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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 GRANTING DEFENDANTS'  
MOTIONS TO STAY PENDING APPEAL**

This matter is before the court on Defendants' Motions to Stay Pending Appeal. Defendant, NorthWestern Energy ("NorthWestern"), filed their motion on April 14th, 2023. Defendant, Montana Department of Environmental Quality ("DEQ"), filed their motion on April 19th, 2023. Plaintiffs, Montana Environmental Information Center and Sierra Club ("MEIC") jointly filed a Response to

1 NorthWestern Energy’s and Montana Department of Environmental Quality’s  
2 Motions for Stay Pending Appeal on May 8th, 2023. NorthWestern filed a Notice of  
3 Supplemental Authority and Reply Memorandum in Support of Motion to Stay  
4 Pending Appeal on May 19th, 2023. DEQ filed its Reply Brief in Support of its Motion  
5 to Stay on May 22nd, 2023. After considering all pleadings and addenda to date, this  
6 Court issues the following order:

7 **I. FACTUAL BACKGROUND**

8 On October 27, 2021, Plaintiffs, Montana Environmental Information Center  
9 and Sierra Club (“MEIC”) filed their First Amended Complaint for Declaratory Relief.  
10 MEIC challenged the permitting of a new gas-fired power plant, the Laurel Generating  
11 Station (“LGS”), in Laurel, Montana. LGS was proposed by NorthWestern Energy  
12 (“NorthWestern”) and permitted by the Montana Department of Environmental  
13 Quality (“DEQ”), together, the Defendants in this case.

14 Following extensive briefings and hearings, this Court issued an Order on April  
15 6th, 2023. The Order vacated the DEQ permit of LGS because the DEQ had failed to  
16 take the requisite “hard look” at the gas plant’s environmental impacts. Specifically,  
17 the environmental assessment that DEQ prepared did not consider the impacts from  
18 the lighting of LGS or the effect of carbon dioxide emissions from LGS within  
19 Montana’s borders. This Court vacated the air quality permit and remanded the  
20 environmental assessment back to DEQ so that they could take the necessary hard  
21 look at those impacts.

22 Following the vacatur and final judgment, Defendants filed separate Motions  
23 for Stay Pending Appeal. Defendant, NorthWestern, also filed a Notice of Appeal  
24 with the Montana Supreme Court on April 17th, 2023. Plaintiffs filed a joint Response  
25 to Defendants Motions for Stay Pending Appeal on May 8th, 2023. On May 10th, 2023,

1 Governor Gianforte signed House Bill 971 into law. House Bill 971 amended MCA §  
2 75-1-201, the Montana Environmental Protection Act (“MEPA”). This Court relied on  
3 the previous version of MEPA to determine what was required for DEQ’s hard look  
4 analysis and to issue its Order vacating LGS’s air quality permit. The amendment  
5 eliminated the requirement that agencies look at the impacts of carbon dioxide  
6 emissions within the boundaries of the state of Montana as part of an environmental  
7 assessment. On May 16th, 2023, the Montana Supreme Court issued its ruling in *Water*  
8 *for Flathead’s Future, Inc. v. Mont. Dep’t of Env’tl. Quality*, which clarified what remedies  
9 are available under MEPA. On May 19th, 2023, NorthWestern filed a Notice of  
10 Supplemental Authority and Reply Memorandum which included analysis of the  
11 amended law and the new Supreme Court precedent. The DEQ filed a Reply Brief in  
12 Support of Its Motion to Stay analyzing them as well.

## 13 II. DISCUSSION

14 Although only two months have passed since this Court issued its Order  
15 vacating the air quality permit for LGS, much changed in the legal landscape. The  
16 legislature amended the language that this Court relied on from MEPA to issue its  
17 decision vacating the air quality permit for LGS. The Montana Supreme Court  
18 provided clarification on the remedies available in cases concerning MEPA when an  
19 agency fails to take a “hard look” before issuing a permit. This Court must consider  
20 these changes when addressing the question of a stay.

21 M.R. App. P. 22 addresses a motion for a stay of judgment pending appeal in  
22 District Court. The Court should only grant Defendants a stay in “extraordinary  
23 circumstances.” *Graves v. Barnes*, 405 U.S. 1201, 1203 (1972). A stay is not a matter of  
24 right, even if irreparable injury may occur in its absence. *Washington v. Trump*, 847  
25 F.3d 1151, 1164 (9th Cir. 2017) (per curium) (quoting *Nken v. Holder*, 556 U.S. 418, 433

1 (2009)). Defendants, as the parties requesting the stay, bear the burden of showing  
2 that their specific circumstances justify an exercise of that discretion. *Nken*, 556 U.S. at  
3 433-34.

