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Montana First Judicial District Court
Lewis and Clark County

Rikki Held, et al., Plaintiffs, vs. State of Montana, et al., Defendants.	Cause No. CDV-2020-307 **Defendants' Reply in Support of Motion for Clarification and for Stay of Judgment Pending Appeal**

INTRODUCTION

Throughout this case, this Court made clear that it was never considering whether to order state agencies to analyze greenhouse gas (GHG) emissions and climate impacts in every "project or proposal." (Doc. 379 at 14.) It was only deciding whether MCA § 75-1-201(2)(a)—which prohibited GHG emissions and climate impacts analysis in environmental reviews under the Montana Environmental Policy Act (MEPA) —violates the Montana Constitution. In its August 14, 2023, Order ("Order"), the Court declared that statute unconstitutional and enjoined its enforcement. (Doc. 405 at 102.) Under the Order's plain terms—and the Court's clear statements throughout this litigation—agencies are no longer barred from considering GHG emissions, but now have discretion to determine whether and how to account for GHG emissions in MEPA review.

Plaintiffs think the Order sweeps much farther. They believe that the Court has not only enjoined MCA § 75-1-201(2)(a), but also replaced it with a novel regulatory scheme for permitting decisions and MEPA analysis that requires state agencies immediately to "calculate the GHG emissions that will result from proposed projects." (Doc. 424, Ex. 1 at 6, Ex. 2 at 6.) Plaintiffs' interpretation of the Order contradicts what this Court has said since 2021. Defendants ask the Court to clarify that its Order does not require state agencies to begin calculating GHG emissions, but leaves it to them to decide whether, when, and how to do so. If Plaintiffs are right, however, the Order is in error and Defendants seek a stay of it.

Plaintiffs claim that the Court lacks jurisdiction to clarify what its Order means because the Montana Supreme Court has accepted appellate jurisdiction over this case. But this Court retains jurisdiction to rule on motions for a stay after a notice of appeal has been filed. *See Powers Mfg. Co. v. Leon Jacobs Enters.*, 216 Mont. 407, 411–12, 701 P.2d 1377, 1380 (1985); M. R. App. P.

22(1)(c). And resolving the parties' fundamental dispute about what the Order requires is a necessary component of resolving Defendants' stay motion. The Court also retains jurisdiction to rule on "ancillary matters" like this. *Powers Mfg. Co.*, 216 Mont. at 412, 701 P.2d at 1380. The Court has jurisdiction to clarify whether its Order requires state agencies immediately to begin calculating GHG emissions and climate impacts in each MEPA review, or whether it leaves it to agencies to determine whether, when, and how to do so.

Next, a stay is warranted if the Court's Order requires Defendants immediately to account for GHG emissions in every permitting decision and MEPA review. Defendants have a likelihood of success on the merits challenging such an order, because requiring state agencies to employ a novel regulatory scheme for analyzing GHG emissions in MEPA review would violate the political question doctrine and the separation of powers. Such an order would irreparably harm Defendants and the public and would not benefit Plaintiffs.

Plaintiffs' arguments to the contrary mischaracterize the basis for Defendants' stay as a request for "permission to continue to implement the MEPA Limitation and ignore the GHG emissions from fossil fuel projects and the resulting harms to Montana's children and environment." *See* (Doc. 428, at 17). That is not Defendants' request. Defendants understand the Court declared § 75-1-201(2)(a), MCA unconstitutional and enjoined Defendants from implementing it. But they also take the Court at its word that it was only assessing the constitutionality of this provision, not ordering Defendants to affirmatively include an evaluation of GHG emissions and corresponding impacts to the climate in each MEPA review. After all, the Court has said that it could not order Defendants to conduct such analyses. Without the statute, Defendants now have the discretion to determine if, when, and how to account for potential

impacts relating to GHG emissions and climate in MEPA reviews. And as this Court recognized, those questions "necessarily require a host of complex policy decisions entrusted, for better or worse, to the wisdom and discretion of the executive and legislative branches." *Juliana v. United States*, 947 F.3d 1159, 1171 (9th Cir. 2020); (Doc. 46, at 21.)

ARGUMENT

I. The Court has jurisdiction to clarify whether its Order requires state agencies to immediately begin analyzing GHG emissions.

