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IN THE SUPREME COURT OF THE STATE OF MONTANA

Cause No. DA 23-0479

COTTONWOOD ENVIRONMENTAL LAW CENTER,

Plaintiff and Appellant,

v.

MONTANA DEPARTMENT OF ENVIRONMENTAL QUALITY,

Defendant and Appellee,

and

YELLOWSTONE MOUNTAIN CLUB,

Defendant-Intervenor and Appellee.

YELLOWSTONE MOUNTAIN CLUB'S ANSWER BRIEF

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

Appearances:

John Meyer
Cottonwood Environmental Law Center
P.O. Box 412
Bozeman, MT 59771
(406) 546-0149
John@cottonwoodlaw.org

Attorney for Plaintiff and Appellant,
Cottonwood Environmental Law Center

Kirsten H. Bowers
Kurt R. Moser
Montana Department of Environmental Quality
P.O. Box 200901
Helena, MT 59620
(406) 444-4009
kbowers@mt.gov
kmoser2@mt.gov

Attorneys for Defendant and Appellee,
Montana Department of Environmental Quality

Ian McIntosh
Neil G. Westesen
CROWLEY FLECK, PLLP
1915 South 19th Ave.
P.O. Box 10969
Bozeman, MT 59719
(406) 556-1430
imcintosh@crowleyfleck.com
nwestesen@crowleyfleck.com

Attorneys for Defendant-Intervenor and Appellee,
Yellowstone Mountain Club, LLC

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INTRODUCTION

Yellowstone Mountain Club, LLC ("YC") worked closely with the Montana Department of Environmental Quality ("DEQ") to develop an innovative water reuse project (the "Snowmaking Project") with numerous environmental benefits and broad community support. Based on its scientific and regulatory expertise, DEQ reviewed the proposed Snowmaking Project in compliance with the Montana Environmental Policy Act, § 75-1-101 *et seq.*, MCA ("MEPA"), and issued a Montana Pollutant Discharge Elimination System ("MDPES") permit (the "Snowmaking Permit") that complies with the Montana Water Quality Act, § 75-5-101 *et seq.*, MCA ("MWQA"). The district court affirmed that decision, and YC successfully operated its Snowmaking Project for the first time in November and December of 2023.

Cottonwood Environmental Law Center ("Cottonwood") opposes the Snowmaking Project, but its claim boils down to an unsupported assertion that DEQ violated MEPA by failing to analyze unspecified "pharmaceutical pollution." Throughout the litigation, Cottonwood has rested its MEPA claim on public documents that it possessed during the comment process but failed to present for DEQ's consideration. Cottonwood spins a tale of documents surreptitiously withheld by the agency, but this narrative obscures the simpler truth—Cottonwood

failed to meaningfully participate in the public process. It now seeks to overturn DEQ's decision and enjoin further operation of the Snowmaking Project.

DEQ is best positioned to defend its environmental review and technical decision making. To summarize, the agency responded to Cottonwood's one-sentence comment regarding pharmaceuticals and explained why further investigation of the issue was not warranted. DEQ's response was reasonable and well-supported in light of the state of the science and regulatory landscape surrounding pharmaceuticals in aquatic environments. YC concurs with and incorporates DEQ's defense of its review of the Snowmaking Project.

YC writes separately to emphasize that the Project is the culmination of years of careful study, collaboration, and regulatory review, and promotes environmentally beneficial reuse of water in the Big Sky region. Given the lack of evidence of adverse water quality impacts from the Snowmaking Project and the ample evidence of its environmental benefits, the Court should affirm the district court's orders denying Cottonwood's motion to supplement the administrative record and granting summary judgment in DEQ and YC's favor.

STATEMENT OF THE ISSUES

1. Whether the district court correctly denied Cottonwood's motion to supplement the administrative record given that Cottonwood offered old, publicly available, and non-material information that Cottonwood possessed during the public process but failed to present to DEQ.

2. Whether DEQ complied with MEPA by evaluating potential environmental impacts supported by evidence but declining to investigate hypothetical pharmaceuticals in response to Cottonwood's one-sentence, unsupported comment.

3. Whether DEQ correctly determined that MEPA did not require an Environmental Impact Statement ("EIS") because the Snowmaking Permit ensured protection of water quality, aquatic life, and human health and there was no evidence of material water quality impacts from pharmaceuticals.

4. Whether the Court should enjoin or vacate the Snowmaking Permit based on extra-record documents despite the lack of evidence of any harm caused by the Snowmaking Project.

STATEMENTS OF THE CASE AND THE FACTS

YC concurs with DEQ's Statement of the Case and Statement of the Facts and incorporates them here by reference. (*See* DEQ's Answer Br. at 1-9.)

STANDARD OF REVIEW

Supplementing the Record. Under MEPA, courts "may not consider any information . . . that was not first presented to the agency for the agency's consideration prior to the agency's decision or within the time allowed for comments to be submitted." Mont. Code Ann. § 75-1-201(6)(a)(iii); *see also Belk v. Mont. Dep't of Envtl. Quality*, 2022 MT 38, ¶ 33, 408 Mont. 1, 504 P.3d 1090 ("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.'" (Citation omitted)). MEPA allows supplementation of the record with extra-record evidence if the court finds that "the proffered information is new, material, and significant evidence that was not publicly available before the agency's decision and that is relevant to the decision or to the adequacy of the agency's environmental review." Mont. Code Ann. § 75-1-201(6)(b)(ii).[1] Additionally, if a party presented evidence that DEQ ignored or omitted from the record, the court may consider the extra-record

[1] MEPA requires that courts "remand the new evidence to the agency for the agency's consideration and an opportunity to modify its decision or environmental review before the court considers the evidence as a part of the administrative record under review." Mont. Code Ann. § 75-1-201(6)(b)(ii).

evidence if it "would make clear what the agency *should have* considered." *Belk*, ¶ 33 (emphasis in original).

