IN THE SUPREME COURT OF THE STATE OF MONTANA
No. DA 25-0710

YELLOWSTONE COUNTY,

Petitioner and Appellant,

v.

MONTANA DEPARTMENT OF ENVIRONMENTAL QUALITY,

Respondent and Appellee.

APPELLEE'S ANSWER BRIEF

On Appeal from the Montana Thirteenth Judicial District Court, Yellowstone County, Cause No. DV 2024-80, the Honorable Jessica Fehr, Presiding

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STATEMENT OF THE ISSUES

1. Whether the District Court correctly found that Yellowstone County, as the owner or operator of a small municipal separate storm sewer system, has the responsibility and the necessary authority to implement storm water controls required by the Federal Clean Water Act and the Montana Water Quality Act.

2. Whether the District Court correctly found that the requirement for Yellowstone County to obtain a discharge permit and comply with storm water control measures at ARM 17.30.1111 was not an unfunded state mandate under § 1-2-112, MCA.

STATEMENT OF THE CASE

Yellowstone County asked the District Court for declaratory judgment stating that the County had no authority or responsibility to comply with the permitting requirements of the Montana Water Quality Act or the Federal Clean Water Act, specifically requesting a declaration that it had no legal duty to control the polluted stormwater discharges from its small municipal separate storm sewer system ("small MS4"). The County also argued that, even if it had the responsibility and authority to comply with the relevant water quality laws, it was not required to comply because the permit requirements constitute an unfunded state mandate under § 1-2-112, MCA.

The parties filed separate motions for summary judgment; the motions were fully briefed and oral argument was heard before the District Court on November 22, 2024. On May 12, 2025, the District Court granted DEQ's motion for summary judgment and denied Yellowstone County's motion for summary judgment. Order Granting Respondent's Motion for Summary Judgment (May 12, 2025) ("Order"), Dkt. No. 22.[1] In its ruling, the District Court denied the County's petition for declaratory ruling in all respects, finding that Montana law does not prevent or prohibit Yellowstone County from controlling its discharges of polluted storm water or from achieving compliance with federal and state permitting requirements. The District Court agreed with DEQ and found that Yellowstone County, as the owner or operator of a small MS4, is obligated to comply with the established small MS4 permitting requirements. The District Court also concluded that Montana's small MS4 permitting requirements are not an unfunded state mandate because the requirements fall within three exceptions to the statute, found at § 1-2-112(4)(a), MCA. Yellowstone County filed a Motion to Alter or Amend

[1] All "Dkt. No." references refer to docket numbers from *Yellowstone Co. v. DEQ,* Montana Thirteenth Judicial District Court, Yellowstone Co., Case No. DV-24-80.

Judgment on June 13, 2025, which was briefed by the parties and deemed denied pursuant to Rule 59(f), M. R. Civ. P.

On appeal Yellowstone County provides limited analysis and sparse legal authority in support of its contention that the District Court erred. The County prays that this Court should both reverse the decision of the District Court and order entry of summary judgment in the County's favor. The County has not carried its burden to show the District Court committed any clear legal error in granting summary judgment to DEQ and the Judgment of the District Court should be affirmed.

STATEMENT OF FACTS

I. Introduction

This case centers on Yellowstone County's petition for a judicial determination that it is not subject to the requirements of the Montana Water Quality Act or the Federal Clean Water Act. Yellowstone County's small MS4 discharges pollutants into Montana's surface waters and meets the requirements to be regulated under the applicable water quality laws. Yellowstone County has identified the outfalls where its small MS4 discharges into state surface waters and, for purposes of permit compliance, has operated a storm water management program for approximately 20 years. Yellowstone County does not dispute that it

meets the requirements to be regulated under the state's storm water pollution laws,[2] but contends it has no authority or responsibility to comply.

Additionally, Yellowstone County claims that even if it is determined the County has the requisite authority to apply for a discharge permit and to comply with federal and state permitting requirements, these laws constitute an unfunded state mandate and that it has no obligation to control pollutants related to its discharges. DEQ argued that the stormwater regulations fall within the three exceptions to the state unfunded mandate statute at § 1-2-112(4)(a), MCA, because the duty to control its discharges of polluted stormwater -- is imposed on Yellowstone County under federal law, involves a constitutional obligation, and is a function necessary for the operation of local government.

The District Court agreed with DEQ and found that Yellowstone County is a regulated MS4 under state laws designed to comply with federal statues and that the federal regulation at 40 C.F.R. § 122.34 contains the same six minimum storm water control requirements as required under state permitting laws. In doing so, the District Court found that DEQ "is not requiring anything more of owners or

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[2] Petition for Declaratory Judgment ("Petition") at 4, ¶ 11 (Jan. 22, 2024), Dkt. No 1; Yellowstone County's Reply Br. to Department's Resp. Br. at 4 (Oct. 31, 2024), Dkt. No. 16.

operators of small MS4s than specifically mandated federal requirements." Order at 9-10. The District Court also found that the County must honor the constitutional imperatives embedded in the Montana Water Quality Act and that, as a local government, Yellowstone County has a basic duty to be accountable for its discharges of polluted storm water. Order at 8-10.

