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

MONTANA ENVIRONMENTAL INFORMATION CENTER AND SIERRA CLUB,

Plaintiffs / Appellees / Cross-Appellants,

v.

MONTANA DEPARTMENT OF ENVIRONMENTAL QUALITY,

Defendant / Appellant / Cross-Appellee,

and

NORTHWESTERN CORPORATION,

Defendant / Appellant / Cross-Appellee,

and

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

Intervenor-Defendant / Appellant / Cross-Appellee.

MONTANA DEPARTMENT OF ENVIRONMENTAL QUALITY'S REVISED COMBINED ANSWER AND REPLY 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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LIST OF ABBREVIATIONS

dBA	A-weighted Decibels
DEQ	Montana Department of Environmental Quality
EA	Environmental Assessment
HVAC	Heating, Ventilation, and Air Conditioning
MEIC	Montana Environmental Information Center
MEPA	Montana Environmental Policy Act
MPDES	Montana Pollutant Discharge Elimination System
OSHA	Occupational Safety and Health Administration
RICE	Reciprocating Internal Combustion Engines

STATEMENT OF ISSUES 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?

2. Did the district court correctly determine that Defendant/Appellant/Cross-Appellee Montana Department of Environmental Quality ("DEQ") adequately addressed the aesthetic impacts from noise for Defendant/Appellant/Cross-Appellee NorthWestern Energy's ("NorthWestern") Laurel Generating Station under MEPA?

STATEMENT OF THE FACTS

In addition to its statement of the facts provided in its opening brief, DEQ notes that on July 9, 2021, the agency issued its draft environmental assessment ("EA") for the Laurel Generating Station. AR 1224–28. This initial document did not contain any noise analysis. *Id*. In its comments in response to the draft EA, Plaintiffs/Appellees/Cross-Appellants Montana Environmental Information Center and Sierra Club (collectively, "MEIC") asserted that DEQ must analyze "[t]he impacts of construction and operations related to noise, including an analysis of any applicable noise regulation." AR 2239. MEIC also asserted that DEQ had failed to address the cumulative impacts from noise. AR 2241.

In preparing the final EA, DEQ staff reached out to NorthWestern requesting a noise study of the proposed action. AR 1963. NorthWestern provided DEQ the results of its noise study that found noise from the project would be equal or less than 65 A-weighted decibels ("dBA")[1] at 450 feet to the east and 600 feet to the west of the project. AR 1995. The noise level of 65-dBA would also occur 600 feet to the north and south of the project. *Id*.

NorthWestern noted that "all installed equipment complies with the established noise criteria for the far-field[2] noise emissions." AR 1995. NorthWestern also informed DEQ that several noise mitigation measures would be implemented like silencers on the air inlet and exhaust for the reciprocating internal combustion engines ("RICE"); low noise radiators; building noise attenuation panels; and treatment for heating, ventilation, and air conditioning ("HVAC") systems. *Id*. NorthWestern also asserted that the two closest

[1] "The A-weighted sound pressure level measurement is thought to provide a rating of noise that predicts the injurious effects the noise has on human hearing and has been adopted by OSHA in its noise standards[.]" Occupational Safety and Health Admin., Technical Manual, Sec. III, Ch. (5)(II)(B)(9) (Jul. 6, 2022), https://www.osha.gov/otm/section-3-health-hazards/chapter-5 ("OSHA Technical Manual").

[2] "Sound fields are categorized as near field or far field . . . . The *far field* is the space outside the near field, meaning that the far field begins at a point at least one wavelength distance from the noise source." OSHA Technical Manual at Sec. III, Ch. (5)(II)(B)(5) (emphasis in original).

residences—one to the east and one to the southeast—are 1,030 feet and 1,230 feet away from the project. *Id*.

DEQ incorporated this information into its final EA. AR 1167–68. In addition to this information, DEQ found "[a]ll reported noise estimates are within the [NorthWestern] property boundaries and noise beyond these distances would drop." AR 1168. The final EA also noted:

> Recreationalists on the Yellowstone River and at Riverside Park . . . would likely hear a steady noise from the RICE operation including noise from the velocity of discharge exhaust running flowing through the stack ductwork. The noise would be similar in nature to the existing CHS Refinery nearby. If a receptor were to increase their distance from the proposed action, noise and visual impacts would decrease.

