Response to Comments
CH SP Acquisition LLC d/b/a Spanish Peaks Mountain Club
MPDES Permit MT0032174

On May 26, 2024, the Montana Department of Environmental Quality (DEQ) issued Public Notice MT-24-06, stating DEQ's intent to issue a Montana Pollutant Discharge Elimination System (MPDES) permit to CH SP Acquisition LLC d/b/a Spanish Peaks Mountain Club (Spanish Peaks) for discharges from the Spanish Peaks Mountain Club Snowmaking on Spirit Mountain, Andesite Mountain and the Spanish Peaks Base Area. Public notice MT-24-06 stated that DEQ prepared a draft permit and fact sheet and draft environmental assessment.

As a result of comments received for Public Notice MT-24-06, DEQ prepared an updated Fact Sheet and draft permit and opened a second public comment period. Administrative Rules of Montana (ARM) 17.30.1376.

On February 3, 2025, DEQ issued a second public notice, Public Notice MT-25-02, stating DEQ's intent to issue a MPDES permit to CH SP Acquisition LLC d/b/a Spanish Peaks Mountain Club (Spanish Peaks) for discharges from the Spanish Peaks Mountain Club Snowmaking on Spirit Mountain, Andesite Mountain and the Spanish Peaks Base Area. Public notice MT-25-02 stated that DEQ had prepared a draft permit and fact sheet for the project. The public notice required that all substantive comments must be received or postmarked by March 6, 2025, to be considered in formulation of the final determination and issuance of the permit.

This Response to Comments document includes a summary of comments received and responses to comments received during both public comment periods. DEQ has considered the following comments in preparation of the final permit and decision. Comments numbered 1 through 33 were received during the first public comment period (MT-24-06); comments numbered 34 through 45 were received during the second comment period (MT-25-02). Duplicative comments (e.g., the same comment received from the same commenter during both public comment periods) are only addressed once in the Response to Comments document. The following Response to Comment document is an addendum to and supersedes relevant portions the Fact Sheet prepared for Public Notice MT-25-02, to the extent specific changes or clarifications are discussed herein.

The table below identifies those individuals who submitted comments.

Persons Submitting Significant Comments on the Fact Sheet and Draft MPDES Permit MT0032174	
Number	**Commenter**
1	John Meyer, Cottonwood Environmental Law Center
2	Peter Jacoby
3	Colleen F. Moore, Bozeman, Montana
4	Rich Chandler, Lone Mountain Land Company
5	Jean Riley, Montana Department of Transportation
6	Scott Bosse, American Rivers
7	Brad Niva, Big Sky Chamber of Commerce
8	Dawn and Brian Gonick, Big Sky, Montana
9	Kim and Chris Colby, Big Sky, Montana
10	Erin L. Steva, Greater Yellowstone Coalition
11	Dale and Sandra Tremblay, Big Sky, Montana
12	Walker and Bill Jones, Big Sky Montana
13	Taylor Middleton, Big Sky Resort
14	Amy Cholnoky, Big Sky Montana
15	Whitney H. Montgomery, Big Sky Community Organization
16	Kurt Dykema, Association of Gallatin Agricultural Irrigators
17	Johnny O'Connor, Big Sky County Water and Sewer District
18	Daniel Bierschwale, Big Sky Resort Area District

Persons Submitting Significant Comments on the Fact Sheet and Draft MPDES Permit MT0032174	
Number	**Commenter**
19	Kristin Gardner, Gallatin River Task Force
20	Hiram Towle, Bridger Bowl
21	Patrick Byorth, Trout Unlimited
22	Guy Alsentzer, Executive Director, Upper Missouri Waterkeeper

Responses to Comments on the Environmental Assessment, Fact Sheet and Draft MPDES Permit MT0032174

Comments from Public Notice MT-24-06

Commenter 1. John Meyer, Cottonwood Environmental Law Center
Commenter 2. Peter Jacoby
Commenter 3. Colleen F. Moore

Commenters 2 and 3 submitted general comments in opposition to the draft permit. Their comments are addressed by the responses to commenter 1.

Comment 1: Cottonwood requests a public hearing to discuss the DEQ's failure to address the potential impacts of pharmaceutical and PFAS pollution and the agency's failure to prepare an Environmental Impact Statement in light of the potential impacts of those pollutants. In addition, Cottonwood requests public comment on the DEQ's attempts to shift the burden to the public to provide and disclose relevant documents in the agency's possession when completing environmental analysis. *See* MCA § 75-1-201(6)(b).

Response: The commenter here claims DEQ is shifting the burden to the public to disclose relevant documents pursuant to § 75-1-201(6)(b), MCA, and claims the statute is unconstitutional. The comment is misplaced. The statute the commenter refers to concerns the admission of extra-record evidence during a court proceeding challenging the agency's environmental review. DEQ's environmental review process under MEPA is not a court

proceeding. Additionally, any allegations concerning the unconstitutionality of a statute are outside the scope of the MEPA review process.

This was the only request for a public hearing that DEQ received on the draft permit (from Commenter 1 only). ARM 17.30.1374(1)(a) states "the department shall hold a public hearing whenever it finds, on the basis of requests, a significant degree of public interest in a draft permit(s)." DEQ evaluated the commenter's request for a public hearing and decided a public hearing was not necessary based on the following:

- There were no other requests for a public hearing during the first public notice period.
- Most comments received during the public comment period for MT-24-06 expressed broad support of the draft permit.
- During a public hearing, DEQ takes public comments and does not respond to those comments during the hearing.
- The commenter submitted numerous comments regarding the issues referenced in the request and DEQ will respond to those in this Response to Comments document.

No change is made to the draft permit in response to this comment.

Comment 2: The Environmental Assessment Violated MEPA Because the DEQ Failed to Establish Baseline Conditions.

DEQ's Environmental Assessment is insufficient because it fails to establish baseline levels of PFA and PPCP pollution before determining that the proposed permit would not significantly affect those undetermined baseline levels. "[W]ithout [baseline] data, an agency cannot carefully consider information about significant environment impacts. Thus, the agency 'fail[s] to consider an important aspect of the problem,'" resulting in an arbitrary and capricious decision. *N. Plains Res. Council, Inc. v. Surface Transp. Bd., 668 F.3d 1067, 1085 (9th Cir. 2011)* (citation omitted). A failure to collect or analyze baseline data also deprives the public of its right to participate in the process. *Id*., *See also Robertson,* 490 U.S. at 349, 109 S.Ct. 1835. Several courts have found environmental assessments insufficient based on a lack of baseline data. *Oregon Nat. Desert Ass'n v. Jewell*, 840 F.3d 562, 568 (9th Cir. 2016). DEQ clearly failed to establish any baseline data for PFAs or PPCPs and needs to conduct baseline testing to conclude whether the proposed permit significantly impacts the environment. The Environmental Assessment will be insufficient regardless of its significance determination on PFA and PPCP impacts until DEQ establishes a baseline for PFA and PPCP pollution.

The DEQ violated MEPA by failing to establish a baseline of what pharmaceuticals are in the treated wastewater that is to be used to make snow, as well as the baseline levels of those pharmaceuticals in the receiving waters. The DEQ should not issue a permit until it has done so. This information is readily available to the agency, but it is not available to the public.

The public cannot collect samples of the treated wastewater to determine whatpharmaceuticals and PFAs are found in the effluent, but the agency can collect this information or require the permit applicant to provide the information. To the extent the agency claims that 'pharmaceuticals' is a broad term, we encourage you to review your public acknowledgment before the BER in which the agency defined pharmaceuticals as "Pharmaceuticals and personal care products are a diverse group of chemicals including all human, veterinary drugs, dietary supplements, topical agents such as cosmetics and sunscreens, laundry and cleaning products." *Mont. Rivers v. Mont. Dep't of Envtl. Quality*, 2022 MT 132, P10. In addition, the agency created a PowerPoint listing the most common pharmaceuticals found in treated effluent. Ex. 1. Cottonwood has also provided specific pharmaceuticals identified by the USGS. Ex. 21. Please provide a baseline of these pharmaceuticals, in addition to the PFAs that are now subject to federal regulation. The agency should look at the presence/absence of those pollutants in the South Fork/West Fork of the Gallatin River below where the Yellowstone Club made snow using treated sewage to determine the potential impacts of the pharmaceuticals and PFAs.

The commenter provided the following list when referring to PFAS and PPCPs:

"PFOA, PFOS, PFHxS, PFNA, HFPO-DA and PFAS mixtures containing at least two or more of PFHxS, PFNA, HFPO-DA, and PFBS."

"PPCPs: 17-alpha-ethynyl, 17-alpha-estradiol,17-beta-estradiol, Androstenedione, Estriol, Estrone, Diethylstilbestrol, Progesterone, Testosterone, Carbamazepine, Diazepam, Dilantin, Diclofenac, Ibuprofen, Gemfibrozil, Naproxen, Triclosan, Sulfamethoxazole, Meprobamate, Fluoxetine, Pentoxifylline, Trimethoprim, Hydrocodone, Atrazine, Bisphenol_A, Caffeine 1111•1, DEET, Oxybenzone and Nonylphenol."

Response:

PFAS and PPCPs represent an emerging area of environmental regulation. The MPDES program has not yet incorporated monitoring requirements or limits for these chemicals in any discharge permits and no specific water quality standards have been derived or adopted in Montana for these substances. While it is understood that these substances may be associated with domestic wastewater, their presence is very unpredictable and their concentrations and response to treatment technologies are not well understood. DEQ has developed a PFAS action plan to address potential PFAS contamination in state waters. That work is ongoing. There are no known areas of elevated PFAS levels near the proposed discharge location.

The proposed discharge is seasonal, of short duration, and the source is a relatively small community of fewer than 3,000 people. Observations made during the snowmelt and runoff season at the Yellowstone Mountain Club (see permit MT0032051 2024 Annual Report)

indicated that runoff from the ski slopes where snowmaking occurred was very gradual. Further, runoff was soaking into the ground before reaching surface waters, making it difficult to even collect samples for analysis of the snowmelt water. It remains unknown if a direct discharge to state surface waters is occurring or even will occur.

The comment makes several invalid assumptions regarding "baseline levels of PFA and PPCP pollution." Pollution is defined at MCA § 75-5-103(28)(a) as "contamination or other alteration of the physical, chemical, or biological properties of state waters that exceeds that permitted by Montana water quality standards…" There are no indications that the narrative standards are being exceeded. DEQ cannot practically assess whether "pollution" is occurring upstream and establish a baseline for PFAS and PPCPs in the receiving waters. Nor can DEQ practically assess whether PFAS and PPCPs are present in the melting snow in sufficient quantities to cause pollution. The basic requirement for establishing effluent limitations in MPDES permits is the likelihood, or reasonable potential (RP), for the discharge to cause or contribute to an exceedance of a water quality standard. In the absence of numeric water quality standards, it is not possible to determine whether there is numeric RP. Regarding RP to exceed the narrative standard that prohibits discharges that would cause toxicity or harm to human health or aquatic life, DEQ finds that the proposed discharge is relatively small, seasonal in nature, and only represents a potential discharge to state surface waters. As such there is not reasonable potential for Spanish Peaks' snowmaking discharges to cause exceedances of the narrative standard.

The commenter states that DEQ has created a power point presentation identifying the most common PPCPs in treated effluent. The presentation referenced is titled "Pharmaceuticals, Personal Care Products, Endocrine Disruptors (PPCPs) and Microbial Indicators of Fecal Contamination in Ground Water in the Helena Valley, Montana." This presentation described a ground water sampling conducted in a specific location that is not in the same part of the state, which has no similarity to the geology or population conditions at the proposed discharge location. The presentation references some "Selected Previous Investigations on PPCPs and Coliphage in Ground Water." Methods listed in the presentation are for sampling and analysis of wells and public water supplies (also wells); all of which are ground water samples. PPCP concentrations are provided for several PPCPs found in ground water. The sections of the presentation that refer to wastewater discharge are in reference to septic tanks. The commenter misrepresents the identification of PPCPs found in ground water after discharge from septic tanks, as essentially equivalent to PPCPs found in "treated effluent." While septic tanks do represent treatment, effluent from a septic tank is not equivalent to treated effluent from a more sophisticated wastewater treatment facility and DEQ has no data from sources within Montana indicating that all these PPCPs will be found in all treated effluent.

