IN THE SUPREME COURT OF THE STATE OF MONTANA
No. DA 22-0064

MONTANA ENVIRONMENTAL INFORMATION CENTER and SIERRA CLUB,

Plaintiffs / Appellees,

v.

MONTANA DEPARTMENT OF ENVIRONMENTAL QUALITY,

Respondent / Appellant,

and

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

Respondents / Appellants,

and

MONTANA BOARD OF ENVIRONMENTAL REVIEW

Respondent / Appellant

MONTANA DEPARTMENT OF ENVIRONMENTAL QUALITY'S REPLY BRIEF IN SUPPORT OF ITS MOTION TO STAY

On Appeal from the Montana Sixteenth Judicial District Court, Rosebud County, Cause No. DV 19-34, the Honorable Katherine M. Bidegaray Presiding

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Pursuant to Mont. R. App. P. 22(2), Respondent-Appellant Montana Department of Environmental Quality ("DEQ") requests a stay of the district court's order vacating DEQ's approval of Respondent-Appellant Westmoreland Rosebud Mining, LLC's, *et al.* ("Westmoreland") fourth amendment of its Area B permit at the Rosebud Mine ("AM4"). The Rosebud Mine is the sole source of fuel for the Colstrip Generating Units, *see* D.C. Doc. 82, ¶ 10, and a stay is, accordingly, appropriate to avoid additional increases in already rising energy costs and to prevent unnecessary risks to the reliability of electricity supply in Montana and the region. By comparison, Petitioner-Appellees Montana Environmental Information Center and Sierra Club (collectively, "MEIC") fail to establish an immediate harm to the East Fork of Armells Creek ("EFAC") if Westmoreland is permitted to mine AM4 during the pendency of this appeal and thus, the balancing of the comparative harms suggests a stay should be granted.

A stay is also appropriate because DEQ has demonstrated a likelihood of success on the merits. In particular, the respective burdens imposed on the parties in the permitting stage before DEQ and the administrative review before Respondent-Appellant Montana Board of Environmental Review ("BER") are nearly identical to the process used in *Mont. Envtl. Information Center v. Mont. Dep't of Envtl. Quality*, 2005 MT 96, 326 Mont. 502, 112 P.3d 964, and the district court should not have disregarded this Court's binding precedent from that case.

I. MEIC fails to establish it will be substantially injured if a stay is granted during the pendency of this appeal.

In response to DEQ's motion for stay, MEIC provides a one paragraph explanation of why it will be injured if a stay is granted. *See* MEIC's Resp. Br., 8 (Jun. 15, 2022). The thrust of MEIC's argument is that it will suffer harm through increased salinity in the already impaired EFAC if mining continues in AM4. *Id.*; *see also* D.C. Doc. 107 at 10. MEIC, however, fails to explain with any clarity how it will suffer significant harm if a stay is granted during the pendency of this appeal.

The record, additionally, demonstrates that MEIC will not suffer significant harm if a stay is granted. For instance, the record establishes that EFAC's impairment is the result of "cattle grazing, agriculture, fertilizer from residential lawns, fertilizer from a commercial golf course, and discharges from a municipal water treatment plant" rather than coal mining operations. AR Doc. 152 at 22–23. To the extent mining has the potential to impact the water quality in EFAC, this is largely the result of spoil[1] interacting with water in the normal hydrological cycle. AR Doc. 152 at 17. In approving Westmoreland's application, DEQ found that AM4's impact on the salinity of EFAC would be indistinguishable from natural variations. AR Doc. 95, Ex. 1A at 9-33. Because the *magnitude* of the salinity in

[1] "Strip-mining produces spoil, the broken-up rock from the overburden which is replaced in the pit after coal is removed." D.C. Doc. 82, ¶ 11.

EFAC would not increase significantly as a result of AM4, a central issue in the case became the *duration* of potential increases of salinity in EFAC. D.C. Doc. 79 at 31–33. Given that this duration issue regarding salinity will bear out over a lengthy period of time, if at all, *see* AR Doc. 152 at 68–69, n.4, a temporary stay granted by the Court would have a negligible impact on MEIC's alleged injury.

