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MONTANA EIGHTEENTH JUDICIAL DISTRICT COURT  
GALLATIN COUNTY

GALLATIN WILDLIFE )  
ASSOCIATION; )  
COTTONWOOD )  
ENVIRONMENTAL LAW CENTER )

Plaintiffs,  
vs.

MONTANA DEPARTMENT OF )  
ENVIRONMENTAL QUALITY, )

Defendant )

YELLOWSTONE MOUNTAIN CLUB, )

Defendant-Intervenor )

) Case No. DV-21-833B

) **FIRST AMENDED COMPLAINT**  
) **FOR DECLARATORY AND**  
) **INJUNCTIVE RELIEF**

) **JURY TRIAL REQUESTED**

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## INTRODUCTION

1. The Gallatin River in southwest Montana is fabled for its clean water, amazing scenery, and abundance of fish. Parts of the movie “A River Runs Through It” were filmed on the Gallatin River.
2. People come from all over the world to enjoy the river, its tributaries, and surrounding areas.
3. Development in Big Sky, Montana, is threatening the quality of the Gallatin River and its tributaries. As more and more vacation homes are built in the Big Sky area, the unincorporated vacation area for the ultra-wealthy is finding itself confronted with the problem of how to dispose of its treated sewage.
4. To address the problem, the Montana Department of Environmental Quality (“DEQ”) issued the Yellowstone Club a permit to blow snow on Church Mountain using the treated sewage.
5. The Montana DEQ violated the Montana Constitution and the Montana Environmental Policy Act (“MEPA”) by issuing the snowmaking permit without first taking a hard look at how pharmaceuticals contained within the snow will impact water quality, aquatic life and habitats, and human health and safety.
6. The Montana Constitution, Article II, section 3 and Article IX, section 1, provide every Montanan with the fundamental, inalienable right to a “clean and healthful environment.”

7. “This guarantee includes the assurance that the government will not take actions jeopardizing such unique and treasured facets of Montana’s natural environment without first thoroughly understanding the risks involved.” *Park County Environmental Council v. Montana DEQ*, 2020 Mont. 303, ¶74, 402 Mont. 168, 477 P.3d 288.
8. These Constitutional provisions are anticipatory and preventative. *Montana Env’tl. Information Center v. Dep’t of Env’tl. Quality*, 1999 MT 249, ¶ 77, 296 Mont. 207, 988 P.2d 1236.
9. The framers of the Constitution “did not intend to merely prohibit that degree of environmental degradation which can be conclusively linked to ill health or physical endangerment. Our constitution does not require that dead fish float on the surface of our state’s rivers and streams before its farsighted environmental protections can be invoked.” *Id.* Instead, the framers intended it to contain “the strongest environmental protection provision found in any state constitution.” *Id.*, ¶66.
10. “One of the ways that the Legislature has implemented Article IX, Section 1 is by enacting MEPA.” *N. Plains Res. Council, Inc. v. Mont. Bd. of Land Comm’rs*, 2012 MT 234, ¶14, 366 Mont. 399, 288 P.3d 169.
11. “At its core, MEPA requires DEQ to engage in a prescribed level of environmental forecasting before taking action impacting the environment.” *Park County Env’tl. Council*, 2020 Mont. 303, ¶31.

