In the Supreme Court of the State of Montana
DA 23-0575

RIKKI HELD, ET AL.,

Plaintiffs and Appellees,

v.

STATE OF MONTANA, ET AL.

Defendants and Appellants.

On appeal from the Montana First Judicial District Court, Lewis and Clark County Cause No. DDV 2013–407, the Honorable Kathy Seeley, Presiding

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APPELLANTS' RULE 22 STAY APPENDIX

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Order Denying Defendants' Motion for Clarification and for Stay of Judgment Pending Appeal November 21, 2023 (Doc. 432)

MONTANA FIRST JUDICIAL DISTRICT COURT
LEWIS AND CLARK COUNTY

RIKKI HELD, et al., Plaintiffs, v. STATE OF MONTANA, et al., Defendants.	Cause No. CDV-2020-307 Hon. Kathy Seeley **ORDER DENYING DEFENDANTS' MOTION FOR CLARIFICATION AND FOR STAY OF JUDGMENT PENDING APPEAL**

Defendants Department of Environmental Quality, Department of Natural Resources and Conservation, Department of Transportation, and Governor Greg Gianforte have moved for clarification of this Court's August 14, 2023, Findings of Fact, Conclusions of Law, and Order (Doc. 405), and for an order to stay the judgment pending appeal. Doc. 422. Defendants' motions were presented in a combined filing. Plaintiffs oppose the motions.

PROCEDURAL HISTORY

The August 14 Order contains a detailed procedural history of the case. Doc. 405. After the August 14 Order was issued, the parties asked the Court to postpone ruling on the issue of attorneys' fees and costs and, pursuant to Montana Rule of Civil Procedure 54(b), requested certification of the Order for interlocutory appeal to the Montana Supreme Court. Docs. 411, 415. On September 18, 2023, the Court certified the Order and several ancillary orders as final pursuant to Rule 54(b), M. R. Civ. P. and Rule 6(6), M. R. App. P. Doc. 417.

On September 29, 2023, Defendant State of Montana filed a notice of appeal to the Montana Supreme Court. Docs. 418, 420. On October 2, 2023, Defendants Governor Greg Gianforte, Department of Environmental Quality, Department of Natural Resources and Conservation, and Department of Transportation filed a separate notice of appeal. On October 16, 2023, Defendants Governor Greg Gianforte, Department of Environmental Quality, Department of Natural Resources and Conservation, and Department of Transportation filed the Motion for Clarification and for Stay of Judgment Pending Appeal. Doc. 422. Defendant State of Montana did not join in the motion for clarification or motion to stay.

On October 17, 2023, the Supreme Court accepted the certification order and allowed the appeal to proceed. *Held v. State of Montana*, DA 23-0575, Order, *2 (Mont. Sup. Ct. Oct. 17, 2023). Therefore, the case is on appeal to the Supreme Court, as agreed by both sides prior to any motion to clarify.

FACTUAL BACKGROUND

The record before this Court includes an extensive trial record and detailed Findings and Conclusions in the August 14 Order. The Court found, in part:

> FF #89. "Until atmospheric GHG concentrations are reduced, extreme weather events and other climactic events such as drought and heatwaves will occur more frequently and in greater magnitude, and Plaintiffs will be unable to live clean and healthy lives in Montana."
>
> FF #104. "Children are uniquely vulnerable to the consequences of climate change, which harms their physical and psychological health and safety, interferes with family and cultural foundations and integrity, and causes economic deprivations."
>
> FF #193. "The degradation to Montana's environment, and the resulting harm to Plaintiffs, will worsen if the State continues ignoring GHG emissions and climate change."
>
> FF #194. "The unrefuted testimony established that Plaintiffs have been and will continue to be harmed by the State's disregard of GHG pollution and climate change pursuant to the MEPA Limitation."

> FF #218. "Accounting for overlap among fossil fuels extracted, consumed, processed, and transported in Montana, the total CO_2 emissions due to Montana's fossil fuel-based economy is about 166 million tons CO_2. This is a conservative estimate and does not include all the GHG emissions, including methane, for which Montana is responsible."
>
> FF #252. "Prior to 2011, Defendants were quantifying and disclosing GHG emissions and climate impacts from fossil fuel projects, including, for example, the Silver Bow Generation Project, the Roundup Power Project (Bull Mountain), and the Highwood Generating Station."
>
> FF #257. "If the MEPA Limitation is declared unconstitutional, state agencies will be capable of considering GHG emissions and the impacts of projects on climate change."
>
> FF #272. "It is technically and economically feasible for Montana to replace 80% of existing fossil fuel energy by 2030 and 100% by no later than 2050, but as early as 2035."
>
> FF #275. "[C]onverting to wind, water, and solar energy would reduce annual total energy costs for Montanans from $9.1 to $2.8 billion per year, or by $6.3 billion per year (69.6% savings)."
>
> CL #6. "Every additional ton of GHG emissions exacerbates Plaintiffs' injuries and risks locking in irreversible climate injuries."
>
> CL #50. "Montana's climate, environment, and natural resources are unconstitutionally degraded and depleted due to the current atmospheric concentration of GHGs and climate change."
>
> CL #64. "Undisputed testimony established that Defendants could evaluate 'greenhouse gas emissions and corresponding impacts to the climate in the state or beyond the state's borders' when evaluating fossil fuel activities. Indeed, Defendants have performed such evaluations in the past."

Doc. 405.

The record demonstrates the dangerous nature of the *status quo* that Defendants seek to preserve. That *status quo* is one where there are already "catastrophic harms to the natural environment of Montana and Plaintiffs," harms that "will worsen if the State continues ignoring GHG emissions and climate change." Doc. 405. The record also shows that Montana need not rely

on fossil fuels to meet its energy needs and can meet those needs by transitioning to renewable energy sources, which would have climate benefits, create jobs, reduce air pollution, save lives and costs from air pollution, and reduce energy costs for Montanans. Doc. 405. The record also demonstrates that Defendants can conduct MEPA analyses that consider GHG emissions and climate impacts, and Defendants have done so in the past.

LEGAL STANDARDS

Motion for Clarification: The legal standard for a motion for clarification is not relevant here because this Court does not have jurisdiction to rule on Defendants' motion for clarification.

Motion to Stay: Montana Rule of Appellate Procedure 22 provides that a motion seeking to stay judgment pending appeal shall be filed in district court. Only in "extraordinary circumstances" should a stay be granted. *Graves v. Barnes*, 405 U.S. 1201, 1203 (1972). The parties seeking the stay have the burden to establish that their specific circumstances justify a stay pending appeal. *Mont. Env't Info. Ctr. v. Westmoreland Rosebud Mining, LLC,* DA 22-0064, *5-6 (Mont. Sup. Ct. Aug. 9. 2022) ("*MEIC v. Westmoreland*"); *Nken v. Holder*, 556 U.S. 418, 433-34 (2009). In evaluating a motion to stay, Montana courts consider four factors: (1) whether the stay applicant has made a strong showing that it is likely to succeed on the merits; (2) whether the applicant will be irreparably injured absent a stay; (3) whether issuance of the stay will substantially injure the other parties interested in the proceeding; and (4) where the public interest lies. *MEIC v. Westmoreland*, *5 (citing *Hilton v. Braunskill*, 481 U.S. 770 (1987)). A stay of proceedings is "an exercise of judicial discretion and the propriety of its issue is dependent upon the circumstances of the particular case." *Nken*, 556 U.S. at 433 (quotes, citations omitted).

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DISCUSSION

Motion for Clarification

This case has been accepted for interlocutory appeal by the Montana Supreme Court and, therefore, the district court does not have jurisdiction to decide the motion for clarification. *Lewistown Propane Co. v. Moncur*, 2003 MT 368, ¶ 12, 319 Mont. 105, 82 P.3d 896 (once a notice of appeal is filed, the district court no longer has jurisdiction over the parties or the cause of action and cannot hear or rule on pending motions). Should any clarification of the August 14 Order be required, the appropriate time would be after the Supreme Court issues a final judgment. *Meine v. Hren Ranches, Inc.,* 2020 MT 284, 402 Mont. 92, 475 P.3d 748. Because this court does not have jurisdiction, Defendants' motion for clarification is DENIED.

I. Defendants' motion for stay.

A. Whether Defendants have made a strong showing they are likely to succeed on the merits.

Defendants do not identify errors in the August 14 Order. Therefore, Defendants fail to establish they are likely to succeed on the merits of their appeal. Defendants' argument that they are likely to succeed on the merits of their appeal if this Court ordered Defendants to prepare and implement a remedial climate recovery plan is not relevant because this Court did not order such relief. The Order declared statutes unconstitutional, and enjoined Defendants from following the unconstitutional statutes. This complies with the judiciary's duty to secure the constitutional rights of Montana's citizens. *Mitchell v. Town of W. Yellowstone*, 235 Mont. 104, 110, 765 P.2d 745, 748 (1988) ("The first business of courts is to provide a forum in which the constitutional rights of all citizens may be protected."); *Marbury v. Madison,* 5 U.S. (1 Cranch) 137, 177 (1803) ("It is emphatically the province and the duty of the judicial department to say what the law is."); *see also* Doc. 217.

Because Defendants' fail to identify errors in the Court's orders, they have not satisfied their burden to establish they are likely to succeed on the merits of the appeal. This factor weighs in favor of denying the motion for a stay pending appeal.

B. Whether Defendants will be irreparably harmed absent a stay.

Defendants have the burden to demonstrate they will be irreparably harmed absent a stay pending appeal. *MEIC v. Westmoreland*, *5-6. However, a stay is "not a matter of right, even if irreparable injury might otherwise result to the appellant." *Nken*, 556 U.S. at 427. Defendants allege their irreparable injuries would result from "[r]ushing to implement a process for analyzing GHG emissions" and argue that their own conduct to rush the regulatory review "process" would cause regulatory confusion, uncertainty, and potential liability for DEQ. Doc. 423 at 9. Defendants' allegations of harm do not meet their burden to prove irreparable harm absent a stay pending appeal.

The August 14 Order does not prevent DEQ from carrying out its statutory functions, including performing environmental analyses on permit applications and deciding whether to issue permits. It requires that these statutory functions are carried out in a constitutional manner. There is no evidence before the Court that analyzing GHG emissions and climate change impacts in environmental reviews, which Defendants argue could potentially lead to not issuing permits for fossil fuel activities, will cause *irreparable* harm to any Defendants. The uncontested evidence at trial established that a transition to renewable energy will help Montana's environment, improve the health of its citizens (especially Montana's children), and save Montana energy consumers money. Doc. 405. Defendants had the opportunity to dispute this evidence at trial, but they did not.

The trial record, which was subject to cross-examination, was compelling and convincing. Defendants belatedly attempt to introduce new material from a person unqualified to opine on the

details of a renewable energy transition in Montana. *See* Nowakowski Decl. ¶ 44; Tr. 1343:23-1345:7 (Nowakowski describing her expertise in law and policy work, not technical). There is no evidence to support Defendants' allegations that, if considering GHG emissions and climate impacts during MEPA reviews resulted in DEQ not permitting new fossil fuel projects, the failure to approve these permits would undermine Montana's energy system, increase costs to consumers, compromise grid reliability, or cause any other irreparable harms to Defendants. The evidence weighs heavily in favor of Plaintiffs.

Additionally, there is no evidence before the Court that MEPA reviews that consider GHG emissions and climate change impacts in environmental reviews will cause *irreparable* harm to any party in this case. *MTSUN, LLC v. Mont. Dep't of Pub. Serv. Regul.,* DA 19-0363, *3 (Mont. Sup. Ct. Aug. 6, 2019) (affirming district court denial of stay and finding that Defendant NorthWestern Energy would not suffer any harm because any increased costs incurred absent a stay would be passed on to consumers). The alleged harms here are readily distinguishable from those alleged in the cases cited by Defendants: *MEIC v. Westmoreland*, DA 22-0064, *7-8 (Mont. Sup. Ct. Aug. 9. 2022) and *Vote Solar v. Montana Dep't of Pub. Serv. Regul.,* DA 19-0223, *2-3 (Mont. Sup. Ct. Aug. 6, 2019). In *MEIC* and *Vote Solar*, there were private corporation defendants alleging irreparable financial injuries, but here there are no private corporations, or government Defendants, alleging any financial injuries. Defendants present no evidence as to how *they* will be irreparably injured if they could not issue new permits for fossil fuel activities after considering GHG emissions and corresponding climate impacts in MEPA reviews.

Defendants' concerns about potential liability are tenuous and speculative, but, even if accepted as true, do not arise to the level of irreparable harms. It is well established that actualized litigation burdens do not constitute irreparable harm. *See, e.g.*, *Renegotiation Bd. v. Bannercraft*

Clothing Co., 415 U.S. 1, 24 (1974) ("Mere litigation expense, even substantial and unrecoupable cost, does not constitute irreparable injury."); *F.T.C. v. Standard Oil Co. of Cal.*, 449 U.S. 232, 244 (1980) (Defendants' "expense and disruption of defending itself in protracted adjudicatory proceedings" did not constitute irreparable harm). Defendants' hypothetical litigation burdens do not constitute irreparable harm.

Similarly, Defendants' concerns about increased administrative burdens do not constitute irreparable harm. Any additional resources required by Defendants to comply with their statutory and constitutional obligations are part of their obligation to comply with the law, including Montana's Constitution. *N. Plains Res. Council v. U.S. Army Corps of Engineers*, 460 F. Supp. 3d 1030, 1045 (D. Mont. 2020) (administrative burdens do not constitute irreparable harm); *Rodriguez v. Robbins*, 715 F.3d 1127, 1146 (9th Cir. 2013) (even if the government faced severe logistical difficulties in implementing the order, that would merely represent the burden of complying with statutory and constitutional obligations); *Hernandez v. Sessions*, 872 F.3d 976, 1000 (9th Cir. 2017) (irreparable harm caused by "a likely unconstitutional process far outweighs the minimal administrative burdens to the government of complying with the injunction while this case proceeds").

Finally, Defendants previously analyzed GHG emissions and climate impacts in MEPA reviews. DEQ's declarant admitted at trial that DEQ could do such reviews again if it had authority to do so. Tr. 1437:4-6, 7-8. Additionally, Plaintiffs' expert Anne Hedges testified that Defendants would be capable of considering greenhouse gas emissions and the climate impacts of proposed fossil fuel projects. Tr. 821:16-20. Based on the trial record, the Court held: "Undisputed testimony established that Defendants could evaluate 'greenhouse gas emissions and corresponding impacts

to the climate in the state or beyond the state's borders' when evaluating fossil fuel activities. Indeed, Defendants have performed such evaluations in the past." Doc. 405.

Defendants never argued at trial that they would suffer any harms if the challenged statutes were declared unconstitutional and Defendants were enjoined from acting in accordance with the unconstitutional statutes. Their alleged harms are raised for the first time in their stay brief. Defendants have not met their burden to establish they will suffer any irreparable harms absent a stay pending appeal. This factor weighs in favor of denying the motion for a stay of judgment pending appeal.

C. Whether Plaintiffs will be substantially injured by a stay

The Court has already found that the youth Plaintiffs are experiencing injuries, including injuries to their physical and mental health, damage to their home and property, lost income and economic security, reduced recreational opportunities, and harm to tribal and cultural traditions, among others. Doc. 405. Additionally, the Court found:

> FF #92. "Every ton of fossil fuel emissions contributes to global warming and impacts to the climate and thus increases the exposure of Youth Plaintiffs to harms now and additional harms in the future."
>
> FF # 98. "According to the Intergovernmental Panel on Climate Change (IPCC) . . . 'There is a rapidly closing window of opportunity to secure a liveable and sustainable future for all (*very high confidence*) . . .. The choices and actions implemented in this decade will have impacts now and for thousands of years (*high confidence*).'"
>
> FF #139. "Actions taken by the State to prevent further contributions to climate change will have significant health benefits to Plaintiffs."
>
> FF # 193. "The science is clear that there are catastrophic harms to the natural environment of Montana and Plaintiffs and future generations of the State due to anthropogenic climate change. The degradation to Montana's environment, and the resulting harm to Plaintiffs, will worsen if the State continues ignoring GHG emissions and climate change."

> FF # 194. "The unrefuted testimony established that Plaintiffs have been and will continue to be harmed by the State's disregard of GHG pollution and climate change pursuant to the MEPA Limitation."

Doc. 405 (citations to the record omitted).

Plaintiffs are already experiencing substantial injuries and infringement of their constitutional rights. These injuries and constitutional violations will be exacerbated if Defendants continue to ignore climate change and GHG emissions in MEPA reviews. The infringement of constitutional rights constitutes irreparable harm. *Driscoll v. Stapleton*, 2020 MT 247, ¶ 15, 401 Mont. 405, 473 P.3d 386 ("the loss of a constitutional right constitutes an irreparable injury"); *Mont. Democratic Party v. Jacobsen*, 2022 MT 184, ¶ 38, 410 Mont. 114, 518 P.3d 58 (same). Depletion or degradation of the environment and natural resources also constitutes irreparable harm. *Amoco Prod. Co. v. Vill. of Gambell*, 480 U.S. 531, 545 (1987).

The balance of equities weighs in favor of denying Defendants' motion for a stay.

D. Where the public interest lies.

The public's interest is best served when Montana's Constitution is followed and when constitutional rights are protected. *Mont. Wilderness Ass'n v. Fry*, 408 F. Supp. 2d 1032, 1038 (D. Mont. 2006). The public interest lies in protecting Montana's clean and healthful environment and in protecting the constitutional rights of all Montanans, especially the youth. *Mont. Env't Info. Ctr. v. Westmoreland Rosebud Mining, LLC,* DA 22-0064, *9 (Mont. Sup. Ct. Aug. 9. 2022); *see also* Mont. Const. art. II, §§ 3, 4, 15, 17; art. IX, §§ 1, 3. The public also has an interest in having access to reliable, safe, and clean energy sources. *MEIC v. Westmoreland*, *9. Defendants argue that, absent a stay, there could be regulatory disruptions that could affect the energy industry and could prevent DEQ from issuing new coal mining permits or permits for gas generating plants, which could increase costs to Montana energy consumers. There was no evidence at trial and there is no

evidence in support of this motion that there would be any disruption to the public's access to reliable and affordable energy if a stay is denied.

Because there is no evidence that the public interest would be harmed, Defendants have failed to meet their burden to show that the public interest weighs in favor of granting a stay. This factor weighs in favor of denying Defendants' motion for a stay of judgment pending appeal.

For the foregoing reasons, it is ORDERED:

1. Defendants' motion for clarification is DENIED.

2. Defendants' motion for stay of judgment pending appeal is DENIED.

ELECTRONICALLY SIGNED AND DATED BELOW.

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Hon. Judge Kathy Seeley
Tue, Nov 21 2023 03:18:24 PM

Findings of Fact, Conclusions of Law, and Order
August 14, 2023 (Doc. 405)

MONTANA FIRST JUDICIAL DISTRICT COURT
LEWIS AND CLARK COUNTY

RIKKI HELD, et al., Plaintiff, v. STATE OF MONTANA, et al., Defendant.	Cause No. CDV-2020-307 **FINDINGS OF FACT, CONCLUSIONS OF LAW, AND ORDER**

PROCEDURAL HISTORY

On March 13, 2020, sixteen Montana youth (collectively Plaintiffs or Youth Plaintiffs) filed a Complaint for Declaratory and Injunctive Relief (Doc. 1) against the State of Montana, the Governor, Montana Department of Environmental Quality, Montana Department of Natural Resources and Conservation, Montana Department of Transportation, and Montana Public Service Commission (collectively Defendants or State). Plaintiffs' Complaint challenged the constitutionality of the State's fossil fuel-based state energy system, which they allege causes and contributes to climate change in violation

of their constitutional rights guaranteed under Article II, Section 3; Article II, Section 4; Article II, Section 15; Article II, Section 17; Article IX, Section 1; Article IX, Section 3 of the Montana Constitution; and the Public Trust Doctrine. (Doc. 1 ¶¶ 3-4).

Specifically, the Complaint challenged the constitutionality of fossil fuel-based provisions of Montana's State Energy Policy Act, Mont. Code Ann. § 90-4-1001(1)(c)-(g); a provision of the Montana Environmental Policy Act (MEPA), Mont. Code Ann. § 75-1-201(2)(a) (MEPA Limitation), which forbids the State and its agents from considering the impacts of greenhouse gas (GHG) emissions or climate change in their environmental reviews; and the aggregate acts the State has taken to implement and perpetuate a fossil fuel-based energy system pursuant to these two statutory provisions. (Doc. 1 ¶¶ 4, 105, 108, 118).

Youth Plaintiffs asked the Court for a declaration of law concerning their constitutional rights; a declaration of law that the fossil fuel-based provisions of Montana's State Energy Policy, Mont. Code Ann. § 90-4-1001(1)(c)-(g), are unconstitutional; a declaration of law that the MEPA Limitation is unconstitutional; and a declaration of law that Defendants' past and ongoing affirmative aggregate actions to implement a fossil fuel-based energy system—carried out in furtherance of the State Energy Policy and perpetuated through the MEPA Limitation—are unconstitutional. (Doc. 1, Requests for Relief # 1-5). The Complaint further requested injunctive relief to enjoin Defendants from subjecting Plaintiffs to the fossil fuel-based State Energy Policy, Mont. Code Ann. § 90-4-1001(1)(c)-(g), the MEPA Limitation, and aggregate acts; order Defendants to prepare a statewide GHG accounting; order

Defendants to develop a remedial plan to reduce statewide GHG emissions; retain jurisdiction until Defendants have fully complied with the Court's orders; and, if necessary, appoint a special master to review the remedial plan for efficacy. (Doc. 1, Requests for Relief # 6-9). Plaintiffs also requested an order awarding Youth Plaintiffs their reasonable attorneys' fees and costs, and any such further or alternative relief as the Court deems just and equitable. (Doc. 1, Requests for Relief # 10-11).

On April 24, 2020, Defendants filed a motion to dismiss pursuant to Mont. R. Civ. P. 12(b)(1), 12(b)(6), and 12(h)(3). (Doc. 11). After briefing and oral argument, the Court issued an Order on Motion to Dismiss on August 4, 2021, (Doc. 46), partially granting and partially denying Defendants' motion to dismiss.

The Court found that Plaintiffs' requests for the Court to order Defendants to develop a remedial plan, to retain jurisdiction over the matter until Defendants complied with the remedial plan, and, if necessary, appoint a special master to assist the Court in reviewing the remedial plan exceeded the Court's authority under the political question doctrine. (Doc. 46 at 21). Nevertheless, the Court held that prudential standing considerations did not merit dismissal because the Court "may grant declaratory relief regardless of injunctive relief. The court possesses the authority to grant declaratory or injunctive relief, or both." (Doc. 46 at 22).

Finally, the Court declined to dismiss Plaintiffs' challenge to MEPA for want of administrative exhaustion, finding that "Youth Plaintiffs properly brought this action in district court rather than through the administrative review process." (Doc. 46 at 24). The Order granted Defendants'

motion with respect to Plaintiffs' Requests for Relief # 6, 7, 8, and 9, and denied Defendants' motion with respect to Plaintiffs' Requests for Relief # 1, 2, 3, 4, and 5.

Defendants filed their Answer on September 17, 2021, (Doc. 53), denying virtually all allegations in the Complaint and raising several affirmative defenses.

Pursuant to the December 27, 2021, Scheduling Order (Doc. 61), the parties engaged in discovery throughout 2022.

On May 6, 2022, Defendants filed a Motion for Clarification of Order on State's Motion to Dismiss pursuant to Rule 60(a), Mont. R. Civ. P. (Doc. 84), seeking clarification on whether Plaintiffs' Request for Relief # 5 had been dismissed by the August 04, 2021, Order on Motion to Dismiss. Plaintiffs filed a Response in Opposition on May 20, 2022. (Doc. 102).

On June 10, 2022, Defendants filed a Petition for Writ of Supervisory Control (OP 22-0315), requesting the Montana Supreme Court exercise supervisory control and "dismiss Request for Relief 5 from this case." On June 14, 2022, the Supreme Court denied the Petition. (OP 22-0315).

On June 15, 2022, the Court issued an Order Partially Granting Defendants' Motion to Modify Scheduling Order and Setting Scheduling Conference. (Doc. 145) (Modified Scheduling Order). The Modified Scheduling Order governed the timeline thereafter. Pursuant to the Modified Scheduling Order, the parties engaged in discovery through January 9, 2023 — including disclosing expert witnesses (Docs. 222, 227), rebuttal expert witnesses (Docs. 240, 242), and conducting dozens of depositions.

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On June 30, 2022, the Court issued an Order on Defendants' Rule 60(a) Motion for Clarification (Doc. 158), clarifying that "requests for injunctive relief contained in the complaint were dismissed, except for Request for Relief 5." (Doc. 158 at 3).

On July 19, 2022, Defendants filed a Motion for Independent Medical Examination, or, in the Alternative, Motion to Strike Opinions and Testimony of Plaintiffs' Expert Dr. Lise Van Susteren Pursuant to Rule 35(a), Mont. R. Civ. P. (Doc. 163), alleging that Plaintiffs' allegations of mental health impacts as a result of climate change had placed their mental health at issue. (Doc. 163 at 2). On October 14, 2022, the Court issued an Order denying Defendants' motion (Doc. 225), ruling that IMEs were unwarranted because "Plaintiffs have not placed their mental health at the center of this case, nor is it really and genuinely in controversy," (Doc. 225 at 6), and because "Defendants have not established good cause for the requested examinations." (Doc. 225 at 7).

On July 20, 2022, Defendants filed a Second Motion for Clarification of Order on State's Motion to Dismiss pursuant to Rule 60(a), Mont. R. Civ. P. (Doc. 167). Defendants' second motion for clarification sought clarification from the Court as to why Plaintiffs' Requests for Relief # 1, 2, 3, 4, and 5 "don't violate the political question doctrine." (Doc. 167 at 3). On September 22, 2022, the Court issued an Order (Doc. 217), denying Defendants' Second Rule 60(a) Motion for Clarification of Order on State's Motion to Dismiss.

On September 30, 2022, pursuant to the Modified Scheduling Order, Plaintiffs disclosed their expert witnesses and expert disclosures. (Doc. 222). On October 31, 2022, Defendants disclosed their expert witnesses and

expert disclosures. (Doc. 227). On November 30, 2022, the parties exchanged rebuttal expert disclosures. (Docs. 239, 242).

Discovery closed on January 9, 2023. Between the parties, discovery included the completion of thirty-six depositions, the exchange of twenty-two expert reports, the exchange of over 50,000 pages of documents, and responses to dozens of interrogatories.

On February 1, 2023, Plaintiffs and Defendants file motions *in limine*. Plaintiffs filed seven motions *in limine* (Docs. 260, 262, 264, 266, 268, 270, 272) and Defendants filed seven motions *in limine* (Docs. 284, 286, 288).

On February 1, 2023, Defendants filed a Motion for Summary Judgment pursuant to Mont. R. Civ. P. 56. (Doc. 290). On February 14, 2023, Plaintiffs filed a response brief opposing summary judgment. (Doc. 299). Plaintiffs filed sixteen declarations from Plaintiffs, experts, and counsel in support of their response brief. (Docs. 300-315). On February 28, 2023, Defendants filed a reply. (Doc. 332).

On March 16, 2023, Governor Greg Gianforte signed House Bill 170 into law, repealing the Montana State Energy Policy, Mont. Code Ann. § 90-4-1001.

On March 31, 2023, Defendants filed a Motion to Partially Dismiss for Mootness pursuant to Mont. R. Civ. P. 12(b)(1), 12(b)(6), and 12(h)(3). (Doc. 339). Defendants moved to dismiss Plaintiffs' claims premised on the Montana State Energy Policy Act, Mont. Code Ann. § 90-4-1001, on the ground that the repeal of Mont. Code Ann. § 90-4-1001 (HB 170) mooted claims concerning the statute.

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On April 14, 2023, Plaintiffs filed a Response Brief in Opposition to Defendants' Motion to Partially Dismiss for Mootness. (Doc. 354). Plaintiffs filed nine declarations from experts in support of their response. (Docs. 355-363).

On April 26, 2023, unable to reach agreement on a joint proposed Pre-Trial Order, the parties submitted separate proposed pre-trial orders. (Docs. 366, 367). On April 27, 2023, a Final Pre-Trial Conference was held with the Court.

In response to Judge Moses' April 6, 2023, Order on Summary Judgment in *MEIC, et al. v. DEQ, et al.*, Yellowstone County Cause No. DV-56-2021-1307, the Montana Legislature adopted House Bill 971, an amendment to clarify the MEPA Limitation. On May 10, 2023, Governor Greg Gianforte signed into law HB 971, which clarified Mont. Code Ann. § 75-1-201(2)(a). The clarifications in HB 971 explicitly prohibit Montana's agencies from considering "an evaluation of greenhouse gas emissions and corresponding impacts to the climate in the state or beyond the state's borders" in their MEPA reviews.

On May 12, 2023, the Court heard oral argument on Defendants' Motions for Summary Judgment, Motion to Partially Dismiss for Mootness, and Motion to Stay Proceedings.

On May 18, 2023, Defendants filed a Motion to Dismiss MEPA Claims based on the enactment of HB 971. (Doc. 376). On June 1, 2023, Plaintiffs filed a response brief opposing Defendant's motion to dismiss the claims. (Doc. 382). Defendants filed a reply and request for oral argument on June 9, 2023. (Doc. 385).

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On May 19, 2023, Governor Gianforte signed into law Senate Bill 557, amending several provisions of MEPA, Mont. Code Ann. § 75-1-201.

On May 23, 2023, the Court issued an Order on Defendants' Motions to Partially Dismiss for Mootness and For Summary Judgment. (Doc. 379). As to Defendants' Motion to Partially Dismiss for Mootness (Doc. 343), the Court granted Defendants' motion and dismissed without prejudice Plaintiffs' claims involving the State Energy Policy and Defendants' aggregate acts taken pursuant to and in furtherance of the State Energy Policy on redressability and prudential standing grounds. (Doc. 379 at 3-4). The Court denied Defendants' motion for summary judgment and allowed Plaintiffs' MEPA claims to proceed to trial. (Doc. 379 at 20-26).

On June 1, 2023, the Court issued an order on the remaining motions *in limine*. (Doc. 381). The Court granted Plaintiffs' motion # 2; granted in part and denied in part Plaintiffs' motions # 3 and 5; and denied Plaintiffs' motions # 4, 6, and 7. The Court granted Defendants' motions # 1, 4, 5, 6, 7; and denied Defendants' motions # 2 and 3.

On June 2, 2023, Defendants filed an Emergency Petition for Writ of Supervisory Control with the Montana Supreme Court (OP 23-0311), requesting again that the Supreme Court exercise supervisory control and reverse this Court's denial of the State's motion for summary judgment. The State also asked the Supreme Court to stay the trial set to begin June 12, 2023.

On June 6, 2023, the Montana Supreme Court denied the Emergency Petition for Writ of Supervisory Control. (OP 23-0311). The Supreme Court observed that Defendants had "not demonstrated that HB 971's

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amendments alter the allegations the Plaintiffs make in the Complaint" concerning the MEPA provision. (OP 23-0311 at 3).

On June 7, 2023, this Court entered the Final Pre-Trial Order governing this proceeding. (Doc. 384). In addition to "supersed[ing] the pleadings as to the remaining issues and govern[ing] the course of the trial of this case," (Doc. 384 at 38), the Court's Final Pre-Trial Order denied Defendants' Motion to Dismiss MEPA Claims (Doc. 376). (Doc. 384 at 38).

Trial began June 12, 2023, and ended on June 20, 2023.

On June 19, 2023, while trial was proceeding, Defendants filed a Bench Memorandum on the Constitutional and Procedural Limits of the Montana Environmental Policy Act. (Doc. 396). On June 25, 2023, Plaintiffs filed a response (Doc. 402). This briefing discussed in detail SB 557.

FINDINGS OF FACT[1]

The Findings of Fact and Conclusions of Law are based on the evidence and arguments presented at trial. The Court heard live testimony from twenty-seven witnesses. Plaintiffs presented testimony from twenty-four witnesses and Defendants presented testimony from three witnesses. The Court admitted one hundred sixty-eight of Plaintiffs' exhibits and four of Defendants' exhibits.

I. PARTIES

A. Plaintiffs

1. Plaintiffs are youth citizens of Montana. When the Complaint was filed in March 2020, Plaintiffs were from two to eighteen years old. They are now between five and twenty-two years old.

[1] Citations to the trial transcript, exhibits, and demonstrative slides are in brackets and identified by witness using their initials. For example, "SR-14", refers to Steven Running demonstrative slide 14.

2. Plaintiffs are Rikki Held, Lander Busse, Sariel Sandoval, Kian Tanner, Georgianna Fischer, Kathryn Grace Gibson-Snyder, Olivia Vesovich, Claire Vlases, Taleah Hernández, Badge B., by and through his guardian Sara Busse, Eva L., by and through her guardian Mark Lighthiser, Mica K., by and through his guardian Rachel Kantor, Jeffrey K., by and through his guardian Laura King; Nathaniel K., by and through his guardian Laura King, Ruby D., by and through her guardian Shane Doyle, and Lilian D., by and through her guardian Shane Doyle.

3. Rikki Held is from Broadus, Montana, was eighteen years old when this case was filed, and is currently twenty-two years old.

4. Lander Busse is from Kalispell, Montana, was fifteen years old when this case was filed, and is currently eighteen years old.

5. Sariel Sandoval is from Ronan, Montana, and lives on the Flathead Indian Reservation. She was seventeen years old when this case was filed and is currently twenty years old.

6. Kian Tanner is from Bigfork, Montana, was fourteen years old when this case was filed, and is currently eighteen years old.

7. Georgianna Fischer is from Bozeman, Montana, was seventeen years old when this case was filed, and is currently twenty-one years old.

8. Kathryn Grace Gibson-Snyder is from Missoula, Montana, was sixteen years old when this case was filed, and is currently nineteen years old.

9. Olivia Vesovich is from Missoula, Montana, was sixteen years old when this case was filed, and is currently twenty years old.

10. Claire Vlases is from Bozeman, Montana, was seventeen years old when this case was filed, and is currently twenty years old.

11. Taleah Hernández is from Polson, Montana, was sixteen years old when this case was filed, and is currently nineteen years old.

12. Badge B. is from Kalispell, Montana, was twelve years old when this case was filed, and is currently fifteen years old.

13. Eva L. is from Livingston, Montana, was fourteen years old when this case was filed, and is currently seventeen years old.

14. Mica K. is from Missoula, Montana, was eleven years old when this case was filed, and is currently fifteen years old.

15. Jeffrey K. is from Montana City, Montana, was six years old when this case was filed, and is currently nine years old.

16. Nathaniel K. is from Montana City, Montana, was two years old when this case was filed, and is currently five years old.

17. Ruby D. is from Bozeman, Montana, was twelve years old when this case was filed, and is currently fifteen years old.

18. Lilian D. is from Bozeman, Montana, was nine years old when this case was filed, and is currently twelve years old.

B. Defendants

19. Defendants are the State of Montana, Governor Greg Gianforte, Montana Department of Environmental Quality, Montana Department of Natural Resources and Conservation, Montana Department of Transportation, and Montana Public Service Commission.

20. The State of Montana is a governmental entity.

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21. Greg Gianforte is the current Governor of Montana. He is sued in his official capacity.

22. As Governor, Governor Gianforte is charged with seeing that the State's laws are faithfully executed, including the Constitution. Mont. Const. Art. VI, Sec. 4.

23. Governor Gianforte has supervisory authority over the principal departments of the executive branch.

24. Governor Gianforte holds cabinet meetings, communicates with other state officers, oversees budget expenditures, and has authority to issue executive orders. [Def. Answer, Doc. 11 ¶ 84].

25. Defendant Montana Department of Environmental Quality (DEQ) is a department of the State of Montana.

26. DEQ is the primary administrator of Montana's environmental regulatory, environmental cleanup, environmental monitoring, pollution prevention, and energy conservation laws. [Def. Answer, Doc. 11 ¶ 88].

27. DEQ is mandated to ensure that projects and activities for which it issues permits, licenses, authorizations, or other approvals comply with Montana's environmental laws and rules (including MEPA) to maintain and improve Montana's natural environment. [Agreed Facts, Final PTO, Doc. 384 at 2; Def. Answer, Doc. 11 ¶ 88].

28. DEQ is mandated to comply with the Montana Constitution and state law. [CD 1308:6-12].

29. DEQ issues air quality permits for applications that demonstrate compliance with all applicable requirements of the Federal and/or Montana Clean Air Act and their implementing rules, including but not limited to

coal and natural gas-powered energy plants, coal mining operations, and oil and gas refineries. [Agreed Facts, Final PTO, Doc. 384 at 2; Def. Answer, Doc. 11 ¶ 90].

30. DEQ prepares environmental review documents under MEPA, including for projects related to fossil fuels, such as natural resource extraction and power generating facilities. [CD 1313:21-1315:13].

31. DEQ has authority to certify certain pipelines that meet the definition provided in the Major Facility Siting Act, § 75-20-104(9)(b), MCA, and that comply with the requirements of the Major Facility Siting Act. [Agreed Facts, Final PTO, Doc. 384 at 2; Def. Answer, Doc. 11 ¶ 91].

32. DEQ permits coal mining for applications which meet the requirements set forth in Titles 82 (Minerals, Oil, and Gas) and 75 (Environmental Protection). DEQ has issued permits for surface coal mining in Montana on state, private, and federal land. [Agreed Facts, Final PTO, Doc. 384 at 2; Def. Answer, Doc. 11 ¶ 92].

33. Pursuant to its statutory authority, DEQ has discretion to deny and revoke permits. [SN 1392:24-1393:6].

34. Since 2011, pursuant to the MEPA Limitation, DEQ has not analyzed in its environmental review documents the cumulative impacts of the permits it issues on GHG emissions or climate change. [AH 846:1-3, 818:11-819:10].

35. Defendant Montana Department of Natural Resources and Conservation (DNRC) is a department of the State of Montana.

36. DNRC prepares environmental review documents under MEPA. [Shawn Thomas Perpetuation Deposition, 42:1-16].

37. DNRC manages the resources of the state trust lands through the State Board of Land Commissioners (Land Board). [Agreed Facts, Final PTO, Doc. 384 at 2; Def. Answer, Doc. 11 ¶ 95].

38. DNRC regulates, permits, and authorizes activities that result in GHG emissions in Montana. [Agreed Facts, Final PTO, Doc. 384 at 2].

39. DNRC issues leases, permits, and licenses for uses of lands under its jurisdiction, including licenses for exploration and leases for production and extraction of oil and gas in Montana and permits for drilling. [Agreed Facts, Final PTO, Doc. 384 at 2].

40. DNRC has exercised its authority to grant easements for the operational rights-of-way for interstate pipelines, with the approval of the Land Board, and issues land use licenses for the construction of rights-of-way and other activities on state lands and waterways for the construction and operation of interstate pipelines, which are used to transport fossil fuels. [Agreed Facts, Final PTO, Doc. 384 at 2; Def. Answer, Doc. 11 ¶ 95].

41. DNRC, through its Forestry Division, is responsible for planning and implementing forestry and fire management programs, as well as authorizing and permitting commercial timber sales on trust lands. [Agreed Facts, Final PTO, Doc. 384 at 3; Def. Answer, Doc. 11 ¶ 97].

42. Defendant Montana Department of Transportation (MDT) is a department of the State of Montana.

43. MDT is responsible for state planning in the transportation sector and is charged with collecting and enforcing fuel taxes. [Agreed Facts, Final PTO, Doc. 384 at 3].

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44. Defendant Montana Public Service Commission (PSC) is a governmental entity.

45. PSC regulates, supervises, and controls public utilities, common carriers, railroads, and pipelines. [Agreed Facts, Final PTO, Doc. 384 at 3].

46. PSC sets standard-offer contracts for qualifying facilities and utility rates. [Agreed Facts, Final PTO, Doc. 384 at 3].

47. PSC is responsible for the safety of interstate pipelines, including crude oil or petroleum products that operate within or through Montana. [Agreed Facts, Final PTO, Doc. 384 at 3].

48. Defendants' performance of their respective governmental functions has resulted in the extraction, transportation, and consumption of fossil fuels. [Agreed Facts, Final PTO, Doc. 384 at 3].

49. The extraction, transportation, and consumption of fossil fuels results in GHG emissions. [Agreed Facts, Final PTO, Doc. 384 at 3].

50. Defendants authorize the operation of coal-fired powerplants in Montana. [Def. Answer, Doc. 11 ¶ 118].

51. The drilling for and production of oil in Montana is authorized by Defendants. [Def. Answer, Doc. 11 ¶¶ 90, 96].

52. Montana has an abundance of energy sources, including fossil fuels yet to be extracted. [PE 944:24-946:4; PE-37].

53. The Montana Legislature enacted Mont. Code Ann. § 90-4-1001 (repealed) and the MEPA Limitation as amended. [Def. Answer, Doc. 11 ¶ 82].

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54. Montana's State Energy Policy was codified at Mont. Code Ann. § 90-4-1001. [Def. Answer, Doc. 11 ¶ 112].

55. Mont. Code Ann. § 90-4-1001 was enacted by the Montana Legislature in 1993 and amended in 2011. [Def. Answer, Doc. 11 ¶ 115].

56. The Montana Legislature repealed Mont. Code Ann. § 90-4-1001 in 2023. The Governor signed the repeal, HB 170, into law on March 16, 2023.

57. The provisions of MEPA governing environmental reviews are codified at Mont. Code Ann. § 75-1-201.

58. In 2011, the Montana Legislature amended MEPA to limit the scope of environmental reviews—enacting the MEPA Limitation, which prohibited Montana's agencies from considering in their MEPA reviews "actual or potential impacts beyond Montana's borders . . . [or] actual or potential impacts that are regional, national, or global in nature."

59. The Montana Legislature adopted amendments to clarify the MEPA Limitation in 2023. The Governor signed the clarifying legislation, HB 971, into law on May 10, 2023.

60. The MEPA limitation now provides that Montana's agencies are prohibited from considering "an evaluation of greenhouse gas emissions and corresponding impacts to the climate in the state or beyond the state's borders." Mont. Code Ann. § 75-1-201(2)(a) (enacted by HB 971, 68th Legislature (2023)).

61. The 2023 Montana Legislature amended various provisions of MEPA that pertain to legal challenges to MEPA environmental reviews.

62. SB 557 was introduced on March 27, 2023, passed by the Legislature, and signed into law by the Governor on May 19, 2023.

63. SB 557 enacted a new provision, Mont. Code Ann. § 75-1-201(6)(a)(ii), which eliminates the preventative, equitable remedies for MEPA litigants who raise GHG or climate change issues. The new subsection provides in part:

> [a]n action alleging noncompliance or inadequate compliance with a requirement of parts 1 through 3, including a challenge to an agency's decision that an environmental review is not required or a claim that the environmental review is inadequate based in whole or in part upon greenhouse gas emissions and impacts to the climate in Montana or beyond Montana's borders, cannot vacate, void, or delay a lease, permit, license, certificate, authorization, or other entitlement or authority unless the review is required by a federal agency or the United States congress amends the federal Clean Air Act to include carbon dioxide as a regulated pollutant.

Mont. Code Ann. § 75-1-201(6)(a)(ii) (enacted by SB 557, 68th Legislature (2023)).

64. Defendants cited Mont. Code Ann. § 75-1-201(6)(a)(ii) and SB 557 as foreclosing redressability in this case in their June 19, 2023, Bench Memorandum on the Constitutional and Procedural Limits of the Montana Environmental Policy Act. (Doc. 396).

II. CLIMATE SCIENCE AND PROJECTIONS.

A. Climate Science

65. Dr. Steven Running is a University Regents Professor Emeritus of Global Ecology in the College of Forestry and Conservation at the University of Montana. [SR-2]. Dr. Running currently co-chairs the standing Committee for Earth Science and Application from Space of the National Academy of Science. In 2007, Dr. Running shared the honor of the Nobel Peace Prize as a chapter Lead Author for the 4th Assessment Report of the

Intergovernmental Panel on Climate Change (IPCC). [P193]. Dr. Running provided expert testimony in the general areas of the climate system, including the energy balance and imbalance, the physics of GHG emissions that are driving climate change, the global carbon cycle, the global hydrologic cycle, how they control this energy imbalance, and then how human caused fossil fuel development is harming Montana's ecosystems and hydrology. Dr. Running is a well-qualified expert, and the Court found his testimony informative and credible.

66. Dr. Cathy Whitlock is Regents Professor Emerita of Earth Sciences and a Fellow of the Montana Institute on Ecosystems at Montana State University (MSU). Dr. Whitlock was lead author of the 2017 Montana Climate Assessment, and in 2020 co-authored a state-level Montana Climate Solutions Plan and a 2021 special report of the Montana Climate Assessment entitled Climate Change and Human Health in Montana. Dr. Whitlock was also co-lead author of the 2021 Greater Yellowstone Climate Assessment. Dr. Whitlock provided expert testimony explaining how human-caused fossil fuel development and the resulting release of CO_2 into the atmosphere are harming Montana's ecosystems, water supplies, communities, and the Plaintiffs themselves. Dr. Whitlock also discussed recent trends and future projections in temperature, precipitation, snow accumulation and snowmelt, and stream runoff in Montana and explained how they affect terrestrial ecosystems, communities, and the livelihoods of people that depend on these ecosystem services. Dr. Whitlock's testimony

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primarily focused on the effect GHG emissions in Montana. Dr. Whitlock is a well-qualified expert, and the Court found her testimony informative and credible.

67. There is overwhelming scientific consensus that Earth is warming as a direct result of human GHG emissions, primarily from the burning of fossil fuels. [SR 102:10-103:9, 125:11-22, 141:18-20; CW 257:14-25; P6, P13, P23, P34, P223, P143; SR-22].

68. Fossil fuels include coal, crude oil or its derivatives (such as gasoline or jet fuel), and natural gas. [PE 901:24-902:8].

69. While several GHGs are emitted from the burning of fossil fuels, carbon dioxide (CO_2) is the GHG most responsible for trapping excess heat within Earth's atmosphere. [SR 114:20-116:10].

70. Science is unequivocal that dangerous impacts to the climate are occurring due to human activities, primarily from the extraction and burning of fossil fuels. [SR 103:5-9; P6, P23, P34, P223, P143; SR-46, SR-47].

71. A substantial portion of every ton of CO_2 emitted by human activities persists in the atmosphere for as long as hundreds of years or millennia. As a result, CO_2 steadily accumulates in the atmosphere. [SR 166:2-10, 168:2-10; CW 279:14-20, 314:20-315:8, 318:2-5].

72. The cumulative effect of GHG emissions causes the impacts to the climate being experienced today. [SR 168:2-16]. Human activity and the burning of fossil fuels have accelerated the accumulation of CO_2 to the point that 42% of the total accumulation of CO_2 emissions has happened in the last thirty years. [SR 141:16-142:2; SR-42].

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73. It has long been understood that certain GHGs, including CO_2 and methane (CH_4), trap heat in the atmosphere, causing the Earth to warm. [SR 107:16-25]. An American, Eunice Newton Foote, was one of the first scientists to research and write about the ability of atmospheric carbon dioxide to affect solar heating in the 1850s. [SR 108:22-109:3; SR-14].

74. In 1896, Svante Arrhenius, a Swedish chemist, wrote that the practice of burning fossil fuels emitting CO_2 could one day warm the planet. [SR 108:1-8]. Arrhenius, and other early climate scientists, understood that the more CO_2 that was added to the atmosphere, the more the surface of the Earth would warm. [SR 108:8-13]. At the time of Arrhenius's work, atmospheric CO_2 levels were approximately 295 parts per million (ppm). Pre-industrial levels were approximately 280 ppm. [SR 109:22-25; SR-14].

75. In 1958, Dr. David Keeling began the modern monitoring of atmospheric CO_2 at Mauna Loa, Hawaii, a remote location not near any local CO_2 sources. [SR 111:12-21]. Keeling's data, now replicated at dozens of stations worldwide, proved that CO_2 has continued to rise every year from 1958 to the present from an initial concentration of 315-316 ppm in 1958, to an annual mean level of around 424 ppm today. [SR 112:22-113:4, 113:16-114:8]. The curve showing a long-term increase in CO_2 concentrations has become known as the "Keeling Curve." [SR 110:22-111:11, 113:20].

76. Between 1960 and 2000, CO_2 levels rose at about 2 ppm per year, but since approximately 2000, CO_2 levels are rising at about 3 ppm per year, primarily from fossil fuel emissions. [SR 117:14-20, 118:1-12, 121:9-11; SR-21].

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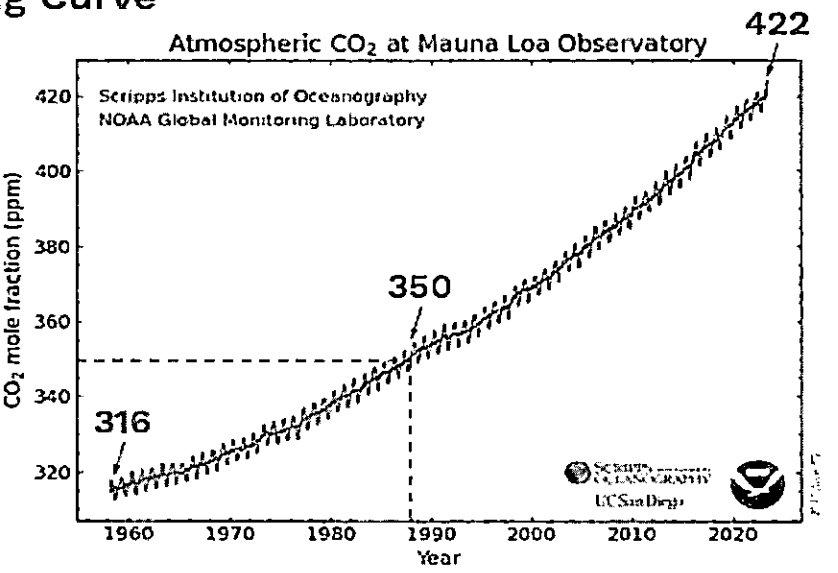
Keeling Curve



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77. CO_2 levels have fluctuated throughout history, but the rate of increase in atmospheric CO_2 is 100 times faster than in natural CO_2 fluctuations and cycles, and it is happening in a very short timeframe that is unprecedented in the geologic record. [SR 119:20-121:11; SR-19].

78. The continuous rise in atmospheric CO_2 has caused global, national, and Montana air temperatures to rise, as measured by meteorological stations. Total global temperature rise over the last 120 years is on average 2.2°F, or about 1.2°C. [SR 132:19-22; SR-38; CW 262:4-21; CW-18, CW-19, CW-20].

79. Montana is heating faster than the global average because higher latitudes are heating more quickly. [CW 263:20-264:7].

80. Montana is warming, and the rate of warming is increasing. [CW 266:15-16].

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81. The Earth has warmed by 1.3 to 2.2°F in only the last thirty-five years, as atmospheric CO_2 concentrations have risen from 350 ppm to over 420 ppm today. [SR 130:14-18; SR-35, SR-64]. It previously took 140 years for the Earth to warm by 0.9°F. [SR-35]. The Earth is heating more quickly now. 2020 was the second warmest year on record, and land areas were record warm. The ten warmest years on record have occurred since 2005, and since 1981, a new global temperature record has been set every three years. Since 1980, the Earth has not experienced a single year with below long-term average temperatures. [SE 131:20-132:10; SR-37].

82. The Earth's energy imbalance (the difference in energy from sun arriving at the Earth and the amount radiated back to space) is what climate scientists describe as the most critical metric for determining the amount of global heating and climate change we have already experienced and will experience as long as the Earth's energy imbalance exists. [SR 122:1-15, 129:17-20; SR-34]. Scientists measure and calculate how much extra energy, or heat, is being retained in Earth's systems, like oceans, ice, air, and land surface, compared to what Earth's natural balance would be if more heat escaped our atmosphere. [SR 122:1-15, 129:21-130:4].

83. The Earth's energy imbalance is currently significant and is due to accumulation of energy within Earth's oceans, ice, land, and air, with the energy measured in joules and the rate of additional energy measured in watts per square meter. [SR 124:14-125:18]. A watt is the addition of one joule of energy in one second, which is then averaged by the area of the Earth to yield watts per square meter. From 1971 to 2018, the Earth gained about 360 zeta joules of heat (a zeta is a unit with 21 zeros; a trillion has 12 zeros). [SR-29]. Adding this much

energy over forty-eight years yields an energy imbalance of about 0.5 W m^{-2}. However, the rate of energy addition has continued to increase due to increasing GHG emissions and the Earth's energy imbalance for 2010 to 2018 is about 0.9 W m^{-2}. [SR 122:14-24; SR-29; P79].

84. 358 zeta joules are enough energy to bring Flathead Lake to boil 40,000 times over. [SR 125:3-6; SR-30].

85. As long as there is an energy imbalance, the Earth will continue to heat, ice will continue to melt, and weather patterns will become more extreme. [SR 127:7-22, 131:9-15, 137:6-9, 149:2-14]. If more GHGs are added to the atmosphere and more incoming energy received from the sun is trapped as thermal energy, the Earth's climate system will continue to heat up. [SR 125:7-22].

86. The scientific consensus is that CO_2 from fossil fuel pollution is the primary driver of Earth's energy imbalance. [SR 117:21-118:12; 125:11-22]. Due to the buildup of CO_2 from about 280 ppm to 419 ppm in the last 140 years (and to a lesser extent other GHGs), more solar energy is now retained on Earth and less energy is released back to space. [SR 130:8-14; P20, P22, P79; SR-14].

87. The buildup of CO_2 and the current Earth energy imbalance is due to anthropogenic changes in the environment, not natural variability. [SR 103:5-9, 121:7-11].

