IN THE SUPREME COURT OF THE STATE OF MONTANA
No. DA 23-0225

MONTANA ENVIRONMENTAL INFORMATION CENTER and SIERRA CLUB,

Plaintiffs/Appellees/Cross-Appellants,

v.

MONTANA DEPARTMENT OF ENVIRONMENTAL QUALITY and NORTHWESTERN CORP.,

Defendants/Appellants/Cross-Appellees

STATE OF MONTANA, BY AND THROUGH THE OFFICE OF THE ATTORNEY GENERAL,

Intervenor Defendant-Appellant.

COMBINED OPENING AND ANSWER BRIEF OF APPELLEES/CROSS-APPELLANTS

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

STATE CASES

FEDERAL CASES

CONSTITUTIONAL PROVISIONS

STATE STATUTES AND LEGISLATIVE MATERIALS

STATE REGULATIONS AND ADMINISTRATIVE MATERIALS

RULES

OTHER AUTHORITIES

ISSUES PRESENTED FOR REVIEW

I. Whether the Department of Environmental Quality's cursory review of lighting and noise impacts from NorthWestern's proposed, 175-megawatt power plant—the Laurel Generating Station—failed to satisfy the requirements of the Montana Environmental Policy Act.

II. Whether the Department violated the Montana Environmental Policy Act's plain language by failing to examine the potentially significant climate implications within Montana from the plant's greenhouse-gas emissions.

III. Whether the Montana Legislature defied Montanans' constitutional right to a clean and healthful environment by prohibiting state agencies from considering the significant harm from climate change in their environmental reviews.

IV. Whether the district court acted properly in vacating the unlawful air permit for NorthWestern's Laurel Generating Station, thereby ensuring that the plant's environmental impacts could be fully assessed before it was authorized—as required under the Montana Environmental Policy Act and Montana's Constitution.

INTRODUCTION

The gas-fired power plant NorthWestern Energy is building near Laurel, Montana would be NorthWestern's largest new energy resource since the company's investment in the Colstrip coal-fired power plant nearly 15 years ago. The Laurel Generating Station promises to cause significant harm—both to the families who live within view of the plant's eighteen exhaust stacks, and to communities much farther away. As the district court summarized in its April 6, 2023 order invalidating NorthWestern's air permit, the 175-megawatt plant "is up wind of the largest city in Montana. It will dump nearly 770,000 tons of greenhouse gases per year into the air. The pristine Yellowstone River is adjacent to the project. … [And it] will have a life of more than 30 years." Vacatur Order 29–30. As the district court understood, "[t]o most Montanans who clearly understand their fundamental constitutional right to a clean and healthful environment, this [plant] is a significant project." *Id.* at 30.

Despite the scale of the gas plant, Montana's Department of Environmental Quality refused to fully and rationally assess its environmental implications before authorizing the plant's construction,

as required by the Montana Environmental Policy Act, or "MEPA." Thus, the Montana Environmental Information Center and Sierra Club (collectively, "MEIC") filed suit in the Thirteenth Judicial District Court to challenge DEQ's inadequate environmental assessment. NorthWestern was undeterred, and immediately began constructing the challenged plant under the authority of its unlawfully issued permit.

For two years, members of the Laurel community and other concerned Montanans have fought for a say on NorthWestern's project.[1] Yet to date, the company has not meaningfully engaged its neighbors or addressed their legitimate concerns. The plant's partial construction is a looming illustration of NorthWestern's approach to this issue:

[1] *See, e.g. Thiel Road Coal. et al. v. City of Laurel, et al.*, No. DV-56-2022-0001087-OC (13th Jud. Dist. filed Oct. 14, 2022) (declaratory judgment action to affirm City jurisdiction to hear resident concerns about plant); *see also Felder et al. v. Yellowstone Cnty., et al.*, No. DV-22-00018 (13th Jud. Dist. filed Jan. 12, 2022) (challenging Yellowstone County's insufficient notice of NorthWestern's floodplain application); AR:2886 (Laurel Outlook story on local opposition to the project)).

Preconstruction depiction of plant site (AR:1960, NWE Br. 13):

Current status of construction (Reprinted from D. Ehrlick, *Construction on Laurel power station will continue while appeals head to the Supreme Cour*t, The Daily Montanan (June 12, 2023) (Photo by Ed Saunders)):

While DEQ and other state agencies have largely followed NorthWestern's approach and disregarded the public's concerns, MEPA and Montana's Constitution provide critical backstops against continuing down this unlawful path. To vindicate Montanans' statutory and constitutional rights, MEIC respectfully requests that this Court affirm the district court's order invalidating NorthWestern's air permit and halting the completion and operation of the plant until the state properly considers its harmful environmental consequences.

STATEMENT OF THE CASE

On April 6, 2023, the district court ruled that DEQ's environmental assessment ("EA") for the Laurel gas plant violated MEPA. Vacatur Order 30–32. The court concluded that DEQ unlawfully disregarded "the plain meaning of the statute" in failing to consider the climate implications of the plant's significant greenhouse-gas emissions within Montana. *Id.* at 29. The court further faulted the agency's discussion of the plant's visual impacts, noting that the challenged assessment included "little analysis" of the industrial lighting at the plant and its impacts on the nearby neighborhood. *Id.* at 32. While the court upheld other aspects of DEQ's analysis—related to noise, air

quality, and water quality—the court found that DEQ must undertake further analysis of the plant's greenhouse-gas emissions and lighting on remand and reassess its determination that the plant's impacts would be insignificant. *Id.* at 29.

Further, to ensure that "'MEPA's role in meeting the State's 'anticipatory and preventative' constitutional obligations … [was not] negated,'" the court vacated NorthWestern's unlawfully issued permit "pending DEQ's further analysis consistent with MEPA and their constitutional responsibilities to the citizens of … Montana." *Id.* at 34 (quoting *Park Cnty. Env't Council v. DEQ*, 2020 MT 303, ¶ 72, 402 Mont. 168, 477 P.3d 288).

With construction of the plant temporarily halted, NorthWestern immediately appealed on April 17, 2023, and filed a motion with the district court for a stay of the vacatur order, which the Department joined. The district court ultimately accepted NorthWestern and the Department's position and, on June 8, 2023, issued a new order granting a stay of its decision. As a result, NorthWestern has again been free to construct a power plant that was approved by the

Department in violation of MEPA and the state's Constitution. *See* Stay Order 12.

With NorthWestern's appeal pending, the Department of Environmental Quality appealed on June 8. On June 5, 2023, MEIC cross-appealed to challenge the portions of the district court's order that upheld the Department's inadequate assessment of several issues and to vindicate the district court's original decision to vacate NorthWestern's unlawfully issued permit.

STATEMENT OF FACTS

I. LEGAL BACKGROUND

A. The Montana Constitution

Fifty years ago, the people of Montana adopted a Constitution establishing an extraordinary set of "inalienable rights." Mont. Const. art. II, § 3. They began with one that is fundamental to all others: "the right to a clean and healthful environment." *Id.*

The environmental protections of Montana's Constitution are expansively drawn—and "the strongest … found in any state constitution." *MEIC v. DEQ* ("*MEIC I*"), 1999 MT 248, ¶ 66, 296 Mont. 207, 988 P.2d 1236. Under Article IX, both the State and its residents

are required to "maintain and improve a clean and healthful environment in Montana for present and future generations." Mont. Const. art. IX, § 1(1). To ensure that this duty is carried out, the Constitution tasks Montana's Legislature with establishing "adequate remedies" for "protect[ing] … the environmental life support system from degradation" and "prevent[ing] unreasonable depletion and degradation of natural resources." *Id.* art. IX, § 1(2)–(3).

B. The Montana Environmental Policy Act

The Montana Environmental Policy Act is an essential piece of the statutory framework the Legislature has adopted to implement the Constitution's environmental protections. MEPA "provide[s] for the adequate review of state actions in order to ensure" that their "environmental attributes are fully considered by the legislature in enacting laws to fulfill constitutional obligations" and that "the public is informed of the anticipated impacts in Montana of potential state actions." MCA § 75-1-102(1).

MEPA's effectiveness results from the preparation of "environmental impact statements," or "EISs." Under the statute, for all "major actions of state government significantly affecting the quality of

the human environment," state agencies are required to prepare a "detailed statement" that evaluates, among other things, an action's environmental impacts and alternatives that could mitigate them. MCA § 75-1-201(1)(b)(iv). When the need for an environmental impact statement is unclear, DEQ's MEPA regulations provide for the preparation of a shorter "environmental assessment," or "EA," "to determine the need … [for] an EIS through an initial evaluation … of the significance of impacts associated with a proposed action[.]" ARM 17.4.607(2)(c), (3)(a).

The statute's focus on pre-decisional review is a vital part of its design. As this Court has acknowledged, "MEPA's procedural mechanisms help bring the Montana Constitution's lofty goals into reality by enabling fully informed and considered decision making, thereby minimizing the risk of irreversible mistakes depriving Montanans of a clean and healthful environment." *Park Cnty.*, ¶ 70.

