IN THE SUPREME COURT FOR THE STATE OF MONTANA

Supreme Court Cause No. DA 23-0479

COTTONWOOD ENVIRONMENTAL LAW CENTER,

Plaintiff/Appellant,

v.

MONTANA DEPARTMENT OF ENVIRONMENTAL QUALITY,

Defendant/Appellee,

and

YELLOWSTONE MOUNTAIN CLUB,

Defendant-Intervenor and Appellee

On Appeal from the Montana Eighteenth Judicial Court,
Gallatin County, Hon. Andrew J. Breuner, Presiding
Cause No. DV 21-833B

OPENING BRIEF OF PLAINTIFF/APPELLANT

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2. Whether the Montana Department of Environmental Quality violated the Montana Environmental Policy Act by failing to compile, analyze, and disclose any of the science and data in its possession that indicates pharmaceutical pollution in treated sewage may cause fish and amphibians to change sexes.

3. Whether the Montana Department of Environmental Quality was required to prepare an Environmental Impact Statement when it had science in its possession stating pharmaceuticals may threaten aquatic life and the trigger for preparing an Environmental Impact Statement is whether the action may have a significant impact.

4. Whether the challenged permit should be enjoined or vacated and set aside.

STATEMENT OF THE CASE

Cottonwood filed an amended complaint alleging the Montana DEQ violated the Montana Constitution and MEPA by failing to take a "hard look" at the environmental impacts of pharmaceutical pollution on the Gallatin River and its tributaries before issuing the Yellowstone Club a Montana Pollution Discharge Elimination System permit that allows the private resort to make snow using treated sewage. Doc. Seq. 23.[1] The district court denied Cottonwood's motion to supplement the administrative record with relevant documents regarding the impacts of pharmaceutical pollutants from *Montana Rivers, et al. v. Mont. Dept. of Envtl. Quality*, DA 21-0613, a case that raised similar issues regarding the environmental impacts of pharmaceutical pollution from the Yellowstone Club's snowmaking. Doc. Seq. 61. The district court refused to entertain Cottonwood's argument that "it may consider extra-record evidence" and stated it did not "believe it would affect the present analysis." Doc. Seq. 61 at 3. The district court then granted the DEQ and Yellowstone Club's motions for summary judgment and determined "the record lacks sufficient information to suggest any material impact to water quality from

[1] Cottonwood will refer to documents in the record of the District Court by the sequence number in the District Court Register Report, which was transmitted to this Court on October 6, 2023. The Administrative Record related to the challenged permit was submitted to the District Court on March 3, 2022 (Doc. Seq. No.) 27.

pharmaceuticals based on the YC permit." Doc. Seq. 89 at 5-6. The district court entered judgment on July 7, 2023. Doc. Seq. 90.

STATEMENT OF THE FACTS

I. Legal Background

In 1972, the Montana Constitutional Convention adopted Article II, section 3 and Article IX, section 1 of the Montana Constitution, which provide every Montanan with inalienable rights to a "clean and healthful environment." 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." *Mont. Envtl. Info. Ctr. v. Dep't of Envtl. Quality*, 1999 MT 248, ¶ 77, 296 Mont. 207, 988 P.2d 1236 ("*MEIC I*"). Instead, the framers intended it to contain "the strongest environmental protection provision found in any state constitution." *Id.*, ¶66. "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.

MEPA was enacted to ensure constitutional environmental safeguards are protected. *Id.* The Montana Constitution "guarantees that the government will provide Montanans with remedies adequate to prevent unreasonable degradation of their natural resources. 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 Cnty. Envtl. Couns. v. Mont. Dep't of Envtl. Quality*, 2020 MT. 303, ¶ 74, 402 Mont. 168, 477 P.3d 288. These constitutional provisions are anticipatory and preventative. *MEIC I*, ¶ 77.

MEPA is patterned after the National Environmental Policy Act (NEPA) and the Montana Supreme Court has held that federal NEPA decisions are instructive. *Mont. Wildlife Fed'n v. Mont. Bd. of Oil and Gas Conservation*, 2012 MT 128, ¶ 32, 365 Mont. 232, 280 P.3d 877. Like NEPA, MEPA is a procedural statute that accomplishes its goal of environmental protection by requiring agencies to take a "hard look" at the environmental impacts of its actions, including issuing MPDES permits. *Ravalli Cnty. Fish & Game Ass'n, Inc. v. Mont. Dep't of State Lands*, 273 Mont. 371, 377, 903 P.2d 1362 (1995); *Park Cnty. Envtl. Council*, ¶18. "MEPA is unique in its ability to avert potential environmental harms through informed decision making." *Park Cnty. Envtl. Council,* ¶ 76. As the Montana Supreme Court has pointed out:

> The Montana Constitution guarantees that certain environmental harms shall be prevented, and prevention depends on forethought. MEPA's procedural mechanisms help bring the Montana Constitution's lofty goals into reality by enabling fully informed and considered decision making, thereby minimizing the risk of irreversible mistakes depriving Montanans of a clean and healthful environment.

Id., ¶ 70.

