

IN THE SUPREME COURT OF THE STATE OF MONTANA
No. DA 23-0479

COTTONWOOD ENVIRONMENTAL LAW CENTER,

Plaintiff / Appellant,

v.

MONTANA DEPARTMENT OF ENVIRONMENTAL
QUALITY,

Defendant / Appellee,

and

YELLOWSTONE MOUNTAIN CLUB,

Defendant-Intervenor / Appellee

ON APPEAL FROM THE MONTANA EIGHTEENTH JUDICIAL DISTRICT COURT,
GALLATIN COUNTY, THE HONORABLE ANDREW J. BREUNER, PRESIDING
CASE No. DV 21-833B

ANSWER BRIEF OF APPELLEE
MONTANA DEPARTMENT OF ENVIRONMENTAL QUALITY

Kurt R. Moser
Kirsten H. Bowers
Department of Environmental Quality
1520 East Sixth Avenue
P.O. Box 200901
Helena, MT 59620-0901
Ph: (406) 444-4009
kmoser2@mt.gov
kbowers@mt.gov

*Attorneys for Defendant and Appellee
Montana Department of
Environmental Quality*

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

*Attorney for Plaintiff and Appellant
Cottonwood Environmental Law
Center*

Ian McIntosh
Neil G. Westesen
Crowley Fleck, PLLP
1915 South 19th Avenue
P.O. Box 10969
Bozeman, MT 59719
Ph: (406) 556-1430
imcintosh@crowkeyfleck.com
nwestesen@crowleyfleck.com

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

TABLE OF CONTENTS

TABLE OF AUTHORITIESv

STATEMENT OF THE ISSUES.....1

STATEMENT OF THE CASE.....1

STATEMENT OF FACTS4

 I. Transmittal of Record.....4

 II. The MPDES Permitting and Related MEPA Process5

 III. Legal Framework8

STANDARD OF REVIEW9

 I. Summary Judgment/Review of an Agency’s MEPA Assessment.....9

 II. Supplementing the Record Under MEPA11

SUMMARY OF ARGUMENT11

ARGUMENT12

 I. The District Court was Correct to Deny Cottonwood’s Motion to Supplement
the Record with the Administrative Record from *Montana Rivers*.....12

 II. DEQ Acted Lawfully Under MEPA and its Environmental Review was
neither Arbitrary nor Capricious.....17

 III. DEQ’s Preparation of the Environmental Assessment Demonstrated an EIS
Was Not Necessary22

 IV. The MPDES Permit was lawfully issued and should not be vacated,
enjoined or set aside.....24

CONCLUSION25

CERTIFICATE OF COMPLIANCE.....27

TABLE OF AUTHORITIES

CASES

Belk v. Mont. Dep’t of Env’tl. Quality, 2022 MT 38, ¶ 30, 408 Mont. 1, 504 P.3d 1090.....9, 11

Bitterrooters for Planning, Inc. v. Mont. Dep’t of Env’tl. Quality, 2017 MT 222, ¶ 20, 388 Mont. 453, 401 P.3d 7129

Citizens to Preserve Overton Park v. Volpe, 401 U.S. 402, 416 (1971)10

Clark Fork Coalition v. Dep’t of Env’tl. Quality, 2008 MT 407, ¶ 47, 347 Mont. 197, 197 P.3d 48221

Knowles v. State ex rel. Lindeen, 2009 MT 415, ¶ 22, 353 Mont. 507, 222 P.3d 59520

Mont. Env’tl. Info Ctr. v. Mont. Dep’t of Env’tl. Quality, 2019 MT 213, ¶ 22, 397 Mont. 161, 451 P.3d 493..... 10, 17

Mont. Rivers v. Mont. Dep’t of Env’tl. Quality, 2022 MT 132, 409 Mont. 204, 512 P.3d 1193 passim

Mont. Wildlife Fed. v. Mont. Bd. of Oil & Gas Conserv., 2012 MT 128, ¶ 25, 365 Mont. 232, 280 P.3d 877) 9, 10, 23

Motor Vehicle Mfrs. Ass’n v. State Farm Mut. Auto Ins. Co., 463 U.S. 29, 43, 103 S. Ct. 2856, 2866, 77 L.Ed. 2d 433 (1983).....21

North Fork Preservation Ass’n v. Dep’t of State Lands, 238 Mont. 451, 464, 778 P.2d 862, 870 (1989).....10

Northwestern Corp. v. Mont. Dep’t of Pub. Serv. Regulation Corp., 2016 MT 239, ¶ 47, 385 Mont. 33, 380 P.3d 787.....21

Park Cty. Env’tl. Council v. Mont. Dep’t of Env’tl. Quality, 2020 MT 303, 402 Mont. 168, 477 P.3d 288)25

Upper Mo. Waterkeeper v. Mont. Dep’t of Env’tl. Quality, 2019 MT 81, ¶ 13, 395
Mont. 263, 438 P.3d 792..... 10, 20

Water for Flathead’s Future v. Mont. Dep’t of Env’tl. Quality, 2023 MT 86, ¶¶ 35-
36, 412 Mont. 258, 530 P.3d 79025

