MONTANA FIRST JUDICIAL DISTRICT COURT
LEWIS AND CLARK COUNTY

RIKKI HELD, et al., Plaintiffs, v. STATE OF MONTANA, et al., Defendants.	Cause No. CDV-2020-307 Hon. Kathy Seeley **ORDER DENYING DEFENDANTS' MOTION FOR CLARIFICATION AND FOR STAY OF JUDGMENT PENDING APPEAL**

Defendants Department of Environmental Quality, Department of Natural Resources and Conservation, Department of Transportation, and Governor Greg Gianforte have moved for clarification of this Court's August 14, 2023, Findings of Fact, Conclusions of Law, and Order (Doc. 405), and for an order to stay the judgment pending appeal. Doc. 422. Defendants' motions were presented in a combined filing. Plaintiffs oppose the motions.

PROCEDURAL HISTORY

The August 14 Order contains a detailed procedural history of the case. Doc. 405. After the August 14 Order was issued, the parties asked the Court to postpone ruling on the issue of attorneys' fees and costs and, pursuant to Montana Rule of Civil Procedure 54(b), requested certification of the Order for interlocutory appeal to the Montana Supreme Court. Docs. 411, 415. On September 18, 2023, the Court certified the Order and several ancillary orders as final pursuant to Rule 54(b), M. R. Civ. P. and Rule 6(6), M. R. App. P. Doc. 417.

On September 29, 2023, Defendant State of Montana filed a notice of appeal to the Montana Supreme Court. Docs. 418, 420. On October 2, 2023, Defendants Governor Greg Gianforte, Department of Environmental Quality, Department of Natural Resources and Conservation, and Department of Transportation filed a separate notice of appeal. On October 16, 2023, Defendants Governor Greg Gianforte, Department of Environmental Quality, Department of Natural Resources and Conservation, and Department of Transportation filed the Motion for Clarification and for Stay of Judgment Pending Appeal. Doc. 422. Defendant State of Montana did not join in the motion for clarification or motion to stay.

On October 17, 2023, the Supreme Court accepted the certification order and allowed the appeal to proceed. *Held v. State of Montana*, DA 23-0575, Order, *2 (Mont. Sup. Ct. Oct. 17, 2023). Therefore, the case is on appeal to the Supreme Court, as agreed by both sides prior to any motion to clarify.

FACTUAL BACKGROUND

The record before this Court includes an extensive trial record and detailed Findings and Conclusions in the August 14 Order. The Court found, in part:

> FF #89. "Until atmospheric GHG concentrations are reduced, extreme weather events and other climactic events such as drought and heatwaves will occur more frequently and in greater magnitude, and Plaintiffs will be unable to live clean and healthy lives in Montana."
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> FF #104. "Children are uniquely vulnerable to the consequences of climate change, which harms their physical and psychological health and safety, interferes with family and cultural foundations and integrity, and causes economic deprivations."
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> FF #193. "The degradation to Montana's environment, and the resulting harm to Plaintiffs, will worsen if the State continues ignoring GHG emissions and climate change."
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> FF #194. "The unrefuted testimony established that Plaintiffs have been and will continue to be harmed by the State's disregard of GHG pollution and climate change pursuant to the MEPA Limitation."

> FF #218. "Accounting for overlap among fossil fuels extracted, consumed, processed, and transported in Montana, the total CO_2 emissions due to Montana's fossil fuel-based economy is about 166 million tons CO_2. This is a conservative estimate and does not include all the GHG emissions, including methane, for which Montana is responsible."
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> FF #252. "Prior to 2011, Defendants were quantifying and disclosing GHG emissions and climate impacts from fossil fuel projects, including, for example, the Silver Bow Generation Project, the Roundup Power Project (Bull Mountain), and the Highwood Generating Station."
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> FF #257. "If the MEPA Limitation is declared unconstitutional, state agencies will be capable of considering GHG emissions and the impacts of projects on climate change."
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> FF #272. "It is technically and economically feasible for Montana to replace 80% of existing fossil fuel energy by 2030 and 100% by no later than 2050, but as early as 2035."
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> FF #275. "[C]onverting to wind, water, and solar energy would reduce annual total energy costs for Montanans from $9.1 to $2.8 billion per year, or by $6.3 billion per year (69.6% savings)."
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> CL #6. "Every additional ton of GHG emissions exacerbates Plaintiffs' injuries and risks locking in irreversible climate injuries."
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> CL #50. "Montana's climate, environment, and natural resources are unconstitutionally degraded and depleted due to the current atmospheric concentration of GHGs and climate change."
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> CL #64. "Undisputed testimony established that Defendants could evaluate 'greenhouse gas emissions and corresponding impacts to the climate in the state or beyond the state's borders' when evaluating fossil fuel activities. Indeed, Defendants have performed such evaluations in the past."

