In the Supreme Court of the State of Montana

Cause No. DA 23-0225

MONTANA ENVIRONMENTAL INFORMATION CENTER & SIERRA CLUB,

Plaintiffs-Appellees-Cross-Appellants

v.

MONTANA DEPARTMENT OF ENVIRONMENTAL QUALITY & NORTHWESTERN CORPORATION,

Defendants-Appellants-Cross-Appellees,

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

Intervenor-Defendant-Appellant.

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

NORTHWESTERN'S COMBINED REPLY AND ANSWER BRIEF

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ARGUMENT

I. THE DISTRICT COURT ERRED IN NOT FOLLOWING THE EQUITABLE RELIEF REQUIREMENTS

The district court vacated Montana Air Quality Permit No. 5261-00 ("Permit") without following the requirements of § 75-1-201(6)(c)(ii) and § 75-1-201(6)(d), MCA ("Equitable Relief Requirements" or "Requirements"). After this Court decided *Water for Flathead's Future v. Montana Dept. Envtl. Quality*, 2023 MT 86, ¶ 35, 412 Mont. 258, ___ P.3d ___ (*WFF*), the district court concluded it had erred and stayed its decision pending this appeal. NW App. 39-40. The district court's recognition of its error was correct.

First, the Requirements apply to all types of injunctions and "other equitable relief." § 75-1-201(6)(c)(ii). Vacatur is an equitable remedy. *See Park Cty. Envtl. Council v. Mont. Dep't of Envtl. Quality*, 2020 MT 303, ¶ 89, 402 Mont. 168, 477 P.3d 288 ("Vacatur of the previously issued permit is an equitable remedy[.]"). Therefore, the Requirements apply to the vacatur remedy the district court erroneously granted here.

Second, the remedies provided in the Requirements for successful challenges to agency decisions are "exclusive." § 75-1-201(6)(c)(i), MCA; *WFF*, ¶¶ 35-36. Therefore, if the Requirements do not encompass vacatur remedies, then vacatur remedies are not available to redress MEPA violations.

A. Plaintiffs' Arguments that the Equitable Relief Requirements Do Not Apply to Vacatur Remedies Lack Merit and, If Adopted, Would Eliminate Vacatur as a Remedy

Plaintiffs nevertheless argue that the phrase "other equitable relief" is limited to variations of injunctive relief because the phrase is preceded by a list of several types of injunctive relief. Opp. at 51. According to Plaintiffs, under the *ejusdem generis* doctrine, the term "other equitable relief" can only include relief "similar in nature" to the listed injunctive remedies. *Id.* But this argument overlooks that "equitable relief" is the guiding principle of the list, not "injunctive relief." All forms of injunctive relief are equitable, but not all forms of equitable relief are injunctive. Plaintiff's argument also proves too much because, if vacatur is not one of the remedies available under the Equitable Relief Requirements, which are the "exclusive" remedies available, then vacatur is not available at all.

Plaintiffs argue that *WFF* "inappropriately erase[s] any legal distinction between injunction and vacatur," Opp. at 54, but the Requirements do not purport to alter the features or rationale of injunctive relief or vacatur. The Requirements merely impose common standards for obtaining either form of relief. Plaintiffs identify no reason or legal authority why the Montana Legislature could not do this.

Plaintiffs argue that *WFF* is distinguishable based on its "particular procedural history, namely the district court's reliance on its 'inherent authority' to

vacate the challenged permit." Opp. at 55. But that feature of *WFF* does not distinguish it from this case. Here, too, the district court necessarily relied on its inherent authority to vacate the Permit because the district court did not follow the "exclusive" Requirements.

