

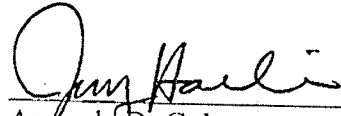
Pursuant to Mont. R. Civ. P. 5.1(a), Plaintiffs hereby give notice that their Complaint for Declaratory Relief in this matter calls into question the constitutionality of a 2011 amendment to the Montana Environmental Policy Act (“MEPA”) that provides that a state agency’s environmental review “may not 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.” MCA § 75-1-201(2)(a).

DEQ interprets this MEPA provision to preclude its consideration of the greenhouse gas emissions and associated climate change impacts associated with the Laurel Generating Station. Plaintiffs argue in the first instance that DEQ’s interpretation is incorrect. One of MEPA’s core purposes is to ensure the State fully considers the consequences of actions it takes or authorizes on Montana’s environment. See MCA §§ 75-1-102, 75-1-103(2). While Montana Code Annotated section 75-1-201(2)(a) precludes DEQ’s consideration of impacts beyond the state’s borders, it does not absolve DEQ of its overarching MEPA obligation to consider climate change impacts in Montana that may result from the project. MCA § 75-1-201(1)(b)(iv)(A).

Plaintiffs argue in the alternative that, if DEQ’s interpretation of Montana Code Annotated section 75-1-201(2)(a) is correct, it would permit unexamined environmental harm, and therefore impair Plaintiffs’ fundamental constitutional right to a “clean and healthful environment,” Mont. Const. art. II, § 3, and would also violate the Legislature’s obligation to provide environmental remedies that anticipate and prevent environmental harm, id. art. IX, § 1. See Mont. Env’t Info. Center. v. Mont. Dep’t of Env’t Quality (“MEIC”), 1999 MT 248, ¶ 77, 296 Mont. 207, 988 P.2d 1236 (stating the constitution’s environmental “protections ... are both anticipatory and preventative”). Thus, Montana Code Annotated section 75-1-201(2)(a), as interpreted by DEQ, is unconstitutional as applied to this challenge and/or on its face.

Plaintiffs have served this notice and a copy of their complaint on the Montana Attorney General by electronic mail concurrently with this filing, as required by Mont. R. Civ. P. 5.1(a), in addition to providing service of process under Mont. R. Civ. P. 5.

Respectfully submitted this 21st day of October, 2021.



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Attorneys for Plaintiffs

MONTANA THIRTEENTH JUDICIAL DISTRICT COURT
YELLOWSTONE COUNTY

MONTANA ENVIRONMENTAL
INFORMATION CENTER and
SIERRA CLUB,

Plaintiffs,

v.

MONTANA DEPARTMENT OF
ENVIRONMENTAL QUALITY, and
NORTHWESTERN ENERGY, INC.,

Defendants.

CLERK OF THE
DISTRICT COURT
TERRY HALPIN

2021 OCT 21 A 8:45

FILED

BY
DEPUTY

Case No.

DV21-01307

Michael G. Moses

**COMPLAINT FOR
DECLARATORY RELIEF**

INTRODUCTION

1. This case challenges the decision by the Montana Department of Environmental Quality (“DEQ”) to permit NorthWestern Energy, Inc. (“Northwestern”) to construct and operate a 175-megawatt gas-fired power plant on the banks of the Yellowstone River in eastern Montana. If constructed, the Laurel Generating Station would contribute to regional air quality problems, risk water contamination and other environmental harm, and cause significant greenhouse gas pollution that contributes to climate change. Yet DEQ granted an air quality permit that authorizes construction of the power plant without fully evaluating these environmental consequences as required by the Montana Environmental Policy Act (“MEPA”), MCA §§ 75-1-101 et seq.

2. The need for DEQ to account for the full impact of Northwestern’s proposed gas plant is especially important in light of the availability of other, cleaner resources available to meet Montana’s energy needs.

