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MONTANA FIRST JUDICIAL DISTRICT COURT, LEWIS AND CLARK COUNTY

<p>RIKKI HELD, et al., Plaintiffs, v. STATE OF MONTANA, et al., Defendants.</p>	<p>Cause No.: CDV-2020-307 Honorable Kathy Seeley DEFENDANTS' NOTICE OF SUPPLEMENTAL AUTHORITY</p>
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Defendants hereby submit this Notice of Supplemental Authority to inform the Court of the Order entered by the Yellowstone County District Court in *MEIC v. DEQ*, Cause No. DV-56-2021-0001307 on April 6, 2023, as relevant to the Court's consideration of Defendants' pending

Motion for Summary Judgment and Motion to Stay Proceedings. Said Order is attached hereto as Exhibit A.

Dated this 10th day of April, 2023.

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Exhibit A

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MONTANA THIRTEENTH JUDICIAL DISTRICT COURT,
YELLOWSTONE COUNTY

MONTANA ENVIRONMENTAL
INFORMATION CENTER and SIERRA
CLUB,

Plaintiffs,

vs.

MONTANA DEPARTMENT OF
ENVIRONMENTAL QUALITY, and
NORTHWESTERN ENERGY, INC.,

Defendants.

Cause No.: DV 21-1307

Judge Michael G. Moses

ORDER

On October 27, 2021, Plaintiffs filed their First Amended Complaint for Declaratory Relief. They alleged that "This case challenges the decision by the Montana Department of Environmental Quality ("DEQ") to permit NorthWestern Energy, Inc. ("Northwestern") to construct and operate a 175-megawatt gas-fired

1 power plant on the banks of the Yellowstone River in eastern Montana. If constructed,
2 the Laurel Generating Station would contribute to regional air quality problems, risk
3 water contamination and other environmental harm, and cause significant greenhouse
4 gas pollution that contributes to climate change. Yet DEQ granted an air quality
5 permit that authorizes construction of the power plant without fully evaluating these
6 environmental consequences as required by the Montana Environmental Policy Act
7 (“MEPA”), MCA §§75-1-101 *et seq.* See ¶ 1 of First Amended Complaint.

8 Their first claim is that the DEQ failed to take a “hard look” at the gas plant’s
9 impacts. Rather than taking the requisite “hard look” at the gas plant’s impacts, *Mont.*
10 *Wildlife Fed’n v. Mont. Bd. Of Oil & Gas Conservation*, 2012 MT 128, ¶ 43, 365 Mont. 232,
11 280 P.3d 877, DEQ granted the air permit based on a 20-page final environmental
12 assessment (“EA”) that dismissed some of the plant’s most troubling impacts with
13 minimal analysis, improperly deferred others for future consideration, and overlooked
14 some harm entirely. Because DEQ’s approach violates MEPA, the Montana
15 Environmental Information Center and Sierra Club request that this Court declares
16 that the EA violated MEPA and vacate the EA and the unlawfully issued air permit
17 that was based on that flawed analysis. See ¶ 3 of First Amended Complaint.

18 Plaintiffs allege “DEQ must prepare an environmental impact statement (“EIS”)
19 before granting an air quality permit if the proposed project will “significantly affect[]
20 the quality of the human environment.” ARM 17.4.607(1). DEQ may issue an air

1 quality permit without preparing an EIS only if it rationally determines through
2 preparation of an environmental assessment ("EA") that the project's impacts will not
3 be significant, *see id.* 17.4.607(1)(b), or that otherwise significant impacts can be
4 mitigated below the level of significance, *id.* 17.4.607(4) ("For an EA to suffice in this
5 instance, the agency must determine that all of the impacts of the proposed action
6 have been accurately identified, that they will be mitigated below the level of
7 significance, and that no significant impact is likely to occur."). See ¶ 13 of First
8 Amended Complaint.

9 The First Amended Complaint further alleges: "NorthWestern applied to DEQ
10 for an air quality permit authorizing the construction and operation of the Laurel
11 Generating Station on May 10, 2021 and submitted a revised application on June 9,
12 2021. DEQ issued a preliminary determination on the application on July 9, 2021,
13 which included a five-page draft EA.

14 NorthWestern's application stated that planned construction would occur
15 approximately April 2022 through May 2023. Construction activities would disturb
16 up to 25.4 acres. The 36-acre parcel on which the plant would be located is currently
17 undeveloped agricultural land. According to the final EA, NorthWestern has
18 requested to re-zone the entire 36-acre parcel to "Heavy Industrial." The parcel is
19 bordered on the west by industrial use (the wastewater treatment plant). To the north
20 and east, the parcel is bordered by agricultural uses. And on the south, the parcel is

1 bordered by the Yellowstone River. Across the River from the project is a Laurel city
2 park (Riverside Park), a boat launch, and a rural residential area.

3 NorthWestern anticipates the plant would begin producing power in January
4 2024 and continue operating until 2057." See ¶¶ 21, 22 and 23 of First Amended
5 Complaint.

6 The generation station would be powered by gas. "To bring fuel to the Laurel
7 Generating Station, NorthWestern would conduct horizontal, directional drilling and
8 place a gas pipeline under the Yellowstone River adjacent to the facility." See ¶ 26 of
9 First Amended Complaint.

10 As to the environmental effects, Plaintiffs allege: "If constructed, the plant
11 would emit nearly a thousand tons per year of air pollution, other than greenhouse
12 gases. This includes particulate matter, nitrogen oxides, carbon monoxide, volatile
13 organic compounds, and sulfur dioxide ("SO₂"). These pollutants risk harm to human
14 health and the environment. See ¶ 27 of First Amended Complaint.

15 In particular, the Laurel Generating Station's SO₂ emissions would further
16 deteriorate air quality that is already impaired with SO₂ pollution. Like many other
17 air pollutants, SO₂ causes respiratory symptoms, aggravates asthma, and contributes
18 to particle formation causing negative health effects. SO₂ emissions also harm trees
19 and plants and can contribute to acid rain, which harms sensitive ecosystems. Further,
20 the fine particles caused by SO₂ pollution lead to regional haze that impairs visibility,

1 including in national parks, wilderness areas, and other special landscapes. The
2 Laurel area surrounding the plant currently is designated nonattainment for health-
3 based air quality standards for SO₂, primarily due to a nearby CHS oil refinery and
4 other industrial activity. SO₂ emissions from the Laurel Generating Station would
5 add to this polluted baseline. See ¶ 28 of First Amended Complaint.

