Exhibit F

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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 **INTERVENORS' REPLY TO PETITIONERS' COMBINED RESPONSE TO DEQ AND INTERVENORS' MOTIONS FOR STAY AND MOTIONS ON REMEDY**

Intervenor-Respondents Westmoreland Rosebud Mining LLC, f/k/a Western Energy Co., Natural Resource Partners, L.P., International Union of Operating Engineers, Local 400, and Northern Cheyenne Coal Miners Association (together, the "Intervenors") submit this reply to Petitioners Montana Environmental Information Center and Sierra Club's (together, "MEIC/Sierra Club") response in opposition to the Intervenor's motion for stay and on remedies as follows:

I. THIS COURT SHOULD STAY ITS ORDER PENDING APPEAL.

MEIC/Sierra Club do not dispute this Court's authority to issue a stay, or that such a decision need only be informed by the weighing of the Parties' competing interests. *Resp. in Opp.* at 5. With the broad stricture to "weigh competing interests" in mind, *Landis v. N. Am. Co.*, 299 U.S. 248, 255 (1936), this Court may look to the Supreme Court's four factor test to determine whether a stay is appropriate.[1] A stay pending appeal is appropriate under either standard.

A. The District Court May Grant a Stay Prior to Filing the Appeal.

As a threshold matter, MEIC/Sierra Club argue that a stay is not warranted prior to the filing of an appeal, but, tellingly, do not identify any Montana law for this novel proposition. *Resp. in Opp.* at 16. Montana Rule of Appellate Procedure 22(1)(a)(i) provides for a "stay [of] a

[1] Because Montana Rule of Civil Procedure 62 governing stays of proceedings is similar to the federal rule, and Montana Rule of Appellate Procedure 22 provides no specific guidance for evaluating motions for stays pending appeal, the District Court may look to federal authority to inform its analysis. *See Chipman v. Nw. Healthcare Corp.*, 2012 MT 242, ¶ 43 (looking to federal authority for guidance where the Federal Rules of Civil Procedure align with the Montana Rules). Under the federal standard, courts weigh (1) whether the applicant for a stay made "a strong showing that he is likely to succeed on the merits;" (2) whether the applicant will suffer irreparable injury without a stay; (3) whether the issuance of the stay will be substantially injurious to other party participants; and (4) "where the public interest lies." *Nken v. Holder*, 556 U.S. 418, 426 (2009); *see also Lado v. Wolf*, 952 F.3d 999, 1007 (9th Cir. 2020) (applying a "sliding scale" approach to the four factors, allowing "a stronger showing of one element [to] offset a weaker showing of anther" (citation omitted)).

judgment … of the district court pending appeal," not pending "an" appeal. This is reflected in the caselaw, which observes that an appellant may first "obtain[] an order to stay proceedings pending appeal" and *then* "timely appeal." *Lenz v. FSC Sec. Corp.*, 2018 MT 67, ¶ 11. As such, Intervenors' motion is timely.

B. Intervenors Will Likely Prevail on Appeal.

As explained in Intervenors' brief in support of stay, multiple holdings the District Court's Order directly conflict with Montana Supreme Court precedent and applicable statutory and regulatory authority. *See Intervenors' Br. in Support of Mot. on Remedy* ("Int. Br.") at 14–17. Each of these conflicts constitutes a flaw in the District Court's Order and reversal on any one of these grounds would require this Court to revisit its decision. The Supreme Court is likely to recognize that (i) MEIC/Sierra Club bears the burden of proof consistent with well-settled precedent that dates back to 2005, (ii) the Court's order on administrative exhaustion is premised on an incorrect understanding of the Board's application of the exhaustion requirement; (iii) because MEIC/Sierra Club never identified the factual elements it now contests in "exceptions," the Court lacks subject matter jurisdiction and (iv) the Montana Administrative Procedure Act ("MAPA") mandates that this Court defer to the Board's findings absent a "clear error". At the very least, these arguments raise the requisite "serious legal questions" that weigh in favor of granting a stay. *Leiva-Perez v. Holder*, 640 F.3d 962, 968 (9th Cir. 2011) (citation omitted).

Intervenors' brief in support of stay further addressed all grounds of the District Court's decision, delving in detail into the four case-dispositive grounds relating to this District Court's jurisdiction, the appropriate burden of proof, and the correct standard of review. Intervenors explicitly observed that the remaining grounds regarding factual disputes about aquatic life would be determined by the disposition of the standard of review issue, observing that the Court's "error in the standard of review is particularly apparent in Sections F and G of the Order,

which purport to overrule findings of fact made in the contested case" under the wrong standard of judicial review. *Int. Br.* at 17. If the Supreme Court determines that the District Court applied the incorrect standard of review in analyzing the Board of Environmental Review's (the "Board") factual findings, remanding to apply the correct standard of review would necessarily require reconsideration of all of the District Court's factual determinations. Because Intervenors' arguments demonstrate that success on appeal is likely, a stay of the District Court's Order is warranted.

1. Jurisdiction – Administrative Exhaustion (Order § V.A)

The District Court's Order adopted MEIC/Sierra Club's allegation that the Board barred all claims that "arose after the close of the public comment period […] on issue exhaustion grounds." *Resp*. at 20. This statement is demonstrably false. The Board's Final Order (which adopted by reference the Hearing Examiner's Order on Motions in Limine) specifically allowed MEIC/Sierra Club to raise ***any*** claim based on information disclosed by the Department of Environmental Quality ("DEQ") after the close of public comment. *See* AR103:7 (observing that "if there were a fundamental issue" that was "introduced … after the public had an opportunity to make objections, then …. [i]f Conservation Groups can articulate … where they have not been previously given any … opportunity to object, then the undersigned will entertain an offer of evidence").

