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

MONTANA ENVIRONMENTAL INFORMATION CENTER AND SIERRA CLUB,

Plaintiffs / Appellees,

v.

MONTANA DEPARTMENT OF ENVIRONMENTAL QUALITY,

Defendant / Appellant,

and

NORTHWESTERN CORPORATION,

Defendant / Appellant,

and

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

Intervenor-Defendant / Appellant.

MONTANA DEPARTMENT OF ENVIRONMENTAL QUALITY'S OPENING BRIEF

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

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ISSUE PRESENTED FOR REVIEW

1. Is the remedy of vacatur, for violations under the Montana Environmental Policy Act ("MEPA"), subject to the framework provided by § 75-1-201(6)(c), MCA?

STATEMENT OF THE CASE

I. Permit application and approval.

On May 10, 2021, Defendant-Appellant NorthWestern Corporation, doing business as NorthWestern Energy ("NorthWestern"), filed its application with the Defendant-Appellant Montana Department of Environmental Quality ("DEQ") for an air quality permit for the Laurel Generating Station located south of Laurel, Montana. AR001373.[1] The Laurel Generating Station would consist of 18 9.7-megawatt electric ("MWe") reciprocating internal combustion engine ("RICE") generators which would provide a total of 165.8 MWe capacity for the facility. AR001528. Because RICE generators have "rapid-starting capability and fast response times[,]" they are capable of "providing the dynamic operation necessary for critical grid regulation flexibility, dispatchable capacity and ancillary services." AR001533. In other words, RICE generators are capable of quickly increasing and decreasing electrical output to balance out an ever-changing load from intermittent renewables generators like wind and solar facilities and fluctuating customer

[1] NorthWestern filed a revised application on June 9, 2021. AR001521.

demand. *Id.*; *see also* Fed. Energy Reg. Comm'n, *Energy Primer: A Handbook of Energy Market Basics*, 56–57 (2020), https://ferc.gov/sites/default/files/2020-06/energy-primer-2020_0.pdf (further describing the ancillary services required to balance the electrical grid) ("*FERC Energy Primer*").

On July 9, 2021, DEQ issued a draft permit pursuant to the Montana Clean Air Act and draft Environmental Assessment ("EA") pursuant to MEPA. AR001179–1228. DEQ received hundreds of pages of public comments on the draft EA. AR000382–1087. On August 23, 2021, DEQ granted NorthWestern's air quality permit, AR1088–1155, and issued a final EA responding to the public comments received by the agency on the Laurel Generating Station, AR001156–78.

II. District court proceedings.

Plaintiff-Appellees Montana Environmental Information Center and Sierra Club (collectively, "MEIC") challenged DEQ's final EA evaluating the Laurel Generating Station under MEPA. Docs. 1 & 4. MEIC did not, however, challenge DEQ's grant of the air quality permit under the Montana Clean Air Act. *See Mont. Envtl. Info. Ctr. v. Mont. Dep't of Envtl. Quality*, 2005 MT 96, ¶ 22, 326 Mont. 502, 112 P.3d 964 ("a party adversely affected by a Department decision approving or denying an air quality permit may request a hearing before the [Montana Board of Environmental Review] to be conducted pursuant to the

contested case provisions of the MAPA."). MEIC, DEQ, NorthWestern, and the Montana Attorney General filed cross-motions for summary judgment, Docs. 13, 22, 23, 25, and oral argument was held on June 20, 2022, Doc. 40.

On April 6, 2023, the district court issued its order on the cross-motions for summary judgment finding that DEQ had in its final EA adequately addressed the issues of pipeline routing, water quality impacts, aesthetic impacts from noise, miscellaneous aesthetic impacts, and sulfur dioxide emissions. Doc. 49 at 17–27. The district court, however, found that DEQ needed to provide more MEPA analysis on the issues of aesthetic impacts from lighting and greenhouse gas emissions. *Id.* at 23–24, 27–29. The district court, additionally, granted MEIC's request to vacate the permit, *id.* at 32–34, without engaging with the framework provided in § 75-1-201(6)(c), MCA that otherwise would have required the district court to consider, among other things, whether (1) the party requesting the relief will suffer irreparable harm in the absence of the relief; (2) issuance of the relief is in the public interest; and (3) the relief contemplated is as narrowly tailored as the facts allow.