Compliance with MEPA. The Court "review[s] summary judgment rulings de novo." *Belk*, ¶ 15. Under MEPA, a plaintiff has the burden of proving DEQ failed to comply with the statute based on "clear and convincing evidence contained in the record." Mont. Code Ann. § 75-1-201(6)(a)(i). A "court shall affirm the agency's decision or the environmental review unless the court specifically finds that the agency's decision was arbitrary and capricious." Mont. Code Ann. § 75-1-201(6)(a)(iv). A decision is arbitrary and capricious if it "appear[s] to be random, unreasonable or seemingly unmotivated based on the existing record." *Bitterrooters for Planning, Inc. v. Mont. Dep't of Envtl. Quality*, 2017 MT 222, ¶ 16, 388 Mont. 453, 401 P.3d 712 (quoting *Mont. Wildlife Fed. v. Mont. Bd. of Oil & Gas Conserv.*, 2012 MT 128, ¶ 25, 365 Mont. 232, 280 P.3d 877).

SUMMARY OF THE ARGUMENT

MEPA requires DEQ to "make an adequate compilation of *relevant* information," "analyze it *reasonably*," and "consider all *pertinent* data." *Park Cnty. Envtl. Council v. Mont. Dep't of Envtl. Quality*, 2020 MT 303, ¶ 18, 402 Mont. 168, 477 P.3d 288 (quoting *Clark Fork Coal. v. Mont. Dep't. of Envtl. Quality*, 2008 MT 407, ¶ 47, 347 Mont. 197, 197 P.3d 482) (emphases added). If a member of the public believes DEQ missed a pertinent document, they need only present it to the

agency during the comment process. *See* Mont. Code Ann. § 75-1-201(6)(a)(iii). This straightforward procedure balances key interests: It allows the public to raise issues that are supported by evidence while also affording DEQ deference in technical decision making and giving project proponents like YC an opportunity to defend their projects before the agency.

During the public comment process, Cottonwood presented no evidence to support its contention that DEQ needed to analyze pharmaceuticals. Instead, Cottonwood sued DEQ and asked the district court to vacate YC's Snowmaking Permit based on documents Cottonwood possessed during the comment process but did not present to DEQ at that time. The district court declined to supplement the record and granted summary judgment to Defendants, concluding DEQ complied with MEPA. Cottonwood protests those rulings, but its challenge to both is the same: It claims the district court improperly excluded the documents because they existed in DEQ's files, and it asks the Court to vacate the Snowmaking Permit because DEQ did not disclose and analyze them.

The district court correctly excluded the documents. Cottonwood failed to present the documents to DEQ, and, under the plain language of MEPA, the court therefore could not consider them. Cottonwood also did not satisfy the two grounds for supplementation under either MEPA or this Court's precedent. First, Cottonwood's proffered documents were old, publicly available documents that

Cottonwood possessed—not "new, material, and significant evidence that was not publicly available before the agency's decision." Mont. Code Ann. § 75-1-201(6)(b)(ii). Second, Cottonwood failed to show that DEQ "*should have* considered" the documents. *Belk*, ¶ 33 (emphasis in original). DEQ defends the scope of it environmental-review process in its brief; in sum, the agency reasonably declined to investigate potential impacts from pharmaceuticals given the lack of scientific consensus and the absence of water quality regulations for these substances anywhere in the country. Without any evidence of water quality impacts from pharmaceuticals, Cottonwood's MEPA claim fails.

Moreover, the Court should not enjoin or vacate the Snowmaking Permit. Because Cottonwood's claim fails on the merits, it is not entitled to injunctive relief. Cottonwood also presented no evidence of irreparable harm to the environment caused by the Snowmaking Project. Nor could it—the Snowmaking Project actually *benefits* the environment.

Cottonwood's singular focus on pharmaceuticals masks the success story that underlies this litigation. YC's Snowmaking Project is an innovative approach to addressing water scarcity and climate change impacts in the Gallatin River watershed. It was the brainchild of a multi-stakeholder sustainability initiative and garnered support from prominent environmental organizations. DEQ then carefully reviewed YC's permit application and imposed numerous conditions to protect water

quality. The Court should not enjoin an environmentally beneficial, community-led project based on unsubstantiated claims that were already addressed by DEQ.

The Court should affirm the judgment.

ARGUMENT

I. The district court correctly denied Cottonwood's motion to supplement the record.

Cottonwood argues that the district court erred in denying its motion to supplement the record. (*See* Opening Br. of Pl./Appellant ("Op. Br.") at 12.) Specifically, Cottonwood sought to supplement the record with the entire administrative record from *Montana Rivers v. Mont. Dep't of Envtl. Quality*, 2022 MT 132, 409 Mont. 204, 512 P.3d 1193 (*Montana Rivers*), another case involving alleged pharmaceutical pollution that Cottonwood lost before this Court. (*See* Pls.' Br. in Supp. of Mot. to Suppl. Administrative R. (Doc. Seq. 38) at 1.) Cottonwood argued that the *Montana Rivers* record contained several documents related to pharmaceuticals that DEQ should have considered as part of its MEPA review in this case. (*See id.* at 1-2.) Cottonwood never brought those documents to DEQ's attention, and it failed to satisfy the standards for supplementation under MEPA and *Belk* in any event.