3. Rather than taking the requisite “hard look” at the gas plant’s impacts, Mont. Wildlife Fed’n v. Mont. Bd. of Oil & Gas Conservation, 2012 MT 128, ¶ 43, 365 Mont. 232, 280 P.3d 877, DEQ granted the air permit based on a 20-page final environmental assessment (“EA”) that dismissed some of the plant’s most troubling impacts with minimal analysis, improperly deferred others for future consideration, and overlooked some harm entirely. Because DEQ’s approach violates MEPA, the Montana Environmental Information Center and Sierra Club request that this Court declare that the EA violated MEPA and vacate the EA and the unlawfully issued air permit that was based on that flawed analysis.

JURISDICTION AND VENUE

4. Plaintiffs bring this action pursuant to the Uniform Declaratory Judgments Act, MCA §§ 27-8-201, 202, and MEPA, MCA § 75-1-101 et seq.

5. Venue is proper in this District because the proposed project Plaintiffs challenge would be constructed in Yellowstone County. MCA §§ 25-2-126(1), 75-1-108.

PARTIES

6. Plaintiff Montana Environmental Information Center (“MEIC”) is a non-profit environmental advocacy organization founded in 1973 by Montanans concerned with protecting and restoring Montana’s natural environment. MEIC plays an active role in promoting Montana clean energy projects and policies, including advocating for the expansion of responsible, renewable energy and energy efficiency, while opposing unnecessary reliance on fossil fuel energy that leads to air and water pollution and contributes to climate change. MEIC is also dedicated to assuring that state agencies comply with and fully uphold state laws and constitutional provisions that are designed to protect the environment from pollution. MEIC has approximately 5,000 members and supporters, many of whom are in Northwestern’s Montana service territory and seek increased access to affordable renewable energy. MEIC and its members have intensive, long-standing health, recreational, aesthetic, professional, and economic interests in the responsible production and use of energy, the reduction of greenhouse gas pollution as a means to ameliorate the climate crisis, and the protection of land, air, water, and communities impacted by fossil-fuel energy projects and other industrial development. MEIC members live, work, and recreate in areas that will be adversely impacted by DEQ’s approval of the Laurel Generating Station. MEIC brings this action on its own behalf and on behalf of its adversely affected members.

7. Plaintiff Sierra Club is America's largest grassroots environmental organization, with more than 800,000 members nationwide, including more than 3,200 in Montana. In addition to creating opportunities for people of all ages, levels, and locations to have meaningful outdoor experiences, the Sierra Club works to safeguard the health of our communities, protect wildlife, and preserve our remaining wild places through grassroots activism, public education, lobbying, and litigation. Sierra Club is dedicated to exploring, enjoying, and protecting the wild places of the Earth; to practicing and promoting the responsible use of the Earth's resources and ecosystems; to educating and enlisting humanity to protect and restore the quality of the natural and human environment; and to using all lawful means to carry out these objectives. Sierra Club members live, work, and recreate in areas that will be adversely impacted by DEQ's approval of the Laurel Generating Station. Sierra Club's concerns encompass the exploration, enjoyment, and protection of the land, air, and water impacted by the proposed project. Sierra Club brings this action on its own behalf and on behalf of its adversely affected members.

8. The legal violations alleged in this complaint cause direct injury to MEIC and Sierra Club members' health, recreational, property, and aesthetic interests because the challenged decision authorizes construction of a power plant that would increase air and water pollution and emit greenhouse gases that contribute to harmful climate change. Additionally, the challenged decision injures MEIC, Sierra Club, and their members' procedural interests because it was not based on the requisite analysis and disclosure that MEPA requires. These are actual and concrete injuries caused by DEQ's failure to comply with MEPA that would be redressed by the relief requested in this complaint. MEIC and Sierra Club exhausted their administrative remedies by submitting comments on the draft EA and thus have no other adequate remedy at law.

