Exhibit G

Nicholas A. Whitaker
Staff Attorney
Department of Environmental Quality
Legal Unit, Metcalf Building
P.O. Box 200901
1520 East Sixth Avenue
Helena, MT 59601-0901
(406) 444-5690
Nicholas.Whitaker@mt.gov
Attorney for Respondent DEQ

MONTANA SIXTEENTH JUDICIAL DISTRICT, 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 **DEQ'S REPLY BRIEF IN SUPPORT MOTION FOR STAY PENDING APPEAL**

Respondent Montana Department of Environmental Quality (DEQ) respectfully files this Reply Brief in Support of its Motion for Stay Pending

Appeal. As explained below, DEQ's Motion is timely, and Petitioners' proposed deferred vacatur of the AM4 Amendment[1] to April 1, 2022, does not obviate the necessity to stay enforcement of this Court's October 28, 2021, Order on Petition (and any related order[2]) pending appeal and final resolution by the Montana Supreme Court. Because the requisite good cause exists under M. R. App. P. 22 for this Court to issue a stay pending appeal, DEQ's motion should be granted.

Argument

1. The Court may issue a stay prior to the filing of a notice of appeal.

As a threshold matter, Petitioners assert that DEQ's Motion is premature because no appeal has been filed. Pet'rs' Comb. Resp. at 16 (Nov. 22, 2021) (citing cases). While Petitioners present several extra-jurisdictional federal district court cases purporting to stand for the proposition that a pending appeal is a prerequisite to a stay, their position is belied by the text of M. R. App. P. 22 and Montana case law on this issue.

Nothing in the text of M. R. App. P. 22 requires that a notice of appeal be filed prior to seeking a stay of the relevant district court order. Indeed, subsection

[1] Westmoreland Rosebud Mining LLC f/k/a Western Energy Company's fourth amendment to the "Area B" coal mining permit for the Rosebud Surface Mine located in Colstrip, Montana.
[2] After DEQ filed its Motion for Stay Pending Appeal on November 5, 2021, Respondent-Intervenors (WRM) filed its Motion on Remedy on November 8, 2021. To the extent the Court issues an order expressly vacating the AM4 Amendment, that order should likewise be stayed for the same reasons described herein.

(1)(d) contemplates that the district court's order on a motion for stay may be entered prior to the filing of an appeal notice, as the rule provides separate instructions for filing in the Supreme Court "any order made after the filing of a notice of appeal." M. R. App. P. 22(1)(d). If a notice of appeal was a prerequisite to seeking a stay pending appeal, the reference to "any order" would be unnecessary, as all such orders would necessarily be made after the filing of a notice of appeal. Montana case law confirms this interpretation. *Lenz v. FSC Secs. Corp.*, 2018 MT 67, ¶ 11, 391 Mont. 84, 414 P.3d 1262 (stay pending appeal granted, then notice of appeal filed); *Conway v. Blackfeet Indian Developers*, 205 Mont. 459, 461, 669 P.2d 225, 226 (1983) (same). As such, DEQ's motion is timely filed.

2. Deferred vacatur of the AM4 Amendment to April 1, 2022, does not resolve the irreparable harm to DEQ necessitating a stay pending appeal.

In their Combined Response, Petitioners propose what they refer to as a "reasonable compromise," asking the Court (1) to issue a deferred vacatur of the AM4 Amendment to April 1, 2022, and (2) to deny DEQ and WRM motions for stay pending appeal. Pet'rs' Comb. Resp. at 1-2. According to Petitioners, deferring vacatur to April 1, 2022, would "avoid unnecessary disruption" by providing DEQ with sufficient time to reevaluate WRM's AM4 permit amendment application while allowing WRM to continue operating under its current permit as

it adjusts its mining operations in the interim. Pet'rs' Comb. Resp. at 1-2, 10-13.