Plaintiffs also argue that the portion of *WFF* pertaining to the Requirements is dicta. This is untrue because *WFF* reversed the district court's decision to vacate a permit, and one of the two independent bases for the ruling was that the district court "erred by departing from [the Equitable Relief Requirements] framework and vacating the Permit." ¶ 36. The statutory provisions in the Equitable Relief Requirements hold no lesser status than other statutory provisions of MEPA. One could as easily say that the adequacy of the MEPA analysis was non-essential to the validity of the permit, because the permit could not be vacated without satisfaction of the Equitable Relief Requirements. Regardless, Plaintiffs have not offered any persuasive basis for concluding that the reasoning in *WFF* is incorrect and that the Requirements can or should be interpreted in the ways that Plaintiffs prefer.

B. Plaintiffs' Policy Arguments Are Not Persuasive

Plaintiffs offer six pages of "policy" arguments why *WFF* should be reversed or the Equitable Relief Requirements overturned as unconstitutional. Opp. at 57-62. Most of these arguments, however, are simply objections to the

application of the Requirements to this case.

Plaintiffs argue that it would be "inappropriate" to impose these "resource-intensive hurdles" "***after*** a court has determined that agency action was unlawful and litigants seek only to invalidate that action." Opp. at 59. But in the typical case, the Requirements are imposed on plaintiffs ***before*** the district court has evaluated the agency action. It was only Plaintiffs' failure to attempt to meet the Requirements that led to the specific sequence in this case.

Plaintiffs argue that "if permitting actions are not vacated upon a court's finding they are unlawful, there is little incentive for an agency to correct its analysis or reconsider its permitting decision[.]" Opp. at 58. But the Requirements permit a court to vacate a permit. *WFF*, ¶¶ 35-36. What Plaintiffs are really arguing is that the Requirements should be ignored when plaintiffs seek "only" to vacate an agency action.

Plaintiffs also argue, in a conclusory way, that the "heightened burden" that the Requirements imposes on environmentalist plaintiffs is unconstitutional because it infringes on their right to a clean and healthful environment. Opp. at 61-62. This issue is not before the Court, nor has it been sufficiently briefed to decide it. Moreover, nothing in the Constitution suggests environmental plaintiffs enjoy a privileged position over other classes of plaintiffs.

A more pertinent policy argument is that, if Plaintiffs had been required to

satisfy the Requirements, then the record on this appeal would contain a great deal of helpful information that it does not presently contain. Pursuant to § 75-1-201(6)(c)(ii)(A)-(C), MCA, there would be (1) evidence and briefing regarding whether Plaintiffs face an imminent risk of irreparable harm if the Permit were to issue;[1] (2) evidence and briefing comparing the public's interest in obtaining reasonable-cost, reliable, and environmentally sustainable electricity, on the one hand, with the public's interest in correcting any specific MEPA deficiencies, on the other hand; and (3) findings as to whether the relief granted by the district court was "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." But the record contains none of this because the Plaintiffs did not request, and the district court did not apply, the Requirements.

II. DEQ'S APPROVAL OF THE PERMIT WAS PROPER

NorthWestern's opening brief explained why the district court erred in rejecting DEQ's EA on the issues of greenhouse gas ("GHG") emissions and lighting. Plaintiffs oppose these arguments, and, on cross-appeal, also challenge

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[1] This criterion would have been fatal to Plaintiffs here with respect to the GHG issue, because Plaintiffs could hardly claim to have been irreparably harmed by DEQ's failure to analyze emissions of a class of pollutants (GHGs) it cannot presently regulate in the Permit.

DEQ's analysis of noise impacts. For the reasons that follow, DEQ's approval of the Permit was proper.

A. DEQ Properly Declined To Evaluate Greenhouse Gas Emissions Because DEQ Does Not Have Lawful Authority To Prevent or Regulate Greenhouse Gas Emissions

DEQ received numerous public comments asking it to evaluate GHG emissions, and DEQ declined to do so in part on the ground that DEQ lacks any authority or duty to regulate GHG emissions in the Permit. DEQ's position is supported by this Court's decision in *Bitterrooters for Planning, Inc. v. Mont. Dep't of Env't. Quality*, 2017 MT 222, 388 Mont. 453, 401 P.3d 712. Plaintiffs' opposition brief fails to rebut these points.