6 In addition to other air pollutants, the Laurel Generating Station is projected to
7 emit 769,706 tons per year of climate-harming greenhouse gases (calculated as carbon
8 dioxide equivalent (CO₂e) emissions). This is equivalent to the annual emissions of
9 167,327 passenger vehicles. Greenhouse gas emissions are the most significant driver
10 of human-caused climate change. And fossil fuel combustion – such as the burning of
11 gas to make electricity – ‘is the largest contributor of greenhouse gas emissions in
12 Montana.’” See ¶¶ 27, 28 and 29 of First Amended Complaint.

13 DEQ issued a Final EA and air quality permit of the Laurel Generating Station
14 on August 23, 2021.

15 Plaintiffs allege violations of MEPA for inadequacies of the Final EA for the
16 following:

- 17 1. Failed to take a “Hard Look” at the five different issues. Those issues
18 include:
 - 19 a. Pipeline impacts
 - 20 b. Water quality impacts

- 1 c. Aesthetic (visual, light and noise) impacts
- 2 d. Cumulative impacts of SO2 emissions
- 3 e. Impact of greenhouse gas emissions

4 As their second cause of action Plaintiffs allege a violation of §75-1-201(2)(a)
5 and thus violations of Article II, § 3 and Article IX, § 1 of the Montana Constitution.
6 Plaintiffs position is found in ¶¶ 57-62 of their First Amended Complaint.

7 DEQ filed their Answer to the First Amended Complaint on December 10, 2021.
8 They generally deny Plaintiffs First Amended Complaint. They affirmatively declare
9 that DEQ did not violate MEPA, the applicable administrative Rules of Montana or the
10 Montana Constitution. They affirmatively state that their EA and MEQP for the
11 Laurel Generating Station are lawful and valid.

12 NorthWestern Corporation, d/b/a NorthWestern Energy filed their Answer to
13 the First Amended Complaint on December 13, 2021. NorthWestern, like the DEQ,
14 generally denies the allegations of the First Amended Complaint. They also declare
15 that DEQ did not violate MEPA, the applicable Administrative Rules of Montana or
16 the Montana Constitution. They affirmatively state that the DEQ's EA and issuance of
17 the air quality permit were lawful and valid.

18 The State of Montana moved to intervene in this case to address Plaintiffs
19 potential constitutional challenges to MCA §75-1-201(2)(a). The motion was timely
20 filed on December 14, 2021. The motion was granted on December 28, 2021.

1 The State's Answer to the First Amended Complaint was filed on December 20,
2 2021. The State generally denies the Plaintiffs claims and affirmatively asserts that
3 Plaintiffs constitutional rights have not been violated.

4 Plaintiffs filed their Motion for Summary Judgment on February 18, 2022. It
5 was supported by a brief in support along with the declarations of Kasey Krum Felder,
6 Derf Johnson, and Steve Krum.

7 Defendant DEQ filed their Motion for Summary Judgment and Brief in Support
8 on March 23, 2022.

9 Defendant NorthWestern filed their Motion for Summary Judgment and Brief
10 in Support on March 23, 2022.

11 Intervenor State of Montana filed their Motion for Summary Judgment and
12 Brief in Support on March 23, 2022.

13 All Defendants also filed Responses to Plaintiffs' Motion for Summary
14 Judgment.

15 Plaintiffs filed their combined responses to all Defendants' Motions for
16 Summary Judgment on April 22, 2022.

17 All Defendants filed their Reply Briefs on May 16, 2022.

18 Oral arguments on all motions were held on June 20, 2022.

19 All parties submitted their proposed Orders on the motions on August 1, 2022.

20 The matter was deemed submitted for decision at that time.

1 **Summary Judgment Standard**

2 Summary judgment is appropriate under M.R.Civ.P. 56 when there is an
3 absence of genuine issues of material fact and a party is entitled to judgment as a
4 matter of law. *Smith v. BNSF Railway*, 2008 MT 225, ¶ 10, 344 Mont. 278, 187 P.3d 639.
5 Summary judgment is the appropriate mechanism for resolving a case where, as here,
6 there are agreeably no “genuine issues of material fact” and the moving party is
7 entitled to judgment as a matter of law. M.R.Civ.P. 56 (c)(3). “Summary judgment is
8 particularly appropriate where, as here, review is on the administrative record.”
9 *Montana v. EPA*, 941 F. Supp. 945, 956 (D. Mont. 1996), *aff’d*, 137 F.3d 1135 (9th Cir.
10 1998); see *Park County Env’tl. Counsel Ph1* (affirming resolution of MEPA case on
11 summary judgment); *Mont. Wildlife Fed’n*, ¶ 17, 24.

12 **Agency Actions Standards**

13 The Court reviews DEQ’s MEPA analysis to determine whether it is “arbitrary,
14 capricious, unlawful, or not supported by substantial evidence.” *Mont. Env’tl. Info. Ctr.*
15 *V. Mont. Dept of Env’tl. Quality* (MEIC II), 2016 MT 9, ¶ 14, 382 Mont. 102, 365 P.3d 454
16 (quoting *Clark Fork Coal*. ¶ 21). Under this standard, the Court determines, based on
17 a careful review of the record, “whether the decision was ‘based on a consideration of
18 the relevant factors and whether there has been a clear error of judgment.’” *Id.*
19 Although review under the arbitrary and capricious standard “is generally narrow,”
20 courts “will not ‘automatically defer to the agency without carefully reviewing the

1 record and satisfying themselves that the agency has made a reasoned decision.”
2 Clark Fork Coal, ¶ 21 (quoting *Friends of the Wild Swan v. Dep’t of Nat. Res. &*
3 *Conservation*, 2003 MT 209, ¶ 28, 301 Mont. 1, 6 P.3d 972). An agency fails this test in
4 the MEPA context if it does not take a “hard look” at a proposal’s environmental
5 impacts. Mont. Wildlife Fed’n, ¶ 43. DEQ’s legal conclusions are “reviewed for
6 correctness.” *N. Cheyenne Tribe v. Mont. Dept of Env’tl. Quality*, 2010 MT 111, ¶ 19, 356
7 Mont. 296, 234 P.3d 51.