NEPA and MEPA's "hard look" requirement is meant to ensure that "the agency will not act on incomplete information, only to regret its decision after it is too

late to correct." *Marsh v. Or. Nat. Res. Council*, 490 U.S. 360, 371 (1989). "Implicit in the requirement that an agency take a hard look at the environmental consequences of its actions is the obligation to make an adequate compilation of relevant information, to analyze it reasonably, and to consider all pertinent data." *Clark Fork Coal. v. Mont. Dep't Envtl. Quality*, 2008 MT 407, ¶ 47, 347 Mont. 197, 197 P.3d 482 (citation omitted). An agency cannot "ignore pertinent data." *Ravalli Cnty. Fish and Game Ass'n, Inc.*, 273 Mont. at 381 (citation omitted).

MEPA requires the DEQ to compile relevant information regarding environmental impacts and complete the environmental analysis to the "fullest extent possible." *Bitterrooters for Planning, Inc. v. Mont. Dep't of Envtl. Quality*, 2017 MT 222, ¶34, 388 Mont. 453, 401 P.3d 712. "It is the agency, not an environmental plaintiff" that has a "duty to gather and evaluate" the "information relevant to the environmental impact of its actions[.]" *Friends of Clearwater v. Dombeck*, 222 F.3d 552, 558 (9th Cir. 2000). "[F]ulfillment of this vital responsibility should not depend on the vigilance and limited resources of environmental plaintiffs." *Id.*

II. Factual Background

The Yellowstone Club is a 15,200-acre private residential, ski, and golf resort located near Big Sky, Montana. DEQ 00037: 00037.[2] The DEQ prepared an

[2] Citations to the Administrative Record begin with "DEQ," provide the bates number of the first page of the referenced document, and then provide a page citation.

Environmental Assessment ("EA") in March 2021 to analyze potential environmental impacts from the Yellowstone Mountain Club Snowmaking Project. DEQ 00037: 00037. The DEQ issued the Yellowstone Club a Montana Pollution Discharge Elimination System ("MPDES") permit to make snow using treated sewage at the resort on June 7, 2021. DEQ 00017: 00017. The challenged MPDES permit authorizes the Yellowstone Club to blow snow on ski runs at the private resort using up to 25 million gallons of treated sewage over the course of 45 days/year for five years. DEQ 00037: 00038. The treated sewage would be piped in from the Big Sky Water and Sewer District and/or produced at the Yellowstone Club's treatment facility. DEQ 00037: 00038; DEQ 00017: 00019.

The snow pollution would be sprayed on "Eglise" Mountain, which is a French word that means "Church" in English. DEQ 00037: 00038. The snow will melt and pollutants will reach tributaries of the Gallatin River. *E.g.*, DEQ 00119: 00123 ("discharge to state waters will occur as snowmelt runoff each spring."). The DEQ permit authorizes the Yellowstone Club to discharge nitrogen pollutants into Muddy Creek and Third Yellow Mule Creek. DEQ: 00017: 00019. Montana considers the two creeks to be "high quality" waters. DEQ 00043: 00057.

The DEQ accepted public comment on the EA as part of its MEPA obligations. DEQ 00043: 00043. Cottonwood told the DEQ the EA violates MEPA because it failed to analyze the impacts of pharmaceutical pollution reaching surface waters. DEQ 00043: 00056. The DEQ responded 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.

DEQ 00043: 00056.

Cottonwood filed a complaint challenging the EA and Finding of No Significant Impact on Aug. 5, 2021. Doc. Seq. 1. Cottonwood's amended complaint claims the DEQ violated MEPA and alleges:

> 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.

Doc. Seq. 23 at 10, ¶56.

The parties engaged in discovery. In response to a Request for Admission, the Montana DEQ admitted it had previously defined the term "pharmaceuticals" in the context of the Yellowstone Club making snow using treated wastewater in the case of *Mont. Rivers, et al. v. Mont. Dept. of Envtl. Quality*, Montana 18th Judicial District Case No. DV-20-200A. Exhibit 3 at 2-3. In that case, the DEQ admitted:

> 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.

Exhibit 3 at 2-3. On appeal, the Montana DEQ noted the issuance of the Yellowstone Club's snowmaking permit formed the basis for the complaint. (Exhibit 4 at 1, N.1).

The Administrative Record in *Montana Rivers* contains a fifty-page PowerPoint report created by six DEQ employees that addresses "Pharmaceuticals, Personal Care Products, Endocrine Disruptors" ("PCCPs"). Exhibit 1 at 00947. The report identifies the five most detected PCCPs. Exhibit 1 at 00959. The report contains data regarding specific pharmaceuticals. Exhibit 1 at 00959. The DEQ admitted in its answer to the complaint that "pharmaceuticals are emerging contaminants of concern that may threaten aquatic life." Doc. Seq. 13 at 13, ¶62.

At the time it prepared the MEPA analysis for the challenged permit, the DEQ possessed a document created by the U.S. EPA that states "information has shown that many of these chemicals may pose a threat to aquatic life, such as feminizing changes observed in male fish exposed to endocrine-active PCCPs in streams and lakes within [Montana]." Exhibit 2 at 001004. The DEQ had information from the EPA stating pharmaceuticals may have impacts on human health. Exhibit 2 at 001004. The DEQ did not disclose any science, data, or information regarding the environmental impacts of pharmaceuticals in the MEPA analysis for the challenged permit.

