In the Supreme Court of the State of Montana

Cause No. DA 23-0225

MONTANA ENVIRONMENTAL INFORMATION CENTER & SIERRA CLUB,

Plaintiffs-Appellees

v.

MONTANA DEPARTMENT OF ENVIRONMENTAL QUALITY & NORTHWESTERN CORPORATION,

Defendants-Appellants,

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

Intervenor-Defendant.

ON APPEAL FROM THE 13TH JUDICIAL DISTRICT COURT, YELLOWSTONE COUNTY
THE HONORABLE MICHAEL G. MOSES

APPELLANT NORTHWESTERN'S BRIEF

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TABLE OF CONTENTS

TABLE OF CITATIONS

Cases **Page(s)**

Statutes and Bills

Rules and Regulations

ISSUES PRESENTED FOR REVIEW

Issue 1: Whether the district court erred when it vacated DEQ's permit without making the findings required by § 75-1-201(6)(c)(ii), MCA.

Issue 2: Whether the district court erred when it concluded that DEQ must analyze the effects of greenhouse gas emissions within Montana's borders when DEQ does not have lawful authority to prevent CO_2 emissions.

Issue 3: Whether the district court erred when it concluded that DEQ did not perform a sufficient analysis of lighting when the plant will be sited next to industrial facilities, no public comments expressed concern about lighting, and DEQ discussed the frequency and duration of lighting, geographic distance to receptors, and potential for visibility.

Issue 4: Whether the district court's order to DEQ to analyze on remand the effects of the plant's greenhouse gas emissions within Montana's borders has been mooted by the passage of HB 971.

STATEMENT OF THE CASE

On May 10, 2021, Defendant / Appellant NorthWestern Corporation (NorthWestern) submitted an application for an air quality permit to Defendant / Appellant Montana Department of Environmental Quality (DEQ). NorthWestern submitted a revised application on June 9, 2021. The application sought permission to construct and operate air emissions units for a 175-megawatt (MW) natural-gas-fueled power plant at the proposed Laurel Generating Station.

DEQ reviewed the application under the Montana Clean Air Act, related rules, and the Montana Environmental Policy Act (MEPA).

On July 9, 2021, DEQ published a draft Environmental Assessment (EA) and a preliminary determination that the air quality permit should be issued because the proposed plant would not have significant environmental impacts. DEQ opened a notice-and-comment period on the draft EA and preliminary determination of no significant effects.

On August 23, 2021, after review of comments received, DEQ approved NorthWestern's application. DEQ issued an air quality permit that subsequently became final on September 8, 2021 after expiration of an appeal period.[1] DEQ

[1] The appeal period was extended for another 15-day period to September 22, 2021 because the LGS was an Energy Project.

also issued a final EA, which found the plant would have no significant environmental impacts. Upon receipt of the permit, NorthWestern commenced construction of the plant.

On October 21, 2021, Plaintiffs / Appellees Montana Environmental Information Center and Sierra Club filed their Complaint commencing this action. On October 25, 2021, Plaintiffs filed an amended Complaint. Plaintiffs asked the district court to vacate the final permit based on DEQ's allegedly inadequate MEPA analysis of five impacts alleged to be associated with the proposed plant. Plaintiffs also contingently challenged the constitutionality of § 75-1-201(2)(a), MCA.

On December 28, 2021, the district court granted the State of Montana's motion to intervene as Defendants to defend the constitutionality of § 75-1-201(2)(a), MCA.

Starting in February 2022, the parties briefed cross motions for summary judgment. Plaintiffs did not submit evidence or briefing pursuant to § 75-1-201(6)(c)(ii) , MCA in support of their request for vacatur of the permit.

On June 20, 2022, the district court held oral argument on the cross-motions for summary judgment.

On April 6, 2023, the Court issued an Order granting in part Plaintiff's motion for summary judgment on the ground that DEQ's final EA failed

adequately to consider the effects of greenhouse gas emissions from the facility, or the lighting impacts of the facility. The Order vacated the permit and remanded the case to DEQ for further analysis. On April 14, 2023, the Court entered Judgment.

On April 17, 2023, NorthWestern timely filed a notice of appeal in this Court. NorthWestern and DEQ both moved to stay the district court's order pending appeal.

On May 10, 2023, the Montana government enacted HB 971. The new law prospectively prohibits DEQ from evaluating greenhouse gas emissions within Montana or outside the State's borders when performing an environmental impacts analysis under MEPA.

On June 5, 2023, Plaintiffs cross-appealed.

On June 7, 2023, DEQ appealed, and its appeal was assigned the case number DA 23-320.

On June 8, 2023, the district court granted the motions for a stay pending appeal.

On June 19, 2023, the Court consolidated the appeal under case number DA 23-225.

On June 20, Plaintiffs cross-appealed.

RELEVANT FACTS

I. NORTHWESTERN APPLIED TO DEQ FOR AN AIR QUALITY PERMIT TO BUILD A PLANT THAT WILL GENERATE 175 MEGAWATTS OF ELECTRICITY

NorthWestern is a regulated utility that is required under state law to provide safe and reliable electricity to its customers and that currently, in fact, provides electricity to approximately 93% of Montana. *See* NorthWestern Appendix (NW App.) 91:24-92:02. On May 10, 2021, NorthWestern filed an air quality permit application with DEQ. Administrative Record (AR) 1373-1518. The application, as revised on June 9, 2021, sought permission to construct and operate the 175-MW Laurel Generating Station (LGS) south of Laurel, Montana. AR 1521-1665. The LGS will be powered by 18 reciprocating internal combustion engines (RICE) that burn natural gas. NW App. 326 / AR 1528. The natural gas will be pumped into the LGS via a pipeline. NW App. 330 / AR 1532 ("The RICE will operate solely on pipeline quality natural gas."). The plant is designed to operate for at least 30 years. NW App. 236 / AR 1159.

A. The Proposed Plant Will Reduce NorthWestern's Reliance on the Electricity Market and Aid Its Transition to Renewable Energy

The LGS will serve two needs. First, the LGS will reduce NorthWestern's reliance on the electricity market to meet consumer demand. NorthWestern does not own sufficient generation assets to meet the peak demand of its retail customers. NW App. 318 / AR 1490. To satisfy its retail customer peak demand,

NorthWestern currently must purchase substantial amounts of power from the market. *Id.* One purpose of the LGS is to reduce NorthWestern's reliance on the electricity market by providing 175 MW of reliable and clean energy at cost-effective rates. *Id.*; *see also* NW App. 92:24-93:5; NW App. 351 / AR 1553. In particular, the LGS capacity will help address the anticipated retirement of 3,600 MW of coal-fired electricity generation in Montana and neighboring states that will make regional power generation (and prices) more volatile. *See* NW App. 185.

