

**IN THE SUPREME COURT OF THE STATE OF MONTANA**

Case No. DA 22-0064

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MONTANA ENVIRONMENTAL INFORMATION CENTER and SIERRA CLUB,

Plaintiffs and Appellees,

v.

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,

Respondent-Intervenors and Appellants.

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MONTANA ENVIRONMENTAL INFORMATION CENTER and SIERRA CLUB,

Petitioners and Appellees,

v.

MONTANA DEPARTMENT OF ENVIRONMENTAL QUALITY,

Respondent and Appellant,

MONTANA BOARD OF ENVIRONMENTAL REVIEW, 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,

Respondents.

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MONTANA ENVIRONMENTAL INFORMATION CENTER and SIERRA CLUB,

Plaintiffs and Appellees,

v.

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

Respondents,

and

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,

Respondent-Intervenors and Appellants.

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MONTANA ENVIRONMENTAL INFORMATION CENTER and SIERRA CLUB,

Plaintiffs and Appellees,

v.

MONTANA DEPARTMENT OF ENVIRONMENTAL QUALITY,

Respondent,

and

MONTANA BOARD OF ENVIRONMENTAL REVIEW,

Respondent and Appellant,

and

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,

Respondents.

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***Reply in Support of Rule 22(a) Motion for Stay (DA 22-0064)***

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## **INTRODUCTION**

In its first brief (original appeal DA 22-0064) MEIC ignores this Court's recent decision firmly establishing that the standard for a stay pending appeal under Rule 22 is "good cause," *NorvVal Elec. Coop., Inc. v. Lawson*, 2022 MT 62, ¶ 14, 408 Mont. 159, 507 P.3d 157, and blatantly mischaracterizes the lower court's actions to avoid the inevitable conclusion that the WMR/Local 400 are likely to succeed on the merits. WRM/Local 400 have already suffered irreparable harm, which will be exacerbated if the Court lifts the stay pending appeal. Thus, good cause exists to maintain the stay.

## **FACTUAL UPDATES**

### **I. CURRENT STATUS OF AM4 OPERATIONS**

Facing the imminent vacatur of the AM4 permit, the Rosebud Mine took expensive, complex, and out-of-sequence steps to suspend AM4 mining operations and shift operations and equipment to other permitted reserves. **Ex. A**, *Supp. Batie Decl.* at ¶¶ 1-7. By March 30, 2022, when this Court temporarily stayed vacatur of the AM4 permit, AM4 mining operations had ceased. *Id.* As discussed below, shifting operations from AM4 to other areas of the mine is a costly and **temporary** fix. *Id.* Unless WRM/Local 400 has access to AM4 coal there is a real and significant risk that the mine will not be able to meet the coal quality demands of the Colstrip Power Station. *Id.*

### **II. BER'S *SIGNAL PEAK* FINAL ORDER**

On June 16, 2022, the Montana Board of Environmental Review (“BER”) issued a final order in an analogous MSUMRA contested case proceeding concerning a different coal mine (“*Signal Peak*”). **Ex. B**, Signal Peak Final Order. Once again, BER rejected ***all*** of MEIC’s claims. Relevant here, in reliance on this Court’s controlling precedent *Mont. Env’tl. Info. Ctr. v. Mont. Dep’t of Env’tl. Quality*, 2005 MT 96 (“*MEIC I*”), BER declined to extend the lower court’s ruling on the question of burden of proof, holding instead that the evidentiary burden of proof rested with MEIC to prove its claims. *Id.* at 48-49. Moreover, consistent with *MEIC I*, § 2-4-612, MCA, and principles of administrative law, BER again rejected MEIC’s post hoc evidence and administrative exhaustion arguments accepted by the lower court. *Id.* at 18 and 35. BER further admonished MEIC for mischaracterizing facts and law. *Id.* at 47 (“MEIC’s attempt to pull language out of context to show otherwise is not persuasive.”). No doubt MEIC will appeal *Signal Peak* and seek vacatur of the underlying permit to mine. These ongoing legal conflicts further demonstrate the need for maintenance of the *status quo ante* pending this Court’s resolution of the consolidated appeals herein.

## **ARGUMENT**

### **I. GOOD CAUSE EXISTS TO MAINTAIN THE STAY BECAUSE THE LOWER COURT UNLAWFULLY SUBSTITUTED ITS JUDGMENT FOR THAT OF BER ON MATERIAL QUESTIONS OF FACT.**

MEIC resists the notion that the lower court unlawfully substituted its judgment for that of BER on questions of environmental harms, asserting instead that the lower court simply employed BER's factual findings to reach a different outcome. MEIC Resp. at 5 ("A review of the district court's decision reveals that the court did not conduct any fact-finding, but made multiple determinations that, based on undisputed facts, DEQ and the Board of Environmental Review (BER) committed legal error." ).<sup>1</sup> MEIC's position – that the lower court is allowed to employ a select few of BER's findings of fact to reach a different result is absurd and violates of MAPA's rules governing judicial review of a contested case proceeding. *See* § 2-4-704, MCA. *All* of BER's factual findings are binding on review. *Id.*; *Carruthers v. Bd. of Horse Racing*, 216 Mont. 184, 187 (1985).