DEQ and NorthWestern filed motions to stay the district court's remedy vacating the permit, Docs. 53 & 59, which MEIC opposed, Doc. 64. After MEIC had filed its response brief in opposition to the motions for stay, but before DEQ and NorthWestern had filed their reply briefs, two important events occurred. First,

this Court issued its decision in *Water for Flathead's Future, Inc. v. Mont. DEQ*, 2023 MT 86, ¶¶ 35–36, 412 Mont. 258, __ P.3d __, *reh'g denied* 2023 Mont. LEXIS 674 ("*Water for Flathead's Future*"), clarifying the remedy of vacatur is subject to the "framework" provided in § 75-1-201(6)(c), MCA. Second, the Montana legislature passed House Bill 971 clarifying that DEQ cannot consider climate change or greenhouse gas emissions in its MEPA analysis. *See* 2023 Mont. Laws ch. 450. To address these new authorities, MEIC filed a motion for leave to file a surreply brief, Doc. 68, which the district court granted, Doc. 71. Citing *Water for Flathead's Future* and House Bill 971, the district court granted DEQ's and NorthWestern's motions for stay. Doc. 77.

On June 1, 2023, DEQ initiated the process of issuing a supplemental EA to address the aesthetic impacts from lighting of the Laurel Generating Station the district court found to be deficient in the August 2021 final EA. *See* Mont. DEQ, *Supplemental EA for Laurel Generating Station Yellowstone County* (Jun. 1, 2023), https://deq.mt.gov/News/publiccomment-folder/AQ-NWE-Laurel-2023-06-01. On June 8, 2023, after it had initiated the process of issuing a supplemental EA on lighting impacts, DEQ filed its notice of appeal. Doc. 74. Therefore, the only issue

presented by DEQ in this appeal is whether the remedy of vacatur is required to adhere to the framework provided in § 75-1-201(6)(c), MCA.[2]

STATEMENT OF THE FACTS

MEIC's argument for why the district court should issue the remedy of vacatur has evolved over the course of this litigation. Initially, without any acknowledgement of § 75-1-201(6)(c), MCA, MEIC argued under *Park Cnty. Envtl. Council v. Mont. DEQ*, 2020 MT 303, 402 Mont. 168, 477 P.3d 288 ("*Park County*"), vacatur is the appropriate remedy for a MEPA violation. Doc. 14 at 1; Doc. 31 at 19–20. But after DEQ pointed out that § 75-1-201(6)(c), MCA requires the district court to engage in specific findings prior to issuing the remedy of vacatur, Doc. 35 at 15–20, MEIC then started to incorrectly claim that DEQ and NorthWestern had waived this issue, Oral Arg. Tr., 30:21–22 (Jun. 20, 2022).

In issuing its order on remedy, the district court adopted MEIC's initial argument that *Park County* permitted vacatur without applying the framework of § 75-1-201(6)(c), MCA. *See* Doc. 49 at 33 (stating that in issuing its *Park County* decision, "[t]he Supreme Court was well aware of the alternative Equitable Relief

[2] Because final judgment had been issued, *see* Doc. 52, and NorthWestern and DEQ had filed their notices of appeal, *see* Docs. 56 & 74, the district court lost jurisdiction to modify its judgment on remedy*, Powers Mfg. Co. v. Leon Jacobs Enters.*, 216 Mont. 407, 411, 701 P.2d 1377, 1380 (1985), necessitating this appeal, *see also* Doc. 68, Ex. 1 at 3 (MEIC asserting "the appropriate Court to consider the effect of [*Water for Flathead's Future*] on this Court's decision, if any, is the Montana Supreme Court.") (emphasis removed).

