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Department of Natural Resources and Conservation,  
Department of Transportation, and Governor Gianforte*

**Montana First Judicial District Court  
Lewis and Clark County**

<p>Rikki Held, et al.,</p> <p style="text-align: center;">Plaintiffs,</p> <p style="text-align: center;">vs.</p> <p>State of Montana, et al.,</p> <p style="text-align: center;">Defendants</p>	<p>Cause No. CDV-2020-307</p> <p><b>Declaration of Sonja Nowakowski in Support of Defendants' Motion for Clarification and for Stay of Judgment Pending Appeal</b></p>
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1. Sonja Nowakowski declares as follows:
2. I am the Administrator of the Montana Department of Environmental Quality ("DEQ") Air, Energy, and Mining Division, and have personal knowledge of the facts herein in this Declaration. Prior to joining DEQ in 2021, I worked for the Montana Legislature for 15 years. I served in a nonpartisan capacity as a research analyst in the Legislative Environmental Policy Office and as the

Research Director for the Office of Research and Policy Analysis. My nonpartisan work for the Legislature focused on environment and energy policy.

3. As the Administrator of DEQ's Air, Energy, and Mining Division, I am familiar with DEQ permitting processes for coal mining, natural gas fueled electricity generators, coal fueled electricity generators, petroleum refineries, and oil pipelines under their respective substantive permitting statutes. I am also familiar with the requirements for energy planning and procurement in Montana, renewable energy programs in Montana, and Montana's transitioning energy marketplace. Finally, I am familiar with DEQ's separate environmental review processes for DEQ permitting decisions under Montana Environmental Policy Act ("MEPA") and understand fully how those review processes and permitting processes are distinct requirements.

4. I, additionally, was a witness for DEQ in the above captioned case and I am, therefore, familiar with this case and this Court's Findings of Fact, Conclusions of Law, and Order issued on August 14, 2023 ("Order").

5. If a stay is not granted and the Court's order not clarified in this case, DEQ and the public will be harmed in two ways. First, invalidating § 75-1-201(2)(a), MCA and expecting DEQ to immediately conduct legally defensible and scientifically appropriate greenhouse gas ("GHG") and climate analysis in all MEPA reviews will impose significant hardships on the agency. Because MEPA

judicial reviews can be, and often are, subject to requests to vacate the relevant permit, it also leaves dozens of applications at risk. Those procedural MEPA reviews are conducted for a broad spectrum of substantive permit activities, ranging from Montana Air National Guard permit modifications to provide for national security to minor coal permit revisions that allow coal mines to continue to legally operate in Montana. Second, the interpretation of this Court's Order by some, including counsel for Plaintiffs, Our Children's Trust ("OCT"), threatens Montana's energy supply. These two harms are addressed in turn.

**I. Absent a stay, this Court's Order creates problems for applications currently being processed by DEQ.**

6. As the Court noted in its Order, DEQ has not included analysis of GHG or climate impacts in its documents issued under MEPA since prior to 2011. Order at 13, 69, 73–74, 77. Because this review has not occurred in over a decade, DEQ cannot immediately conduct such review without adequate time to prepare scientifically and legally defensible analysis.

7. For instance, DEQ's analysis of GHG emissions in evaluating the Keystone XL Pipeline considered global economic demand of petroleum products, which was conducted with the assistance of a federal partner, the U.S. Department of State. *See* Mont. Dept't Envtl. Quality, *Supp. Information for Compliance with the Mont. Envtl. Policy Act and Supp. for Decisions under the Major Facility Citing Act*, I-6 (Aug. 26, 2011) (Ex. C). This analysis took several years to

complete (TransCanada filed its application with DEQ on December 22, 2008, and DEQ's final EIS on the project was issued on August 26, 2011) and was completed under a federal partnership. DEQ does not currently have the in-house expertise to conduct this type of economic analysis without hiring a third-party consultant. In most permitting processes, statutorily mandated timelines are also in place and do not afford DEQ with the luxury of several years to complete such an analysis.

8. A true and correct copy of DEQ's Final Environmental Impact Statement ("EIS") for TransCanada's Keystone XL Pipeline Project is attached as Exhibit C.

9. DEQ similarly engaged in climate and GHG analysis in the Highwood Generating Station Final EIS with the U.S. Department of Agriculture – Rural Utility Service. This GHG and climate discussion presented the applicant's proposed mitigation efforts to offset the plant's GHG emissions. *See* U.S. Dep't of Agric. – Rural Util. Service & Mont. Dep't of Env'tl. Quality, *Final Environmental Impact Statement Highwood Generating Station*, 4-53 to 4-46 (Jan. 2007) (Ex. D). Many of these mitigation efforts appear to have taken considerable time to prepare for, like applying for federal grants. *Id.* at 4-45. If the Highwood Generating Plant is the model for conducting climate and GHG analysis under MEPA, DEQ must collect information from applicants about GHG emissions and potential mitigation efforts. The applicants will, additionally, be required to develop and describe those

efforts. Those alternatives must then be vetted by DEQ as well as stakeholders. The time necessary to collect such information, in some instances, will prevent DEQ from meeting statutory deadlines for conducting its review of projects. The Highwood Generating Station required a nearly 500-page Environmental Impact Statement, of which a draft EIS was released in June 2006 and a final EIS was released in January 2007, and included, at one time during analysis, more than 20 different alternatives.

10. A true and correct copy of the U.S. Department of Agriculture – Rural Utilities Service and DEQ’s Final EIS for Southern Montana Electric Generation and Transmission Cooperative, Inc.’s Highwood Generating Station is attached as Exhibit D.