Doc. 405.

The record demonstrates the dangerous nature of the *status quo* that Defendants seek to preserve. That *status quo* is one where there are already "catastrophic harms to the natural environment of Montana and Plaintiffs," harms that "will worsen if the State continues ignoring GHG emissions and climate change." Doc. 405. The record also shows that Montana need not rely

on fossil fuels to meet its energy needs and can meet those needs by transitioning to renewable energy sources, which would have climate benefits, create jobs, reduce air pollution, save lives and costs from air pollution, and reduce energy costs for Montanans. Doc. 405. The record also demonstrates that Defendants can conduct MEPA analyses that consider GHG emissions and climate impacts, and Defendants have done so in the past.

LEGAL STANDARDS

Motion for Clarification: The legal standard for a motion for clarification is not relevant here because this Court does not have jurisdiction to rule on Defendants' motion for clarification.

Motion to Stay: Montana Rule of Appellate Procedure 22 provides that a motion seeking to stay judgment pending appeal shall be filed in district court. Only in "extraordinary circumstances" should a stay be granted. *Graves v. Barnes*, 405 U.S. 1201, 1203 (1972). The parties seeking the stay have the burden to establish that their specific circumstances justify a stay pending appeal. *Mont. Env't Info. Ctr. v. Westmoreland Rosebud Mining, LLC,* DA 22-0064, *5-6 (Mont. Sup. Ct. Aug. 9. 2022) ("*MEIC v. Westmoreland*"); *Nken v. Holder*, 556 U.S. 418, 433-34 (2009). In evaluating a motion to stay, Montana courts consider four factors: (1) whether the stay applicant has made a strong showing that it is likely to succeed on the merits; (2) whether the applicant will be irreparably injured absent a stay; (3) whether issuance of the stay will substantially injure the other parties interested in the proceeding; and (4) where the public interest lies. *MEIC v. Westmoreland*, *5 (citing *Hilton v. Braunskill*, 481 U.S. 770 (1987)). A stay of proceedings is "an exercise of judicial discretion and the propriety of its issue is dependent upon the circumstances of the particular case." *Nken*, 556 U.S. at 433 (quotes, citations omitted).

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DISCUSSION

Motion for Clarification

This case has been accepted for interlocutory appeal by the Montana Supreme Court and, therefore, the district court does not have jurisdiction to decide the motion for clarification. *Lewistown Propane Co. v. Moncur*, 2003 MT 368, ¶ 12, 319 Mont. 105, 82 P.3d 896 (once a notice of appeal is filed, the district court no longer has jurisdiction over the parties or the cause of action and cannot hear or rule on pending motions). Should any clarification of the August 14 Order be required, the appropriate time would be after the Supreme Court issues a final judgment. *Meine v. Hren Ranches, Inc.,* 2020 MT 284, 402 Mont. 92, 475 P.3d 748. Because this court does not have jurisdiction, Defendants' motion for clarification is DENIED.

I. Defendants' motion for stay.

A. Whether Defendants have made a strong showing they are likely to succeed on the merits.

Defendants do not identify errors in the August 14 Order. Therefore, Defendants fail to establish they are likely to succeed on the merits of their appeal. Defendants' argument that they are likely to succeed on the merits of their appeal if this Court ordered Defendants to prepare and implement a remedial climate recovery plan is not relevant because this Court did not order such relief. The Order declared statutes unconstitutional, and enjoined Defendants from following the unconstitutional statutes. This complies with the judiciary's duty to secure the constitutional rights of Montana's citizens. *Mitchell v. Town of W. Yellowstone*, 235 Mont. 104, 110, 765 P.2d 745, 748 (1988) ("The first business of courts is to provide a forum in which the constitutional rights of all citizens may be protected."); *Marbury v. Madison,* 5 U.S. (1 Cranch) 137, 177 (1803) ("It is emphatically the province and the duty of the judicial department to say what the law is."); *see also* Doc. 217.

Because Defendants' fail to identify errors in the Court's orders, they have not satisfied their burden to establish they are likely to succeed on the merits of the appeal. This factor weighs in favor of denying the motion for a stay pending appeal.

B. Whether Defendants will be irreparably harmed absent a stay.

Defendants have the burden to demonstrate they will be irreparably harmed absent a stay pending appeal. *MEIC v. Westmoreland*, *5-6. However, a stay is "not a matter of right, even if irreparable injury might otherwise result to the appellant." *Nken*, 556 U.S. at 427. Defendants allege their irreparable injuries would result from "[r]ushing to implement a process for analyzing GHG emissions" and argue that their own conduct to rush the regulatory review "process" would cause regulatory confusion, uncertainty, and potential liability for DEQ. Doc. 423 at 9. Defendants' allegations of harm do not meet their burden to prove irreparable harm absent a stay pending appeal.