Western Tradition P’ship v. AG of Mont., 2012 MT 271, ¶ 14, 367 Mont. 112, 291
P.3d 54516

STATUTES

§ 75-1-201(1)(b)(iv), MCA.....9

§ 75-1-201(6)(a)(i), MCA21

§ 75-1-201(6)(a)(ii), MCA.....13

§ 75-1-201(6)(a)(iii), MCA.....9,11

§ 75-5-201, MCA.....8

§ 75-1-201(6)(b), MCA..... 11, 16

§ 75-1-201(6)(b)(i), MCA.....11

§ 75-1-201(6)(b)(ii), MCA.....11

§ 75-1-201(6)(c), MCA..... 24, 25

§ 75-5-402(1), MCA20

RULES

ARM 17.4.601.....8

ARM 17.4.608.....8

ARM 17.4.608(1).....17

ARM 17.4.608(1)(a) through (g)7, 22

ARM 17.4.610.....16

ARM 17.30.607.....9

ARM 17.30.610.....20

ARM 17.30.610(1)(a)19
ARM 17.30.1375.....13
ARM 17.30.1377.....16
ARM 17.30.623(1).....20

STATEMENT OF THE ISSUES

1. Did the district court correctly deny Cottonwood’s motion to supplement the administrative record?
2. Did the Montana Department of Environmental Quality (“DEQ”) comply with the Montana Environmental Policy Act (“MEPA”) when it determined that further investigation of pharmaceuticals was not warranted in response to public comments by Plaintiff and Appellant Cottonwood Environmental Law Center (“Cottonwood”)?
3. Did DEQ comply with MEPA by preparing an Environmental Assessment and not an Environmental Impact Statement to address the potential impacts of pharmaceutical pollution?
4. Based upon Cottonwood’s single, generic comment concerning pharmaceuticals, should the discharge permit, associated with the Yellowstone Mountain Club’s snowmaking activities, be vacated, enjoined, or set aside?

STATEMENT OF THE CASE

This matter arises out of Appellant Cottonwood Environmental Law Center’s (“Cottonwood”) challenge to DEQ’s MEPA review that was conducted concurrently with the application review and issuance of a Montana Pollutant Discharge Elimination System (“MPDES”) Permit to the Yellowstone Mountain

Club (“YC”).¹ The issued MPDES permit authorizes the discharge of reclaimed (or treated) domestic wastewater following the water’s use for making artificial snow. Cottonwood filed its First Amended Complaint alleging, among other things, that DEQ violated MEPA by failing to take a hard look at the potential impacts of any pharmaceuticals found in the discharge. First Amended Complaint for Declaratory and Injunctive Relief (Jan. 27, 2022) (“Amended Complaint”), Doc. Seq. 23.² On February 11, 2022, DEQ and YC filed a joint motion to dismiss four out of the five claims alleged in the Amended Complaint, as well as a motion to strike Cottonwood’s demand for a jury trial. Doc. Seq. 24. On May 3, 2022, the district court issued an order staying proceedings pending resolution of Supreme Court Cause No. DA 21-0613.³ Doc. Seq. 32. Although the district court ultimately determined Cottonwood was improperly attempting to re-litigate claims from Cause No. DA 21-0613, it ordered the stay because it found certain issues in that appeal were “inextricably intertwined” with issues raised in this case. *Id.*

On July 5, 2022, the Montana Supreme Court issued its decision in *Mont. Rivers v. Mont. Dep’t of Env’tl. Quality*, 2022 MT 132, 409 Mont. 204, 512 P.3d

¹ At the district court, Gallatin Wildlife Association and Cottonwood were named plaintiffs; only Cottonwood now seeks appeal.

² Doc. Seq. refers to the numbered filing item listed in the district court docket for Case No. DV 21-833B.

³ *Mont. Rivers v. Mont. Dep’t of Env’tl. Quality*, 2022 MT 132, 409 Mont. 204, 512 P.3d 1193

1193 (“*Montana Rivers*”), ruling in favor of DEQ and against plaintiffs, which included Cottonwood. On December 28, 2022, the district court granted DEQ and YC’s partial motion to dismiss and the motion to strike jury demand.⁴ The order included a dismissal of Cottonwood’s claim that DEQ violated the Montana Constitution by issuing the discharge permit. *See Order Re Def.s’ Joint Mot. to Dismiss and to Strike Jury Demand (Dec. 28, 2022), Doc. Seq. 62.* Following the district court’s dismissal, only the First Cause of Action from the Amended Complaint remained, which alleged that DEQ violated MEPA by failing to take a hard look at the environmental impacts of YC’s proposed snowmaking activities, specifically related to pharmaceuticals. *See Amended Complaint ¶¶ 62-73.*

Following the parties’ filing of their respective cross motions for summary judgment, the district court found that DEQ acted lawfully under MEPA and that DEQ’s environmental review was neither arbitrary nor capricious. *Opinion and Order Re Cross Motions for S.J. (June 30, 2023), Doc. Seq. 89.*

On appeal, Cottonwood challenges the district court’s denial of its motion to supplement the record with the administrative record from *Montana Rivers*.

