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 and NORTHWESTERN CORP.,

Defendants/Appellants/Cross-Appellees

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

Intervenor Defendant-Appellant.

COMBINED REPLY BRIEF OF APPELLEES/CROSS-APPELLANTS

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INTRODUCTION

The district court correctly ruled that the Montana Department of Environmental Quality unlawfully permitted NorthWestern Energy to construct and operate the Laurel gas plant based on a deficient environmental assessment ("EA"). Vacatur Order 30–32. But the infirmity of DEQ's action goes beyond the well-supported reasons stated by the district court. As argued in MEIC's cross-appeal and response brief, DEQ also insufficiently considered the potentially significant noise impacts from the large industrial operation, which has overtaken agricultural land immediately across the Yellowstone River from a substantial residential neighborhood. Additionally, to the extent MEPA's 2011 amendment, MCA § 75-1-201(2)(a), is read to prohibit DEQ's consideration of the climate-harming greenhouse gasses that would be emitted by the Laurel plant—the largest fossil-fuel power plant the State has permitted in four decades—the statute is unconstitutional.

DEQ, NorthWestern, and the Attorney General fail to justify the challenged permit and EA in light of these deficiencies.

I. THE EA'S FAILURE TO TAKE A HARD LOOK AT THE LAUREL GAS PLANT'S NOISE IMPACTS VIOLATED MEPA

NorthWestern's and DEQ's arguments defending the adequacy of the EA's noise analysis—which misconstrue the agency's duties under MEPA and rely on inappropriate post-hoc rationalizations—fail.

There is no dispute that constant noise from the Laurel gas plant's eighteen internal-combustion engines and associated equipment will impact nearby residents. But far from a "robust investigation," DEQ Resp./Reply 17, DEQ's noise analysis omits information critical to meeting the agency's MEPA obligations to analyze and disclose "the severity, duration, [and] geographic extent" of such impacts to the human population, ARM 17.4.608(1)(a), 17.4.609(3)(e)—in both the residences discussed in the EA, and those it ignored. The only information related to noise impacts in the nearly 3,000-page administrative record occur in a single sentence in NorthWestern's application—noting that noise will not exceed 65 dBA on NorthWestern's property, AR:1630—and a NorthWestern email responding to DEQ's request for a noise study, AR:1864–65. That "study" consists of only two paragraphs describing noise-mitigation

equipment and repeating the application's assertion about maximum-volume limits. *Id.* Nonetheless, DEQ attempts to defend the EA's conclusions by pointing to its acknowledgments that the plant's eighteen engines will generate noise measuring 65-dBA "24/7 365 days per year" on the edge of NorthWestern's property, in addition to unquantified intermittent noise from a backup diesel generator, fire pump, and construction. DEQ Resp./Reply 16. But despite these vague concessions, the EA omits meaningful analysis of the extent, severity, or duration of the impacts on the individuals and families in nearby residences—the "human population," ARM 17.4.609(3)(e)—as required by MEPA. DEQ's and NorthWestern's contrary arguments fail.

First, DEQ erroneously insists that its MEPA obligations are satisfied by the EA's bare assertions that the plant will generate constant noise that would drop some unquantified amount over an unspecified distance. DEQ Resp./Reply 16–17. Such "general statements" are insufficient for ascertaining the likely experience of nearby residents, including potentially reduced quality of life and adverse health effects related to prolonged and constant exposure. *Mont. Wildlife Fed'n v. Mont. Bd. of Oil & Gas Conservation*, 2012 MT

128, ¶ 43, 365 Mont. 232, 280 P.3d 877 (MEPA's "hard look" requirement is not satisfied by "general statements about 'possible' effects and the existence of 'some risk'") (quotation omitted).[1] DEQ and NorthWestern attempt to overcome this significant omission primarily with reference to post-hoc material cited in their briefing, which only emphasizes the deficiency of the EA. DEQ Resp./Reply 2, n.1–2. (citing extra-record OSHA guidance); NWE Resp./Reply 17–18 (requesting judicial notice of a Yale University decibel chart). The Court cannot consider such post-hoc rationalizations because, except in circumstances not present here, "the court shall confine its review to the record certified by the agency." MCA § 75-1-201(6)(iv); *see Montana-Dakota Utilities Co. v. Mont. Dep't of Pub. Serv. Reg.*, 223 Mont. 191, 196, 725 P.2d 548, 551 (1986) (stating "the validity of the decision must be judged on the grounds and reasons set forth in the order, and no other grounds should be considered") (citation omitted).