AR 1171. DEQ also noted that noise estimates would not exceed any Occupational Safety and Health Administration ("OSHA") exposure limits. AR 1169.

The district court decided in favor of DEQ on the issue of aesthetic impacts from noise. Doc. 49 at 22–23. MEIC challenges the district court's determination, arguing that DEQ's noise analysis fails to disclose the severity, duration, and geographic extent of these impacts. MEIC Br. at 25–27. MEIC also argues that DEQ did not examine the cumulative impacts of noise from existing sources. *Id.* at 26.

ARGUMENT

I. The remedy of vacatur for MEPA violations is required to adhere to the framework provided by § 75-1-201(6)(c), MCA.

MEIC provides several reasons for why the district court was initially correct to ignore the statutory requirements of § 75-1-201(6)(c), MCA in granting MEIC's request to vacate NorthWestern's air quality permit. Notably absent in MEIC's arguments, however, is any meaningful response to DEQ's point that MEIC's argument on this subject is self-defeating because if vacatur escapes the "exclusive" remedies provided in this subsection, then vacatur is not an available remedy for MEPA violations. MEIC's only response on this subject is a tepid footnote asserting "[i]n stating that the remedies are 'exclusive,' the Legislature ensured that MEPA's specific injunction test would apply, '[n]otwithstanding the provisions of 27-19-201 and 27-19-314.'" MEIC Br. at 56, n.12 (citing § 75-1-201(6)(c)(ii), MCA). But MEIC's interpretation conflicts with the statute, which says "[t]he remedies provided in this section for successful challenges to a decision of the agency or the adequacy of the statement are exclusive." Section 75-1-201(6)(c)(i), MCA. This text, accordingly, doesn't say that injunctions granted under MEPA are exclusively governed by the factors provided in subsection (6)(c). Rather, it says that the only remedies that may be obtained for MEPA violations are provided by this statute, which requires litigants and courts to adhere to the framework provided in subsection (6)(c).

MEIC's failure to address DEQ's arguments on this subject is fatal to its claims and should immediately demonstrate to this Court that DEQ has the correct interpretation of § 75-1-201(6)(c), MCA. Besides failing to address this fatal flaw in its argument, MEIC's argument on remedy should be rejected because (A) its arguments distinguishing this case from *Water for Flathead's Future, Inc. v. Mont. DEQ,* 2023 MT 86, 412 Mont. 258, 530 P.3d 790, are meritless; and (B) its statutory interpretation arguments that vacatur is not "other equitable relief" that would enjoin the effectiveness of NorthWestern's permit are unavailing.

A. This Court should follow its reasoning in *Water for Flathead's Future*.

MEIC argues that *Water for Flathead's Future* is not dispositive to this case because that case only addressed whether the district court had "inherent authority" to vacate the permit. MEIC Br. at 55. MEIC omits critical elements of the procedural history in *Water for Flathead's Future*. In particular, the district court in that case found:

> While [plaintiff] spends considerable time distinguishing the remedy of *vacatur* from the remedy of an injunction, that distinction is not dispositive as to the applicability of the contingency statute. It cannot seriously be argued that [plaintiff's] request to vacate the [Montana Pollutant Discharge Elimination System ("MPDES")] Permit does not trigger Mont. Code Ann. §75-1-201(6)(c)(ii), as to do so would obviously "enjoin the effectiveness" of the permit.

Water for Flathead's Future, Inc. v. Mont. DEQ, Cause No. DV-15-2017-1109(A), Order on Remedies, 5 (Mont. 11th Jud. Dist. Ct. Dec. 29, 2021) (DEQ Opening

Br., App. B) ("Water Flathead's Future, Order on Remedies") (emphasis in original). The district court then examined the factors in § 75-1-201(6)(c), MCA and found the plaintiffs had failed to demonstrate that vacatur could be granted in that case. *Id*. The district court then went on to find that it could issue vacatur under its inherent authority under *Park County Envtl. Council v. Mont. DEQ*, 2020 MT 303, 402 Mont. 168, 477 P.3d 288 ("*Park County*"). *Water for Flathead's Future*, Order on Remedies at 5–6. This Court overturned the district court's analysis finding that the remedies provided in § 75-1-201(6)(c), MCA are exclusive for MEPA violations and that under that framework, the district court determined it could not vacate the permit. *Water for Flathead's Future*, ¶ 36.