The Court has explained many times that it was not considering whether to order state agencies to conduct GHG and climate impact analysis. *See* (Doc. 379 at 3–4, 14), (Doc. 46 at 18–19), (Doc. 217 at 7). Rather, the Court has made clear that "the relief contemplated by the Court has always been limited to declaratory judgment on the constitutionality of "the challenged statutory provisions "and an injunction on the enforcement of those provisions." (Doc. 379 at 3–4); *see also* (*id.* at 14) ("[T]his case now only involves declaring a statute unconstitutional."). And "declaring the MEPA Limitation unconstitutional is not congruent with commanding the State to consider climate change in every project or proposal." (Doc. 379 at 14.) Consistent with these repeated explanations, the Court's dispositive Order declared MCA § 75-1-201(2)(a) unconstitutional and enjoined its enforcement. (Doc. 405 at 102.) But it did not command the State to consider GHG emissions and climate impacts in every project or proposal.

Remarkably, Plaintiffs' response brief does not address this Court's frequent statements that ordering state agencies to conduct GHG emissions and climate impact analyses was beyond its power. More remarkably still, Plaintiffs continue to claim that the Court's Order *requires* state agencies to analyze GHG emissions in every permitting decision. (Doc. 428 at 5–6, 17.) But Plaintiffs are wrong. This Court should reaffirm that "the relief contemplated by the Court has

always been limited to declaratory judgment on the constitutionality of the" challenged statutory provisions "and an injunction on the enforcement of those provisions." (Doc. 379 at 3–4.) The Court retains jurisdiction to correct Plaintiffs' mischaracterization of its orders.

A. Clarifying what the Order means is a necessary part of ruling on Defendants' Motion for a Stay.

Plaintiffs on the one hand accused DEQ of "choosing to deliberately ignore a binding order from Montana's judiciary," and demanding that it "explain why it should not be held in contempt of court," even after this Court issued its Rule 54(b) certification. (Doc. 424, Ex. 1 at 6.) But now Plaintiffs reverse course, suggesting that the Court lacks authority to do anything at all. Plaintiffs cannot have it both ways. And in any event, they are wrong that the Court cannot clarify its Order as part of its analysis of Defendants' Stay Motion.

Even after a notice of appeal is filed, district courts retain jurisdiction to rule on motions for stay pending appeal. *Powers Mfg. Co.*, 216 Mont. 407, 411–12, 701 P.2d 1377, 1380; M. R. App. P. 22(1)(c). And resolving Defendants' Motion for Stay necessarily will entail clarifying what the Order means. Plaintiffs think that the Court's Order requires Defendant state agencies to immediately begin accounting for GHG emissions and climate impacts in every permitting decision. DEQ believes the Order takes a more reasonable path and gives Defendant state agencies **discretion** to determine whether, when, and how it should account for GHG emissions. It is impossible to analyze and rule on Defendants' stay motion without clarifying whose interpretation is correct.

If Plaintiffs are right, then the Court's Order effectively grants Plaintiffs the same "remedial plan" that the Court already found beyond its power to grant. Thus, it would violate the political question doctrine and the constitutionally mandated separation of powers set forth in

Mont. Const. Art. III, Sec. 1. *See* (Doc. 46 at 19–21) (explaining that granting Plaintiffs' request for a statewide remedial plan would violate the political question doctrine); *see also Bullock v. Fox*, 2019 MT 50, ¶ 43–44, 435 P.3d 1187, 395 Mont. 35 (explaining that the political question doctrine ensures that courts do not violate the constitutional separation of powers). It would also irreparably harm Defendants by violating the separation of powers and invading the prerogative of the Executive Branch, forcing DEQ to divert valuable resources, sowing regulatory chaos, and requiring DEQ to employ a GHG emissions and climate impact analysis without adequate time to formulate a fully-informed and legally defensible analysis—all without preventing any harm to Plaintiffs. MEPA has no bearing on Plaintiffs' injuries because MEPA does not allow the reviewing agency to deny or grant a permit. § 75-102(3)(b), MCA.MEPA is only an information-gathering and disclosing statute— no state agency can "withhold, deny, or impose conditions on any permit or other authority act" based on MEPA. § 75-1-201(4)(a), MCA. No progress will be made toward accurately evaluating GHG emissions or climate impacts if DEQ is forced to cook up a method overnight. *See infra* §III.B.2.