Despite MEPA's vital role in maintaining a "clean and healthful environment," Mont. Const. art. IX, § 1(1), the Montana Legislature in 2011 weakened the statute in key respects that undermined this role. One amendment—eliminating meaningful remedies for MEPA

violations, MCA § 75-1-201(6)(c) (2011)—has already been ruled unconstitutional. *Park Cnty.*, ¶ 90. Another amendment—limiting agencies' ability to evaluate the climate implications of their actions, MCA § 75-1-201(2)(a) (2011)—is at issue in this appeal.

II. FACTUAL BACKGROUND

A. The Laurel Generating Station

NorthWestern's challenged power plant proves the importance of evaluating environmental impacts before permits are granted. While the harms caused by fossil fuels have become painfully clear in recent decades, causing many utilities to shift investments to clean alternatives, *see* AR:2240, NorthWestern designed the Laurel Generating Station to burn climate-harming methane gas, AR:1163 (EA).[2] The 175-megawatt plant will house eighteen reciprocating internal-combustion engines—each with an independent exhaust stack rising more than seventy feet into the air. AR:1168. The pollution emitted from these stacks promises to be significant in both volume and effect. According to NorthWestern's estimates, the Laurel plant's

[2] "AR" citations refer to DEQ's administrative record in this case, key portions of which are reproduced in NorthWestern's Appendix and MEIC's Supplemental Appendix.

annual emissions would likely include more than 90 tons of hazardous air pollutants; 215 tons of volatile organic compounds, including formaldehyde; more than 14 tons of sulfur dioxide; 75 tons of particulate matter; 222 tons of nitrogen dioxide; and 246 tons of carbon monoxide. AR:1529, 2185 (NorthWestern air-permit application). On top of this, the facility would also emit nearly 800,000 tons of greenhouse gases each year—giving it the climate impact of more than 160,000 passenger vehicles. *Id.*; AR:2237 (MEIC comments).

The plant's harmful effects would not be limited to air pollution. The company is building the facility near Laurel, Montana—on the banks of the Yellowstone River, and across from Laurel's Riverside Park and the neighboring Thiel Road community. AR:1168, 1171; *see also* AR:2886 (Laurel Outlook story on local opposition to the project). The plant's imposing presence, noise, and industrial lighting would affect all who live in the surrounding region or paddle past on the Yellowstone's waters. *See id.* And these air and aesthetic harms will be additive to similar impacts the area's residents have suffered due to a nearby oil refinery, a sewage-treatment plant, and other facilities. *See, e.g.*, AR:1165, 1172–73 (EA).

Under Montana law, NorthWestern is prohibited from building or operating a power plant without first obtaining an air-quality permit from DEQ. MCA §§ 75-2-204, 75-2-211. On May 10, 2021, the utility accordingly submitted a permit application to the agency. AR:1373, 2136.

B. The Department's Inadequate Environmental Analysis

NorthWestern's application triggered the Department's MEPA obligation to evaluate the environmental consequences of building and operating the Laurel plant. On July 9, 2021—only a month after receiving NorthWestern's revised application—the Department released a five-page, draft environmental assessment declaring, based on conclusory dismissals, that the plant would have "no significant impacts." AR:1224–1228. In response, MEIC provided comments and analysis demonstrating that the plant would "increase air pollution in an already impacted community; threaten water pollution in the Yellowstone River; and generate climate-harming greenhouse gas emissions even while clean and affordable alternatives to fossil-fuel generation exist." AR:2216–2241.

On August 23, 2021, the Department issued an air permit to NorthWestern based on a final environmental assessment that again dismissed most major impacts. AR:1088, 1157. While acknowledging that "the facility would operate 24/7 365 days per year," for instance, the assessment dismissed the potential effects of the project's industrial lighting and noise on nearby residences without meaningful explanation. AR:1168. And based on a misreading of MEPA, DEQ entirely refused to address the implications of the facility's significant greenhouse-gas emissions. AR:1113–14. Despite these and other deficiencies, the agency's analysis—and the air permit it authorized—allowed NorthWestern to begin building the Laurel Generating Station. AR:1279.

C. The District Court's Review of NorthWestern's Unlawful Permit

To protect the health and rights of all Montanans—including organization members that live, farm, and recreate near the proposed plantsite—MEIC challenged DEQ's analysis and decision in the fall of 2021. Complaint (Oct. 21, 2021). On April 6, 2023, the district court held that the agency had acted arbitrarily and unlawfully in granting NorthWestern's permit. Vacatur Order 32. While the court upheld the

Department's handling of the plant's noise impacts, among others, it concluded that the assessment's single sentence addressing lighting failed to "take a hard look" at this issue. *Id.* at 17–27. The district court further faulted the agency for ignoring the plant's climate implications. While MEPA's then-existing language prohibited "review of environmental impacts that are 'beyond Montana's borders,'" the court noted, it did "not absolve DEQ of its … obligation to evaluate a project's environmental impacts within Montana," including the climate implications of the Laurel plant. *Id.* at 29.

MEIC also argued that DEQ's interpretation of MEPA to disallow climate analyses would, if correct, violate the Montana Constitution's environmental protections. *See* Mont. Const. art. II, § 3; art. IX, § 1. However, having ruled that DEQ's failure to evaluate the plant's climate impacts was unlawful on statutory grounds, the court did not reach this constitutional question. Vacatur Order 34.

Based on the EA's deficiencies, the district court emphasized that DEQ would also have to reconsider its finding that the project would have no significant impact. Vacatur Order 29–30. According to the court, moreover, the significance of NorthWestern's power plant—and

the resulting need for a full environmental impact statement—seemed evident enough. "To most Montanans who clearly understand their fundamental constitutional right to a clean and healthful environment," the court noted, the 175-megawatt plant "is a significant project." *Id.* at 30.

The district court imposed the standard remedy for significant MEPA violations—and the remedy necessary to protect Montanans' environmental rights—by vacating NorthWestern's unlawful air permit while the agency revisited its environmental analysis. Vacatur Order 33–34.

The district court's decision to enforce Montana's environmental laws prompted an aggressive legislative effort to change them. On May 10, 2023—after the Legislature suspended its rules in order to take up the bill near the end of its session—Governor Gianforte signed HB 971, "an act generally revising the Environmental Policy Act." 2023 Montana Laws Ch. 450. The law declared that "environmental review[s] conducted pursuant to [MEPA] … may not include an evaluation of greenhouse gas emissions and corresponding impacts to the climate in the state or beyond the state's borders" unless they are "conducted

jointly … [with] a federal agency[,]" or unless Congress "amends the federal Clean Air Act to include carbon dioxide emissions as a regulated pollutant." *Id.* § 1 (amending MCA § 75-1-201(2)(a)–(b)). Montana officials, in other words, would be required to ignore the most pressing environmental threat to the state's residents under a statute designed to anticipate and prevent environmental harm.

The Legislature's effort to undermine MEPA benefitted NorthWestern almost immediately. On June 8, 2023, the district court ruled on NorthWestern's and DEQ's motions to stay the vacatur, noting that HB 971 had "eliminate[d] agencies' obligations to take a hard look at greenhouse gas emissions within the boundaries of the state." Stay Order 5. Further, in light of this Court's recent discussion of MEPA's injunction provisions in *Water for Flathead's Future v. DEQ*, 2023 MT 86, ¶ 36, 412 Mont. 258, 530 P.3d 790, the district court accepted DEQ and NorthWestern's position that vacating the permit "was improper." *Id.* For both reasons, the court stayed its prior order pending the resolution of these appeals. *Id.* As a result, NorthWestern is again free to construct (and eventually, operate) a power plant that was approved by state officials in violation of MEPA and the Montana Constitution.

STANDARD OF REVIEW

I. MEPA CLAIMS

The Court reviews DEQ's MEPA analyses, including the agency's decision not to prepare an EIS, to determine whether they are "arbitrary, capricious, unlawful, or not supported by substantial evidence." *MEIC v. DEQ* ("*MEIC II*"), 2016 MT 9, ¶ 14, 382 Mont. 102, 365 P.3d 454 (quoting *Clark Fork Coal. v. DEQ*, 2008 MT 407, ¶ 21, 347 Mont. 197, 197 P.2d 482). Under this standard, the Court determines, based on a careful review of the administrative record, "whether the decision was based on a consideration of the relevant factors and whether there has been a clear error of judgment." *Id.* (quotations omitted). An agency fails this test if it does not take a "hard look" at a proposal's environmental impacts. *Mont. Wildlife Fed'n v. Mont. Bd. Of Oil & Gas Conservation*, 2012 MT 128, ¶ 43, 365 Mont. 232, 280 P.3d 877.

II. CONSTITUTIONAL CLAIMS

The right of Montanans to a clean and healthful environment, found in Article II of our Constitution, is a "fundamental right because it is guaranteed by the Declaration of Rights." *MEIC I*, ¶ 63.