II. Legal Background of MS4 Regulation

Under the Montana Water Quality Act ("MWQA") and the Federal Clean Water Act ("CWA"), point source discharges of pollutants must obtain permit coverage to control their discharges of pollutants to state waters. ARM 17.30.1301, ARM 17.30.1101, 33 U.S.C. § 1311(a). *See also* § 75-5-605(2), MCA (stating it is unlawful to discharge pollutants into state waters without a permit). In Montana, permits that allow the discharge of pollutants into surface waters are called MPDES permits.[3] Storm water discharges from some of Montana's larger municipal areas, like portions of Yellowstone County, are classified as point sources and are subject to MPDES permitting requirements. ARM 17.30.1105(1)(d). A core component of MPDES permits is the required imposition

[3] The Montana Pollutant Discharge Elimination System (or MPDES) is designed to be compatible with the federal NPDES permitting program. ARM 17.30.1304(43).

of effluent limitations to control discharges of pollutants. 33 U.S.C. § 1311; ARM 17.30.1344. Under federal law, states are mandated to impose technology-based effluent limitations (or pre-discharge standards) in every instance, because states "stand in the shoes" of EPA when issuing MPDES permits. *N. Cheyenne Tribe v. Mont. Dep't of Env't Quality,* 2010 MT 111, ¶¶ 33, 46, 356 Mont. 296, 234 P.3d 51.

A. Federal Regulation of Small MS4s

In 1987, Congress amended the CWA to include provisions to address stormwater discharges from certain municipalities. *Water Quality Act of 1987,* Pub. L. No. 100-4, 101 Stat. 7 (1987). In addition to addressing larger municipal areas, the amendments further required EPA, in consultation with States and local officials, to regulate additional stormwater discharges as needed to protect water quality. *See* 33 U.S.C. § 1342(p)(6). It was this requirement that led to the designation of small MS4s, i.e., municipal stormwater dischargers from certain population areas of less than 100,000 persons. *Upper Mo. Waterkeeper v. DEQ,* 2019 MT 81, ¶ 5, 395 Mont. 263, 438 P.3d 792. Because of the variable and highly intermittent nature of municipal stormwater, Congress recognized that a flexible regulatory approach was necessary, and that the application of traditional end-of-pipe treatment requirements would typically be impractical. 55 Fed. Reg. 47990, 48038 (Nov. 16, 1990). As a result, Congress set two different stormwater permitting standards, one for industrial stormwater dischargers, which requires

strict compliance with section 301 [33 U.S.C. § 1311] of the CWA (section that requires the implementation of water-quality based effluent limitations in order to comply with water quality standards), and one for municipal stormwater dischargers, which requires municipal stormwater dischargers, instead, to treat their stormwater discharges to the maximum extent practicable (or MEP). 33 U.S.C. § 1342(p)(3). *See Defenders of Wildlife v. Browner,* 191 F.3d 1159, 1164-1167 (9th Cir. 1999) (interpreting meaning of 33 U.S.C. § 1342(p)(3)(B) and finding that Congress did "not require municipal storm-sewer discharges to comply strictly with 33 U.S.C. § 1311(b)(1)(C)."); *see Upper Mo. Waterkeeper,* ¶ 6 (explaining that small MS4s are subject to six federally mandated minimum storm water control measures with the requirement to reduce the discharge of pollutants to the MEP standard).

As implemented in MPDES permits, the control measures may function as appropriate narrative effluent limitations. Narrative effluent limitations, implemented using best management practices ("BMPs"), can be designed to satisfy federal technology requirements (including reductions of pollutants to the

maximum extent practicable) and to protect water quality. 40 C.F.R. § 122.34(a).[4] When BMPs are implemented within the provisions of a required stormwater management program (or "SWMP") consisting of the six minimum control measures and MS4s follow the permitting requirements set forth at 40 C.F.R. § 122.33, EPA considers a stormwater program to be compliant with the MEP standard. *Id.*

The six minimum storm water control measures for small MS4s are: (1) Public Education and Outreach on Stormwater Impacts; (2) Public Involvement/Participation; (3) Illicit Discharge Detection and Elimination; (4) Construction Site Stormwater Runoff Control; (5) Post-Construction Stormwater Management in New Development and Redevelopment; and (6) Pollution Prevention/Good Housekeeping for Municipal Operations. 40 C.F.R. § 122.34(b). These required measures were not intended to be implemented as more conventional technology-based or water quality-based standards, *see* 33 U.S.C. § 1342(p)(3), and EPA presumed that BMPs would typically be sufficient to protect

[4] In 2016, EPA modified its regulations to allow for the imposition of numeric effluent limitations, as appropriate. *See* 40 C.F.R. § 122.34(a); 81 Fed. Reg. 89320 (Dec. 9, 2016). In most cases, however, the level of control needed is achieved through narrative requirements, such as Best Management Practices (or BMPs).

water quality standards and satisfy the MEP requirement. 64 Fed. Reg. 68,772, 68754 (Dec. 8, 1999). EPA's approach in regulating small MS4s was thus consistent with the intent of Congress to provide necessary flexibility when regulating municipal stormwater discharges.