1. DEQ Relied on its Lack of Regulatory Authority, Not Only the MEPA Statute, When it Declined To Evaluate Greenhouse Gas Emissions

Plaintiffs argue that reliance on *Bitterrooters* to justify DEQ's decision not to evaluate GHGs is an impermissible *post hoc* rationalization of DEQ's conduct. Opp. at 37. According to Plaintiffs, "DEQ's sole rationale for not evaluating the Laurel plant's greenhouse-gas emissions was its erroneous interpretation of the 2011 MEPA limitation, MCA § 75-1-201(2)(a) (2011)" *Id.* (citing AR 1110). Plaintiffs are wrong as a matter of fact and law.

a. The Administrative Record Contradicts Plaintiffs

In the Final Permit/Environmental Assessment, DEQ organized the 700 public comments that it received into 34 categories. AR 1095-1116. Four of these

comment categories asked DEQ to evaluate the impact of the proposed plant's GHG emissions or consider measures to mitigate those emissions. AR 1098, 1100, 1104-05, 1114.

GHG Response 1. In response to the question, "Why are greenhouse gases not evaluated with this proposed project?", AR 1098, DEQ states, in pertinent part, that "The Department of Environmental Quality, specifically the Air Quality Bureau, does not regulate greenhouse gases such as CO_2. . . . ***Until such time as the State of Montana decides to regulate greenhouse gases as part of the Air Quality Bureau's statutory requirements, CO_2 emissions are only required to be reported by certain industrial sources under Federal Reporting Programs.***" AR 1102 (emphasis added).

GHG Response 2. In response to the demand that DEQ "analyze and provide an accounting of TOTAL potential emissions of greenhouse gases," AR 1099-1100, DEQ states, in pertinent part, "Greenhouse gas emissions are not required to be evaluated for this permit application." AR 1103.

GHG Response 3. In response to the comment that the Permit "fails to require BACT [i.e., "best available control technology"] for Greenhouse Gas Emissions," DEQ responded, in pertinent part, that "[t]he Laurel Generating Station does not trigger [Clean Air Act] 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.

GHG Response 4. In response to the EarthJustice Letter's comment that DEQ "failed to conduct any BACT analysis for greenhouse gas emissions . . . and thus did not address any alternatives to reduce these categories of emissions," DEQ offered the same response as GHG Response 3. NW App. 230 / AR 1114.

These responses are variations of the holding in *Bitterrooters* that, when an agency cannot lawfully prevent an effect of a proposed action, the agency is not required to analyze the environmental impact of that effect. *Bitterrooters*, ¶ 33.

Plaintiff's "sole rationale" argument is based on a citation to a single page in the administrative record, where DEQ cited § 201(2)(a) one time in its response to a single public comment. Opp. at 37 (citing AR 1110). This particular public comment stated that "The Draft EA Does Not Contain Adequate Disclosure or Analysis of Potential Impacts to Air Quality." AR 1109. In its response, DEQ summarized how, in response to public comments, the Final EA had been updated to disclose the impacts on air quality of the proposed plant's emissions of regulated pollutants and how an analysis was performed "to ensure that the project would not adversely affect the closest Class I area, the North Absaroka Wilderness Area." AR 1110. DEQ went on to say that, to the extent the comment reflected concern about climate change impacts, "environmental reviews under MEPA 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. § 75-1-201(2)(a), MCA."

b. DEQ Did Not Waive Application of Bitterrooters *by Not Emphasizing It in District Court*

As shown, DEQ articulated the rationale in *Bitterrooters* when it prepared the Final EA, not after the fact, as Plaintiffs claim. Plaintiffs also fail to identify any legal authority to support their argument that DEQ's decision not emphasize this rationale on appeal somehow compromises *NorthWestern's* ability to rely on the clear record, or changes that record. The Court should therefore reject Plaintiffs' argument that *Bitterrooters* is an untimely rationale for upholding DEQ's decision not to evaluate GHGs.