⁴ Cottonwood does not appeal the claims dismissed by the district court, including: (1) its claim that DEQ’s action in issuing the discharge permit violated the Montana Constitution; (2) its claims that various provisions of MEPA are unconstitutional; and (3) its claim that DEQ violated MEPA by not supplementing the Environmental Impact Statement for a different proposed action that was the subject of *Montana Rivers*. *See Order Re Defendants’ Joint Partial Motion to Dismiss and to Strike Jury Demand (Dec. 28, 2022), Doc. Seq. 62.*

Cottonwood also challenges the district court's Opinion and Order denying its motion for summary judgment – arguing the court erred in finding that DEQ's environmental review and decision to forgo preparing an Environmental Impact Statement was lawful and rationally based on the record.

STATEMENT OF FACTS

I. Transmittal of Record

On March 4, 2022, DEQ transmitted the record of the permitting action and related MEPA review to the district court. Doc. Seq. 27. On October 14, 2022, DEQ filed a correction to its transmittal of record. Doc. Seq. 35. Also on October 14, 2022, Cottonwood filed its motion to supplement the record, arguing that it was necessary to supplement the record with the administrative record from the recently concluded *Montana Rivers* case. Doc. Seq. 36. The district court denied Cottonwood's motion to supplement the record on December 28, 2022, finding that supplementation was not appropriate under MEPA. *See* Order Re Motion to Supplement Administrative Record, Doc. Seq. 61. The record contains over 1,000 pages and includes public comments and other information submitted to or considered by DEQ in issuing the Permit.

II. The MPDES Permitting and Related MEPA Process

In April of 2020, YC submitted its formal application for an MPDES Permit, to authorize the discharge of reclaimed (or treated) domestic wastewater after its use as artificial snow for skiing on Eglise Mountain. Corrected Administrative Record (“AR”) DEQ00214; AR DEQ00105, Doc. Seq. 35. The sources of the treated wastewater used for snowmaking include the treatment facilities of YC and the Big Sky County Water and Sewer District. AR DEQ00105. Following its review of YC’s revised application and supplemental information, DEQ issued its public notice and tentative determination to issue an MPDES permit to YC for discharges associated with YC’s planned snowmaking activities. AR DEQ00105. At the same time, DEQ also publicly noticed the draft MPDES permit, the permit fact sheet, and the draft environmental assessment. *See id; see also* AR DEQ00125-53 (Fact Sheet), AR DEQ00154-73 (Draft Permit), and AR DEQ00174-84 (Draft Environmental Assessment).

On May 4, 2021, DEQ received combined comments from Cottonwood, Montana Rivers, and the Gallatin Wildlife Association on the draft MPDES permit, fact sheet, and environmental assessment. AR DEQ00094-96. The comment letter included the following statement about pharmaceuticals: “[t]he EA violates MEPA because it fails to analyze the impacts of pharmaceuticals reaching surface waters.” AR DEQ00095. The letter was attached to a brief email and did not identify any

specific pharmaceuticals the commenters were concerned with, did not include any supplemental information on pharmaceuticals, and did not reference any scientific articles, presentations, or notices regarding the environmental impacts of pharmaceuticals. AR DEQ00094-96. DEQ also received the identical comment letter directly from Montana Rivers, AR DEQ00097-99, and from the Gallatin Wildlife Association, AR DEQ00100-102.

During the public comment period, DEQ also received comments from environmental groups and others expressing broad support for YC's proposed snowmaking project. For example, American Rivers supported the project and found that it would help to achieve one of the highest priorities of the Big Sky Sustainable Water Solutions Forum, i.e., using snowmaking to address wastewater treatment and reuse "to support the recreation-based economy and provide for water storage and runoff patterns in sync with the natural hydrologic cycle." AR DEQ00077. The Gallatin River Task Force commented that snowmaking was identified as a "key strategy for bolstering late-season in-stream flows and improving water quality in the Gallatin River and its tributaries." AR DEQ00083. Trout Unlimited and the Greater Yellowstone Coalition also expressed their support for YC's snowmaking project. AR DEQ00085; DEQ00090.

Pursuant to its MEPA obligations, and in consideration of the public comments received, DEQ prepared the final environmental assessment. AR

DEQ00037-47. Through its assessment, DEQ determined that “no significant adverse impacts to the physical or human environment associated with the permitted discharge of effluent or construction of the outfalls as described in the MPDES permit application will occur.” AR DEQ00045. As a result, DEQ also determined that “[a]n [Environmental Impact Statement] is not required under the Montana Environmental Policy Act (MEPA) because the project lacks significant adverse effects to the human and physical environment based on . . . the criteria in ARM 17.4.608(1)(a) through (g).” AR DEQ00046. DEQ analyzed the proposed discharges and determined that no significant water quality impacts would occur or were expected from the permitted discharges and stated that:

The MPDES permit includes effluent limits, monitoring requirements and other permit conditions that will ensure the water quality standards and beneficial uses are protected. Further, DEQ found that both Third Yellow Mule Creek and Muddy Creek are high quality waters per Montana’s Nondegradation Policy. The proposed discharges were evaluated to ensure the changes in water quality would be nonsignificant. See the Fact Sheet pages 13 through 14 and 29 for further detail.