9. Defendant DEQ is the agency charged with issuing permits for the construction and operation of air pollution sources in the state, MCA §§ 75-2-204, 75-2-211, and evaluating the environmental impacts of proposed exploration under MEPA, MCA § 75-1-201. DEQ prepared and issued the Final EA approving the air quality permit for the Laurel Generating Station.

10. Defendant NorthWestern Energy, Inc. is a Delaware corporation doing business in the State of Montana as the state's largest public utility. NorthWestern applied for and was issued the air quality permit that is challenged in this proceeding and is therefore a proper party to this action. MCA § 27-8-301.

LEGAL AND FACTUAL BACKGROUND

I. MEPA

11. MEPA was designed “to promote efforts that will prevent, mitigate, or eliminate damage to the environment and biosphere and stimulate the health and welfare of humans.” MCA § 75-1-102(2). To meet this purpose, MEPA requires DEQ to “take a ‘hard look’ at the environmental impacts of a given project or proposal.” Mont. Wildlife Fed’n, ¶ 43; see also MCA § 75-1-201(1)(b)(iv); ARM 17.4.609(3)(d). Properly implemented, “MEPA’s procedural mechanisms ... enabl[e] fully informed and considered decision making, thereby minimizing the risk of irreversible mistakes depriving Montanans of a clean and healthful environment.” Park Cnty Env’t Council v. Mont. Dep’t of Env’t Quality, 2020 MT 303, ¶ 70, 402 Mont. 168, 477 P.3d 288.

12. MEPA requires state agencies to consider, among other things, the direct, indirect, and cumulative environmental impacts of their actions. MCA § 75-1-201(1)(b)(iv); ARM 17.4.609(3)(d) (requiring an evaluation of “impacts, including cumulative and secondary

impacts, on the physical environment”); see also ARM 17.4.609(3)(e) (describing requirements for environmental assessments). In evaluating environmental impacts under MEPA, “[t]he agency must examine the relevant data and articulate a satisfactory explanation for its action, including a rational connection between the facts found and the choice made.” Mont. Wildlife Fed’n, ¶ 43 (quoting Clark Fork Coal. v. Mont. Dep’t of Env’t Quality, 2008 MT 407, ¶ 47, 347 Mont. 197, 197 P.3d 482).

13. DEQ must prepare an environmental impact statement (“EIS”) before granting an air quality permit if the proposed project will “significantly affect[] the quality of the human environment.” ARM 17.4.607(1). DEQ may issue an air quality permit without preparing an EIS only if it rationally determines through preparation of an environmental assessment (“EA”) that the project’s impacts will not be significant, see id. 17.4.607(1)(b), or that otherwise significant impacts can be mitigated below the level of significance, id. 17.4.607(4) (“For an EA to suffice in this instance, the agency must determine that all of the impacts of the proposed action have been accurately identified, that they will be mitigated below the level of significance, and that no significant impact is likely to occur.”).

14. DEQ undertook the underlying permitting action pursuant to its obligations under the Clean Air Act of Montana, specifically MCA §§ 75-2-204, 75-2-211, 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 the Montana Environmental Policy Act, 75-1-101, et seq., MCA[.]” ARM 17.8.748(4)(k).

15. DEQ’s obligations under MEPA are complementary and additional to its obligations under substantive permitting statutes, and as the Montana Supreme Court has explained, analysis under permitting statutes such as the Clean Air Act of Montana does not

satisfy an agency's MEPA obligations. "MEPA's environmental review process is complementary to—rather than duplicative of—other environmental provisions, functioning to, for example, enable DEQ to make an informed decision in responding to [a] permit application under [a permitting statute]." Park Cnty Env't Council, ¶ 76:

II. THE MONTANA CONSTITUTION'S ENVIRONMENTAL PROTECTIONS

16. Montana's Constitution compels the state to prevent unreasonable environmental degradation to protect Montanans' inalienable "right to a clean and healthful environment," and requires that "[t]he state and each person shall maintain and improve a clean and healthful environment in Montana for present and future generations." Mont. Const. art. II, § 3, art. IX, § 1(1). In addition, the Constitution requires that the Montana Legislature "shall ... provide adequate remedies to prevent unreasonable depletion and degradation of natural resources." Id. art. IX, § 1(3).

