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IN THE SUPREME COURT OF THE STATE OF MONTANA

Supreme Court Cause No. DA 21-0613

MONTANA RIVERS; GALLATIN WILDLIFE ASSOCIATION; COTTONWOOD ENVIRONMENTAL LAW CENTER,

Plaintiffs-Appellants,

v.

MONTANA DEPARTMENT OF ENVIRONMENTAL QUALITY,

Defendant-Appellee

On Appeal from the Montana Eighteenth Judicial Court,
Gallatin County, Hon. Peter Ohman, Presiding

Cause No. DV-20-200A

OPENING BRIEF OF PLAINTIFFS/APPELLANTS

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STATEMENT OF THE ISSUES

1. Whether a staff attorney for the Montana Department of Environmental Quality published a Record of Decision for a Montana Environmental Policy Act analysis by offering testimony at a public hearing before another agency that does not mention the words "Record of Decision"?

2. Whether the Montana Department of Environmental Quality violated the Montana Environmental Policy Act by failing to consider the significance of new information regarding the effects of pharmaceutical pollution and a request for engineers to design a pipeline to discharge treated wastewater into the Gallatin River?

3. Whether the new information and changed circumstances regarding pharmaceutical pollution and a pipeline triggered the obligation to prepare a supplemental Environmental Impact Statement when the Department of Environmental Quality attorney stated during a public hearing that a supplemental Environmental Impact Statement was probably needed?

STATEMENT OF THE CASE

In 2007, the Montana Department of Environmental Quality (DEQ) issued a final Environmental Impact Statement (EIS) that proposed designating the section of the Gallatin River from the boundary of Yellowstone National Park to the confluence with Spanish Creek as an Outstanding Resource Water. In 2020, Plaintiffs-Appellants Montana Rivers, Gallatin Wildlife Association, and Cottonwood Environmental Law Center (collectively "Montana Rivers") filed this Montana Environmental Policy Act (MEPA) action challenging the DEQ's failure to supplement the 2007 EIS to address new information and changed circumstances regarding the effects of pharmaceutical pollution and a new discharge pipe that were not analyzed in the original EIS. The district court determined the DEQ did not have to prepare a supplemental EIS that analyzed the new information and changed circumstances because the MEPA process terminated when a DEQ attorney issued a Record of Decision during a public hearing before another agency that never mentioned the words Record of Decision.

STATEMENT OF THE FACTS

I. LEGAL BACKGROUND

A. Montana Environmental Policy Act

In 1971, a farsighted Montana Legislature initiated a state program of environmental quality with its passage of Montana Environmental Policy Act (MEPA). The purpose of MEPA is to declare a state policy that will encourage productive and enjoyable harmony between humans and their environment; to protect

the right to use and enjoy private property free of undue government regulation; to promote efforts that will prevent, mitigate, or eliminate damage to the environment and biosphere, and stimulate the health and welfare of humans; and to enrich the understanding of the ecological systems and natural resources important to the state. Mont. Code Ann. § 75-1-102(2) (2019).

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. MEPA was enacted to ensure these environmental safeguards are protected. *N. Plains Res. Council, Inc. v. Mont. Bd. of Land Comm'rs*, 2012 MT 234, ¶ 14, 366 Mont. 399, 288 P.3d 169. 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 Cty. Envtl. Council v. Mont. Dep't Envtl. Quality*, 2020 Mont. 303, ¶ 74, 402 Mont. 168, 477 P.3d 288. "MEPA is unique in its ability to avert potential environmental harms through informed decision making." *Id.* ¶ 76.

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 effects of a proposed action or proposal. *Ravalli Cty. Fish & Game Assn., Inc. v. Mont. Dep't of State Lands*, 273 Mont. 371, 377, 903 P.2d 1362, 1367 (1995). As this Court recently pointed out:

> 'Procedural,' of course, does not mean 'unimportant.' 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.

Park Cty. Envtl. Council, 2020 Mont. at *14, ¶ 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 that has prepared an Environmental Impact Statement cannot simply rest on the original document." *Friends of Clearwater v. Dombeck*, 222 F.3d 552, 557 (9th Cir. 2000) (citation omitted). Instead, agencies have a continuing duty to

gather and evaluate new information, even after release of an Environmental Impact Statement. *Id.* (citing *Marsh*, 490 U.S. at 374). "'When new information comes to light the agency must consider it, evaluate it, and make a reasoned determination whether it is of such significance as to require'" a supplemental Environmental Impact Statement. *Id.* at 558 (quoting *Warm Springs Dam Task Force v. Gribble*, 621 F.2d 1017, 1024 (9th Cir. 1980)); *N. Fork Pres. Ass'n v. Dep't of State Lands,* 238 Mont. 451, 457-59, 778 P.2d 862 (1989) (citing *Marsh*, 490 U.S. at 372-73).

