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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

[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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