Petitioners' "compromise" position goes to the issue of vacatur itself and fails to cure the irreparable harm to DEQ that would result if the Court were to enforce its Order on Petition (or any subsequent vacatur order) while appeal is pending. As explained below, deferred vacatur in the absence of a stay pending appeal would (a) vacate the environmental protections for already-mined areas of AM4 currently contained in the AM4 Amendment on April 1, 2022, very likely before any appeal is resolved; (b) require DEQ to take extensive immediate action to comply with the Court's Order on Petition, action which would be rendered meaningless if DEQ is successful on appeal to the Montana Supreme Court; and (c) leave unresolved substantial uncertainty as to the current state of the law until issues are finally decided on appeal. Because good cause exists to prevent these harms during the pendency and ultimate resolution of appeal of the Order on Petition, this Court should grant DEQ's request for a stay.

a. Deferred vacatur to April 1, 2022, without a stay pending appeal would vacate the environmental protections in the current AM4 Amendment to the Area B permit.

As DEQ noted in its opening brief, allowing the AM4 Amendment to remain in place pending appeal will ensure current environmental protections, including but not limited to the reclamation plan and bond covering the AM4 Area, remain in place throughout the appeal process. DEQ Br. Supp. Mot. Stay at 14-15

(November 5, 2021). Deferred vacatur of the AM4 Amendment, in the absence of a stay, does little to address these concerns, as the environmental protections for the already-mined portions of AM4 in the current permit would be vacated as of April 1, 2022, absent substantial immediate action from DEQ.

b. Deferred vacatur to April 1, 2022, without a stay pending appeal would require DEQ to take immediate action to ensure WRM meets reclamation requirements under Montana law.

In his declaration supporting DEQ's Motion for Stay, DEQ Hydrologist Martin Van Oort explained that, in the absence of a stay, DEQ would be required to undertake significant work in response to the Order on Petition. Decl. Martin Van Oort, ¶¶ 17-24 (November 5, 2021). For example, Van Oort noted that, "because substantial mining and disturbance in AM4 has already occurred, it is not possible to simply revert to the Area B permit which existed prior to the approval of AM4, as there would then be existing mining and disturbance outside the permitted limits for these activities." Decl. Van Oort, ¶ 17.

According to Van Oort, DEQ would likely require WRM to submit a revision to the Area B permit to incorporate the mining and disturbance that has already occurred, and to include the changes in the mine reclamation plan necessary to meet the performance standards in MSUMRA. Decl. Van Oort, ¶ 18. DEQ would also begin a new review of the AM4 application. Decl. Van Oort, ¶ 19. As previously explained, this work would involve many agency staff and the

"[t]otal time expended to complete these reviews would likely be in the range of a couple thousand manhours." Decl. Van Oort, ¶¶ 20-24.

In the absence of a stay pending appeal, deferred vacatur fails to resolve these harms. Because there is no assurance that even an expedited appeal would be resolved by April 1, 2022, DEQ would need to take immediate action to ensure the Court's Order on Petition is implemented and the current environmental protections in the AM4 Amendment remain in place after April 1, 2022. The entirety of this additional work would be rendered meaningless if the Montana Supreme Court reverses the Order on Petition. Avoiding this irreparable harm is a "legally sufficient reason" constituting good cause for the issuance of a stay pending appeal. *City of Helena v. Roan*, 2010 MT 29, ¶ 13, 355 Mont. 172, 226 P.3d 601 ("Good cause is generally defined as a 'legally sufficient reason'"); *Columbia Riverkeeper, et al v. Wheeler,* 2018 U.S. Dist. LEXIS 203478 (W.D. Wash. November 30, 2018) (granting stay pending appeal where immediate compliance with district court order "would tax EPA resources devoted to other projects").

c. Deferred vacatur to April 1, 2022, without a stay pending appeal would not resolve uncertainty from the effect of the Order on Petition.