88. Approximately 89% of annual anthropogenic CO_2 emissions, or 35 gigatons of CO_2, is attributable to burning fossil fuels. [SR 115:9-17; SR-20]. Approximately 11% of annual anthropogenic CO_2 is from land use change, which includes wildfires, agricultural burning, and deforestation.

[SR 115:18-22, 116:7-15; SR-20]. This means that fossil fuel use is around 10 times as large as other sources of emissions due to human management. [SR 115:15-21]. In terms of the CO_2 humans emit each year, approximately 48% of these emissions end up in the atmosphere, 29% are absorbed in back up in the biosphere, and 26% are absorbed by the oceans. [SR 115:7-117:10; SR-20].

89. Until atmospheric GHG concentrations are reduced, extreme weather events and other climactic events such as droughts and heatwaves will occur more frequently and in greater magnitude, and Plaintiffs will be unable to live clean and healthy lives in Montana. [SR 128:22-129:5, 131:5-15, 149:2-150:7; SR-45; LVS-44].

90. There is scientific certainty that if fossil fuel emissions continue, the Earth will continue to warm. [SR 106:15-18, 168:20-24; SR-46, SR-47].

91. Each additional ton of GHGs emitted into the atmosphere exacerbates impacts to the climate. [SR 106:15-18, 188:3-6; CW 279:14-20, 314:20-315:8, 318:2; P143].

92. Every ton of fossil fuel emissions contributes to global warming and impacts to the climate and thus increases the exposure of Youth Plaintiffs to harms now and additional harms in the future. [SR 168:17-169:7; CW 279:14-20, 314:20-315:8, 318:2-5; PE-40].

B. Climate Change Projections.

93. Computer models used by scientists are an important tool for predicting climate change and are reasonably relied upon by members of the scientific community. [SR 90:23-91:9].

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94. Projections indicate atmospheric CO_2 and other GHGs will increase the severity of all impacts to the climate for the foreseeable future, absent drastic reduction in fossil fuel use and the resulting GHG emissions. [SR 106:1-18, 169:22-170:10, 170:16-22; CW 269:14-18; SR-46, SR-47].

95. There is a strong scientific consensus that as GHG emissions continue to increase, impacts to the climate will become more severe. [SR 106:15-18, 137:3-9; SR-43].

96. The yearly days in Montana with extreme heat, meaning temperatures over 90 degrees, is expected to increase by 11 – 30 days by midcentury, and by as much as two months by the end of the century. [CW 273:6-20; CW-24, CW-28]. At the same time, the number of days above freezing will increase by weeks to months in the future. [CW 273:6-20, 275:21-276:7; CW-27; P222].

97. Projections indicate a high-emission scenario results in 9.8°F of warming in Montana by 2100, relative to temperatures in 1971-2000. An intermediate emission scenario projects an increase of 5.6°F in Montana by 2100, relative to temperatures in 1971-2000. [CW 270:1-271:9; CW-23; P222].

98. According to the Intergovernmental Panel on Climate Change (IPCC), "Climate change is a threat to human well-being and planetary health (*very high confidence*). [SR-48]. There is a rapidly closing window of opportunity to secure a liveable and sustainable future for all (*very high confidence*) . . .. The choices and actions implemented in this decade will have impacts now and for thousands of years (*high confidence*)." [SR 149:15-150:7; P143; SR-48, SR-63; LB-43].

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99. According to the IPCC, "[i]n the near term, every region of the world is projected to face further increases in climate hazards (*medium to high confidence*, depending on region and hazard), increasing multiple risks to ecosystems and humans (*very high confidence*). Hazards and associated risks expected in the near-term include an increase in heat-related human mortality and morbidity (*high confidence*), food-borne, water-borne, and vector-borne diseases (*high confidence*)." [SR-46, SR-47; LB-42].

III. CLIMATE CHANGE HARMS CHILDREN AND SPECIFICALLY THE YOUTH PLAINTIFFS.

100. Dr. Lori Byron obtained a Doctor of Medicine degree in 1984. She has been a board-certified pediatrician since 1988. Dr. Byron earned a M.S. in Energy Policy and Climate from Johns Hopkins in 2020. From 1988-2015, Dr. Byron worked with the Indian Health Service in Crow Agency, Montana, providing primary care, emergency care, and public health services to Crow Indian children. Dr. Byron now works as a pediatric hospitalist at SCL Health in Billings, Montana. Dr. Byron has decades of experience caring for children who have suffered Adverse Childhood Events (ACEs). Over the past decade, Dr. Lori Byron and her husband, Dr. Rob Byron, have made presentations on climate change and health locally, nationally, and internationally. Dr. Lori Byron finished a six-year term on the Executive Committee of the Council on Environmental Health and Climate Change with the American Academy of Pediatrics and a six-year term on the Children's Health protection Advisory Committee with the Environmental Protection Agency (EPA). Dr. Byron was an author on the 2021 report "Climate Change and Human

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Health in Montana: A Special Report of the Montana Climate Assessment," as well as other climate and health publications.

101. Dr. Byron provided expert testimony that climate change and the air pollution associated with it are negatively affecting children in Montana, including Youth Plaintiffs, with a strong likelihood that those impacts will worsen in the absence of aggressive actions to mitigate climate change. Dr. Byron outlined ways in which climate change is already creating conditions that are harming the health and well-being of the Youth Plaintiffs. Dr. Byron testified that reducing fossil fuel production and use, and mitigating climate change now, will benefit the health of the Youth Plaintiffs now and for the rest of their lives. Dr. Byron is a well-qualified expert, and the Court found her testimony informative and credible.

102. Dr. Lise Van Susteren is a board certified general and forensics clinical psychiatrist, in practice for thirty years. She is a Clinical Associate Professor of Psychiatry and Behavioral Sciences at George Washington University in Washington, D.C. In 2009, Dr. Van Susteren co-convened one of the first conferences on the psychological effects of climate change. In 2013, Dr. Van Susteren worked with Dr. James Hansen and other experts on a paper, Assessing "Dangerous Climate Change": Required Reductions of Carbon Emissions to Protect Young People, Future Generations and Nature. (Hansen et al., 2013). In May 2018, Dr. Van Susteren received the Distinguished Fellow award of the American Psychiatric Association, its highest membership honor. Dr. Van Susteren has helped develop youth climate anxiety assessment tools, conducted research and reviewed data in assessing the mental health of young people faced with climate change. Dr. Van Susteren provided

expert testimony on the physiological harms caused by climate change to Montana's youth, including the Youth Plaintiffs, the psychological harms caused by the MEPA Limitation, and the availability of remedies to alleviate Plaintiffs' psychological injuries. Dr. Van Susteren is a qualified expert, and the Court found her testimony credible.

103. Michael Durglo, Jr., is a member of the Confederated Salish and Kootenai Tribes (CSKT). He has a Bachelor of Science degree in Environmental Science from Salish Kootenai College. Mr. Durglo has worked in different capacities for the CSKT for over three decades. In his current role as Head of the Tribal Preservation Department and Chairman of the Climate Change Advisory Committee (CCAC), Mr. Durglo has worked extensively with tribal elders and youth on climate related issues. He has been involved with the Institute for Tribal Environmental Professionals' Climate Change Adaptation Planning Workshop, and he served as the co-chair of the National Tribal Science Council and the chair of the EPA Region 8 Tribal Operations Committee, consisting of EPA tribal environmental directors in Montana, Wyoming, Colorado, Utah, and North and South Dakota. He has taught workshops and seminars on climate adaptation planning throughout North America. Mr. Durglo is a qualified expert and the Court found him informative and credible.

104. Children are uniquely vulnerable to the consequences of climate change, which harms their physical and psychological health and safety, interferes with family and cultural foundations and integrity, and causes economic deprivations. [LB 473:12-24, 474:12-477:12; LVS 1177:5-8, 1202:6-24, 1215:13-24, 1217:2-1222:11; MDJ 597:9-18, 600:23-604:14, 609:23-610:10; LB-9, LB-15, LB-16; LVS-11, LVS-25].

105. Children are at a critical development stage in life, as their capacities evolve, and their physiological and psychological maturity develops more rapidly than at any other time in life. [LB 474:12-477:12, 485:10-486:1; LVS 1177:10-21, 1213:7-23, 1215:13-24].

106. The brains and lungs of children and youth are not fully developed until around age 25. [LB 474:18-25; LVS 1213:7-16].

107. All children, even those without pre-existing conditions or illness, are a population sensitive to climate change because their bodies and minds are still developing. [LB 473:12-24, 474:12-477:12; LVS 1177:2-1178:12, 1213:7-23; LB-9; LVS-11].

108. The physical and psychological harms are both acute and chronic and accrue from impacts to the climate such as heat waves, droughts, wildfires, air pollution, extreme weather events, the loss of wildlife, watching glaciers melt, and the loss of familial and cultural practices and traditions. [LB 498:12-25, 524:11-22; LVS 1178:13-1179:6, 1196:6-11, 1200:7-1201:25, 1202:6-24, 1204:21-1205:19, 1206:19-1209:12, 1218:2-16, 1219:25-1220:11, 1221:19-21; MDJ 595:18-596:2, 597:6-18, 600:23-604:14, 606:11-607:2, 608:1-13, 609:23-610:10].

109. Climate change can cause increased stress and distress which can impact physical health. [LB 526:8-16; LVS 1188:16-24; LVS-15]. Dr. Van Susteren observed that Youth Plaintiffs testified to specific personal consequences. For example:

a. Grace feels fearful due to the glaciers disappearing from a state she loves.

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b. Sariel has suffered significant distress due to the impacts of climate change on culturally important plants, and snow for creation stories. Her cultural connection to the land increases this impact.

c. Mica has experienced a sense of loss from having to stay inside due to wildfire smoke.

d. Olivia expressed despair due to climate change.

e. Claire has been impacted by fear and loss from glaciers melting, and anxiety over whether it is a safe world in which to have children.

110. Heat waves are associated with significant psychological stress. Increased heat and temperature negatively affect cognition and are linked to increased incidence of aggression and exacerbation of pre-existing mental health disorders. [LVS 1197:1-1198:7, 1200:7-12; LVS-29].

111. Children have a higher risk of becoming ill or dying due to extreme heat. [LB-15, LB-16].

112. Drought is associated with anxiety, depression, and chronic despair. [LVS 1200:24-1201:25].

113. Wildfires, including those witnessed by Badge, are traumatic. Being surrounded by wildfires can make the world feel unsafe and the inability to breathe clean air creates anxiety. [LVS 1202:6-24, 1204:21-1205:19].

114. The threat of loss can be enough to cause mental health harms, especially when there are no signs the future will be any different. [LVS 1203:15-1204:6].

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115. As climate disruption transforms communities, some Plaintiffs are experiencing feelings that they are losing a place that is important to them.

116. The IPCC has found, with *very high confidence*, that climate change has "detrimental impacts" on mental health and the harms to mental health are expected to get worse. [LVS 1185:12-1186:3, 1192:23-1194:9, 1195:6-13; P127; LVS-23, LVS-24].

117. The 2021 report, Climate Change and Human Health in Montana, found that "[t]he mental health impacts of climate change are profound and varied." [LVS-27]. Extreme weather events, prolonged heat and smoke, and environmental change can all impact mental health and increase feelings of disconnectedness and despair. [LVS 1196:6-11; P31; LVS-28].

118. Exposure to extreme heat can cause heat rash, muscle cramps, heatstroke, damage to liver and kidney, worsening allergies, worsening asthma, and neurodevelopmental effects. [LB 485:2-9; P31; LB-13, LB-14].

119. The psychological harms caused by the impacts of climate change can result in a lifetime of hardships for children. [LVS 1194:4-9, 1210:2-1211:2, 1213:24-1215:4; P127; LVS-12].

120. The physiological features of children make them disproportionately vulnerable to the impacts of climate change and air pollution. [LB 474:14-25, 475:4-10; LVS 1213:7-23; LB-9, LB-10; LVS-11].

121. Children have a higher basal metabolic rate, which makes it harder for them to dissipate heat from their bodies. [LB 475:14-21].

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122. Children breathe in more air per unit of time than adults and consume more food and water proportional to their body weight, making children more susceptible to polluted or contaminated air, water, or food. [LB 476:21-477:12].

123. Typical child behavior and physiology—which involves spending more time recreating outdoors and more difficulty self-regulating body temperature—render children more susceptible to excess heat, poor air quality, and other climate change impacts. [LB 476:21-477:12, 481:9-19].

124. Childhood exposure to climate disruptions and air pollution can result in impaired physical and cognitive development with lifelong consequences. Air pollution can trigger or worsen juvenile idiopathic arthritis, leukemia, and asthma in children. [LB 482:9-21, 502:4-22; LB-25; LVS 1205:20-1206:8, 1207:18-1208:3].

125. The air quality where Plaintiffs live has been negatively impacted by smoke from wildfires contributed to by climate change.

126. Allergies are increasingly prevalent among children and anthropogenic climate change is extending the allergy season and exacerbating allergy symptoms. An increase in these symptoms can affect children's physical and psychological health by interfering with sleep, play, school attendance, and performance. [LB 484:25-485:9, 508:2-16; LVS-30].

127. Climate change is contributing to an increase in the severity and frequency of asthma in children. Six million children in the U.S. ages 0-17 have asthma, which translates to approximately one in every twelve children. [LB 485:7-8, 503:1-14, 505:4-25; LB-26, LB-30].

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128. Children who have pre-existing respiratory conditions, including asthma, are especially vulnerable to climate impacts, including increasing air pollution and rising temperatures. Wildfire smoke has harmed the health of Plaintiffs Olivia, Jeffrey, and Nate, all who have pre-existing health conditions, and other Plaintiffs, including Badge and Eva. [LB 505:12-506:20, 508:23-509:1; LB-28].

129. Plaintiffs Olivia and Grace are distressed by feeling forced to consider foregoing a family because they fear the world that their children would grow up in. [LB 497:4-21; LVS 1214:21-1215:1, 1221:19-1222:5; GGS 208:3-22].

130. Plaintiffs Rikki, Kian, Claire, and Taleah, face economic deprivations, including barriers to keeping family wealth and property intact and decreased future economic opportunities.

131. Extreme heat threatens the health of competitive athletes, including Kian, Georgi, Claire, and Grace. [LB 490:6-491:15; LB-18].

132. For indigenous youth, like Ruby, Lilian, and Sariel, extreme weather harms their ability to participate in cultural practices and access traditional food sources, which is particularly harmful to indigenous youth with their place-based cultures and traditions. [LB 491:23-493:9; MDJ 579:19-580:9].

133. Because of their unique vulnerabilities, their stages of development as youth, and their average longevity on the planet in the future, Plaintiffs face lifelong hardships resulting from climate change. [LB 474:14-25, 475:4-10; LVS 1177:2-1178:12, 1189:1-6,1194:4-9, 1210:2-1211:2, 1213:7-23, 1215:13-24].

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134. Youth are more vulnerable to the mental health impacts of climate change because younger people are more likely to be affected by the cumulative toll of stress and have more adverse childhood experiences (ACEs). ACEs increase the likelihood of cumulative trauma that leads to mental and physical illness, as well as an increased risk of early death. [LB 521:14-16, 5236-15; LVS 1210:2-1211:2; LB-33; LVS-31].

135. ACEs can cause prolonged fear, anxiety, and stress, cognitive impairments, and unhealthy risk behaviors. ACEs can also cause long-term health impacts including increased risk of obesity, diabetes, heart disease, depression, strokes, chronic obstructive pulmonary disease, and broken bones. [LB 516:3-20, 519:16-520:4, 522:17-523:2; LB-34].

136. Children born in 2020 will experience a two to sevenfold increase in extreme events, particularly heatwaves, compared with people born in 1960. [LB 495:1-11, 497:1-3; P45; LB-20].

137. According to the IPCC, "Climate change is a threat to human well-being and planetary health (*very high confidence*)." The IPCC stated, "Without urgent, effective, and equitable mitigation and adaptation actions, climate change increasingly threatens ecosystems, biodiversity, and the livelihoods, health and wellbeing of current and future generations (*high confidence*)." [LB 530:11-533:9; LB-43, LB-44; P143; SR-61].

138. The unrefuted testimony at trial established that climate change is a critical threat to public health. [LB 536:10-537:14].

139. Actions taken by the State to prevent further contributions to climate change will have significant health benefits to Plaintiffs. [LB 534:25-535:9].

IV. CLIMATE CHANGE IS ALREADY ADVERSELY AFFECTING MONTANA'S NATURAL ENVIRONMENT.

140. Anthropogenic climate change is impacting, degrading, and depleting Montana's environment and natural resources, including through increasing temperatures, changing precipitation patterns, increasing droughts and aridification, increasing extreme weather events, increasing severity and intensity of wildfires, and increasing glacial melt and loss. [JS 655:2-658:10, 659:6-660:11; *see generally* SR, CW, DF; CW-56; DF-20].

141. Climate change impacts result in hardship to every sector of Montana's economy, including recreation, agriculture, and tourism. For example, private water supplies will be harmed. [SR 144:13-145:17; CW-52].

142. Montana has already warmed significantly more than the global average. [CW 263:12-17, 263:20-264:7; CW-18, CW-19].

143. All parts of Montana have seen a long-term trend of increasing mean annual temperatures since 1950. Winter and spring have warmed the most [CW 267:18-268:20; CW-21; P6].

144. There is a scientific consensus that rising temperatures in Montana are due to rising GHG concentrations, primarily CO_2. [SR 103:5-9, 117:25-118:12; CW 269:18-25].

145. Montana's snowpack has been decreasing and is likely to continue decreasing with warmer temperatures, as a long-term trend caused by impacts to the climate. [CW 283:11-19; CW-33, CW-35, CW-55; DF 421:12-23].

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146. Montana's April 1, Snow Water Equivalent, which is an important metric for how much water will be available during the dry summer months in Montana, has been declining since the 1930s. [CW 284:23-286:15; CW-34].

147. The decline in snowpack is directly attributed to elevated temperatures due to high levels of GHG emissions. [CW 283:11-19, 288:3-10].

148. Warming temperatures in Montana are resulting in more precipitation falling as rain instead of snow, particularly in western Montana. This results in reduced snowpack and shorter snowpack runoff duration in the spring and summer. Warming temperatures and rapid snowmelt and rain-on-snow events have been a major cause of spring flooding in Montana. [CW 291:17-292:20].

149. Extreme spring flooding events are consistent with climate change, including more spring precipitation, which can cause flash flooding when rain falls on snow. [SR 144:24-145:8; SR-44]. Spring flooding is expected to increase in frequency with increased climate change. [CW 291:15-292:20].

150. The 2018 Shields River flooding and the 2022 Yellowstone River flooding event are examples of rain on snow and heavy precipitation events that will be more frequent with climate change. [CW 291:15-292:20].

151. Dr. Dan Fagre holds a Ph.D. from the University of California, Davis. He joined the National Park Service as a research scientist in 1989 and, in 1991, he became the Climate Change Research Coordinator at Glacier National Park as part of the nationwide United States Global Change Research Program. His position was transferred to the United States Geological Survey (USGS), where he served until his retirement in 2020, after which he has

continued as Scientist Emeritus. At Glacier National Park, Dr. Fagre helped develop a national climate change research program within the National Park Service, coordinating with other scientists at national parks from Florida to Alaska. He built a research program centered on Glacier Park as a representative mountain ecosystem, engaging faculty and scientists from Montana universities and across the U.S. [P190]. Dr. Fagre is a well-qualified expert, and his testimony was informative and credible.

152. Glacier National Park is a major driver of the regional economy and a source of fresh water for countless communities. [Def. Answer, Doc. 54 ¶ 159; DF 404:10-406:10, 407:1-3, 408:11-25, 426:2-17; DF-13].

153. The glaciers in Glacier National Park were an early focus of the U.S. Geological Survey climate change research because they are excellent indicators of impacts to the climate. Located above the rest of the mountain ecosystem, glaciers respond only to climatic forces that affect summer temperatures that melt ice and snow and winter snow accumulation (i.e., snowpack). [DF 394:15-396:1, 396:25-397:17].

154. Of the approximately 146 glaciers present in Glacier National Park in 1850, only twenty-six glaciers larger than twenty-five acres remained in 2015. 82% of Glacier Park's glaciers are gone and there has been a 70% loss of area of all glaciers. [DF 418:1-8, 422:25-424:4; DF-17, DF-20].

155. Since 1900, glaciers in Glacier Park lost 66% of their area, making Montana the largest region for glacier loss in the U.S. lower forty-eight. Agassiz Glacier, Grinnell Glacier, Jackson Glacier, Sperry Glacier, and

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Thunderbird Glacier have all experienced significant retreat. [DF 409:9-23, 410:23-415:5, 412:13-21, 415:12-416:20; P61-P64; DF-8, DF-15, DF-16, DF-18, DF-20, DF-21].

156. The scientific consensus is that the retreat of Glacier Park's glaciers over the past century is due to human GHG emissions (mainly CO_2 from fossil fuel burning). [DF 409:24-410:19, 416:21-417:15, 422:8-19, 424:5-11, 428:13-24].

157. The current ice retreat of Glacier Park's glaciers is in response to modern, human-caused warming of the region. [DF 428:13-24].

158. Computer models project the loss of Glacier Park's glaciers if fossil fuel emissions continue to rise. [DF 425:9-23].

159. The loss of Glacier National Park's glaciers will affect the water sources of many communities, stream and river hydrology, local economies, and the recreational opportunities of several Plaintiffs because they will be denied access to natural resources enjoyed by previous generations of Montanans. [DF 404:10-406:10, 407:1-3, 408:11-25, 426:2-17; DF-13].

160. If GHG emissions are reduced glaciers would slow their melting, eventually stabilize, and then begin to grow again. [DF 428:1-12].

161. Climate change results in water levels in Montana's rivers and lakes that are routinely well below normal levels in summer and fall months and water temperatures that are well above historical levels. [JS 686:18-687:4, 690:7-17, 692:22-25, 693:2-7; JS-25].

162. Dr. Jack Stanford received his Ph.D. in Freshwater Ecology at the University of Utah. [JS-2]. He is Professor Emeritus at the Flathead Lake Biological Station (FLBS) of the University of Montana. He was the Director and

Bierman Professor of Ecology at the University of Montana (1980-2016). His primary area of research is aquatic ecosystem processes, including influences of human activities. He has published over 220 scientific papers and books on aquatic ecosystem processes, including influences of human activities. [P194]. Dr. Stanford is a well-qualified expert, and his testimony was informative and credible.

163. Montana is part of the northern Rocky Mountain region. The northern Rocky Mountains are a headwaters region, including for the Missouri River system to the East and the Columbia River System to the West, where most of the water originates as snow. [Def. Answer, Doc. 54 ¶ 157].

164. Montana is a key "water tower" of the Continent. Water that drains from the Rocky Mountains feeds three of the great rivers of North America: the Columbia, the Saskatchewan, and the Missouri-Mississippi. Snow at high elevations provides eighty-five percent of the fresh water that people use in Montana. [DF 405:22-406:10, 407:16-409:1; DF-13; JS 656:21-657:7].

165. The accumulation of winter snowpack in the mountains naturally acts as a reservoir for the hotter, drier months, gradually melting with onset of spring, and in summer providing continuous flow downstream, which is critical in the period of less precipitation and warmer temperatures. [SR 152:2-18]. Some accumulations are held in mountain glaciers which add meltwaters to the flow paths. [DF 407:16-409:1; DF-13].

166. Precipitation also is retained in lakes and wetlands where a large share of runoff penetrates into the ground, feeding aquifers that store water or augment river and stream flows. [JS 655:20-24, 657:13-17, 660:12-661:7; JS-4].

167. Montana's river and lake ecosystems are interconnected with each other and with aquatic and terrestrial ecosystems beyond Montana's borders. [JS 646:2-647:2]. The interconnectivity of Montana's river and lake ecosystems includes being connected with groundwater and atmospheric waters. [JS 661:8-12; JS-4, JS-8, JS-9; P82].

168. The rivers of Montana are interlinked and their flows and the quantity of materials (e.g., sediments) that they naturally transport are now, without functioning glaciers, increasingly dependent on seasonal rain and Snow. These river networks transport and deliver the water and materials that sustain the natural and cultural (human) elements of Montana's ecosystems. [JS 661:8-664:18, 646:2-647:2; JS-4; DF-19].

169. Montana's water resources are critically important to Youth Plaintiffs and all Montana citizens and to many people beyond the State's borders. Montanans must have a dependable supply of clean freshwater. [JS 659:6-19; JS-25].

170. Anthropogenic climate change is disrupting the natural range of variation in the flow paths of Montana's river systems. Compared to the 1960s, the summer streamflow in Montana's rivers has decreased by approximately 20% and stream temperatures have increased between 1-2°C. [JS 666:15-667:20; JS-10, JS-25].

171. As a result of anthropogenic climate change:

a. Surface temperatures in Flathead Lake are too warm for bull and cutthroat trout to sustain their historic populations. [JS 687:5-14].

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b. The Flathead River is experiencing low streamflow and a decline in cutthroat trout populations due to warm temperatures and low water. Bull trout populations have also declined in Flathead Lake. [JS 687:5-14].

c. The Missouri River is experiencing discharge declines, and increase in stream temperatures, fishing restrictions, and algae blooms. [JS 687:15-688:25].

d. The Clark Fork River is experiencing low streamflow and discharge declines. [CW 292:21-293:18; CW-42].

e. The Yellowstone River is experiencing discharge declines, low streamflow, increasing temperatures, fish die offs due to diseases, record-setting floods, a decline in brown trout populations, and algae blooms. [JS 676:4-25, 689:9-690:1].

f. The Powder River is experiencing low streamflow and a decline in water quality. [JS 690:7-17].

g. The Madison River is experiencing increased temperatures, declining discharge, fishing closures, a decline in brown trout populations, algae blooms, fish die offs and river closures. [JS 692:2-10].

h. The Blackfoot River is experiencing declining discharge, increased temperatures, and river closures. [JS 692:22-25].

i. The Smith River is experiencing record low flows in June, increased temperatures, and fishing restrictions. [JS 693:2-7].

j. The Shields River is experiencing low flows and river closures. [JS 693:9-10].

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k. The Bitterroot River has experienced increased temperatures, a reduction in bull trout habitat, algae blooms, and fishing closures. [JS 693:12-22].

172. One impact of anthropogenic climate change to Montana's aquatic ecosystems is that runoff (spring spate) from snowmelt is days to weeks earlier. Loss of snowpack also accelerates warming and water loss owing to reduced reflection than would occur if the snowpack was sustained. [JS 670:20-671:2].

173. Low water levels and abnormally warm water temperatures create harmful conditions for fish and other aquatic organisms. [JS 671:3-17].

174. Access to boating and fishing on certain rivers and lakes in Montana has been limited, and in some instance completely foreclosed, because of low river flows or high-water temperatures. These changes limit the ability of some Plaintiffs to fish and access the State's rivers and lakes for sport or recreation. [SR 152:25-153:9, 153:10-13; JS 679:7-15].

175. Wildfires resulting from climate change have caused nitrogen levels in Montana's lakes to increase. This has caused nutrient imbalances that threaten the plant and animal life in the lakes. [JS 683:1-684:4].

176. If GHG emissions continue to rise, impacts to the climate will further harm Montana's wildlife and fisheries, and the ability of Plaintiffs to hunt and fish. [JS 679:7-15; 687:8-14].

177. The western United States, including Montana, has experienced a trend of increased drought and heat stress from climate change,

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which has killed trees and altered ecosystem dynamics, and this trend toward hotter and drier summers will continue in the future. [SR 106:1-18, 146:18-21, 156:2-17; CW 258:24-259:8, 283:3-10; CW-44].

178. Droughts in Montana are more expansive and longer term which negatively affects stream systems: aquifer systems become depleted due to reduced infiltration of streamflow and rainfall. Where aquifers contribute significantly to base flow maintenance in Montana streams, the outcome is even more extreme and with sustained drying. [JS 677:7-678:1].

179. Anthropogenic climate change is producing a shift from snow to rain earlier in the year, and flooding from intense but extreme, short-duration flooding is more commonly occurring today than in the past (especially in the spring). That ultimately means less water is retained in the drainage network. [JS 676:12-25].

180. Increases in the frequency, duration, and/or severity of drought and heat stress associated with climate change are fundamentally altering the composition, structure, and biogeography of forests in Montana. [SR 106: 1-14]. There is already evidence of accelerating forest mortality in western forests, and this acceleration is clearly tied to increasing temperatures and plant water stress. [SR 156:2-17, 163:9-164:2].

181. Montana's forests are being drastically altered due to the combination of drought, pest infestations, and wildfires. [SR 156:12-157:15].

182. Climate scientists have long known that increasing temperatures intensify drought conditions, and the combination of drier and hotter weather leads to larger, more frequent, and severe wildfires. [SR 106:1-14, 157:2-158:6].

183. The wildfire season in Montana is two months longer than it was in 1980s. [SR 159:7-13]. The lengthening of the fire season is largely due to declining mountain snowpack, earlier spring snowmelt, decreased summer precipitation, and warmer summer temperatures leading to deficits in soil and fuel moisture—which are all due to increasing GHG emissions. [SR 106:1-14, 156:24-157:13, 159:18-160:6, 160:22-24; SR-54; CW 305:3-24; CW-47].

184. The extent of area burned in the U.S. each year has increased since the 1980s. According to National Interagency Fire Center data, of the ten years with the largest acreage burned, all have occurred since 2004, including the peak year of 2021. This period coincides with many of the warmest years on record nationwide. [SR 158:4-11; SR-52].

185. Wildfires in Montana are expected to become significantly worse in the coming years without immediate steps to reduce GHG emissions. [SR 106:1-24; CW 306:11-307:11; CW-49].

186. The effects of anthropogenic climate change, including rising temperatures, changing precipitation patterns, and drought conditions, create challenges and uncertainty for farmers. [CW 312:2-313:15].

187. Climate change affects wildlife, and some species will be more sensitive to impacts to the climate than others. Species may adapt, move, or go extinct. For example, the American pika and Snowshoe hares are considered highly sensitive to climate change due in large part to their dependence on subalpine habitat and snow cover, which is also projected to decline. [SR-59; P72; DF 406:11-15]. Dependence on climate-sensitive habitats like seasonal

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streams, wetlands and vernal pools, seeps and springs, alpine and subalpine snowfield areas, grasslands and balds, is a large driver of species sensitivity. [SR 164:5-16, 165:6-166:6].

188. Rising temperatures will increase the number of freeze-free days in Montana and increase in the number of days above 90°F. [CW 273:6-20, 275:18-276:7; P6; CW-24, CW-27].

189. There will be increasing seasonal variation in Montana's precipitation, with more precipitation falling in the spring and fall and less in the winter and summer. The change in precipitation timing and a decrease in precipitation during the summer months, combined with increasing summer temperatures, will contribute to increasing risk of summer drought conditions in parts of Montana and more precipitation falling as rain as opposed to snow. [CW 281:4-21; CW-30, CW-35; P6, P34].

190. Increasing temperature will offset small increases in precipitation by increasing rates of evaporation and transpiration and will make late-summer and fall droughts highly likely and increasingly severe. [CW 283: 3-10].

191. The current decline in Montana snowpack and snow accumulation is projected to continue. The loss of snowpack and snow accumulation is primarily driven by increasing temperatures, which are caused by anthropogenic GHG emissions. [CW 283:11-19, 284:23-285:21, 286:9-15, 287:15-288:10, 290:20-291:9; CW-35].

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192. Spring runoff in Montana is projected to increase through the 21st century because of warmer temperatures and earlier snowmelt. Increased January-April runoff will lead to increasingly low streamflow in July-September. [CW 293:8-18].

193. The science is clear that there are catastrophic harms to the natural environment of Montana and Plaintiffs and future generations of the State due to anthropogenic climate change. [SR 105:9-21, 149:15-150:7]. The degradation to Montana's environment, and the resulting harm to Plaintiffs, will worsen if the State continues ignoring GHG emissions and climate change. [SR 105:22-106:18, 137:10-15, 168:17-169:7, 169:19-21; CW 318:2-5, 316:17-317-14; DF 428:6-12; JS 712:8-12].

V. CLIMATE CHANGE IS ALREADY HARMING PLAINTIFFS.

194. The unrefuted testimony established that Plaintiffs have been and will continue to be harmed by the State's disregard of GHG pollution and climate change pursuant to the MEPA Limitation.

195. Plaintiff Rikki Held lives on her family's ranch twenty miles outside of Broadus, Montana. Broadus is a ranching community in Southeastern Montana, with a population of approximately 450 people in the town and approximately 2000 in Powder River County.

a. Rikki has experienced climate change-related harms to herself and her family ranch, including harms from flooding, severe storms, wildfires, and drought.

b. The Powder River runs through Rikki's ranch. The ranch includes five pivot fields and pine-covered hills. Rikki and her family have raised cattle on the ranch, grew crops to feed cattle, and owned horses.

c. Rikki started riding horses and herding livestock when she was four. Rikki grew up involved in ranching activities, working with livestock, haying, and fixing fences.

d. Rikki's grandparents are from Broadus and her dad grew up in Broadus.

e. Rikki and her family run a motel that rents rooms to travelers. Rikki often works for the family motel business. The primary source of Rikki's family's income is the ranch (currently leased) and motel business. Loss of this income affects Rikki personally.

f. Impacts to the climate are already harming Rikki's home, family, community, income, and way of life.

g. Rikki was often required to work outside on the ranch regardless of the temperatures or air quality. Rikki's physical well-being has been harmed by wildfires and wildfire smoke, as well as extreme heat.

h. In 2012, the Ash Creek fire burned seventy miles of power poles, causing the loss of electricity on Rikki's ranch for a month. Electricity is required to access water for both cattle and Rikki's house on the ranch, so the loss of electricity harmed both cattle and Rikki.

i. Climate change has impacted the snowpack on the ranch in recent years, with snow typically not lasting through the winter. Reduced winter snowpack means less natural water available for cattle. As a result, the cattle must rely on water tanks, which are far apart and expensive to install. With less water, there is also less grass available for the cattle to eat.

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j. With less water and grasses, cattle travel further for water and food, and lose weight. This means the cattle are not as valuable and the ranch profits and income declined.

k. Wildfires have closed roads around Broadus limiting the number of people that can reach Rikki's family motel business, causing lost income for Rikki and her family.

l. Climate change has caused increased variability in water levels in the Powder River. Rikki's family relies on the river to water their livestock. Increasingly, the river levels are extremely low while at other times the river floods.

m. In 2017, the Powder River flooded and eroded the riverbank on Rikki's ranch, undercutting a fifty-year-old fence. Since then, continued flooding has eroded about fifty feet of riverbank, with floodwaters that nearly reach Rikki's home.

n. Rikki experiences stress and despair from how climate change impacts her well-being, the well-being of her family, and the well-being of other Montanans. Montana is Rikki's home and seeing how climate change is impacting Montana and her family ranch is a heavy emotional burden for Rikki.

o. Rikki faces economic harm, including barriers to keeping family wealth and property intact and decreased future economic opportunities.

196. Plaintiffs Lander Busse and Badge B. are brothers, living in Kalispell, Montana.

a. Lander and Badge enjoy hunting and fishing.

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b. Lander and Badge hunt with their parents and grandparents. Hunting is an important family activity.

c. Lander and Badge's ability to hunt and fish is inhibited due to climate change consequences, including extreme heat and wildfires.

d. Climate change has adversely impacted Lander and Badge's ability to fish by rendering certain waterways impassible by raft due to low instream levels or too-warm water temperatures, which harm fish and decrease their populations.

e. Lander and Badge have had their ability to fish limited or foreclosed due to fishery closures as a result of climate change-induced conditions in Montana's rivers. Lander and Badge have also had their access to rivers limited for other recreational activities.

f. The extreme temperatures and smoke have at times made hunting unbearable and impossible for Lander and Badge. Smoky conditions have also impacted their fishing activities.

g. Due to climate change, the wildfire smoke in Kalispell, and in other parts of Montana where Badge recreates, makes it difficult for Badge to breathe and triggers a cough, which negatively impacts his health and well-being.

h. In 2018, a wildfire near the Busse's home forced their family to prepare to evacuate. Preparing to evacuate was a traumatic experience for Lander and Badge. Badge is worried that wildfires will continue to threaten his home.

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i. Lander has seasonal pollen allergies, which are worsening due to the increased pollen count and a changing climate.

j. Lander is an accomplished musician and theater performer and often performs outdoors. Climate change and wildfires have hampered his ability to perform music and theater at a high level and have negatively impacted his physical well-being.

k. Badge is named after the Badger-Two Medicine, an area where he frequently recreates and fishes. Wildfires in the Badger-Two Medicine have destroyed trees and have degraded areas important to Badge and where he enjoys visiting and recreating, which has had a powerful emotional impact on Badge. Badge experiences a sense of loss and distress knowing that the area is being damaged and degraded due to climate change. Badge feels as if a part of him were lost in the Badger Two-Medicine fire.

l. Badge is passionate about skiing and has skied for as long as he can remember. Climate change is reducing Badge's ability to participate in this important recreational activity.

m. Badge is anxious when he thinks about the future that he, and his potential children, will inherit.

n. Lander and Badge care deeply about protecting Montana's environment, which is an integral part of their family traditions, culture, and identity. Witnessing the current impacts of climate change in Montana is traumatic for both Lander and Badge.

o. Lander and Badge are experiencing the loss of ties to the land in Montana.

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197. Plaintiff Sariel Sandoval is a member of the Confederated Salish and Kootenai Tribes and is from Ronan, Montana.

a. Sariel and her family have a deep connection to the natural world, and have a unique connection to the land, the natural environment, and the seasons. Climate change is harming Sariel's culture and tribal practices. Sariel went to a Salish language immersion school called Nkwusm in Arlee. At school, Sariel was taught her native language and learned about the Salish culture.

b. Sariel was excited to receive her Salish name, which means "Person Who Brings the Cedar." Cedar has important cultural significance because it provides a connection through the land to the Creator.

c. Sariel feels a strong sense of connection to her community. She believes that carrying on her community's traditions is important because it is their way of life and reflects their connection to the land.

d. Gathering and using sweet grass and bear root is important to Sariel culturally and spiritually.

e. Sariel is concerned about how climate change affects the seasons because her culture is very ingrained with the land and the seasons. It also affects plants and foods her tribe needs to survive, and she is concerned that these changes will change the community itself. Because of earlier-than-normal snowmelt and the consequent drying of mountain streams as a result of climate change, plants used in Salish and Kootenai medicines are becoming scarcer and more difficult for tribe members to gather.

f. Coyote Stories are a culturally important type of Creation Story that can only be told when there is snow on the ground. Sariel is

concerned because the snow is not staying on the ground as long, and she does not know what will happen to the stories when there is no more snow.

g. Climate change impacts Sariel's ability to partake in cultural and spiritual activities and traditions, which are central to her individual dignity. Climate change has disrupted tribal spiritual practices and longstanding rhythms of tribal life by changing the timing of natural events like bird migrations.

h. Sariel worked at Blue Bay Campground the summer after she graduated high school. Sariel lost a few weeks of work and income due to the nearby Finley Point fire (also known as the Boulder 2700 Fire) in 2021. The fire also led to the road being shut down, homes being lost, and people being evacuated.

i. Sariel is often unable to see the mountains near her home due to wildfire smoke.

j. Berry picking is a staple cultural activity for Sariel and her family. Some huckleberry bushes are not producing fruit because of drought and Sariel must travel higher up into the mountains to find healthy huckleberries.

k. Climate change has a profound emotional impact on Sariel, who experiences stress and despair about the impacts her community is facing due to climate change.

l. Sariel was greatly distressed when she learned that Montana was almost at the point of no return with respect to climate change.

198. Plaintiff Kian Tanner lives on his family's property in Bigfork, Montana.

a. Kian's property has been degraded by wildfire smoke.

b. Kian is a passionate fly fisher and has fished with his dad since he was about four years old. Kian hopes he will be able to preserve this tradition and fish for the next fifty years or more.

c. The warmer water temperatures, lower oxygen levels, and declining instream flows due to climate disruption are harming Montana's rivers and fish. These climate impacts have decreased fishing opportunities for Kian as he has had to cancel fishing trips due to wildfires. Not being able to fish is devastating for Kian.

d. Kian lives near and enjoys visiting and recreating in Glacier National Park, which is a very special place for Kian. He is distressed he will never be able to see the natural glaciers as they have historically existed, and as other generations experienced them.

e. Kian enjoys downhill and cross-country skiing, which is an activity he does with his mom, who taught him to ski. Kian cross-county skis on his family's property. Impacts to the climate have reduced his opportunities to downhill and cross-country ski.

f. Increased smoke in the summer has harmed Kian's ability to play soccer, fish, and otherwise recreate outside, activities which are crucial for his emotional health and foundational to his family. Kian's soccer practices have been cancelled due to heat and wildfire smoke.

g. The smoke often forces Kian to seek refuge indoors, which makes him feel very claustrophobic.

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h. Kian's fears about impacts to the climate take an emotional toll on him and he feels a heavy burden to carry the mantel of the generation that must address climate change.

199. Plaintiff Georgianna Fischer (Georgi) is from Bozeman, Montana.

a. Georgi's family has lived in Montana for generations. Goergi's great grandmother, Mary "Polly" Wisner Renne, is someone that Georgi admires because of her work to protect Montana's environment. Renne was a key figure in establishing protections for the Lee Metcalf Wilderness Area.

b. Georgi is a competitive Nordic skier. She has competed on the national level, including Junior National Championships, U.S. National Championships, and the 2021 NCAA competition. She trains eleven months of the year, six days a week. Georgi's ability to compete and participate in Nordic skiing has been directly impacted by climate disruption. Declining winter snowpack has inhibited Georgi's ability to complete necessary and appropriate training and hinders her ability to continue to compete at a high level, which adversely impacts her health and mental well-being.

c. In recent years there has not been enough snow to groom trails or create tracks in the snow to Nordic ski race until January, although historically tracks were created in November.

d. Georgi's summer Nordic skiing training has been impacted by wildfires and wildfire smoke. Practices have been cancelled or curtailed due to smoke and the smoke prevents Georgi from training at a high intensity. Georgi is increasingly worried about the long-term effects that the exposure to heavy wildfire smoke while training has on her health and respiratory

system. Extreme heat also harms Georgi and her ability to recreate and train outdoors. The heat has caused her to feel dizzy, nauseous, generally unwell, and has caused persistent nosebleeds that led Georgi to seek medical attention.

e. Georgi enjoys paddleboarding, rafting, backpacking, hiking, and other outdoor activities. Georgi's recreation on Montana's rivers has been impaired due to low water levels and stream flows. Georgi and her family have had to cancel river rafting trips, including one on the Smith River, due to low stream flow.

f. Georgi experiences feelings of despair and hopelessness because of the declining winter snowpack and what that trend entails for her snow-based sport.

200. Kathryn Gibson-Snyder (Grace) is from Missoula, Montana.

a. Grace's recreation on Montana's rivers and streams has been affected due to both low water levels and flooding conditions. Because of climate change, Grace's access to the Clark Fork River for recreational activities has been increasingly impaired, limiting her ability to enjoy activities important to her health and family.

b. Grace enjoys many outdoor activities, including long-distance biking, hiking, soccer, and kayaking.

c. Grace has been harmed by wildfire smoke and extreme heat; which have adversely impacted her ability to play competitive soccer. Smoke and heat have led to fewer soccer practices and the cancellation of games. Wildfires have impacted Grace's ability to go outside, enjoy outdoor activities, and have placed her safety, health, and well-being at risk.

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d. One of Grace's environmental community education events was cancelled due to wildfire smoke.

e. Grace has had hiking activities impacted by wildfire smoke.

f. Grace experiences psychological harms, is distressed from day-to-day climate conditions, and is anxious about climate change. It is devastating for Grace to think that Montana's special landscapes, like Glacier National Park's glaciers, will not exist as they have in the past, or at all, when she is older.

g. Even though Grace would like to raise children in Montana, she questions whether she can morally bring children into the world, because of her knowledge and fear of the world that her children would grow up in if climate change is not ameliorated.

201. Plaintiff Olivia Vesovich is from Missoula, Montana.

a. Olivia has exercise-induced asthma and is therefore particularly vulnerable to smoke-filled air. In smoky conditions, Olivia feels she is suffocating if she spends more than thirty minutes outdoors. During smoky conditions, Olivia is forced to stay inside and reduce or eliminate the outdoor activities she enjoys. Olivia has been forced to spend recent summers away from Montana due to the smoke-filled air and her asthma.

b. Olivia suffers from spring pollen allergies, which force her to stay indoors and prevent her from engaging in the recreational activities she enjoys. Olivia's spring allergies cause her eyes to swell shut and can cause eye pain for weeks at a time. Olivia's allergies have become progressively worse in recent years.

c. Olivia is affected emotionally and psychologically by climate change, and experiences bouts of depression when she thinks about the dire projections of the future. Olivia would like to have children of her own, but she questions whether this is an option in a world devastated by the effects of climate change.

d. Olivia experiences psychological harms and is distressed from day-to-day climate conditions and is anxious about climate change. There are days when Olivia feels paralyzed by the impacts and threats of climate change and she fears that it is too late to address climate change.

e. For Olivia, climate anxiety is like an elephant sitting on her chest and it feels like a crushing weight. This climate anxiety makes it hard for her to breathe.

202. Plaintiff Claire Vlases is from Bozeman, Montana.

a. Claire works as a ski instructor at Big Sky Resort, and her ability to earn money is harmed by climate disruption, which is decreasing Montana's winter snowpack and the number of days Claire can work. Claire has been sent home from her job as a ski instructor without working her scheduled shift, and without pay, because of insufficient snow. Claire relies on her income as a ski instructor, so the lost income is a financial hardship for her.

b. Claire regularly visits Glacier National Park where she loves to hike. Seeing the loss of glaciers in Glacier National Park is terrifying for Claire and reduces her enjoyment of the park. Claire's ability to enjoy hiking in Glacier National Park has also been diminished due to increasing wildfire smoke, which obstructs the beautiful views and is harmful to her health.

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c. Claire has been harmed by the reduced snowpack in Montana and the related impacts to winter sports and tourism.

d. Claire's ability to run cross-country has been harmed by extreme heat and wildfire smoke. Claire has had cross-country practices cancelled due to dangerously smoky air quality conditions. The heat and smoke make it difficult for Claire to train and compete.

e. Claire's family has water rights to Bozeman Creek. Claire and her family use the water for drinking, plumbing, watering their garden, and all other water needs at their home.

f. Claire's water security is threatened by Montana's melting glaciers, declining snowpack, and increasing summer drought conditions, which lead to water scarcity and low water levels in Bozeman Creek.

g. As an individual born with a disability, Claire relies on the outdoors for recreational therapy to replace the physical therapy her insurance stopped providing when she was ten years old. The outdoors helped Claire to grow strong and she continues to rely on activities like skiing, biking, hiking, and running to maintain her physical health. Claire depends on a clean and healthful environment for her physical and mental health and well-being.

h. Climate change impacts harm Claire's mental health, causing her to feel stress, anxiety, and a sense of helplessness about the future.

203. Plaintiff Taleah Hernández is from Polson, Montana, and lives on the Flathead Indian Reservation.

a. Taleah has been forced to remain inside for extended periods of time during the summer because of poor air quality caused by excessive wildfire smoke. Wildfires have caused Taleah to lose electricity at her

home and forced her to prepare to evacuate her home. The Boulder 2700 fire in 2021, forced Taleah to cut down trees around her property for fire safety.

b. Taleah works outdoors with horses and other animals. Dangerous air quality conditions created by wildfire smoke have caused Taleah to miss days of work, lose pay, and lose opportunities to ride horses.

c. Wildfires and wildfire smoke have prevented Taleah from participating in outdoor recreation activities, including hiking and paddleboarding on Flathead Lake.

d. Changes in weather and climate patterns, including warming winter temperatures, have reduced the number of opportunities Taleah has to ice skate on Flathead Lake in the winter.

e. Wildfires and wildfire smoke have caused Taleah physical and emotional distress.

204. Plaintiff Eva L. is from Livingston, Montana.

a. Eva enjoys many outdoor activities, including backpacking, climbing, and cycling, which are central to her family life.

b. Eva has been harmed by wildfire smoke in Montana on numerous occasions, and Eva has suffered eye, nose, and throat irritation and headaches because of the smoky air.

c. Eva and her family had a family trip to Glacier National Park negatively impacted by excessive wildfire smoke, which posed risks to Eva's health and safety.

d. Eva has been harmed by the impacts of extreme flooding. In 2018, flooding along the Shields River damaged a bridge and rendered impassable for more than a year the primary route from Eva's home to

the town of Livingston. A temporary bridge was also washed away due to extreme flooding. Eva's family eventually decided to relocate because of this hardship. Being cut off from town was very stressful for Eva and her family.

e. Eva moved to Livingston and now lives near the Yellowstone River. Eva feels a strong connection to the river. In 2022, there was major flooding along the Yellowstone River, including in Livingston. [CW-41; JS-11]. Eva helped fill sandbags to hold back the flood waters. [P108, P109]. A park near Eva's home was underwater. [P110]. Eva saw her community and close friends lose property due to flooding.

f. The 2022 flooding in Livingston caused Eva acute emotional distress, panic, and dread. Parks and other public places she often visits were significantly damaged, preventing her enjoyment of them.

g. Eva's access to the Yellowstone River in summer 2016 was significantly curtailed, as a 180-mile portion of the river was closed for several weeks due to a parasite growth in cutthroat and rainbow trout perpetuated by abnormally high air temperatures and historically low river flows.

h. Eva has experienced forced relocation and the loss of ties to the land.

i. Eva has had her ability to access Montana's rivers for other recreational activities limited due to river conditions.

j. Wildfire smoke has impacted Eva's ability to hike and spend time outdoors with her family.

k. Eva is anxious about how she, her family and community can adapt to the devastation of public resources and infrastructure as the impacts of climate change worsen. Eva is increasingly anxious about the

climate change impacts she and her family are experiencing. She is distressed that climate change will worsen if action is not immediately taken.

205. Plaintiff Mica K. is from Missoula, Montana.

a. Rising temperatures and wildfires resulting from climate change make it difficult for Mica to recreate outdoors and participate in activities he loves, and which are important to his health and well-being.

b. Mica has been forced to spend extended periods of time indoors and has lost school recess time because of wildfire smoke. In 2019, a forest fire started approximately one mile from Mica's home, and Mica is anxious that, as climate change worsens, he may lose his family home.

c. Wildfire smoke has impacted Mica's training as a long-distance runner. Mica is an avid runner, running his first half-marathon when he was nine. He runs regularly with his dad. Running is a way for Mica to be in nature and relieve stress. Running in smoke makes Mica feel sick, so he cannot run as much due to increasingly smoky summers in Missoula. Smoke has limited Mica's ability to train and compete in sports.

d. Mica gets frustrated when he is required to stay indoors during the summer because of wildfire smoke.

e. Mica's family now avoids camping and other outdoor activities in August and September due to wildfire smoke and its negative effect on Mica's health.

f. Mica was recently diagnosed with exercise-induced asthma, which puts him at greater risk for respiratory hardship when the air is smoky.

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g. Mica's favorite animal is the pika. Mica understands the pika is uniquely vulnerable to climate impacts, and its survival is in jeopardy due to climate change.

h. Mica's outdoor recreation activities such as enjoying the views of glaciers in Glacier National Park are disrupted by climate change. Seeing the glaciers recede in Glacier National Park is depressing for Mica.

i. Climate change causes Mica to feel anxious, stressed, and depressed, and makes it hard for him to sleep at times.

206. Plaintiffs Jeffrey K. and Nathaniel K. are brothers who grew up in Montana City, Montana.

a. Jeffrey K. has pulmonary sequestration and is uniquely susceptible to respiratory complications, such as infections. Nathaniel K. also has respiratory issues. Both Jeffrey and Nate are therefore especially vulnerable to poor air quality, such as smoke-filled air caused by wildfires. [LB 487:21-488:11, 505:4-25].

b. The increasing length and severity of the wildfire season harms Jeffrey's and Nathaniel's health, especially given their young age and pre-existing respiratory health conditions. It has forced their family to make changes in daily activities. [LB 487:21-488:11, 505:4-25].

207. Plaintiffs Ruby D. and Lilian D. are from Bozeman, Montana. Shane Doyle is their father and he testified on their behalf.

a. Ruby and Lilian are members of the Crow Nation. Ruby and Lilian regularly travel to the Crow Reservation to visit family members and engage in traditional cultural activities.

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b. Ruby's Crow name is Biachəgata, which means "Pretty Woman." Lilian's Crow name is Malesch, which means "Loved by Many."

c. Abnormal and extreme weather conditions caused by climate change have impacted Ruby's and Lilian's ability to engage and otherwise partake in cultural practices that are central to their spirituality and individual dignity.

d. Ruby and Lilian visit their family on the Crow Reservation several times a year. Ruby and Lilian attend Crow Fair on the Crow Reservation every year. Crow Fair takes place each August and is a large gathering to celebrate cultural activities and events. Many people, including Ruby and Lilian, stay in teepees. Attending Crow Fair is a highlight for Ruby and Lilian. Ruby and Lilian love dancing at Crow Fair, and enjoy the parades, the rodeo, and doing family events.

e. In recent years, increasing temperatures at Crow Fair have made it hard to wear traditional regalia and participate in cultural activities because it is dangerously hot, sometimes over 100 degrees.

f. Wildfire smoke has also made it difficult for Ruby and Lilian to enjoy the Crow Fair.

g. It is a huge disappointment to Ruby and Lilian when they are unable to dance or participate in other events at the Crow Fair due to heat or smoke.

h. Crow Fair used to coincide with when chokecherries were ripe, which was important because many meals eaten at Crow Fair involved

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chokecherries. In recent years chokecherry harvest has become much harder to predict, and drought has meant there are less chokecherries available for the festival.

i. Ruby and Lilian pick chokecherries with their family as part of the Crow tradition. They enjoy participating in the process of picking the berries, processing them into syrup, and eating them. But due to drought and heat, fewer chokecherries are available and some stands that usually have berries had none. Increased wildfire frequency has impacted the ability of Ruby and Lilian to participate in these traditional cultural practices.

j. Ruby was diagnosed with asthma when she was eight years old and had an acute form of pneumonia. As a result, Ruby stays inside when it is smoky, and Lilian often stays inside too. This is a disappointment for Ruby and Lilian.

k. During the Bridger fire, which burned near Bozeman in 2020, Ruby and Lilian were worried to see a fire so close to their home and it brought up concerns about whether they were safe.

l. Climate disruption has impacted Ruby and Lilian's outdoor recreation activities, such as rafting, swimming, and floating. Drought has created low river conditions that have impacted Ruby and Lilian's ability to enjoy recreating on the river because it has such low flow.

m. Ruby and Lilian believe that protecting Montana's environment and natural resources is important because in their culture taking care of the Earth is their responsibility.