12. The Montana Environmental Policy Act requires the Montana DEQ to take a “hard look” at the environmental impacts of its actions, including issuing MPDES permits. *See e.g., Park County Environmental Council v. Montana DEQ*, 2020 Mont. 303, ¶18, 402 Mont. 168, 477 P.3d 288.
13. The “hard look” requirement requires the Montana DEQ to “make an adequate compilation of relevant information, to analyze it reasonably, and to consider all pertinent data.” *Park County Envntl. Council*, 2020 Mont. 303, ¶18 (citation omitted).
14. MEPA required the DEQ to compile relevant information regarding the impacts of pharmaceutical pollution on the impacted waterways and complete the environmental analysis to the “fullest extent possible.” *Bitterrooters for Planning, Inc. v. Montana Dep’t of Envntl. Quality*, 2017 Mont. 222, ¶20, 388 Mont. 453, 401 P.3d 712.
15. The DEQ was in possession of several scientific articles and notices regarding the impacts of pharmaceuticals on humans, water quality, and aquatic ecosystems before it issued the Yellowstone Club the MPDES permit.
16. The Montana DEQ violated the Montana Constitution and MEPA by failing to make an adequate compilation of information relevant to the impacts of pharmaceutical pollution and personal care products.
17. The Montana DEQ violated the Montana Constitution and MEPA by failing to consider and reasonably analyze all pertinent data regarding the impacts of pharmaceutical pollution to the fullest extent possible.

18. The Montana DEQ violated MEPA and the Montana Constitution by preparing an EA for the MPDES permit that failed to take a hard look at the impacts of pharmaceuticals from the challenged snowmaking.
19. In March 2021, the Montana DEQ prepared an Environmental Assessment (“EA”) pursuant to the Montana Environmental Policy Act to analyze potential environmental impacts from the Yellowstone Mountain Club Snowmaking Project.
20. The EA asked whether the snowmaking would have “potential impacts” on “aquatic life and habitats.”
21. The EA stated “[N]”.
22. In the case of *Montana Rivers v. MT DEQ*, 20-200A, the Montana DEQ admitted that “pharmaceuticals are emerging contaminants of concern that may threaten aquatic life.”
23. The Montana DEQ determination that snowmaking would not have potential impacts on aquatic life and habitats is arbitrary and capricious.
24. During an October 5, 2018 public hearing, the Montana DEQ told the Board of Environmental Review:

DEQ is also concerned about pharmaceutical pollution, as those are emerging issues of concern with regard to pharmaceuticals, and also certain personal care products. And you're correct there are no water quality standards designed to protect beneficial uses from those types of pollutants, and so there are no standards that can be incorporated in a permit.

25. During the public comment period on the Montana Environmental Policy Act analysis for the challenged snowmaking permit, Plaintiffs submitted public comments to the Montana DEQ telling it, “[t]he EA violates MEPA because it fails to analyze the impacts of pharmaceuticals reaching surface waters.”
26. The DEQ responded to Plaintiffs’ comments by stating:
- “Pharmaceuticals” is a general term. Pharmaceuticals are an emerging area of science and research concerning water quality. DEQ has not yet adopted water quality standards for pharmaceuticals. MPDES permits implement adopted MT water quality standards to protect the beneficial uses of the receiving water bodies. DEQ evaluated water quality concerns under Final EA Part 2.
27. In the case of *Montana Rivers v. MT DEQ*, 20-200A, the Montana DEQ defined pharmaceuticals in its answer:
- Pharmaceuticals and personal care products are a diverse group of chemicals including all human veterinary drugs, dietary supplements, topical agents such as cosmetics and sunscreens, laundry and cleaning products.
28. The DEQ had a notice in its possession from the U.S. Environmental Protection Agency (“EPA”) stating pharmaceuticals and personal care products are being detected in surface water and ground waters within the Region.
29. The MEPA analysis for the challenged snowmaking permit analyzed whether the challenged snowmaking would have “potential impacts” on “water quality, quantity, and distribution.”
30. The EA stated “[N].”
31. The “No” determination is arbitrary and capricious because the Montana DEQ had documents in its possession prepared by the U.S. EPA stating the

“occurrence, fate, and transport of these [pharmaceutical] chemicals are an important water quality concern, both nationally and regionally, and have gained public interest.”