Accordingly, "any statute or rule which implicates that right must be strictly scrutinized and can only survive scrutiny if the State establishes a compelling state interest and that its action is closely tailored to effectuate that interest and is the least onerous path that can be taken to achieve the State's objective." *Id.* (emphasis omitted); *accord N. Plains Res. Council v. Mont. Bd. of Land Comm'rs*, 2012 MT 234, ¶ 18, 366 Mont. 399, 288 P.3d 169. To demonstrate a compelling interest, the State must show, "at a minimum, some interest 'of the highest order and ... not otherwise served' or 'the gravest abuse[], endangering [a] paramount [government] interest.'" *Armstrong v. State*, 1999 MT 261, ¶ 41 n.6, 296 Mont. 361, 989 P.2d 364 (alterations in original; quotations omitted).

SUMMARY OF THE ARGUMENT

This case challenges DEQ's failure to gather critical information about the environmental consequences of a massive power plant in an Eastern Montana community—an omission that left the agency unable to make an informed choice when it authorized NorthWestern to construct and operate the plant and the public unable to understand

how it would affect their quality of life and the quality of their environment.

In particular, DEQ failed to take the hard look required by MEPA at impacts associated with industrializing a former agricultural property, introducing constant lighting and noise across the Yellowstone River from a residential community. *Infra* Argument Pt. I.

Beyond local impacts, DEQ's refusal to disclose the climate harm in Montana of the plant's greenhouse-gas emissions violated MEPA. As the district court correctly held, DEQ improperly interpreted MEPA's prohibition against "a review of actual or potential impacts beyond Montana's borders," MCA § 75-1-201(2)(a) (2011), to also preclude any review of the project's climate impacts within Montana's borders. While no party continues to advance this flawed rationale, DEQ erroneously asserts that the Legislature's 2023 MEPA amendments, which on their face have no retroactive effect, moot the issue. On the contrary, the district court's proper construction of MEPA to require climate analysis within Montana's borders is not affected by the 2023 MEPA amendments and should be affirmed. *Infra* Argument Pt. II.B.

DEQ no longer defends its unlawful failure to analyze greenhouse gases on appeal, and NorthWestern's defense relies on an impermissibly *post hoc* and in any event erroneous argument that MEPA prevents agencies from analyzing impacts beyond their regulatory purview. None of these arguments justifies DEQ's unlawful omission. *Infra* Argument Pt. II.B.

Further, if the Department were correct that MEPA exempts from consideration harm to Montana's climate, such an exemption would violate Montanans' constitutional right to be free from unreasonable environmental degradation. Mont. Const. art. II, § 3; art. IX, § 1. *Infra* Argument Pt. III.

Finally, the lower court properly vacated the unlawfully issued permit because it was, effectively, "void from the beginning." *Kadillak v. Anaconda Co.*, 184 Mont. 127, 144, 602 P.2d 147, 157 (1979). Appellants' contrary position seeks to impose MEPA's heightened standard for injunctive remedies, MCA § 75-1-201(6)(c), which is not justified by the statutory language nor commanded by this Court' recent decision in *Water for Flathead's Future.* Moreover, the imposition of such onerous prerequisites to obtaining the standard remedy of

vacatur—including, under NorthWestern's view, a bond payment of more than $67 million—would conflict with this Court's decision in *Park County*, where the Court held that such a remedy must be available to satisfy the environmental protections of Montana's Constitution. *Park Cnty.*, ¶ 55. *Infra* Argument Pt. IV.

ARGUMENT

I. DEQ'S CURSORY ANALYSES OF LIGHTING AND NOISE IMPACTS VIOLATED MEPA

In granting NorthWestern's air-quality permit without taking the requisite "hard look" at the project's lighting and noise impacts, including potential harm to the well-being of nearby residents, DEQ violated MEPA. *See Mont. Wildlife Fed'n*, ¶ 43 (quotation omitted).

A. DEQ Failed to Adequately Evaluate Lighting Impacts

The EA's single sentence about the Laurel plant's lighting impacts—which declared that "some external lighting would exist at the facility and may be visible from the immediate surrounding properties" on a "24/7" basis, AR:1168—fell well short of MEPA's requirements. *See* ARM 17.4.609(3)(e) (requiring "an evaluation of the impacts … on the human population in the area"). As the sentence amounted to nothing more than a "general statement[] about 'possible' effects and the

existence of 'some risk,'" the EA's lighting "analysis" must be rejected by this Court. *Mont. Wildlife Fed'n*, ¶ 43 (quotation omitted).

Acceding to the district court's decision on this point, DEQ no longer defends its lighting analysis and has already issued a new draft assessment to address the discussion's deficiencies.[3] While NorthWestern attempts to defend the original assessment, its arguments fail.

The Montana Supreme Court's recent decision in *Belk v. DEQ*, 2022 MT 38, 408 Mont. 1, 504 P.3d 1090, which NorthWestern cites in support of DEQ's inadequate lighting analysis, does not justify DEQ's analysis. NWE Br. 45–46. In contrast to *Belk*—where the agency had analyzed how "distance would affect visibility" of a proposed quarry operation from a residential area approximately one mile from the project site, *Belk*, ¶¶ 4, 31—DEQ here did nothing more than declare that the plant's lighting would persist "24/7 365 days a year," and "may be visible" in the surrounding area, AR:1168. As the district court

[3] While DEQ initiated a new analysis shortly after the Court's vacatur order, the agency has confirmed that it suspended that analysis in light of the subsequent stay. MEIC-0001–02 (Aug. 29, 2023 email from J. Langston).

correctly held, DEQ's assessment violated MEPA because it failed to provide any "analysis of what type of lights, how bright the lights may be or any other analysis on this subject," Vacatur Order 24, much less address how the impact of constant industrial lighting would be experienced by the local community.

Contrary to NorthWestern's argument, the absence of explicit references in MEPA or DEQ's rules to types of lights or brightness does not excuse DEQ from disclosing and evaluating this information. NWE Br. 46. DEQ was required to disclose such information to meet its obligation to analyze the "the severity, duration, [and] geographic extent" of impacts on the "quality of the human environment." ARM 17.4.608(1)(a). Here, DEQ unlawfully provided virtually *no* information.

Additionally, and contrary to NorthWestern's argument, DEQ's unlawful analysis finds no shield in agency deference. NWE Br. 46. Courts "will not automatically defer to … [an] agency without carefully reviewing the record and satisfying themselves that the agency has made a reasoned decision." *Clark Fork Coal.*, ¶ 21 (quotation omitted). And when the agency provides no rationale for its conclusions, like here,

a court "cannot defer to a void." *Or. Nat. Desert Ass'n v. BLM*, 625 F.3d 1092, 1121 (9th Cir. 2010).

Finally, this Court should reject NorthWestern's attempt to shift blame to MEIC and its comments for the agency's lack of diligence. At the outset, the Court should reject NorthWestern's exhaustion argument because no party raised it before the district court. *See Kurtzenacker v. Davis Surveying, Inc.*, 2012 MT 105, ¶ 17, 365 Mont. 71, 278 P.3d 1002. Even setting aside the impropriety of raising the issue now, NorthWestern is wrong because MEIC's comments adequately raised lighting. As the comments noted, DEQ's Draft EA failed to include any discussion of "impacts related to increased industrialization" in the area, which includes industrial lighting. *See* AR: 2238–2239 (comments). In responding to MEIC's comments, DEQ made clear that it "underst[ood] the issue[] raised" by adding a reference to lighting its Draft EA had omitted. *Vote Solar v. Mont. Dep't of Pub. Serv. Regul.*, 2020 MT 213A, ¶ 48, 401 Mont. 85, 473 P.3d 963 (Oct. 6, 2020) (exhaustion requirement satisfied where a commenter provides enough clarity to make the decision-maker understand);

AR:1168 (EA). The unreasonably high bar that NorthWestern seeks to impose on commenters is unsupported in the law.

The district court's rejection of DEQ's lighting analysis should be affirmed.

B. DEQ Failed to Adequately Evaluate Noise Impacts

DEQ's MEPA analysis was further flawed because the agency failed to meaningfully analyze and disclose the impacts of the plant's noise on nearby communities. ARM 17.4.609(3)(e) (requiring "an evaluation of the impacts … on the human population in the area").

The EA's noise analysis was insufficient both because it omitted important parameters for characterizing the plant's noise, and because it failed to recognize the impacts on nearby residences. First, the EA included only a single maximum measurement of volume: "65 A-weighted decibels … at 600 feet west of the radiators and 555 feet east of the east exterior wall of the engine hall" and "600 feet to the north and south." AR:1167–68. And the EA altogether failed to assess the additive effect of the plant's noise considering other nearby industrial activity. AR:1167–68, 1173–74. As a result of these failures, the

agency's EA failed to offer the public a meaningful assessment of the plant's overall noise implications.