In Montana, this requirement is found in an Administrative Rule implementing MEPA:

> The agency shall prepare supplements to either draft or final environmental impact statements whenever:
>
> (b) there are significant new circumstances, discovered prior to final agency decision, including information bearing on the proposed action or its impacts that change the basis for the decision;

Mont. Admin. R. § 17.4.621(1)(b) (2020). This regulation, like all MEPA regulations, must be applied to the "fullest extent practicable" to ensure agencies have satisfied the "hard look" requirement. *Bitterrooters for Planning v. Mont. Dep't. Envtl. Quality*, 2017 MT 222, ¶ 33, 388 Mont. 453, 401 P.3d 712.

The Ninth Circuit and Supreme Court have explained "an agency is not free to ignore the possible significance of new information. Rather, NEPA requires that the agency take a 'hard look' at the new information to determine whether an SEIS is necessary." *Headwaters v. BLM*, 914 F.2d 1174, 1177 (9th Cir. 1990) (citing *Marsh*, 490

U.S. at 374). "The Court's focus is on the administrative decision-making process rather than the decision itself." *Park Cnty. Envtl. Council*, ¶ 18. An agency's "'failure to evaluate the need to supplement the original EIS in light of [] new information violate[s] NEPA.'" *Gallatin Wildlife Ass'n v. U.S. Forest Serv.*, No. CV-15-27-BU-BMM, 2016 WL 3282047 at *13 (D. Mont. June 14, 2016) (quoting *Friends of Clearwater*, 222 F.3d at 557).

When determining whether the DEQ violated MEPA by failing to prepare supplemental analysis, this Court asks whether the agency acted in a manner that was "arbitrary, capricious, unlawful, or not supported by substantial evidence." *Clark Fork Coal.*, ¶ 21; *N. Fork Pres. Ass'n,* 238 Mont. at 459, 779 P.2d at 867. Under this standard, a plaintiff challenging an agency's failure to prepare a supplemental Environmental Impact Statement is not required to show that significant effects will in fact occur, but must only raise substantial questions as to whether the new information or changed circumstances "may" have a significant effect. *Klamath Siskiyou Wildlands Ctr. v. Boody*, 468 F.3d 549, 562 (9th Cir. 2006) (citation omitted). The bar for requiring supplemental NEPA is "low." *League of Wilderness Defs./Blue Mountains Biodiversity Project v. Connaughton*, 752 F.3d 755, 760 (9th Cir. 2014) (citation omitted).

B. Outstanding Resource Water

In 1995, the Montana Legislature recognized that certain state waters are of such environmental, ecological, or economic value that the state should prohibit changes to

the existing water quality of those waters. Mont. Code Ann. § 75-5-315. An ORW designation is the strongest protection available to a river in Montana and prevents the Montana DEQ from issuing a permit that would change the water quality of the designated waterbody. Mont. Code Ann. § 75-5-316(2).

A person or group may petition the Montana Board of Environmental Review (BER) for rulemaking to classify state waters as an Outstanding Resource Water (ORW). *Id.* § 75-5-316(3). The BER reviews a petition against statutory criteria, such as "the presence of an outstanding recreational fishery in the waters" when deciding whether to accept a petition. *Id.* § 75-5-316 (4)(c). The BER must determine that designation "as an outstanding resource water is necessary because of a finding that there is no other effective process available that will achieve the necessary protection." *Id.* § 75-5-316 (3)(c)(iii).

If the BER accepts a petition, it then directs the Montana Department of Environmental Quality to prepare an Environmental Impact Statement that analyzes the impacts of the designation. *Id.* § 75-5-316 (6). The BER can initiate rule-making after completion of the MEPA analysis. *Id.* § 75-5-316 (8). After a petition has been accepted and MEPA analysis has been completed, the BER can still deny a petition if it finds that "based on information available to the department from the environmental impact statement or otherwise, approving the outstanding resource waters classification petition would cause significant adverse environmental, social, or economic impacts." *Id.* § 75-5-316 (8)(a)(ii).

Even after the BER adopts a rule designating a water body as an Outstanding Resource Water, the Montana Legislature must pass legislation adopting a Rule before the waterbody is officially designated as an ORW. *Id.* § 75-5-316 (9).