Moreover, such an Order would not be in the public interest. Defendant state agencies owe it to the public to develop carefully reasoned measures for analyzing potential GHG emissions and climate impacts that are based on careful science and public input. It is not in the public interest to force DEQ to rush out a hurried method for GHG emissions and climate impact analysis. The purpose of MEPA is informational. § 75-1-102(1)(a-b). Accuracy and legal defensibility are critical. It is not in anyone's interest for any state agency to hastily issue a MEPA document which would inevitably be challenged in court and quite probably found arbitrary and capricious – state agencies are required to take a "hard look" at all potential impacts in the

MEPA review, not a "hasty look." *Water for Flathead's Future, Inc. v. Mont. Dep't. of Envtl. Quality,* 2023 MT 86, ¶ 21. (When reviewing a MEPA review, the Montana Supreme Court takes a close look to determine whether the agency has taken a 'hard look' to fulfill its obligation to "make an adequate compilation of *relevant* information, to analyze it reasonably, and to consider all *pertinent* data.")(citations omitted). Under MEPA, agencies are required to present thorough analyses based on carefully collected information – their best thinking – not a half-baked method that cannot possibly account for the complexity of climate change. Yet that is exactly what Plaintiffs want. The public would also be deprived of its right to notice and comment on such significant changes in process and analysis. The purpose of MEPA itself is in part to provide for public notification and participation. *See* §75-1-102, MCA.

If DEQ is correct, however, that the Court's Order *does not* require it to implement any GHG emissions or climate impacts analyses, but only struck down a statute barring such analyses, DEQ will have the time and discretion necessary to determine whether, when, and how to analyze potential impacts regarding GHG emissions and/or climate impacts in its MEPA reviews.

In sum, the parties fundamentally disagree about the Court's ruling. So clarifying what the Order requires is a necessary component of ruling on Defendants' stay motion.

B. Clarifying the Order is also an ancillary matter over which the Court also retains jurisdiction.

The Court also retains jurisdiction over all "ancillary matters" after an appeal is filed. *Moore v. Frost*, 2021 MT 74, ¶ 9, 483 P.3d 1090, 403 Mont. 483 (quoting *In re Estate of Boland*, 2019 MT 236, ¶ 46, 397 Mont. 319, 450 P.3d 849). "Ancillary matters" are "supplementary" or "subordinate" matters. *See* Black's Law Dictionary, "Ancillary," (11th ed. 2019). "Ancillary matters" do not include motions filed under Montana Rule of Civil Procedure 60(b), or motions

to amend the judgment or findings of fact. *See Moore*, ¶ 9; *In re Estate of Erickson*, 2017 MT 260, ¶ 36, 406 P.3d 1, 389 Mont. 147.

Explaining what the Court's order requires is such an "ancillary matter." Defendants are not asking the Court for relief from a final judgment under Rule 60(b). Nor are they asking the Court to amend its judgment or findings of fact. They merely ask the Court to reaffirm what it has already held in the face of Plaintiffs' accusation that DEQ is in contempt. From the start, the Court has been crystal clear that it could not "force the State to conduct" a GHG "analysis," but could only "strike down a statute prohibiting it." (Doc. 379 at 13.); *see also* (Doc. 46 at 19–20) (finding that a request to order the State "to develop a remedial plan or policies to effectuate reductions of GHG emissions" was a nonjusticiable political question). This Court has made clear that "this case … involves only declaring a statute unconstitutional" and explained that "declaring the MEPA Limitation unconstitutional *is not congruent* with commanding the State to consider GHG emissions and climate impacts in ever project or proposal." (*Id.* at 14) (emphasis added). Consistent with these explanations, the Court's August 14 Order declared unconstitutional and enjoined MCA § 75-1-201(2)(a) but did not order DEQ to analyze potential impacts regarding GHG emissions or climate impacts in reviewing any proposed project, permit application/amendment, or in preparing any MEPA review. (Doc. 405 at 102.) If Plaintiffs simply took the Court at its word, no clarification would be necessary. Defendants only ask for the Court to make clear—in the face of Plaintiffs' threats of contempt—what it has already held several times. This is an ancillary matter over which the Court still has jurisdiction.

II. Maintaining the status quo – through a stay – is warranted until the Montana Supreme Court determines the issues on appeal.

