IN THE SUPREME COURT OF THE STATE OF MONTANA

Case No. DA 22-0064

MONTANA ENVIRONMENTAL INFORMATION CENTER and SIERRA CLUB,

Plaintiffs / Appellees,

v.

MONTANA DEPARTMENT OF ENVIRONMENTAL QUALITY, MONTANA BOARD OF ENVIRONMENTAL REVIEW,

Respondents,

and

WESTERN ENERGY CO., NATURAL RESOURCE PARTNERS, L.P., INTERNATIONAL UNION OF OPERATING ENGINEERS, LOCAL 400, and NORTHERN CHEYENNE COAL MINERS ASSOCIATION,

Respondent-Intervenors / Appellants.

M.R.App.P.22(2)(a) Motion for Stay of District Court Order Pending Appeal

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This Court's January 4, 2022 Order denying Westmoreland's Petition for Supervisory Control explained: "Petitioners have a pending motion to stay the Order on Petition in the District Court and if denied by the District Court, M. R. App. P. 22(2) provides an avenue for Petitioners to seek review of that denial." (OP 21-0655, Order at 2). The District Court has now denied that motion to stay. Accordingly, Westmoreland Rosebud Mining, LLC, Natural Resource Partners, L.P., International Union of Operating Engineers, Local 400, and Northern Cheyenne Coal Miners Association ("Westmoreland") seek review of that denial ("Remedy Order")[1] which fails to address pertinent factors and rests on the District Court's fundamentally flawed merits decision.

An emergency now indisputably exists. The Remedy Order threatens substantial harm to the Rosebud Mine, its workforce, and Montanans. The Remedy Order enjoins mining in an area that provides approximately 30% of coal supplied to the Colstrip Power Station ("CPS"), effective April 1. Key evidence on the potential harm to the public resulting from the April 1 vacatur – higher electricity prices and possible brown or black-outs in eastern Montana – was neither considered nor analyzed by the District Court, which also improperly rejected intervention by the CPS Operator to address this concern. Relief under Rule 22 to

[1] The District Court's Order on Remedy and Stay is attached as **Ex. A**.

stay the Remedy Order is necessary and appropriate to prevent severe harm and maintain the status quo pending review.

PROCEDURAL POSTURE

DEQ approved AM4 in 2015, and Westmoreland has been mining its high-quality coal, which is critically important to the CPS, since 2016. Montana Environmental Information Center and Sierra Club ("MEIC/Sierra Club") challenged DEQ's AM4 approval in a Montana Administrative Procedure Act ("MAPA") contested case before the Board of Environmental Review ("Board"). After years of litigation, and a four-day evidentiary hearing, the Board dismissed MEIC/Sierra Club's challenge, affirming DEQ's approval of AM4 in a detailed 87-page decision (the "Board's Order").[2] At the hearing, Board member Christopher Tweeten challenged MEIC/Sierra Club on its failure to take exception to ***any*** of the Hearing Examiner's 248 proposed findings of fact subsequently adopted by the Board. 5/31/19 Tr. at 95:20 through 106:9.[3] (The lower court nonetheless reversed these factual findings without determining whether they were clearly erroneous.) On judicial review, the District Court adopted MEIC/Sierra Club's proposed order substantially verbatim, overturning the Board's Order on factual and legal grounds

[2] The Board's Order is attached as **Ex. B**.

[3] The Board's 5/31/2019 Hearing Transcript is attached as **Ex. C**.

("Merits Decision").[4] Westmoreland and DEQ moved to stay the decision and, on January 28, 2022, the District Court adopted MEIC/Sierra Club's proposed order denying the stay without addressing pertinent facts and arguments supporting the stay. Per this Court's instruction, Westmoreland seeks a stay under Mont. R. App. Pro. 22(2).