Second, the LGS will help NorthWestern continue its transition to renewable energy sources by providing flexible on-demand power. Over half of NorthWestern's portfolio of generation assets is based on renewable energy, including approximately 485 MW of hydro-energy, approximately 538 MW of wind energy, and approximately 97 MW of solar energy. *Id.* at 4-6. But one major and inevitable shortcoming of renewable energy is that it is not available uniformly upon demand. NW App. 92:18-93:02; NW App. 187-88. Hydro-power is substantially more plentiful in spring after snowmelt than in winter; wind generators can only produce electricity when the wind blows; and solar projects can only produce electricity when the sun is shining. *Id.*

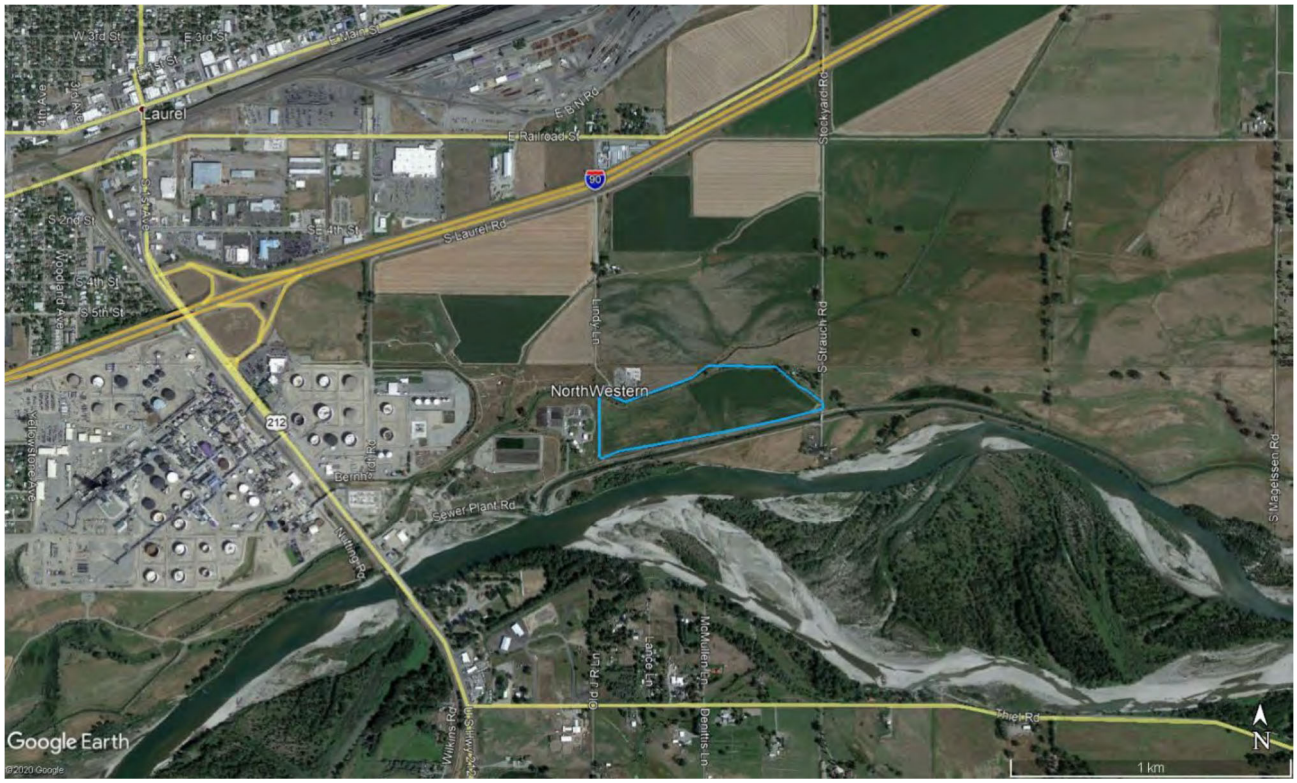
To meet consumer demand when renewable-energy electricity is unavailable, NorthWestern owns baseload generation assets like the coal-fired Colstrip Unit 4, which currently provides NorthWestern 222 MW. NW App. 203.

The natural-gas-powered LGS will supplement these baseload generation assets while offering major environmental advantages over coal-power generation. NW App. 93:6-15. Natural gas burns cleaner and produces far fewer pollutants than coal. NW App. 219 / AR 1103. Natural-gas-fueled generators can also be turned on and off easily, while coal-fired generators cannot. The LGS will have 18 different engines so that the amount of power it generates at any given time can be tailored to consumer demand. NW App. 327 / AR 1529; NW App. 330 / AR 1532. The LGS will thus provide "dispatchable" electricity that is accessible to meet surges in demand. NW App. 327 / AR 1529.

B. The Proposed Plant Will Occupy 10 Acres of a 36-Acre Parcel that Is Adjacent To Industrial and Agricultural Land

The LGS is being constructed on a 36-acre parcel of land in Yellowstone County, as depicted in the following diagrams:

NW App. 404 / AR 1960.



NW App. 237 / AR 1160. As indicated, the parcel is bounded on the west by industrial users, including, most proximately, the City of Laurel's wastewater treatment plant, an existing NorthWestern substation, and a CHS, Inc. refinery. On the north the parcel is bounded by agricultural land, and, beyond that, I-90. On the south, the parcel is bounded by an irrigation ditch and then by the Yellowstone River. On the east, the parcel is bounded by two isolated residences that are located approximately 1,030 feet and 1,230 feet, respectively, from the plant's future engine hall. NW App. 244 / AR 1167 (Aesthetics). The next nearest residences are located southwest of the plant, across the Yellowstone River, and the nearest of these residences is approximately 2,300 feet from the plant. NW App. 249 / AR 1172.

The construction of the plant will collectively affect approximately 20 to 25 of the parcel's 36 acres. NW App. 236 / AR 1159. The operation of the plant will affect only approximately 10 of the 36 acres. *Id.*

C. NorthWestern's Permit Application Offered Data on the Plant's Proposed Air Emissions

NorthWestern sought permission to operate the plant up to its maximum capacity of 8,760 operational hours per year (assuming all 18 RICE would operate 24 hours per day, seven days per week, for 365 days).[2] NW App. 332 / AR 1534. NorthWestern's permit application therefore submitted data about the plant's maximum possible emissions of pollutants regulated by DEQ under the Clean Air Act, namely, nitrogen oxides (NOx), carbon monoxide (CO), volatile organic compounds (VOC), particulate matter of various sizes (PM, PM_{10}, $PM_{2.5}$), sulfur dioxide (SO_2), and hazardous air pollutants (HAPs).[3] NW App. 334 / AR 1536; NW App. 340 / AR 1542.

The permit application also disclosed that the plant, operating at maximum

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[2] In actuality, the plant will not operate at maximum capacity year round. The purpose of constructing a plant with 18 different generators is so that the number of generators in operation at any given time can be tailored to the demand for energy. The LGS will therefore operate at maximum capacity only during certain periods of peak demand.

[3] HAPs include such substances as acetaldehyde, acrolein, benzene, biphenyl, formaldehyde, methanol, naphthalene, toluene, and xylenes. *E.g.*, NW App. 285-86 / AR 1208-09.

capacity year round, would generate 769,706 tons per year of carbon dioxide equivalent (CO2e) emissions, also known as greenhouse gases. NW App. 315 / AR 1457; NW App. 340 / AR 1542.

II. DEQ PERFORMED A THOROUGH REVIEW AND GRANTED NORTHWESTERN AN AIR QUALITY PERMIT

DEQ is the agency responsible for issuing air-quality permits under the Clean Air Act of Montana. DEQ evaluated NorthWestern's permit under the Clean Air Act of Montana, specifically §§ 75-2-204 and 75-2-211, MCA, and the agency's implementing rules. Montana's Air Quality Permitting Rules require the permit application to include "information regarding site characteristics necessary to conduct an assessment of impacts under [MEPA]." Administrative Rules of Montana (ARM) 17.8.748(4)(k).

Under MEPA, if a proposed project will "significantly affect[] the quality of the human environment," DEQ must prepare an environmental impact statement (EIS) before granting an air quality permit. ARM 17.4.607(1). But if DEQ determines through preparation of an EA that a project's impacts will not be significant or that otherwise significant impacts can be mitigated below the level of significance, DEQ may issue an air quality permit without preparing an EIS. ARM 17.4.607(4).