The August 14 Order does not prevent DEQ from carrying out its statutory functions, including performing environmental analyses on permit applications and deciding whether to issue permits. It requires that these statutory functions are carried out in a constitutional manner. There is no evidence before the Court that analyzing GHG emissions and climate change impacts in environmental reviews, which Defendants argue could potentially lead to not issuing permits for fossil fuel activities, will cause *irreparable* harm to any Defendants. The uncontested evidence at trial established that a transition to renewable energy will help Montana's environment, improve the health of its citizens (especially Montana's children), and save Montana energy consumers money. Doc. 405. Defendants had the opportunity to dispute this evidence at trial, but they did not.

The trial record, which was subject to cross-examination, was compelling and convincing. Defendants belatedly attempt to introduce new material from a person unqualified to opine on the

details of a renewable energy transition in Montana. *See* Nowakowski Decl. ¶ 44; Tr. 1343:23-1345:7 (Nowakowski describing her expertise in law and policy work, not technical). There is no evidence to support Defendants' allegations that, if considering GHG emissions and climate impacts during MEPA reviews resulted in DEQ not permitting new fossil fuel projects, the failure to approve these permits would undermine Montana's energy system, increase costs to consumers, compromise grid reliability, or cause any other irreparable harms to Defendants. The evidence weighs heavily in favor of Plaintiffs.

Additionally, there is no evidence before the Court that MEPA reviews that consider GHG emissions and climate change impacts in environmental reviews will cause *irreparable* harm to any party in this case. *MTSUN, LLC v. Mont. Dep't of Pub. Serv. Regul.,* DA 19-0363, *3 (Mont. Sup. Ct. Aug. 6, 2019) (affirming district court denial of stay and finding that Defendant NorthWestern Energy would not suffer any harm because any increased costs incurred absent a stay would be passed on to consumers). The alleged harms here are readily distinguishable from those alleged in the cases cited by Defendants: *MEIC v. Westmoreland*, DA 22-0064, *7-8 (Mont. Sup. Ct. Aug. 9. 2022) and *Vote Solar v. Montana Dep't of Pub. Serv. Regul.,* DA 19-0223, *2-3 (Mont. Sup. Ct. Aug. 6, 2019). In *MEIC* and *Vote Solar*, there were private corporation defendants alleging irreparable financial injuries, but here there are no private corporations, or government Defendants, alleging any financial injuries. Defendants present no evidence as to how *they* will be irreparably injured if they could not issue new permits for fossil fuel activities after considering GHG emissions and corresponding climate impacts in MEPA reviews.

Defendants' concerns about potential liability are tenuous and speculative, but, even if accepted as true, do not arise to the level of irreparable harms. It is well established that actualized litigation burdens do not constitute irreparable harm. *See, e.g.*, *Renegotiation Bd. v. Bannercraft*

Clothing Co., 415 U.S. 1, 24 (1974) ("Mere litigation expense, even substantial and unrecoupable cost, does not constitute irreparable injury."); *F.T.C. v. Standard Oil Co. of Cal.*, 449 U.S. 232, 244 (1980) (Defendants' "expense and disruption of defending itself in protracted adjudicatory proceedings" did not constitute irreparable harm). Defendants' hypothetical litigation burdens do not constitute irreparable harm.

Similarly, Defendants' concerns about increased administrative burdens do not constitute irreparable harm. Any additional resources required by Defendants to comply with their statutory and constitutional obligations are part of their obligation to comply with the law, including Montana's Constitution. *N. Plains Res. Council v. U.S. Army Corps of Engineers*, 460 F. Supp. 3d 1030, 1045 (D. Mont. 2020) (administrative burdens do not constitute irreparable harm); *Rodriguez v. Robbins*, 715 F.3d 1127, 1146 (9th Cir. 2013) (even if the government faced severe logistical difficulties in implementing the order, that would merely represent the burden of complying with statutory and constitutional obligations); *Hernandez v. Sessions*, 872 F.3d 976, 1000 (9th Cir. 2017) (irreparable harm caused by "a likely unconstitutional process far outweighs the minimal administrative burdens to the government of complying with the injunction while this case proceeds").