B. Montana's Regulation of Small MS4s

The Montana Legislature adopted the Montana Water Quality Act "mindful of its constitutional obligations under Article II, section 3, and Article IX of the Montana Constitution." § 75-5-102(1), MCA. It is the intent of the Legislature "that the requirements of [the Montana Water Quality Act] provide adequate remedies for the protection of the environmental life support system from degradation and provide adequate remedies to prevent unreasonable depletion and degradation of natural resources." *Id.* In this context, the legislative purpose "is to provide additional and cumulative remedies to prevent, abate, and control the pollution of state waters." *Id.* The Legislature further set forth that it is the policy of Montana to "conserve water by protecting, maintaining, and improving the quality . . . of water for public water supplies, wildlife, fish and aquatic life, agriculture, industry, recreation and other beneficial uses." § 75-5-101(1)(a), MCA. To accomplish these constitutional objectives, a primary tool is the discharge permitting program authorized by § 75-5-401, MCA.

Montana sought permitting authority under Section 402 of the CWA and EPA approved Montana's program on June 10, 1974. 39 Fed. Reg. 26061 (July 16, 1974). The MPDES permit program is implemented through rules adopted by DEQ.[5] §§ 75-5-401 and 75-5-402, MCA. Those rules are intended to be consistent with the requirements of the CWA at 33 U.S.C. § 1342. ARM 17.30.1301; ARM 17.30.1101. MPDES Permits contain two types of effluent limitations, technology-based requirements and, if necessary, water quality-based requirements. See ARM 17.30.1203(1); ARM 17.30.1344(1), (2)(b). Technology-based requirements are the minimum level of control that must be imposed in MPDES permit and these requirements are expressed in permits through the imposition of effluent limitations. *N. Cheyenne Tribe,* ¶¶ 33, 46. Water quality-based requirements are necessary when technology-based requirements alone are insufficient to protect the beneficial uses of state waters. *Id*., ¶ 41.

In 2003, the Montana Board of Environmental Review adopted rules establishing a permitting program to regulate small municipal separate storm sewer systems. 3 Mont. Admin. Register 219 (Feb. 13, 2003). In moving forward with

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[5] Prior to the enactment of Senate Bill 233 in 2021, the Board of Environmental Review had primary rulemaking authority under the Montana Water Quality Act. 2021 Mont. Laws ch. 324.

rules to protect state waters from the harmful effects of municipal storm water discharges, the Board of Environmental made the following findings:

> Storm water runoff from lands modified by human activities can harm surface water resources and can cause or contribute to exceedances of water quality standards. Storm water runoff may contain or mobilize high levels of contaminants, such as sediment, suspended solids, nutrients (phosphorus and nitrogen), heavy metals and other toxic pollutants, pathogens, toxins, oxygen-demanding substances and floatables.

19 Mont. Admin. Register 2717, 2718 (Oct. 17, 2002). The storm water rules were adopted to implement the MWQA and "to comply with the requirements of the CWA." *Upper Mo. Waterkeeper*, ¶ 7. "In accordance with these rules, small MS4s in Montana include the cities of Billings, Missoula, Great Falls, Bozeman, Butte, Helena, and Kalispell (collectively MS4 cities), portions of *Yellowstone*, Missoula, and Cascade counties, as well as Malmstrom Air Force Base, Montana State University, and the University of Montana." *Id.* (emphasis added). Montana's regulated MS4s are considered "small MS4s" and are subject to specific permitting requirements at ARM 17.30.1111. As owners or operators of small MS4s the corresponding governmental entities must then develop, implement, and enforce a storm water management program designed to reduce the discharge of pollutants from their small MS4s to the maximum extent practicable and comply with the six minimum storm water control measures. *See* ARM 17.30.1111(5), (6).

C. MS4 General Permit and Yellowstone County's Small MS4

DEQ has issued five versions of the General Permit for Storm Water Discharges Associated with Small Municipal Separate Storm Sewer Systems (MS4) ("MS4 General Permit"), with the first version becoming effective on January 1, 2005, and most recent version becoming effective on April 1, 2022 (and as modified on July 11, 2022). DEQ's Br. in Supp. Mot. for S.J., Exhibit A, Aff. of Davila ¶ 5, Dkt. No. 13. During the public notice process for the current permit, Yellowstone did not provide any comments. DEQ's Br. in Supp. Mot. for S.J., Exhibit A, Aff. of Davila ¶ 6, Dkt. No. 13. The 2022 MS4 General Permit remains in effect through March 31, 2027. DEQ's Br. in Supp. Mot. for S.J., Exhibit K, Dkt. No. 13.

Yellowstone County owns and operates an MS4 that discharges into surface waters and the County represents the same on its government website. *See* https://www.yellowstonecountymt.gov/publicworks/StormWater.asp (accessed Jan. 11, 2026). In its Order, the District Court noted that the County had taken "systematic actions to comply with the MS4 permit requirements for twenty years," and that "there is authority found in statute and case law requiring the County's on-going compliance with permitting requirements." Order at 6. After first applying for MS4 permit coverage under the first version of the MS4 General Permit in 2006, Yellowstone County has applied for authorization to discharge

pollutants from its municipal storm water under the terms of each successive version of the MS4 General Permit. DEQ's Br. in Supp. Mot. for S.J., Exhibit A, Aff. of Davila ¶ 6, Dkt. No. 13. More recently, after first refusing to seek MS4 permit coverage for over two years, Yellowstone County submitted its application to be covered under the terms of the 2022 MS4 General Permit.[6] DEQ's Br. in Supp. Motion for S.J., Exhibit G, Dkt. No. 13. On September 5, 2024, DEQ authorized Yellowstone County to discharge storm water under the terms of the 2022 MS4 General Permit. DEQ's Br. in Supp. Mot. for S.J., Exhibit H, Dkt. No. 13.

