

IN THE SUPREME COURT OF THE STATE OF MONTANA
No. DA 23-0225

MONTANA ENVIRONMENTAL INFORMATION CENTER
& SIERRA CLUB,

Plaintiffs / Appellees / Cross-Appellants,

v.

MONTANA DEPARTMENT OF ENVIRONMENTAL QUALITY
& NORTHWESTERN CORPORATION,

Defendants / Appellants / Cross-Appellees

and

STATE OF MONTANA, BY AND THROUGH THE
OFFICE OF THE ATTORNEY GENERAL,

Intervenor-Defendant-Appellant.

***AMICUS CURIAE BRIEF OF THE 16 YOUTH PLAINTIFFS IN HELD v.
STATE OF MONTANA IN SUPPORT OF PLAINTIFFS-APPELLEES***

On Appeal from the Montana Thirteenth Judicial District Court
Yellowstone County, Cause No. DV 21-1307, Honorable Michael G. Moses

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INTEREST OF AMICI CURIAE

Amici curiae are the sixteen Montana Youth Plaintiffs in the constitutional climate case, *Held v. State of Montana*, No. CDV-2020-307 (Mont. First Jud. Dist. Ct. Aug. 14, 2023), on appeal to this Court, No. DA 23-0575: Rikki Held, Lander Busse, Sariel Sandoval, Kian Tanner, Georgianna Fischer, Kathryn Grace Gibson-Snyder, Olivia Vesovich, Claire Vlases, Taleah Hernández, Badge B., Eva L., Mica K., Jeffrey K., Nathaniel K., Ruby D., and Lilian D. Youth *Amici* are now between the ages of six and twenty-two years old and are from across the state of Montana. The Youth Plaintiffs are represented in *Held v. State of Montana* by Our Children’s Trust, McGarvey Law, and the Western Environmental Law Center.

After a seven-day trial in June 2023, the district court issued its Findings of Fact, Conclusions of Law, and Order in favor of the Youth Plaintiffs. Based on an extensive trial record, including ten testifying experts and fourteen fact witnesses, including twelve testifying Youth Plaintiffs, the district court declared the Montana Environmental Policy Act’s (“MEPA”) Climate Limitation, § 75-1-201(2)(a), MCA, unconstitutional and permanently enjoined its implementation. *Held v. State of Montana*, No. CDV-2020-307, Findings of Fact, Conclusions of Law, and Order, Doc. 405 at 102 (Aug. 14, 2023). The district court also declared unconstitutional and enjoined the newly enacted § 75-1-201(6)(a)(ii), MCA (2023), which aimed to preclude equitable judicial relief for MEPA violations. *Id.* The district court found

that the greenhouse gas (“GHG”) emissions resulting from permits for fossil fuel activities issued by the Department of Environmental Quality (“DEQ”) and other government defendants, with no analysis of that pollution, were causing grave harms *today* to the Youth Plaintiffs’ health and well-being, and to Montana’s environment and natural resources, harms that are undisputed in the extensive trial record. *See id.* at 28, 29, 46, 69, 70, 72, 74-80, 86-87, 98-100.

Youth *Amici* have a unique and significant interest in: (1) ensuring that no new fossil fuel infrastructure—like the Laurel Generating Station gas power plant, now known as the Yellowstone County Generating Station, at issue in this appeal, which was permitted during the pendency of Youth *Amici*’s case against DEQ—is allowed to proceed given the significant harms resulting from additional GHG pollution in Montana; (2) ensuring that DEQ appropriately and consistently analyzes the environmental and human health effects of additional GHG pollution, including impacts to the climate and children, before issuing or making operable any air quality permit; and (3) alerting this Court to the need to review the constitutionality of the MEPA Climate Limitation, § 75-1-201(2)(a), MCA, in Youth *Amici*’s pending case, *Held v. State of Montana* (DA 23-0575), with the benefit of the extensive Findings and Fact and Conclusions of Law of the district court in their case.

