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MONTANA FIRST JUDICIAL DISTRICT COURT, LEWIS AND CLARK COUNTY

<p>RIKKI HELD, et al.,</p> <p style="text-align: right;">Plaintiffs,</p> <p style="text-align: center;">v.</p> <p>STATE OF MONTANA, et al.,</p> <p style="text-align: right;">Defendants.</p>	<p style="text-align: center;">Cause CDV 20–307 Hon. Kathy Seeley</p> <p style="text-align: center;">DEFENDANTS’ REPLY BRIEF IN SUPPORT OF MOTION TO STAY PROCEEDINGS</p>
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INTRODUCTION

As relevant to Defendants’ current Motion, Plaintiffs seek a declaration from the Court that Section 75-1-201(2)(a), MCA (the “MEPA Limitation”) is facially unconstitutional. (Compl. at 102). Indeed, Plaintiffs’ Response specifically confirms that “the question in this case, [is] whether

Section 75-1-201(2)(a), MCA is facially unconstitutional.” (Plaintiffs’ Response Brief in Opposition to Defendants’ Motion to Stay Proceedings (“Response”), at 5.) As established in Defendants’ separate briefing, the repeal of Section 90-4-1001, MCA, eviscerated all of Plaintiffs’ claims predicated on that statute—there is simply nothing left of that statute, or Plaintiffs’ claims based upon it, for this Court to review. Thus, Plaintiffs’ only remaining claim is their facial constitutional challenge to the MEPA Limitation. (Compl. at 102; Response at 5.)

The MEPA Limitation provides that an environmental review under the Montana Environmental Policy Act (“MEPA”) may not include a review of actual or potential impacts beyond Montana’s borders, nor may it include actual or potential impacts which, by their nature, are regional, national, or global. That’s it. The statute does not carve out particular categories of impacts which must be addressed, and none of MEPA’s implementing rules¹ require an analysis of the potential impacts of greenhouse gas emissions. MEPA’s model rules have been adopted by individual agencies in their administrative rules, e.g., DEQ’s rules describing categories for impacts analysis: ARM 17.4.609(3)(d) impacts on the physical environment and (e) impacts to the human environment. No statute or rule provides DEQ with authority to regulate greenhouse gas emissions.

The constitutionality of this same MEPA provision was fully briefed in *Montana Environmental Information Center and Sierra Club v. Montana Department of Environmental Quality and Northwestern Energy*, Montana Thirteenth Judicial District Court, DV-21-1307, (“*MEIC v. DEQ*”) (MEPA challenge to DEQ’s permitting decision of the Laurel Gas Plant). The claims in *MEIC v. DEQ* are functionally similar to this case — Plaintiffs allege that DEQ’s failure to analyze potential greenhouse gas emissions is unlawful and unconstitutional. (In this case,

¹ This can be found at <https://tinyurl.com/yey6uhns>.

Plaintiffs do not challenge a specific permitting decision, but instead claim that the MEPA Limitation is facially unconstitutional because it prohibits the State from analyzing impacts, specifically greenhouse gas emissions, beyond Montana’s borders. It’s the other side of the same coin.) In *MEIC v. DEQ*, Plaintiffs argued in the alternative that either: 1) DEQ’s omission violated MEPA’s requirement to examine the plant’s direct, secondary, and cumulative impacts within Montana, MCA § 75-1-201(b)(iv)(A); ARM 17.4.609(3)(d) and (e); or 2) Section 75-1-201(2)(a) is unconstitutional.

Recently, the Thirteenth Judicial District Court issued an order on summary judgment. (*See* Or. dated Apr. 6, 2023). The Thirteenth Judicial District avoided the constitutional issue and instead ruled that DEQ misinterprets Section 75-1-201(2)(a), MCA. (*Id.* at 29 (“[DEQ] must take a hard look at the greenhouse gas effects of this project as it relates to impacts within Montana’s borders”).) The Court further ruled that the constitutional issue was not ripe for review. (*Id.* at 34.)

Because DEQ believes that the district court’s rulings are erroneous, DEQ plans to timely appeal to the Montana Supreme Court. The Montana Supreme Court’s determination of this issue will likely be dispositive of the remaining issue in this case, either because it will affirm the district court, or because it will determine the constitutionality of the MEPA Limitation, an issue that is fully briefed in that case.