STANDARD OF REVIEW

The Court reviews a district court's grant or denial of summary judgment de novo and applies the criteria of M. R. Civ. P. 56(c). *N. Cheyenne Tribe,* 2010 MT 111, ¶ 18. Conclusions of law upon which the district court bases its decision are reviewed for correctness. *Smith v. Burlington Northern & Santa Fe Ry.,* 2008 MT 225, ¶ 10, 344 Mont. 278, 187 P.3d 639 (citation omitted). If a district court determines no issues of material fact exist, the determination is a conclusion of law

[6] As a result of Yellowstone County's refusal to seek any form of permit coverage for its discharges of municipal storm water, U.S. EPA took enforcement action. DEQ's Br. in Supp. Mot. for S.J., Exhibit J, Dkt. No. 13.

and is reviewed by the Court for correctness. *City of Missoula v. Fox,* 2019 MT 250, ¶ 6, 397 Mont. 388, 450 P.3d 898 (citation omitted). The standard of review concerning a ruling on declaratory judgment is to determine if the district court's interpretations of law are correct. *Id.*

SUMMARY OF ARGUMENT

On appeal, Yellowstone County contends that the District Court erred in making certain factual and legal conclusions and that the Court should reverse the decision of the District Court granting DEQ's motion for summary judgment and denying the County's motion for summary judgment.

The District Court correctly found that the Montana Water Quality Act, as well as the Federal Clean Water Act, requires Yellowstone County to control its discharges of stormwater. Yellowstone County has operated a stormwater management program for nearly twenty years and Montana's constitutional and statutory grants of county power, coupled with the state's MPDES permitting framework, provide Yellowstone County the authority to comply with storm water regulations and to fulfill its permitting obligations. The Court must reject Yellowstone County's overly narrow reading of county authority.

This Court should also affirm the District Court's conclusion that the requirement to obtain a discharge permit and to comply with the storm water control measures at ARM 17.30.1111 is not an unfunded state mandate under § 1-

2-112, MCA. The requirement to obtain a permit and to control its discharges of polluted wastewater is mandated under federal law, involves a constitutional imperative, and is necessary for the operation of local government. Local governments are expected to operate in ways that protect rather than harm public health and welfare.

There are no issues as to any material fact and the motions for summary judgment were correctly decided by the District Court as a matter of law. This Court should affirm the District Court's grant of summary judgment in favor of DEQ because Yellowstone County, as the owner or operator of a small MS4, is subject to small MS4 permitting requirements and has the necessary authority to control its discharges of stormwater into state surface waters.

ARGUMENT

I. The District Court Correctly Determined that Yellowstone County is the Owner or Operator of a Small MS4 and is Obligated Under Federal and State Law to Comply with Storm Water Regulations

Mindful of its obligations under the Montana Constitution, the Legislature identified political subdivisions of the state as subject to the provisions of the MWQA and as potential owners or operators of point sources -- and therefore prospective permittees. *See* § 75-5-103(26), MCA (defining a person to include "a political subdivision of the state"). Any person, including a political subdivision of the State of Montana, who discharges or proposes to discharge storm water from a

point source must obtain coverage under an MPDES permit for its discharges. ARM 17.30.1105(1). Any person who discharges storm water pollutants without a permit is in violation of the MWQA. §75-5-605(2), MCA.

Yellowstone County meets the requirements to apply for an MPDES permit pursuant to the MWQA and its implementing regulations. ARM 17.30.1102(23)(a), ARM 17.30.1105(1). Montana's MPDES permitting rules were adopted to be consistent with the requirements of the Federal CWA. ARM 17.30.1301; ARM 17.30.1101. Congress enacted the CWA "to restore and maintain the chemical, physical, and biological integrity of the Nation's waters." 33 U.S.C. § 1251(a). The CWA is clear that, without a permit, "the discharge of any pollutant by any person shall be unlawful." 33 U.S.C. § 1311(a). *See also Committee to Save Mokelumne River v. East Bay Mun. Util. Dist.*, 13 F.3d 305, 309 (9th Cir. 1993) (finding the CWA "categorically prohibits any discharge of a pollutant from a point source without a permit").

Yellowstone County has been identified as a regulated small MS4 pursuant to ARM 17.30.1102(23)(a) since 2003. Yellowstone County's designation as a regulated MS4 was required as a matter of federal law, because a portion of the county that surrounds the City of Billings met certain population and density thresholds. 19 Mont. Admin. Register at 2725. In its petition for declaratory judgment, Yellowstone County admits that it "met the requirements to apply for a

permit." Petition at 4. The County also admits, on its own website, that it is the owner or operator of a small MS4. Order at 6. *See* https://www.yellowstonecountymt.gov/publicworks/StormWater.asp (accessed Jan. 11, 2026). As the District Court noted, this Court has also recognized that Yellowstone County: is a regulated small MS4, is subject to Montana's small MS4 regulations and permitting requirements, and that state storm water regulations are necessary to comply with the CWA. *Upper Mo. Waterkeeper,* ¶ 7.