II. FACTUAL BACKGROUND

a. Gallatin River

The Gallatin Canyon is a mecca for outdoor recreation. Parts of the movie "A River Runs Through It" were filmed on the Gallatin and locals are frequently seen jumping off "Deer Bridge" into the Gallatin River. Rock climbers in the Gallatin Canyon watch as kayakers and whitewater rafters navigate the large "House Rock" boulder. Knight Decl. ¶ 5. The Gallatin River is a "blue-ribbon" trout fishery that has also been designated an "outstanding recreational fishery." DEQ Ex. 3-23 at E-3; Montana Rivers Ex. 12 at 11. "Rainbow trout dominate, while brown trout are more limited; other fish common in the river are mountain whitefish, two species of sucker, and a sculpin." DEQ Ex. 3-23 at E-3. "The high quality water, cold water and stable flows provide for high-density stable fishery that is highly used by the angling public." DEQ—000931. "[I]n Region 3 (Southwest Montana) the Gallatin River varies from the 2nd most fished section of water to the 4th most fished section of water in the region." DEQ—000931.[1]

b. Original Outstanding Resource Water Petition & MEPA Analysis

[1] Six of the nine major tributaries in the upper Gallatin River drainage are currently listed as having impaired water quality. DEQ Ex. 3-23 at E-1.

In 2001, a Bozeman-based conservation organization named American Wildlands filed a petition with the Montana Board of Environmental Review to make a Rule that would designate the Gallatin River an "Outstanding Resource Water" (ORW) from the boundary of Yellowstone National Park to the confluence of Spanish Creek. DEQ Ex. 3-23 at E-1.

The Montana Board of Environmental Review accepted the petition and directed the Montana DEQ to prepare an Environmental Impact Statement analyzing the impacts of designating the 35-mile stretch of river an ORW. The DEQ published a draft Environmental Impact Statement in September 2006. DEQ Ex. 3-23 at E-1. Public comments were accepted until October 27, 2006. DEQ Ex. 3-23. The agency published a final Environmental Impact Statement in January 2007. DEQ Ex. 3-23.

The EIS contains three alternatives: the No Action Alternative, the Proposed Action Alternative, and the Cumulative Impacts Analysis Alternative. DEQ Ex. 3-23 at E-1. "Under the No Action Alternative, the Board would not adopt a rule and Outstanding Resource Water designation would not proceed." DEQ Ex. 3-23 at E-1 "Current water quality laws would remain in force and there would be no changes to DEQ's water quality management in the proposed" Outstanding Resource Water reach. DEQ Ex. 3-23 at E-1. "DEQ could issue authorizations to degrade, and permits for new and increased point source discharge." DEQ Ex. 3-23 at E-1 to E-2.

"Under the Proposed Action, the BER would adopt a rule for the Administrative Rules of Montana designating the river an ORW." DEQ Ex. 3-23

(cover page). "Under the Proposed Action Alternative, the Gallatin River would be designated an ORW from the Yellowstone National Park boundary to the river's confluence with Spanish Creek." DEQ Ex. 3-23 at E-2. "Under this designation, DEQ could not allow any activity that caused any permanent and measurable change to water quality within this reach." DEQ Ex. 3-23 at E-2. The Montana Department of Environmental Quality "could not issue any authorizations to degrade" the water quality. DEQ Ex. 3-23 at E-2. "Under the Cumulative Impacts Analysis Alternative, DEQ would exercise its discretion to evaluate the impact of developments to surface water quality when added to those of other past and pending permits." DEQ Ex. 3-23 at E-2.

According to the cover page of the Final Environmental Impact Statement, "[t]he final decision will be made in the Record of Decision that will be published no sooner than 15 days after the release of this final EIS." DEQ Ex. 3-23. "DEQ will recommend in a Record of Decision (ROD) a course of action for the Montana Board of Environmental Review." DEQ Ex. 3-23 at 1. "The ROD is a concise public notice of DEQ's decision, explaining the reasons for the decision and any special conditions surrounding the decision or its implementation." DEQ Ex. 3-23 at 1. "The Board may, based on DEQ's ROD, choose to proceed with the proposed rule (adopt the Proposed Action Alternative), decline to adopt the rule (adopt the No Action Alternative), or modify the proposed rule and send it out for further public comment. If the Board decides to decline the rule, the Board must identify its reasons." DEQ

Ex. 3-23 at 1. The cover letter of the final EIS states a Record of Decision would be sent to everyone that commented during the MEPA process. DEQ Ex. 3-23.