A stay is warranted to preserve the status quo to alleviate regulatory uncertainty while the Montana Supreme Court considers the novel issues in this case. That is especially so if Plaintiffs are correct that the Court's Order can be stretched to require state agencies to conduct GHG and climate impacts analysis for every project. While not binding, the parties agree that the Montana Supreme Court looks to the familiar four-factor test employed by federal courts in assessing a party's motion for a stay pending appeal. *See Mont. Env't Info. Ctr. v. Westmoreland Rosebud Mining, LLC*, DA 22-0064, 2022 Mont. LEXIS 735 at *5 (Mont. Sup. Ct. Aug. 9, 2022) ("*MEIC*") (citing *Hilton v. Braunskill*, 481 U.S. 770 (1987)). Under that test, a stay is particularly appropriate when a case involves novel and unsettled legal questions. "Unsettled questions of law present serious legal questions so as to demonstrate sufficient likelihood of success on a motion to stay." *Maxcrest Limited v. United States*, No. 15-mc-802070, 2016 WL 6599463, *2 (N.D. Cal. November 7, 2016) (citation cleaned up). Here the Order has been described as a unique and landmark ruling in Montana and beyond, and addressed novel issues involving environmental policy, standing, causation, and redressability, to name a few. Given the critical interests in avoiding abrupt and seismic changes in the State's ability to timely and accurately complete the legal steps necessary to review permitting applications and amendments, especially in the energy arena, this Court should stay its decision pending the Supreme Court's final resolution of the unsettled legal issues.

A. Defendants have made a strong showing on the merits.

First, Defendants have made a "strong showing on the merits." *Nken*, 556 U.S. at 433. This standard only requires a petitioner to "show that there is a substantial case for relief on the

merits." *Lair v. Bullock*, 697 F.3d 1200, 1204 (9th Cir. 2012) (citation omitted). It "does not require the petitioners to show that it is more likely than not they will win on the merits." *Id.* In other words, it does not require a district court to essentially reverse itself to grant a stay. "When a request for a stay is made to a district court, common sense dictates that the moving party need not persuade the court that it is likely to be reversed on appeal. Rather, the movant must only establish that the appeal raises serious and difficult questions of law in an area where the law is somewhat unclear." *Strobel v. Morgan Stanley Dean Witter*, No. 04-CV-1069, 2007 WL 1238709, at *1 (S.D. Cal. Apr. 24, 2007) (citing cases).

This case is a paradigmatic example of an "an appeal" that "raises serious and difficult questions of law in an area where the law is somewhat unclear." *Strobel*, 2007 WL 1238709, at *1. No Montana Supreme Court decision has ever addressed the relationship between the right to a clean and healthful environment and global climate change. The case raises novel questions about standing, causation, redressability, and the relationship between the co-equal branches of Montana's government. The Court's Order also has the potential to impact the way in which Defendants prepare MEPA reviews for all permitting decisions, and particularly for Montana's energy industry. A stay is warranted under these unusually significant circumstances in an area where the law is far from settled.

Next, if Plaintiffs are correct that the Court's Order affirmatively requires state agencies to implement a new regulatory scheme for analyzing GHG emissions and climate impacts, then the Order violates the political question doctrine. This Court has already held that it lacked power to order "Defendants to develop a remedial plan or policies to effectuate reductions of GHG emissions in Montana." (Doc. 46 at 19) (quoting Compl. ¶ 7.) After all, such relief would

amount to enacting new legislation, a power that "lies exclusively with the Montana Legislature." (Doc. 46 at 19.) Over two years ago, this Court declined Plaintiffs' invitation to "create laws, policies, or regulations" and to "craft a remedy 'committed for resolution to other branches of government[.]'" (Doc. 46 at 18–19) (quoting *Larson v. State*, 2019 MT 28, ¶ 39, 394 Mont. 167, 434 P.3d 241); *see also* (Doc. 379 at 3–4) ("[T]he relief contemplated by the Court has always been limited to declaratory judgment on the constitutionality of [the challenged statutory provisions] and the enforcement of those provisions.").