A. DEQ Analyzed the Relevant MEPA Factors, Made a Preliminary Determination that the Plant Would Have No Significant Adverse Impacts, and Determined that the Permit Should Issue

On July 9, 2021, DEQ published a Preliminary Determination on Permit Application, a draft permit, and a draft EA for public comment. *See* AR 1179-1223 (Preliminary Determination and draft permit) and 1224-1228 (draft EA). DEQ performed a "best available control technology" (BACT) analysis on the plant's proposed methods of controlling the plant's emissions of nitrogen oxides (NOx), carbon monoxide (CO), volatile organic compounds (VOC), particulate matter of various sizes (PM, PM_{10}, $PM_{2.5}$), and sulfur dioxide (SO_2). AR 1191-1204. As noted, this analysis was based on the assumption that the plant would operate 24 hours per day, seven days per week, for 365 days per year, minus start-up and shut-down times for 8,760 total operational hours.

DEQ concluded that the proposed plant would use the best available control technology for NOx, CO, and VOC, *see* AR 1194 (NOx); 1198 (CO), 1201 (VOC), and that plant's anticipated emission rates of these gases would the lowest, or among the lowest, of published emission rates for similar facilities. AR 1195 (NOx), 1199 (CO), 1203 (VOC). DEQ also concluded that the plant's methods of controlling emissions of PM, PM_{10}, $PM_{2.5}$, and SO_2, were consistent with methods previously approved by the agency. AR 1203 (SO_2), 1204 (PM, PM_{10}, $PM_{2.5}$). DEQ also performed an ambient air analysis and noted that the plant's proposed

emissions of PM_{10}, $PM_{2.5}$, NO_2, and CO were above modeling guidelines and warranted further analysis. AR 1211 *et seq*. This further analysis demonstrated compliance with the relevant standards and that the plant's emissions would not have an adverse impact. *Id.*

In addition to the foregoing air-quality analysis, DEQ examined the proposed project's impacts on (1) terrestrial and aquatic life and habitats, (2) water quality, quantity, and distribution, (3) geology and soil quality, stability and moisture, (4) vegetation cover, quantity, and quality, (5) aesthetics, (6) unique endangered, fragile, or limited environmental resources, (7) the Sage Grouse Executive Order, (8) demands on environmental resources of water, air and energy, (9) historical and archaeological sites, and (10) cumulative and secondary impacts. NW App. 302-303 / AR 1225-1226.

The draft EA concluded that the project would have no significant environmental effects and that no EIS was required. NW App. 305 / AR 1228. The Preliminary Determination concluded that NorthWestern's air quality permit should be granted on certain conditions. NW App. 256 / AR 1179; NW App. 258-261 / AR 1181-84.

B. DEQ Submitted Its Draft Permit and Draft EA to a Notice-and-Comment Period, during which DEQ Received 700 Comments, Including 26 Pages of Comments from Plaintiffs

DEQ opened a notice-and-comment period on the draft permit and draft EA.

NW App. 256 / AR 1179. The comment period was subsequently extended. NW App. 217 / AR 1101. DEQ received a total of 700 comments, *id.*; *see also* AR 382-1087, including 26 pages of comments from Plaintiffs Montana Environmental Information Center (MEIC) and the Sierra Club. NW App. 405-430 / AR 2216-2241.

MEIC is an environmental advocacy organization with approximately 5,000 members that was founded in 1973 to protect and restore Montana's natural environment. District Court Docket (Dkt.) 4 ¶ 6. Sierra Club is an environmental organization with more than 800,000 members nationwide that is dedicated to providing people with meaningful outdoor experiences and preserving the environment. *Id.* ¶ 7.

C. DEQ Approved the Permit and Issued a Final EA

On August 23, 2021, at the conclusion of the notice-and-comment period, DEQ issued its decision to approve NorthWestern's application for an air quality permit. AR 1088. DEQ also published the final permit and final EA. AR 1088-1155 (final permit) and 1156-1178 (final EA).

1. DEQ Materially Improved the EA in Response to the Comments

DEQ rewrote the EA in response to the comments it received. Whereas the draft EA was only five pages; the final EA was 23 pages and provided a substantially more robust discussion of each of the MEPA factors. *Compare* NW

App. 301-305 / AR 1224-28 (draft EA), *with* NW App. 233-255 / AR 1156-1178 (final EA). The final EA also added maps—*see* NW App. 237 / AR 1160 (aerial view of parcel and surrounding land); NW App. 243 / AR 1166 (diagram of pertinent areas containing special species) —and a more precise description of the portions of the 36-acre LGS parcel that would be affected by construction and operation of the plant. NW App. 253 / AR 1176 ("The estimated construction disturbance would be about 20.4 to 25.4 acres. Once operational, the disturbed acreage is estimated at 10.4 acres."). The final EA also added discussion of (i) four types of secondary effects—*compare* NW App. 305 / AR 1228, *with* NW App. 241 / AR 1164 (Air Quality); NW App. 242 / AR 1165 (Vegetation Cover); NW App. 245 / AR 1168 (Aesthetics, Demand on Environmental Resources), and (ii) cumulative effects from other nearby sources of industrial emissions—namely, the CHS refinery and the Laurel Wastewater Treatment Plant. *Compare* NW App. 305 / AR 1228, *with* NW App. 250 / AR 1173.

2. DEQ's Final Permit Responded to All 700 Comments on the Draft Permit and Draft EA

DEQ's final permit grouped the 700 comments into categories and responded in substance to all of them.

a. DEQ Explained That It Did Not Analyze the Plant's Proposed CO_2 Emissions Because DEQ Does Not Have Authority To Regulate CO_2

Hundreds of the comments (including Plaintiffs' submission) raised

concerns about the plant's emissions of greenhouse gases (GHGs), *i.e.*, carbon dioxide (CO_2) and other GHGs like nitrous oxide, all converted to carbon dioxide equivalents (CO2e). *E.g.*, AR 382, 390, 444, 471, 479, 480, 604, 610, 611, 612, 613, 615, 616, 619, 656, 661, 687, 689, 708, 712, 752, 787, 824, 827, 840, 877, 910, 974, 1005. Plaintiffs' own submission argued that DEQ failed to analyze greenhouse gas emissions and cited instead the estimated 769,706 tons per year of total CO2e emissions contained in NorthWestern's permit applications. *E.g.*, NW App. 413 / AR 2224. Many of the other comments alleged that the plant would emit 42,000 tons per year of GHGs. *E.g.*, AR 410, 419, 422, 427, 428, 429, 439, 444, 445, 448, 452, 453, 460, 463, 469, 472, 474, 475, 477, 482, 488, 489, 490, 503, 505, 508, 510, 512, 519, 521, 536, 540, 541, 546, 548, 549, et al. The source of the "42,000 tons" allegation was apparently a mass email from the Northern Plains Resource Council that encouraged recipients to comment on the proposed plant. AR 2210-11.