11. DEQ conducted its own GHG and climate analysis in the EIS for the Roundup Power Project without a federal partner. The Draft EIS for this project discusses the generic impacts of GHG emissions, disclosed the total GHG emissions from the proposed project, compared the proposed project’s GHG emissions to nationwide GHG emissions, and concluded “[n]o basis exists for determining the severity of greenhouse gas[’s] impacts on global warming; therefore, an impact level cannot be assigned.” Mont. Dep’t of Env’tl. Quality, *Draft Env’tl. Impact Statement for Roundup Power Project*, 4-20 to 4-22 (Nov. 2002) (Ex. E). In the Final EIS, DEQ determined “[f]urthermore, carbon dioxide

and other greenhouse gases are not regulated air pollutants under the federal or state regulations, so cumulative effects from carbon dioxide were not analyzed.” Mont. Dep’t of Env’tl. Quality, *Final Env’tl. Impact Statement for Roundup Power Project*, 4-12 (Jan. 2002) (Ex. F); *see also id.* at 1-1 (incorporating by reference the Draft EIS for this project into the Final EIS). It remains the case that, under Montana law, carbon dioxide and other greenhouse gases are not regulated criteria pollutants under the Montana Clean Air Act.

12. A true and correct copy of DEQ’s Draft EIS of Bull Mountain Development Company, LLC’s Roundup Power Project is attached as Exhibit E.

13. A true and correct copy of DEQ’s Final EIS of Bull Mountain Development Company, LLC’s Roundup Power Project is attached as Exhibit F.

14. In February 2002, DEQ issued its record of decision and final air quality permit for Continental Energy Service, Inc. Silver Bow Generation Plant to construct a 500 mega-watt natural gas fired power plant near Butte. The EIS disclosed that the plant would emit about 2,375,720 tons of carbon dioxide into the air each year. Montana Environmental Information Center (“MEIC”) later challenged the permit because the “permit and EIS provide no analysis of the health, environmental, and economic impacts of global climate change and provide no analysis to justify the statement that an additional release of 2,375,720 tons per year of CO<sub>2</sub> is insignificant.” *In re Continental Energy Services, Inc.*, Permit No.

3165-00, Aff. and Pet. for Hearing and Stay of Permit Issuance, 7 (Mont. BER Mar. 29, 2002) (Ex. G).

15. As this example demonstrates, DEQ only disclosing the amount of GHG emissions from a proposed project does not ensure that parties will be satisfied with DEQ's analysis. Without either statutory guidance on how to conduct a climate analysis in MEPA or state GHG regulations, DEQ is working to understand how a proposed project's GHG emissions interact with MEPA's command to determine "if an agency action will significantly affect the quality of the human environment." *Park Cty. Env'tl. Council v. Mont. Dep't of Env'tl. Quality*, 2020 MT 303, ¶ 31, 402 Mont. 168, 477 P.3d 288. This process requires time and energy that, without a stay, will be spent defending against MEPA challenges on GHG and climate grounds, rather than developing a method for addressing these issues. DEQ is committed to working through these complexities and has demonstrated so by engaging with the public in a dialogue about MEPA.

16. A true and correct copy of MEIC's Affidavit and Petition for Hearing and Stay of Permit Issuance challenging Continental Energy Services, Inc's Silver Bow Generation Plant dated March 29, 2002, is attached as Exhibit G.

17. There are additional indications that suggest that the disclosure of GHG emissions without further analysis, as provided in the Roundup Power

Project and the Silver Bow Generation Project, will be viewed as inadequate and vulnerable to challenge.

18. For instance, this Court’s August 14, 2023, stated in its findings of fact that “DEQ approved revision to Spring Creek Mine, the largest coal mine in the State, allowing for recovery of [an] additional seventy-two million tons of coal,” and that “DEQ refused, pursuant to the MEPA Limitation, to analyze impacts on the social cost of carbon and economic impacts from climate change in its EIS.” *See* Order at 77 (finding of fact 265(f)).

19. Additionally, at a listening session hosted by DEQ in Billings on October 2, 2023, on MEPA reform, many participants indicated that they would prefer DEQ to conduct a social cost of carbon analysis for its GHG and climate review under MEPA. DEQ will be conducting additional public meetings on MEPA reform in Helena on October 18, 2023, and Missoula on October 19, 2023. *See* Mont. Dep’t of Env’tl. Quality, *DEQ Seeking Input on Environmental Impact Analysis Process Under the Montana Environmental Policy Act* (Sept. 27, 2023), <https://deq.mt.gov/News/pressrelease-folder/news-article112>. The purpose of these meetings is, in part, to determine how DEQ could conduct GHG and climate analysis. These meetings will take time to appropriately host and collect public input; this is an additional reason for granting a stay to allow DEQ to gather

information from the public and stakeholders to inform DEQ's development of how GHG and climate analysis under MEPA might be done.

20. Federal agencies have demonstrated that adopting the correct methodology for analyzing GHG and climate impacts under federal NEPA is challenging.

21. NEPA requires federal agencies to analyze the environmental effects of their proposed actions before making decisions. Climate change is one environmental effect that may be considered. The federal Council on Environmental Quality ("CEQ") oversees NEPA implementation by issuing guidance on procedural requirements. This guidance continues to evolve and change in terms of how best to evaluate greenhouse gas and climate change effects. In 2016, the CEQ issued final guidance to federal agencies regarding how they consider GHG emissions and climate change. In 2019, the CEQ rescinded the 2016 guidance and issued new draft guidance. In 2020, the CEQ adopted a comprehensive revision of NEPA and revised the definition of "effects" and removed the definition of "cumulative impacts," which the CEQ stated "does not preclude consideration" of climate change impacts, but the "analysis of the impacts on climate change will depend on the specific circumstances of the proposed action." In 2021, the CEQ was directed to rescind the previous guidance. In April 2022, "cumulative effects" was added back to the definition of "effects" and GHG

analysis was revised. In January 2023, the CEQ published interim guidance that agencies should quantify reasonably foreseeable direct and indirect gross and net GHG emissions increases or reductions, both for individual pollutants and aggregated in terms of carbon dioxide equivalence. Separate from the above-mentioned guidance, in July 2023, the CEQ released the second phase of its NEPA revisions, adding further detail to the required analysis necessary in proposed mitigation measures and alternatives under NEPA under the lens of climate.

22. While the DEQ may rely on federal guidance in its implementation of NEPA, it's not a straightforward path, and under Title 75, chapter 1, part 3 of the Montana Code Annotated, the Montana Environmental Quality Council ("EQC") is charged with analyzing and interpreting information for the purpose of determining whether actions taken by an Agency achieve the policy set forth in 75-1-103, which establishes MEPA. DEQ looks forward to engaging with the EQC in its efforts to comply with the Court order, however, this will require thoughtful and time-intensive discussions and coordination.