Plaintiffs' response brief coyly asserts that this matter has already been resolved. (Doc. 428 at 8–9.) But that assertion omits one glaring fact. Plaintiffs now insist the Court has ordered state agencies to implement policies that will account for GHG emissions and climate impacts analyses in **every permitting decision**. *See* (Doc. 424, Ex. 1 at 6, Ex. 2 at 6); (Doc. 428 at 17.) And they have threatened Defendants with contempt if they do not immediately begin calculating GHG emissions in **every permitting decision**. *See* (Doc. 424, Ex. 1 at 6, Ex. 2 at 6). One problem with these assertions is that no substantive permitting statute requires an analysis of GHGs or climate impacts. Furthermore, MEPA is not a permitting statute. Therefore, Defendants cannot lawfully do what Plaintiffs insist they do. Plaintiffs, however, believe the Court's Order requires Defendants immediately to calculate GHG emissions that will result from proposed projects. That is essentially the same "remedial plan" that the Court found beyond its power to grant more than two years ago. Defendants take the Court at its word that it did not issue such a sweeping ruling. *See supra* § I. If, however, Plaintiffs are right about the scope of the Court's ruling, then Defendants are likely to succeed on appeal on political questions grounds alone. In Montana, such "complex policy decisions" such as if, when, and how to calculate GHG emissions and climate

impacts are entrusted to other branches of government. *Larson v. State*, 2019 MT 28, ¶ 39, 394 Mont. 167, 434 P.3d 241.

B. Defendants will suffer irreparable harm absent a stay.

Next, if Plaintiffs are correct about the breadth of the Order, Defendants will suffer an irreparable injury absent a stay. First, "any time a State is enjoined by a court from effectuating statutes enacted by representatives of its people, it suffers a form of irreparable injury." *Maryland v. King*, 567 U.S. 1301, 1303 (2012) (cleaned up) (quoting *New Motor Vehicle Bd. of Cal.v. Orrin W. Fox Co.*, 434 U.S. 1345, 1351 (1977)). And here—assuming Plaintiffs correctly interpret the Order—the Court has not only enjoined Montana agencies from enforcing a statute enacted by the people's representatives, it has also affirmatively ordered executive branch agencies to implement a new regulatory scheme in place of the enjoined statute. This violation of the separation of powers constitutes an irreparable injury. *See Cnty. Of Santa Clara v. Trump*, 250 F. Supp. 3d 497, 538 (N.D. Cal. 2017).

Second, under Plaintiffs' interpretation, Defendants would be forced to somehow determine and implement methods for GHG and climate impact analyses overnight. For example, Defendant DEQ must evaluate whether it has the internal expertise and capacity to conduct legally defensible analyses or will need to hire outside expert contractors. *See* (Doc. 424 ¶¶ 6–7, 15–23.) It's not one-size fits all, and accuracy and consistency are far more important than speed. For each proposed project or permit, DEQ will also need to assess whether the information that applicants submit under the existing regulatory regime provides DEQ with enough GHG climate information to allow the agency to begin conducting analyses for the project at issue. (*Id.* ¶¶ 9–10, 15.) DEQ activities are funded by biennial appropriations by Montana's Legislature. The Court,

on June 12, shortly before the start of the trial determined that it was hearing arguments on the statutory language adopted by the Legislature in 2023 (Chapter 450, Laws of 2023), as opposed to the language that had been in place since 2011 regarding impact analyses. Defendant state agencies have no means of traveling back in time to secure an appropriation to properly address this abrupt shift in requirements and analyses.

Furthermore, Defendants, particularly DEQ, are sued for nearly every decision that they make regarding projects relating to coal, natural gas, nonrenewable energy generation, and the transportation, refining, or distribution of petroleum products. These legal challenges – to both the permitting actions through the substantive permitting statutes and the Montana Administrative Procedures Act (MAPA) and separately, to MEPA review, divert tremendous agency resources from implementing and enforcing substantive regulatory statutes-- staff time and money that would otherwise be spent in pursuit of the agency's critical function to ensure that environmental protections are implemented in a consistent and transparent way. State agencies will have no way to recover these lost resources. These are irreparable injuries. *See E. Bay Sanctuary Covenant v. Biden*, 993 F.3d 640, 677–78 (9th Cir. 2021) (economic injuries for which a party has "no vehicle for recovery" constitute irreparable harm).