208. The testimony of the Youth Plaintiffs and their guardian was credible and was undisputed.

VI. DEFENDANTS' ACTIONS CONTRIBUTE TO CLIMATE CHANGE AND HARM PLAINTIFFS.

209. Anne Hedges received a B.S. in environmental policy analysis and planning from the University of California at Davis in 1988 and a Master of Environmental Law, *magna cum laude,* from Vermont Law School in 1993. She is Co-Director and Director of Policy and Legislative Affairs at the Montana Environmental Information Center (MEIC). She directs MEIC's program work, including its legislative, regulatory, policy, and legal activities. She has worked at MEIC since 1993, and her work is focused on pollution-related policy issues in Montana, with a primary emphasis on impacts to air, water, landscapes, and climate from fossil fuels. Ms. Hedges is a well-qualified expert, and the Court found her testimony informative and credible.

210. Peter Erickson received a bachelor's degree in Geology in 1998 at Carleton College, Minnesota, as well as coursework in intermediate microeconomics and macroeconomics at the University of Washington. Mr. Erickson has worked as an environmental and climate policy and technical analyst in greenhouse gas emission accounting, most recently with the Stockholm Environment Institute, an international research institution providing, in part, technical analysis to government and NGOs on the details of climate policy and emissions accounting. Mr. Erickson has served on both national and international committees devoted to GHG emissions accounting: one convened by the International Council of Local Environmental Initiatives (ICLEI) to create a U.S. Community-scale GHG Emissions Accounting and Reporting Standard, and one convened by the Greenhouse Gas Protocol to create the Greenhouse Gas Mitigation Goals Standard. [P192]. Mr. Erickson testified about Montana's fossil

fuel consumption, extraction, and infrastructure, focusing on three categories: (1) extraction of fossil fuels; (2) processing and transportation of fossil fuels; and (3) consumption of fossil fuels by end users. For each of these categories, Mr. Erickson quantified the amount of coal, oil, and gas and translated that in units of carbon dioxide (CO_2) emissions released from the fuels once they are combusted. Mr. Erickson added up all the coal, oil, and gas to determine the emissions associated with the extraction, consumption, and transportation of those fuels. In his opinion, emissions from Montana's fossil fuel consumption, extraction, and infrastructure are globally significant quantities. Mr. Erickson is a well-qualified expert, and the Court found his testimony informative and credible.

211. Defendants offered the testimony of Dr. Terry Anderson as an expert economist. Purporting to be based on data from the Energy Information Agency (EIA), Dr. Anderson provided extremely limited testimony in response to three questions: (1) the total greenhouse gas emissions for the world; (2) the 2020 greenhouse gas consumption emissions for the state of Montana; and (3) the 2022 greenhouse gas consumption emissions for the state of Montana. Dr. Anderson's testimony was not well-supported, contained errors, and was not given weight by the Court.

212. Defendants permit three types of fossil fuel-related activities: (1) extraction of fossil fuels; (2) processing and transportation of fossil fuels; and (3) consumption of fossil fuels by end users. [PE 914:12-915:3; PE-9].

213. Fossil fuel consumption includes any combustion, or burning, of these fuels, primarily for energy. Fossil fuel extraction is mining, pumping, drilling, or otherwise taking fossil fuels out of the ground for purposes of making fuels. Fossil fuel processing and transportation are activities that occur

between that initial extraction and combustion by the end user, such as refining, or moving the fuels in bulk from one place to another. [PE 914:14-21; PE-11].

214. It is possible to calculate the amount of CO_2 and GHG emissions that results from fossil fuel extraction, processing and transportation, and consumption activities that are authorized by Defendants. [PE 915:13-21; P311; PE-10].

215. Data indicates that in 2019, the total annual fossil fuels extracted in Montana led to about 70 million tons of CO_2 being released into the atmosphere once the fuels were combusted, which is higher than many other countries, including Brazil, Japan, Mexico, Spain, or the United Kingdom. [PE 922:23-923:3, 928:18-929:11, 950:13-14; PE-17].

216. Data indicates that in 2019, total annual fossil fuels consumed in Montana led to about 32 million tons of CO_2 being released into the Atmosphere.

217. In 2019, total annual fossil fuels transported and processed in and through Montana led to at least 80 million tons of CO_2 being released into the atmosphere once those fuels were combusted. [PE 923:19-924:4, 950:14-15]. That is equivalent to all the GHG emissions from Columbia, which has 50 times the population of Montana. [PE 930:11-23; PE-17, PE-20].

218. Accounting for overlap among fossil fuels extracted, consumed, processed, and transported in Montana, the total CO_2 emissions due to Montana's fossil fuel-based economy is about 166 million tons CO_2. [PE 924:5-18, 950:16-18; PE-18]. This is a conservative estimate and does not include all the GHG emissions, including methane, for which Montana is responsible. [PE 928:5-9; PE-17].

219. The 166 million tons CO_2 due to Montana's fossil fuel-based economy is equivalent to the emissions from Argentina (with forty-seven million residents), the Netherlands (with eighteen million residents), or Pakistan (with 248 million residents). [PE 931:22-932:9; PE-22].

220. In terms of per capita emissions, Montana's consumption of fossil fuels is disproportionately large and only five states have greater per capita emissions. [PE 930:19-23, 938:23-25; PE-25].

221. The cumulative CO_2 emissions from all fossil fuels extracted in Montana since 1960 is 3.7 billion metric tons of CO_2. [PE 941:9-19; PE-26].

222. Montana is a major emitter of GHG emissions in the world in absolute terms, in per person terms, and historically. [PE 930:19-23].

223. Montana has six coal mines that Defendants authorize: Spring Creek Mine, Rosebud Mine, Decker Mine, Absaloka, Bull Mountain, and Savage Mine. [PE 942:16-943:5]. Montana also has the largest estimated recoverable coal reserves in the U.S., and Montana is a substantial exporter of coal. [AH 791:1-25; AH-7-AH-13; PE 946:1-3].

224. Montana's annual coal production is 34 million short tons of coal. [PE 946:5-22]. Montana's coal reserves, as of 2019, are 707 million short tons. [PE 945:21-25; PE-37].

225. Montana is a substantial producer of oil and gas in the U.S. Defendants authorize the drilling and production of oil and gas in Montana. [PE 932:18-933:5, 949:7-15].

226. Montana has approximately 4,000 oil producing wells with an annual oil production of twenty-three million barrels. As of 2019, Montana's oil reserves were 298 million barrels. [PE 946:23-947:8; PE-36, PE-37].

227. Montana has approximately 5,000 gas producing wells with an annual oil production of forty-three billion cubic feet. As of 2019, Montana's gas reserves were 613 billion cubic feet. [PE 947:14-19; PE-36, PE-37].

228. Between 1960 and 2019 the fastest growing category of fossil fuel consumption in Montana has been gas. [PE 942:11-12].

229. Montana is home to four state-authorized oil refineries. [PE 948:22-24, 949:10-15]. Montana's refineries process crude oil largely from Canada and Wyoming and distribute the refined product by railroad and pipeline throughout Montana and to nearby states. [PE 948:17-949:23; PE-38].

230. Montana's land contains a significant quantity of fossil fuels yet to be extracted. [Def. Answer, Doc. 54 ¶ 139; PE 945:21-946:4, 947:16-19, 945:1-25].

231. Montana's GHG emissions have grown significantly since the passage of the 1972 Montana Constitution. [AH 940:15-941:2; PE-27, PE-28].

232. Defendants continue to approve permits and licenses for new fossil fuel activities. [AH 862:1-5; SN 1354:12-16].

233. Defendants have authorized fossil fuel extraction, transportation, and combustion resulting in high levels of GHG emissions that contribute to climate change. [AH 831:22-832:1, 846:25-847:11, 845:14-846:3; AH-50-AH-61; PE 932:18-933:5].

234. In taking action to authorize fossil fuel extraction, since 2011 Defendants have not considered or disclosed GHG or climate change impacts in their environmental reviews because they were statutorily precluded from doing so. [AH 836:2-13, 845:14-846:3; AH-50-AH-61].

235. DEQ issues air quality permits to facilities that emit GHG emissions. [AH 788:13-23; Def. Answer, Doc. 11 ¶ 90].

236. DEQ has authorized fossil fuel extraction, transportation, and combustion, which generate GHG emissions, contribute to climate change, and harm Plaintiffs. [AH 845:14-846:24; AH-50-AH-61].

237. What happens in Montana has a real impact on fossil fuel energy systems, CO_2 emissions, and global warming. [PE 976:8-24; PE-40].

VII. THE MEPA LIMITATION AND ITS IMPLEMENTATION.

238. The 2011 MEPA Limitation provided in pertinent part:

> (2)(a) Except as provided in subsection (2)(b), an environmental review conducted pursuant to subsection (1) 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.

239. While this case has been pending, Judge Moses held in *MEIC v. DEQ*:

> Here, the plain language of MCA 75-1-201(2)(a) precludes agency MEPA review of environmental impacts that are 'beyond Montana's borders,' but it does not absolve DEQ of its MEPA obligation to evaluate a project's environmental impacts within Montana. DEQ misinterprets the statute. They must take a hard look at the greenhouse gas effects of this project as it relates to the impacts within the Montana borders.

Order on Summary Judgment at 29:3-9, *MEIC v. DEQ*, No. DV-56-2021-1307 (Thirteenth Dist. Ct., April 6, 2023).

240. Eight days after Judge Moses' ruling, on April 14, 2023, HB 971 was introduced in the Montana Legislature. HB 971 was passed, sent to enrolling

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on May 1 and signed by the Governor on May 10, 2023. HB 971 clarifies the MEPA Limitation to say:

> (2)(a) Except as provided in subsection (2)(b), an environmental review conducted pursuant to subsection (1) may not include an evaluation of greenhouse gas emissions and corresponding impacts to the climate in the state or beyond the state's borders.
> (b) An environmental review conducted pursuant to subsection (1) may include an evaluation if:
> (i) conducted jointly by a state agency and a federal agency to the extent the review is required by the federal agency; or
> (ii) the United States congress amends the federal Clean Air Act to include carbon dioxide emissions as a regulated pollutant.

Mont. Code Ann. § 75-1-201(2)(a) (enacted May 10, 2023) (new language underlined).

241. On May 19, 2023, various provisions of MEPA that pertain to legal challenges to MEPA environmental reviews were amended when the Governor signed SB 557 into law. SB 557 created Mont. Code Ann. § 75-1-201(6)(a)(ii), which states:

> (ii) An action alleging noncompliance or inadequate compliance with a requirement of parts 1 through 3, including a challenge to an agency's decision that an environmental review is not required or a claim that the environmental review was inadequate based in whole or in part upon greenhouse gas emissions and impacts to the climate in Montana or beyond Montana's borders, cannot vacate, void, or delay a lease, permit, license, certificate, authorization, or other entitlement or authority unless the review is required by a federal agency or the United States congress amends the federal Clean Air Act to include carbon dioxide as a regulated pollutant.

Mont. Code Ann. § 75-1-201(6)(a)(ii) (enacted by SB 557, 68th Legislature (2023)) (signed May 19, 2023).

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242. Other components of SB 557 limit who can challenge an agency's final decision, the scope of the challenge, and require challengers to pay a fee to compile and submit a certified record to the reviewing court. [AH 825:4-826:18; AH-45].

243. Both the 2011 and 2023 versions of the MEPA Limitation allowed Projects to be permitted without consideration of their impacts that increase emissions of greenhouse gases. [AH 851:9-852:23; AH-51-AH-60].

244. The State has known of the dangerous impacts of GHG emissions and climate change for at least the last thirty years. [CW 256:6-15; AH 802:13-18; AH-25, AH-26; P17, P19].

245. State government and scientists have known about the international scientific consensus of the dangers posed by climate change since at least the 1990s when the IPCC started issuing climate assessment reports. The State also had access to the congressionally mandated national climate assessments undertaken in 2000, 2009, 2014, and 2017. [SR 139:12-140:1; AH 797:5-798:6, 802:13-18; CW 256:9-24; AH-32, AH-33, AH-34; P28, P262, P263].

246. In 2007, Defendants DNRC, DEQ, and the Office of the Governor were made aware of the issues concerning the impacts of climate change in Montana, including rising temperatures, accelerating warming, and reduced snowpack, and the need for Montana to reduce its GHG emissions, as a result of the 2007 Montana Climate Change Action Plan and the 2007 Montana Greenhouse Gas Inventory and Reference Case Projections 1990-2020. [CW 243:14-244:3, 256:19-24; CW-12, CW-13, CW-14; AH 806:17-807:20; AH-35, AH-36, AH-37; P2, P18].

247. In 2017, Defendants DNRC, DEQ, and the Office of the Governor were again informed by the 2017 Montana Climate Assessment of the issues concerning the impacts of climate change in Montana. [CW 243:14-244:3; AH 832:12-24; AH-49; P6].

248. In 2019, when then Governor Steve Bullock promulgated Executive Order No. 8-2019 creating the Montana Climate Solutions Council, Defendants knew that "climate change poses a serious threat to Montana's natural resources, public health, communities, and economy," and "Montanans understand that climate change is occurring and are concerned about the impacts it will have on current and future generations." [AH 832:25-833:6; AH-49; P10].

249. In August 2020, when the Montana Climate Solutions Council released its final report, the Montana Climate Solutions Plan (Climate Solutions Plan), the State knew how climate change was already harming Montana and its residents, through rising temperatures, early snowmelt, earlier spring runoff, flooding, changes in water availability and stream temperatures, increase in forest mortality due to insects, and increasing wildfires. [CW 244: 7-22; AH 833:7-835:10; AH-49; P36].

250. The Climate Solutions Plan included thirty-seven recommendations and strategies to reduce Montana's GHG emissions. [AH 833:7-835:10; AH-49; P36]. Defendants have not implemented the recommendations. [AH 835:8-10].

251. In 2021, the report Climate Change and Human Health in Montana was distributed to State officials. [CW 245:2-246-1].

252. Prior to 2011, Defendants were quantifying and disclosing GHG emissions and climate impacts from fossil fuel projects, including, for

example, the Silver Bow Generation Project, the Roundup Power Project (Bull Mountain), and the Highwood Generating Station. [AH 808:10-19, 808:20-809:18, 809:19-810:24, 811:8-24, 813:6-23; AH-38, AH-39, AH-40; P231, P224, P232, P225, P226, P229, P237].

253. Since 2011, because of the MEPA Limitation, Defendants have been statutorily prevented from considering climate change impacts and GHG emissions when conducting environmental reviews. [AH 814:6-21, 816:17-817:14, 818:11-819:10; SN 1361:6-9; AH-42].

254. The MEPA Limitation explicitly prohibits state agencies from considering the impacts of climate change and GHG emissions in environmental reviews under MEPA. [AH 814:22-815:9, 816:17-817:14, 818:11-819:10; SN 1361:6-9; AH-42].

255. Pursuant to the MEPA Limitation, the State has ignored GHG emissions and climate impacts when authorizing fossil fuels activities. [AH 814:22-815:9, 816:17-817:14, 818:11-819:10; AH-51-AH-60].

256. The MEPA Limitation constrains Defendants from making fully informed decisions through their environmental analysis about the scope and scale of the impacts to the environment and Montana's children and youth when conducting environmental reviews. Mont. Code Ann. § 75-1-201(6)(a)(ii) attempts to constrain the authority of courts when reviewing agency permitting decisions and MEPA analyses.

257. If the MEPA Limitation is declared unconstitutional, state agencies will be capable of considering GHG emissions and the impacts of projects on climate change. [AH 807:23-808:19, 821:16-25; SN 1437:4-8; P231, P224, P232, P225, P226, P229, P237].

258. Montana's river and lake ecosystems are interconnected with each other, as well as aquatic and terrestrial ecosystems beyond Montana's borders. Because of this interconnectivity to ecosystems both within and beyond Montana's borders, any prohibition on the consideration of either impacts within Montana or regional impacts of climate change, is not scientifically supported. [JS 642:23-15, 646:2-647:2].

259. Defendants' application of the MEPA Limitation during environmental review of fossil fuel and GHG-emitting projects, prevents the availability of vital information that would allow Defendants to comply with the Montana Constitution and prevent the infringement of Plaintiffs' rights. [AH 810:13-24, 816:9-16, 820:16-821:11, 822:1-823:10; AH-51-AH-60].

260. The State authorizes energy projects and facilities within Montana that emit substantial levels of GHG pollution, including, but not limited to, projects that burn and promote the use of fossil fuels, but pursuant to the MEPA Limitation, Defendants do not consider climate change and GHG emissions and measure those individual and cumulative emissions against the standards the Montana Constitution imposes on the State to protect people's rights, before authorizing energy projects and facilities. [AH 818:25-819:10, 824:8-825:3; AH-51-AH-60].

261. The State issues permits, licenses, and leases that result in GHG emissions without considering how the additional GHG emissions will contribute to climate change or be consistent with the standards the Montana Constitution imposes on the State to protect people's rights. [AH 832:2-11, 841:23-844:9, 843:1-844:5, 844:19-846:3; AH-51-AH-60].

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262. The State authorizes four private coal power plants to operate in the State, which generate 30% of Montana's energy production, without considering how the additional GHG emissions will contribute to climate change or be consistent with the standards the Montana Constitution imposes on the State to protect people's rights. [AH 792:1-21].

263. The State continues to permit surface coal mining and reclamation in Montana, which results in substantial GHG emissions, without considering how the additional GHG emissions will contribute to climate change or be consistent with the standards the Montana Constitution imposes on the State to protect people's rights. [AH 836:16-846:3; PE 934:14-15].

264. The State authorizes, through licenses and leases, the exploration for and extraction of oil and gas in Montana, without considering how the additional GHG emissions will contribute to climate change or be consistent with the standards the Montana Constitution imposes on the State to protect people's rights. [AH 793:6-18, 845:20-846:9].

265. Defendants have and continue to authorize projects, activities, and plans that cause emissions of GHG pollution into the atmosphere, all while ignoring the impacts of climate change and GHG emissions due to the MEPA Limitation. [AH 836:16-846:3; AH-51-AH-60; PE 932:18-933:5]. For example:

a. Defendants authorize and certify energy projects and facilities within the State of Montana that emit substantial levels of GHG pollution, including, but not limited to, projects that burn and promote the use of fossil fuels. [AH 836:16-846:3; PE 932:18-933:5].

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b. DEQ approved the AM4 expansion of Rosebud Strip Mine in December 2015, a 12.1-million-ton coal mine expansion. Pursuant to the MEPA Limitation, DEQ refused to analyze how that decision would aggravate climate impacts. [AH 836:16-837:12; P259, P260, P277; AH-51].

c. DEQ issued a MSUMRA permit to Bull Mountain Mine in January 2016, authorizing Bull Mountain Mine to produce 176 million tons of coal per year. DEQ refused, pursuant to the MEPA Limitation, to analyze how the decision would aggravate climate impacts. [AH 837:14-838:16; P243, P264; AH-52].

d. Between 2002 and 2014, DEQ issued twelve different permits for Signal Peak Energy to operate the Bull Mountain Mine. Since 2011, pursuant to the MEPA Limitation, DEQ refused, in its environmental assessments to consider how those GHG emissions would contribute to climate change or adversely impact Montana's environment and natural resources. [P245, P247, P256].

e. DEQ approved the TR3 expansion of Decker Mine in 2018, allowing for strip-mining of twenty-three million tons of coal. DEQ refused, pursuant to the MEPA Limitation, to analyze how that decision would aggravate climate impacts. [P236, P238, P250, P252, P257-258].

f. In 2020, DEQ approved revision to Spring Creek Mine, the largest coal mine in the State, allowing for recovery of additional seventy-two million tons of coal. In August 2019, DEQ refused, pursuant to the MEPA Limitation, to analyze impacts on the social cost of carbon and economic impacts from climate change in its EIS. [AH 841:23-842:20; P227, P248, P253, P255; AH-56].

g. DEQ authorized the operation of Colstrip Steam Electric Station—which produced 13.2 million metric tons of carbon dioxide equivalent (CO_2e), 38,015 metric tons methane, and 65,919 metric tons nitrous oxide in 2018. CO_2e is a metric measure used to compare the emissions from various greenhouse gases based upon their global warming potential (GWP). [P281, P285, P286].

h. In 2019, when DEQ issued its Record of Decision approving Western Energy's permit application to expand coal mining at Rosebud Coal Mine Area F, where "[t]he proposed mine permit application would add 6,746 acres and approximately 70.8 million tons of recoverable coal reserves to the Rosebud Mine, extending the operational life of the mine by eight years (at the current rate of production)." DEQ, pursuant to the MEPA Limitation, did not consider how those GHG emissions would contribute to climate change or adversely impact Montana's environment and natural resources. [AH 830:25-840:16; SN 1322:21-1323:2; P254, P277, P297; AH-54].

i. DEQ issued the air quality permit to NorthWestern Energy for the Laurel Generating Station (now named the Yellowstone County Generating Station), a proposed gas-fired power plant. Pursuant to the MEPA Limitation, DEQ, in its environmental assessment, did not consider how the GHG emissions would contribute to climate change or adversely impact Montana's environment and natural resources. [AH 831:9-21, 844:19-845:13; P294; AH-57].

j. In May 2022, DEQ issued its Final EIS for Rosebud Mine Area B AM5, in Colstrip. Pursuant to the MEPA Limitation, the environmental assessment did not consider how GHG emissions would

contribute to climate change or adversely impact Montana's environment and natural resources. [AH 840:20-841:22; P228; AH-55].

k. DEQ continues to issue permits for fossil fuel energy projects, including oil and gas pipelines and associated compressor stations, coal mines and coal facilities, oil and gas facilities, oil and gas leases, oil and gas drilling, petroleum refineries, industrial facilities that burn fossil fuels, and fossil fuel power plants. Pursuant to the MEPA Limitation, DEQ does not consider how a proposed project would contribute to climate change or adversely impact Montana's environment and natural resources. [AH 845:14-846:24; PE 949:7-15, 954:2-9; P138, P224, P232, P239, P240, P241, P242, P246, P249, P251, P264, P276, P277, P278, P279, P280, P281, P282, P285-301; AH-58, AH-59, AH-60].

l. DNRC issues permits for fossil fuel projects, including coal mines and oil and gas extraction. DNRC does not consider how GHG emissions from projects will contribute to climate change or adversely impact Montana's environment and natural resources or violate the Constitution, because of the MEPA Limitation. [P217-217; P233, P234, P235, P265-P275, P283, P284].

266. Montana's annual, historical, and cumulative GHG emissions are increased by Defendants' actions to permit and approve fossil fuel activities with no environmental review of their impact on GHG levels in the atmosphere and climate change. [PE 932:18-933:5].

267. Defendants' actions cause emissions of substantial levels of GHG pollution into the atmosphere within Montana and outside its borders, contributing to climate change. [SR 164:18-166:16; PE 932:18-933:5].

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268. The State's actions exacerbate anthropogenic climate change and cause further harms to Montana's environment and its citizens, especially its youth. [AH 845:14-846:2; P150].

VIII. THE MEPA LIMITATION PREVENTS FULL REVIEW OF THE TECHNOLOGICALLY AND ECONOMICALLY AVAILABLE ALTERNATIVES TO FOSSIL FUEL ENERGY IN MONTANA.

269. Dr. Mark Jacobson obtained a M.S. in Environmental Engineering, from Stanford University. Dr. Jacobson also obtained both a M.S. and later a Ph.D. in Atmospheric Sciences from UCLA. In 1994, Dr. Jacobson became an Assistant Professor in the Department of Civil & Environmental Engineering at Stanford. Since 2007, he has been a full professor in that Department. Dr. Jacobson was a co-founder and is Director of Stanford's Atmosphere/Energy Program, as well as a Senior Fellow at Stanford's Precourt Institute for Energy, and Stanford's Woods Institute for the Environment. Since 2008, Dr. Jacobson has been Director and Co-founder of The Solutions Project, an organization that utilizes the combined efforts of individuals in the fields of science, business, and culture to accelerate the transition to 100% renewable energy use in the United States. Starting in 1999, Dr. Jacobson began examining clean, renewable energy solutions. In 2015, this research culminated in the development of roadmaps to transition the all-sector energy infrastructures of each of the fifty United States to 100% clean, renewable energy by 2050, which Dr. Jacobson updated in 2022. Dr. Jacobson has published six textbooks of two editions each and over 175 peer-reviewed journal articles. Dr. Jacobson's career has focused on understanding air pollution and global warming problems and developing large-scale clean, renewable energy solutions to those problems. In

this case, Dr Jacobson summarized his research related to Montana and the feasibility of transitioning Montana swiftly from fossil fuels to clean and renewable energy in all sectors by mid-century, where all energy sectors include electricity, transportation, heating/cooling, and industry. Dr. Jacobson is a well-qualified expert, and his testimony was informative and credible.

270. The MEPA Limitation causes the State to ignore renewable energy alternatives to fossil fuels. [MJ 1030:7-1032:24, 1035:9-23, 1069:18-1071:8, 1066:6-17, 1067:10-20; MJ-15, MJ-62, MJ-63; AH 823:15-825:3; P312].

271. Non-fossil fuel-based energy systems across all sectors, including electricity, transportation, heating/cooling, and industry, are currently economically feasible and technologically available to employ in Montana. Experts have already prepared a roadmap for the transition of Montana's all-purpose energy systems (for electricity, transportation, heating/cooling, and industry) to a 100% renewable portfolio by 2050, which, in addition to direct climate benefits, will create jobs, reduce air pollution, and save lives and costs associated with air pollution. [MJ 1030:7-1032:24, 1035:9-23, 1069:18-1071:8, 1066:6-17, 1067:10-20; P312; MJ-15, MJ-62, MJ-63].

272. It is technically and economically feasible for Montana to replace 80% of existing fossil fuel energy by 2030 and 100% by no later than 2050, but as early as 2035. [MJ 1072:4-23, 1100:9-1101:4; P312; MJ-62, MJ-63]. A number of countries around the world with populations far larger than Montana's relied on >95% wind, water, and sunlight (WWS) to power their electricity sectors in 2021. [MJ-44].

273. To replace fossil fuel energy, Montana would need to electrify all energy sectors with existing or near-existing appliances and

machines, and then generate the electricity for all sectors with 100% WWS, namely onshore wind, utility-scale photovoltaics (PV), rooftop PV, geothermal power, and hydroelectric power. [MJ 1043:9-1045:8, 1045:15-1047:10; P312; MJ-12, MJ-15, MJ-18, MJ-19, MJ-20, MJ-29].

274. All-purpose Montana energy in 2050 can be met, for example, in one scenario, with 4.5 gigawatts (GW) of onshore wind, 3 GW of rooftop PV, 2.9 GW of utility-scale PV, 0.17 GW of geothermal electricity, and 2.7 GW of hydropower (which already exists). [MJ 1057:2-1058:15; MJ-29].

275. Converting from fossil fuel energy to renewable energy would eliminate another $21 billion in climate costs in 2050 to Montana and the world. Most noticeable to those in Montana, converting to wind, water, and solar energy would reduce annual total energy costs for Montanans from $9.1 to $2.8 billion per year, or by $6.3 billion per year (69.6% savings). [MJ-39]. The total energy, health, plus climate cost savings, therefore, will be a combined $29 billion per year (decreasing from $32 to $2.8 billion per year), or by 91%. [MJ 1061:20-1063:24; MJ-15, MJ-39, MJ-40, MJ-41, MJ-42].

276. Wind, water, and solar are the cheapest and most efficient form of energy. Cost per unit of energy in a 100% WWS system in Montana would be about 15% lower than a business-as-usual case by 2050, even when including increased costs for energy storage. New wind and solar are the lowest cost new forms of electric power in the United States, on the order of about half the cost of natural gas and even cheaper compared to coal. [MJ 1045:9-1047:10, 1062:8-1063:24; MJ-20].

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277. According to a 2018 Montana DEQ report, Understanding Energy in Montana, Montana has significant solar energy potential, comparable to many other U.S. cities. [MJ 1086:21-1087:4; P9; MJ-50].

278. The new footprint over land required to implement a 100% renewable energy system in Montana would be only about 0.06% of Montana's land. Utility scale solar would occupy 0.01% of Montana's land (fourteen square miles), while new wind turbines, including the land around those turbines, which could be used for agriculture, open space, or more solar panels, would occupy about 0.05% (seventy-one square miles) of Montana's land. In comparison, Montana's oil and gas wells and associated infrastructure already occupy about 304 square miles of land (0.21% of Montana land area). [MJ 1079:25-1082:3; MJ-46].

279. There is an abundant supply of renewable energy and four ways to store renewable energy: heat storage (in water), cold storage (as ice), electricity storage (pumped hydropower, batteries, hydrogen fuel cells), and hydrogen as a form of storage (for use in long distance transportation and steel production). [MJ 1057:2-15, 1058:5-15, 1072:24-1073:7, 1076:9-1077:22, 1079:22-1082:8; MJ-15, MJ-19, MJ-45, MJ-62].

280. Montana's energy needs in 2050 under a 100% WWS roadmap would decline significantly (over fifty percent) as compared to a business-as-usual energy system due to a mix of gains in energy efficiency in vehicles and appliances, and through eliminating the significant amounts of energy required to extract, transport, and refine fossil fuels. [MJ 1045:9-1047:10; MJ-15, MJ-19, MJ-20, MJ-21, MJ-22, MJ-23, MJ-24, MJ-25, MJ-26, MJ-27, MJ-28, MJ-55].

281. Transitioning to WWS will keep Montana's lights on while saving money, lives, and cleaning up the air and the environment, and ultimately using less of Montana's land resources. [MJ 1061:4-1062:12, 1066:6-17, 1066:18-1067:20, 1079:22-1082:8; MJ-15, MJ-20-MJ-30, MJ-39, MJ-41, MJ-42, MJ-46, MJ-56, MJ-57, MJ-58, MJ-62].

282. The current barriers to implementing renewable energy systems are not technical or economic, but social and political. Such barriers primarily result from government policies that slow down and inhibit the transition to renewables, and laws that allow utilization of fossil fuel development and preclude a faster transition to a clean, renewable energy system. [MJ 1042:15-1043:2, 1059:9-1061:3, 1100:9-1101:4, 1103:11-1104:24; MJ-15, MJ-19, MJ-20, MJ-33, MJ-35, MJ-36, MJ-38, MJ-62, MJ-63].

283. Montana has abundant renewable energy resources that can provide enough energy to power Montana's energy needs for all purposes in 2050. [MJ 1058:2-15; MJ-15, MJ-19, MJ-29, MJ-30, MJ-46, MJ-47, MJ-48, MJ-50, MJ-61, MJ-62].

IX. THE 1972 MONTANA CONSTITUTION.

284. Mae Nan Ellingson was a delegate to the 1972 Montana Constitutional Convention. Ms. Ellingson's testimony was informative and provided useful context, including on the compilation of the records of the Constitutional Convention proceedings on which Montana courts regularly rely. Ms. Ellingson was elected to the Constitutional Convention as a delegate from Missoula County.

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285. The first "delegate proposal" advanced during the Constitutional Convention was for a constitutional provision on environmental quality.

286. Article IX, Section 1 of the Constitution states that "[t]he state and each person shall maintain and improve a clean and healthful environment in Montana for present and future generations." This provision came about after long debate to strengthen the environmental article recommended by the Natural Resources Committee by including the words "clean" and "healthful."

287. As reflected in the Constitutional Convention Transcripts (March 1, 1972, Vol. V 1230), Ms. Ellingson suggested the "legislature shall provide adequate remedies to prevent" language of Article IX, Section 1 to assure greater protections of the current environment. She believed that if you are trying to protect the environment, you need the ability to sue or seek injunctive relief before the environmental damage is done--paying someone monetary damages after the harm is done does little good. This position was complemented by including the right to a clean and healthful environment in the Declaration of Rights in Article II, Sec. 3 of the Montana Constitution. The decision to include the right to a clean and healthful environment as one of the unalienable rights included in the Bill of Rights passed by a large majority.

288. During the Constitutional Convention, there were concerns among the delegates over the constitutional rights for people under the age of eighteen, and Article II, Section 15 in the Declaration of Rights was included to ensure that Montana's youth have the same fundamental rights as adults. This section was adopted with broad support.

289. Delegates to the 1972 Constitutional Convention intended to adopt the strongest preventative and anticipatory constitutional environmental provisions possible to protect Montana's air, water, and lands for present and future generations.

CONCLUSIONS OF LAW

1. To the extent that any of the foregoing Findings of Fact incorporate Conclusions of Law or the application of law to fact, they are incorporated herein as Conclusions of Law.

2. This Court has jurisdiction over the parties and subject matter in this case.

3. The Conclusions of Law are conformed to the evidence presented at trial by both parties. Mont. R. Civ. P. 15(b)(2). The Court will address the constitutionality of Mont. Code Ann. § 75-1-201(6)(a)(ii), which was enacted by SB 557 and addressed by both parties during trial and in trial briefing. *See, e.g.,* Docs. 390, 402.

I. PLAINTIFFS HAVE PROVEN STANDING.

A. Plaintiffs Have Proven Injury.

4. As described in the Findings of Fact, Youth Plaintiffs have experienced past and ongoing injuries resulting from the State's failure to consider GHGs and climate change, including injuries to their physical and mental health, homes and property, recreational, spiritual, and aesthetic interests, tribal and cultural traditions, economic security, and happiness.

5. Plaintiffs' mental health injuries directly resulting from State inaction or counterproductive action on climate change, on their own, do not establish a cognizable injury. *Steel Co. v. Citizens for a Better Envt.*, 523 U.S. 83,

107 (1998). However, Plaintiffs' mental health injuries stemming from the effects of climate change on Montana's environment, feelings like loss, despair, and anxiety, are cognizable injuries.

6. Every additional ton of GHG emissions exacerbates Plaintiffs' injuries and risks locking in irreversible climate injuries.

7. Plaintiffs' injuries will grow increasingly severe and irreversible without science-based actions to address climate change.

8. Plaintiffs have proven that as children and youth, they are disproportionately harmed by fossil fuel pollution and climate impacts.

9. Plaintiffs have proven that they have suffered injuries that are concrete, particularized, and distinguishable from the public generally.

10. Plaintiffs suffer and will continue to suffer injuries due to the State's statutorily mandated disregard of climate change and GHG emissions in the MEPA Limitation, and due to SB 557's removal of MEPA's preventative equitable remedies with Mont. Code Ann. § 75-1-201(6)(a)(ii).

B. Plaintiffs Have Proven Causation at Trial.

11. The PSC is exempted from MEPA as a matter of law. Mont. Code Ann. § 75-1-201(3).[2]

12. There is a fairly traceable connection between the MEPA Limitation and the State's allowance of resulting fossil fuel GHG emissions, which contribute to and exacerbate Plaintiffs' injuries.

13. There is a fairly traceable connection between the State's disregard of GHG emissions and climate change, pursuant to the MEPA Limitation, GHG emissions over which the State has control, climate change impacts, and Plaintiffs' proven injuries. Unlike in *Bitterrooters Inc.*, the causal

[2] Hereinafter, when the Court refers to Defendants or the State, the PSC is excluded.

relationship between the permitted activities and the resulting environmental harms is reasonably close. *Bitterrooters for Planning, Inc. v. Mont. Dep't of Envtl.* Quality, 2017 MT 222, ¶ 25, 401 P.3d 712. The State authorizes fossil fuel activities without analyzing GHGs or climate impacts, which result in GHG emissions in Montana and abroad that have caused and continue to exacerbate anthropogenic climate change.

14. The Defendants have the authority under the statutes by which they operate to protect Montana's environment and natural resources, protect the health and safety of Montana's youth, and alleviate and avoid climate impacts by limiting fossil fuel activities that occur in Montana when the MEPA analysis shows that those activities are resulting in degradation or other harms which violate the Montana Constitution.

15. Montana's contributions to GHG emissions can be measured incrementally and cumulatively both in terms of immediate local effects and by mixing in the atmosphere and contributing to global climate change and an already destabilized climate system.

16. Montana's GHG contributions are not *de minimis* but are nationally and globally significant. Montana's GHG emissions cause and contribute to climate change and Plaintiffs' injuries and reduce the opportunity to alleviate Plaintiffs' injuries.

C. Plaintiffs Have Proven Redressability at Trial.

17. The psychological satisfaction of prevailing in this lawsuit does not establish redressability. *Steel Co.* at 107.

18. Defendants can alleviate the harmful environmental effects of Montana's fossil fuel activities through the lawful exercise of their authority if

they are allowed to consider GHG emissions and climate change during MEPA review, which would provide the clear information needed to conform their decision-making to the best science and their constitutional duties and constraints, and give them the necessary information to deny permits for fossil fuel activities when inconsistent with protecting Plaintiffs' constitutional rights.

19. Montana's land contains a significant quantity of fossil fuels yet to be extracted. The State and its agents could consider GHG emissions and climate impacts and reject projects that would lead to unreasonable degradation of Montana's environment.

20. A reduction in Montana's GHG emissions that results from a declaration that Montana's MEPA Limitation is unconstitutional would provide partial redress of Plaintiffs' injuries because the amount of additional GHG emissions emitted into the climate system today and in the coming decade will impact the long-term severity of the heating and the severity of Plaintiffs' injuries.

21. It is possible to affect future degradation to Montana's environment and natural resources and injuries to these Plaintiffs.

22. Permitting statutes give the State and its agents discretion to deny permits for fossil fuel activities. *See, e.g.,* Mont. Code Ann. §§ 75-2-203 and -204 (discretion under Clean Air Act of Montana to prohibit facilities that cause air pollution); § 75-2-211(2)(a) (DEQ to provide rules governing suspension or revocation of air quality permits); § 75-2-218(2) (DEQ has discretion to deny air quality permits); § 75-2-217(1) (DEQ to provide rules governing suspension or revocation of operating permits); 75-20-301 (DEQ can only approve permits for Major Facility Siting Act facilities after considering

numerous discretionary factors, including environmental impacts and public health, welfare, and safety); § 77-3-301 (state lands "may" be leased for coal if "in the best interests of the state"); § 77-3-401 (state lands "may" be leased for oil and gas if consistent with the Constitution); § 82-4-102(3)(a) (stating purpose of surface and underground mining and reclamation laws to vest DEQ with rulemaking authority to "either approve or disapprove" new strip mines or new underground mines); § 82-4-227 (DEQ has wide discretion to refuse mining permits).

23. The State must either: 1) have discretion to deny permits for fossil fuel activities when the activities would result in GHG emissions that cause unconstitutional degradation and depletion of Montana's environment and natural resources, or infringement of the constitutional rights of Montana's children and youth; or 2) the permitting statutes themselves must be unconstitutional.

24. "[C]ourts should avoid constitutional issues whenever possible." *Park Cnty. Envtl. Council v. Mont. Dep't of Envtl. Quality*, 2020 MT 303, ¶ 54, 477 P.3d 288 (citing *Sunburst Sch. Dist. No. 2 v. Texaco, Inc.*, 2007 MT 183, ¶ 62, 165 P.3d 1079). Under the doctrine of constitutional avoidance, this Court clarifies that Defendants do have discretion to deny permits for fossil fuel activities that would result in unconstitutional levels of GHG emissions, unconstitutional degradation and depletion of Montana's environment and natural resources, or infringement of the constitutional rights of Montanans and Youth Plaintiffs.

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II. MONT. CODE ANN. § 75-1-201(6)(a)(ii) IS NOT A BARRIER TO REDRESSABILITY BECAUSE IT IS FACIALLY UNCONSTITUTIONAL UNDER *PARK COUNTY.*

25. Mont. Code Ann. § 75-1-201(6)(a)(ii) eliminates the preventative remedies available to MEPA litigants: vacatur and injunction. The State raised Mont. Code Ann. § 75-1-201(6)(a)(ii) during trial as a barrier to redressability in this case, bringing it before the Court and making the issue unavoidable.

26. The Legislature is obligated under Article IX, Sec. 1(3) to provide "adequate remedies for the protection of the environmental life support system from degradation" and "to prevent unreasonable depletion and degradation of natural resources." Mont. Const. Art. IX, Sec. 1(3).

27. "MEPA is an essential aspect of the State's efforts to meet its constitutional obligations, as are the equitable remedies without which MEPA is rendered meaningless." *Park Cnty.* ¶ 89.

28. In *Park Cnty*, a unanimous Court reasoned:

> Montanans' right to a clean and healthful environment is complemented by an affirmative duty upon their government to take active steps to realize this right. Article IX, § 1, Subsections 1 and 2 of the Montana Constitution command that the Legislature 'shall provide for the administration and enforcement' of measures to meet the State's obligation to 'maintain and improve' the environment. Critically, Subsection 3 explicitly directs the Legislature to 'provide adequate remedies to prevent unreasonable depletion and degradation of natural resources ...
>
> 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. Whatever interest might be served by a statute that instructs an agency to forecast and consider the environmental implications of a project that is already underway—perhaps analogous to a mandatory aircraft inspection after takeoff—the constitutional obligation to prevent certain environmental harms from arising is certainly not one of them.

Id. ¶¶ 63, 72.

29. Pursuant to the Court's decision in *Park Cnty.*, Mont. Code Ann. § 75-1-201(6)(a)(ii) is facially unconstitutional because it eliminates MEPA litigants' remedies that prevent irreversible degradation of the environment, and it fails to further a compelling state interest. *Park Cnty.* ¶¶ 63, 69-72.

III. ALL PLAINTIFFS' CONSTITUTIONAL CLAIMS ARE PREDICATED ON DEGRADATION OF MONTANA'S CLEAN AND HEALTHFUL ENVIRONMENT.

30. All of Plaintiffs' claims hinge on whether the MEPA Limitation and Mont. Code Ann. § 75-1-201(6)(a)(ii) violate Mont. Const. Art. II, Sec. 3 and Art. IX, Sec. 1.

a. The Public Trust Doctrine is already codified in the Montana Constitution in Art. IX, Sec. 3. *Galt v. State*, 225 Mont. 142, 144, 146, 731 P.2d 912, 913, 914 (1987) (citing *Mont. Coal. for Stream Access v. Curran*, 210 Mont. 38, 682 P.2d 163 (1984) and Mont. Const. Art. IX, Sec. 3(3)).

b. Except for Plaintiffs' mental health injuries resulting from government inaction on climate change, the alleged equal protection, dignity, liberty, and health and safety violations all stem from harm to Montana's environment.

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c. Plaintiffs' mental health injuries resulting from government inaction alone do not establish a cognizable, redressable injury.

d. It would be impossible for the Court to find that the MEPA Limitation and Mont. Code Ann. § 75-1-201(6)(a)(ii) do not violate Art. II, Sec. 3 and Art. IX, Sec. 1, and then find that the statutes violate the Public Trust Doctrine or the rights to equal protection, dignity, liberty, or health and safety.

IV. DETERMINING WHETHER THE CONSTITUTIONAL PROVISIONS AT ISSUE ARE SELF-EXECUTING IS UNECESSARY TO RESOLVE THIS CONTROVERSY.

31. It is possible to resolve this case without determining whether Art. II, Sec. 3 and Art. IX, Sec. 1 are self-executing.

32. A determination that a right is non-self-executing "does not end the inquiry. As here, (1) once the Legislature has acted, or 'executed,' a provision (2) that implicates individual constitutional rights, courts can determine whether that enactment fulfills the Legislature's constitutional responsibility." *Columbia Falls Elem. Sch. Dist. No. 6 v. State*, 2005 MT 69, ¶ 17, 109 P.3d 257 (citing *City of Boerne v. Flores*, 521 U.S. 507 (1997)).

33.

> "Provisions that directly implicate rights guaranteed to individuals under our Constitution are in a category of their own. That is, although the provision may be non-self-executing, thus requiring initial legislative action, the courts, as final interpreters of the Constitution, have the final 'obligation to guard, enforce, and protect every right granted or secured by the Constitution . . ..'"

Brown v. Gianforte, 2021 MT 149, ¶ 23, 488 P.3d 548 (citing *Columbia Falls Elem. Sch. Dist.*, ¶ 18 (quoting *Robb v. Connolly*, 111 U.S. 624, 637 (1884))).

34. Like in *Park Cnty.*, the question presented to the Court by this case "is straightforward: has the Legislature met its obligation to provide adequate remedies with which to prevent potential future environmental harms when it removes what appears to be the *only* available legal relief positioned to do so?" *Park Cnty.* ¶ 78. The MEPA Limitation, especially in conjunction with Mont. Code Ann. § 75-1-201(6)(a)(ii), removes the only preventative equitable relief available to the public and MEPA litigants concerned about GHGs and climate change, which are degrading Montana's environment.

V. THE MEPA LIMITATION IS SUBJECT TO STRICT SCRUTINY.

35. Any statute, policy, or rule which implicates a fundamental right must be strictly scrutinized and can only survive scrutiny if the State establishes a compelling state interest and that the action is narrowly tailored to effectuate that interest. *Park Cnty.* ¶ 84.

36. The MEPA Limitation is subject to strict scrutiny because it implicates Plaintiffs' fundamental right to a clean and healthful environment.

VI. THE MEPA LIMITATION VIOLATES THE MONTANA CONSTITUTION.

A. MEPA Limitation violates Plaintiffs' Right to a Clean and Healthful Environment – Mont. Const. Art. II, Sec. 3, 15; Art. IX, Sec. 1.

37. Montana's Constitution provides: "All persons are born free and have certain inalienable rights. They include the right to a clean and healthful environment...." Mont. Const. Art. II, Sec. 3. Consistent with the provision of these rights and responsibilities, the Montana Constitution further provides: "The

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state and each person shall maintain and improve a clean and healthful environment in Montana for present and future generations." Mont. Const. Art. IX, Sec. 1(1).

38. Article II, Sec. 3 and Article IX, Sec. 1 are to be read together, along with the Preamble to Montana's Constitution. *MEIC I*, ¶¶ 65, 77.

39. The right to a clean and healthful environment is a fundamental right protected by Mont. Const. Art. II, Sec. 3 and Art. IX, Sec. 1(1). *MEIC I*, ¶ 64.

40. Montana's children under age eighteen, have a fundamental right to a clean and healthful environment. Mont. Const. Art. II, Sec. 15. The right to a clean and healthful environment is intended to protect Montana's children and future generations.

41. During Montana's 1972 Constitutional Convention, delegates placed significant emphasis on protecting natural resources and improving Montana's environment. The Montana Supreme Court has recognized that "it was agreed by both sides of the debate that it was the convention's intention to adopt whatever the convention could agree was the stronger language." *MEIC I*, ¶ 75 (citing Convention Transcripts, Vol. IV at 1209, Mar. 1, 1972). The Montana Supreme Court has repeatedly found that the Framers intended the state constitution contain "the strongest environmental protection provision found in any state constitution." *Park Cnty.*, ¶ 61.

42. The Constitutional Framers "did not intend to merely prohibit that degree of environmental degradation which can be conclusively linked to ill health or physical endangerment." *MEIC I*, ¶ 77. As Delegate Foster noted: "[I]f we put in the Constitution that the only line of defense is a healthful

environment and that I have to show, in fact, that my health is being damaged in order to find some relief, then we've lost the battle." *MEIC I*, ¶ 74 (citing Convention Transcripts, Vol. V at 1243-44, Mar. 1, 1972).

43. The right to a clean and healthful environment language in Montana's Constitution is "forward-looking and preventative language" which "clearly indicates that Montanans have a right not only to reactive measures after a constitutionally-proscribed environmental harm has occurred, but to be free of its occurrence in the first place." *Park Cnty.*, ¶ 62.

44. The right to a clean and healthful environment requires enhancement of Montana's environment. According to the Constitutional Delegates, "*our intention was to permit no degradation* from the present environment and affirmatively require enhancement of what we have now." *MEIC I,* ¶ 69 (quoting Convention Transcripts, Vol. IV at 1205, Mar. 1, 1972) (emphasis in original).

45. Montanans' right to a clean and healthful environment is complemented by an affirmative duty upon their government to take active steps to realize this right. Article IX, Sec. 1(1) and (2) of the Montana Constitution command that the Legislature "shall provide for the administration and enforcement" of measures to meet the State's obligation to "maintain and improve" the environment. Critically, Subsection 3 explicitly directs the Legislature to "provide adequate remedies to prevent unreasonable depletion and degradation of natural resources." Mont. Const. Art. IX, Sec. 1(3); *Park Cnty.*, ¶ 63.

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46. The obligations of the Legislature found in Article IX, Sec. 1 include providing "adequate remedies for the protection of the environmental life support system from degradation." Mont. Const. Art. IX, Sec. 1(3).

47. According to Delegate McNeil, "the term 'environmental life support system' 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 (citing Convention Transcripts, Vol. IV at 1201, Mar. 1, 1972) (emphasis in original).

48. Montana's constitutional right to a clean and healthful environment prohibits environmental degradation that causes ill health or physical endangerment and unreasonable depletion or degradation of Montana' natural resources for this and future generations:

> Our conclusions in *MEIC I* are consistent with the constitutional text's unambiguous reliance on preventative measures to ensure that Montanans' inalienable right to a 'clean and healthful environment' is as evident in the air, water, and soil of Montana as in its law books. Article IX, Section 1, of the Montana Constitution describes the environmental rights of 'future generations,' while requiring 'protection' of the environmental life support system 'from degradation' and 'prevent[ion of] unreasonable depletion and degradation' of the state's natural resources. This forward-looking and preventative language clearly indicates that Montanans have a right not only to reactive measures after a constitutionally-proscribed environmental harm has occurred, but to be free of its occurrence in the first place.

Park Cnty., ¶ 62.

49. Based on the plain language of the implicated constitutional provisions, the intent of the Framers, and Montana Supreme Court precedent,

climate is included in the "clean and healthful environment" and "environmental life support system." Mont. Const. Art. II, Sec. 3; Art. IX, Sec. 1.

50. Montana's climate, environment, and natural resources are unconstitutionally degraded and depleted due to the current atmospheric concentration of GHGs and climate change.

51. The right to a clean and healthful environment allows plaintiffs to obtain equitable relief before harm occurs. According to the Supreme Court:

> When considering which remedies are 'adequate' in this context, we note that equitable relief, unlike monetary damages, can avert harms that would have otherwise arisen. It follows that equitable relief must play a role in the constitutional directive to ensure remedies that are adequate to prevent the potential degradation that could infringe upon the environmental rights of present and future generations. We are not alone in this conclusion. As Delegate Mae Nan Robinson pointed out during the 1972 Constitutional Convention: if you're really trying to protect the environment, you'd better have something whereby you can sue or seek injunctive relief before the environmental damage has been done; it does very little good to pay someone monetary damages because the air has been polluted or because the stream has been polluted if you can't change the condition of the environment once it has been destroyed.

Park Cnty. ¶ 64 (citing *MEIC I* ¶ 71).

52. "The essential purpose of MEPA is to aid in the agency decision-making process otherwise provided by law by informing the agency and the interested public of environmental impacts that will likely result from agency actions or decisions." *Bitterrooters Inc.* ¶ 18.

53. "MEPA is an essential aspect of the State's efforts to meet its constitutional obligations." *Park Cnty.*, ¶ 89; § 75-1-102, MCA.

54. The stated policy of MEPA makes clear that the State should use "all practicable means" "so that the state may: (a) fulfill the responsibilities of each generation as trustee of the environment for succeeding generations; (b) ensure for all Montanans safe, healthful, productive, and aesthetically and culturally pleasing surroundings; (c) attain the widest range of beneficial uses of the environment without degradation, risk to health or safety, or other undesirable and unintended consequences . . .." § 75-1-103, MCA.

55. By enacting and enforcing the MEPA Limitation, the State is failing to meet their affirmative duty to protect Plaintiffs' right to a clean and healthful environment, and to protect Montana's natural resources from unreasonable depletion.

56. The MEPA Limitation categorically limits what the agencies, officials, and agencies tasked with protecting Montana's clean and healthful environment can consider. The MEPA Limitation conflicts with the very purpose of MEPA, which is to aid the State in meeting its constitutional obligation to prevent degradation by "informing the agency and the interested public of environmental impacts that will likely result" from State actions. *Bitterrooters Inc.* ¶ 18; § 75-1-102(1), MCA ("The legislature, mindful of its constitutional obligations under Article II, section 3, and Article IX of the Montana constitution, has enacted the Montana Environmental Policy Act . . . [to] provide for the adequate review of state actions in order to ensure that: (a) environmental attributes are fully considered . . ..").

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57. The plain language of the MEPA Limitation bars agencies from considering GHG emissions and climate impacts for any project or proposal, even to assess whether the project complies with the Montana Constitution.

58. The MEPA Limitation is unconstitutionally contributing to the depletion and degradation of Montana's environment and natural resources and contributing to Plaintiffs' injuries. The MEPA Limitation deprives Plaintiffs of their constitutionally guaranteed rights under Mont. Const. Art. II, Sec. 3, and Art. IX, Sec. 1.