INTRODUCTION AND SUMMARY OF ARGUMENT

Although presently escaping review of deleterious climate impacts, every additional ton of GHG pollution permitted by state agencies in Montana is aggravating existing constitutional injuries to Montana's children. Air pollution from the new 175-megawatt gas-fired power plant being built by NorthWestern—if allowed to operate under DEQ's unlawfully issued air quality permit—will unequivocally harm children, including Youth *Amici* Rikki, Lander, Sariel, Kian, Georgianna, Grace, Olivia, Claire, Taleah, Badge, Eva, Mica, Jeffrey, Nathaniel, Ruby, and Lilian, locking in more injuries to their lungs and the environment their lives depend upon, which is heating up, drying out, burning, and losing the water resources essential to Montanans' health. NorthWestern intends to spew into the air 769,706 tons of GHG pollution per year over the next 33 years (totaling 25,400,298 tons over the project's lifetime) and can only do so because of the permit DEQ issued in August 2021—after these Youth *Amici* sued DEQ for constitutional violations—and with zero consideration of the project's effects on the children of the State and their constitutional rights. Those 33 years of cumulative air pollution will outlive every one of these Youth *Amici* because the carbon dioxide molecules will linger for millennia, heating up the planet and degrading Montana's unique and precious environment.

MEPA is an essential component of the statutory framework the legislature has adopted to implement the Constitution's environmental protections. As the Plaintiffs/Appellees argue in their brief, the DEQ never should have approved the air quality permit at issue in this appeal without a proper GHG and climate analysis under MEPA. Absent that required analysis the permit is *void ab initio*.

Youth *Amici* come before this Court to support: (1) judicial recognition that the permit is *void ab initio*, (2) immediate permit vacatur on the statutory grounds presented by Plaintiffs/Appellees and adopted by the district court, or (3) at minimum a stay of the permit, pending this Court's decision on the threshold constitutional questions concerning the MEPA Climate Limitation and § 75-1-201(6)(a)(ii) fully presented in *Held v. State of Montana*, No. DA 23-0575. If the district court in *Held* is upheld, then the air quality permit at issue in the instant case, issued without the constitutionally requisite review, is invalid. In the meantime, this Court is able to affirm the District Court in the instant case without addressing the constitutional question, as Plaintiffs/Appellees urge and consistent with the District Court's constitutional avoidance decision.

ARGUMENT

I. Children are Uniquely Vulnerable to and Disproportionately Harmed by Climate Change Resulting from the Development and Combustion of Fossil Fuels

Children are uniquely vulnerable to and disproportionately harmed by the

dangerous effects of fossil fuel emissions and ensuing climate change.¹ Children’s still-developing bodies; unique behavioral patterns; higher intake of air, food, and water per unit of body weight; dependence on caregivers; political powerlessness; and inheritance of the worst of the increasing harms of climate change all contribute to making them more susceptible compared to adults.²

Dangerous air quality caused directly by the development and combustion of fossil fuels, and by the increased incidence of wildfires from the resulting climate change, contribute to adverse health impacts, including respiratory infections, increased emergency room visits and hospital admissions, and premature deaths.³

Children are particularly vulnerable to air pollutants because they breathe more air

¹ The multitude of grave harms to the Youth Plaintiffs’ health and well-being are undisputed in the extensive trial record now before this Court in *Held*, which is subject to separate review. *See Held Order, supra*, at p. 2. Moreover, the scholarly literature copiously documents these harms. *See, e.g.*, Frederica Perera & Kari Nadeau, *Climate Change, Fossil-Fuel Pollution, and Children’s Health*, 386 *New Eng. J. Med.* 2303, 2308 (2022).

² *See* Samantha Ahdoot, Susan E. Pacheco & Council on Environmental Health, *Global Climate Change and Children’s Health*, 136 *Pediatrics* e1468 (2015); Rebecca Pass Philipsborn & Kevin Chan, *Climate Change and Global Child Health*, 141 *Pediatrics* e20173774 (2018); Wim Thiery et al., *Intergenerational Inequities in Exposure to Climate Extremes*, 374 *Science* 158 (2021); U.S. EPA, *Climate Change and Children’s Health and Well-Being in the United States* (Apr. 2023).