[1] The extra-record OSHA noise manual notes that "excessive noise exposure can contribute to … physical effects," such as muscle tension, high blood pressure, stress, sleep interference, and fatigue. OSHA Technical Manual, Sec. III, Ch. (5)(III)(B)(9) (cited at DEQ Resp./Reply 2). The EA neither discloses nor analyzes these potential health impacts.

Second, DEQ arbitrarily failed to quantify or describe the additive noise impacts of the plant to the existing baseline. In the EA, DEQ states that the project's noise will be similar to existing noise from the nearby refinery. AR:1171. But rather than acknowledge the additive nature of the noise, which may result in more severe cumulative impacts, DEQ in its brief again uses current industrial noise in the area to *dismiss* the project's impacts. A simple analogy illustrates the absurdity of DEQ's approach. One can imagine the noise generated by a single electric fan. Adding one, two, or more fans to the room—even if each additional fan's noise is "similar in nature to the existing" fan noise, *id.*—would compound the severity and extent of the noise. Here DEQ provides no analysis of the additive harm the project may cause to the health or quality of life of individuals and families living nearby, in violation of MEPA. And, contrary to DEQ's arguments, the agency's omission finds no refuge in this Court's *Belk* decision. *See Belk v. DEQ*, 2022 MT 38, 408 Mont. 1, 504 P.3d 1090. Importantly, *Belk* concerned DEQ's analysis of the impacts of extending quarry operations that had already been occurring at the site and, unlike here, the resulting noise

was not additive, but rather a continuation of those same levels of noise. *Id.* ¶¶ 4–6, 27.[2]

Third, DEQ's decision to dismiss as insignificant the gas plant's foreseeable noise impacts on nearby residents overlooked entirely the impacts, including on human health and safety, to "human populations," as MEPA requires. *Belk*, ¶¶ 29–30.[3] This is certainly true for the residents on the south bank of the river, which DEQ failed to so much as acknowledge even though it conceded that recreationalists *on* the river would experience noise. AR:1171. But, as discussed *supra*, the EA's deficiencies extend also to the two residences that DEQ *did* acknowledge in the EA, for which DEQ failed to describe the nature, severity, or extent of the impacts. AR:1167. Moreover, and contrary to DEQ's arguments, the agency's failure to sufficiently examine the

[2] NorthWestern's argument that cumulative impacts would be insignificant should be rejected for the additional reason that it relies on inappropriate post-hoc information. NWE Resp./Reply 19.

[3] NorthWestern's quibble with MEIC's description of the closest neighbor as 1,000 feet south of the project is beside the point. NWE Resp./Reply 19. The record contains no precise measurement. And, in any event, the finding of no significance on closer residents, as discussed, is also arbitrary.

impacts on all nearby residences, again, finds no support in *Belk*. DEQ Resp./Reply 17. While the Court found DEQ's qualitative discussion sufficient in *Belk*, on the record here no similar finding can be made where all noise impacts acknowledged were arbitrarily dismissed on grounds that the area is already noisy; the only health information DEQ has proffered is in briefing, rather than the EA; and DEQ failed even to acknowledge the significant residential area across the river.

In a last-ditch effort to overcome this significant omission, DEQ takes aim at MEIC's comments on the Draft EA, suggesting that the agency had insufficient notice of its obligation to evaluate potential impacts to the neighborhood to the south of the plant. DEQ Resp./Reply 17. Even setting aside that DEQ failed to provide sufficient analysis for *all* residences, not just the neighborhood south of the plant, neither the facts nor the case law support DEQ's argument.

First, MEIC's comments requested evaluation of *all* foreseeable noise impacts related to the plant, which includes impacts to the largest nearby residential neighborhood. AR:2239. Second, established case law does not require the level of specificity in comments that DEQ demands. MEIC Op./Resp. 24–25 (explaining exhaustion standard). But perhaps

most fundamentally, DEQ *did* receive comments requesting the agency evaluate the potential "noise pollution" impacts on the "'residential' area south of the Yellowstone River." AR:700–01 (attached as Ex. 1). DEQ dismisses the comment as requesting analysis of impacts "on property values," which DEQ says this Court rejected in *Belk*. DEQ Resp./Reply 17 (citing EA Resp. to Comments at AR:1099). But the comment does not express any such limitation. AR:700–01. Because DEQ had clear notice of the potential for impacts to the surrounding area, including the largest nearby neighborhood, the agency's failure to analyze all potential noise impacts violates MEPA.