8 **Constitutional Issue**

9 The Court should not adjudicate constitutional claims unless absolutely
10 necessary. *Merlin Myers Revocable Tr. v. Yellowstone Cty.*, 2002 MT 201, ¶ 24, 311 Mont.
11 194, 53 P.3d 1268 (“we will not rule on the constitutionality of a legislative act if we are
12 able to decide the case without reaching constitutional considerations” (quoting *State*
13 *v. Still*, 273 Mont. 261, 263 (1995)) (quotations omitted). Moreover, statutes enacted by
14 the Legislature “are presumed to be constitutional, and it is the duty of this Court to
15 avoid an unconstitutional interpretation if possible.” *Brown v. Gianforte*, 2021 MT 149,
16 ¶ 32, 404 Mont. 269, 488 P.3d 548 (quoting *Hernandez v. Bd. Of Cty. Comm’rs*, 2008 MT
17 251, ¶ 15, 345 Mont. 1, 189 P.3d 638)(internal quotations omitted). Constitutional
18 challenges to statutes require that the challenging party prove that the statute is
19 “unconstitutional ‘beyond a reasonable doubt’ and, if any doubt exists, it must be

20

1 resolved in favor of the statute." *Hernandez*, ¶ 15 (quoting *Powell v. State Comp. Ins.*
2 *Fund*, 2000 MT 321, ¶ 13, 302 Mont. 518, 15 P.3d 877).

3 MEPA Standards

4 MEPA was designed "to promote efforts that will prevent, mitigate, or
5 eliminate damage to the environment and biosphere and stimulate the health and
6 welfare of humans." MCA §75-1-102(2). To meet this purpose, MEPA requires DEQ
7 to "take a 'hard look' at the environmental impacts of a given project or proposal."
8 *Mont. Wildlife Fed'n v. Mont. Bd. Of Oil & Gas Conservation*, 2012 MT 128, ¶ 43, 365
9 Mont. 232, 280 P.3d 877. Properly implemented, "MEPA's procedural
10 mechanisms...enabl[e] fully informed and considered decision making, thereby
11 minimizing the risk of irreversible mistakes depriving Montanans of a clean and
12 healthful environment." *Park Cnty. Env'tl. Council v. Mont. Dep't of Env'tl. Quality*, 2020
13 MT 303, ¶ 70, 402 Mont. 168, 477 P.3d 288.

14 The Montana legislature identified MEPA as a necessary tool for implementing
15 the state's constitutional obligation to prevent unreasonable environmental
16 degradation. See MCA §75-1-102(1). While MEPA mandates procedures rather than
17 particular outcomes, the Legislature enacted MEPA to "prevent or eliminate damage
18 to the environment." *Park Cnty. Env'tl. Council*, ¶ 65. MEPA's environmental review
19 requirement fosters better decision-making by establishing a look-before-you-leap
20 mandate, "ensur[ing] that presently unquantified environmental amenities and values

1 may be given appropriate consideration." MCA §75-1-201(1)(b)(ii); see also *id.* §75-1-
2 102(1) (legislature's intent is that MEPA "review of state actions [will] ensure
3 that...environmental attributes are fully considered by the legislature in enacting laws
4 to fulfill constitutional obligations" and "the public is informed of the anticipated
5 impacts in Montana of potential state actions"); *Ravalli Cnty. Fish & Game Ass'n v.*
6 *Mont. Dep't of State Lands*, 273 Mont. 371, 378, 903 P.2d 1362, 1367 (1995) ("MEPA
7 requires that an agency take procedural steps to review '...major actions of state
8 government significantly affecting the quality of the human environment' in order to
9 make informed decisions.") (citation omitted).

10 To meet these purposes, MEPA requires DEQ to "take a 'hard look' at the
11 environmental impacts of a given project or proposal." *Mont. Wildlife Fed'n*, ¶ 43; see
12 also MCA §75-1-201(1)(b)(iv); ARM 17.4.609(3)(d). DEQ must consider, among other
13 things, reasonable alternatives to the proposed action, the direct, indirect, and
14 cumulative environmental impacts of the action, and "the economic advantages and
15 disadvantages of the proposal," MCA §75-1-201(1)(b)(iv), (v); ARM 17.4.609(3). DEQ
16 must also identify and evaluate measures that will mitigate the project's impacts.
17 ARM 17.4.609(3)(g). In discussing all of these matters pursuant to MEPA, DEQ "must
18 examine the relevant data and articulate a satisfactory explanation for its action,
19 including a rational connection between the facts found and the choice made." *Mont.*

20

1 *Wildlife Fed'n*, ¶ 43 (quoting *Clark Fork Coal. v. Mont. Dep't of Env'tl. Quiality*, 2008 MT
2 407, ¶ 47, 347 Mont. 197, 197 P.3d 482).

3 DEQ must set out this analysis in an environmental impact statement ("EIS") if
4 the project it is considering will "significantly affect[] the quality of the human
5 environment." ARM 17.4.607(1). DEQ may approve the project without preparing an
6 EIS only if it rationally determines through preparation of an environmental
7 assessment ("EA") that the project's impacts will not be significant, or that otherwise
8 significant impacts can be mitigated below the level of significance. See *id.*
9 17.4.607(1)(b); 17.4.607(4). To demonstrate that an EIS is required, "[a] plaintiff need
10 not show that significant effects will in fact occur, but if the plaintiff raises substantial
11 questions whether a project may have a significant effect, an EIS must be prepared."
12 *Ravalli Cnty. Fish & Game Ass'n*, 273 Mont. at 379, 903 P.2d at 1368 (quotation omitted;
13 emphasis omitted).