23. Most state actions—including DEQ permits and certificates for coal mining, natural gas fueled electricity generators, coal fueled electricity generators, petroleum refineries, and oil pipelines—are the subject of an environmental assessment ("EA"), as opposed to an EIS. State agencies undergo a review of proposed state actions to determine whether an EA or an EIS is needed. See ARM

17.4.608. In accordance with § 75-1-208, MCA, statutory timelines, however, apply to both EA and EIS procedures. While the Court’s order points to “fossil-fuel activities[,]” Order at 69, 79, 88–90, 101, and “greenhouse gas-emitting projects[,]” *id.* 75, those terms are undefined in Montana statute. Potential projects that allow the burning of coal or natural gas are obviously “fossil-fuel activities.” However, an approved opencut application permits an operator to mine gravel and is not obviously a fossil-fuel or greenhouse gas emitting project. Nevertheless, these opencut projects require heavy equipment that may emit GHGs. Determining what GHG and climate impacts (if any) might result from an opencut project, which is already subject to strict statutory timelines, *see* § 82-4-432, MCA, will be less straight forward than projects that emit GHG at a point-source, like a proposed power plant. Without legislative direction, DEQ needs time to work with stakeholders and properly weigh its limited discretion to find the proper path forward to ensure DEQ complies with its statutory timelines for issuing permits, follows the Court’s order, and does not unnecessarily jeopardize permits.

24. Absent this Court’s order, DEQ would have conducted statutory interpretation to determine if it could have examined climate and GHG impacts under House Bill 971 from the 2023 Montana Legislature. Under § 75-1-201(2)(b), MCA, as amended by House Bill 971, “[a]n environmental review conducted pursuant to [MEPA] may include an evaluation if . . . the United States congress

amends the federal Clean Air Act to include carbon dioxide emissions as a regulated pollutant.” 2023 Mont. Laws ch. 450, § 1(2)(b). MEIC filed comments asserting DEQ’s Environmental Assessment (“EA”) of NorthWestern’s Natural Gas Plant near Laurel, Montana may include a discussion of GHG and climate impacts because the Inflation Reduction Act of 2022 passed by the U.S. Congress designates carbon dioxide as a pollutant, satisfying the requirements of § 75-1-201(2)(b), MCA. *See* MEIC’s Comments on DEQ’s Draft EA, 4–10 (Jun. 30, 2023) (Ex. H). Because of this Court’s invalidation of § 75-1-201(2)(a), MCA as amended by House Bill 971 and the stay granted by the district court, DEQ has paused its MEPA analysis on the Laurel Gas Plant and DEQ is, therefore, not addressing MEIC’s proposed statutory interpretation of § 75-1-201(2)(b), MCA.<sup>1</sup>

25. A true and correct copy of MEIC’s comments on DEQ’s draft EA of NorthWestern Energy’s Laurel Gas Plant is attached as Exhibit H.

26. Each year, DEQ processes roughly 30 to 50 coal applications, ranging from requests for minor revisions to existing permits to amendments that allow for new areas to be mined. These actions, if they impact the human environment, all trigger a MEPA review. In addition, each year, the Mining Bureau analyzes upward

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<sup>1</sup> The district court stayed its vacatur of NorthWestern Energy’s permit pending appeal before the Montana Supreme Court, which has allowed DEQ to pause its MEPA review being conducted on remand. *See Mont. Env’tl. Information Center v. Mont. DEQ*, Cause No. DV 21-1307, Order Granting Defs’ Mot. to Stay Pending Appeal (Mont. 13th Jud. Dist. Ct. Jun. 8, 2023).

of 120 new opencut mining applications and 40 to 60 hard rock mining applications, permit amendments, and modifications. These actions are also all subject to MEPA. Air quality permit modifications and applications number close to 70 annually. These numbers do not include the numerous actions taken by the other Divisions across DEQ which also trigger a MEPA analysis.

27. In 2022, the Air, Energy, and Mining Division staff, one of only three Divisions at DEQ, issued 525 permits or licenses and conducted 194 environmental assessments.

28. In the month of September, 2023, DEQ's Air, Energy, and Mining programs have done the following: the Coal Mining Section received one new permit application and reported 18 additional permits or amendments in process; the Opencut Mining Section received 9 new applications and reported 72 permits and amendments in process; and the Air Quality program reported 19 permits, renewals, and modifications in process.

29. Because DEQ may not make a permitting decision until the MEPA analysis is complete, DEQ will have to delay issuing decisions on many of these projects or decline to conduct climate and GHG analysis during the MEPA review, which will make these projects vulnerable to challenge on appeal. In either event, this Court denying DEQ's motion for stay has the potential to harm entities and individuals beyond the parties included in this litigation.

**II. This Court's Order has led Plaintiffs' counsel to argue that it prevents the permitting of any project that adds GHG emissions to the atmosphere.**

30. On September 9, 2023, DEQ received two letters from Plaintiffs' Counsel, OCT, regarding permits currently being addressed by DEQ.

31. The first of these letters concerns an air quality permit for the applicant Montana Renewables, LLC for a new renewable biodiesel facility.

32. A true and correct copy of OCT's letter dated September 29, 2023, titled "RE: Montana Youth's Demand Letter and Comments on DEQ's Preliminary Determination on Permit Application MAQP #5263-02, Montana Renewables LLC" is attached as Exhibit A ("Montana Renewables Letter").

33. The second letter concerns an air quality permit for the Montana Air National Guard. The intent of this permit action is to update assumptions, equipment, processes, emission factors, and permit language that was specific to the previous F-15 mission. The benefits of the proposed action, if approved, include allowing the facility to continue operating within the 100 tons/year threshold for all criteria pollutants and updating equipment identifiers to reflect more accurately what is on-site. There are no proposed increases in total site potential to emit ("PTE"), with every pollutant decreasing.