II. The District Court Correctly Determined that Yellowstone County Has Authority to Comply with Federal and State Permitting Requirements

In its Opening Brief, and as it did at the District Court, Yellowstone County argues that it lacks any authority to act toward compliance with Montana's storm water rules. Despite its discharges of stormwater, the County claims it is paralyzed because the Legislature has not passed any statute that explicitly or implicitly allows it to comply with any storm water requirement, including any of the six minimum storm water control measures mandated under federal and state law. The County admits, at a minimum, that it has authority to implement internal practices to control its discharges of storm water but asks the Court to construe any permit compliance as optional, despite the environmental and public health stakes and Montana's constitutional right to a clean and healthful environment. The District Court correctly rejected the County's unduly narrow view of its authority.

A. A County with General Powers Has Broad Authority.

A county has legislative, administrative, and other powers provided or implied by law. Mont. Const. art. XI, § 4(1)(b), (2). The Montana Constitution grants broad general powers to units of local government, including counties, and the powers of counties must be liberally construed. *Fair Play Missoula, Inc. v. City of Missoula,* 2002 MT 179, ¶ 27, 311 Mont. 22, 52 P.3d 926. Except where contrary to express statutory language, courts must also liberally construe statutes enacted for the promotion of public health, safety, and welfare. *Larson v. State,* 2019 MT 28, ¶ 29, 394 Mont. 167, 434 P.3d 241 (citing *State ex rel. Florence-Carlton Sch. Dist. No. 15-16 v. Bd. of Cty. Comm'rs of Ravalli Cty.,*180 Mont. 285, 291, 590 P.2d 602, 605 (1978)). As a county with general powers, Yellowstone County has the authority to regulate its own conduct, care for county property, and to manage its business affairs and other county concerns "in all cases where no other provision is made by law." § 7-5-2101(1), MCA. Except where limitations and restrictions are prescribed by law, the board of county commissioners has "jurisdiction and power to perform all other acts and things required by law not enumerated in [Title 7, MCA] or which may be necessary to the full discharge of the duties of the chief executive authority of the county government." § 7-5-2101(2), MCA. The general powers granted to county commissioners pursuant to § 7-5-2101, MCA, are certainly powers granted by the Legislature, and the

Legislature also made political subdivisions, like counties, subject to permitting requirements under the MWQA.

Yellowstone County's powers include the ability to carry out necessary government functions -- like applying for and receiving discharge permits or related permit authorizations, and to control its discharges of polluted storm water. The Legislature has directed Yellowstone County, same as any individual, to comply with the requirements of the MWQA, and the MWQA is a constitutional imperative, necessary to ensure Montanans' fundamental right to a clean and healthful environment. § 75-5-102(1), MCA. When the Legislature made county governments subject to permitting requirements, it was also aware of "all related constitutional duties and limitations." *See Clark Fork Coalition v. Mont. Dep't of Nat. Res. & Conservation.,* 2021 MT 44, ¶ 60, 403 Mont. 225, 481 P.3d 198. With presumed knowledge of the Montana Constitution and its provisions concerning the powers of county government, the Legislature adopted the MWQA and subjected counties to its requirements. County commissioners must fulfill the duties of the county and comply with the requirements of the MWQA.

Despite its plain duty, Yellowstone County claims it has no authority, whatsoever, to comply with the discharge permitting requirements, including compliance with the effluent limits contained with the 2022 MS4 General Permit. Petition, ¶ 25. If true, Yellowstone County has no expressed or implied authority to

be accountable for its discharges of polluted storm water, irrespective of any harm caused. To interpret the MWQA or Section 7-5-2101, MCA, in this fashion would lead to absurd results. Such interpretations must be avoided. *Mont. Sports Shooting Ass'n. v. State,* 2008 MT 190, ¶ 11, 344 Mont. 1, 185 P.3d 1003.

In support of its arguments on appeal, Yellowstone County makes conclusory assertions about its lack of authority, provides scant legal argument, and offers no controlling precedent for its position. As set forth above, Yellowstone County's authority is not so limited that it can do nothing; the County has the authority to control its discharges of polluted stormwater.

B. Yellowstone County Has Long Treated Itself as Having Authority and Capacity in the Area of MS4 Storm Water Regulation

The District Court was correct to use Yellowstone County's past compliance activities as corroborating facts to demonstrate that the County has both the authority and the practical ability to implement MS4 requirements. Order at 6-7. The County claims it makes no difference that it has engaged in nearly twenty years of storm water management activities designed to comply with MS4 permitting requirements. According to the County, the District Court erred because it based its decision on the County's past and current compliance activity. YC's Opening Br. at 7. While it is correct that the District Court based its decision, in part, upon Yellowstone County's past compliance activities, the District Court also

adopted DEQ's argument that the Legislature requires a county government, same as any person, to control its discharges of pollutants under the MWQA, finding that, "[b]y caselaw, statute and historical practice Yellowstone County is an owner or operator of a small MS4. As a small MS4, the County is obligated to comply with the six minimum requirements of MS4 regulations." Order at 7.

Yellowstone County's past activities also demonstrate it is an owner or operator of a small MS4 that discharges pollutants into adjacent surface waters. The County has submitted applications and requested permit coverage as an owner or operator of an MS4 under all five iterations of the MS4 General Permit, including the current version, which was issued on February 14, 2022, and modified on July 11, 2022. DEQ's Br. in Supp. Mot. for S.J., Exhibit A, Aff. of Davila ¶ 6, Dkt. No. 13. Through its words and actions, and over approximately twenty years of its permit related activities, Yellowstone County demonstrates it has the authority and the capacity to control its discharges of storm water and to seek an authorization to discharge under the MS4 General Permit.