Accordingly, Intervenors do not dispute the District Court's conclusion that MEIC/Sierra Club should have had the opportunity to raise claims based on new information disclosed after the close of public comment. This is because MEIC/Sierra Club *were* allowed to raise such claims. Rather, Intervenors dispute the District Court's mistaken belief that MEIC/Sierra Club were somehow prohibited from raising such claims (and offering evidence) during the contested case proceeding, because the record of the case flatly contradicts that position.

2. Jurisdiction – MAPA Requirements (Order § V.B)

Caselaw demonstrates that MEIC/Sierra Club failed to comply with regulatory requirements in their brief in response to the Hearing Examiner's proposed order, depriving this District Court of jurisdiction to consider their claims. MEIC/Sierra Club further proffer a statutory construction that would turn the applicable statute into a quagmire.

MEIC/Sierra Club claim § 2-4-621(1), MCA means that because a party is "afforded" an opportunity to file exceptions that the exceptions are optional. This is a clear misreading of the provision. Section 2-4-621(1) states that "an opportunity is afforded to each party adversely affected to file exceptions and present briefs and oral argument to the officials who are to render the decision." The "opportunity" allows MEIC/Sierra Club to choose whether they contest the final decision. If they choose to contest, they then must fulfill the three elements listed in the provision. *Id.* MEIC/Sierra Club do not explain how their reading, that the "exceptions" identified in the text are optional, gives any weight to the statute's use of the word "exceptions," nor how such a construction would prevent a party in a future case from listing exceptions, filing briefs, and then abstain from the now "optional" oral argument. The statute says what it means: that once a party takes the opportunity to contest the Hearing Examiner's proposed order, the party must fulfill all three statutory requirements to give a reviewing court jurisdiction to consider a further appeal.

Nor is this simply a matter of form; the obligation constitutes a substantive requirement particularly applicable in this case. If MEIC/Sierra Club had intended the Board to address the litany of factual objections that they have made the subject of their appeal to this Court, they owed the Board the duty of identifying each of them specifically. Perhaps recognizing that these factual assertions lack support in the record, MEIC/Sierra Club chose not to specify them as exceptions and instead to brief the matter and later admit to the Board that, in contrast to the

position taken in this Court, that they were advancing only the "legal" claims evident in their briefing.

Flowers v. Bd. of Pers. Appeals, 2020 MT 150 illustrates the correct application of this requirement: when Flowers failed to file exceptions and instead "filed a second petition for judicial review" of the agency decision that raised "a constitutional issue" relating to the agency's adjudication of his case, among other issues, the Montana Supreme Court concluded Flowers had "failed to exhaust administrative remedies." *Id*. ¶¶ 5, 15–16. The fact that the District Court in this case mistakenly applied the term "exceptions" to MEIC/Sierra Club' legal brief in its order does not, as MEIC/Sierra Club contend, cover for their error in failing to follow the statute. *See Resp*. at 19. Because MEIC/Sierra Club failed to exhaust their administrative remedies by failing to lodge *any* factual exceptions, the District Court lacked jurisdiction to consider MEIC/Sierra Club's factual claims in this case and Intervenors' argument is likely to succeed on appeal.

3. Burden of Proof (Order § V.E)

Montana law is clear: after a permitting decision is made and a hearing is requested wherein the "requester contends the decision is in error …. [t]he burden of proof at such hearing is on the party seeking to reverse the decision of the board." Mont. Admin. R. 17.24.425 (1),(7). The cases MEIC/Sierra Club cite in support for their position are fatally distinguishable: while indeed, the applicants in those cases had the burden of proof on appeal, it is because in those cases the applicant was "seeking to reverse the decision of the board" and properly shouldered the burden of proof. *Id*. at 17.24.425(7). Furthermore, in both cases cited by MEIC/Sierra Club, the burden in the contested case was not disputed and the court focused instead on the burden at the application stage. See *Bostwick Props., Inc. v. Mont. Dep't of Nat. Res. & Conservation*, 2013 MT 48, ¶¶ 1, 13–14 (observing that the applicant was challenging a permit denial and

agreeing that at the initial application stage Bostwick had to fulfill the statutorily required criteria); *In re Royston*, 816 P.2d 1054, 1056–57 (Mont. 1991) (observing the applicants were challenging denial of their permit and ruling that "at the initial application stage" the "initial burden of producing evidence" is on the applicant (citation omitted)).

MEIC/Sierra Club's arguments conflate the different burdens applied in Montana when one is seeking a permit and when one is subsequently seeking review of the agency's permitting decision. The applicant in *Montana Envtl. Info. Ct*r. *v. Montana Dept. of Envtl. Quality* was indeed required—when applying for its permit—to "establish[] that emissions from its proposed project [would] not cause or contribute to" adverse environmental impacts. 2005 MT 96, ¶ 38. But MEIC/Sierra Club' persistence in arguing that the applicant's initial burden continues to remain on the applicant when another party initiates a contested case simply restates the losing argument in that case:

> MEIC asserts that, when [the permittee] applied for the air quality permit, [the permittee] had the burden of proving to the Department that all statutory and regulatory criteria for issuance of the permit were satisfied. From that premise, MEIC contends that [the permittee's] initial burden of proof in this regard extended to the contested case hearing before the Board and required [the permittee]—as well as the Department—to establish that the application met the permit criteria…. The statutory evidentiary provisions pertinent to this issue state that … 'a party has the burden of persuasion as to each fact the existence or nonexistence of which is essential to the claim for relief or defense he is asserting.' Thus, ***the party asserting a claim for relief bears the burden of producing evidence in support of that claim***.

Id. at ¶ 12–14 (emphasis added) (internal citations omitted) (emphasis added). This case is not distinguishable on the basis of the type of permit; the determinative question was the law applied to the contested hearing, not the initial burden of proof for the particular permit at the application stage. *Id*. Intervenors are likely to succeed on appeal of this issue, with explicit regulations and identical on-point Montana Supreme Court caselaw that correctly applies the burden of proof.