DEQ responded to these comments by noting that it did not have authority to regulate GHG emissions:

> The Department of Environmental Quality, specifically the Air Quality Bureau does not regulate greenhouse gases such as CO2. The Bureau is required to regulate the emissions of criteria pollutants including NOx, SO2, PM, VOC, CO and ozone. Until such time as the State of Montana decides to regulate greenhouse gases as part of the Air Quality Bureau's statutory requirements, CO2 emissions are only required to be reported by certain industrial sources under Federal Reporting

> Programs. The Federal Program currently is essentially a reporting program to develop national greenhouse gas inventories, but only requires evaluations for CO2 when the proposed emissions are above very high thresholds, and in these cases, the required steps are to ensure that the equipment design implements best practices such as heat recovery to minimize the quantity of fuel used. It does not restrict the type or quantity of fuel that may be used, rather it requires an evaluation for those practices that minimize the quantity of fuel to be combusted.
>
> The reference to 42,000 tons of climate changing pollution is reference to the amount of CO2 (mass emissions) that will result if each RICE operates at the proposed 8,760 hours. As long as natural gas is being combusted in the engines, CO2 will be produced at a known rate. There currently is no off-the-shelf solution to economically capture and control CO2 emissions from natural gas engines. While there are innovative solutions being researched and piloted on exhaust streams from natural gas combustion processes, they are not required on new or existing equipment either at a federal level or within the State of Montana. If these solutions become economical in the future, they likely would be identified as BACT for RICE.

NW App. 218 / AR 1102 (Pub_Com_2); *see also* NW App. 219 / AR 1103 (Pub_Com_5).

Some of the public comments objected to the draft permit because it failed to require BACT for GHG emissions. DEQ responded that "no BACT analysis is required for GHGs for this application" for the following reasons:

> The Supreme Court of the United States (SCOTUS), in its *Utility Air Regulatory Group v. EPA* decision on June 23, 2014, ruled that the Clean Air Act neither compels nor permits EPA to require a source to obtain a PSD or Title V permit on the sole basis of its potential emissions of GHG. SCOTUS also ruled that EPA lacked the authority to tailor the Clean Air Act's unambiguous numerical thresholds of 100 or 250 TPY to

> accommodate a CO2e threshold of 100,000 TPY. SCOTUS upheld that EPA reasonably interpreted the Clean Air Act to require sources that would need PSD permits based on their emission of conventional pollutants to comply with BACT for GHG. As such, sources that must undergo PSD permitting due to pollutant emissions other than GHG may still be required to comply with BACT for GHG emissions. The Laurel Generating Station does not trigger PSD permitting as a new major source of emissions, therefore; no BACT analysis is required for GHGs for this application.

NW App. 220-221 / AR 1104-1105; *see also* NW App. 230 / AR 1114.

b. DEQ Did Not Receive Any Comments that Expressed Concerns about the Plant's Lighting or Aesthetics, but DEQ Nevertheless Augmented Its Analysis of the Plant's Aesthetic Impacts

In DEQ's draft EA, the "Aesthetics" section said only that the "proposed electrical generation project would change the aesthetics at the site as it is currently bare land that is rural in nature." NW App. 302 / AR 1225. Nevertheless, DEQ received very few comments about the aesthetic impacts of the plant. None of the comments on the draft EA raised a concern about the lighting of the plant, or light pollution at night resulting from operation of the plant, or even about "aesthetics" generally. Two public comments raised concerns about the noise associated with constructing and operating the plant and/or the impact of the plant on nearby property values. AR 405, 701.

Despite the minimal number of comments on aesthetic features of the plant, DEQ nevertheless substantially rewrote and enhanced the "Aesthetics" section in

the final EA to say the following:

> The site is located in an area mostly surrounded by agricultural and industrial private property area. The project would occur on private land. 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. The exhaust stacks are on the west side of the engine hall and are further away from the residences.
>
> **Direct Impacts:** *Proposed Action:* There would be temporary construction with building activities including noise and dust. Equipment planned for construction would likely include cranes, backhoes, graders/dozers, passenger trucks, delivery trucks, cement trucks, and various other types of smaller equipment. The use of the various types of equipment would be spread out over the duration of the expected year-long construction schedule. Once the proposed action is constructed, a baseline level of noise would occur from the 18 RICE. This project is considered to be short-term with far field-noise specification estimates less than or equal to 65 A-weighted decibels (dBa) at 600 feet west of the radiators and 555 feet east of the east exterior wall of the engine hall. Noise estimates would also not exceed 65 dBa at 600 feet to the north and south. All reported noise estimates are within the NWE property boundaries and noise beyond these distances would drop. The proposed project would incorporate noise mitigation measures:
>
> - Combustion air inlet 45 dB silencer
> - Exhaust gas 45 dB silencer
> - Low noise radiators
> - Building noise attenuation panels, including treatment for HVAC systems
>
> The backup diesel generator and fire pump could also result in some intermittent noise due to operation for emergency situations as well as periodic testing of these engines to test

> their functionality. The backup generator and fire pump engines are each limited to 300 hours of operation per year. During operation of these two engines (which use diesel fuel), visible emissions from the engines exhaust is likely but are limited by permit opacity conditions. Each of the 18 RICE have their own exhaust stack at approximately 77 feet in height and 4.3 feet in diameter. The backup generator stack height would approximately be 16 feet tall and the emergency fire pump engine stack height is approximately 13 feet tall. The dew point heater also has its own stack estimated at 20 feet in height. The tallest stacks located on the site could be visible from the surrounding properties, intermittently from recreationalists on the Yellowstone River to the south, and visible from the Laurel Riverside Park. Since the facility would operate 24/7 365 days per year, some external lighting would exist at the facility and may be visible from the immediate surrounding properties.
>
> **Secondary Impacts:** *Proposed Action:* There would be secondary impacts to places with previously unobstructed views of the facility. No other secondary impacts to aesthetics and noise are anticipated.

NW App. 244-245 / AR 1167-68.

III. PLAINTIFFS SUED TO VACATE THE PERMIT BASED ON FIVE ALLEGED DEFICIENCIES IN DEQ'S REVIEW

In October 2021, without filing an administrative appeal of the final permit, Plaintiffs commenced this action. As amended, Plaintiffs' First Cause of Action alleged that the final EA violated MEPA due to inadequate analyses of five impacts: pipeline impacts; water quality impacts; cumulative sulfur dioxide (SO_2) emissions; aesthetic (visual and noise) impacts; and greenhouse gas emissions. Dkt. 4 ¶¶ 36-54. In support of this claim, Plaintiffs repeated their assertion that the LGS "is projected to emit 769,706 TPY [tons per year] of climate-harming

greenhouse gases (calculated as carbon dioxide equivalent (CO2e) emissions). This is equivalent to the annual emissions of 167,327 passenger vehicles." Dkt. 4 ¶ 29; *see also id.* ¶ 53.

Plaintiffs' Second Cause of Action contingently challenged the constitutionality of § 75-1-201(2)(a) , MCA, which was amended in 2011 to foreclose MEPA review in certain circumstances "of actual or potential impacts beyond Montana's borders," and "actual or potential impacts that are regional, national, or global in nature." Dkt. 4 ¶¶ 55-62.

Plaintiffs asked the Court to "[d]eclare unlawful and set aside the air quality permit" on the ground that DEQ's MEPA violations rendered DEQ's decision to issue the permit unsound. Dkt. 4 (Request for Relief) at 18 ¶ 3.

The parties briefed cross-motions for summary judgment based on the administrative record, and the district court heard oral argument on June 20, 2022.

At no time did Plaintiffs submit evidence or briefing pursuant to § 75-1-201(6)(c)(ii), MCA in support of their request for vacatur of the permit.

IV. THE DISTRICT COURT VACATED THE PERMIT ON TWO GROUNDS

On April 6, 2023, the Court issued an Order granting in part Plaintiff's motion for summary judgment on two grounds. NW App. 1.

