether the proposed project will cause "material damage to the hydrologic balance outside the permit area." MEIC's disagreement lies with the merits of the conclusions reached by DEQ as a result of the CHIAs.

MEIC can challenge the merits of the CHIAs through the administrative review process established under Montana law as required by SMCRA. Mont. Code Ann. §§ 84-2-205(2), 206(1); 30 U.S.C. § 1275. Judicial review is also available if MEIC is unsatisfied with the result of an administrative review. Mont. Ann. Code § 82-4-206(2). By mandating an administrative procedure for reviewing the merits of permitting decisions (that every state program is required to provide, in order to be approved under SMCRA), and correspondingly limiting federal court jurisdiction over SMCRA citizens suits against a state regulatory agency only to those involving a duty "which is not discretionary," Congress clearly intended that merits-based challenges to permitting decisions not be brought via a citizens suit in federal court. *See PSMRL,* 653 F.2d at 519 (in primacy states, "administrative and judicial appeals of permits decisions are matters of state jurisdiction…."). MEIC's position is thus diametrically opposed to SMCRA's Congressional design.

Even if the Court were to find that "SMCRA's structure and purpose" (as opposed to its actual language) creates the non-discretionary duty MEIC claims – "to formulate and apply criteria that define 'material damage'" – DEQ has already done so by promulgating a definition of "material damage" that OSM has approved:

> "Material damage" means, with respect to protection of the hydrologic balance, degradation or reduction by coal mining and reclamation operations of the quality or quantity of water outside of the permit area in a manner or to an extent that land uses or beneficial uses of

> water are adversely affected, water quality standards are violated, or water rights are impacted. Violation of a water quality standard, whether or not an existing water use is affected, is material damage.

Mont. Code Ann. § 82-4-203(31). This definition does exactly what MEIC seeks; it reflects a formulation of criteria for DEQ to apply when undertaking the CHIA process.

MEIC is apparently unsatisfied with this definition and the way in which DEQ applies it, but federal courts do not have jurisdiction to resolve such policy disagreements through adjudication of a citizens suit. Rather, the SMCRA citizens suit provision is limited only to actions, "to the extent permitted by the eleventh amendment[,]" where a primacy state has failed to perform a *non*-discretionary duty. How DEQ applies its definition of "material damage" when undertaking a CHIA is clearly a discretionary function. Therefore, even if MEIC's claims were not barred by the Eleventh Amendment (which they are), they fall outside the scope of the SMCRA citizens suit provision. As noted above, the absence of a federal court venue does not deprive MEIC of a remedy. If MEIC wishes to challenge the merits of a CHIA decision, the appropriate procedure is to pursue an administrative appeal of the permit - not a citizens suit in federal court.

MEIC's position that federal courts have jurisdiction to hear citizens suits challenging the merits of permitting decisions made by primacy states applying state law is contrary to over 30 years of settled practice by IMCC's member states.

Rather than committing review of the site-specific scientific and technical decisions involved in permitting decisions for mining operations to administrative agencies uniquely trained and qualified to perform that review, MEIC seeks to vest this obligation in the federal courts in the face of clear Congressional intent to the contrary. In essence, MEIC seeks to sidestep the administrative review process established specifically to adjudicate the type of merits-based challenges MEIC asserts here. This Court should not countenance such an effort.

IV. CONCLUSION.

"[S]aying that certain conduct is a violation of SMCRA does not make it so…." *Pa. Fed'n of Sportsmen's Clubs*, 297 F.3d at 325. MEIC's confused effort to somehow transform discretionary decisions made under state law into mandatory federal duties is fundamentally flawed. That is because it runs so clearly counter to SMCRA's "careful and deliberate" encouragement to each of the states to assume "exclusive" regulation of coal mining within its borders. *Bragg*, 248 F.3d at 294 (internal citations omitted). MEIC has several avenues open to it for challenging any flaws that it perceives in permits issued by the DEQ. Bringing suit against the DEQ in federal court is not one of them.

For all of the reasons set forth above, and for those described in the briefs filed on behalf of the Appellees, the District Court's January 22, 2013 Order should be affirmed.

Respectfully submitted this 17th day of September, 2013.

INTERSTATE MINING COMPACT COMMISSION

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CERTIFICATE OF COMPLIANCE WITH FED. R. APP. R. 32(a)(7)(c) AND NINTH CIRCUIT RULE 32-1

I hereby certify that pursuant to Fed. R. App. P. 32(a)(7)(C) and Ninth Circuit Rule 32-1, the foregoing brief is proportionately spaced, has a typeface of 14 points or more and contains 5,296 words or less based on a Microsoft Word count.

Dated: September 17, 2013

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CERTIFICATE OF SERVICE

I, Christopher B. Power, hereby certify that on September 17, 2013, I electronically filed the foregoing "Brief on Behalf of Interstate Mining Compact Commission, *Amicus Curiae*, In Support of Defendants-Intervenors-Appellees" with the Clerk of the Court for the United States Court of Appeals for the Ninth Circuit by using the appellate CM/ECF system.

I certify that all participants in the case are registered CM/ECF users and that service will be accomplished by the appellate CM/ECF system upon each of the following counsel:

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