32. The Montana DEQ violated the Montana Constitution and MEPA by failing to consider and reasonably analyze all pertinent data regarding the impacts of pharmaceutical pollution on water quality to the fullest extent possible.
33. The MEPA analysis for the challenged snowmaking permit analyzed whether the challenged snowmaking would have “potential impacts” on “human health and safety.”
34. The EA stated “[N].”
35. The “No” determination is arbitrary and capricious because the Montana DEQ had a document in its possession prepared by the U.S. EPA stating exposure to pharmaceuticals and personal care products can have “adverse ecological or human health effects.”
36. The DEQ violated the Montana Constitution and MEPA by failing to disclose and analyze to the fullest extent possible the relevant information it held in its possession at the time it issued the challenged MPDES discharge permit indicating pharmaceutical pollution may have a significant impact on aquatic life.
37. The EA answered all of these questions “No Significant Impact Expected” because “[t]he MPDES permit includes effluent limits, monitoring requirements,

and other permit conditions that will ensure the water quality standards and beneficial uses are protected.”

38. The Clean Water Act authorizes the Montana DEQ to impose technology-based effluent limits for pharmaceuticals in MPDES permits on a case-by-case basis. 33 U.S.C. §1342(a)(1)(B); 40 C.F.R. §125.3(c).
39. The Montana DEQ’s failure to set, or consider setting, technology-based effluent limitations for pharmaceuticals violated Plaintiffs’ Constitutional rights to a “clean and healthful environment.”
40. Pharmaceutical pollution may have a significant impact on aquatic life and habitats, water quality, or human health because technology-based effluent limits are not in place.
41. The Montana DEQ violated the Montana Constitution and MEPA by failing to take a hard look at the impacts of pharmaceuticals to the fullest extent possible before issuing the snowmaking discharge permit.
42. Since 2001, two petitions have been submitted to the Board of Environmental Review seeking Outstanding Resource Water (“ORW”) designation for the stretch of the Gallatin River from the boundary of Yellowstone National Park to the confluence of Spanish Creek.
43. Pursuant to the ORW statutory requirements, Montana DEQ issued a final Environmental Impact Statement (“EIS”) in 2007.



44. In its cover letter to the Final EIS, the DEQ stated that the Record of Decision would be “published” and a copy would be sent to everyone that received the Final EIS.
45. The Montana DEQ never published a Record of Decision.
46. The Montana DEQ never sent a Record of Decision to anyone.
47. The late John North, legal counsel for the DEQ, attended a Board of Environmental Review hearing in 2012 and provided testimony that a supplemental Environmental Impact Statement would be required in the near future.
48. Attorney North’s testimony never mentions the words “Record of Decision.”
49. Instead, Attorney North’s testimony asks the Board of Environmental Review to leave the ORW issue “in limbo.”
50. The public could not be expected to know that an attorney for the Montana DEQ was making a decision regarding the EIS for the ORW during a hearing before another agency when he never used the words “Record of Decision” and instead told the Board of Environmental Review to leave the issue “in limbo.”
51. The geographic scope of the 2007 ORW EIS covers “the ORW reach and lands around the ORW which have a hydrologic connection to this reach.”
52. The Muddy Creek and Third Yellow Mule Creek have a hydrologic connection to the reach of the Gallatin River that was proposed to be protected as an Outstanding Resource Water.

53. In light of the new information regarding pharmaceuticals, the Montana DEQ should have prepared a supplemental EIS to analyze their impacts on the Gallatin River and its tributaries before issuing the Yellowstone Club Snowmaking Project permit.
54. The Montana DEQ violated MEPA and the Montana Constitution by issuing the Yellowstone Club a permit to blow snow pollution on Church Mountain without first supplementing the EIS to analyze and disclose the environmental impacts of pharmaceuticals reaching the Gallatin River and its tributaries.
55. The Montana DEQ violated the Montana Constitution by issuing the Yellowstone Club a permit to blow snow pollution on Church Mountain without analyzing and disclosing the environmental impacts of pharmaceutical pollution reaching the Gallatin River and its tributaries.
56. The Yellowstone Club Snowmaking Project will result in conveyances of pharmaceutical pollution into the Gallatin River or its tributaries, thereby changing the water quality of the river and creating a nuisance or otherwise rendering the water harmful, detrimental, or injurious to public health, recreation, safety, or welfare, to wild animals, birds, fish, and the aquatic ecosystem.