As this procedural history demonstrates, this Court in *Water for Flathead's Future* did consider the thrust of MEIC's arguments presented here. To begin with, MEIC's argument that vacatur is not "other equitable relief" was directly addressed in the district court's analysis (albeit this argument was deemed so unserious that even the overturned district court would not entertain it). *Water for Flathead's Future*, Order on Remedies at 5. MEIC also urges this Court to use the Ninth Circuit's remand without vacatur test, MEIC's Br. at 60–61, which was cited extensively in the district court's analysis finding that it had inherent authority to vacate permits, *Water for Flathead's Future*, Order on Remedy at 6 (citing *Pollinator Stewardship Council v. U.S. EPA*, 806 F.3d 520, 532 (9th Cir. 2015)).

There is, therefore, nothing in the procedural history of *Water for Flathead's Future* that would distinguish that case from MEIC's arguments in this current case.

Further demonstrating the similarities of these two cases, MEIC asks this Court to do what was already rejected in *Water for Flathead's Future*. Namely, to overlook the exclusive remedies provided by § 75-1-201(6)(c), MCA and find some other implied basis for this Court to vacate NorthWestern's permit. As discussed above, MEIC has no meaningful response to DEQ's argument that if vacatur is not included within "other equitable relief," then vacatur is altogether unavailable for MEPA violations. Because MEIC fails to address the exclusive nature of subsection (6)(c)—which was a central component of this Court's reasoning in *Water for Flathead's Future*—it cannot contend that it has adequately distinguished that case from the present case.

The parallels between this case and *Water for Flathead's Future* do not end there. MEIC also drums up constitutional arguments and *Park County* in this case to assert that vacatur must be made available for MEPA violations. MEIC Br. at 57–62. But like the plaintiff in *Water for Flathead's Future*, MEIC has not raised a constitutional challenge to § 75-1-201(6)(c), MCA and, therefore, cannot ask this Court to disregard the plain text of this statute on constitutional grounds. *See Water*

for Flathead's Future, ¶ 36 ("This provision is not constitutionally challenged here.").

While MEIC is correct that this Court's analysis in *Water for Flathead's Future* on § 75-1-201(6)(c), MCA was not essential and therefore is not binding, MEIC Br. at 56, this analysis is still entitled to considerable weight and cannot be ignored. This Court's decision in *Water for Flathead's Future* provided direction to district courts on how to interpret the remedial provisions of MEPA in future cases, which is judicial dicta. *See judicial dictum*, Black's Law Dictionary (11th ed., 2019) ("An opinion by a court on a question that is directly involved, briefed, and argued by counsel, and even passed on by the court, but is not essential to the decision and therefore not binding even if it may be later accorded some weight.").

An appellate court's judicial dicta is entitled to greater weight than obiter dicta:

> There is authority for the proposition that a distinction should be drawn between "obiter dictum," which constitutes an aside or an unnecessary extension of comments, and considered or "judicial dictum" where the Court, as in this case, is providing a construction of a statute to guide the future conduct of inferior courts. While such dictum is not binding upon us, it must be given considerable weight and can not be ignored in the resolution of the close question we have to decide.

United States v. Bell, 524 F.2d 202, 206 (2nd Cir. 1975). This is especially true—as is the case with *Water for Flathead's Future*—when the decision is recent and there is no precedent to the contrary. *Wright v. Morris*, 111 F.3d 414, 419 (6th Cir.

1997) ("We believe that this [dicta] is instructive of the Supreme Court's views and cannot be dismissed out of hand. . . . Where there is no clear precedent to the contrary, we will not simply ignore the Court's dicta"); *Gaylor v. United States*, 74 F.3d 214, 217 (10th Cir. 1996) ("While these statements are dicta, this court considers itself bound by Supreme Court dicta almost as firmly as by the Court's outright holdings, particularly when the dicta is recent and not enfeebled by later statements"). This Court not only rejected arguments that a district court could vacate a permit outside the framework of § 75-1-201(6)(c), MCA in its initial decision but it also rejected these arguments a second time in denying appellees' motion for rehearing. *Water for Flathead's Future, Inc. v. Mont. DEQ*, 2023 Mont. LEXIS 674, *2 (Mont. Sup. Ct. Jun. 27, 2023).

