KATHERINE M. BIDEGARY
District Judge, Department 2
Seventh Judicial District
300 12th Avenue, N.W., Suite #2
Sidney, Montana 59270

DATE January 25, 2022
CLERK OF DISTRICT COURT
By: Kathleen Ball

MONTANA SIXTEENTH JUDICIAL DISTRICT COURT

ROSEBUD COUNTY

MONTANA ENVIRONMENTAL INFORMATION CENTER, and SIERRA CLUB, Petitioners, vs. MONTANA DEPARTMENT OF ENVIRONMENTAL QUALITY, MONTANA BOARD OF ENVIRONMENTAL REVIEW, WESTERN ENERGY CO., NATURAL RESOURCE PARTNERS, L.P., INTERNATIONAL UNION OF OPERATING ENGINEERS, LOCAL 400, and NORTHERN CHEYENNE COAL MINERS ASSOCIATION, Respondents.	Cause No.: DV 19-34 Judge Katherine M. Bidegaray **ORDER ON REMEDY AND STAY**

I. PROCEDURAL AND FACTUAL BACKGROUND

Pursuant to the Montana Administrative Procedures Act (MAPA), which provides for the judicial review of final agency action, the Montana Environmental Information Center and Sierra Club (Conservation Groups) petitioned the Court contending that the approval by the Montana Board of Environmental Review (BER) of the AM4 permit expanding the Rosebud Mine was procedurally and substantively flawed and should be reversed and remanded to the Montana Department of

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Environmental Quality (DEQ) to review the AM4 permit application consistent with applicable laws. By Order dated October 27, 2021, this Court "reverse[d] the BER and remand[ed] to DEQ to review the AM4 permit application consistent with this decision and applicable laws." Order on Petition at 34. This Court held that BER committed four procedural errors: (1) unlawfully engrafting an issue exhaustion requirement onto MSUMRA; (2) unlawfully allowing Respondents to submit *post hoc* evidence and argument; (3) allowing an unqualified witness to provide key expert testimony; and (4) unlawfully reversing the burden of proof. *Id.* at 13-28. This Court further held that BER and DEQ committed two critical substantive errors: (1) arbitrarily and capriciously assessing water quality standards regarding the growth and propagation of aquatic life; and (2) arbitrarily and capriciously determining that releasing additional salt for decades to centuries into a stream that is already impaired for excessive salt will not worsen the impairment. *Id.* at 31-37.

Thereafter, Respondents DEQ and Westmoreland Rosebud Mining, LLC (WRM) (together, "Respondents") sought leave to allow WRM to continue strip-mining operations in the AM4 Area of the Rosebud Mine, notwithstanding this Court's reversal of the permit approval that authorized the AM4 mining. In addition, DEQ and WRM request the Court to stay its decision pending anticipated but yet-unfiled appeals. The principal justifications offered for these requests, supported by briefs and declarations, are (1) the burden to DEQ of complying at this juncture with

its legal obligations and (2) alleged threats to the public power supply caused by WRM's potential inability to supply sufficient coal to the Colstrip Power Plant.

The Conservation Groups have opposed Respondent's motions, also supported by briefs and declarations, arguing that the standard judicial remedy for an unlawfully issued permit is reversal and vacatur of the permit and further arguing that, because vacatur is an equitable remedy, the Court may defer vacatur.

The Court notes that there is no substantial dispute of fact that DEQ has (1) determined the receiving stream, East Fork Armells Creek (EFAC), to be impaired and not meeting water quality standards for over a decade; and (2) failed to prepare a remedial plan. *Id.* at 6-7.[1] Nor is it disputed that in fall 2020 and again in spring 2021, one of the two Colstrip units was shut down for two and one-half months. Declaration of David Schlissel ¶ 7 (attached as Exhibit 2 to Conservation Groups' Response). The Conservation Groups argue that, because hydroelectric and solar energy is abundant and energy demand is low in spring, it is possible to shut down one of the two units during this "shoulder" season without negatively affecting energy supplies or energy costs. *Id.* ¶¶ 7, 14, 19.

[1] Of further note, since this case was filed, WRM has violated water pollution limitations 67 times. Declaration of Anne Hedges ¶ 9, attached as Exhibit 1 to Conservation Groups' Combined Response to DEQ's and WRM's Motions for Stay and Motions on Remedy (hereafter Conservation Groups' Response).