For each of these reasons, the district court's holding that the EA's noise analysis satisfied DEQ's MEPA obligations should be reversed.

II. THE CONSTITUTIONALITY OF MEPA'S CLIMATE LIMITATION, MCA § 75-1-201(2)(A), IS PROPERLY BEFORE THIS COURT

As the district court correctly found, DEQ unlawfully failed to analyze and consider the climate implications of the Laurel gas plant's substantial greenhouse-gas emissions before permitting NorthWestern to build and operate the plant. This Court should affirm the district court's determination that the plain language of MCA § 75-1-201(2)(a)

(2011) required DEQ's consideration of Montana-specific climate-change impacts, or affirm on the alternate basis—fully briefed on summary judgment below—that the statute's prohibition against climate considerations violates the state Constitution's environmental protections, Mont. Const. art. II, § 3; art. IX, § 1. *See Hudson v. Irwin*, 2018 MT 8, ¶ 12, 390 Mont. 138, 408 P.3d 1283 ("We will affirm the district court when it reaches the right result, even if it reaches the right result for the wrong reason.") (citation omitted).[4]

The constitutional question is properly before this Court as an alternate ground for affirmance. Although the State lost on the climate issue before the district court and was on notice pursuant to Montana Rule of Appellate Procedure 27 that MEIC intended to assert their constitutional claim as an alternate ground for affirmance, neither DEQ

[4] Because the Legislature's 2023 amendment of MCA § 75-1-201(2)(a) was not retroactive, this Court should consider whether DEQ's action was lawful under the 2011 version of the MEPA climate limitation that DEQ applied when issuing the challenged permit. However, under DEQ's interpretation, the 2011 limitation would implicitly prohibit state agencies' consideration of climate change, both within and beyond Montana's borders, in the same way the 2023 limitation makes explicit. *Compare* MCA § 75-1-201(2)(a) (2011) *with* MCA § 75-1-201(2)(a) (2023). Accordingly, this Court's constitutional ruling would apply equally to both versions of the statute.

nor the Attorney General appealed the district court's decision on the climate issue. And NorthWestern declined to brief the alternate, constitutional basis for affirming the district court's ruling in its appeal. The Attorney General now enters the appeal at this late stage to assert that Plaintiffs waived their constitutional challenge or in the alternative that it lacks merit. The Attorney General's arguments are unfounded.

A. This Court May Affirm the District Court's Decision on the Alternate Basis that MEPA's Climate Limitation Is Unconstitutional

If this Court does not affirm the district court's determination that the plain language of the 2011 MEPA climate limitation, MCA § 75-1-201(2)(a), precludes *only* the consideration of climate impacts beyond Montana's borders, then it should affirm the district court on the alternate ground—properly raised below and in this appeal—that MCA § 75-1-201(2)(a) is unconstitutional. Contrary to the Attorney General's position, AG Br. 11–12, remand to the district court to first address the constitutional issue is unwarranted and would cause delay that would prolong significant harm to MEIC.

There would be no benefit from remanding the constitutional issue to the district court. As the Attorney General noted, this Court's review of constitutional questions is plenary, AG Br. 5, which means that the Court addresses such questions *de novo,* without deference to a district court's findings. *State v. Pound*, 2014 MT 143, ¶ 20, 375 Mont. 241, 326 P.3d 422. Further, all parties sought summary judgment on the constitutional issue before the district court and no party argued that disputed factual issues prevented its resolution. The essential facts are admitted: DEQ interpreted MCA § 75-1-201(2)(a) to prohibit consideration of the Laurel gas plant's greenhouse-gas emissions and corresponding climate implications, so DEQ authorized construction and operation of the plant without such consideration. AR:1110 (EA). Without any need for fact-finding by the district court, this Court may resolve the constitutional issue on the current record.[5]

[5] NorthWestern inexplicably suggests that MEIC has requested a remand to the district court to apply the First Judicial District's ruling in *Held v. Montana*, No. CDV-2020-307 (1st Jud. Dist. Aug. 14, 2023). NWE Resp./Reply 21. To the contrary, MEIC urges *this Court* to resolve this constitutional issue. However, in response to NorthWestern's erroneous argument that the constitutional issue was rendered moot by the Legislature's 2023 amendment to MCA § 75-1-201(2)(a), MEIC noted that the First Judicial District's injunction in *Held* would prevent