This Court should, accordingly, find (1) that MEIC presents the same arguments, regarding the remedial provisions of MEPA, to what was rejected by this Court in *Water for Flathead's Future* and (2) this Court's judicial pronouncements on the remedial provisions in MEPA in *Water for Flathead's Future*, as judicial dicta, should be followed here.

B. Vacatur is other equitable relief contemplated by the framework in § 75-1-201(6)(c), MCA.

A simple syllogism resolves the question whether vacatur is subject to the framework provided in § 75-1-201(6)(c), MCA. Vacatur is equitable relief.[3] "Other equitable relief" is subject to the framework provided in § 75-1-201(6)(c), MCA. Therefore, vacatur is subject to the framework provided in § 75-1-201(6)(c), MCA.

MEIC attempts to resist this basic logic by deploying the *ejusdem generis* canon of statutory interpretation to claim that "other equitable relief" should be limited to mean injunctive relief because the remedies of temporary restraining order, preliminary injunction, and permanent injunction precede the category of other equitable relief. MEIC Br. at 51–52; *see also Briese v. Mont. Pub. Emples. Ret. Bd.*, 2012 MT 192, ¶ 26, 366 Mont. 148, 285 P.3d 550 (under the canon of *ejusdem generis*, "where a list of specific things is followed by a more general word or phrase, the general word or phrase is interpreted to include only items that are 'similar in nature' to those listed.") (citation omitted). MEIC's reliance on this canon is in error because "other" means "being the one or ones *distinct* from that or those first mentioned or implied[.]" *Other*, Merriam-Webster Dictionary, https://www.merriam-webster.com/dictionary/other (last accessed Nov. 10, 2023) (emphasis added). The legislature, therefore, intended "other equitable relief" to be

[3] *Park County*, ¶ 89.

distinct from the preceding remedies listed in this statute, which explicitly refutes MEIC's proposed use of the *ejusdem generis* canon. *Mont. Sports Shooting Ass'n v. State*, 2008 MT 190, ¶ 11, 344 Mont. 1, 185 P.3d 1003 ("We interpret a statute first by looking to its plain language. . . . We will not interpret the statute further if the language is clear and unambiguous.") (citation omitted); *Clark Fork Coalition v. Tubbs*, 2016 MT 229, ¶ 23, 384 Mont. 503, 380 P.3d 771 ("In ascertaining plain meaning, we have 'long adhered to ordinary rules of grammar.'") (citation omitted).

Said differently, if the legislature intended the framework in subsection (6)(c) to only apply to injunctive relief, it would have included "other injunctive relief" instead of "other equitable relief" in the subsection. That's exactly what the legislature did in subsection (6)(d) of the same statute, which applies only to "temporary restraining order, preliminary injunction, permanent injunction, or *other injunctive relief*[.]" (Emphasis added.) Because the legislature has plainly intended other forms of equitable relief beyond injunctive relief to be included in subsection (6)(c)—in contrast to subsection (6)(d)—adopting MEIC's proposed interpretation would violate § 1-2-101, MCA by "insert[ing] what has been omitted or . . . omit[ting] what has been inserted."

Even if the *ejusdem generis* canon could somehow apply here, MEIC is still wrong to argue that vacatur is not subject to the framework in § 75-1-201(6)(c),

MCA. In *Park County*, this Court noted many similarities between vacatur and injunctions. *See, e.g.*, *Park County*, ¶ 71 (noting that overturning the district court's issuance of vacatur in *Park County* would be a departure from prior precedent because "this Court has granted injunctions for MEPA violations prior to the 2011 Amendments."); *id.*, ¶ 83 ("[w]e do not see why a court-ordered injunction to remedy a MEPA violation poses more of a threat to property rights than an agency-ordered injunction to remedy a substantive violation."). The remedy of vacatur is, therefore, not so dissimilar from an injunction such that the listing of "temporary restraining order, preliminary injunction, and permanent injunction" in § 75-1-201(6)(c)(ii), MCA renders vacatur wholly incompatible with the category of "other equitable relief."

MEIC's citation of *Alsea Valley Alliance v. DOC*, 358 F.3d 1181, 1186 (9th Cir. 2004), is also unavailing. MEIC Br. at 53. This case concerned whether the National Marine Fisheries Service's rule complied with the Endangered Species Act ("ESA"). *Alsea Valley Alliance*, 358 F.3d at 1183–84. The district court found that the rule didn't comply with the ESA preventing the Service from enforcing the rule. *Id*. On appeal, the Ninth Circuit found the rule did not amount to enjoining the Service or an appealable injunction under 28 U.S.C. § 1292(a)(1). *Id*. at 1186–87.