Specifically, the Conservation Groups request that this Court defer vacatur of the AM4 permit until April 1, 2022, which the Conservation Groups argue will allay Respondents' proffered concerns, while assuring that the environmental protections of the Montana Strip and Underground Mine Reclamation Act (MSUMRA) and the Montana Constitution are honored. Additionally, the Conservation Groups argue that Respondents' stay motions should be denied because they are untimely, and they fail to meet the legal standard for a stay in that: they demonstrate no likelihood of success on appeal; DEQ and WRM will suffer no irreparable harm from a remedy that defers vacatur until April 2022; and a stay would harm the Conservation Groups and the public.

Having considered the parties' arguments and affidavits, the Court is prepared to rule.

II. LEGAL FRAMEWORK

Vacatur

The Montana Supreme Court has recently affirmed that "[t]he judiciary's standard remedy for permits or authorizations improperly issued without required procedures is to set them aside." *Park Cnty. Envtl. Council v. DEQ*, 2020 MT 303, ¶ 55, 402 Mont. 168, 477 P.3d 288.[2] The *Park County* Court explained that, where

[2] *Accord, e.g., Mont. Envtl. Info. Ctr. v. DEQ* (*MEIC II*), 2020 MT 288, ¶ 27, 402 Mont. 128, 476 P.3d 32 ("[W]e conclude the 2017 Permit was not validly issued and must be vacated."); *Northern Cheyenne Tribe v. DEQ*, 2010 MT 111, ¶ 47, 356 Mont. 296, 234 P.3d 51 (reversing approval of

an agency fails to conduct an adequate "environmental review," vacatur is essential to ensure that "the government will not take actions jeopardizing ... Montana's natural environment without first thoroughly understanding the risks involved." *Id.* ¶¶ 74-77. Thus, it is only in "limited circumstances" when courts decline to vacate unlawful permits. *Id.* ¶ 55.

Setting aside (or "vacatur") of an unlawful permit is an "equitable remedy." *Id.* ¶ 89. Accordingly, in appropriate circumstances, a court may in equity defer vacatur to allow the orderly winding down of unlawfully permitted activities. *Northern Cheyenne Tribe*, ¶ 47 (vacating permit but allowing permittee to "continue operating under its current permits" for "90 days").

Stay

"The power to stay proceedings is incidental to the power inherent in every court to control the disposition of the causes on its docket with economy of time and effort for itself, for counsel, and for litigants." *Landis v. N. American Co.*, 299 U.S. 248, 255 (1936), *followed in Henry v. Dist. Ct. of Seventeenth Jud. Dist.*, 198 Mont. 8, 13-14, 645 P.2d 1350, 1352-53 (1982). A motion for a stay pending appeal must

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water permit and "declar[ing] Fidelity's [the applicant's] permits void"); *Aspen Trails Ranch, LLC v. Simmons*, 2010 MT 79, ¶¶ 58-59, 356 Mont. 41, 230 P.3d 808 (affirming district court decision to "void [a] preliminary plat" that was approved "unlawfully" by county commission); *Kadillak v. Anaconda Co.*, 184 Mont. 127,144, 602 P.2d 147, 157 (1979) ("Because the application was not returned Permit 41A was void from the beginning and Anaconda may not continue the mining activities on the Permit 41A area until a valid permit is granted by State Lands."); *see also Alliance for the Wild Rockies v. U.S. Forest Serv.*, 907 F.3d 1105, 1121 (9th Cir. 2018) ("Although not without exception, *vacatur* of an unlawful agency action normally accompanies remand.").

be filed first in district court. Mont. R. App. P. 22(1)(a). While Montana Rule of Appellate Procedure 22(1)(a) does not establish a standard for district courts to evaluate motions for stays pending appeal, the decision ultimately rests with the district court's discretion and requires a "weigh[ing] [of] competing interests." *Landis*, 299 U.S. at 254-55 (decision calls "calls for the exercise of judgment"); *Flying T Ranch, LLC v. Catlin Ranch, LP*, 2020 MT 99, ¶ 7, 400 Mont. 1, 462 P.3d 218 (district court order on motion for stay reviewed for abuse of discretion).