On July 3, 2008, the Greater Yellowstone Coalition sent a letter to the BER asking it not to finalize a rule designating the Gallatin as an Outstanding Resource Water because it "preferred to pursue a more collaborative effort to achieve protection of the river." Order at 3. Requests to extend the time for rule-making went on for several years while the DEQ, resorts in Big Sky, developers, and a few conservation groups explored snow-making as an alternative to the ORW designation. DEQ—00700-702. On December 7, 2012, an attorney for the Montana DEQ attended a public hearing before the BER and testified that snow-making provided an alternative to an ORW rule. DEQ—000709–710. The attorney for the DEQ told the BER:

> So the Department is then recommending that the Board take no action here, which would then mean that this particular proceeding would die, and part of our recommendation is on the basis that the Board could at a future date reinstitute rulemaking for the adoption of the ORW status.
>
> [T]he Department is then recommending that the Board take no action, which again is not a denial of the petition, but simply leaving that essentially in limbo, and with the idea that should the parties decide in the future that they're not going to proceed along these lines, it is available to the Board to reinstitute the process.
>
> [W]hether the Board were to take action today . . . in the near future or not we probably would need to supplement the EIS.

DEQ-000703. Ultimately, the Board did not accept or deny the petition. DEQ-000712. The Board did not make any factual findings. DEQ-000711.

c. <u>2018 Outstanding Resource Water Petition & Current Litigation</u>

Plaintiffs (hereinafter "Montana Rivers") sought to reinstitute the rule-making process and filed a petition with the Board of Environmental Review in 2018 that was nearly identical to American Wildlands' 2001 petition. During the administrative hearings, the attorney for the DEQ stated:

> The petitioned stretch of the Gallatin River does meet the Outstanding Resource Water criteria as an outstanding fishery, and it meets the criteria with regard to other important environmental and economic factors, including recreational use of the river.
>
> 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.

Montana Rivers Ex. 12 at 16-17.

Montana Rivers filed this action on February 18, 2020, alleging the DEQ violated MEPA by: 1) failing to consider whether new information and changed circumstances were significant and triggered the need to prepare a supplemental EIS; and 2) by failing to supplement the 2007 EIS in light of the significant new information and changed circumstances. Montana Rivers asked the Court to enjoin the DEQ from issuing any Montana Pollution Discharge Elimination System (MPDES) permit to discharge into the Gallatin or any tributaries that feed into the petitioned ORW section until supplemental MEPA and a ROD were issued. Am. Compl. at 6-7, ¶¶ 33-36.

The district court held oral argument on cross-motions for summary judgment on May 27, 2021. Montana Rivers submitted a proposed order that granted their motion for summary judgment on June 4, 2021. The DEQ issued the Yellowstone Mountain Club a MPDES permit to blow snow on Eglise (Church) Mountain using treated wastewater on June 7, 2021.[2] The DEQ submitted a proposed order granting it summary judgment on June 10, 2021. On September 20, 2021, the district court granted the DEQ's motion for summary judgment. Order.

I. 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.

SUMMARY OF THE ARGUMENT

[2] On August 5, 2021, Plaintiffs filed an action challenging the DEQ's issuance of the snow-making permit as a violation of MEPA because it failed to address the impacts of pharmaceutical pollution and a violation of the Montana Constitution for failing to set, or consider setting, technology-based effluent limitations for pharmaceutical pollution. *Gallatin Wildlife Ass'n, et al. v. MT Dept. of Envt'l Quality*, DV-21-833B. Plaintiffs also challenged the failure to prepare a supplemental EIS for the 2007 MEPA.

The Montana Environmental Policy Act requires the DEQ to prepare a supplemental Environmental Impact Statement when there is significant new information that is discovered before the agency makes a Record of Decision. In this case, the DEQ admitted that it has concerns about the impacts of pharmaceutical pollution on the Gallatin River. The agency claims it does not have to prepare a supplemental EIS because its attorney issued a Record of Decision while offering public testimony before the Board of Environmental Review. The testimony does not mention the words "Record of Decision." The cover letter of the final EIS states a Record of Decision would be "published" and a "copy of the Record of Decision" would be "sent" to everyone that received the final EIS. DEQ Ex. 3-23. No one that received a Record of Decision.

The DEQ violated MEPA by failing to consider whether the new information it had in its possession regarding the impacts of pharmaceutical pollution triggered the need to prepare a supplemental Environmental Impact Statement. The DEQ violated MEPA by failing to prepare a supplemental Environmental Impact Statement that addressed the new information regarding pharmaceutical pollution and changed circumstances regarding a pollution pipeline.