A. Cottonwood possessed the proffered documents during the public process but failed to present them to DEQ.

The Court must interpret MEPA according to its plain language. *See* Mont. Code Ann. § 1-2-101; *Tai Tam, LLC v. Missoula Cnty.*, 2022 MT 229, ¶ 13, 410 Mont. 465, 520 P.3d 312 ("We interpret a statute first by looking to its plain language and 'will not interpret the statute further if the language is clear and unambiguous.'" (Citation omitted)); *see, e.g.*, *Park Cnty.*, ¶ 50 (applying the "plain language" of MEPA regarding alternatives analysis). MEPA is unambiguous: Courts "may not consider any information, including but not limited to . . . evidence . . . that was not first presented to the agency for the agency's consideration prior to the agency's decision or within the time allowed for comments to be submitted." Mont. Code Ann. § 75-1-201(6)(a)(iii). This rule limits judicial review "to the record before the governing body at the time of its decision," *Heffernan v. Missoula City Council*, 2011 MT 91, ¶ 66, 360 Mont. 207, 255 P.3d 80, and ensures courts afford "great deference" to decisions implicating "substantial agency expertise," *Park Cnty.*, ¶ 18 (citation omitted).

The district court correctly rejected Cottonwood's additional documents because Cottonwood possessed the information during the comment period but chose not to present it to DEQ. Cottonwood was a party in *Montana Rivers* and received a complete, electronic copy of the record in that case on November 16, 2020. (*See* Ex. 1 to Doc. Seq. 42, Aff. of Kirsten Bowers in Supp. of DEQ's Mot.

for Summ. J. in *Montana Rivers*, dated January 8, 2021, ¶ 8.) Yet, when Cottonwood submitted comments on the draft Snowmaking Permit nearly six months later, (*see* DEQ00079), its comment letter did not attach or even reference the documents from that record that it now relies on to support its MEPA claim.

Cottonwood argues that it was DEQ's responsibility to identify and analyze all documents in its files regarding pharmaceuticals because environmental review "should not depend on the vigilance and limited resources of environmental plaintiffs." (Op. Br. at 16 (quoting *Friends of the Clearwater v. Dombeck*, 222 F.3d 552, 559 (9th Cir. 2000).) But this is not a case involving an environmental plaintiff whose limited resources prevented access to documents. Cottonwood possessed the documents and actively was litigating issues related to pharmaceuticals in *Montana Rivers* at the time it submitted its comments in this case. (*Compare* DEQ000079 (Cottonwood comment letter dated May 4, 2021), *with Mont. Rivers*, ¶ 10 (explaining Cottonwood originally filed *Montana Rivers* suit in February 2020).) MEPA prescribes a clear and simple framework to ensure a fair and deliberative public process: "A challenge may only be brought by a person who submits formal comments on the agency's environmental review," § 75-1-201(5)(a)(i), MCA, and courts "may not consider any information . . . that was not first presented to the agency," § 75-1-201(6)(a)(iii), MCA. It is not a complicated or burdensome procedure—Cottonwood simply had to provide the documents with its comment

letter and explain their relevance. *See* Mont. Code Ann. § 75-1-201(6)(a)(iii). Cottonwood failed to do so. It would undermine the public process and create perverse incentives to overturn DEQ's decision based on Cottonwood's one-sentence, unsupported comment.

B. Cottonwood offered documents that were old and publicly available at the time DEQ approved the Snowmaking Permit.

MEPA permits supplementation of the record with "new, material, and significant evidence that was not publicly available" at the time DEQ made its decision, provided the court first grants the agency an opportunity to consider the information and modify its decision or environmental review. *See* Mont. Code Ann. § 75-1-201(6)(b)(ii). In its motion to supplement the record, Cottonwood certified that its additional documents met this standard. (*See* Decl. of John Meyer (Doc. Seq. 37), ¶ 3 ("I certify that the information regarding pharmaceuticals in the 4 exhibits is new, material, significant, and relevant evidence that was not publicly available before the agency's decision."); Doc. Seq. 38 at 4.) The district court correctly determined that Cottonwood failed to meet this standard.

Cottonwood's proffered documents were old and publicly available at the time DEQ issued the Snowmaking Permit. Cottonwood repeatedly has relied on DEQ000946-98 from the *Montana Rivers* record, which is a DEQ presentation regarding pharmaceuticals, personal care products, and fecal contamination in the Helena Valley. (*See, e.g.*, Op. Br. at 15 (citing Ex. 1 to Op. Br.).) The presentation

was available online, is dated September 2006, and summarizes a study by the authors dated March 2006.[2] Additionally, Cottonwood relies on a summary from the United States Environmental Protection Agency ("EPA"), (*see, e.g.*, Op. Br. at 8, 14, 22, 25 (citing Ex. 2 to Op. Br.)), that was published in 2013.[3] MEPA does not allow Cottonwood to supplement the record with publicly available information that long predates DEQ's decision. *See* Mont. Code Ann. § 75-1-201(6)(b)(ii).

C. DEQ rationally concluded that investigation into pharmaceuticals was not warranted based on the state of the law and the science.

Cottonwood argues the district court also erred in failing to admit the documents as extra-record evidence under the *Belk* standard.[4] (*See* Op. Br. at 16.) The district court correctly excluded the evidence under *Belk* because the documents

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[2] *See* Miller, K. and Meek, J., "Pharmaceuticals, Personal Care Products, Endocrine Disruptors (PPCPs) and Microbial Indicators of Fecal Contamination in Ground Water in the Helena Valley, Montana," Mont. Dep't of Envtl. Quality (Sept. 2006), https://leg.mt.gov/content/Committees/Interim/2007_2008/water_policy/staffmemos/pharmaceuticals.pdf; Miller, K. and Meek, J., *Helena Valley Ground Water: Pharmaceuticals, Personal Care Products, Endocrine Disruptors (PPCPs), and Microbial Indicators of Fecal Contamination* (Mar. 2006), http://www.mbmg.mtech.edu/pdf-open-files/mbmg532-helenavalley.pdf.

[3] *See* U.S. EPA, "Region 8 Emerging Contaminants Project Summary" (Aug. 2013), https://www.epa.gov/sites/default/files/2013-08/documents/r8_emergingcontaminantsprojectsummaryaug2013.pdf.