Consistent with the need to assess competing interests, the U.S. Supreme Court considers the following four factors in evaluating a motion for a stay pending appeal:

> (1) whether the stay applicant has made a strong showing that he is likely to succeed on the merits; (2) whether the applicant will be irreparably injured absent a stay; (3) whether issuance of the stay will substantially injure the other parties interested in the proceeding; and (4) where the public interest lies.

Nken v. Holder, 556 U.S. 418, 426 (2009) (quoting *Hilton v. Braunskill*, 481 U.S. 770, 776 (1987)); *see also Flying T Ranch*, ¶ 16 (requiring party seeking stay to "make out a clear case of hardship or inequity" (quoting *Henry*, 198 Mont. at 13, 645 P.3d at 1353)).[3] "A party requesting a stay pending appeal bears the burden of showing that the circumstances justify an exercise of the court's discretion." *N.*

[3] Montana Rule of Appellate Procedure 22(2)(a)(i) provides that a motion for a stay from the Montana Supreme Court must demonstrate "good cause." A showing of "good cause" inherently requires an evaluation of competing interests, as in *Nken*, *Landis*, *Flying T Ranch*, and *Henry*.

Plains Res. Council v. U.S. Army Corps of Eng'rs (*Northern Plains*), 460 F. Supp. 3d 1030, 1044 (D. Mont. 2020); *Flying T Ranch*, ¶ 16. A party's failure to satisfy any prong of the standard "dooms the motion." *In re Silva*, No. 9:10-bk-14135-PC, 2015 WL 1259774, at *4 (C.D. Cal. Mar. 17, 2015).

III. DISCUSSION

A. Appropriate Remedy

This Court previously reversed the BER's affirmance of the AM4 permit for the Rosebud strip-mine. The practical and legal effect of this determination is that WRM does not have a valid permit to mine in compliance with, and as required by, MSUMRA. Nevertheless, WRM contends that this Court lacks authority to grant effective relief that would stop its strip-mining operations in the AM4 Area, i.e., vacatur of WRM's unlawful permit. WRM Br. on Remedy at 5-7 (Nov. 8, 2021). WRM's argument, however, is refuted by case law, MSUMRA, and the Montana Administrative Procedure Act (MAPA). The touchstone here is that this Court has broad authority to grant effective relief to remedy unlawful agency action, including reversing and vacating DEQ's permitting decision. Clearly Montana courts possess equitable authority to vacate or "set aside" unlawfully issued permits, which is the "standard remedy for permits or authorizations improperly issued." *Park Cnty.*, ¶¶ 55, 89. What is more, a statutory denial of the judicial authority to set aside unlawful action that may harm the environment would violate Montana's

constitutional mandate to the Legislature to "provide adequate remedies for the protection of the environmental life support system from degradation." Mont. Const. art. IX, § 1(3); *Park Cnty.*, ¶ 89.

However, the Court at this juncture need not consider whether the relevant laws unconstitutionally preclude effective remedies. MSUMRA and MAPA plainly authorize a reviewing court to vacate an unlawfully issued permit. As this Court explained, MSUMRA is required to meet the minimum standards of the federal Surface Mining Control and Reclamation Act (SMCRA). 30 U.S.C. § 1253(a)(1), *cited in* Order on Petition at 14 n.3. SMCRA provides that on judicial review of any action by a regulatory authority, including permitting, a "court may affirm, *vacate*, or modify any order or decision or may remand the proceedings ... for such further action as it may direct." 30 U.S.C. § 1276(b) (emphasis added). "States with an approved State program shall implement, administer, enforce and maintain it in accordance with the Act [SMCRA], this chapter and the provisions of the approved State program." 30 C.F.R. § 733.11.

This broad authority of judicial review is mirrored at the state level in MSUMRA and MAPA. MSUMRA provides that permit appeals are subject to the provisions of MAPA. § 82-4-206(1)-(2), MCA. MAPA, like SMCRA, provides reviewing courts broad authority review to "affirm," "remand," "reverse," or

"modify" an agency decision. § 2-4-704(2), MCA.[4] Here, the final agency action subject to judicial review was the BER decision, which "Affirmed" the "AM4 Permit." BER:152 at 85-86. Reversal of BER's approval of the permit is equivalent to vacatur of the permit. The contrary conclusion advanced by WRM would violate *Park County*, the Montana Constitution, MSUMRA, and SMCRA.