59. By prohibiting consideration of climate change, GHG emissions, and how additional GHG emissions will contribute to climate change or be consistent with the Montana Constitution, the MEPA Limitation violates Plaintiffs' right to a clean and healthful environment and is facially unconstitutional.

B. The MEPA Limitation Does Not Pass Strict Scrutiny.

60. The MEPA Limitation infringes on fundamental rights and must pass strict scrutiny. *Mont. Cannabis Indus. Ass'n v. Montana*, 2012 MT 201, ¶ 16, 366 Mont. 224, 286 P.3d 1161 ("*Mont. Cannabis Indus Ass'n* (2012)"); *see also Kloss v. Edward D. Jones & Co.*, 2002 MT 129, ¶ 52, 310 Mont. 123, 54 P.3d 1.

61. Under strict scrutiny, "the government must show that the law is narrowly tailored to serve a compelling government interest." *Mont. Cannabis Indus. Ass'n* (2012), ¶ 16.

62. The State failed to show that the MEPA Limitation serves a compelling governmental interest.

63. The State did not put forward any evidence of a compelling governmental interest for the MEPA Limitation.

64. Undisputed testimony established that Defendants could evaluate "greenhouse gas emissions and corresponding impacts to the climate in the state or beyond the state's borders" when evaluating fossil fuel activities. Indeed, Defendants have performed such evaluations in the past.

65. Undisputed testimony established that clean renewable energy is technically feasible and economically beneficial in Montana.

66. Even if the State had established a compelling interest for the statute, the MEPA Limitation is not narrowly tailored to serve any interest.

67. The MEPA Limitation neither serves a compelling state interest nor is narrowly tailored and fails strict scrutiny.

ORDER

1. Based upon the foregoing Findings of Fact and Conclusions of Law the Court determines and declares that:

2. The Youth Plaintiffs have standing to bring the claims addressed herein.

3. Montana's GHG emissions have been proven to be fairly traceable to the MEPA Limitation.

4. Montana's GHG emissions and climate change have been proven to be a substantial factor in causing climate impacts to Montana's environment and harm and injury to the Youth Plaintiffs.

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5. This judgment will influence the State's conduct by invalidating statutes prohibiting analysis and remedies based on GHG emissions and climate impacts, alleviating Youth Plaintiffs' injuries and preventing further injury.

6. By prohibiting analysis of GHG emissions and corresponding impacts to the climate, as well as how additional GHG emissions will contribute to climate change or be consistent with the Montana Constitution, the MEPA Limitation violates Youth Plaintiffs' right to a clean and healthful environment and is unconstitutional on its face.

7. Plaintiffs have a fundamental constitutional right to a clean and healthful environment, which includes climate as part of the environmental life-support system.

8. 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.

9. Mont. Code Ann. § 75-1-201(6)(a)(ii), enacted into law by SB 557 from the 2023 legislative session, is hereby declared unconstitutional and is permanently enjoined because it removes the only preventative, equitable relief available to the public and MEPA litigants.

10. In addition to the findings, conclusions, and declarations set forth above, injunctive relief is appropriate, prohibiting Defendants from acting in accordance with the statutes declared unconstitutional.

11. Judgment is hereby found in favor of the Plaintiffs as prevailing parties.

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12. The Youth Plaintiffs requested an award of reasonable attorneys' fees and costs. (Doc. 1 at 104.). Pursuant to Rule 54 (d), Mont. R. Civ. P., Youth Plaintiffs shall submit their motion for fees and costs and documentation in support of their request for fees and costs, within fourteen days of the date of this Order. Defendants shall have fourteen days thereafter to respond, and shall have the opportunity to request a hearing pursuant to the provisions of Rule 43 (c), Mont. R. Civ. P. The Court reserves jurisdiction to issue its final judgment to include the issue of attorneys' fees and costs.

DATED this 14 day of August 2023.

Kathy Seeley
District Court Judge

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KS/sm/CDV-2020-307 Held FCO

Order on Defendants' Motions to Dismiss for Mootness and for Summary Judgment May 23, 2023 (Doc. 379)

MONTANA FIRST JUDICIAL DISTRICT COURT
LEWIS AND CLARK COUNTY

RIKKI HELD, et al., Plaintiff, v. STATE OF MONTANA, et al., Defendant.	Cause No. CDV-2020-307 **ORDER ON DEFENDANTS' MOTIONS TO DISMISS FOR MOOTNESS AND FOR SUMMARY JUDGMENT**

BACKGROUND

The relevant background of this case is sufficiently described in the Court's Order on Motion to Dismiss at 1-5, apart from four new developments: (1) the Court denied Defendants' Motion to Dismiss on August 4, 2021; (2) on March 16, 2023, the Governor signed HB 170 which repealed the State Energy Policy, Mont. Code Ann. § 90-4-1001; (3) District Court Judge Michael Moses held in *MEIC v. DEQ* that the State has been misinterpreting the MEPA Limitation and is, in fact, required to consider how greenhouse gas

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(GHG) emissions will affect Montana's environment, DV-56-2021-0001307 (13th District, April 6, 2023) (Order on Summary Judgment) at 29:3-9; and (4) in response to Judge Moses' ruling, the Legislature expeditiously passed HB 971, which amended the MEPA Limitation to explicitly prohibit the State from considering greenhouse gases in MEPA decisions. HB 971 was signed into law by the Governor on May 10, 2023. The repeal of the State Energy Policy led to the State's Motion to Partially Dismiss for Mootness, filed April 3, 2023, which will be discussed before moving to Defendants' Motion for Summary Judgment, filed Feb. 1, 2023. Defendants' previously filed a motion to stay the proceedings but withdrew that motion at oral argument held on May 12, 2023.

1. Mootness/Redressability and Prudential Standing Issues

The State[1] argues that Plaintiffs' challenge to the State Energy Policy is moot due to the repeal of that statute on March 16, 2023. Defs.' Br. Supp. Mootness at 2 (citing *Wilkie v. Hartford Underwriters Ins. Co.*, 2021 MT 221, ¶ 7, 494 P.3d 892 (quoting *Progressive Direct Ins. Co. v. Stuivenga*, 2012 MT 75, ¶ 16, 276 P.3d 867); *Greater Missoula Area Fed'n of Early Childhood Educators v. Child Start Inc.*, 2009 MT 362, ¶ 22, 219 P.3d 881.

Plaintiffs argue that "the State has failed to establish that they no longer have a state energy policy, or that they have ceased systematically authorizing, permitting, encouraging, and facilitating activities promoting fossil fuels and resulting in dangerous GHG emissions." Pls.' Br. Opp. Mootness at 16.

Plaintiffs also argue that the voluntary cessation and public interest exceptions apply. Pls.' Br. Opp. Mootness at 14 (citing *A.J.B. v. Mont. Eighteenth Jud. Dist. Ct., Gallatin Cnty.*, 2023 MT 7, ¶ 14, 523 P.3d 519 (citing

[1] For simplicity, the Court will refer to Defendants as "the State" or "State" throughout the remainder of the opinion.

In re Big Foot Dumpsters & Containers, LLC, 2022 MT 67, ¶ 15, 507 P.3d 169)). *See also Havre Daily News, LLC v. City of Havre*, 2006 MT 215, ¶¶ 38-39, 142 P.3d 864 (citing *Friends of the Earth, Inc. v. Laidlaw Envtl. Servs. (TOC), Inc.*, 528 U.S. 167, 189 (2000)); *Ramon v. Short*, 2020 MT 69, ¶¶ 21-26. 460 P.3d 867.

The Court will not analyze mootness per se because, after the repeal of Mont. Code Ann § 90-4-1001, other redressability and prudential issues are dispositive. In the Order on Motion to Dismiss, the Court held that declaring "these statutory provisions unconstitutional" would partially redress Plaintiffs' claimed injuries. Order on MTD at 18-19. Plaintiffs cite *Columbia Falls Elem. v. State* to support their contention that the Court can declare a *de facto* policy and the "aggregate acts" unconstitutional, but that suit challenged a legislative act. Pls.' Br. Opp. Mootness at 13; *But see* 2005 MT 69, ¶¶ 23-25, 109 P.3d 257. In this sense, the State's reading of *Donaldson* is correct: "the broad injunction and declaration not specifically directed at any particular statute would lead to confusion and further litigation." Defs.' Reply Br. Supp. MSJ at 11 (citing *Donaldson*, 2012 MT 288, ¶ 9, 292 P.3d 364).

Plaintiffs' contention that a ruling from this Court on the constitutionality of the State's "longstanding and ongoing course of conduct . . . would change the legal status of such conduct and would steer Defendants' future conduct into constitutional compliance" is not persuasive. Pls.' Br. Opp. Mootness at 13. Notwithstanding the fact that Plaintiffs pled the aggregate acts as an unconstitutional course of conduct, Compl. at 38, the relief contemplated by the Court has always been limited to declaratory judgment on the constitutionality of the "statutory provisions" and an injunction on the

enforcement of those provisions. Order on MTD at 18-19; Order on Second Rule 60 Clarification at 7:10-12.

Plaintiffs' claims involving the *de facto* State Energy Policy are **DISMISSED** without prejudice for redressability and prudential standing issues.

2. Summary Judgment

Summary judgment "should be rendered if the pleadings, the discovery and disclosure materials on file, and any affidavits show that there is no genuine issue as to any material fact and that the movant is entitled to a judgment as a matter of law." *State v. Avista Corp.*, 2023 MT 6, ¶ 11, 411 Mont. 192, 523 P.3d 44 (quoting Mont. R. Civ. P. 56(c)(3)). "To determine whether a genuine issue of material fact exists, [courts] view all evidence and draw all reasonable inferences in the light most favorable to the non-moving party." *Brishka v. State*, 2021 MT 129, ¶ 9, 487 P.3d 771 (citing *McLeod v. State ex rel. Dep't. of Transp.*, 2009 MT 130, ¶ 12, 206 P.3d 956). The initial burden is on the movant to demonstrate that there are no genuine issues of material fact, and that the movant is entitled to judgment as a matter of law. *Id.* If the movant satisfies this burden, it shifts to the nonmovant "to prove, by more than mere denial or speculation, that a genuine issue does exist." *Id.* (citing *Valley Bank v. Hughes*, 2006 MT 285, ¶ 14, 147 P.3d 185). "On summary judgment, trial courts do not apply a standard of proof or issue findings of fact," and "need not weigh evidence, choose one disputed fact over another, or assess the credibility of the witnesses." *Barrett, Inc. v. City of Red Lodge*, 2020 MT 26, ¶ 8, 457 P.3d 233.

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UNDISPUTED FACTS

Movant State did not set forth undisputed facts in its motion for summary judgment or related briefing. On Reply, the State says this was an "inadvertent omission" and argues that denying summary judgment on that basis would elevate "form over substance." Defs.' Reply Br. Supp. MSJ at 2 n. 2. The State further argues that this case "can be decided on summary judgment because all of Plaintiffs' remaining claims for relief hinge on whether Plaintiffs have the right to a 'stable climate system' under the Montana Constitution—a purely legal question." *Id.* at 2. This is a confounding argument because the State has expended considerable effort challenging the factual bases for Plaintiffs' standing throughout this litigation.

The Court appreciates its duty to not elevate form over substance, but Rule 56(c)(3) clearly requires the movant to demonstrate that there are no genuine disputes over material facts—this is substance. It is unclear how the Court could award the State judgment as a matter of law when the State did not set forth any undisputed facts entitling it to that judgment, regardless of whether Plaintiffs asserted undue prejudice or whether they "submit a detailed response." *Id.* at 2 n. 2.

DISPUTED MATERIAL FACTS

In the judgment of the Court, the following material facts are in dispute:

1. Whether Plaintiffs' injuries are mischaracterized or inaccurate.

2. Whether Montana's GHG emissions can be measured incrementally.

3. Whether climate change impacts to Montana's environment can be measured incrementally.

4. Whether climate impacts and effects in Montana can be attributed to Montana's fossil fuel activities.

5. Whether a favorable judgment will influence the State's conduct and alleviate Plaintiffs' injuries or prevent further injury.

DISCUSSION

I. Case-or-Controversy Standing

The State argues that Plaintiffs have failed to "set forth by affidavit or other evidence specific facts" that establish their standing to challenge the MEPA Limitation. Defs.' Br. Supp. MSJ at 3 (internal quotation marks omitted). But the initial burden lies with the movant to demonstrate the lack of genuine disputes over material facts. *Brishka* ¶ 9.

As a preliminary note, it is unclear how the standing rules interact with the concept of implication. In *MEIC I*, the Court held that "the right to a clean and healthful environment is a fundamental right … and that any statute or rule which *implicates* that right *must be* strictly scrutinized." *Mont. Envtl. Info. Ctr. v. Dept. of Envtl. Quality* (*MEIC I)*, 1999 MT 248, ¶ 63, 988 P.2d 1236 (emphasis added). The *MEIC I* Court also noted that the Framers "did not intend to merely prohibit that degree of environmental degradation which can be conclusively linked to ill health or physical endangerment." *Id.* ¶¶ 77. The Court highlighted this comment from Delegate Foster: "[I]f we put in the Constitution that the only line of defense is a healthful environment and that I have to show, in

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fact, that my health is being damaged in order to find some relief, then we've lost the battle." *Id.* ¶ 74 (citing Convention Transcripts, Vol. V at 1243-44, March 1, 1972).

a. Distinguishable Injuries

The Court ruled that Plaintiffs sufficiently alleged "significant and physical manifestations of an infringement of their constitutional right to a clean and healthful environment." Order on MTD at 14:19-22 (citing *MEIC I* ¶ 77). Plaintiffs set forth specific facts to support their allegations. Compl. ¶¶ 14-81; Pls.' Br. Opp. MSJ at 2-3 n. 5-11.

The State's position that Plaintiffs' alleged injuries are "inaccurate, mischaracterized, or not otherwise demonstrating standing" only emphasizes the factual dispute over these injuries. Defs.' Br. Supp. MSJ at 4. It is not appropriate to weigh conflicting evidence or assess the credibility of witnesses at summary judgment; those duties are for the fact finder at trial. *Barrett, Inc.* ¶ 8.

The State asserts that Plaintiffs' claims are not "distinguishable from the injury to the public generally." Defs.' Br. Supp. MSJ at 4 (quoting *MEIC I* ¶ 41). However, "to deny standing to persons who are in fact injured simply because many others are also injured, would mean that the most injurious and widespread government actions could be questioned by nobody." *Helena Parents Comm'n v. Lewis & Clark Cnty. Comm'rs*, 277 Mont. 367, 374, 922 P.2d 1140 (1996) (quoting *US v. SCRAP*, 412 U.S. 669, 688, 93 S. Ct. 2405 (1973); *see also Sierra Club v. Morton*, 405 U.S. 727, 734 (1972) ("the fact that particular environmental interests are shared by the many rather than the few does not make them less deserving of legal protection through the judicial process").

The State points to *Mitchell v. Glacier Cnty.* for the proposition that Plaintiffs' may not merely allege they "suffer[] in some indefinite way in common with people generally." 2017 MT 258, ¶ 10, 406 P.3d 427; Defs.' Br. Supp. MSJ at 4. But that case was not about distinguishable injuries. *Id.* ¶ 36 (citing *Helena Parents Comm'n* at 372-74) ("This case differs significantly from *Helena Parents Comm'n*. First, the contested issue—and the focus of our analysis in that case—was on the second requirement for standing: whether the alleged injury was distinguishable from the injury to the public generally.")

Unlike *Mitchell*, *Helena Parents Comm'n* is instructive. In that case, plaintiffs were able to establish a kind of taxpayer standing by showing that the government would "impose tax burdens on them as it seeks to recoup losses and that the investments will result in a lessening of governmental services." 277 Mont. at 372. The Court went on to determine whether the taxpayers' injury was distinguishable from the public generally. It held the district court "failed to consider that 'the injury need not be exclusive to the complaining party,' and failed to consider *Lee v. State*." *Id.* (quoting *Sanders v. Yellowstone County*, 53 Mont. St. Rep. 305, 306, 915 P.2d 196 (1996) (internal citation omitted)) (citing *Lee v. State*, 195 Mont. 1, 635 P.2d 1282 (1981)).

In *Lee*, which involved a constitutional challenge to a statewide 55 mile-per-hour speed limit, the State claimed that the plaintiff lacked standing because all members of the driving public had an affected interest in the statute and attempted to dismiss the case. The Court found Lee had standing based on the threat of prosecution, stating: "[t]he acts of the legislature which directly

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concern large segments of the public, or all the public, are not thereby insulated from judicial attack. Otherwise, the Uniform Declaratory Judgment Act would become largely useless." *Lee*, 195 Mont. at 7.

Fifteen years later, in *Helena Parents Comm'n*, the Court elaborated on *Lee*'s reasoning: "[n]ot everyone who claims they will be injured claims to have been injured in the same way, and while each plaintiff claims a form of harm in common with other members of a larger class of people, the harm each claims is not common to all members of the general public." 277 Mont. at 373-74.

It is true, as the State argues, that climate change is a global problem and affects everyone. Had Plaintiffs merely alleged climate change was the injury, the State's rule from *Mitchell* would apply. 2017 MT 258, ¶ 10. Here, Plaintiffs' have set forth specific facts that show their claimed injuries are concrete, particularized, and distinguishable from the public generally. Pls.' Br. Opp. MSJ at 2-3 n. 4-12; Compl. ¶¶ 14-81. The fact that many other Montanans are likely experiencing similar injuries is not dispositive.

b. Traceability and Redressability

The Court has already ruled on whether Plaintiffs' injuries are fairly traceable to State actions performed pursuant to MEPA and the MEPA Limitation, and whether Plaintiffs' injuries could be alleviated by an order declaring the MEPA Limitation unconstitutional. Order on MTD at 7-19. The State argues that discovery has resolved the factual disputes around causation and reiterates its position that Plaintiffs have failed to establish the "direct causal connection" articulated in *Larson v. State*, 2019 MT 28, ¶ 46, 434 P.3d 241, 262. The Court disagrees.

The State appears to be conflating the fairly traceable standard for standing with some kind of tort-like causation standard. As the Court already stated, "causation is an issue best left 'to the rigors of evidentiary proof …'" Order on MTD at 8-9 (quoting *Connecticut v. Am. Elec. Power Co.*, 582 F.3d 309, 345-47 (2d Cir. 2009), *rev'd on non-material grounds by Am. Elec. Power Co. v. Connecticut*, 564 U.S. 410, 411, 131 S. Ct. 2527, 2530 (2011) (US Supreme Court affirmed Second Circuit's exercise of jurisdiction; reversed on displacement)). Furthermore, "the 'fairly traceable' standard is not equivalent to a requirement of tort causation." *Connecticut,* 582 F.3d at 346 (citing *Natural Res. Def. Council, Inc. v. Watkins*, 954 F.2d 974, 980 n.7 (4th Cir. 1992) ("for purposes of satisfying Article III's causation requirement, we are concerned with something less than the concept of proximate cause" (citation and internal quotation marks omitted)); *Barbour v. Haley*, 471 F.3d 1222, 1226 (11th Cir. 2006)).

In its briefing, the State quotes the "direct causal connection" language from *Larson* but omits how it was prefaced: "a general or abstract interest in the constitutionality of a statute or the legality of government action is insufficient for standing *absent* a direct causal connection" between the alleged illegality and the injury. *Larson* ¶ 46 (emphasis added). A plain reading suggests a "direct causal connection" is only required when plaintiffs have "a general or abstract interest" in the controversy, but that would violate the standing rules for concrete and particularized injury. Furthermore, *Larson* did not involve the constitutionality of statutes. It is unclear how this Court should interpret and apply this phrase from *Larson* to this case.

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This "direct causal connection" language has only been used to describe standing in *Larson* itself. *Id.* To learn where that language came from, the Court performed a Lexis search for "direct causal connection" and found this language in thirteen other Montana cases: eleven workers' compensation cases and two negligence cases. In all those other cases, the courts were describing tort causation, not standing. *See e.g., Andree v. Anaconda Copper Mining Co.*, 47 Mont. 554, 568, 133 P. 1090 (1913); *Landeen v. Toole Cnty. Ref. Co.*, 85 Mont. 41, 54, 277 P. 615 (1929); *Birdwell v. Three Forks Portland Cement Co.*, 98 Mont. 483, 497, 40 P.2d 43 (1935); *Young v. Liberty Nat'l Ins. Co.*, 138 Mont. 458, 463, 357 P.2d 886 (1960); *Hines v. Indus. Accident Bd.*, 138 Mont. 588, 601, 358 P.2d 447 (1960) (Castles dissenting); *Greger v. United Prestress*, 180 Mont. 348, 352, 590 P.2d 1121 (1979); *Ridenour v. Equity Supply Co.*, 204 Mont. 473, 477, 665 P.2d 783 (1983); *Whittington v. Ramsey Constr. & Fabrication*, 229 Mont. 115, 122, 744 P.2d 1251 (1987); *Polk v. Planet Ins. Co.*, 287 Mont. 79, 83, 951 P.2d 1015 (1997); *Hanks v. Liberty Nw. Ins. Corp.*, 2002 MT 334, ¶ 33, 62 P.3d 710 (Trieweiler dissenting); *Stavenjord v. Mont. State Fund*, 2003 MT 67, ¶ 57, 67 P.3d 229 (Rice dissenting); *Pittman v. Horton*, 2004 ML 1654, 18, 2004 Mont. Dist. LEXIS 1771, *14; *Kratovil v. Liberty Nw. Ins. Corp.*, 2008 MT 443, ¶ 19, 200 P.3d 71.

Furthermore, federal courts have held bench trials "where the plaintiffs' standing allegations were put to the proof based on the facts elicited," and even in that context, "courts have pointed out that 'tort-like causation is not required by Article III.'" *Connecticut* at 346 (citing *Friends of the Earth, Inc. v. Gaston Copper Recycling Corp.*, 204 F.3d 149 (4th Cir. 2000); *Sierra Club, Lone Star Chapter v. Cedar Point Oil Co.*, 73 F.3d 546 (5th Cir. 1996); *Nat. Res. Def.*

Council v. Watkins, 954 F.2d 974, 976 (4th Cir. 1992); *Pub. Interest Research Grp. v. Powell Duffryn Terminals*, 913 F.2d 64, 72 (3d Cir. 1990) ("A plaintiff need not prove causation with absolute scientific rigor to defeat a motion for summary judgment")). And Montana courts have recognized, even in tort law, that causation is a factual issue to be *proven* at trial, not summary judgment. *Prindel v. Ravalli Cnty*., 2006 MT 62, ¶ 46, 133 P.3d 165 ("[C]ausation should not be decided on summary judgment, but should be resolved by the trier of fact").

The State also argues that MEPA "requires a reasonably close causal relationship between the triggering state action and the subject environmental effect," and that "an agency action is a legal cause of an environmental effect only if the agency can prevent the effect through the lawful exercise" of its authority. Defs.' Reply Br. Supp. MSJ at 6 (quoting *Bitterrooters for Planning, Inc. v. Mont. Dept. of Envtl. Quality*, 2017 MT 222, ¶ 33, 401 P.3d 712). "Thus," the State says, "because Defendants have no independent statutory authority to regulate or prevent climate change or its environmental impacts, any exclusion from environmental review of climate change or its impacts pursuant to the MEPA Limitation cannot be considered a legal cause of Plaintiffs' claimed injuries." *Id.* at 6-7.

Based on the pleadings and discovery, there appears to be a reasonably close causal relationship between the State's permitting of fossil fuel activities under MEPA, GHG emissions, climate change, and Plaintiffs' alleged injuries. Furthermore, the State has the authority to regulate GHG emissions and climate impacts by regulating fossil fuel activities that occur in Montana. Throughout this litigation, the State has pointed to the disparate statutes

governing specific activities such as the mining of coal, drilling oil and gas wells, and generating electricity from fossil fuels. *See e.g.,* Defs.' Br. Supp. MSJ at 5-6, 10. Those statutes clearly regulate fossil fuel activities, and the State's agents could alleviate the environmental effects of climate change through the lawful exercise of their authority if they were allowed to consider GHG emissions and climate impacts during MEPA review. It is a tautology to suggest that Plaintiffs cannot challenge the statute depriving the agencies of authority because the agencies lack that very authority. The State may not have the power to regulate out-of-state actors that burn Montana coal, but it could consider the effects of burning that coal before permitting a new coal mine. This Court cannot force the State to conduct that analysis, but it can strike down a statute prohibiting it.

As discussed in the Order on Motion to Dismiss, Plaintiffs only need to show their injuries will be effectively alleviated, remedied, or prevented by a favorable ruling. Order on MTD at 15:17-16:3 (citing *Larson v. State*, 2019 MT 28, ¶ 46, 394 Mont. 167, 434 P.3d 241). The Court ruled that Plaintiffs had established redressability. *Id.* at 18:23.

In addition to the specific facts alleged and supported with data in the Complaint, Compl. ¶¶ 118, 122-141, 144-184, Plaintiffs have set forth specific facts by declaration and deposition that establish both causation and redressability, i.e.; Montana's contributions to GHG emissions can be measured incrementally, Dorrington 30(b)(6) Dep. 38:3-12; Montana's contributions are not *de minimis*, Erickson Expert Report at 19-20; Erickson Dep. 38:6-7.

The State disputes Plaintiffs' specific facts, and factual disputes are not appropriate for disposition at summary judgment. The Court will find facts after trial. Here and now, the State has not shown that there are no genuine issues of material fact. Notwithstanding the State's failure to meet its own burden,

Plaintiffs have sufficiently supported their allegations with specific facts to survive summary judgment.

II. Prudential Standing

Viewing the MEPA Limitation separately from the *de facto* energy policy, Plaintiffs' reading of *Donaldson* is correct. Pls.' Br. Opp. MSJ at 12 ("Plaintiffs are not asking this Court to enact new laws") (citing *Donaldson* ¶ 4). Here, like in *Donaldson*, Plaintiffs asked for remedies that went beyond the scope of the Court's power and the Court has dismissed those claims. *See supra* pp. 3-4; Order on MTD at 21:4-20. However, unlike *Donaldson*, this case now only involves declaring a statute unconstitutional. As the State concedes, declaring the MEPA Limitation unconstitutional is not congruent with commanding the State to consider climate change in every project or proposal. Defs.' MSJ at 8 ("The Montana Legislature would have to amend MEPA to require this analysis"). There are no prudential concerns that prevent this Court from adjudging whether the MEPA Limitation is constitutional.

III. Absurd Results

"The absurd results canon . . . is a rule of statutory construction that serves to help resolve . . . ambiguity pursuant to which courts should construe statutes so as to avoid results glaringly absurd." *NRDC v. United States DOI*, 478 F. Supp. 3d 469, 487 (S.D.N.Y. 2020) (quoting *United States v. Venturella*, 391 F.3d 120, 126-27 (2d Cir. 2004)) (internal quotation marks removed).

The State argues that it "strains the bounds of credulity to assume that the Framers of the Montana Constitution had any intention of the right to a clean and healthful environment to be construed so broadly," Defs.' Br. Supp.

MSJ at 13. The Court interprets this argument as a rebuttal to Plaintiffs' allegations that a clean and healthful environment includes "a stable climate system that sustains human lives and liberties." Compl. at 103 (Prayer for Relief 4). The State speculates that an adverse ruling in this case will "give rise to seemingly endless litigation against all manner of public and private entities and individuals for any given emission of GHGs—from electrical generation to driving a car or using wood-burning stoves." Defs.' Br. Supp. MSJ at 13.

While the State correctly points out that Convention delegates never explicitly discussed a "stable climate system" during the debates over the environmental provisions, Defs.' Br. Supp. MSJ at 13, the Montana Supreme Court has recognized that "it was agreed by both sides of the debate that it was the convention's intention to adopt whatever the convention could agree was the stronger language." *MEIC I* ¶ 75 (citing Convention Transcripts, Vol IV at 1209, March 1, 1972). In fact, the Court has repeatedly found that the Framers intended the state constitution contain "the strongest environmental protection provision found in any state constitution." *Park Cnty. Envtl. Council v. Mont. Dep't of Envtl. Quality*, 2020 MT 303, ¶ 61, 402 Mont. 168, 477 P.3d 288 (quoting *MEIC I* ¶ 66).

Furthermore, the obligations of the Legislature found in Art. IX, Sec. 1 include providing "adequate remedies for the protection of the environmental life-support system from degradation." Mont. Const. Art. IX, Sec. 1. The Court in *MEIC I* cited Delegate McNeil's comments for guidance as to what that meant: "the term 'environmental life support system' 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 (citing Convention Transcripts, Vol. IV at 1201, March 1, 1972) (emphasis in opinion). "[O]ur intention was to permit no degradation from the present environment and affirmatively require enhancement of what we have now." *Id.* ¶ 69 (quoting Convention Transcripts, Vol IV at 1205, March 1, 1972) (emphasis in opinion).

Accordingly, the *MEIC I* Court concluded that the Montana Constitution's environmental provisions were "both anticipatory and preventative," and that "the delegates did not intend to merely prohibit that degree of environmental degradation which can be conclusively linked to ill health or physical endangerment." *MEIC I* ¶¶ 76-77. Delegate Foster's comment is apposite again: "[I]f we put in the Constitution that the only line of defense is a healthful environment and that I have to show, in fact, that my health is being damaged in order to find some relief, then we've lost the battle." *MEIC I* ¶ 74 (citing Convention Transcripts, Vol. V at 1243-44, March 1, 1972). These conclusions sound in both this absurdity analysis and the standing analysis previously discussed.

The Court reaffirmed the conclusions of *MEIC I* in *Park Cnty,* which warrants quoting at length:

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> "Our conclusions in *MEIC I* are consistent with the constitutional text's unambiguous reliance on preventative measures to ensure that Montanans' inalienable right to a 'clean and healthful environment' is as evident in the air, water, and soil of Montana as in its law books. Article IX, Section 1, of the Montana Constitution describes the environmental rights of 'future generations,' while requiring 'protection' of the environmental life support system 'from degradation' and 'prevent[ion of] unreasonable depletion and degradation' of the state's natural resources. This forward-looking and preventative language clearly indicates that Montanans have a right not only to reactive measures after a constitutionally-proscribed environmental harm has occurred, but to be free of its occurrence in the first place.
>
> Montanans' right to a clean and healthful environment is complemented by an affirmative duty upon their government to take active steps to realize this right. Article IX, Section 1, Subsections 1 and 2, of the Montana Constitution command that the Legislature 'shall provide for the administration and enforcement' of measures to meet the State's obligation to 'maintain and improve' the environment. Critically, Subsection 3 explicitly directs the Legislature to 'provide adequate remedies to prevent unreasonable depletion and degradation of natural resources.' Mont. Const. art. IX, § 1(3)."

Park Cnty. ¶¶ 62-63.

Based on the plain language of the implicated constitutional provisions, the intent of the Framers, and Montana Supreme Court precedent, it would not be absurd to find that a stable climate system is included in the "clean and healthful environment" and "environmental life-support system" contemplated by the Framers. Mont. Const. Art. II, Sec. 3; Art. IX, Sec. 1.

There is also no evidence, besides the State's speculative and conclusory statements, that such a judgment would result in an opening of the

floodgates. The Southern District of New York recently dealt with a similar argument from the Department of the Interior regarding incidental take of migratory birds under the Migratory Bird Treaty Act (MBTA), finding that "Interior's complaint that without the Jorjani Opinion the MBTA raises the specter of criminal liability any time someone allows his or her cat to go outside falls flat." *NRDC*, 478 F. Supp. 3d at 487. The State's argument that holding a clean and healthful environment to include a stable climate system would open the floodgates for private actions against Montanans for driving cars or using wood stoves similarly "falls flat." *Id.*

IV. Indispensable Parties

Next, the State argues that Plaintiffs failed to join indispensable parties. The only bases proffered in support of this argument are the speculative statements that "the declaratory relief Plaintiffs seek could and would result in the reduction of GHG emissions *through the destruction of Montana's fossil fuel industry* and the injunction of related activities," and that "Plaintiffs would surely reverse and prohibit the permitting of all manner of fossil-fuel related activities on a unilateral basis *if they had their druthers*." Defs.' Br. Supp. MSJ at 13-14 (emphasis added). The first statement essentially concedes that declaratory relief would redress Plaintiffs' injuries, contrary to the State's redressability arguments. The second demonstrates that this argument relies on speculative hyperbole.

As discussed above, declaring the MEPA Limitation unconstitutional is not commanding the State to consider climate change in every project or proposal. Furthermore, vacatur of specific permits is not an available remedy in this case. There are no indispensable parties unnamed in this suit.

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V. Constitutionality

"The constitutionality of a statute is presumed, 'unless it conflicts with the constitution, in the judgment of the court, beyond a reasonable doubt.'" *Mont. Cannabis Indus. Ass'n v. State*, 2016 MT 44, ¶ 12, 382 Mont. 256, 368 P.3d 1131 (quoting *Powell v. State Comp. Fund.*, 2000 MT 321, ¶ 13, 302 Mont. 518, 15 P.3d 877). The party challenging the constitutionality of a statute bears the burden of proof. *Id.* (citing *Big Sky Colony, Inc. v. Mont. Dep't of Labor and Indus.*, 2012 MT 320, ¶ 16, 368 Mont. 66, 291 P.3d 1231). To prevail on their facial challenges, Plaintiffs must show "that 'no set of circumstances exists under which the [challenged statute] would be valid, i.e., that the law is unconstitutional in all of its applications' or that the statute lacks any 'plainly legitimate sweep.'" *State v. Jensen*, 2020 MT 309, ¶ 12, 402 Mont. 231, 477 P.3d 335) (quoting *Wash. State Grange v. Wash. State Republican Party*, 552 U.S. 442, 449 (2008)).

However, "the distinction" between facial and as-applied challenges "is perhaps overstated." *Park Cnty.* ¶ 85. "Courts seek to resolve the controversy at hand, not to speculate about the constitutionality of hypothetical fact patterns." *Id.* ¶ 86. As the Montana Supreme Court has previously held for other MEPA amendments: "the 2011 Amendments [to MEPA] are unconstitutional because they substantially burden a fundamental right and are not narrowly tailored to further a compelling government interest. Thus, our conclusion that [the statutes are] unconstitutional flows from the content of the statute itself, not the particular circumstances of the litigants." *Id.* The Court's reasoning in *Park Cnty.* is compelling.

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a. Balancing competing constitutional rights and interests is the Court's duty.

The State cites *Berman*, 348 U.S. 26, 32-33 (1954) for the proposition that it "is solely the Legislature's prerogative" to balance competing constitutional rights and interests. Defs.' Br. Supp. MSJ at 15. The State argues that "[i]t is not for Plaintiffs *or the judiciary* to strike a proper balance between Montanan's right to a clean and healthful environment" and other rights. *Id.* (emphasis added).

Berman involved a challenge to Congress' exercise of police powers in Washington D.C.—a condemnation of property pursuant to the District of Columbia Redevelopment Act of 1945. *Id.* at 31. The Supreme Court held that great judicial deference is given to a legislative determination that a use is a public use. *Id.* at 31-32. The language the State is ostensibly referencing states: "Subject to specific constitutional limitations, when the legislature has spoken, the public interest has been declared in terms well-nigh conclusive. In such cases the legislature, not the judiciary, is the main guardian of the public needs to be served by social legislation…" *Berman* at 32. *Berman* does not present the factual or legal issues presented here, and it does not hold that the legislature is generally the arbiter of constitutional rights. *Compare, e.g., Missoulian v. Bd. of Regents*, 207 Mont. 513, 529, 675 P.2d 962 (1984) (Court required to "balance the competing constitutional interests in the context of the facts of each case"); *Butte Cmty. Union v. Lewis*, 219 Mont. 426, 433-34 712 P.2d 1309 (1986) (Court developed the "meaningful middle-tier" scrutiny which includes a balancing of interests test); *Crites v. Lewis & Clark Cnty.*, 2019 MT 161, ¶ 27, 396 Mont. 336, 444 P.3d 1025 (quoting *In re Lacy*, 239 Mont. 321, 326, 780 P.2d 186 (1989)).

("Because the judiciary has authority over the interpretation of the Constitution, it is the courts' duty to balance the competing rights at issue"). It is the judiciary's duty to determine a statute's constitutionality and balance competing constitutional rights and interests.

b. The MEPA Limitation

When interpreting a statute, the courts "look first to the plain meaning of the words [the statute] contains." *State v. Kelm*, 2013 MT 115, ¶ 22, 300 P.3d 387 (quoting *Kluver v. PPL Mont., LLC*, 2012 MT 321, ¶ 55, 293 P.3d 817). Courts must endeavor to give "harmonious effect" to its various provisions, *Crist v. Segna*, 191 Mont. 210, 213, 622 P.2d 1028 (1981), and may not construe a statute in a manner that would "defeat its evident object or purpose." *Howell v. State*, 263 Mont. 275, 286-87, 868 P.2d 568 (1994).

"The essential purpose of MEPA is to aid in the agency decision-making process otherwise provided by law by informing the agency and the interested public of environmental impacts that will likely result from agency actions or decisions." *Bitterrooters*, 2017 MT 222, ¶ 18. **"**MEPA is an essential aspect of the State's efforts to meet its constitutional obligations." *Park Cnty.* ¶ 89.

The MEPA Limitation provided:

> (2)(a) Except as provided in subsection (2)(b), an environmental review conducted pursuant to subsection (1) 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.
> (b) An environmental review conducted pursuant to subsection (1) may include a review of actual or potential impacts beyond Montana's borders if it is conducted by:

> (i) the department of fish, wildlife, and parks for the management of wildlife and fish;
> (ii) an agency reviewing an application for a project that is not a state-sponsored project to the extent that the review is required by law, rule, or regulation; or
> (iii) a state agency and a federal agency to the extent the review is required by the federal agency.

Mont. Code Ann. 75-1-201(2) (Amended by HB 971 on May 10, 2023).

While this case has been pending, Judge Moses' held in *MEIC v. DEQ*:

> Here, the plain language of MCA 75-1-201(2)(a) precludes agency MEPA review of environmental impacts that are 'beyond Montana's borders,' but it does not absolve DEQ of its MEPA obligation to evaluate a project's environmental impacts within Montana. DEQ misinterprets the statute. They must take a hard look at the greenhouse gas effects of this project as it relates to the impacts within the Montana borders.

MEIC v. DEQ, DV-56-2021-0001307 (13th District, April 6, 2023) (Order on Summary Judgment) at 29:3-9.

The substance of HB 971 had been requested on December 3, 2022, but the draft was not provided until April 11, 2023. The bill was introduced on April 14, 2023, eight days after Judge Moses' ruling. The bill was sent to enrolling on May 1 and signed by the Governor on May 10. It is a bill to clarify the statute and amends Mont. Code Ann. § 75-1-201(2) to say:

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> "(2)(a) Except as provided in subsection (2)(b), an environmental review conducted pursuant to subsection (1) may not include an evaluation of greenhouse gas emissions and corresponding impacts to the climate in the state or beyond the state's borders.
> (b) An environmental review conducted pursuant to subsection (1) may include an evaluation if:
> (i) conducted jointly by a state agency and a federal agency to the extent the review is required by the federal agency; or
> (ii) the United States congress amends the federal Clean Air Act to include carbon dioxide emissions as a regulated pollutant."

Mont. Code Ann. § 75-1-201(2) (enacted May 10, 2023) (new language underlined).

Throughout this litigation, the parties and the Court have used varying terminology to describe this statute: exclusion, exception, limitation, etc. This statute is aptly described as the MEPA Limitation because it categorically limits what the agencies, officials, and employees tasked with protecting Montana's environment can consider—it hamstrings them. On its face, the MEPA Limitation appears to conflict with the purpose of MEPA, which is to aid the State in meeting its constitutional obligation to prevent degradation by "informing the agency and the interested public of environmental impacts that will likely result" from State actions. *Bitterrooters* ¶ 18.

The State argues that since not all State actions taken pursuant to MEPA would implicate effects beyond Montana's borders, the statute is patently constitutional because Plaintiffs failed to prove "beyond a reasonable doubt that 'no set of circumstances exist under which the [challenged sections] would be valid." Defs.' Br. Supp. MSJ at 14 (quoting *Mont. Cannabis* ¶ 14; *Satterlee* ¶ 10). The State conveniently omits the second half of that rule, which states: "or that the statute lacks any 'plainly legitimate sweep.'" *State v. Jensen*, 2020 MT 309,

¶ 12, 402 Mont. 231, 477 P.3d 335 (emphasis added) (quoting *Wash. State Grange v. Wash. State Republican Party*, 552 U.S. 442, 449 (2008)).

Plaintiffs need not prove the unconstitutionality of the statute on summary judgment, and the State's attempt to cherry-pick situations when the MEPA Limitation has no real bearing on the decision-making process is unavailing. The MEPA Limitation bars the agencies from considering GHG emissions and climate impacts for any project or proposal, unless compelled by Federal law, whether the project would lead to any of those effects or not. But even if an analysis of GHGs and climate impacts is unnecessary given the nature and scope of a particular project, the statute still imposes a blanket prohibition. The Montana Supreme Court dealt with this argument in *Park Cnty.* and approvingly quoted Justice Leaphart's concurrence in *MEIC I:*

> "The fact that there may be water discharges from well tests, say for agricultural purposes, that do not in fact create harm to the environment, does not alter the fact that such discharges are exempted from nondegradation review and that such review is the tool by which the State implements and enforces the constitutional right to a clean and healthy environment."

Park Cnty. ¶ 87 (quoting *MEIC I*, ¶ 85 (Leaphart, J., specially concurring)). The Court found "Justice Leaphart's reasoning persuasive and adopt[ed] it" in that case. *Id.* ¶ 88.

Similarly, the fact there may be projects that do not implicate GHGs and climate impacts does not alter the fact that the statute prohibits considering those factors. The State vigorously contends that MEPA is procedural, and the Court agrees, but "[p]rocedural, of course, does not mean unimportant." *Park Cnty.* ¶ 70 (internal quotation marks omitted). The MEPA

Limitation affects MEPA procedure the same way every time—it blocks an entire line of inquiry.

Next, the State argues that it is entitled to summary judgment because Plaintiffs have failed to establish the unconstitutionality of the exceptions to the MEPA Limitation. Defs.' Br. Supp. MSJ at 16. The State does not offer any legal authority supporting this proposition, and the Court rejects it. The *exceptions* to an allegedly unconstitutional statute could be constitutional. But that does not change the fundamental analysis of the statute itself. *See Park Cnty.* ¶ 86. Two narrow exceptions, exceptions that merely allow the agencies to conduct the analysis Plaintiffs want them to do, and only when required by Federal law, cannot shield the statute's main text from constitutional review. *Id.* The intent of the Framers was not to lag behind the Federal government in environmental protections, it was to have the strongest constitutional environmental protections in the country. *Park Cnty*. ¶ 61; *MEIC I* ¶¶ 66, 74-75. If anything, these exceptions inform the tailoring analysis under strict scrutiny, but the case has not yet proceeded to that stage.

The MEPA Limitation clearly implicates Plaintiffs' fundamental right to a clean and healthful environment. A statute may only infringe a fundamental right if it is narrowly tailored to serve a compelling state interest. *Park Cnty.* ¶¶ 84-86. Whether Plaintiffs can prove standing and whether the statute can withstand strict scrutiny will be determined after trial.

VI. Plaintiffs' other claims.

The State also seeks summary judgment on Plaintiffs' equal protection claim, arguing that the MEPA Limitation does not create classifications. Defs.' Br. Supp. MSJ at 18. However, Plaintiffs correctly point

out that "the law may contain no classification . . . and be applied evenhandedly," but still "may be challenged as in reality constituting a device designed to impose different burdens on different classes of persons." Pls.' Br. Opp. MSJ at 20 (quoting *Gazelka v. St. Peter's Hosp.*, 2018 MT 152, ¶ 16, 420 P.3d 528). Whether climate change and the MEPA Limitation impact youths disproportionately is a material fact to be proven at trial.

Plaintiffs also levied claims under the right to seek safety, health and happiness, Mont. Const. Art. II, Sec. 3, 15, 17, Art. IX, Sec. 1; and the public trust doctrine, Mont. Const. Art. IX, Sec. 1, 3. Compl. Counts II, III, IV. The State argues on Reply that "all of Plaintiffs' claims are subject to dismissal [not summary judgment] under Defendants' arguments regarding standing, prudential concerns, absurd results, failure to join indispensable parties, and failure to demonstrate the facial invalidity" of the challenged statutes, and that none of these claims "survive summary judgment if Defendants prevail on any one of these arguments.". Defs.' Reply Br. Supp. MSJ at 18. As discussed above, the State did not prevail on those arguments. Also, the State did not establish any undisputed facts that entitle it to summary judgment on those claims.

For the foregoing reasons, Defendants' motion for summary judgment is **DENIED**.

ELECTRONICALLY SIGNED BELOW

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KS/sm/CDV-2020-307 Ord Def Motions Dismiss Mootness and Summ Judg

Order on Second Rule 60(a) Motion for Clarification September 22, 2022 (Doc. 217)

MONTANA FIRST JUDICIAL DISTRICT COURT
BROADWATER COUNTY

RIKKI HELD, et al., Plaintiff, v. STATE OF MONTANA, et al., Defendant.	Cause No. CDV-2020-307 **ORDER ON SECOND RULE 60(a) MOTION FOR CLARIFICATION**

Defendants State of Montana, et al., filed a second motion for clarification on July 22, 2022. The motion, filed under Montana Rules of Civil Procedure 60(a) and 52(a)(3), asks this court to explain why Youth Plaintiffs' requests for relief #1-5 are in fact justiciable and not political questions for the other two branches of government. While the State's motions are clearly an attempt to relitigate the motion to dismiss, this court will fully address the issues because they are critically important to the separation of powers and role of the judiciary in Montana. Professor Anthony Johnstone, recently nominated to the

Ninth Circuit, perhaps best articulated the difference between federal justiciability standards and the standards in Montana: "[t]he open-textured vesting of 'judicial power' and broad terms of state jurisdictional statutes leaves state courts ample space to depart from lockstep federal notions of standing, ripeness, mootness, advisory opinions, and political questions . . . the courthouse doors open a little wider to litigants in Montana." Anthony Johnstone, *The Montana Constitution in the State Constitutional Tradition*, 190, 223 (2021).

The State has presented the following two points of clarification:

I. Why don't requests for relief #1-4 (declaratory relief) violate the political question doctrine?

II. Why doesn't request for relief #5 violate the political question doctrine?

DISCUSSION

I. Do Youth Plaintiffs' claims for declaratory relief (requests for relief 1-4) violate the political question doctrine?

"It is a proposition too plain to be contested, that the constitution controls any legislative act repugnant to it . . . It is emphatically the province and the duty of the judicial department to say what the law is." *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 177 (1803). Constitutional and statutory interpretation are still squarely within the purview of the judicial branch, but the courts have self-imposed limits of justiciability known as prudential standing. The Court recently articulated one limit of prudential standing, the political question doctrine, in *Brown v. Gianforte*, stating: "[a]n issue is not properly before the judiciary when 'there is a textually demonstrable constitutional commitment of the issue to a coordinate political department or a lack of judicially discoverable and

manageable standards for resolving' the issue. However, 'not every matter touching on politics is a political question.'" *Brown v. Gianforte*, 2021 MT 149, ¶ 21, 404 Mont. 269, 280, 488 P.3d 548, 555 (citations omitted). Countervailing factors that weigh against prudential standing limitations are "the importance of the question to the public," and "whether the statute at issue would effectively be immunized from review if the plaintiff were denied standing." *Heffernan v. Missoula City Council*, 2011 MT 91, ¶ 33, 360 Mont. 207, 255 P.3d 80 (citations omitted).

While Justice Marshall thought it "a proposition too plain to be contested," the State is apparently unsure whether the judiciary has the power to declare statutes unconstitutional. This court assures the State that it can. Youth Plaintiffs' requests for relief 1-4 simply ask this court to determine whether the State Energy Policy, Mont. Code Ann. 90-4-1001(c)-(g), and the Climate Change Exception to the Montana Environmental Policy Act (MEPA), Mont. Code Ann. 75-1-201(2)(a), with their appurtenant acts and policies, violate the Montana Constitution — particularly the "clean and healthful environment" clause of Art. II, Sec. 3, and the "non-degradation" provision under Art. IX, Sec. 1.

The State mischaracterizes subsections two and three of Art. IX, Sec. 1 as committing the interpretation of Art. IX to the legislature, what would otherwise be known as a non-self-executing provision, but this is incorrect. Like the old constitutional guarantee of state assistance benefits under *Butte Community Union*, and guaranteed public education under *Columbia Falls*,

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"[o]nce the legislature has acted, or 'executed,' a provision that implicates individual constitutional rights, courts can determine whether that enactment fulfills the legislature's constitutional responsibility." *Columbia Falls Elem. Sch. Dist. No. 6 v. State*, 2005 MT 69, ¶ 17, 326 Mont. 304, 109 P.3d 257; see also *Butte Community Union v. Lewis*, 219 Mont. 426, 712 P.2d 1309 (Court upheld district court's determination that the legislature's act eliminating general assistance payments to "able-bodied persons" was unconstitutional because the legislature was failing to meet its obligations under Art. XII, Sec. 3 (Amd. Const. Amend. No. 18, approved Nov. 8, 1988)). The provisions of Art. IX, Sec. 1 similarly direct the legislature to provide the administration, enforcement, and remedies for the protection of the environment, and therefore the judiciary's role is to ensure they are fulfilling those duties.

This court agrees with the State that it is difficult to determine what exactly constitutes a clean and healthful environment, but Montana courts have undertaken it before. The seminal case, as the State knows, is *Montana Envtl. Info. Ctr. v. Dep't of Envtl. Quality (MEIC)*, 1999 MT 248, 296 Mont. 207, 988 P.2d 1236. In *MEIC*, the Court ultimately concluded that the plaintiffs had the ability to challenge the constitutionality of statutory provisions that allowed an agency to bypass environmental review. *MEIC*, ¶¶ 77-79. The Court famously stated the Montana Constitution "does not require that dead fish float on the surface of our state's rivers and streams before its farsighted environmental protections can be invoked." *Id.*, ¶ 77. The same is true, here: Youth Plaintiffs sufficiently invoked their fundamental constitutional rights, and they made a

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showing that the statutes at issue implicate those rights. The applicable legal standard for review of statutes infringing fundamental rights is strict scrutiny. *Id.*, ¶ 63. Youth Plaintiffs are challenging the constitutionality of statutes that allow the State to bypass environmental review, on all fours with *MEIC*.

The State points to *Juliana v. United States*, 947 F.3d 1159 (2019) as authority for dismissing Youth Plaintiffs' remaining claims as non-justiciable political questions, but the State's reliance on *Juliana* is misguided. First of all,

> "[t]his Court need not blindly follow the United States Supreme Court when deciding whether a Montana statute is constitutional pursuant to the Montana Constitution . . . We will not be bound by decisions of the United States Supreme Court where independent state grounds exist for developing heightened and expanded rights under our state constitution."

Butte Community Union at 433.

Plaintiffs in *Juliana* were bringing a substantive due process claim, not challenging the constitutionality of a statute. Furthermore, the United States Constitution does not include the right to a clean and healthful environment. *Juliana* was instructive as to case-in-controversy standing and causation, but the parallels end there.

In *Juliana*, the Ninth Circuit found that the request for a remedial plan violated the political question doctrine, exactly how this court ruled on Youth Plaintiffs' identical request. Importantly, however, the declaratory relief sought by plaintiffs in *Juliana* was found to be likely non-justiciable due to the perceived lack of redressability, not the political question doctrine. *Juliana* at 1171. As this court explained in the order on the State's motion to dismiss, unlike federal courts Montana courts may review claims that can "alleviate" an injury,

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even if they do not completely redress it. Order on Motion to Dismiss, 15:19–16:3; *Larson v. State*, 2019 MT 28, ¶ 46, 394 Mont. 167, 434 P.3d 241; *Heffernan*, ¶ 33. While declaratory relief in this case may not reverse global climate change in its entirety, it certainly could alleviate it.

This court agrees that climate change is a politically-charged issue, but whether the State's energy statutes violate the Montana constitution is a question for the courts, not the other branches of government. Constitutional and statutory interpretation are "the very essence of judicial duty." *Marbury* at 177. Furthermore, climate change is of paramount public importance, and if the State's position on so-called political questions were adopted, no controversial legislation would be reviewable by the courts. At the most basic level, the judiciary is not subservient to the legislature. To hold this controversy as non-justiciable due to the political question doctrine would completely upset the separation of powers.

II. Does request for relief #5 violate the political question doctrine?

At the outset of this analysis, it is worth noting the Court's recent decision in *Bd. of Regents of Higher Educ. of Mont. V. State*, 2022 MT 128, 409 Mont. 96, 512 P.3d 748. In that case, the Court affirmed the district court's ruling that a statute was unconstitutional as applied to the Board of Regents and enjoined the State from enforcing the statutes. *Bd. of Regents of Higher Educ. of Mont.*, ¶ 2, ¶ 8.

In its first order on clarification, this court explained that request for relief #5 "would be a logical extension and result" if the State Energy Policy and Climate Change Exception are declared unconstitutional. The State, unwilling to accept that reasoning, has asked for more. Again, the State points to

Juliana as a deus ex machina that will rescue it from judicial review. It won't.

The injunctive relief rejected by the Ninth Circuit as a political question was the remedial plan. *Juliana* at 1171-1173. This court has already rejected Youth Plaintiffs' similar prayer for a remedial plan, their request for an accurate accounting of greenhouse gas emissions, the request for a special master to oversee the remedial plan, and the request for an order retaining the court's jurisdiction over the remedial plan. Request for Relief #5 has no relation, no bearing on the remedial plan. Request for Relief #5 simply asks the court to enjoin the State from subjecting Youth Plaintiffs to allegedly unconstitutional statutes. Once again, it is well within the purview of the judiciary to: a) declare statutes unconstitutional, and b) prevent the State from enforcing unconstitutional statutes.