Because *MEIC v. DEQ* is procedurally ahead of this case on an issue that would essentially resolve Plaintiffs’ concerns, it makes sense to stay this case to allow the Montana Supreme Court to weigh in before a tremendous amount of resources – both from the Court the parties – are expended. While it may be a small delay for the Plaintiffs in this case, it is actually a faster resolution of the overall issue—something that that would benefit all parties herein.

ARGUMENT

I. PLAINTIFFS DO NOT ACCURATELY SET FORTH THE APPLICABLE LEGAL STANDARD ADOPTED BY THE MONTANA SUPREME COURT.

In Montana, the applicable legal standard for whether a particular case warrants a stay is well established. Plaintiffs only cite the portions of the legal standard which favor denying a stay. This Court should consider all factors.

Pursuant to Section 25-4-503, MCA, “upon good cause shown and in furtherance of justice, a court may, in its discretion, postpone a trial or proceeding...” *Id.* Additionally, because this stay request is essentially a motion to modify the Scheduling Order, the good cause standard under Mont. R. Civ. P. 16(b), applies.² “Good cause is generally defined as a ‘legally sufficient reason’ and referred to as ‘the burden placed on a litigant (usu. by court rule or order) to show why a request should be granted or an action excused.’” *City of Helena v. Roan*, 2010 MT 29, ¶ 13, 355 Mont. 172, 226 P.3d 601 (quoting *Black’s Law Dictionary* 251 (Bryan A. Garner ed., 9th ed., West 2009)). Good cause is a “flexible standard,” and whether it is present “will necessarily depend on the totality of the facts and circumstances of a particular case.” *Brookins v. Mote*, 2012 MT 283, ¶ 29, 367 Mont. 193, 292 P.3d 347 (citation omitted) (finding that district court had legally sufficient reason to modify the scheduling order).

“[T]he power to stay proceedings is incidental to the power inherent in every court to control the disposition of the causes on its docket with economy of time and effort for itself, for counsel, and for litigants.” *Landis v. North American Co.*, 299 U.S. 248, 254 (1936). “A court determines whether to grant a stay by balancing competing interests and considering whether the

² Other procedural rules also require a showing of good cause and provide solid precedent for a stay in this case. For example, Mont. R. App. P. 22(1) authorizes a party to file a motion in district court. “[t]o stay a judgment or order of the district court pending appeal.” Mont. R. App. P. 22(1)(a)(i). To obtain the stay, the moving party must “demonstrate good cause for the relief requested.” Mont. R. App. P. 22(2)(a)(i).

public welfare or convenience will be benefitted by a stay.” *Henry v. Mont. Seventh Jud. Dist. Ct.*, 198 Mont. 8, 13, 645 P.2d 1350, 1353 (1982). Stays serve the interests of justice; where, as here, a stay would resolve or clarify issues, benefit the public by providing certainty or avoiding unnecessary expenditure of resources, or promote judicial economy. Montana trial courts have applied the *Henry* considerations and found that a stay was warranted. *See, e.g. Log Condos., Inc. v. Water & Sewer Dist. #363*, 2001 MT 3036, 2001 Mont. Dist. LEXIS 2808 (*Henry* criteria met. “If a Montana Supreme Court ruling in the PSC case will resolve or even clarify the issues here, a stay will be in the interests of justice.”); *In re Jocko River Hydrologic Sub-Basin*, 2019 Mont. Water LEXIS 227. (*Henry* criteria satisfied. After balancing competing interests, the Court found that the stay benefits the public welfare and promotes judicial economy).

Consistent with United States Supreme Court precedent in *Landis*, the Montana Supreme Court adopted the following three legal considerations for district courts to use in determining whether proceedings in one court should be stayed pending decisions on proceedings in another court:

1. After balancing competing interests, a district court has inherent power to control its docket by staying proceedings.
2. *If* there is a fair possibility that the requested stay will harm someone else, the movant for a stay must make out a clear case of hardship or inequity in being required to go forward. This means that if no harm occurs, a clear showing of hardship or inequity is not required. In may be rare, but in certain cases, a litigant in one case will be compelled to stand aside while a litigant in another settles the rule of law for both cases.
3. In cases that are very important to the public, individual plaintiffs may be required to submit to moderate delay and unoppressive consequences if the stay will benefit public welfare or convenience.

See Henry, 198 Mont. at 13, 645 P.2d at 1353.