34. A true and correct copy of OCT's letter dated September 29, 2023, titled "Montana Youth's Demand Letter and Comments on DEQ's Preliminary

Determination on Permit Application MAQP #2930-07, Montana Air National Guard” is attached as Exhibit B (“MANG Letter”).

35. Both letters state:

Every additional fossil fuel permit approved by DEQ that causes an increase in GHG emissions is a violation of the constitutional rights of the youth Plaintiffs in *Held*. Every ton of GHG emissions exacerbates the injuries and constitutional violations the Plaintiffs are already suffering. Fortunately, as the undisputed facts in *Held* established, Montana can transition to 100% clean renewable energy—thereby mitigating the enormous harms caused to Montana’s youth and saving Montanans billions of dollars in avoidable costs caused by reliance on fossil fuels. *Held* Order at 80-84.

Montana Renewables Letter at 1; MANG Letter at 1.

36. Both letters provided by OCT also assert:

[T]he MEPA Limitation has been declared unconstitutional, and therefore, DEQ must now calculate the GHG emissions that will result from proposed projects .... Importantly, because the Court held that Plaintiffs’ constitutional rights are already being violated due to the current atmospheric concentration of GHG emissions and resulting climate harms, it is incumbent upon DEQ, before issuing permits that will result in additional GHG emissions, to establish that the proposed project will not further violate Plaintiffs’ constitutional rights.

Montana Renewables Letter at 6; MANG Letter at 6.

37. In other words, OCT has interpreted this Court’s Order to require additional analysis by DEQ in permitting any projects that would emit GHG. OCT also distorts and disregards the differences between DEQ’s obligations under MEPA and DEQ’s authority under the various permitting statutes,

38. Absent clarification and correction from this Court, OCT's interpretation of this Court's order will potentially disrupt and endanger the energy supply of Montana.

39. For instance, OCT's interpretation of this Court's Order would prevent DEQ from issuing new coal mining permits, minor revisions, or modifications. Those permits, revisions, and modifications affect existing coal provisions under contract and are necessary to fuel existing power plants like Colstrip Units 3 and 4, which currently provide power to Montana and the Northwestern United States.

40. OCT's interpretation of this Court's Order would also prevent DEQ from granting air quality permits to natural gas electricity generating plants, which are necessary to provide the dispatchable and flexible electricity generation needed to integrate variable wind and solar facilities into the electric grid and meet the dynamic demand of Montana ratepayers.

41. OCT's interpretation of this Court's Order explicitly claims that DEQ cannot permit renewable biodiesel facilities, which use alternative fuels to create products that have lower carbon intensities than traditional petroleum products. OCT's interpretation of this Court's Order would undoubtedly extend to traditional refineries that produce the petroleum products that, among other things, power our cars.

42. DEQ has a particular interest in avoiding OCT's disruptive reading of this Court's Order. DEQ houses the state energy bureau, *see* ARM 17.1.101(3)(c)(iii), which means DEQ has administrative and information sharing obligations concerning Montana's energy supply emergency powers, *see* §§ 90-4-301 to -319, MCA; ARM 14.8.401–412; Mont. Dep't of Env'tl. Quality, *Montana Energy Assurance Plan*, 22 (Jan. 2016), <https://deq.mt.gov/files/Energy/EnergizeMT/Energy%20Assurance/MTENERGYASSURANCEPLAN-final.pdf> (“DEQ has been designated the primary agency in the State's response to energy emergencies.”). DEQ is also required to provide comment on Montana public utilities' long term electricity supply planning before the Montana Public Service Commission, § 69-3-1205(3), MCA, which entails an evaluation “of cost-effective means for the public utility to meet the service requirements of its Montana customers[,]” § 69-3-1204(2)(a)(i), MCA.

43. OCT's letters suggest that this Court's Order states that 100% renewable energy supply is possible today. Montana Renewables at 1; MANG at 1. This Court found that 100% renewable energy is possible by 2050. Order at 80–84. This Court's Order seems to understand that an immediate change prohibiting GHG emissions is impractical. This interpretation also ignores that the rapid siting, development, and construction of renewable energy cannot be completed absent other environmental (wildlife, water) protections afforded to the state and its

citizens, as well as other contractual obligations (interconnection agreements, Federal Energy Regulatory Commission approval).

44. This Court’s findings regarding the transition to 100% renewable energy supply still lack important findings on issues like reliability. The energy consulting group Energy + Environmental Economics (“E3”) found in 2019 for Montana and other states in the Northwestern United States “absent technological breakthroughs, achieving 100% GHG reductions using only wind, solar, hydro, and energy storage is both impractical and prohibitively expensive.” E3, *Resource Adequacy in the Pacific Northwest*, i (March 2019) (Ex. I). E3 noted that land use implications and reliability standards would be impediments to complete decarbonization in places like Montana. *Id.* at 67–74. While this Court’s Order discusses land use concerns, it did not address the reliability of Montana’s electric grid if 100% transition to renewables were to occur. Order at 80–84. Without a discussion of this important subject of reliability, this Court cannot really address the subject of whether a 100% transition to renewables would be possible while maintaining other legal requirements like North American Electric Reliability Corporation (“NERC”) Standards. See NERC, *Reliability Standards* (last visited Oct. 9, 2023), <https://www.nerc.com/pa/Stand/Pages/ReliabilityStandards.aspx>.

45. A true and correct copy of E3’s study titled Resource Adequacy in the Pacific Northwest from March 2019 is attached as Exhibit I.

46. The Montana legislature has passed statutes guiding Montana utilities' acquisition of electricity supply resources. *See* § 69-3-1201 to -1209, MCA; *see also* § 38.5.38.5.2016–2025 (the Montana Public Service Commission's administrative rules on the subject). Included within these requirements is “an evaluation of the full range of cost-effective means for the public utility to meet the service requirements of its Montana customers[.]” Section 69-3-1204, MCA; *see also* § 69-3-201, MCA(“Every public utility is required to furnish reasonably adequate service and facilities.”). Thus, Montana law requires utilities to acquire resources with reliability as a priority, which is not addressed by this Court's Order regarding the transition to 100% renewable energy.