2. Plaintiffs Offer an Erroneous Interpretation of *Bitterrooters*

Plaintiffs acknowledge *Bitterrooters* held that an agency need only examine environmental impacts it "can avoid or mitigate . . . through the lawful exercise of its independent authority." Opp. at 38 (citing *Bitterrooters*, ¶¶ 33-35). But Plaintiffs interpret DEQ's "lawful authority" to encompass anything that DEQ's denial of a permit would have the effect of preventing. Opp. at 38. According to Plaintiffs, because DEQ is empowered to deny air quality permits, DEQ is responsible for every consequence of a permit that issues, even consequences that are outside of the scope of DEQ's regulatory authority. *Id.*

But Plaintiffs get *Bitterrooters* backwards. Plaintiffs' argument here is the

same argument that this Court rejected in *Bitterrooters*. *Bitterrooters*, ¶ 33. Under *Bitterrooters*, an agency's "lawful authority" is not, as Plaintiffs argue, coextensive with every effect that results from the agency's decisions, but is rather determined by the substantive scope of its regulatory authority. "MEPA . . . must be construed in harmony with the substantive limitations of an agency's applicable regulatory authority." *Bitterrooters*, ¶ 30 (citing *Department of Transportation v. Public Citizen*, 541 U.S. 752, 769 (2004); *Mont. Wilderness Ass'n v. Bd. Of Health & Env't Scis.* (1976), 171 Mont. 477, 484-85, 559 P.2d 1157, 1161). MEPA does not expand or modify those substantive limitations. *Bitterrooters*, ¶ 30. MEPA requirements are "procedural," § 75-1-102(1), MCA, and MEPA provides no additional regulatory authority to an agency. § 75-1-102(3)(b), MCA. An "agency may not withhold, deny or impose conditions on any permit or other authority to act based on" MEPA. §§ 75-1-201(4)(a), MCA.

Plaintiffs also argue that the outcome should be different here than in *Bitterrooters* or *Public Citizen* because, in those cases, the environmental impacts at issue were caused by other governmental authorities, whereas, here, DEQ is the government authority that can approve the plant and thus "cause" the GHG emissions. But Plaintiffs do not offer a meaningful distinction. Here, DEQ concluded that an authority beyond DEQ's control – *i.e.*, the Montana Legislature – has declined to provide DEQ the authority to regulate GHGs. AR 1102-3.

Without such regulatory authority, implemented in concrete provisions via an express legislative directive that would allow DEQ to control emissions of GHGs or base a permit decision on emissions of GHGs, DEQ is in no different position as the agencies in *Bitterrooters* or *Public Citizen.*[2]

Plaintiffs argue that *Bitterrooters* was wrongly decided because "interpreting MEPA to foreclose analysis of the plant's greenhouse-gas emissions and resulting climate-change impacts in Montana would violate the State constitution's environmental protections[.]" Opp. at 42-43 (citing Mont. Const. art. II, § 3; art. IX, § 1). But Plaintiffs do not explain why performing an analysis that cannot change an agency's decision would make any difference, or how declining to perform such an analysis violates any constitutional right or duty.[3]

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[2] Plaintiffs vaguely argue that DEQ *now may* have the authority to regulate GHG's because of the 2022 federal Inflation Reduction Act, P.L. 117-169 ("IRA"). Opp. at 35 n. 6. This is both irrelevant and incorrect. It is irrelevant because such alleged authority did not exist at the time DEQ issued the permit and conducted environmental review. DEQ could only apply the law as it stood at the time of the decision. They do not identify any specific new authority in the IRA. And even if the IRA provides federal authority that could eventually translate into emission requirements applicable to a facility like the Laurel Generating Station, no such regulations presently exist or have even been proposed. DEQ's lack of regulatory authority is thus unchanged.

[3] Plaintiffs' quarrel is ultimately not with *Bitterrooters*, but with the Legislature's failure to give DEQ authority to regulatory GHGs. That is an issue far beyond the bounds of this case.