17. In enacting these provisions, the drafters of Montana's Constitution aimed to establish "the strongest environmental protection provision found in any state constitution." Park Cnty Env't Council, ¶ 61 (quoting Mont. Env't Info. Center. v. Mont. Dep't of Env't Quality ("MEIC"), 1999 MT 248, ¶ 66, 296 Mont. 207, 988 P.2d 1236). To that end, these provisions do not "merely prohibit that degree of environmental degradation which can be conclusively linked to ill health or physical endangerment." MEIC, ¶ 77. Rather, they provide environmental "protections which are both anticipatory and preventative." Id.

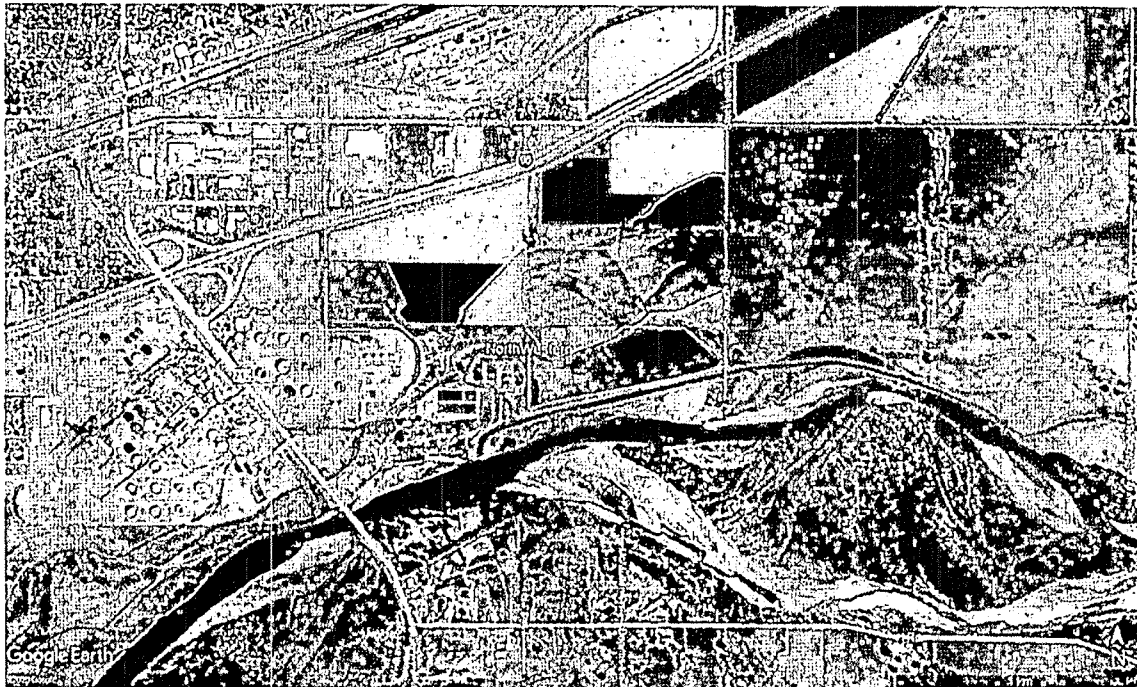
18. The Montana Legislature designated MEPA as an essential element of the overall statutory scheme for meeting its constitutional obligation to prevent unreasonable environmental degradation. See 2003 Mont. Laws ch. 361, § 5 (HB 437); see also MCA §§ 75-1-102(1) (MEPA's purpose), 82-4-302 (MMRA's purpose); see Park Cnty Env't Council, ¶ 67 ("MEPA

serves a role in enabling the Legislature to fulfill its constitutional obligation to prevent environmental harms infringing upon Montanans' right to a clean and healthful environment.”). Accordingly, MEPA must be interpreted to serve its constitutional purpose. To the extent any provision of MEPA allows for unreasonable environmental degradation, it would violate Plaintiffs' environmental rights guaranteed by Article II, Section 3 and Article IX, Section 1 of the Montana Constitution. See MEIC, ¶ 80.