I hereby declare that under the penalty of perjury that the foregoing is true and correct to the best of my knowledge.

DATED this 16<sup>th</sup> day of October, 2023.

/s/ Sonja Nowakowski  
SONJA NOWAKOWSKI

## EXHIBITS

- EXHIBIT A OCT's letter dated September 29, 2023, titled "RE: Montana Youth's Demand Letter and Comments on DEQ's Preliminary Determination on Permit Application MAQP #5263-02, Montana Renewables LLC"
- EXHIBIT B OCT's letter dated September 29, 2023, titled "Montana Youth's Demand Letter and Comments on DEQ's Preliminary Determination on Permit Application MAQP #2930-07, Montana Air National Guard"
- EXHIBIT C DEQ's Final Environmental Impact Statement ("EIS") for TransCanada's Keystone XL Pipeline Project (Aug. 26, 2011)
- EXHIBIT D Montana Department of Environmental Quality's Final Environmental Impact Statement for Southern Montana Electric Generation and Transmission Cooperative, Inc.'s Highwood Generating Station (Jan. 2007)
- EXHIBIT E DEQ's Draft EIS of Bull Mountain Development Company, LLC's Roundup Power Project (Nov. 2002)
- EXHIBIT F DEQ's Final EIS of Bull Mountain Development Company, LLC's Roundup Power Project (Jan. 2002)
- EXHIBIT G MEIC's Affidavit and Petition for Hearing and Stay of Permit Issuance challenging Continental Energy Services, Inc's Silver Bow Generation Plant (March 29, 2002)
- EXHIBIT H MEIC's comments on DEQ's draft Environmental Assessment for Laurel Generating Station (MAQP: #5261-00) (June 30, 2023)
- EXHIBIT I Energy + Environmental Economics, *Resource Adequacy in the Pacific Northwest* (March 2019)

## Exhibit A

Our Children's Trust's Demand Letter and Comments on DEQ's Preliminary  
Determination on Permit Application MAQP #5263-02, Montana Renewables LLC  
(Sept. 29, 2023)



September 29, 2023

*Submitted via email only*

DEQ-ARMB-Admin@mt.gov  
Montana Department of Environmental Quality  
1520 E 6th Avenue  
Helena, MT 59601

**RE: Montana Youth's Demand Letter and Comments on DEQ's Preliminary Determination on Permit Application MAQP #5263-02, Montana Renewables LLC**

To Montana Department of Environmental Quality:

On behalf of the 16 youth Plaintiffs in the constitutional climate case *Held v. State of Montana* (CDV-2020-307), Our Children's Trust respectfully submits this demand letter and comments on DEQ's preliminary determination on Permit Application MAQP #5263-02 for applicant Montana Renewables LLC.<sup>1</sup> As you are presumably aware, DEQ cannot simply defy the Montana Constitution and the August 14, 2023 Order in *Held v. State of Montana* declaring the Montana Environmental Policy Act Limitation (MEPA Limitation), § 75-1-201(2)(a), MCA, unconstitutional and permanently enjoining DEQ from implementing it. *Held*, CDV-2020-307, \*102 (1st Jud. Dist., Aug. 14, 2023). The August 14 Order in *Held* is in full force and effect and is binding on DEQ—one of the Defendants in the case. As a result, DEQ cannot continue to rely on § 75-1-201(2)(a), MCA, as a basis for failing to analyze the greenhouse gas (GHG) emissions from the proposed project, and the impacts of the proposed project on climate change, Montana's environment and natural resources, and Montana's youth. As DEQ staff admitted during their depositions, the agency must comply with Montana's Constitution and court orders interpreting the Constitution. Defying a Court Order constitutes contempt of court and is sanctionable conduct. § 3-1-501(1)(e), MCA.

**Every additional fossil fuel permit approved by DEQ that causes an increase in GHG emissions is a violation of the constitutional rights of the youth Plaintiffs in *Held*. Every ton of GHG emissions exacerbates the injuries and constitutional violations the Plaintiffs are already suffering. Fortunately, as the undisputed facts in *Held* established, Montana can transition to 100% clean renewable energy—thereby mitigating the enormous harms caused to Montana's youth and saving Montanans billions of dollars in avoidable costs caused by reliance on fossil fuels. *Held* Order at 80-84.**

For the reasons outlined herein, DEQ must substantially revise its Environmental Assessment and preliminary determination on Permit Application MAQP #5263-02 to comply with the August 14, 2023 Order in *Held v. State of Montana*. Absent such corrections, DEQ must explain why they should not be held in contempt of court for defying a court order.

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<sup>1</sup> These comments should be included in the administrative record for MAQP #5263-02.

## **I. The Proposed Project Will Burn Fossil Fuels and Release GHG Emissions.**

DEQ's Environmental Assessment and preliminary determination on Permit Application MAQP #5263-02 admit that if approved, the permitted activities will burn fossil fuels, including natural gas, distillate fuel oil, and diesel. *See* MAQP Analysis, Montana Renewables LLC, MAQP #5263-02, 11, 37, 38 (Sept. 14, 2023). Burning fossil fuels, of course, results in the release of GHG emissions, as DEQ admits. DEQ, Environmental Assessment for MAQP #5263-02, 9. While the Environmental Assessment and MAQP Analysis includes an emissions inventory for many pollutants, it explicitly excludes GHGs on the emissions inventory table, instead listing GHGs as "N/A". *Id.* Contrary to the *Held* Order, there is no analysis about how the proposed project will contribute to climate change, harm Montana's youth, or comply with Montana's Constitution. *Held* Order at 102 ("By prohibiting analysis of GHG emissions and corresponding impacts to the climate, as well as how additional GHG emissions will contribute to climate change or be consistent with the Montana Constitution, the MEPA Limitation violates Youth Plaintiffs' right to a clean and healthful environment and is unconstitutional on its face."). DEQ is unconstitutionally failing to quantify and disclose the GHG emissions associated with the proposed permit and the resulting harm to the climate system, Montana's environment and natural resources, and Montana's children.