A. The District Court Concluded that DEQ Lacked Sufficient Justification for Not Analyzing the Plant's Greenhouse Gas Emissions

The district court was plainly troubled by Plaintiffs' claims about the plant's projected emissions of greenhouse gases. In its summary judgment order, the district court twice mentioned Plaintiffs' assertion that the LGS "is projected to emit 769,706 tons per year of climate-harming greenhouse gases," NW App. 5, 28. The district court went on to say in dicta:

> This project is one of NorthWestern Energy's largest projects in Montana. It is up wind of the largest city in Montana. It will dump nearly 770,000 tons of greenhouse gases per year into the air. The pristine Yellowstone River is adjacent to the project. This project will have a life of more than 30 years. That amounts to in excess of 23,100,000 tons of greenhouse gases [sic] emissions directly impacting the largest city in Montana that is less than 15 miles down wind.

NW App. 29-30.

The district court concluded that DEQ failed to analyze the plant's proposed greenhouse gas emissions in part because DEQ believed that such review was barred by § 75-1-201(2)(a), MCA, which at the time prohibited agencies from performing MEPA review of environmental impacts that are "beyond Montana's borders." NW App. 29. The district court concluded that DEQ had misinterpreted this statute to "absolve DEQ of its MEPA obligation" to "take a hard look at the greenhouse gas effects of this project as it relates to impacts within the Montana borders." *Id.* "Because of this misinterpretation of the plain meaning of the

statute, DEQ's failure to evaluate the plant's greenhouse gas emissions and corresponding impacts of the climate in Montana violates MEPA." *Id.*; *see also* NW App. 32.

The district court nevertheless recognized that Defendants offered another reason why DEQ did not review the plant's GHG emissions. "Defendants contend that because the DEQ cannot regulate CO2 emissions, DEQ cannot be required to perform a MEPA review of CO2 emissions." *Id.* at 28. But the district court failed to analyze this argument or rule on it.

B. The District Court Concluded that DEQ Failed To Analyze Adequately the Impact of the Plant's Lighting

The district court also agreed with Plaintiffs that "DEQ did not take a hard look at lighting." NW App. 24. The district court concluded that DEQ acted arbitrarily and capriciously because "[t]here is but one comment on lighting found in the administrative record." *Id.* (citing AR 1168). "There is no analysis of what type of lights, how bright the lights may be or any other analysis on this subject." *Id.*; *see also* NW App. 31.

C. The District Court Vacated the Permit without Applying the Requirements in § 75-1-201(6)(c)(ii), MCA

The district court granted Plaintiffs' request to vacate the permit and remand the case to DEQ for further MEPA analysis. The district court concluded that, under *Park County Environmental Council v. Montana Department of*

Environmental Quality, 2020 MT 303, ¶ 55, 402 Mont. 168, 477 P.3d 288, vacatur is a "standard remedy" to set aside "permits or authorizations improperly issued." NW App. 33.

Defendants argued that vacatur is an equitable remedy, that equitable remedies for MEPA violations are exclusively governed by § 75-1-201(6)(c)(ii), MCA, and that Plaintiffs had failed to submit evidence or argument that satisfied the statutory requirements. NW App. 33. The district court rejected these arguments on the ground that *Park County* did not require application of § 75-1-201(6)(c)(ii), MCA. NW App. 34.

V. SHORTLY AFTER THE DISTRICT COURT VACATED THE PERMIT, MONTANA ENACTED HB 971, WHICH BARS DEQ FROM ANALYZING GREENHOUSE GAS EMISSIONS IN MOST CONTEXTS

On May 10, 2023, the Montana Governor signed into law House Bill (HB) 971. HB 971 enacted the following changes to MEPA at § 75-1-201(2)(a), MCA:

> (2)(a) Except as provided in subsection (2)(b), an environmental review conducted pursuant to subsection (1) may not include ~~a review of actual or potential impacts beyond Montana's borders. It may not include actual or potential impacts that are regional, national, or global in nature~~ an evaluation of greenhouse gas emissions and corresponding impacts to the climate in the state or beyond the state's borders.

See § 1, Ch. 450, L. 2023. The law became effective immediately upon signing.

VI. THE DISTRICT COURT STAYED VACATUR AFTER CONCLUDING IT ERRED, AND CONSTRUCTION OF THE PLANT RESUMED

The LGS was forecast to commence operations in April 2024. Dkt. 55 (Affidavit of James L. Williams) ¶ 14. Permit vacatur required cessation of construction, pursuant to Administrative Rule of Montana 17.8.843. At the time the district court vacated the permit, NorthWestern had spent or committed $215 million of the LGS's then-forecast $285 million cost. *Id.*

On June 8, 2023, the district court stayed its decision pending appeal. NW App. 36. Construction of the LGS has resumed.

STANDARD OF REVIEW

This Court reviews summary judgment rulings *de novo* for correctness. *Bitterrooters for Planning, Inc. v. Mont. Dep't of Envtl. Quality*, 2017 MT 222, ¶ 15, 388 Mont. 453, 401 P.3d 712. Summary judgment "should be rendered if the pleadings, the discovery and disclosure materials on file, and any affidavits show that there is no genuine issue as to any material fact and that the movant is entitled to judgment as a matter of law." M. R. Civ. P. 56(c)(3). During reviews of administrative rulings, "[t]he Court's focus is on the administrative decision-making process rather than the decision itself." *Park County*, ¶ 18. Agency decisions involving "substantial agency expertise" are generally given "great deference." *Park County*, ¶ 18.

When reviewing an agency's environmental review under MEPA, courts determine whether the agency's decision was unlawful or arbitrary and capricious. *Bitterrooters*, ¶ 15. "An agency decision is unlawful if it does not comply with governing laws and administrative rules." *Id*. "An agency decision is arbitrary and capricious if made without consideration of all relevant factors or based on a clearly erroneous judgment." *Id.*, ¶ 16. "A review under the arbitrary and capricious standard 'does not permit a reversal merely because the record contains inconsistent evidence or evidence which might support a different result. Rather, the decision being challenged must appear to be random, unreasonable or seemingly unmotivated based on the existing record.'" *Mont. Wildlife Fed'n v. Mont. Bd. of Oil & Gas Conservation*, 2012 MT 128, ¶ 25, 365 Mont. 232, 280 P.3d 877 (quoting *Hobble Diamond Ranch, LLC v. State*, 2012 MT 10, ¶ 24, 363 MT 310, 268 P.3d 31). "[T]he [party] challenging the [agency's] decision has the burden of proving the claim by clear and convincing evidence contained in the record." § 75-1-201(6)(a)(i), MCA.

SUMMARY OF ARGUMENT

The district court erred in vacating the permit without requiring plaintiffs to satisfy the statutory requirements for equitable relief set forth in § 75-1-201(6)(c)(ii), MCA. The district court has acknowledged it erred following this Court's decision in *Water for Flathead's Future v. Montana Department of*

Environmental Quality, 2023 MT 86, ¶ 35, 412 Mont. 258, ___ P.3d ___, and has stayed its decision pending appeal.

The district court also erred in holding that DEQ was required to analyze the effects of GHG emissions from the LGS, where it was undisputed that DEQ did not have the regulatory authority to prevent GHG emissions in an air quality permit. Under *Bitterrooters,* DEQ's lack of regulatory authority to prevent GHG emissions means it had no duty to analyze such emissions in a MEPA document. *Bitterrooters*, ¶ 33.