Finally, Defendants previously analyzed GHG emissions and climate impacts in MEPA reviews. DEQ's declarant admitted at trial that DEQ could do such reviews again if it had authority to do so. Tr. 1437:4-6, 7-8. Additionally, Plaintiffs' expert Anne Hedges testified that Defendants would be capable of considering greenhouse gas emissions and the climate impacts of proposed fossil fuel projects. Tr. 821:16-20. Based on the trial record, the Court held: "Undisputed testimony established that Defendants could evaluate 'greenhouse gas emissions and corresponding impacts

to the climate in the state or beyond the state's borders' when evaluating fossil fuel activities. Indeed, Defendants have performed such evaluations in the past." Doc. 405.

Defendants never argued at trial that they would suffer any harms if the challenged statutes were declared unconstitutional and Defendants were enjoined from acting in accordance with the unconstitutional statutes. Their alleged harms are raised for the first time in their stay brief. Defendants have not met their burden to establish they will suffer any irreparable harms absent a stay pending appeal. This factor weighs in favor of denying the motion for a stay of judgment pending appeal.

C. Whether Plaintiffs will be substantially injured by a stay

The Court has already found that the youth Plaintiffs are experiencing injuries, including injuries to their physical and mental health, damage to their home and property, lost income and economic security, reduced recreational opportunities, and harm to tribal and cultural traditions, among others. Doc. 405. Additionally, the Court found:

> FF #92. "Every ton of fossil fuel emissions contributes to global warming and impacts to the climate and thus increases the exposure of Youth Plaintiffs to harms now and additional harms in the future."
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> FF # 98. "According to the Intergovernmental Panel on Climate Change (IPCC) . . . 'There is a rapidly closing window of opportunity to secure a liveable and sustainable future for all (*very high confidence*) . . .. The choices and actions implemented in this decade will have impacts now and for thousands of years (*high confidence*).'"
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> FF #139. "Actions taken by the State to prevent further contributions to climate change will have significant health benefits to Plaintiffs."
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> FF # 193. "The science is clear that there are catastrophic harms to the natural environment of Montana and Plaintiffs and future generations of the State due to anthropogenic climate change. The degradation to Montana's environment, and the resulting harm to Plaintiffs, will worsen if the State continues ignoring GHG emissions and climate change."

> FF # 194. "The unrefuted testimony established that Plaintiffs have been and will continue to be harmed by the State's disregard of GHG pollution and climate change pursuant to the MEPA Limitation."

Doc. 405 (citations to the record omitted).

Plaintiffs are already experiencing substantial injuries and infringement of their constitutional rights. These injuries and constitutional violations will be exacerbated if Defendants continue to ignore climate change and GHG emissions in MEPA reviews. The infringement of constitutional rights constitutes irreparable harm. *Driscoll v. Stapleton*, 2020 MT 247, ¶ 15, 401 Mont. 405, 473 P.3d 386 ("the loss of a constitutional right constitutes an irreparable injury"); *Mont. Democratic Party v. Jacobsen*, 2022 MT 184, ¶ 38, 410 Mont. 114, 518 P.3d 58 (same). Depletion or degradation of the environment and natural resources also constitutes irreparable harm. *Amoco Prod. Co. v. Vill. of Gambell*, 480 U.S. 531, 545 (1987).

The balance of equities weighs in favor of denying Defendants' motion for a stay.

D. Where the public interest lies.

The public's interest is best served when Montana's Constitution is followed and when constitutional rights are protected. *Mont. Wilderness Ass'n v. Fry*, 408 F. Supp. 2d 1032, 1038 (D. Mont. 2006). The public interest lies in protecting Montana's clean and healthful environment and in protecting the constitutional rights of all Montanans, especially the youth. *Mont. Env't Info. Ctr. v. Westmoreland Rosebud Mining, LLC,* DA 22-0064, *9 (Mont. Sup. Ct. Aug. 9. 2022); *see also* Mont. Const. art. II, §§ 3, 4, 15, 17; art. IX, §§ 1, 3. The public also has an interest in having access to reliable, safe, and clean energy sources. *MEIC v. Westmoreland*, *9. Defendants argue that, absent a stay, there could be regulatory disruptions that could affect the energy industry and could prevent DEQ from issuing new coal mining permits or permits for gas generating plants, which could increase costs to Montana energy consumers. There was no evidence at trial and there is no

evidence in support of this motion that there would be any disruption to the public's access to reliable and affordable energy if a stay is denied.

Because there is no evidence that the public interest would be harmed, Defendants have failed to meet their burden to show that the public interest weighs in favor of granting a stay. This factor weighs in favor of denying Defendants' motion for a stay of judgment pending appeal.

For the foregoing reasons, it is ORDERED:

1. Defendants' motion for clarification is DENIED.

2. Defendants' motion for stay of judgment pending appeal is DENIED.

ELECTRONICALLY SIGNED AND DATED BELOW.

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Tue, Nov 21 2023 03:18:24 PM