The potential remedy in the present case is different than *Alsea Valley Alliance* because the order in *Alsea Valley Alliance* "[did] not compel the Service to remove Oregon coast coho salmon from the threatened species list *or take any other actions*." *Id.* at 1186 (emphasis added). In contrast, the present case concerns a specific project where, absent vacatur, NorthWestern may engage in permitted activities. At multiple times during oral argument counsel for MEIC said "[v]acatur is required . . . to prevent NorthWestern from moving forward with building and operating an unlawfully permitted gas plant." Oral Arg. Tr., 32:4–7 (Jun. 20, 2022); *see also id.* at 29:15–30:1 (stating the same). In addressing its analysis in *Alsea Valley Alliance*, the Ninth Circuit noted "we are not bound by what a district court chooses to call an order, or even by a failure to give an order a particular name. We, instead, look to the order's substantial effect rather than its terminology." *Negrete v. Allianz Life Ins. Co.*, 523 F.3d 1091, 1097 (9th Cir. 2008) (citations, quotation marks, and brackets omitted). Here, MEIC's own statements make clear that the substantial effect of vacatur would be to enjoin the effectiveness of NorthWestern's permit and prevent the utility from moving forward with its project. *See Enjoin*, Ballentine's Law Dictionary (3rd ed., 2010) ("To forbid; to restrain by injunction; to command; to order."). MEIC's extensive reliance on the labels of these remedies—at the expense of MEIC's admitted and

intended effect of prohibiting NorthWestern's actions through vacatur—is, therefore, contrary to Ninth Circuit precedent.

This Court's decision in *Kadillak v. Anaconda Co.*, 184 Mont. 127, 602 P.2d 147 (1979), also contradicts MEIC's arguments that the word "enjoin" in § 75-1-201(6)(c)(ii), MCA precludes this subsection's application to vacatur. As MEIC has asserted on numerous occasions in this litigation, MEIC Br. at 20, 49, 54, the Court in *Kadillak* found that the applicant had not complied with the relevant laws and the permit "was void from the beginning[.]" 184 Mont. at 144, 602 P.2d at 157. What MEIC neglects to include from *Kadillak* is this Court's additional statement that "[w]e *enjoin* further use of the 41A area for mining operations until a valid permit is issued by [the Montana Department] of State Lands." *Id.* (emphasis added). If *Kadillak* is the model for what vacating a specific project looks like (as MEIC proposes), then this Court has already described that remedy as enjoining a party's actions, in direct contradiction of MEIC's argument here.

This Court should, therefore, find that vacatur constitutes "other equitable relief" and subject to the framework provided in § 75-1-201(6)(c), MCA.

II. The district court properly found that DEQ had adequately addressed aesthetic impacts from noise.

In rejecting MEIC's arguments that DEQ had not adequately addressed noise impacts from the project, the district court found: DEQ examined noise impacts on nearby residences; DEQ examined NorthWestern's far field noise

specification that stated noise would be at or below 65-dBA 600 feet away from the project; DEQ noted that noise levels would drop at greater distances outside of the Laurel Generating Station property; DEQ found that noise would be similar to existing noise impacts from the nearby refinery and would be within the current ambient baseline; and DEQ looked at noise mitigation measures that NorthWestern would use at the project like intake and exhaust silencers, low noise radiators, and noise attenuators. Doc. 49 at 22–23 (citing AR 1167–68, 1171–72, 1995).

MEIC argues the district court should be overturned because DEQ's final EA "omitted important parameters for characterizing the plant's noise, and . . . failed to recognize the impacts on nearby residences." MEIC Br. at 25. This Court should reject MEIC's arguments on this point because (A) MEIC mischaracterizes the EA by omitting relevant impacts evaluated by DEQ; and (B) MEIC fails to cite to any authority that would require DEQ to evaluate impacts to the level of specificity demanded by MEIC.

A. MEIC mischaracterizes the final EA.

In *Water for Flathead's Future*, ¶ 24, this Court overturned the district court's findings that DEQ had not taken a hard look in its MEPA analysis because the district court did not fully examine the agency's rationale: "The District Court's consideration of whether a hard look had been given to the relevant information related to this concern did not contemplate the entirety of DEQ's

rationale." *See also id.* (noting "the Permit's effluent limits and conditions are sufficient to protect the quality of water necessary for bull trout."). In its brief, MEIC repeatedly violates this principle by omitting or misrepresenting critical portions of DEQ's EA.