Second, DEQ's analysis arbitrarily failed to acknowledge that noise impacts will be widespread by omitting any mention of impacts to residents living in a nearby residential neighborhood across the Yellowstone River, approximately 1,000 feet south of the project. AR:1160 (aerial photograph showing proximity of residences south of the plant).

Ultimately, DEQ's unlawful noise analysis failed to inform members of the public about the type and frequency of noise anticipated, its duration, and how the area's combined noise may affect residents' enjoyment of their homes. ARM 17.4.609(3)(e) (DEQ must evaluate cumulative impacts on human populations); ARM 17.4.608(1)(a) (EAs must evaluate "the severity, duration, [and] geographic extent" of impacts). And while the EA identifies certain noise mitigations, AR:1168, the agency's insufficient analysis inhibited its ability to determine the sufficiency of these measures. *See* ARM 17.4.607(4) (allowing an agency to avoid an EIS when "all of the impacts

of the proposed action … will be mitigated below the level of significance" and "no significant impact is likely to occur").

While the district court took solace in NorthWestern's assurances that noise impacts from the plant will "'compl[y] with the established … criteria for far field-noise emissions,'" Vacatur Order 23 (quoting NorthWestern email to DEQ (AR:1995)), DEQ's inclusion of a single measurement of volume as experienced by only some impacted residents unlawfully fails to disclose important information to allow the public to evaluate the broader noise impacts of the large industrial operation. *See Mont. Wildlife Fed'n*, ¶ 43 (MEPA analysis must take a "'hard look'" at a project's impacts and disclose them to the public); *see also Belk*, ¶¶ 27, 31 (finding noise analysis adequate where, unlike here, the agency discussed "severity," "frequency," and "quantity" of noise).

The district court's holding that the EA's noise analysis satisfied DEQ's obligations under MEPA should be reversed.

II. DEQ'S FAILURE TO EVALUATE THE CLIMATE-CHANGE IMPACTS OF THE LAUREL PLANT'S GREENHOUSE-GAS EMISSIONS VIOLATED MEPA

Despite the undisputed and mounting harm from climate change to Montana's water, land, wildlife, and economy, DEQ refused in the EA

to disclose the climate implications of the proposed gas plant's significant emissions of greenhouse gases, particularly carbon dioxide and methane. In the EA and proceedings below, DEQ's sole defense for this omission was its reliance on a MEPA provision stating that an environmental review "may not include a review of actual or potential impacts *beyond Montana's borders*. It may not include actual or potential impacts that are regional, national, or global in nature." AR:1110 (citing MCA § 75-1-201(2)(a) (2011)) (emphasis added). However, as the district court held, MEPA required DEQ to evaluate the direct, secondary, and cumulative effects of the proposed project *within* Montana's borders. Vacatur Order 28–29. Further, because the climate consequences of NorthWestern's gas plant are potentially significant, DEQ violated MEPA by failing to analyze them thoroughly in an EIS. MCA § 75-1-201(1)(b)(iv); ARM 17.4.607.

DEQ does not attempt to defend its assessment in this appeal, and NorthWestern's defenses are meritless. First, NorthWestern's claim that legislation passed in 2023 moots this issue on appeal ignores that the new legislation is not retroactive, so this Court must apply MEPA as it existed in 2021 when DEQ approved the Laurel plant. Second,

NorthWestern's attempts to justify DEQ's conduct on grounds other than those proffered by the agency (and rejected by the district court)—claiming that this Court's precedent limits DEQ's ability to consider climate impacts from the project's greenhouse-gas emissions—are both impermissibly *post hoc* and erroneous.

DEQ's failure to analyze and consider the Laurel plant's climate-harming greenhouse-gas emissions provides an independent reason—in addition to DEQ's lighting and noise failures—for declaring NorthWestern's air permit unlawful and void, and affirming the district court's decision to vacate it.

A. The Laurel Gas Plant's Greenhouse-Gas Emissions

MEPA's requirement that agencies evaluate a project's human and environmental "impacts, including cumulative and secondary impacts," ARM 17.4.609(3)(d)–(e), obligates DEQ to evaluate the climate effects of the Laurel plant's greenhouse-gas emissions. If the plant is operated, the impacts from these emissions would be significant, both individually and in combination with past and present actions. The gas plant would emit at least 769,706 tons per year of climate-harming greenhouse gases (calculated as carbon-dioxide-

equivalent (CO2e) emissions). AR:2188. This is equal to the annual emissions of *167,327* passenger vehicles.[4] Greenhouse-gas emissions are the most significant driver of human-caused climate change. *See* AR:2237. And fossil-fuel-burning power plants "are the largest contributor of greenhouse gases in Montana." DEQ Answer ¶ 29. Moreover, as the State has recognized, "Montana's climate is already changing" and harming our environment, health, and economy:

> Our temperatures are 2–3° F warmer on average than in 1950. Historical observations demonstrate a shift to earlier snowmelt and earlier peak spring runoff, impacting flooding, water availability, and stream temperatures. Increased temperatures, insect and disease mortality, and fuel loads together are driving increases in the size and possibly the frequency and severity of wildfires. According to the *2017 Montana Climate Assessment* (MCA), the state could experience an additional 3–7° F increase in average temperatures by mid-century, including more days of extreme heat that would dramatically increase many of these impacts moving forward.

First Am. Compl. ¶ 30 (quoting DEQ, *Montana Climate Solutions Plan* 4, 21 (2020)); DEQ Answer ¶ 30 (admitting statement appears in cited state document). In other words, while climate change is felt globally, it

[4] *See* AR:2237 (MEIC comments) (citing https://www.epa.gov/greenvehicles/greenhouse-gas-emissions-typical-passenger-vehicle).

impacts Montana's environment and economy in particular—and particularly harmful—ways.

No party has disputed the significant harm Montanans experience due to climate change, nor the Laurel gas plant's expected greenhouse-gas emissions that would contribute to this problem.

B. The District Court's Uncontested Determination that MEPA Required DEQ to Analyze the Plant's Greenhouse-Gas Emissions Is Not Moot and Should be Affirmed

The district court properly determined that MEPA required DEQ to analyze the project's greenhouse-gas emissions. Neither NorthWestern nor DEQ contest this determination on appeal except to incorrectly claim that the Legislature's 2023 MEPA amendments, which are not retroactive, rendered the issue moot. Because the new law has no application to DEQ's decision in 2021 to issue the challenged permit, the district court's ruling should be upheld.

While a project's harmful air emissions would normally be subject to MEPA review, DEQ argued that consideration of the Laurel gas plant's greenhouse-gas emissions was precluded by a 2011 amendment to MEPA prohibiting agency analysis "of actual or potential impacts beyond Montana's borders"—"impacts that are regional, national, or

global in nature." MCA § 75-1-201(2)(a) (2011); 2011 Mont. Laws Ch. 396 (SB 233) (enacting the relevant language); AR:1110 (citing same).

Looking to the "plain meaning of the words [the statute] contains," the district court properly rejected DEQ's interpretation. Vacatur Order 28–29 (quoting *State v. Kelm*, 2013 MT 115, ¶ 22, 370 Mont. 61, 300 P.3d 687) (alternation in original)). While MEPA's 2011 climate limitation prevented DEQ from reviewing out-of-state impacts, it did "not absolve DEQ of its MEPA obligation to evaluate a project's environmental impacts within Montana." *Id.* at 29.[5] The court thus rejected the only rationale DEQ offered to justify the EA on this issue, and it ordered the agency to "take a hard look at the greenhouse gas

[5] The legislative history of MCA § 75-1-201(2)(a) (2011) supports this interpretation. The legislation's sponsor, Senator Jim Keane, clarified that his bill would "narrow[] the focus [of MEPA reviews] to Montana. What we're concerned about in the legislature of Montana and the Montana Environmental Policy Act is what it does for Montana—not North Dakota, not Wyoming, not the United States, not the world—what impacts will happen in Montana." Audio Recording: Revise Environmental Impact Laws: Hearing on SB 233 Before the H. Federal Relations, Energy, and Telecommunications, 2011 Leg., 62 Sess. at 8:34:38 (Mont. Mar. 9, 2011). *Available at* http://sg001-harmony.sliq.net/00309/Harmony/en/PowerBrowser/PowerBrowserV2/20170221/-1/20352?agendaId=93015.

effects of this project as it relates to impacts within the [state's] borders." *Id.*

At the outset, DEQ and NorthWestern have waived any challenge to the district court's correct statutory interpretation by failing to raise the issue in their opening brief. *Pengra v. State*, 2000 MT 291, ¶ 13, 302 Mont. 276, 14 P.3d 499 (affirming that the Court "will not address the merits of an issue presented for the first time in a reply brief on appeal"). For this reason alone, the district court's determination that DEQ violated MEPA by failing to consider the environmental consequences of the Laurel plant's greenhouse-gas emissions should be affirmed.

