IN THE SUPREME COURT OF THE STATE OF MONTANA

Case No. DA 22-0064

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.

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.

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.

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.

Reply in Support of Rule 22(a) Motion for Stay (DA 22-0068)

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INTRODUCTION

In its second response brief (original appeal DA 22-0068), MEIC disregards this Court's recent instruction that the standard for a stay pending appeal is "good cause," *NorvVal Elec. Coop., Inc. v. Lawson*, 2022 MT 62, ¶ 14, 408 Mont. 159, 507 P.3d 157, and argues that the current stay should be lifted due to alleged procedural "errors" in WRM/Local 400's motion and because MEIC disagrees that WRM/Local 400 is likely to prevail on any of the six fatal flaws it identified in the lower court's decision. However, there is no question that a stay is appropriate under this Court's "good cause" standard to avoid further harm to WRM/Local 400 and the public interest pending resolution of these merits questions that tip sharply in favor of upholding the Board of Environmental Review's ("BER") decision and reversing the fundamentally flawed lower court opinion.

ARGUMENT

I. MEIC RELIES ON INAPPLICABLE AND REPUDIATED AUTHORITIES.

Citing inapposite federal law, MEIC argues that a stay pending appeal is "an 'extraordinary remedy.'" MEIC Resp. at 2. It is not. In Montana, stays pending civil appeals are common. *See NorVal*, ¶ 14, 45-50 (stays are granted when movant "demonstrate[s] good cause"). This has been true for decades. *Id.*; *State ex rel. Adamson v. District Court*, 128 Mont. 538, 546 (1955) (contrasting

"extraordinary remedy" of a writ of prohibition with the norm of "granting stays" pending appeal). Rule 22's non-extraordinary standard of "good cause" controls.

II. WRM/LOCAL 400 HAVE SHOWN GOOD CAUSE.

A. WRM/Local 400 Need Not Address Every Lower Court Error.

MEIC devotes the lion's share of its brief to the facially incorrect proposition that WRM/Local 400, by not identifying ***every*** error in the lower court's decisions, "failed to make a 'strong showing' of success on the merits."[1] quoting the lower court's remedy decision (that MEIC authored**).** MEIC Resp. at 3-4. "Good cause" however, does not require a point-by-point demonstration of all the errors in two orders that total 58 pages. Indeed, explaining all of the lower court errors would overwhelm the page limits here. Success on any one of the issues WRM/Local 400 identifies is sufficient to overturn the lower court's

[1] MEIC claims argues that WRM/Local 400 omitted pinpoint cites to the lower court's decisions and thus failed to justify maintaining the stay. Rule 22, however, simply requires showing "good cause;" it does not require pinpoint cites to all potential errors in the lower court's decision. MEIC further argues that, although WRM/Local 400's motion in each appeal was within Rule 22's limits, the Court should reject the second motion on page limit grounds, again relying on inapposite federal law. MEIC Resp. at 3-4. Rule 22, with which WRM/Local 400 complied, controls. Moreover, it is "good cause" that matters; not "procedural quibbles." *See* NorVal, ¶¶ 14, 16 (Rule 22 is controlling standard; rejecting picayune "procedural arguments" in favor of substantive "good cause" review).

decision. The strong likelihood that WRM/Local 400 will prevail on at least one of these issues is good cause to maintain the stay pending appeal.

B. WRM/Local 400 Has Demonstrated Good Cause by Identifying the Six Fatal Flaws in the Lower Court's Decisions.

WRM/Local 400 identified six[2] fatal flaws in the lower court's decisions, demonstrating a likelihood of success and, by extension, good cause for a stay. Mot. at 1-6.[3]

1. This Court's decision in *MEIC I* dictates the burden of proof.

This Court resolved the question of burden of proof in a MAPA contested case proceeding in *MEIC I*. Tracking *MEIC I*, BER concluded that (1) MEIC had the evidentiary burden to prove its claims (2) MEIC failed to meet its burden. **Ex. A**, BER Final Order at COL ¶¶ 5-12. MEIC's attempt to distinguish *MEIC I* from the present case is not persuasive in light of this Court's clear directive that, absent a clear statutory exception, the evidentiary burden of proof in a contested case

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[2] MEIC's response to the first two errors was limited to its attempt to argue that the lower court did not establish new facts. *See* Section subsection 2.b.2 *infra*.