For instance, MEIC claims DEQ "failed to inform members of the public about the type and frequency[4] of noise anticipated[.]" MEIC Br. at 26. But DEQ did describe the frequency and type of noise impacts by explaining the 18 RICE units would create "a baseline level of noise[.]" AR 1167; *see also* AR 1168 ("the facility would operate 24/7 365 days per year"). DEQ also noted that there would be intermittent noise impacts from a backup diesel generator and fire pump to be used in emergency and test situations. AR 1168. In response to public comments, DEQ similarly described construction noise impacts as occurring intermittently and happening most often on Mondays through Fridays. AR 1113. MEIC, therefore, cannot credibly claim that the frequency and the type of noise impacts were not studied in the EA.

[4] It's unclear if MEIC intends to suggest that DEQ did not examine the frequency of noise as measured in hertz. If that is the case, MEIC misunderstands the use of the word frequency in ARM 17.4.608(1)(a), which refers to how often the impact will occur. *See, e.g., Belk v. Mont. DEQ*, 2022 MT 38, ¶ 27, 408 Mont. 1, 504 P.3d 1090 (affirming DEQ's finding that removal of rock would result in noise impacts "very limited in frequency").

MEIC, additionally, contends "the EA altogether failed to assess the additive effect of the plant's noise considering other nearby industrial activity." MEIC Br. at 25. But DEQ's final EA stated "noise would be similar in nature to the existing CHS Refinery nearby." AR 1771; *see also* Doc. 49 at 22 (the district court noting that this analysis indicated potential noise impacts from the Laurel Generating Station would be "within the current ambient baseline."). This Court found in *Belk v. Mont. DEQ*, 2022 MT 38, ¶ 27, 408 Mont. 1, 504 P.3d 1090 that a comparison to baseline noise impacts satisfied DEQ's MEPA obligations: "[t]he noise levels in the area would be essentially the same as the noise levels that have existed with ongoing operations[.]" DEQ, accordingly, evaluated the noise impacts for the Laurel Generating Station in the context of existing noise impacts.

MEIC further contends that DEQ failed to provide "important parameters for characterizing the plant's noise" because DEQ only provided noise impacts at 600 feet from the project. MEIC Br. at 25. MEIC's description of DEQ's analysis is incomplete. DEQ also explained that "[a]ll reported noise estimates are within the [NorthWestern] property boundaries and noise beyond these distances would drop." AR 1168. And DEQ explained that "[i]f a receptor were to increase their distance from the proposed action, noise and visual impacts would decrease." AR 1171.

MEIC also faults DEQ for supposedly "omitting any mention of impacts to residents living in a nearby residential neighborhood across the Yellowstone River[.]" MEIC Br. at 26. But DEQ did acknowledge the presence of nearby residences in its noise analysis. *See* AR 1167 ("There are two nearby residents. When measuring from the center of the east side of the engine hall these residences are approximately 1,030 feet and 1,230 feet away from the engine hall."). And as discussed above, the EA recognized NorthWestern's far field noise estimate at locations 600 feet away from the project. AR 1167–68. The EA also noted that beyond NorthWestern's property boundaries the noise impacts would drop. AR 1168. The final EA further stated that "[r]ecreationalists on the Yellowstone River and at Riverside Park . . . would likely hear a steady noise from the RICE operation including noise from the velocity of discharge exhaust running flowing through the stack ductwork." AR 1171. Just because DEQ did not conduct a site-specific noise analysis for these residences does not mean that DEQ omitted any noise impact to nearby residents, as MEIC claims.

Because MEIC misrepresents or omits the contents of DEQ's EA, this Court should reject its claims that the agency did not adequately address noise impacts from the Laurel Generating Station.