DEQ explained in its opening brief how, absent a stay pending appeal, the Order on Petition will introduce tremendous uncertainty into DEQ's permitting

regime for the agency, regulated entities, and the public. DEQ Br. Supp. Mot. for Stay at 6-8 (Nov. 5, 2021). Deferred vacatur in the absence of a stay does nothing to resolve this uncertainty, which would continue to impact DEQ, regulated entities, and the public until the Montana Supreme Court finally resolves this matter.

d. *Northern Cheyenne Tribe* is not analogous to the circumstance of this case.

Petitioners point to *Northern Cheyenne Tribe v. DEQ*, 2010 MT 111, ¶ 47, 356 Mont. 296, 234 P.3d 51, to support their contention that deferred vacatur without a stay appropriately addresses the concerns set forth by DEQ and WRM. Pet'rs' Comb. Resp. at 11-12. Because *Northern Cheyenne Tribe* dealt with the appropriate remedy after final resolution by the Montana Supreme Court, it is not helpful in evaluating DEQ's Motion for relief pending appeal.

In *Northern Cheyenne Tribe*, the Montana Supreme Court reversed a district court decision upholding certain permits issued by DEQ. After declaring the DEQ-issued permits void, the Court "remand[ed] to DEQ and direct[ed] the agency to re-evaluate [the applicant's] permit applications under the appropriate pre-discharge standards within 90 days of this Court's decision, during which time Fidelity may continue operating under its current permits." *Northern Cheyenne Tribe*, ¶ 47. Because the validity of the DEQ-issued permit at issue had been

finally decided, the *Northern Cheyenne Tribe* Court fashioned an appropriate remedy that allowed the permittee to continue operations while DEQ reevaluated the permit application in accordance with the Court's Opinion.[3]

Northern Cheyenne Tribe does not speak to whether a stay pending appeal is appropriate. Here, the issues decided by this Court in its Order on Petition are subject to appellate review, and DEQ is requesting a stay of enforcement of this Court's Order on Petition to maintain the status quo pending appeal and final resolution of these issues. *Northern Cheyenne Tribe* does not cut against DEQ's request for a stay pending appeal.

3. DEQ's harms are legally cognizable and support the issuance of a stay pending appeal.

Relying on *N. Plains Res. Council v. U.S. Army Corps of Eng'rs (Northern Plains)*, 460 F. Supp. 3d 1030, 1044 (D. Mont. 2020), Petitioners assert that DEQ's concerns regarding the expenditure of unnecessary costs and limited staff resources to implement the Order on Petition while appeal is pending "are not cognizable,

[3] As WRM points out, the *Northern Cheyenne Tribe* Court appeared to have expected that the permittee could comply with the revised standards imposed on DEQ. Intervenors' Reply at 10; *Northern Cheyenne Tribe*, ¶ 43 (noting that the parties did not dispute that the permittee "had a pre-discharge treatment system already in place that could reduce the CBM wastewater's SAR level to 0.1 or less"). Indeed, the Montana Supreme Court later extended the period for DEQ's re-evaluation of the permit application (and the permittee's lawful operations under its now-void permit) to 180 days upon a showing that it would be impractical for DEQ to complete the re-evaluation in the timeframe allotted by the Court. *Northern Cheyenne Tribe et al v. DEQ et al*, No. DA 09-0131, Order dated June 29, 2010.

much less irreparable, harm." Pet'rs' Comb. Resp. at 13-14.

Concerningly, Petitioners failed to inform this Court that the U.S. Supreme Court later granted a partial stay of the federal district court's Order in *Northern Plains*, issuing the same stay pending appeal requested by the federal agencies before the district court:

> The district court's May 11, 2020, order granting partial vacatur and an injunction is stayed, except as it applies to the Keystone XL pipeline, pending disposition of the appeal in the United States Court of Appeals for the Ninth Circuit and disposition of the petition for writ of certiorari, if such writ is timely sought.