Requirements raised here by the Defendants."). In its brief supporting its motion for stay, DEQ pointed out, among other things, that the district court's analysis misunderstood the statute at issue in *Park County*. Doc. 60 at 8. In particular, DEQ pointed out the version of the statute at issue in *Park County* explicitly precluded any remedy other than remand, whereas the current version of the statute did allow equitable relief such as vacatur so long as certain requirements had been met. *Id*.

Then, in response to DEQ's motion for stay, MEIC provided an entirely new rationale why § 75-1-201(6)(c), MCA should not apply here. Doc. 64 at 4–6. MEIC argued that use of the word "enjoin" in this statute meant that the requirements of § 75-1-201(6)(c), MCA only apply to injunctive relief and that because vacatur is not injunctive relief, this statute did not apply in this case. *Id*. In DEQ's reply brief—besides alerting the district court of this Court's decision in *Water for Flathead's Future*—it noted that MEIC's newly adopted argument emphasizing the word "enjoin" in subsection (6)(c) would (1) improperly omit "other equitable relief" from the statute; (2) is self-defeating because the remedies for MEPA violations are exclusively provided by subsection (6)(c) and if vacatur is not contemplated by this subsection, then vacatur is an unlawful remedy for MEPA violations; and (3) MEIC had adopted an overly narrow definition of the word enjoin. Doc. 67 at 3–7.

After DEQ filed its reply brief, MEIC filed a motion for leave to file a surreply brief in opposition to NorthWestern's and DEQ's motions for stay wherein it argued the district court should disregard this Court's decision in *Water for Flathead's Future*, in part, because:

> The Court in [*Water for Flathead's Future*] did not address the arguments that plaintiffs make here: that vacatur is a distinct remedy from enjoinder, and MEPA's provision that a court must make certain findings before it may "enjoin the issuance or effectiveness of a license or permit," MCA § 75-1-201(6)(c), does not apply to a decision that an unlawfully issued permit is, effectively, void *ab initio*.

Doc. 68, Ex. 1 at 2 (citing *Kadillak v. Anaconda Co.*, 184 Mont. 127, 144, 602 P.2d 147, 157 (1979)).

In granting DEQ's and NorthWestern's motions for stay, the district court asserted that "[i]n [*Water for Flathead's Future*], the Montana Supreme Court reversed the District Court's vacatur, and determined that it was an *improper remedy* under the current remedial provisions of MEPA" and "the remedial provisions of MEPA limit the Court to providing injunctive relief[.]" Doc. 77 at 4–5 (emphasis added).

SUMMARY OF THE ARGUMENT

While DEQ certainly appreciates that the district court stayed its remedy vacating NorthWestern's permit, the district court still misunderstands the import of § 75-1-201(6)(c), MCA and *Water for Flathead's Future* on the subject of vacatur. This Court did not find in *Water for Flathead's Future* that vacatur was a

categorically improper remedy[3] under § 75-1-201(6)(c), MCA or that this subsection only permits injunctive relief. Instead, this Court found that the district court had "erred by departing from its *framework* [provided in § 75-1-201(6)(c), MCA] and vacating the Permit." *Water for Flathead's Future*, ¶ 36 (emphasis added).

This framework requires a district court to make particular findings before providing equitable relief like vacatur. For instance, the district court must find, among other things, (1) the party requesting the relief will suffer irreparable harm in the absence of the relief; (2) issuance of the relief is in the public interest; and (3) the contemplated relief is as narrowly tailored as the facts allow. Section 75-1-201(6)(c), MCA. The requirements in subsection (6)(c) apply to "other equitable relief" which includes vacatur. *Park County*, ¶ 89 ("Vacatur of the previously issued exploration permit is an *equitable remedy* suitable to the present MEPA violations and we affirm the District Court decision to that effect.") (emphasis added). Thus, vacatur is the type of remedy that may be granted by a district court