The presentation also states that when PPCPs are present in municipal treatment systems concentrations will vary from treatment system to treatment system and that the goal for further regulation is to identify "potential environmental issues, thereby fostering further environmental

research, and to compile and integrate the resulting data so that the scientific community and the public can reach informed decisions – ensuring that science provides the foundation for any eventual discussion/decisions regarding guidance/regulation." DEQ is currently engaged in this work. The presentation the commenter points to is nascent part of that work. Standards are not yet adopted for PPCPs (or PFAS) and regulatory decisions have not been made. It is neither appropriate nor lawful to impose such regulations in this MPDES permit.

No change is made to the draft permit in response to this comment.

Comment 3: The Environmental Assessment violates MEPA by failing to take a "hard look" at the potential impacts of the proposed snowmaking.

NEPA and MEPA's "hard look" requirement is meant to ensure that "the agency will not act on incomplete information, only to regret its decision after it is too late to correct." *Marsh v. Or. Nat. Res. Council*, 490 U.S. 360, 371 (1989). "Implicit in the requirement that an agency take a hard look at the environmental consequences of its actions is the obligation to make an adequate compilation of relevant information, to analyze it reasonably, and to consider all pertinent data." *Clark Fork Coal. v. Mont. Dep't Envtl. Quality*, 2008 MT 407, ¶ 47, 347 Mont. 197, 197 P.3d 482 (citation omitted). An agency cannot "ignore pertinent data." *Ravalli Cnty. Fish and Game Ass'n, Inc.*, 273 Mont. at 381 (citation omitted). MEPA requires DEQ to compile relevant information regarding environmental impacts and complete the environmental analysis to the "fullest extent possible." *Bitterrooters for Planning, Inc. v. Mont. Dep't of Envtl. Quality*, 2017 MT 222, ¶34, 388 Mont. 453, 401 P.3d 712. "It is the agency, not an environmental plaintiff" that has a "duty to gather and evaluate" the "information relevant to the environmental impact of its actions[.]" *Friends of Clearwater v. Dombeck*, 222 F.3d 552, 558 (9th Cir. 2000). "[F]ulfillment of this vital responsibility should not depend on the vigilance and limited resources of environmental plaintiffs." *Id.* It is incumbent on agencies to consider science already within the agency's possession when fulfilling MEPA requirements. *Friends of Clearwater*, 222 F.3d at 559 (holding that agency was on notice that relevant reports and data existed because the agency itself had generated the report). The Court affords great deference to DEQ when it utilizes its expertise, not when it avoids using it. *See e.g, Mont. Envtl. Info. Ctr. v. Mont. Dep't of Envtl. Quality*, 2019 MT, ¶26, 397 Mont. 161, 451 P.3d 493 ("An agency has an obligation to "examine the relevant data and articulate a satisfactory explanation for its action. . ."); *see also Alliance for the Wild Rockies v. U. S. Forest Serv.*, 907 F.3d 1105, 1112 (9th Cir. 2018) ("a court is not to substitute its judgment for that of the agency. . . Nevertheless, the agency must 'examine the relevant data and articulate a satisfactory explanation for its action.'" (citations omitted)). DEQ must also disclose the science in its possession relevant to this proposed permit. *Friends of the Clearwater*, 222 F.3d at 558-61.

"At its core, MEPA requires DEQ to engage in a prescribed level of environmental forecasting before taking action impacting the environment." *Park Cnty. Envtl. Council*, ¶31. "While

'foreseeing the unforeseeable' is not required, an agency must use its best efforts to find out all that it reasonably can." *Barnes v. U.S. Dept. of Tansp.*, 655 F.3d 1124, 1136 (9th Cir. 2011) (citation omitted). MEPA foresight needs to be more robust than NEPA foresight: "Our constitution does not require that dead fish float on the surface of our state's rivers and streams before its farsighted environmental protections can be invoked." *MEIC I*, ¶ 77.

Critically, the Montana Supreme Court has held that the agency's analysis of impacts cannot be spared from MEPA analysis because they fail to cross a legal threshold or because standards do not exist for the pollutant of concern. *Cottonwood Environmental Law Center v. MT DEQ*, 2024 MT 105N, ¶32; *see also*, *Calvert Cliffs Coordinating Committee, Inc. v. United States Atomic Energy Com.*, 449 F.2d 1109, 1123 (D.C. Cir. 1971) (rejecting failure to prepare NEPA analysis because standards would not be exceeded). Reducing MEPA analysis to a simple question of legal violation obviates the Act's purpose: "environmental forecasting." *Park Cnty. Envtl. Council*, ¶31 *Park Cnty. Envtl. Council*, ¶31. MEPA analyses must include all reasonably foreseeable impacts, even if those impacts are below legal limits or those impacts are not explicitly proscribed, so long as those impacts have "environmental consequences." *Clark Fork Coal. v. Mont. Dep't Envtl. Quality*, 2008 MT 407, ¶ 47, 347 Mont. 197, 197 P.3d 482 (citation omitted). Analyzing and disclosing potential environmental impacts under MEPA neither establishes nor is required to be based on established regulatory standards. *Park Cnty. Envtl. Council*, ¶80 ("MEPA is procedural and contains no regulatory language"). MEPA required the agency to disclose the impacts of its actions, not place limitations or conditions on specific PPCPs or PFAs. *Id.* DEQ cannot escape reporting the potential impacts of PFA and PPCP simply because it has not established PFA or PPCP limitations.

Response: DEQ's MEPA review addressed the potential effects of the discharge and associated activities at the site. The potential for PPCPs and PFAS to be present in the discharge are addressed in the permit Fact Sheet (pp. 26 – 28), which is referenced in the Environmental Assessment (EA). Additionally, regarding PPCPs, in conducting its environmental review, DEQ cannot engage in rank speculation regarding the presence of hundreds or even thousands of different PCPPs in the receiving water or in the effluent. Without any indication of the presence of specific PCPPs, it is unwarranted to require testing. Because no surface water quality standards have been derived for these compounds, DEQ also lacks reasonable information to assess impacts of observed concentrations, even if such compounds are detected. See also response to comment 2.

No change is made to the draft permit in response to this comment.

Comment 4: DEQ violated MEPA by failing to compile, consider, and disclose any of the science, data or information in its MEPA analysis regarding the impacts of PFA or PPCP pollution.

Response: See responses to comments 2 and 3. No change is made to the draft permit in response to this comment.

Comment 5: DEQ's Environmental Assessment stated, "Effluent limits and permit conditions would ensure water quality standards for aquatic life are protected." Ex. 17 at 2.1(e) (quoting ARM 17.30.623(1)). DEQ failed to take a "hard look" at whether fish in the receiving waters will propagate, given its admission that PPCP pollution "may threaten aquatic life." *Cottonwood v. MT DEQ*, DV-21-833D, ¶22 (DEQ answer to amended complaint) (citing *Montana Rivers v.* MT DEQ, 20-200A*).* DEQ failed to take a hard look at whether fish in the receiving waters will propagate, given the science that pharmaceuticals are making fish change sexes. Ex. 21; *see also* Ex. 20 ("native fish populations were found to exhibit endocrine disruption, including low male-to-female sex ratio and fish having both female and male reproductive organs (gonadal intersex)." The possibility of such outcomes is clearly incompatible with an assessment that "aquatic life will be protected." Ex. 17 at 2.1(e).

The agency failed to disclose and analyze the potentially significant impacts of certain PPCPs, such as antidepressants, which the agency reported can have "[p]rofound effects on the development, spawning, and other behaviors" in "aquatic organisms." Ex. 1 at 000994. "Sex steroids (e.g., from oral contraceptives) can feminize male fish and change the behaviors of either sex[.]" Ex. 1 at 000968. "Acute toxicity, carcinogenesis, and mammalian endocrine disruption are highly visible concerns[.]" Ex. 1 at 000996. If the agency had discussed the information and data in its possession regarding PPCPs and made a rational connection between the facts found and the decision made, it would be entitled to deference. *Mont. Envtl. Info. Ctr. v. Mont. Dep't Envtl. Quality*, 2019 MT 213, ¶26 (citations omitted). However, DEQ failed to consider the impacts of PPCP pollution at all.

The agency's determination that "any related water quality changes would be nonsignificant" is similarly arbitrary and capricious because it failed to consider the impacts of PPCP pollution in its analysis. Ex. 17 at 2.1(b). The agency's decision to issue the MPDES permit was unlawful, arbitrary, and capricious because it was made without consideration of all relevant factors. *E.g.*, *Bitterrooters for Planning, Inc.*, ¶16.

Response: DEQ permits numerous municipal discharges, some of which discharge over one million gallons per day, into state surface waters. Despite reports or studies indicating that endocrine disruption and other aquatic life changes are happening across the country in response to various PPCP chemicals, DEQ is unaware that any of the permitted discharges in Montana are causing any of the effects on aquatic life that are noted in the comment. However, DEQ does know that fish spawn successfully in many of the streams where MPDES permitted discharges occur and have occurred for decades (i.e. the Madison, Gallatin, East Gallatin, Clark Fork, and Missouri Rivers to name a few) and none of these permitted discharges currently regulate PPCP chemicals. It is a reasonable conclusion that the small discharge from Spanish Peaks

snowmaking, which will accumulate on ski slopes and be diluted by natural snowpack prior to potentially discharging to small intermittent streams, will likewise not have reasonable potential to cause the effects noted in the comment. Until beneficial use impacts from specific pharmaceuticals are studied and evaluated and corresponding standards are adopted, potential impacts are unknown and are extremely speculative. As to the referenced answer from *Cottonwood Envt'l Law Center v. DEQ*, Montana 18th Judicial Dist. Court, Case No. DV-21 833D, involving the commenter's challenge to a similar MPDES permit, the commenter omits DEQ's qualification whereby DEQ stated that "DEQ denies much certainty exists regarding the potential impacts of pharmaceuticals in aquatic environments."

See also, responses to comments 2 and 3. No change is made to the draft permit in response to this comment.

Comment 6: DEQ's Environmental Assessment is also insufficient because DEQ has failed to explain why it did not consider PFA pollution in the drinking water-classified Gallatin River. PFA pollution is a reasonably foreseeable impact of the proposed permit. As mentioned above, DEQ must analyze PFA pollution within this proposed permit *even if there is no legal threshold for PFA pollution* because that PFA pollution will have an impact. *Cottonwood Environmental Law Center v. MT DEQ*, 2024 MT 105N, ¶32; *Calvert Cliffs Coordinating Committee, Inc. v. United States Atomic Energy Com.*, 449 F.2d 1109, 1123 (D.C. Cir. 1971).

DEQ knows about the health effects of PFA pollution on people and is on notice of the aquatic effects of PFA pollution. Ex. 4, 5, 9, 10, 11, 13 and 15. The effects of PFA pollution are easily within reach of DEQ's "best efforts to find out all that it reasonably can." *Barnes v. U.S. Dept. of Tansp.*, 655 F.3d 1124, 1136 (9th Cir. 2011) (citation omitted). DEQ should therefore include PFA pollution in the Environmental Analysis.

Response: The PFAS discussion of the Fact Sheet (pp.27-28) is incorporated into the EA and addresses the questions raised in the comment. See also, responses to comments 2, 3, 44. No change is made to the draft permit in response to this comment.

Comment 7: The Montana Department of Environmental Quality was required to prepare an Environmental Impact Statement because there are substantial questions as to whether the challenged permit may have significant impacts on the environment.

The Montana DEQ violated MEPA by failing to prepare an Environmental Impact Statement. "A determination that significant effects on the human environment will in fact occur is not essential… If substantial questions are raised whether a project may have a significant effect upon the environment, an EIS must be prepared." *Ravalli Cnty. Fish and Game Ass'n, Inc.*, 273 Mont. at 381 (citation omitted). "Part of the harm [M]EPA attempts to prevent in requiring an EIS is that, without one, there may be little if any information about prospective environmental

harms and potential mitigating measures." *Winter v. Nat. Res. Def. Council*, 555 U.S. 7, 23, 129 S. Ct. 365, 172 L. Ed. 249 (2008).