ARGUMENT

I. The Montana Department of Environmental Quality cannot publish a Record of Decision by offering verbal testimony before another agency that does not state the words "Record of Decision."

MEPA requires the DEQ to prepare a supplemental EIS when there is new information or changed circumstances that are discovered before the agency issues a Record of Decision. Mont. Admin. R. § 17.4.621(1). Montana Rivers' first cause of action alleged the DEQ violated MEPA by failing to determine whether to prepare a supplemental EIS. Am. Compl. at 6, ¶ 34. The crux of this case is whether the Montana DEQ published a Record of Decision after it issued its 2007 Environmental Impact Statement.

Administrative Rule of Montana § 17.4.629 provides:

> (1) At the time of its decision concerning a proposed action for which an EIS was prepared, the agency shall prepare a concise public record of decision. The record, which may be integrated into any other documentation of the decision that is prepared by the agency, is a public notice of what the decision is, the reasons for the decision, and any special conditions surrounding the decision or its implementation.

The district court decided the DEQ did not have to prepare a supplemental EIS because an attorney for the DEQ issued a Record of Decision while providing testimony during a public hearing before the BER. Order at 11-12. The transcript of the public hearing shows the DEQ attorney never said the words "Record of Decision." DEQ 000699-000712. The cover page of the 2007 final EIS states a Record of Decision would be "published" and "sent" to everyone that received the final EIS. DEQ Ex. 3-23. The DEQ did not send a copy of the transcript of the public hearing to everyone that received the final EIS. No one received a "published" Record of Decision. The public cannot be expected to know that a DEQ attorney is

issuing a ROD while providing testimony before another agency without saying the words Record of Decision.

The policy purpose of Mont. Admin. R. § 17.4.629 is to ensure the public receives adequate notice when the DEQ makes a decision so that it can challenge a decision if necessary. Montana Rivers was required to challenge the Record of Decision within 60 days. Mont. Code Ann. § 75-1-201(5)(a)(ii). The district court determined the time to challenge the Record of Decision has "long passed." Order at 12. The DEQ's failure to provide adequate notice that it published a ROD during testimony before another agency runs contrary to the spirit of the MEPA and its goal of public participation. *See e.g.*, *Mont. Wildlife Fed'n v. Mont. Bd. of Oil & Gas Conservation*, 2012 MT 128, ¶ 64, 365 Mont. 232, 280 P.3d 877 (Wheat, J., dissenting) ("The public is not informed when an agency's decision-making process is concealed within the confines of its institutional knowledge, and the only way to uncover the details is by engaging in lengthy litigation.").

Assuming the DEQ attorney could verbally publish a Record of Decision during testimony before the Board of Environmental Review, the attorney did not indicate which alternative the DEQ selected. The EIS contains three alternatives the DEQ could select: the No Action Alternative, the Proposed Action Alternative, and the Cumulative Impacts Analysis Alternative. DEQ Ex. 3-23 at E-1 to E-2. The "No Action Alternative" analyzed in the EIS is a denial of the petition. DEQ Ex. 3-23 at E-1. The DEQ attorney testified during the hearing that "the [DEQ] is then

recommending that the [BER] take no action, which again is not a denial of the petition, but simply leaving that essentially in limbo." DEQ—000703. Leaving the petition "in limbo" was not one of the alternatives that was analyzed in the FEIS that could be selected in a ROD. It would be inequitable to expect interested parties to challenge the verbal testimony of a DEQ attorney as a Record of Decision when the attorney did not state the words Record of Decision and did not select an alternative that was analyzed in the Environmental Impact Statement.

The DEQ attorney could not have verbally published a Record of Decision because the Director was required to sign a Record of Decision. *See* Mont. Code Ann. § 75-1-201(8). The Director signed the draft and final EIS. DEQ Ex. 2 & 3. Pursuant to Montana Rule of Evidence 202(b)(6), this Court can take judicial notice of a recent court filing in *Gallatin Wildlife Ass'n et al. v. MT Dept. of Envt'l Quality*, DV-21-833B, in which the DEQ "admits only a state agency director may endorse in writing any determination . . . under the Montana Environmental Policy Act." Exhibit 1 at 2-3. (citing Mont. Code Ann. § 75-1-201(8) (2021)). "DEQ admits that . . . in its normal course of business DEQ attorneys do not sign or otherwise authorize decision-making MEPA documents." Exhibit 1 at 3. The Court can take judicial notice of these legal and factual issues on appeal. *See Matter of A.M.M.R.,* 2021 MT 314 N, ¶ 22 n.5, 407 Mont. 5, 500 P.3d 1232.