AR DEQ00041. DEQ evaluated the potential impacts upon aquatic life, finding that: “[e]ffluent limits and permit conditions will ensure water quality standards for aquatic life are protected.” AR DEQ00042. DEQ also evaluated the impacts on human health and safety and stated: “[e]ffluent limits and permit conditions, including disinfection of snowmaking water will ensure water quality standards are met and human health is protected.” AR DEQ00043.

DEQ issued its final permit decision, issuing MPDES Permit No. MT0032051 and the Final Environmental Assessment (“EA”) on June 7, 2021. AR DEQ00002-3. On the same day, notice of DEQ’s final permit action, its response to comments, and the issuance of the EA was provided to Gallatin Wildlife Association, AR DEQ00009, Cottonwood Environmental Law Center, AR DEQ00010, and Montana Rivers, AR DEQ00012. In response to the single comment received from Cottonwood concerning pharmaceuticals, DEQ stated:

“Pharmaceuticals” is a general term. Pharmaceuticals are an emerging area of science and research concerning water quality. DEQ has not yet adopted water quality standards for pharmaceuticals. MPDES permits implement adopted MT water quality standards to protect beneficial uses of the receiving water bodies. DEQ evaluated water quality concerns under Final EA Part 2.

AR DEQ00061.

III. Legal Framework

Under MEPA, all agencies of the state must conduct reviews to evaluate the environmental impacts of proposed state actions. § 75-1-201, MCA. In furtherance of this statutory objective, administrative rules at Title 17, Chapter 4, Subchapter 6, ARM, were adopted to guide DEQ “prior to reaching a final decision on actions covered by MEPA.” ARM 17.4.601. This includes criteria for considering the significance of impacts within an EA. *See* ARM 17.4.608. When conducting an EA, the purpose is “to evaluate the individual and cumulative impacts of a

proposed action and determine their significance.” *Belk v. Mont. Dep’t of Env’tl. Quality*, 2022 MT 38, ¶ 30, 408 Mont. 1, 504 P.3d 1090 (citation omitted). If a proposed action will have a significant impact on the environment, then a more thorough analysis, an Environmental Impact Statement (“EIS”), must be prepared. *Id.*; see also § 75-1-201(1)(b)(iv), MCA; ARM 17.30.607. However, MEPA does not require the preparation of an EIS if the EA determines an “agency action will not significantly affect the quality of the human environment.” *Bitterrooters for Planning, Inc. v. Mont. Dep’t of Env’tl. Quality*, 2017 MT 222, ¶ 20, 388 Mont. 453, 401 P.3d 712.

STANDARD OF REVIEW

I. Summary Judgment/Review of an Agency’s MEPA Assessment

The Court reviews a district court’s grant of summary judgment and its conclusions of law “de novo for correctness.” *Bitterrooters for Planning*, ¶ 15. (citations omitted).

To determine if an agency’s environmental review was sufficient, the Court considers “whether the decision was unlawful or arbitrary and capricious.” *Id.* (citing § 75-1-201(6)(a)(iii), MCA; *Mont. Wildlife Fed. v. Mont. Bd. of Oil & Gas Conserv.*, 2012 MT 128, ¶ 25, 365 Mont. 232, 280 P.3d 877). An agency decision is unlawful if it is inconsistent with applicable laws and administrative rules. *Belk*,

¶ 15 (citing *North Fork Preservation Ass’n v. Dep’t of State Lands*, 238 Mont. 451, 464, 778 P.2d 862, 870 (1989)). Courts afford deference to an “agency’s legal determination when that agency is interpreting a statute that it has been authorized by the legislature to administer.” *Upper Mo. Waterkeeper v. Mont. Dep’t of Env’tl. Quality*, 2019 MT 81, ¶ 13, 395 Mont. 263, 438 P.3d 792 (citation omitted). If an “agency’s interpretation of its rule or regulation is within the range of reasonable interpretation, it is lawful and deserves deference.” *Mont. Env’tl. Info Ctr. v. Mont. Dep’t of Env’tl. Quality*, 2019 MT 213, ¶ 22, 397 Mont. 161, 451 P.3d 493 (citation omitted).

When making an inquiry to determine if the agency decision was arbitrary or capricious, the court must consider whether the “decision was based upon a consideration of relevant factors and whether there has been a clear error of judgment.” *N. Fork Preservation Ass’n*, 238 Mont. at 465, 778 P.2d at 871 (quoting *Citizens to Preserve Overton Park v. Volpe*, 401 U.S. 402, 416 (1971)). While the inquiry must be thorough, “the ultimate standard of review is a narrow one,” *id.*, and a court may not substitute its judgment for that of the agency “by determining whether its decision was ‘correct.’” *N. Fork Preservation Ass’n*, 238 Mont. at 465, 778 P.2d at 871. A court may not reverse an agency decision “merely because the record contains inconsistent evidence or evidence which might support a different result.” *Montana Wildlife Fed.*, ¶ 25. To reverse, “the decision ‘must

appear to be random, unreasonable or seemingly unmotivated based on the existing record.” *Bitterrooters*, ¶ 15 (citations omitted).