The Environmental Assessment concludes that "water quality, aquatic life, and human health, would be protected." Ex. 17 at 2.1(b) and 2.1(e). Cottonwood has raised substantial questions about whether the challenged snowmaking "may" have a significant effect. Ex. 1, 2, 5, 6, 9, 10, 11, 12, 13 and 15. DEQ itself has stated that "pharmaceuticals are emerging contaminants of concern that may threaten aquatic life" and that "[t]here is evidence that exposure to PFAS can lead to adverse human health effects." *Cottonwood Envtl. Law Center v. MT DEQ*, DV-21-833D, ¶22 (DEQ answer to amended complaint) (citing *Montana Rivers v.* MT DEQ, 20-200A). Ex. 4, 15. DEQ's own admission that PFA and PPCP pollution in the snow "may threaten aquatic life" raises substantial questions about DEQ's conclusion that aquatic life "would be protected." Ex. 17 at 2.1(e); Cottonwood Envtl. Law Center v. MT DEQ, DV-21-833D, ¶22. DEQ violated MEPA by failing to prepare an EIS. *Ravalli Cnty. Fish and Game Ass'n, Inc.*, 273 Mont. at 381.

Under MEPA, agencies weigh seven factors to determine significance. ARM 17.4.608. The proposed permit clearly meets the first factor, "severity, *duration*, geographic extent, and frequency of occurrence of the impact," as PFAs and PPCPs are extremely durable pollutants. ARM 17.4.608 (emphasis added); Ex. 1, 5. The second factor, "probability that the impact will occur if the proposed action occurs," is also met, as PFAs and PPCPs will be present in currently unknown concentrations based on DEQ's own published materials. ARM 17.4.608; Ex. 1, 2, 4, 5, 6, 7, 9, 13 and 15. The fifth factor, "the importance to the state and to society of each environmental resource or value that would be affected," is also met, as the proposed permit will contaminate Montana's *drinking water*. ARM 17.4.608. The seventh element, "potential conflict with local, state, or federal laws, requirements, or formal plans," is also clearly met, as the proposed permit is a facial violation of the MWQA and the Montana Constitution. ARM 17.4.608.

Further, since Montana courts find NEPA caselaw persuasive, the Council on Environmental Quality's significance criteria should be examined. Montana Wildlife Fed'n v. Montana Bd. of Oil & Gas Conservation, 2012 MT 128, ¶ 32, 365 Mont. 232, 244, 280 P.3d 877, 886. The proposed permit also meets several of the Council on Environmental Quality's factors for determining significance and, therefore, whether an EIS is required. The second factor, "may adversely affect public health and safety," is clearly met based on DEQ's public-facing information regarding PFA and PPCP pollution. 88 FR 49924, 49969; Ex. 1 and 4. The fourth factor, "Whether the action may violate relevant Federal, State, Tribal, or local laws or other requirements or be inconsistent with Federal, State, Tribal, or local policies designed for the protection of the environment," is also clearly met, as the proposed permit would violate the MWQA. *See* infra. 88 FR 49924, 49969. The fifth factor, "The degree to which the potential effects on the human environment are highly uncertain," is also met because while PFAs' danger to humans is known, the degree of that danger is not. 88 FR 49924, 49969. The sixth factor,

aggregation, is also met, as PFAs are widespread 'forever chemicals', and every incremental addition of PFAs pushes PFA concentrations towards EPA's recently established Maximum Concentration Levels. *Id*. The factors here tilt towards a finding that PFA and PPCP pollution from this proposed permit would have a significant impact and, therefore, merit an EIS rather than an EA. Given Montana's stringent constitutional substantive and procedural environmental protections, such an analysis *must* result in an EIS. See *MEIC I*, ¶77. ("[D]ead fish do not have to float on the surface of our state's rivers and streams before [MEPA] protections can be invoked."); *Park Cnty Envtl. Council*, ¶70 (MEPA effectuates Art IX. Sec. 1(1) of the Montana Constitution).

Response: DEQ disagrees with the commenter. See Section 4.3 of the EA and the responses to all previous comments. The EA is adequate because it discloses the possible effects of the project, which is relatively small in area, limited in duration and volume, and will not cause significant environmental impacts. This permit is not a "challenged" permit, it is a proposed permit.

No change is made to the draft permit in response to this comment.

Comment 8: The proposed permit violates MWQA and the Montana Constitution

The Montana Water Quality Act and the Montana Constitution require the DEQ to make state surface waters free of substances that "create concentrations or combinations of materials which are toxic or harmful to human, animal, plant, or aquatic life" as well as "maintain and improve a clean and healthful environment" for all Montanans. ARM 17.30.637(1)(d); Mont. Const. Art. IX. Sec. 1(1). DEQ is therefore required to reduce and eliminate PFA pollution, which DEQ knows is harmful to humans. DEQ consequently cannot adequately ensure that PFAs are not entering Montana's drinking water if it does not even consider how a proposed MPDES permit might lead to PFA pollution. Any discharge permits that might reasonably lead to PFA pollution must, therefore, include an analysis of potential PFA impacts to satisfy DEQ's substantive statutory and constitutional mandates.

Response: The comment references the narrative water quality standard at ARM 17.30.637(1)(d). MPDES permits must include limitations to protect the water quality standards, including narrative standards, when the discharge has the reasonable potential (RP) to cause an exceedance of the standard. DEQ did not specifically evaluate RP for PFAS in the discharge because there are no standards for surface water that have been derived for PFAS. As stated in responses to previous comments, DEQ considered the potential for the discharge to create concentrations or combinations of materials which are toxic or harmful to human, animal, plant, or aquatic life, and determined that the discharge does not have reasonable potential to cause or contribute to the conditions specified in the narrative standard. The determination is based on the volume and nature of the discharge, the fact the discharge will only occur (reach surface water),

if it does at all, during the highest flows of the year (snowmelt and spring runoff). PFAS chemicals are the subject of intense study and interest. Regulatory requirements for these chemicals have not been adopted under state or federal law. It is not appropriate to impose limits in a discharge, without a scientific and legal basis. See also,responses to comments 2 and 3.

The Montana Legislature recognized its constitutional obligations under Mont. Const. art. II, § 3, and art IX, by adopting the Montana Water Quality Act ("MWQA"), See §75-5-102, MCA. The conditions of the permit comply with the Montana Water Quality Act and administrative rules adopted thereunder. DEQ's environmental review process and the final environmental assessment provides adequate review of the state's action in approving the MPDES permit and compliance with the permit will protect the quality of state waters from any point source discharges associated with snowmaking.

No change is made to the draft permit in response to this comment.

Comment 9: Failure to consider PFA pollution is a MWQA violation.

The proposed action will violate MWQA because it will increase the concentration of PFAs in a state surface water to a concentration harmful to humans and will make state waters classified for drinking water unsuitable for their classified use. ARM 17.30.637(1)(d) and ARM 17.30.623(1). The degradation of drinking water is also a violation of the Montana Water Quality Act's Antidegradation policy. ARM 17.30.701, 715.

Response: DEQ disagrees with the commenter. There are no water quality standards for PFAS in surface water and DEQ has determined there is no RP for exceedance of the narrative standards and that the proposed discharges are nonsignificant for purposes of nondegradation. See also, response to comment 8.

No change is made to the draft permit in response to this comment.

Comment 10: The proposed permit substantively violates DEQ's duty to maintain state waters by adding substances that can be harmful to human health

Montana Water Quality Act, through ARM 17.30.637(1)(d), states that state surface water bodies must be free of substances that "create concentrations or combinations of materials which are toxic or harmful to human, animal, plant, or aquatic life." ARM 17.30.637(1)(d). Unlike other portions of the State Water Quality Standards that tie prohibitions to pollutants with specific thresholds specified in DEQ-7, this Rule states only that waters must be free of substances that are harmful to humans. *Montana Env't Info. Ctr. v. Dep't of Env't Quality,* 2019 MT 213, ¶ 49, 397 Mont. 161, 184, 451 P.3d 493, 505 (17.30.637 contains "general prohibitions applicable to all water classifications"). This Rule cannot be read to apply exclusively to substances named in

DEQ7, as the Rules refer explicitly to DEQ7 in other companion passages. *See* ARM 17.30.623(2)(h). DEQ cites 17.30.637 in public materials as authority for its potential regulation of PFAs in state surface waters in the future. Ex. 4.

Response: See responses to comments 2, 3, 8, and 9. No change is made to the draft permit in response to this comment.

Comment 11: EPA has established that PFAs, known as 'forever chemicals,' are harmful to human health in drinking water as well as carcinogenic at exposures as low as four parts per trillion. Ex. 5. In this particular case, DEQ is on notice for the potential for PFA pollution, given the science demonstrating the near-universal presence of PFAs in wastewater at or near health risk levels, EPA's recently promulgated Rule setting Maximum Concentration Levels for PFAs in drinking water as well as DEQ's *own fact sheet* on the dangers of PFAs in Montana's waters. Ex. 5, 6 and 7. DEQ itself acknowledges that PFAs can have adverse health effects *and has listed related PFO compounds as toxic in groundwater* in its numeric water quality standards. Ex. 4 and 8.

Freshwater fish bioaccumulate PFAs, increasing Montanans' PFA exposure from contaminated water. Ex. 9, 10, 11 and 13. One serving of contaminated fish is the equivalent of a month of PFA-contaminated drinking water at a level of 48 parts per trillion, 12 times EPA's *maximum allowable exposure* in drinking water. Ex. 10 and 12. Further, PFAs are known to cause reproductive toxicity in aquatic life as well as a variety of other adverse health outcomes. Ex. 13. DEQ violated the MWQA by failing to consider and, therefore, prevent PFA pollution in concentrations harmful to both human and aquatic life. A failure to investigate is tantamount to affirmative pollution when DEQ is fairly on notice that pollution is extremely likely.

DEQ, given its own statements acknowledging the 'widespread presence' and diverse sources of PFAs, is on notice for the possibility of PFA pollution in any MPDES permit it issues that impacts drinking water sources. Ex. 15. Given its statutory mandate to prevent concentrations of substances harmful to humans**,** DEQ has a substantive requirement under the MWQA to consider and monitor PFA pollution in state surface waters. The permit should not be granted because the agency has not done that in this case.

Response: When assessing limitations based on human health criteria in surface water discharges, DEQ usually grants dilution with the full 7Q10 of the receiving water. This dilution allowance is made because human health criteria are generally based on a person weighing 80 kilograms (~175 lbs) consuming 2.4 liters of water a day for 70 years, from the same water source. The 7Q10 is used because it represents the low stream flow that will occur for 7 consecutive days once every 10 years. It is a very low flow estimation and is protective of critical conditions for discharges that are happening 24 hours a day, 365 days a year. Further, the estimation ignores the fact that it is unlikely any person today is going to drink that amount of

untreated water from a surface water source for what is a typical human lifetime. In this case, there are no numeric human health standards for PFAS that apply to surface water. Given that the discharge will only occur, if it does at all, for a period of a couple of weeks during the highest flows of the year each spring, and that the discharge is small in volume, DEQ has determined that there is no reasonable potential for this discharge to cause conditions attributable to PFAS, or any other chemicals, that are toxic or harmful to human, animal, plant, or aquatic life.

DEQ must issue MPDES permits consistently under its rules. § 75-5-402(1), MCA. Those rules include water quality standards, adopted to protect beneficial uses of state waters, see § 75-5-301, MCA, as well as technology-based requirements, adopted pursuant to §75-5-305, MCA. DEQ's monitoring and assessment responsibilities under Title 75, chapter 5, Part 7, MCA, are outside the scope of this environmental review and the MPDES permitting process.

Also see the revised fact sheet for the 2025 draft permit. No change is made to the draft permit in response to this comment.

Comment 12: DEQ cannot approve an MPDES permit that involves a substance that can be harmful to human or aquatic health without first establishing baseline concentrations of those substances.

DEQ must also establish a baseline standard for PFA pollution in state surface waters to comply with the MWQA. DEQ has an obligation under ARM 17.30.637 beyond preventing the addition of substances in harmful concentrations to people. The Rule states, "State surface waters must be free from substances attributable to municipal, industrial, agricultural practices or other discharges that will ... create concentrations or combinations of materials which are toxic or harmful to human, animal, plant, or aquatic life." ARM 17.30.637.