If request for relief #5 was related to the remedial plan, then the State would have a point. However, a plain reading of request #5 leaves no doubt that it is unrelated to the remedial plan or any other injunctive relief that this court already found beyond the judiciary's power. As it was in *Bd. of Regents*, it is perfectly within this court's authority to enjoin the State from enforcing statutes that are declared unconstitutional.

To avoid any further confusion:

I. Requests for relief #1-4 do not violate the political question doctrine because they simply call for constitutional and statutory interpretation — "the very essence of judicial duty."

II. Request for relief #5 does not violate the political question doctrine because it asks the court to enjoin the State from enforcing allegedly unconstitutional statutes.

This order clarifies that the surviving requests for relief do not violate the political question doctrine and are justiciable controversies.

DATED this 22 day of September, 2022.

KATHY SEELEY
District Court Judge

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KS/sm/CDV-2020-307 Ord Sec Rule 60(a) Mot Clarification

Order on Motion to Dismiss August 4, 2021(Doc. 46)

MONTANA FIRST JUDICIAL DISTRICT COURT
LEWIS AND CLARK COUNTY

RIKKI HELD, et al., Plaintiffs, v. STATE OF MONTANA, et al., Defendants.	Cause No. CDV-2020-307 **ORDER ON MOTION TO DISMISS**

BACKGROUND

I. Procedure

Rikki Held and 15 other Youth Plaintiffs (collectively "Youth Plaintiffs") filed a complaint for declaratory and injunctive relief on March 13, 2020. Youth Plaintiffs consist of youth citizens of Montana between the ages of two and eighteen. Plaintiffs engage in a variety of outdoor pursuits including ranching, fishing, hunting, foraging, cultural and familial practices, and recreating.

Youth Plaintiffs filed a Complaint against the State of Montana, Governor Steve Bullock, Montana Department of Environmental Quality,

Montana Department of Natural Resources and Conservation, Montana Department of Transportation, and Montana Public Service Commission (collectively "Defendants"). The Complaint alleges that Youth Plaintiffs were and are harmed by Defendants' extraction and utilization of fossil fuels, the release of greenhouse gas (GHG) emissions, and ultimately the rising climate change caused therefrom. Youth Plaintiffs allege physical, mental, emotional, aesthetic, cultural and economic injuries. According to Youth Plaintiffs, Defendants caused this harm through Montana's fossil-fuel focused State Energy Policy and the Climate Change Exception to the Montana Environmental Policy Act (MEPA).

Specifically, Youth Plaintiffs allege that the State Energy Policy and the MEPA Climate Change Exception are unconstitutional under the Montana Constitution. According to the Complaint, Defendants' actions pursuant to these statutory provisions violate several sections of Montana's Constitution, including Article II § 3, Article II § 4, Article II § 15, Article II § 17, Article IX § 1, and Article IX § 3. Stated generally, these sections declare that current and future citizens of Montana, regardless of age, possess an inalienable right to a clean and healthful environment. In addition to their constitutional arguments, Youth Plaintiffs allege that Defendants' actions violate the Public Trust Doctrine.

Defendants moved to dismiss the Complaint pursuant to Montana Rules of Civil Procedure 12(b)(1), 12(b)(6) and 12(h)(3) arguing Plaintiffs lack case-or-controversy standing, present a claim barred by a prudential limitation, and failed to exhaust administrative remedies.

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II. Montana State Energy Policy

The State Energy Policy of Montana is codified at Montana Code Annotated § 90-4-1001. The purpose of the State Energy Policy is to "promote energy efficiency, conservation, production, and consumption of a reliable and efficient mix of energy sources that represent the least social, environmental, and economic costs and the greatest long-term benefits to Montana citizens." Mont. Code Ann. § 90-4-1001(1)(a).

Despite this stated policy requiring Montana to utilize energy sources that cause the least harm to people, the environment, and the economy, five provisions of the State Energy Policy promote fossil fuel energy, as follows:

> (c) promote development of projects using advanced technologies that convert coal into electricity, synthetic petroleum products, hydrogen, methane, natural gas, and chemical feedstocks;
> (d) increase utilization of Montana's vast coal reserves in an environmentally sound manner that includes the mitigation of greenhouse gas and other emissions;
> (e) increase local oil and gas exploration and development to provide high-paying jobs and to strengthen Montana's economy;
> (f) expand exploration and technological innovation, including using carbon dioxide for enhanced oil recovery in declining oil fields to increase output;
> (g) expand Montana's petroleum refining industry as a significant contributor to Montana's manufacturing sector in supplying the transportation energy needs of Montana and the region;

Mont. Code Ann. § 90-4-1001(c)-(g).

The State Energy Policy also includes various other provisions that promote development of other sources of alternative energy including renewable energy sources. Mont Code Ann. § 90-4-1001.

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III. MEPA's Climate Change Exception

The Montana Legislature passed MEPA to (1) ensure that environmental impacts of state actions are fully considered and (2) ensure the public is informed of anticipated impacts of state actions. Mont. Code Ann. § 75-1-102. Under MEPA, the relevant agency engaged in the state action must conduct an environmental review. Mont. Code Ann. § 75-1-208. Environmental review results in the relevant agency producing either an Environmental Impact Statement or an Environmental Assessment.

MEPA includes an exception to this environmental review procedure referred to by Youth Plaintiffs as the Climate Change Exception. The exception provides that except in limited circumstances, "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." Mont. Code Ann. § 75-1-201(2)(a). Defendants characterize this exception differently, stating the exception's purpose is merely to streamline the environmental review process by preventing agencies from considering activities and impacts outside of the state. Defs.' Br. in Supp. of Mot. to Dismiss 5 (Apr. 24, 2020).

IV. *Juliana v. United States*

The case at bar is similar to the Ninth Circuit case *Juliana v. United States*, 947 F.3d 1159 (9th Cir. 2020). While a federal appellate court reviewed *Juliana*, the Ninth Circuit's review is instructive.

In *Juliana*, the plaintiffs included 21 youths. 947 F.3d at 1165. The plaintiffs claimed that the federal government violated their Fifth Amendment due process rights to a life-sustaining climate system. *Id.* at 1164. Defendants

sought summary judgment arguing that the plaintiffs presented a non-justiciable claim. *Id.*

At the outset, the Ninth Circuit acknowledged the expansive evidence presented by the plaintiffs and concluded "the record leaves little basis for denying that climate change is occurring at an increasingly rapid pace." *Id.* at 1166. Nonetheless, the court ultimately held that plaintiffs' claim was not reviewable. *Id.*

In its analysis, the Ninth Circuit first found that plaintiffs alleged constitutional violations. As such, the plaintiffs needed not exhaust their administrative remedies and properly decided not to bring their claim pursuant to the Administrative Procedure Act. *Id.* at 1667. Because the *Juliana* plaintiffs were not challenging a discrete action, federal court was the proper avenue for plaintiffs to pursue their constitutional claims. *Id.*

Second, the Ninth Circuit reviewed whether the plaintiffs possessed Article III standing to pursue their claim in federal court. *Id.* at 1168. The Ninth Circuit found that the plaintiffs possessed the first two requirements of standing: injury and causation. *Id.* at 1168-69. The court, however, found that plaintiffs could not establish redressability, the final element of standing. *Id.* at 1169. For this reason, the Ninth Circuit granted summary judgment for the government.

LEGAL STANDARD

Under Montana Rule of Civil Procedure 8(a)(1)-(2), a complaint must contain "a short and plain statement of the claim showing that the pleader is entitled to relief" and "a demand for the relief sought." In reviewing a complaint, the court "must accept as true the complaint's factual allegations, considering

them in the light most favorable to the plaintiff." *Cossitt v. Flathead Industries, Inc.*, 2018 MT 82, ¶ 8, 391 Mont. 156, 415 P.3d 486 (citation omitted).

A defendant may seek to dismiss a complaint in several ways. Under Montana Rule of Civil Procedure 12(b)(1) and 12(h)(3), a defendant may seek dismissal where the court lacks subject-matter jurisdiction. Subject-matter jurisdiction refers to the court's "fundamental authority . . . to hear and adjudicate particular class of cases or proceedings." *Lorang v. Fortis, Ins. Co.*, 2008 MT 252, ¶ 57, 345 Mont. 12, 192 P.3d 186 (citations omitted). District courts derive their subject-matter jurisdiction from the Montana Constitution which states "district courts have original jurisdiction in . . . all civil matters and cases at law and equity." Mont. Const. Art. VII § 4.

A defendant may also seek dismissal of a complaint where the plaintiff fails to "state a claim upon which relief can be grated." Mont. R. Civ. P. 12(b)(6). A motion to dismiss filed pursuant to 12(b)(6) should not be granted unless the plaintiffs can show no set of facts to support a claim entitling them to relief. *City of Cut Bank v. Tom Patrick Constr., Inc.*, 1998 MT 219, ¶ 6, 290 Mont. 470, 963 P.2d 1283 (citation omitted).

DISCUSSION

Like the defendants in *Juliana*, Defendants here contend that Youth Plaintiffs lack standing. Standing requires that a plaintiff demonstrate that they are entitled to have the merits of their claim reviewed by a Montana court. The plaintiff must demonstrate case-or-controversy standing.

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Second, Defendants argue a prudential limitation applies to Youth Plaintiffs' requested relief. Defendants argue that Plaintiffs' request for a court-order remedial plan to be created by Montana's executive and/or legislative branches poses a political question and is therefore nonjusticiable.

Finally, Defendants argue that the court must dismiss the Complaint because Plaintiffs failed to exhaust their administrative remedies. Without exhaustion of administrative remedies, this court is an improper forum to review Youth Plaintiffs' claims.

I. Case-or-Controversy Standing

A plaintiff must demonstrate case-or-controversy standing by "clearly alleg[ing] a past, present, or threatened injury to a property or civil right." *Heffernan v. Missoula City Council*, 2011 MT 91, ¶ 33, 360 Mont. 207, 255 P.3d 80 (citation omitted). The plaintiff's injury must also be "alleviated by successfully maintaining the action." *Id.* Simply put, the plaintiff must demonstrate: (1) an injury and (2) the court's ability to redress that injury through favorable outcome.

The parties do not dispute that Youth Plaintiffs allege a variety of past, present, and threatened injuries. *See Heffernan*, ¶ 33. Instead, Defendants argue that Youth Plaintiffs lack standing because Plaintiffs cannot establish causation or redressability.

A. Causation

Standing in federal court expressly requires plaintiffs to demonstrate three elements: (1) injury, (2) causation, and (3) redressability. *Heffernan*, ¶ 32 (citing *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560-61 (1992)). First, the plaintiff must suffer an injury in fact meaning "a concrete

harm that is actual or imminent, not conjectural or hypothetical." *Id.* Second, the plaintiff must demonstrate causation meaning "a fairly traceable connection between the injury and the conduct complained of." *Id.* Finally, the plaintiff must demonstrate redressability meaning "a likelihood that the requested relief will redress the alleged injury." *Id.*

Although Montana's standing requirements do not expressly direct plaintiffs to prove causation, causation is nonetheless implicit in establishing standing. This is because "[c]ase-or-controversy standing derives from Article VII, Section 4(1), of the Montana Constitution, and Article III, Section 2 of the United States Constitution." *Bullock v. Fox*, 2019 MT 50, ¶ 30, 395 Mont. 35, 435 P.3d 1187. As such, the Montana Supreme Court emphasized that federal precedent interpreting the federal requirements for standing under the U.S. Constitution is "persuasive authority" for interpreting Montana's constitutional requirements for standing. *Id.* (citations omitted).

A plaintiff demonstrates causation by showing her injury is "fairly traceable" to the defendant's injurious conduct. *Heffernan*, ¶ 32. But a plaintiff may establish causation "even if there are multiple links in the chain . . . as long as the chain is not hypothetical or tenuous." *Juliana*, 947 F.3d at 1169 (internal quotations and citations omitted).

Further, a plaintiff may establish causation even if the defendant was one of multiple sources of injury. *WildEarth Guardians v. United States Dep't of Agric.*, 795 F.3d 1148, 1157 (9th Cir. 2015) ("[s]o long as a defendant is at least partially causing the alleged injury, a plaintiff may sue that defendant, even if the defendant is just one of multiple causes of the plaintiff's injury."); *Connecticut v. Am. Elec. Power Co.*, 582 F.3d 309, 345-47 (2d Cir. 2009)

(finding (1) that "fairly traceable" does not require a plaintiff to allege that one injurious act alone caused the her injury and (2) that causation is an issue best left to "the rigors of evidentiary proof at a future stage of the proceedings") *rev'd. on other grounds*, 564 U.S. 410 (2011).

In *Juliana*, the Ninth Circuit agreed that the plaintiffs established the causation element of standing. 947 F.3d at 1169. The Ninth Circuit stated that "carbon emissions from fossil fuel production, extraction, and transportation" caused the plaintiffs' injuries. *Id.* And the United States is responsible for a significant amount of those carbon emissions. *Id.* Further, federal action continues to increase those emissions. *Id.* Accordingly, at the minimum, a genuine factual dispute existed "as to whether those polices were a 'substantial factor' in causing the plaintiffs' injuries." *Id.* (citation omitted).

Similar to *Juliana*, Youth Plaintiffs have met their burden to establish causation. Youth Plaintiffs cannot allege that the State Energy Policy and MEPA Climate Change Exception are the exclusive source of their injury. *See* Defs.' Bf. in Supp. of Mot. to Dismiss 9 (Apr. 24, 2020). However, demonstrating causation for standing purposes does not require such preciseness. *See Juliana*, 947 F.3d at 1169; *WildEarth Guardians*, 795 F.3d at 1157; *Connecticut*, 582 F.3d at 345-47. Rather, Youth Plaintiffs need only show that a set of facts demonstrate that the unconstitutional State Energy Policy and MEPA Climate Change Exception were a substantial factor in causing Plaintiffs' injuries. *See Juliana*, 947 F.3d at 1169; *See City of Cut Bank*, ¶ 6. Based on the facts alleged, Youth Plaintiffs have demonstrated that a genuine factual dispute exists with respect to whether Defendants' actions, taken pursuant to the two relevant statutory provisions, were a substantial factor in Plaintiffs' injuries.

While all states contribute to the nation's overall carbon emissions, Youth Plaintiffs sufficiently allege that Montana is responsible for a significant amount of those carbon emissions. *See Juliana*, 947 F.3d at 1169. In the complaint, Youth Plaintiffs offer several examples that demonstrate Montana's significant contribution to climate change. For example:

- Montana's per capita energy consumption is among the top one-third of all states, ranking 12th highest energy use per capita in 2017. Complaint ¶ 129 (Mar. 13, 2020).
- Montana is the sixth largest coal producer in the United States. *Id.*, ¶ 134.
- Montana produces 1 in every 200 barrels of U.S. oil. *Id.*, ¶ 135.
- One fifth of all U.S. natural gas imports from Canada entered the U.S. by pipelines through Montana in 2017. These pipelines were authorized by Defendants. Roughly 95% of natural gas that enters Montana passes through this state to other states *Id.*, ¶ 138.
- Between 1960 and 2017, coal, oil, and gas extracted from Montana with state-authorization resulted in 3,940 million metric tons of CO2 emissions once combusted. This number is roughly equivalent to 80% of all energy-related U.S. CO2 emissions in 2018. This amount of cumulative emissions would rank as the third largest when compared to the annual emissions of countries. *Id.*, ¶ 140.

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Plaintiffs allege that Defendants authorized much of those emissions pursuant to the State Energy Policy and MEPA's climate change exception. Paragraph 118 of the Complaint provides 23 examples of Defendants' "affirmative actions to authorize, implement, and promote projects, activities, and plans . . . that cause emissions of dangerous levels of GHG pollution into the atmosphere." Complaint ¶ 118 (Mar. 13, 2020). Youth Plaintiffs title these examples "aggregate acts." *Id.* The aggregate acts range from authorizing surface coal mining, coal-fired power plants, and pipelines to reducing contract lengths for renewable energy projects like solar. *Id.*, ¶ 118(b)-(c), (f)-(g), (i)-(m). Youth Plaintiffs allege that Defendants accomplished these aggregate acts in furtherance of the State Energy Policy which promotes fossil-fuel extraction and use. *Id.*, ¶ 118. Additionally, Defendants accomplished these acts without considering or informing Montana residents of associated climate change impacts pursuant to MEPA's Climate Change Exception. *Id.*

In their motion to dismiss, Defendants contend that the State Energy Policy is fully discretionary and seeks to promote "a reliable and efficient mix of energy" and "a balance between a sustainable environment and a viable economy." Defs.' Reply Br. in Supp. of Mot. to Dismiss 5 (June 11, 2020) (quoting Mont. Code Ann. §§ 90-4-1001(1)(a), (2)(d)). Thus, Plaintiffs cannot argue that the State Energy Policy caused the complained of injuries.

The court finds that, for the purposes of a motion to dismiss, Youth Plaintiffs have sufficiently raised a factual dispute as to whether the State Energy Policy was a substantial factor in causing Youth Plaintiffs' injuries. *See Juliana*, 947 F.3d at 1169. Like the plaintiffs in *Juliana*, Youth Plaintiffs here allege that Defendants authorized a "host of policies, from subsidies … to permits" over the

past decade pursuant to the State Energy Policy which encourages fossil-fuel development. *See id*; Complaint ¶ 118 (Mar. 13, 2020). As alleged, Defendants' aggregate acts taken pursuant to the State Energy Policy were a substantial factor in causing "dangerous levels of pollution," resulting in injury. *See Juliana*, 947 F.3d at 1169; *City of Cut Bank*, ¶ 6; Youth Pls.' Resp. to Defs.' Mot. to Dismiss 5 (May 29, 2020).

Defendants also posit that MEPA could not have caused Plaintiffs' harm because MEPA is a procedural rather than a substantive statute. Therefore, "any defect with MEPA would be procedural in nature and thus limited to a particular administrative decision." Defs.' Reply Br. in Supp. of Mot. to Dismiss 9 (Apr. 24, 2020). Because MEPA's requirements are merely "procedural" MEPA does not require an agency to reach any particular decision in the exercise of its independent authority. *Bitterrooters for Planning, Inc. v. Mont. Dep't of Envtl. Quality*, 2017 MT 222, ¶ 18, 388 Mont. 453, 401 P.3d 712.

Youth Plaintiffs respond that their constitutional challenge circumvents this analysis because Plaintiffs do not seek judicial review of an agency procedural decisions under MEPA. Instead, Plaintiffs challenge the constitutionality of the Climate Change Exception to MEPA that grants agencies the authority to disregard climate change analyses in conducting environmental review of proposed projects.

Youth Plaintiffs cite *Montana Envtl. Info. Ctr. v. Dep't of Envtl. Quality* (*MEIC),* 1999 MT 248, 296 Mont. 207, 988 P.2d 1236, to support their argument. In *MEIC* the Montana Supreme Court reviewed a constitutional challenge to a statutory provision allowing discharges from water wells. *Id.,* ¶ 1. In particular, the challenged provision provided an exception to

nondegradation review for discharges from water wells. *Id.*, ¶ 50. Absent this exception, the agency could not authorize degradation unless the agency demonstrated by the preponderance of the evidence that the degradation was, for example, necessary or conferred a benefit. *Id.*, ¶ 49 (citing Mont. Code Ann. § 75-5-303(3)(a)-(b)). However, with the exception in place, the agency was exempt from reviewing the degrading effect of some categories or classes of activities. *Id.* The plaintiffs argued this exception violated Article II, § 3[1] and Article IV, § 1[2] of the Montana Constitution.

The Montana Supreme Court ultimately concluded that the plaintiffs had the ability to challenge the constitutionality of statutory provisions that allowed an agency to bypass environmental review. *Id.*, ¶¶ 77-79. The statutory provision at issue in *MEIC* prevented degrading discharges unless the agency offered evidentiary support for its conclusion. This is arguably more substantive than MEPA, which as Defendants point out, does not require the agency to reach a particular conclusion. However, in *MEIC* the Court did not distinguish between procedural and substantive statutes. Instead, the Montana Supreme Court found that a clean and healthful environment is a "fundamental right" and that "any statute . . . which implicates that right must be strictly scrutinized." *Id.*, ¶ 63. In reaching its conclusion, the Supreme Court stated:

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[1] Article II, § 3 of the Montana Constitution states that "[a]ll persons . . . have certain inalienable rights. They include the right to a clean and healthful environment."

[2] Article IV, § 1, subparagraph (1) of the Montana Constitution states that "[t]he State and each person shall maintain and improve a clean and healthful environment in Montana for present and future generations." Additionally under Article IV, § 1, subparagraph (3), "[t]he legislature shall provide adequate remedies for the protection of the environmental life support system from degradation and provide adequate remedies to prevent unreasonable depletion and degradation of natural resources."

> Our constitution does not require that dead fish float on the surface of our state's rivers and streams before its farsighted environmental protections can be invoked. . . . the rights provide for in subparagraph (1) or Article IX, Section 1 was linked to the legislature's obligation in subparagraph (3) to provide adequate remedies for degradation of the environmental life support system and to prevent unreasonable degradation of natural resources.

Id., ¶ 77.

Based on the holding in *MEIC*, this court finds that Youth Plaintiffs sufficiently allege that Defendants' actions pursuant to MEPA's Climate Change Exception implicate their right to a clean and healthful environment. *See id.*, ¶ 63. Youth Plaintiffs allege that Defendants deliberately failed to consider or account for climate change in their MEPA analysis. Complaint ¶ 108 (Mar. 13, 2020). Pursuant to this exception, Defendants failed to account for or "disclose to the public the health or climate consequences" of the state-approved aggregate acts. *Id.*, ¶ 118(i), (k), (p). MEPA's Climate Change Exception allows Defendants to effectively turn a blind eye to constitutional violations. The exception allows Defendants to ignore whether state-approved projects will impede on a clean and healthful environment with respect to climate change.

As stated in *MEIC*, Youth Plaintiffs need not allege significant and physical manifestations of an infringement of their constitutional right to a clean and healthful environment to enforce their constitutional right, but Plaintiffs did so here. *See MEIC*, ¶ 77. Defendants' alleged violation of Youth Plaintiffs' constitutional rights resulted in injury. These injuries included economic, aesthetic, cultural, and physical, mental, and emotional health. *See* Complaint,

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¶¶ 15, 20, 36, 44, 53 (Mar. 13, 2020). Accordingly, the court declines to dismiss Plaintiffs' claims with respect to MEPA's Climate Change Exception.

Finally, with regard to MEPA, Defendants also argue that Plaintiffs are challenging "hypothetical future administrative decisions" and that these speculative claims will result in this court issuing an advisory opinion. Defs.' Reply Br. in Supp. of Mot. to Dismiss 10 (June 11, 2020) (citing *Donaldson v. State*, 2012 MT 288, ¶ 9, 367 Mont. 228, 292 P.3d 364). In *MEIC*, the Montana Supreme Court seemed to address this argument by stating the Constitution's clean and healthful environment language provides "protections which are both anticipatory and preventative." *MEIC*, ¶ 77. Additionally, Youth Plaintiffs' challenge is not against hypothetical future administrative decisions. Instead, Youth Plaintiffs allege that they will continue to suffer harm if these statutes are left in place because "Defendants continue to aggressively pursue expansion of the fossil fuel industry in Montana." Complaint, ¶ 118(t) (Mar. 13, 2020); *See Id.*, ¶ 118(u), (v), (w).

B. Redressability

To establish standing in federal court, a plaintiff must demonstrate "a likelihood that the requested relief will redress the alleged injury." *Heffernan*, ¶ 32. While federal case law is persuasive authority in interpreting Montana's standing requirements, the Montana Supreme Court seems to have adopted a broader interpretation of the redressability element. In Montana, a court may only review a claim where the plaintiff alleges an injury that "available legal relief can effectively alleviate, remedy, or prevent." *Larson v. State*, 2019 MT 28, ¶ 46, 394 Mont. 167, 434 P.3d 241 (citation omitted). The term "alleviate" means to "make (something, such as pain or suffering) more bearable" or "to partially

remove or correct (something undesirable)." *Alleviate*, Merriam-Webster Dictionary, *https://www.merriam-webster.com/dictionary/alleviate* (last visited June 2021).

In *Juliana*, the Ninth Circuit found that the plaintiffs failed to establish redressability. 947 F.3d at 1170-73. The Ninth Circuit stated that plaintiffs must establish Article III redressability under a two-prong analysis. Plaintiffs must demonstrate that the relief sought is: "(1) substantially likely to redress their injuries; and (2) within the district court's power to award." *Id.* at 1170. In asking for relief, the plaintiffs first requested the court to declare that the government was violating the Constitution. *Id.* But the Ninth Circuit found this relief was "unlikely by itself to remediate [the plaintiffs'] alleged injuries absent further court action." *Id.* (citation omitted). Thus, plaintiffs failed the first prong.

Second, the plaintiffs asked the Ninth Circuit to issue an injunction "requiring the government not only to cease permitting, authorizing, and subsidizing fossil fuel use, but also to prepare a plan subject to judicial approval to draw down harmful emissions." *Id.* The court found, and the plaintiffs agreed, that an injunction alone would not remedy their injuries. *Id.* at 1171. Further, the Ninth Circuit found that a court-ordered remedial plan was beyond the court's power to award under the second prong of redressability. The plaintiffs' request for a remedial plan would require the court to tread into the authority vested in the legislative and executive branches, and this would violate the separation of powers. *Id.* at 1172.

This case is distinguishable from *Juliana*. Beginning with the second prong of *Juliana*'s redressability analysis, this court may grant Youth Plaintiffs' declaratory relief. Discussed in greater detail below, the court finds

that it lacks the authority to grant Youth Plaintiffs' injunctive relief, including Plaintiffs' request for a remedial plan like in *Juliana*. Such expansive relief presents a political question and exceeds the court's powers. *See id.*

However, importantly, Youth Plaintiffs must satisfy a different first prong to establish redressability than the *Juliana* plaintiffs. Youth Plaintiffs need not prove that the relief sought is "substantially likely to redress their injuries." *Id.* at 1170. Instead, Youth Plaintiffs' burden is to demonstrate that the redress sought will "alleviate, remedy, or prevent" harm caused by Defendants. *See* Larson, ¶ 46. Under the facts alleged and relief requested by Youth Plaintiffs, a favorable ruling will alleviate Plaintiffs' injuries.

According to Youth Plaintiffs, their Complaint establishes that the State Energy Policy and Climate Change Exception to MEPA contributed to their injuries. Therefore, if the court declares that the State Energy Policy and Climate Change Exception to MEPA are unconstitutional, this "by itself, [would] suffice to establish redressability, regardless of whether additional injunctive relief was issued." Youth Pls.' Resp. to Defs.' Mot. to Dismiss 10 (May 29, 2020). The court agrees.

The Complaint provides support for this contention. First, Youth Plaintiffs described 23 affirmative acts, or aggregate acts, taken by Defendants pursuant to the State Energy Policy and MEPA exception. Complaint ¶ 118 (Mar. 13, 2020).

Second, Youth Plaintiffs allege through these aggregate acts, "Defendants are responsible for dangerous amounts of GHG emissions from Montana – both cumulative emissions and ongoing emissions, which in turn causes and contributes to the Youth Plaintiffs' injuries." *Id.* ¶ 121

(Mar. 13, 2020). The ensuing paragraphs describe Montana's GHG emissions, as well as the State's role in contributing to the country's total GHG emissions. *Id.* ¶¶ 122-42. Youth Plaintiffs conclude that "as a result of actions taken pursuant to and in furtherance of the State Energy Policy, [Defendants are] responsible for a significant and dangerous quantity of GHG emissions that have contributed to dangerous climate change and infringed the constitutional rights of Youth Plaintiffs." *Id.* ¶ 142.

Finally, Youth Plaintiffs alleged that Montana's GHG emissions and overall contribution to national GHG emissions "harm[ ] Youth Plaintiffs' physical and psychological health and safety, interfere[ ] with family and cultural foundations and integrity, and cause[ ] economic deprivations." *Id.* ¶ 2; *See also Id.* ¶¶ 143-84 ("Anthropogenic Climate Destabilization is Already Causing Dangerous Impacts in Montana"). Further, "[b]ecause of their unique vulnerabilities and age, Youth Plaintiffs are disproportionately harmed by the climate crisis and face lifelong hardships." *Id.* Youth Plaintiffs support these statements by describing their historic and ongoing injuries caused by rising GHG emissions. *Id.* ¶¶ 14-81.

Under these alleged facts, the State Energy Policy and MEPA Climate Change Exception contribute to Youth Plaintiffs' injuries. *See City of Cut Bank*, ¶ 6. Notwithstanding Youth Plaintiffs' request for this court to order a remedial plan, Youth Plaintiffs sufficiently demonstrate that finding State Energy Policy and Climate Change Exception to MEPA unconstitutional would alleviate their injuries. *See Larson*, ¶ 46. If the court declared these statutory provisions

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unconstitutional, it would partially remove or correct the injuries suffered by Youth Plaintiffs. For these reasons, Youth Plaintiffs adequately establish redressability here.

II. Prudential Standing

Prudential Standing sets additional limits on what cases a plaintiff may bring before a court. One such prudential limitation is the political question doctrine. Under this doctrine courts recognize that they "generally should not adjudicate matters 'more appropriately in the domain of the legislative or executive branches or the reserved political power of the people.'" *Larson*, ¶ 18 n. 6. Courts may not review "controversies . . . which revolve around policy choices and value determinations constitutionally committed for resolution to other branches of government or to the people in the manner provided by law." *Id.*, ¶ 39 (citation omitted).

Defendants contend that Plaintiffs seek a remedy which the court lacks the authority to grant. Plaintiffs ask the court to order "Defendants to develop a remedial plan or policies to effectuate reductions of GHG emissions in Montana . . . to protect Youth Plaintiffs' constitutional rights from further infringement by Defendants." Complaint ¶ 7 (Mar. 13, 2020). If the court deems necessary, the court should also appoint a special master with appropriate expertise to "assist the Court in reviewing the remedial plan for efficacy." *Id.*, ¶ 8. Further, the court should order that it will "retain[ ] jurisdiction over this action until such time as Defendants have fully complied with the orders of the Court." *Id.*, ¶ 9. Defendants argue that such relief exceeds the court's authority because the ability to enact new legislation lies exclusively with the Montana Legislature. The court agrees.

In *Juliana*, the Ninth Circuit found that the plaintiffs' request for a remedial climate plan violated the political question doctrine. 947 F.3d at 1171-72. The Ninth Circuit stated that "any effective plan would necessarily require a host of complex policy decision entrusted . . . to the wisdom and discretion of the executive and legislative branches." *Id.* at 1171 (citation omitted). As such, the court found it lacked any power to grant or enforce a remedial plan. *Id.* at 1172-73.

In response, Youth Plaintiffs first state that the Montana Supreme Court granted the plaintiffs' request for a similar plan to remedy an unconstitutional school funding system in *Columbia Falls Elem. v. State.* 2005 MT 69, 326 Mont. 304, 109 P.3d 257. Plaintiffs state that in *Columbia Falls*, "the Court declared Montana's school funding system unconstitutional and gave the legislature an opportunity to correct the unconstitutional school funding system." Youth Pls.' Resp. to Defs.' Mot. to Dismiss 11 (May 29, 2020).

However, in *Columbia Falls*, the court did not order a remedy to the extent requested here. The court did not order the legislative or executive branches to create laws, policies, or regulations to remedy the unconstitutional school funding system. Instead, the court deemed the funding system unconstitutional under the Public School Clause which required the legislature to "provide a basic system of free quality public . . . schools." Mont. Const. Art. X § 1(3), *Columbia Falls Elem.*, ¶ 31. The court then stated, "we defer to the Legislature to provide a threshold definition of what the Public School Clause requires," however, "the current funding system . . . cannot be deemed

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constitutionally sufficient." *Id.* In deferring to the Legislature, the court did not craft a remedy "committed for resolution to other branches of government or to the people in the manner provided by law." *See Larson*, ¶ 39.

The court finds that Youth Plaintiffs' request for a remedial plan violates the political question doctrine. The Complaint asks this court to oversee Defendants' development of a remedial plan or policies that adequately reduce GHG emissions to a constitutionally permissible level. Ordering such a remedial plan, and retaining jurisdiction over the plan's development, would require the court to make or evaluate complex policy decision entrusted to the discretion of other governmental branches. *See Larson*, ¶ 39, *Juliana*, 947 F.3d at 1171.

In a similar vein, the court also finds that the requested injunctive relief seeking an accounting of GHG emissions violates the political question doctrine. Plaintiffs ask the court to order that Defendants retroactively review and "prepare a complete and accurate accounting of Montana's GHG emissions, including those emissions caused by the consumption of fossil fuels extracted in Montana and consumed out of state, and Montana's embedded emissions." Complaint ¶ 6 (Mar. 13, 2020). Such an order would require the court to exceed its authority by overseeing analysis and decision-making that should be left to "the wisdom and discretion of the legislative or executive branches." *See Juliana*, 947 F.3d at 1171.

However, Youth Plaintiffs also offer a second argument: the court may grant declaratory relief without imposing an injunctive remedy. Courts have "the duty to decide the appropriateness and the merits of the declaratory request irrespective of its conclusion as to the propriety of the issuance of the injunction." *Steffel v. Thompson*, 415 U.S. 452, 468 (1974). Further, a district

court has "power to declare rights, status, and other legal relations whether or not further relief is or could be claimed." Mont. Code Ann. § 27-8-201.

The court agrees that it may grant declaratory relief regardless of injunctive relief. The court possesses the authority to grant declaratory or injunctive relief, or both. *See Steffel*, 45 U.S. at 468-69; Mont. Code Ann. § 27-8-201. Therefore, despite dismissing Youth Plaintiffs' claims for injunctive relief, the court will allow Plaintiffs' claims for declaratory relief to move forward.

III. Administrative Exhaustion

Defendants' final argument is that Plaintiffs allege injuries from various administrative decisions but failed to exhaust administrative remedies. Moreover, the statute of limitations for filing an administrative challenge bars Plaintiffs from asserting such a challenge now.

Under the Montana Administrative Procedure Act (MAPA), plaintiffs may only seek judicial review of an agency's final written decision after they have "exhausted all administrative remedies available within the agency." Mont. Code Ann. § 2-4-702(1)(a). "The purpose of the exhaustion doctrine is to 'allow[ ] a governmental entity to make a factual record and to correct its own errors within its specific expertise before a court interferes.'" *Shoemaker v. Denke*, 2004 MT 11, ¶ 18, 319 Mont. 238, 84 P.3d 4 (citation omitted).

In their brief, Youth Plaintiffs respond that they are "not seeking review of any contested case under MAPA." Youth Pls.' Resp. to Defs.' Mot. to Dismiss 18 (May 29, 2020). Additionally, because Plaintiffs are not challenging a discrete agency action or review of a contested case "they intentionally have not

asserted MAPA claims; their claims are brought directly under Montana's Constitution." *Id.*

Plaintiffs' argument is supported by the Montana Supreme Court's ruling in *MEIC*. In *MEIC*, the lower court held that "Article II, Section 3 of the Montana Constitution does provide a fundamental right to a clean and healthy environment, and that parties such as the Plaintiffs are entitled to bring a direct action in court to enforce that right." *MEIC*, ¶ 28. The basis for the plaintiffs' constitutional challenge in *MEIC* was a statutory provision that allowed the defendant agency to circumvent nondegradation review of discharges from water wells for certain categories or classes of activities. *Id.*, ¶ 6. In *MEIC* the district court held – and the Supreme Court did not overturn – the plaintiffs' ability to bring a direct action in district court without first seeking administrative review. *See id.*, ¶¶ 77-81.

Moreover, "exhaustion of an administrative remedy is unnecessary if the remedy would be futile as a matter of law." *Leo G.*, ¶ 11. A party need not exhaust administrative remedies where the administrative rules and statutes make agency relief futile. *Mountain Water Co. v. Mont. Dep't of Pub Serv. Regulation*, 2005 MT 84, ¶¶ 15-16, (citing *DeVoe v. Department of Revenue*, 263 Mont. 100, 866 P.2d 228 (1993)). A showing of futility requires the aggrieved party to demonstrate more than "the mere possibility or likelihood that an administrative remedy may not succeed on the merits." *Leo G.*, ¶ 11 (citing *Mountain Water Co.*, ¶¶ 16-18).

Under similar reasoning, the court in *Juliana* found that the plaintiffs needed not exhaust their administrative remedies prior to bringing their claim under the federal version of MAPA – the Administrative Procedure Act

(APA). The court stated that the plaintiffs argued "the totality of various government actions contributes to the deprivation of constitutionally protected rights. Because the APA only allows challenges to discrete agency decisions . . . the plaintiffs cannot effectively pursue their constitutional claims – whatever their merits – under that statute." *Juliana*, 947 F.3d at 1167.

The court concludes that Youth Plaintiffs properly brought this action in district court rather than through the administrative review process. *See MEIC*, ¶ 28.

Additionally, had Youth Plaintiffs sought Defendants' review of the administrative decisions noted, Defendants would have found no errors to correct. *See Shoemaker*, ¶ 18. The Climate Change Exception exempts Defendants from considering climate impacts altogether. Any challenge brought by Youth Plaintiffs asking the agency to review climate-related impacts would therefore be futile. *See Leo G.*, ¶ 11. Additionally, similar to the plaintiffs in *Juliana*, no single agency action standing alone caused their injuries. *See* 947 F.3d at 1167; Complaint ¶ 118 (Mar. 13, 2020). Accordingly, contesting any one final agency decision before the agency would not provide the relief sought by Youth Plaintiffs. *See Leo G.*, ¶ 11. For these reasons, the court declines to dismiss Youth Plaintiffs' MEPA-related claims for want of administrative exhaustion.

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ORDER

Based on the foregoing, Defendants' motion to dismiss is **GRANTED** with respect to Requests for Relief 6, 7, 8, and 9. The motion to dismiss with respect to all other claims is **DENIED**.

DATED this 4 day of August 2021.

KATHY SEELEY
District Court Judge

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Defendants' Motion for Clarification and Stay of Judgment Pending Appeal October 16, 2023

(Doc. 422)

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Montana First Judicial District Court
Lewis and Clark County

Rikki Held, et al., Plaintiffs, vs. State of Montana, et al., Defendants.	Cause No. CDV-2020-307 **Defendants' Motion for Clarification and for Stay of Judgment Pending Appeal**

Defendants Department of Environmental Quality, Department of Natural Resources and Conservation, Department of Transportation, and Governor Gianforte respectfully move this Court for the following relief:

1. Clarification that this Court's August 14, 2023, Findings of Fact, Conclusions of Law, and Order ("Order") (Doc. 405), does not require Defendants to analyze or calculate greenhouse gas (GHG) emissions or climate change impacts in every MEPA analysis for permitting decisions and/or regulatory actions but, instead, merely declared Montana

Code § 75-1-201(2)(a) unconstitutional and enjoined Defendants from applying Montana Code § 75-1-201(2)(a).

2. A stay of the Court's Order and any judgment contained therein pending appeal under Montana Rule of Appellate Procedure 22(1)(a)(i).

A supporting brief, declaration, and exhibits are filed contemporaneously with this Motion. Counsel for Plaintiffs have been contacted about this motion and indicated that they oppose.

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Defendants' Brief in Support of Motion for Clarification for Stay of Judgment Pending Appeal October 16, 2023 (Doc. 423)

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Montana First Judicial District Court
Lewis and Clark County

Rikki Held, et al., Plaintiffs, vs. State of Montana, et al., Defendants.	Cause No. CDV-2020-307 **Defendants' Brief in Support of Motion for Clarification and for Stay of Judgment Pending Appeal**

INTRODUCTION

In 2021, this Court dismissed Plaintiffs' requests for a court-ordered "remedial plan," and "GHG accounting" as nonjusticiable political questions. *See* (Doc. 46 at 19–21.) This reasonable holding followed the Ninth Circuit's ruling in *Juliana v. United States* and the holdings of other state courts who have dismissed claims like Plaintiffs'.

In this Court's words, at the beginning of this case, "Plaintiffs asked for remedies that went beyond the scope of the Court's power and the Court … dismissed those claims." (Doc. 379 at 14.) After the Court "dismissed those claims," the only legal issue left was whether § 75-1-201(2)(a), MCA was constitutional. (*Id.*) ("[T]his case now only involves declaring a statute unconstitutional."). This Court's August 14, 2023, Findings of Fact, Conclusions of Law, and Order ("Order") declared this statutory provision unconstitutional and enjoined the State from enforcing it. *See* (Doc. 405 at 102.) Thus, the statute no longer bars DEQ from considering greenhouse gas (GHG) emissions and their impact on the climate in its MEPA analysis. But the Court made clear that it was granting only *negative* injunctive relief barring Defendants from applying § 75-1-201(2)(a), MCA. The Court did not enter any *affirmative* injunctive relief requiring DEQ and other state agencies to revolutionize their environmental analyses overnight. Nor did the Court order DEQ or other state agencies to take any specific measures to change their analysis of GHG emissions.

The narrow focus of the Court's Order was no surprise. As the Court had previously put it, "the relief contemplated by the Court *has always* been limited to declaratory judgment on the constitutionality of the statutory provisions [at issue] and an injunction on the enforcement of those provisions." (Doc. 379 at 3–4) (quotation cleaned up) (emphasis added). The Court has explained that "declaring the MEPA Limitation unconstitutional is not congruent with

commanding the State to consider climate change in every project or proposal." (Doc. 379 at 14.); *see also id.* at 18 ("[D]eclaring the MEPA Limitation unconstitutional is not commanding the State to consider climate change in every project or proposal.").

Plaintiffs, however, read the Court's Order differently. They have issued two demand letters claiming that "DEQ must now calculate the GHG emissions that will result from proposed projects." *See* Nowakowski Decl., Ex. A, at 6; Ex. B, at 6. And they have threatened DEQ with contempt if the agency does not agree *Id.*, Ex. A at 6–7; Ex. B at 6–7. Allied third-party interest groups—who often litigate environmental issues in Montana—have gone so far as to say that "the court told DEQ to immediately consider climate change in its environmental analyses under MEPA" and that "DEQ has not complied with the clear order in *Held*." *See* https://meic.org/deq-mepa-climate-now/.

This is a remarkable reading of the Court's order. To start, the Court was clear that the *opposite* was true: "declaring the MEPA Limitation unconstitutional *is not* commanding the State to consider climate change in every project or proposal." (Doc. 379 at 14.) (emphasis added). And the Court has held since 2021 that a Montana court lacks power to order state agencies to overhaul their environmental analyses. (Doc. 46 at 19–21.) The Court can strike down a statute; it cannot craft a new regulatory scheme. The Court struck down one statutory provision; it did not rewrite Montana environmental law.

Defendants request this Court clarify that its order does not require Defendants to immediately implement analysis of GHG emissions or climate change impacts in every MEPA review for every project or proposal. This Court has made clear over and over that it declined to

order such sweeping relief and correctly concluded it was a matter left to the political branches. (Doc. 46 at 19–21.) Yet Plaintiffs have missed the message.

Defendants also respectfully move this Court for a stay of its order pending appeal. A stay is necessary to preserve the status quo and avoid satellite litigation surrounding permitting decisions before the Supreme Court finally resolves the issues in this case. Both the "good cause" standard of M. R. App. 22(2)(a)(i) and the federal factors the Montana Supreme Court recently approved favor a stay pending appeal.

While Defendants are considering if, when, and how to calculate GHG emissions in permitting analyses, this process cannot be completed overnight. Nowakowski Decl. ¶¶ 18–23. Indeed, until this Court's ruling two months ago, Montana law *forbade* Defendants to account for GHG emissions in their analysis of a project's impact. Issues surrounding climate change are complex. They should be analyzed carefully under well-considered methodologies. Adopting a makeshift analysis would shortchange regulated parties and the public. It would also create regulatory uncertainty that would have ripple effects throughout Montana's energy system. And it would subject Defendants to potential litigation risk in the future by parties who claim that it is acting arbitrarily and capriciously by using a slipshod analysis cobbled together to avoid a contempt motion by Plaintiffs here or widespread litigation against Defendants' MEPA reviews and permitting decisions. No one wins in that scenario.

Ultimately, the Montana Supreme Court will have the final word on Plaintiffs' claims. Until then, this Court should maintain the status quo. The matter is urgent. Absent clarification and a stay, Defendants will be stuck between a rock and hard place: on the one hand, they will be threatened by Plaintiffs' attorneys with contempt; on the other hand, they will be subject to

MEPA challenges from being forced to hastily develop and employ a GHG analysis without devoting the time and consideration that is necessary to implement that complex analysis.

RELEVANT LEGAL STANDARDS

Clarification Standard

"In subsequently interpreting or clarifying a prior judgment, the issuing court may more precisely explain or specify the original meaning or effect of the judgment or provide additional specification necessary to implement it." *Meine v. Hren Ranches, Inc.*, 2020 MT 284, ¶ 19, 402 Mont. 92, 475 P.3d 748. Motions requesting clarification of an order are not subject to the time limitations of a motion brought under Montana Rules of Civil Procedure 59 and 60 as they merely allow the issuing court to interpret or clarify its "prior judgment … as necessary to enforce, implement, or otherwise fully effect its manifest original meaning or effect." *Id.*

Stay Standard

Montana Rule of Appellate Procedure 22(1)(a)(i) authorizes a party to file a motion in the district court "[t]o stay a judgment or order of the district court pending appeal." While this rule does not provide a standard for a district court to evaluate a stay motion, a motion for stay filed in the Montana Supreme Court must "demonstrate good cause for relief requested." M. R. App. P. 22(2)(a)(i). 'Good cause' is generally defined as a legally sufficient reason and referred to as the burden placed on a litigant to show why a request should be granted." *Mont. Env't Info. Ctr. v. Westmoreland Rosebud Mining, LLC*, DA 22-0064, 2022 Mont. LEXIS 735 (Mont. Sup. Ct. Aug. 9, 2022) ("*MEIC*").

The Montana Supreme Court also "looks to" the factors federal courts use in assessing stay motions: (1) whether the stay applicant has made a strong showing that it is likely to succeed

on the merits; (2) whether the applicant will be irreparably injured absent a stay; (3) whether issuance of the stay will substantially injure the other parties interested in the proceeding; and (4) where the public interest lies." *MEIC* at *5 (citing *Hilton v. Braunskill,* 481 U.S. 770 (1987)).

A district court's failure to adequately address these factors may lead the Montana Supreme Court to find good cause to grant a stay. *See Vote Solar v. Mont. PSC*, DA 19-0223, Order on Stay at *3 (Mont. Sup. Ct. Aug. 6, 2019) ("*Vote Solar*").

ARGUMENT

I. This Court should clarify that its order did not require DEQ to account for GHG emissions.

Plaintiffs and their allies believe this Court's Order requires DEQ and other agencies to immediately analyze GHG emissions every time it evaluates a project's environmental impacts. But throughout this litigation, this Court has been clear it was doing no such thing.

When it dismissed several of Plaintiffs' claims in 2021, this Court concluded that Plaintiffs' request for the Court to order the State "to develop a remedial plan or policies to effectuate reductions of GHG emissions in Montana" was a nonjusticiable political question. (Doc. 46 at 19–20.) The Court reasoned that "[o]rdering such a remedial plan, and retaining jurisdiction over the plan's development, would require the court to make or evaluate *complex policy decision*[*s*] entrusted to the discretion of other governmental branches." (Doc. 46 at 21) (emphasis added). This is not mere word mincing. The Court confirmed its reasoning at several points throughout this litigation.

In its ruling on the State's Second Motion for Clarification, the Court explained that Plaintiffs' remaining claim for injunctive relief was "unrelated to the remedial plan [request] or any other injunctive relief [request] that this court already found beyond the judiciary's power."

(Doc. 217 at 7.) This Court explained its sole remaining task was to "a) declare statutes unconstitutional, and b) prevent the State from enforcing unconstitutional statutes." (*Id.*)

Later, when ruling on the State's motion for summary judgment, the Court again explained that "the relief contemplated by the Court has always been limited to declaratory judgment on the constitutionality of [§ 75-1-201(2)(a)] and an injunction on the enforcement of th[at] provision[]." (Doc. 379 at 3–4) (quotation cleaned up). The Court was clear that it could not "force the State to conduct [a GHG] analysis," but could "strike down a statute prohibiting it." (*Id.* at 13.) This Court went on to say that "this case now only involves declaring a statute unconstitutional" and explained that "declaring the MEPA Limitation unconstitutional is not congruent with commanding the State to consider climate change in every project or proposal." (*Id.* at 14.) Thus, the only issue left was whether § 75-1-201(2)(a), MCA, was, in fact, unconstitutional. In its dispositive Order on August 14, 2023, the Court struck down the challenged statutory provision but did not order DEQ to analyze GHG emissions. (Doc. 405 at 102).

It is difficult to imagine how the Court could have been clearer. But Plaintiffs and their interest group allies seem to have missed the message. Plaintiffs have sent "demand letters" to DEQ insisting that the Court's order requires DEQ to analyze how each "proposed project will contribute to climate change." Nowakowski Decl., Ex. A at 2; Ex. B at 2. In these letters, Plaintiffs claimed that the Court's order requires DEQ to "calculate the GHG emissions that will result from proposed projects" and, "before issuing permits that will result in additional GHG emissions, to establish that the proposed project will not further violate Plaintiffs' constitutional

rights."[1] To top this off, Plaintiffs threatened DEQ with a contempt motion if it does not acquiesce to Plaintiffs' view. (*Id.* at 6.) Plaintiffs' ally, the Montana Environmental Information Center ("MEIC"), has also claimed that this court requires "DEQ to immediately consider climate change in its environmental analysis under MEPA," and that DEQ is not complying with the Court's order. *See* https://meic.org/deq-mepa-climate-now/. MEIC has urged its supporters to send comment to DEQ to the same effect. *Id.*

That incorrect interpretation of the Court's ruling deviates from the Court's consistent logic and its plain language. It also ignores the Court's repeated statements that "the relief contemplated by the Court has always been limited to declaratory judgment on the constitutionality of [MCA § 75-1-201(2)(a)] and an injunction on the enforcement of those provisions." (Doc. 379 at 3–4.)

Defendants thus request an order from this Court clarifying that its August 14, 2023, Order did not require them to analyze GHG emissions or climate change impacts in every permitting decision they make. This Court repeatedly said it was only analyzing the constitutionality of a statutory provision that forbade analysis of climate change impacts during MEPA review—not crafting an alternative regulatory scheme to take its place. For the benefit of Plaintiffs—and to remove the specter of a contempt motion against DEQ for following the Court's directives—the Court should again make clear that it did not—and, indeed, lacked power to—order state agencies to analyze GHG emissions or climate change impacts.

[1] Plaintiffs' attorneys also implied that DEQ must meet with them to "discuss the ruling in *Held* … and the requisite steps DEQ must take to comply with the Court's order by exercising its statutory and constitutional authority and duty to redress the climate crisis and protect Montana's children." Nowakowski Decl., Ex. A at 6-7; Ex. B at 6-7.

II. DEQ Moves this Court for a Stay of its Order Pending Appeal.

Plaintiffs claim that the Court's Order requires DEQ "to calculate the GHG emissions that will result from proposed projects," and ensure that each new project will not contribute to global climate change. Nowakowski Decl., Exs. A, B at 6. In addition to the clarification requested above, DEQ respectfully moves this Court for a stay of its order pending appeal to preserve the status quo.

The Montana Rules of Appellate Procedure direct that a stay pending appeal should be granted for "good cause." M. R. App. P. 22(2)(a)(i); *see also MEIC* at *5. "Good cause" is "a legally sufficient reason and referred to as the burden placed on a litigant to show why a request should be granted." *MEIC* at *5 (citations omitted). In addition to "good cause," the Montana Supreme Court has recently looked to the familiar four-factor test federal courts use to evaluate stay motions: (1) whether the stay applicant has made a strong showing that it is likely to succeed on the merits; (2) whether the applicant will be irreparably injured absent a stay; (3) whether issuance of the stay will substantially injure the other parties interested in the proceeding; and (4) where the public interest lies. *MEIC* at *5 (citing *Hilton*, 481 U.S. at 770).

A stay of the Court's order will allow DEQ to determine whether to evaluate GHG emissions, and the scope and potential methods of any evaluation, without the constant threat of litigation from all sides while the Montana Supreme Court considers and finally determines the case.

A. DEQ cannot responsibly transform its MEPA analysis overnight.

While this matter is being appealed to the Supreme Court, DEQ is not sitting idle. If MCA § 75-1-201(2)(a) is declared unconstitutional, agencies would no longer be prohibited from

conducting GHG analyses in MEPA reviews. Therefore, DEQ is separately considering its obligations under a MEPA statute that does not contain a prohibition on conducting GHG analyses.

No one disputes that climate change is a complex global issue. This litigation is proof enough: the parties exchanged 50,000 pages of documents and engaged in a seven-day trial. This Court issued a 102-page order on the topic.

Analyzing the climate change impacts of a permitted project is, thus, no easy task. And DEQ cannot implement methods for performing that analysis overnight. Indeed, until this Court issued its ruling two months ago, Montana law forbade DEQ from considering GHG emissions in its MEPA analysis. *See* MCA § 75-1-201(2)(a). DEQ has begun the process of assessing whether and how to implement GHG analysis for the diverse portfolio of projects the agency regulates. Nowakowski Decl. ¶¶ 18–23. But as with everything DEQ does, DEQ intends to base this decision on science, careful analysis, and public input. *See* Nowakowski Decl. ¶¶ 15–23. This process takes time.

Rushing to implement a process for analyzing GHG emissions without such careful analysis would subject DEQ to potential liability for failing to take the "hard look" required by MEPA. It would subject regulated parties to confusion and uncertainty. It would deprive the public of any opportunity to provide input on an important regulatory change. And it would do little to alleviate Plaintiffs' concerns about climate change. Thus, a stay would prevent irreparable harm to DEQ and is in the public interest. *MEIC* at *5 (federal factors 2and 4). For the same reasons, there is "good cause" to grant a stay.