[3] MEIC's suggestion that the lower court's decisions (together with the bases for such decisions) should be the focus of this Court's inquiry misses the mark. This Court is tasked with reviewing BER's legal conclusions de novo, not the lower court's decisions. *Ced Wheatland Wind. LLC v. Mont. Dep't of Pub. Serv. Regul.*, 2022 MT 87, ¶ 12 (citing §2-4-704, MCA). Because BER's Final Order is the subject of this judicial review, no deference is afforded to the lower court, and, as such, the lower court's decisions do not control (or otherwise guide) the outcome of this appeal.

proceeding rests with the party asserting the challenge. *Id.* Indeed, BER itself recently held as much. *See* **Ex. B** to WRM/Local 400 Reply (DA 22-0064) (*Signal Peak* Final Order).

2. The lower court unlawfully created new "facts."

MEIC would have this Court believe that the lower court did not substitute its judgment for that of BER on factual questions. Yet, it is well beyond dispute that the MEIC-crafted decision reached factual conclusions at odds with BER's decision, as demonstrated in WRM/Local 400's first reply brief (DA 22-0064) at pp. 5-8. ***All*** of BER's factual findings are binding on judicial review, and the lower court lacked authority to accept some facts (while ignoring others not compatible with MEIC's narrative) to reach a conclusion different from BER. § 2-4-704, MCA; *Carruthers v. Bd. of Horse Racing of Dep't of Commerce*, 216 Mont. 184, 187, 700 P.2d 179, 181 (1985) ("Findings of fact by an agency are *binding* on the court 'if there is substantial, credible evidence in the record.'") (emphasis added, internal quotation marks omitted). This is particularly true in this case because MEIC failed to preserve ***any*** factual claims during the contested case

proceeding.[4] WRM/Local 400 Mot. to Stay (DA 22-0068) at 2-3; *Flowers v. Mont. Bd. of Personnel Appeals*, 2020 MT 150 ¶ 13.

3. The lower court unlawfully rejected evidence accepted by the Hearing Examiner and BER.

Despite MAPA's clear directive that all parties to a contested case proceeding are afforded the opportunity to "respond and present evidence and argument on all issues involved," § 2-4-612(1), MCA, the lower court nonetheless held that BER erred by admitting evidence from DEQ and Westmoreland/Local 400 that was not excerpted from permit application materials. D.C. Dkt. 79 at 20-23. MEIC attempts to brush off this statutory directive by claiming that the evidence rejected by the lower court was "post hoc" (MEIC Resp. at 8), but nothing in the statute excludes evidence post-dating the agency decision. To the contrary, the statutory requirement that parties be allowed to "*respond*" to evidence presented at the hearing necessitates it because the hearing itself takes place after the agency decision. Indeed, this Court has endorsed such a view by giving

[4] The lower court's merits decision mischaracterizes Westmoreland/Local 400's argument on this point, asserting that it is merely a matter of semantics. D.C. Dkt. 79 at pp. 18-20. It is not. MAPA requires that a party adversely affected by proposed findings and conclusions "file exceptions and present briefs and oral argument." § 2-4-621(1), MCA. Here, MEIC declined to lodge *any* exceptions to the Hearing Examiner's proposed factual findings. MEIC conceded this point at oral argument when confronted by members of BER. D.C. Dkt. at 47 pp. 5, 10-14.

express instructions to BER in a remand to "***in its discretion, rely entirely on the record before it or receive additional evidence on such matters as it may deem appropriate.***" *MEIC I*, 2005 MT at ¶ 26 (emphasis added). Here, given that MEIC presented evidence in the form of expert testimony that was *not* drawn from the permit materials, BER properly allowed WRM/Local 400 and DEQ to respond to that testimony, and the lower court's decision to the contrary must be reversed.