[4] Cottonwood argues that, because it did not invoke *Belk* in its motion to supplement, the district court should have reconsidered the issue at summary judgment. (*See* Op. Br. at 16.) This argument is beside the point. Cottonwood moved to supplement on grounds that DEQ should have considered the documents in its MEPA review, (*see* Doc. Seq. 38 at 4), and the district court then applied the relevant *Belk* standard in ruling on Cottonwood's motion, (*see* Doc. Seq. 61 at 3).

were not material to DEQ's review of the Snowmaking Project and were unnecessary to determine whether DEQ acted reasonably.

Under *Belk*, a court may consider extra-record evidence to determine whether DEQ should have considered information that it did not. *Belk*, ¶ 33. The crux of the analysis is whether DEQ failed to consider material evidence that is relevant to its analysis under MEPA and the substantive statute underlying the decision—here, MWQA. *See id.* ¶¶ 36-38. The Court explained that, in some cases, "it may be 'impossible for [a] court to determine whether the agency took into consideration all relevant factors'" without extra-record evidence. *Id.* ¶ 33 (quoting *Skyline Sportsmen's Ass'n v. Bd. of Land Commrs.* (1997), 286 Mont. 108, 113, 951 P.2d 29, 32).

The Court adopted this rule from *ASARCO, Inc. v. U.S. EPA*, 616 F.2d 1153, 1160 (9th Cir. 1980). *See Belk*, ¶ 33; *Skyline Sportsmen's Ass'n*, 286 Mont. at 113, 951 P.2d at 32. In *ASARCO*, the U.S. Court of Appeals for the Ninth Circuit held that, "[i]f the reviewing court finds it necessary to go outside the administrative record, it should consider evidence relevant to the substantive merits of the agency action only for background information . . . or for the limited purposes of ascertaining whether the agency considered all the relevant factors or fully explicated its course of conduct or grounds of decision." 616 F.2d at 1160. The

Ninth Circuit made clear that "[c]onsideration of the evidence to determine the correctness or wisdom of the agency's decision is not permitted." *Id.*

Cottonwood moved to supplement the record for that impermissible purpose. In the district court, Cottonwood offered extra-record documents to show that DEQ erred in failing to investigate pharmaceuticals. But DEQ "fully explicated" its grounds for declining to further investigate the issue in response to Cottonwood's conclusory comment. *Id.* Notably, under MWQA, DEQ regulates point-source discharges to ensure any water quality impacts do not "cause or contribute to the violation of water quality standards," Admin. R. Mont. ("ARM") 17.30.1311(7), and to prevent "degradation of high-quality waters," § 75-5-303(3), MCA; *see also* ARM 17.30.715. No water quality standards or nondegradation criteria have been adopted for pharmaceuticals; therefore, there were no parameters under which DEQ rationally could analyze water quality impacts from "pharmaceutical pollution" in its review. DEQ explained this to Cottonwood during the public comment process. (*See* DEQ00061 (responding to Comment No. 23).) DEQ also explained that "pharmaceuticals" is a "general term," (*id.*), which encapsulates thousands of diverse substances, (Op. Br. at 19; Ex. 3 to Op. Br. at 3). Cottonwood's comment thus provided DEQ with no actionable information.

DEQ's response was reasonable in light of the state of the science and water-quality regulation surrounding pharmaceuticals. Pharmaceuticals are an "emerging

area of science and research concerning water quality," (DEQ00061), and the scientific community has not yet determined the potential impacts on aquatic environments, (*see* Doc. Seq. 66, DEQ's Answer to First Am. Compl. for Decl. and Inj. Relief, ¶ 22). Consequently, neither the federal government nor any state government has promulgated water quality standards for pharmaceuticals.

In fact, such standards are not even on the horizon. Under the federal Clean Water Act, the U.S. EPA "develop[s] and publish[es] . . . criteria for water quality accurately reflecting the latest scientific knowledge" regarding the impacts of pollutants on aquatic ecosystems. *See* 33 U.S.C. § 1314(a)(1). States typically rely on EPA's "National Recommended Water Quality Criteria" to develop state water quality standards.[5] EPA has not yet developed criteria for pharmaceuticals.[6] Without the benefit of the scientific and regulatory analyses that underlie EPA's

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[5] *See* U.S. EPA, *Methodology for Deriving Ambient Water Quality Criteria for the Protection of Human Health*, EPA 822-B-00-004 (Oct. 2000), at iii, https://www.epa.gov/sites/production/files/2018-10/documents/methodology-wqc-protection-hh-2000.pdf; *see also* U.S. EPA, *Guidelines for Deriving Numerical National Water Quality Criteria for the Protection of Aquatic Organisms and Their Uses*, PB85-227049 (1985), at iv, 2-3, https://www.epa.gov/sites/default/files/2016-02/documents/guidelines-water-quality-criteria.pdf. The Court may take judicial notice of these official federal policy documents under Mont. R. Evid. 202(b)(3) and 202(b)(4).

[6] *See National Recommended Water Quality Criteria—Human Health Criteria Table*, U.S. EPA, https://www.epa.gov/wqc/national-recommended-water-quality-criteria-human-health-criteria-table (last visited Jan. 9, 2024); *National Recommended Water Quality Criteria—Aquatic Life Criteria Table*, U.S. EPA, https://www.epa.gov/wqc/national-recommended-water-quality-criteria-aquatic-life-criteria-table (last visited Jan. 9, 2024).

water quality criteria, states are unlikely to regulate pharmaceuticals in water-quality permitting anytime soon. This is especially true for Montana—MWQA limits DEQ's authority to issue water quality standards that are stricter than those issued by the federal government. *See* Mont. Code Ann. § 75-5-203 (prescribing strict standard for when DEQ may adopt rules that are "more stringent than the comparable federal regulations or guidelines" or are "in an area in which no federal regulations or guidelines exist[]").