## **II. The MEPA Limitation, § 75-1-201(2)(a), MCA, Has Been Declared Unconstitutional and DEQ Is Permanently Enjoined from Enforcing It.**

DEQ admits that it is aware of the August 14, 2023 Order in *Held v. State of Montana*, yet ignores the detailed findings of fact, conclusions of law, and injunctive relief, in the Order. DEQ, Environmental Assessment for MAQP #5263-02, 17 ("DEQ is aware of the recent opinion in *Held v. State*"). The Court unequivocally declared § 75-1-201(2)(a), MCA, unconstitutional and enjoined Defendants, including DEQ, from implementing or relying on the MEPA Limitation. The Court held the MEPA Limitation, § 75-1-201(2)(a), MCA, "unconstitutional and is permanently enjoined." *Held* Order at 102. The Court further enjoined DEQ, "prohibiting Defendants from acting in accordance with the statutes declared unconstitutional." *Id.*

While Defendants have filed their notice of appeal to the Montana Supreme Court, the District Court's judgment has not been stayed. Montana Rule of Civil Procedure 62 clearly states that a court-ordered injunction is not stayed, even if an appeal is taken. M. R. Civ. P. 62(a)(1). In the meantime, the Court's Order is valid and enforceable, if necessary, through enforcement and contempt proceedings in the District Court. *See, e.g., State ex rel. Kaasa v. Dist. Ct. of Seventeenth Jud. Dist., In & For Phillips Cnty.*, 177 Mont. 547, 550, 582 P.2d 772, 774 (1978) (District Court "has the power to enforce the judgment already entered by contempt proceedings" even if an appeal is pending); *Valley Unit Corp. v. City of Bozeman*, 232 Mont. 52, 54–55, 754 P.2d 822 (1988) (affirming District Court's contempt order after a motion to show cause was filed).

DEQ cites two cases in support of its position that it can ignore the District Court's August 14 Order. DEQ, Environmental Assessment for MAQP #5263-02, 17. But both cases are easily distinguishable. *Whitehall Wind, LLC v. Montana Pub. Serv. Comm'n*, 2010 MT 2, ¶1, 355 Mont. 15, 223 P.3d 907, concerned judicial review of a Public Service Commission (PSC) order in a rate-setting case. There the Supreme Court held that the PSC did not need to recalculate the appropriate

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Defendants cite no authority to support their untenable position that they can continue to implement a statute that has been declared unconstitutional. DEQ's blatant disregard for the August 14, 2023 Order in *Held v. State of Montana* is contempt of court. § 3-1-501(1)(e), MCA (contempt of the court includes "disobedience of any lawful judgment, order, or process of the court"). Indeed, just three months ago, the State of Montana, Governor Gianforte, and the Montana Department of Public Health and Human Services, were found to be in contempt of Court for failing to comply with a District Court order declaring a statute unconstitutional and enjoining it from being implemented. *Marquez v. State of Montana*, DV 21-873 (13th Jud. Dist., June 26, 2023). According to the District Court, Defendants "repeatedly disobeyed a lawful order from this Court, showing their contempt for this judicial body and the judicial system as a whole. . . . Defendants acted in total disregard for this Court and the established procedures of the judicial branch of government." *Id.* at \*8, 9. The *Held* plaintiffs are experiencing grave constitutional injuries, harms that are compounded daily by DEQ's failure to comply with the August 14, 2023 Order in *Held v. State of Montana*.

### **III. The Youth Plaintiffs in *Held*, and Other Montana Children, Are Being Gravely Injured by DEQ's Fossil Fuel Permitting Activities and DEQ Cannot Act so as to Further Violate Their Constitutional Rights.**

The August 14 Order in *Held v. State of Montana* set forth detailed findings of fact and conclusions of law relating to Montanans' fundamental rights, including their right to a clean and healthful environment. The Order also made detailed factual findings related to the basic science of climate change; the irrefutable connection between fossil fuel extraction, transportation, and combustion and the observed planetary warming and attendant consequences; and the array of serious harm that climate change has already caused and will increasingly cause to Montana's environment and citizens. Importantly, based on the testimony of the youth Plaintiffs and their experts at trial, the Court also detailed how the 16 youth Plaintiffs are already suffering grave injuries as a result of Defendants' (including DEQ's) historic and ongoing approval of fossil fuel

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<sup>2</sup> In fact DEQ, through its counsel, repeatedly argued that Plaintiffs should have challenged individual agency actions pursuant to the Montana Administrative Procedure Act. That argument was rejected by the Court. *Held v. State of Montana*, CDV-2020-307, \*22-24 (1st Jud. Dist., Aug. 4, 2021) (order on motion to dismiss) (holding that Plaintiffs do not need to bring a challenge pursuant to the Montana Administrative Procedures Act).

activities. The Court made clear that these injuries will get worse if fossil fuel activities continue. Based on the uncontested evidence presented at trial, the Court found that:

89. Until atmospheric GHG concentrations are reduced, extreme weather events and other climactic events such as drought and heatwaves will occur more frequently and in greater magnitude, and Plaintiffs will be unable to live clean and healthy lives in Montana.

92. Every ton of fossil fuel emissions contributes to global warming and impacts to the climate and thus increases the exposure of Youth Plaintiffs to harms now and additional harms in the future.

98. According to the Intergovernmental Panel on Climate Change (IPCC), “Climate change is a threat to human well-being and planetary health (*very high confidence*). . . . There is a rapidly closing window of opportunity to secure a liveable and sustainable future for all (*very high confidence*). . . . The choices and actions implemented in this decade will have impacts now and for thousands of years (*high confidence*).”

101. Dr. Byron provided expert testimony that climate change and the air pollution associated with it are negatively affecting children in Montana, including Youth Plaintiffs, with a strong likelihood that those impacts will worsen in the absence of aggressive actions to mitigate climate change. Dr. Byron outlined ways in which climate change is already creating conditions that are harming the health and well-being of the Youth Plaintiffs. Dr. Byron testified that reducing fossil fuel production and use, and mitigating climate change now, will benefit the health of the Youth Plaintiffs now and for the rest of their lives.