In sum, *Bitterrooters* holds that, when an agency has no regulatory authority to prevent the effect of a proposed action, the agency is not required to analyze the environmental impact of that effect. *Bitterrooters*, ¶ 33; *accord WFF v. DEQ*, ¶ 32. Here, DEQ correctly concluded that it lacked regulatory authority to regulate GHG emissions. AR 1102. DEQ was therefore not required to analyze the plant's emissions of GHGs.

3. Plaintiffs' Federal NEPA Cases Are Distinguishable

Plaintiffs argue that the foregoing interpretation of *Bitterrooters* "cannot be squared" with NEPA decisions following *Public Citizen* that have required evaluation of climate-harming emissions. Opp. at 40 n. 7. But Plaintiffs' cases are all distinguishable.

In *Center for Biological Diversity*, the Ninth Circuit ruled that an agency was required to perform an analysis of GHGs over the agency's objections, but the agency was not, as here, making a yes-or-no decision on a permit under an existing set of regulations. Rather, it was setting fuel economy standards through rulemaking, and the court concluded that the agency's decision whether to set higher or lower standards could lawfully take into account the level of GHG emissions associated with different standards. *Ctr. For Biological Diversity v. NHTSA*, 538 F.3d 1172, 1213-14 (9th Cir. 2008). Thus, unlike here, the agency had the requisite regulatory authority, which in turn triggered the duty to examine

GHGs in environmental review.

In *WildEarth*, the Bureau of Land Management ("BLM") tried to avoid responsibility for evaluating GHG emissions by arguing they are not an "indirect effect" of oil and gas leasing requiring NEPA review.[4] *WildEarth Guardians v. Zinke*, 368 F. Supp. 3d 41, 73 (D.D.C. 2019). The district court rejected this argument under *Public Citizen* on the grounds that BLM has broad discretion to approve or reject oil and gas leases based on its role as land manager, and that a foreseeable downstream "indirect effect" of oil and gas leasing is the burning of oil and gas. Significantly, the court concluded that BLM could take account of downstream GHG emissions in deciding on oil and gas leases because "[t]he touchstone of these [*Public Citizen*] cases is that an agency need not consider environmental effects that cannot influence its decision." *WildEarth*, 368 F.Supp.3d at 73. There, the court held such emissions *could* influence BLM's decision. Here, the proposed plant's emissions of GHGs cannot influence DEQ's decisions because DEQ cannot deny or condition the permit on the basis of GHG emissions.

Neither *350 Montana v. Haaland*, 50 F.4th 1254 (9th Cir. 2022) nor *MEIC v.*

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[4] BLM had, in fact, evaluated the proposed action's greenhouse gas emissions but had not quantified them on the grounds that they could not be calculated with reasonable accuracy. 368 F. Supp. 3d at 74-75.

U.S. Off. Of Surface Mining, 274 F. Supp. 3d 1074 (D. Mont. 2017) even concerned *Public Citizen* because the agencies in both cases voluntarily undertook to evaluate GHG emissions. Unlike here, those cases involved no dispute over whether the agencies were required to evaluate GHG emissions.

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

1. Plaintiffs Did Not Exhaust Their Administrative Remedies on Lighting

Nothing in the Permit application or the public comments raised any issues about the plant's lighting. MEPA prohibits a court from considering issues, comments, and arguments not presented to the agency in the first instance. § 75-1-201(6)(a)(ii), MCA. Plaintiffs did not raise lighting as an issue to DEQ, and therefore the district court erroneously considered Plaintiffs' *post hoc* lighting arguments.

Plaintiffs argue that the Court should reject this "exhaustion argument because no party raised it before the district court." Opp. at 24. But Plaintiffs overlook that a failure to exhaust administrative remedies precludes judicial review on the grounds that the matter lacks procedural justiciability. *North Star Dev., LLC v. Mont. Pub. Serv. Comm'n*, 2022 MT 103, ¶ 23, 408 Mont. 498, 510 P.3d 1232. Furthermore, these "threshold jurisdictional issues" are "non-waivable requirements for court adjudication of a case or controversy" and cannot be defeated by assertion of equitable defenses like waiver or estoppel. *Id.* ¶ 25. Thus,

Plaintiffs' lighting challenge lacked procedural justiciability, and neither DEQ nor NorthWestern can have waived this defense.