STANDARD OF REVIEW

Rule 22(2)(a)(i) requires a demonstration of good cause. The Court reviews a denial of stay for abuse of discretion using four general factors: (1) whether the stay applicant has shown likelihood of success on the merits; (2) whether the applicant will be irreparably injured absent a stay; (3) whether issuance of the stay will substantially injure other interested parties, and (4) where the public interest lies. *See, e.g., Vote Solar v. Mont. Dept. of Pub. Serv. Reg.*, DA 19-0223, Order Granting Stay, Aug. 6, 2019 ("Vote Solar") (citing *Hilton v. Braunskill*, 481 U.S. 770 (1987) (copy of Order attached as **Ex. E**).[5]

[4] The Merits Decision is attached as **Ex. D**.

[5] Westmoreland was unable to locate any published opinions or orders of this Court addressing the standard for a Rule 22(2) stay motion. Given the Court's recent reliance in similar situations on unpublished orders identified by the parties in similar procedural matters – *see, e.g.*, *Mont. Shooting Sports Ass'n v. Mont. First Judicial Dist. Court*, No. OP 21-0377 (Sept. 29, 2021) – Westmoreland refers the Court's attention to its recent Rule 22(2) Order in *Vote Solar*, which the Court cited in its subsequent published opinion addressing the appeal. *See Vote Solar v. Mont. Dep't of Pub. Serv. Reg.*, 2020 MT 213A, ¶¶ 34, 74.

ARGUMENT

I. THE DISTRICT COURT ABUSED ITS DISCRETION IN DENYING THE STAY.

A court abuses its discretion when it acts arbitrarily without employment of conscientious judgment or exceeds the bounds of reason resulting in substantial injustice. *Billings High Sch. Dis. v. Billings Gazette*, 2006 MT 329, ¶ 23. This includes failure to consider and analyze pertinent factors. *Vote Solar* at 3.

In addition to significant legal errors (*see infra* II.A), the Remedy Order lacks conscientious judgment because it fails to consider or analyze the evidence on harms if a stay is not granted. The District Court adopted, almost verbatim, MEIC/Sierra Club's proposed order, which was submitted ***prior*** to three key reply briefs and attached declarations.[6] As Russell Batie's accompanying Rule 22 declaration shows, filings[7] from both Westmoreland and CPS operator Talen

[6] The Remedy Order cannot fairly be characterized as the District Court's "rationale," (*Yellowstone County v. Billings Gazette*, 2006 MT 218, ¶ 30) having been drafted by MEIC/Sierra Club. This Court has repeatedly counseled district courts against the wholesale adoption of proffered decisions. *See, e.g.*, *Swapinski v. Lincoln Cnty.*, 2015 MT 275, ¶ 11; *Wurl v. Polson Sch. Dist. No. 23*, 2006 MT 8, ¶ 29. This practice is particularly troubling when, as here, the district court sits in an appellate posture.

[7] *See* Batie Rule 22 Declaration and appended thereto (**Exhibits B** (Second Declaration of Russell Batie) at ¶¶ 5-14 and **Exhibit C** (Second Declaration of Shannon Brown) at ¶¶ 13-37); *see also* **Exhibit I** First Declaration of Shannon Brown at ¶¶ 16-17; **Exhibit F** Intervenors' Reply to Petitioners' Combined Response Brief; **Exhibit G** DEQ Reply Brief In Support of Motion for Stay Pending Appeal; and **Exhibit H** Talen Montana Reply Brief In Support of Motion to Intervene.

refuted the proposed order's assertion (Remedy Order, p. 20) that delaying vacatur to April 1 would "assuage" all concerns. In fact, the sworn evidence – ignored by the District Court – shows, *inter alia*, that (1) long-term replacement of the AM4 coal would require 6-10 months of difficult and costly preparation work, effort, and expense; and (2) vacatur after April 1 presents a substantial risk that reduced coal quality or quantity will result in consumer price increases, brown-outs, and/or blackouts in eastern Montana. The Remedy Order's silence on these harms shows the District Court never considered them. Failure to state a rationale is abuse of discretion. *Yellowstone Cty.*, ¶ 30; *see also Vote Solar* at 3 (court acts arbitrarily where its reasoning cannot be discerned). Therefore, Westmoreland has demonstrated good cause for the Court to review whether it is entitled to a stay pending appeal.