4. Standard of Review (Order §§ II.A, IV, V.C, V.D, V.F, V.G)

MEIC/Sierra Club misstate MAPA's "express[]" terms. *Resp*. at 18. MAPA instructs that "[t]he court may not substitute its judgment for that of the agency as to the weight of the evidence on questions of fact." § 2-4-704(2), MCA. Because of the MAPA's clarity on this issue, the Montana Supreme Court has explicitly acknowledged that it "review[s] an agency decision ***not*** classified as a contested case under [MAPA] to determine whether the decision was arbitrary, capricious, unlawful or not supported by substantial law." *Clark Fork Coal. v. Dep't of Env't Quality*, 2012 MT 240, ¶ 20 (emphasis added). The standard of review is plainly different for review of MAPA contested cases. Based on Supreme Court authorities and statutory requirements demonstrating that this Court applied an incorrect standard of review, Intervenors have a high likelihood of success on appeal to the Montana Supreme Court.[2]

C. Westmoreland Will Suffer Irreparable Harm Absent a Stay.

MEIC/Sierra Club's proposed delay for ceasing activity in AM4 to defer the harm vacatur would cause to Intervenors and the inhabitants of the Mountain West both fails to address the irreparable harms entailed and reveals that MEIC/Sierra Club's nonexistent harms should not prevail over the public's energy needs.

Intervenors detailed various mine operations that are ongoing and would create extreme safety risks if the mine abruptly ceased operating, including coal seam fires, accidental detonation of explosives, spoils in the blasted area creating slides, and increasing the density of

[2] The Court's misapplication of the standard of review impacts all of its grounds for decision that rely on factual determinations, including the Court's determinations regarding Dr. Schafer's statistical testimony (§ V.C), Dr. Hinz's hydrology testimony (§ V.D), the macroinvertebrate analysis (§ V.F), and the cumulative hydrologic impacts (§ V.G). Order on Petition at 20–25, 28–34. If re-evaluated under the properly deferential standard of review, i.e., under the "clearly erroneous" standard, the District Court would necessarily arrive at different conclusions on those factual issues and trial-type decisions.

workers in the other areas of the mine. Relying solely on a declaration from an individual with no claimed experience with mining engineering or knowledge of the Rosebud Mine, whose only possibly relevant experience was unspecified participation in Montana Public Service Commission actions related to the Colstrip Power Station, MEIC/Sierra Club claim to have a solution: the Court should wait five months to vacate the permit. *Resp*. at 11. While this may decrease the likelihood of accidental detonations, it does not change the high likelihood that Intervenors would still be unable to meet its quantity or quality contractual obligations to the Colstrip Power Station with coal from other areas of the mine. Indeed, it is striking that a person claiming experience with PUC actions would consider a fallback litigation position on remedy briefing to be a substitute for the careful analysis that generally accompanies regulatory decisions that affect electrical production.[3] In fact, far from being a viable "compromise" to address the significant adverse impacts resulting from their preferred remedy, MEIC/Sierra Club's suggestion of delayed vacatur merely demonstrates their acknowledgement that the mine's interest in providing coal to power the Mountain West outweighs the speculative harm that could arise from water near the mine continuing to have the same saline content it has had since before AM4 began operations in 2015.

Caselaw examples of partial vacatur only serve to prove Intervenors' point—in *Northern Plains*, the Court explicitly noted that the "Plaintiffs acknowledge that the potential impacts arising from NWP 12, by contrast, likely would be less severe for … *existing* NWP 12 projects." *N. Plains Res. Council v. U.S. Army Corps of Eng'rs*, 460 F. Supp. 3d 1030, 1040 (D. Mont. 2020). The Court therefore excluded from its vacatur the projects in operation, observing its

[3] MEIC/Sierra Club' declarant makes frequent reference to proposed Intervenor Talen, with multiple suggestions for what Talen "should" do to avert adverse impacts that would otherwise result from MEIC/Sierra Club' preferred remedy. Unless and until Talen responds to these "suggestions" it is unclear whether they are even viable.

remedy of "[p]artial vacatur does not block any projects." *Id.* Here, where any contemplated construction of the vacatur would detrimentally affect the Rosebud mine currently in operation, the analysis from *Northern Plains* counsels for a stay pending appeal. Conversely, in *Northern Cheyenne Tribe* the burden of the Court's vacatur to ongoing operations was minimal—although the Court determined that DEQ failed to hold the subject company Fidelity to the "more stringent" pre-discharge water treatment standards, "[t]he parties [did] not dispute that Fidelity had a pre-discharge treatment facility already in place that could reduce the CBM wastewater's SAR level to 0.1 or less." *N. Cheyenne Tribe*, 2010 MT 111, ¶ 43. Thus, vacatur in that case was a matter of form and not substance, as Fidelity was allowed to "continue operating under its current permits" and the Court clearly expected that Fidelity could comply with the revised standards imposed on DEQ with little additional effort. *Id.* These cases demonstrate that Courts apply partial vacatur where it will not harm ongoing operations—which is starkly contrary to the facts of this case.

Intervenors explained in their brief and through their declarant that the Rosebud mine only maintains about a month's worth of inventory before it will fail to meet the quantity of its contractual obligations to the Colstrip Power Station. *See* Russell Batie Declaration ("Batie Decl.") at ¶ 6. While MEIC/Sierra Club argue that their delayed vacatur option would mitigate this impact, their assertion is based on a superficial understanding of mine operations.[4] The

[4] MEIC/Sierra Club's declarant Mr. Schlissel contends that Intervenors do not understand their own mine, as a previous declarant for the mine "testified … that the mine has 95 million tons of permitted reserves." Schlissel Decl. at ¶ 9. While Mr. Standa's declaration indeed states that "95 million tons are currently permitted," that statement clearly applies to the entire lifecycle of the mine as the next sentence confirms that the Rosebud mine is only "capable of producing approximately 13 million tons of coal annually." Declaration of Jack Standa, *MEIC v. Bernhardt*, Case No. 1:19-cv-130 (D. Mont. Sept. 18, 2020), ECF No. 73-2 at ¶ 3. Thus, the loss of 7.5 to 9.2 million tons of current production from AM4 is indeed devastating to the yearly output and would likely result in breach of contract with the Colstrip Power Station. Batie Decl. at ¶ 6.