Citing *Calvert Cliffs' Coordinating Committee v. United States Atomic Energy Commission*, Cottonwood argues that the lack of water quality standards "is irrelevant to whether pharmaceutical pollutants may have significant impacts on the environment." (Op. Br. at 14 (citing 449 F.2d 1109, 1123 (D.C. Cir. 1971)).) But the lack of standards *is* relevant to whether pharmaceuticals merit DEQ's attention when identifying bona fide potential environmental impacts based on its technical expertise and project-specific information.

Calvert Cliffs supports DEQ's approach in any event. In that case, the Atomic Energy Commission ("AEC") promulgated a National Environmental Policy Act ("NEPA") rule, under which the AEC (1) prohibited parties from raising water quality issues during the NEPA process, and (2) deferred to compliance with other agencies' water-quality and environmental regulations. *See* 449 F.2d at 1122. The United States Court of Appeals for the D.C. Circuit held the rule violated NEPA

because the statute "mandates a case-by-case balancing judgment on the part of federal agencies." *Id.* at 1123.

Here, DEQ exercised case-specific judgment in evaluating the Snowmaking Project. As explained, Cottonwood submitted a single comment vaguely referring to impacts from unspecified "pharmaceuticals." (DEQ00079.) It provided *no* evidence during the public comment process that—despite the lack of water quality standards anywhere in the United States—DEQ nonetheless should have investigated the potential for unspecified pharmaceutical pollution. DEQ's analysis of pharmaceuticals in connection with a MPDES permit would have been novel and unprecedented and based on no actual standards. The onus was on Cottonwood to, at minimum, submit or reference information supporting further review of the issue. Absent scientific consensus, applicable standards, or any evidence in the record regarding pharmaceuticals, DEQ rationally focused its environmental review on factors it determined were relevant to the Snowmaking Project, such as protecting surface waters from harmful bacteria or nitrogen pollution. (*See* DEQ00134-47.) The Court should give due deference to DEQ's exercise of its professional judgment in this technical area and affirm the district court's order denying Cottonwood's motion to supplement.

II. DEQ complied with MEPA in evaluating YC's Snowmaking Project.

Cottonwood also challenges the district court's order granting summary judgment to Defendants on Cottonwood's MEPA claim. (*See* Op. Br. at 18, 26.) DEQ is best positioned to defend its environmental-review process, and the agency's answer brief explains why the district court correctly ruled that it complied with MEPA in evaluating the potential environmental impacts of the Snowmaking Permit. (*See* DEQ's Answer Br. at 17-24. YC incorporates DEQ's arguments by reference. In sum, DEQ reviewed potential water quality impacts that were supported by evidence and declined to further investigate pharmaceuticals in response to a vague, unsubstantiated comment. The agency's review was rational and fair—not "random, unreasonable or seemingly unmotivated based on the existing record." *Bitterrooters for Planning*, ¶ 16. The Court should affirm the district court's summary judgment order.

III. The Court should not enjoin or vacate the Snowmaking Permit because Cottonwood's claim fails and the Permit benefits the environment and the public.

"Section 75-1-201(6)(c), MCA, declares the 'exclusive' remedies for successful challenges to an agency's environmental review." *Water for Flathead's Future, Inc. v. Mont. Dep't of Envtl. Quality*, 2023 MT 86, ¶ 35, 412 Mont. 258, 530 P.3d 790. Specifically, a court cannot issue an injunction that "enjoin[s] the issuance or effectiveness of a license or permit" unless:

(1) "the party requesting the relief is more likely than not to prevail on the merits of its complaint given the uncontroverted facts in the record and applicable law";

(2) the party requesting the relief "will suffer irreparable harm in the absence of the relief";

(3) "issuance of the relief is in the public interest"; and

(4) the "relief is as narrowly tailored as the facts allow to address both the alleged noncompliance and the irreparable harm the party asking for the relief will suffer."

Mont. Code Ann. § 75-1-201(6)(c)(ii).

Cottonwood's request to enjoin or vacate the Snowmaking Permit fails for three main reasons. First, Cottonwood's MEPA claim fails on the merits for the reasons stated above and in DEQ's brief. Cottonwood therefore does not prevail "given the uncontroverted facts in the record" and is not entitled to any relief.

Second, Cottonwood will not suffer irreparable harm absent an injunction or vacatur of the Snowmaking Permit. This Court has not yet expounded MEPA's "irreparable harm" standard[7]; in federal environmental cases, however, courts have found irreparable harm where a defendant's activities risk permanently destroying natural resources. *See, e.g.*, *Sierra Club v. United States Forest Serv.*, 843 F.2d 1190, 1196 (9th Cir. 1988) (finding injunction should have been granted to prevent logging of giant sequoia redwood forests where Forest Service failed to comply with NEPA); *Tenn. Valley Auth. v. Hill*, 437 U.S. 153, 193-94 (1978) (affirming order

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[7] MEPA's current injunction standard took effect after the Court's December 2020 decision in *Park County*. *See Water for Flathead's Future*, ¶ 36.

enjoining operation of federal dam that would have eradicated species of endangered fish). No such harm exists here. In fact, Cottonwood has not provided *any* evidence that the Snowmaking Project will adversely impact water quality or otherwise harm the environment. Instead, it rests its MEPA claim on old documents generally related to pharmaceuticals in the environment. These general documents do not demonstrate irreparable harm justifying injunctive relief.