The issue of excess salinity in a nearby ephemeral creek illustrates MEIC's diversionary tactics. BER found that neither the mine nor AM4 are responsible for the excess salinity in East Fork Armells Creek ("EFAC"). **Ex. C**, BER Final Order at FOF ¶¶ 45-106. MEIC argues that the lower court simply employed one of BER's findings of fact to reach the opposite conclusion. MEIC Resp. at FN 2 ("The court cited BER's finding that DEQ had identified mining as an

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<sup>1</sup> MEIC's implicit suggestion that certain facts remain in dispute while others are undisputed is absurd. The time for fact finding has long since passed. *All* of BER's 248 discreet findings of fact are indisputable and binding on judicial review.

“unconfirmed source” of excess salinity in the receiving stream.”) (citing BER’s Finding of Fact No. 96) (emphasis in original). MEIC is not wrong that the lower court cited *one* of BER’s findings – Finding of Fact No. 96 – for the proposition that the mine is an “unconfirmed source” of excess salinity in EFAC. However, BER’s analysis did not begin or end with Finding of Fact No. 96, and BER ultimately concluded that the mine is not a source of excess salinity in EFAC.<sup>2</sup> **Ex. C** at FOF ¶¶ 45-106; Discussion at p. 71.

But MEIC and the lower court ignore these inconvenient findings to reach the opposite conclusion: that mining *is* responsible for excess salinity in EFAC and that AM4 will contribute additional salinity. D.C. Dkt. 79 at 6-7, 31-33; D.C. Dkt. 107 at 21 (“...AM4 mining operations will substantially worsen impairment.”). As such, it is beyond cavil that the lower court impermissibly substituted its judgment on factual questions of environmental harms in violation of MAPA. § 2-4-704(2), MCA. Because WRM/Local 400 are likely to prevail on this issue, good cause exists to maintain the stay to avoid further harm pending final resolution.

## **II. GOOD CAUSE EXISTS BECAUSE WRM/LOCAL 400 HAVE SUFFERED AND CONTINUE TO SUFFER IRREPARABLE HARM IN THE ABSENCE OF A STAY.**

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<sup>2</sup> BER expressly found that (i) mining is not the cause of excess salinity in EFAC, (ii) DEQ’s prior attributions of excess salinity to historic mining operations were factually wrong, (iii) AM4 will not cause violations of water quality standards outside the permit boundary (*i.e.*, cause material damage), and (iv) contributions of TDS from all mining, if any, is not distinguishable from natural background conditions. **Ex. C** at ¶¶ FOF 87-106.

MEIC dismisses the prospect of higher electricity demands, rolling blackouts, and economic impacts at the local and state level as speculative. MEIC Resp. at 8. But these threats are real, and they will be exacerbated by the loss of AM4. In fact, WRM/Local 400 have already suffered irreparable harms. **Ex. A** at ¶¶ 1-2. Presented with the imminent vacatur of the AM4 permit on April 1, 2022, the mine took steps to suspend mining operations on AM4 lands. *Id.* This was an expensive, out-of-sequence, and disruptive endeavor. *Id.*

To reduce the operational impacts of losing AM4, the mine moved equipment and manpower from AM4 lands to Area F and Area A lands – permitted coal reserves several miles from AM4.<sup>3</sup> *Id.* at ¶ 2. The mine expended considerable time and resources moving equipment, building infrastructure, opening a new Area F pit, and reopening an Area A pit. *Id.* This required moving two draglines – the largest and costliest pieces of equipment to move – several miles. Construction of Area F roads and reservoirs – projects the mine would

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<sup>3</sup> In light of the lower court’s ordered vacatur of AM4, the mine also took steps to boost its on-hand coal inventories. However, moving equipment and resources from AM4 to Area F and Area A hampered these efforts, and the loss of AM4 production – which accounted for 30% of the mine’s total production – strained existing inventories. As things stand, the mine’s on-hand coal inventories are only able to cover 4-6 weeks of anticipated demand. With the high-demand summer season around the corner, it is expected that demand will increase, thereby putting additional pressure on the mine and exacerbating the threat of brownouts in Montana and the greater Northwest, a threat that is mitigated considerably by preserving the mine’s access to AM4 coal reserves. **Ex. A** at ¶ 7.

typically internalize at minimal cost – were outsourced to contractors as a result of the emergency presented by losing AM4. *Id.* These projects alone cost the mine hundreds of thousands of dollars. *Id.* All told, the mine anticipates that unscheduled costs associated with shifting operations from AM4 to other areas of the mine will exceed \$6,000,000. *Id.* These costs would not have been incurred but for the loss of AM4. *Id.*