United States Army Corps of Eng'rs v. North Plains Res. Council, 207 L. Ed. 2d. 1116*, 2020 U.S. LEXIS 3545**, 141 S. Ct. 190; *compare with* 460 F.Supp.3d at 1044 ("Federal defendants ask the Court, at the very least, to stay the vacatur and injunction as they relate to anything other than the Keystone XL pipeline"). Thus, the U.S. Supreme Court later determined to be a sufficient basis for stay pending appeal the same type of arguments—namely, the extensive administrative costs of complying with an order that may later be vacated or reversed—that Petitioners purport to be insufficient here.

Furthermore, Petitioners' blanket statement that a stay pending appeal is unavailable to DEQ because "agencies cannot complain about the burden of following the law" (Pet'rs' Comb. Resp. at 13-14) should be rejected. Courts

routinely grant stays to governmental agencies. *United States Army Corps of Eng'rs v. North Plains Res. Council*, 207 L. Ed. 2d. 1116*, 2020 U.S. LEXIS 3545**, 141 S. Ct. 190; *City & Cty. Of San Francisco v. United States Citizenship & Immigration Servs.*, 944 F.3d 773, 781 (9th Cir. 2019) (granting stay to U.S. Department of Homeland Security); *Columbia Riverkeeper, et al v. Wheeler,* 2018 U.S. Dist. LEXIS 203478 (W.D. Wash. November 30, 2018) (granting stay pending appeal where EPA "demonstrated irreparable injury absent a stay" because implementing district court order pending appeal "would tax EPA resources devoted to other projects").[4]

Likewise, in contrast to Petitioners' unsupported accusations to the contrary, DEQ's request for a stay pending appeal in no way should be construed as a "reticence to comply with the law." Pet'rs' Comb. Resp. at 14. The issue before the Court in DEQ's Motion is limited to whether DEQ should be compelled to implement the Order on Petition while it is on appeal to the Montana Supreme Court.

DEQ has presented evidence that requiring DEQ to implement the Court's

[4] Petitioners' reliance on *Rodriguez v. Robbins*, 715 F.3d 1127 (9th Cir. 2013) is also misplaced, as that case concerned whether a preliminary injunction should issue and did not in any manner evaluate whether to grant a stay pending appeal. Further, *Rodriguez* noted that "the government provide[d] almost no evidence that it would be harmed, other than its assertions that the order enjoins 'presumptively lawful' activity." *Id.* at 1145. The circumstances are starkly different here, where DEQ would be required to take specific actions to respond to Order on Petition absent a stay.

Order on Petition immediately, or even by Petitioners' proposed April 1, 2022, deadline, will cause irreparable harm to DEQ. This harm presents a legally cognizable basis for this Court to grant a stay pending appeal, which Petitioners have not meaningfully rebutted. Under the circumstances of this case, DEQ has established the requisite good cause for the Court to enter a stay pending appeal and final resolution of this matter by the Montana Supreme Court.

4. The balance of equities supports issuance of a stay pending appeal.

Petitioners' generalized contentions of "substantial injury to the environment" (Pet'rs' Comb. Resp. at 23) do not outweigh the harms asserted by DEQ and WRM. *Native Ecosystem Council v. Raby*, 2018 U.S. Dis. LEXSIS 140170 at *4 (D. Mont. Aug. 16, 2018) (claims of "abstract injury to the environment" are insufficient to show irreparable harm).

To establish irreparable harm, Petitioners need to show that the issuance of a stay pending appeal would cause "certain and great" injury stemming from the issuance of the stay. *Chaplaincy of Full Gospel Churches v. England*, 454 F.3d 290, 297 (D.C. Cir. 2006); *Sierra Club v. U.S. Army Corp of* Eng'rs, 990 F. Supp. 2d, 9, 38-39 (D.D.C. 2013). But here, Petitioners do not distinguish between harms allegedly emanating from mining at the Rosebud Mine generally from those harms that would occur as a result of mining within the AM4 Area during the pendency of appeal. Pet'rs' Comb. Resp. at 23 (complaining of long-term environmental

harm from the Rosebud Mine generally); Decl. Anne Hedges, ¶ 7-8 (Nov. 19, 2021) (discussing impacts related to Area F permit covering different area of Rosebud Mine); ¶ 8 (alleging harm in the form of elevated "incidence of lung cancer and asthma…which may be linked to environmental pollution from coal plant emissions."). Because the impacts from the Area F permit will not be affected by a stay pending appeal related to the AM4 Amendment (which is associated with the Area B Permit), such impacts are inappropriate to consider in evaluating DEQ's Motion. Likewise, air impacts have never been raised in this case and thus are inappropriate to consider now.