104. Children are uniquely vulnerable to the consequences of climate change, which harms their physical and psychological health and safety, interferes with family and cultural foundations and integrity, and causes economic deprivations.

108. The physical and psychological harms are both acute and chronic and accrue from impacts to the climate such as heat waves, droughts, wildfires, air pollution, extreme weather events, the loss of wildlife, watching glaciers melt, and the loss of familial and cultural practices and traditions.

138. The unrefuted testimony at trial established that climate change is a critical threat to public health.

139. Actions taken by the State to prevent further contributions to climate change will have significant health benefits to Plaintiffs.

140. Anthropogenic climate change is impacting, degrading, and depleting Montana’s environment and natural resources, including through increasing temperatures, changing precipitation patterns, increasing droughts and

aridification, increasing extreme weather events, increasing severity and intensity of wildfires, and increasing glacial melt and loss.

141. Climate change impacts result in hardship to every sector of Montana's economy, including recreation, agriculture, and tourism.

193. The science is clear that there are catastrophic harms to the natural environment of Montana and Plaintiffs and future generations of the State due to anthropogenic climate change. . . . The degradation to Montana's environment, and the resulting harm to Plaintiffs, will worsen if the State continues ignoring GHG emissions and climate change.

Based on the compelling factual record presented by Plaintiffs and their experts, the Court held, as a conclusion of law, that:

50. Montana's climate, environment, and natural resources are unconstitutionally degraded and depleted due to the current atmospheric concentration of GHGs and climate change.

The Defendants, including DEQ, were provided the opportunity to present evidence refuting these factual findings, but they did not. The Court made clear that the MEPA Limitation, § 75-1-201(2)(a), MCA, (and § 75-1-201(6)(a)(ii), MCA) infringe Plaintiffs' fundamental right to a clean and healthful environment (as well as their fundamental rights to equal protection, dignity, liberty, health and safety, and public trust resource rights stemming from harm to Montana's environment). The Court declared § 75-1-201(2)(a), MCA, and § 75-1-201(6)(a)(ii), MCA, facially unconstitutional and permanently enjoined their enforcement.

The Court also made important findings of fact both detailing how the MEPA Limitation, § 75-1-201(2)(a), MCA, is harming Plaintiffs; and once declared unconstitutional, Defendants, including DEQ, can calculate GHG emissions from proposed projects, as they did before the MEPA Limitation was first passed into law in 2011. As determined by the Court:

194. The unrefuted testimony established that Plaintiffs have been and will continue to be harmed by the State's disregard of GHG pollution and climate change pursuant to the MEPA Limitation.

214. It is possible to calculate the amount of CO<sub>2</sub> and GHG emissions that results from fossil fuel extraction, processing and transportation, and consumption activities that are authorized by Defendants.

257. If the MEPA Limitation is declared unconstitutional, state agencies will be capable of considering GHG emissions and the impacts of projects on climate change.

259. Defendants' application of the MEPA Limitation during environmental review of fossil fuel and GHG-emitting projects, prevents the availability of vital

information that would allow Defendants to comply with the Montana Constitution and prevent the infringement of Plaintiffs' rights.

In sum, the MEPA Limitation has been declared unconstitutional, and therefore, DEQ must now calculate the GHG emissions that will result from proposed projects, including the project proposed by Montana Renewables LLC, just as DEQ calculates the emissions for other pollutants that will result from the proposed project. **Importantly, because the Court held that Plaintiffs' constitutional rights are already being violated due to the current atmospheric concentration of GHG emissions and resulting climate harms, it is incumbent upon DEQ, before issuing permits that will result in additional GHG emissions, to establish that the proposed project will not further violate Plaintiffs' constitutional rights.**

Should DEQ need a reminder that it has the authority to deny permits, the Court in *Held v. State of Montana* made this clear, holding as conclusions of law that:

18. Defendants can alleviate the harmful environmental effects of Montana's fossil fuel activities through the lawful exercise of their authority if they are allowed to consider GHG emissions and climate change during MEPA review, which would provide the clear information needed to conform their decision-making to the best science and their constitutional duties and constraints, and give them the necessary information to deny permits for fossil fuel activities when inconsistent with protecting Plaintiffs' constitutional rights.

22. Permitting statutes give the State and its agents discretion to deny permits for fossil fuel activities.

24. [T]his Court clarifies that Defendants do have discretion to deny permits for fossil fuel activities that would result in unconstitutional levels of GHG emissions, unconstitutional degradation and depletion of Montana's environment and natural resources, or infringement of the constitutional rights of Montanans and Youth Plaintiffs.

The constitutional rights of Montana's youth, including the *Held* Plaintiffs, are currently being violated, in part, due to DEQ's historic and ongoing permitting of fossil fuels activities. To address these constitutional violations, sixteen brave Montanans' took their state to Court and on August 14, 2023 won an historic victory. Now, instead of working to alleviate the ongoing harms to Montana's children, DEQ is choosing to deliberately ignore a binding order from Montana's judiciary. Such deliberate disregard for the rule of law not only risks having DEQ continue to approve dangerous fossil fuels projects exacerbating the youth Plaintiffs' constitutional injuries, but is an affront to our constitutional democracy. DEQ must amend its Environmental Assessment and preliminary determination on Permit Application MAQP #5263-02 to comply with the legally binding August 14, 2023, Order in *Held v. State of Montana*, as outlined herein, or explain why it should not be held in contempt of court.

We would be pleased to meet with you and your counsel to discuss the ruling in *Held v. State of Montana*, 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. Please send us a response to this demand letter and comments no later than October 13, 2023

Sincerely,

A handwritten signature in black ink, appearing to read "Nate Bellinger", is written over a horizontal line.