DEQ must, therefore, ensure that state waters *are not* contaminated at a baseline in addition to its duty to prevent *further* pollution, as discussed above. The regulatory language is unequivocal. Given the state's antidegradation policy, this is the only reasonable interpretation of the language, which establishes an affirmative duty for DEQ to preserve the quality of high-quality state waters for their intended use. ARM 17.30.701-15. DEQ cannot adhere to the language of ARM 17.30.637 or ARM 17.30.701-15 and ensure there are not "concentrations ... harmful to human health" if it does not seek to ascertain whether state waters actually meet the regulatory standard. ARM 17.30.637. Thus, MWQA compliance for state waters under ARM 17.30.637 must establish baseline concentrations of substances that can harm human and aquatic life before determining whether the proposed permit will lead to noncompliance with ARM 17.30.637. Here, DEQ has failed to determine whether the receiving waters meet the state quality requirements or explain why it has failed to do so when DEQ has an affirmative duty to ensure such waters meet those standards.

Response: DEQ can determine that a discharge has the reasonable potential to cause the conditions listed in the rule based on the nature, volume, and duration of the discharge, regardless of upstream, or baseline, conditions. Where numeric water quality standards apply, DEQ characterizes upstream water quality before assessing a limit, but it is not required. DEQ has methods that allow for the imposition of limitations based on little or no background water quality data, consistent with EPA guidance. The converse is also true in that DEQ can make reasonable estimates of effluent quality based on the nature, volume, and duration of the discharge, and determine that it is unreasonable, given the situation, to impose effluent limitations or other requirements when the discharge is small in volume and will only occur seasonally when stream flows are at their highest as is the case here.

At present, there is no surface water quality standard that has been derived for PFAS. Furthermore, DEQ's monitoring assessment activities under Title 75, chapter 5, Part 7, MCA, are outside the scope of the MPDES permitting process.

DEQ must issue MPDES permits consistently under its rules. § 75-5-402(1), MCA. Those rules include water quality standards, adopted to protect beneficial uses of state waters, see § 75-5-301, MCA, as well as technology-based requirements, adopted pursuant to 75-5-305, MCA. DEQ's monitoring and assessment responsibilities under Title 75, chapter 5, Part 7, MCA, are outside the scope of this environmental review and the MPDES permitting process. DEQ evaluated RP under ARM 17.30.637. Also see responses to comments 8, 9, 10, 11, and 12.

No change is made to the draft permit in response to this comment.

Comment 13: The proposed permit violates MWQA antidegradation requirements

The proposed permit will also make the receiving waters unusable for their designated use: drinking water. The EPA has the authority to establish federal floors for pollution of drinking water, known as Maximum Contamination Levels (MCLs). § 1412(b)(1)(A) of SDWA. On April 10, EPA announced its final MCLs for PFAs in drinking water, to be enforceable in April 2029. 89 FR 32532. EPA announced this proposed rulemaking in March 2023. *Id*. The EA for this proposed permit classifies the receiving waters as B-1, "suitable for drinking ... after conventional treatment and the propagation of salmonid and associated aquatic life." ARM 17.30.623(1). Ex. 16 at 2.2.2.

While DEQ's water quality standards for B-1 water explicitly incorporate only the thresholds set in DEQ7, it specifically notes that MPDES permits issued for B-1 waters must conform with the antidegradation requirements discussed above. ARM 17.30.623(2)(i) and ARM 17.30.701. The standards must be read to incorporate MCLS set under the Safe Drinking Water Act, as B-1

water is deemed acceptable for consumption after conventional treatment. Treatment techniques employed to make B-1 waters fit for human consumption may vary, and thus, B-1 waters need not be kept below MCLs before treatment, but where no public water systems in the state employ the EPA-approved Best Available Technology Economically Achievable (BAT) for the measurement and reduction of PFA pollution in water supplies, any PFA pollution is guaranteed to reach human mouths. Ex. 14 and 15. PFA pollution in B-1 waters beyond MCLs set by the EPA will degrade the receiving waters for their intended use and, therefore, violate ARM 17.30.623(2)(i) antidegradation standards.

Further, DEQ's failure to follow antidegradation procedures outlined in ARM 17.30.705, ARM 17.30.708, and ARM 17.30.715 for potential PFA pollution in connection with this permit violates the high-quality water antidegradation requirements of the MWQA. ARM 17.30.715 requires that DEQ affirmatively find that the proposed activity will not have a significant impact on high-quality waters and, therefore, be subject to strict antidegradation protections. ARM 17.30.715(1). DEQ should have analyzed for significance with regards to PFA pollution, as PFA pollution has the potential to meet factors (1)(b) and (1)(h), carcinogenic parameters and measurable impacts in narrative water quality, respectively. Ex. 15 and ARM 17.30.715(1)(b), (h).[1] The Montana Supreme Court has affirmed that DEQ must consider incremental degradation in its permits: "The potential existed for incremental degradation of high-quality water without the required findings." Pennaco Energy v. Mont. Bd. of Envtl. Review, 2007 Mont. Dist. LEXIS 513, *40 (affirmed by Pennaco Energy, Inc. v. Mont. Bd. of Envtl. Review, 2008 MT 425, P11). DEQs failure to conduct this analysis violates the MWQA because DEQ has an affirmative duty to prevent the degradation of high-quality water, and this permit will cause incremental degradation of high-quality waters. DEQ's failure to consider the potential for significant PFA pollution precludes the fulfillment of its statutory mandate to protect high-quality waters.

Response: Degradation is a change in water quality that lowers the quality of a high-quality water for a parameter. § 75-5-103(6), MCA. PFAS is not a regulated parameter in state surface waters. DEQ ensured all applicable water quality standards were met, therefore, under the law, designated beneficial uses are protected. Those water quality standards include water quality criteria necessary to protect and support designated beneficial uses, including drinking water after conventional treatment and the growth and propagation of salmonid and aquatic life. See ARM 17.30.623. DEQ also followed all required nondegradation procedures during the permit review process, thereby protecting existing uses. DEQ set necessary effluent limits and monitoring requirements and established special conditions in the permit to comply with the nonsignificance criteria of ARM 17.30.715(1). DEQ reviewed the additional criteria in ARM 17.30.715(2) and found that cumulative impacts or synergistic effects are unlikely because the effluent limitations and monitoring requirements will ensure protection of water quality. Discharges in compliance with ARM 17.30.715(1) and (2) are nonsignificant and are not required to undergo further review under Montana's Nondegradation Policy (§ 75-5-303, MCA). DEQ therefore made all required nondegradation findings.

DEQ disagrees it must analyze PFAS for purposes of nondegradation. It is not a parameter of concern for purposes of permitting because there is no applicable water quality standard that has been adopted for PFAS. State water quality standards (or criteria) are derived and used to assess and protect both beneficial and existing uses; however, PFAS is presently outside the scope of those standards. DEQ must also issue MPDES permits consistently under its rules. § 75-5-402(1), MCA. PFAS is not a parameter of concern for purposes of permitting because there is no applicable water quality standard that has been derived for PFAS. The nonsignificance criteria for narrative water quality standards requires that any changes in water quality not have a measurable effect on any existing or anticipated use or cause measurable changes in aquatic life or ecological integrity. DEQ's RP assessment found that such changes will not occur, and the discharge is nonsignificant with respect to the narrative standards. Furthermore, MPDES permits may not be issued for periods that exceed five years. ARM 17.30.1346(1). Should a specific PFAS water quality criterion be adopted in the future, future permitting actions may consider such criterion.

No change is made to the draft permit in response to this comment.

Comment 14: DEQs proposed permit will result in harmful pharmaceutical pollution and therefore violates the MWQA.

DEQ's proposed permit also violates MWQA because it will result in PPCP pollution of state surface waters. DEQ must keep such waters free of substances that "create concentrations or combinations of materials which are toxic or harmful to human, animal, plant, or aquatic life." ARM 17.30.637(1)(d). DEQ itself has previously found PPCP pollution harmful to aquatic life, and therefore, its failure to monitor and mitigate such pollution violates its duty under the MWQA.

DEQ is familiar with PPCP pollution in Montana's waters and on notice that such pollution is possible as well as the risks that pollution poses to aquatic life. The Montana DEQ admitted it had previously defined the term "pharmaceuticals" in the context of the Yellowstone Club making snow using treated wastewater in the case of *Mont. Rivers v. Mont. Dep't of Envtl. Quality*, 2022 MT 132, P10. In that case, DEQ admitted: "Pharmaceuticals and personal care products are a diverse group of chemicals including all human veterinary drugs, dietary supplements, topical agents such as cosmetics and sunscreens, laundry and cleaning products."

DEQ has prepared a fifty-page report regarding the impacts of certain PPCP pollutants. Ex. 1. The agency did not include its report outlining specific PPCP pollutants' environmental impacts in the administrative record. For example, DEQ's own report states antidepressants can have "[p]rofound effects on the development, spawning, and other behaviors" in "aquatic organisms."

Ex. 1 at 000994. “Sex steroids (e.g., from oral contraceptives) can feminize male fish and change the behaviors of either sex[.]” Exhibit 1 at 000968. “Acute toxicity, carcinogenesis, and mammalian endocrine disruption are highly visible concerns[.]” Ex. 1 at 000996. The report identifies the five most detected PPCPs. Ex. 1 at 00959. The report contains data regarding specific PPCPs. Ex. 1 at 00959. DEQ report provided detection frequencies for 23 other PPCPs. Exhibit 1 at 000958. None of the pertinent PPCPs were discussed in the MEPA analysis. The agency violated MEPA by ignoring the data it created. *Ravalli Cnty. Fish and Game Ass’n, Inc.*, 273 Mont. at 381 (citation omitted). DEQ admitted in its answer to Cottonwood’s complaint in the prior Yellowstone Club PPCP case that “pharmaceuticals are emerging contaminants of concern that may threaten aquatic life.” *Cottonwood v. MT DEQ*, DV-21-833D, ¶22.

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

DEQ could not avoid its MWQA obligation to protect the propagation and health of aquatic by simply ignoring the information in its possession regarding PPCP dangers. Ex. 1, 16 and 17. DEQ completely ignored the fifty-page PowerPoint report it created entitled "Pharmaceuticals, Personal Care Products, Endocrine Disruptors (PPCPs) and Microbial Indicators of Fecal Contamination in Ground Water in Helena Valley, Montana.” Ex. 1 at 000998. According to the report, it is “[i]mportant to recognize that ALLmunicipal sewage, regardless of location, will contain PPCPs. The issue is not unique to any particular municipal area.” Exhibit 1 at 000991 (emphasis in original). “The two major sources of PPCPs in the environment are domestic sewage and terrestrial runoff. Since PPCPs [] are generally much less volatile, they tend to end up in aquatic environments . . . This means that aquatic organisms can suffer continual life-long exposures[.]” Exhibit 1 at 000976. “No municipal sewage treatment plants are engineered for PPCP removal.” Exhibit 1 at 000965.

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

DEQ possessed information from the EPA at the time it prepared the MEPA analysis that states, "information has shown that many of these chemicals may pose a threat to aquatic life, such as feminizing changes observed in male fish exposed to endocrine-active PPCPs[.]" Ex. 2 at 001004. DEQ publicly acknowledged it is "concerned about pharmaceutical pollution" because "there are no water quality standards designed to protect from those types of pollutants, and so there are no standards that can be incorporated in a permit." Ex. 3 at 4. DEQ and EPA documents indicating fish and amphibians may change sexes because of PPCP pollution indicates impacts can also occur if there are no standards in place. Ex. 1 and 2. DEQ is thoroughly on notice that the proposed permit will increase PPCP pollution and, therefore, harm aquatic life.

The applicable rules required DEQ to ensure the receiving waters were adequate to maintain the "growth and propagation of salmonid fishes and associated aquatic life." A.R.M 17.30.623(1). DEQ cannot comply with ARM 17.30.623(1) for pharmaceuticals if it does not establish baseline concentrations. DEQ must explain how it met the propagation standard in light of its admittance that PPCP pollution "may threaten aquatic life." *Cottonwood v. MT DEQ*, DV-21-833D, ¶22. DEQ is therefore required to both monitor and mitigate PPCP pollution in state waters to ensure that those waters are free from substances in concentrations "harmful to aquatic life." ARM 17.30.637(1)(d).