II. A STAY IS WARRANTED UNDER THE TRADITIONAL FOUR-FACTOR TEST.

A. Westmoreland is likely to succeed on the merits.

The District Court's Merits Decision is unlikely to be upheld because it exceeded the court's jurisdiction, disregarded plain statutory language, and overturned decades of settled Montana administrative law:[8]

1. The District Court, sitting in an appellate posture as required by MAPA, violated this Court's recent precedent, *Flowers v. Montana Bd. of Personnel Appeals*, 2020 MT 150 ¶ 13, by reconsidering the

[8] Westmoreland will identify all errors in its forthcoming Merits Decision appeal. *See also* Westmoreland's Petition for Writ of Supervisory Control.

Board's factual findings even though MEIC/Sierra Club never lodged exceptions to the Board's factual findings.

2. The District Court did not apply MAPA's "clearly erroneous" standard of factual review and, instead, substituted its judgment for the Board's in violation of § 2-4-704(2), MCA.

3. The District Court had authority only to affirm or remand "the case" to the Board for further proceedings; the District Court had no jurisdiction to rewrite the Board decision and remand to DEQ.[9]

4. Contrary to *Mont. Envtl. Info. Ctr. v. Dept. of Envtl. Quality*, 2005 MT 96 (*MEIC I*), the District Court held that the permit applicant and agency have the burden to disprove the permit challenger's claims in a MAPA contested case.

5. Contrary to *MEIC I*, the District Court held that Westmoreland and DEQ could not present evidence responsive to MEIC/Sierra Club's claims if such evidence was not in the permit application.

6. Contrary to settled law, the District Court reversed the Board's policy requiring MEIC/Sierra Club to exhaust their administrative remedies by presenting their objections to DEQ prior to the contested case.

These legal errors exceed the reviewing court's limited jurisdiction, straying well beyond the bounds of reason and inflicting serious injustice. Thus, this factor favors granting a stay.

B. Westmoreland will be irreparably harmed absent a stay.

The District Court abused its discretion in evaluating harm to Westmoreland

[9] Authority to "affirm the decision of the agency or remand *the case* for further proceedings" requires remanding the case to the Board, not DEQ. § 2-4-704(2), MCA (emphasis added). *See also* § 2-3-102(1), MCA ("Agency" means…any board…authorized by law to…determine contested cases;" and § 2-4-102(2)(a) ("For purposes of this chapter [*i.e.,* MAPA] … "Agency" means an agency, as defined in 2-3-102[.]").

absent a stay by crediting the opinion of an unqualified, uninformed individual over the sworn testimony of an experienced mine engineer regarding the Mine's ability to prepare for and respond to a stay. The Remedy Order relies on testimony from MEIC/Sierra Club's declarant, who does not assert the necessary technical qualifications to support his opinions, let alone profess any familiarity with the Mine or its operations. *See* Remedy Order at 7; **Ex. J** Schlissel Declaration at ¶¶ 4-5. Westmoreland responded to Mr. Schlissel's back-of-the-envelope ideas with qualified expert opinion, which the District Court never addressed. *See supra* at Section I. That testimony shows Westmoreland will suffer irreparable harms including loss of investments in drilling and blasting and significant costs to shut down AM4 and access other Mine areas to replace AM4 coal. With its permit vacated, Westmoreland will also be unable to comply with statutory reclamation obligations, another consequence the District Court did not address. *See* Batie Decl. at 1. MEIC/Sierra Club did not dispute these irreparable harms, merely arguing that delaying the vacatur date by two months would lessen the admitted loss. Because Westmoreland's irreparable harm is unrefuted, "this factor preponderates in favor of" a stay. *See Vote Solar* at 4.