Plaintiffs demand a sea change—and they demand it *now*. *See* Nowakowski Decl. Exs. A, B. But DEQ would be remiss to roll out a rushed analysis of GHG emissions without first analyzing the proper scope, level of detail, and methodology for each type of regulatory action that DEQ conducts. DEQ must assess whether it has the internal expertise to conduct such analyses or will need to hire outside expert contractors. *See* Nowakowski Decl. ¶¶ 6–7, 15–23. DEQ will also need to assess whether the information that permit applicants submit under the existing regulatory regime provides DEQ with enough GHG information to allow the agency to begin conducting a GHG analysis under MEPA for individual projects. *See id.* ¶¶ 9–10, 15.

To short-circuit this analysis would invite regulatory chaos. This would affect not just DEQ, but Montana's entire energy industry because it could prevent DEQ from issuing new coal mining permits that provide power to Montana and the Northwestern United States. Nowakowski Decl. ¶¶ 3, 6, 23, 26–29. It would also prevent DEQ from granting air quality permits to natural gas electricity generating plants, which are needed to integrate variable wind and solar facilities into the electric grid. *Id.* at ¶¶ 4, 6, 23, 26–29. Montana's consumers would pay the price. It is impractical, unwise, and decidedly against the public interest for DEQ to revolutionize its analysis of GHG emissions overnight. *See MEIC* AT *5 ("where the public interest lies" is the fourth federal factor in a stay analysis).

It may also be unlawful: under MEPA, DEQ must take a "hard look" at the environmental impacts of any project it analyzes. *See, e.g.*, *Belk v. Mont. DEQ*, 2022 MT 38, ¶17, 408 Mont. 1, 504 P.3d 1090. But without time to build the regulatory infrastructure necessary for such a "hard look" at GHG emissions, DEQ cannot meet its statutory duty. Engaging in the "quick look" Plaintiffs want would invite MEPA lawsuits from environmental groups and regulated parties

alike. Moreover, hurriedly developing a procedure to account for GHG emissions would likely violate the Montana Administrative Procedure Act (MAPA) in two ways. First, under MAPA, DEQ must provide the public with notice and the opportunity to comment on proposed rule changes. *See* §§ 2-4-302, -305, MCA. DEQ cannot do so if it must immediately implement processes for analyzing GHG emissions. This would deprive the public of the opportunity to provide input on significant rule change. *See MEIC* at *5 (federal factor 4 is "where the public interest lies"). It could also subject DEQ to liability under MAPA. *See S. Mont. Tel. Co. v. Mont. PSC*, 2017 MT 123, ¶ 16, 387 Mont. 415, 395 P.3d 473 ("Unless a rule is adopted in substantial compliance with [MAPA's] procedures, the rule is not valid.") (internal quotation marks and citation omitted). Second, DEQ could be subject to liability for acting arbitrarily and capriciously. *See, e.g.*, *Mont. Envtl. Info. Ctr. v. Mont. Dep't of Envt. Quality*, 2019 MT 213, ¶ 19, 397 Mont. 161, 451 P.3d 493. And Plaintiffs would threaten DEQ with contempt anytime it didn't reach their desired outcome. *See* Nowakowski Decl. Exhs. 1, 2, 3.

Defending against litigation from all corners would divert DEQ resources away from analyzing GHG emissions and ensuring that projects do not unlawfully harm the environment (the very thing Plaintiffs say they want). Thus, Plaintiffs would not be substantially injured if the Court grants a stay and preserves the status quo until the Montana Supreme Court finally resolves this case. *See MEIC* at *5.

Plaintiffs may suggest that DEQ can simply plug and play ready-made federal tools. But the matter is not so simple. For example, federal agencies have proposed numerous guidance documents advising agencies how to account for GHG emissions in their analyses under the National Environmental Policy Act (NEPA), but many of these documents have been challenged

or rescinded.[2] More recently, the federal Council on Environmental Quality (CEQ) issued interim guidance to federal agencies that provides general guidance for considering GHG impacts for proposed actions. Yet this "guidance" does not prescribe a specific process agencies could use, but instead recognizes "each agency's unique circumstances and authorities." Nat'l Env'tl Policy Act Guidance on Consideration of Greenhouse Gas Emissions and Climate Change, 88 Fed. Reg. 1196, 1197 (Jan. 9, 2023). And while the CEQ provides tools and resources for federal agencies to use in their analysis of GHG emissions, the wide variety of tools confirms there is no generally accepted, one-size-fits-all methodology for analyzing climate change impacts.[3] Besides, CEQ "does not control or guarantee the accuracy, legality, relevance, timeliness, or completeness" of these tools.[4] CEQ notes that this bank of resources is "non-exhaustive," and provided "solely for information and convenience."[5]

At bottom, whether and how to analyze GHG emissions is a difficult question. DEQ can answer that question only after a thorough and independent determination about what resources and methodologies it can use to account for GHG emissions.

Beyond this, there are different approaches to a MEPA analysis because different Programs do different things. Even after DEQ engages in the public process, it likely will not have

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[2] *See, e.g.*, 86 Fed. Reg. 10252, Council on Envtl. Quality, *National Environmental Policy Act Guidance on Consideration of Greenhouse Gas Emissions*, (Feb. 19, 2021), available at federalregister.gov/documents/2021/02/19/2021-03355/national-environmental-policy-act-guidance-on-consideration-of-greenhouse-gas-emissions; 82 Fed. Reg. 16576, Council on Envtl. Quality, *Withdrawal of Final Guidance for Federal Departments and Agencies on Consideration of Greenhouse Gas Emissions and the Effects of Climate Change in National Environmental Policy Act Reviews*, (Apr. 5, 2017), available at https://www.govinfo.gov/content/pkg/FR-2017-04-05/pdf/2017-06770.pdf.

[3] *See* Council on Env'tl Quality, *Resources for NEPA practitioners:* GHG Tools and Resources, https://ceq.doe.gov/guidance/ghg-tools-and-resources.html.

[4] *Id.*

[5] *Id.*

one format that every Program must use. It cannot simply plug-and-play federal guidance. Plaintiffs demand immediate resolution of all this complexity. But reality will not allow it—a hastily conceived analysis will necessarily be a slipshod analysis. DEQ needs the time to develop an analysis that is both legally defensible and scientifically advisable. Without a stay, DEQ and the public will be seriously and irreparably harmed. *See MEIC* at *5 (factors include irreparable harm and "where the public interest lies").

Moreover, Plaintiffs will not be substantially harmed by a stay. *See MEIC* at *5 (federal factor 3). The Montana Supreme Court will have the final say on the viability of Plaintiffs' claims. But meanwhile, DEQ cannot develop adequate procedures for analyzing GHG emissions. Plaintiffs' alleged concerns about climate change will not be alleviated by DEQ hastily implementing a procedure for analyzing GHG emissions. As explained, whether and how to account for GHG emissions is a complex decision that requires sufficient time for adequate legal analysis, scientific review, and public input. No one benefits if DEQ rushes out a hastily conceived and poorly implemented rule.

Finally, granting a stay would be consistent with Montana Supreme Court precedent finding that agencies are not required to immediately implement district court orders modifying agency decisions pending appeal. For instance, in a case reviewing the Montana Public Service Commission's ("PSC") rates for renewable energy generators in a Montana Administrative Procedure Act ("MAPA') contested case, the Court found "[t]o force the PSC to recalculate the rate in accordance with the District Court's specific instructions before allowing it to appeal would undermine the PSC's right to appeal under § 2-4-711, MCA." *Whitehall Wind, LLC v. Mont. PSC*, 2010 MT 2, ¶ 18, 355 Mont. 15, 223 P.3d 907; *see also Vote Solar* at *4 (applying

similar reasoning in granting NorthWestern Energy's motion for stay of a district court order). The Montana Supreme Court has applied this same principle to non-MAPA contested case proceedings, meaning this concept is not limited to cases impacted by § 2-4-711, MCA. *Grenz v. Mont. Dep't of Natural Res. & Conservation*, 2011 MT 17 (applying this principle to a district court's review of the Montana Department of Natural Resources and Conservation's decision regarding the value of improvements made on state trust lands in an arbitration process required under § 77-6-306, MCA). The reasoning behind this principle is intuitive: "as a matter of judicial economy, a reversal by [the Montana Supreme] Court could well revise the instructions upon remand that were entered by the District Court." *Mays v. Sam's Inc.*, 2019 MT 219, ¶ 9, 397 Mont. 248, 448 P.3d 1096. While all the cases cited above concern individual agency decisions subject to review, this principle should apply in greater force here because the Court's order impacts numerous administrative proceedings across multiple agencies, meaning that the Montana Supreme Court ought to weigh in before such a disruptive change to the statutory text of MEPA is imposed.

B. If the Court's order requires DEQ to analyze GHG emissions, it would violate the political question doctrine.

Next, if the Court's order sweeps as broadly as Plaintiffs believe, then DEQ has made a "strong showing that it is likely to succeed on the merits." *MEIC* at *5 (citing *Hilton*, 481 U.S. at 770); *see also Leiva-Perez v. Holder*, 640 F.3d 962, 966 (9th Cir. 2011) (stay appropriate under this factor "upon demonstration of a substantial case on the merits.") (quotation omitted).

If the Court's Order required DEQ to implement a new regulatory scheme for analyzing GHG emissions, it would award Plaintiffs the same "remedial plan" that this Court already rejected as beyond its power to grant (*See* Doc. 46 at 19–21); *see also Juliana v. United States*, 947

F. 3d 1159, (9th Cir. 2020) ("[I]t is beyond the power of an Article III court to order, design, supervise, or implement the Plaintiffs' requested remedial plan."). Determining whether and how to analyze GHG emissions would "necessarily require a host of complex policy decisions entrusted, for better or worse, to the wisdom and discretion of the executive and legislative branches." *Juliana*, 947 F.3d at 1171.

In Montana, such "complex policy decisions" entrusted to other branches of government are nonjusticiable under the political question doctrine. *Larson v. State*, 2019 MT 28, ¶ 39, 394 Mont. 167, 434 P.3d 241. A question is "political" and "not properly before the judiciary" when there is a "lack of judicially discoverable and manageable standards for resolving the issue." *Brown v. Gianforte*, 2021 MT 149, ¶ 23, 404 Mont. 269, 488 P.3d 548 (quoting *Nixon v. United States*, 506 U.S. 224, 228 (1993)) (quotation cleaned up). If and how to account for GHG emissions is precisely that kind of question. DEQ believes the Court was clear that it did not issue such a sweeping ruling. *See supra* § I. But if DEQ is wrong about the scope of the Court's ruling, then it is likely to succeed on appeal. *See MEIC* at *5 (considering whether a stay applicant has shown that it is likely to succeed on the merits).

CONCLUSION

For the foregoing reasons, Defendants respectfully request that this Court clarify that its August 14, 2023, Order (Doc. 405) does not require Defendants to analyze GHG emissions; rather, the decision simply declared § 75-1-201(2)(a) unconstitutional and enjoined Defendants from implementing it.

Based on Plaintiffs' assertion that the Court's order requires Defendants to calculate the GHG emissions that will result from proposed permitting projects, and ensure that each new

project will not contribute to global climate change, Nowakowski Decl. Exs. A, B, at 6,

Defendants respectfully move this Court for a stay of its order pending appeal.

Respectfully submitted October 16, 2023.

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Affidavit of Sonja Nowakowski in Support of Clarification and Stay of Judgment Pending Appeal (with Exhibits A and B) October 16, 2023 (Doc. 424)

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Montana First Judicial District Court
Lewis and Clark County

Rikki Held, et al., Plaintiffs, vs. State of Montana, et al., Defendants	Cause No. CDV-2020-307 **Declaration of Sonja Nowakowski in Support of Defendants' Motion for Clarification and for Stay of Judgment Pending Appeal**

1. Sonja Nowakowski declares as follows:

2. I am the Administrator of the Montana Department of Environmental Quality ("DEQ") Air, Energy, and Mining Division, and have personal knowledge of the facts herein in this Declaration. Prior to joining DEQ in 2021, I worked for the Montana Legislature for 15 years. I served in a nonpartisan capacity as a research analyst in the Legislative Environmental Policy Office and as the

Research Director for the Office of Research and Policy Analysis. My nonpartisan work for the Legislature focused on environment and energy policy.

3. As the Administrator of DEQ's Air, Energy, and Mining Division, I am familiar with DEQ permitting processes for coal mining, natural gas fueled electricity generators, coal fueled electricity generators, petroleum refineries, and oil pipelines under their respective substantive permitting statutes. I am also familiar with the requirements for energy planning and procurement in Montana, renewable energy programs in Montana, and Montana's transitioning energy marketplace. Finally, I am familiar with DEQ's separate environmental review processes for DEQ permitting decisions under Montana Environmental Policy Act ("MEPA") and understand fully how those review processes and permitting processes are distinct requirements.

4. I, additionally, was a witness for DEQ in the above captioned case and I am, therefore, familiar with this case and this Court's Findings of Fact, Conclusions of Law, and Order issued on August 14, 2023 ("Order").

5. If a stay is not granted and the Court's order not clarified in this case, DEQ and the public will be harmed in two ways. First, invalidating § 75-1-201(2)(a), MCA and expecting DEQ to immediately conduct legally defensible and scientifically appropriate greenhouse gas ("GHG") and climate analysis in all MEPA reviews will impose significant hardships on the agency. Because MEPA

judicial reviews can be, and often are, subject to requests to vacate the relevant permit, it also leaves dozens of applications at risk. Those procedural MEPA reviews are conducted for a broad spectrum of substantive permit activities, ranging from Montana Air National Guard permit modifications to provide for national security to minor coal permit revisions that allow coal mines to continue to legally operate in Montana. Second, the interpretation of this Court's Order by some, including counsel for Plaintiffs, Our Children's Trust ("OCT"), threatens Montana's energy supply. These two harms are addressed in turn.

I. Absent a stay, this Court's Order creates problems for applications currently being processed by DEQ.

6. As the Court noted in its Order, DEQ has not included analysis of GHG or climate impacts in its documents issued under MEPA since prior to 2011. Order at 13, 69, 73–74, 77. Because this review has not occurred in over a decade, DEQ cannot immediately conduct such review without adequate time to prepare scientifically and legally defendable analysis.

7. For instance, DEQ's analysis of GHG emissions in evaluating the Keystone XL Pipeline considered global economic demand of petroleum products, which was conducted with the assistance of a federal partner, the U.S. Department of State. *See* Mont. Dept't Envtl. Quality, *Supp. Information for Compliance with the Mont. Envtl. Policy Act and Supp. for Decisions under the Major Facility Citing Act*, I-6 (Aug. 26, 2011) (Ex. C). This analysis took several years to

complete (TransCanada filed its application with DEQ on December 22, 2008, and DEQ's final EIS on the project was issued on August 26, 2011) and was completed under a federal partnership. DEQ does not currently have the in-house expertise to conduct this type of economic analysis without hiring a third-party consultant. In most permitting processes, statutorily mandated timelines are also in place and do not afford DEQ with the luxury of several years to complete such an analysis.

8. A true and correct copy of DEQ's Final Environmental Impact Statement ("EIS") for TransCanada's Keystone XL Pipeline Project is attached as Exhibit C.

9. DEQ similarly engaged in climate and GHG analysis in the Highwood Generating Station Final EIS with the U.S. Department of Agriculture – Rural Utility Service. This GHG and climate discussion presented the applicant's proposed mitigation efforts to offset the plant's GHG emissions. *See* U.S. Dep't of Agric. – Rural Util. Service & Mont. Dep't of Envtl. Quality, *Final Environmental Impact Statement Highwood Generating Station*, 4-53 to 4-46 (Jan. 2007) (Ex. D). Many of these mitigation efforts appear to have taken considerable time to prepare for, like applying for federal grants. *Id.* at 4-45. If the Highwood Generating Plant is the model for conducting climate and GHG analysis under MEPA, DEQ must collect information from applicants about GHG emissions and potential mitigation efforts. The applicants will, additionally, be required to develop and describe those

efforts. Those alternatives must then be vetted by DEQ as well as stakeholders. The time necessary to collect such information, in some instances, will prevent DEQ from meeting statutory deadlines for conducting its review of projects. The Highwood Generating Station required a nearly 500-page Environmental Impact Statement, of which a draft EIS was released in June 2006 and a final EIS was released in January 2007, and included, at one time during analysis, more than 20 different alternatives.

10. A true and correct copy of the U.S. Department of Agriculture – Rural Utilities Service and DEQ's Final EIS for Southern Montana Electric Generation and Transmission Cooperative, Inc.'s Highwood Generating Station is attached as Exhibit D.

11. DEQ conducted its own GHG and climate analysis in the EIS for the Roundup Power Project without a federal partner. The Draft EIS for this project discusses the generic impacts of GHG emissions, disclosed the total GHG emissions from the proposed project, compared the proposed project's GHG emissions to nationwide GHG emissions, and concluded "[n]o basis exists for determining the severity of greenhouse gas['s] impacts on global warming; therefore, an impact level cannot be assigned." Mont. Dep't of Envtl. Quality, *Draft Envtl. Impact Statement for Roundup Power Project*, 4-20 to 4-22 (Nov. 2002) (Ex. E). In the Final EIS, DEQ determined "[f]urthermore, carbon dioxide

and other greenhouse gases are not regulated air pollutants under the federal or state regulations, so cumulative effects from carbon dioxide were not analyzed." Mont. Dep't of Envtl. Quality, *Final Envtl. Impact Statement for Roundup Power Project*, 4-12 (Jan. 2002) (Ex. F); *see also id.* at 1-1 (incorporating by reference the Draft EIS for this project into the Final EIS). It remains the case that, under Montana law, carbon dioxide and other greenhouse gases are not regulated criteria pollutants under the Montana Clean Air Act.

12. A true and correct copy of DEQ's Draft EIS of Bull Mountain Development Company, LLC's Roundup Power Project is attached as Exhibit E.

13. A true and correct copy of DEQ's Final EIS of Bull Mountain Development Company, LLC's Roundup Power Project is attached as Exhibit F.

14. In February 2002, DEQ issued its record of decision and final air quality permit for Continental Energy Service, Inc. Silver Bow Generation Plant to construct a 500 mega-watt natural gas fired power plant near Butte. The EIS disclosed that the plant would emit about 2,375,720 tons of carbon dioxide into the air each year. Montana Environmental Information Center ("MEIC") later challenged the permit because the "permit and EIS provide no analysis of the health, environmental, and economic impacts of global climate change and provide no analysis to justify the statement than an additional release of 2,375,720 tons per year of CO2 is insignificant." *In re Continental Energy Services*, Inc., Permit No.

3165-00, Aff. and Pet. for Hearing and Stay of Permit Issuance, 7 (Mont. BER Mar. 29, 2002) (Ex. G).

15. As this example demonstrates, DEQ only disclosing the amount of GHG emissions from a proposed project does not ensure that parties will be satisfied with DEQ's analysis. Without either statutory guidance on how to conduct a climate analysis in MEPA or state GHG regulations, DEQ is working to understand how a proposed project's GHG emissions interact with MEPA's command to determine "if an agency action will significantly affect the quality of the human environment." *Park Cty. Envtl. Council v. Mont. Dep't of Envtl. Quality*, 2020 MT 303, ¶ 31, 402 Mont. 168, 477 P.3d 288. This process requires time and energy that, without a stay, will be spent defending against MEPA challenges on GHG and climate grounds, rather than developing a method for addressing these issues. DEQ is committed to working through these complexities and has demonstrated so by engaging with the public in a dialogue about MEPA.

16. A true and correct copy of MEIC's Affidavit and Petition for Hearing and Stay of Permit Issuance challenging Continental Energy Services, Inc's Silver Bow Generation Plant dated March 29, 2002, is attached as Exhibit G.

17. There are additional indications that suggest that the disclosure of GHG emissions without further analysis, as provided in the Roundup Power

Project and the Silver Bow Generation Project, will be viewed as inadequate and vulnerable to challenge.

18. For instance, this Court's August 14, 2023, stated in its findings of fact that "DEQ approved revision to Spring Creek Mine, the largest coal mine in the State, allowing for recovery of [an] additional seventy-two million tons of coal," and that "DEQ refused, pursuant to the MEPA Limitation, to analyze impacts on the social cost of carbon and economic impacts from climate change in its EIS." *See* Order at 77 (finding of fact 265(f)).

19. Additionally, at a listening session hosted by DEQ in Billings on October 2, 2023, on MEPA reform, many participants indicated that they would prefer DEQ to conduct a social cost of carbon analysis for its GHG and climate review under MEPA. DEQ will be conducting additional public meetings on MEPA reform in Helena on October 18, 2023, and Missoula on October 19, 2023. *See* Mont. Dep't of Envtl. Quality, *DEQ Seeking Input on Environmental Impact Analysis Process Under the Montana Environmental Policy Act* (Sept. 27, 2023), https://deq.mt.gov/News/pressrelease-folder/news-article112. The purpose of these meetings is, in part, to determine how DEQ could conduct GHG and climate analysis. These meetings will take time to appropriately host and collect public input; this is an additional reason for granting a stay to allow DEQ to gather

information from the public and stakeholders to inform DEQ's development of how GHG and climate analysis under MEPA might be done.

20. Federal agencies have demonstrated that adopting the correct methodology for analyzing GHG and climate impacts under federal NEPA is challenging.

21. NEPA requires federal agencies to analyze the environmental effects of their proposed actions before making decisions. Climate change is one environmental effect that may be considered. The federal Council on Environmental Quality ("CEQ") oversees NEPA implementation by issuing guidance on procedural requirements. This guidance continues to evolve and change in terms of how best to evaluate greenhouse gas and climate change effects. In 2016, the CEQ issued final guidance to federal agencies regarding how they consider GHG emissions and climate change. In 2019, the CEQ rescinded the 2016 guidance and issued new draft guidance. In 2020, the CEQ adopted a comprehensive revision of NEPA and revised the definition of "effects" and removed the definition of "cumulative impacts," which the CEQ stated "does not preclude consideration" of climate change impacts, but the "analysis of the impacts on climate change will depend on the specific circumstances of the proposed action." In 2021, the CEQ was directed to rescind the previous guidance. In April 2022, "cumulative effects" was added back to the definition of "effects" and GHG

analysis was revised. In January 2023, the CEQ published interim guidance that agencies should quantify reasonably foreseeable direct and indirect gross and net GHG emissions increases or reductions, both for individual pollutants and aggregated in terms of carbon dioxide equivalence. Separate from the above-mentioned guidance, in July 2023, the CEQ released the second phase of its NEPA revisions, adding further detail to the required analysis necessary in proposed mitigation measures and alternatives under NEPA under the lens of climate.

22. While the DEQ may rely on federal guidance in its implementation of NEPA, it's not a straightforward path, and under Title 75, chapter 1, part 3 of the Montana Code Annotated, the Montana Environmental Quality Council ("EQC") is charged with analyzing and interpreting information for the purpose of determining whether actions taken by an Agency achieve the policy set forth in 75-1-103, which establishes MEPA. DEQ looks forward to engaging with the EQC in its efforts to comply with the Court order, however, this will require thoughtful and time-intensive discussions and coordination.

23. Most state actions—including DEQ permits and certificates for coal mining, natural gas fueled electricity generators, coal fueled electricity generators, petroleum refineries, and oil pipelines—are the subject of an environmental assessment ("EA"), as opposed to an EIS. State agencies undergo a review of proposed state actions to determine whether an EA or an EIS is needed. See ARM

17.4.608. In accordance with § 75-1-208, MCA, statutory timelines, however, apply to both EA and EIS procedures. While the Court's order points to "fossil-fuel activities[,]" Order at 69, 79, 88–90, 101, and "greenhouse gas-emitting projects[,]" *id.* 75, those terms are undefined in Montana statute. Potential projects that allow the burning of coal or natural gas are obviously "fossil-fuel activities." However, an approved opencut application permits an operator to mine gravel and is not obviously a fossil-fuel or greenhouse gas emitting project. Nevertheless, these opencut projects require heavy equipment that may emit GHGs. Determining what GHG and climate impacts (if any) might result from an opencut project, which is already subject to strict statutory timelines, *see* § 82-4-432, MCA, will be less straight forward than projects that emit GHG at a point-source, like a proposed power plant. Without legislative direction, DEQ needs time to work with stakeholders and properly weigh its limited discretion to find the proper path forward to ensure DEQ complies with its statutory timelines for issuing permits, follows the Court's order, and does not unnecessarily jeopardize permits.

24. Absent this Court's order, DEQ would have conducted statutory interpretation to determine if it could have examined climate and GHG impacts under House Bill 971 from the 2023 Montana Legislature. Under § 75-1-201(2)(b), MCA, as amended by House Bill 971, "[a]n environmental review conducted pursuant to [MEPA] may include an evaluation if . . . the United States congress

amends the federal Clean Air Act to include carbon dioxide emissions as a regulated pollutant." 2023 Mont. Laws ch. 450, § 1(2)(b). MEIC filed comments asserting DEQ's Environmental Assessment ("EA") of NorthWestern's Natural Gas Plant near Laurel, Montana may include a discussion of GHG and climate impacts because the Inflation Reduction Act of 2022 passed by the U.S. Congress designates carbon dioxide as a pollutant, satisfying the requirements of § 75-1-201(2)(b), MCA. *See* MEIC's Comments on DEQ's Draft EA, 4–10 (Jun. 30, 2023) (Ex. H). Because of this Court's invalidation of § 75-1-201(2)(a), MCA as amended by House Bill 971 and the stay granted by the district court, DEQ has paused its MEPA analysis on the Laurel Gas Plant and DEQ is, therefore, not addressing MEIC's proposed statutory interpretation of § 75-1-201(2)(b), MCA.[1]

25. A true and correct copy of MEIC's comments on DEQ's draft EA of NorthWestern Energy's Laurel Gas Plant is attached as Exhibit H.

26. Each year, DEQ processes roughly 30 to 50 coal applications, ranging from requests for minor revisions to existing permits to amendments that allow for new areas to be mined. These actions, if they impact the human environment, all trigger a MEPA review. In addition, each year, the Mining Bureau analyzes upward

[1] The district court stayed its vacatur of NorthWestern Energy's permit pending appeal before the Montana Supreme Court, which has allowed DEQ to pause its MEPA review being conducted on remand. *See Mont. Envtl. Information Center v. Mont. DEQ*, Cause No. DV 21-1307, Order Granting Defs' Mot. to Stay Pending Appeal (Mont. 13th Jud. Dist. Ct. Jun. 8, 2023).

of 120 new opencut mining applications and 40 to 60 hard rock mining applications, permit amendments, and modifications. These actions are also all subject to MEPA. Air quality permit modifications and applications number close to 70 annually. These numbers do not include the numerous actions taken by the other Divisions across DEQ which also trigger a MEPA analysis.

27. In 2022, the Air, Energy, and Mining Division staff, one of only three Divisions at DEQ, issued 525 permits or licenses and conducted 194 environmental assessments.

28. In the month of September, 2023, DEQ's Air, Energy, and Mining programs have done the following: the Coal Mining Section received one new permit application and reported 18 additional permits or amendments in process; the Opencut Mining Section received 9 new applications and reported 72 permits and amendments in process; and the Air Quality program reported 19 permits, renewals, and modifications in process.

29. Because DEQ may not make a permitting decision until the MEPA analysis is complete, DEQ will have to delay issuing decisions on many of these projects or decline to conduct climate and GHG analysis during the MEPA review, which will make these projects vulnerable to challenge on appeal. In either event, this Court denying DEQ's motion for stay has the potential to harm entities and individuals beyond the parties included in this litigation.

II. This Court's Order has led Plaintiffs' counsel to argue that it prevents the permitting of any project that adds GHG emissions to the atmosphere.

30. On September 9, 2023, DEQ received two letters from Plaintiffs' Counsel, OCT, regarding permits currently being addressed by DEQ.

31. The first of these letters concerns an air quality permit for the applicant Montana Renewables, LLC for a new renewable biodiesel facility.

32. A true and correct copy of OCT's letter dated September 29, 2023, titled "RE: Montana Youth's Demand Letter and Comments on DEQ's Preliminary Determination on Permit Application MAQP #5263-02, Montana Renewables LLC" is attached as Exhibit A ("Montana Renewables Letter").

33. The second letter concerns an air quality permit for the Montana Air National Guard. The intent of this permit action is to update assumptions, equipment, processes, emission factors, and permit language that was specific to the previous F-15 mission. The benefits of the proposed action, if approved, include allowing the facility to continue operating within the 100 tons/year threshold for all criteria pollutants and updating equipment identifiers to reflect more accurately what is on-site. There are no proposed increases in total site potential to emit ("PTE"), with every pollutant decreasing.

34. A true and correct copy of OCT's letter dated September 29, 2023, titled "Montana Youth's Demand Letter and Comments on DEQ's Preliminary

Determination on Permit Application MAQP #2930-07, Montana Air National Guard" is attached as Exhibit B ("MANG Letter").

35. Both letters state:

> Every additional fossil fuel permit approved by DEQ that causes an increase in GHG emissions is a violation of the constitutional rights of the youth Plaintiffs in Held. Every ton of GHG emissions exacerbates the injuries and constitutional violations the Plaintiffs are already suffering. Fortunately, as the undisputed facts in Held established, Montana can transition to 100% clean renewable energy—thereby mitigating the enormous harms caused to Montana's youth and saving Montanans billions of dollars in avoidable costs caused by reliance on fossil fuels. *Held* Order at 80-84.

Montana Renewables Letter at 1; MANG Letter at 1.

36. Both letters provided by OCT also assert:

> [T]he MEPA Limitation has been declared unconstitutional, and therefore, DEQ must now calculate the GHG emissions that will result from proposed projects …. Importantly, because the Court held that Plaintiffs' constitutional rights are already being violated due to the current atmospheric concentration of GHG emissions and resulting climate harms, it is incumbent upon DEQ, before issuing permits that will result in additional GHG emissions, to establish that the proposed project will not further violate Plaintiffs' constitutional rights.

Montana Renewables Letter at 6; MANG Letter at 6.

37. In other words, OCT has interpreted this Court's Order to require additional analysis by DEQ in permitting any projects that would emit GHG. OCT also distorts and disregards the differences between DEQ's obligations under MEPA and DEQ's authority under the various permitting statutes,

38. Absent clarification and correction from this Court, OCT's interpretation of this Court's order will potentially disrupt and endanger the energy supply of Montana.

39. For instance, OCT's interpretation of this Court's Order would prevent DEQ from issuing new coal mining permits, minor revisions, or modifications. Those permits, revisions, and modifications affect existing coal provisions under contract and are necessary to fuel existing power plants like Colstrip Units 3 and 4, which currently provide power to Montana and the Northwestern United States.

40. OCT's interpretation of this Court's Order would also prevent DEQ from granting air quality permits to natural gas electricity generating plants, which are necessary to provide the dispatchable and flexible electricity generation needed to integrate variable wind and solar facilities into the electric grid and meet the dynamic demand of Montana ratepayers.

41. OCT's interpretation of this Court's Order explicitly claims that DEQ cannot permit renewable biodiesel facilities, which use alternative fuels to create products that have lower carbon intensities than traditional petroleum products. OCT's interpretation of this Court's Order would undoubtedly extend to traditional refineries that produce the petroleum products that, among other things, power our cars.

42. DEQ has a particular interest in avoiding OCT's disruptive reading of this Court's Order. DEQ houses the state energy bureau, *see* ARM 17.1.101(3)(c)(iii), which means DEQ has administrative and information sharing obligations concerning Montana's energy supply emergency powers, *see* §§ 90-4-301 to -319, MCA; ARM 14.8.401–412; Mont. Dep't of Envtl. Quality, *Montana Energy Assurance Plan*, 22 (Jan. 2016), https://deq.mt.gov/files/Energy/EnergizeMT/Energy%20Assurance/MTENERGYASSURANCEPLAN-final.pdf ("DEQ has been designated the primary agency in the State's response to energy emergencies."). DEQ is also required to provide comment on Montana public utilities' long term electricity supply planning before the Montana Public Service Commission, § 69-3-1205(3), MCA, which entails an evaluation "of cost-effective means for the public utility to meet the service requirements of its Montana customers[,]" § 69-3-1204(2)(a)(i), MCA.

43. OCT's letters suggest that this Court's Order states that 100% renewable energy supply is possible today. Montana Renewables at 1; MANG at 1. This Court found that 100% renewable energy is possible by 2050. Order at 80–84. This Court's Order seems to understand that an immediate change prohibiting GHG emissions is impractical. This interpretation also ignores that the rapid siting, development, and construction of renewable energy cannot be completed absent other environmental (wildlife, water) protections afforded to the state and its

citizens, as well as other contractual obligations (interconnection agreements, Federal Energy Regulatory Commission approval).

44. This Court's findings regarding the transition to 100% renewable energy supply still lack important findings on issues like reliability. The energy consulting group Energy + Environmental Economics ("E3") found in 2019 for Montana and other states in the Northwestern United States "absent technological breakthroughs, achieving 100% GHG reductions using only wind, solar, hydro, and energy storage is both impractical and prohibitively expensive." E3, *Resource Adequacy in the Pacific Northwest*, i (March 2019) (Ex. I). E3 noted that land use implications and reliability standards would be impediments to complete decarbonization in places like Montana. *Id.* at 67–74. While this Court's Order discusses land use concerns, it did not address the reliability of Montana's electric grid if 100% transition to renewables were to occur. Order at 80–84. Without a discussion of this important subject of reliability, this Court cannot really address the subject of whether a 100% transition to renewables would be possible while maintaining other legal requirements like North American Electric Reliability Corporation ("NERC") Standards. See NERC, *Reliability Standards* (last visited Oct. 9, 2023), https://www.nerc.com/pa/Stand/Pages/ReliabilityStandards.aspx.

45. A true and correct copy of E3's study titled Resource Adequacy in the Pacific Northwest from March 2019 is attached as Exhibit I.

46. The Montana legislature has passed statutes guiding Montana utilities' acquisition of electricity supply resources. *See* § 69-3-1201 to -1209, MCA; *see also* § 38.5.38.5.2016–2025 (the Montana Public Service Commission's administrative rules on the subject). Included within these requirements is "an evaluation of the full range of cost-effective means for the public utility to meet the service requirements of its Montana customers[.]" Section 69-3-1204, MCA; *see also* § 69-3-201, MCA("Every public utility is required to furnish reasonably adequate service and facilities."). Thus, Montana law requires utilities to acquire resources with reliability as a priority, which is not addressed by this Court's Order regarding the transition to 100% renewable energy.

I hereby declare that under the penalty of perjury that the foregoing is true and correct to the best of my knowledge.

DATED this 16th day of October, 2023.

/s/ Sonja Nowakowski
SONJA NOWAKOWSKI

EXHIBITS

EXHIBIT A	OCT's letter dated September 29, 2023, titled "RE: Montana Youth's Demand Letter and Comments on DEQ's Preliminary Determination on Permit Application MAQP #5263-02, Montana Renewables LLC"
EXHIBIT B	OCT's letter dated September 29, 2023, titled "Montana Youth's Demand Letter and Comments on DEQ's Preliminary Determination on Permit Application MAQP #2930-07, Montana Air National Guard"
EXHIBIT C	DEQ's Final Environmental Impact Statement ("EIS") for TransCanada's Keystone XL Pipeline Project (Aug. 26, 2011)
EXHIBIT D	Montana Department of Environmental Quality's Final Environmental Impact Statement for Southern Montana Electric Generation and Transmission Cooperative, Inc.'s Highwood Generating Station (Jan. 2007)
EXHIBIT E	DEQ's Draft EIS of Bull Mountain Development Company, LLC's Roundup Power Project (Nov. 2002)
EXHIBIT F	DEQ's Final EIS of Bull Mountain Development Company, LLC's Roundup Power Project (Jan. 2002)
EXHIBIT G	MEIC's Affidavit and Petition for Hearing and Stay of Permit Issuance challenging Continental Energy Services, Inc's Silver Bow Generation Plant (March 29, 2002)
EXHIBIT H	MEIC's comments on DEQ's draft Environmental Assessment for Laurel Generating Station (MAQP: #5261-00) (June 30, 2023)
EXHIBIT I	Energy + Environmental Economics, *Resource Adequacy in the Pacific Northwest* (March 2019)

Exhibit A

Our Children's Trust's Demand Letter and Comments on DEQ's Preliminary Determination on Permit Application MAQP #5263-02, Montana Renewables LLC (Sept. 29, 2023)

September 29, 2023

Submitted via email only

DEQ-ARMB-Admin@mt.gov
Montana Department of Environmental Quality
1520 E 6th Avenue
Helena, MT 59601

RE: Montana Youth's Demand Letter and Comments on DEQ's Preliminary Determination on Permit Application MAQP #5263-02, Montana Renewables LLC

To Montana Department of Environmental Quality:

On behalf of the 16 youth Plaintiffs in the constitutional climate case *Held v. State of Montana* (CDV-2020-307), Our Children's Trust respectfully submits this demand letter and comments on DEQ's preliminary determination on Permit Application MAQP #5263-02 for applicant Montana Renewables LLC.[1] As you are presumably aware, DEQ cannot simply defy the Montana Constitution and the August 14, 2023 Order in *Held v. State of Montana* declaring the Montana Environmental Policy Act Limitation (MEPA Limitation), § 75-1-201(2)(a), MCA, unconstitutional and permanently enjoining DEQ from implementing it. *Held*, CDV-2020-307, *102 (1st Jud. Dist., Aug. 14, 2023). The August 14 Order in *Held* is in full force and effect and is binding on DEQ—one of the Defendants in the case. As a result, DEQ cannot continue to rely on § 75-1-201(2)(a), MCA, as a basis for failing to analyze the greenhouse gas (GHG) emissions from the proposed project, and the impacts of the proposed project on climate change, Montana's environment and natural resources, and Montana's youth. As DEQ staff admitted during their depositions, the agency must comply with Montana's Constitution and court orders interpreting the Constitution. Defying a Court Order constitutes contempt of court and is sanctionable conduct. § 3-1-501(1)(e), MCA.

Every additional fossil fuel permit approved by DEQ that causes an increase in GHG emissions is a violation of the constitutional rights of the youth Plaintiffs in *Held*. Every ton of GHG emissions exacerbates the injuries and constitutional violations the Plaintiffs are already suffering. Fortunately, as the undisputed facts in *Held* established, Montana can transition to 100% clean renewable energy—thereby mitigating the enormous harms caused to Montana's youth and saving Montanans billions of dollars in avoidable costs caused by reliance on fossil fuels. *Held* Order at 80-84.

For the reasons outlined herein, DEQ must substantially revise its Environmental Assessment and preliminary determination on Permit Application MAQP #5263-02 to comply with the August 14, 2023 Order in *Held v. State of Montana.* Absent such corrections, DEQ must explain why they should not be held in contempt of court for defying a court order.

[1] These comments should be included in the administrative record for MAQP #5263-02.

I. The Proposed Project Will Burn Fossil Fuels and Release GHG Emissions.

DEQ's Environmental Assessment and preliminary determination on Permit Application MAQP #5263-02 admit that if approved, the permitted activities will burn fossil fuels, including natural gas, distillate fuel oil, and diesel. *See* MAQP Analysis, Montana Renewables LLC, MAQP #5263-02, 11, 37, 38 (Sept. 14, 2023). Burning fossil fuels, of course, results in the release of GHG emissions, as DEQ admits. DEQ, Environmental Assessment for MAQP #5263-02, 9. While the Environmental Assessment and MAQP Analysis includes an emissions inventory for many pollutants, it explicitly excludes GHGs on the emissions inventory table, instead listing GHGs as "N/A". *Id*. Contrary to the *Held* Order, there is no analysis about how the proposed project will contribute to climate change, harm Montana's youth, or comply with Montana's Constitution. *Held* Order at 102 ("By prohibiting analysis of GHG emissions and corresponding impacts to the climate, as well as how additional GHG emissions will contribute to climate change or be consistent with the Montana Constitution, the MEPA Limitation violates Youth Plaintiffs' right to a clean and healthful environment and is unconstitutional on its face."). DEQ is unconstitutionally failing to quantify and disclose the GHG emissions associated with the proposed permit and the resulting harm to the climate system, Montana's environment and natural resources, and Montana's children.

II. The MEPA Limitation, § 75-1-201(2)(a), MCA, Has Been Declared Unconstitutional and DEQ Is Permanently Enjoined from Enforcing It.

DEQ admits that it is aware of the August 14, 2023 Order in *Held v. State of Montana*, yet ignores the detailed findings of fact, conclusions of law, and injunctive relief, in the Order. DEQ, Environmental Assessment for MAQP #5263-02, 17 ("DEQ is aware of the recent opinion in *Held v. State.*"). The Court unequivocally declared § 75-1-201(2)(a), MCA, unconstitutional and enjoined Defendants, including DEQ, from implementing or relying on the MEPA Limitation. The Court held the MEPA Limitation, § 75-1-201(2)(a), MCA, "unconstitutional and is permanently enjoined." *Held* Order at 102. The Court further enjoined DEQ, "prohibiting Defendants from acting in accordance with the statutes declared unconstitutional." *Id.*

While Defendants have filed their notice of appeal to the Montana Supreme Court, the District Court's judgment has not been stayed. Montana Rule of Civil Procedure 62 clearly states that a court-ordered injunction is not stayed, even if an appeal is taken. M. R. Civ. P. 62(a)(1). In the meantime, the Court's Order is valid and enforceable, if necessary, through enforcement and contempt proceedings in the District Court. *See, e.g., State ex rel. Kaasa v. Dist. Ct. of Seventeenth Jud. Dist., In & For Phillips Cnty.*, 177 Mont. 547, 550, 582 P.2d 772, 774 (1978) (District Court "has the power to enforce the judgment already entered by contempt proceedings" even if an appeal is pending); *Valley Unit Corp. v. City of Bozeman*, 232 Mont. 52, 54–55, 754 P.2d 822 (1988) (affirming District Court's contempt order after a motion to show cause was filed).

DEQ cites two cases in support of its position that it can ignore the District Court's August 14 Order. DEQ, Environmental Assessment for MAQP #5263-02, 17. But both cases are easily distinguishable. *Whitehall Wind, LLC v. Montana Pub. Serv. Comm'n*, 2010 MT 2, ¶1, 355 Mont. 15, 223 P.3d 907, concerned judicial review of a Public Service Commission (PSC) order in a rate-setting case. There the Supreme Court held that the PSC did not need to recalculate the appropriate

rate while the appeal was pending because § 2-4-711, MCA, provided for an automatic stay of the order pending final determination of the appeal. *Id.* Importantly, § 2-4-711, MCA, **only applies to cases where a party is seeking judicial review of a specific agency action pursuant to the Administrative Procedure Act**. DEQ and its counsel are well aware *Held v. State of Montana* is not a case challenging an individual agency decision pursuant to the Administrative Procedure Act.[2] Therefore, § 2-4-711, MCA, which provided for the automatic stay in *Whitehall Wind* pending appeal, is inapplicable to the *Held* judgment. Similarly, *Grenz v. Montana Dep't of Nat. Res. & Conservation*, 2011 MT 17, ¶ 20, 359 Mont. 154, 248 P.3d 785, involved judicial review of a specific agency action and is inapplicable here for the same reason.

Defendants cite no authority to support their untenable position that they can continue to implement a statute that has been declared unconstitutional. DEQ's blatant disregard for the August 14, 2023 Order in *Held v. State of Montana* is contempt of court. § 3-1-501(1)(e), MCA (contempt of the court includes "disobedience of any lawful judgment, order, or process of the court"). Indeed, just three months ago, the State of Montana, Governor Gianforte, and the Montana Department of Public Health and Human Services, were found to be in contempt of Court for failing to comply with a District Court order declaring a statute unconstitutional and enjoining it from being implemented. *Marquez v. State of Montana*, DV 21-873 (13th Jud. Dist., June 26, 2023). According to the District Court, Defendants "repeatedly disobeyed a lawful order from this Court, showing their contempt for this judicial body and the judicial system as a whole. . . . Defendants acted in total disregard for this Court and the established procedures of the judicial branch of government." *Id.* at *8, 9. The *Held* plaintiffs are experiencing grave constitutional injuries, harms that are compounded daily by DEQs failure to comply with the August 14, 2023 Order in *Held v. State of Montana*.

III. The Youth Plaintiffs in *Held*, and Other Montana Children, Are Being Gravely Injured by DEQ's Fossil Fuel Permitting Activities and DEQ Cannot Act so as to Further Violate Their Constitutional Rights.

The August 14 Order in *Held v. State of Montana* set forth detailed findings of fact and conclusions of law relating to Montanans' fundamental rights, including their right to a clean and healthful environment. The Order also made detailed factual findings related to the basic science of climate change; the irrefutable connection between fossil fuel extraction, transportation, and combustion and the observed planetary warming and attendant consequences; and the array of serious harm that climate change has already caused and will increasingly cause to Montana's environment and citizens. Importantly, based on the testimony of the youth Plaintiffs and their experts at trial, the Court also detailed how the 16 youth Plaintiffs are already suffering grave injuries as a result of Defendants' (including DEQ's) historic and ongoing approval of fossil fuel

[2] In fact DEQ, through its counsel, repeatedly argued that Plaintiffs should have challenged individual agency actions pursuant to the Montana Administrative Procedure Act. That argument was rejected by the Court. *Held v. State of Montana*, CDV-2020-307, *22-24 (1st Jud. Dist., Aug. 4, 2021) (order on motion to dismiss) (holding that Plaintiffs do not need to bring a challenge pursuant to the Montana Administrative Procedures Act).

activities. The Court made clear that these injuries will get worse if fossil fuel activities continue. Based on the uncontested evidence presented at trial, the Court found that:

> 89. Until atmospheric GHG concentrations are reduced, extreme weather events and other climactic events such as drought and heatwaves will occur more frequently and in greater magnitude, and Plaintiffs will be unable to live clean and healthy lives in Montana.
>
> 92. Every ton of fossil fuel emissions contributes to global warming and impacts to the climate and thus increases the exposure of Youth Plaintiffs to harms now and additional harms in the future.
>
> 98. According to the Intergovernmental Panel on Climate Change (IPCC), "Climate change is a threat to human well-being and planetary health (*very high confidence*). . . . There is a rapidly closing window of opportunity to secure a liveable and sustainable future for all (*very high confidence*). . . . The choices and actions implemented in this decade will have impacts now and for thousands of years (*high confidence*)."
>
> 101. Dr. Byron provided expert testimony that climate change and the air pollution associated with it are negatively affecting children in Montana, including Youth Plaintiffs, with a strong likelihood that those impacts will worsen in the absence of aggressive actions to mitigate climate change. Dr. Byron outlined ways in which climate change is already creating conditions that are harming the health and well-being of the Youth Plaintiffs. Dr. Byron testified that reducing fossil fuel production and use, and mitigating climate change now, will benefit the health of the Youth Plaintiffs now and for the rest of their lives.
>
> 104. Children are uniquely vulnerable to the consequences of climate change, which harms their physical and psychological health and safety, interferes with family and cultural foundations and integrity, and causes economic deprivations.
>
> 108. The physical and psychological harms are both acute and chronic and accrue from impacts to the climate such as heat waves, droughts, wildfires, air pollution, extreme weather events, the loss of wildlife, watching glaciers melt, and the loss of familial and cultural practices and traditions.
>
> 138. The unrefuted testimony at trial established that climate change is a critical threat to public health.
>
> 139. Actions taken by the State to prevent further contributions to climate change will have significant health benefits to Plaintiffs.
>
> 140. Anthropogenic climate change is impacting, degrading, and depleting Montana's environment and natural resources, including through increasing temperatures, changing precipitation patterns, increasing droughts and

aridification, increasing extreme weather events, increasing severity and intensity of wildfires, and increasing glacial melt and loss.

141. Climate change impacts result in hardship to every sector of Montana's economy, including recreation, agriculture, and tourism.

193. The science is clear that there are catastrophic harms to the natural environment of Montana and Plaintiffs and future generations of the State due to anthropogenic climate change. . . . The degradation to Montana's environment, and the resulting harm to Plaintiffs, will worsen if the State continues ignoring GHG emissions and climate change.

Based on the compelling factual record presented by Plaintiffs and their experts, the Court held, as a conclusion of law, that:

50. Montana's climate, environment, and natural resources are unconstitutionally degraded and depleted due to the current atmospheric concentration of GHGs and climate change.

The Defendants, including DEQ, were provided the opportunity to present evidence refuting these factual findings, but they did not. The Court made clear that the MEPA Limitation, § 75- 1-201(2)(a), MCA, (and § 75-1-201(6)(a)(ii), MCA) infringe Plaintiffs' fundamental right to a clean and healthful environment (as well as their fundamental rights to equal protection, dignity, liberty, health and safety, and public trust resource rights stemming from harm to Montana's environment). The Court declared § 75-1-201(2)(a), MCA, and § 75-1-201(6)(a)(ii), MCA, facially unconstitutional and permanently enjoined their enforcement.

The Court also made important findings of fact both detailing how the MEPA Limitation, § 75- 1-201(2)(a), MCA, is harming Plaintiffs; and once declared unconstitutional, Defendants, including DEQ, can calculate GHG emissions from proposed projects, as they did before the MEPA Limitation was first passed into law in 2011. As determined by the Court:

194. The unrefuted testimony established that Plaintiffs have been and will continue to be harmed by the State's disregard of GHG pollution and climate change pursuant to the MEPA Limitation.

214. It is possible to calculate the amount of CO_2 and GHG emissions that results from fossil fuel extraction, processing and transportation, and consumption activities that are authorized by Defendants.

257. If the MEPA Limitation is declared unconstitutional, state agencies will be capable of considering GHG emissions and the impacts of projects on climate change.

259. Defendants' application of the MEPA Limitation during environmental review of fossil fuel and GHG-emitting projects, prevents the availability of vital

information that would allow Defendants to comply with the Montana Constitution and prevent the infringement of Plaintiffs' rights.

In sum, the MEPA Limitation has been declared unconstitutional, and therefore, DEQ must now calculate the GHG emissions that will result from proposed projects, including the project proposed by Montana Renewables LLC, just as DEQ calculates the emissions for other pollutants that will result from the proposed project. **Importantly, because the Court held that Plaintiffs' constitutional rights are already being violated due to the current atmospheric concentration of GHG emissions and resulting climate harms, it is incumbent upon DEQ, before issuing permits that will result in additional GHG emissions, to establish that the proposed project will not further violate Plaintiffs' constitutional rights.**

Should DEQ need a reminder that it has the authority to deny permits, the Court in *Held v. State of Montana* made this clear, holding as conclusions of law that:

> 18. Defendants can alleviate the harmful environmental effects of Montana's fossil fuel activities through the lawful exercise of their authority if they are allowed to consider GHG emissions and climate change during MEPA review, which would provide the clear information needed to conform their decision-making to the best science and their constitutional duties and constraints, and give them the necessary information to deny permits for fossil fuel activities when inconsistent with protecting Plaintiffs' constitutional rights.
>
> 22. Permitting statutes give the State and its agents discretion to deny permits for fossil fuel activities.
>
> 24. [T]his Court clarifies that Defendants do have discretion to deny permits for fossil fuel activities that would result in unconstitutional levels of GHG emissions, unconstitutional degradation and depletion of Montana's environment and natural resources, or infringement of the constitutional rights of Montanans and Youth Plaintiffs.

The constitutional rights of Montana's youth, including the *Held* Plaintiffs, are currently being violated, in part, due to DEQ's historic and ongoing permitting of fossil fuels activities. To address these constitutional violations, sixteen brave Montanans' took their state to Court and on August 14, 2023 won an historic victory. Now, instead of working to alleviate the ongoing harms to Montana's children, DEQ is choosing to deliberately ignore a binding order from Montana's judiciary. Such deliberate disregard for the rule of law not only risks having DEQ continue to approve dangerous fossil fuels projects exacerbating the youth Plaintiffs' constitutional injuries, but is an affront to our constitutional democracy. DEQ must amend its Environmental Assessment and preliminary determination on Permit Application MAQP #5263-02 to comply with the legally binding August 14, 2023, Order in *Held v. State of Montana*, as outlined herein, or explain why it should not be held in contempt of court.

We would be pleased to meet with you and your counsel to discuss the ruling in *Held v. State of Montana,* and the requisite steps DEQ must take to comply with the Court's order by

exercising its statutory and constitutional authority and duty to redress the climate crisis and protect Montana's children. Please send us a response to this demand letter and comments no later than October 13, 2023

Sincerely,

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Exhibit B

Our Children's Trust's Demand Letter and Comments on DEQ's Preliminary Determination on Permit Application MAQP #2930-07, Montana Air National Guard (Sept. 29, 2023)

September 29, 2023

Submitted via email only

DEQ-ARMB-Admin@mt.gov
Montana Department of Environmental Quality
1520 E 6th Avenue
Helena, MT 59601

RE: Montana Youth's Demand Letter and Comments on DEQ's Preliminary Determination on Permit Application MAQP #2930-07, Montana Air National Guard

To Montana Department of Environmental Quality:

On behalf of the 16 youth Plaintiffs in the constitutional climate case *Held v. State of Montana* (CDV-2020-307), Our Children's Trust respectfully submits this demand letter and comments on DEQ's preliminary determination on Permit Application MAQP #2930-07 for applicant Montana Air National Guard.[1] As you are presumably aware, DEQ cannot simply defy the Montana Constitution and the August 14, 2023 Order in *Held v. State of Montana* declaring the Montana Environmental Policy Act Limitation (MEPA Limitation), § 75-1-201(2)(a), MCA, unconstitutional and permanently enjoining DEQ from implementing it. *Held*, CDV-2020-307, *102 (1st Jud. Dist., Aug. 14, 2023). The August 14 Order in *Held* is in full force and effect and is binding on DEQ—one of the Defendants in the case. As a result, DEQ cannot continue to rely on § 75-1-201(2)(a), MCA, as a basis for failing to analyze the greenhouse gas (GHG) emissions from the proposed project, and the impacts of the proposed project on climate change, Montana's environment and natural resources, and Montana's youth. As DEQ staff admitted during their depositions, the agency must comply with Montana's Constitution and court orders interpreting the Constitution. Defying a Court Order constitutes contempt of court and is sanctionable conduct. § 3-1-501(1)(e), MCA.