³ Alexandra Adams et al., *Climate Change and Human Health in Montana – A Special Report of the Montana Climate Assessment*, Montana State University, Institute on Ecosystems (Jan. 2021), http://live-mca-site.pantheonsite.io/sites/default/files/thumbnails/image/2021_C2H2inMT_final.pdf; Perera & Nadeau, *supra* note 1, at 2308.

relative to their body weight than adults, increasing the exposure of their narrow airways, that are already vulnerable to constriction because they are small and developing, to toxins.⁴ Children’s unique behavioral patterns—spending more time outside and closer to the ground, drinking more water and inhaling more air (and therefore more pollution) per pound of body weight—place them at greater risk of harm than adults.⁵ It is estimated that children bear 88% of the global burden of disease attributable to climate change.⁶

The psychological health injuries to children related to climate change are also significant and include elevated levels of anxiety, depression, post-traumatic stress disorder, substance abuse, social disruptions, and a distressing sense of loss.⁷ The U.S. Environmental Protection Agency and mental health experts have identified “climate anxiety” among children as a chronic stressor with adverse effects on

⁴ Perera & Nadeau, *supra* note 1, at 2304.

⁵ U.S. EPA, *Climate Change and Children’s Health*, <https://www.epa.gov/climateimpacts/climate-change-and-childrens-health> (last visited Nov. 28, 2023).

⁶ Ahdoon, Pacheco & Council on Environmental Health, *supra* note 2.

⁷ Susie E. L. Burke et al., *The Psychological Effects of Climate Change on Children*, 20 *Current Psychiatry Reports* (2018); Caroline Hickman et al., *Climate Anxiety in Children and Young People and Their Beliefs About Government Responses to Climate Change: A Global Survey*, 5 *The Lancet Planetary Health* e863 (2021); Xinyao Lian et al., *The Association Between Air Pollutants and Depression in Children and Adolescents: A Systematic Review*, 5 *Env’t Rsch. Comm’n* 102002 (2023).

children's lives.⁸ Climate anxiety and feelings of government betrayal affects youth's everyday lives.⁹

Under current GHG emission pledges, children born in 2020 are expected to face more than a seven-fold increase in overall extreme climate events, such as heat waves, wildfires, crop failures, droughts, and floods, compared to an adult born in 1960.¹⁰ Children are at elevated risk of heat-related illness and death compared to adults,¹¹ as well as uniquely vulnerable to the increasing flooding, storms, and other extreme weather events resulting from fossil fuel-induced climate change.¹²

II. DEQ Did Not Do Its Job and the Air Quality Permit Is *Void Ab Initio* and Should be Vacated to Prevent a Massive Injustice

On March 13, 2020, these sixteen Youth *Amici* filed their Complaint in *Held* for Declaratory and Injunctive Relief against the State of Montana, the Governor, DEQ, and other state agencies responsible for fossil fuel pollution for violating their constitutional rights guaranteed by Article II, Section 3; Article II, Section 4; Article

⁸ Judy Wu et al., *Climate Anxiety in Young People: A Call to Action*, 4 *The Lancet Planetary Health* e435-3436 (2020); U.S. EPA, *supra* note 2.

⁹ Hickman et al., *supra* note 7.

¹⁰ Thiery et al., *supra* note 2, at 158.

¹¹ U.S. EPA, *Climate Change Indicators: Heat-Related Deaths*, <https://www.epa.gov/climate-indicators/climate-change-indicators-heat-related-deaths> (last visited Nov. 28, 2023).

¹² Perera & Nadeau, *supra* note 1, at 2305.

II, Section 15; Article II, Section 17; Article IX, Section 1; Article IX, Section 3 of the Montana Constitution; and the Public Trust Doctrine. *Held v. State of Montana*, No. CDV-2020-307, Complaint for Declaratory and Injunctive Relief, Doc. 1 at 2 (Mar. 13, 2020). They specifically challenged the facial constitutionality of the MEPA Climate Limitation and put DEQ on notice that its refusal to consider, disclose, and analyze the climate change impacts of GHG pollution it permitted was infringing their rights to a clean and healthful environment, liberties, health, safety, dignity, equal protection of the law, and public trust resources. *Id.*; *see also id.* at 92, 102.