The district court granted the DEQ and Yellowstone Club's motions for summary judgment. Cottonwood appeals the district court's grant of summary judgment to Defendant and Defendant-Intervenor. Cottonwood also appeals the district court order denying its motion to supplement the administrative record with

two relevant documents that contain information and data regarding the environmental impacts of pharmaceutical pollution in treated wastewater.

STANDARD OF REVIEW

This Court reviews the district court's grant of summary judgment *de novo*. *Cole v. Valley Ice Garden, LLC*, 2005 MT 115, ¶ 4, 327 Mont. 99, 113 P.3d 275. "A de novo review affords no deference to the district court's decision, and we independently review the record, using the same criteria used by the district court to determine whether summary judgment is appropriate." *Siebken v. Voderberg*, 2012 MT 291, ¶ 20, 367 Mont. 344, 291 P.3d 572.

The Supreme Court has expressed a general rule that courts reviewing an agency decision are limited to the administrative record. *Fla. Power & Light Co. v. Lorion*, 470 U.S. 729, 743-44, 84 L. Ed. 2d 643, 105 S. Ct. 1598 (1985); *Ravalli Cnty. Fish and Game Ass'n, Inc.*, 273 Mont. at 382. "When a district court reviews an administrative agency decision, it must base its review on the record before the governing body at the time of its decision."' *Belk v. Mont. Dep't of Envtl. Quality*, 2022 MT 38, ¶33, 408 Mont. 1, 504 P.3d 1090 (citation omitted). "If the record before the agency does not support the agency action, if the agency has not considered all relevant factors, or if the reviewing court simply cannot evaluate the challenged agency action on the basis of the record before it, the proper course, except in rare

circumstances, is to remand to the agency for additional investigation or explanation." *Ravalli Cnty. Fish and Game Ass'n, Inc.*, 273 Mont. at 382 (citation omitted)

Courts do not "automatically defer to the agency 'without carefully reviewing [whether] the agency has made a reasoned decision.'" *Mont. Envtl. Info. Ctr v. Mont. Dep't of Envtl. Quality,* 2019 MT 213, ¶26, 397 Mont. 161, 451 P.3d 493 (quoting *Clark Fork Coal. v. Tubbs,* 2016 MT 229, ¶ 21, 384 Mont. 503, 380 P.3d 771). Instead, courts defer to consistent, rational, and well-supported agency decision-making. *Mont. Envtl. Info. Ctr.,* 2019 MT 213, ¶26. "An agency has an obligation to examine the relevant data and articulate a satisfactory explanation for its action, including a rational connection between the facts found and the choice made." *Id.*

Courts can consider "extra-record evidence… if it would make clear what the agency should have considered." *Belk*, 2022 MT 38, ¶33. The Montana Supreme Court has "previously noted that without this evidence, it may be impossible for the court to determine whether the agency took into consideration all relevant factors." *Belk*, 2022 MT 38, ¶33 citing *Asarco*, *Inc. v. EPA*, 616 F.2d 1153, 1160 (9th Cir. 1980). The Ninth Circuit in *Asarco* warned:

> [I]t is both unrealistic and unwise to "straightjacket" the reviewing court with the administrative record. It will often be impossible . . . for the court to determine whether the agency took into consideration all relevant factors unless it looks outside the record to determine what matters the agency should have considered but did not. The court cannot adequately discharge its duty to engage in a

> "substantial inquiry" if it is required to take the agency's word that it considered all relevant matters.

Id. at 1160.

Courts can also consider extra-record evidence "when plaintiffs make a showing of agency bad faith." *Lands Council v. Powell*, 395 F.3d 1019, 1030 (9th Cir. 2005) (citation omitted). A defense is made "in bad faith when it is outside the bounds of legitimate argument on a substantial issue on which there is a bona fide difference of opinion." *Cmty. Ass'n for N. Shore Conservation, Inc. v. Flathead Cty.*, 2019 MT 147, ¶ 54, 396 Mont. 194, 445 P.3d 1195 (citations omitted).

SUMMARY OF ARGUMENT

The DEQ answered Cottonwood's complaint by admitting pharmaceutical pollution may threaten aquatic species, but then refused to include the science and data supporting the admission in the administrative record. The agency opposed Cottonwood's motion to supplement the administrative record with two relevant documents—the DEQ's own fifty-page PowerPoint regarding the impacts of certain pharmaceuticals, and a notice from the U.S. EPA regarding the environmental impacts of pharmaceutical pollution.

The DEQ violated MEPA by failing to take a "hard look" at the environmental impacts of the challenged snowmaking to the "fullest extent possible" before issuing the Yellowstone Club a permit to make snow using treated sewage. *Bitterrooters for Planning, Inc.,* ¶34. To satisfy its "hard look" requirement, the agency was required to

make an adequate compilation of relevant information regarding the environmental impacts of pharmaceutical pollution, to analyze it reasonably, and to consider all pertinent data. *Clark Fork Coal.*, 2008 MT 407, ¶ 47 (citation omitted). The DEQ violated MEPA by failing to compile, consider, and disclose any of the science, data or information in its MEPA analysis regarding the impacts of pharmaceutical pollution. The DEQ refused to disclose and analyze a fifty-page PowerPoint report that it created that addresses the environmental impacts of specific pharmaceuticals.