Response: Until beneficial use impacts from specific pharmaceuticals are studied and evaluated and corresponding standards are adopted, potential impacts are unknown and are extremely speculative. As to the referenced answer from *Cottonwood Envt'l Law Center v. DEQ*, Montana 18th Judicial Dist. Court, Case No. DV-21 833D, involving the commenter's challenge to a similar MPDES permit, the commenter omits DEQ's qualification whereby DEQ stated that "DEQ denies much certainty exists regarding the potential impacts of pharmaceuticals in aquatic environments."

The DEQ "fifty-page report" referred to in the comment is a PowerPoint presentation by a group of county and state government staff from multiple agencies. It is an unvetted summarization of research and websites related to PPCPs and more specifically the presence of those chemicals in the ground water of the Helena Valley. It identifies the state of science many years ago regarding emerging contaminants of concern and was not intended as a document that would provide a basis for developing effluent limitations in an MPDES permit, and the information compiled is from a completely different part of the state. It makes broad statements about PPCPs and cannot be used as the basis for the development of a legal document like a discharge permit and it was never intended to do so.

DEQ must also develop discharge permits consistently with state rules. § 75-5-402, MCA. DEQ developed the Spanish Peaks permit in accordance with all rules in effect for the development of

discharge permits. Please see also responses to previous comments regarding DEQ's RP analysis for potential exceedance of the narrative standard at ARM 17.30.637(1)(d).

No change is made to the draft permit in response to this comment.

Comment 15: The MEPA process for the proposed permit violates the Montana Constitution.

Failure to consider PFA and PPCP pollution under MEPA is a facial violation of the Montanan's right to a "clean and healthful environment." Mont. Const. Art. IX Sec. 1(1). The Montana Supreme Court has previously reversed a district court that held Montanans' right to a clean and healthful environment was not implicated, absent a demonstration that water quality standards would be affected. *See e.g., MEIC I*, ¶78. "[D]ead fish do not have to float on the surface of our state's rivers and streams before [MEPA] protections can be invoked." *Id.,* ¶77.

MEPA effectuates the Montana Constitution, which requires the state and each person to "maintain and improve a clean and healthful environment" Mont. Const. Art. IX, Sec. 1(1). The framers of the Montana Constitution intended this section to "mandate[] the legislature to prevent degradation." *E.g., MEIC I,* ¶ 70 (citation omitted). "[P]revention depends on forethought. MEPA's procedural mechanisms help bring the Montana Constitution's lofty goals into reality by enabling fully informed and considered decision-making. . ." *Park Cnty Envtl. Council*, ¶70.

The MEPA process is insufficient and, therefore, fails to protect Montanan's right to a "clean and healthful environment." Mont. Const. Art. IX. Sec. 1(1).

Response: As a state agency, DEQ must follow requirements of MEPA in assessing environmental impacts of agency actions. Comments as to the constitutionality of statutory requirements are outside the scope of DEQ's environmental review process.

Although it is unclear from the "facial violation" language in the comment, to the extent the commenter is saying DEQ has violated the Montana Constitution in its consideration of PFAS and PPCP during the environmental review process:
The Montana Legislature recognized its constitutional obligations under Mont. Const. art. II, § 3, and art IX, by adopting the Montana Environmental Policy Act ("MEPA") and the Montana Water Quality Act ("MWQA"), See §§ 75-1-102 & 75-5-102, MCA. The conditions of the permit comply with MEPA and the Montana Water Quality Act and administrative rules adopted thereunder. DEQ's environmental review process and the final environmental assessment provides adequate review of the state's action in approving the MPDES permit and compliance with the permit will protect the quality of state waters from any point source discharges associated with snowmaking.

No change is made to the draft permit in response to this comment.

Comment 16: MEPA's administrative record constraint is unconstitutional.

MCA § 75-1-201(6)(b) violates Article IX of the Montana Constitution because it does not allow for a full MEPA review in the case of agency failure to adequately consider information not included in the judicially reviewable record but within the agency's possession.

Unless a court specifically allows the introduction of new evidence under § 75-1-201(6)(b), MCA, a court's review under MEPA also "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." Mont. Code Ann. § 75-1-201(6)(a)(ii). "When a district court reviews an administrative agency decision, it must base its review on the record before the governing body at the time of its decision.'" *Belk v. Mont. Dep't of Envtl. Quality*, 2022 MT 38, ¶33, 408 Mont. 1, 504 P.3d 1090 (citation omitted). This provision is in direct tension with MT Supreme Court and 9th Circuit decisions supporting the use of extra-record evidence in the MEPA process: "without this evidence, it may be impossible for the court to determine whether the agency took into consideration all relevant factors." *Belk*, 2022 MT 38, ¶33 citing *Asarco*, *Inc. v. EPA*, 616 F.2d 1153, 1160 (9th Cir. 1980). A MEPA analysis without context is insufficient and therefore unconstitutional. "[I]t is both unrealistic and unwise to 'straightjacket the reviewing Court with the administrative record. It will often be impossible . . . for the Court to determine whether the agency took into consideration all relevant factors unless it looks outside the record to determine what matters the agency should have considered but did not. The Court cannot adequately discharge its duty to engage in a 'substantial inquiry' if it is required to take the agency's word that it considered all relevant matters." *Asarco, Inc. v. EPA*, 616 F.2d 1153, 1160 (9th Cir. 1980).

This requirement is contrary to NEPA and the Montana Constitution, which command the agencies to analyze the environmental impact of proposed projects. *See e.g, Mont. Envtl. Info. Ctr. v. Mont. Dep't of Envtl. Quality*, 2019 MT, ¶26, 397 Mont. 161, 451 P.3d 493 ("An agency has an obligation to "examine the relevant data and articulate a satisfactory explanation for its action. . ."). Courts have further clarified that this obligation falls exclusively on agencies rather than commenters: "[F]ulfillment of this vital responsibility [of information gathering and analysis] should not depend on the vigilance and limited resources of environmental plaintiffs." *Friends of Clearwater v. Dombeck*, 222 F.3d 552, 558 (9th Cir. 2000). It is incumbent on agencies to consider science already within the agency's possession when fulfilling MEPA requirements. *Id.* (holding that agency was on notice that relevant reports and data existed because the agency itself had generated the report).

Here, limiting judicial review to information contained in the administrative record defeats the "substantial inquiry" Montana courts must make under MEPA. *Asarco, Inc. v. EPA*, 616 F.2d 1153, 1160 (9th Cir. 1980). The inquiry will invariably present the agency's decision as reasonable if the Court can only see evidence the agency has added to the record. Without this comment, the proposed permit would be reasonable with regard to PFAs and PPCPs if reviewed by a court under MCA § 75-1- 201(6)(b). This is despite the fact that DEQ knows and has published the dangers of PFA and PPCP pollution to drinking water and aquatic life but neglected to include that information in its analysis of the proposed permit. Ex. 1, 2, 4 and 15. While the public comment period serves an essential function in MEPA decisions, MEPA ultimately requires that the *agency* analyze the environmental effects. *Park Cnty Envtl. Council*, ¶70 (emphasis added). Because MEPA effectuates Montanan's rights to a "clean and healthful environment," provisions such as this, which prevent comprehensive MEPA analyses, are unconstitutional. Mont. Const. Art. IX. Sec. 1(1).

MCA §75-1-201(2)(6) also forecloses plaintiffs making a successful bad faith argument against agency environmental analysis. Courts can also consider extra-record evidence "when plaintiffs make a showing of agency bad faith." *Lands Council v. Powell*, 395 F.3d 1019, 1030 (9th Cir. 2005) (citation omitted). A defense is made "in bad faith when it is outside the bounds of legitimate argument on a substantial issue on which there is a bona fide difference of opinion." *Cmty. Ass'n for N. Shore Conservation, Inc. v. Flathead Cty*., 2019 MT 147, ¶ 54, 396 Mont. 194, 445 P.3d 1195 (citations omitted). However, the blanket preclusion of extra-record evidence makes such a claim prima facie unwinnable.

Response: As a state agency, DEQ must follow requirements of MEPA in assessing environmental impacts of agency actions. Comments as to the constitutionality of statutory requirements are outside the scope of DEQ's environmental review process.

No change is made to the draft permit in response to this comment.

Comment 17 Montana Constitutional delegates did not intend for courts to factor in the economic consequences in their injunction analysis. *See MEIC I,* ¶ 67: the term "environmental life support system" is all- encompassing, including but not limited to air, water, and land; and whatever interpretation is afforded this phrase by the Legislature and courts, there is no question that it cannot be degraded. Montana Constitutional Convention, Vol. IV at 1201, March 1, 1972 (emphasis added).

Response: As a state agency, DEQ must follow requirements of MEPA in assessing environmental impacts of agency actions. Comments as to the constitutionality of statutory requirements are outside the scope of DEQ's environmental review process.

No change is made to the draft permit in response to this comment.

Commenter 4: Rich Chandler, Lone Mountain Land Company

Comment 18: Spanish Peaks would like to clarify its legal name as the Applicant/ Permittee for the MPDES Permit No. MT0032174 for the reuse snowmaking operation referenced throughout the various referenced documents.

The DEQ has listed the applicant's name as Cross Harbor Spanish Peaks (CHSP) Acquisitions, LLC in the abovementioned referenced documents. The official entity name for the owner and operator of the Spanish Peaks Mountain Club Reclaimed Water Snowmaking Operation is: *CH SP Acquisition LLC, d/b/a Spanish Peaks Mountain Club ("Spanish Peaks").*

Spanish Peaks respectfully requests that the DEQ update the applicant/ permittee name in the Draft Permit and Fact Sheet and in the Draft Environmental Assessment as:
CH SP Acquisition LLC, d/b/a Spanish Peaks Mountain Club ("Spanish Peaks").

The locations were this is applicable are in the Draft Permit on page 1; in the Fact Sheet on pages 1 and 3 (on page 3 specifically referenced as the permittee in paragraph 2 under Section 1 Background); and in the Draft Environmental Assessment on pages 1 and 2 (on page 2 specifically in paragraph 1 under Section 1.3 Proposed Action).
Additionally, the applicant/ permittee name is also referenced in various abbreviated forms throughout these documents where it would be appropriate to update the abbreviated form to "Spanish Peaks," in the Fact Sheet on page 3 (Sections 1.1 and 1.2); and in the Draft Environmental Assessment on page 5 (Section 1.4).

Response: DEQ agrees with the comment. The permittee name on the final permit and final EA will be changed as requested.

Comment 19: Spanish Peaks would like to clarify the facility's legal description for the reuse snowmaking operation noted throughout the various referenced documents.
See Draft Environmental Assessment, Page 3- Table 1- General Overview; and Fact Sheet, Page 4- Section 1.2.1

The legal description of the entire reclaimed water snowmaking operations encompasses both Section 32 in Township 6S, Range 3E (as referenced in the abovementioned documents) as well as in Sections 4 and 5 of Township 7S, Range 3E. The Spanish Peaks respectfully requests that the DEQ add the additional descriptive detail to the legal description for the project in the abovementioned documents.

Spanish Peaks would like to clarify the nomenclature of the receiving waters in the abovementioned documents. *See Draft Permit, Page 1, Page 3- Section 1A Outfall Descriptions*

(2 places), Page 6- Section D1; the Fact Sheet, Page 1- Receiving Waters, Page 6- Section 1.2.2, Page 13- Table 5; and anywhere else within the referenced documents.

The official name of the receiving waters for this project are: Unnamed Tributaries to Middle Fork West Fork Gallatin River. Spanish Peaks respectfully requests the DEQ correct any reference to "Middle Fork West Gallatin River" in the abovementioned documents to "Middle Fork West Fork Gallatin River." The document locations where this text appears are referenced above.

Response: DEQ agrees to make the requested changes. As noted in the introduction to this response to comments, DEQ does not revise the Fact Sheet. The RTC supersedes relevant sections of the Fact Sheet.