In such circumstances, this Court has routinely addressed issues that district courts have not first resolved. For example, in *Advocates for School Trust Lands v. State*, this Court reversed the district court's finding that the plaintiff's constitutional challenge to legislation was unripe and proceeded to address the claim on its merits. 2022 MT 46, ¶¶ 30–31, 408 Mont. 39, 505 P.3d 825. Similarly, in *Carbon County Resource Council v. Montana Board of Oil & Gas Conservation*, this Court resolved the plaintiff's constitutional participation claim in the first instance after reversing the district court's finding that the claim was unripe. 2016 MT 240, ¶ 15, 385 Mont. 51, 380 P.3d 798. *See also*, *e.g. Payne v. Berry's Auto, Inc.*, 2013 MT 102, ¶ 16, 369 Mont. 529, 301 P.3d 804 (interpreting contract language and state law to resolve a plaintiff's alternate argument that "the District Court did not address"); *State v. Gai*, 2012 MT 235, ¶ 17, 366 Mont. 408, 288 P.3d 164 (finding district court erred in disallowing defendant's evidentiary challenge, but reviewing record *de novo* to determine sufficiency of other evidence to affirm defendant's conviction).

DEQ from applying the 2023 climate limitation in the revised MEPA analysis required under the district court's remand order in this case. MEIC Op./Resp. Br. 34–35.

The *Held* amici urge that if this Court does not affirm the district court's statutory interpretation of MCA § 75-1-201(2)(a) (2011) as requiring consideration of climate impacts in Montana, it should defer its resolution of the constitutionality of that MEPA climate limitation to amici's pending appeal, No. DA 23-0575. Amici Br. 12–13. However, this Court need not choose whether to resolve the constitutional question in the present case or the *Held* appeal, and instead should address the important interests and distinctly argued issues in both cases, either separately or concurrently. Importantly, the present case involves DEQ's concrete application of the MEPA climate limitation to approve a major, methane-burning generating station—which continues to cause significant harm to the concrete interests and constitutional rights of MEIC's members. As the district court observed, "[t]o most Montanans who clearly understand their fundamental constitutional right to a clean and healthful environment," the 175-megawatt plant "is a significant project." Vacatur Order 30. Yet NorthWestern is currently constructing the gas plant and plans to commence operation in 2024 without the constitutionally required scrutiny of its climate impacts. To end this constitutional infringement, the Court should find MCA § 75-1-

201(2)(a) unconstitutional based on the law and undisputed facts of the present case.

B. MEIC's Constitutional Claim is Ripe

Contrary to the Attorney General's brand-new theory, ripeness is no barrier to this Court's resolution of the important constitutional question presented, and the district court did not hold otherwise. On summary judgment below, the parties briefed both the statutory and constitutional claims—which Plaintiffs pled in the alternative—challenging DEQ's failure to analyze the climate impacts of the Laurel gas plant's greenhouse-gas emissions. *See* Vacatur Order 27 (restating alternative grounds). Because the district court determined that the plain language of the 2011 MEPA climate limitation, MCA § 75-1-201(2)(a) (2011), demands analysis of climate impacts in Montana, the court found that it "need not address the constitutional questions submitted." *Id.* at 29.[6]

[6] The district court was not silent on the constitutional question. In interpreting DEQ's statutory obligations, the court stated that, "[o]n the greenhouse gases issue, DEQ took no look at the environmental impacts. Analysis within the borders of Montana is required by MEPA *and the Montana Constitution*." Vacatur Order 32 (emphasis added).

The Attorney General wrongly interprets the district court's exercise of constitutional avoidance as a determination on the justiciability of MEIC's constitutional claim. AG Br. 4 (asserting that "the District Court effectively ruled against MEIC with respect to its constitutional challenge on justiciability grounds"). No party raised ripeness below and the Attorney General's position bears no relation to the district court's actual findings or this Court's justiciability principles. While the district court stated on the order's final page that "[t]he constitutional issues are not yet ripe for consideration," Vacatur Order 34, it is clear from the order, which did not analyze the constitutional or prudential fitness of the claim for judicial resolution, that the court determined that resolution of MEIC's claim was unnecessary rather than non-justiciable.