The district court further erred in holding that DEQ's analysis of lighting impacts was inadequate under MEPA. DEQ's discussion of aesthetic impacts included information on the frequency and duration of facility lighting, distance to nearest receptors, and potential for the lights to be visible off-site. This discussion was consistent with the requirements of MEPA and this Court's precedent in *Belk v. Montana Department of Environmental Quality*, 2022 MT 38, 408 Mont. 1, 504 P.3d 1090. The district court's demand for additional information on the type and brightness of the lights deployed was unreasonable and erroneous under the circumstances, which include Plaintiffs' failure to raise these issues in comments to DEQ.

Finally, even if this Court were to conclude that the district court correctly ruled that DEQ was required to analyze the GHG emissions from the LGS based

on the MEPA language then in effect, the issue has been mooted by the recent passage of HB 971. *See* § 1, Ch. 450, L. 2023. HB 971 repealed the text that the district court relied upon, and the amended text prohibits DEQ from analyzing the GHG effects for projects like the LGS. Consequently, the district court's ruling has been superseded by statute and the issue of DEQ analyzing GHG emissions is now moot.

ARGUMENT

I. THE VACATUR REMEDY THAT THE DISTRICT COURT AWARDED TO PLAINTIFFS WAS IMPROPER

MEPA specifies the "exclusive" remedies for successful challenges to MEPA decisions. § 75-1-201(6)(c)(i), MCA; *Water for Flathead's Future v. Montana Dept. Envtl. Quality*, 2023 MT 86, ¶ 35, 412 Mont. 258, ___ P.3d ___ (*WFF v. DEQ*). Those provisions of MEPA provide, in pertinent part, that:

> . . . 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 that the party requesting the relief is more likely than not to prevail on the merits of its complaint given the uncontroverted facts in the record and applicable law and, in the absence of [the pertinent equitable relief] that the:
>
> (A) party requesting the relief will suffer irreparable harm in the absence of the relief;
>
> (B) issuance of the relief is in the public interest. In determining whether the grant of the relief is in the public interest, a court:

(I) may not consider the legal nature or character of any party; and

(II) shall consider the implications of the relief on the local and state economy and make written findings with respect to both.

(C) relief is as narrowly tailored as the facts allow to address both the alleged noncompliance and the irreparable harm the party asking for the relief will suffer. In tailoring the relief, the court shall ensure, to the extent possible, that the project or as much of the project as possible can go forward while also providing the relief to which the applicant has been determined to be entitled.

§ 75-1-201(6)(c)(ii), MCA (Equitable Relief Requirements).[4]

The Equitable Relief Requirements do not specifically identify the remedy of vacatur as a form of equitable relief, and the district court interpreted the Court's decision in *Park County* to mean that the statute does not apply to vacatur remedies. NW App. 33. But in *WFF v. DEQ*, this Court rejected the district court's interpretation of *Park County*. A permit cannot be vacated for violating MEPA unless the party challenging the permit satisfies the Equitable Relief Requirements. *WFF v. DEQ,* ¶¶ 35-36.

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[4] To obtain a remedy, a party is also required to "provide[] a written undertaking to the court in an amount reasonably calculated by the court as adequate to pay the costs and damages sustained by any party that may be found to have been wrongfully enjoined or restrained by a court through a subsequent judicial decision in the case." § 75-1-201(6)(d), MCA.

In staying its decision pending appeal, the district court acknowledged that its interpretation of *Park County* and the Equitable Relief Requirements was in error, as a result of this Court's holding in *WFF v. DEQ*. NW App. 40. As the district court explained:

> Under the Montana Supreme Court's analysis in *WFF v. DEQ*, the remedial provisions of MEPA limit the Court to providing injunctive relief and only after making a number of findings of fact. *Id.* The court determined that the injunctive remedies provided in MEPA are exclusive. *Id.* Following *WFF v. DEQ*, this Court's reliance on *Park Cty.* for its analysis was incorrect. Further, relying on *Park Cty.*, Plaintiffs requested vacatur and not an injunction as their relief, so this Court did not follow the exclusive remedies laid out by *WFF v. DEQ* and issue an injunction. Pursuant to *WFF v. DEQ* and the remedial clause of MEPA, this Court's vacatur of the air quality permit was improper and a stay of this Court's April 2023 Order is appropriate.

NW App. 40. Thus, the district court came to recognize that it erred in concluding that the Equitable Relief Requirements do not apply to vacatur remedies.

The district court also lacked a basis for granting relief under the Equitable Relief Requirements because the Plaintiffs never proffered evidence or argument on the issues of irreparable harm, tailored relief, or the economic consequences of vacating the permit. Consequently the record does not support a vacatur remedy.

As a result, this Court should reverse the district court on the issue of permit vacatur.

II. DEQ'S PERMIT APPROVAL WAS PROPER, AND THE DISTRICT COURT ERRED WHEN IT FOUND OTHERWISE

The district court also erred on the merits when it concluded that DEQ violated MEPA by failing to analyze the plant's emissions of greenhouse gases and the plant's lighting impacts.

A. DEQ Was Not Required To Analyze the Effects of the Plant's CO_2 Emissions

"MEPA must be construed in harmony with the substantive limitations of an agency's applicable regulatory authority." *Bitterrooters*, ¶ 30. MEPA does not expand or modify those substantive limitations.[5] *Mont. Wilderness Ass'n v. Bd. Of Health & Env't Scis.* (1976), 171 Mont. 477, 484-85, 559 P.2d 1157, 1161. When an agency cannot lawfully prevent the effect of a proposed action, the agency is not required to analyze the environmental impact of that effect. *Bitterrooters*, ¶ 33. Here, DEQ was not required to analyze the plant's emissions of GHGs because DEQ does not have lawful authority to regulate GHG emissions in an air quality permit.

1. DEQ Need Not Perform a MEPA Review of Effects that It Does Not Have Lawful Authority To Prevent

In *Bitterrooters*, DEQ received a permit application for a wastewater

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[5] MEPA requirements are "merely procedural" in the sense that MEPA does not "provide for regulatory authority, beyond authority explicitly provided for in existing statute, to a state agency." § 75-1-102(3)(b), MCA.

treatment facility to be constructed in conjunction with a retail big box store on an eight-acre parcel. *Bitterrooters*, ¶ 33. The wastewater treatment facility was thus a part of a larger development project. When DEQ confined its MEPA analysis to the impacts of the wastewater system, two citizen groups sued DEQ on the ground that MEPA required DEQ to consider the impacts of the construction and operation of the entire development project. *Id.*, ¶ 13. The citizen groups argued that, because "the construction and operation of the retail store would not occur 'but for' the issuance of the wastewater permit," the DEQ's MEPA analysis should extend to all of the impacts "that would not occur 'but for' the issuance of the permit." *Id.*, ¶ 24. The district court agreed with the citizen groups that DEQ is responsible for evaluating all of the environmental impacts that would not occur "but for" DEQ's issuance of a permit. *Id.*

This Court reversed. "We reject the unyielding 'but for' causation standard asserted by [plaintiffs] to the effect that a state action is a cause of an environmental impact regardless of whether the agency, in the lawful exercise of its independent authority, can avoid or mitigate the effect." *Id.*, ¶ 33. *Bitterrooters* relied on *Department of Transportation v. Public Citizen*, 541 U.S. 752 (2004). The operative principle in *Public Citizen* is that "an agency cannot be considered a relevant cause of an effect when the agency cannot prevent the effect in the lawful exercise of its limited authority." *Bitterrooters*, ¶ 28 (citing *Public*

Citizen, 541 U.S. at 770) (internal quotations omitted). *Bitterrooters* went on to hold: "As in *Public Citizen*, requiring a state agency to consider environmental impacts it has no authority lawfully to prevent would not serve MEPA's purposes of ensuring that agencies and the interested public have sufficient information regarding relevant environmental impacts to inform the lawful exercise of agency authority." *Bitterrooters*, ¶ 33. "[F]or purposes of MEPA, an agency action is a legal cause of an environmental effect only if the agency can prevent the effect through the lawful exercise of its independent authority." *Id.*, ¶ 33.