What's more, mining in AM4 has taken place since 2016 and spoils have already been produced in this area. *See* DEQ's Motion for Stay, 3 (Feb. 8, 2022). Despite the ability to do so, MEIC never sought a preliminary injunction to stop mining during that period. *Id*. If AM4 were to have any impact on the salinity of EFAC—which, as discussed above, is indistinguishable from natural variations—that impact has already occurred and the existing reclamation plan[2] to manage those spoils, as a part of the AM4 permit, should be permitted to go forward. *See* D.C. Doc. 82, ¶¶ 11–18. Thus, the district court's order vacating the AM4 permit, and its attendant reclamation plan, should be stayed.

II. DEQ and the public may suffer irreparable harm if a stay is not granted.

MEIC asserts that ample coal supplies exist at the Rosebud Mine to avoid an unplanned outage at Colstrip. For instance, MEIC argues Westmoreland "has more

[2] Citing ARM 17.24.407(1)(b), 17.24.522(1), and 17.24.1118(3), MEIC asserts that reclamation in AM4 can go forward despite the district court's vacatur of the permit. But none of these authorities specifically address a situation in which a court has vacated a permit and the clearer path to authorizing reclamation would be for this Court to grant a stay.

permitted reserves in Areas A (.8 [million tons ("Mt.")], B (2 Mt.), and F (approximately 60 Mt.) that could be in production in 2-4 months, 6-8 months, and 8-10 months, respectively." MEIC's Resp. Br. at 7. MEIC fails to inform the Court that, pursuant to a U.S. magistrate's recommended order, a portion of Area F soon could be subject to National Environmental Policy Act ("NEPA") review before the U.S. Office of Surface Mining Reclamation and Enforcement ("OSM") and OSM's approval of mining in Area F could be vacated within 365 days of the final order. *See Mont. Envtl. Information Center v. Haaland*, Case No. 1:19-cv-00130-SPW-TJC, Dkt. No. 177 (D. Mont. Feb. 11, 2022). Thus, MEIC potentially overstates the amount of coal available at the Rosebud Mine to serve Colstrip.

Regardless of MEIC speculation about the Rosebud Mine's ability to supply Colstrip, the fact of the matter is that the cost of energy has increased considerably over the last few months. *See* Bureau of Labor Statistics, Consumer Price Index Summary (Jun. 10, 2022), https://www.bls.gov/news.release/cpi.nr0.htm. This Court should resolve the final merits of this case—and issue a stay pending appeal—before potentially subjecting Montanans to additional and unnecessary energy costs beyond what they are already experiencing. *See Vote Solar v. Mont. Pub. Serv. Comm'n*, DA 19-0223, Order at 4 (Aug. 8, 2019) ("*Vote Solar*").

MEIC avers this Court should not worry about the possibility NorthWestern Energy ("NorthWestern") and other co-owners of Colstrip would need to purchase

replacement power in the event of an unplanned outage because these costs, in some instances, have not been passed onto ratepayers. MEIC's Resp. Br. at 7. This ignores principles of utility regulation wherein a utility may recover their prudently incurred costs. *Northwestern Corp. v. Mont. Dep't of Pub. Serv. Regulation*, 2016 MT 239, ¶ 37, 385 Mont. 33, 380 P.3d 787. In situations in which the Montana Public Service Commission ("PSC") has denied recovery of replacement power costs, and this Court has affirmed those denials, it has been because "the costs were not prudently incurred because the plant was not reasonably managed[.]" *Id.*, ¶ 30. While recovery of these hypothetical replacement power costs as a result of this litigation would be subject to a contested case proceeding before the PSC, the prudence standard would ameliorate towards NorthWestern recovering these costs from ratepayers because NorthWestern has no ability to control or "reasonably manage" costs directly resulting from the district court vacating the AM4 permit.