NorthWestern's position that this issue was rendered moot by subsequent legislation, which on its face has no retroactive application, is incorrect. In 2023, following the district court's ruling, the Legislature again amended MEPA. HB 971 expanded the 2011 amendment's prohibition on climate analyses "beyond Montana's borders" to provide that, subject to certain exceptions, DEQ may not analyze "greenhouse gas emissions and corresponding impacts to the climate *in the state* or beyond the state's borders." *Compare* MCA § 75-

1-201(2)(a) (2011) *with* MCA § 75-1-201(2)(a) (2023) (emphasis added); *see* 2023 Mont. Laws Ch. 450, § 1 (HB 971). But because HB 971 was only "effective on passage and approval" in 2023, the new law has no effect on the central question in this litigation, which is whether DEQ's decision to authorize construction of the Laurel plant *in 2021* was arbitrary or unlawful. 2023 Mont. Laws Ch. 450, § 5 (HB 971). Because HB 971 is expressly prospective, NorthWestern's attempt to apply the 2023 MEPA amendment to this matter would violate this Court's retroactivity rule by forcing "a different legal result" than the law interpreted by the district court. *Porter v. Galarneau*, 275 Mont. 174, 182–85, 911 P.2d 1143, 1150 (1996); MCA § 1-2-109 (a statute is not retroactive "unless expressly so declared").

Moreover, this issue is not moot because an order from this Court vacating the challenged permit and directing DEQ to evaluate the plant's greenhouse-gas emissions under MEPA would provide "'effective relief'" even after the 2023 amendment for three reasons. *Rimrock Chrysler, Inc. v. Montana*, 2016 MT 165, ¶¶ 39–40, 384 Mont. 76, 375 P.3d 392. First, DEQ is enjoined from applying MEPA's 2023 climate limitation following the district court's order in *Held v. Montana,* No.

CDV-2020-307 (1st Jud. Dist. Aug. 14, 2023), which ruled that the law unconstitutionally infringes on Montanans' right to a clean and healthful environment. *See* MEIC-0104 ("The 2023 version of the MEPA Limitation, Mont. Code Ann. § 75-1-201(2)(a), enacted into law by HB 971, is hereby declared unconstitutional and is permanently enjoined."). Thus, on remand, DEQ may not implement the new legislation, which on its face is broader than the 2011 limitation.

Second, the 2023 MEPA limitation enumerates exceptions allowing for a climate analysis where: 1) MEPA review is jointly conducted by state and federal agencies; or 2) "the United States congress [*sic*] amends the federal Clean Air Act to include carbon dioxide emissions as a regulated pollutant." MCA § 75-1-201(2)(b) (2023). NorthWestern's bare assertion that these exceptions do not apply in this case notwithstanding, NWE Br. 47, DEQ must make its own determination on remand. *See Rimrock Chrysler*, ¶¶ 40–41 (issue is not moot where remand to state agency would require new findings and restore litigant's right to protest such findings).[6]

[6] For example, DEQ will be required to evaluate whether the federally enacted Inflation Reduction Act, passed in 2022, triggers these

And third, regardless of DEQ's approach to the 2023 climate limitation on remand, vacating the permit would eliminate NorthWestern's authorization for plant construction and operation, providing at least temporary relief for MEIC's members and the opportunity to advocate for a different permitting decision in the future.

For these reasons, there remains a live controversy—and an opportunity to provide the public with relief—regarding DEQ's refusal to consider the plant's climate impacts. And because the district court's unchallenged determination that DEQ's interpretation was legally erroneous was correct under the plain statutory language, it should be affirmed.

C. NorthWestern's Assertion that *Bitterrooters* Forecloses MEPA Review of the Plant's Greenhouse-Gas Emissions Is *Post Hoc* and Meritless

NorthWestern gets no further in advancing an unjustified interpretation of this Court's *Bitterrooters* decision to foreclose DEQ from considering the Laurel plant's climate impacts because the agency purportedly lacks authority to regulate greenhouse-gas emissions. NWE

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contingency provisions, or whether carbon capture and sequestration is a viable option to reduce emissions.

Br. 36–42 (discussing *Bitterrooters for Planning, Inc. v. DEQ*, 2017 MT 222, 388 Mont. 453, 401 P.3d 712). This Court should reject NorthWestern's reliance on *Bitterrooters* to excuse DEQ's conduct because DEQ itself did not rely on it in the challenged decision; NorthWestern mischaracterizes DEQ's regulatory authority; and NorthWestern's extreme interpretation of *Bitterrooters* cannot be squared with that decision or the language and purposes of MEPA.

First, NorthWestern's *Bitterrooters* argument must be rejected because, in MEPA cases, "'an agency's action must be upheld, if at all, on the basis articulated by the agency itself.'" *Park Cnty.*, ¶ 36 (quoting *Motor Vehicle Mfrs. Ass'n v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 50 (1983)). As discussed, DEQ's sole rationale for not evaluating the Laurel plant's greenhouse-gas emissions was its erroneous interpretation of the 2011 MEPA limitation, MCA § 75-1-201(2)(a) (2011). AR:1110.

Second, NorthWestern is wrong about DEQ's authority to regulate greenhouse gases. NWE Br. 40. As NorthWestern's own citations demonstrate, DEQ did not claim that it lacked such authority; the agency stated only that the federal Clean Air Act *did not require* a "Best

Available Control Technology" analysis or corresponding emissions limit for greenhouse gases. *Id.*; AR:1104–05, 1114. Indeed, the Clean Air Act of Montana authorizes DEQ to establish emission limits "from any source necessary to prevent, abate, or control air pollution," and such limits may be more stringent than federal requirements. MCA § 75-2-203(1), (4). NorthWestern's *post-hoc Bitterrooters* rationale must be rejected. *Park Cnty.*, ¶ 36.

Third, NorthWestern's argument dramatically overstates the reach of this Court's precedent. The Court in *Bitterrooters* clarified that MEPA requires only that an agency examine impacts it "can avoid or mitigate … through the lawful exercise of its independent authority." *Bitterrooters*, ¶¶ 33-35 (citation omitted). MEPA analysis is therefore required whenever there is "a reasonably close causal relationship between the triggering state action and the subject environmental effect." *Id.* ¶ 33.

Importantly, the causal-nexus limitation announced in *Bitterrooters* does not—as NorthWestern argues—extend to the present circumstances, where NorthWestern's challenged plant can only be constructed and operated with DEQ's approval. Instead, the Court in

Bitterrooters found that, in the agency's analysis of a wastewater plant and permit, "the broader environmental impacts of the larger construction and operation of … [an adjacent] retail store [we]re not subject to MEPA review because the Legislature ha[d] not placed general land use control in the hands of a state agency." *Id.* ¶ 34. In other words, in *Bitterrooters*, DEQ did not have authority over the challenged retail facility at all—only its wastewater plant. Thus, DEQ was not required to examine the broader impacts of that facility that the agency could not "prevent … through the lawful exercise of its independent authority." *Id.* ¶¶ 33–35.

The authority relied on in *Bitterrooters'*—a U.S. Supreme Court decision interpreting MEPA's federal analogue, the National Environmental Policy Act ("NEPA")—further illustrates the limitations of this causal-nexus requirement. *See Bitterrooters*, ¶¶ 25–33. In *Department of Transportation v. Public Citizen*, the President ended a prohibition on operating Mexican trucks in the U.S., but required that the Federal Motor Carrier Safety Administration ("FMCSA") first issue new safety regulations for the trucks. 541 U.S. 752, 758–60 (2004). In its NEPA review for the new regulations, FMCSA declined to evaluate

air-quality impacts from an increase in Mexican traffic. *Id.* at 761. The U.S. Supreme Court endorsed the agency's approach, explaining that "the legally relevant cause of the entry of the Mexican trucks [wa]s *not* FMCSA's action, but instead the actions of the President in lifting the moratorium," and therefore any analysis of the environmental impacts of increased truck traffic could not inform the FMCSA's discretion. *Id.* at 769; *see also Stand Up for California! v. U.S. Dep't of the Interior*, 959 F.3d 1154, 1164 (9th Cir. 2020) (explaining that the principle in *Public Citizen* "obviated" NEPA review when a substantive statute leaves an agency with "no discretion" over an action).[7]

Both *Public Citizen* and *Bitterrooters* rejected "tail-wagging-the-dog reasoning" of litigants seeking to bootstrap the environmental effects of a larger action over which the agencies lacked authority (*i.e.*,

[7] NorthWestern's erroneous position cannot be squared with federal-court rulings under NEPA, following *Public Citizen*, that have required agencies to evaluate climate-harming emissions generated by fossil-fuel projects regardless of the agencies' permitting framework. *See, e.g.*, *Ctr. for Biological Diversity v. Nat'l Highway Traffic Safety Admin.*, 538 F.3d 1172, 1216 (9th Cir. 2008) (fuel-economy standards); *350 Mont. v. Haaland*, 50 F.4th 1254, 1265–70 (9th Cir. 2022) (coal-mine expansion); *WildEarth Guardians v. Zinke*, 368 F. Supp. 3d 41, 67–79 (D.D.C. 2019) (oil-and-gas leases); *MEIC v. U.S. Off. of Surface Mining*, 274 F. Supp. 3d 1074, 1094–99 (D. Mont. 2017) (coal-mining-plan modification), *remedy modified in part*, 2017 WL 5047901 (D. Mont. Nov. 3, 2017).

the dog), to environmental review for a narrower permitting or rulemaking action (*i.e.*, the tail). *Bitterrooters*, ¶ 25. In stark contrast here, DEQ's decision to authorize NorthWestern's Laurel plant is "the dog." DEQ is the agency with authority to grant the air-quality permit allowing the gas plant's construction and operation, MCA § 75-2-211, and it has discretion to set air-pollution limits, *id.* § 75-2-203, or to reject NorthWestern's application, as "[n]othing in [the agency's air-permitting rules] obligates the department to issue a Montana air quality permit." ARM 17.8.749(6). As the EA conceded, the challenged "permit will allow NWE to construct and operate the proposed equipment at the proposed site." AR:1157. Conversely, if the permit were denied, "[a]ny potential impacts that would result from the proposed action would not occur." AR:1172–73. Accordingly, the greenhouse-gas emissions from the Laurel plant's smokestacks are part-and-parcel of DEQ's action, not a separate project placed by the Legislature "beyond the reach of MEPA in the hands of" another entity.