14 One of MEPA's fundamental purposes is to inform and engage the public on
15 decisions with significant environmental consequences. See §75-1-102(1)(b), MCA
16 (stating MEPA's purpose to ensure that "the public is informed of the anticipated
17 impacts in Montana of potential state actions"). To that end, DEQ must make a draft
18 EIS available to the public and responsible state and federal agencies for public
19 comment, ARM 17.4.620, and must respond to substantive comments in a final EIS,
20 ARM 17.4.619. Following its issuance of a final EIS, DEQ must issue a "record of

1 decision" that provides "public notice of what the decision is, the reasons for the
2 decision, and any special conditions surrounding the decision or its implementation."

3 ARM 17.4.629. In evaluating environmental impacts pursuant to MEPA, "[t]he agency
4 must examine the relevant data and articulate a satisfactory explanation for its action,
5 including a rational connection between the facts found and the choice made." *Mont.*
6 *Wildlife Fed'n*, ¶ 43 (quoting *Clark Fork Coal. v. Mont. Dep't of Env'tl. Quality*, 2008 MT
7 407, ¶ 47, 347 Mont. 197, 197 P.3d 482).

8 **Montana Constitutional Environmental Protections**

9 Montana's Constitution compels the state to prevent unreasonable
10 environmental degradation to protect the public's right to a clean and healthful
11 environment. It protects Montanans' inalienable "right to a clean and healthful
12 environment," and requires that "[t]he state and each person shall maintain and
13 improve a clean and healthful environment in Montana for present and future
14 generations." Mont. Const. art. II, §3; Mont. Const. art. IX, §1(1). In addition, the
15 Constitution requires that the Montana Legislature "shall...provide adequate
16 remedies to prevent unreasonable depletion and degradation of natural resources."
17 Mont. Const. art. IX, §1(3).

18 In enacting these provisions, the drafters of Montana's Constitution aimed to
19 establish "the strongest environmental protection provision found in any state
20 constitution." *Park County Env'tl. Council*, ¶61 (quoting *Mont. Env'tl. Info. Ctr. v. Mont.*

1 *Dep't of Env'tl. Quality ("MEIC")*, 1999 MT 248, ¶ 66, 296 Mont. 207. 988 P.2d 1236). To
2 that end, these provisions do not "merely prohibit that degree of environmental
3 degradation which can be conclusively linked to ill health or physical endangerment."
4 *MEIC*, ¶ 77. Rather, they provide environmental "protections which are both
5 anticipatory and preventative." *Id.*

6 The Montana Legislature enacted MEPA to help meet its constitutional
7 obligation to prevent unreasonable environmental degradation. See §75-1-102(1),
8 MCA (MEPA's purpose). See *Park County Env'tl. Council*, ¶ 67 ("MEPA serves a role in
9 enabling the Legislature to fulfill its constitutional obligation to prevent environmental
10 harms infringing upon Montanans' right to a clean and healthful environment").
11 Accordingly, MEPA must be interpreted to serve their constitutional purpose. To the
12 extent any provision of MEPA allows for unreasonable environmental degradation, it
13 would violate Plaintiffs' environmental rights guaranteed by Article II, Section 3 and
14 Article IX, Section 1 of the Montana Constitution. See *MEIC*, ¶ 80.

15 Discussion

16 A. Proposed Laurel Generation Station

17 NorthWestern proposes to build a 175-megawatt gas-fired power plant on the
18 banks of the Yellowstone River in eastern Montana. AR 1156. The plant would be
19 comprised of eighteen 9.7 megawatt-electrical reciprocating internal combustion
20 engines ("RICE"), approximately 300 feet from the north bank of the Yellowstone

1 River in Laurel, Montana. AR 1180. The 36-acre parcel on which the plant would be
2 located is on largely undeveloped agricultural land, which NorthWestern has
3 requested to re-zone as "Heavy Industrial." AR 1170-71. To the north and east, the
4 parcel is bordered by agricultural uses. *Id.* To the south, the parcel is bordered by the
5 Yellowstone River. AR 1161. Across the River from the project is a Laurel city park
6 (Riverside Park), a boat launch, and a rural residential area. AR 1168, 1171, 2886. The
7 parcel is bordered on the west by industrial use (the wastewater treatment plant). AR
8 1357. Wildlife, including eagles, bears, and deer, are known to roam the area. AR
9 1658.

10 The plant, which would be situated directly across the river from a residential
11 neighborhood, would alter the surrounding landscape in several ways, including that
12 it would: require a pipeline to be bored underneath the river; include several massive
13 structures that would be visible from the park, river, and residential areas as well as
14 emit harmful emissions into the air that would negatively impact the climate; be
15 continuously lit by industrial lighting; and generate noise well above what is typical
16 for the area. AR 1355; AR 1359-60.

17 DEQ's MEPA Analysis

18 DEQ received NorthWestern's application for an air quality permit on June 9,
19 2021. AR 2136. On July 9, 2021, DEQ released a 5-page Draft Environmental
20 Assessment ("Draft EA"). AR 01-05. Plaintiffs submitted timely public comments on

1 DEQ's Draft EA on August 10, 2021 that identified, among other things, deficiencies in
2 DEQ's consideration of: potential water quality impacts; the impacts of constructing
3 and operating a gas pipeline; direct and cumulative air pollution impacts; noise and
4 visual impacts; and the proposed project's significant greenhouse gas emissions and
5 resulting climate change impacts. AR 382-406. The next day, DEQ requested
6 information from NorthWestern on a list of 18 additional issues not addressed in the
7 Draft EA, including impacts from the plant's construction, distance from residences,
8 the presence of wetlands, and the plant's operational lifespan. AR 1963. Additionally,
9 DEQ asked NorthWestern for the first time to provide any analysis it had performed
10 regarding projected noise from the project. *Id.* NorthWestern provided a minimal,
11 two-page response. AR 1994-96. DEQ's administrative record does not include any
12 additional analysis by DEQ on the issues raised in Plaintiffs' comments.

13 DEQ issued its Final EA on August 23, 2021, which concluded that the project
14 will not have significant environmental impacts and therefore no EIS is required. AR
15 1156-76. The same day, DEQ issued the air quality permit to NorthWestern. AR 1088-
16 1155. In response, Plaintiffs filed this challenge on October 22, 2021.