The DEQ violated MEPA by failing to prepare an Environmental Impact Statement for the challenged permit. The DEQ's answer to Cottonwood's complaint, that pharmaceutical pollution "may" pose a threat to aquatic life by changing the sex of fish and amphibians, satisfied the threshold of raising substantial questions as to whether the challenged project "may" have significant environmental impacts.

ARGUMENT

I. The district court erred by denying Cottonwood's motion to supplement the administrative record with relevant documents, some of which the Montana Department of Environmental Quality itself created, or to consider the documents as extra record evidence that is relevant to the environmental impacts of the challenged permit.

The DEQ was required to compile and analyze the relevant information regarding the potential environmental impacts of the challenged permit to the "fullest extent possible." *Bitterrooters for Planning, Inc*, ¶34. The MEPA analysis does not disclose any of the potential impacts of pharmaceutical pollution. The administrative record not contain any of the science or information regarding the potential impacts

of pharmaceutical pollution that was in the DEQ's possession at the time it prepared its MEPA analysis.

Cottonwood moved the district court to supplement the administrative record with the science and data the DEQ had in its possession regarding the impacts of pharmaceuticals at the time it prepared the MEPA analysis for the challenged permit. Doc. Seq. 39 & 40. In particular, Cottonwood sought to supplement the record with a fifty page report the DEQ itself prepared and a notice from the U.S. EPA regarding the impacts of pharmaceuticals. *Id.*[3] The district court denied Cottonwood's motion to supplement. Doc. Seq. 61.

The district court allowed Cottonwood to conduct discovery, but then denied its motion to supplement the administrative record with documents the agency produced. The DEQ cannot have it both ways—claim that judicial review is limited to an administrative record that it prepared, but then object to supplementing the record with relevant documents that it produced that were in its possession at the time it completed the MEPA analysis. "When a district court reviews an administrative agency decision, it must base its review on 'the record before the governing body at the time of its decision.' In certain circumstances, a court may need to admit extra-record evidence, materials beyond those considered by the agency, if it would make

[3] Those documents were provided to the district court in support of Cottonwood's motion to supplement the administrative record but were not included in the electronic docket. *See* Doc. Seq. 40 at 6. They are included here as Exhibits 1-3.

clear what the agency should have considered. We have previously noted that without this evidence, it may be 'impossible for the court to determine whether the agency took into consideration all relevant factors.'" *Belk*, ¶33 (Internal citations omitted).

The district court ruled that "it does not appear that DEQ should have, but failed to, consider such materials." Doc. Seq. 61 at 3. The district court pointed to the lack of water quality standards as parameters that could be analyzed in the EA. Doc. Seq. 61 at 3. Whether there are water quality standards in place for pharmaceutical pollutants is irrelevant to whether pharmaceutical pollutants may have significant impacts on the environment. *See e.g., Calvert Cliffs Coordinating Committee, Inc. v. United States Atomic Energy Com.*, 449 F.2d 1109, 1123 (D.C. Cir. 1971) (rejecting failure to prepare NEPA analysis because standards would not be exceeded).

The MEPA analysis for the challenged permit says nothing about the *impacts* of pharmaceutical pollution. The DEQ admitted in its answer to Cottonwood's complaint that pharmaceutical pollution may threaten aquatic life (Doc. Seq. 13 at 13, ¶62), admitted that "pharmaceuticals are emerging contaminants of concern that may threaten aquatic life" in response to a request for admission (Exhibit 3 at 3-4); produced a document from the EPA stating "new information has shown that many of these chemicals may pose a threat to aquatic life, such as feminizing changes observed in male fish exposed to endocrine-active PCCPs," (*see* Exhibit 3 at 4; Exhibit 2), but then refused to include the relevant document in the administrative record and

opposed Cottonwood's motion to supplement the administrative record with the document. Doc. Seq. 42.

The DEQ also prepared a fifty-page report regarding the impacts of certain pharmaceutical pollutants. Exhibit 1. The agency did not include its own report outlining the environmental impacts of specific pharmaceutical pollutants in the administrative record. For example, the DEQ's own report states antidepressants can have "[p]rofound effects on the development, spawning, and other behaviors" in "aquatic organisms." Exhibit 1 at 000994. "Sex steroids (e.g., from oral contraceptives) can feminize male fish and change the behaviors of either sex[.]" Exhibit 1 at 000968. "Acute toxicity, carcinogenesis, and mammalian endocrine disruption are highly visible concerns[.]" Exhibit 1 at 000996. The DEQ was required to prepare an administrative record that contained all relevant information to demonstrate it satisfied its MEPA obligation to take a "hard look" at the environmental impacts of the challenged permit by compiling the relevant documents to the "fullest extent possible." *Bitterrooters for Planning, Inc.,* ¶34. That is true even if the agency does not currently have standards in place to regulate the pollutants. *See e.g., MEIC I*, ¶ 77 ("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.")