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[3] The district court's analysis in *Water for Flathead's Future* noted that after applying the factors in § 75-1-201(6)(c), MCA, that the plaintiffs in that case would not suffer irreparable harm in the absence of vacatur and that "vacatur in this instance is 'not narrowly tailored as the facts allow'" meaning under the particular facts in that case vacatur was an improper remedy. *See Water for Flathead's Future, Inc. v. Mont. DEQ*, DV-15-2017-1109(A), Order on Remedies, 5 (Mont. 11th Jud Dist. Ct. Dec. 29, 2021) (App. B). Neither the district court nor this Court ever stated that vacatur was altogether unavailable under § 75-1-201(6)(c), MCA.

for a MEPA violation so long as it adheres to the framework identified by this Court in *Water for Flathead's Future*.

MEIC's most recent argument that use of the word "enjoin" in § 75-1-201(6)(c), MCA precludes application of this subsection to the remedy of vacatur is also wrong. MEIC's argument violates the principle of stare decisis because it fails to assert that this Court's decision in *Water for Flathead's Future* is manifestly wrong. *McDonald v. Jacobsen*, 2022 MT 160, ¶ 30, 409 Mont. 405, 515 P.3d 777 ("In order to justify a departure from stare decisis, the [litigant] must show that [the prior decision] was 'manifestly wrong,' rather than merely one of several 'viable alternatives.'"). Indeed, this Court has already rejected parties' competing applications of canons of textual interpretation as a basis for overturning existing precedent. *McDonald*, ¶ 47; *Estate of Woody v. Big Horn Cnty.*, 2016 MT 180, ¶ 20, 384 Mont. 185, 376 P.3d 127.

MEIC's arguments, additionally, violate § 1-2-101, MCA by attempting to omit "other equitable relief" from this subsection. MEIC's arguments are also self-defeating because, as this Court noted in *Water for Flathead's Future*, the remedies for MEPA violations are exclusively provided by § 75-1-201(6)(c), MCA. *Water for Flathead's Future*, ¶ 35. Thus, if it's the case that vacatur is not encapsulated by subsection (6)(c) as MEIC proposes, then vacatur is not within the exclusive remedies provided by this subsection and is an unlawful remedy for

MEPA violations. This prohibition on vacatur as a remedy for MEPA violations, however, is an inaccurate reading of the statute and this Court need only to reject MEIC's contorted reading of this statute to avoid this outcome.

Finally, requiring courts to provide thoughtful and considered remedies is good policy. Construction of other projects like electricity transmission lines, which MEIC supports,[4] are subject to MEPA and its remedy provisions. This Court should, therefore, reject MEIC's incorrect reading of § 75-1-201(6)(c), MCA that would broadly result in harsh remedies that may unnecessarily disrupt a whole host of projects beyond the project at issue in this case.

ARGUMENT

As discussed above, MEIC's theory of why § 75-1-201(6)(c), MCA should not apply here has changed over the course of this litigation. Accordingly, it is difficult to predict what arguments it might offer on appeal. In any event, this Court should reject MEIC's arguments for why this statute does not apply here for four reasons. First, MEIC's arguments, presented in its surreply brief in opposition to the motions for stay, that the district court should not have adhered to this Court's holding in *Water for Flathead's Future*, *see* Doc. 68, Ex. 1 at 2–3, violates the principle of stare decisis. Second, MEIC's reliance on *Park County* in its initial

[4] Mont. Envtl. Information Center, *Transmission: A Key to a Clean Energy Future* (Mar. 5, 2022), https://meic.org/transmission-a-key-to-a-clean-energy-future/ ("MEIC supports . . . building more transmission[.]").

arguments on the subject, *see* Doc. 14 at 1; Doc. 31 at 19–20, are invalid as demonstrated by this Court's finding in *Water for Flathead's Future*. Third, MEIC's reliance on the word "enjoin" in § 75-1-201(6)(c), MCA to preclude this subsection's application to the remedy of vacatur, *see* Doc. 64 at 4–6, is contrary to the plain text of the statute. Fourth, requiring courts to consider the factors in § 75-1-201(6)(c), MCA prior to granting the remedy of vacatur is good policy.