II. DEFENDANTS HAVE SATISFIED BOTH THE GOOD CAUSE STANDARD AND THE *HENRY* FACTORS; THEREFORE, A STAY OF THIS CASE IS WARRANTED.

A. THE MOTION TO STAY IS APPROPRIATE AND MADE WELL IN ADVANCE OF TRIAL.

Because a scheduling order can be modified for good cause with the Court's consent, Mont. R. Civ. P. 16(a)(4) (Doc. 145, ¶ 7), Plaintiffs' contention that the two-year-old Scheduling Order cannot accommodate the need for flexibility is misplaced. Defendants' Motion asks the Court for a stay. It would be unnecessarily duplicative and a misuse of scarce resources to file two motions – a motion to stay and a motion for leave to file a motion to stay – when the same thing is economically accomplished by filing only the motion to stay. There are already lengthy, substantial motions submitted for the Court to review in this case; the Court does not need to review an additional formulaic motion for leave to file a motion. Given recent events, not only is the motion to stay timely – it was filed well before the Final Pre-Trial Scheduling Conference – but it is procedurally appropriate, and just plain common sense, to file one motion instead of two to economize the time of all parties and the Court.

B. AFTER BALANCING COMPETING INTERESTS, THIS COURT SHOULD STAY THIS CASE UNTIL AFTER THE MONTANA SUPREME COURT DECIDES *DEQ v. MEIC*.

Following the Legislature's repeal of Section 90-4-1001, there is one remaining issue: the facial constitutionality of the MEPA Limitation. (Compl. at 102; Response at 5.) Because this is a legal issue, fully briefed on summary judgment, this matter should be stayed until the Montana Supreme Court decides *MEIC v. DEQ*. The legal issue, not the factual testimony of Plaintiffs, is the relevant inquiry. The Montana Supreme Court's opinion on the forthcoming *DEQ v. MEIC* appeal is critical to this Court's determination of the legal issue.

The Montana Supreme Court explained that the hallmark of determining facial unconstitutionality is the content of the statute itself, not the particular circumstances of the litigation. *Park Cnty Env'tl. v. Mont. Dept. of Env'tl. Quality*, 2020 MT 303, ¶ 86, 402 Mont. 168, 477 P.3d 288. Translation: The constitutionality determination is not unique to this case and can be more expediently determined in *DEQ v. MEIC* which is procedurally ahead, (even though it was filed later). To succeed on a facial challenge, a challenger must show “that no set of circumstances exists under which [the statute] would be valid,” *United States v. Salerno*, 481 U.S. 739, 745 (1987), or that the statute lacks any “plainly legitimate sweep.” *Washington v. Glucksberg*, 521 U.S. 702, 740, n. 7 (1997) (Stevens, J., concurring) (internal quotation marks omitted). It is not dependent on enforcement. Because the constitutionality determination focuses on whether the written words violate the Montana Constitution, the factual testimony of these Plaintiffs is not relevant to determining facial constitutionality. There is nothing unique about these Plaintiffs that requires the constitutional facial challenge of MEPA Limitation to be determined separately in this case. Because the Court’s analysis is a legal determination of statutory language, it doesn’t matter who the parties are. A stay is warranted here until the Montana Supreme Court fully resolves the appeal of the issues relating to the MEPA Limitation in *MEIC v. DEQ*.

As to the second *Henry* consideration, Plaintiffs have it backwards. The second *Henry* consideration only comes into play *if* the party opposing the motion shows that it will be harmed by the stay. Montana district courts have granted stays for judicial economy, public welfare, or clarity without requiring the moving party to demonstrate hardship or inequity. *See, e.g. Log Condos., Inc. v. Water & Sewer Dist.* #363, 2001 ML 3036; *In re Jocko River Hydrologic Sub-Basin*, 2019 Mont. Water LEXIS 227.

Only a showing of real harm from Plaintiffs would require the State to show an equally competing interest such as hardship or inequity. Plaintiffs have not demonstrated such harm. Travel schedules for Montana-based plaintiffs and expert witnesses do not constitute the level of harm required because they will likely be abruptly dismantled if this Court narrows Plaintiffs' claims in light of the repeal of Section 90-4-1001, MCA.