Mine expects AM4 to produce 180,00 to 200,000 tons of coal every month. *See* Exhibit A, Second Declaration of Russell Batie ("Second Batie Decl.") at ¶ 8. Thus, to ameliorate the adverse impacts of decreased coal production on electrical supply, the Mine must obtain replacement coal of similar quantity and quality from other areas of the mine for the duration of the vacatur. *Id.* at ¶¶ 10-11. In the near term, within 2-4 months the Mine could access an area that could provide replacement coal for a few months. *Id.* at ¶ 9.1. However, longer-term replacements could not be available to produce coal for electrical generation for 6-10 months, and even when those areas are available, they cannot serve as a "long-term replacement for AM4 because of coal quality and operational constraints." *Id.* at ¶¶ 9.2, 9.4, 10, and 12. Nor can the Mine "increase [its] inventories" as suggested by MEIC/Sierra Club's Declarant because permit limitations and labor availability preclude the kind of stockpiling he envisions. *Id.* at ¶ 14. Indeed, as MEIC/Sierra Club know, mining is a highly regulated industry, requiring careful planning and permitting before even reclamation may begin. *Id*. at ¶¶ 15-16. Thus, any other suggestions that MEIC/Sierra Club may proffer – such as permitting other areas of the mine or even obtaining coal from another mine – cannot be seriously entertained because none of them can be achieved in sufficient time to prevent the risk of coal production shortfalls leading to electrical disruption. *See id.* at ¶¶ 16-17.

Notably, while MEIC/Sierra Club claim their purpose in recommending delayed vacatur is to avoid the anticipated energy spike in the winter, their own maps show the same spike occurs again in the summer—and they cannot promise or predict a mere two to three-month vacatur. *See* Schlissel Decl. at ¶ 11–12. Any vacatur, delayed or not, will have irreparable impacts to the health and safety of Montana by impairing access to energy—whether it is the current winter, the

coming summer season when the western energy grid has historically been stressed, or the coming winter of 2022-23.

MEIC/Sierra Club's own goals would be stymied by vacatur—as DEQ's declarant explained, all reclamation under the AM4 permit would cease if the permit is vacated. Van Oort Decl. at ¶ 17. And reclamation, contrary to MEIC/Sierra Club's incredible claims, is not only possible, the Montana Federal Court explicitly states that it is effective: "Reclamation is now the only way to reverse the work done in [the mine], whether the Plaintiffs find it adequate or not." *Mont. Envtl. Info. Ctr. v. Bernhardt*, No. 1:19-cv-00130-SPW-TJC, 2021 U.S. Dist. LEXIS 13472, at *11 (D. Mont. Jan. 25, 2021). Furthermore, Mr. Van Oort does not say the environmental impacts are irreversible, he explained how the mine would not be able to *carry out* the reclamation plan under the AM4 permit to address mining disturbances caused by the permit if the AM4 permit was revoked. Van Oort Decl. at ¶ 17. Denying a stay would thus increase the likelihood of harms contemplated, because all reclamation activity would cease upon vacatur of the permit.

The Rosebud mine will not be able to meet its contractual obligations to provide the Colstrip Power Station with sufficient quantity or quality of coal if the AM4 permit is vacated, causing a loss of power to the inhabitants of the Mountain West and a cessation of important reclamation activities. A delayed vacatur would not avoid those irreparable harms during the winter months and there is no legal support to apply vacatur to ongoing operations. As such, the irreparable harm of the vacatur weighs in favor of a stay of this Court's decision pending appeal.

D. The Public Interest Weighs Heavily in Favor of a Stay.

As MEIC/Sierra Club's suggestion for delayed vacatur acknowledges, the people of the Mountain West depend on the energy produced by the Colstrip Power Station. An injunction

beginning immediately or delayed five months will result in the same outcome for that public: increased risk of energy disruption because of the long lead times necessary to prepare for production in areas of the mine that could replace AM4 coal. The public interest also favors the continuation of permitted reclamation work to continue apace, and decreasing permitted reclamation work reduces its effectiveness. Additionally, Intervenors explained above how the Court's decision differs from the Montana Supreme Court's prior precedent in significant ways, creating uncertainty as to the current state of the law. *Cf. Ariz. Contractors Ass'n v. Napolitano*, Nos. CV07-1355-PHX-NVW, CV07-1684-PHX-NVW, 2007 U.S. Dist. LEXIS 96194, at *16 (D. Ariz. Dec. 21, 2007) (dismissing Plaintiffs' case and refusing to enjoin the statute, explaining that employers were already complying with it and an injunction would harm the public interest by causing confusion and legal uncertainty).

1. A stay pending appeal will not harm MEIC/Sierra Club.

MEIC/Sierra Club – by requesting a *delayed* vacatur – effectively admit their claims of harm are outweighed by Intervenors' harms. They provide no reason why waiting five months does not harm them, but yet somehow in the *sixth* month, the same level of salinity in the water near AM4 since 2015 will somehow start to injure the MEIC/Sierra Club. Asking the Court to delay vacatur in a way that MEIC/Sierra Club believe avoids the harm of loss of power to Montana in the winter months means that MEIC/Sierra Club concede that (i) the harm of power loss is likely; (ii) the harm is severe and outweighs any harm they could contrive; and (iii) any harms to MEIC/Sierra Club are not immediate or certain enough to warrant consideration in the upcoming five months. By MEIC/Sierra Club's own admission then, their harms are not "certain and immediate" such that they do not qualify as "irreparable harm[s]." *Sierra Club v. U.S. Army Corps of Eng'rs*, 990 F. Supp. 2d 9, 38–39 (D.D.C. 2013).