The district court determined the documents were not "new," were publicly available, and determined if Cottonwood wanted them preserved in the record, it

should have included them as attachments to their comments in the MEPA process. Doc. 61 at 3-4 (citing MCA 75-1-201(6)(a)(ii)). "It is the agency, not an environmental plaintiff" that has a "duty to gather and evaluate" the "information relevant to the environmental impact of its actions[.]" *Friends of Clearwater,* 222 F.3d at 558. "[F]ulfillment of this vital responsibility should not depend on the vigilance and limited resources of environmental plaintiffs." *Id.* "Implicit in the requirement that an agency take a hard look at the environmental consequences of its actions is the obligation to make an adequate compilation of relevant information, to analyze it reasonably, and to consider all pertinent data." *Clark Fork Coal.,* 208 MT 407, ¶ 47 (citation omitted).

After denying its motion to supplement the administrative record (Doc. Seq. 61), Cottonwood asked the district court to consider the DEQ report and EPA notice as extra-record evidence in support of its motion for summary judgment. Doc. Seq. 79 at 16-17. Courts can consider "extra-record evidence… if it would make clear what the agency should have considered." *Belk*, 2022 MT 38, ¶33 *citing Asarco, Inc. v. EPA*, 616 F.2d 1153, 1160 (9th Cir. 1980). The Ninth Circuit in *Asarco* warned:

> [I]t is both unrealistic and unwise to 'straightjacket' the reviewing court with the administrative record. It will often be impossible . . . for the court to determine whether the agency took into consideration all relevant factors unless it looks outside the record to determine what matters the agency should have considered but did not. The court cannot adequately discharge its duty to engage in a 'substantial inquiry' if it is required to take the agency's word that it considered all relevant matters.

Asarco, 616 F.2d at 1160.

The district court ruled that it had "already disposed of the issue" and would "not entertain further argument as to whether it may consider extra-record evidence, nor does the Court believe it would affect the present analysis." Doc. Seq. 89 at 3. Cottonwood did not ask the district court to consider the two documents as extra-record evidence as part of its motion to supplement. Doc. Seq. 40. Cottonwood did not request that the Court consider the documents as extra-record evidence that showed what the agency failed to compile and analyze in violation of MEPA until it moved for summary judgment. Doc. Seq. 79 at 16-17. The DEQ cannot "straightjacket" the Court by providing an overly narrow administrative record of its choosing. *Belk*, ¶33. This Court should consider the documents because it affects the present analysis of whether the agency compiled and analyzed the relevant documents to the "fullest extent possible." *Belk*, ¶33; *Bitterrooters for Planning, Inc.*, ¶34.

Courts can also consider extra-record evidence "when plaintiffs make a showing of agency bad faith." *Lands Council v. Powell*, 395 F.3d 1019, 1030 (9th Cir. 2005) (citation omitted). A defense is made "in bad faith when it is outside the bounds of legitimate argument on a substantial issue on which there is a bona fide difference of opinion." *Cmty. Ass'n for N. Shore Conservation, Inc. v. Flathead Cty.*, 2019 MT 147, ¶ 54, 396 Mont. 194, 445 P.3d 1195 (citations omitted). It is outside the bounds of legitimate argument for the DEQ to: 1.) argue judicial review is limited to the administrative record it prepared; 2.) produce relevant documents in response to

discovery that show it did not compile and analyze all relevant documents to the fullest extent possible; and 3.) then oppose a motion to supplement the administrative record with its own report and an EPA summary regarding the relevant environmental impacts of the challenged permit. *Id.* The public deserves better from state agencies.

II. The Montana Department of Environmental Quality violated the Montana Environmental Policy Act by failing to take a hard look at the environmental impacts of the challenged permit to the fullest extent possible.

The DEQ failed to take a "hard look" at the environmental impacts of pharmaceutical pollution to the "fullest extent possible" before issuing the Yellowstone Club a permit to make snow using treated sewage. *Bitterrooters for Planning, Inc.*, ¶20; *Ravalli Cnty. Fish & Game Ass'n*, 273 Mont. at 377; *Park Cnty. Envtl. Council*, ¶18. As part of its MEPA comments on the MPDES permit, Cottonwood told the DEQ, "[t]he EA violates MEPA because it fails to analyze the impacts of pharmaceuticals reaching surface waters." DEQ 00043: 00056. The DEQ responded 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 waters. DEQ evaluated water quality concerns under Final EA Part 2.

DEQ 00043: 00056.

As explained more fully below, the DEQ had already defined the term pharmaceutical and had a fifty-page PowerPoint report in its possession that it created that identified the most common pharmaceuticals and their impacts. The agency conflated the lack of standards with a lack of impacts, as evidenced by the DEQ's own report stating fish and amphibians have been documented to change sexes because of pharmaceuticals. The DEQ's conclusion that it evaluated water quality concerns is directly contradicted by the agency's own information.

A. The DEQ had already defined the term "pharmaceuticals" and identified specific pharmaceuticals of concern.

The DEQ could not avoid its MEPA obligation to compile, analyze, and disclose the relevant information regarding the impacts of pharmaceutical pollution by claiming "pharmaceuticals" is a general term. DEQ 00043: 00056. At the time it completed the MEPA analysis, the agency had already defined the term "pharmaceutical" to include "a diverse group of chemicals including all human veterinary drugs, dietary supplements, topical agents such as cosmetics and sunscreens, laundry and cleaning products." Exhibit 3 at 3.