However, shifting operations to Area F or AM5 does not eliminate the risks presented by losing AM4. *Id.* at ¶ 3. Although MEIC disingenuously claims other mining areas can replace AM4, it has filed legal challenges to vacate permits for precisely those areas. *Id.* at ¶¶ 3 and 5. With respect to Area F, MEIC has challenged the mine permit and the underlying environmental assessment in federal court and before BER. *Id.* at ¶ 3. In each case, MEIC has sought the vacatur of the Area F mine permit. *Id.* With respect to the federal litigation, a magistrate judge – having identified procedural questions in the federal government’s environmental review – has proposed a decision that would vacate the Area F permit. *Id.* That proposed decision is currently being considered by the district court judge. *Id.* If the Area F permit is vacated, the mine will require immediate access to AM4 in order to meet the demands of the Colstrip Power Station. There is simply nowhere else to go in the immediate short-term. *Id.*

Setting aside the threat of vacatur, Area F coal is likely not a long-term replacement (and potentially not even a short-term replacement) for AM4 coal. As the mine progresses through Area F, sodium levels are expected to rise, and blending Area F coal with lower-sodium coal will likely be necessary to meet quality requirements.<sup>4</sup> *Id.* at ¶ 4. Simply put, at some point in the near future, Area F coal will not be a substitute for AM4 coal. *Id.* Unless Westmoreland has access to AM4 coal there is a real and significant risk that the mine will not be able to meet the coal quality demands of the Colstrip Power Station when (not if) Area F coal quality worsens and/or the Area F permit is vacated. *Id.*

In contrast, MEIC fails to allege that *its* members will suffer any harm from continued mining on AM4 lands. MEIC Resp. at 7-8. Instead, and without support, MEIC broadly states that “ongoing pollution” to EFAC constitutes irreparable harm to the organization and its members. MEIC Resp. Br. at 7. But BER conclusively resolved every question of environmental harm – including EFAC impairment and the mine’s responsibility for such impairment – ***against***

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<sup>4</sup> Regarding coal quantity, MEIC’s declarant Mr. Schlissel submits that AM5 coal reserves – a mine permit issued by DEQ one month ago – can replace AM4. **Ex. A** at *Id.* at ¶ 5. But Mr. Schlissel overlooks significant factors that prevent the mine from immediately accessing AM5. While the mine has begun building out necessary AM5 infrastructure, mining coal will not begin until mid-summer at the earliest. *Id.* The infrastructure projects require considerable time, money, and manpower. *Id.* Further, MEIC has challenged AM5 and seeks to void the permit. *Id.* If MEIC achieves its objective, AM5 may not be available for some time.

MEIC in the contested case proceeding. **Ex. C** at FOF ¶¶ 34-248. BER found that mining *is not responsible* for any environmental harms to EFAC, much less the “ongoing pollution” stated in the lower court’s decisions. *Id.* Thus good cause exists to maintain the stay.

### **III. GOOD CAUSE EXISTS BECAUSE PUBLIC INTEREST IS SERVED BY THE STAY.**

MEIC states that “the public interest is best served when the law is followed.” MEIC Resp. at 13. That platitude is hardly “good cause” to expose the public to the real-world harms identified by WRM/Local 400, Talen Montana, and DEQ. BER’s exhaustive analysis and dismissal of MEIC’s claims is strong evidence DEQ acted lawfully and in the public’s interest in approving AM4. *See Ex. C.* That interest is further served by reliable and affordable electrical generation, diverse energy supplies, and the employment of the hundreds of Montanans who rely on the mine for their livelihood – all of which will be jeopardized should this Court lift its stay of the vacatur of AM4. Avoiding that jeopardy is good cause to maintain the stay.

### **CONCLUSION**

For the foregoing reasons, Westmoreland/Local 400 respectfully requests the Court continue its stay of the vacatur and remand of AM4, and thereby maintain the *status quo ante* pending resolution of the consolidated appeals.

Dated this 29th day of June 2022.

/s/ John C. Martin

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## **CERTIFICATE OF COMPLIANCE**

Pursuant to Rule 22(2)(a)(iv) of the Montana Rules of Appellate Procedure and in accordance with this Court's March 30, 2022 Order, I certify that this brief is printed with a proportionately spaced Times New Roman text typeface of 14 points; is double spaced except for footnotes and for quoted and indented material; and does not exceed 10 pages in text, including the affidavit, but exclusive of relevant documents from the record and the district court's order, caption, signature blocks and certificate of compliance.

/s/ John C. Martin

## **CERTIFICATE OF SERVICE**

I, John C. Martin, hereby certify that I have served true and accurate copies of the foregoing Brief - Other to the following on 06-30-2022:

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