17 **Submissions to the Court**

18 The Court has considered the entire file to include all pleadings from all parties;
19 the administrative record consisting of 2,939 pages. This record was submitted as
20 required and referred to by all parties in their pleadings and submissions as well as

1 referenced during the hearing on the motions for Summary Judgment. The transmittal
2 of the administrative record is dated February 3, 2022. Plaintiffs and Defendant
3 NorthWestern Energy received copies also on February 3, 2022. The transmittal
4 consisted of a true and accurate copy of the administrative record.

5 **Standing**

6 Intervenor, State of Montana, asserts that Plaintiffs lack standing. The State
7 takes the position Plaintiff "never traced their alleged injuries-in-fact to the MEPA
8 limitation. They further take the position that Plaintiff does not satisfy the
9 redressability element of constitutional standing. As a result, the State claims
10 Plaintiffs fail to meet the threshold constitutional prerequisites and thus this Court
11 lacks jurisdiction to hear the constitutional claims.

12 Plaintiffs claim they have both organizational and associational standing to
13 pursue their challenge.

14 Because of the Court's following Findings of Fact and Conclusions of Law, the
15 court need not yet address the constitutional issues and the prerequisite issue of
16 standing as it relates to constitutional challenges by Plaintiffs.

17 **The Pipeline**

18 Plaintiffs claim DEQ violated MEPA by failing to consider the impacts of
19 constructing a natural gas pipeline adjacent to and under the Yellowstone River. DEQ
20 did not analyze this impact. They assert that MEPA review of the air quality permit

1 does not require an analysis of the pipeline impacts as it is outside of an air quality
2 permitting decision. The Court agrees with the Defendants. First, there is an entirely
3 separate permitting process for the pipeline, administered by a different agency which
4 undertook its own environmental review. As was noted in these proceedings,
5 NorthWestern had obtained an easement for the purpose of constructing a natural-gas
6 pipeline under the Yellowstone River to the LGS. The pipeline will supply the
7 necessary natural gas to operate the LGS's 18 RICE units. NorthWestern obtained its
8 easement from the State Land Board, which has authority for issuing easements and
9 other rights-of-way over state land, including pipeline permitting for riverbed
10 crossing. MCA §77-2-101. The State Land Board conducted a MEPA review of an
11 easement for the pipeline to cross under the Yellowstone River and issued the
12 easement. See (State Land Board EA) and 2021-10-07-row-signed-checklist-ea-
13 northwest-energy-pipe-bore-yellowstone-river-15-25-24e.pdf(mt.gov). This issue was
14 raised by public comment and DEQ responded. See AR 1110 and AR 1099. This air
15 quality permit review does not and need not address the pipeline routing.

16 The parties both addressed the definition of "legal cause" as it relates to this
17 pipeline issue. The Court agrees with the Supreme Court when they held: "We reject
18 the unyielding 'but for' causation standard asserted by [plaintiff] to the effect that a
19 state action is a cause of environmental impact regardless of whether the agency, in
20 the lawful exercise of its independent authority, can avoid or mitigate the effect. We

1 hold that, for purposes of MEPA, an agency action is a legal cause of an environmental
2 effect only if the agency can prevent the effect through the lawful exercise of its
3 independent authority." Bitterrooters, ¶ 33.

4 Bitterrooters indicates that when "proposed actions" under MEPA are parts of
5 larger projects, MEPA analysis should be confined to the environmental impacts of the
6 proposed actions and not to the impacts of the larger projects. Here, the routing of the
7 pipeline, the energy source of the LGS, is not an issue of impact on the air quality
8 permit process.

9 As a result, the Court finds that DEQ did not act arbitrarily or capriciously
10 when it excluded the environmental impact of the pipeline routing from the air quality
11 permit process. The State Land Board handled those issues related to the pipeline.

12 **Water Quality Impacts**

13 Plaintiffs assert DEQ violated MEPA by failing to take a "hard look" in the final
14 EA at the project's potential impacts to water quality in the Yellowstone River from
15 construction and operation of the LGS. Plaintiffs raised this issue in their comments to
16 the Draft EA. See AR 404-05.

17 In the final EA, DEQ noted that NorthWestern "has not submitted any water
18 quality of MPDES [Montana Pollutant Discharge Elimination System] permit
19 application to DEQ" but that DEQ does not anticipate an impact to surface water
20 features and water quality, quantity, and distribution management." See AR 1162.

1 Thus, even though NorthWestern did not submit an MPDES, DEQ addressed the
2 issue.

3 DEQ did address what it believed to be the only foreseeable discharges from
4 LGS – surface stormwater that may carry sediment. DEQ observed that surface
5 stormwater conditions were unlikely to change as a result of the LGS because during a
6 heavy storm event, surface water would continue to migrate to irrigation ditches to
7 the north and south sides of the site. AR 1162. Precipitation and surface water would
8 be expected to infiltrate into the subsurface. *Id.*

9 DEQ explained that it is possible that there could be impacts in the future, but
10 those will be analyzed by future reviews associated with those future permitting
11 actions. AR 1173. (“DEQ cannot speculate about which permits may be needed or
12 which will be granted or denied”) DEQ further explained: “Any action DEQ takes at
13 this time is limited to the pending air quality permit application currently before
14 DEQ’s Air Quality Bureau and the authority granted DEQ under the Clean Air Act of
15 Montana – it is not indicative of any other authority (e.g. Montana Water Protection
16 Act). AR 1157. See also AR 1158 (explaining that no other application had been
17 submitted by NorthWestern at that time).

18 The parties do not dispute that the LGS is designed to not discharge
19 wastewater, and in the ordinary course of business will not discharge any wastewater
20 whatsoever. AR 1173.

1 Like the pipeline issue, there is a separate process as it relates to wastewater.
2 Unlike the pipeline issue, DEQ exercises separate and independent authority over
3 water-quality and discharge permitting issues. NorthWestern did not address water
4 in their air-quality application. It is a separate issue. It is handled by submitting a
5 separate MPDES permit application that was not done here. It may need to be done in
6 the future. It is not part of the air-quality permit process. It was addressed by the
7 DEQ during the EA. The parties don't dispute it is not a problem. It can be addressed
8 by a separate permitting process.