I. MEIC's arguments violate the principle of stare decisis.

In its surreply brief opposing DEQ's and NorthWestern's motion for stay, MEIC fails to offer any facts that would distinguish *Water for Flathead's Future* from the present case. Doc. 68, Ex. 1 at 2–3.[5] Instead, MEIC asserts that it would provide different arguments—namely, that § 75-1-201(6)(c), MCA contains the word "enjoin" precluding its application to vacatur—than what the appellees in *Water for Flathead's Future* previously presented. *Id*. This Court has said "[t]he principal of stare decisis applies strongly when interpreting statutes; once the Court has placed a construction on statutory language, the Court prefers to leave it to the legislature to amend the law should a change be deemed necessary." *Estate of Woody*, ¶ 20 (citation, brackets, and quotation marks omitted).

[5] Appellees' petition for rehearing filed in *Water for Flathead's Future* largely incorporated MEIC's arguments regarding the word "enjoin" as it pertains to § 75-1-201(6)(c), *see Water for Flathead's Future v. Mont. DEQ*, DA 22-0112, Appellees' Pet. for Reh'g, 1–4 (Mont. Sup. Ct. May 31, 2023), demonstrating that this Court's holding in that case applies with full force here.

To overturn existing precedent, a party must demonstrate the prior decision is “manifestly wrong.” *McDonald*, ¶ 30. Because MEIC offers an alternative statutory interpretation of § 75-1-201(6)(c), MCA, its arguments fall short of showing that *Water for Flathead’s Future* is a manifestly wrong decision. *Id.* (asserting that manifestly wrong does not mean “one of several ‘viable alternatives’”). Indeed, this Court’s reasoning in *McDonald* demonstrates that alternative textual analysis is insufficient to demonstrate that a prior decision is manifestly wrong. *McDonald*, ¶ 47 (“The Secretary’s proposed textual analysis of Section 8(1) does not support the conclusion that *Reichert* was ‘manifestly wrong.’”).

Accordingly, this Court should find that MEIC’s arguments fall short of the “manifestly wrong” standard and follow its precedent in *Water for Flathead’s Future* that the remedy of vacatur is subject to the framework provided in § 75-1-201(6)(c), MCA.

II. *Park Count*y does not preclude application of the current version of § 75-1-201(6)(c), MCA.

MEIC’s argument relying on *Park County* is easily rejected as this Court has already stated that “[t]he current language of § 75-1-201(6)(c), MCA, was not effective at the time of our holding in [*Park County*].” *Water for Flathead's Future*, ¶ 36. As an example of the differences between these two statutes, the 2011 version of the statute at issue in *Park County* only permitted remand as a

remedy. *See Park County*, ¶ 57 ("A court's only remedy … is to remand to the agency to complete its review, with no ability to halt the project in the interim."). By comparison, under the current version of the statute, a court may grant the remedy of vacatur if it adheres to the framework provided in subsection (6)(c). *See* § 75-1-201(6)(c)(ii), MCA ("a court . . . may not enjoin the issuance or effectiveness of a license or permit . . . unless the court specifically finds" certain requirements have been met).

Even when it granted DEQ's and NorthWestern's motions for stay, the district court misunderstood the difference between these two versions of § 75-1-201(6)(c), MCA. For instance, the district court asserted vacatur is "an improper remedy under the current remedial provisions of MEPA" and "the remedial provisions of MEPA limit the Court to providing injunctive relief." Doc. 77 at 4–5. This is inaccurate.