Plaintiffs also argue that they sufficiently raised an objection to the plant's lighting because they objected to the Draft EA's "failure to disclose any impacts related to increased ***industrialization***" on page 24 of their 26-page letter.[5] Opp. at 24 (citing AR 2238-39; *see also* AR 405) (emphasis added). But "claims raised at the administrative [stage] and in the [district court] complaint must be so similar that the district court can ascertain that the agency was on notice of, and had an opportunity to consider and decide, the same claims now raised[.]" *Kleissler v. United States Forest Serv.*, 183 F.3d 196, 202 (3d Cir. 1999). As the U.S. Supreme Court has stated:

> [A]dministrative proceedings should not be a game or a forum to engage in unjustified obstructionism by making cryptic and obscure reference to matters that "ought to be" considered and then, after failing to do more to bring the matter to the agency's attention, seeking to have that agency determination vacated[.]

Vermont Yankee Nuclear Power Corp. v. Natural Resources Defense Council, Inc., 435 U.S. 519, 553-54 (1978); *see also Kleissler*, 183 F.3d at 202 n.6 (describing "Paper Monkeywrench" tactics in administrative proceedings). Here, as in *Kleissler*, Plaintiffs' lighting claims raised in district court "were only vaguely and

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[5] The word "industrialization" does not appear anywhere else in the 700 comments.

cryptically referred to" during DEQ's review, and, therefore, "the required correlation is sorely lacking." *Id.* at 203.

2. DEQ's Analysis of Lighting Was Sufficient

An agency's MEPA review must be rationally related and proportional to the environmental issues presented by a proposed action. *E.g.*, *Clark Fork Coal. v. Mont. Dep't of Env't Quality*, 2008 MT 407, ¶ 47, 347 Mont. 197, 197 P.3d 482. DEQ's statement about lighting in the Final EA indicated that the environmental impacts will be insignificant: "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).

Other features of the administrative record provide context for this conclusion: (1) the nearest residents to the plant were located 1,030 and 1,230 feet away, respectively, NW App. 244 / AR 1167, and the next nearest resident was 2,300 feet away, NW App. 249 / AR 1172; (2) 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; and (3) no public comments raised concerns about lighting. DEQ's analysis was sufficient.

Plaintiffs nevertheless argue that DEQ failed to analyze the "severity, duration [and] geographic extent" of impacts on the "quality of the human

environment." Opp. at 22-23 (ARM 17.4.608(1)(a) and *Belk v. Mont. Dep't. of Env't. Quality*, 2022 MT 38, 408 Mont. 1, 504 P.3d 1090). But here, as in *Belk*, DEQ analyzed the (1) the distance between the plant's lighting and receptors (at least 1,030 feet), (2) the severity of the lighting, or how the distance would affect impacts (some lighting "may be visible"), (3) the geographic scope of the lighting (potentially visible to "immediate surrounding properties"), and (4) the frequency or duration of the lighting (lights potentially in operation "24/7 365 days per year"). *See Belk* ¶ 31. To the extent DEQ did more in *Belk*, it was because the plaintiffs in that case raised a number of specific concerns that Plaintiffs did not raise here. *Id.* ¶ 8.

C. DEQ's Analysis of Noise Impacts Was Sufficient

The only affirmative issue Plaintiffs raise in their cross-appeal is that DEQ failed to analyze noise impacts sufficiently. As with lighting, DEQ analyzed noise impacts on the nearest residences. AR 1167. DEQ concluded that the project would generate less than or equal to 65 A-weighted decibels (dBa) at distances of approximately 600 feet from the 18 RICE units. AR 1167-68.