II. Supplementing the Record Under MEPA

Unless a court allows the introduction of new evidence under Section 75-1-201(6)(b), MCA, a court’s review under MEPA “may not consider any information, including but not limited to an issue, comment, argument, proposed alternative, analysis, or 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.” § 75-1-201(6)(a)(iii), MCA.

Section 75-1-201(6)(b)(ii), MCA, provides a narrow exception that allows supplementation with new evidence that was not properly presented to the agency; however, such information must be “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 environmental review.” If the proffered evidence was not explicitly considered by the agency, it must be demonstrated to be “what the agency should have considered but did not.” *Belk*, ¶ 36.

SUMMARY OF ARGUMENT

1. The district court correctly denied Cottonwood’s motion to supplement the record in finding that the proffered administrative record from *Montana Rivers* did not meet the requirements of Section 75-1-201(6)(b)(i), MCA.

Cottonwood's proffered evidence was not new, material, and significant evidence, and it was publicly available before DEQ issued its final EA and related discharge permit. The proffered evidence was also not relevant to the decision or the adequacy of DEQ's environmental review under MEPA.

2. The district court correctly found that: (1) DEQ had followed all MEPA requirements in its assessment of environmental impacts associated with YC's discharge permit; (2) DEQ's MEPA review was not arbitrary or capricious and was based on a rational assessment of the facts before it and its administrative duty; and (3) DEQ's choice to forgo preparing an EIS was rationally based on the facts before it and memorialized in the EA.

ARGUMENT

I. The District Court was Correct to Deny Cottonwood's Motion to Supplement the Record with the Administrative Record from *Montana Rivers*

The district court correctly denied Cottonwood's motion to supplement the record. In its corresponding order, the district court properly applied the plain language of MEPA and denied Cottonwood's motion. Order Re Motion to Supplement Administrative Record (Dec. 28, 2022), Doc. Seq. 61.

Cottonwood sought to supplement the record with the administrative record filed in *Montana Rivers*. Cottonwood argued that the record from *Montana Rivers*

was relevant because it contained “several scientific articles, reports, power points, and other documents” that discussed pharmaceuticals, and that DEQ needed to consider these documents in its MEPA decision-making process. *See* Br. in Support of Mot. to Supp. Admin. R. (Oct. 14, 2022), Doc. Seq. 38.

The *Montana Rivers* case involved an aborted rulemaking process to designate a portion of the Gallatin River as an Outstanding Resource Water. *Montana Rivers*, ¶¶ 16-20. This Court found Cottonwood’s lawsuit was “an attempt to work around” Montana law, because the law provided no means to challenge DEQ’s decision not to proceed with the contemplated rule. *Montana Rivers*, ¶ 19.

With its attempt to supplement the record here, Cottonwood is again trying to work around the law. If Cottonwood wanted DEQ to consider certain articles, reports, PowerPoint presentations, or other documents during the MEPA process, it had the means to do so – it could have submitted such documents to DEQ during the public comment process.⁵ *See* § 75-1-201(6)(a)(ii), MCA. Instead, Cottonwood submitted a single broad and generic comment regarding pharmaceuticals and included no additional information. *See* AR DEQ00095. Based on Cottonwood’s

⁵ When providing public comment on a draft discharge permit, any person who believes that the department’s tentative decision to “prepare a draft permit is inappropriate, shall raise all reasonably ascertainable issues and submit all reasonably available arguments supporting their position by the close of the public comment period.” ARM 17.30.1375.

comment, DEQ responded that the term “pharmaceuticals” was a general term and that this group of compounds represented an “emerging area of science and research,” and that DEQ had not adopted any related water quality standards. AR DEQ00061.

Cottonwood focuses on two documents from the administrative record in *Montana Rivers* and claims the documents must be made part of the record here. *See* Opening Brief of Plaintiff/Appellant 13 (Nov. 9, 2023) (“Pl.’s Opening Br.”). The first document is a 2006 PowerPoint presentation that DEQ presented along with the Montana Bureau of Mines and Geology. *Id.* The PowerPoint presentation notes that 22 pharmaceuticals compounds (or PCCPs) were detected during a survey of groundwater wells in the Helena Valley. Pl.’s Opening Br., Exhibit 1 at 000948. The presentation, at its introduction, noted that “little is known” about the “mobility or persistence [of pharmaceuticals] in ground water or surface water” or about related “human health or aquatic system effects.” *Id.* The presentation summarizes the collected Helena Valley groundwater monitoring data, lists several previous investigations conducted by other entities, and generally discusses pharmaceuticals as an emerging issue. Pl.’s Opening Br., Exhibit 1 at 000948-000997. However, there is nothing in the PowerPoint presentation that would constitute new, material, or significant evidence that DEQ should have analyzed in the EA conducted for the YC’s proposed snowmaking discharges.