4 The Court must consider the following four factors to determine if a stay should  
5 be issued: (1) whether the stay applicants have made a strong showing that they are  
6 likely to succeed on the merits; (2) whether the applicants will be irreparably injured  
7 absent a stay; (3) whether issuance of the stay will substantially injure the other parties  
8 interest in the proceedings; and (4) where the public interest lies. *Hilton v. Braunskill*,  
9 481 U.S. 770, 776 (1987). The first two factors of the traditional standard are the most  
10 critical. *Nken*, 556 U.S. at 435. However, individual judgments must be made in each  
11 case, the formula cannot be reduced to a rigid set of rules. *Hilton*, 481 U.S. at 777.

12 After reviewing all pleadings and addenda, when the factors are weighed  
13 together, a stay of this Court's April 6th, 2023, Order is appropriate.

14 **a. Whether the Defendants have Made a Strong Showing That They are**  
15 **Likely to Succeed on the Merits:**

16 All parties have submitted compelling arguments on their respective positions  
17 on the merits of this litigation. However, the parties' arguments and this Court's  
18 Order were submitted before the Montana Supreme Court issued its recent decision in  
19 *Water for Flathead's Future, Inc. v. Mont. Dep't of Env'tl. Quality* ("*WFF v. DEQ*") which  
20 clarified the proper remedies under MEPA. 2023 MT 86, 412 Mont. 258. This Court  
21 and the parties instead relied on an older case, *Park Cty. Env'tl. Council v. Mont. Dep't of*  
22 *Env'tl' Quality* ("*Park Cty.*"). 2020 MT 303, 402 Mont. 168, 477 P.3d 288.

23 This Court, and the District Court in *WFF v. DEQ*, interpreted *Park Cty.* to mean  
24 that when an agency failed to take a hard look prior to issuing the permit under  
25 MEPA, the proper remedy was vacatur of the permit. In *WFF v. DEQ*, the Montana  
Supreme Court reversed the District Court's vacatur, and determined that it was an

1 improper remedy under the current remedial provisions of MEPA. *WFF v. DEQ*, 2023  
2 MT at ¶ 35. Those provisions were not in effect at the time that the *Park Cty.* decision  
3 was issued. *Id.* Under the Montana Supreme Court’s analysis in *WFF v. DEQ*, the  
4 remedial provisions of MEPA limit the Court to providing injunctive relief and only  
5 after making a number of findings of fact. *Id.* The court determined that the  
6 injunctive remedies provided in MEPA are exclusive. *Id.* Following *WFF v. DEQ*, this  
7 Court’s reliance on *Park Cty.* for its analysis was incorrect. Further, relying on *Park*  
8 *Cty.*, Plaintiffs requested vacatur and not an injunction as their relief, so this Court did  
9 not follow the exclusive remedies laid out by *WFF v. DEQ* and issue an injunction.  
10 Pursuant to *WFF v. DEQ* and the remedial clause of MEPA, this Court’s vacatur of the  
11 air quality permit was improper and a stay of this Court’s April 2023 Order is  
12 appropriate.

13         The legal landscape will likely undergo additional changes before  
14 NorthWestern is prepared to power up LGS. In this Court’s April 2023 Order, DEQ  
15 was ordered to analyze the impacts of lighting and greenhouse gas emissions from  
16 LGS within the boundaries of the state of Montana. Whether they will have to analyze  
17 the impact of LGS’s carbon dioxide emissions within the boundaries of the state of  
18 Montana will depend upon the changing legal landscape. The 2023 amendment to  
19 MEPA eliminates agencies’ obligations to take a hard look at greenhouse gas  
20 emissions within the boundaries of the state. This amendment will likely be  
21 challenged as unconstitutional. Because a notice of appeal has already been filed, this  
22 Court has no jurisdiction to address the constitutional question presented by the  
23 amendment.

24         The first factor weighs heavily in favor of Defendants.  
25

1                   **b. Whether the Defendants will be Irreparably Injured Absent a Stay:**

2                   The Defendants must show that “irreparable harm is probable, not merely  
3 possible” in order to succeed under the second factor. *Doe #1 v. Trump*, 957 F.3d 1050,  
4 1059 (9th Cir. 2020). All parties have given this Court compelling arguments on this  
5 issue. Many of the irreparable injuries that NorthWestern alleges will occur are  
6 merely speculative or possible. Given the current state of the approvals and  
7 permitting of the project, the full extent of the total injury to NorthWestern or its  
8 customers if a stay is not granted is impossible to predict.