MEIC/Sierra Club's previous failure to seek injunctive relief in the five years this litigation has been pending is telling. When an injunction is requested late in the timeline of a case, a Montana Federal District Court previously held that "the Court does not see what harm a preliminary injunction could prevent now that excavation in Area F has been ongoing since at least May 2020 and coal extraction since August 2020." *Mont. Envtl. Info. Ctr. v. Bernhardt*, No. 1:19-cv-00130-SPW-TJC, 2021 U.S. Dist. LEXIS 13472, at *10 (D. Mont. Jan. 25, 2021) (denying a preliminary injunction sought by plaintiffs in another case concerning a different permitted area of this same mine). Indeed, this case presents a starker picture: the AM4 area of the mine has been in operation *since 2015*, and throughout this long-protracted litigation MEIC/Sierra Club never deemed the alleged harms worthy of an injunction.[5]

Turning to the nature of MEIC/Sierra Club' alleged harms, they first claim "substantial injury to the environment." Pet'rs' Resp. at 23. But MEIC/Sierra Club cannot claim to represent injuries to the environment, because "an abstract injury to the environment" does not "show a particularized injury to [MEIC/Sierra Club'] interests." *Native Ecosystem Council v. Raby*, No. CV 18-55-BLG-SPW, 2018 U.S. Dist. LEXIS 140170, at *4 (D. Mont. Aug. 16, 2018) (denying injunctive relief); *Backcountry Against Dumps v. Perry*, No. 3:12-cv-03062-L-JLB, 2017 U.S. Dist. LEXIS 139090, at *11 (S.D. Cal. Aug. 29, 2017) (concluding it is not "proper to focus on any general environmental harms from continued operation that are not suffered by Plaintiffs"). MEIC/Sierra Club cannot weigh general vague harms to the environment against Intervenors'

[5] MEIC/Sierra Club try to excuse their lack of harms by claiming other courts issued final decisions vacating permits without an injunction first being requested, Pet'rs' Resp. at 24 n.12, but that merely shows that there are some projects that fail to comply with permitting requirements and yet are not deemed by the plaintiffs pursuing the case to be creating irreparable harms sufficient to warrant seeking an injunction. Those cases shed no light on MEIC/Sierra Club' alleged harms—or lack thereof—in this case.

concrete and imminent harms to the company, the Colstrip Power Station, and the inhabitants of Montana.[6]

MEIC/Sierra Club's final salvo states in one sentence that AM4 permit activities cause "ongoing pollution" that "irreparably harms the Conservation Groups and their members." Pet'rs' Resp. at 23. But MEIC/Sierra Club's declaration in support of this statement does not demonstrate harm to MEIC/Sierra Club deriving from the AM4 permit. Declarant Hedges states she "enjoy[s] the view of many of the area creeks," but does not explain how her visual enjoyment of those creeks is irreparable harmed by the salinity levels within the water. Hedges Decl. at ¶ 5. Hedges claims that other "members … in and around the Colstrip Plant and mine … are concerned about their health and water resources." *Id.* But this statement does not explain how the continued salinity since 2015 from AM4 activities actually affects either the health or water resources of nearby member residents and cannot demonstrate irreparable harm.[7]

Hedges then cites to a Final Environmental Impact Statement for a permit covering a different area of the mine, claiming those Area F activities could result in "loss of springs." *Id.* ¶ 7. But those Area F impacts are not part of this case, nor have MEIC/Sierra Club alleged

[6] And even were Plaintiffs able to claim harms to the environment, they do not explain how continued salinity levels constitute "irreparable harm." In fact, the case they cite for the proposition that any "long-term environmental harm is irreparable," Pet'rs' Resp. at 23, actually concludes that presuming irreparable damage from an allegedly erroneous agency decision "is contrary to traditional equitable principles and has no basis in [the federal statute]. Moreover, the environment can be fully protected without this presumption." *Amoco Prod. Co. v. Vill. of Gambell*, 480 U.S. 531, 545 (1987).

[7] It is also hearsay because Hedges purports to quote other members and submit their concerns as proof of an alleged harm, and the court should decline to consider this portion of her declaration. *Ave. C Aps., Ltd. Liab. Co. v. Cincinnati Ins. Co.*, No. CV 19-37-BLG-SPW-TJC, 2021 U.S. Dist. LEXIS 49341, at *15–16 (D. Mont. Feb. 25, 2021) (concluding a statement in a declaration was hearsay where the "declarant[] clearly represents an out of court declaration made by a third party, … which is offered to prove the truth of the matter asserted …. Thus, the statement is inadmissible, and cannot be considered for purposes of the present motion").

similar harms in this case. Because the impacts from the Area F permit will not be affected by the actions this Court takes on the AM4 permit, they are inappropriate for consideration as an alleged irreparable harm arising from *this* case. *Lado*, 952 F.3d at 1024 (9th Cir. 2020) ("For a federal court to issue an injunction, there must be 'a sufficient nexus between the claims raised in a motion for injunctive relief and the claims set forth in the underlying complaint itself.'"). The Court should not grant the extraordinary relief MEIC/Sierra Club seek in this case based upon on alleged, unspecified hydrology harms from a separate location and permit. *See All. for the Wild Rockies v. Kruger*, 35 F. Supp. 3d 1259, 1270 (D. Mont. 2014) (observing that "Plaintiffs cannot merely utter the same general harm under which they succeeded in [a different case] as an incantation and expect the same outcome."); *see also Mont. Envtl. Info. Ctr.*, 2021 U.S. Dist. LEXIS 13472, at *10 (denying a preliminary injunction sought concerning the permitted activities in Area F).[8]

While Hedges concludes her declaration urging DEQ and Westmoreland to take "the opportunity to clean up this mess," she seems not to comprehend that vacating the permit prevents Westmoreland from completing the reclamation activities required under the permit. Hedges Decl. at ¶ 11. Thus, because MEIC/Sierra Club fail to allege any concrete harms, admit that Intervenors' harms outweigh their unsubstantiated harms, admit the public interest supports continued operations, and urge certain activities under the AM4 permit to continue, this Court should stay vacatur of the permit pending appeal.