19. These statutory and constitutional standards govern DEQ's review and approval of the proposed Laurel Generating Station.

III. THE LAUREL GENERATING STATION

20. NorthWestern Energy proposes to build a 175-megawatt gas-fired power plant, comprised of eighteen 9.7-megawatt-electrical reciprocating internal combustion engines (“RICE”), approximately 300 feet from the north bank of the Yellowstone River in Laurel, Montana. The site location is depicted below:



Final EA, at 5.

21. NorthWestern applied to DEQ for an air quality permit authorizing the construction and operation of the Laurel Generating Station on May 10, 2021 and submitted a revised application on June 9, 2021. DEQ issued a preliminary determination on the application on July 9, 2021, which included a five-page draft EA.

22. NorthWestern's application stated that plant construction would occur approximately April 2022 through May 2023. Construction activities would disturb up to 25.4 acres. The 36-acre parcel on which the plant would be located is currently undeveloped agricultural land. According to the final EA, NorthWestern has requested to re-zone the entire 36-acre parcel to "Heavy Industrial." The parcel is bordered on the west by industrial use (the wastewater treatment plant). To the north and east, the parcel is bordered by agricultural uses. And on the south, the parcel is bordered by the Yellowstone River. Across the River from the project is a Laurel city park (Riverside Park), a boat launch, and a rural residential area.

23. NorthWestern anticipates the plant would begin producing power in January 2024 and continue operating until 2057.

24. To bring fuel to the Laurel Generating Station, NorthWestern would conduct horizontal, directional drilling and place a gas pipeline under the Yellowstone River adjacent to the facility.

25. If constructed, the plant would emit nearly a thousand tons per year of air pollution, other than greenhouse gases. This includes particulate matter, nitrogen oxides, carbon monoxide, volatile organic compounds, and sulfur dioxide ("SO₂"). These pollutants risk harm to human health and the environment.

26. In particular, the Laurel Generating Station's SO₂ emissions would further deteriorate air quality that is already impaired with SO₂ pollution. Like many other air

pollutants, SO₂ causes respiratory symptoms, aggravates asthma, and contributes to particle formation causing negative health effects.¹ SO₂ emissions also harm trees and plants and can contribute to acid rain, which harms sensitive ecosystems.² Further, the fine particles caused by SO₂ pollution lead to regional haze that impairs visibility, including in national parks, wilderness areas, and other special landscapes.³ The Laurel area surrounding the plant currently is designated nonattainment for health-based air quality standards for SO₂, primarily due to a nearby CHS oil refinery and other industrial activity. SO₂ emissions from the Laurel Generating Station would add to this polluted baseline.

27. In addition to other air pollutants, the Laurel Generating Station is projected to emit 769,706 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.⁴ Greenhouse gas emissions are the most significant driver of human-caused climate change. And fossil fuel combustion—such as the burning of gas to make electricity—“is the largest contributor of greenhouse gas emissions in Montana.”⁵

28. As the State of Montana has recognized, “Montana’s climate is already changing” and harming our environment, health, and economy.

Our temperatures are 2–3° F warmer on average than in 1950. Historical observations demonstrate a shift to earlier snowmelt and earlier peak spring runoff, impacting flooding, water availability, and stream temperatures. Increased temperatures, insect and disease mortality, and

¹ See EPA, Sulfur Dioxide Basics, <https://www.epa.gov/so2-pollution/sulfur-dioxide-basics#effects>.