Bitterrooters, ¶ 34.[8] Thus, the EA should have evaluated these emissions and their climate impacts.

Fourth, NorthWestern's interpretation of MEPA and *Bitterrooters* should be rejected because it would "defeat [the statute's] evident object or purpose." *Howell v. Montana*, 263 Mont. 275, 286–87, 868 P.2d 568, 575 (1994) (citation omitted). Among other things, MEPA "provide[s] for the adequate review of state actions in order to ensure that … environmental attributes are fully considered by the legislature in enacting laws to fulfill constitutional obligations." MCA § 75-1-102(1)(a). If MEPA analyses were coextensive with an agency's regulatory authority under current permitting statutes, as NorthWestern's argument suggests, they would not serve their intended purpose of identifying gaps in the Legislature's environmental remedial scheme as necessary to allow it to fulfill its constitutional mandate to provide for adequate environmental remedies. Mont. Const. art. IX, § 1.

Finally, interpreting MEPA to foreclose analysis of the plant's greenhouse-gas emissions and resulting climate-change impacts in

[8] Indeed, DEQ evaluated numerous issues falling outside of its air-permitting authority, including aesthetics, economics, soil quality, archeological effects, and other impacts. *See* AR:1160–72 (EA).

Montana would violate the State constitution's environmental protections, which ensure "a clean and healthful environment in Montana for present and future generations." Mont. Const. art. II, § 3; art. IX, § 1; *see Montana v. Stanko*, 1998 MT 321, ¶ 15, 292 Mont. 192, 974 P.2d 1132 ("It is the duty of the courts, if possible, to construe statutes in a manner that avoids an unconstitutional interpretation.").

This Court should reject NorthWestern's illegitimate defenses of DEQ's failure to consider the Laurel gas plant's greenhouse-gas emissions, which was arbitrary and unlawful.

III. IN THE ALTERNATIVE, IF MCA § 75-1-201(2)(a) IS PROPERLY READ TO PRECLUDE CLIMATE-CHANGE ANALYSES, IT IS UNCONSTITUTIONAL

If this Court were to accept NorthWestern's position that MEPA's language foreclosed DEQ's consideration of Montana-specific climate change impacts—which, as discussed, it should not—that would not end the inquiry because MEIC alternatively challenged DEQ's action on the basis that it violated the state Constitution's environmental protections. Mont. Const. art. II, § 3; art. IX, § 1. Specifically, barring state agencies from considering harm to Montana's climate violates the constitutional right of MEIC's members to be free from unreasonable environmental

degradation. *Id.* Because the issue of the constitutionality of MCA § 75-1-201(2)(a) (2011) was fully briefed and argued by all parties in the district court, this Court may—and should— reach it as an alternative basis for affirming the district court's judgment. *Braulick v. State*, 2019 MT 234N, ¶ 8, 398 Mont. 443, 459 P.3d 214; *see also Payne v. Berry's Auto, Inc.*, 2013 MT 102, ¶¶ 16, 26, 369 Mont. 529, 301 P.3d 804 (affirming judgment on alternate grounds argued by the parties but not reached by the district court).[9]

DEQ's interpretation of MCA § 75-1-201(2)(a) (2011), MEPA's 2011 climate limitation, cannot meet this Court's demanding standard of review of state actions that impair fundamental constitutional rights. Such legislation is subject to strict scrutiny and can be upheld only if it is narrowly tailored to meet a compelling state interest. *MEIC I*, ¶¶ 62–63; *Park Cnty.*, ¶¶ 16, 18.

[9] As required by Montana Rule of Appellate Procedure 27, MEIC filed and served notice of this constitutional challenge on June 16, 2023. The Attorney General filed its notice of intervention on the constitutional issue on July 6, 2023, but has not filed any brief.

1. *MEPA's climate limitation violates Montanans' constitutional environmental rights.*

As interpreted by DEQ in the EA, MEPA's 2011 climate limitation, MCA § 75-1-201(2)(a), violates the state Constitution's environmental protections, which ensure "a clean and healthful environment in Montana for present and future generations." Mont. Const. art. II, § 3; art. IX, § 1. The Constitution's environmental protections are "anticipatory and preventative." *MEIC I*, ¶ 77. The Legislature used its constitutionally delegated authority to "shape[] MEPA as a vehicle for pursuing its constitutional mandate." *Park Cnty.*, ¶ 68 (citations omitted); *see also* MCA § 75-1-102(1) (MEPA's purposes, citing Mont. Const. art. II § 3 and art. IX). The Constitution, as implemented by MEPA, prohibits the state from authorizing unexamined environmental harm. *Park Cnty.*, ¶ 71. Specifically:

> MEPA's procedural mechanisms help bring the Montana Constitution's lofty goals into reality by enabling fully informed and considered decision making, thereby minimizing the risk of irreversible mistakes depriving Montanans of a clean and healthful environment. Therefore, *the Legislature cannot fulfill its constitutional obligation to prevent proscribed environmental harms without some legal framework in place that mirrors the uniquely "anticipatory and preventative" mechanisms found in the original MEPA.*

Id. ¶ 70 (emphasis added).

Having identified MEPA as an essential component of the constitution's environmental remedial scheme, this Court's precedents hold that the Legislature cannot arbitrarily exempt potentially harmful activities from MEPA's purview. *Id.* ¶ 71; *MEIC I*, ¶ 80. In *Park County*, this Court invalidated another portion of the Legislature's 2011 MEPA amendments, which limited courts' ability to enjoin or invalidate challenged activity, on the ground that the 2011 amendments "are unconstitutional because they undercut the State's ability to determine in advance whether a given activity will cause environmental harm and thereby take actions to 'prevent unreasonable depletion and degradation of natural resources' as required by Article IX, Section 1(3), of the Montana Constitution." *Park Cnty.*, ¶ 88. Similarly, in *MEIC*, the Court held that a statutory exemption from requirements to review the potential for activities to degrade high-quality waters was unconstitutional, because it allowed polluting activities to proceed without consideration of whether they would cause unreasonable environmental harm. *MEIC I*, ¶ 80.

As interpreted by DEQ, MEPA's 2011 climate limitation is constitutionally infirm for the same reasons the Montana Supreme

Court recognized in *Park County* and *MEIC I*. DEQ's interpretation would allow NorthWestern to construct and operate the Laurel Generating Station without accounting for the actual or potential climate change impacts of its greenhouse-gas emissions, despite the environmental harm these emissions would ultimately cause in Montana. Thus, the 2011 MEPA limitation undermines the statute's fundamental constitutional role of preventing environmental harm through "informed decision making" based on complete analysis of a project's environmental effects. *Park Cnty.*, ¶ 76.

There is no question that constitutional protections against environmental harm include harm from human-caused climate change. Burning fossil fuels, such as methane gas, is Montana's largest source of climate-harming greenhouse gases, impacting Montana's water resources, lands, wildlife, and public health. *See supra* Argument Pt. II.A; *N. Plains Res. Council,* ¶ 9 ("[T]he effects of climate change include specific adverse effects on Montana's water, air and agriculture."). These harms threaten the "'environmental life support system," Mont. Const. art. IX, §1(3), which "is all-encompassing, including but not limited to air, water, and land; and whatever interpretation is afforded

this phrase by the Legislature and courts, there is no question that it cannot be degraded." *MEIC I*, ¶ 67 (emphasis omitted).

Because MCA § 75-1-201(2)(a) (2011) would permit unexamined environmental harm, it impairs MEIC's fundamental constitutional rights, Mont. Const. art. II, § 3, and the Legislature's obligation to provide environmental remedies to address climate change impacts of greenhouse-gas emissions for present and future generations, Mont. Const. art. IX, § 1. *Park Cnty.*, ¶¶ 60, 62, 84.