Plaintiffs do not contend that the 65 dBa noise level calculation was inaccurate, or would be disruptive. Further, NorthWestern requests that the Court take judicial notice on appeal of the fact that ***65 dBa is the volume of an ordinary***

conversation.[6] M. R. Evid. 201(f) ("Judicial notice may be taken at any stage of the proceeding."). This fact is capable of accurate and ready determination by resort to sources whose accuracy cannot reasonably be questioned. M. R. Evid. 201(b).

DEQ further noted that "[a]ll reported noise estimates are within the NWE property boundaries and noise beyond these distances would drop," and that the plant would incorporate various noise mitigation measures like silencers. AR 1168. The district court concluded that DEQ took the necessary "hard look" at noise impacts because "DEQ identified and evaluated the specific impacts of the 18 RICE to the noise baseline and found these impacts did not constitute a material change to the noise baseline." NW App. at 22-23.

Notwithstanding that the noise volume of the plant will be equivalent to that of an ordinary conversation approximately 400-to-600 feet away from the nearest residences, Plaintiffs contend DEQ should have done more to analyze noise impacts. Plaintiffs argue that DEQ should have considered more than "a single maximum measurement of volume," Opp. 25, but Plaintiffs do not explain what

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[6] *See* Yale University Environmental Health & Safety department's decibel chart at https://ehs.yale.edu/sites/default/files/files/decibel-level-chart.pdf. A copy of this chart is attached as Exhibit A. "A court shall take judicial notice if requested by a party and supplied with the necessary information." M. R. Evid. 201(d); *In re Marriage of Carter-Scanlon*, 2014 MT 97, ¶ 17, 374 Mont. 434, 322 P.3d 1033.

this means. DEQ measured maximums in four different locations, AR 1167, and Plaintiffs offer no reason why measuring volume levels other than maximums could lead to a different result.

Plaintiffs also argue that DEQ should have considered additive or cumulative effects of noise produced by the plant and "other nearby industrial activity." Opp. at 25. But Plaintiffs do not offer any reason why a sound that will be, at most, the volume of an ordinary conversation on the plant's property, can combine with noises emitted elsewhere to produce a significant noise impact on residents 400-to-600 feet away.

Plaintiffs further argue that DEQ failed to analyze noise impacts on neighbors south of the Yellowstone River. Opp. at 26. Plaintiffs characterize these neighbors as residing "approximately 1,000 feet south of the project," id., but the district court found that the "closest" of these neighbors is "approximately 2,300 feet away." NW App. at 22. Obviously if the noise impacts are insignificant on the nearest residence approximately 1,030 feet away, there is no point in studying the noise effects at 2,300 feet away.

III. A CHANGE IN LAW HAS MOOTED THE ISSUE WHETHER DEQ MUST ANALYZE THE IN-STATE EFFECTS OF THE PLANT'S GHG EMISSIONS

The arguments in this section are relevant only if the Court overturns *Bitterrooters* or otherwise decides that the lack of regulatory authority does not

absolve DEQ of responsibility for evaluating GHG emissions.

The district court held that DEQ was required to analyze the "in-state" effects of the facility's GHG emissions, based on the then-text of § 75-1-201(2)(a), MCA (2011) ("2011 MEPA"). After the district court issued its ruling, the Montana Legislature passed HB 971, 2023 Mont. Laws Ch. 450, amending § 75-1-201(2)(a), MCA ("HB 971"), to preclude any analysis of GHG emissions, except in specified circumstances not applicable here. This change in law moots the district court's ruling. On remand, a district court applies existing law. When a change in law occurs on appeal, "the preferred procedure is for the court of appeals to remand the case to the district court for reconsideration of the case under the amended law." *Phelps-Roper v. Troutman*, 712 F.3d 412, 417 (8th Cir. 2013) (citing cases).