B. The final EA complied with MEPA.

Under ARM 17.4.608(1)(a), DEQ must consider "the severity, duration, geographic extent, and frequency of occurrence of the impact" of a project. DEQ satisfied these requirements in its final EA. On severity, the final EA notes the project would generate 60-dBA at 600 feet from the project. AR 1167–68. The duration analysis states that construction would occur for 12 months, and operation is expected to occur for 30 years. AR 1159. The geographic extent analysis explains noise impacts drop at the boarder of the property, AR 1168, and "[i]f a receptor were to increase their distance from the proposed action, noise and visual impacts would decrease[,]" AR 1171. On frequency, the EA states that "a baseline level of noise would occur from the 18 RICE[,]" AR 1167, and "the facility would operate 24/7 365 days per year[,]" AR 1168. Additionally, on frequency, the EA provides that a backup diesel generator and fire pump could create intermittent noise in emergency and testing situations. AR 1168.

MEIC attempts to engraft additional requirements onto MEPA. For instance, MEIC argues that DEQ should have conducted site specific analysis for individual homes. MEIC Br. at 26 (suggesting that DEQ should have conducted noise impacts for a residential neighborhood across the Yellowstone River), 27 (complaining that DEQ only conducted one far field noise emission test rather than evaluating broader noise impacts for other residents).

In *Belk*, this Court rejected similar demands for additional information. For example, the plaintiffs in *Belk* argued "that DEQ failed to expand on the extent to which residents and visitors would be impacted" by noise and visual impacts. *Belk*, ¶ 28. This Court denied these arguments, finding DEQ discussed, among other things, "the distance between the lake and the permit area [and] how this distance would affect . . . noise effects," and concluded "[t]his constitutes an adequately robust investigation, acknowledgment, and discussion of aesthetic impacts to justify DEQ's conclusions." *Belk*, ¶ 31.

The same robust investigation, acknowledgement, and discussion occurred here. DEQ provided noise estimates a certain distance from the project and noting the distances to nearby residences. AR 1167–68. DEQ also noted potential noise impacts to recreationalists on the Yellowstone River and in Riverside Park. AR 1171.

MEIC, furthermore, did not request in its comments that DEQ conduct noise analysis for specific residences. AR 2216–2241.[5] Instead, MEIC asked DEQ to conduct additional analysis on "[t]he impacts of construction and operations related to noise, including an analysis of any applicable noise regulation[,]" AR

[5] One commentor requested that DEQ provide impacts "on property values surrounding the proposed site[,]" AR 1099, but this Court found in *Belk*, ¶ 29 that there is "no authority for the notion that such impacts must be assessed in quantitative economic terms."

2239, and DEQ provided additional information on noise impacts in response to this comment, AR 1113, 1167–68, 1171.

This Court has stated the purpose of MEPA is to ensure "that agencies and the interested public have sufficient information regarding relevant environmental impacts to inform the lawful exercise of agency authority." *Bitterrooters for Planning, Inc. v. Mont. DEQ*, 2017 MT 222, ¶ 33, 388 Mont. 453, 401 P.3d 712. To countenance MEIC's efforts to move the goalpost by asserting in litigation that more specific information should have been collected than what MEIC requested in its public comments would run counter to this Court's observation in *Belk*, ¶ 31 that litigants "may perceive the significance of the [proposed project] differently, and they may take issue with the outcome DEQ reached, but DEQ's assessment process was procedurally sound and comported with MEPA's 'hard-look' directive."

DEQ engaged in the required "hard look" in analyzing noise impacts and was responsive to MEIC's public comment requesting additional information on noise impact. *See Belk*, ¶ 27 ("In response to comments on the EA, DEQ discussed in greater detail the quantity of noise from Glacier Stone's periodic potential blasting of rock."). This Court should, accordingly, affirm the district court and find that DEQ's noise impact analysis complied with MEPA.

CONCLUSION

For the reasons stated above, DEQ requests this Court find (1) that the remedy of vacatur for MEPA violations is required to adhere to the framework provided in § 75-1-201(6)(c), MCA and (2) the district court correctly determined that DEQ adequately addressed the aesthetic impacts from noise in its EA.

Respectfully submitted this 21st day of November 2023.

/s/ Jeremiah Langston
Jeremiah Langston

Counsel for Defendant/Appellant/Cross-Appellee Montana Department of Environmental Quality

CERTIFICATE OF COMPLIANCE

Pursuant to Rule 11 of the Montana Rules of Appellate Procedure, 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 4,985 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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CERTIFICATE OF SERVICE

I, Jeremiah Radford Langston, hereby certify that I have served true and accurate copies of the foregoing Brief - Appellant Reply and Answer to Cross Appeal to the following on 11-21-2023:

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