The district court then pivoted away from the Record of Decision issue and determined that "regardless of whether one questions whether this process satisfies

the mandate of Mont. Admin. R. § 17.4.629, any rule promulgated today as an outgrowth of the 2001 Petition would be void *ab initio* because it would not have been adopted within the six-month time period following the last notice of public comment from July 2012 or anywhere close to the time the BER let rulemaking lapse in 2012. Order at 12. The district court determined the DEQ did not have to prepare supplemental NEPA analysis because the "[f]inal agency action occurred" at the time the proposed rulemaking expired—six months after the BER determined it would no longer extend the public comment period. Order at 12.

While neither the Administrative Rules of Montana nor this Court appear to have defined "final agency action," federal courts have held that "[i]n NEPA litigation, the final agency action that makes an agency's compliance subject to judicial review is the issuance of a Record of Decision." *Sierra Club v. U.S. Dept. of Transp.*, 245 F. Supp. 2d 1109, 1118 (D. NV. 2003) citing *Or. Nat. Res. Council v. Harrell*, 52 F.3d 1499, 1504 (9th Cir. 1995). "[F]ederal case law construing parallel provisions in NEPA is persuasive." *Mont. Wildlife Fed'n*, ¶ 32. The DEQ did not issue a Record of Decision and can therefore be required to prepare supplemental MEPA analysis. Mont. Admin. R. § 17.4.621(1)(b) (2020).

II. The Montana DEQ violated Montana Environmental Policy Act by failing to consider whether new information and changed circumstances were significant and thus required preparation of a supplemental EIS.

The DEQ had in its possession a fifty-page power point report that it created in association with the Montana Bureau of Mines and Geology entitled

"Pharmaceuticals, Personal Care Products, Endocrine Disruptors (PCCPs) and Microbial Indicators of Fecal Contamination in Ground Water in Helena Valley, Montana." DEQ—000946-000998. 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." DEQ—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[.]" DEQ—000976. "No municipal sewage treatment plants are engineered for PCCP removal." DEQ—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." DEQ—000964. PCCPs are a new concern because information regarding their effects has begun to emerge in the last five to ten years. DEQ—000967. The DEQ's own report states antidepressants can have "[p]rofound effects on the development, spawning, and other behaviors" in "aquatic organisms." DEQ—000994. "Sex steroids (e.g., from oral contraceptives) can feminize male fish and change the behaviors of either sex[.]" DEQ—000968. "Acute toxicity, carcinogenesis, and mammalian endocrine disruption are highly visible concerns[.]"

DEQ—000996. "PCCPs have been identified in most places where they have been looked for." DEQ—000970.

"When new information comes to light the agency must consider it, evaluate it, and make a reasoned determination of whether it is of such significance as to require" a supplemental EIS. *Friends of the Clearwater*, 222 F.3d at 558; *N. Fork Pres. Ass'n. v. Dep't of State Lands*, 238 Mont. 451, 457–59, 778 P. 2d 862 (1989) (citing *Marsh*, 490 U.S. at 372–73). "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.

This Court has held that "courts must satisfy themselves that the agency has made a reasoned decision based on its evaluation of the significance–or lack of significance–of the new information." *Mont. Envtl. Info. Ctr. v. Mont. Dep't of Transp.*, 2000 MT 5, ¶ 27, 298 Mont. 1, 994 P.2d 676. "It is the agency, not an environmental plaintiff, that has a continuing duty to gather and evaluate new information relevant to the environmental impact of its actions, even after release of an EIS." *Friends of Clearwater,* 222 F.3d at 559. (citation omitted). "[F]ulfillment of this vital responsibility should not depend on the vigilance and limited resources of environmental plaintiffs." *Id.* (citation omitted). Judge Morris has previously ruled that an agency's failure to evaluate the need to supplement the original EIS in light of new information violates NEPA. *See Gallatin Wildlife Ass'n. v. U.S. Forest Serv.*, No. CV-15-27-BU-BMM, 2016

WL 3282047, at *12 (D. Mont. June 14, 2016) (citing *Friends of the Clearwater*, 222 F.3d at 557).

A DEQ attorney told the BER during a public hearing on Montana Rivers' 2021 ORW petition:

> DEQ is also concerned about pharmaceutical pollution, as those are emerging issues of concern with regard to pharmaceuticals and also certain personal care products.

Montana Rivers Ex. 12 at 16-17.