Moreover, the DEQ had already created a fifty page report that identified the "five most frequently-detected [Pharmaceuticals, Personal Care Products, Endocrine Disruptors (PCCPs)]" and provided their maximum detected concentration. Exhibit 1 at 000959. The DEQ report provided detection frequencies for 23 other PCCPs. Exhibit 1 at 000958. None of the pertinent PCCPs were discussed in the MEPA

analysis. The agency violated MEPA by ignoring the data it created. *Ravalli Cnty. Fish and Game Ass'n, Inc.*, 273 Mont. at 381 (citation omitted).

B. The DEQ violated MEPA by failing to compile, analyze, and disclose the information available regarding the impacts of pharmaceuticals to the "fullest extent possible."

The DEQ tried to justify its failure to compile, analyze, and disclose the information in its possession by stating, "[p]harmaceuticals are an emerging area of science and research concerning water quality." DEQ 00043: 00056. This response does not satisfy MEPA's "hard look" requirement. "At its core, MEPA requires DEQ to engage in a prescribed level of environmental forecasting before taking action impacting the environment." *Park Cnty. Envtl. Council*, ¶31. "While 'foreseeing the unforeseeable' is not required, an agency must use its best efforts to find out all that it reasonably can." *Barnes v. U.S. Dept. of Tansp.*, 655 F.3d 1124, 1136 (9th Cir. 2011) (citation omitted).

The DEQ violated MEPA by failing to compile and disclose any of the studies, articles, and information in its possession relevant to the diverse group of chemicals including all human veterinary drugs, dietary supplements, topic agents such as cosmetics and sunscreens, laundry and cleaning products. *E.g.*, *Clark Fork Coal.,* 208 MT 407, ¶ 47. "Implicit in the requirement that an agency take a hard look at the environmental consequences of its actions is the obligation to make an adequate compilation of relevant information, to analyze it reasonably, and to consider all pertinent data." *Id.* (citation omitted).

The DEQ was aware of the science and information regarding the impacts of pharmaceutical pollution before the plaintiffs pointed that information out during this lawsuit—it created one of the reports. Exhibit 1. "This information was not buried in a report prepared by another agency, which might have escaped the [DEQ's] attention, but was generated by the [DEQ] itself." *Friends of Clearwater*, 222 F.3d at 559; "It is the agency, not an environmental plaintiff" that has a "duty to gather and evaluate" the "information relevant to the environmental impact of its actions[.]"*Id.* at 558. "[F]ulfillment of this vital responsibility should not depend on the vigilance and limited resources of environmental plaintiffs." *Id.*

The DEQ completely ignored a fifty-page PowerPoint report that it created entitled "Pharmaceuticals, Personal Care Products, Endocrine Disruptors (PCCPs) and Microbial Indicators of Fecal Contamination in Ground Water in Helena Valley, Montana." Exhibit 1 at 000998. According to the report, it is "[i]mportant to recognize that ALL municipal sewage, regardless of location, will contain PCCPs. Issue is not unique to any particular municipal area." Exhibit 1 at 000991 (emphasis in original). "The two major sources of PCCPs in the environment are from domestic sewage and terrestrial runoff. Since PCCPs [] are generally much less volatile, they tend to end up in aquatic environments . . . This means that aquatic organisms can suffer continual life-long exposures[.]" Exhibit 1 at 000976. "No municipal sewage treatment plants are engineered for PCCP removal." Exhibit 1 at 000965.

According to the DEQ report, "the scientific community has become increasingly concerned that humans experience health problems and wildlife populations are adversely affected following exposure to chemicals that interact with the endocrine system." Exhibit 1 at 000964. PCCPs are a new concern because information regarding their effects has begun to emerge in the last five to ten years. Exhibit 1 at 000967. The DEQ's own report states antidepressants can have "[p]rofound effects on the development, spawning, and other behaviors" in "aquatic organisms." Exhibit 1 at 000994. "Sex steroids (e.g., from oral contraceptives) can feminize male fish and change the behaviors of either sex[.]" Exhibit 1 at 000968. "Acute toxicity, carcinogenesis, and mammalian endocrine disruption are highly visible concerns[.]" Exhibit 1 at 000996.

The DEQ possessed information from the EPA at the time it prepared the MEPA analysis that states, "information has shown that many of these chemicals may pose a threat to aquatic life, such as feminizing changes observed in male fish exposed to endocrine-active PCCPs[.]" Exhibit 2 at 001004. The DEQ violated MEPA by failing to compile, analyze, and consider this pertinent data that was in its possession before issuing the challenged permit. *Clark Fork Coal.,* 208 MT 407, ¶ 47. The agency's decision to issue the MPDES permit was unlawful, arbitrary, or capricious because it was made without consideration of all relevant factors. *E.g.*, *Bitterrooters for Planning, Inc.*, ¶16.