Comment 20: Spanish Peaks proposes allowance for an optional analytical method for total residual chlorine of composited snow samples.

See Draft Permit, Page 5- Section C- Table 2; and Fact Sheet, Page 28- Section 3.3- Table 16

Spanish Peaks respectfully requests an allowance to be incorporated into the effluent monitoring requirements of the Draft Permit and Fact Sheet for an additional total residual chlorine (TRC) analytical methodology. Currently the Draft Permit and Fact Sheet designates that TRC must be "composited and analyzed immediately." Spanish Peaks is requesting an additional option for TRC analysis that involves sending three individual snow samples to the laboratory as snow for composition and analyses using CFR 40 Part 136 approved analytical methods (as referenced in the Draft Permit) in a controlled environment. Through past snow monitoring experience, this has been shown to be a feasible and reputable method for analyzing snow for TRC. The samples have consistently arrived at the laboratory as snow and are analyzed by the lab in a controlled environment. Spanish Peaks may alternatively use a field meter in future monitoring of snow TRC concentrations to be able to "analyze immediately" if monitoring trial runs prove to be efficient.

Response: DEQ declines to make the requested change. Every other MPDES permit requires analyses of TRC upon sample collection. Because it deviates from established methods and hold time requirements, it may be feasible at some future time for the permittee to request this change as part of a major modification to the permit. Such a change would require a comparison of samples collected and analyzed with an approved method at the time of sample collection with samples collected and preserved as described and analyzed later at a laboratory.

No change is made to the permit in response to this comment.

Comment 21: Spanish Peaks proposes that DEQ consider additional socioeconomic benefits of the Spanish Peaks Mountain Club Reclaimed Water Snowmaking Operation in the Environmental Assessment.

See Draft Environmental Assessment, Page 12- Section 2i - Direct Impacts

Spanish Peaks respectfully requests DEQ to consider adding the following socioeconomic direct impact of the project:

The project would create additional terrain sustainability within the ski season in that critical terrain would remain available for recreationalists for a longer period, leading to overall economic stability in the face of climate challenges.

Response: DEQ agrees to add the requested language to the final EA.

No change is made to the permit in response to this comment.

Comment 22: Miscellaneous Clarifications and Requests to Correct Text in the Draft Permit, Fact Sheet, and the Draft Environmental Assessment

Recommendation to correct the acronym and name reference to the Big Sky County Water and Sewer District (BSCWSD) in various locations.

See Fact Sheet, Page 6- Section 1.2.1- Wastewater Sources, Treatments, and Controls; and Draft Environmental Assessment, Page 12- Section 4.1
Big Sky County Water and Sewer District (BSCWSD) is referred to with the acronym "BSCSWD" in several locations throughout the Fact Sheet. In addition, it is referred to as "Big Sky Community Wastewater Facility" in the Draft Environmental Assessment. Spanish Peaks respectfully requests that DEQ update the acronym to BSCWSD in the Fact Sheet and the name reference to "BSCWSD Facility" in the Draft Environmental Assessment.

Recommended text correction: County to Counties.

See Draft Permit, Page 1

The Spanish Peaks Mountain Club is in two counties, Gallatin and Madison Counties. Spanish Peaks recommends updating the text from "County" to "Counties" in the Draft Permit (page 1).

Response: DEQ agrees to make the requested changes to the final permit and notes for the record the references to corrections for the Fact Sheet. Please refer to the Fact Sheet and draft permit for Public Notice MT-25-02.

Comment 23: Propose to add consideration of the DEQ-2 Review and Approval to the General Overview of Table 1- Summary of Proposed Action in the Draft Environmental Assessment.

See Draft Environmental Assessment, Page 3- Table 1- General Overview

Spanish Peaks respectfully requests that the DEQ add the consideration of the DEQ Engineering Bureau's review of the proposed modifications to public water and wastewater systems to the General Overview section of the Proposed Action Table in the Draft Environmental Assessment (Table 1) as referenced in paragraph 2 in Section 1.2 of this document.

Response: DEQ agrees to make the requested addition to the EA.

No change is made to the draft permit in response to this comment.

Comment 24: Propose to adjust the personnel onsite to 15 from 10 in the Draft Environmental Assessment.

See Draft Environmental Assessment, Page 4- Table 1- Personnel Onsite

Spanish Peaks proposes to adjust the number of staff from 10 to 15 in the Personnel Onsite section of Table 1 in the Draft Environmental Assessment.

Response: DEQ agrees to make the requested change to the EA.

No change is made to the draft permit in response to this comment.

Comment 25: Proposed text clarification: golf courses.

See Draft Environmental Assessment, Page 8- Section 2a

Spanish Peaks respectfully requests to add an "s" to "golf course" within the Direct Impacts paragraph as there are two golf courses at Spanish Peaks Mountain Club that are approved for reclaimed water consumptive use (reuse application) under DEQ-2 Approvals.

Response: DEQ agrees to make the requested change to the EA.

No change is made to the draft permit in response to this comment.

Comment 26: Proposed text correction: Contact Title.

See Fact Sheet, Page 1- Facility Information Contact

For clarification purposes, Spanish Peaks respectfully requests DEQ to update the title of the Contact for the Facility to: Rich Chandler, VP Environmental Operations.

Response: DEQ agrees with the comment.

No change is made to the final permit or EA in response to this comment.

Comment 27: Propose to edit text for clarity.

See Fact Sheet, Pages 6, Section 1.2.1, Wastewater Sources, Treatments, and Controls

Spanish Peaks respectfully requests to adjust the names and references to the different holding ponds and other details in the second paragraph under Section 1.2.1- Wastewater Sources, Treatments, and Controls in the Fact Sheet with the following *italicized* text:

"*BSCSWSD* pumps water from their reclaimed water holding ponds to the SPMC South reclaimed water holding pond *(a/k/a the South Pond or Spanish Peaks Pond 1)*. Once *BSCSWSD* reclaimed water has been transferred to SPMC, it is the responsibility of SPMC to manage this reclaimed water. Reclaimed water is pumped from the SPMC South Storage Pond to the Hole 10 Irrigation Pond *(Hole 10 Pond)* via pump station SP-PS-1, located adjacent to the South Storage Pond. The Hole 10 Irrigation Pond currently supplies *DEQ-approved* summertime golf course irrigation *of the golf courses, ski area, and nearby forested areas*, and will also be used to store reclaimed water for snowmaking. Reclaimed water held in the Hole 10 Pond will be blended with fresh groundwater, if necessary, to meet DEQ-2 Class A-1 standards. SPMC also has the ability to inject chlorine into the water to regulate bacteria concentrations as it is pumped from the South Pond to the Hole 10 Pond. From the Hole 10 Pond water is pumped through a pipeline towards midway Lewis and Clark lift where it is dispersed to additional pipelines to the proposed ski runs where snowmaking guns are established. The snowmaking guns are mainly tower guns and can be moved on skids *with some mobile snowmaking machines*. The main snowmaking gun models are HKD Snowmakers Impulse RS Tower Guns or similar model.
At the snowmaking gun, water is pressurized to 200+ pounds per square inch and filtered through a stainless steel 74-micron filter. Flow rates of the tower guns range from 14 to 80 gallons per

Response: These changes/revisions to the Fact Sheet were addressed in PN MT-25-02.

No change is made to the final permit or EA in response to this comment.

Comment 28: The following comments are combined for a single response.

Proposed text clarification: RO nomenclature.

See Fact Sheet, Page 7- Section 1.2.2- Discharge Points

Spanish Peaks suggests replacing the "r" in reference to the text, "RO-r" with a "4" to be "RO-4" as well as deleting the first "0" in reference to "0002A."

Proposed text clarification: tributary name references.

See Fact Sheet, Page 7- Section 1.2.2- Discharge Points, Table 2
Spanish Peaks suggests editing the reference to "Unnamed North Tributary" to "North Unnamed Tributary" and "Unnamed South Tributary" to "South Unnamed Tributary" in Table 2 in the Fact Sheet to be consistent with the nomenclature throughout the remaining text, documents and application.

Proposed text correction: Water Treatment Class reference.

See Fact Sheet, Page 11- Section 2.1.2 and Page 22- Section 2.2.7 on Total Nitrogen

Spanish Peaks recommends correcting the text "Class 2A" to "Class A-1" in the last sentence of the first paragraph of Section 2.1.2 and from "Class A" to "Class A-1" in the third paragraph of Section 2.2.7 under the section on Total Nitrogen.

Propose text correction: RO identification reference.

See Fact Sheet, Page 16- Section 2.2.6 and Page 20- Table 11
Spanish Peaks recommends correcting the text "PRW-1" to "RO-4" in the second paragraph of Section 2.2.6 on Mixing Zones and in the Title of Table 11 to be consistent with location references throughout the document. In addition, the reference to "Figure 1" should be updated to "Figure 2" in the second paragraph of this Section 2.2.6 Mixing Zones.

Response: These changes/revisions to the Fact Sheet were addressed in PN MT-25-02.

No change is made to the final permit or EA in response to this comment.

Comment 29: Suggest correcting the RRVs for Total Residual Chlorine (TRC) and Total Nitrogen in Table 16 of the Fact Sheet.

See Fact Sheet, Page 28- Section 3.3, Table 16

The RRVs listed for Total Residual Chlorine (TRC) and Total Nitrogen do not match the Draft Permit RRVs or those listed in Circular DEQ-7. Spanish Peaks recommends adjusting the RRV for TRC to 0.1 mg/L to be consistent with DEQ-7 requirements and the RRV for Total Nitrogen to 0.225 mg/L per Circular DEQ-12A and the designations in the Draft Permit.

Response: DEQ agrees with the requested clarifications to the Fact Sheet.

No change is made to the final permit or EA in response to this comment.

Comment 30: Supplemental Information

Please consider the attached supplemental information
1) Subject Matter Introduction Letter
   a) Exhibit 1: Cottonwood publication from May 2024
   b) Exhibit 2: Bozeman Daily Chronicle
   c) Exhibit 3: State of Science on Pharmaceuticals and Personal Care Products in the Environment with Focus on Reuse of Reclaimed Water (Goodfellow, W., McArdle, M., Sept. 2023)
   d) Exhibit 4: Curriculum Vitae for Exponent's Mr. Goodfellow and Ms. McArdle

Response: DEQ reviewed the attached materials. They are incorporated for the record.

Commenter 5: Jean Riley, Montana Department of Transportation

Comment 31: MDT staff review the public notice and offered the following comment:

The water, deposited as snow, will be more than 3 miles up the West Fork Gallatin River drainage from the MDT facility. This drainage crosses MT-64 near RP 3.5 through a bridge. The additional melting snow would have no negative impact on our structure."

Response: Thank you for your comment and participation in the permitting process.

Commenter 6: Scott Bosse, American Rivers
Commenter 7: Brad Niva, Big Sky Chamber of Commerce
Commenter 8: Dawn and Brian Gonick, Big Sky, MT
Commenter 9: Kim and Chris Colby, Big Sky, MT
Commenter 10: Erin L. Steva, Greater Yellowstone Coalition
Commenter 11: Dale and Sandra Tremblay, Big Sky, MT

Commenter 12: Walker and Bill Jones, Big Sky, MT
Commenter 13: Taylor Middleton, Big Sky Resort
Commenter 14: Amy Cholnoky, Big Sky, MT
Commenter 15: Whitney H. Montgomery, Big Sky Community Organization
Commenter 16: Kurt Dykema, Association of Gallatin Agricultural Irrigators
Commenter 17: Johnny O'Connor, Big Sky County Water and Sewer District
Commenter 18: Daniel Bierschwale, Big Sky Resort Area District
Commenter 19: Kristin Gardner, Gallatin River Task Force
Commenter 20: Hiram Towle, Bridger Bowl
Commenter 21: Patrick Byorth, Trout Unlimited

Comment 32: The commenters listed above all submitted comments/letters in support of the permit and the project. None of them requested changes or clarification of the fact sheet, draft permit, or EA. Common themes among the comments included:

- Support for the beneficial reuse of wastewater that may benefit the aquifer and increased stream flow in the drainage.
- Support for 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 that may allow for some continued growth and economic development in the community
- Potentially increased water for downstream irrigators
- Protection of fish and wildlife habitats
- Broad support for the project in the community
- Potential to help ski areas adapt to climate change

Response: Thank you for the comment letters of support and for participating in the public review part of the permit development process.