Finally, WRM argues that § 2-4-711, MCA, somehow prevents a court from vacating an unlawful agency permitting decision. WRM Br. on Remedy at 6-7. In fact, that statute cuts sharply *against* WRM's argument and provides in relevant part that "if appeal is taken from a judgment of the district court reversing or modifying an agency decision" (as here) "the agency decision *shall be stayed* pending final determination of the appeal unless the supreme court orders otherwise." § 2-4-711(2), MCA (emphasis added). Far from requiring a district court to allow unlawfully permitted activities to continue, this provision—like the above-cited provisions of SMCRA and MAPA—provides that an unlawful action must be stopped pending appeal. *In re Investigative Records of Columbus Police Dep't*, 265 Mont. 379, 381-82, 877 P.2d 470, 471 (1994) ("The word 'may' is commonly understood to be permissive or discretionary. In contrast 'shall' is understood to be compelling or mandatory." (internal citations omitted)); *see also* Merriam-Webster Dictionary,

[4] WRM states incorrectly that MAPA only permits courts to "affirm" or "remand" agency decisions, ignoring the express authority to "reverse" or "modify." WRM Br. on Remedy at 6.

www.merriam-webster.com (defining to "stay" as "to stop going forward: PAUSE" or "to stop doing something: CEASE"). Simply stated, WRM's contention that these provisions somehow straitjacket the district court's ability to stop unlawful action is without merit.

Deferred Vacatur

That said, deferred vacatur of the AM4 permit until April 1, 2022, is the appropriate remedy. As explained in *Park County*, requiring DEQ to conduct the necessary "environmental review"—here the required analysis of cumulative impacts to water resources under the MSUMRA—before mining has occurred is necessary to secure Montanans' right to a clean and healthful environment, which mandates "anticipatory and preventative" action. *Id.* ¶¶ 72-78; Mont. Const. arts. II, § 3, IX, § 1(1) ("The state ... shall maintain and improve a clean and healthful environment in Montana for present and future generations."); *Mont. Wilderness Ass'n v. Fry*, 408 F. Supp. 2d 1032, 1038 (D. Mont. 2006) ("[T]he public interest is best served when the law is followed.").

Here, the impacts of mining on water resources adjacent to the mine—principally East Fork Armells Creek (EFAC)—have already been severe. As the record shows and this Court explained, the stream is impaired for multiple pollutants, including salinity; mining in the AM4 Area will add more salinity to the stream; and the cumulative impact of all mining will increase the concentration of salinity in the

stream substantially. Order on Petition at 6-7. This is precisely the harm MSUMRA is intended to prevent. *See* ARM 17.24.405(6)(c) (prohibiting issuance of a permit unless applicant demonstrates and DEQ confirms that "cumulative hydrologic impacts will not result in material damage"); § 82-4-203(32), MCA, (defining "material damage" to include any "[v]iolation of a water quality standard"); *Northern Plains*, 460 F. Supp. 3d at 1039-40 (vacatur appropriate to avoid harm underlying statute is designed to prevent). As demonstrated by the wall of decisions from *Kadillak*, 184 Mont. at 144, 602 P.2d at 157, to *Park County*, ¶¶ 55, 89, this is precisely the situation in which vacatur of an unlawful permitting decision is warranted. *See supra* note 1 (collecting cases).

While WRM and DEQ raise several complaints in opposition to vacatur, to the degree that any have merit, they can be resolved by deferring vacatur until April 1, 2022. The Montana Supreme Court addressed an analogous situation in *Northern Cheyenne Tribe*, where DEQ had issued unlawful discharge permits to a company that extracted coal-bed methane. *Id.* ¶¶ 4, 10, 46. The Court "declare[d]" the unlawfully issued permits "void." *Id.* ¶ 47. However, to avoid unnecessary disruption, the Court granted DEQ 90 days to reevaluate the permits, "during which time Fidelity [the company] may continue operating under its current permits." *Id.* ¶ 47; *see also Northern Plains*, 460 F. Supp. 3d at 1040 (finding that narrowed vacatur "strikes a reasonable balance" between competing concerns).