In addition to its own scientific reporting and admission over concerns about pharmaceuticals, the DEQ had information from the E.P.A. that states, "[t]here is increasing concern that the potential exists for low-level, chronic exposure to mixtures of these chemicals to have adverse ecological or human health effects. For example, <u>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[.]</u>" DEQ—001004 (emphasis added). The DEQ also had science indicating pharmaceuticals "in waterways polluted by municipal wastewater" have been found to "impair reproductive functions in amphibians[.]" DEQ—000884-885.

In addition to the new science, the DEQ did not consider whether the changed circumstance that the Big Sky Water and Sewer District began accepting Requests for Qualifications to engineer a pipeline to directly discharge the treated sewage containing the pharmaceutical pollution into the Gallatin River required preparation of a supplemental EIS. Am. Compl. ¶¶ 24-25, 34. The Defendants violated MEPA by

failing to consider the significance of its own science and the changed circumstances. *Friends of Clearwater*, 222 F.3d at 558; *Mont. Envtl. Info. Ctr.*, 2000 MT at ¶ 27.

III. The Montana DEQ violated MEPA by failing to prepare a supplemental EIS in light of significant new information and changed circumstances.

In 2012, the DEQ attorney that provided testimony during the public hearing before the BER stated that "whether the Board were to take action today . . . in the near future or not we probably would need to supplement the EIS." DEQ-000703. The DEQ violated MEPA by failing to prepare a supplemental EIS that analyzed the new information and changed circumstances that it obtained after the 2012 BER hearing.

A plaintiff challenging an agency's failure to prepare a supplemental Environmental Impact Statement is not required to show that significant effects will in fact occur, but must only raise substantial questions as to whether the new information or changed circumstances "may" have a significant effect. *Klamath Siskiyou Wildlands Ctr.,* 468 F.3d at 562 (citation omitted). The bar for requiring supplemental NEPA is "low." *League of Wilderness Defs./Blue Mountains Biodiversity Project*, 752 F.3d at 760 (citation omitted). Montana Rivers has easily met that low burden and the DEQ violated MEPA by failing to prepare a supplemental EIS. *Id.*

CONCLUSION AND REQUESTED RELIEF

For the foregoing reasons, the Court should reverse the district court, order the Montana DEQ to prepare a supplemental EIS, and remand to the district court to determine injunctive and other equitable relief in the first instance.

Respectfully submitted this 21st day of March, 2022.

/s/ John Meyer
JOHN MEYER

Attorney for Plaintiffs-Appellants

CERTIFICATE OF COMPLIANCE

I certify that pursuant to Mont. R. App. P. 11(4)(e), I certify that this brief is proportionately spaced, has a typeface of 14 points or more and contains 5,538 words. I used Microsoft Word 2017.

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EXHIBIT 1

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MONTANA EIGHTEENTH JUDICIAL DISTRICT, GALLATIN COUNTY

GALLATIN WILDLIFE ASSOCIATION, COTTONWOOD ENVIRONMENTAL LAW CENTER Plaintiffs, v. **MONTANA DEPARTMENT OF ENVIRONMENTAL QUALITY, an agency of the State of Montana** Defendant, and **YELLOWSTONE MOUNTAIN CLUB, LLC,** Defendant-Intervenor.	Case No. DV 21-833B Hon. Rienne H. McElyea **DEQ'S RESPONSES TO PLAINITFFS' SECOND DISCOVERY REQUESTS**

COMES NOW Defendant Montana Department of Environmental Quality ("DEQ"), through counsel, and submits the following responses to Gallatin Wildlife Association and Cottonwood Environmental Law Center's ("Plaintiffs") Second Discovery Requests to DEQ.

GENERAL OBJECTIONS

1. DEQ objects to these discovery requests to the extent they seek to require DEQ to produce documents not in DEQ's care, custody, or control or to answer on behalf of other parties.

2. DEQ objects to Plaintiffs' "Definitions" and "Instructions" to the extent they purport to impose discovery obligations that differ from or exceed the discovery obligations imposed by the Montana Rules of Civil Procedure.

3. DEQ objects to these discovery requests to the extent they seek to require DEQ to produce documents or other information protected from disclosure by the attorney-client privilege and/or the attorney work product doctrine.

These discovery requests are answered subject to and without waiving these general objections, which are incorporated in the below responses.

REQUESTS FOR ADMISSION

Please admit the following:

REQUEST FOR ADMISSION 1: Please admit that Montana DEQ attorneys are not authorized to sign decision-making MEPA documents.