No change is made to the permit in response to these comments.

Beginning of Comments from Public Notice MT-25-02

Commenter 1. John Meyer, Cottonwood Environmental Law Center

Comment 33: Because the Montana Constitution provides all Montanans with the right to a clean and healthful environment, the DEQ must limit Spanish Peaks to spraying effluent that has been filtered/treated using the *best* treatment technology available, even if that is beyond the

minimum requirements set by the EPA via the National Pollutant Discharge Elimination System (NPDES).[1]

Response: The Montana Legislature recognized its constitutional obligations under Mont. Const. art. II, § 3, and art IX, by adopting the Montana Water Quality Act ("MWQA"), See §75-5-102, MCA. The conditions of the permit comply with the Montana Water Quality Act and administrative rules adopted thereunder.
DEQ also must develop discharge permits consistently with state rules, including as applicable, federal requirements incorporated into state law. § 75-5-402, MCA. DEQ developed the Spanish Peaks permit in accordance with current laws and rules in effect for the development of discharge permits.

No change is made to the draft permit in response to this comment.

Comment 34: Contaminants of Emerging Concern (CECs) are not regulated by the EPA or the Clean Water Act. They are also not addressed in the MT DEQ's permitting process as contaminants in receiving waters. CECs are defined generally as "unregulated substances detected in the environment that may present a risk to human health, aquatic life, or the environment, and for which scientific understanding of potential risks is evolving."[2] Pharmaceuticals and personal care products (PPCPs) are a wide range of chemicals that include all drugs (over-the-counter and prescription), as well as other non-medical consumer products such as the fragrances in lotions or UV filters in sunscreen.[3] PPCPs are one type of CEC and are present in and continually released by treated wastewater. Therefore, PPCPs are increasingly detected in surface water and can cause harm to aquatic life, human health, and environmental health.[4] PPCPs do not have to be present in high concentrations in the environment to affect the ecosystem or drinking water since their residues bioaccumulate in humans and other animals as they live in and/or drink the contaminated water.[5] For example, "new information has shown that many of these chemicals may pose a threat to aquatic life, such feminizing changes observed in male fish exposed to endocrine-active PPCPs in streams and lakes within Region 8" (where Montana is located).[6] PFAS–per- and polyfluoroalkyl substances–are used in many products and applications, from non-stick pans to firefighting foam to waterproof clothing.[7] They are long-lasting and break down slowly over time. Therefore, they are persistent in the environment, found in food, soils, air, waterways, people, and other animals (fish) around the globe.[8] Various scientific studies have shown that PFAS can negatively impact human and other animal health:[9]

- Reproductive effects such as decreased fertility or increased high blood pressure in pregnant women.
- Developmental effects or delays in children, including low birth weight, accelerated puberty, bone variations, or behavioral changes.
- Increased risk of some cancers, including prostate, kidney, and testicular cancers.

- Reduced ability of the body's immune system to fight infections, including reduced vaccine response.
- Interference with the body's natural hormones.
- Increased cholesterol levels and/or risk of obesity.

PFAS are found in and bioaccumulated in fish, and not only do they cause negative health effects for the fish, but they transfer to humans who eat PFAS-contaminated fish and are a major source of human PFAS exposure. PFAS-contaminated fish can lead to an exceedance of safe levels of PFAS in humans.[10]

There are treatment technologies available that can filter out PPCPs and PFAS chemicals from treated wastewater. A Granulated Activated Carbon (GAC) filter at the end of the process will remove the PPCPs and PFAS that make it through the Membrane Bioreactor which BSWSD has already installed in the last quarter of 2024.[11,12] A GAC filter is the most economical option, and the EPA provides a cost calculator for adding such filter systems.[13]

The MT DEQ may not grant Spanish Peaks this MPDES Permit without requiring the installation of a GAC filter, an anion exchange resin system, and/or a high-pressure filter. Allowing Spanish Peaks to blow snow pollution without this technology will violate Cottonwood members' constitutional rights to a clean and healthful environment because PPCPs, PFAS, and microplastics negatively impact human health and the environment.[14] Exposure to PPCPs, PFAS, and microplastics among both humans and animals have been linked "to an array of carcinogenic, mutagenic, and reproductive toxicity risks."[15] The EA conducted by the DEQ found that
Effluent limits and permit conditions, including disinfection of snowmaking water, would ensure water quality standards are met and human health is protected. The reclaimed wastewater would be disinfected to comply with human health standards prior to snowmaking.[16]

However, neither the DEQ nor the EPA regulates PPCP levels in water, so human health is still impacted even if all of the standards are met by the Spanish Peaks snowmaking plan.

Response: DEQ effectively evaluated PPCPs and PFAS in the Spanish Peaks discharge by evaluating reasonable potential to cause or contribute to an exceedance of the narrative standards and found that effluent limitations and/or monitoring requirements for these compounds are not warranted at this time. See also response to comments 8, 9, 10, 11, 12, and 13. Please refer to the Fact Sheet (pp. 26-28). In developing MPDES permits, DEQ assesses the need for and, where necessary, establishes effluent limitations to protect beneficial uses of state waters. In this permit, DEQ established the required technology-based effluent limitations and necessary water quality-based effluent limitations. DEQ does not have regulatory authority to prescribe specific treatment technology to achieve those limits.

No change is made to the draft permit in response to this comment.

Comment 35: The clean and healthful environment provision in the MT Constitution has been interpreted by the MT Supreme Court as "'the strongest environmental protection provision found in any state constitution'" in various cases.[17] It is also both "anticipatory and preventative" meaning the protection can be invoked prior to dead fish floating on the surface of water.[18] Therefore, the negative effects wrought by PPCPs, microplastics, and PFAS need not be fully realized before this protection is violated. People who recreate in or drink the water from the Middle Fork West Fork of the Gallatin River (MFWFGR) after the snow made from treated effluent has melted do not need to have developed, for example, cancer for their right to a clean and healthful environment to be violated. The MFWFGR is designated as a B-1 water.[19] B-1 waters must be "free from substances that will… create concentrations or combinations of materials which are toxic or harmful to human, animal, plant or aquatic life; and (e) create conditions which produce undesirable aquatic life." Failing to require Spanish Peaks to filter out PPCPs will create conditions that will be toxic or harmful to human, animal, plant, or aquatic life as the PPCPs bioaccumulate over time. In fact, "PPCP concentrations in some wastewaters were [already] observed to be higher than the toxicity limits for some PPCPs."[20] Various studies have been conducted across Montana and have found PPCPs in water. For instance, a 2004 study in Missoula found acetaminophen, caffeine, nicotine, codeine, trimethoprim (an antibiotic) and carbamazepine in wastewater.[21] Similarly, 22 PPCPs have been detected in groundwater in the Helena Valley in both public and private water supplies. These PPCPs are associated with the discharge of domestic wastewater.[22]
The DEQ's 50-page PowerPoint contains relevant info the agency did not consider in the EA:

> Sex steroids (e.g., from oral contraceptives) can feminize male fish and change the behaviors of either sex…
>
> Acute toxicity, carcinogenesis, and mammalian endocrine disruption are highly visible concerns…[23]

The presentation describes the 5 most detected pharmaceuticals, personal care products, and endocrine disruptors, and highlights that "it is important to recognize that ALL municipal sewage regardless of location will contain PPCPs. Issue is not unique to any particular municipal area," (emphasis in original).[24] The DEQ has already issued a draft EA for the Spanish Peaks snowmaking permit and has not analyzed the data it has been provided nor has it disclosed any relevant analysis of such data such as the the 5 most frequently detected PPCPs within Montana: Sulfamethoxazole (SMX), Atrazine, Dilantin, and Diclofenac.[25] The DEQ must "make an adequate compilation of relevant information, analyze it reasonably, and consider all pertinent data."[26] This must be done "to the fullest extent possible."[27] The DEQ failed to do that and thus violated MEPA and the Montana Constitution.

Response: During permit development, DEQ assessed the reasonable potential for the discharge to "create concentrations or combinations of materials which are toxic or harmful to human, animal, plant, or aquatic life." As stated in the fact sheet, DEQ determined that the discharge does not have reasonable potential to cause an exceedance of this narrative standard. As has been previously stated, PCCPs, PFAS and even microplastics are emerging pollutants of concern. Until the process for determining the appropriate means for regulating these potential pollutants has come to completion and water quality standards or effective technology-based treatment processes are identified, DEQ has no basis for establishing either of those requirements in this MPDES permit. The PowerPoint presentation referred to by the commenter was addressed in response to comment 15. See also, response to comment 34.

No change is made to the draft permit in response to this comment.

Comment 36: The DEQ has no way of ensuring that the effluent produced by the BSWSD is up to water quality standards for making snow. The Yellowstone Club uses the same effluent to make snow. The Yellowstone Club has previously expressed concern about securing its snow-making permit because the BSWSD did not treat the effluent to any standard: "The DEQ approval/ok will be impossible to get because we have 45 million gallons of un-irrigatable water in our pond from the district [BSWSD]."[28] That pond is not disinfected and is full of bacteria, PPCPs, PFAS, and other contaminants.

Response: Please refer to the permit fact sheet (pp.11-12). The permit includes effluent limitations for *E. coli*, and TBELs to ensure the effluent is treated. In addition to the MPDES permit, the DEQ Engineering Bureau reviewed the treatment system at BSCWSD for compliance with DEQ requirements for reclaimed wastewater reuse. Regarding PFAS, PPCPs and other contaminants, DEQ assessed the reasonable potential for these parameters to cause or contribute to an exceedance of the water quality standards and developed appropriate effluent limitations and monitoring requirements. Please refer to the Fact Sheet (pp. 11- 29) See also the responses to comments 8, 9, 10, 11, 12, 13, 34 and 35.

No change is made to the draft permit in response to this comment.

Comment 37: The DEQ cannot authorize a permit to make snow if there is no way to prove that the water used to make snow meets water quality standards. Spanish Peaks does not have a treatment plant that can sufficiently disinfect bacteria/decontaminate the effluent and remove PPCPs, PFAS, and microplastics. Furthermore, the DEQ's EIS did not consider nor analyze the effect of cumulative impacts of various pollution sources on the MFWFGR should Spanish Peaks' manmade snowmelt add to the pollution from the Yellowstone Club's snowmelt in the MFWFGR. Adding more contaminants to the system will likely have negative effects on humans, aquatic life, and the environment since PPCPs, PFAS, and microplastics are found in

the effluent that is not sufficiently treated by the BSWSD, are known to cause harmful health effects, and bioaccumulate.

Response: DEQ developed TBELs and WQBELs in the permit to ensure the protection of beneficial uses in state surface waters. Please refer to the fact sheet (pp. 11-29) and response to comments 34, 35 and 36. DEQ did not issue an EIS for this project. The Environmental Assessment stated that there would be no significant cumulative impacts. Permits issued by DEQ will protect the beneficial uses in the immediate receiving waters and thereby prevent cumulative downstream impacts.

No change is made to the draft permit in response to this comment.

Comment 38: Any law that prevents DEQ from requiring the best available treatment technology is unconstitutional because it infringes on the right to a clean and healthful environment by preventing adequate remedies required to protect and maintain the right to a clean and healthful environment. Art. II, §3; Art. IX, §1. Montana law unconstitutionally prohibits state regulations regarding water quality from being more stringent than federal regulations or guidelines, with limited exceptions. MCA 75-5-203. Subsection 2 (a-b) states that: The [DEQ] may adopt a rule to implement this chapter that is more stringent than comparable federal regulations or guidelines only if the department makes a written finding after a public hearing and public comment and based on evidence in the record that:

(a) the proposed state standard or requirement protects public health or the environment of the state; and
(b) the state standard or requirement to be imposed can mitigate harm to the public health or environment and is achievable under current technology.