Notably, Plaintiffs' Response makes only sweeping statements as to global climate change (Response at 3-4) without any analysis of how they would be harmed by a stay of the one remaining claim. Instead, Plaintiffs' Response broadly claims that ongoing fossil fuel permitting decisions continue to injure Plaintiffs without explaining how that relates to the facial constitutional challenge. (*Id.*) The remaining constitutional facial constitutional challenge to the MEPA Limitation is a purely legal issue which does not require additional factual testimony from Plaintiffs or opinion testimony from Plaintiffs' expert witnesses; it is appropriately decided as a matter of law. After the Montana Supreme Court weighs in, if there is any remaining issue for this Court to decide, both parties and this Court will have the benefit of the Montana Supreme's Court's analysis and determination regarding the MEPA Limitation.

The second prong of the second consideration—in rare circumstances, a litigant in one case will be compelled to stand aside while a litigant in another settles the rule of law for both cases—fits perfectly here. These Plaintiffs should temporarily stand aside to allow the Montana Supreme Court to decide the constitutionality of the MEPA Limitation, because *DEQ v. MEIC*, though filed more recently, is procedurally ahead of this case. Therefore, that case will get the issue in front of the Montana Supreme Court faster, and all parties will benefit from the Montana Supreme Court's guidance.

The third consideration applies to cases of “extraordinary public moment” like this. Individual plaintiffs may be required to submit to moderate delay, not oppressive in its consequences, if the stay will benefit public welfare and convenience. *Henry*, 198 Mont. at 13, 645 P.2d 1353. Plaintiffs appear to contend that expediency is the only goal here, but it is not. Because a determination of the issues relating to the MEPA Limitation is important for clarity and certainty in ongoing and future state permitting decisions, it benefits the public, as well as the Court and the parties, to wait until the Montana Supreme Court weighs in before proceeding further.

In addition to clarity and certainty, jurisprudential benefits from staying this case include conserving judicial resources, avoiding duplicative efforts, saving taxpayer dollars, and reducing public confusion due to multiple proceedings determining the same MEPA Limitation. Most importantly, it provides certainty for the State’s future environmental analyses which occur regularly across state agencies (e.g. DEQ’s review of certain permit applications under its authority in Titles 75 and 82). Proceeding without the Montana Supreme Court’s resolution in *MEIC v. DEQ* will create uncertainty which will permeate all levels of State decision-making and administrative processes. These considerations satisfy the *Henry* considerations and constitute good cause for a stay. A moderate delay, until the Supreme Court resolves *MEIC v DEQ*, will not cause oppressive consequences for Plaintiffs.

C. THE CASES PLAINTIFFS CITE IN OPPOSITION TO A STAY ARE DISTINGUISHABLE.

The cases Plaintiffs cite denying a stay are factually and legally distinguishable from this case. Though the *Henry* case provides the guidelines adopted by the Montana Supreme Court, the *Henry* case itself presents a very different factual and postural situation that was not a basis for a stay. In that case, on basis of the preemption doctrine, the defendant railroad asked for a stay of the state case against it (for injuries to Henry and the death of his wife) until the Ninth Circuit

Court of Appeals decided preemption issues not applicable to the state case. The Montana Supreme Court found that a stay was not warranted because federal preemption did not apply: “The proof sought to be obtained here relates to warning not to illumination. We hold that Congress has preempted the area of illumination devices but not warning devices.” *Henry*, 198 Mont. at 12-13, 645 P.2d at 1353. In short, because the railroad failed to establish preemption under federal law, it failed to show that there was a substantial risk of a conflicting decision from the state court. Therefore, no stay was warranted. *Id.*

Flying T Ranch, LLC v. Catlin Ranch, LP is also readily distinguishable. 2020 MT 99, 400 Mont. 1, 462 P.3d 218. In that case, the sole issue on appeal was whether the District Court abused its discretion by staying proceedings without holding a hearing on Flying T's motion for a preliminary injunction. *Id.* at ¶ 2. On appeal, the Montana Supreme Court determined that the district court committed multiple errors which required reversal including ignoring clear law which required a hearing on Flying T's motion for a preliminary injunction. (The Court held that this error alone was abuse of discretion justifying reversal of the stay. *See id.* at ¶ 17.) The Court also found that the issues and remedy sought in the other case—for money damages against a title company—were completely unrelated to the case where a stay was sought—where the issue was access to property and how to classify a road. *Id.*

Flying T has no relevance here—there's no preliminary injunction request and no required hearing—and should be disregarded, because there, the parties, issues, and remedies in the two different cases, involving the same plaintiff, were completely different. Here, in contrast, the challenge to the MEPA Limitation in both cases is based on the same statute and relates to the same concerns, which are significant not only to the parties in this case, but to all Montanans, all branches of Montana government, environmental and other special interest groups, permit

applicants, current permit holders, and, because this case has attracted national attention, to the public at large.