C. The Requirement to Use Ordinances or Other Regulatory Mechanisms to Implement Certain Provisions of the Storm Water Rules Do Not Demand Authority Beyond That Which the County Can Lawfully Exercise

Yellowstone County repeatedly argues that it has no authority, whatsoever, to comply with the small MS4 rules at ARM 17.30.1111. To demonstrate this, it

asks the Court to consider the phrase "to the extent allowable under state or local law," a phrase that qualifies portions of three of the six minimum storm water control measures.[7] The phrase does not provide the County with a mechanism to evade permitting requirements by claiming a lack of authority. Instead, the phrase allows flexible compliance options and accounts for those governmental entities that may have more limited regulatory power. If an entity truly has more limited authority to implement or enforce an ordinance or other regulatory mechanism, the rules still provide for compliance. This qualifying language is included in the MS4 General Permit (within its table of required BMPs) and specifically qualifies the prohibition and enforcement procedures for the Illicit Discharge Detection and Elimination, Construction Site Storm Water Management, and Post-Construction Site Storm Water Management control measures.[8] DEQ's Br. in Supp. Mot. for

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[7] Minimum control measures Nos. 3, 4, and 5 contain subparts that require an MS4 to develop and implement ordinances or other regulatory mechanisms to control stormwater related to illicit discharge detection and elimination, construction site runoff, and post-construction site runoff, respectively. These are the only requirements qualified by the phrase "to the extent allowable under state or local law." *See* ARM 17.30.1111(6)(c)(ii)(B), (6)(d)(ii)(A), (6)(e)(iii).

[8] Yellowstone County has stated it is not challenging the conditions of the MS4 General Permit. YC's Brief in Support of Summary Judgment 15 (Sept. 25, 2024), Dkt. No. 10. Yellowstone County did not provide any comments during the public notice process for the current version of the MS4 General Permit, therefore, to the extent the County takes issue with specific BMPs or other conditions set forth in the Permit itself, the County has

S.J., Exhibit K, 2022 MS4 General Permit at 12, 17, 21, Dkt. No. 13. In finding Yellowstone County had the requisite authority to comply, the District Court also recognized the related flexibility attached to the phrase "to the extent allowable under state or local law" in the context of satisfying specific storm water control measures and the regulation of third parties. Order at 7.

In a related issue, Yellowstone County claims the District Court erred when it found the County has authority under subdivision laws to regulate stormwater. YC's Opening Br. at 2. Other than offering a conclusory statement, Opening Br. at 2, the County fails to further argue this point or to cite any relevant authority in support. Indeed, M. R. App. P. 12(1)(g) requires a party to present argument and cite to relevant authorities and statutes in support of an argument on appeal. *State v. Cybulski*, 2009 MT 70, ¶ 13, 349 Mont. 429, 204 P.3d 7. It is not this Court's "obligation to conduct legal research on behalf of a party or to develop legal analysis that might support a party's position." *State v. Gunderson*, 2010 MT 166, ¶ 12, 357 Mont. 142, 237 P.3d 74 (citing *Cybulski*, ¶ 13). Since the County has not

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failed to exhaust its administrative remedies or such arguments have been waived. ARM 17.30.1375; *Barinicoat v. Comm'r of Dep't of Labor and Indus.,* 201 Mont. 221, 225, 653 P.2d 498, 500 (1982). *See also* DEQ's Resp. Br. in Opp. to YC's Mot. for S.J. 11-12 (Oct. 16, 2024), Dkt. No. 14.

developed this issue, it is not necessary for the Court to consider it further. Assuming, arguendo, the Court considers the merits of the issue, the District Court was correct to conclude that County can regulate stormwater (and third parties) through subdivision laws. The District Court did not conclude the County has unlimited storm water authority under its subdivision regulations to implement and enforce the regulatory requirements of ARM 17.30.1111. However, the District Court's analysis demonstrates the County has *some* authority to implement the regulatory requirements specific to storm water ordinance implementation and enforcement. Pointing to statements made by the County during oral argument, the District Court found that "the County agreed that it does have the ability to regulate construction site storm water runoff – one type of wastewater." Order at 7.

After considerable questioning, the County agreed it has at least some enforcement authority related to construction storm water in subdivisions. Transcript pp 9-17. The Court's conclusion here is also consistent with Yellowstone County's basic authority to address storm drainage requirements through county subdivision regulations, *see* §§ 76-3-501(1)(i) and 76-3-504(1), MCA, as well as the County's own subdivision regulations, which plainly provide for storm water control and enforcement in subdivisions. Sections 4.7 and 11.7, Appendix, Excerpts of Yellowstone County Subdivision Regulations. Available at: https://billingsmt.gov/DocumentCenter/View/52562 (accessed Jan. 16, 2026).

Under the flexibility provided through the small MS4 permitting rules, including the effluent limitations that implement the six minimum control measures in ARM 17.30.1111, DEQ has historically accepted various authorities from small MS4s to demonstrate compliance. Yellowstone County offers no authority or substantive argument that the use of various county authorities cannot collectively be used to satisfy storm water requirements. In its briefing at the District Court, DEQ explained that the flexibility provided through the small MS4 permitting program allowed the consideration of general and specific regulatory authorities that allowed small MS4s to work toward developing and implementing a storm water management program, including the requirements related to an MS4's development and implementation of various ordinance and regulatory mechanisms. *See* DEQ's Br. in Supp. Mot. for S.J. at 15-17, Dkt. No. 13 (citing a list of authorities that could be used to address stormwater, including local subdivision regulations). Implementing the BMP requirements in this manner is consistent with the flexibility afforded under the MEP standard. *Upper Mo. Waterkeeper,* ¶¶ 6, 18. In fact, EPA's original Phase II regulations envisioned that all six minimum control measures would be implemented and evaluated through an "iterative process" that would ensure progress continues toward achieving water quality goals. 64 Fed. Reg. at 68754.