[8] Hedges finally notes that "lung cancer and asthma … 'may be linked … [to] coal plant emissions.'" Hedges Decl. at ¶ 8. MEIC/Sierra Club have never raised air impacts in this case, and, as such, it is improper to consider such newfound allegations of harm at this late stage in the case. *See Lado*, 952 F.3d at 1024.

II. THE DISTRICT COURT LACKS AUTHORITY TO VACATE THE AM4 DECISION.

A. Only the Board has Jurisdiction to Vacate the AM4 Decision, and Such Authority May be Exercised Only After a Lawful Contested Case.

MEIC/Sierra Club ask the District Court to vacate the AM4 permit, and, in support, argue that the District Court has broad authority to grant such equitable relief. Resp. at 7-10. MEIC/Sierra Club are mistaken. The remedies available to a District Court on judicial review of a contested case proceeding are statutorily limited: "The court may ***affirm the decision of the agency or remand the case for further proceedings***." § 2-4-704(2), MCA. Because the District Court declined to affirm the agency decision – here, the Board's Final Order in the contested case proceeding[9] – the statutory remedy authorized by Part 704 is to "remand the case for further proceedings." *Id*. MEIC/Sierra Club's argument that equitable remedies may go beyond the statutory remedies is unavailing. When presented with respondents who similarly claimed that a court could use its equitable powers to grant relief not authorized by statute, the Montana Supreme Court declined to endorse this approach, holding instead that the statute specifically granted the equitable powers in question. *Kellogg v. Dearborn Information Servs.*, 2005 MT 188, ¶ 12, 25; *see also id.*, ¶ 26, J. Rice dissenting ("Neither can a court grant relief by equity which exceeds statutory authorization."); *Cf. Yellowstone Packing & Provision Co. v. Hays*, 268 P. 555, 557 (Mont. 1928) ("When the statutes provide a remedy against an excessive, erroneous,

[9] It is undisputed that this action is concerns the judicial review of a contested case proceeding conducted by the Board of Environmental Review (the "Board"). Because Part 704 governs the "judicial review of contested case proceedings," the only reasonable and logical interpretation of the phrase "decision of the agency" is the Board's Final Order in the contested case proceeding. § 2-4-704(2), MCA. Expanding the phrase to include DEQ's underlying permitting decision runs afoul of the rules of statutory construction, especially given the fact that the Board and DEQ (and, by extension, their respective agency decisions) are separate and distinct under the law. 2-15-102 (defining agency to mean "an office, position, commission, committee, board, department, council, division, bureau, section, or any other entity or instrumentality of the executive branch of state government.").

or improper [tax] assessment of the property of an individual, by the proceedings before a board of equalization, or review, the taxpayer … cannot resort to the courts in the first instance … nor invoke the common-law or equitable powers of the courts for the redress of this grievance." (citation omitted)).

When considering the construction of a statute, the "cardinal first step" of a Court is to "ascertain and declare what is in terms or in substance contained [in the statute], not to insert what has been omitted or to omit what has been inserted." § 1-2-101, MCA. Where the Court can determine the intent from the plain meaning of words used in a statute, the Court may not go further or apply any other interpretation. *State v. Wolf*, 2020 MT 24, ¶15. In this pursuit, the Court "must reasonably and logically interpret that language, giving words their usual and ordinary meaning." *Id*. "Where the statutory language is 'plain, unambiguous, direct and certain, the statute speaks for itself and there is nothing left for the court to construe.'" *Id*.

The statutory language of Part 704 is plain and certain: the District Court may only "***remand the case for further proceedings***." § 2-4-704, MCA (emphasis added). Because Part 704 governs the "judicial review of contested case proceedings," the term "case" must logically be understood to mean the *contested case proceeding* before the Board on which this appeal originated. The District Court may not replace the phrase "remand the case" with the "vacate the permit." § 1-2-101, MCA; *Mont. Trout Unlimited v. Mont. Dept. of Natural Res.*, 2006 MT 72, ¶ 23 (Mont. 2006) ("We must endeavor to avoid a statutory construction that renders any section of the statute superfluous or fails to give effect to all of the words used."). As such, the statutory phrase "remand the case for further proceedings" must be interpreted to mean "remand *the contested case* for further proceedings" before the Board.

This interpretation – that the District Court's authority on judicial review of a contested case proceeding does not extend to the underlying permit – is supported by the fact that Part 704 is silent on the question of permit vacatur. The words "vacatur" and "permit" do not appear in statutory text specific to the judicial review of contested case proceedings. § 2-4-704, MCA. This is because the exclusive authority to vacate AM4 rests with the Board, and such authority may be exercised only after a lawful contested case proceeding. § 2-4-623(b), MCA (prescribing procedures for the Board to grant or deny relief sought in a contested case proceeding). Because the District Court declined to affirm the Board's Final Order, the only remedy authorized by Part 704 is the remand of the contested case to the Board for further proceedings in accordance with the District Court's Order. § 2-4-704(2), MCA.

B. The Montana Supreme Court has Recognized that a Remand Rather than Vacatur of the Permit and a Remand to the Permitting Agency is the Appropriate Remedy.

This approach – that the appropriate remedy on judicial review is a remand to the trial court – is consistent with a recent ruling from the Montana Supreme Court. In *MEIC v. DEQ*, MEIC/Sierra Club challenged the DEQ's issuance of a water discharge permit in District Court.[10] The District Court invalidated the water discharge permit, holding that "[t]he decisions are arbitrary and not supported by the law applicable to the permitting process" and referred the matter back to DEQ.