III. A STAY OF THIS CASE TO ALLOW THE MONTANA SUPREME COURT TO DECIDE *MEIC V. DEQ* IS WARRANTED.

Although the Thirteenth Judicial District Court’s April 6, 2023 Order did not directly decide the constitutional challenge to the MEPA Limitation, a stay of this case to allow the Montana Supreme Court to decide the appeal of that Order is warranted. The district court’s ruling that DEQ misinterprets the statute is directly relevant to Plaintiffs’ concerns in this case, and because the constitutionality issue is fully briefed, the resolution of that appeal could well foreclose the remaining issue in this case.

Plaintiffs contend that *MEIC v. DEQ* is not a basis for a stay because the Thirteenth Judicial District Court Order “*did not* address the question in this case, whether Section 75-1-201(2)(a), MCA is facially unconstitutional.” (Response at 5.) Instead, the district court ruled that DEQ “misinterprets the statute” (Order at 5) and that the constitutional issues are not yet ripe for consideration. (*Id.* at 34.) DEQ is reviewing the Order and plans to timely appeal.

When the State filed its present Motion, it believed that the Thirteenth Judicial District would rule on the constitutionality of the MEPA Limitation. That the district court made a different ruling on this same statute does not change the fundamental premise that the challenge to the MEPA Limitation is functionally equivalent to Plaintiffs’ concerns in this case and that it should be finally resolved before this case proceeds. Furthermore, Plaintiffs are correct that the decision of the Thirteenth Judicial District is not binding on this district court. That’s another reason why a stay of this case, while the Montana Supreme Court considers the MEPA Limitation, and settles the law in Montana, is the recommended path forward.

Plaintiffs contend that this case differs from *MEIC v. DEQ* because here Plaintiffs claim that the MEPA Limitation violates multiple constitutional rights, not just the constitutional right to a clean and healthful environment. But more claims of the same nature don't change the fact that Plaintiffs' facial constitutional challenge is a legal issue most appropriately resolved as a matter of law, not at trial.

Finally, *Barhaugh v. State*, 361 Mont. 537, 264 P.3d 518 (2011) has no bearing here. In that case, Petitioners filed an original action in the form of a petition for declaratory judgment with the Montana Supreme Court, asking the Court to enter judgment declaring that the State of Montana holds the atmosphere in trust for the present and future citizens of the State of Montana. *Id.* In dismissing this extremely unusual petition seeking the Court to exercise original jurisdiction, not appellate review, the Court held in part that the plaintiffs' action did not involve purely legal questions and that the high Court was ill-equipped to resolve the plaintiffs' factual assertions. *Id.* In short, *Barhaugh* simply does not apply.

Here, no additional facts are needed to decide the purely legal issue of the facial constitutionality of the MEPA Limitation. Waiting for the Montana Supreme Court to decide whether that statute addresses greenhouse gases and requires permitting agencies to consider related impacts within Montana will greatly inform this Court as to the correct law to apply to the issues briefed by the parties. The delay is minimal, but the benefit is significant.

CONCLUSION

Defendants' current Motion should be granted. DEQ intends to timely appeal the Order denying summary judgment and findings in *DEQ v. MEIC*. A stay will allow the Montana Supreme Court to provide clarity and certainty regarding this statute and avoid piecemeal litigation. Moreover, Defendants' Motion was made well before trial and is supported by good cause. In

addition to the jurisprudential considerations of judicial economy, avoiding duplicative efforts, and saving taxpayer dollars, a stay to allow the Montana Supreme Court to weigh in, on the very statute at issue here, will provide clarity and certainty to all branches of Montana government in analyzing MEPA reviews, permit applicants, permit holders, and the public at large. It will allow this Court to make the correct ruling because the Court will have the benefit of the Montana Supreme Court's analysis of the MEPA Limitation. The *Henry* factors are also satisfied as explained above. For all the reasons set forth herein, this Court should grant the Defendant's Motion and stay further proceedings herein until the Montana Supreme Court fully resolves the issues relating to the MEPA Limitation in *MEIC v. DEQ*.

DATED this 28th day of April, 2023.

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