Remand, however, is not necessary when the change in law extinguishes the controversy. *Id.*; *Hadix v. Johnson*, 144 F.3d 925, 934-35 (6th Cir. 1998), *overruled on other grounds by Miller v. French*, 530 U.S. 327 (2000). Here, the change in law extinguishes the controversy over the evaluation of GHG emissions because HB 971 clearly bars DEQ from evaluating them. Remand would make no difference here because determining whether DEQ must evaluate GHG emissions is a purely legal issue; it does not require any findings of fact and this Court's appellate review would not be aided by the district court's expertise in evaluating

factual matters.[7] *Hadix*, 144 F.3d at 935.

Plaintiffs note that a different district court, in a different matter, recently permanently enjoined HB 971 as unconstitutional. Opp. at 34-35 (citing *Held v. Montana*, No. CDV-2020-307 (1st Jud. Dist. Aug. 14, 2023). The district court's decision in *Held* is on appeal.

Plaintiffs argue that, in light of *Held*, the case should be remanded so that the district court can apply the district court's interpretation of 2011 MEPA that Defendants did not challenge on appeal. Opp. at 33-34. But Plaintiffs misunderstand appellate procedure. When, as in *Held*, a court declares an amended statute unconstitutional, it does not repeal the amendment and reinstate the prior version of the statute. "There is no procedure in American law for the courts or other agencies of government – other than the legislature itself – to purge from the statute books, laws that conflict with the Constitution as interpreted by the courts." *Winsnesds v. Yocom*, 433 F.3d 727, 728 (10th Cir. 2006). "When a court declares a law unconstitutional, the law remains in place unless and until the body that enacted it repeals it, even though the government may no longer

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[7] Plaintiffs argue that remand is also necessary for the district court to make findings of fact on whether exceptions to the HB 971 statute apply here. Opp. at 35 (citing MCA 75-1-201(2)(b)). However, none of these exceptions apply, and Plaintiffs do not even argue otherwise.

constitutionally enforce it." *Pidgeon v. Turner*, 538 S.W.3d 73, 88 n.20 (Tex. 2017).

The relevant portions of 2011 MEPA no longer exist and cannot be applied. Further, if the constitutionality of HB 971 is affirmed on appeal in *Held*, the issue of whether DEQ must analyze the plant's GHG emissions on remand is moot.

CONCLUSION

The district court's order should be overturned because it erroneously rejected DEQ's MEPA analysis. This Court should reverse the district court and reinstate the Permit. Alternatively, if the Court concludes that DEQ's MEPA analysis was deficient, the Court should remand to DEQ for performance of any necessary supplemental environmental review, and hold that the Permit remains in effect during the pendency of that environmental review, as provided in the Equitable Relief Requirements.

Date: November 13, 2023

Respectfully submitted,

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By: */s/ Harlan B. Krogh*
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CERTIFICATE OF COMPLIANCE

Pursuant to Rule 11(4)(a) 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 4,995 words, excluding those sections exempted under Rule 11(4)(d).

Dated this 13th day of November, 2023.

/s/ Harlan Krogh
Harlan Krogh

Attorney for Appellant

Exhibit A

Decibel Level Chart

Reproduced from https://ehs.yale.edu/sites/default/files/files/decibel-level-chart.pdf

(last accessed November 12, 2023)

Decibel Level Comparison Chart

Environmental Noise	*dBA*
Jet engine at 100’	140
Pain Begins	*125*
Pneumatic chipper at ear	120
Chain saw at 3’	110
Power mower	107
Subway train at 200’	95
Walkman on 5/10	94
Level at which sustained exposure may result in hearing loss	*80-90*
City Traffic	85
Telephone dial tone	80
Chamber music, in a small auditorium	75-85
Vacuum cleaner	75
Normal conversation	60-70
Business Office	60-65
Household refrigerator	55
Suburban area at night	40
Whisper	25
Quiet natural area with no wind	20
Threshold of hearing	0

Note: dBA = Decibels, A weighted

CERTIFICATE OF SERVICE

I, Harlan B. Krogh, hereby certify that I have served true and accurate copies of the foregoing Brief - Appellant Reply and Answer to Cross Appeal to the following on 11-13-2023:

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