9 The Court finds that the DEQ did not act arbitrarily or capriciously by
10 independently identifying potential stormwater discharge issues that may require
11 future permits unrelated to air-quality and deferring analysis of the environmental
12 impacts of such discharges until a MPDES permit application is filed by
13 NorthWestern.

14 **Aesthetic Impacts**

15 Plaintiffs claim DEQ failed to acknowledge and rationally evaluate the
16 significant noise and visual impacts of the LGS in violation of ARM 17.4.609(3)(e).

17 Plaintiffs raised these issues in comments to the Draft EA. Originally, DEQ did
18 not even address these aesthetic impacts in the Draft EA. AR 405.

19 DEQ did address the aesthetic impacts in the Final EA. Plaintiffs claim the
20 DEQ's analysis was insufficient and thus violated MEPA.

1 A. Noise

2 DEQ considered and determined it was reasonable to rely upon a preliminary
3 engineering analysis conducted by NorthWestern to identify potential impacts and
4 establish noise criteria for far field-noise emissions for neighboring properties, and
5 outside of the NorthWestern proposed fence line. AR 1995; AR 1167-68. DEQ focused
6 on two nearby residences that are approximately 1,030 feet and 1,203 feet away from
7 the area where the 18 RICE units will be installed. AR 1167. The other closest
8 residences are located across the Yellowstone River, with the closest being
9 approximately 2,300 feet away. AR 1172.

10 DEQ determined, based upon the far field-noise specifications, that noise
11 impacts of less than or equal to 65 dBA would occur at distances of 600 feet from the
12 engine hall. AR 1167-68. DEQ determined that these noise impacts were all within
13 NorthWestern's LGS property boundaries and noise levels would drop at greater
14 distances, outside of the LGS property. AR 1168.

15 Overall, DEQ concluded the noise generated by engine operation at the LGS
16 "would be similar in nature" to the existing refinery nearby, and thereby within
17 current ambient baseline. AR 1171.

18 DEQ also took into account that NorthWestern will implement noise mitigation
19 measures including: (i) a combustion air inlet 45 dB silencer; (ii) an exhaust gas 45 dB
20

1 silencer; (iii) low noise radiators; and (iv) noise attenuators, including treatment for
2 HVAC systems. AR 1168; AR 1995.

3 Collectively, DEQ identified and evaluated the specific impacts of the 18 RICE
4 to the noise baseline and found these impacts did not constitute a material change to
5 the noise baseline.

6 Plaintiffs claim this is not enough. Plaintiffs position is that this is not a hard
7 enough look at noise emissions.

8 The Court finds DEQ, once brought to their attention, did take a "hard look" at
9 the noise emissions. They relied upon NorthWestern's preliminary engineering
10 analysis that found that all "installed equipment complies with the established noise
11 criteria for far field-noise emissions." See AR 1995. Noise mitigating measures will be
12 installed and are required by the permit. DEQ did not arbitrarily or capriciously
13 analyze the noise emissions.

14 B. Lighting

15 As with noise, Plaintiffs claim DEQ's analysis on lighting was not hard enough.

16 The DEQ did note that "the facility would operate 24/7 365 days per year, some
17 external lighting would exist at the facility and may be visible from the immediate
18 surrounding properties." AR 1168. They assert that this, in light of the refinery
19 lighting, would not affect the lighting baseline in the area.

20

1 The Court agrees with Plaintiffs. DEQ did not take a hard look at lighting.
2 There is but one comment on lighting found in the administrative record. AR 1168.
3 There is no analysis of what type of lights, how bright the lights may be or any other
4 analysis on this subject. Comparing the lighting to the Laurel refinery tells the people
5 of Montana nothing about this project and its external emissions of light. Because
6 DEQ failed to take the requisite hard look at the lighting emissions, their position on
7 this issue is arbitrary and capricious.

8 C. Miscellaneous Aesthetics

9 There were raised by Plaintiffs other miscellaneous aesthetics emissions or
10 impacts not analyzed by DEQ. Visual impacts of the LGS "may alter the quality of life
11 of nearby residents and impair recreational opportunities important to the City of
12 Laurel" in violation of ARM 17.4.609(3)(e).

13 The administrative record briefly addressed this visual concern. This can be
14 found at AR 1168. After describing all stacks that will be constructed on the property,
15 including their height and diameter, DEQ describes that they "could be visible from
16 the surrounding properties, intermittently from recreationalists on the Yellowstone
17 River to the south, and visible from the Laurel Riverside Park." DEQ describes the
18 "secondary impacts" as "there would be secondary impacts to places with previously
19 unobstructed views of the facility." AR 1168.

20

1 The DEQ argues that the primary visual impacts of the LGS are attributed to its
2 18 exhaust stacks which are each 77 feet high. DEQ conducted a simulation from
3 which it determined the visual impacts would be similar to the already existing
4 landscape. (Laurel Refinery) AR 1865. DEQ further argues that LGS's exhaust stacks
5 would essentially blend in with the existing industrial skyline of the surrounding area.

6 The Court finds that DEQ did analyze the visual impacts of LGS. They
7 described the impacts and from where these impacts would come. The purpose to
8 inform the public and public officials of potential impacts is set forth in the AR. There
9 are impacts, but according to DEQ, not sufficient to deny the air quality permit.

10 The DEQ reasonably analyzed and disclosed the visual impacts of the LGS and
11 their overall analysis of the aesthetic impacts were not arbitrary or capricious.

12 **Cumulative Impacts of SO₂**

13 Plaintiffs claim that DEQ's failure to analyze the cumulative impacts of SO₂
14 was arbitrary and unlawful.

15 Defendants argue otherwise.

16 In the final EA, DEQ estimated the LGS's potential SO₂ emissions attributable
17 to the RICE are 14.3 tons per year (TPY). AR 1164. The EA stated: "For this proposed
18 project, particulate matter and no concentrations were modeled (along with nearby
19 source emissions and background concentrations) to demonstrate that there would be
20 no violations of any ambient air quality standards associated with these pollutants.