9                   NorthWestern contends that any delay in the construction of LGS will risk  
10 brownouts across the state. Currently, NorthWestern contracts with sources outside  
11 the state to meet any in-state deficit. Some of these out-of-state contracts are set to  
12 expire around when NorthWestern planned for LGS to come online. MEIC  
13 illuminated, in their pleadings, that changes in future regional electrical supply are  
14 speculative. Additionally, many of the changes that are of greatest concern to  
15 NorthWestern are set to occur well after the end of the anticipated appeals period,  
16 giving NorthWestern sufficient time to finish the appeal and restart construction if  
17 permitted. NorthWestern has only provided evidence that customers will possibly  
18 lose power, this is not sufficient to show that this irreparable harm is probable.

19                   Further, to fully know their financial liability, NorthWestern needs to receive a  
20 determination from the Montana Public Service Commission (The “MPSC”). The  
21 MPSC must evaluate NorthWestern’s reports to determine how much NorthWestern  
22 can recover from its ratepayers for the cost of building LGS. MPSC’s determination  
23 could also have adverse effects on NorthWestern’s credit if MPSC determines that LGS  
24 is not a prudent and least-cost investment. NorthWestern took the risk of starting  
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1 construction without knowing the outcome of MPSC's determination. This Court  
2 cannot speculate and supplant its judgment for that of MPSC.

3 While many of the irreparable injuries that NorthWestern has alleged will occur  
4 are speculative, NorthWestern has shown that delay in construction will result in a  
5 considerable cost increase that NorthWestern may not be able to adequately recover  
6 later. While temporary loss of income does not usually constitute irreparable injury,  
7 the Ninth Circuit has indicated that if that loss of income cannot be corrected or  
8 relieved at a later date, that could constitute irreparable injury. *Los Angeles Memorial*  
9 *Coliseum Com. v. National Football League*, 634 F.2d 1197, 1202 (9th Cir. 1980).

10 Currently, construction of LGS is paused. Winding down construction efforts  
11 cost NorthWestern a great deal. Further, NorthWestern has shown that pausing the  
12 project indefinitely will significantly increase the total cost of the project. Additional  
13 months of delay add millions of dollars to the total cost of LGS due to escalation  
14 charges set by major contractors working on the project. Overall cost of construction  
15 labor and materials has also been consistently increasing year-over-year.

16 NorthWestern anticipates that the cost of construction of LGS will largely be borne by  
17 ratepayers. However, if the project is delayed long enough, LGS could end up costing  
18 NorthWestern an amount that cannot reasonably be recovered from ratepayers. Even  
19 if NorthWestern can recover the full cost from ratepayers, ratepayers themselves will  
20 have no recourse to recover that increase.

21 Many of the injuries that NorthWestern asserts in their motion are speculative.  
22 However, absent a stay, the cost of the project will significantly increase.  
23 NorthWestern may be able to pass this cost along to ratepayers, but those ratepayers  
24 will be harmed without recourse. This factor weighs slightly towards the issuance of a  
25 stay for NorthWestern.

1                   **c. Whether Issuance of the Stay will Substantially Injure the Other**  
2                   **Parties Interest in the Proceedings:**

3                   In this Court’s Order issued on April 6th, 2023, the Court vacated  
4 NorthWestern’s air quality permit because the DEQ had failed to take the necessary  
5 hard look at the lighting and the impact of the carbon dioxide emissions from LGS  
6 within the state of Montana. Analysis has now been provided on the lighting impacts  
7 of LGS and that analysis is open for public comment.

8                   The remaining interest in these proceedings relates to the effect of the carbon  
9 dioxide emissions from LGS within the state of Montana. Plaintiffs have illustrated  
10 other effects that the construction of LGS has had on the local community. However,  
11 some of these interests, including noise disturbances and tree removal, are either not  
12 part of the process of obtaining an air quality permit, or have already received the  
13 necessary hard look analysis that the DEQ was required to give them.

14                   Plaintiffs still have an interest in having carbon dioxide emissions analyzed and  
15 considered, however, this interest now faces a changed statutory landscape. Plaintiffs  
16 must now contend with the amendment to MEPA that the legislature passed in May  
17 2023. The 2023 amendment has a significant impact on Plaintiffs interest in whether  
18 DEQ must take a hard look at the effect of greenhouse gas emissions within the state.  
19 The amendment creates a new constitutional question that Plaintiffs must address. As  
20 this case has already been appealed, this Court does not have jurisdiction to consider  
21 the constitutional question presented by the 2023 amendment. A stay pending appeal  
22 will not adversely affect Plaintiffs’ ability to raise that constitutional question properly.  
23 Plaintiffs still have time before LGS will be completed and before it will start emitting  
24 carbon dioxide to bring this constitutional challenge.



1 Further, because the Montana Supreme Court determined in *WFF v. DEQ* that  
2 vacatur was an improper remedy under MEPA, a stay in this case does not change the  
3 remedies that are available to Plaintiffs pursuant to MEPA. This Court improperly  
4 read *Park Cty.* as providing Plaintiffs with a remedy that the Montana Supreme Court  
5 determined they never truly had under MEPA's remedy provisions. The stay brings  
6 this case in line with the new precedent in *WFF v. DEQ* and cures this Court's reliance  
7 on *Park Cty.* This factor weighs towards Defendants' request for a stay.