2. *MEPA's climate limitation serves no compelling state interest.*

In adopting MCA § 75-1-201(2)(a), the 2011 Legislature did not evince any compelling state interest for precluding DEQ's review of actual and potential environmental harms of greenhouse-gas emissions in Montana, nor is the provision narrowly tailored to address any such interest. And in the district court proceedings, no party defended the MEPA limitation on this ground. Accordingly, MCA § 75-1-201(2)(a) (2011), as that provision is interpreted by DEQ, is unconstitutional on its face and as applied to this case. Mont. Const. art. II, § 3, art. IX, § 1; *see Park Cnty.*, ¶¶ 85–86 (holding statute was facially unconstitutional where infirmity "flows from the content of the statute itself").

IV. TO PREVENT UNEXAMINED ENVIRONMENTAL HARM, THE COURT SHOULD FIND THE PERMIT VOID AND VACATE IT.

Because DEQ failed to follow requisite procedures when issuing the Laurel gas plant air permit, it was "void from the beginning." *Kadillak*, 184 Mont. at 144, 602 P.2d at 157. To avoid further environmental harm from the construction and operation of the plant—harm DEQ has not yet fully considered as required by MEPA—this Court should affirm the district court's application of "[t]he judiciary's standard remedy for permits or authorizations improperly issued without required procedures," which "is to set them aside." *Park Cty.*, ¶ 55 (citing cases).

Appellants' arguments for reversing the district court's remedy fail. Ignoring MEPA's clear language, they incorrectly argue that MEPA's "exclusive" remedial provisions, which took effect after the *Park County* decision, required the district court to apply the factors for injunctive relief before declaring an agency action void or setting it aside. *See* MCA § 75-1-201(6)(c) (2011) (MEPA remedy provisions). Appellants' position is not supported by the statutory language nor demanded by this Court's discussion of MEPA remedies in *Water for*

Flathead's Future. *See* DEQ Br. 11–17; NWE Br. 34–35. Additionally, subjecting MEPA litigants to onerous requirements for nullifying the harmful effects of unlawful agency action, as Appellants urge, would counter important constitutional and public policy principles this Court affirmed in *Park County*.

For these reasons, this Court should affirm the district court's decision to vacate NorthWestern's unlawful permit.

A. MEPA's Language Does Not Evince a Legislative Intent to Condition the Standard Vacatur Remedy on the Injunctive Relief Factors

Appellants' attempts to require MEPA litigants to make the showing required for an injunction before a court may nullify or vacate an unlawfully issued permit are foreclosed by the "plain language" of MEPA's remedial provision. *State Dep't of Revenue v. Alpine Aviation, Inc.*, 2016 MT 283, ¶ 12, 385 Mont. 282, 384 P.3d 1035. In relevant part, the provision provides that a court considering "a request for a temporary restraining order, preliminary injunction, permanent injunction, or other equitable relief … may not enjoin the issuance or effectiveness of a license or permit or a part of a license or permit" unless it makes findings regarding likelihood of success on the merits,

irreparable harm, and the public interest, i.e., the traditional injunction factors. MCA § 75-1-201(6)(c)(ii).

While Appellants argue that such findings are required before a court may nullify or vacate a permit, DEQ Br. 15–18; NWE Br. 34, they ignore that the phrase "other equitable relief" is limited to court actions that "*enjoin* the issuance or effectiveness" of a permit. (citing MCA § 75-1-201(6)(c)(ii)). The provision's general phrase "other equitable relief" differs from the types of relief specifically listed—*i.e.*, "a temporary restraining order, preliminary injunction, [or] permanent injunction." MCA § 75-1-201(6)(c)(ii). Under the *ejusdem generis* doctrine frequently applied by this Court, "where a list of specific things is followed by a more general word or phrase, the general word or phrase is interpreted to include only items that are 'similar in nature' to those listed." *Briese v. Mont. Pub. Employees' Ret. Bd.,* 2012 MT 192, ¶ 26, 366 Mont. 148, 285 P.3d 550 (*citing Mattson v. Mont. Power Co.*, 2009 MT 286, ¶ 32, 352 Mont. 212, 215 P.3d 675). MEPA's remedy provision *specifically* requires heightened consideration *only* for injunctive remedies. MCA § 75-1-201(6)(c)(ii). Thus, the statute's general reference to "other

equitable relief" may not be expanded to non-injunctive remedies, including vacatur.

Moreover, the Legislature has demonstrated that it knows how to specifically reference non-vacatur remedies under MEPA. In the remedy provision invalidated by *Park County*, which was adopted concurrently with the contingency remedy provision at issue in this case, the Legislature provided that "[a] permit … may not be enjoined, *voided, nullified, revoked, modified, or suspended* pending the completion of an environmental review that may be remanded by a court." 2011 Mont. Laws Ch. 396, § 6 (SB 233) (emphasis added). The Legislature's abstention from referencing non-vacatur remedies in the provision at issue here counsels against reading such remedies into the Legislature's general reference to "other equitable relief." *See Pengra*, ¶ 9 ("The fact that the Legislature has enacted statutes granting minors elevated privacy rights in other areas shows that the Legislature knows how to express its intent to allow for confidentiality of proceedings involving children.").

Newly enacted legislation confirms this reading. In 2023, the Legislature again amended MEPA's remedy provisions, prospectively,

requiring a litigant who "seeks to vacate, void, or delay a … permit" to first "seek an injunction," demonstrating a likelihood of success and posting a bond. 2023 Mont. Laws Ch. 703 § 1 (SB 557), codified at MCA § 75-1-201(6)(d) (2023). Although the new remedy provision does not retroactively apply to this case, it demonstrates that the Legislature is aware of the difference between requests to vacate or void a permit on the one hand, and enjoin its effectiveness on the other.[10]

Further, Appellants' position would inappropriately erase any legal distinction between injunction and vacatur, in conflict with well-established federal and state caselaw and the legal meaning of those terms.[11] Setting aside an unlawful agency decision through vacatur "prohibits, as a practical matter, the enforcement of" that decision, but is not "the practical equivalent of 'enjoining'" the agency. *Alsea Valley All. v. U.S. Dep't of Com.*, 358 F.3d 1181, 1186 (9th Cir. 2004) (citation omitted). To "enjoin" is to "legally prohibit or restrain *by injunction*."

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[10] As with HB 971, discussed *supra* Argument Pt. II.B, SB 557 had an immediate, but not a retroactive, effective date. MCA § 1-2-109.

[11] "[T]echnical words and phrases and such others as have acquired a peculiar and appropriate meaning in law … are to be construed according to such peculiar and appropriate meaning or definition." MCA § 1-2-106.

ENJOIN, Black's Law Dictionary (11th ed. 2019) (emphasis added). Such an order commanding or prohibiting action "is a drastic and extraordinary remedy." *Monsanto Co. v. Geertson Seed Farms*, 561 U.S. 139, 165–66 (2010); *see also Davis v. Westphal*, 2017 MT 276, ¶ 26, 389 Mont. 251, 405 P.3d 73 ("Permanent injunctive relief … is available only where necessary to prevent irreparable injury in the absence of a plain, speedy, and adequate statutory or common law remedy.") (citation omitted); *Troglia v. Bartoletti*, 152 Mont. 365, 370, 451 P.2d 106, 109 (1969) (stating "injunctions are extraordinary remedies granted with caution and in the exercise of sound judicial discretion").

By contrast, rather than commanding action or restraint, vacatur is the legal vehicle for effectuating the necessary nullification of an action that was "void from the beginning." *Kadillak*, 184 Mont. at 144, 602 P.2d at 157; *see also* Black's Law Dictionary (11th ed. 2019) (defining "vacatur" as "[t]he act of annulling or setting aside"). As opposed to extraordinary injunctive relief, vacatur is "the standard remedy for permits or authorizations improperly issued without required procedures." *Park Cnty.*, ¶ 55. The U.S. Supreme Court has explained that courts should refrain from enjoining activity "[i]f a less

drastic remedy (such as partial or complete vacatur of [the unlawful] decision)" is sufficient to redress the injury. *Monsanto Co.*, 561 U.S. at 165–66; *see Kiakombua v. Wolf*, 498 F. Supp. 3d 1, 52 (D.D.C. 2020) (affirming "that injunctions and vacaturs are distinct remedies, and that the latter is considered substantially less intrusive") (citing *Monsanto Co.*, 561 U.S. at 165–66).

In sum, MEPA's conditions on court orders that "enjoin" permits cannot legitimately be read to sweep in remedies that nullify or vacate unlawful agency actions.