² Id.

³ Id.

⁴ See EPA, Greenhouse Gas Emissions from a Typical Passenger Vehicle, <https://www.epa.gov/greenvehicles/greenhouse-gas-emissions-typical-passenger-vehicle>.

⁵ Montana DEQ, Montana Climate Solutions Plan 21 (2020), https://deq.mt.gov/files/DEQAdmin/Climate/2020-09-09_MontanaClimateSolutions_Final.pdf.

fuel loads together are driving increases in the size and possibly the frequency and severity of wildfires. According to the 2017 Montana Climate Assessment (MCA),¹ the state could experience an additional 3–7° F increase in average temperatures by mid-century, including more days of extreme heat that would dramatically increase many of these impacts moving forward.⁶

29. The Laurel Generating Station would more than double NorthWestern's owned gas-powered electric generating resources and significantly increase the company's and Montana's greenhouse gas footprint.

30. As described in NorthWestern's air quality permit application, the utility selected the Laurel Generating Station over other resources that submitted bids in a competitive resource solicitation. In the context of NorthWestern's request to the Montana Public Service Commission for approval of the Laurel Generating Station, a request the company has now abandoned, numerous parties—including MEIC and Sierra Club—argued that NorthWestern's resource-selection process unreasonably foreclosed selection of other, cleaner, and safer generating resources, such as solar and wind energy projects that could be paired with battery storage.

31. MEIC and Sierra Club submitted timely public comments on DEQ's preliminary determination and draft EA on August 10, 2021. Among other things, MEIC and Sierra Club's comments requested that DEQ analyze under MEPA: the proposed project's potential water quality impacts; the impacts of constructing and operating a gas pipeline; the direct and cumulative impacts of SO₂ pollution; and the proposed project's significant greenhouse gas emissions and resulting climate change impacts.

⁶ Id. at 4.

32. Without thoroughly evaluating these impacts, DEQ issued a final EA and air quality permit for the Laurel Generating Station on August 23, 2021.

FIRST CAUSE OF ACTION
(Inadequacy of Final EA –
Violation of MEPA, MCA § 75-1-201, ARM 17.4.608(1)(b))

33. Plaintiffs hereby reallege and reincorporate Paragraphs 1 through 32.

34. To fulfill its requirement to take a “hard look” at the environmental impacts of DEQ’s authorization to NorthWestern to construct and operate the Laurel Generating Station, DEQ must evaluate the direct, cumulative, and secondary impacts of the project on the physical environment and on the human population affected by a proposed action. ARM 17.4.609(3)(d), (e). In this regard, MEPA requires DEQ to analyze any “direct” impacts that occur at the same time and place as the action that triggers the effect, and secondary impacts, defined as “a further impact to the human environment that may be stimulated or induced by or otherwise result from a direct impact of the action[.]” ARM 17.4.603(18), in its environmental analysis. ARM 17.4.609(3)(d).

35. DEQ’s final EA for the Laurel Generating Station violates these MEPA standards because it does not disclose or rationally evaluate the direct, secondary, or cumulative impacts to the physical environment posed by the project. MCA § 75-1-201; ARM 17.4.609(3)(d).

A. Pipeline Impacts

36. First, the final EA fails to disclose, as MEPA requires, potential impacts associated with the construction and operation of the pipeline necessary to transport gas under the Yellowstone River to the Laurel Generating Station.

37. Among other risks, the final EA fails to acknowledge or evaluate the potential for spills or releases of gas; the potential release of hazardous drilling mud from pipeline

installation; and sedimentation impacts to the Yellowstone River from construction and operation of the pipeline. In addition, the pipeline would likely have fugitive emissions of methane, a potent greenhouse gas.

38. The pipeline is integral to NorthWestern's proposed project, and thus the pipeline's impacts are both direct and secondary effects of DEQ's action that must be evaluated under MEPA. ARM 17.4.609(3)(d).