C. A stay will not injure MEIC/Sierra Club.

The District Court abused its discretion in finding that a stay would harm MEIC/Sierra Club because mining would "substantially worsen . . . impairment" in

a stream near the Mine, improperly attributing that impairment to coal mining. Remedy Order at 21. In fact, the Board found that mining had ***not*** caused impairment (Board's Order, Findings 79, 91-94, 97, 100-104, and 106), that AM4 will not exacerbate naturally occurring salinity and nitrogen concentrations (*id.*, Findings 121-122, 130-142, 144-147), and that AM4 is designed to prevent material damage (*id.*, Conclusions 18-20).[10] The District Court further abused its discretion by treating environmental harm as harm to MEIC/Sierra Club. This Court requires the party opposing the stay to "personally suffer harm if the stay is granted." *MTSUN, LLC v. Mont. Dept. Pub. Serv. Reg.*, 2020 Mt 238, ¶ 48; *Vote Solar* at 4 n.2. Because MEIC/Sierra Club did not make that showing and the record demonstrates AM4 will not cause the alleged environmental harm, this factor, too, preponderates in favor of a stay being granted.

D. Public interest supports a stay.

The District Court improperly weighed the public interest because it relied on "facts" about environmental impact that are contrary to the record (*see supra* II.C), and credited the opinion of an unqualified individual over experts from the Mine and CPS to discount risks to the public electrical supply (*see supra* I). As

[10] In fact, the Board found – in findings not challenged by MEIC/Sierra Club and thus not subject to District Court review– that the Mine **cannot** be the source of impairment in the creek because water quality downstream of the Mine is measurably better than portions of the creek further downstream that are impaired. Board's Order, Finding 106.

discussed above, the District Court did not consider or analyze Westmoreland's Reply debunking Mr. Schlissel's amateur plan to avoid impacts resulting from vacatur. Nor did the Court address expert testimony outlining the real-world implications of eliminating 30% of the Mine's coal production, including Westmoreland's ability to meet the CPS quality and quantity requirements. Similarly, the District Court's order denying intervention to Talen, the CPS operator (yet another order drafted by MEIC/Sierra Club and adopted verbatim by the District Court – this time within hours of its submission), falsely stated that Talen had not replied in support of intervention. In fact, Talen submitted a detailed declaration refuting Mr. Schlissel's unsupported, erroneous predictions. Batie Decl., at 1. This Court recognized in *Vote Solar* that the risk of higher energy prices a power company's "customers will ultimately pay" if no stay is granted, is a public interest that preponderates in favor of granting a stay despite "public policy" arguments to the contrary. *Id.* at 4. As such, the "public interest" factor, too, preponderates in favor of a stay.

CONCLUSION

Westmoreland respectfully requests the Court stay the Remedy Order pending the resolution of this appeal. The District Court abused its discretion by not considering and analyzing the proffered evidence, providing good cause for this Court to itself consider the four factors. Each of these factors support a stay.

Dated this 8th day of February 2022.

Respectfully submitted,

/s/ John C. Martin
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CERTIFICATE OF COMPLIANCE

Pursuant to Rule 22(2) of the Montana Rules of Appellate Procedure, I certify that this brief is printed with a proportionately spaced Times New Roman text typeface of 14 points; is double spaced except for footnotes and for quoted and indented material; and is less than ten pages of text (including the Batie declaration but exclusive of the documents attached to it, exclusive of cover and signature pages, the Certificate of Compliance, and Table of Authorities, and the documents excluded from the page county by Rule 22(2)(a)(iv), Mont. R. App. P.).

Pursuant to Rule 16(1) of the Montana Rules of Appellate Procedure, I certify that opposing counsel has been contacted concerning the motion and opposing counsel objects to this motion.

/s/ John C. Martin

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CERTIFICATE OF SERVICE

I, John C. Martin, hereby certify that I have served true and accurate copies of the foregoing Motion - Opposed to the following on 02-08-2022:

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