### **JURISDICTION AND VENUE**

57. This Court has subject matter jurisdiction over claims brought under Mont. Code Ann. § 27-8-202 (uniform declaratory relief); Mont. Code Ann. § 27-19-101 (injunctive relief).

58. Venue lies in Gallatin County pursuant to Mont. Code Ann. § 25-2-126 and Mont. Code Ann. § 2-4-506(4) because Plaintiffs are located and have their principal place of business in this judicial district.

### **PARTIES**

59. Plaintiffs GALLATIN WILDLIFE ASSOCIATION, and COTTONWOOD ENVIRONMENTAL LAW CENTER are Bozeman-based conservation organizations dedicated to protecting the people, forests, water, and wildlife of the American West. Plaintiffs' members use the Gallatin River extensively for fishing, swimming, and rafting. Plaintiffs' members' aesthetic, scientific, inspirational, educational, health, conservation, and economic interests are adversely affected by the Montana DEQ's failure to consider the impacts of pharmaceutical pollution resulting from the Yellowstone Club Snowmaking Project.

60. Defendant MONTANA DEPARTMENT OF ENVIRONMENTAL QUALITY is the state agency that prepared the EA and Finding of No Significant Impact for the Yellowstone Club Snowmaking Project permit.

61. Defendant-Intervenor Yellowstone Mountain Club, LLC ("Yellowstone Club") is a 15,200-acre private residential, ski, and golf community located in the Big Sky area.

### **FIRST CAUSE OF ACTION**

I. **The Montana DEQ violated the Montana Environmental Policy Act by failing to take a "hard look" at the environmental impacts of the challenged snowmaking.**

62. Plaintiffs incorporate by reference all previous allegations.
63. Defendant violated MEPA by failing to take a hard look at the impacts of pharmaceutical pollution in the EA prepared for the Yellowstone Club Snowmaking Project permit. Mont. Admin. R. 17.4.602; Mont. Admin. R. 17.4.607.
64. Defendant violated MEPA by failing to make a significance determination for the adverse impacts of pharmaceutical pollution as required under Mont. Admin. R. 17.4.608(1).
65. Defendant was required to analyze “the severity, duration, geographic extent, and frequency of occurrence of the impact” of pharmaceutical pollution. Mont. Admin. R. 17.4.601(1)(A).
66. Defendant violated MEPA by failing to make these significance determinations for pharmaceutical pollution.
67. Defendant violated MEPA by failing to analyze or disclose the numerous scientific documents and peer-reviewed articles in its possession regarding the adverse impacts of pharmaceuticals.
68. Defendant violated the Montana Environmental Policy Act by issuing the MPDES permit before making an adequate compilation of relevant information regarding the impacts of pharmaceuticals, analyzing it, and considering all pertinent data to the fullest extent possible.

69. The Finding of No Significant Impact/Decision Notice violates MEPA by determining that the snowmaking would not have “potential impacts” on “aquatic life and habitats” because the Montana DEQ admitted in *Montana Rivers v. MT DEQ*, 20-200A that “pharmaceuticals are emerging contaminants of concern that may threaten aquatic life.”
70. The Finding of No Significant Impact/Decision Notice violates MEPA by determining that the snowmaking would not have “potential impacts” on “water quality, quantity, and distribution” when documents prepared by the U.S. EPA in the Montana DEQ’s possession state the “occurrence, fate, and transport of these [pharmaceutical] chemicals are an important water quality concern, both nationally and regionally, and have gained public interest.”
71. The Finding of No Significant Impact/Decision Notice violates MEPA by determining that the snowmaking would not have “potential impacts” on “human health and safety” because it is contradicted by U.S. EPA documents that the Montana DEQ had in its possession before issuing the MPDES permit, which state exposure to pharmaceuticals can have “adverse ecological or human health effects.”
72. Defendant violated MEPA by failing to disclose and analyze to the fullest extent possible the relevant information it held in its possession at the time it issued the challenged MPDES discharge permit indicating pharmaceutical pollution may have a significant impact on aquatic life.