The DEQ tried to justify its failure to compile, analyze, and disclose the relevant information by stating the agency "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 waters." DEQ 00043: 00056. The district court granted the DEQ summary judgment by reasoning that because there are no water quality standards in place for pharmaceuticals, the agency had no way of evaluating the impacts. Doc. Seq. 89 at 4. The Order does not cite a single case holding a lack of standards somehow eliminates the obligation under MEPA to disclose the information regarding potential impacts.

Courts have already held that impacts can occur regardless of whether standards will be exceeded. *E.g.*, *Calvert Cliffs Coordinating Comm., Inc*, 449 F.2d at 1123. The DEQ publicly acknowledged it is "concerned about pharmaceutical pollution" because "there are no water quality standards designed to protect from those types of pollutants, and so there are no standards that can be incorporated in a permit." Exhibit 3 at 4. The DEQ and EPA documents indicating fish and amphibians may change sexes because of pharmaceutical pollution indicates impacts can also occur if there are no standards in place. Exhibits 1 & 2. The MEPA analysis makes no reference to these potential impacts.

The Montana Supreme Court has previously reversed a district court that held Montanans' right to a clean and healthful environment was not implicated absent a demonstration that water quality standards would be affected. *See e.g., MEIC I*, ¶78.

"[D]ead fish do not have to float on the surface of our state's rivers and streams before [MEPA] protections can be invoked." *Id.,* ¶77. The DEQ violated its MEPA obligation to compile, analyze, and disclose the relevant information regarding the impacts of pharmaceutical pollutants to the "fullest extent possible," regardless of whether standards were in place or would be violated. *MEIC I*, ¶78; *Clark Fork Coal.,* ¶ 47; *Calvert Cliffs Coordinating Comm.,* 449 F.2d at 1123. The DEQ violated MEPA by failing to take a "hard look" at the environmental impacts of pharmaceuticals before issuing the challenged permit. *Ravalli Cnty. Fish & Game Ass'n*, 273 Mont. at 377.

C. The DEQ violated MEPA by failing to consider the relevant pharmaceutical impacts in its Water Quality Evaluation.

The DEQ responded to Cottonwood's MEPA comment by stating it "evaluated water quality concerns under Final EA Part 2." DEQ 00043: 00056. The agency violated MEPA because Part 2 of the EA does not address the impacts that pharmaceuticals have on water quality.

Part 2 of the EA asks whether there are "potential impacts" on "water quality". DEQ 00037: 00039. The DEQ concluded "No" 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." DEQ 00037: 00039. In contrast, the DEQ admitted during discovery it had information from the EPA that states, "there are no suitable water quality standards regulating

pharmaceuticals. Therefore, these contaminants are not controlled through effluent limits and conditions incorporated in MPDES permits." Exhibit 3 at 4.

The applicable rules required the DEQ to ensure the receiving waters were adequate to maintain the "growth and propagation of salmonid fishes and associated aquatic life." A.R.M 17.30.623(1). The DEQ failed to take a "hard look" at whether fish that change sexes will propagate. The DEQ failed to explain how it met the propagation standard in light of its admittance that pharmaceutical pollution "may threaten aquatic life." Doc. Seq. 13 at 13, ¶62. The DEQ violated MEPA by failing to "examine the relevant [information] and articulate a satisfactory explanation for its action, including a rational connection between the facts found and the choice made." *Mont. Envtl. Info. Ctr.,* 2019 MT 213, ¶ 26.

Part 2 of the EA also asks, "Will this project add to health and safety risks in the area?" DEQ 00037: 00040. The DEQ concluded "No" by stating, "[e]ffluent limits and permit conditions, including disinfection of snowmaking water will ensure water quality standards are met and human health is protected." DEQ 00037: 00040. The DEQ had information from the EPA in its possession that states pharmaceuticals can have "human health effects." Exhibit 2 at 000870. The DEQ violated MEPA by failing to "examine the relevant [information] and articulate a satisfactory explanation for its action, including a rational connection between the facts found and the choice made." *Mont. Envtl. Info. Ctr.,* 2019 MT 213, ¶26 (citations omitted).

III. The Montana Department of Environmental Quality was required to prepare an Environmental Impact Statement because there are substantial questions as to whether the challenged permit may have significant impacts on the environment.

The Montana DEQ violated MEPA by failing to prepare an Environmental Impact Statement. "A determination that significant effects on the human environment will in fact occur is not essential.... If substantial questions are raised whether a project may have a significant effect upon the environment, an EIS must be prepared." *Ravalli Cnty. Fish and Game Ass'n, Inc.*, 273 Mont. at 381 (citation omitted). "Part of the harm [M]EPA attempts to prevent in requiring an EIS is that, without one, there may be little if any information about prospective environmental harms and potential mitigating measures." *Winter v. Nat. Res. Def. Council*, 555 U.S. 7, 23, 129 S. Ct. 365, 172 L. Ed. 249 (2008).

In this case, the Environmental Assessment concludes that "water quality, aquatic life, and human health, would be protected." DEQ 00037-47. Cottonwood has raised substantial questions as to whether the challenged snowmaking "may" have a significant effect in light of the DEQ's answer to Cottonwood's complaint that "pharmaceuticals are emerging contaminants of concern that may threaten aquatic life." Doc. Seq. 13 at 13, ¶62. The DEQ's own admission that pharmaceutical pollution contained within the snow "may threaten aquatic life" raises substantial questions as to the DEQ's conclusion that aquatic life "would be protected." DEQ

00037-47. The DEQ violated MEPA by failing to prepare an EIS. *Ravalli Cnty. Fish and Game Ass'n, Inc.*, 273 Mont. at 381.