During the pendency of the Youth *Amici's* case, DEQ continued to issue permits for fossil fuel activities resulting in GHG pollution, including the air quality permit at issue here. MEIC sued to stop the Laurel Plant from operating. In *Held*, the evidence has been heard at trial and the Youth's rights have been vindicated. The MEPA Climate Limitation DEQ has relied upon since 2011 to ignore GHG pollution in its environmental analyses, while issuing every fossil fuel permit it was asked to issue, has been deemed unconstitutional. *Held v. State of Montana*, No. CDV-2020-307, Findings of Fact, Conclusions of Law, and Order, Doc. 405 at 102 (Aug. 14, 2023). It would be a manifest injustice to the Youth *Amici* for DEQ's unlawfully issued air quality permit to take effect, and to allow GHG pollution to be emitted in amounts that will exacerbate the constitutional injuries already found by a court of

law to be suffered by the Youth *Amici*, all without ever having been analyzed or disclosed by DEQ. As such, the lower court properly vacated the unlawfully issued permit because it was, effectively, “void from the beginning.” *Kadillak v. Anaconda Co.*, 184 Mont. 127, 144, 602 P.2d 147, 157 (1979).

In *Park County*, this Court recognized MEPA compliance is an important component of the State’s constitutionally mandated scheme to prevent unreasonable environmental degradation and held that the “judiciary’s standard remedy for permits or authorizations improperly issued without required procedure is to set them aside.” *Park Cnty. Env’t Council v. Montana Dep’t of Env’t Quality*, 2020 MT 303, ¶ 55, 402 Mont. 168, 477 P.3d 288. In doing so the *Park County* Court cited to several cases, in addition to *Kadillak*, which are instructive here. *See Citizens for Responsible Dev. v. Bd. of Cnty. Comm’rs*, 2009 MT 182, ¶¶ 26-27, 351 Mont. 40, 208 P.3d 876 (the Court “determined that the Board’s decision should be voided” based on County’s unlawful failure to comply with the Montana Subdivision and Platting Act’s environmental review provisions); *Aspen Trails Ranch, LLC. v. Simmons*, 2010 MT 79, ¶ 59, 356 Mont. 41, 230 P.3d 808 (because governing body failed to consider environmental impacts approval was unlawful and “we affirm the District Court’s decision to void the preliminary plat for the Aspen Trails subdivision”).

In *Kadillak* the plaintiffs sued a mining company and various state agencies relating to the establishment and operation of a waste dump containing overburden and discard from open pit mining operations in the vicinity of their residences. *Kadillak*, 184 Mont. at 130, 602 P.2d at 150.¹³ The Department of State Lands issued the requested mining permit to the mining company notwithstanding that the permit application failed to include information necessary for the agency to make an informed decision. Instructive here, the *Kadillak* Court concluded:

For these reasons the permit was invalid. The present mining operations on the 500 acres covered by Permit 41A cannot be continued until an adequate application is made and a valid permit pursuant to the HRMA is issued.

Id. at 140, 602 P.2d at 155.

Here, the Appellants' attempt to impose MEPA's heightened standard for injunctive remedies, § 75-1-201(6)(c), MCA, is neither justified by the statutory language nor congruent the effect of an agency-issued permit which is *void ab initio*.

As explained in *Kadillak*:

Because the [inadequate and incomplete] application was not returned Permit 41A *was void from the beginning* and Anaconda may not continue the mining activities on the Permit 41A area *until a valid permit is granted* by State Lands.

¹³ *Kadillak's* discussion of MEPA was distinguished by this Court in *Park Cnty. Env't Council v. Mont. Dep't of Env't Quality*, 2020 MT 303, ¶ 68, 402 Mont. 168, 477 P.3d 288, which noted subsequent MEPA amendments made clear that the legislature has shaped MEPA as a vehicle for pursuing its constitutional mandate. See §§ 75-1-102(1), (2), (3), MCA.

Id. at 144, 602 P.2d at 157 (emphasis added).