On appeal, the Montana Supreme Court – sitting in the same appellate posture as the District Court in this case – reversed the trial court on two questions of law and, just like this case, held that certain factual questions regarding the issuance of the permit required further investigation. *Petition for Rehearing* at 2. The Montana Supreme Court remanded the case to

[10] Because an appeal of a water discharge permit does not implicate MAPA or its contested case provisions, the District Court sat as the trial court in a similar posture to the Board in this case.

the trial court with instructions that the factual questions be addressed in an evidentiary hearing. *Id*. MEIC/Sierra Club petitioned the Montana Supreme Court to reconsider this remedy and instead vacate the water discharge permit and remand the matter to DEQ for further processing:

> The Opinion's closing paragraph remanded "to the District Court for a hearing on the factual issues raised in this Opinion." However, under this Court's unbroken precedent the proper remedy for agency action that lacks evidentiary support or reasoned analysis, as here, is not remand to district court for trial, but to vacate the decision and remand to the agency ***to either develop evidence and analysis to support its decision, or issue a different decision***.

Pet. for Rehearing at 1-2 (internal citations omitted) (emphasis added). The Montana Supreme Court rejected MEIC/Sierra Club's request to vacate the permit and remand the matter to DEQ for further processing. *Order Denying Pet. for Rehearing* at 3.

Here, the trial court was the Board, and the trial was the contested case proceeding. On judicial review of the contested case proceeding, the District Court held that the Board committed six reversible errors by (1) applying the doctrine of administrative exhaustion; (2) employing the wrong burden of proof; (3) admitting on post-decisional and extra-record evidence; (4) allowing unqualified expert testimony; (5) unlawfully assessing the water quality standards; and (6) determining that the contribution of pollutants to an impaired stream is not material damage *per se*. Resp. at 3. All of these errors arise from procedural decisions by the Board; thus the only entity in a position to address the errors is the Board. Similar to *MEIC v. DEQ*, the remedy is not vacatur of the permit and a remand to the permitting agency for further processing. Rather, the appropriate remedy is a remand to the Board with instructions to process the contested case proceeding in accordance with the District Court's Order.

C. Vacatur of the Permit in the Absence of a Lawful Contested Case Proceeding Violates the Due Process Rights of Intervenors.

This Court concluded that the Board - by applying flawed procedure and incorrect law – conducted an unlawful contested case proceeding. It now rests with the District Court to remand the contested case proceeding to the Board with instructions to apply the correct procedure and law to MEIC/Sierra Club's claims. A vacatur of the permit and a direct remand to DEQ violates the Montana Strip and Underground Mine Reclamation Act, MAPA, and the due process rights of Intervenors. Intervenors are owed the opportunity to defend the permit in a contested case proceeding conducted in accordance with the District Court's Order before a vacatur of the permit can be entertained by either the Board or the District Court.

DATED this 6th day of December, 2021.

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CERTIFICATE OF SERVICE

The undersigned certifies that on December 6, 2021, the original or a copy of the foregoing was delivered or transmitted as noted to the persons named below:

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Exhibit A

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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 **SECOND DECLARATION OF RUSSELL BATIE**

I, Russell Batie, declare under penalty of perjury as follows:

1. I am the Environmental and Engineering Manager at the Rosebud Mine ("Mine"), which is owned and operated by Westmoreland Rosebud Mining, LLC ("Westmoreland"), formerly Western Energy Company. I have been employed at the Mine in various capacities for 16 years, and I have served in my current role for five years.

2. I am familiar with this Court's October 27, 2021 Order in this matter and with Petitioners' Combined Response brief and accompanying exhibits filed November 22, 2021.

3. I have personal knowledge of Westmoreland's operations at the Mine, including its operations in the area covered by the AM4 Permit (the "AM4 Area"). I also have personal knowledge of the anticipated impacts to the Mine if operations in the AM4 Area were to cease.

4. I have reviewed the Declaration of David Alan Schlissel submitted with Petitioners' Combined Response brief.

5. I understand that Mr. Schlissel asserts that if vacatur of the AM4 permit is delayed until April 2022, it is unlikely that the cessation of mining operations in the AM4 Area will threaten the energy supply or cost of energy in Montana or the Pacific Northwest. I understand that Mr. Schlissel bases this belief in part on his interpretation of my previous declaration and that of the previous manager of the Rosebud Mine, Jack Standa.

6. I disagree with Mr. Schlissel's prediction because his oversimplified calculations do not reflect the complex realities of coal mining at the Rosebud Mine. Rosebud Mine production is a function of a complicated interplay of state and federal government approvals, geology, infrastructure, and labor.

7. First, the Mine must have legal authority to mine coal. At present, the Mine has five permitted areas, four of which are currently in production. It uses coal from all of these

areas to blend together to produce coal that meets the quality requirements in its contract with the Colstrip Power Station. Thus, contrary to Mr. Schlissel's assumption, the Mine's total volume of coal reserves is insufficient to determine whether the Mine will be able to meet contractual commitments. The Mine must have coal available in sufficient quantities to blend to meet the contractual requirements.

8. AM4 produces approximately 180,000 tons of coal each month as an annual average to fulfill the Mine's contractual obligations with the Colstrip Power Station. However, in the first quarter of 2022 we expect to mine approximately 200,000 tons of coal each month from AM4. As stated in my previous declaration, this represents approximately 30% of the Mine's production each month.

9. Currently, the Mine's permitted reserves are as follows (with the caveat that these numbers change daily with mine production):

9.1. The Mine has one permitted pass remaining within Area A. To mine this pass, equipment will need to be moved, which may take 2–4 months, as noted in my prior declaration. We estimate this pass includes approximately 800 thousand tons of coal. At the Colstrip Power Station's current rate of consumption, this represents 1–2 months of production. Because this coal is of higher quality and will be blended with lower quality coal, I estimate mining the coal from the final pass of Area A would take 3–4 months and thus would not be able to replace AM4's production long-term.