Here, WRM claims that ,if it is required to cease operations in the AM4 Area, it might not be able to supply sufficient coal to the Colstrip Power Plant, which could in turn "jeopardize" electricity supplies during the winter period of high energy demand. WRM Br. on Remedy at 10-11. WRM's hypothetical concerns about coal and electricity supply are highly speculative, given AM4 constitutes less than 10% of the mine's permitted reserves, which are distributed between four active mine areas. Schlissel Decl. ¶ 9; *cf.* WRM Br. on Remedy, Ex. A (Declaration of Russell Batie) ¶ 4 (stating only 30% of mine production from AM4, 70% from other areas). Even assuming WRM's worst-case scenario were accurate, however, if vacatur is deferred until spring, when electricity demand is low and supplies of hydroelectric and solar energy are abundant, "it is still extremely unlikely that energy supplies or energy costs in ... Montana or the Pacific Northwest would be negatively affected." Schlissel Decl. ¶ 19. This is because coal stockpiles at the mine and power plant, identified by WRM and plant operator Talen Montana, LLC, are sufficient to keep at least one of the two Colstrip units operating for four months (the maximum time need to move WRM's equipment), which is sufficient to meet reduced spring electricity demands. *Id.* Indeed, in both 2021 and 2020, one of the two Colstrip units was shut down for two-and-one-half months during spring and fall shoulder seasons. *Id.* ¶ 7.

Deferred vacatur would also alleviate WRM's complaints about safety hazards caused if "operations in the AM4 Area suddenly cease." WRM Br. on Remedy at 11-12. Five months from the issuance of this Court's Order reversing BER's approval of the AM4 permit are certainly sufficient time for WRM to wind down operations in the AM4 Area, detonate set explosives, and remove exposed coal and blasted overburden. Batie Decl. ¶ 6 (two to four months to move equipment and preform preliminary work). So too with respect to WRM's investments in drilling and blasting. *See* WRM Br. on Remedy at 12. Five months is enough time to allow WRM wind down its operations in the AM4 Area without investing in additional, unnecessary drilling or blasting in AM4. Batie Decl. ¶ 6. In sum, deferred vacatur until April 1, 2022, will uphold the law, protect the environment, and avoid any negative impacts to power supplies.

Cognizable harm

DEQ's concerns about the costs associated with complying with its legal obligations, set forth in this Court's earlier Order, are not cognizable "harm". DEQ Br. in Supp. of Stay at 6-10 (Nov. 5, 2021). Agencies cannot complain about the burden of following the law. *Northern Plains* is illustrative. There the Court held that the nationwide permitting process used to approve dredge and fill activities associated with certain oil and gas pipelines violated the Endangered Species Act (ESA). 460 F. Supp. 3d at 1034-35. The agency sought a stay pending appeal,

"complain[ing] that, absent a stay, [the agency] will be burdened by having to process an increased number of individual permit applications." *Id.* at 1045, 1048 (noting thousands of pending pipeline preconstruction notices). The Court discounted the agency's complaints because they "resulted from the agency's failure to follow the law in the first instance." *Id.* (quoting *Swan View Coal. v. Weber*, 52 F. Supp. 3d 1160, 1161-62 (D. Mont. 2014)). So too here; DEQ's reticence to comply with the law is no basis for denying vacatur or staying this Court's decision.[5]

Finally, WRM's complaints about losing its investment in operations in the AM4 Area do not change the analysis. First, as noted, deferring vacatur until spring strikes a "reasonable balance" that will provide WRM time to wind down operations in AM4 and move its operations to one of its other approved permit areas. *See Northern Plains*, 460 F. Supp. 3d at 1040; *Northern Cheyenne Tribe*, ¶ 47. Further, the "cost of compliance" with the law, including some "lost profits and industrial inconvenience" are the "nature of doing business" and do not overcome the weighty interests of the rule of law and environmental protection. *Northern Plains*, 460 F. Supp. 3d at 1041 (quoting *Standing Rock Sioux v. U.S. Army Corps of Eng'rs*, 282 F. Supp. 3d 91, 104 (D.D.C. 2017)); *Park Cnty.*, ¶¶ 81-82 (explaining that a

[5] DEQ could have avoided these costs, if, for example, agency management had not prohibited agency and industry experts from reviewing and analyzing the relevant data regarding water quality standards. Order on Petition at 25 n.8; *see Northern Plains*, 460 F. Supp. 3d at 1045 (agency cannot complain of "self-inflicted" harm (quoting *Al Otro Lado v. Wolf*, 952 F.3d 999, 1008 (2020))).

company's right to conduct mining activities is restricted by requirement of a lawful permit and that "some administrative delay" does not infringe property rights). This is especially the case where, as here, the cessation of operations is temporary, and may end when DEQ, in compliance with the law, completes the remand process. *Park Cnty.*, ¶ 82; *League of Wilderness Defs. v. Connaughton*, 752 F.3d 755, 765-66 (9th Cir. 2014) (holding "irreparable environmental injuries outweigh the temporary delay" of economic gains from project).