RESPONSE: DEQ objects to Request for Admission 1 because the terms "not authorized" and "decision-making MEPA documents" are vague and ambiguous. DEQ further objects to Request for Admission 1 because it is argumentative and seeks information that is irrelevant and is not reasonably calculated to lead to the discovery of admissible evidence. Without waiving these objections, and in respect thereof, DEQ admits only a state agency director may endorse in writing any determination of significance or recommendation that a determination of

significance be made under the Montana Environmental Policy Act. *See* Mont. Code Ann. § 75-1-201(8). DEQ denies there is any requirement or policy prohibiting DEQ attorneys from being authorized to sign other decision-making MEPA documents. However, DEQ admits that the scope of any Montana DEQ attorney review is generally for legal purposes only and in its normal course of business DEQ attorneys do not sign or otherwise authorize decision-making MEPA documents.

REQUEST FOR ADMISSION 2: Please admit that Montana DEQ attorneys are not authorized to verbally commit to decisions for which MEPA analysis has been completed.

RESPONSE: DEQ objects to Request for Admission 2 because it is vague and ambiguous. DEQ further objects to Request for Admission 2 because it is argumentative and seeks information that is irrelevant and is not reasonably calculated to lead to the discovery of admissible evidence. Without waiving these objections, DEQ denies there is any requirement prohibiting Montana DEQ attorneys from being authorized to verbally commit to decisions for which MEPA analysis has been completed, with the exceptions set forth in Mont. Code Ann. § 75-1-201(8). However, DEQ admits that the scope of any Montana DEQ attorney review is generally for legal purposes only and in its normal course of business DEQ attorneys do not commit to decisions outside of the scope of legal representation.

REQUEST FOR ADMISSION 3: Please admit that the Defendant-Intervenor Yellowstone Mountain Club helped draft responses to MEPA comments on the challenged permit.

RESPONSE: Deny. DEQ drafted responses to MEPA comments on the challenged permit.

REQUEST FOR PRODUCTION 1: Please provide a copy of any Decision Notice/FONSI or Record of Decision that has been signed or otherwise authorized by an attorney for the Montana DEQ in the last twenty years.

RESPONSE: DEQ objects to Request for Production 1 because the terms "otherwise authorized" are vague and ambiguous. DEQ further objects to Request for Production 1 because it seeks information that is overbroad, irrelevant, and is not reasonably calculated to lead to the discovery of admissible evidence. Without waiving these objections, and in respect thereof, DEQ has a reasonable belief no such documents exist. In its normal course of business, Montana DEQ attorneys do not sign or otherwise authorize Environmental Assessments (including FONSIs), Environmental Impact Statements, or Record of Decisions. Furthermore, a historical review of such documents would involve thousands of items that are equally available to Plaintiffs. Individual programs throughout DEQ transmit EIS and EA information to the Environmental Quality Council ("EQC") and the EQC maintains a MEPA document list at: https://leg.mt.gov/mepa/search/.

REQUEST FOR PRODUCTION 2: Please provide a copy of all documents regarding protocol for MT DEQ officials to sign decision-making MEPA documents.

RESPONSE: There are no protocol documents for MT DEQ officials to sign decision-making MEPA documents, however, for purposes of MPDES permitting, DEQ has produced a routing process document and a flowchart process document. See attached USB Drive.

REQUEST FOR PRODUCTION 3: Please provide a copy of all documents regarding responses to comments for the challenged permit.

RESPONSE: See attached USB Drive.

A USB Drive in an envelope labelled "DEQ's Responses to Plaintiffs' First and Second Discovery Requests" is attached hereto and incorporated herein by this reference.

DEQ reserves the right to supplement and amend these discovery responses pursuant to the Montana Rules of Civil Procedure.

DATED this 22nd day of February, 2022.

MONTANA DEPARTMENT OF ENVIRONMENTAL QUALITY

By: *_/s/ Kurt R. Moser_________*
KURT R. MOSER
Attorney for the Department

CERTIFICATE OF SERVICE

I hereby certify that this 22nd day of February, 2022, I caused to be served a true and correct copy of the foregoing document and any attachments to all parties or their counsel of record as set forth below:

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/s/ Catherine Armstrong _________
Catherine Armstrong
MT-Department of Environmental Quality

CERTIFICATE OF SERVICE

I, John Meyer, hereby certify that I have served true and accurate copies of the foregoing Brief - Appellant's Opening to the following on 03-21-2022:

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CERTIFICATE OF SERVICE

I, John Phillip Meyer, hereby certify that I have served true and accurate copies of the foregoing Brief - Appellant's Opening to the following on 03-24-2022:

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