Citing *Park County*, Cottonwood argues that "the failure to prepare adequate MEPA analysis constitutes irreparable harm" because it harms Cottonwood's members' "constitutional interests in a clean and healthful environment." (Op. Br. at 28.) The Court did not create that bright-line rule in *Park County*. Moreover, Cottonwood's proposed rule would write the injunction standard out of MEPA—Section 75-1-201(6)(c), MCA, would be superfluous if a violation of the statute automatically entitled the plaintiff to injunctive relief.[8] Cottonwood is attempting to invent a rule where none exists to distract from its lack of case-specific evidence.

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[8] Cottonwood also argues that "[t]he loss of a constitutional right constitutes irreparable harm," implying any MEPA violation deprives Cottonwood's members of their constitutional rights. (Op. Br. at 28 (citing *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).) Cottonwood's cited cases are inapposite because each involved a constitutional challenge to a statute that allegedly violated the plaintiff's rights. *See Driscoll*, ¶¶ 4-5; *Netzer*, ¶ 1; *Mont. Cannabis Indus. Ass'n*, ¶¶ 3, 5. Here, Cottonwood does not challenge the constitutionality of MEPA, but rather DEQ's compliance with the statute.

Finally, Cottonwood's requested injunctive relief is not in the public interest. Cottonwood argues that the environment and the economy will benefit from an injunction, (*see* Op. Br. at 29), but nothing could be further from the truth. As described further in Section IV, the Snowmaking Project promotes the public interest by providing benefits for the environment and the community. The Court should deny Cottonwood's request to enjoin or vacate this innovative and beneficial project.

IV. YC's Snowmaking Project underwent thorough review and garnered broad support, including from prominent environmental nonprofit organizations.

DEQ complied with MEPA in issuing the Snowmaking Permit, and the Court should affirm the district court's summary judgment order accordingly. In doing so, the Court will allow a project to proceed that not only is lawful, but which also garnered widespread support due to the environmental benefits it affords the Gallatin River watershed.

A. The Snowmaking Project provides environmental benefits for the Gallatin River watershed.

YC invests in the environmental sustainability of the Big Sky community. For more than a decade, YC has utilized treated effluent (or "reclaimed water") from its treatment plant and the treatment plant of Big Sky County Water & Sewer District No. 363 (the "District") to irrigate its golf course. (*See* DEQ00037.) As recognized by Circular DEQ-2, *Design Standards for Public Sewage Systems* (2018), irrigation is a beneficial use of reclaimed water because it nourishes plants while providing

additional treatment of nitrogen and other constituents. (*See* DEQ00693, DEQ00697 (referring to agronomic uptake of nitrogen by plants, denitrification, volatilization, and soil storage).) It also reduces demand for limited groundwater resources.

Like irrigation with reclaimed water, snowmaking provides water-quality benefits. Notably, relative to conventional disposal methods such as direct discharge to surface waters, snowmaking reduces nitrogen and phosphorus loading of surface waters. (*See* DEQ00144-45.) Literature reviews and modeling indicate that snowmaking significantly reduces the concentration of all forms of nitrogen due to a multitude of fate and transport mechanisms. (*See id.*; DEQ00089; DEQ00144; DEQ00337-40 (compiling studies that indicate, among other benefits, 71%-91% reduction in Nitrate + Nitrite concentrations).)

The Big Sky community has been studying snowmaking as an additional beneficial reuse of reclaimed water for more than two decades. Studies in Colorado, Michigan, and Maine previously showed that "water quality improved in snowmelt and runoff by converting wastewater to snow." (DEQ00248.) Pilot projects in the Big Sky region confirmed these water quality benefits. (*See* DEQ00088-89.) For example, in 1997, the District conducted a snowmaking pilot project in Big Sky's Meadow Village. (*See id.*) And in 2011-2012, YC partnered with the District and a local environmental nonprofit organization called the Gallatin River Task Force to conduct another pilot project on YC's land, building upon the earlier pilot project.

(*See* DEQ00467-96.) The pilot projects demonstrated "that the freeze and crystallization of the snowmaking process provides additional wastewater treatment; specifically reducing nitrogen and phosphorous to levels essentially undetectable in the surface water while also eliminating e-coli bacteria." (DEQ00089; *see also* DEQ00249; DEQ00342-43 (observing reductions in Nitrate + Nitrite, total coliform bacteria, and other potential pollutants).)

Snowmaking with reclaimed water also alleviates water scarcity. In 2016, the Gallatin River Task Force convened the Big Sky Sustainable Water Solutions Forum (the "Forum"), a multi-stakeholder process that sought to evaluate approaches to addressing freshwater scarcity and water-quality issues associated with climate change and population pressure in the Gallatin River watershed. (*See* DEQ00083; DEQ00041; DEQ00246.) Thirty-five key stakeholders participated in the three-year Forum, representing "local business owners, non-profit organizations, environmental groups, county, city, and state agency representatives (including DEQ), recreational groups, and land companies." (*See* DEQ00083; DEQ00328.) The Forum identified reuse of reclaimed water in snowmaking operations "as one of the priorities for the disposal of wastewater in the Big Sky area." (DEQ00041.) The stakeholders agreed that "snowmaking with reclaimed water is an important tool for the community to extend the snowpack and slow water movement through the watershed." (DEQ00246.) This method of snowmaking also conserves valuable

groundwater resources that are used for drinking water or other beneficial uses. Instead of pumping from local aquifers, ski areas can reuse treated wastewater, conserving groundwater supplies and preventing direct discharge to surface waters. (*See* DEQ00059; DEQ00083.) Ultimately, the Snowmaking Project mitigates the impacts of "climate change and limited water supply," (DEQ00246), and thus responds to community demand for innovative solutions to the water-quality and water-supply issues facing the Big Sky region.

B. DEQ conducted a thorough permitting process.

Other states have permitted snowmaking with reclaimed water, including Arizona, Maine, Pennsylvania, and California, (*see* DEQ00245), but YC's Snowmaking Project is the first of its kind in Montana. Accordingly, YC and DEQ engaged in an extensive regulatory process to permit the Snowmaking Project.