In sum, the "standard remedy" of vacatur should apply here to assure environmental and constitutional protections and uphold the rule of law. *Park Cnty.*, ¶ 55. And, like *Northern Cheyenne Tribe*, ¶ 47, this Court defers vacatur until April 1, 2022, to strike a reasonable balance, allow WRM to wind down operations in AM4, and avoid or mitigate potential negative impacts.

B. Whether Stay Is Warranted

Consideration of merits

The Court notes that the gravamen of Respondents' arguments is a rehash of arguments rejected by the Court in its previous Order on Petition. Moreover, the Court notes that where a district court's decision rests on alternative grounds, as here, a party cannot demonstrate a strong likelihood of success on the merits without addressing *each* basis to the Court's holding. *State v. English*, 2006 MT 177, ¶ 47, 333 Mont. 23, 140 P.3d 454 ("Failure to challenge each of the alternative bases for

a district court's ruling results in affirmance."); *MEIC II*, ¶ 27 (finding single issue sufficient to affirm vacatur of unlawful permit and "declin[ing] to address the other issues" raised by appellants); *Life Spine, Inc. v. Aegis Spine, Inc.*, No. 19 CV 7092, 2021 WL 1750173, at *1-2 (N.D. Ill. May 4, 2021) (denying stay motion that failed to address alternative grounds).

Similarly, a party cannot make a "strong showing" of success on the merits by simply "rehash[ing]" unsuccessful summary judgment arguments. *Friends of Wild Swan v. U.S. Forest Serv.*, No. CV 11-125-M-DWM, 2014 WL 12672270, at *2 (D. Mont. June 20, 2014); *In re Pac. Fertility Ctr. Litig.*, No. 18-CV-01586-JSC, 2019 WL 2635539, at *3 (N.D. Cal. June 27, 2019); *Roman Catholic Archbishop of Wash. v. Sibelius*, No. 13-1441, 2013 WL 12333208, at *3 (D.D.C. Dec. 23, 2013); *Titan Tire Corp. of Bryan v. Local 890L, United Steelworkers of Am.*, 673 F. Supp. 2d 588, 590 (N.D. Ohio 2009). Thus, Respondents' motions fail because, in addition to being premature, neither addresses *each* of six grounds on which this Court reversed BER's decision. *Compare* DEQ Br. in Supp. of Stay at 11-13 (addressing one ground), *and* WRM Br. on Remedy at 14-17 (addressing only three of six grounds[6]), *with* Order on Petition at 13-34. This alone is fatal. Equally fatal, the arguments which Respondents raise (addressed below in reverse order) merely

[6] WRM also argues about this Court's ruling related to Montana Code Annotated § 2-4-621, WRM Br. on Remedy at 3, but while this Court rejected WRM's argument on that point, it was not one of the Court's six bases for reversing BER. Order on Petition at 13-34.

repeat arguments rejected in this Court's Order on Petition. *See, e.g.*, *Friends of Wild Swan*, 2014 WL 12672270, at *2.

Regarding this Court's substantive rulings on BER's and DEQ's arbitrary analysis of water quality standards (Order on Petition at 28-34), WRM argues that the Court incorrectly applied the "arbitrary and capricious standard," which, WRM suggests, is not permitted by MAPA. WRM Br. on Remedy at 17. WRM is plainly mistaken. MAPA expressly permits a court to reverse an agency decision that is "arbitrary or capricious." § 2-4-704(2)(a)(vi), MCA. Because Respondents must show a strong likelihood of success with respect to *each* of the Court's alternative rulings, *English*, ¶ 47; *MEIC II*, ¶ 27, this is fatal, and the Court need go no further. Nevertheless, Respondents' remaining arguments also miss the mark.