Every additional fossil fuel permit approved by DEQ that causes an increase in GHG emissions is a violation of the constitutional rights of the youth Plaintiffs in *Held*. Every ton of GHG emissions exacerbates the injuries and constitutional violations the Plaintiffs are already suffering. Fortunately, as the undisputed facts in *Held* established, Montana can transition to 100% clean renewable energy—thereby mitigating the enormous harms caused to Montana's youth and saving Montanans billions of dollars in avoidable costs caused by reliance on fossil fuels. *Held* Order at 80-84.

For the reasons outlined herein, DEQ must substantially revise its Environmental Assessment and preliminary determination on Permit Application MAQP #2930-07 to comply with the August 14, 2023 Order in *Held v. State of Montana.* Absent such corrections, DEQ must explain why they should not be held in contempt of court for defying a court order.

[1] These comments should be included in the administrative record for MAQP #2930-07.

I. The Proposed Project Will Burn Fossil Fuels and Release GHG Emissions.

DEQ's Environmental Assessment and preliminary determination on Permit Application MAQP #2930-07 admit that if approved, the permitted activities will burn fossil fuels, including natural gas and diesel. *See* MAQP Analysis, Montana Air National Guard, MAQP #2930-07, 2 (Sept. 15, 2023). Burning fossil fuels, of course, results in the release of GHG emissions. While the Environmental Assessment includes an emissions inventory for many pollutants, it explicitly excludes GHGs on the emissions inventory table, instead listing GHGs as "N/A". DEQ, Draft Environmental Assessment for MAQP #2930-07, 24. Contrary to the *Held* Order, there is no analysis about how the proposed project will contribute to climate change, harm Montana's youth, or comply with Montana's Constitution. *Held* Order at 102 ("By prohibiting analysis of GHG emissions and corresponding impacts to the climate, as well as how additional GHG emissions will contribute to climate change or be consistent with the Montana Constitution, the MEPA Limitation violates Youth Plaintiffs' right to a clean and healthful environment and is unconstitutional on its face."). DEQ is unconstitutionally failing to quantify and disclose the GHG emissions associated with the proposed permit and the resulting harm to the climate system, Montana's environment and natural resources, and Montana's children.

II. The MEPA Limitation, § 75-1-201(2)(a), MCA, Has Been Declared Unconstitutional and DEQ Is Permanently Enjoined from Enforcing It.

In a different Environmental Assessment, DEQ has admitted that it is aware of the August 14, 2023 Order in *Held v. State of Montana*, yet ignores the detailed findings of fact, conclusions of law, and injunctive relief, in the Order. *See* DEQ, Environmental Assessment for MAQP #5263-02, 17 ("DEQ is aware of the recent opinion in *Held v. State.*"). The Court unequivocally declared § 75-1-201(2)(a), MCA, unconstitutional and enjoined Defendants, including DEQ, from implementing or relying on the MEPA Limitation. The Court held the MEPA Limitation, § 75-1-201(2)(a), MCA, "unconstitutional and is permanently enjoined." *Held* Order at 102. The Court further enjoined DEQ, "prohibiting Defendants from acting in accordance with the statutes declared unconstitutional." *Id.*

While Defendants have filed their notice of appeal to the Montana Supreme Court, the District Court's judgment has not been stayed. Montana Rule of Civil Procedure 62 clearly states that a court-ordered injunction is not stayed, even if an appeal is taken. M. R. Civ. P. 62(a)(1). In the meantime, the Court's Order is valid and enforceable, if necessary, through enforcement and contempt proceedings in the District Court. *See, e.g., State ex rel. Kaasa v. Dist. Ct. of Seventeenth Jud. Dist., In & For Phillips Cnty.*, 177 Mont. 547, 550, 582 P.2d 772, 774 (1978) (District Court "has the power to enforce the judgment already entered by contempt proceedings" even if an appeal is pending); *Valley Unit Corp. v. City of Bozeman*, 232 Mont. 52, 54–55, 754 P.2d 822 (1988) (affirming District Court's contempt order after a motion to show cause was filed).

In a different Environmental Assessment, DEQ cited two cases in support of its position that it can ignore the District Court's August 14 Order. DEQ, Environmental Assessment for MAQP #5263-02, 17. But both cases are easily distinguishable. *Whitehall Wind, LLC v. Montana Pub. Serv. Comm'n*, 2010 MT 2, ¶1, 355 Mont. 15, 223 P.3d 907, concerned judicial review of a Public Service Commission (PSC) order in a rate-setting case. There the Supreme Court held that

the PSC did not need to recalculate the appropriate rate while the appeal was pending because § 2-4-711, MCA, provided for an automatic stay of the order pending final determination of the appeal. *Id.* Importantly, § 2-4-711, MCA, **only applies to cases where a party is seeking judicial review of a specific agency action pursuant to the Administrative Procedure Act**. DEQ and its counsel are well aware *Held v. State of Montana* is not a case challenging an individual agency decision pursuant to the Administrative Procedure Act.[2] Therefore, § 2-4-711, MCA, which provided for the automatic stay in *Whitehall Wind* pending appeal, is inapplicable to the *Held* judgment. Similarly, *Grenz v. Montana Dep't of Nat. Res. & Conservation*, 2011 MT 17, ¶ 20, 359 Mont. 154, 248 P.3d 785, involved judicial review of a specific agency action and is inapplicable here for the same reason.

Here, Defendants cite no authority to support their untenable position that they can continue to implement a statute that has been declared unconstitutional. DEQ's blatant disregard for the August 14, 2023 Order in *Held v. State of Montana* is contempt of court. § 3-1-501(1)(e), MCA (contempt of the court includes "disobedience of any lawful judgment, order, or process of the court"). Indeed, just three months ago, the State of Montana, Governor Gianforte, and the Montana Department of Public Health and Human Services, were found to be in contempt of Court for failing to comply with a District Court order declaring a statute unconstitutional and enjoining it from being implemented. *Marquez v. State of Montana*, DV 21-873 (13th Jud. Dist., June 26, 2023). According to the District Court, Defendants "repeatedly disobeyed a lawful order from this Court, showing their contempt for this judicial body and the judicial system as a whole. . . . Defendants acted in total disregard for this Court and the established procedures of the judicial branch of government." *Id.* at *8, 9. The *Held* plaintiffs are experiencing grave constitutional injuries, harms that are compounded daily by DEQs failure to comply with the August 14, 2023 Order in *Held v. State of Montana*.

III. The Youth Plaintiffs in *Held*, and Other Montana Children, Are Being Gravely Injured by DEQ's Fossil Fuel Permitting Activities and DEQ Cannot Act so as to Further Violate Their Constitutional Rights.

The August 14 Order in *Held v. State of Montana* set forth detailed findings of fact and conclusions of law relating to Montanans' fundamental rights, including their right to a clean and healthful environment. The Order also made detailed factual findings related to the basic science of climate change; the irrefutable connection between fossil fuel extraction, transportation, and combustion and the observed planetary warming and attendant consequences; and the array of serious harm that climate change has already caused and will increasingly cause to Montana's environment and citizens. Importantly, based on the testimony of the youth Plaintiffs and their experts at trial, the Court also detailed how the 16 youth Plaintiffs are already suffering grave injuries as a result of Defendants' (including DEQ's) historic and ongoing approval of fossil fuel

[2] In fact DEQ, through its counsel, repeatedly argued that Plaintiffs should have challenged individual agency actions pursuant to the Montana Administrative Procedure Act. That argument was rejected by the Court. *Held v. State of Montana*, CDV-2020-307, *22-24 (1st Jud. Dist., Aug. 4, 2021) (order on motion to dismiss) (holding that Plaintiffs do not need to bring a challenge pursuant to the Montana Administrative Procedures Act).

activities. The Court made clear that these injuries will get worse if fossil fuel activities continue. Based on the uncontested evidence presented at trial, the Court found that:

> 89. Until atmospheric GHG concentrations are reduced, extreme weather events and other climactic events such as drought and heatwaves will occur more frequently and in greater magnitude, and Plaintiffs will be unable to live clean and healthy lives in Montana.
>
> 92. Every ton of fossil fuel emissions contributes to global warming and impacts to the climate and thus increases the exposure of Youth Plaintiffs to harms now and additional harms in the future.
>
> 98. According to the Intergovernmental Panel on Climate Change (IPCC), "Climate change is a threat to human well-being and planetary health (*very high confidence*). . . . There is a rapidly closing window of opportunity to secure a liveable and sustainable future for all (*very high confidence*). . . . The choices and actions implemented in this decade will have impacts now and for thousands of years (*high confidence*)."
>
> 101. Dr. Byron provided expert testimony that climate change and the air pollution associated with it are negatively affecting children in Montana, including Youth Plaintiffs, with a strong likelihood that those impacts will worsen in the absence of aggressive actions to mitigate climate change. Dr. Byron outlined ways in which climate change is already creating conditions that are harming the health and well-being of the Youth Plaintiffs. Dr. Byron testified that reducing fossil fuel production and use, and mitigating climate change now, will benefit the health of the Youth Plaintiffs now and for the rest of their lives.
>
> 104. Children are uniquely vulnerable to the consequences of climate change, which harms their physical and psychological health and safety, interferes with family and cultural foundations and integrity, and causes economic deprivations.
>
> 108. The physical and psychological harms are both acute and chronic and accrue from impacts to the climate such as heat waves, droughts, wildfires, air pollution, extreme weather events, the loss of wildlife, watching glaciers melt, and the loss of familial and cultural practices and traditions.
>
> 138. The unrefuted testimony at trial established that climate change is a critical threat to public health.
>
> 139. Actions taken by the State to prevent further contributions to climate change will have significant health benefits to Plaintiffs.
>
> 140. Anthropogenic climate change is impacting, degrading, and depleting Montana's environment and natural resources, including through increasing temperatures, changing precipitation patterns, increasing droughts and

aridification, increasing extreme weather events, increasing severity and intensity of wildfires, and increasing glacial melt and loss.

141. Climate change impacts result in hardship to every sector of Montana's economy, including recreation, agriculture, and tourism.

193. The science is clear that there are catastrophic harms to the natural environment of Montana and Plaintiffs and future generations of the State due to anthropogenic climate change. . . . The degradation to Montana's environment, and the resulting harm to Plaintiffs, will worsen if the State continues ignoring GHG emissions and climate change.

Based on the compelling factual record presented by Plaintiffs and their experts, the Court held, as a conclusion of law, that:

50. Montana's climate, environment, and natural resources are unconstitutionally degraded and depleted due to the current atmospheric concentration of GHGs and climate change.

The Defendants, including DEQ, were provided the opportunity to present evidence refuting these factual findings, but they did not. The Court made clear that the MEPA Limitation, § 75- 1-201(2)(a), MCA, (and § 75-1-201(6)(a)(ii), MCA) infringe Plaintiffs' fundamental right to a clean and healthful environment (as well as their fundamental rights to equal protection, dignity, liberty, health and safety, and public trust resource rights stemming from harm to Montana's environment). The Court declared § 75-1-201(2)(a), MCA, and § 75-1-201(6)(a)(ii), MCA, facially unconstitutional and permanently enjoined their enforcement.

The Court also made important findings of fact both detailing how the MEPA Limitation, § 75- 1-201(2)(a), MCA, is harming Plaintiffs; and once declared unconstitutional, Defendants, including DEQ, can calculate GHG emissions from proposed projects, as they did before the MEPA Limitation was first passed into law in 2011. As determined by the Court:

194. The unrefuted testimony established that Plaintiffs have been and will continue to be harmed by the State's disregard of GHG pollution and climate change pursuant to the MEPA Limitation.

214. It is possible to calculate the amount of CO_2 and GHG emissions that results from fossil fuel extraction, processing and transportation, and consumption activities that are authorized by Defendants.

257. If the MEPA Limitation is declared unconstitutional, state agencies will be capable of considering GHG emissions and the impacts of projects on climate change.

259. Defendants' application of the MEPA Limitation during environmental review of fossil fuel and GHG-emitting projects, prevents the availability of vital

information that would allow Defendants to comply with the Montana Constitution and prevent the infringement of Plaintiffs' rights.

In sum, the MEPA Limitation has been declared unconstitutional, and therefore, DEQ must now calculate the GHG emissions that will result from proposed projects, including the project proposed by Montana Renewables LLC, just as DEQ calculates the emissions for other pollutants that will result from the proposed project. **Importantly, because the Court held that Plaintiffs' constitutional rights are already being violated due to the current atmospheric concentration of GHG emissions and resulting climate harms, it is incumbent upon DEQ, before issuing permits that will result in additional GHG emissions, to establish that the proposed project will not further violate Plaintiffs' constitutional rights.**

Should DEQ need a reminder that it has the authority to deny permits, the Court in *Held v. State of Montana* made this clear, holding as conclusions of law that:

> 18. Defendants can alleviate the harmful environmental effects of Montana's fossil fuel activities through the lawful exercise of their authority if they are allowed to consider GHG emissions and climate change during MEPA review, which would provide the clear information needed to conform their decision-making to the best science and their constitutional duties and constraints, and give them the necessary information to deny permits for fossil fuel activities when inconsistent with protecting Plaintiffs' constitutional rights.
>
> 22. Permitting statutes give the State and its agents discretion to deny permits for fossil fuel activities.
>
> 24. [T]his Court clarifies that Defendants do have discretion to deny permits for fossil fuel activities that would result in unconstitutional levels of GHG emissions, unconstitutional degradation and depletion of Montana's environment and natural resources, or infringement of the constitutional rights of Montanans and Youth Plaintiffs.

The constitutional rights of Montana's youth, including the *Held* Plaintiffs, are currently being violated, in part, due to DEQ's historic and ongoing permitting of fossil fuels activities. To address these constitutional violations, sixteen brave Montanans' took their state to Court and on August 14, 2023 won an historic victory. Now, instead of working to alleviate the ongoing harms to Montana's children, DEQ is choosing to deliberately ignore a binding order from Montana's judiciary. Such deliberate disregard for the rule of law not only risks having DEQ continue to approve dangerous fossil fuels projects exacerbating the youth Plaintiffs' constitutional injuries, but is an affront to our constitutional democracy. DEQ must amend its Environmental Assessment and preliminary determination on Permit Application MAQP #2930-07 to comply with the legally binding August 14, 2023, Order in *Held v. State of Montana*, as outlined herein, or explain why it should not be held in contempt of court.

We would be pleased to meet with you and your counsel to discuss the ruling in *Held v. State of Montana,* and the requisite steps DEQ must take to comply with the Court's order by

exercising its statutory and constitutional authority and duty to redress the climate crisis and protect Montana's children. Please send us a response to this demand letter and comments no later than October 13, 2023

Sincerely,

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Plaintiffs' Response Brief in Opposition to Defendants' Motion for Clarification and for Stay of Judgment Pending Appeal November 6, 2023

(Doc. 428)

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MONTANA FIRST JUDICIAL DISTRICT COURT
LEWIS AND CLARK COUNTY

RIKKI HELD, et al., Plaintiffs, v. STATE OF MONTANA, et al., Defendants.	Cause No. CDV-2020-307 Hon. Kathy Seeley **PLAINTIFFS' RESPONSE BRIEF IN OPPOSITION TO DEFENDANTS' MOTION FOR CLARIFICATION AND FOR STAY OF JUDGMENT PENDING APPEAL**

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INTRODUCTION

On August 14, 2023, this Court adjudged Defendants are violating the constitutional rights of the sixteen youth Plaintiffs, declared unconstitutional the Montana Environmental Policy Act Limitation ("MEPA Limitation"), Mont. Code Ann. § 75-1-201(2)(a), and Mont. Code Ann. § 75-l-201(6)(a)(ii), and enjoined Defendants from enforcing or acting in accordance with the unconstitutional statutes. Doc. 405 at 102 (Findings of Fact, Conclusions of Law, and Order) ("August 14 Order"). Now, Defendants come to this Court seeking to "maintain the status quo" of environmental reviews and fossil fuel permitting. Doc. 423 at 3. The *status quo* Defendants want to maintain is one where there are already "catastrophic harms to the natural environment of Montana and Plaintiffs," harms that "will worsen if the State continues ignoring GHG emissions and climate change." Doc. 405 at 46. *At minimum*, youth Plaintiffs should not suffer any exacerbation of their current injuries pending appeal. But what Plaintiffs are constitutionally entitled to is full enjoyment of their constitutionally protected right to a "clean and healthful environment," which Defendants have an affirmative obligation to secure, by improving the significant degradation that has already occurred to Montana's environment and natural resources, and preventing further harm. *Id.* at 96; Mont. Const. art. II, § 3; art. IX, §§ 1, 3.[1]

Defendants' request to stay this Court's judgment and maintain a *status quo* of constitutional infringement pending appeal should be denied because Defendants do not satisfy any of the stay factors. Defendants are unable to identify a single error with this Court's August 14 Order and, therefore, are not likely to succeed on the merits of their appeal. Moreover, given the grave constitutional injuries the undisputed evidence shows Plaintiffs are *currently*

[1] Defendants' motion and brief never reference § 75-1-201(6)(a)(ii), MCA, or ask this Court to stay the August 14 Order declaring that provision unconstitutional and enjoining Defendants from implementing it. Doc. 405 at 102. Therefore, Defendants' stay request, which should be fully denied, does not pertain to that statute.

experiencing, and the failure of Defendants to identify *any* irreparable harms if a stay is not granted, the balance of equities overwhelming weighs in favor of not granting a stay. Defendants cannot be permitted to continue their unconstitutional conduct and cause further harm to Montana's children pending their appeal.

Moreover, because this case is now pending before the Montana Supreme Court, the District Court does not have jurisdiction to decide Defendants' motion for clarification and, consequently, it must be denied. This Court's jurisdiction extends only to Defendants' motion to stay pursuant to Montana Rule of Appellate Procedure 22.

RELEVANT PROCEDURAL HISTORY

Following a seven-day trial from June 12 to June 20, 2023, this Court issued its August 14 Order. Doc. 405. The August 14 Order contains 289 findings of fact based on the testimony and evidence presented at trial, including testimony from twenty-four witnesses for Plaintiffs and three witnesses for Defendants, 168 of Plaintiffs' exhibits, and four of Defendants' exhibits. Doc. 405 at 9. Defendants did not contest any of the testimony from the youth Plaintiffs, which was determined to be credible. Doc. 405 at 64. Prior to trial, Defendants disclosed several expert witnesses and lay witnesses, Docs. 227, 235, 242, but Defendants called only one expert and two lay witnesses to testify at trial. The testimony of Defendants' sole testifying expert witness, an economist, contained errors, was unsupported, and was not given weight. Doc. 405 at 66. Sonja Nowakowski, who authored the declaration in support of Defendants' motion to stay, testified at trial, as did DEQ Director Chris Dorrington. Tr. 1274; Tr. 1332.

This Court's August 14 Order held in part:

> (1) Plaintiffs have standing to bring the claims addressed; (2) Plaintiffs have a fundamental constitutional right to a clean and healthful environment, which includes climate as part of the environmental life-support system; (3) the MEPA Limitation, § 75- 1-201(2)(a), MCA, and § 75-1-201(6)(a)(ii), MCA, infringe

> Plaintiffs' fundamental right to a clean and healthful environment (as well as their fundamental rights to equal protection, dignity, liberty, health and safety, and public trust resource rights stemming from harm to Montana's environment) and are facially unconstitutional; (4) § 75-1-201(2)(a), MCA, and § 75-1-201(6)(a)(ii), MCA, do not pass strict scrutiny; and (5) Plaintiffs are entitled to injunctive relief barring Defendants from enforcing or acting in accordance with the statutes declared unconstitutional. (Doc. 405 at 101-03).

Doc. 417 at 6 (Order Granting Certification for Interlocutory Appeal).

The parties agreed that the August 14 Order should be certified for interlocutory appeal and moved for certification pursuant to Montana Rule of Civil Procedure 54(b). Docs. 411, 415. On September 18, 2023, this Court certified its August 14 Order, as well as several ancillary orders, as final for purposes of interlocutory appeal. Doc. 417. On September 29, 2023, Defendant State of Montana filed its notice of appeal to the Montana Supreme Court. Docs. 418, 420. On October 2, 2023, Defendants Governor Greg Gianforte, Department of Environmental Quality, Department of Natural Resources and Conservation, and Department of Transportation filed a separate notice of appeal to the Montana Supreme Court. *Held v. State of Montana*, DA 23-0575, Notice of Appeal (Mont. Sup. Ct. Oct. 2, 2023). On October 16, 2023, Defendants Governor Greg Gianforte, Department of Environmental Quality, Department of Natural Resources and Conservation, and Department of Transportation filed their Motion for Clarification and for Stay of Judgment Pending Appeal. Doc. 422. Defendant State of Montana did not join in these motions. On October 17, 2023, the Supreme Court accepted this Court's certification order and "ordered that this appeal may proceed." *Held v. State of Montana*, DA 23-0575, Order, *2 (Mont. Sup. Ct. Oct. 17, 2023). This case is now on appeal to the Montana Supreme Court.

RELEVANT FACTUAL BACKGROUND

The factual record before this Court illustrates how dangerous the "*status quo*" Defendants want to preserve for another year of appeal would be to youth Plaintiffs. That "*status quo*" is one

where Defendants approve every permit it receives for fossil fuel activities while ignoring greenhouse gas ("GHG") emissions and the resulting climate harms. Doc. 405 at 74-75. The resulting GHG emissions from Defendants' conduct is causing grave harms *today* to Plaintiffs' health and well-being, and to Montana's environment and natural resources, harms that are undisputed in the trial record. *Id.* at 46-64. Plaintiffs, as youth, are "uniquely vulnerable to the consequences of climate change, which harms their physical and psychological health and safety, interferes with family and cultural foundations and integrity, and causes economic deprivations." *Id.* at 28. According to this Court's uncontroverted Findings and Conclusions:

> FF #89. "Until atmospheric GHG concentrations are reduced, extreme weather events and other climactic events such as drought and heatwaves will occur more frequently and in greater magnitude, and Plaintiffs will be unable to live clean and healthy lives in Montana."
>
> FF #193. "The degradation to Montana's environment, and the resulting harm to Plaintiffs, will worsen if the State continues ignoring GHG emissions and climate change."
>
> FF #194. "The unrefuted testimony established that Plaintiffs have been and will continue to be harmed by the State's disregard of GHG pollution and climate change pursuant to the MEPA Limitation."
>
> CL #6. "Every additional ton of GHG emissions exacerbates Plaintiffs' injuries and risks locking in irreversible climate injuries."
>
> CL #50. "Montana's climate, environment, and natural resources are unconstitutionally degraded and depleted due to the current atmospheric concentration of GHGs and climate change."

Id. at 24, 46, 87, 98 (citations omitted).

Importantly, this Court also found that it is technically and economically feasible for Montana to "replace 80% of existing fossil fuel energy by 2030 and 100% by no later than 2050, but as early as 2035." *Id.* at 81. Transitioning to renewable energy, "in addition to direct climate benefits, will create jobs, reduce air pollution, and save lives and costs associated with air

pollution." *Id*. It would also reduce energy costs for Montanans by $6.3 billion per year. *Id.* at 82. Not only did Defendants fail to present any evidence refuting the copiously detailed harms to the Plaintiffs caused by Defendants' conduct, Defendants did not present any evidence at trial to dispute the benefits or feasibility of a renewable energy transition in Montana.

This Court also found that Defendants have the ability to do a MEPA analysis that evaluates GHG emissions and climate impacts, as Defendants conducted such analyses in the past. *Id.* at 73-74, 101; *see also* Tr. 1437:4-8 (Ms. Nowakowski's trial testimony explaining DEQ could do climate analyses if it had authority). Defendants' minimal allegations of harm, incomparable to the findings of Plaintiffs' harm in the August 14 Order, in the Nowakowski declaration were never presented for cross-examination by qualified witnesses at trial. The record before this Court makes clear that the unconstitutional "*status quo*" conduct Defendants want to preserve cannot lawfully continue without exacerbating the *status quo* injuries of the youth Plaintiffs.

Defendants reference two post-trial letters Plaintiffs' counsel sent to Defendant DEQ related to draft environmental assessments for air quality permits; those letters are irrelevant to the stay factors this Court must consider in determining whether a stay is warranted. *See infra,* Section II. Nevertheless, Defendants neglect to explain the underlying DEQ conduct that prompted the letters. Doc. 423 at 2. For example, on September 14, 2023, DEQ posted a preliminary determination on a Montana Air Quality Permit ("MAQP") application for a fossil fuel refinery, including an Environmental Assessment ("EA"),[2] disobeying this Court's August 14 Order, stating: "This environmental review under MEPA does not contain an analysis of potential impacts of greenhouse gases or climate change," with citation to § 75-1-201(2)(a), MCA, *the very provision this Court enjoined DEQ from implementing*. DEQ, EA for MAQP #5263-02, at 17. Also on

[2] Montana DEQ, *Preliminary Determination on Permit Application MAQP #5263-02, Montana Renewables LLC* (Sept. 14, 2023), https://deq.mt.gov/files/Air/AirQuality/Documents/ARMpermits/5263-02_PD.pdf.

September 14, 2023, DEQ posted a preliminary determination and EA on another MAQP application to burn fossil fuels.[3] Again, the EA included an emissions inventory for many pollutants, but explicitly excludes GHGs on the emissions inventory table, instead listing GHGs as "N/A." DEQ, Draft EA for MAQP #2930-07, at 24.

As a result of Defendant DEQ's ongoing implementation of the MEPA Limitation, which this Court declared unconstitutional and enjoined DEQ from implementing, counsel for Plaintiffs submitted letters on both projects informing DEQ that it was "defying a court order" and needed to "amend its Environmental Assessment . . . to comply with the legally binding August 14, 2023, Order in *Held v. State of Montana.*" *See* Nowakowski Decl. Ex. A at 1, 6; Ex. B at 1, 6. While Plaintiffs expect Defendants to ensure their final environmental reviews and decision-making comply with this Court's August 14 Order, that issue is separate from the motions currently before this Court, and does not support Defendants' burden on the stay factors. However, if the Court were to issue a stay, these are two fossil fuel project expansions that would proceed under the *status quo* of Defendants not considering GHG emissions, climate impacts, and resulting harms to Montana citizens and youth. As explained herein, that "*status quo*" cannot be perpetuated.

LEGAL STANDARDS

Clarification. Defendants cite no rule or legal standard for their motion for clarification. The dispositive issue, however, is this Court's lack of jurisdiction to decide Defendants' motion for clarification because an appeal is pending before the Supreme Court. *See infra*, Section I. Defendants' motion fails to address this issue.

Stay. Defendants, as the parties seeking a stay, have the burden to establish that a stay pending appeal is warranted. *Mont. Env't Info. Ctr. v. Westmoreland Rosebud Mining, LLC,* DA

[3] Montana DEQ, *Preliminary Determination on Permit Application MAQP #2930-07, Montana Air National Guard* (Sept. 15, 2023), https://deq.mt.gov/files/Air/AirQuality/Documents/ARMpermits/2930-07_PD.pdf.

22-0064, *5-6 (Mont. Sup. Ct. Aug. 9. 2022) ("*MEIC v. Westmoreland*"). Only in "extraordinary circumstances" should a stay be granted. *Graves v. Barnes*, 405 U.S. 1201, 1203 (1972). In evaluating a motion to stay, Montana's courts consider four factors: "(1) whether the stay applicant has made a strong showing that it is likely to succeed on the merits; (2) whether the applicant will be irreparably injured absent a stay; (3) whether issuance of the stay will substantially injure the other parties interested in the proceeding; and (4) where the public interest lies." *MEIC v. Westmoreland*, *5 (citing *Hilton v. Braunskill*, 481 U.S. 770 (1987)). A stay of proceedings is "an exercise of judicial discretion and the propriety of its issue is dependent upon the circumstances of the particular case." *Nken v. Holder*, 556 U.S. 418, 433 (2009) (quotes, citations omitted).

ARGUMENT

I. THIS COURT LACKS JURISDICTION TO ENTERTAIN DEFENDANTS' MOTION FOR CLARIFICATION

As a result of the interlocutory appeal, which Defendants requested, this Court does not have jurisdiction to consider the merits of Defendants' motion for clarification. It is axiomatic that once an appeal has been filed, the District Court loses jurisdiction to rule on motions. "It is the law in Montana that once a Notice of Appeal is filed, the district court no longer has jurisdiction over the parties or the cause of action and cannot hear or rule on any pending motions." *Lewistown Propane Co. v. Moncur*, 2003 MT 368, ¶ 12, 319 Mont. 105, 82 P.3d 896; *Kruckenberg v. City of Kalispell,* 2004 MT 185, ¶ 12, 322 Mont. 177, 94 P.3d 748 (district court is divested of jurisdiction after notice of appeal is filed); *see also* M. R. Civ. P. 60(a).

The Montana Rules of Appellate Procedure provide an exception and allow district courts to retain jurisdiction to rule on a motion to stay judgment pending appeal. M. R. App. P. 22(1)(c). There are, however, no exceptions in the rules for a motion for clarification and Defendants provide no authority supporting this Court's jurisdiction to rule on their motion for clarification

after their notice of appeal was filed, and after the Supreme Court ordered that the appeal may proceed. *Held v. State of Montana*, DA 23-0575, Order (Mont. Sup. Ct. Oct. 17, 2023). Should any clarification of this Court's August 14 Order be required at a later date, the appropriate time to do so would be after the Supreme Court issues a final judgment, as was the case in *Meine v. Hren Ranches, Inc.,* 2020 MT 284, 402 Mont. 92, 475 P.3d 748, the sole case cited by Defendants in support of their motion for clarification. In *Meine*, the motion for clarification was filed after the Supreme Court's final judgment and, when it was filed, there was no appeal pending before the Supreme Court. *Id.* ¶ 7. Because this Court does not now have jurisdiction to grant Defendants' motion for clarification, it must be denied.

II. DEFENDANTS HAVE NOT MET THEIR BURDEN TO ESTABLISH THAT A STAY PENDING APPEAL IS WARRANTED

This Court should deny Defendants' motion for a stay pending appeal because Defendants have failed to demonstrate a likelihood of success on the merits or a probability of their irreparable harm. On the contrary, a stay would allow Defendants to continue to violate the constitutional rights of the sixteen youth Plaintiffs, exacerbate their already significant injuries, further degrade the *status quo* of Montana's environment, and harm the public's interest.

A. Defendants Have Not Made Any Showing They Are Likely to Succeed on the Merits of Their Appeal

Defendants do not point out a single error with this Court's August 14 Order, the Order they seek to have stayed. Doc. 423 at 14-15. Instead, Defendants' sole argument regarding their likely success on the merits relates to claims for a remedial plan that this Court dismissed over two years ago, did not address in the August 14 Order, and are not the subject of the appeal. *Id*. Thus, the only issue Defendants appear to believe they will succeed on in their appeal has already been dismissed by this Court and is not implicated in the August 14 Order.

While Defendants purport to rely on *Juliana v. United States*, 947 F.3d 1159 (9th Cir. 2020), to suggest that a remedial plan is beyond the court's authority, as noted above, this Court disposed of that issue two years ago. Doc. 423 at 14-15. Moreover, they neglect to note that *Juliana* is proceeding towards trial with an amended complaint. *Juliana v. United States*, No. 6:15-cv-01517-AA, 2023 WL 3750334 (D. Or. June 1, 2023) (Opinion and Order granting Plaintiffs' motion to file amended Complaint). According to the *Juliana* Court:

> It is a foundational doctrine that when government conduct catastrophically harms American citizens, the judiciary is constitutionally required to perform its independent role and determine whether the challenged conduct, not exclusively committed to any branch by the Constitution, is unconstitutional. *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 176–78 (1803). The judicial role in cases like this is to apply constitutional law, declare rights, and declare the government's responsibilities. No other branch of government can perform this function . . . .

Id. at *8. So too here. This Court properly fulfilled its constitutional duty to determine whether the challenged laws violate the rights of the sixteen youth Plaintiffs. *Mitchell v. Town of W. Yellowstone*, 235 Mont. 104, 110, 765 P.2d 745, 748 (1988) ("The first business of courts is to provide a forum in which the constitutional rights of all citizens may be protected."). Therefore, *Juliana* supports the August 14 Order, where this Court applied constitutional law, declared rights, declared laws and conduct unconstitutional, declared Defendants' responsibilities under the Montana Constitution, and enjoined unconstitutional conduct.[4]

Defendants fail to raise any errors with this Court's August 14 Order (or any prior orders) and, therefore, have not satisfied their burden to establish they are likely to succeed on the merits of the appeal. This factor weighs in favor of denying Defendants' motion for a stay of judgment.

B. Defendants Will Not Be Irreparably Injured Absent a Stay

[4] The Environmental Protection Agency, a Defendant in *Juliana*, issued a statement celebrating the August 14 Order, calling it a "landmark moment" in the youth's effort to protect the earth. https://www.epa.gov/newsreleases/epa-regional-administrator-statement-montana-court-ruling-favor-youth-and-their.

In order to justify issuance of a stay, Defendants have the burden of demonstrating that "irreparable harm is probable, not merely possible." *Doe #1 v. Trump*, 957 F.3d 1050, 1059 (9th Cir. 2020); *Leiva-Perez v. Holder*, 640 F.3d 962, 968 (9th Cir. 2011). A stay is "not a matter of right, even if irreparable injury might otherwise result to the appellant." *Nken*, 556 U.S. at 427.

Defendants allege their irreparable injuries would result from "[r]ushing to implement a process for analyzing GHG emissions." Doc. 423 at 9. Defendants argue that their own conduct to rush the regulatory review "process" would cause regulatory confusion, and uncertainty and potential liability for DEQ. *Id*. Defendants take the untenable position that they should be allowed to continue to violate Plaintiffs' constitutional rights and worsen attendant grievous harms because they need time to assess "whether and how to implement GHG analysis," *id.*, all while they continue their long-standing practice of approving all fossil fuel project permits. Tr. 831:22-832:1 (Ms. Hedges testifying that, to her knowledge, Defendants have never denied a fossil fuel permit). However, Defendants' purported injuries are self-inflicted, and do not constitute irreparable harm or warrant a stay of this Court's August 14 Order, especially when compared to the grave, and worsening, injuries Plaintiffs are experiencing. *See infra*, Section II.C.

Defendants assert without support that, absent a stay, DEQ would be required to consider GHG emissions and corresponding impacts to the climate, and could thereby be prevented from issuing new coal mining permits or air quality permits for natural gas plants, which would "invite regulatory chaos," and increase energy prices for consumers. Doc. 423 at 10. There is no evidence, however, that considering GHG emissions and corresponding impacts to the climate, and not issuing new fossil fuels permits, would cause Defendants any harms, let alone irreparable harms. In fact, the undisputed evidence at trial shows the opposite would be true when renewable energy alternatives to fossil fuels are considered as provided in MEPA. *See* Mont. Code Ann. § 75-1-201

(1)(b)(iv)(C); Doc. 405 at 81 ("The MEPA Limitation causes the State to ignore renewable energy alternatives to fossil fuels."). As the evidence at trial established, Montana can meet its current and future energy needs by transitioning its energy systems to renewable energy and, in doing so, will clean up Montana's environment, improve the health of its citizens (especially Montana's children), and save energy consumers money. Doc. 405 at 80-84. The August 14 Order found:

> FF #272. "It is technically and economically feasible for Montana to replace 80% of existing fossil fuel energy by 2030 and 100% by no later than 2050, but as early as 2035."
>
> FF #275. "[C]onverting to wind, water, and solar energy would reduce annual total energy costs for Montanans from $9.1 to $2.8 billion per year, or by $6.3 billion per year (69.6% savings)."
>
> FF #276. "New wind and solar are the lowest cost new forms of electric power in the United States, on the order of about half the cost of natural gas and even cheaper compared to coal."
>
> FF #281. "Transitioning to WWS [wind, water, solar] will keep Montana's lights on while saving money, lives, and cleaning up the air and the environment, and ultimately using less of Montana's land resources."

Id. at 81, 82, 84 (citations omitted). Defendants presented no evidence to the contrary. Moreover, the undisputed evidence in the trial record established that a 100% wind, water, and solar energy system for Montana would be reliable. Tr. 1072:24-1073:4 ("Q. I'd like to turn now to the issue of grid reliability. Would a wind, water, solar energy system developed over the next couple of decades be reliable to meet all of the energy needs of the state of Montana? A. *Yes, with a high degree of certainty*." (emphasis added)); *see also* Tr. 1073:5-1075:25; *contra* Nowakowski Decl. ¶ 44.

Simply stated, Defendants had an opportunity to dispute this evidence at trial but chose not to. While the testimony of Defendants' economist, Dr. Terry Anderson, was not given weight by this Court, he never questioned the reliability of a 100% renewable energy grid or argued that it

would increase energy costs for Montana's consumers. Doc. 405 at 66; *see also* Tr. 1082:19-1083:2 (defense counsel choosing not to call Dr. Judith Curry to testify at trial). This Court should not re-open the trial record and rely on evidence that was neither presented at trial nor subject to cross-examination from a witness who is not qualified to offer expert testimony on the technical and economic feasibility of Montana's transition to renewable energy. *See* Nowakowski Decl. ¶¶ 44-45; Tr. 1343:23-1345:7 (describing her expertise in law and policy work, *not* technical and economic feasibility of decarbonizing Montana's energy system). Regardless, there is no evidence to support Defendants' assertion that not permitting new fossil fuel projects would undermine Montana's energy system, increase costs to consumers, compromise grid reliability, or cause any other irreparable harms to Defendants or Montanans. If Defendants need more time to develop a process to evaluate permit applications, they can and should postpone the issuance of new permits pending development of that process. As this Court explained, there is also no obligation or mandate for Defendants to continue to authorize new fossil fuels projects, and they must have discretion to deny permits for fossil fuel activities. Doc. 405 at 89-90.

Moreover, there is no evidence that any *party to this case* would suffer harm, let alone irreparable harm, if Defendants could not issue new permits for fossil fuel activities. *See MTSUN, LLC v. Mont. Dep't of Pub. Serv. Regul.,* DA 19-0363, *3 (Mont. Sup. Ct. Aug. 6, 2019) (affirming district court denial of stay and finding that Defendant NorthWestern Energy would not suffer any harm because any increased costs incurred absent a stay would be passed on to consumers). Unlike the situation in *MEIC v. Westmoreland*, here there are no private defendants alleging financial injuries from having to shut down mining operations. DA 22-0064, *7-8 (Mont. Sup. Ct. Aug. 9. 2022); *accord Vote Solar v. Mont. Dep't of Pub. Serv. Regul.,* DA 19-0223, *2-3 (Mont. Sup. Ct. Aug. 6, 2019). Defendants present no evidence as to how *they* will be irreparably injured if they

could not issue new permits for fossil fuel activities after considering GHG emissions and corresponding impacts to the climate.

Defendants' concerns about "potential" liability and having to "divert DEQ resources" are pure conjecture and, even if valid, do not constitute irreparable harm. Doc. 423 at 9, 11; *N. Plains Res. Council v. U.S. Army Corps of Engineers*, 460 F. Supp. 3d 1030, 1045 (D. Mont. 2020) (administrative burdens do not constitute irreparable harm). Any additional resources required by Defendants to comply with their statutory and constitutional obligations do not constitute irreparable harm but do implicate Defendants' obligation to comply with the law, including court orders interpreting Montana's Constitution. *Rodriguez v. Robbins*, 715 F.3d 1127, 1146 (9th Cir. 2013) ("even if the government faced severe logistical difficulties in implementing the order," that would merely represent the burden of complying with statutory and constitutional obligations); *see also Hernandez v. Sessions*, 872 F.3d 976, 1000 (9th Cir. 2017). What Defendants should be focused on is the ongoing harms to the youth Plaintiffs and their own potential liability for disregarding this Court's August 14 Order.

Defendants' conjecture that they may be subject to lawsuits under MEPA or the Montana Administrative Procedure Act ("MAPA") if they rush their process to determine whether and how to consider climate change and GHGs during MEPA review is similarly without merit and does not constitute irreparable harm. Doc. 423 at 10-11. Even actualized litigation burdens do not rise to the level of irreparable harm. *See, e.g., Renegotiation Bd. v. Bannercraft Clothing Co.*, 415 U.S. 1, 24 (1974) ("Mere litigation expense, even substantial and unrecoupable cost, does not constitute irreparable injury."); *F.T.C. v. Standard Oil Co. of Cal.*, 449 U.S. 232, 244 (1980) (Defendants' "expense and disruption of defending itself in protracted adjudicatory proceedings" did not constitute irreparable harm). Purely conjectural litigation risk, likewise, does not constitute

irreparable harms. Moreover, Defendants present no evidence that the issuance of a stay would alleviate their purported injuries stemming from hypothetical future litigation, or that such litigation is more likely to materialize if they immediately begin complying with this Court's August 14 Order.

Importantly, DEQ's own trial testimony makes clear that the agency knows how to consider climate impacts and GHG emissions, and would do so, if the MEPA Limitation were declared unconstitutional. At trial the Court asked Ms. Nowakowski, "if you had the authority, do you believe that your agency could do this kind of [climate change impacts] analysis?" Tr. 1437:4-6. Ms. Nowakowski responded, "I do believe we could do this kind of analysis, yes." Tr. 1437:7-8. Additionally, Anne Hedges was asked at trial, "[i]f the climate change limitation to MEPA were declared unconstitutional, do you think defendant agencies would be capable of considering greenhouse gas emissions and the climate impacts of proposed fossil fuel projects?" Tr. 821:16-20. Ms. Hedges responded: "One hundred percent. State agencies absolutely have the skills and the information they need to create these types of analyses. These analyses are already conducted at the federal level and in MEPA." Tr. 821:21-25. On the basis of the trial evidence, this Court's August 14 Order found:

> FF #252. "Prior to 2011, Defendants were quantifying and disclosing GHG emissions and climate impacts from fossil fuel projects, including, for example, the Silver Bow Generation Project, the Roundup Power Project (Bull Mountain), and the Highwood Generating Station."
>
> FF #257. "If the MEPA Limitation is declared unconstitutional, state agencies will be capable of considering GHG emissions and the impacts of projects on climate change."
>
> CL #64. "Undisputed testimony established that Defendants could evaluate 'greenhouse gas emissions and corresponding impacts to the climate in the state or beyond the state's borders' when evaluating fossil fuel activities. Indeed, Defendants have performed such evaluations in the past."

Doc. 405 at 73-74, 101 (citations omitted). In sum, the trial record shows Defendants already have the tools to analyze climate impacts and GHG emissions and professed capability to do so. Their alleged irreparable harm is being manufactured by their own begrudging processes of complying with this Court's Order and erroneous assumption that they need to promptly approve every fossil fuel permit they receive without considering GHG emissions and corresponding climate impacts.

Even accepting *arguendo* DEQ's argument that it will take time to complete the agency's "process" of considering whether and how to update MEPA, requiring Defendants to immediately implement and adhere to this Court's August 14 Order, cease implementing unconstitutional statutes, and begin exercising their statutory discretion in a constitutional manner will not cause any *irreparable* harm to Defendants. Irreparable harm to Defendants is a "bedrock requirement" of a stay pending appeal, and Defendants' failure to establish irreparable harm necessitates denial of their motion to stay proceedings. *N. Plains Res. Council*, 460 F. Supp. 3d at 1045.

C. Issuance of A Stay Will Exacerbate Plaintiffs' Uncontroverted and Well-Established Constitutional Injuries, Causing Further Irreparable Harm

Conspicuously absent from Defendants' stay motion is any meaningful discussion of whether the sixteen youth Plaintiffs will be harmed if a stay is granted. Doc. 423 at 13. Defendants fail to acknowledge this Court has already found, based on the uncontested evidence presented at trial, that Plaintiffs are *currently suffering substantial injuries* under the *status quo* of climate disruptions and Defendants' disregard for the dangers of climate change and GHG pollution in their permitting decisions. Doc. 405 at 46-64.

This Court held that each Plaintiff is already experiencing grave injuries, including injuries to their physical and mental health, damage to their home and property, lost income and economic security, reduced recreational opportunities, and harm to tribal and cultural traditions as a result of "the State's disregard of GHG pollution and climate change pursuant to the MEPA Limitation."

Id. at 46; *id.* at 46-64. For example, the Court found that, "[f]or Olivia, climate anxiety is like an elephant siting on her chest and it feels like a crushing weight . . . mak[ing] in hard for her to breathe." *Id.* at 57. The increasingly smoky summers in Montana "makes Mica feel sick," and because he has exercise-induced asthma, he is "at greater risk for respiratory hardship when the air is smoky." *Id.* at 61. For Sariel, climate impacts affect her "ability to partake in cultural and spiritual activities and traditions, which are central to her individual dignity," and disrupt "spiritual practices and longstanding rhythms of tribal life." *Id.* at 52.

Plaintiffs' substantial injuries are occurring *right now* and, as the uncontested evidence presented at trial demonstrated, will increase and compound with each passing day and with any delay in Defendants' full implementation of the August 14 Order. As this Court found:

> FF #89. "Until atmospheric GHG concentrations are reduced . . . Plaintiffs will be unable to live clean and healthy lives in Montana."
>
> FF #92. "Every ton of fossil fuel emissions contributes to global warming and impacts to the climate and thus increases the exposure of Youth Plaintiffs to harms now and additional harms in the future."
>
> FF #98. "According to the Intergovernmental Panel on Climate Change (IPCC) . . . 'There is a rapidly closing window of opportunity to secure a liveable and sustainable future for all (*very high confidence*) . . . . The choices and actions implemented in this decade will have impacts now and for thousands of years (*high confidence*).'"
>
> FF #193. "The science is clear that there are catastrophic harms to the natural environment of Montana and Plaintiffs and future generations of the State due to anthropogenic climate change. The degradation to Montana's environment, and the resulting harm to Plaintiffs, will worsen if the State continues ignoring GHG emissions and climate change."
>
> FF #194. "The unrefuted testimony established that Plaintiffs have been and will continue to be harmed by the State's disregard of GHG pollution and climate change pursuant to the MEPA Limitation."
>
> CL #7. "Plaintiffs' injuries will grow increasingly severe and irreversible without science-based actions to address climate change."

Doc. 405 at 24-25, 46, 87 (citations omitted).

Incongruously, pending final resolution of this case before the Montana Supreme Court, Defendants want permission to continue to implement the MEPA Limitation and ignore the GHG emissions from fossil fuel projects and the resulting harms to Montana's children and environment. Doc. 423 at 3 (asking this Court to "maintain the status quo" of always approving fossil fuel permits without considering GHG emissions and corresponding impacts to the climate). However, if Defendants continue to follow the *status quo* of disregarding GHG emissions and climate impacts, all applied for fossil fuel activities will continue to be permitted, increasing GHG emissions at a time when they need to be declining, and exacerbating Plaintiffs' proven injuries. Doc. 405 at 87-88 (describing causal connection between MEPA Limitation and resulting GHG emissions). The uncontested evidence of record and this Court's detailed findings of fact and conclusions of law make clear that Plaintiffs are suffering substantial injuries and constitutional rights violations *now*, and the issuance of a stay and preservation of the unconstitutional *status quo* would cause further substantial injuries to Plaintiffs, with a narrowing window to abate the harm.

A stay of this Court's August 14 Order would result in MEPA reviews conducted pursuant to the MEPA Limitation that ignore GHG emissions and climate harms and the continued approval of all new fossil fuel projects, thereby prolonging and exacerbating the dangerous conditions which cause and contribute to Plaintiffs' injuries and violate their fundamental constitutional rights.[5] Under such trial-proven facts and circumstances, there is no justification to grant a stay and allow Defendants to continue the *status quo* of violating Plaintiffs' constitutional rights. As Montana's

[5] For example, the two fossil fuel projects previously referenced, *supra,* p. 5-6. Additionally, because MEPA provides timelines ranging between 60 and 180 days to conduct scoping and environmental reviews, § 75-1-208, MCA, and because DEQ conducts dozens of environmental reviews every year, Nowakowski Decl. ¶¶ 26-28, if a stay is granted there is a high likelihood that dozens of environmental reviews would be conducted pursuant to the MEPA Limitation this Court declared unconstitutional while this appeal is resolved, thereby greatly exacerbating the already substantial harms to Plaintiffs.

courts have consistently recognized, infringement of constitutional rights constitutes irreparable injury. *Driscoll v. Stapleton*, 2020 MT 247, ¶ 15, 401 Mont. 405, 473 P.3d 386 ("the loss of a constitutional right constitutes an irreparable injury"); *Mont. Democratic Party v. Jacobsen*, 2022 MT 184, ¶ 38, 410 Mont. 114, 518 P.3d 58 (same); *see also Amoco Prod. Co. v. Vill. of Gambell*, 480 U.S. 531, 545 (1987) (environmental injury is irreparable).

Because the *status quo* Defendants seek to perpetuate through a stay of this Court's August 14 Order is one in which Plaintiffs *have already suffered* constitutional and environmental harms, and because Plaintiffs will suffer substantial additional harms if a stay is granted, the balance of harms clearly disfavors a stay and necessitates prompt and full compliance with this Court's August 14 Order and denial of Defendants' request for a stay.

D. The Public Interest Overwhelmingly Weighs Against a Stay

The public interest also weighs against issuance of a stay because it is always in the public's interest for Defendants to comply with their Constitutional obligations. *See MTSUN,* DA 19-0363, *3 (it is in the public's interest for defendants to follow the law); *Mont. Wilderness Ass'n v. Fry*, 408 F. Supp. 2d 1032, 1038 (D. Mont. 2006) (same). As with the third stay factor, Defendants' arguments that the public interest lies in favor of a stay is built entirely on conjecture and speculation and is contrary to the trial record and the findings in this Court's August 14 Order.

As described in Section II.B *supra*, there is no benefit to the public from Defendants' ongoing failure to consider climate impacts and GHG emissions in permitting decisions and continued issuance of all fossil fuel permits. The undisputed trial evidence makes clear that a transition away from fossil fuels towards renewable energy is not only feasible, but will save Montana energy consumers billions of dollars, eliminate dangerous air pollution, and ensure grid reliability. Doc. 405 at 80-84. Unlike the situations in *MEIC v. Westmoreland* and *Vote Solar,* there

is no evidence here that private corporations, or Montana energy consumers, will suffer irreparable financial harms; on the contrary, the evidence shows that the public will *benefit* as Montana stops blindly permitting all fossil fuel activities without considering GHG emissions and corresponding impacts to the climate. *MTSUN,* DA 19-0363, *3; Doc. 405 at 80-84.

Regarding the purported harms stemming from limited public input, Doc. 423 at 9, Defendants fail to explain why the public cannot continue to provide input during a MEPA review process that complies with this Court's August 14 Order. Additionally, there is no evidence that such a "harm" would cause irreparable injury to the public or justify the exacerbation of Plaintiffs' already substantial injuries. Further, Defendants gloss over the overwhelming outpouring of public support at DEQ's MEPA "public listening sessions" in favor of swift and comprehensive compliance with this Court's August 14 Order and inclusion of GHG emissions and climate change impacts analyses in MEPA reviews. Indeed, practically every public comment submitted on DEQ's "MEPA Conversation" webpage implores the agency to begin conducting GHG and climate analyses in MEPA reviews.[6] Through DEQ's public listening sessions, the public is making abundantly clear that its interests lie against a stay and in favor of prompt adherence to this Court's August 14 Order. The public interest lies squarely with having Defendants comply with the law and ceasing their unconstitutional conduct. Defendants' motion should be denied.

E. MAPA Cases Applying § 2-4-711, MCA, to Stay Agency Actions Pending Appeal are Inapposite

Defendants advocate for a new rule that anytime a district court declares unconstitutional statutory text that implicates state agencies, a stay is warranted pending appeal. Doc. 423 at 13-14. But the cases Defendants cite in support of their argument concern judicial review of a specific

[6] Montana DEQ, *DEQ MEPA Conversation*, https://storymaps.arcgis.com/stories/4e14fb535c034e08bcf87c6c2a113c9d.

agency action under MAPA, not cases where courts have enjoined the implementation of unconstitutional statutes. None of the cases cited by Defendants stands for the proposition that state agencies should be allowed to implement unconstitutional statutes or violate constitutional rights while an appeal is pending – which is what Defendants are asking to do here. Notably, a specific MAPA provision, § 2-4-711, MCA, provides for the stay of the district court orders reversing agency decisions in the cases cited by Defendants. *Whitehall Wind, LLC v. Mont. Pub. Serv. Comm'n*, 2010 MT 2, ¶18, 355 Mont. 15, 223 P.3d 907; *Grenz v. Mont. Dep't of Nat. Res. & Conservation*, 2011 MT 17, ¶ 20, 359 Mont. 154, 248 P.3d 785.[7] The instant case is not a MAPA case and there is no statute automatically authorizing a stay here. Doc. 46 at 22-24 (finding Plaintiffs need not bring a MAPA case). This Court should apply the four stay factors outlined above and, in so doing, will find that Defendants' motion must be denied.

CONCLUSION

Defendants' motion for clarification must be denied because this Court does not have jurisdiction to consider such a motion while this case is on appeal to the Montana Supreme Court. Defendants' motion for stay must be denied because granting such a motion would allow Defendants to continue their unconstitutional conduct, exacerbate the grave constitutional injuries Plaintiffs are currently experiencing, and risk locking in irreversible harms to Plaintiffs and the public. Defendants have demonstrated no likelihood of their success on the merits, no irreparable injury to them, and no public benefit to a stay. The Court should take this opportunity to remind Defendants they must fully comply with this Court's August 14 Order and begin working to fulfill their affirmative constitutional obligations to Montana's youth.