Petitioners assert that "the waters impacted by AM4 and the Rosebud Mine are impaired for salinity and the cumulative effects of WRM's AM4 mining operations will substantially worsen that impairment." Pet'rs' Comb. Resp. at 23 (citing Order on Petition, pp. 6-7, 28-34). But Petitioners do not explain how, considering the significant mining that has already occurred in the AM4 Area, a stay pending appeal would result in "substantial injury to the environment" during the pendency of appeal. Pet'rs' Comb. Resp. at 23; *see also* Decl. Van Oort, ¶ 14 (estimating 24-38 percent of the coal in AM4 has already been mined).

Virtually non-existent are any claims of irreparable harm to Petitioners themselves. While Petitioners state that "ongoing pollution . . . irreparably harms the Conservation Groups and their members" (Pet'rs' Comb. Resp. at 23), the only

support for this statement comes from the Declaration of Anne Hedges, which contains hearsay statements of generalized harm to "MEIC members and concerned individuals…who are concerned about their health and water resources due to impacts from the plant and mine." Decl. Hedges, ¶ 5. Such concerns—which go beyond the AM4 Amendment and even the Rosebud Mine—are woefully inadequate to show harm from staying the Order on Petition pending appeal. *See Sierra Club*, 990 F. Supp. 2d at 39. Hedges' claimed harm "from witnessing the impacts of strip mining on this stream" (Decl. Hedges, ¶ 11) suffers for the same reason.

Moreover, by requesting a deferred vacatur to April 1, 2022, Petitioners effectively concede that the balance of harms and public interest weigh in favor of DEQ and WRM. For example, while Petitioners' state that "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," (Pet'rs' Comb. Resp. at 23-24), they provide no explanation as to how this statement squares with their proposal to allow the AM4 Amendment to remain in effect until April 1, 2022. Because the Montana Supreme Court has recognized that continued operations under a permit determined to be void is acceptable under certain circumstances, Petitioners' argument that continued operations here "would violate Montana's constitutional protection and

the rule of law" must be rejected. *See, e.g., Northern Cheyenne Tribe*, ¶ 47 (authorizing continued operations under permit determined to be invalid, pending DEQ's re-evaluation of permit application).

Petitioners have otherwise not rebutted the public interests raised by DEQ or those raised separately by WRM. DEQ Br. Supp. Mot. Stay at 14 (noting public interests in unnecessary expenditure of limited agency resources and avoiding uncertainty created by Order on Petition); Intervenors' Reply Br. at 12-13 (noting public interests in continued energy production, continued reclamation, and avoiding uncertainty created by Order on Petition).

Because the concrete, particularized harms asserted by DEQ and WRM sharply outweigh the nebulous, generalized harms alleged by Petitioners, and because the public interest favors a stay, the balance of equities supports the issuance of a stay pending appeal.

5. DEQ and WRM are likely to prevail on appeal.

Petitioners fault DEQ and WRM for failing to address each of the holdings in the Order on Petition, claiming "[t]his alone is fatal" to the present motions for stay. Pet'rs' Comb. Resp. at 18. As explained elsewhere, the motions before the Court address multiple holdings in the Order on Petition, each of which constitutes a flaw that, if reversed, would require this Court to revisit its decision. Intervenors' Reply Br., p. 3. The Court has before it ample analysis for why DEQ and WRM

are likely prevail on appeal. DEQ Br. Supp. Mot. Stay at 11-13; Intervenors' Br. Supp. Mot. on Remedy at 14-17 (November 8, 2021); Intervenors' Reply Br. at 3-8; *see also Citizens for Responsibility & Ethics in Wash. v. Office of Admin.*, 593 F.Supp.2d 156, 160 (D.D.C. 2009) ("[A] court is not required to find that ultimate success by the movant is a mathematical probability, and indeed, may grant a stay even though its own approach may be contrary to the movant's view of the merits.")