IV. The challenged permit should be permanently enjoined or vacated and set aside.

"The judiciary's standard remedy for permits or authorizations improperly issued without required procedures is to set them aside." *Park Cty. Envtl. Council,* 2020 MT 303, ¶55 (collecting cases). After *Park Cty.* invalidated § 75-1-201(6)(c), MCA (2011) as unconstitutional, the statute's contingency remedy language went into effect. *Water for Flathead's Future, Inc. v. Mont. Dep't of Envtl. Quality,* 2023 MT 86, ¶ 35, 412 Mont. 258 530 P.3d 790. Under the contingency remedy language, courts can permanently enjoin or provide "other equitable relief," such as vacating and setting aside a permit, if the plaintiff demonstrates "irreparable harm in the absence of relief" and issuance of the relief is in the public interest. § 75-1-201(6)(c), MCA. In addition, a court must make written findings with respect to the implications of the relief on the local and state economy. *Id.*

A. Cottonwood has suffered irreparable harm because of the MEPA violation.

When deciding whether a plaintiff has suffered irreparable harm in NEPA cases, federal courts look to whether the interests of the plaintiff have been harmed. *Winter* at 20. "[E]stablishing irreparable injury should not be an onerous task for plaintiffs" that seek to protect the environment. *Cottonwood Envtl. L. Ctr. v. U.S. Forest Serv.*, 789 F.3d 1075, 1086 (9th Cir. 2015) (cert. denied, 580 U.S. 916). MEPA was enacted to

ensure constitutional environmental safeguards are protected. *N. Plains Res. Council, Inc.*, ¶14. The loss of a constitutional right constitutes irreparable harm. *Driscoll v. Stapleton*, 2020 MT 247, ¶15, 401 Mont. 405, 473 P.3d 386; *Netzer Law Office, P.C. v. State*, 2022 MT 234, ¶20, 410 Mont. 513, 520 P.3d 335; *Mont. Cannabis Indus. Ass'n v. State*, 2012 MT 201, ¶ 15, 366 Mont. 224, 286 P.3d 1161. The failure to prepare adequate MEPA analysis constitutes irreparable harm. *See, e.g.*, *Park Cnty. Envtl. Council*, 2020 Mont. 303, ¶ 74; ¶89 ("MEPA is an essential aspect of the State's efforts to meet its constitutional obligations.")

In this case, Cottonwood submitted declarations from seven of its members stating the DEQ's failure to analyze the impacts of the pharmaceutical pollution in the MEPA analysis harms their constitutional interests in a clean and healthful environment, their recreation interests, and their business interests. Doc. Seqs. 46; 47; 48; 49; 50; 67; 68. Cottonwood has shown its members are facing irreparable harm in light of the MEPA violation.

B. <u>The public interest requires enjoining or setting aside the permit.</u>

This Court has recognized the framers of the 1972 Constitutional Convention intended for the Montana Constitution to provide "the strongest environmental protection provision found in any state constitution." *MEIC I,* ¶ 66. Similarly, the U.S. Supreme Court has recognized the Endangered Species Act as "the most comprehensive legislation for the preservation of endangered species ever enacted by any nation." *Tennessee Valley Authority v. Hill,* 437 U.S. 153, 180, 98 S. Ct. 2279, 57 L.

Ed. 2d 117 (1978). The *Hill* Court determined the balance of harms and public interest always tip in favor of the species because Congress "afford[ed] first priority to the declared national policy of saving endangered species." 437 U.S. at 185. *Hill* also held that Congress established an unparalleled public interest in the "incalculable" value of preserving endangered species. *Id.* at 187-88. Montanans' constitutional right to a "clean and healthful environment" "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 Cnty. Envtl. Council,* ¶74. Because MEPA, like the ESA, effectuate the strongest environmental safeguards possible, the public interest always tips in favor of the environment in MEPA cases. *See e.g.*, *MEIC I,* ¶ 66.

C. The local and state economies will benefit from enjoining or vacating and setting aside the permit.

The Big Sky area and Gallatin River is host to one of the most popular year-round recreation destinations in Montana and a tourism-dependent human economy. Exhibit 5. This Court has already found that "the need for fully informed and considered decision making could hardly be more pressing" when a challenged permit occurs within the Greater Yellowstone Ecosystem in an area adjacent to the world's first National Park. *Park Cnty.,* ¶*73*. The same holds true here.

CONCLUSION AND REQUESTED RELIEF

For the foregoing reasons, Cottonwood respectfully requests that the Court reverse the district court, rule that the DEQ violated the Montana Environmental Policy Act, and enjoin or vacate and set aside the challenged MPDES permit.

Respectfully submitted this 9th day of November, 2023.

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CERTIFICATE OF COMPLIANCE

I certify that pursuant to Mont. R. App. P. 11(4)(e), this brief is proportionately and double spaced, has a typeface of 14 points and contains 7,158 words. I used Microsoft Word 2017.

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