[7] *Matter of Mays* was also a MAPA case but does not consider the issue of a stay and is, therefore, irrelevant to Defendants' argument. 2019 MT 219, ¶ 7, 397 Mont. 248, 448 P.3d 1096. *Vote Solar* was also a MAPA case challenging a specific agency decision.

DATED this 6th day of November, 2023.

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(Proposed) Order Denying Defendants' Motion for Clarification and for Stay of Judgment Pending Appeal November 6, 2023 (Doc. 428 Ex. 1)

MONTANA FIRST JUDICIAL DISTRICT COURT
LEWIS AND CLARK COUNTY

RIKKI HELD, et al., Plaintiffs, v. STATE OF MONTANA, et al., Defendants.	Cause No. CDV-2020-307 Hon. Kathy Seeley **[PROPOSED] ORDER DENYING DEFENDANTS' MOTION FOR CLARIFICATION AND FOR STAY OF JUDGMENT PENDING APPEAL**

Defendants Department of Environmental Quality, Department of Natural Resources and Conservation, Department of Transportation, and Governor Greg Gianforte have moved for an order clarifying this Court's August 14, 2023 Findings of Fact, Conclusions of Law, and Order (Doc. 405), and for an order to stay this Court's August 14 judgment, pending appeal. Doc. 422. Defendants' motions were consolidated into a combined filing. Plaintiffs oppose both motions. After considering the parties' briefing, and in light of this Court's prior rulings and the evidentiary record before the Court, this Court issues the following order:

PROCEDURAL HISTORY

This Court's August 14 Order contains a detailed procedural history of this case. Doc. 405 at 1-9. After this Court issued its August 14 Order, the parties asked the Court to postpone ruling on the issue of Plaintiffs' entitlement to and amount of attorneys' fees and costs and, pursuant to Montana Rule of Civil Procedure 54(b), requested certification of the August 14 Order for

interlocutory appeal to the Montana Supreme Court. Docs. 411, 415. On September 18, 2023, this Court certified its August 14 Order (Doc. 405) and several ancillary orders as final for purposes of interlocutory appeal, pursuant to Rule 54(b), M. R. Civ. P. and Rule 6(6), M. R. App. P. Doc. 417.

On September 29, 2023, Defendant State of Montana filed its notice of appeal to the Montana Supreme Court. Docs. 418, 420. On October 2, 2023, Defendants Governor Greg Gianforte, Department of Environmental Quality, Department of Natural Resources and Conservation, and Department of Transportation filed a separate notice of appeal to the Montana Supreme Court. *Held v. State of Montana*, DA 23-0575, Notice of Appeal (Mont. Sup. Ct. Oct. 2, 2023). On October 16, 2023, Defendants Governor Greg Gianforte, Department of Environmental Quality, Department of Natural Resources and Conservation, and Department of Transportation filed their Motion for Clarification and for Stay of Judgment Pending Appeal. Doc. 422. Defendant State of Montana did not join in the motion for clarification or motion to stay judgment.

On October 17, 2023, the Supreme Court accepted this Court's certification order and "ordered that this appeal may proceed." *Held v. State of Montana*, DA 23-0575, Order, *2 (Mont. Sup. Ct. Oct. 17, 2023). This case is now on appeal to the Montana Supreme Court.

FACTUAL BACKGROUND

The record before this Court includes an extensive trial record, with testimony from twenty-seven witnesses and one hundred and seventy-two exhibits, and the detailed Findings of Fact and Conclusions of Law in the August 14 Order. Relevant to the present motions before this Court, the August 14 Order found, in part:

> FF #89. "Until atmospheric GHG concentrations are reduced, extreme weather events and other climactic events such as drought and heatwaves will occur more frequently and in greater magnitude, and Plaintiffs will be unable to live clean and healthy lives in Montana."

FF #104. “Children are uniquely vulnerable to the consequences of climate change, which harms their physical and psychological health and safety, interferes with family and cultural foundations and integrity, and causes economic deprivations.”

FF #193. “The degradation to Montana’s environment, and the resulting harm to Plaintiffs, will worsen if the State continues ignoring GHG emissions and climate change.”

FF #194. “The unrefuted testimony established that Plaintiffs have been and will continue to be harmed by the State’s disregard of GHG pollution and climate change pursuant to the MEPA Limitation.”

FF #218. “Accounting for overlap among fossil fuels extracted, consumed, processed, and transported in Montana, the total CO_2 emissions due to Montana's fossil fuel-based economy is about 166 million tons CO_2. This is a conservative estimate and does not include all the GHG emissions, including methane, for which Montana is responsible.”

FF #252. “Prior to 2011, Defendants were quantifying and disclosing GHG emissions and climate impacts from fossil fuel projects, including, for example, the Silver Bow Generation Project, the Roundup Power Project (Bull Mountain), and the Highwood Generating Station.”

FF #257. “If the MEPA Limitation is declared unconstitutional, state agencies will be capable of considering GHG emissions and the impacts of projects on climate change.”

FF #272. “It is technically and economically feasible for Montana to replace 80% of existing fossil fuel energy by 2030 and 100% by no later than 2050, but as early as 2035.”

FF #275. “[C]onverting to wind, water, and solar energy would reduce annual total energy costs for Montanans from $9.1 to $2.8 billion per year, or by $6.3 billion per year (69.6% savings).”

FF #276. “New wind and solar are the lowest cost new forms of electric power in the United States, on the order of about half the cost of natural gas and even cheaper compared to coal.”

FF #281. “Transitioning to WWS [wind, water, solar] will keep Montana’s lights on while saving money, lives, and cleaning up the air and the environment, and ultimately using less of Montana’s land resources.”

CL #6. “Every additional ton of GHG emissions exacerbates Plaintiffs’ injuries and risks locking in irreversible climate injuries.”

> CL #50. "Montana's climate, environment, and natural resources are unconstitutionally degraded and depleted due to the current atmospheric concentration of GHGs and climate change."
>
> CL #64. "Undisputed testimony established that Defendants could evaluate 'greenhouse gas emissions and corresponding impacts to the climate in the state or beyond the state's borders' when evaluating fossil fuel activities. Indeed, Defendants have performed such evaluations in the past."

Doc. 405 at 24, 28, 46, 67, 73-74, 81-82, 84, 87, 98, 101 (citations to the record omitted).

These findings and conclusions were undisputed at trial by Defendants. The record before this Court demonstrates the dangerous nature of the *status quo* that Defendants seek to preserve. That *status quo* is one where there are already "catastrophic harms to the natural environment of Montana and Plaintiffs," harms that "will worsen if the State continues ignoring GHG emissions and climate change." Doc. 405 at 46. The record before this Court also shows that Montana does not need to continue relying on fossil fuels to meet its energy needs, and can meet all of its energy needs by transitioning the State to renewable energy sources, which would have climate benefits, create jobs, reduce air pollution, save lives and costs from air pollution, and reduce energy costs for Montanans. Doc. 405 at 81-82. The record also demonstrates, through Defendants' own trial testimony and documents, that Defendants can conduct a MEPA analysis that considers GHG emissions and climate impacts, and indeed Defendants have done so in the past. It is in light of this undisputed factual context and trial record that the Court considers Defendants' present motions.

LEGAL STANDARDS

Motion for Clarification: The precise legal standard for a motion for clarification is not relevant here because, as explained below, this Court does not have jurisdiction to rule on Defendants' motion for clarification.

Motion to Stay: Montana Rule of Appellate Procedure 22 provides that a motion seeking to stay judgment pending appeal shall be filed in the district court. Only in "extraordinary circumstances" should a stay be granted. *Graves v. Barnes*, 405 U.S. 1201, 1203 (1972). Defendants, as the parties requesting the stay, have the burden to establish that their specific circumstances justify a stay pending appeal. *Mont. Env't Info. Ctr. v. Westmoreland Rosebud Mining, LLC,* DA 22-0064, *5-6 (Mont. Sup. Ct. Aug. 9. 2022) ("*MEIC v. Westmoreland*"); *Nken v. Holder*, 556 U.S. 418, 433-34 (2009). In evaluating a motion to stay, Montana's courts consider four factors: (1) whether the stay applicant has made a strong showing that it is likely to succeed on the merits; (2) whether the applicant will be irreparably injured absent a stay; (3) whether issuance of the stay will substantially injure the other parties interested in the proceeding; and (4) where the public interest lies. *MEIC v. Westmoreland*, *5 (citing *Hilton v. Braunskill*, 481 U.S. 770 (1987)). A stay of proceedings is "an exercise of judicial discretion and the propriety of its issue is dependent upon the circumstances of the particular case." *Nken*, 556 U.S. at 433 (quotes, citations omitted).

ANALYSIS

I. Defendants' Motion for Clarification

This case has been accepted for interlocutory appeal by the Montana Supreme Court and, therefore, the District Court does not have jurisdiction to decide Defendants' motion for clarification. *Lewistown Propane Co. v. Moncur*, 2003 MT 368, ¶ 12, 319 Mont. 105, 82 P.3d 896 ("It is the law in Montana that once a Notice of Appeal is filed, the district court no longer has jurisdiction over the parties or the cause of action and cannot hear or rule on any pending motions."). Should any clarification of this Court's August 14 Order be required at a later date, the appropriate time would be after the Supreme Court issues a final judgment. *Meine v. Hren*

Ranches, Inc., 2020 MT 284, 402 Mont. 92, 475 P.3d 748. Because this Court does not have jurisdiction, Defendants' motion for clarification is DENIED.

II. Defendants' Motion for Stay of Judgment Pending Appeal

A. Whether Defendants have Made a Strong Showing they Are Likely to Succeed on the Merits

In their moving papers, Defendants do not identify any errors with this Court's August 14 Order, the Order they seek to have stayed, or any of this Court's prior orders. Therefore, Defendants fail to establish they are likely to succeed on the merits of their appeal. Defendants' argument that they are likely to succeed on the merits of their appeal if this Court ordered Defendants to prepare and implement a remedial climate recovery plan is not relevant because this Court did not order such relief in its August 14 Order. The Court's August 14 Order, which applied constitutional law, declared rights, declared statutes unconstitutional, and enjoined Defendants from acting in furtherance of the unconstitutional statutes, is entirely in line with the judiciary's duty to secure the constitutional rights of Montana's citizens. *Mitchell v. Town of W. Yellowstone*, 235 Mont. 104, 110, 765 P.2d 745, 748 (1988) ("The first business of courts is to provide a forum in which the constitutional rights of all citizens may be protected."); *Marbury v. Madison,* 5 U.S. (1 Cranch) 137, 177 (1803) ("It is emphatically the province and the duty of the judicial department to say what the law is."); *see also* Doc. 217.

Because Defendants' moving papers fail to identify any errors with this Court's August 14 Order, or any of this Court's prior orders, they have not satisfied their burden to establish they are likely to succeed on the merits of the appeal. This factor weighs in favor of denying Defendants' motion for a stay of judgment pending appeal.

B. Whether or Not Defendants Will be Irreparably Harmed Absent a Stay Pending the Appeal

Defendants have the burden to demonstrate they will be irreparably harmed absent a stay pending appeal. *MEIC v. Westmoreland*, *5-6. However, a stay is "not a matter of right, even if irreparable injury might otherwise result to the appellant." *Nken*, 556 U.S. at 427. Defendants allege their irreparable injuries would result from "[r]ushing to implement a process for analyzing GHG emissions" and argue that their own conduct to rush the regulatory review "process" would cause regulatory confusion, uncertainty, and potential liability for DEQ. Doc. 423 at 9. Defendants' allegations of harm fall short of meeting their burden to prove irreparable harm absent a stay pending appeal.

This Court's Order does not prevent DEQ from carrying out its statutory functions, including performing environmental analyses on permit applications and deciding whether to issue permits. It requires that its statutory functions are carried out in a constitutionally-compliant manner. There is no evidence before the Court that analyzing the GHG emissions and climate change impacts in their environmental reviews, which Defendants argue could potentially lead to not issuing permits for fossil fuel activities, will cause *irreparable* harm to any Defendants in this case. Nor do Defendants support their motion with evidence that not issuing permits for fossil fuel activities would cause Defendants irreparable harm. To the contrary, the undisputed evidence at trial established that the opposite would be true when renewable energy alternatives to fossil fuels are considered as provided in MEPA. *See* Mont. Code Ann. § 75-1-201(1)(b)(iv)(C); Doc. 405 at 81. The undisputed trial record and this Court's findings in the August 14 Order make clear that Montana can meet its current and future energy needs by transitioning its energy systems away from fossil fuels and towards renewable energy. Doc. 405 at 80-84. The uncontested evidence at trial established that a transition to renewable energy will clean up Montana's environment, improve the health of its citizens (especially Montana's children), save Montana energy consumers

money, and ensure a reliable grid. Doc. 405 at 80-84; Tr. 1072:24-1075:25. Defendants had the opportunity to dispute this evidence at trial, or offer alternative evidence, but they did not. While the testimony of Defendants' sole testifying expert, Dr. Terry Anderson, contained flaws and was not given weight by this Court, Dr. Anderson never questioned the feasibility, reliability, or costs of transitioning Montana's energy system to renewable energy. Doc. 405 at 66. Neither of the two DEQ witnesses that testified at trial, Sonja Nowakowski and Chris Dorrington, questioned the feasibility, reliability, or costs of transitioning Montana's energy system to renewable energy either (nor were they identified as experts on the subject).

This Court finds the trial record on this matter, which was subject to cross-examination, compelling and convincing and will not give weight to Defendants' belated attempt to introduce new material on this matter from someone unqualified to opine on the details of a renewable energy transition in Montana. *See* Nowakowski Decl. ¶ 44; Tr. 1343:23-1345:7 (Ms. Nowakowski describing her expertise in law and policy work, not technical and economic feasibility of decarbonizing Montana's energy system). In short, there is no evidence to support Defendants' allegations that, if considering GHG emissions and climate impacts during MEPA reviews resulted in DEQ not permitting new fossil fuel projects, the failure to approve these permits would undermine Montana's energy system, increase costs to consumers, compromise grid reliability, or cause any other irreparable harms to Defendants – the undisputed evidence of record shows nothing but benefits from a transition away from fossil fuels for all Montanans. The evidence weighs heavily in favor of Plaintiffs.

Additionally, there is no evidence before the Court that MEPA reviews that considered the GHG emissions and climate change impacts in environmental reviews, which could potentially lead to not issuing permits for coal mines or gas plants, will cause *irreparable* harm to any party

in this case. *MTSUN, LLC v. Mont. Dep't of Pub. Serv. Regul.,* DA 19-0363, *3 (Mont. Sup. Ct. Aug. 6, 2019) (affirming district court denial of stay and finding that Defendant NorthWestern Energy would not suffer any harm because any increased costs incurred absent a stay would be passed on to consumers). The alleged harms here are readily distinguishable from those alleged in the cases cited by Defendants: *MEIC v. Westmoreland*, DA 22-0064, *7-8 (Mont. Sup. Ct. Aug. 9. 2022) and *Vote Solar v. Montana Dep't of Pub. Serv. Regul.,* DA 19-0223, *2-3 (Mont. Sup. Ct. Aug. 6, 2019). In *MEIC* and *Vote Solar*, there were private corporation defendants alleging irreparable financial injuries, but here there are no private corporations, or government Defendants for that matter, alleging any financial injuries, let alone irreparable financial injuries. Defendants present no evidence as to how *they* will be irreparably injured if they could not issue new permits for fossil fuel activities after considering GHG emissions and corresponding climate impacts in MEPA reviews.

Defendants' concerns about potential liability are also tenuous and speculative, but again, even if accepted as true, do not arise to the level of irreparable harms. It is well established that actualized litigation burdens do not constitute irreparable harm. *See, e.g.*, *Renegotiation Bd. v. Bannercraft Clothing Co.*, 415 U.S. 1, 24 (1974) ("Mere litigation expense, even substantial and unrecoupable cost, does not constitute irreparable injury."); *F.T.C. v. Standard Oil Co. of Cal.*, 449 U.S. 232, 244 (1980) (Defendants' "expense and disruption of defending itself in protracted adjudicatory proceedings" did not constitute irreparable harm). Defendants' hypothetical litigation burdens, likewise, do not constitute irreparable harm.

Similarly, Defendants' concerns about increased administrative burdens do not constitute irreparable harm. Any additional resources required by Defendants to comply with their statutory and constitutional obligations are part of Defendants' obligation to comply with the law, including

Montana's Constitution. *N. Plains Res. Council v. U.S. Army Corps of Engineers*, 460 F. Supp. 3d 1030, 1045 (D. Mont. 2020) (administrative burdens do not constitute irreparable harm); *Rodriguez v. Robbins*, 715 F.3d 1127, 1146 (9th Cir. 2013) ("even if the government faced severe logistical difficulties in implementing the order," that would merely represent the burden of complying with statutory and constitutional obligations); *Hernandez v. Sessions*, 872 F.3d 976, 1000 (9th Cir. 2017) (irreparable harm caused by "a likely unconstitutional process far outweighs the minimal administrative burdens to the government of complying with the injunction while this case proceeds").

Finally, it is worth noting that the process Defendants now claim will be so onerous to complete – analyzing GHG emissions and climate impacts in MEPA reviews – is one that Defendants used to perform and DEQ's own declarant admitted at trial DEQ could do again if it had authority to do so. At trial, the Court asked Ms. Nowakowski, "if you had the authority, do you believe that your agency could do this kind of [climate change impacts] analysis?" Tr. 1437:4-6. Ms. Nowakowski responded, "I do believe we could do this kind of analysis, yes." Tr. 1437:7-8. Additionally, one of Plaintiffs' experts, Anne Hedges, was asked at trial, "[i]f the climate change limitation to MEPA were declared unconstitutional, do you think defendant agencies would be capable of considering greenhouse gas emissions and the climate impacts of proposed fossil fuel projects?" Tr. 821:16-20. Ms. Hedges responded: "One hundred percent. State agencies absolutely have the skills and the information they need to create these types of analyses. These analyses are already conducted at the federal level and in MEPA." Tr. 821:21-25. Based on the trial record, this Court held: "Undisputed testimony established that Defendants could evaluate 'greenhouse gas emissions and corresponding impacts to the climate in the state or beyond the state's borders' when

evaluating fossil fuel activities. Indeed, Defendants have performed such evaluations in the past." Doc. 405 at 101.

Defendants never argued at trial, or post-trial in Defendants' Proposed Findings of Fact and Conclusions of Law, they would suffer any harms, let alone irreparable injuries, if the challenged statutes were declared unconstitutional and if Defendants were enjoined from acting in accordance with the unconstitutional statutes. Their alleged harms are now being raised for the first time, without support, in their stay brief. Defendants have not met their burden to establish they will suffer any irreparable harms absent a stay pending appeal. This factor weighs in favor of denying Defendants' motion for a stay of judgment pending appeal.

C. Whether Plaintiffs Will be Substantially Injured by a Stay

This Court has already found that each of the sixteen youth Plaintiffs are currently experiencing grave injuries, including injuries to their physical and mental health, damage to their home and property, lost income and economic security, reduced recreational opportunities, and harm to tribal and cultural traditions, among others. Doc. 405 at 46-64. This Court found that, "[u]ntil atmospheric GHG concentrations are reduced . . . Plaintiffs will be unable to live clean and healthy lives in Montana." Doc. 405 at 24. Additionally, this Court found:

> FF #92. "Every ton of fossil fuel emissions contributes to global warming and impacts to the climate and thus increases the exposure of Youth Plaintiffs to harms now and additional harms in the future."
>
> FF # 98. "According to the Intergovernmental Panel on Climate Change (IPCC) . . . 'There is a rapidly closing window of opportunity to secure a liveable and sustainable future for all (*very high confidence*) . . . . The choices and actions implemented in this decade will have impacts now and for thousands of years (*high confidence*).'"
>
> FF #139. "Actions taken by the State to prevent further contributions to climate change will have significant health benefits to Plaintiffs."

> FF # 193. "The science is clear that there are catastrophic harms to the natural environment of Montana and Plaintiffs and future generations of the State due to anthropogenic climate change. The degradation to Montana's environment, and the resulting harm to Plaintiffs, will worsen if the State continues ignoring GHG emissions and climate change."
>
> FF # 194. "The unrefuted testimony established that Plaintiffs have been and will continue to be harmed by the State's disregard of GHG pollution and climate change pursuant to the MEPA Limitation."

Doc. 405 at 24-25, 34, 46 (citations to the record omitted).

Given these, and other factual findings, the Court held: "Montana's climate, environment, and natural resources are unconstitutionally degraded and depleted due to the current atmospheric concentration of GHGs and climate change." Doc. 405 at 98. This Court also held: "Every additional ton of GHG emissions exacerbates Plaintiffs' injuries and risks locking in irreversible climate injuries"; and "Plaintiffs' injuries will grow increasingly severe and irreversible without science-based actions to address climate change." Doc. 405 at 87.

Plaintiffs are already experiencing substantial injuries and infringement of their constitutional rights. If a stay were granted, there is a high likelihood that dozens of MEPA reviews could be conducted, and permits issued thereafter, by Defendants during the pendency of this appeal and pursuant to the MEPA Limitation's injurious blinders that this Court has declared unconstitutional. *See* Nowakowski Decl. ¶¶ 26-28. Plaintiffs' injuries and constitutional violations will be substantially exacerbated if Defendants continue to ignore climate change and GHG emissions in MEPA reviews and absent such analysis continue issuing permits for fossil fuel activities, which will increase the already unconstitutional levels of GHG concentrations in the atmosphere. Doc. 405 at 87-88 (describing causal connection between MEPA Limitation and resulting GHG emissions). The infringement of constitutional rights constitutes irreparable harm. *Driscoll v. Stapleton*, 2020 MT 247, ¶ 15, 401 Mont. 405, 473 P.3d 386 ("the loss of a

constitutional right constitutes an irreparable injury"); *Mont. Democratic Party v. Jacobsen*, 2022 MT 184, ¶ 38, 410 Mont. 114, 518 P.3d 58 (same). Depletion or degradation of the environment and natural resources also constitutes irreparable harm. *Amoco Prod. Co. v. Vill. of Gambell*, 480 U.S. 531, 545 (1987).

The evidence is uncontradicted: Plaintiffs will be substantially injured if a stay is granted that allows Defendants to maintain the *status quo* of failing to consider climate impacts and GHG emissions, approving every fossil fuel permit they receive, and increasing Montana's GHG emissions at a time when emissions must be declining rapidly. Even accepting arguendo Defendants' purported harms as true, the evidence at trial established Plaintiffs are experiencing harms much more substantial and irreparable than any of Defendants' alleged harms. Considering the balance of equities, this factor weighs in favor of denying Defendants' motion for a stay of judgment pending appeal.

D. Where the Public Interest Lies

The public's interest is best served when Montana's Constitution is followed and when constitutional rights are protected. *Mont. Wilderness Ass'n v. Fry*, 408 F. Supp. 2d 1032, 1038 (D. Mont. 2006) ("[T]he public interest is best served when the law is followed."). The public interest lies in protecting Montana's clean and healthful environment and in protecting the constitutional rights of all Montanans, especially the youth. *Mont. Env't Info. Ctr. v. Westmoreland Rosebud Mining, LLC,* DA 22-0064, *9 (Mont. Sup. Ct. Aug. 9. 2022); *see also* Mont. Const. art. II, §§ 3, 4, 15, 17; art. IX, §§ 1, 3. The public also has an interest in having access to reliable, safe, and clean energy sources. *MEIC v. Westmoreland*, *9. Defendants argue that, absent a stay, there could be regulatory disruptions that could affect the energy industry and could prevent DEQ from issuing new coal mining permits or permits for gas generating plants, which could increase costs to

Montana energy consumers. The undisputed trial record before this Court makes clear that with the MEPA Limitation's injurious and unconstitutional blinders removed, and with the attendant renewable energy alternatives to fossil fuels properly considered as provided in MEPA, Mont. Code Ann. § 75-1-201(1)(b)(iv)(C), Montana can meet all of its energy needs by transitioning away from fossil fuels towards renewable energy sources and reach 100% renewable energy by 2035 at the earliest, and no later than 2050. Doc. 405 at 80-84. A renewable energy system in Montana would be reliable, save Montanans money, and improve air quality. Doc. 405 at 80-84. There was no evidence at trial and there is no evidence in support of this motion that there would be any disruption to the public's access to reliable and affordable energy if a stay were not granted. *See also supra,* Section II.B.

Because there is no evidence that the public interest would be harmed absent a stay, and the evidence in the record shows nothing but benefits to the public interest from transitioning Montana's energy system away from fossil fuels, Defendants have failed to meet their burden to show that the public interest weighs in favor of granting a stay. This factor weighs in favor of denying Defendants' motion for a stay of judgment pending appeal.

FOR THE FOREGOING REASONS, and upon review of the briefing and evidentiary record before this Court, it is hereby ORDERED:

Defendants' motion for clarification is DENIED.

Defendants' motion for stay of judgment pending appeal is DENIED.

DATED this _____ day of November, 2023.

_____
KATHY SEELEY
District Court Judge

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Defendants' Reply in Support of Motion for Clarification for Stay of Judgment Pending Appeal November 22, 2023 (Doc. 433)

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Montana First Judicial District Court
Lewis and Clark County

Rikki Held, et al., Plaintiffs, vs. State of Montana, et al., Defendants.	Cause No. CDV-2020-307 **Defendants' Reply in Support of Motion for Clarification and for Stay of Judgment Pending Appeal**

INTRODUCTION

Throughout this case, this Court made clear that it was never considering whether to order state agencies to analyze greenhouse gas (GHG) emissions and climate impacts in every "project or proposal." (Doc. 379 at 14.) It was only deciding whether MCA § 75-1-201(2)(a)—which prohibited GHG emissions and climate impacts analysis in environmental reviews under the Montana Environmental Policy Act (MEPA) —violates the Montana Constitution. In its August 14, 2023, Order ("Order"), the Court declared that statute unconstitutional and enjoined its enforcement. (Doc. 405 at 102.) Under the Order's plain terms—and the Court's clear statements throughout this litigation—agencies are no longer barred from considering GHG emissions, but now have discretion to determine whether and how to account for GHG emissions in MEPA review.

Plaintiffs think the Order sweeps much farther. They believe that the Court has not only enjoined MCA § 75-1-201(2)(a), but also replaced it with a novel regulatory scheme for permitting decisions and MEPA analysis that requires state agencies immediately to "calculate the GHG emissions that will result from proposed projects." (Doc. 424, Ex. 1 at 6, Ex. 2 at 6.) Plaintiffs' interpretation of the Order contradicts what this Court has said since 2021. Defendants ask the Court to clarify that its Order does not require state agencies to begin calculating GHG emissions, but leaves it to them to decide whether, when, and how to do so. If Plaintiffs are right, however, the Order is in error and Defendants seek a stay of it.

Plaintiffs claim that the Court lacks jurisdiction to clarify what its Order means because the Montana Supreme Court has accepted appellate jurisdiction over this case. But this Court retains jurisdiction to rule on motions for a stay after a notice of appeal has been filed. *See Powers Mfg. Co. v. Leon Jacobs Enters.*, 216 Mont. 407, 411–12, 701 P.2d 1377, 1380 (1985); M. R. App. P.

22(1)(c). And resolving the parties' fundamental dispute about what the Order requires is a necessary component of resolving Defendants' stay motion. The Court also retains jurisdiction to rule on "ancillary matters" like this. *Powers Mfg. Co.*, 216 Mont. at 412, 701 P.2d at 1380. The Court has jurisdiction to clarify whether its Order requires state agencies immediately to begin calculating GHG emissions and climate impacts in each MEPA review, or whether it leaves it to agencies to determine whether, when, and how to do so.

Next, a stay is warranted if the Court's Order requires Defendants immediately to account for GHG emissions in every permitting decision and MEPA review. Defendants have a likelihood of success on the merits challenging such an order, because requiring state agencies to employ a novel regulatory scheme for analyzing GHG emissions in MEPA review would violate the political question doctrine and the separation of powers. Such an order would irreparably harm Defendants and the public and would not benefit Plaintiffs.

Plaintiffs' arguments to the contrary mischaracterize the basis for Defendants' stay as a request for "permission to continue to implement the MEPA Limitation and ignore the GHG emissions from fossil fuel projects and the resulting harms to Montana's children and environment." *See* (Doc. 428, at 17). That is not Defendants' request. Defendants understand the Court declared § 75-1-201(2)(a), MCA unconstitutional and enjoined Defendants from implementing it. But they also take the Court at its word that it was only assessing the constitutionality of this provision, not ordering Defendants to affirmatively include an evaluation of GHG emissions and corresponding impacts to the climate in each MEPA review. After all, the Court has said that it could not order Defendants to conduct such analyses. Without the statute, Defendants now have the discretion to determine if, when, and how to account for potential

impacts relating to GHG emissions and climate in MEPA reviews. And as this Court recognized, those questions "necessarily require a host of complex policy decisions entrusted, for better or worse, to the wisdom and discretion of the executive and legislative branches." *Juliana v. United States*, 947 F.3d 1159, 1171 (9th Cir. 2020); (Doc. 46, at 21.)

ARGUMENT

I. The Court has jurisdiction to clarify whether its Order requires state agencies to immediately begin analyzing GHG emissions.

The Court has explained many times that it was not considering whether to order state agencies to conduct GHG and climate impact analysis. *See* (Doc. 379 at 3–4, 14), (Doc. 46 at 18–19), (Doc. 217 at 7). Rather, the Court has made clear that "the relief contemplated by the Court has always been limited to declaratory judgment on the constitutionality of "the challenged statutory provisions "and an injunction on the enforcement of those provisions." (Doc. 379 at 3–4); *see also* (*id.* at 14) ("[T]his case now only involves declaring a statute unconstitutional."). And "declaring the MEPA Limitation unconstitutional is not congruent with commanding the State to consider climate change in every project or proposal." (Doc. 379 at 14.) Consistent with these repeated explanations, the Court's dispositive Order declared MCA § 75-1-201(2)(a) unconstitutional and enjoined its enforcement. (Doc. 405 at 102.) But it did not command the State to consider GHG emissions and climate impacts in every project or proposal.

Remarkably, Plaintiffs' response brief does not address this Court's frequent statements that ordering state agencies to conduct GHG emissions and climate impact analyses was beyond its power. More remarkably still, Plaintiffs continue to claim that the Court's Order *requires* state agencies to analyze GHG emissions in every permitting decision. (Doc. 428 at 5–6, 17.) But Plaintiffs are wrong. This Court should reaffirm that "the relief contemplated by the Court has

always been limited to declaratory judgment on the constitutionality of the" challenged statutory provisions "and an injunction on the enforcement of those provisions." (Doc. 379 at 3–4.) The Court retains jurisdiction to correct Plaintiffs' mischaracterization of its orders.

A. Clarifying what the Order means is a necessary part of ruling on Defendants' Motion for a Stay.

Plaintiffs on the one hand accused DEQ of "choosing to deliberately ignore a binding order from Montana's judiciary," and demanding that it "explain why it should not be held in contempt of court," even after this Court issued its Rule 54(b) certification. (Doc. 424, Ex. 1 at 6.) But now Plaintiffs reverse course, suggesting that the Court lacks authority to do anything at all. Plaintiffs cannot have it both ways. And in any event, they are wrong that the Court cannot clarify its Order as part of its analysis of Defendants' Stay Motion.

Even after a notice of appeal is filed, district courts retain jurisdiction to rule on motions for stay pending appeal. *Powers Mfg. Co.*, 216 Mont. 407, 411–12, 701 P.2d 1377, 1380; M. R. App. P. 22(1)(c). And resolving Defendants' Motion for Stay necessarily will entail clarifying what the Order means. Plaintiffs think that the Court's Order requires Defendant state agencies to immediately begin accounting for GHG emissions and climate impacts in every permitting decision. DEQ believes the Order takes a more reasonable path and gives Defendant state agencies **discretion** to determine whether, when, and how it should account for GHG emissions. It is impossible to analyze and rule on Defendants' stay motion without clarifying whose interpretation is correct.

If Plaintiffs are right, then the Court's Order effectively grants Plaintiffs the same "remedial plan" that the Court already found beyond its power to grant. Thus, it would violate the political question doctrine and the constitutionally mandated separation of powers set forth in

Mont. Const. Art. III, Sec. 1. *See* (Doc. 46 at 19–21) (explaining that granting Plaintiffs' request for a statewide remedial plan would violate the political question doctrine); *see also Bullock v. Fox*, 2019 MT 50, ¶ 43–44, 435 P.3d 1187, 395 Mont. 35 (explaining that the political question doctrine ensures that courts do not violate the constitutional separation of powers). It would also irreparably harm Defendants by violating the separation of powers and invading the prerogative of the Executive Branch, forcing DEQ to divert valuable resources, sowing regulatory chaos, and requiring DEQ to employ a GHG emissions and climate impact analysis without adequate time to formulate a fully-informed and legally defensible analysis—all without preventing any harm to Plaintiffs. MEPA has no bearing on Plaintiffs' injuries because MEPA does not allow the reviewing agency to deny or grant a permit. § 75-102(3)(b), MCA.MEPA is only an information-gathering and disclosing statute— no state agency can "withhold, deny, or impose conditions on any permit or other authority act" based on MEPA. § 75-1-201(4)(a), MCA. No progress will be made toward accurately evaluating GHG emissions or climate impacts if DEQ is forced to cook up a method overnight. *See infra* §III.B.2.

Moreover, such an Order would not be in the public interest. Defendant state agencies owe it to the public to develop carefully reasoned measures for analyzing potential GHG emissions and climate impacts that are based on careful science and public input. It is not in the public interest to force DEQ to rush out a hurried method for GHG emissions and climate impact analysis. The purpose of MEPA is informational. § 75-1-102(1)(a-b). Accuracy and legal defensibility are critical. It is not in anyone's interest for any state agency to hastily issue a MEPA document which would inevitably be challenged in court and quite probably found arbitrary and capricious – state agencies are required to take a "hard look" at all potential impacts in the

MEPA review, not a "hasty look." *Water for Flathead's Future, Inc. v. Mont. Dep't. of Envtl. Quality,* 2023 MT 86, ¶ 21. (When reviewing a MEPA review, the Montana Supreme Court takes a close look to determine whether the agency has taken a 'hard look' to fulfill its obligation to "make an adequate compilation of *relevant* information, to analyze it reasonably, and to consider all *pertinent* data.")(citations omitted). Under MEPA, agencies are required to present thorough analyses based on carefully collected information – their best thinking – not a half-baked method that cannot possibly account for the complexity of climate change. Yet that is exactly what Plaintiffs want. The public would also be deprived of its right to notice and comment on such significant changes in process and analysis. The purpose of MEPA itself is in part to provide for public notification and participation. *See* §75-1-102, MCA.

If DEQ is correct, however, that the Court's Order *does not* require it to implement any GHG emissions or climate impacts analyses, but only struck down a statute barring such analyses, DEQ will have the time and discretion necessary to determine whether, when, and how to analyze potential impacts regarding GHG emissions and/or climate impacts in its MEPA reviews.

In sum, the parties fundamentally disagree about the Court's ruling. So clarifying what the Order requires is a necessary component of ruling on Defendants' stay motion.

B. Clarifying the Order is also an ancillary matter over which the Court also retains jurisdiction.

The Court also retains jurisdiction over all "ancillary matters" after an appeal is filed. *Moore v. Frost*, 2021 MT 74, ¶ 9, 483 P.3d 1090, 403 Mont. 483 (quoting *In re Estate of Boland*, 2019 MT 236, ¶ 46, 397 Mont. 319, 450 P.3d 849). "Ancillary matters" are "supplementary" or "subordinate" matters. *See* Black's Law Dictionary, "Ancillary," (11th ed. 2019). "Ancillary matters" do not include motions filed under Montana Rule of Civil Procedure 60(b), or motions

to amend the judgment or findings of fact. *See Moore*, ¶ 9; *In re Estate of Erickson*, 2017 MT 260, ¶ 36, 406 P.3d 1, 389 Mont. 147.

Explaining what the Court's order requires is such an "ancillary matter." Defendants are not asking the Court for relief from a final judgment under Rule 60(b). Nor are they asking the Court to amend its judgment or findings of fact. They merely ask the Court to reaffirm what it has already held in the face of Plaintiffs' accusation that DEQ is in contempt. From the start, the Court has been crystal clear that it could not "force the State to conduct" a GHG "analysis," but could only "strike down a statute prohibiting it." (Doc. 379 at 13.); *see also* (Doc. 46 at 19–20) (finding that a request to order the State "to develop a remedial plan or policies to effectuate reductions of GHG emissions" was a nonjusticiable political question). This Court has made clear that "this case … involves only declaring a statute unconstitutional" and explained that "declaring the MEPA Limitation unconstitutional *is not congruent* with commanding the State to consider GHG emissions and climate impacts in ever project or proposal." (*Id.* at 14) (emphasis added). Consistent with these explanations, the Court's August 14 Order declared unconstitutional and enjoined MCA § 75-1-201(2)(a) but did not order DEQ to analyze potential impacts regarding GHG emissions or climate impacts in reviewing any proposed project, permit application/amendment, or in preparing any MEPA review. (Doc. 405 at 102.) If Plaintiffs simply took the Court at its word, no clarification would be necessary. Defendants only ask for the Court to make clear—in the face of Plaintiffs' threats of contempt—what it has already held several times. This is an ancillary matter over which the Court still has jurisdiction.

II. Maintaining the status quo – through a stay – is warranted until the Montana Supreme Court determines the issues on appeal.

A stay is warranted to preserve the status quo to alleviate regulatory uncertainty while the Montana Supreme Court considers the novel issues in this case. That is especially so if Plaintiffs are correct that the Court's Order can be stretched to require state agencies to conduct GHG and climate impacts analysis for every project. While not binding, the parties agree that the Montana Supreme Court looks to the familiar four-factor test employed by federal courts in assessing a party's motion for a stay pending appeal. *See Mont. Env't Info. Ctr. v. Westmoreland Rosebud Mining, LLC*, DA 22-0064, 2022 Mont. LEXIS 735 at *5 (Mont. Sup. Ct. Aug. 9, 2022) ("*MEIC*") (citing *Hilton v. Braunskill*, 481 U.S. 770 (1987)). Under that test, a stay is particularly appropriate when a case involves novel and unsettled legal questions. "Unsettled questions of law present serious legal questions so as to demonstrate sufficient likelihood of success on a motion to stay." *Maxcrest Limited v. United States*, No. 15-mc-802070, 2016 WL 6599463, *2 (N.D. Cal. November 7, 2016) (citation cleaned up). Here the Order has been described as a unique and landmark ruling in Montana and beyond, and addressed novel issues involving environmental policy, standing, causation, and redressability, to name a few. Given the critical interests in avoiding abrupt and seismic changes in the State's ability to timely and accurately complete the legal steps necessary to review permitting applications and amendments, especially in the energy arena, this Court should stay its decision pending the Supreme Court's final resolution of the unsettled legal issues.

A. Defendants have made a strong showing on the merits.

First, Defendants have made a "strong showing on the merits." *Nken*, 556 U.S. at 433. This standard only requires a petitioner to "show that there is a substantial case for relief on the

merits." *Lair v. Bullock*, 697 F.3d 1200, 1204 (9th Cir. 2012) (citation omitted). It "does not require the petitioners to show that it is more likely than not they will win on the merits." *Id.* In other words, it does not require a district court to essentially reverse itself to grant a stay. "When a request for a stay is made to a district court, common sense dictates that the moving party need not persuade the court that it is likely to be reversed on appeal. Rather, the movant must only establish that the appeal raises serious and difficult questions of law in an area where the law is somewhat unclear." *Strobel v. Morgan Stanley Dean Witter*, No. 04-CV-1069, 2007 WL 1238709, at *1 (S.D. Cal. Apr. 24, 2007) (citing cases).

This case is a paradigmatic example of an "an appeal" that "raises serious and difficult questions of law in an area where the law is somewhat unclear." *Strobel*, 2007 WL 1238709, at *1. No Montana Supreme Court decision has ever addressed the relationship between the right to a clean and healthful environment and global climate change. The case raises novel questions about standing, causation, redressability, and the relationship between the co-equal branches of Montana's government. The Court's Order also has the potential to impact the way in which Defendants prepare MEPA reviews for all permitting decisions, and particularly for Montana's energy industry. A stay is warranted under these unusually significant circumstances in an area where the law is far from settled.

Next, if Plaintiffs are correct that the Court's Order affirmatively requires state agencies to implement a new regulatory scheme for analyzing GHG emissions and climate impacts, then the Order violates the political question doctrine. This Court has already held that it lacked power to order "Defendants to develop a remedial plan or policies to effectuate reductions of GHG emissions in Montana." (Doc. 46 at 19) (quoting Compl. ¶ 7.) After all, such relief would

amount to enacting new legislation, a power that "lies exclusively with the Montana Legislature." (Doc. 46 at 19.) Over two years ago, this Court declined Plaintiffs' invitation to "create laws, policies, or regulations" and to "craft a remedy 'committed for resolution to other branches of government[.]'" (Doc. 46 at 18–19) (quoting *Larson v. State*, 2019 MT 28, ¶ 39, 394 Mont. 167, 434 P.3d 241); *see also* (Doc. 379 at 3–4) ("[T]he relief contemplated by the Court has always been limited to declaratory judgment on the constitutionality of [the challenged statutory provisions] and the enforcement of those provisions.").

Plaintiffs' response brief coyly asserts that this matter has already been resolved. (Doc. 428 at 8–9.) But that assertion omits one glaring fact. Plaintiffs now insist the Court has ordered state agencies to implement policies that will account for GHG emissions and climate impacts analyses in **every permitting decision**. *See* (Doc. 424, Ex. 1 at 6, Ex. 2 at 6); (Doc. 428 at 17.) And they have threatened Defendants with contempt if they do not immediately begin calculating GHG emissions in **every permitting decision**. *See* (Doc. 424, Ex. 1 at 6, Ex. 2 at 6). One problem with these assertions is that no substantive permitting statute requires an analysis of GHGs or climate impacts. Furthermore, MEPA is not a permitting statute. Therefore, Defendants cannot lawfully do what Plaintiffs insist they do. Plaintiffs, however, believe the Court's Order requires Defendants immediately to calculate GHG emissions that will result from proposed projects. That is essentially the same "remedial plan" that the Court found beyond its power to grant more than two years ago. Defendants take the Court at its word that it did not issue such a sweeping ruling. *See supra* § I. If, however, Plaintiffs are right about the scope of the Court's ruling, then Defendants are likely to succeed on appeal on political questions grounds alone. In Montana, such "complex policy decisions" such as if, when, and how to calculate GHG emissions and climate

impacts are entrusted to other branches of government. *Larson v. State*, 2019 MT 28, ¶ 39, 394 Mont. 167, 434 P.3d 241.

B. Defendants will suffer irreparable harm absent a stay.

Next, if Plaintiffs are correct about the breadth of the Order, Defendants will suffer an irreparable injury absent a stay. First, "any time a State is enjoined by a court from effectuating statutes enacted by representatives of its people, it suffers a form of irreparable injury." *Maryland v. King*, 567 U.S. 1301, 1303 (2012) (cleaned up) (quoting *New Motor Vehicle Bd. of Cal.v. Orrin W. Fox Co.*, 434 U.S. 1345, 1351 (1977)). And here—assuming Plaintiffs correctly interpret the Order—the Court has not only enjoined Montana agencies from enforcing a statute enacted by the people's representatives, it has also affirmatively ordered executive branch agencies to implement a new regulatory scheme in place of the enjoined statute. This violation of the separation of powers constitutes an irreparable injury. *See Cnty. Of Santa Clara v. Trump*, 250 F. Supp. 3d 497, 538 (N.D. Cal. 2017).

Second, under Plaintiffs' interpretation, Defendants would be forced to somehow determine and implement methods for GHG and climate impact analyses overnight. For example, Defendant DEQ must evaluate whether it has the internal expertise and capacity to conduct legally defensible analyses or will need to hire outside expert contractors. *See* (Doc. 424 ¶¶ 6–7, 15–23.) It's not one-size fits all, and accuracy and consistency are far more important than speed. For each proposed project or permit, DEQ will also need to assess whether the information that applicants submit under the existing regulatory regime provides DEQ with enough GHG climate information to allow the agency to begin conducting analyses for the project at issue. (*Id.* ¶¶ 9–10, 15.) DEQ activities are funded by biennial appropriations by Montana's Legislature. The Court,

on June 12, shortly before the start of the trial determined that it was hearing arguments on the statutory language adopted by the Legislature in 2023 (Chapter 450, Laws of 2023), as opposed to the language that had been in place since 2011 regarding impact analyses. Defendant state agencies have no means of traveling back in time to secure an appropriation to properly address this abrupt shift in requirements and analyses.

Furthermore, Defendants, particularly DEQ, are sued for nearly every decision that they make regarding projects relating to coal, natural gas, nonrenewable energy generation, and the transportation, refining, or distribution of petroleum products. These legal challenges – to both the permitting actions through the substantive permitting statutes and the Montana Administrative Procedures Act (MAPA) and separately, to MEPA review, divert tremendous agency resources from implementing and enforcing substantive regulatory statutes-- staff time and money that would otherwise be spent in pursuit of the agency's critical function to ensure that environmental protections are implemented in a consistent and transparent way. State agencies will have no way to recover these lost resources. These are irreparable injuries. *See E. Bay Sanctuary Covenant v. Biden*, 993 F.3d 640, 677–78 (9th Cir. 2021) (economic injuries for which a party has "no vehicle for recovery" constitute irreparable harm).

Further, if Plaintiffs are correct and the Order requires DEQ to hastily incorporate GHG emissions and climate impacts data into its MEPA analyses and somehow extend that procedural review to its permitting decisions, such a requirement would set up the executive agencies for certain failure and potentially sow regulatory chaos. Applicants would immediately challenge the conditioning of a permitting decision based on consideration of GHG emissions and climate impacts in that decision because the substantive permitting requirements neither require any such

analyses nor allow for modifications to a permit due to that analysis. Plaintiffs would also challenge the decision citing the Conclusions of Law in the Order for the proposition that DEQ failed to conduct adequate analyses. In addition, Plaintiffs, and other entities, would immediately challenge the MEPA reviews for failure to take the required "hard look," yet they are not willing to allow the agencies the time to develop and implement the "hard look," creating the very real possibility of permit vacatur and remand to the agency for a do-over" under MEPA's exclusive remedies. See, e.g., § 75-1-201(6)(c)(i-ii), MCA; *Water for Flathead's Future,* ¶¶ 35-36. That would be a waste of agency resources and taxpayer dollars.

Plaintiffs answer that Defendants can simply suspend evaluation of permit applications and further deny applications. (Doc. 428, at 12). There is no substantive permitting statute in Title 82 or 75 that provides for such suspension or denial. And the very permits they cite as supposedly violating the Court's Order show the harm that would cause. For example, the application for a "fossil fuel refinery," was a permit modification for boilers that will provide steam for a *renewable energy* project for Montana Renewables, LLC, and is necessary to provide enough energy for efficient cold weather operation of a facility that is actually reducing overall emissions. *See* Final Air Quality Permit, Montana Renewables, LLC, # 5263-02, November 9, 2023, https://deq.mt.gov/files/Air/AirQuality/Documents/ARMpermits/5263-02.pdf.[1] Without those modifications the facility would be unable to operate as designed, causing significant harm by limiting production of renewable fuels. Plaintiffs criticize DEQ's preliminary determination cited § 75-1-201(2)(a), but the enjoined statute was not cited in DEQ's final determination. *See*

[1] Montana Renewables, LLC is described as a "leader in North America's energy transition movement" with the goal of pioneering the renewable fuels industry and "lower the carbon footprint of the planet." *See https://montanarenewables.com/*.

id., at 17. Rather, DEQ noted that MEPA does not allow DEQ to "withhold, deny, or impose conditions on any permit or other authority to act based on' an environmental assessment," as described above. *Id.* (citing § 75-1-201(4)(a)). Again, DEQ has no authority to deny or suspend consideration of a permit under MEPA. § 75-1-102(3)(b). Doing so based on Plaintiffs' mischaracterization of this Court's Order would subject it to additional liability and significant expenditure of resources because of appeals from permit applicants, not to mention that it could cause irreparable harm to projects entitled to permit modifications, like Montana Renewables, LLC.

Suspending consideration of the second permit amendment Plaintiffs cite creates similar, problems. That Air Quality Permit (#2930-07) involves the Montana Air National Guard's permit amendment to simply update its permit to reflect improvements made on site that reduce overall emissions. In other words, it's largely a paperwork exercise to ensure records on file with DEQ demonstrate compliance with air quality permit conditions. Final Permit Issuance for MAQP #2930-07, November 14, 2023, at p. 3, https://deq.mt.gov/files/Air/AirQuality/Documents/ARMpermits/2930-07.pdf. The permit modification itself *demonstrates a significantly smaller environmental footprint for MANG operations*. *Id.* The permit amendment noted that the reduction was below federally enforceable limits, so it was only subject to the State criteria. *Id.*, at p. 3-4. Without this permit modification, MANG could be found in noncompliance of its permit requirements, potentially jeopardizing ongoing operations of the 120th Airflight Wing and its mission to participate in defense of the United States. If even a simple update to a permit to ensure records match activities on the ground is subject to such a challenge, simply because it involves the term fossil fuels, it sets the stage for

challenges by plaintiffs to any action (modification, amendment, renewal application), regardless of actual environmental impact, based on alleged climate impacts. If this type of challenge is taken on future permit modifications at MANG, it may cause significant harm to national security and federal comity, and even undermine Plaintiffs' goals given that the amendment reduces emissions.

In short, these examples illustrate that permitting decisions are complex and multi-faceted evaluations that Plaintiffs cannot sophomorically dismiss. They also illustrate the irreparable harm that could occur if Plaintiffs are right that this Court's Order requires Defendants to affirmatively overhaul its MEPA analysis.

C. Plaintiffs will not be harmed by a stay.

Third, Plaintiffs will not be substantially injured by a stay. Plaintiffs argue that they will suffer ongoing climate change injuries if state agencies are not immediately forced to begin accounting for GHG emissions and climate impacts. (Doc. 428 at 15–17.) But climate change is a complicated issue, and solutions are not developed overnight. Courts usually recognize that "assessment of environmental impacts fits squarely within an agency's 'significant technical and scientific expertise beyond the grasp of the Court.'" *Water for Flathead's* Future, ¶ 21 (quoting *Mont. Envtl. Info. Ctr. v. Mont. DEQ*, 2019 MT 213, ¶ 20, 397 Mont. 161, 451 P.3d 493). Developing methods for analyzing GHG emissions and climate impacts is an example *par excellence* of a complicated issue that will require technical and scientific agency expertise. It will take time to develop sound procedures for this analysis. Implementing a rushed GHG emissions and climate impacts analysis that fails to address the many layers of complexity will not alleviate climate impacts or Plaintiffs' injuries. Thus, a stay would not substantially injure Plaintiffs. MEPA requires state agencies to use a systematic, interdisciplinary approach to provide

information about potential impacts. Plus, MEPA does not even allow agencies to deny permits. See, e.g. § 75-1-201(1)(b); 75-1-102(1)(a-b) and (3)(b). Plaintiffs are not harmed by waiting for the Supreme Court's decision because permitting will continue under the requirements of substantive permitting statutes, regardless of whether the procedural MEPA reviews contain a GHG emissions and climate impacts analysis.

D. A stay is in the public interest.

Finally—for several reasons—a stay is in the public interest. *Nken*, 556 U.S. at 433–34. First, an order that violates the Constitution's hard limit on the separation of powers is against the public interest. *See Stormans, Inc. v. Selecky*, 586 F.3d 1109, 1139 (9th Cir. 2009) ("[A]ll citizens have a stake in upholding the Constitution.") (internal citation and quotation marks omitted). Second, the public deserves—and has a legal right to—notice and comment on significant changes in process and analysis, which such a significant departure from the last 12 years would necessitate. *See* §§ 2-4-302, -305, MCA. But immediately implementing GHG emissions and climate impacts analyses in every MEPA review, as Plaintiffs demand, would deprive the public of that right. Third, immediately requiring analysis of GHG emissions and climate impacts would wreak havoc on Montana's energy industry and other decisions that may fall under the broad umbrella of "fossil fuel activities," which is not a defined term in Montana code. It would also invite inevitable legal challenges from Plaintiffs and other entities. Accounting for GHG emissions and climate impacts is a significant decision that should be made after careful consideration and should not be rushed. To force Defendant state agencies to instantly begin incorporating GHG emissions and climate impact analysis in every project and proposal would sow regulatory chaos. (Doc. 424 ¶¶ 3, 6, 23, 26–29.) And the costs of this chaos would be passed

onto Montana consumers. It is against the public interest for DEQ to create an analysis of GHG emissions and climate impacts overnight. Since DEQ last did so 12 years ago, a significant body of Montana MEPA law has developed which must be considered in developing new analyses, as well as, on the national level, a significant body of law on the National Environmental Policy Act, including challenges to analyses of GHGs and climate impacts. And as noted, using MEPA review to withhold, deny, or impose conditions on permits is not only unauthorized under Montana law, it would also significantly harm the public interest.

CONCLUSION

For these reasons, DEQ respectfully requests that this Court clarify that its August 14, 2023, Order (Doc. 405) does not require DEQ to analyze GHG emissions and climate impacts at all; the decision simply declared § 75-1-201(2)(a) unconstitutional and enjoined DEQ from implementing it. If Plaintiffs are correct that the Court's order requires DEQ to "calculate the GHG emissions that will result from proposed permitting projects," (Doc. 424 Exhs. 1 and 2) and ensure that each new project will not contribute to global climate change, Defendants respectfully move this Court for a stay of its order pending appeal.

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