Vacatur—as a form of "other equitable relief"— may be granted so long as a district court follows the framework and process provided in § 75-1-201(6)(c), MCA. In *Water for Flathead's Future*, this Court identified that the district court found that vacatur was not justified under the circumstances of this case, which is different than saying vacatur is altogether unavailable for MEPA violations or that injunctive relief is the only proper remedy under subsection (6)(c). *Compare Water for Flathead's Future, Inc. v. Mont. DEQ*, DV-15-2017-1109(A), Order on

Remedies, 5 (Mont. 11th Jud Dist. Ct. Dec. 29, 2021) (App. B) (noting after applying the factors in § 75-1-201(6)(c) to the particular facts of the case that vacatur was improper), *with Water for Flathead's Future*, ¶ 35 ("The District Court acknowledged that vacatur was improper under these provisions, but nevertheless vacated the Permit based on 'inherent authority' it drew from our decision in [*Park County*].") The requirement to consider factors before granting a remedy shouldn't be particularly foreign or unfamiliar, as district courts are required to consider similar factors prior to issuing preliminary injunctions. *See* § 27-19-201, MCA (amended by 2023 Mont. Laws ch. 43). Requiring a court to make certain findings prior to granting relief cannot be construed to mean that remedy is altogether improper or unavailable.

Additionally, recent legal proceedings have demonstrated that a limited remedy of vacatur is appropriate in some circumstances. For example, in *Mont. Trout Unlimited v. Mont. DEQ*, DV 20-10 (Mont. 14th Jud. Dist. Ct.), the district court, after finding that DEQ provided insufficient analysis under MEPA and the Montana Metal Mine Reclamation Act, approved a stipulation that permitted certain elements of mine construction to go forward, but precluded full operation of the mine. *See Mont. Trout Unlimited v. Mont. DEQ*, DV 20-10, Order Granting Unopposed Joint Mot. to Enter Stipulated Remedy Order (Mont. 14th Jud. Dist. Ct. Jul. 22, 2022) (App. C). Thus, courts are fully capable of fashioning limited and

thoughtful remedies consistent with § 75-1-201(6)(c), MCA when given the opportunity and when they are not blinded with the incorrect notion that complete vacatur must be the default[6] response to MEPA violations.

III. The framework provided in § 75-1-201(6)(c), MCA applies to the remedy of vacatur.

MEIC's argument that the word "enjoin" precludes the application of subsection (6)(c) to the remedy of vacatur is wrong for three reasons. First, relying on the word "enjoin" to preclude the application of § 75-1-201(6)(c)(ii), MCA to vacatur does violence to the plain text of this statute, which states:

> a court having considered the pleadings of parties and intervenors opposing a request for a temporary restraining order, preliminary injunction, permanent injunction, or *other equitable relief* may not enjoin the issuance or effectiveness of a license or permit or a part of a license or permit issued pursuant to Title 75 or Title 82 unless the court specifically finds [several criteria have been satisfied].

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[6] The federal Administrative Procedure Act states that incorrect agency decisions will be "set aside[,]" 5 U.S.C. § 706(2), which is why vacatur is sometimes viewed as the default or standard remedy, *Hoosier Env't Council v. Nat. Prairie Ind. Farmland Holdings, LLC*, 2023 U.S. Dist. LEXIS 46257, *7, 2023 WL 2571678 (N.D. Ind. Mar. 20, 2023); *but see Allied-Signal, Inc. v. U.S. Nuclear Regul. Comm'n*, 988 F.2d 146, 150–51 (D.C. Cir. 1993) ("The decision whether to vacate depends on the seriousness of the order's deficiencies (and thus the extent of doubt whether the agency chose correctly) and the disruptive consequence of an interim change that may itself be changed.") (quotation marks omitted). MEPA contains no such language and elevating federal statute at the expense of the plain text of § 75-1-201(6)(c), MCA is contrary to this Court's precedent. *Davis v. State*, 2008 MT 226, ¶ 16, 344 Mont. 300, 187 P.3d 654 ("[T]he federal courts' interpretation of federal law does not bind our interpretation of Montana Law.").

(Emphasis added.) Vacatur is equitable relief and is therefore subject to the framework of § 75-1-201(6)(c). *Park County*, ¶ 89 ("[v]acatur of the previously issued exploration permit is an *equitable remedy* suitable to the present MEPA violations and we affirm the District Court decision to that effect.") (emphasis added); *Black Warrior Riverkeeper, Inc. v. United States Army Corps of Eng'rs*, 781 F.3d 1271, 1290 (11th Cir. 2015) ("Undeniably, vacatur is 'equitable relief.'") (citation omitted).