MEIC's constitutional claim is ripe. This Court has explained the constitutional and prudential components of ripeness:

> The constitutional component asks whether there is sufficient injury or, framed differently, whether the issues presented are definite and concrete, not hypothetical or abstract. … The prudential component weighs the fitness of the issues for judicial decision and the hardship to the parties of withholding court consideration. The prudential component demands consideration

of whether the record presented is factually adequate.

Advocs. for Sch. Tr. Lands, ¶ 20 (quotations and citations omitted). On the prudential aspect of ripeness, "[t]he more the question presented is purely one of law, and the less that additional facts will aid the court in its inquiry, the more likely the issue is to be ripe." *Id.* (quoting *Havre Daily News, LLC v. City of Havre*, 2006 MT 215, ¶ 20, 333 Mont. 331, 142 P.3d 864).

The present controversy is neither hypothetical nor abstract, *id.*, because DEQ already applied its unconstitutional interpretation of MEPA in the EA and permitting action MEIC challenges. Because DEQ omitted any analysis of the Laurel gas plant's climate implications, the agency was unable to make an informed decision before permitting the project. MEIC's members thus suffered injury to constitutional rights MEPA was designed to protect—specifically, the right to "fully informed and considered decision making" by state agencies. *Park Cnty. Env't Council v. DEQ*, 2020 MT 303, ¶ 70, 402 Mont. 168, 477 P.3d 288; *see also Schoof v. Nesbit*, 2014 MT 6, ¶ 17, 373 Mont. 226, 316 P.3d 831 (recognizing cognizable injury when procedural rights are violated). This constitutional injury was caused by the challenged MEPA

provision itself and therefore is sufficiently concrete for adjudication. *Weems v. State by & through Fox* ("*Weems I*"), 2019 MT 98, ¶¶ 13–14, 395 Mont. 350, 440 P.3d 4; *see also Advocs. for Sch. Tr. Lands*, ¶ 23 (an issue is ripe when the "statute itself" causes injury).

For the same reasons, the constitutional issue satisfies prudential ripeness standards because it presents a legal question that is fit for resolution on the current record. The constitutional violation was complete when DEQ authorized construction and operation of the Laurel gas plant without first evaluating the project's climate implications and thus "does not depend on further State action or adjudication." *Advocs. for Sch. Tr. Lands*, ¶ 28; *see also Reichert v. State*, 2012 MT 111, ¶ 59, 365 Mont. 92, 278 P.3d 455 (noting that "the prudential concerns of the ripeness doctrine [are] not implicated where the possible constitutional infirmity [is] clear on the face of the measure") (quotation and citation omitted).

While no benefit may be gained from awaiting further state action before adjudicating the constitutional question, the "hardship that will be suffered by the parties if the court withholds review" is substantial. *Havre Daily News*, ¶ 20. NorthWestern is constructing the gas plant

and, if this Court were to delay resolution of MEIC's claim, could begin operating the plant before DEQ has fully considered the resulting pollution, noise, and other harm that directly impacts MEIC's members.[7] As this Court has recognized, "[w]hatever interest might be served by a statute that instructs an agency to forecast and consider the environmental implications of a project that is already underway … the constitutional obligation to prevent certain environmental harms from arising is certainly not one of them." *Park Cnty.*, ¶ 72. Timely resolution of MEIC's claims is essential to vindicating its members' constitutional environmental rights, as contemplated by MEPA.

C. MEIC Has Standing

MEIC similarly has standing to pursue its constitutional claim. The Attorney General does not meaningfully argue standing on appeal, but MEIC addresses it here to assure the Court of its jurisdiction. As the Attorney General acknowledged by seeking summary judgment on

[7] MEIC's members include Laurel residents living near the plant and others who recreate in the area, all of whom would be impacted by the plant's emissions of greenhouse gases and other harmful air pollutants, in addition to the high costs of gas-powered electricity compared with cleaner alternatives. Johnson Dec. ¶¶ 12, 14; Krum Dec. ¶ 7; Felder Dec. ¶ 6 (submitted with MEIC's summary-judgment motion).

this issue before the district court—and contrary to its suggestion here, AG Br. 11—no fact-finding is necessary to determine MEIC's standing. The key facts are established: MEIC's members suffered a concrete injury when DEQ permitted the Laurel gas plant without first considering the climate implications of its decision, and this injury would be redressed by a court order requiring DEQ to analyze such impacts before construction and operation of the plant may proceed. *Heffernan v. Missoula City Council*, 2011 MT 91, ¶¶ 33, 42, 360 Mont. 207, 255 P.3d 80 (citations omitted) (an association demonstrates standing by alleging a "past, present, or threatened injury" to its members that can be alleviated by a successful action).