9.2. The Mine has approximately 9 million tons of permitted coal in Area B, exclusive of the AM4 Area. Approximately 7 million tons of this coal is on the far west end of Area B, in what is called Area B Extension. The Mine is actively

mining this coal, so it cannot serve to replace lost production from AM4. Area B Extension coal also requires blending with higher quality coal to achieve contractual quality requirements. The remainder of non-AM4 coal lies in Area B East and is currently a non-active area requiring preparation before production can be restarted. Since the pit has been inactive for some time, I estimate it would take at least 6–8 months to prepare that area for mining to attempt to replace some of the AM4 production. Once preparation is completed (and assuming no safety or other issues are identified) there are approximately 2 million tons of mineable coal available in Area B East.

9.3. The Mine has approximately 2.5 million tons of permitted coal remaining in Area C. The Mine is actively mining Area C as part of its current production, so Area C cannot serve as a replacement for AM4. When that coal is mined, Area C will be fully mined out, with only reclamation work remaining. The coal remaining in Area C represents less than half a year's worth at the current rate of production.

9.4. The Mine's permitted reserves in Area F are being challenged by the Petitioners in federal court and before the Board of Environmental Review. In each case, Petitioners are seeking vacatur of the permit. If Petitioners obtain their requested relief in either action, the permitted reserves in Area F will not be available to replace AM4 coal. Further, the Mine is currently mining one pit in Area F, which is considered "direct ship" quality. The pit is very short and does not have the capacity to satisfy the Colstrip Power Station's demand. This coal does meet contract specifications and does not require blending, but it not of high

enough quality that it can be blended with lower quality coal, particularly coal with higher sodium levels. As we progress in this part of Area F, we expect the sodium to increase, so that we will have to blend with lower sodium coal. This part of Area F has 9 million tons of coal remaining. To access higher quality coal in another part of Area F would require an investment of approximately $6–7 million, and I expect that it would take approximately 8–10 months of preparatory work to build necessary infrastructure before coal production could begin.

10. In sum, of the Mine's permitted reserves, the only available long-term replacement for the approximately 180,000–200,000 tons of coal mined from AM4 each month are in the portion of Area B that has significant engineering challenges and could be available (if at all) no earlier than 6–8 months, and in undeveloped parts of Area F that would also require substantial preparatory work and would not produce coal for electrical generation for at least 8–10 months. I previously offered the 2–4 month timeframe in reference to Area A, specifically to address the expected winter demand spike by identifying the earliest that any short-term replacement could be available if the Court vacated the permit in the near-term because Petitioners had not, at that time, proposed deferred vacatur until April. That estimate was not intended to imply that it would require only 2–4 months for the Mine to be in a position to *fully* replace the coal from AM4 over the long-term.

11. Second, the Mine's production is dependent on geology. As noted above, the Mine blends coal from multiple sources to achieve contractual specifications. AM4 is important to the Mine's production because it is high quality coal that can be blended with other coal. Vacating the AM4 permit would do more than reduce the permitted reserves available, it would significantly reduce the volume of higher quality coal that the Mine has available for blending.

12. Third, the Mine's production requires substantial engineering. AM4 is a well-developed portion of the mine, with well-established pits. If the Mine is forced to replace the AM4 coal with coal from other permitted areas earlier than planned, it will necessarily be required to mine in pits with more difficult engineering strategies and to develop currently undeveloped parts of the Mine. Because of the engineering and construction requirements, Areas B and F cannot be available in the near term. Once they become available, they cannot serve as a single-source long-term replacement for AM4 because of coal quality and operational constraints.

13. Fourth, the Mine is limited by its manpower availability. Coal mining requires skilled labor, and there is a limited pool of individuals with the appropriate skills. The Mine has been actively attempting to hire for the past several months. The Covid-19 pandemic has also negatively impacted attendance.

14. I understand the Mr. Schlissel has suggested that the Mine and the Colstrip Power Station "increase their inventories" of coal prior to the vacatur of the AM4 permit. If such action were feasible, the only source within the Mine capable of producing the proposed stockpiling would be the AM4 Area. However, it is not feasible for two reasons. First, the Mine does not have the necessary labor force to increase production beyond the Colstrip Power Station's current demands, nor do I expect the Mine would be able to hire staff on short notice for such a surge in production. Second, neither the Mine nor the Colstrip Power Station has sufficient area permitted to accommodate a stockpile as suggested by Mr. Schlissel.

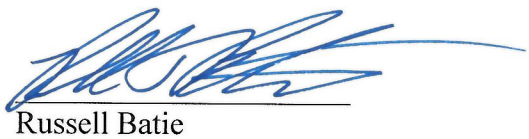
15. I understand that Petitioners assert that deferring vacatur until April would provide sufficient time to wind down operations in AM4 in an orderly fashion. The lead time

must be sufficient so that all placed explosives are detonated, all exposed coal is removed, and at least interim action is taken to stabilize the pit prior to reclamation.

16. Further, Petitioners do not address the concern raised by Martin Van Oort regarding permitting for reclamation. Westmoreland has won awards for the quality of its reclamation, which is designed to be integrated with the mining process to the extent possible. All of the reclamation plans for the AM4 Area are in the AM4 Permit, and the Department has taken the position in Mr. Van Oort's declaration that reclamation cannot proceed if the AM4 Permit is vacated. Westmoreland would work promptly and cooperatively with the Department to obtain a new permit approval for reclamation of the AM4 Area, but it would necessarily take time, during which the exposed pit would delay reclamation activity.

17. Finally, I do not believe replacing the AM4 coal from a source other than the Rosebud Mine is a viable solution given the current infrastructure. Coal from the Mine is carried on a conveyor belt to the Colstrip Power Station. Because there is no current way to offload trains at the Mine or the Colstrip Power Station, the replacement coal must be shipped by truck. If a semi-truck carries approximately 40 tons, even assuming coal could be purchased from another source and trucked to Colstrip, moving 180,000 tons of coal per month would require 4,500 vehicle trips per month, or 150 trucks per day.

Executed this 6th day of December, 2021.



Russell Batie