To clarify the limits of what DEQ can "lawfully prevent," the Montana Supreme Court noted that DEQ could not lawfully prevent the decision to authorize construction of the big box retail facility. That decision was a matter for zoning authorities, and "the [Montana] Legislature has, with limited exceptions, placed general land use control beyond the reach of MEPA in the hands of local governments." *Id.*, ¶ 34 (citing Title 76, chapters 1-3, MCA (Subdivision and Platting Act and local zoning enabling Acts)). Thus, because DEQ could not regulate or prevent the construction of the development project as a whole, DEQ was not required to evaluate the environmental impacts of the entire project.

This Court recently re-affirmed these principles in *WFF v. DEQ* at ¶ 32.

2. DEQ Cannot Lawfully Prevent the Plant's CO_2 Emissions

Bitterrooters controls the outcome here. DEQ was not required to analyze

the effects of the plant's CO_2 emissions because DEQ cannot lawfully prevent the plant's CO_2 emissions.

As DEQ explained in its responses to comments on its draft EA, the federal Clean Air Act charges the Environmental Protection Agency (EPA) with formulating national ambient air-quality standards (NAAQS) for air pollutants. *See Util. Air Regul. Grp. v. EPA*, 573 U.S. 302, 308 (2014). To date, EPA has issued NAAQS for six pollutants: nitrogen dioxide (NO_2), carbon monoxide (CO), particulate matter (PM), sulfur dioxide (SO_2), ozone, and lead. *Id.* EPA has not issued a NAAQS for carbon dioxide (CO_2).

States have primary responsibility for implementing NAAQS through permitting programs. *Id.* Montana has developed NAAQS for all of the six pollutants regulated by EPA, plus hydrogen sulfide. *See* ARM 17.8.210 through 17.8.223. Like EPA, Montana also has not developed a NAAQS for carbon dioxide (CO_2).

The Clean Air Act also authorizes regulation of "other" pollutants like CO_2, but only if a permitting requirement has already been triggered by one of the statutorily-specified pollutants. In *Utility Air*, the United States Supreme Court held that States may *only* impose controls on greenhouse gas emissions like CO_2 if a facility is subject to regulation under the Clean Air Act's "Prevention of Significant Deterioration" (PSD) program for emissions of some *other* pollutant

besides GHGs. *Utility Air*, 573 U.S. at 308.

For these reasons, DEQ noted in its responses to the hundreds of public comments questioning the proposed plant's greenhouse gas emissions:

> The Department of Environmental Quality, specifically the Air Quality Bureau does not regulate greenhouse gases such as CO2. The Bureau is required to regulate the emissions of criteria pollutants including NOx, SO2, PM, VOC, CO and ozone. Until such time as the State of Montana decides to regulate greenhouse gases as part of the Air Quality Bureau's statutory requirements, CO2 emissions are only required to be reported by certain industrial sources under Federal Reporting Programs.

NW App. 218 / AR 1102 (Pub_Com_2).

> The Supreme Court of the United States (SCOTUS), in its *Utility Air Regulatory Group v. EPA* decision on June 23, 2014, . . . upheld that EPA reasonably interpreted the Clean Air Act to require . . . sources that must undergo PSD permitting due to pollutant emissions other than GHG may still be required to comply with BACT for GHG emissions. ***The Laurel Generating Station does not trigger PSD permitting as a new major source of emissions, therefore; no BACT analysis is required for GHGs for this application.***

NW App. 220-221 / AR 1104-1105 (emphasis added). In sum, DEQ does not have lawful authority to prevent the plant's CO_2 emissions because the LGS will not emit any another pollutant at levels triggering PSD permitting under the Clean Air Act. Therefore, under *Bitterrooters*, DEQ had no duty under MEPA to evaluate the plant's CO_2 emissions.

In briefing to the district court, Plaintiffs never identified a basis on which

DEQ could lawfully prevent CO_2 emissions from the LGS through exercise of DEQ's permitting authority. They offered two alternative theories. First, Plaintiffs contended that if DEQ denied the permit on any grounds, it would have the ancillary effect of preventing the LGS's GHG emissions. But this is simply a rehash of the "but-for" causation theory expressly rejected in *Bitterrooters*.

Second, Plaintiffs observed that MEPA allows a project proponent to implement voluntarily a pollution-mitigation measure that would not otherwise be required by law. *See* Dkt. 31 at 15 (citing §§ 75-1-201(1)(b)(v) and 75-1-201(4)(b), MCA); *see also id.* at 8. Plaintiffs contended that because DEQ's analysis of the LGS's GHG emissions could potentially cause NorthWestern to implement voluntarily a measure to reduce the LGS's GHG emissions, this constitutes agency authority to "prevent or mitigate" project effects within the meaning of *Bitterrooters* and therefore triggers DEQ's duty to analyze GHG emissions under MEPA. *See* Dkt. 31 at 15.

This argument would turn *Bitterrooters* on its head. *Bitterrooters* is clear that an agency is required to perform a MEPA analysis only of those effects that the agency can lawfully compel or prevent. *Bitterrooters*, ¶ 33. But an agency can neither lawfully compel nor prevent the implementation of alternative pollution-control measures by a project proponent. The very MEPA provisions that Plaintiffs cite make clear that, while an agency like DEQ can analyze and

recommend pollution-mitigation "alternatives" to a proposed action, "[n]either the alternatives analysis nor the resulting recommendations bind the project sponsor to take a recommended course of action[.]" § 75-1-201(1)(b)(v), MCA. Therefore, the fact that a MEPA "alternatives analysis" might reveal options that a project proponent might voluntarily undertake does not bring the subject matter of the "alternatives analysis" within the scope of compulsory MEPA review.

These issues were fully briefed to the district court. Elsewhere in its decision, the district court acknowledged and correctly applied *Bitterrooters* to other aspects of Plaintiffs' challenges to DEQ's EA, *see* NW App. 19, but the district court inexplicably failed to apply or even acknowledge *Bitterrooters* in the context of GHG emissions. As a result, the district court erred and should be reversed on the subject of GHG emissions.[6]

B. The District Court's Analysis of Lighting Was Erroneous

A MEPA inquiry must be tailored to the impact at issue and the factors relevant to it and rationally supported by evidence before the agency. Agencies are required "to make an ***adequate*** compilation of relevant information, to analyze it

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[6] Because DEQ was not required to analyze GHG emissions in any respect, the Court need not address the district court's additional holding regarding the geographic scope of such an analysis (*i.e.*, that DEQ was required to analyze the impact of GHG emissions within Montana's borders). NW App. 29.

reasonably, and to consider all ***pertinent*** data." *Clark Fork Coal. v. Mont. Dep't of Env't Quality*, 2008 MT 407, ¶ 47, 347 Mont. 197, 197 P.3d 482 (emphasis added). Where the agency's decision "implicat[es] substantial agency expertise," courts afford "great deference" to the agency. *Mont. Env't Info. Ctr. v. Mont. Dep't of Env't Quality*, 2019 MT 213, ¶ 20, 397 Mont. 161, 451 P.3d 493 (*MEIC*).