Critical to the standing question is the nature of MEIC members' injuries, which include not just the direct consequences of the challenged project but also the *procedural* harm from DEQ's failure to consider and disclose those consequences before authorizing the plant's construction. Laws (including statutes and the Constitution) can create rights and injuries that would not otherwise exist. *Id.* ¶ 34. As this Court explained in *Schoof*, where those rights are procedural, an agency's failure to follow such procedures constitutes injury sufficient to

establish standing. *Schoof*, ¶¶ 17–19 (affirming plaintiff's standing where agency deprived him of "opportunity to observe and participate" in agency decisionmaking). Similarly, MEPA's procedures—and the constitutional provisions they implement—were designed to encourage decisions that avert environmental harm. *Park Cnty.*, ¶¶ 70, 76. Thus, the harm to MEIC's members from the Legislature's exemption of the Laurel plant's greenhouse-gas emissions from MEPA review "consists of added risk to the environment that takes place when governmental decisionmakers make up their minds without having before them an analysis (with public comment) of the likely effects of their decision on the environment." *Citizens for Better Forestry v. U.S. Dep't of Agric.*, 341 F.3d 961, 971 (9th Cir. 2003).[8]

Vacating the challenged permit and requiring DEQ to perform a climate analysis would alleviate MEIC's procedural injury caused by the agency's uninformed decisionmaking—even if DEQ elects to reissue NorthWestern's challenged permit. *See Park Cnty.*, ¶ 22 (vacating DEQ's approval of mine-exploration permit would redress plaintiffs' injuries caused by MEPA violation). Additionally, although not

[8] *See supra* note 7 (describing MEIC's standing declarations).

necessary for standing purposes, such analysis could cause DEQ to exercise its statutory authority to establish emission limits "necessary to prevent, abate, or control air pollution"—including limits that are more stringent than federal requirements—to abate the Laurel gas plant's harmful greenhouse-gas pollution. MCA §§ 75-2-203(1), (4).[9]

In short, MEIC has standing.

III. AS INTERPRETED BY DEQ, MEPA'S CLIMATE LIMITATION, MCA § 75-1-201(2)(A), IS UNCONSTITUTIONAL

As interpreted by DEQ to prohibit consideration of climate change in agency decisionmaking, MCA § 75-1-201(2)(a) implicates Montanans' fundamental right to a clean and healthful environment and fails strict scrutiny review. *Park Cnty.*, ¶¶ 16, 18. The Attorney General offers no legitimate defense of the constitutionality of MEPA's climate limitation, MCA § 75-1-201(2)(a), either as applied to this case or on its face.

First, the Attorney General correctly observes that Montana's Legislature is responsible for creating adequate remedies that provide

[9] NorthWestern repeats its incorrect claim that DEQ lacks such authority. NWE Resp./Reply 10–11. But DEQ itself does not disclaim its authority to regulate greenhouse gases; instead, the agency noted that state and federal law currently do not *require* such regulation. *See id.* at 7–8 (quoting DEQ statements).

for a clean and healthful environment, AG Br. 13 (citing Mont. Const. Art. IX, § 1), but incorrectly suggests that the judiciary has no role in determining whether the Legislature has fulfilled this constitutional obligation. There is no dispute that the Legislature must adopt laws that prevent environmental degradation, but here "[t]he question is not whether the Legislature has authority to act, but rather whether the Legislature's action is constitutional." *Weems v. State by & through Knudsen*, 2023 MT 82, ¶ 41, 412 Mont. 132, 529 P.3d 798. "Once the legislative branch has exercised its authority to enact a statute, … it is within the courts' inherent power to interpret the constitutionality of that statute when called upon to do so. A court is thus duty-bound to decide whether a statute impermissibly curtails rights the constitution guarantees." *Driscoll v. Stapleton*, 2020 MT 247, ¶ 11 n.3, 401 Mont. 405, 473 P.3d 386.