If this Court accepts MEIC's arguments that the remedy of vacatur is not included within the requirements of § 75-1-201(6)(c), MCA, then this Court would read "other equitable relief" out of the statute,[7] violating § 1-2-101, MCA ("In the construction of a statute, the office of the judge is simply to ascertain and declare what is in terms or in substance contained therein, not to insert what has been omitted or *to omit what has been inserted*.") (emphasis added). Similarly, MEIC's placing such emphasis on one word—enjoin—as to render "other equitable relief" mere surplusage in the statute also violates § 1-2-101, MCA ("Where there are several provisions or particulars, such a construction is, if possible, to be adopted as will give effect to all."); *see also TRW Inc. v. Andrews*, 534 U.S. 19, 31 (2001) ("It is a cardinal principle of statutory construction that a statute ought, upon the

[7] Subsection 6(d) of this statute doesn't include "other equitable relief" but does list injunctive relief, further demonstrating that the legislature intended subsection 6(c) to apply to a wider swath of remedies than that proposed by MEIC.

whole, to be so construed that, if it can be prevented, no clause, sentence, or word shall be superfluous, void, or insignificant.") (citation and quotation marks omitted).

Second, MEIC's argument on this point is self-defeating. As this Court noted in *Water for Flathead's Future*, the remedies available under MEPA are exclusively provided in § 75-1-201(6)(c), MCA. *Water for Flathead's Future*, ¶ 36. If it is the case that vacatur escapes the remedies contemplated by subsection (6)(c), then vacatur is beyond the "exclusive" remedies provided by this subsection and an impermissible remedy for a MEPA violation. MEIC's contorted reading of § 75-1-201(6)(c), MCA is, however, wrong and a district court only needs to comply with its requirements before issuing the remedy of vacatur.

Third, MEIC's definition of enjoin to include only injunctive relief is too restrictive. *See Enjoin*, Ballentine's Law Dictionary (2010) ("To forbid; to restrain by injunction; to command; to order."). MEIC has argued that the district court's grant of vacatur would prevent NorthWestern from engaging in activities authorized under its air quality permit. *See* Oral Arg. Tr. at 32:4–7 (MEIC's counsel stating "[v]acatur is required . . . to prevent NorthWestern from moving forward with building and operating an unlawfully permitted gas plant."). This Court has, additionally, used the word "enjoin" to describe a remedy that prevents an applicant from engaging in activities otherwise authorized under its permit.

Kadillak, 184 Mont. at 144, 602 P.2d at 157 (because of the Montana Department of State Lands' failure to require an applicant to satisfy the requirements of the Montana Metal Mine Reclamation Act, this Court "*enjoin[ed]* further use of the 41A area for mining operations until a valid permit is issued by State Lands.") (emphasis added).[8] Thus, use of the word "enjoin" in § 75-1-201(6)(c), MCA does not mean this subsection is incompatible with the remedy of vacatur.

This Court should, accordingly, find MEIC's arguments that the framework contained in § 75-1-201(6)(c), MCA does not apply to the remedy of vacatur fail because: (1) MEIC improperly omits "other equitable relief" from the statute; (2) the arguments are self-defeating and such an interpretation would categorically preclude vacatur as a remedy for MEPA violations, and (3) they are predicated on an overly restrictive definition of the word "enjoin."