8 **d. Where the Public Interest Lies:**

9 Determining where the public interest lies is the overwhelming question  
10 presented by this case and cases like it. The Montana public has numerous varying  
11 and opposing interests regarding energy production and use within the state. The  
12 proper balance between these critical public interests will take many, many years to  
13 bear out.

14 The public has a significant interest in access to affordable and consistent  
15 electricity. As Defendants noted in their motions, this country has witnessed the  
16 tremendous consequences of inadequate electricity contending with extreme weather  
17 conditions. Montanans are no strangers to extreme temperatures. A consistent,  
18 reliable source of affordable electricity is critical to citizens' survival during Montana's  
19 cold snaps and heat waves. Some of NorthWestern's contracts with out-of-state  
20 electricity suppliers are nearing their end. NorthWestern must find a way to replace  
21 the electricity from those contracts to ensure Montanans have the electricity they need.  
22 That energy must either come from renewed or new contracts out of the state or new  
23 sources of in-state electricity.

24 Montanans also have considerable interest in the state's natural environment.  
25 Article IX of the state constitution protects citizens' right to a "clean and healthful

1 environment". The full environmental impacts of LGS have not been analyzed which  
2 is Plaintiffs' primary concern. Without that analysis it is impossible to fully  
3 understand the impacts that LGS will have on Montana's natural environment.

4 In their motion, NorthWestern illustrates the complex web of interests and  
5 priorities at issue when considering new electrical projects. LGS will use fossil fuels,  
6 but it will be cleaner burning than most of the fossil fuel plants that are online  
7 currently and that NorthWestern purchases energy from. LGS is located within and  
8 will emit carbon dioxide within the boundaries of the state of Montana. However,  
9 importing energy from out of state is less efficient as energy is lost along the way.  
10 Additionally, NorthWestern is building infrastructure around renewable energy, but  
11 battery technology has not advanced to ensure that naturally fluctuating energy  
12 sources, like solar and wind, can provide consistent, affordable energy to meet  
13 Montanans needs. Additionally, consistent out-of-state forms of renewable energy,  
14 like hydroelectricity, are only available at a limited capacity.

15 Determining the best way forward for the public in Montana is not possible  
16 with the information available. The full environmental impacts of LGS are currently  
17 unknown. Potential consequences to Montana's energy grid in its absence are also not  
18 fully known.

19 Balancing these issues and interests properly is critical for the Montana public  
20 and it will take time. Their importance to Montanans is in part responsible for the  
21 quickly changing legal landscape around MEPA. With the information currently  
22 available to this Court however, there is no objective legal answer to where the public  
23 interest lies.

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1                   **e. Plaintiffs’ Motion to Dismiss Montana Department of Environmental**  
2                   **Quality’s Motion for Stay Pending Appeal:**

3                   On May 26th, 2023, Plaintiffs filed a Motion to Dismiss DEQ’s Motion for Stay  
4 Pending Appeal. At the time Plaintiffs filed said motion, DEQ had not appealed this  
5 Court’s final judgment and thus lacked one of the requirements to request a stay  
6 under M. R. App. P. 22. DEQ has since filed an appeal with the Montana Supreme  
7 Court and filed a Notice of Appeal with this Court on June 8th, 2023. Plaintiffs also  
8 filed a Notice of Cross-Appeal with this Court on that same day.

9                   Because this Court is granting the stay, the Motion to Dismiss DEQ’s Motion for  
10 Stay Pending Appeal is moot. Even though DEQ had not appealed this Court’s  
11 decision prior to their Motion for a Stay, NorthWestern did and was in the appropriate  
12 procedural position to request a stay. Whether the Court grants a stay to DEQ or to  
13 NorthWestern, the effect of this Order on the parties and the LGS air quality permit is  
14 the same.

15                   **III. CONCLUSION**

16                   The first three factors weigh towards granting Defendants a stay pending the  
17 appeal of this case. The fourth factor shines light on critical questions where this  
18 Court cannot provide an objective legal answer. After considering all pleadings and  
19 addenda, this Court will issue a stay of its Order from April 6th, 2023. The stay is  
20 granted pursuant to M.R. App. P. 22(1)(a) and will remain in effect during the  
21 pendency of the appeal to the Montana Supreme Court.

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**IT IS HEREBY ORDERED** that Defendants' Motions to Stay Pending Appeal are granted. This Court's Order, dated April 6th, 2023, is hereby stayed pending appeal to the Montana Supreme Court.

DATED June 8, 2023

/s/ Michael G. Moses  
District Court Judge

cc: Counsel of Record