That process took several years. Following discussions with DEQ regarding the required regulatory authorizations, YC submitted an initial proposal in June 2018. (*See* DEQ00244-54.) Throughout 2018 and 2019, DEQ reviewed YC's proposal, (*see* DEQ00255-56), and evaluated the appropriate permitting processes, (*see* DEQ00261-64). In the meantime, YC conducted a robust water-quality monitoring program to further evaluate existing site conditions. (*See* DEQ00351.)

YC officially applied for a MPDES permit in April 2020. (*See* DEQ00127.) Following an eleven-month review process, DEQ issued a draft permit on March 19,

2021. (*See* DEQ00104; *see also* DEQ00154-73.) DEQ also issued a draft Environmental Assessment ("EA"), which summarized DEQ's analysis of the potential environmental impacts of the Snowmaking Project. (*See* DEQ00174-84.)

Drafting the Snowmaking Permit was no small task. Under MWQA, DEQ had to characterize the snowmaking site, identify pollutants of concern, and analyze whether discharges from the Snowmaking Project could cause exceedances of numeric or narrative water quality standards. (*See* DEQ00127-53.) The agency then developed appropriate permit limitations. (*See* DEQ00148.) The complex and technical nature of the permitting process is reflected in the "Permit Writers' Manual"—a several-hundred-page guidance document published by EPA that details the ins and outs of water-quality permitting. (*See* DEQ00829-1097.) Moreover, DEQ specialists reviewed the Snowmaking Project under other statutes, including MEPA and the Public Water Supplies, Distribution and Treatment Act.[9] (*See* DEQ00261.)

DEQ also solicited public input on the draft Snowmaking Permit and EA during an extended six-week comment period, (*see* DEQ00105), and thirteen organizations or individuals submitted significant comments, (*see* DEQ00048-49;

[9] The Snowmaking Project also underwent review by the Department of Natural Resources & Conservation, (*see* DEQ00243), and the Montana Natural Heritage Program, which evaluated wildlife and other ecological resources in the area, (*see* DEQ00265-306).

DEQ00065-102). The comments included YC's proposed technical revisions to the permit, (*see* DEQ00064-76), and Cottonwood's critiques of DEQ's permitting process, (*see* DEQ00079). DEQ responded to every comment and revised the draft permit and EA where appropriate. (*See* DEQ00048-62). Three years after receiving YC's initial proposal, DEQ issued a MPDES permit and a final EA on June 7, 2021. (*See* DEQ00002-03 (issuance letter); DEQ00017-36 (final permit); DEQ00037-47 (Permit No. MT0032051).)

Cottonwood fixates on hypothetical "pharmaceutical pollution" and ignores the many public-health and environmental protections DEQ included in the Snowmaking Permit. For example, the Snowmaking Permit imposes technology-based effluent limitations for pollutants like Biochemical Oxygen Demand (BOD_5), *E. coli* bacteria, and residual chlorine—conventional wastewater pollutants for which EPA has promulgated national permit limitations. (*See* DEQ00020; DEQ00134-37.) Regarding ecological pollutants of concern like nitrogen and phosphorus, DEQ concluded that "significant additional treatment and attenuation of pollutants present in the wastewater occurs during the snowmaking and accumulation process." (DEQ00129.) DEQ also concluded that any risk of environmental impact from the Snowmaking Project would only decrease in the future because the District currently is upgrading its wastewater treatment plant to produce the highest quality of effluent recognized under Montana law (known as

Class A-1 effluent). (*See* DEQ00039; DEQ00129; *see also* DEQ00718 (setting forth reclaimed water classes in Appendix B of Circular DEQ-2).) Regardless, the agency crafted special permit conditions requiring YC to monitor for nitrogen, phosphorus, and other constituents at multiple monitoring locations to ensure the Snowmaking Project realizes its environmental benefits without unexpected impacts to the ecosystem.[10] (DEQ00022-23.)

Notably, Cottonwood does not challenge the substance of YC's Snowmaking Permit under MWQA. Cottonwood cannot claim that the Snowmaking Permit fails to implement the water-quality protections guaranteed by MWQA. Instead, its sole claim rests on its belief that DEQ had a duty to investigate the potential for pollution from unspecified pharmaceuticals—a broad category including thousands of substances for which no state or federal water quality standards exist. DEQ concluded that its chosen "permit conditions ensure that all beneficial uses of the receiving water are protected and the discharge will not cause significant changes in existing water quality." (DEQ00045.) Cottonwood failed to provide any evidence to the contrary.

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[10] The Permit also contains other protective conditions, including a requirement that YC notify DEQ regarding discharges of toxic pollutants not listed in the permit. (*See* DEQ00020-26.)

C. The Snowmaking Project received overwhelming public support.

During the public-comment period, DEQ received numerous comment letters that expressed support for the Snowmaking Project, (*see* DEQ00077-78; DEQ00081-93), including from environmental nonprofit organizations like American Rivers, Trout Unlimited, and Greater Yellowstone Coalition. (*See* DEQ00077-78 (American Rivers); DEQ00085-86 (Trout Unlimited); DEQ00090-91 (Greater Yellowstone Coalition).) For example, Greater Yellowstone Coalition commented that the Snowmaking Project is an "innovative climate adaptation approach" that provides "several positive ecological outcomes," including reduced nitrogen and phosphorus pollution of surface waters, reduced demand for scarce groundwater resources, and augmentation of natural streamflow at times when trout and other wildlife need it most. (DEQ00090-91.) Trout Unlimited "appreciate[d] the leadership of [YC] in developing an innovative approach to protecting water quality," and viewed the Snowmaking Project so favorably that it "strongly encourage[d]" YC, DEQ, and the District to expand snowmaking with reclaimed water to other ski resorts in the area, including Big Sky Resort and Moonlight Basin. (DEQ00086.) Finally, American Rivers commented that the Project "demonstrat[es] how Big Sky can be a model mountain community by protecting and improving water resources, sustaining ecological health of the watersheds, and supporting a vibrant local economy." (DEQ00078.)