WRM continues to assert its argument that the Conservation Groups' brief in response to the Hearing Examiner's proposed order, which was captioned "objections," was flawed because it was not captioned "exceptions." WRM Br. on Remedy at 16. WRM merely rehashes its already rejected arguments about *Flowers v. Board of Personnel Appeals*, 2020 MT 150, 400 Mont. 238, 465 P.3d 210, and § 2-4-621, MCA. *Compare* WRM Br. on Remedy at 16, *with* Order on Petition at 18-20 (rejecting both arguments). WRM's argument is premised on a misstatement of the law. WRM contends that under § 2-4-621(1), MCA, parties "*must* 'file exceptions and present briefs and oral arguments.'" WRM Br. on Remedy at 16

(emphasis added). In fact, the law contains no such mandate, but states only that parties must be "afforded" the "opportunity ... to file exceptions and present briefs and oral arguments." § 2-4-621(1), MCA. The statute does not support WRM's argument that the exceptions a party files are not "exceptions" unless they are captioned as "exceptions." As this Court noted, "unlike in *Flowers*, the Conservation Groups filed extensive exceptions." Order on Petition at 20; *Flowers*, ¶ 15. That the Conservation Groups captioned their exceptions as "objections" does not make them not be "exceptions." As such, *Flowers* is plainly inapposite.

WRM also rehashes its administrative issue exhaustion argument and fails to address any of the numerous authorities addressed in this Court's ruling. *Compare* WRM Br. on Remedy at 15-16, *with* Order on Petition at 13-17. This constitutes a failure to make a "strong showing" of likely success on the merits. *Nken*, 556 U.S. at 426. Moreover, contrary to WRM's argument, Conservation Groups argued repeatedly that the claims that BER barred on issue exhaustion grounds arose after the close of the public comment period. BER:84 at 5-7 (motions *in limine* briefing); BER:94 at 1:25:50 to 1:26:02 (motions *in limine* hearing); BER:151 at 59:19 to 61:24, 66:1-20 (hearing before the Board).[7] Again, the Court finds that WRM's issue exhaustion argument has no merit.

[7] Conservation Groups also raised the same arguments at the pretrial conference, but the Hearing Examiner failed to properly record that hearing, causing the record to be lost. BER:151 at 66:24 to 67:12.

Likewise, DEQ's and WRM's argument[8] about the burden of proof is simply a rehash of their argument relying on *Montana Environmental Information Center v. DEQ* (*MEIC I*), 2005 MT 96, 326 Mont. 502, 112 P.3d 964,[9] which this Court already rejected. Order on Petition at 25-28. Notably, Respondents fail to address Montana Supreme Court case law holding that an applicant's (here, WRM's) *statutory* burden to show the lack of adverse environmental impacts does not shift in a contested case. *Id.* at 25 (citing *Bostwick Props., Inc. v. DNRC*, 2013 MT 48, ¶¶ 1, 10-14, 36, 369 Mont. 150, 296 P.3d 1154). When, as here with MSUMRA (but unlike the Clean Air Act, which was at issue in *MEIC I*), the *statutory* burden is placed on a permit applicant, it does not shift in a contested case because, consistent with the rules of evidence, "the applicant would be defeated if neither side produced evidence." *In re Royston*, 249 Mont. 425, 428, 816 P.3d 1054, 1057 (1991) (rejecting burden-shifting argument); § 82-4-227(1), (3)(a), MCA, (placing "burden" of proof on "applicant"); ARM 17.24.405(6)(c) (*applicant* must "affirmatively demonstrate[]" that "material damage" "will not result"). Nor do Respondents address the SMCRA legislative history confirming that the permit applicant bears the burden of proof on a permit appeal. S. Rep. No. 95-128 at 80 (1977), *cited in* Order on Petition at 25.

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[8] WRM presents the same rehash of rejected arguments regarding the burden of proof as DEQ. WRM Br. on Remedy at 14-15.

[9] DEQ also cites ARM 17.24.625, DEQ Br. in Supp. of Stay at 13, but that provision addresses "seismograph measurements," which is wholly inapposite.

Finally, *MEIC I* does not refute but confirms the reasoning of this Court's ruling. *MEIC I* did not hold (as BER did here) that in the contested case the public was required to demonstrate adverse environmental impacts. *MEIC I*, ¶¶ 36, 38. Instead, there, the Court explained that the question for BER was whether "Bull Mountain [the applicant] established that emissions from the proposed project will not cause or contribute to" adverse environmental impacts. *Id.*, ¶ 38. Thus, as this Court held, *MEIC I* does not support BER's decision requiring the Conservation Groups to "establish the existence of water quality standard violations." Order on Petition at 26-28 (quoting BER:152 at 84). Accordingly, Respondents' rehashed burden of proof argument does not constitute a "strong showing" of likely success on the merits. *Nken*, 556 U.S. at 426.