When a county owns or operates a regulated small MS4, Montana's constitutional and statutory grants of county power, coupled with the state's MPDES permitting framework, give that county clear legal authority to take the necessary actions to comply with ARM 17.30.1111. Yellowstone County has the authority and the obligation to comply with storm water permitting laws, including the storm water control measures found at ARM 17.30.1111(6).

III. The District Court Correctly Found that the Small MS4 Storm Water Requirements are Not an Unfunded Mandate

The District Court correctly rejected Yellowstone County's claim that compliance with small MS4 permitting requirements constitutes an unfunded mandate under § 1-2-112, MCA. The District Court agreed with DEQ and found that all three exceptions to the statute were applicable, namely, that:

> being held accountable for its discharges of polluted storm water and complying with its legal obligation is already a necessary duty related to basic operation of local government; they are persons under MWQA 75-5-102(26); the County's duty to control its polluted discharges is constitutional in Montana, the right to a clean and healthful environment is a fundamental right guaranteed to all individuals and the MWQA implements this constitutional imperative; and the County has been designated as a regulated MS4 under State laws adopted to comply with federal statutes and related regulations.

Order at 8. The District Court needed to find that only one of the three exceptions at § 1-2-112(4)(a), MCA, applied to overcome the County's claims

of unfunded mandate; however, the District Court correctly found all three exceptions were satisfied under the circumstances.

A. Controlling Discharges of Polluted Storm Water is Necessary for the Operation of Local Government

As a political subdivision entrusted with basic authority and duties, Yellowstone County is accountable for its discharges of polluted storm water and as an owner and operator of a regulated small MS4, it must comply with related legal obligations as a basic, necessary requirement for the operation of local government. *See* §§ 1-2-112(4)(a) and 7-5-2101, MCA. On appeal, the County does not provide an analysis of how the District Court erred and why controlling the County's discharges of polluted wastewater is not a necessary operational function of local government. YC's Opening Br. at 13. Without supporting legal analysis, the County simply asserts that controlling its storm water discharges is not necessary to its operations and baldly contends that the District Court's interpretation would nullify the statute. *Id.*

To comply with M. R. App. P. 12(1)(g), Yellowstone County must present arguments and cite to relevant authorities. *State v. Cybulski*, ¶ 13. The County's conclusory assertions under § 1-2-112(4)(a), MCA, provide no analysis as to how the District Court erred in concluding that controlling a political subdivision's

discharges is necessary government function. Indeed, this Court has no obligation to further develop the County's legal analysis. *Gunderson,* ¶ 12.

In any case, the District Court's conclusion is correct and does not open a Pandora's box that nullifies the statute. Any "person," including Yellowstone County, may not cause pollution of any state waters or "discharge sewage, industrial wastes, or other wastes into any state waters." §§ 75-5-103(26), 75-5-605(1), MCA. The MWQA was adopted to protect Montana's "environmental life support system from degradation" and has a basic purpose to prevent, abate, and control water pollution. §§ 75-5-102(1), 75-5-101(2), MCA. While Yellowstone County is certain it "can operate without the regulation of stormwater," YC's Opening Br. at 13, its duty under the law requires otherwise. Local governments are responsible for their discharges of pollutants and must operate their small MS4s in a manner to prevent and control water pollution.

B. Yellowstone County's Compliance with Small MS4 Discharge Permitting Requirements is Required Under the Federal Clean Water Act

The requirement for Yellowstone County to obtain a discharge permit and to comply with the effluent limitations imposed in the MS4 General Permit is mandated under the Federal Clean Water Act and the related federal regulations. 33 U.S.C. § 1311(a); 33 U.S.C. § 1342(p), and 40 C.F.R. § 122.34. Montana adopted, nearly verbatim, the federal small MS4 regulations when it adopted ARM

17.30.1111. *Upper Mo. Waterkeeper,* ¶ 24. Citing 40 C.F.R. § 122.34(a), the District Court concluded that under the state's small MS4 rules, "MDEQ is not requiring anything more of owners or operators of small MS4's than the specifically mandated federal requirements." Order at 9. The District Court further found that state storm water rules contain the "exact same six minimum requirements that MDEQ's permits have for small MS4s" and that "everything that is required of the County to comply with the permit is the exact same as what is required federally." Order at 9-10.

In its Opening Brief, Yellowstone County states that "the reason for the rule [ARM 17.30.1111] is the amendments to the Clean Water Act." YC's Opening Br. at 12. Since the County admits ARM 17.30.1111 was adopted to comply with amendments to the Federal CWA, it is difficult to understand how the County can also conclude that the state's storm water rule is not federally mandated.