IV. Applying the framework in § 75-1-201(6)(c), MCA to the remedy of vacatur is good policy.

Besides being required by § 75-1-201(6)(c), MCA, courts crafting thoughtful and proportional remedies is good policy. Legal commentors have lamented the court's "systematic inattention to remedial questions" in administrative law and

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[8] MEIC's citation of *Kadillak* to distinguish vacatur, as rendering an agency decision as void from the beginning, and enjoining the issuance or effectiveness of a license or permit, Doc. 68, Ex. 1 at 2 (citing 184 Mont. at 144, 602 P.2d at 157), is peculiar because this Court explicitly stated in this case that the effect of voiding the permit would enjoin the applicant from engaging in certain activities. Thus, enjoining the effectiveness of a permit is the logical result of vacating the permit.

noted that more remedial restraint would benefit the public. Nicholas Bagley, *Remedial Restraint in Administrative Law*, 117 Colum. L. Rev. 253, 255 (2017), https://columbialawreview.org/wp-content/uploads/2017/03/253_low.pdf; *see also id.* (noting that in many cases where a court found an agency decision to be procedurally deficient "the remedy appears disproportionate to the underlying infraction."). MEIC cannot possibly contend that a court pausing to consider whether "issuance of the relief is in the public interest[,]" § 75-1-201(6)(c)(ii)(B), MCA, before vacating a permit is imprudent.

Further demonstrating this point, MEPA applies to a whole host of projects subject to environmental review. This Court's decision on the applicability of § 75-1-201(6)(c), MCA to the remedy of vacatur for MEPA violations will apply with equal force to electricity transmission lines and natural gas generators. *See* James W. Coleman, *Pipelines & Powerlines: Building the Energy Transport Future*, 80 Ohio St. L.J. 263, 290–91 (2019), https://scholar.smu.edu/cgi/viewcontent.cgi?article=1037&context=law_faculty (noting that the same tactics used to delay fossil fuel projects "by expanded and uncertain environmental assessments" can also be used to delay electric transmission) ("*Coleman*").

For a state like Montana, which has high renewable potential but a relatively low population, exporting renewable energy through electric transmission lines is critically important. *FERC Energy Primer* at 50–51 ("Because the best wind

resources are often far from load centers, obtaining sufficient transmission presents a challenge to delivering its output."). Developers of electric transmission lines are, additionally, particularly susceptible to regulatory delays from environmental review because they are subject to permitting authority from multiple jurisdictions (such as multiple states and the federal government) where these projects cross. *Coleman* at 289–91. Accepting MEIC's arguments that propose to subject this project to harsh and automatic remedies for MEPA violations ignores its application in equal measure to a whole host of other projects like electric transmission lines that must also undergo environmental review. As a matter of policy, this Court should, accordingly, reject MEIC's short sighted arguments and reverse the district court's remedy of vacatur.

CONCLUSION

For the reasons provided above, DEQ requests this Court reverse the district court's remedy vacating the entirety of NorthWestern's air permit without engaging in the framework provided by § 75-1-201(6)(c), MCA.

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CERTIFICATE OF COMPLIANCE

Pursuant to Rule 11 of the Montana Rules of Appellate Procedure and this Court's October 26, 2022, I certify that this principal brief is printed with a proportionately spaced Times New Roman text typeface of 14 points; is double-spaced except for footnotes and for quoted and indented material; and the word count calculated by Microsoft Word for Windows is 4,823 words, excluding table of contents, table of citations, certificate of service, certificate of compliance, or any appendix containing statutes, rules, regulations, and other pertinent matters.

/s/ Jeremiah Langston
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APPENDIX

Mont. Envtl. Information Center v. Mont. DEQ, DV 21-1307, Order on the Parties' Cross Motions for Summary Judgment (Mont. 13th Jud. Dict. Ct. Apr. 6, 2023)……………………………………………………………..............App. A

Water for Flathead's Future v. Mont. DEQ, DV-15-2017-1109(A), Order on Remedies (Mont. 13th Jud Dist. Ct. Dec. 29, 2021)……………………….App. B

Mont. Trout Unlimited v. Mont. DEQ, DV 20-10, Order Granting Unopposed Joint Mot. to Enter Stipulated Remedy Order (Mont. 14th Jud. Dist. Ct. Jul. 22, 2022) ………………………………………………………….........................App. C

CERTIFICATE OF SERVICE

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