Other stakeholders also support the project, including the Association of Gallatin Agricultural Irrigators ("AGAI"), local government, residents, and hospitality and recreational interests.[11] (*See, e.g.*, DEQ00093 (letter from AGAI); DEQ00088-89 (letter from the District); DEQ00087 (letter from Mike Richter and Jodi Moravec-Butash); DEQ00092 (letter from Big Sky Resort).) AGAI believes that the Snowmaking Project helps "increase downstream flow for . . . agricultural water users." (DEQ00093.) Thus, the Snowmaking Project supports the local agricultural economy while also providing ecological benefits for the Gallatin River. DEQ synthesized other common themes from the comment letters as follows:

- "Support for the beneficial reuse of wastewater that may result in recharge of the aquifer and increased stream flow in the drainage";
- "Support for the rationale in the permit Fact Sheet regarding the monitoring plan for nutrients and related parameters";
- "The benefits of avoiding a direct discharge of treated wastewater to the Gallatin River";
- "Support for the prioritization of reuse of wastewater via snowmaking to support the area's recreation-based economy and . . . allow for some continued growth and economic development in the community";

[11] In fact, Cottonwood and Gallatin Wildlife Association—another plaintiff that did not appeal—submitted the *only* comments in opposition to the Snowmaking Project.

- “Support for potential reduction in the use of ground water for snowmaking, increasing water storage in the watershed”;
- “Potentially increased water for downstream irrigators.”

(DEQ00059.) The Project’s multiple benefits and “win-wins” for the community explain why the Forum—a collaborative process involving thirty-five key stakeholders—identified snowmaking with reclaimed water as a high priority for the Gallatin River watershed.

Ultimately, Cottonwood stands alone in its opposition to the Snowmaking Project. Rather than meaningfully participating in the public process, Cottonwood submitted an unsupported comment on which it now rests this entire lawsuit. In contrast, numerous stakeholders, including prominent environmental nonprofit organizations, committed their time and energy to identifying solutions to water sustainability issues in the Gallatin River watershed. Those stakeholders support the Snowmaking Project due to its environmental and other benefits. Even with the advantage of broad consensus, DEQ conducted a thorough regulatory review and established appropriate environmental guardrails. The Court should affirm the district court’s judgment and allow YC to continue operating an innovative, widely supported project that does not compromise the environmental protections afforded to Montanans under MWQA and MEPA.

CONCLUSION

For the reasons stated in DEQ's Answer Brief and above, YC respectfully requests that the Court affirm the district court's orders denying Cottonwood's motion to supplement the administrative record and granting summary judgment for Defendants.

DATED this 10th day of January, 2024.

Respectfully submitted,

/s/Ian McIntosh

Ian McIntosh
Neil G. Westesen
CROWLEY FLECK, PLLP

Attorneys for Defendant-Intervenor Yellowstone Mountain Club, LLC

CERTIFICATE OF COMPLIANCE

Pursuant to Rule 11 of the Montana Rules of Appellate Procedure, I certify that this principal brief is printed with a proportionately spaced Times New Roman text typeface of 14 points; is double-spaced except for footnotes and for quoted and indented material; and the word count calculated by Microsoft Word for Windows is 6,559 words, excluding table of contents, table of citations, certificate of service, certificate of compliance, or any appendix containing statutes, rules, regulations, and other pertinent matters.

/s/Ian McIntosh
Ian McIntosh

CERTIFICATE OF SERVICE

The undersigned hereby certifies that on this 10th day of January, 2024, the foregoing document, **YELLOWSTONE MOUNTAIN CLUB'S ANSWER BRIEF**, was served upon the following counsel of record by the means designated below :

[ ] U.S. Mail
[ ] FedEx
[ ] Hand-Delivery
[ ] Facsimile
[x] EPASS Filing

John Meyer
Cottonwood Environmental Law Center
P.O. Box 412
Bozeman, MT 59771
john@cottonwoodlaw.org

Attorney for Plaintiffs

[ ] U.S. Mail
[ ] FedEx
[ ] Hand-Delivery
[ ] Facsimile
[x] EPASS Filing

Kirsten H. Bowers
Kurt R. Moser
Montana Department of Environmental Quality
P.O. Box 200901
Helena, MT 59620
Telephone: 406.444.4009
kbowers@mt.gov
kmoser2@mt.gov

Attorneys for Defendant Montana Department of Environmental Quality

/s/Ian McIntosh
Ian McIntosh

CERTIFICATE OF SERVICE

I, Ian McIntosh, hereby certify that I have served true and accurate copies of the foregoing Brief - Appellee's Response to the following on 01-10-2024:

John Phillip Meyer (Attorney)
P.O. Box 412
Bozeman MT 59771
Representing: Cottonwood Environmental Law Center
Service Method: eService

Neil G. Westesen (Attorney)
1915 South 19th Avenue
Bozeman MT 59718
Representing: Yellowstone Mountain Club, LLC
Service Method: eService

Kurt R. Moser (Govt Attorney)
1520 East Sixth Avenue
P.O. Box 200901
Helena MT 59620-0901
Representing: Montana Department of Environmental Quality
Service Method: eService

Kirsten Hughes Bowers (Govt Attorney)
1520 E. 6th Ave.
P.O. 200901
Helena MT 59620
Representing: Montana Department of Environmental Quality
Service Method: eService

Electronically Signed By: Ian McIntosh
Dated: 01-10-2024