1 The proposed project would only have an increase of a maximum of 14.3 tons per year
2 of SO₂, this level of emissions increase was not required to undergo an SO₂ modeling
3 demonstration. Negligible formation and deposition of sulfur would occur from the
4 RICE as they are required to use low sulfur content natural gas...Natural gas power
5 plants emit significantly less pollutants due to the makeup of natural gas which is
6 primarily methane." AR 1164. 14.3 TPY is well below the 25 TPY threshold necessary
7 to require a permit under ARM 17.8.743(1)(e). AR 1101.

8 The DEQ addressed the air quality classification for the immediate area. See
9 AR 1101. The DEQ compared the expected maximum SO₂ emissions from the LGS to
10 other sources of SO₂ in the Laurel – Billings area and discussed the reductions over the
11 last 30 years or so in SO₂ emissions in Yellowstone County. AR 1101; 1596; 2794-2819;
12 1742. Overall, the Montana Regional Haze Progress Report show reductions in SO₂ in
13 Yellowstone County approaching 25,000 TPY from base year 1990. AR 1106.
14 Emissions from the neighboring refinery decreased by approximately 90% from 2000
15 to 2020. AR 1742. This was done largely by investing in emissions controls. AR 1742.
16 The Laurel refinery, from 2000 to 2018 reduced SO₂ emissions from 15,000 TPY to
17 4,000 TPY. AR 1742.

18 The administrative record demonstrates that the DEQ did take a hard look at
19 the SO₂ emissions of the LGS. The DEQ reasonably examined the regional SO₂
20

1 emissions, including the Laurel refinery to demonstrate that 14.3 TPY of SO₂ is not a
2 significant impact.

3 The Court agrees with the Defendants, the DEQ performed an adequate
4 analysis as to the SO₂ emissions and their analysis is supported by the record. DEQ
5 did not act arbitrarily or capriciously as it relates to their SO₂ analysis.

6 Greenhouse Gas Emissions

7 The final EA states that the LGS "would be identified as a power plant by EPA
8 and would be required to report under the Acid Rain Program and also to the EPA
9 Greenhouse Gas Reporting Program." AR 1350. The final EA otherwise performs no
10 analysis of LGS's potential greenhouse gas emissions.

11 Plaintiffs claim DEQ's failure to analyze potential greenhouse gas emissions
12 was unlawful and unconstitutional. Plaintiffs argue in the alternative that either:

- 13 1. DEQ's omission violated MEPA's requirement to examine the plant's direct,
14 secondary, and cumulative impacts within Montana. MCA §75-1-
15 201(1)(b)(iv)(A); ARM 17.4.609(3)(d)(e);
- 16 2. Section 75-1-201(2)(a) is unconstitutional.

17 Defendants rely upon their interpretation of the 2011 statute to support their
18 exclusion of any analysis of greenhouse gas emissions. They defend the
19 constitutionality of the statute.

20

1 Section 75-1-201(2)(a) provides: "Except as provided in subsection (2)(b), an
2 environmental review conducted pursuant to subsection (1) may not include a review
3 of actual or potential impacts beyond Montana's borders. It may not include actual or
4 potential impacts that are regional, national, or global in nature."

5 Plaintiffs submit that the emissions and impacts of the LGS are potentially
6 significant. The LGS would emit 769,706 TPY of climate-harming greenhouse gases
7 (calculated as carbon dioxide equivalent (CO₂e) emissions). AR 2188. Defendants do
8 not dispute this.

9 Defendants contend that because the DEQ cannot regulate CO₂ emissions, DEQ
10 cannot be required to perform a MEPA review of CO₂ emissions. Defendants also
11 contend that, because the effect of greenhouse gas emissions is global warming, DEQ
12 cannot analyze greenhouse gas emissions under MEPA because the statute says "may
13 not include actual or potential impacts that are regional, national or global in nature."
14 MCA §75-1-201(2)(a)(1).

15 To evaluate this issue requires an interpretation of the statutory language. The
16 Court "looks first to the plain meaning of the words [the statute] contains." *State v.*
17 *Kelm*, 2013 MT 115, ¶ 22, 370 Mont. 61, 300 P.3d 387 (quoting *Kluver v. PPL Mont., LLC*,
18 2012 MT 321, ¶ 55, 368 Mont. 101, 293 P.3d 817). The Court must endeavor to give
19 "harmonious effect" to its various provisions, *Crist v. Segna*, 191 Mont. 210, 213, 622
20 P.2d 1028, 1029 (1981), and may not construe a statute in a manner that would "defeat

1 its evident object or purpose," *Howell v. State*, 263 Mont. 275, 286-87, 868 P.2d 568, 575
2 (1994).

3 Here, the plain language of MCA §75-1-201(2)(a) precludes agency MEPA
4 review of environmental impacts that are "beyond Montana's borders," but it does not
5 absolve DEQ of its MEPA obligation to evaluate a project's environmental impacts
6 within Montana. DEQ misinterprets the statute. They must take a hard look at the
7 greenhouse gas effects of this project as it relates to impacts within the Montana
8 borders. They did not take any sort of look at the impacts because of their
9 misinterpretation of the statute.

10 Because of this misinterpretation of the plain meaning of the statute, DEQ's
11 failure to evaluate the plant's greenhouse gas emissions and corresponding impacts of
12 the climate in Montana violates MEPA.

13 Because of the above finding, the Court need not address the constitutional
14 questions submitted.

15 **EA v. EIS**

16 DEQ made a significance determination in its EA. AR 1176. DEQ "has not
17 identified any significant impacts associated with the proposed action..." AR 1176. In
18 light of the Court's findings, and remand for further consideration and "hard looks",
19 DEQ will need to reassess their significance determination. This project is one of
20 NorthWestern Energy's largest projects in Montana. It is up wind of the largest city in

1 Montana. It will dump nearly 770,000 tons of greenhouse gases per year into the air.
2 The pristine Yellowstone River is adjacent to the project. This project will have a life of
3 more than 30 years. That amounts to in excess of 23,100,000 tons of greenhouse gases
4 emissions directly impacting the largest city in Montana that is less than 15 miles
5 down wind. To most Montanans who clearly understand their fundamental
6 constitutional right to a clean and healthful environment, this is a significant project.
7 Until DEQ completes their MEPA responsibilities, the significance determination is
8 not ripe for a decision. This issue is left for another day.