Nathan Bellinger  
Counsel for Plaintiffs in *Held v. State of Montana*  
Our Children's Trust  
P.O. Box 5181  
Eugene, OR 97405  
[nate@ourchildrenstrust.org](mailto:nate@ourchildrenstrust.org)

## Exhibit B

Our Children's Trust's Demand Letter and Comments on DEQ's Preliminary  
Determination on Permit Application MAQP #2930-07, Montana Air National  
Guard (Sept. 29, 2023)



September 29, 2023

*Submitted via email only*

DEQ-ARMB-Admin@mt.gov  
Montana Department of Environmental Quality  
1520 E 6th Avenue  
Helena, MT 59601

**RE: Montana Youth's Demand Letter and Comments on DEQ's Preliminary Determination on Permit Application MAQP #2930-07, Montana Air National Guard**

To Montana Department of Environmental Quality:

On behalf of the 16 youth Plaintiffs in the constitutional climate case *Held v. State of Montana* (CDV-2020-307), Our Children's Trust respectfully submits this demand letter and comments on DEQ's preliminary determination on Permit Application MAQP #2930-07 for applicant Montana Air National Guard.<sup>1</sup> As you are presumably aware, DEQ cannot simply defy the Montana Constitution and the August 14, 2023 Order in *Held v. State of Montana* declaring the Montana Environmental Policy Act Limitation (MEPA Limitation), § 75-1-201(2)(a), MCA, unconstitutional and permanently enjoining DEQ from implementing it. *Held*, CDV-2020-307, \*102 (1st Jud. Dist., Aug. 14, 2023). The August 14 Order in *Held* is in full force and effect and is binding on DEQ—one of the Defendants in the case. As a result, DEQ cannot continue to rely on § 75-1-201(2)(a), MCA, as a basis for failing to analyze the greenhouse gas (GHG) emissions from the proposed project, and the impacts of the proposed project on climate change, Montana's environment and natural resources, and Montana's youth. As DEQ staff admitted during their depositions, the agency must comply with Montana's Constitution and court orders interpreting the Constitution. Defying a Court Order constitutes contempt of court and is sanctionable conduct. § 3-1-501(1)(e), MCA.

**Every additional fossil fuel permit approved by DEQ that causes an increase in GHG emissions is a violation of the constitutional rights of the youth Plaintiffs in *Held*. Every ton of GHG emissions exacerbates the injuries and constitutional violations the Plaintiffs are already suffering. Fortunately, as the undisputed facts in *Held* established, Montana can transition to 100% clean renewable energy—thereby mitigating the enormous harms caused to Montana's youth and saving Montanans billions of dollars in avoidable costs caused by reliance on fossil fuels. *Held* Order at 80-84.**

For the reasons outlined herein, DEQ must substantially revise its Environmental Assessment and preliminary determination on Permit Application MAQP #2930-07 to comply with the August 14, 2023 Order in *Held v. State of Montana*. Absent such corrections, DEQ must explain why they should not be held in contempt of court for defying a court order.

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<sup>1</sup> These comments should be included in the administrative record for MAQP #2930-07.

## **I. The Proposed Project Will Burn Fossil Fuels and Release GHG Emissions.**

DEQ's Environmental Assessment and preliminary determination on Permit Application MAQP #2930-07 admit that if approved, the permitted activities will burn fossil fuels, including natural gas and diesel. *See* MAQP Analysis, Montana Air National Guard, MAQP #2930-07, 2 (Sept. 15, 2023). Burning fossil fuels, of course, results in the release of GHG emissions. While the Environmental Assessment includes an emissions inventory for many pollutants, it explicitly excludes GHGs on the emissions inventory table, instead listing GHGs as "N/A". DEQ, Draft Environmental Assessment for MAQP #2930-07, 24. Contrary to the *Held* Order, there is no analysis about how the proposed project will contribute to climate change, harm Montana's youth, or comply with Montana's Constitution. *Held* Order at 102 ("By prohibiting analysis of GHG emissions and corresponding impacts to the climate, as well as how additional GHG emissions will contribute to climate change or be consistent with the Montana Constitution, the MEPA Limitation violates Youth Plaintiffs' right to a clean and healthful environment and is unconstitutional on its face."). DEQ is unconstitutionally failing to quantify and disclose the GHG emissions associated with the proposed permit and the resulting harm to the climate system, Montana's environment and natural resources, and Montana's children.

## **II. The MEPA Limitation, § 75-1-201(2)(a), MCA, Has Been Declared Unconstitutional and DEQ Is Permanently Enjoined from Enforcing It.**

In a different Environmental Assessment, DEQ has admitted that it is aware of the August 14, 2023 Order in *Held v. State of Montana*, yet ignores the detailed findings of fact, conclusions of law, and injunctive relief, in the Order. *See* DEQ, Environmental Assessment for MAQP #5263-02, 17 ("DEQ is aware of the recent opinion in *Held v. State*"). The Court unequivocally declared § 75-1-201(2)(a), MCA, unconstitutional and enjoined Defendants, including DEQ, from implementing or relying on the MEPA Limitation. The Court held the MEPA Limitation, § 75-1-201(2)(a), MCA, "unconstitutional and is permanently enjoined." *Held* Order at 102. The Court further enjoined DEQ, "prohibiting Defendants from acting in accordance with the statutes declared unconstitutional." *Id.*

While Defendants have filed their notice of appeal to the Montana Supreme Court, the District Court's judgment has not been stayed. Montana Rule of Civil Procedure 62 clearly states that a court-ordered injunction is not stayed, even if an appeal is taken. M. R. Civ. P. 62(a)(1). In the meantime, the Court's Order is valid and enforceable, if necessary, through enforcement and contempt proceedings in the District Court. *See, e.g., State ex rel. Kaasa v. Dist. Ct. of Seventeenth Jud. Dist., In & For Phillips Cnty.*, 177 Mont. 547, 550, 582 P.2d 772, 774 (1978) (District Court "has the power to enforce the judgment already entered by contempt proceedings" even if an appeal is pending); *Valley Unit Corp. v. City of Bozeman*, 232 Mont. 52, 54–55, 754 P.2d 822 (1988) (affirming District Court's contempt order after a motion to show cause was filed).

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Sincerely,

A handwritten signature in black ink, appearing to read "Nate Bellinger", is written over a horizontal line.

Nathan Bellinger  
Counsel for Plaintiffs in *Held v. State of Montana*  
Our Children's Trust  
P.O. Box 5181  
Eugene, OR 97405  
[nate@ourchildrenstrust.org](mailto:nate@ourchildrenstrust.org)