The only way the proposed Spanish Peaks MPDES permit can be determined to be constitutional is if the DEQ adopts a rule that requires entities seeking to make snow using treated effluent to obtain and utilize the best available treatment technology as a condition of the permit. Cottonwood requests that the DEQ hold a public hearing, accept public comment, make a written finding, and adopt a rule that requires dischargers to obtain the best available treatment technology that is economically achievable. Short of that, 75-5-203 is an unconstitutional infringement upon Cottonwood members' rights to a clean healthful environment.[30]

The DEQ must provide a public hearing and create standards to mitigate harm to public health and the environment by requiring a discharger to obtain the best available treatment technology– filter systems that can remove PPCPs from the water. BSWSD has already installed one type of filter, and Spanish Peaks must pay to purchase and install technology to protect the health of the

MFWFGR and human and aquatic life that would be impacted by the snowmaking operations at Spanish Peaks.

Regardless of any exceptions, MCA 75-5-203 unconstitutionally violates the clean and healthful environment protections of the MT Constitution because the default nature of the law holds the MT DEQ to the bare minimum regulations set by the EPA which, as evidenced by the lack of regulations of PPCPs, are insufficient to properly protect the environment, state waters, animals, and humans. The government has an obligation to maintain and improve the environment.[31]

The DEQ should not grant Spanish Peaks an MPDES permit for its proposed snowmaking operation without first purchasing available treatment technology for the BSWSD (from where the wastewater is sourced) that will remove PPCPs, PFAS, and microplastics from the water. Otherwise, these chemicals will find their way into state waters in violation of Cottonwood members and all Montanans' right to a clean and healthful environment.

Response: The comment addresses the adoption of new state rules and the constitutionality of § 75-5-203, MCA, both subjects are outside of the scope of this permitting process. Furthermore, and unless Montana courts direct otherwise, statutes are presumed to be constitutional. DEQ does not purchase treatment technology for permittees. See also, responses to comments 34, 35, and 36.

No change is made to the draft permit in response to this comment.

Comment 39: The DEQ must prepare an EIS because there are significant questions as to whether the discharge of PPCPs, PFAS, and microplastics may have a significant impact on the environment. PFAS are "forever chemicals," and the duration of their impacts triggers the need to prepare an EIS. PFAS are known to cause cancer and PPCPs are known to cause fish and amphibians to change sexes. These are severe impacts that trigger the need to prepare an EIS. Microplastics are known to cause neurotoxicity, reproductive toxicity, altered metabolism, carcinogenicity, and oxidative stress in humans.[32] In fish, microplastics may cause structural damage to the intestine, liver, gills, and brain, while affecting metabolic balance, behavior, and fertility.[33]

Response: DEQ prepared an Environmental Assessment and found there were no significant impacts from the proposed snowmaking project if operated in compliance with the discharge permit and approvals from the Engineering Bureau. An Environmental Impact Statement is not necessary. See also, responses to comments 34 and 35. Regarding microplastics, as with PPCPs this is an emerging pollutant of possible concern, and little is definitively known about environmental effects. DEQ has no basis to address microplastics at this time.

No change is made to the draft permit or EA in response to this comment.

Comment 40: Cottonwood has previously filed a Water Quality Act complaint against Spanish Peaks for unlawfully discharging treated effluent into waters of the United States. The DEQ never closed the complaint. The DEQ is well aware of the lawsuits that Cottonwood has filed against Spanish Peaks but never asked for any information to help with its investigation. Cottonwood settled the first Clean Water Act lawsuit against Spanish Peaks, but the Court determined the consent decree barred us from bringing the second case. The second case involves the DEQ spraying treated effluent out of its snow guns during the summer on the ski slopes. We have photographic evidence of treated effluent running down a road in Spanish Peaks. The DEQ should bring Spanish Peaks into compliance before issuing a discharge permit that allows Spanish Peaks to discharge even more pollution. We have attached the expert report that used isotopic analysis to determine the algae in the tributary below the spraying contains treated effluent. Why has the DEQ not done anything? Answer: The DEQ is a captured agency that is more interested in allowing polluters to continue polluting. Please stop working for the polluters and do your job.

Response: DEQ does not operate snow guns, during summer or any other time. Regardless, Cottonwood's MWQA complaint and any related enforcement activities are outside the scope of this permitting process. DEQ has a duty to issue permits pursuant to § 75-5-402, MCA, and it developed the Spanish Peaks permit in accordance with applicable permitting laws.

No change is made to the draft permit in response to this comment.

Commenter 22: Guy Alsentzer, Executive Director, Upper Missouri Waterkeeper

Comment 41: The following is a summary of the comment.

The commenter asserted that the proposed permit's effluent limits do not include nutrient limitations of any type and that the permit should have included as an effluent limitation the value that was the basis of the nutrient discussion in the fact sheet. The permit application included an estimated total nitrogen value of 5 mg/L that could be achieved either by treatment from the BSCWSD or by adding groundwater to the hole 10 pond to ensure that TN concentrations would not exceed this value. The commenter provided a lengthy discussion of how effluent limits are established in NPDES permits, the types of effluent limitations employed by the federal clean water act, and provided numerous citations to court decisions and other rationale for why DEQ should establish an effluent limit for total nitrogen in the permit.

The entire comment is part of the permit administrative record.

Response: The total nitrogen concentration (5.0 mg/L) specified in DEQ Circular-2 for wastewater classified as A-1 for reuse was used in the fact sheet's reasonable potential analysis with the understanding that the water used for snowmaking would meet this concentration via improved treatment at the BSCWSD or by adding groundwater to the Hole 10 Pond, or both. The BSCWSD is not subject to the 5.0 mg/L A-1 standard at this time, therefore a 5.0 mg/L effluent limitation is added to the final permit as a daily maximum that may not be exceeded. The limit will apply at the point of discharge from the Hole 10 Pond. This limit and/or the monitoring location may be revised if the plan and specifications review for the BSCWSD is updated to require compliance with the 5.0 mg/L A-1 classification standard.

Commenter 4: Rich Chandler, Lone Mountain Land Company

Comment 42: Spanish Peaks respectfully proposes utilizing the same methodology for monitoring TRC for the Spanish Peaks snowmaking permit that DEQ approved and that is used for the Eglise reclaimed-water snowmaking permit (MT0032051, "Eglise Permit"). Currently, the Draft Permit and Fact Sheet specify that TRC must be "composited and analyzed immediately." However, to immediately measure TRC in the field using a meter, the media must be in a liquid form. Given the frozen condition of snow, this monitoring approach is not feasible to complete immediately. By contrast, under the Eglise Permit, freshly made snow is packed tightly into glass vials and sent to the laboratory for composition and analyses using CFR 40 Part 136 approved analytical methods (as referenced in the Draft Permit) in a controlled environment. Through past snow monitoring experience, the method used for the Eglise Permit has proved to be a feasible and reputable method for analyzing snow for TRC. The samples have consistently arrived at the laboratory as snow still packed in the glass vial with zero headspace (as originally collected and also required for the analytical method) and are analyzed by the lab in a controlled environment. Spanish Peaks requests confirmation that the Draft Permit allows Spanish Peaks to utilize the same methodology under Permit No. MT0032174, or alternatively, requests clarification of the Draft Permit to allow this methodology.

Response: DEQ agrees that, due to the unique situation for collecting water samples as snow, that the methodology for collecting and analyzing TRC as described is acceptable. A footnote has been added to the monitoring table in the final permit.

Comment 43: As DEQ is aware, Spanish Peaks manages the reuse of a portion of the Big Sky community's reclaimed water (treated and disinfected domestic wastewater), which is generated by Big Sky County Water and Sewer District No. 363 (BSCWSD). The reclaimed water is conveyed to the South Pond at Spanish Peaks for storage and eventual beneficial reuse. To effectively manage this water, Spanish Peaks uses the South Pond and Hole 10 Pond for storage. Water from the South Pond is transferred to Hole 10 Pond, where the water is stored until it can be reused (for golf course irrigation, and eventually under the Permit, for artificial snowmaking).

Spanish Peaks also has the ability to commingle the water held in Hole 10 Pond with domestic water supply.

Spanish Peaks will need to transfer water from the South Pond to Hole 10 Pond prior to the snowmaking time period. This timing is necessary due to the relative pumping capacity for flows into and out of Hole 10 Pond (the pond fills more slowly than the rate at which water will flow out for snowmaking), as well as the fact that domestic water is added to Hole 10 Pond. The transfer will occur over a few weeks to a month, typically in September or October. However, snowmaking with reclaimed water under the Draft Permit would not occur until later, likely in November or December. Therefore, to comply with the draft permit conditions, Spanish Peaks will need to monitor the required TBEL parameters listed in Table 2 of the Draft Permit (pH, BOD5, and TSS) prior to months in which snowmaking occurs, as reclaimed water is transferred from the South Pond to the Hole 10 Pond and prior to any addition of domestic water.

Spanish Peaks proposes to report the TBEL monitoring results once snowmaking actually begins (in November or December). For example, if reclaimed water that will be used for an upcoming reclaimed-water snowmaking campaign is transferred from the South Pond to Hole 10 Pond in October, monitoring will be completed for pH, BOD5, and TSS at the time of the transfer as outlined in Table 2 of the Draft Permit. All other required monitoring will be completed during the snowmaking period (November, December). Reporting of the other required monitoring data will be reflected in the month (or months) of snowmaking (November, December), and the DMR submittal will also include the monitoring data collected for the TBELs in October when the reclaimed water was transferred to Hole 10 Pond. Spanish Peaks respectfully requests that DEQ consider these necessary logistics for managing reclaimed water and confirm that the monitoring and reporting protocol outlined above is consistent with the Draft Permit conditions. This approach will be outlined in the forthcoming Sampling and Analysis Plan (SAP) submittal to DEQ.

Response: DEQ agrees to allow TBEL monitoring (pH, BOD5, and TSS) and reporting as described in the comment. A footnote has been added to the monitoring table in the final permit.

Comment 44: Spanish Peaks originally submitted comments regarding the Draft Permit on June 5, 2024, as part of the first comment period. Spanish Peaks is now providing additional information in response to a public comment submitted by Cottonwood Environmental Law Center (Cottonwood) during the 2024 comment period. Cottonwood raised concerns about potential impacts from per- and polyfluoroalkyl substances (PFAS). DEQ has concluded that PFAS effluent limits or other permit conditions are not necessary for Spanish Peaks' snowmaking operations. Spanish Peaks is submitting additional information that further demonstrates Cottonwood's concerns regarding alleged PFAS
impacts from Spanish Peaks' proposed snowmaking operations are unfounded and misguided.

To investigate the issue, Spanish Peaks commissioned a technical evaluation from GSI Environmental Inc. (GSI). GSI's Technical Memorandum is attached to this letter. *See* GSI Environmental Inc., Technical Memorandum of PFAS in Support of the Proposed Spanish Peaks' Montana Pollutant Discharge Elimination System Permit No. MT0032174 (March 4, 2025) (GSI Report). Based on GSI's evaluation, there is no reason to believe that PFAS pose a risk to human health or the environment such that DEQ must further investigate the issue in connection with the Draft Permit. This conclusion is supported by Montana-specific PFAS data and site-specific considerations for Big Sky and Spanish Peaks' snowmaking operations. Specifically, GSI determined the following:

- Data collected across Montana, including by DEQ or its contractors, indicate PFAS levels are likely near or below analytical detection limits in Big Sky's reclaimed water, if present at all.
- There are no known local primary or secondary sources of PFAS in the Big Sky area, and DEQ therefore would not anticipate finding elevated PFAS concentrations in the reclaimed water used in Spanish Peaks' proposed snowmaking operations.
- Snowmelt from Spanish Peaks' reclaimed-water snowmaking would occur at a time when dilution is maximized, thereby minimizing any potential risks associated with PFAS in the reclaimed water.

- The substantial environmental benefits associated with the Draft Permit—including prevention of direct discharges of treated effluent to the Gallatin River—far outweigh any speculative concern about PFAS in snowmaking discharges.

Further supporting information and discussion regarding PFAS can be found in the attached GSI Report.

Response: Thank you for the comment. The comment and attachments are entered into the administrative record. DEQ agrees that the report referenced in the comment provides additional information that supports DEQ's conclusions that effluent limitations or monitoring requirements for PFAS are not necessary at this time.

No change is made to the draft permit in response to this comment.