As part of the administrative record in *Montana Rivers*, the PowerPoint presentation was reasonably available to Cottonwood when it filed its comments during the public comment period for the EA and Draft Permit. Cottonwood was a plaintiff in *Montana Rivers* and was represented by the same legal counsel. Cottonwood asserts that DEQ was required to and “refused to disclose and analyze” the PowerPoint presentation here, *see* Pl.’s Opening Br. at 12, but if Cottonwood really wanted DEQ to discuss a sixteen-year-old PowerPoint presentation analyzing groundwater from the Helena Valley, it could have easily submitted the presentation during the public comment period.

The same is also true for the second document Cottonwood discusses -- the two-page EPA document Cottonwood claims is “a notice from the U.S. EPA regarding the impacts of pharmaceuticals.” Pl.’s Opening Br. at 13. This publicly available EPA document was contained within the administrative record for *Montana Rivers* and was also reasonably available to Cottonwood when it provided its comments. *See* Pl.’s Br. in Support of Mot. to Supp. Admin. Record at 4, Doc. Seq. 38. The two-page “project summary” document describes pharmaceuticals as an emerging issue, and generally describes federal projects EPA was pursuing in 2013 to gain background information on pharmaceuticals, personal care products, pesticides, and other chemicals of emerging concern. Pl.’s

Opening Br., Exhibit 2.⁶ This EPA document does not constitute new, material, or significant evidence that DEQ should have analyzed when reviewing YC's discharge permit and the related environmental impacts. Therefore, supplementation or further consideration of the EPA document is not required under Section 75-1-201(6)(b), MCA.⁷

Finally, Cottonwood's mere mention of the term "pharmaceuticals" in its comments does not require DEQ to locate and analyze every document in its possession that contains the term, no matter how insignificant it may be. During its environmental review of a discharge permit, DEQ is required to analyze public comments and respond appropriately. *See* ARM 17.30.1377; ARM 17.4.610. Because responding to public comments is a part of its decision-making process, DEQ is entitled to rely upon comments as presented. If Cottonwood wanted (or expected) the PowerPoint presentation and the two-page EPA document to be part of the record, it should have complied with MEPA in the first place.

⁶ *See also* U.S. EPA, "Region 8 Emerging Contaminants Project Summary" (Aug. 2013), *available at* https://www.epa.gov/sites/default/files/2013-08/documents/r8_emergingcontaminantsprojectsummaryaug2013.pdf.

⁷ Asking the district court to apply the plain language of MEPA and deny a supplement to the record is hardly "bad faith" as Cottonwood suggests in its brief. DEQ's related arguments are certainly within "the bounds of legitimate argument." *See Western Tradition P'ship v. AG of Mont.*, 2012 MT 271, ¶ 14, 367 Mont. 112, 291 P.3d 545.

DEQ concurs in YC's arguments concerning Cottonwood's motion to supplement the record and incorporates them here by reference. *See* YC's Answer Br. at 8-17.

II. DEQ Acted Lawfully Under MEPA and its Environmental Review was neither Arbitrary nor Capricious

Based upon the requirements of MEPA, DEQ conducted an environmental assessment of the proposed project. AR DEQ00037-47. DEQ considered the potential significance of impacts and evaluated the criteria set forth in the applicable administrative rules. *See* ARM 17.4.608(1); AR DEQ00046. This included DEQ's evaluation of potential water quality impacts. AR DEQ00037-47. In interpreting its rules, DEQ is afforded significant deference. *Mont. Env'tl. Info Ctr.*, ¶ 22. Following its evaluation, DEQ concluded that an EIS would not be required because the project lacked "significant adverse effects to the human and the physical environment." AR DEQ00046. As DEQ noted in the EA, the MPDES permit imposed effluent limitations and permit conditions to ensure water quality, aquatic life, and human health, would be protected. AR DEQ00037-47.

In the sole remaining cause of action from its Amended Complaint, Cottonwood claims that DEQ violated MEPA in issuing the discharge permit because DEQ allegedly failed to properly analyze and disclose the impacts of pharmaceutical pollution. Amended Complaint at 11-14, Doc. Seq. 23. During the

public comment period for the draft EA and the Draft Permit, Cottonwood provided only a brief comment concerning pharmaceuticals, did not identify any specific pharmaceutical of concern, and provided no additional information. AR DEQ00094-102. Cottonwood never provided *any* information to the agency suggesting that further analysis of pharmaceuticals was warranted. Without more, DEQ cannot be expected to and was not required to investigate further.

There is also no definition adopted for the category of compounds generally labeled as “pharmaceuticals” in the Montana Water Quality Act, MEPA, or the related administrative rules. Cottonwood argues that DEQ has already defined the term through the *Montana Rivers* case and through DEQ’s discovery responses in this case. *See* Pl.’s Opening Br. at 19. The full statement DEQ admitted to is:

Pharmaceuticals and personal care products are a diverse group of chemicals including all human and veterinary drugs, dietary supplements, topical agents such as cosmetics and sunscreens, laundry and cleaning products.

Pl.’s Opening Br., Exhibit 3 at 2. Even assuming, *arguendo*, that DEQ did adopt this definition, the admitted to statement is general in nature and refers to an extremely broad category of compounds and related chemicals. This definition does not narrow the field or identify which specific compound or parameter requires additional environmental review. DEQ’s decision to

respond to Cottonwood’s comment in a general nature was reasonable, even using these parameters to qualify the term “pharmaceuticals.”