4. The lower court unlawfully overruled BER's policy on administrative exhaustion.

MEIC entirely side-steps the factual error WRM/Local 400 identified in the lower court's decision on administrative exhaustion (MEIC Resp. at 9) – to wit, the Hearing Examiner's Order on Motion in Limine specifically *allowed* MEIC to raise any new claim arising *after* the close of public comment. **Ex. B**, Order on Motions in Limine at pp. 4-7 ("If, however [MEIC] can point to a portion of the CHIA that contains an entirely new issue, never canvassed anywhere in the previous years of administrative record, and to which they had no opportunity to object prior to filing the notice of appeal in this case, then the undersigned with entertain such a discussion."). Despite this explicit invitation to present claims, argument, and evidence on any "new" issue, MEIC never did. The lower court's analysis of administrative exhaustion in its merits decision (D.C. Dkt. 79 at 13-17) is, thus, plainly wrong because it is premised on the entirely false notion that

MEIC was *not* given an opportunity to present claims, argument, and evidence on any "new" issue arising after the close of public comment. Ignoring this issue entirely, MEIC focuses its response on the brevity of WRM/Local 400's argument. However, WRM/Local 400 showed "good cause" for the stay by demonstrating that the lower court was *factually incorrect* about how the BER applied the administrative exhaustion standard.

5. The lower court purported to impose a remedy not authorized by law.

MEIC argues that even though MSUMRA specifically articulates which remedies are available to the district court on judicial review (*see* § 2-4-704(2), MCA), *federal* law and this Court's decision in *Park County v DEQ*, 2020 MT 303, 402 Mont. 168, 477 P.3d 288, empowered the lower court to impose vacatur, a remedy not authorized by the Montana legislature. MEIC Resp. at 9-10. Federal law is irrelevant to Montana state court jurisdiction, so the *Park County* argument is the only potential support for the lower court's *ultra vires* action, but it also fails MEIC because of the different state statutory systems at issue. In *Park County* the agency decision was *not* subject to an administrative review process, so the only means to enforce the Montana Constitutional claims at issue was through the district court. *See id.*at ¶ 72. MSURMA, however, provides a mechanism for vacatur of permits – it is simply vested with BER, not the lower court. Thus,

because the lower court ordered an unlawful remedy, good cause exists to maintain the stay.

III. GOOD CAUSE EXISTS BECAUSE THE BALANCING-OF-HARMS FAVOR WRM/LOCAL 400 AND THE CITIZENS OF MONTANA WHO RELY ON AFFORDABLE AND DEPENDABLE ELECTRICITY GENERATION.

The original briefing and declarations, and now the Supplemental Batie Declaration, show the risk of real-world harms to WRM/Local 400 and the public if the stay is lifted. MEIC does nothing to rebut this, and the reason it does so seems clear. In *Vote Solar v. Dep't of Pub. Serv. Regul.*, DA 19-0233, slip op. at 4 (Mont. Aug. 6, 2019), this Court recognized that "non-profit organizations" like MEIC "do not have investments or the potential loss of credits" that corporations like the mine has on the line, so cannot suffer real-world harm by simply awaiting resolution on appeal. The mine has expended millions in unrecoverable sunk costs and faces more such harm if the stay is lifted. *See* Supp. Batie Decl.; *see also* WRM/Local 400 Reply (DA 22-0064) at pp. 5-8. On the other hand, MEIC stands to lose nothing if the stay remains in place. This, too, is good cause for maintain the stay and the *status quo ante* on appeal.

CONCLUSION

For the reasons set forth above, this Court's stay preserving the *status quo ante* should be maintained and the lawful mining in the AM4 area that began over six years ago should continue.

Dated this 29th day of June 2022.

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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, exclusive of relevant documents from the record and the district court's order, caption, signature blocks and certificate of compliance.

/s/ John C. Martin

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