B. *Water for Flathead's Future* Does Not Require this Court to Overturn the District Court's Vacatur Order

Contrary to Appellants' position, this Court's recent consideration of MEPA's remedy provisions in *Water for Flathead's Future* is not dispositive in this case. The Court's remedy discussion resulted from that case's particular procedural history, namely, the district court's reliance on its "inherent authority" to vacate the challenged permit, citing *Park County*. *Water for Flathead's Future,* ¶¶ 35–36. This Court noted that *Park County* did not analyze MEPA's contingent remedy provisions—which were not then in effect—and that such remedies are "exclusive." *Id.* ¶ 36. However, the Court did not address other language

in MCA § 75-1-201(6)(c)(ii), which, as discussed, specifically conditions only injunctive remedies.[12]

Principles of *stare decisis* are not in play. *Cf.* DEQ Br. 11–12. First, MEIC does not ask this Court to "expressly overrul[e]" *Water for Flathead's Future. See McDonald v. Jacobsen*, 2022 MT 160, ¶ 21, 409 Mont. 405, 515 P.3d 777 (explaining circumstances implicating *stare decisis*). Instead, the Court's discussion in *Water for Flathead's Future* of MEPA remedies was not essential to the outcome of that case because, having first determined that DEQ did not violate MEPA, the plaintiff's request for relief was moot. Accordingly, the *Water for Flathead's Future* discussion is not binding on this Court. *Beach v. State*, 2015 MT 118, ¶ 31, 379 Mont. 74, 348 P.3d 629 (explaining that a court's opinion that is not essential to the holding of a case is not binding); *Humphrey's Ex'r v. United States*, 295 U.S. 602, 626, 55 S. Ct. 869, 873, 79 L. Ed. 1611 (1935) (stating that a court's expressions "beyond the point involved … do not come within the rule of stare decisis"). And in any event, the analyses MEIC presents here differ

[12] In stating that the remedies are "exclusive," the Legislature ensured that MEPA's specific injunction test would apply, "[n]otwithstanding the provisions of 27-19-201 and 27-19-314." MCA § 75-1-201(6)(c)(ii).

from the circumstances this Court addressed in *Water for Flathead's Future* and foreclose Appellants' interpretation of MEPA's remedial provisions. *McDonald*, ¶ 21 (discussing circumstances for overruling prior decision).

C. Constitutional and Public-Policy Considerations Sharply Counter Appellants' Remedy Arguments

While DEQ would subject Montanans to an ever-raising bar for nullifying the harmful effects of unlawful agency action, this Court in *Park County* elucidated the important constitutional and public-policy reasons for rejecting this approach.

Declining to invalidate NorthWestern's unlawfully issued permit would allow construction and operation of the Laurel gas plant even before DEQ completes a lawful MEPA analysis. Absent vacatur of the challenged permit, DEQ's MEPA review on remand "can be expected to achieve very little beyond informing Montanans—perhaps tragically—of the consequences of actions that have already been taken." *Park Cnty.*, ¶ 74. DEQ's conduct in this case illustrates the practical consequences of failing to vacate an unlawful permit. Following the district court's order vacating the challenged permit, DEQ initiated a supplemental MEPA process to correct its errors. When the district court

subsequently stayed vacatur, however, DEQ promptly suspended its remand process, even though it does not defend the lawfulness of its permit on appeal. *See* MEIC-0001–02 (Aug. 29, 2023 email from J. Langston, DEQ, stating "With the appeal and stay in place, DEQ does not intend to move forward with the remand analysis at this time."). Indeed, if permitting actions are not vacated upon a court's finding they are unlawful, there is little incentive for an agency to correct its analysis or reconsider its permitting decision based on that analysis. "Without a mechanism to prevent a project from going forward until a MEPA violation has been addressed, MEPA's role in meeting the State's 'anticipatory and preventative' constitutional obligations is negated." *Park Cnty.*, ¶ 72.

DEQ suggests that its interpretation of MEPA's remedial provisions does not eliminate the ability for courts to nullify or vacate a permit; litigants need only meet the requirements for injunctive relief. DEQ Br. 13–14. But DEQ ignores the substantially higher bar its position would create by requiring plaintiffs to present evidence regarding irreparable harm and the public interest, including "implications … on the local and state economy." MCA § 75-1-

201(6)(c)(ii)(A), (B). While such heightened requirements may be warranted for "extraordinary" injunction remedies, which require "caution and … the exercise of sound judicial discretion," *Troglia*, 152 Mont. at 370, 451 P.2d at 109, such resource-intensive hurdles are inappropriate after a court has determined that agency action was unlawful and litigants seek only to invalidate that action.

NorthWestern's brief demonstrates the mischief inherent in blurring the line between vacatur and injunctive remedies, suggesting that in addition to meeting the requirements of MCA § 75-1-201(6)(c)(ii), MEPA plaintiffs must also post a bond sufficient to cover the costs and damages of the restrained party under MCA § 75-1-201(6)(d), NWE Br. 34 n.4, echoing DEQ's argument in the district court, DEQ Reply in Supp. of MSJ 19–20. NorthWestern's stay briefing to the district court provided the company's exorbitant estimate of such costs—claiming that leaving vacatur in place for 14 months would cause it to incur "at least $67 million" in increased construction costs, along with unquantified additional damages. NWE Br. in Supp. of Mot. for

Stay 17.[13] The specter of having to pay such extraordinary costs—either through the posting of a bond or a subsequent action for injunction damages, MCA § 27-19-306(4)—would be enough to prevent almost any Montanan from invoking judicial review to vindicate their statutory and constitutional rights. While NorthWestern could (and did) argue that such costs weigh against vacatur, the company's extreme position that Montanans should be forced to pay such costs to obtain any meaningful remedy for unlawful agency action would, if accepted, defeat MEPA enforcement entirely.

DEQ disingenuously claims that applying the injunction factors to vacatur is prudent to allow courts to consider the public interest and environmental benefits of a project before determining whether to invalidate agency action. DEQ Br. 19–20. Even absent the vacatur factors, courts apply exactly such equitable considerations to determine if the type of "limited circumstances" are present that warrant allowing

[13] NorthWestern initiated plant construction aware of the alleged legal deficiencies in DEQ's permit and chose to defend those deficiencies rather than rectify them. NorthWestern's arguments here would shift the cost of such risk from the company to members of the public enforcing MEPA.

unlawful agency action to proceed. *Park Cnty.*, ¶ 55 (citing *Pollinator Stewardship Council v. EPA*, 806 F.3d 520, 532 (9th Cir. 2015)). Specifically, courts "consider whether vacating a faulty rule could result in possible environmental harm" and "weigh the seriousness of the agency's errors against the disruptive consequences" of vacatur. *Pollinator Stewardship Council*, 806 F.3d at 532. Indeed, in the proceedings below, DEQ and NorthWestern unsuccessfully argued that such circumstances are present here. DEQ Reply in Supp. of MSJ 16–17; NWE Br. in Supp. of MSJ 18–19. But while courts appropriately determine if *defendants* demonstrate that a case presents the type of "limited circumstances" in which vacatur is inappropriate, substituting the vacatur test with injunction factors would both transfer and heighten plaintiffs' burden. Where the injunction factors are unnecessary to "craft[] thoughtful and proportional remedies," DEQ Br. 18, such a heightened burden is inappropriate.[14]

[14] DEQ's reference to the stipulated partial vacatur in *Mont. Trout Unlimited v. DEQ*, No. DV 20-10 (Mont. 14th Jud. Dist. Jul. 22, 2022), DEQ Br. 14–15, demonstrates that application of the injunction factors is unnecessary to craft appropriately narrow relief for unlawful agency action.

Ensuring that MEPA's vacatur remedy is not unreasonably encumbered is essential to ensuring "that the government will not take actions jeopardizing such unique and treasured facets of Montana's natural environment without first thoroughly understanding the risks involved." *Park Cnty.*, ¶ 74 (noting that Montana's constitutional guarantee includes the assurance). This Court should resist Appellants' invitation to apply MEPA's injunction factors to requests to nullify or set aside an unlawfully issued permit.

For all of these reasons, the district court's decision to vacate NorthWestern's unlawfully issued permit should be upheld.

CONCLUSION

To vindicate Montanans' statutory and constitutional rights, MEIC respectfully requests that this Court affirm the district court's order invalidating NorthWestern's air permit and halting the completion and operation of the plant until the state properly considers its harmful environmental consequences. And, to the extent that this Court finds that the Legislature's 2011 MEPA amendment, MCA § 75-1-201(2)(a), forecloses DEQ's analysis of climate change impacts

occurring within Montana, Plaintiffs request that the Court invalidate this provision as unconstitutional.

Respectfully submitted this 11th day of October, 2023

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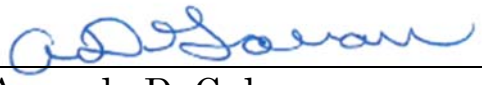
CERTIFICATE OF COMPLIANCE

Pursuant to Rule 11 of the Montana Rules of Appellate Procedure, I certify that this brief is printed with a proportionately spaced Century Schoolbook text typeface of 14 points and is double-spaced. Pursuant to Judge McGrath's October 3, 2023 Order, the word count calculated by Microsoft Word is 11,311 and does not exceed 11,500 words, excluding the certificate of compliance.

Dated this 11th day of October, 2023.



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