Cottonwood raises concerns about pharmaceuticals in the context of water quality impacts. Notably, there are no water quality standards or related nondegradation requirements for pharmaceuticals.⁸ Therefore, there is no lawful standard DEQ can use to evaluate potential impacts upon beneficial uses or high-quality waters and no related limits that can be incorporated into a discharge permit. AR DEQ00061. Without established standards to assess potential water quality impacts, any limitation or condition placed on specific compounds within the extremely broad category of “pharmaceuticals” would itself be unlawful, arbitrary, and capricious. The lack of standards precludes any meaningful water quality impact assessment of pharmaceuticals and related potential harm under the terms of the permit or under MEPA.

In assessing water quality impacts, DEQ applied the applicable rules. The receiving waters identified in the permit are Muddy Creek and Third Yellow Mule Creek, streams which are classified as B-1 under state rules. ARM 17.30.610(1)(a); AR DEQ00130. Under B-1 classification standards, such waters “are to be maintained suitable for drinking, culinary, and food processing purposes, after

⁸ Neither EPA nor Montana has adopted water quality standards for the category of compounds referred to as “pharmaceuticals.”

conventional treatment; bathing, swimming, and recreation; growth and propagation of salmonid fishes and associated aquatic life, waterfowl and furbearers; and agricultural and industrial water supply.” ARM 17.30.623(1). In the EA, DEQ concluded that all beneficial uses of the receiving waters were protected from potential discharges from YC’s snowmaking activities. AR DEQ00037-47. DEQ also evaluated high-quality waters, for purposes of the state’s nondegradation policy, and concluded any related water quality changes would be nonsignificant. AR DEQ00041.

DEQ must evaluate and issue permits consistently with its rules, including water quality standards. *See* § 75-5-402(1), MCA. Until DEQ has adopted water quality standards for pharmaceuticals, it has no authority to impose related discharge permitting requirements. In issuing YC’s discharge permit, DEQ ensured all applicable water quality standards were met. Therefore, under the law, beneficial uses are protected. Those water quality standards include water quality criteria necessary to protect and support designated beneficial uses, including aquatic life and human health. *See* ARM 17.30.610. As the agency implementing MEPA and the Montana Water Quality Act, DEQ is afforded deference in its legal interpretations regarding significance and water quality standards. *See Upper Mo. Waterkeeper*, ¶ 13; *see also Knowles v. State ex rel. Lindeen*, 2009 MT 415, ¶ 22, 353 Mont. 507, 222 P.3d 595.

Until beneficial use impacts from specific pharmaceuticals are studied and evaluated, and corresponding standards are adopted, potential impacts are unknown and are extremely speculative. Based on the undisputed facts contained in the record and the lack of any water quality standards, such potential impacts have not been established as a matter of law. *See* § 75-1-201(6)(a)(i), MCA.

In responding to Cottonwood’s comment on pharmaceuticals and the adequacy of the environmental review, DEQ articulated a satisfactory explanation for its action and its considerations and analysis were neither arbitrary nor capricious. Courts defer to agency decision-making provided there is a “rational connection between the facts found and the choice made.” *Clark Fork Coalition v. Dep’t of Env’tl. Quality*, 2008 MT 407, ¶ 47, 347 Mont. 197, 197 P.3d 482 (citing *Motor Vehicle Mfrs. Ass’n v. State Farm Mut. Auto Ins. Co.*, 463 U.S. 29, 43, 103 S. Ct. 2856, 2866, 77 L.Ed. 2d 433 (1983)). In considering record evidence, the judiciary’s “role is not to reweigh the evidence, but rather, to determine if substantial evidence existed ‘and not whether, on the same evidence, [it] would have arrived at the same conclusion.’” *Northwestern Corp. v. Mont. Dep’t of Pub. Serv. Regulation Corp.*, 2016 MT 239, ¶ 47, 385 Mont. 33, 380 P.3d 787 (citations omitted). Substantial evidence existed to support DEQ’s conclusions.

III. DEQ's Preparation of the Environmental Assessment Demonstrated an EIS Was Not Necessary

During DEQ's environmental assessment, there were no substantial questions raised that required the preparation of an EIS. DEQ evaluated the criteria in ARM 17.4.608(1)(a)-(g) to determine the significance of impacts associated with YC's snowmaking discharges. In evaluating potential water quality impacts, DEQ noted in Section 2 of the EA, "[t]he MPDES permit includes effluent limitations, monitoring requirements and other permit conditions that will ensure the water quality standards are protected." AR DEQ00041. DEQ further found that "[t]he discharges and subsequent snowmelt runoff are subject to permit conditions and limitations that will protect beneficial uses and prevent significant changes in water quality." AR DEQ00046.