III. DEQ has demonstrated a likelihood of success on the merits.

In an attempt to defend the district court's decision on burden of proof, MEIC cites a prior Montana Strip and Underground Mine Reclamation Act ("MSUMRA") case heard before the BER, *In re Bull Mountain*, BER 2013-07 SM ("*Bull Mountain*"), *see* D.C. Doc. 46, App. A, to assert the "relevant inquiry in a permit appeal is whether . . . the applicant established that its proposed project will not cause or contribute to environmental harms." MEIC's Resp. Br. at 5 (quotation

marks and brackets omitted). A fuller and more accurate quote on this burden issue from the same *Bull Mountain* order states, "[b]y law the burden of proof in the *permitting process* rests with the mine applicant and DEQ to demonstrate with record evidence that material damage will not result." DC Doc. 46, App. A at 76 (emphasis added).

Here lies the fundamental error of MEIC's and the district court's analysis on burden of proof: both conflate the (1) permitting process before DEQ and (2) the contested case review of the permitting process before the BER. The permitting process occurs before DEQ and the applicant—here, Westmoreland—undoubtedly has the burden to demonstrate its application complies with relevant laws. *See, e.g.*, § 82-4-227(1), MCA (under MSUMRA, a permit "*may not be approved by the department unless* ... the applicant has affirmatively demonstrated that . . . [a number of environmental controls] can be carried out consistently with the purpose of this part") (emphasis added). But once DEQ has granted the application, like any other review of administrative action, the burden shifts to the party seeking to challenge the agency's initial decision. *Missoula County Sch. Dist. v. Anderson*, 232 Mont. 501, 503, 757 P.2d 1315, 1317 (1988) ("When confronted with reviewing an administrative decision . . . this Court recognizes that a rebuttable presumption exists in favor of the agency's decision and that the burden of proof is on the party attacking it to show that it is erroneous.").

This two-step process of administrative decision making is precisely what occurred in *MEIC*, 2005 MT 96. In that case, DEQ initially granted a permit to the applicant. *Id.*, ¶ 7. Regarding the burden in the permitting stage, this Court explicitly stated "[t]he Department may not issue an air quality permit unless the *applicant demonstrates* that there will be no resulting adverse impact on visibility in Class I areas." *Id.*, ¶ 28 (emphasis added). Despite the applicant having this burden in the permitting stage, this Court found that in administrative review before the BER "MEIC had the burden of presenting the evidence necessary to establish the facts essential to a determination that the Department's decision violated the law." *Id.*, ¶ 16. MEIC continues to attempt to distinguish *MEIC*, 2005 MT 96, from the present case on the grounds the Montana Clean Air Act did not assign burdens to DEQ and the applicant, *see* MEIC's Resp. Br. at 5, but this is demonstrably false when considering the nearly identical burdens imposed in both cases, *compare MEIC*, 2005 MT 96, ¶¶ 28, 30, *with* § 82-4-227(1), MCA.

In its response brief, MEIC also argues the district court addressed DEQ's contentions about the statutory rules of evidence in its order denying the stay because the Order states "consistent with the rules of evidence, the applicant would be defeated if neither side produced evidence." D.C. Doc. 107 at 19 (citation and quotation marks omitted). MEIC's invocation of this portion of the order only further demonstrates how the district court conflated the permitting process before

DEQ and the administrative review process before the BER. Hypothetically, if the applicant had not offered any evidence to support its application, DEQ would have found the application deficient in the permit stage. Indeed, DEQ issued Westmoreland eight deficiency letters prior to accepting its AM4 application. *See* AR Doc. 95, Ex. 1 at 2–4. Thus, the district court's supposition about what would occur in the absence of any evidence in support of the application ignores that a permit, without the legally required information, would not advance past DEQ.

With this two-step administrative process in mind, the relevant inquiry before the BER, therefore, was whether DEQ had unlawfully issued the AM4 permit and if it did, "MEIC had the burden of presenting the evidence necessary to establish the facts essential to a determination that the Department's decision violated the law." *MEIC*, 2005 MT 96, ¶ 16. Continuing with the hypothetical posited by the district court, if all the parties failed to present evidence before the BER, then the permit would be affirmed because it would have been as if MEIC had not invoked its right to challenge the AM4 permit in a contested case proceeding under § 82-4-206 in the first place.