This case compels the same result. Recall, *before* addressing the consequences of DEQ's failure of proper review of the permit application, the district court first determined the merits, holding that MEPA required DEQ to evaluate the direct, secondary, and cumulative effects of the proposed project *within* Montana's borders. Vacatur Order 28–29. And, because the climate consequences of NorthWestern's gas plant are demonstrably significant, DEQ violated MEPA by failing to analyze them thoroughly in an EIS. *See* § 75-1-201(1)(b)(iv), MCA; ARM 17.4.607. Allowing NorthWestern to proceed in the face of a *judicially determined invalid permit* would not only be illogical but would vitiate the fundamental “look before you leap” purpose of MEPA. As this Court has noted, “MEPA’s procedural mechanisms help bring the Montana Constitution’s lofty goals into reality by enabling fully informed and considered decision making, thereby minimizing the risk of irreversible mistakes depriving Montanans of a clean and healthful environment.” *Park Cnty.*, ¶ 70.

In sum, DEQ did not do its job. The air quality permit is *void ab initio* and should be vacated to prevent a massive injustice. Because Youth *Amici* will suffer irreparable harm in the absence of such action, and because such relief would be manifestly in the public's interest, this Court should vacate, or at the very least stay, the unlawfully issued permit pending this Court's resolution of the threshold

constitutional questions concerning the MEPA Climate Limitation at issue in *Held v. State of Montana*, No. DA 23-0575, now pending in this Court.

III. The Constitutional Question of the MEPA Climate Limitation Should Be Decided by this Court in *Held v. State of Montana*.

If this Court accepts NorthWestern’s position that MEPA’s 2011 language foreclosed DEQ’s consideration of Montana-specific climate change impacts, MEIC alternatively plead a challenge to the 2011 MEPA Climate Limitation, § 75-1-201(2)(a), MCA (2011), as unconstitutionally applied to the environmental analysis for the gas power plant’s air quality permit. Appellees’ Opening/Answer Br. at 43-48; Mont. Const. art. II, § 3; art. IX, § 1. Citing the doctrine of constitutional avoidance, the district court declined to decide the constitutional question below. *MEIC v. Mont. Dep’t of Env’t Quality*, No.: DV 21-1307, *29 (Thirteenth Jud. Dist. Ct. Apr. 6, 2023) (“[T]he Court need not address the constitutional questions submitted.”).

As the parties to this proceeding have pointed out,¹⁴ the constitutionality of § 75-1-201(2)(a), MCA (2011), including its 2023 amendments, is now squarely before this Court in *Youth Amici’s* case with a fully developed evidentiary record, a thorough 103 pages of findings of fact and conclusions of law, and should be decided

¹⁴ See Appellees’ Opening/Answer Br. at 34-35, 48; Appellant NorthWestern’s Reply/Answer Br. at 21.

in Youth *Amici's* case with full consideration of the record and district court findings. *Held v. State of Montana*, No. DA 23-0575. If the district court in *Held* is upheld, an application of that precedent by the district court or DEQ in the present action would result in a clear decision that the air quality permit at issue in the instant case is invalid and additional MEPA review would be required.

CONCLUSION

As the district court determined, DEQ failed to do its job in this case. To protect Youth *Amici* and their constitutional rights, as well as the interests of the Plaintiffs/Appellees organizations and their members, the illegally issued air quality permit should be recognized as *void ab initio* and vacated or, at minimum, stayed. Youth *Amici* submit that the constitutional questions regarding the MEPA Climate Limitation should be expeditiously decided in their case now on appeal in *Held* based on their record and the thorough ruling of the district court.

RESPECTFULLY SUBMITTED this 28th day of November, 2023.

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CERTIFICATE OF COMPLIANCE

Pursuant to Rule 11 of the Montana Rules of Appellate Procedure, I certify that this brief is printed with a proportionately spaced Times New Roman text typeface of 14 points; is double spaced; and the word count calculated by Microsoft Word is 3,002 words, excluding those sections exempted under Rule 11(4)(d).

Dated this 28th day of November, 2023.

/s/ Barbara Chillcott
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