In sum, Respondents' failure to show a strong likelihood of success on each of the six bases of this Courts' decision "dooms the[ir] motion[s]." *In re Silva*, 2015 WL 1259774, at *4

Costs of complying

A party seeking a stay must demonstrate that "irreparable harm is probable, not merely possible." *Doe #1 v. Trump*, 957 F.3d 1050, 1059 (9th Cir. 2020). Here, if, as Conservation Groups request, vacatur is deferred until April 1, 2022, Respondents' concerns about coal and energy supplies will be assuaged. *See supra* Part III.A. Thus, there is no probability Respondents would suffer irreparable harm.

As noted, DEQ's concerns about the costs of complying with its legal obligations do not constitute irreparable harm. *Northern Plains*, 460 F. Supp. 3d at 1045; *Rodriguez*, 715 F.3d at 1146. Likewise, a temporary delay in economic activity does not constitute irreparable harm. *Park Cnty.*, ¶¶ 81-82; *Northern Plains*, 460 F. Supp. 3d at 1041; *League of Wilderness Defs.*, 752 F.3d at 766; *L.A. Mem'l Coliseum Comm'n*, 634 F.2d at 1202.

Conversely, a stay would cause substantial injury to the environment, Conservation Groups, and the rule of law. As this Court earlier noted, the waters that the AM4 and the Rosebud Mine impact are impaired for salinity, and the cumulative effects of WRM's AM4 mining operations will substantially worsen that impairment. Order on Petition at 6-7, 28-34. DEQ has known of this impairment for over a decade but taken no action to remedy it. *Id.* at 7. Such long-term environmental harm is irreparable. *See Amoco Prod. Co. v. Vill. of Gambell*, 480 U.S. 531, 545 (1987) ("Environmental injury, by its nature, can seldom be adequately remedied by money damages and is often permanent or at least of long duration, *i.e.*, irreparable. If such injury is sufficiently likely, therefore, the balance of harms will usually favor the issuance of an injunction to protect the environment.").[10] This ongoing pollution, along with WRM's repeated violation of

[10] DEQ admits that the harm from strip-mining is irreparable. *See* Declaration of Martin Van Oort ¶¶ 11, 17 (explaining impacts of strip-mining are "irreversible" and "not possible to revert" to pre-mining state).

pollution limits, also irreparably harms the Conservation Groups and their members. Hedges Decl. ¶¶ 4-11. Allowing strip-mining to continue despite DEQ's failure to take a hard look at the environmental consequences of the AM4 expansion would violate Montana's constitutional protections and the rule of law. *Park Cnty.*, ¶¶ 72-73; *Mont. Wilderness Ass'n*, 408 F. Supp. 2d at 1038 ("[T]he public interest is best served when the law is followed."); Mont. Const. arts. II, § 3, IX, § 1(1).[11] Thus the equities and the public interest do not support a stay.

IV.CONCLUSION

For the forgoing reasons, the standard judicial remedy, vacatur, is appropriate here; however, to strike an appropriate balance between competing interests, this Court will defer vacatur of the AM4 permit until April 1, 2022. The Court further concludes that Respondents have not demonstrated that a stay pending appeal is warranted.

Accordingly, it is HEREBY ORDERED:

1. WRM's motion on remedy is DENIED;
2. WRM's and DEQ's motions for a stay pending appeal are DENIED; and

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[11] Respondents' insinuation that Conservation Groups' decision not to seek preliminary relief somehow limits their ability to obtain relief now is without merit. The Montana Supreme Court has repeatedly approved vacatur in the absence of preliminary relief. *See supra* note 2 (collecting cases).

3. The AM4 Permit is VACATED, however vacatur is DEFERRED until April 1, 2022.

DATED this 27th day of January, 2022.

Signed:

Katherine M. Bidegaray
District Court Judge

Cc: Shiloh Hernandez
Derf Johnson
Walton Morris, Jr.
Roger Sullivan
John Martin
Samuel Yemington
Victoria Marquis
Nicholas Whitaker
Amy Christensen