In its response brief, MEIC also urges this Court to disregard the language in ARM 17.24.425(7), which assigns burden of proof in MSUMRA contested case proceedings before the BER. MEIC's Resp. Br. at 5–6. This Rule states "[t]he burden of proof at such hearing is on the party seeking to reverse the decision of

the board." (Emphasis added.) A quick review of the Montana Administrative Register reveals this rule should instead state "the burden of proof at such hearing is on the party seeking to reverse the decision of *the department*."

This confusion stems back to a rulemaking initiated in 2011 to clean up ARM 17.24.425, *see* 24 MAR 2735–36 (Dec. 22, 2011), after House Bill 370 was passed in the 2005 legislative session, which transferred the responsibility of conducting MSUMRA contested case hearings from DEQ to the BER, *see* 2005 Mont. Laws 385, ch. 127, § 6(9) (codified at § 82-4-231(9), MCA). When this rule was updated, "the board" was incorrectly inserted into certain places that had previously said "the department." Relevant here, this rulemaking should not have amended subsection (7) of the Rule because MSUMRA permit authority was not transferred to the Board and thus, a contested case proceeding before the BER would seek to reverse the decision of DEQ—not the BER.

MEIC additionally argues this Court should deny DEQ's motion because "the agency addresses only one of six bases for the court's ruling" suggesting DEQ should have proven a likelihood of success on every issue presented for review. MEIC's Resp. Br. at 4. MEIC's argument on this point is wrong for several reasons. First, burden of proof permeates all the substantive issues in this case and thus, this issue bears on several of the alternative basis provided in the district court's decision.

Second, in support of its argument on this point, MEIC cites *State v. English*, 2006 MT 177, ¶ 47, 333 Mont. 23, 140 P.3d 454. But *English* was a criminal case concerning an evidence suppression argument on the final merits of the case. This case had nothing to do with a Rule 22 motion or any other type of motion considering the likelihood of success standard and it is, accordingly, off-topic and inapplicable.

Third, this Court has already stated a party does not have to satisfy the likelihood of success standard for a stay to be issued. *Vote Solar* at 4 ("Although we have no opinion at this stage as to NorthWestern's likelihood of success on appeal, we conclude NorthWestern has demonstrated it will suffer significant irreparable harm if a stay is not granted and the District Court's decision is overturned on appeal."). It stands to reason a party would, likewise, not have to prove every issue presented for appeal for a stay to be issued.

Fourth, Rule 22 limits movants to 10 pages for arguing why this Court should stay the district court's order. By comparison, Rule 11(4)(a) limits parties to 10,000 words in their principal brief, which allows approximately 50 pages of text. Common sense dictates that a party, when filing a Rule 22 motion, will not be able to address every alternative basis provided in a district court's 34-page order on the merits. *See* D.C. Doc. 79.

Respectfully summited this 29th day of June, 2022.

/s/ Jeremiah Langston
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CERTIFICATE OF COMPLIANCE

Pursuant to this Court's March 30, 2022 order stating "Appellants are granted 14 DAYS following Appellees' Responses to submit reply briefs on the motion for a stay pending appeal, not to exceed 10 pages in text[,]" Respondent-Appellant Montana Department of Environmental Quality files this reply brief in support of its motion to stay. Additionally, pursuant to Rule 11 of the Montana Rules of Appellate Procedure, I certify that this reply 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 does not exceed 10 pages, excluding table of contents, signature, table of citations, certificate of service, certificate of compliance, or any appendix containing statutes, rules, regulations, and other pertinent matters.

/s/ Jeremiah Langston
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CERTIFICATE OF SERVICE

I, Jeremiah Radford Langston, hereby certify that I have served true and accurate copies of the foregoing Brief - Other to the following on 06-29-2022:

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