73. Defendant violated MEPA by failing to prepare an EIS because the MPDES permit will significantly impact the quality of the human environment. Mont. Admin. R. 17.4.607(1)(b).

## SECOND CAUSE OF ACTION

### **II. The Montana DEQ violated MEPA by failing to supplement the 2007 EIS for the ORW designation in light of new information regarding the impacts of pharmaceuticals.**

74. Plaintiffs incorporate by reference all previous allegations.
75. The Yellowstone Club Snowmaking Project permit will result in pharmaceuticals reaching tributaries of the Gallatin River as well as the Gallatin River itself.
76. The 2007 EIS never analyzed the impacts of pharmaceuticals on the Gallatin River or its tributaries.
77. The geographic scope of the 2007 ORW EIS covers “the ORW reach and lands around the ORW which have a hydrologic connection to this reach.”
78. Pharmaceutical pollution will reach tributaries of the Gallatin if the Yellowstone Club is allowed to blow snow pollution on Church Mountain under the MPDES permit that was approved by the DEQ.
79. Pharmaceutical pollution will reach the main stem of the Gallatin if the Yellowstone Club is allowed to blow snow pollution on Church Mountain under the MPDES permit that was approved by the DEQ.

80. The pharmaceutical pollution will have adverse impacts on the tributaries and/or the main stem of the Gallatin River that have been proposed for ORW designation.
81. Defendant had documents in its possession that indicate pharmaceutical pollution has adverse impacts on “aquatic life and habitats,” “human health and safety,” or “water quality, quantity, and distribution.”
82. The adverse impacts are significant new information that triggered the need to prepare supplemental MEPA analysis for the 2007 ORW EIS.
83. Defendant violated MEPA by failing to prepare supplemental MEPA analysis for the 2007 EIS.
84. Admin. R. 17.4.620(7) prohibits the MT DEQ from taking any action that would have an “adverse impact” before it reaches a final decision.
85. The MT DEQ violated Admin. R. 17.4.620(7) because the challenged permit allows for “adverse impacts” before the agency issued a Record of Decision for the ORW MEPA.
86. Defendant violated Mont. Admin. R. 17.4.620(7) by issuing the Yellowstone Club Snowmaking Project permit before preparing a supplemental EIS for the 2007 ORW and issuing a Record of Decision.
87. Defendant violated Mont. Admin. R. 17.4.608(1)(g) by failing to address whether the issuance of the Yellowstone Club Snowmaking Project permit before preparing a Supplemental EIS and ROD for the 2007 ORW EIS would violate

Mont. Admin. R. 17.4.620(7)(a) because Muddy Creek and the Third Yellow Mule Creek are hydrologically connected to the Gallatin River.

### **THIRD CAUSE OF ACTION**

#### **III. The Montana DEQ's issuance of the MPDES permit violates the Montana Constitution.**

88. Plaintiffs incorporate by reference all previous allegations.
89. Issuance of the Yellowstone Club Snowmaking Project permit violates the “clean and healthful environment” provisions of the Montana Constitution. Mont. Const. art. II, § 3; Mont. Const. art. IX, § 1, cl. 1.
90. Defendant violated the Montana Constitution by failing to take a hard look at the impacts of pharmaceutical pollution on the Gallatin River and its tributaries.
91. Pharmaceutical pollution may have a significant impact on aquatic life and habitats, water quality, or human health because technology-based effluent limits are not in place.
92. Defendant violated Plaintiffs’ Constitutional rights to a “clean and healthful environment” by failing to set technology-based effluent limitations for pharmaceuticals.