This Court rejected a similar argument in the context of the Legislature's constitutional obligation to provide a basic system of free quality public schools. *Columbia Falls Elementary Sch. Dist. No. 6 v. State*, 2005 MT 69, ¶ 19, 326 Mont. 304, 109 P.3d 257 (discussing Mont. Const. Art. X, § 1(3)). As the Court explained, that requirement "must

be read in conjunction with Section 1 of Article X, which guarantees a right to education" and "it is incumbent upon the court to assure that the system enacted by the Legislature enforces, protects and fulfills the right." *Id.*; *see also Brown v. Gianforte*, 2021 MT 149, ¶ 24, 404 Mont. 269, 488 P.3d 548 (rejecting argument that constitutionality of law eliminating judicial-nomination commission was unreviewable because the Constitution authorizes the Legislature to determine how judicial nominees are presented to the Governor). Similarly, here, the Legislature exercised its constitutional authority by adopting MEPA as one tool to prevent unreasonable environmental degradation. *Park Cnty.*, ¶¶ 69–71. But it is the Court's role to ascertain whether, given the MEPA climate limitation, "the Legislature met its obligation to provide 'adequate remedies' with which to prevent potential future environmental harms." *Id.* ¶ 78.

Second, the Attorney General argues that MEPA's climate limitation is consistent with the Constitution's environmental provisions because they "protect *Montana's* environment," rather than the global climate. AG Br. 14–15 (emphasis added). This misses the point. The record in this case demonstrates that Montana's

environment is uniquely harmed by climate change and that the state's fossil-fuel energy sources are significant contributors to that harm. *See* MEIC Op./Resp. Br. 30–31, 47; DEQ Ans. ¶ 29 (admitting "that Montana's fossil fuel Electric Generating Units (EGUs) are the largest contributor of greenhouse gases in Montana"). MEPA generally requires state agencies to examine whether the actions they authorize cause significant direct, secondary, or cumulative environmental effects, thus allowing agencies to identify ways "to prevent environmental harms infringing upon Montanans' right to a clean and healthful environment." *Park Cnty.*, ¶ 67. There is no support for the Attorney General's proffered exception for Montana sources of harm to Montana's climate merely because such harm is also felt beyond the state's borders.[10]

Finally, the Attorney General attempts to incorporate by reference its district court briefing on the merits of the constitutional challenge.

[10] The numerous cases in which courts have reviewed agency climate-change analyses have identified neither the global nature of climate change nor a supposed lack of "scientifically trustworthy method[s]" as obstacles to meaningful analysis, AG Br. 13–14. *See, e.g., 350 Mont. v. Haaland*, 50 F.4th 1254, 1265–70 (9th Cir. 2022); MEIC Op./Resp. Br. 40 n.7 (citing cases).

AG Br. 13. While that briefing is largely co-extensive with the Attorney General's defense on appeal, "[t]he requirement [in Mont. R. App. P. 23] that appellate briefs 'contain' a party's contentions unquestionably precludes parties from incorporating trial briefs or any other kind of argument into appellate briefs by mere reference." *State v. Ferguson*, 2005 MT 343, ¶ 41, 330 Mont. 103, 126 P.3d 463. To the extent the Attorney General raised arguments before the district court that it does not address on appeal, those arguments are waived.

Like the 2011 MEPA amendment at issue in *Park County*, the MEPA climate limitation, as interpreted by DEQ, is "unconstitutional because [it] undercut[s] the State's ability to determine in advance whether a given activity will cause environmental harm and thereby take actions to 'prevent unreasonable depletion and degradation of natural resources'" as required by Article IX, Section 1(3), of the Montana Constitution. *Park Cnty.*, ¶ 88.

CONCLUSION

The district court correctly held that DEQ acted unlawfully by authorizing NorthWestern to construct and operate a large, methane-fired power plant—the largest new electric-generating station

authorized in Montana this century—without the scrutiny required by MEPA. Vacatur of the challenged permit is justified both by the district court's findings on lighting and the correct interpretation of MEPA's 2011 climate limitation, as well as DEQ's insufficient noise analysis and the constitutional infirmity of the climate limitation. To end the ongoing harm to MEIC's members and Montana's environment from the construction and eventual operation of this plant, MEIC requests that the Court deny DEQ's and NorthWestern's appeals and grant MEIC's cross-appeal.

Respectfully submitted this 22nd day of December, 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 Century Schoolbook text typeface of 14 points, is double-spaced, and contains 4,989 words, as counted by Microsoft Word for Windows.

Dated this 22nd day of December, 2023.

Amanda D. Galvan

CERTIFICATE OF SERVICE

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