Furthermore, courts have granted stays where "serious legal questions" are raised and the balance of hardships tips sharply in the movant's favor. *Leiva-Perez v. Holder*, 640 F.3d 962, 968 (9th Cir. 2011); *Ala. Ass'n of Realtors v. United States HHS*, 2021 U.S. Dis. LEXIS 92104 (May 14, 2021) (staying vacatur of nationwide eviction moratorium issued by the Centers for Disease Control and Prevention pending appeal because it raised "serious legal questions"). As DEQ explained in its opening brief, the issues to be considered on appeal "go to fundamental administrative law principles that permeate through DEQ's permitting regime and the litigation of permit challenges stemming from DEQ's regulatory decisions." DEQ Br. Supp. Mot. Stay at 5, 7 (noting that exhaustion of administrative remedies ruling and the burden of proof ruling in particular have potential far-reaching impacts). Because the balance of hardships tips sharply in DEQ and WRM's favor, a stay pending appeal is appropriate while the Montana

Supreme Court considers the serious legal issues to be decided on appeal.

Conclusion

For the reasons stated, DEQ respectfully requests the Court stay enforcement of its October 28, 2021, Order on Petition and, if entered, any order vacating the AM4 amendment to the Rosebud Mine Area B permit, pending appeal and final resolution of this matter by the Montana Supreme Court. A proposed order is enclosed for the Court's consideration.

DATED this 9th day of December, 2021.

MONTANA DEPARTMENT OF
ENVIRONMENTAL QUALITY

NICHOLAS A. WHITAKER
Attorney for Respondent DEQ

CERTIFICATE OF SERVICE

I hereby certify that on December 9, 2021, a true and accurate copy of the foregoing document for DV 2019-34 was mailed by electronic mail, addressed as follows:

Original by electronic mail:

Dan Eakin
Judicial Assistant to Judge Bidegaray
300 12th Avenue NW, Suite 2
Sidney, MT 59270
dan.eakin@mt.gov
lball@mt.gov
kbidegaray@mt.gov
**Courtesy Copy, Email and U.S. Mail*

Shiloh Hernandez
Earthjustice
313 East Main Street
P.O. Box 4743
Bozeman, Montana 59772-4743
shernandez@earthjustice.org

Derf Johnson
Montana Environmental Information Center
W. Lawrence St., #N-6
Helena, Montana 59624
djohnson@meic.org

Walton D. Morris, Jr., pro hac vice
Morris Law Office, P.C.
1901 Pheasant Lane
Charlottesville, VA 22901
Telephone: (434) 293-6616
wmorris@fastmail.net

Roger Sullivan
McGarvey Law
345 1st Avenue East
Kalispell, MT 59901
rsullivan@mcgarveylaw.com

Victoria A. Marquis
Holland & Hart LLP
401 North 31st Street, Suite 1500
Billings, Montana 59103-0639
Telephone: (406) 252-2166
vamarquis@hollandhart.com
aforney@hollandhart.com

John C. Martin
Holland & Hart LLP
645 S. Cache Street, Suite 100
P.O. Box 68
Jackson, Wyoming 83001-0068
jcmartin@hollandhart.com

Samuel R. Yemington
Holland & Hart LLP
2515 Warren Avenue, Suite 450
Cheyenne, Wyoming 82001
sryemington@hollandhart.com

Amy Christensen,
Christensen & Prezeau, PLLP
314 N. Last Chance Gulch, Suite 300
Helena, MT 59601
Amy@cplawmt.com

Nicholas A. Whitaker
Attorney for Respondent DEQ