Here, the district court concluded DEQ did not analyze the plant's lighting sufficiently because "[t]here is but one comment on lighting found in the administrative record" and "no analysis of what type of lights, how bright the lights may be or any other analysis on this subject." NW App. 24. But the district court erred in two respects.[7]

First, the district court improperly rejected DEQ's MEPA analysis on grounds that were not presented to DEQ in the first instance. Second, the district court erroneously ignored the context of DEQ's analysis and its proportionality to the issues posed by the plant's lighting.

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[7] NorthWestern is aware that DEQ has released for public comment a draft supplemental EA on the subject of the plant's lighting. Therefore, DEQ may not address in its appeal the district court's determination on lighting. NorthWestern nevertheless contends that the district court's lighting analysis was erroneous for the reasons stated herein. If NorthWestern prevails on these issues, any future challenges to the supplemental EA will be moot.

1. The Lighting Issues Were Not Presented to DEQ in the First Instance

Nothing in the permit applications or the public comments raised any issues about the plant's lighting. DEQ received 700 comments on its draft permit and draft EA, and none of the comments expressed concerns about the plant's lighting in general or about the type or brightness of the plant's lights in particular. Plaintiffs' 26-page comment submission did not challenge DEQ's analysis of the plant's lighting.

MEPA prohibits a court from considering issues, comments, and arguments not presented to the agency in the first instance:

> Except as provided in subsection (6)(b), in a challenge to the agency's decision or the adequacy of an environmental review, a court may not consider any information, including but not limited to an issue, comment, argument, proposed alternative, analysis, or evidence, that was not first presented to the agency for the agency's consideration prior to the agency's decision or within the time allowed for comments to be submitted.

§ 75-1-201(6)(a)(ii), MCA. Here, the district court erred by rejecting DEQ's MEPA analysis based on lighting issues that were not presented to DEQ in the first instance. *See Belk v. Mont. Dep't. of Env't. Quality*, Cause Nos. DV-15-2019-328, DV-15-2019-404, 2020 Mont. Dist. LEXIS 1, at *67-68 (11th Jud. Dist. Ct., Flathead Cnty. Dec. 4, 2020), *aff'd on other grounds, Belk*, 2022 MT 38, 408 Mont. 1, 504 P.3d 1090.

2. DEQ's Analysis of Lighting Was Sufficient

Despite the absence of concerns about the plant's lighting, DEQ nevertheless considered it, and DEQ's analysis was sufficient. In the final EA, DEQ added a sentence that expressed DEQ's conclusion that the environmental impact of the plant's lighting would be extremely limited: "Since the facility would operate 24/7 365 days per year, ***some*** external lighting would exist at the facility and ***may be*** visible from the ***immediate surrounding properties***." NW App. 245 / AR 1168 (emphasis added). This conclusion was supported by other factors relevant to lighting. DEQ noted that the nearest residents to the plant were located 1,030 and 1,230 feet away, respectively. NW App. 244 / AR 1167. The next nearest resident was 2,300 feet away. NW App. 249 / AR 1172. DEQ also concluded that the construction and operation of the plant as a whole (which implicitly includes the plant's lighting) would not disturb either wildlife or unique species in the area. NW App. 242-243 / AR 1165-66.

Although brief, DEQ's discussion of the plant's lighting met all the requirements of MEPA. The Montana Supreme Court most recently addressed MEPA discussions of aesthetic impacts in *Belk v. Montana Department of Environmental Quality*, 2022 MT 38, 408 Mont. 1, 504 P.3d 1090. In *Belk*, this Court upheld a DEQ analysis of aesthetic effects in an EA, described as follows:

> Regarding noise, recreation, and aesthetics, DEQ adequately considered each of the relevant factors and made a reasonable determination. DEQ

> discussed the distance between the lake and the permit area, how this distance would affect visibility and noise effects, the geographic and temporal scope of the disturbance, the severity and frequency of noise from blasting, the duration of the permit and the length of time required for reclamation, and other factors. This constitutes an adequately robust investigation, acknowledgment, and discussion of aesthetic impacts to justify DEQ's conclusions.

Id., ¶ 31. In *Belk*, as in the final EA for the LGS, visibility was discussed as one strand of an overall aesthetics analysis. *Id.* The Court identified three relevant factors for visibility – (1) distance from receptors, (2) how distance would affect impacts, and (3) geographic and temporal scope. *Id.* DEQ addressed all of these factors here. There is no specific requirement to identify the type of lights or brightness; those requirements were invented by the district court.

The district court thus erred when it held there was there was "no analysis" of lighting within the meaning MEPA. Rather, the district court was dissatisfied with the ***degree*** of analysis. Such line drawing on the scope of a technical analysis is where the greatest deference is owed to the agency. *MEIC,* ¶ 20. It was also unreasonable for the district court to fault DEQ for not discussing the type and brightness of lights when no commenters asked DEQ to consider such information.

In sum, Plaintiffs did not demonstrate that DEQ's conclusion on lighting was "random, unreasonable or seemingly unmotivated based on the existing record." *Mont. Wildlife Fed'n*, ¶ 25. The district court erred, and DEQ's discussion of lighting impacts should be upheld.

III. THE ISSUE WHETHER DEQ MUST ANALYZE THE IN-STATE EFFECTS OF THE PLANT'S GREENHOUSE GAS EMISSIONS ON REMAND HAS BEEN MOOTED BY LEGISLATIVE AMENDMENTS

As noted, DEQ owed no duty analyze the plant's GHG emissions because DEQ lacks regulatory authority to prevent GHG emissions. But even if the district court were deemed to have ruled correctly that DEQ was required to analyze the plant's GHG emissions based on the MEPA language in effect at the time it ruled, the issue has been mooted by subsequent legislative developments.

On May 10, 2023, the Legislature enacted HB 971, which amended § 75-1-201(2)(a), MCA. *See* § 1, Ch. 450, L. 2023. As amended, MEPA now reads:

> (a) Except as provided in subsection (2)(b), an environmental review conducted pursuant to subsection (1) may not include an evaluation of greenhouse gas emissions and corresponding impacts to the climate in the state or beyond the state's borders.

§ 75-1-201(2)(a), MCA (2023). None of the § 75-1-201(2)(b) exceptions apply. Consequently, the district court's conclusion based on the prior statutory text that DEQ must consider the impact of the plant's GHG emissions within Montana's borders is now moot.[8]

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[8] NorthWestern expects Plaintiffs to argue that the amended statute is unconstitutional or that the § 75-1-201(2)(b) exceptions apply. But such arguments should be first addressed in district court and are beyond the scope of this appeal.

CONCLUSION

The district court erroneously vacated the permit without satisfying the Equitable Relief Requirements. It also erroneously rejected DEQ's MEPA analysis. DEQ was not required to analyze the LGS's GHG emissions because DEQ cannot lawfully prevent such emissions. DEQ was not required to analyze the LGS's lighting because nobody raised lighting concerns to DEQ in the first instance, and, in any event, DEQ's lighting analysis was sufficient under MEPA. Therefore, this Court should reverse the district court and reinstate the permit.

Date: July 12, 2023

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

Pursuant to Rule 16(3) of the Montana Rules of Appellate Procedure, I certify that this Motion is printed with a proportionately spaced Times New Roman text typeface of 14 points; is double spaced; and the word count calculated by Microsoft Word 2010, is not more than 9,567 words, excluding certificate of service and certificate of compliance.

Dated this 12th day of July, 2023.

/s/ Harlan Krogh
Harlan Krogh

Attorney for Appellant

CERTIFICATE OF SERVICE

I, Harlan B. Krogh, hereby certify that I have served true and accurate copies of the foregoing Brief - Appellant's Opening to the following on 07-12-2023:

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