Further, if Plaintiffs are correct and the Order requires DEQ to hastily incorporate GHG emissions and climate impacts data into its MEPA analyses and somehow extend that procedural review to its permitting decisions, such a requirement would set up the executive agencies for certain failure and potentially sow regulatory chaos. Applicants would immediately challenge the conditioning of a permitting decision based on consideration of GHG emissions and climate impacts in that decision because the substantive permitting requirements neither require any such

analyses nor allow for modifications to a permit due to that analysis. Plaintiffs would also challenge the decision citing the Conclusions of Law in the Order for the proposition that DEQ failed to conduct adequate analyses. In addition, Plaintiffs, and other entities, would immediately challenge the MEPA reviews for failure to take the required "hard look," yet they are not willing to allow the agencies the time to develop and implement the "hard look," creating the very real possibility of permit vacatur and remand to the agency for a do-over" under MEPA's exclusive remedies. See, e.g., § 75-1-201(6)(c)(i-ii), MCA; *Water for Flathead's Future,* ¶¶ 35-36. That would be a waste of agency resources and taxpayer dollars.

Plaintiffs answer that Defendants can simply suspend evaluation of permit applications and further deny applications. (Doc. 428, at 12). There is no substantive permitting statute in Title 82 or 75 that provides for such suspension or denial. And the very permits they cite as supposedly violating the Court's Order show the harm that would cause. For example, the application for a "fossil fuel refinery," was a permit modification for boilers that will provide steam for a *renewable energy* project for Montana Renewables, LLC, and is necessary to provide enough energy for efficient cold weather operation of a facility that is actually reducing overall emissions. *See* Final Air Quality Permit, Montana Renewables, LLC, # 5263-02, November 9, 2023, https://deq.mt.gov/files/Air/AirQuality/Documents/ARMpermits/5263-02.pdf.[1] Without those modifications the facility would be unable to operate as designed, causing significant harm by limiting production of renewable fuels. Plaintiffs criticize DEQ's preliminary determination cited § 75-1-201(2)(a), but the enjoined statute was not cited in DEQ's final determination. *See*

[1] Montana Renewables, LLC is described as a "leader in North America's energy transition movement" with the goal of pioneering the renewable fuels industry and "lower the carbon footprint of the planet." *See https://montanarenewables.com/.*

id., at 17. Rather, DEQ noted that MEPA does not allow DEQ to "withhold, deny, or impose conditions on any permit or other authority to act based on' an environmental assessment," as described above. *Id.* (citing § 75-1-201(4)(a)). Again, DEQ has no authority to deny or suspend consideration of a permit under MEPA. § 75-1-102(3)(b). Doing so based on Plaintiffs' mischaracterization of this Court's Order would subject it to additional liability and significant expenditure of resources because of appeals from permit applicants, not to mention that it could cause irreparable harm to projects entitled to permit modifications, like Montana Renewables, LLC.

Suspending consideration of the second permit amendment Plaintiffs cite creates similar, problems. That Air Quality Permit (#2930-07) involves the Montana Air National Guard's permit amendment to simply update its permit to reflect improvements made on site that reduce overall emissions. In other words, it's largely a paperwork exercise to ensure records on file with DEQ demonstrate compliance with air quality permit conditions. Final Permit Issuance for MAQP #2930-07, November 14, 2023, at p. 3, https://deq.mt.gov/files/Air/AirQuality/Documents/ARMpermits/2930-07.pdf. The permit modification itself *demonstrates a significantly smaller environmental footprint for MANG operations*. *Id.* The permit amendment noted that the reduction was below federally enforceable limits, so it was only subject to the State criteria. *Id.*, at p. 3-4. Without this permit modification, MANG could be found in noncompliance of its permit requirements, potentially jeopardizing ongoing operations of the 120th Airflight Wing and its mission to participate in defense of the United States. If even a simple update to a permit to ensure records match activities on the ground is subject to such a challenge, simply because it involves the term fossil fuels, it sets the stage for

challenges by plaintiffs to any action (modification, amendment, renewal application), regardless of actual environmental impact, based on alleged climate impacts. If this type of challenge is taken on future permit modifications at MANG, it may cause significant harm to national security and federal comity, and even undermine Plaintiffs' goals given that the amendment reduces emissions.

In short, these examples illustrate that permitting decisions are complex and multi-faceted evaluations that Plaintiffs cannot sophomorically dismiss. They also illustrate the irreparable harm that could occur if Plaintiffs are right that this Court's Order requires Defendants to affirmatively overhaul its MEPA analysis.