The record presented was insufficient to suggest any material impact to water quality from pharmaceuticals or any need to investigate potential impacts beyond DEQ's understanding of the issue. Although Cottonwood argues DEQ admitted "pharmaceuticals are emerging contaminants of concern that may threaten aquatic life," *see* Pl.'s Opening Br. at 26, it omits DEQ's qualification to that admission, i.e., that "DEQ denies much certainty exists regarding the potential impacts of pharmaceuticals in aquatic environments." DEQ's Ans. to First Amend. Compl. ¶ 22, Doc. Seq. 66. There is nothing in the record to suggest any material

adverse impact could occur -- based on the alleged presence of some unknown quantity of an unidentified pharmaceutical in the treated wastewater used to make snow.

The fact that certain pharmaceuticals may threaten aquatic life is not enough to trigger an EIS, particularly where no state or federal standards are developed, and no lawful means exist to evaluate the impacts of pharmaceuticals or impose effluent limitations on the snowmaking related discharges. Standards have not been developed because pharmaceuticals still represent an emerging area of science and research, as DEQ noted in its Response to Comments. AR DEQ00061.

DEQ cannot base its environmental review and permitting process on unregulated compounds with undeveloped science and research, and it cannot deny all permit applications based on the hypothetical unknown, or until the effects of pharmaceuticals on aquatic ecosystems are better understood. DEQ's actions must be lawful, rational, and based on the record before it. *Mont. Wildlife Fed.*, ¶ 25.

Should state or federal standards be adopted in the future, DEQ could properly evaluate discharges against such standards, and, if necessary, reopen the YC permit to include necessary effluent limitations. *See* AR DEQ00033. Nonetheless, Cottonwood failed to present any information to DEQ indicating a need for further environmental analysis of pharmaceuticals in YC's snowmaking

related discharges. DEQ performed the necessary environmental review under MEPA and its decision not to prepare an EIS was reasonable under the circumstances.

IV. The MPDES Permit was lawfully issued and should not be vacated, enjoined or set aside.

The only claim Cottonwood now appeals is related to DEQ's MEPA review of the potential water quality impacts associated with pharmaceuticals. Because DEQ did not expand its review of pharmaceuticals or analyze old and publicly available documents, Cottonwood claims the Court must vacate, enjoin, or otherwise set aside the discharge permit. As set forth above, the Court should find that DEQ acted lawfully in responding to Cottonwood's generic comment about pharmaceuticals and further find that DEQ satisfied its obligations under MEPA. Should the Court find DEQ's environmental review was inconsistent with the law or otherwise inadequate, the legislature has provided exclusive MEPA remedies for MPDES permits. If a court finds that the factors contained in Section 75-1-201(6)(c), MCA, have been satisfied, it may grant injunctive or other equitable relief.

Notably, Montana law does not presume vacatur is the necessary remedy. When the environmental review of an MPDES permit is deemed insufficient, a court must first consider the appropriate remedy under Section 75-1-201(6)(c),

MCA. See *Water for Flathead's Future v. Mont. Dep't of Env'tl. Quality*, 2023 MT 86, ¶¶ 35-36, 412 Mont. 258, 530 P.3d 790 (finding that the district court erred in vacating an MPDES permit based on the “inherent authority” it derived from *Park Cty. Env'tl. Council v. Mont. Dep't of Env'tl. Quality*, 2020 MT 303, 402 Mont. 168, 477 P.3d 288).

In the absence of an injunction, and based upon the record, Cottonwood fails to demonstrate it has been harmed, or that the issuance of an injunction is in the public interest or will benefit the local economy. See § 75-1-201(6)(c), MCA. Cottonwood provided no evidence that it will be harmed by YC's snowmaking discharges and its general allegations about the harms caused by pharmaceuticals are insufficient to support vacatur or injunctive relief.

CONCLUSION

Cottonwood fails to carry its burden in challenging DEQ's Final Environmental Assessment. Based upon the certified record filed with the district court, DEQ's environmental review, including its consideration of Cottonwood's single, generic comment concerning pharmaceuticals, was not unlawful, arbitrary, or capricious.

For the reasons specified herein and in the district court record, the Court should affirm the district court's orders denying Cottonwood's motion to

supplement the record, granting the motions for summary judgment filed by DEQ and Yellowstone Club, and denying Cottonwood's motion for summary judgment.

Respectfully submitted this 10th day of January, 2024.

MONTANA DEPARTMENT OF
ENVIRONMENTAL QUALITY

*/s/ Kurt R. Moser*_____

Kurt R. Moser

Kirsten H. Bowers

*Attorneys for Defendant and Appellee
Montana Department of Environmental Quality*

CERTIFICATE OF COMPLIANCE

Pursuant to Rule 11 of the Montana Rules of Appellate Procedure, I certify that this answer brief is printed with a proportionately spaced Times New Roman text typeface of 14 points; is double-spaced, except for footnotes and quoted and indented material; and the word count calculated by Microsoft Word software is 5,436 words, excluding caption, table of contents, table of citations, signature, certificates of service and compliance.

/s/ Kurt Moser
Kurt R. Moser

CERTIFICATE OF SERVICE

I, Kurt R. Moser, 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

Ian McIntosh (Attorney)
1915 S. 19th Ave
P.O. Box 10969
Bozeman MT 59719
Representing: Yellowstone Mountain Club, LLC
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 Catherine Ann Armstrong on behalf of Kurt R. Moser
Dated: 01-10-2024