B. Water Quality Impacts

39. In addition to impacts from the construction and operation of a gas pipeline, the final EA disregards analysis of the project's potential direct and secondary water quality impacts from construction and operation of the proposed gas plant. These include potential spills or releases of hazardous materials stored on site; stormwater runoff from the site into the Yellowstone River; and sedimentation impacts to the Yellowstone River from construction and operation of the power plant.

40. Although DEQ acknowledges in the Final EA the potential for sedimentation, stormwater impacts, and erosion, the agency dismisses the need to analyze any of those potential water quality impacts based on the faulty assumption that DEQ cannot analyze any water quality impacts until it has received applications from NorthWestern for water discharge permits. MEPA and DEQ's implementing rules do not allow the piecemealing of environmental analysis. See MCA § 75-1-201(1)(b)(iv)(A) (requiring examination of "the environmental impact of the proposed action"); ARM 17.4.609(3)(d), (e) (requiring DEQ to evaluate in an EA the "impacts, including cumulative and secondary impacts" posed by the project). Instead, the scope of the agency's MEPA review must include all impacts for which there is "a reasonably close causal relationship' between the subject government action and the particular environmental effect."

Bitterrooters for Plan., Inc. v. Mont. Dep't of Env't Quality, 2017 MT 222, ¶ 25, 388 Mont. 453, 401 P.3d 712 (citation omitted).

41. Because DEQ's authorization for the plant's construction and operation causes potential direct and secondary water quality impacts, DEQ's failure to analyze such impacts in the EA violates MEPA. ARM 17.4.609(3)(d).

C. Cumulative Impacts of SO₂ Emissions

42. DEQ's MEPA analysis is also arbitrary and unlawful because it does not evaluate the cumulative air quality and health impacts of the proposed project's SO₂ emissions combined with other nearby sources.

43. The Laurel Generating Station would be located in an area that is currently designated nonattainment for the primary health-based air quality standard for SO₂. The U.S. Environmental Protection Agency ("EPA") established this SO₂ National Ambient Air Quality Standard in 2010 at the level determined necessary to protect public health from short-term exposures to SO₂ based on evidence that links exposure from 5-minutes to 24-hours to adverse respiratory effects. EPA, Final Rule, Primary National Ambient Air Quality Standard for Sulfur Dioxide, 75 Fed. Reg. 35,520 (June 22, 2010) (to be codified at 40 C.F.R. pt. 50, 53, 58). Among other sources, the CHS oil refinery, located near the site proposed for the Laurel Generating Station, is a significant source of SO₂ pollution.

44. The final EA does not evaluate whether the Laurel Generating Station, in combination with other existing sources of pollution, will contribute to harmful SO₂ pollution. While the EA states that SO₂ emissions reductions over the past 30 years may have alleviated unhealthful air quality in the Laurel area, DEQ did not support its speculation with analysis in

the EA to show that, with the addition of SO₂ emissions from the Laurel Generating Station, short-term air quality would be protected.

45. Because the EA arbitrarily dismisses the potential cumulative air quality and health impacts due to the Laurel Generating Station's SO₂ emissions, it violates MEPA. ARM 17.4.609(3)(d), (e).

D. Impacts of Greenhouse Gas Emissions

46. The final EA also unlawfully fails to disclose or provide any analysis of potential climate change impacts from greenhouse gas emissions from the proposed facility.

47. The Laurel Generating Station is projected to emit at least 769,706 tons per year of greenhouse gases, which contribute to climate change. Under the Legislature's 2011 amendments to MEPA, DEQ's environmental review "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." MCA § 75-1-201(2)(a). However, while the effects of climate change are felt globally, they impact Montana's environment and economy in particular ways, including by impacting our wildfire seasons, spring runoff and surface water temperatures, agricultural production, and habitat quality for our native wildlife. One of MEPA's core purposes is to ensure the State fully considers the consequences of actions it takes or authorizes on Montana's environment. See MCA §§ 75-1-102, 75-1-103(2). The Legislature's amendment to MEPA restricting consideration of "regional, national, or global" impacts, MCA § 75-1-201(2)(a), does not absolve DEQ of its obligation to consider the climate change impacts in Montana caused by the Laurel Generating Station's greenhouse gas emissions.