### **FOURTH CAUSE OF ACTION**

#### **IV. Montana Code Annotated §75-1-201(6)(c)(ii)(B)(I) & § 75-1-201(6)(d) are Unconstitutional Because Deprive Plaintiffs of Adequate Remedies.**

93. Plaintiffs incorporate by reference all previous allegations.



94. Article IX, Section 1(3) of the Montana Constitution requires the Montana legislature to “provide adequate remedies for the protection of the environmental life support system from degradation and provide adequate remedies to prevent unreasonable depletion and degradation of natural resources.”
95. Montana Code Ann. § 75-1-201(6)(c)(ii)(B)(I) prohibits courts from considering the legal nature or character of any party when determining whether injunctive relief is in the public interest.
96. Montana Code Ann. § 75-1-201(6)(d) requires a plaintiff seeking equitable relief to provide a written undertaking to the Court in an amount calculated to pay the costs and damages sustained by any party that may be found to have been wrongfully enjoined or restrained by a court.
97. Mont. Code Ann. § 75-1-201(6)(c)(ii)(B)(I) & § 75-1-201(6)(d) are unconstitutional because they are not narrowly tailored to effectuate a compelling state interest.
98. Mont. Code Ann. § 75-1-201(6)(c)(ii)(B)(I) & § 75-1-201(6)(d) are unconstitutional because they preclude Plaintiffs from adequate remedies that are guaranteed under the Montana Constitution.

### **FIFTH CAUSE OF ACTION**

#### **V. Montana Code Annotated § 75-1-201(6)(f) is Unconstitutional Because It Deprives Plaintiffs of Adequate Remedies.**

99. Plaintiffs incorporate by reference all previous allegations.

100. Mont. Code Ann. § 75-1-201(6)(f) states: “[a]ttorney fees or costs may not be awarded to the prevailing party in an action alleging noncompliance or inadequate compliance with a requirement of parts 1 through 3.”
101. MEPA was enacted to further the Montana Constitution’s fundamental guarantee of a “clean and healthful environment” to all Montana citizens.
102. Mont. Code Ann. § 75-1-201(6)(f) is unconstitutional because it discourages Montana citizens from asserting their fundamental rights under Mont. Const. art. II, § 3; Mont. Const. art. IX, § 1, cl. 1.
103. Mont. Code Ann. § 75-1-201(6)(f) is unconstitutional because it does not provide adequate remedies for the protection of the environmental life support system from degradation and provide adequate remedies to prevent unreasonable depletion of natural resources.
104. Mont. Code Ann. § 75-1-201(6)(f) is unconstitutional because it does not provide an adequate remedy to Montana citizens that successfully assert their fundamental rights under Mont. Const. art. II, § 3; Mont. Const. art. IX, § 1, cl. 1.

### **PRAYER FOR RELIEF**

WHEREFORE, Plaintiffs respectfully request that this Court:

1. Adjudge and declare that Defendant DEQ violated the Montana Environmental Policy Act and the Montana Constitution.

2. Adjudge and declare that Mont. Code Ann. §§ 75-1-201(6)(f) is unconstitutional.
3. Adjudge and declare that Mont. Code Ann. §§ 75-1-201(6)(c)(ii)(B)(I) and § 75-1-201(6)(d) are unconstitutional.
4. Order Defendant to prepare a Supplemental Environmental Impact Statement for the 2007 ORW EIS that analyzes the impacts of pharmaceuticals on the Gallatin River and its Tributaries.
5. Enjoin the Yellowstone Club from making snow under the challenged permit.
6. Vacate the Yellowstone Club Snowmaking Project MPDES permit.
7. Issue any other temporary, preliminary, and/or permanent injunctive relief as may be specifically requested hereafter by Plaintiffs.
8. Award Plaintiffs their reasonable attorney fees, costs, and litigation expenses, under the Private Attorney General Theory, and/or any other applicable provision of law.
9. Grant such further and additional relief as the Court deems just and proper in order to remedy the violations of law alleged herein and to protect the interests of the Plaintiffs and the public.

Respectfully submitted this 27th day of January, 2022.

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