9 **Conclusion**

10 **I. The Pipeline**

11 Plaintiffs' Motion for Summary Judgment as it relates to the natural gas
12 pipeline adjacent to and under the Yellowstone River is denied. Defendants' Motion
13 for Summary Judgment on this issued is granted. The DEQ did not act arbitrarily or
14 capriciously when it excluded the environmental impact of the pipeline routing from
15 the air quality permit process.

16 **II. Water Quality Impacts**

17 Plaintiffs' Motion for Summary Judgment as it relates to the water quality
18 impacts is denied. Defendants' Motion for Summary Judgment as it relates to the
19 water quality impacts is granted. The DEQ did not act arbitrarily or capriciously by
20 independently identifying potential stormwater discharge issues that may require

1 future permits unrelated to air-quality and deferring analysis of the environmental
2 impacts of such discharges until a MPDES permit application is filed.

3 **III. Aesthetic Impacts**

4 **A. Noise**

5 Plaintiffs' Motion for Summary Judgment as it relates to the "hard look"
6 concerning the noise impacts is denied. Defendants' Motion for Summary Judgment
7 on this issue is granted. DEQ did take a "hard look" at the noise emissions. Noise
8 mitigation measures will be installed pursuant to the permit. DEQ did not arbitrarily
9 or capriciously analyze the noise emissions.

10 **B. Lighting**

11 Plaintiffs' Motion for Summary Judgment as it relates to the "hard look"
12 concerning the lighting impacts is granted. Defendants' Motion for Summary
13 Judgment on this issue of lighting is denied. DEQ failed to take a "hard look" at the
14 lighting emissions thus their findings on this issue are arbitrary and capricious.

15 **C. Miscellaneous Aesthetics**

16 Plaintiffs' Motion for Summary Judgment on the miscellaneous aesthetics to
17 include the visual impacts of the LGS is denied. Defendants' Motion for Summary
18 Judgment on these issues is granted. DEQ took a "hard look" at these issues and their
19 secondary impacts. DEQ reasonably analyzed and disclosed the impacts. Their
20 analysis of these miscellaneous aesthetic impacts was not arbitrary or capricious.

1 **IV. Cumulative Impacts of SO2**

2 Plaintiffs' Motion for Summary Judgment on this issue of the failure to take a
3 "hard look" at the cumulative impacts of SO2 is denied. Defendants' Motion for
4 Summary Judgment on this issue is granted. The DEQ did take a "hard look" at the
5 SO2 emissions of the LGS. They reasonably examined the regional SO2 emissions to
6 include the Laurel refinery and other contributors to the areas SO2 emissions. They
7 adequately analyzed the SO2 emissions. DEQ did not act arbitrarily or capriciously as
8 it relates to the SO2 emissions.

9 **V. Greenhouse Gas Emissions**

10 Plaintiffs' Motion for Summary Judgment on the greenhouse gas emissions lack
11 of analysis is granted. Defendants' Motion for Summary Judgment on this issue is
12 denied. DEQ's failure to analyze this issue violated the clear and unambiguous
13 language of MEPA. Failure to analyze this issue was arbitrary and capricious and a
14 clear violation of MEPA.

15 **VI. Remedy**

16 The Court has found that the DEQ failed to take the requisite "hard look"
17 concerning two environment issues. On the lighting issue, there is little analysis by
18 DEQ. Further analysis is required. On the greenhouse gases issue, DEQ took no look
19 at the environmental impacts. Analysis within the borders of Montana is required by
20 MEPA and the Montana Constitution.

1 Plaintiffs request vacatur and remand. They suggest these equitable remedies
2 will allow the DEQ to complete its statutory responsibilities and then be able to make
3 a fully informed decision on issuance of the air quality permit.

4 Defendants submit that even if this Court found in favor of Plaintiffs on any
5 issue, vacatur was not the proper remedy. They submit that the Court must consider
6 the "Equitable Relief Requirements". See § 11, Ch.396, L. 2011. They further submit
7 the Plaintiffs have not met the statutory burdens of the "Equitable Relief
8 Requirements" and therefore vacatur is not an available remedy for this Court.

9 Park County Environmental Council and Greater Yellowstone Coalition, 2020
10 MT 303, provides the most recent Montana Supreme Court direction and decision on
11 the remedy question. Both parties have cited this case, Plaintiffs for direct authority,
12 Defendants as not addressing their position that the Equitable Relief Requirements
13 apply.

14 At ¶ 55 in Park County, the Supreme Court states clearly the general rule: "The
15 Judiciary's standard remedy for permits or authorizations improperly issued without
16 required procedures is to set them aside." (Citations omitted)

17 The Supreme Court then goes on to discuss very specifically the equitable
18 remedies available to the District Court in MEPA cases. Park County is a 2020 case.
19 The Supreme Court was well aware of the alternative Equitable Relief Requirements
20 raised here by the Defendants.

1 In ¶ 72 in Park County the Supreme Court held: "Without a mechanism to
2 prevent a project from going forward until a MEPA violation has been addressed,
3 MEPA's role in meeting the State's 'anticipatory and preventative' constitutional
4 obligations is negated." Park County, ¶ 72.

5 Ultimately the Supreme Court found: "MEPA is an essential aspect of the
6 State's efforts to meet its constitutional obligations, as are the equitable remedies
7 without which MEPA is rendered meaningless." Park County, ¶ 89.

8 The Court ruled that: "Vacatur of the previously issued exploration permit is an
9 equitable remedy suitable to the present MEPA violations and we affirm the District
10 Court decision to that effect."

11 Plaintiffs do not request an injunction, they request the equitable remedy of
12 vacatur as affirmed by the Supreme Court in Park County.

13 Therefore, based upon all proceedings before this Court and consideration of
14 the prior decisions of the Montana Supreme Court, the EA is remanded back to the
15 DEQ for further analysis. The air quality permit previously issued is vacated pending
16 DEQ's further analysis consistent with MEPA and their constitutional responsibilities
17 to the citizens of the State of Montana.

18 The constitutional issues are not yet ripe for consideration.
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DATED April 6, 2023

/s/ Michael G. Moses
District Court Judge

cc: Counsel of Record