C. Plaintiffs will not be harmed by a stay.

Third, Plaintiffs will not be substantially injured by a stay. Plaintiffs argue that they will suffer ongoing climate change injuries if state agencies are not immediately forced to begin accounting for GHG emissions and climate impacts. (Doc. 428 at 15–17.) But climate change is a complicated issue, and solutions are not developed overnight. Courts usually recognize that "assessment of environmental impacts fits squarely within an agency's 'significant technical and scientific expertise beyond the grasp of the Court.'" *Water for Flathead's* Future, ¶ 21 (quoting *Mont. Envtl. Info. Ctr. v. Mont. DEQ*, 2019 MT 213, ¶ 20, 397 Mont. 161, 451 P.3d 493). Developing methods for analyzing GHG emissions and climate impacts is an example *par excellence* of a complicated issue that will require technical and scientific agency expertise. It will take time to develop sound procedures for this analysis. Implementing a rushed GHG emissions and climate impacts analysis that fails to address the many layers of complexity will not alleviate climate impacts or Plaintiffs' injuries. Thus, a stay would not substantially injure Plaintiffs. MEPA requires state agencies to use a systematic, interdisciplinary approach to provide

information about potential impacts. Plus, MEPA does not even allow agencies to deny permits. See, e.g. § 75-1-201(1)(b); 75-1-102(1)(a-b) and (3)(b). Plaintiffs are not harmed by waiting for the Supreme Court's decision because permitting will continue under the requirements of substantive permitting statutes, regardless of whether the procedural MEPA reviews contain a GHG emissions and climate impacts analysis.

D. A stay is in the public interest.

Finally—for several reasons—a stay is in the public interest. *Nken*, 556 U.S. at 433–34. First, an order that violates the Constitution's hard limit on the separation of powers is against the public interest. *See Stormans, Inc. v. Selecky*, 586 F.3d 1109, 1139 (9th Cir. 2009) ("[A]ll citizens have a stake in upholding the Constitution.") (internal citation and quotation marks omitted). Second, the public deserves—and has a legal right to—notice and comment on significant changes in process and analysis, which such a significant departure from the last 12 years would necessitate. *See* §§ 2-4-302, -305, MCA. But immediately implementing GHG emissions and climate impacts analyses in every MEPA review, as Plaintiffs demand, would deprive the public of that right. Third, immediately requiring analysis of GHG emissions and climate impacts would wreak havoc on Montana's energy industry and other decisions that may fall under the broad umbrella of "fossil fuel activities," which is not a defined term in Montana code. It would also invite inevitable legal challenges from Plaintiffs and other entities. Accounting for GHG emissions and climate impacts is a significant decision that should be made after careful consideration and should not be rushed. To force Defendant state agencies to instantly begin incorporating GHG emissions and climate impact analysis in every project and proposal would sow regulatory chaos. (Doc. 424 ¶¶ 3, 6, 23, 26–29.) And the costs of this chaos would be passed

onto Montana consumers. It is against the public interest for DEQ to create an analysis of GHG emissions and climate impacts overnight. Since DEQ last did so 12 years ago, a significant body of Montana MEPA law has developed which must be considered in developing new analyses, as well as, on the national level, a significant body of law on the National Environmental Policy Act, including challenges to analyses of GHGs and climate impacts. And as noted, using MEPA review to withhold, deny, or impose conditions on permits is not only unauthorized under Montana law, it would also significantly harm the public interest.

CONCLUSION

For these reasons, DEQ respectfully requests that this Court clarify that its August 14, 2023, Order (Doc. 405) does not require DEQ to analyze GHG emissions and climate impacts at all; the decision simply declared § 75-1-201(2)(a) unconstitutional and enjoined DEQ from implementing it. If Plaintiffs are correct that the Court's order requires DEQ to "calculate the GHG emissions that will result from proposed permitting projects," (Doc. 424 Exhs. 1 and 2) and ensure that each new project will not contribute to global climate change, Defendants respectfully move this Court for a stay of its order pending appeal.

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I, Dale Schowengerdt, hereby certify that I have served true and accurate copies of the foregoing Answer/Brief - Reply Brief to the following on 11-22-2023:

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Dated: 11-22-2023