48. Because DEQ's approval of the Laurel Generating Station is the direct cause of the proposed plant's greenhouse gas emissions, which contribute to climate change and its

harmful impacts in Montana, DEQ was required to evaluate these impacts under MEPA. ARM 17.4.609(3)(d), (e).

SECOND CAUSE OF ACTION
(Unconstitutionality of MCA § 75-1-201(2)(a) –
Violation of Mont. Const. art. II, § 3, art. IX, § 1)

49. Plaintiffs hereby reallege and reincorporate Paragraphs 1 through 48.

50. In the alternative, to the extent that DEQ correctly interprets Montana Code Annotated section 75-1-201(2)(a) to foreclose consideration of all climate change impacts including those in Montana, the provision violates Montana’s constitutional environmental protections provided under Article II, Section 3 and Article IX, Section 1. Mont. Const. art. II, § 3, art. IX, § 1.

51. The State’s constitutional obligation to prevent unreasonable environmental degradation under Article II, Section 3 and Article IX, Section 1 of Montana’s Constitution is expressly implemented by MEPA, MCA § 75-1-102, which promotes a healthy environment by requiring state agencies to thoroughly evaluate the environmental consequences of activities they permit before those activities occur. MEPA is part of the Legislature’s scheme to “provide adequate remedies” to prevent unreasonable environmental degradation as required under Article IX, Section 1 of Montana’s Constitution. Mont. Const. art. IX, § 1(3).

52. Montana’s Constitution unambiguously requires preventative measures to protect Montanans’ inalienable right to a “clean and healthful environment,” and this right extends to protecting the environmental rights of future generations. Mont. Const. art. II, § 3, art. IX, § 1; Park Cnty Env’t Council, ¶ 62 (“[The] forward-looking and preventative language [of Article IX, Section 1] clearly indicates that Montanans have a right not only to reactive measures after a

constitutionally-proscribed environmental harm has occurred, but to be free of its occurrence in the first place.”).

53. The Montana Legislature amended MEPA in 2011 to provide that an environmental review conducted pursuant to its provisions “may not include a review of actual or potential impacts beyond Montana’s borders [and] may not include actual or potential impacts that are regional, national, or global in nature.” MCA § 75-1-201(2)(a); 2011 Mont. Laws ch. 396 (SB 233). DEQ reads this provision to limit the agency’s ability to review the actual or potential climate change impacts of greenhouse gas emissions due to the regional, national, and global nature of greenhouse gas emissions, even though those emissions may have actual or potential climate change impacts in Montana. If DEQ’s interpretation of this provision is correct, NorthWestern could proceed with constructing the Laurel Power Plant without accounting for actual or potential climate change impacts of greenhouse gas emissions, despite the environmental harm these emissions ultimately cause in Montana.

54. Because Montana Code Annotated section 75-1-201(2)(a) as interpreted by DEQ would permit unexamined environmental harm, it impairs Plaintiffs’ fundamental constitutional rights and is subject to strict judicial scrutiny. Mont. Const. art. II, § 3, art. IX, § 1; Park Cnty Env’t Council, ¶¶ 60, 84.

55. Similarly, because Montana Code Annotated section 75-1-201(2)(a) as interpreted by DEQ would permit unexamined environmental harm, it violates the Legislature’s obligation to provide environmental remedies to address climate change impacts of greenhouse gas emissions for present and future generations as required under Montana’s Constitution. Mont. Const. art. IX, § 1; Park Cnty Env’t Council, ¶ 62.