Yellowstone County's arguments are unsupported and logically unsound. The County provides a conclusory assertion and then thinly argues that a federal statute does not mandate its compliance with state stormwater requirements at ARM 17.30.1111. YC's Opening Br. at 12. The purpose of Montana's storm water rules "is to establish a system for regulating dischargers of potential pollutants from point source dischargers of storm waters into surface waters" and these rules "are intended to be compatible with the national pollutant discharge elimination

system (NPDES) as established by the United States environmental protection agency pursuant to section 402 of the federal Clean Water Act (CWA), 33 USC 1251, et seq." ARM 17.30.1101. When the Board of Environmental Review adopted storm water regulations for small MS4s in 2003, it clearly did so to comply with the federal requirements EPA adopted under the CWA. 19 Mont. Admin. Register 2718. Yellowstone County's obligation to obtain a permit and comply with small MS4 permitting requirements remains a federal law obligation, not a purely independent state mandate. As the owner or operator of a small MS4, Yellowstone County is required to obtain a discharge permit and comply with the federal minimum requirements contained at ARM 17.30.1111.

In its only cognizable argument on the federal mandate issue, the County argues that federal law does not require the regulation of any small MS4 entity if the entity has no authority to "enact or enforce regulations" concerning stormwater. *Id.* In seeking to avoid responsibility under § 1-2-112(4)(a), the County attempts to use the phrase "to the extent allowable under state or local law," as found in 40 C.F.R. § 122.34(b), to exempt it from all permitting requirements. As set forth above, the qualification "to the extent allowable under state or local law" only concerns three of the six minimum measures and even then, only a portion of those three. More importantly though, and as set forth above, the qualification *provides*

for compliance and does not exempt small MS4s from the requirement to obtain or permit or from the related small MS4 permitting requirements.

The District Court was correct in concluding that the state's small MS4 rules are based on a federal mandate from the CWA. States are required to implement the six minimum control measures of 40 C.F.R. § 122.34(b) in their permitting programs and must apply them to small MS4s -- like Yellowstone County.

C. Yellowstone County's Compliance with Small MS4 Discharge Permitting Requirements is Required Under the Montana Constitution

Yellowstone County also challenges the District Court's conclusion that the stormwater requirements are exempt under § 1-2-112(4)(a), MCA, because "the County's duty to control its polluted discharges is constitutional in Montana" and that "the right to a clean and healthful environment is a fundamental right guaranteed to all individuals and the MWQA implements this constitutional imperative." Order at 8. The County argues that since the Montana Constitution was adopted in 1972, and because the storm water rules were enacted to comply with amendments to the Clean Water Act some thirty years later, these requirements could not be based on a constitutional imperative. YC's Opening Br. at 12.

The County's claims are misplaced. Increased population and the density of development leads to more impervious surfaces, additional runoff, and increases in

storm water pollutants that "can harm surface water resources and can cause or contribute to exceedances of water quality standards." 19 Mont. Admin. Register at 2718. Alongside its stated purpose of complying with federal law, the Board of Environmental Review concluded that adopting the storm water rules was necessary to prevent the negative water quality impacts of storm water. *Id.* Precisely how constitutional rights are protected, including necessary regulatory requirements, must evolve over time. It makes no difference that Montana's storm water rules were adopted 30 years after the Montana Constitution was adopted. The Framers did not need to envision what type of environmental controls would be necessary to protect Montana's water quality and fundamental constitutional rights. *Held v. State,* 2024 MT 312, ¶ 27, 419 Mont. 403, 560 P.3d 1235 (holding that the Constitution "does not require the Framers to have specifically considered an issue for it to be included in the rights enshrined in the Montana Constitution"). The Framers envisioned that the right to a clean and healthful environment was a fundamental right guaranteed to all persons. *Held,* ¶ 22 (citing both Article II, Section 3 and Article IX, Section 1 of the Montana Constitution). The intent of the Framers was also to provide environmental protections that were both "anticipatory and preventative." *Held,* ¶ 25 (citation omitted). The County's static reading of the Constitution has been rejected by this Court. *See Held,* ¶ 27.

Significant increases in urban development and the associated increase in polluted runoff has created a water quality issue that must be addressed.

The provisions of the MWQA plainly implement constitutional directives and their corresponding responsibilities. § 75-5-102(1), MCA. Yellowstone County's duty to comply with the requirements of the MWQA concerns a constitutional mandate that the County may not simply choose to ignore. The County must control its discharges of polluted stormwater and prevent harm to state surface waters pursuant to the MWQA and the Montana Constitution.

CONCLUSION

Yellowstone County has both the authority and the responsibility to control its discharges of municipal storm water. The County's claims that it need not comply with long-established state and federal water quality laws and that the related permit requirements constitute an unfunded state mandate were correctly rejected by the District Court.

For the reasons set forth herein and in the District Court record, the District Court correctly determined that Yellowstone County was not entitled to any relief it sought in its Petition for Declaratory Judgment. The Court should affirm the District Court's Order granting DEQ's motion for summary judgment and denying Yellowstone County's motion for summary judgment in all respects.

Respectfully submitted this 21st day of January, 2026.

By: */s/ Kurt R. Moser*
KURT R. MOSER

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CERTIFICATE OF COMPLIANCE

Pursuant to Rule 11(4)(e) of the Montana Rules of Appellate Procedure, I certify that this brief is printed with proportionately spaced Times New Roman typeface 14-point font, is double-spaced, and the word count calculated by Microsoft Word is 7,772, excluding Table of Contents, Table of Authorities, and Certificate of Compliance.

By: */s/ Kurt R. Moser*
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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 01-21-2026:

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