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MONTANA FIRST JUDICIAL DISTRICT, LEWIS AND CLARK COUNTY

UPPER MISSOURI WATERKEEPER Plaintiff, v. MONTANA DEPARTMENT OF ENVIRONMENTAL QUALITY, an agency of the State of Montana Defendant.	Case No. BDV-25-2025-0000265-WM **PLAINTIFF'S RESPONSE IN OPPOSITION TO DEFENDANT'S MOTION TO DISMISS**

INTRODUCTION

The very essence of mandamus is the necessity of a speedy remedy if, in this case, water quality in the Big Hole is to be protected. This Court, much less Defendant the Montana Department of Environmental Quality, have constitutional obligations to "maintain and improve a clean and healthy environment for this and future generations." *Cape-France Enterprises v. Estate of Peed,* 2001 MT 139. But to the contrary, Defendant urges delay, delay, delay.

This Court has clear jurisdiction, Plaintiffs possess standing, and there is no other speedy and adequate remedy. So too the question presented to this Court remains narrow, and ripe: does

the Department possess discretion to circumvent the express requirements of federal environmental law when Congress has already occupied the field? The answer necessarily must be a resounding "NO."

LEGAL STANDARD

A motion to dismiss under Rule 12(b)6 tests the legal sufficiency of a complaint. *Navarro v. Block*, 250 F.3d 729, 732 (9th Cir. 2001). A claim is subject to Rule 12(b)6 dismissal only if it either fails to state a cognizable legal theory for relief, or states an otherwise valid legal claim but fails to state sufficient facts that, if true, would entitle the claimant for relief under that claim. *Anderson v. ReconTrust Co., NA*, 2017 MT 313, ¶8 citing M.R.C.P. 12(b)6. A complaint will survive a motion to dismiss if it alleges facts that allow "the court to draw the reasonable inference that the defendant is liable for the misconduct alleged." *Ashcroft v. Iqbal,* 556 U.S. 662, 678 (2009).

In determining whether the liberal pleading standard of Rule 12(b)6 is satisfied, the Court must accept all factual allegations as true and view them in the light most favorable to the plaintiff, drawing all reasonable inferences in favor of the claim. Assessing a claim under a Rule 12(b)6 motion is a "context-specific task that requires the reviewing court to draw on its judicial experience and common sense." *Iqbal*, 129 S.Ct. at 1950.

ARGUMENT

I. DEQ Has a Clear Legal Duty to Apply EPA-Approved Water Quality Standards in Any Applicable Clean Water Act Decision

The Montana Supreme Court has repeatedly affirmed that a court's decision to issue a writ of mandate turns on two questions: " 1) "whether the act sought to be compelled is one which the law specially enjoins as a duty resulting from an office, trust or station" and 2) "whether there is a plain, speedy and adequate remedy in the ordinary course of law." *Allied*

Waste Servs. of N. Am., LLC v. Mont. Dep't of Pub. Serv. Regulation, 2019 MT 199, ¶ 19, 397 Mont. 85, 447 P.3d 463 (Mont. 2019) (internal citations omitted). Instructive to this case, on May 29, 2025, the Supreme Court again affirmed that "the writ must be issued in all cases in which there is not a plain, speedy, and adequate remedy in the ordinary course of law." *MEIC et al v. Office of the Governor of Montana*, 2024 MT 112, ¶ 22, (May 29, 2025) (internal citations omitted). Therefore the first, threshold, question is whether DEQ violated a clear legal duty.

Here, there can be no dispute that DEQ possesses a clear legal duty to apply promulgated water quality standards. It is undisputed that the State of Montana adopted dual numeric nutrient criteria and Circular DEQ-12A in 2014, and that such criteria represent a 'revision of water quality standards' requiring review and approval of the Environmental Protection Agency (EPA) before carrying the force of law for any Clean Water Act purpose. *See* 33 U.S.C. § 1313(c)(3). EPA took action approving Montana's numeric nutrient criteria by Letter dated February 26, 2015. EPA has not approved any revision of numeric nutrient criteria since its approval, and as recently as May 10, 2022, issued formal letters to the Director of DEQ stating that numeric nutrient criteria remain applicable for all Clean Water Act purposes. *See* Exhibit B to the Complaint; *see also Alaska Clean Water Alliance et al v. EPA, et al,* 1997 U.S. Dist. LEXIS 11144, 27 ELR 21330 (July 8 1997) (revisions to state water quality standards are only effective after EPA review and approval).

As a state delegated authority to implement requirements of the Clean Water Act, DEQ is obligated by both state and federal law to faithfully apply promulgated and EPA-approved water quality standards in its program administration, including here, application of numeric nutrient criteria to a petition providing best available science to determine whether the Big Hole River is violating applicable criteria and fully attaining its beneficial uses pursuant to

33 U.S.C. § 1313(d).

In its Motion to Dismiss DEQ argues that its decision-making under 75-5-702(3) represents an exercise of discretion, and a writ may not issue to compel a discretionary act. Yet DEQ specifically admits that "DEQ denied the Petition because it determined that DEQ-12A was not applicable for purposes of state law." Ds.' Br. ISO Mot. to Dismiss, pp. 7. This statement and the plain language of DEQ's April 14, 2025 Letter to Petitioners, demonstrates DEQ's legal error in failing to perform the non-discretionary, ministerial act of applying binding numeric nutrient criteria to support a decision on the nutrient impairment petition under 75-5-702. DEQ conflates an agency's ability to weigh evidence in a petition with its non-discretionary duty to apply the binding criteria, AKA the measuring stick, for rendering a decision on the basis of such an evaluation.

Plaintiff's Complaint and Application for a Writ of Mandate is narrowly tailored at holding DEQ accountable to apply requisite scientific metrics applicable to the agency's weighing of evidence. *See* Plaintiff's Complaint ¶¶ 61-74*,* Plaintiff's Brief ISO Appl. for Writ at pp. 7-10. DEQ's brief does not allege that DEQ possesses authority to ignore requirements of federal law, nor does it raise or provide any support for an argument that the Art. I, Section 8 of the United States Constitution and the federal Clean Water Act's preemption of water pollution control is somehow not binding on DEQ's action. The United States Supreme Court addressed the issue of conflict preemption in *Gade v. Nat'l Solid Wastes Mgmt. Assn.,* 505 U.S. 88 (1992). There, the Supreme Court determined that federal law preempts a state law that conflicts with federal law, emphasizing that the plain language of the federal statute controls the leeway, if any, for state law to deviate from its requirements.

As raised in Plaintiff's Complaint and Brief in Support of the Application for Writs of Mandate, the federal Clean Water Act and unanimous federal courts have determined that state water quality standards are only applicable upon EPA review and approval. 33 U.S.C. § 1313(c); *see supra, Alaska et al v. EPA*; *Miccosukee Tribe of Indians of Florida v. EPA,* 105 F.3d 599 (11th Cir. 1997); *FPIRG v. EPA*, 386 F.3d 1070 (11th Cir 2004). So too, a state agency delegated authority to implement programs of the Clean Water Act has no discretion to refuse to apply duly-promulgated and EPA-approved water quality standards. Federal law binds DEQ to only act in manners consistent with requirements of the Clean Water Act when it is rendering a Clean Water Act decision. DEQ's brief also purposefully omits any meaningful discussion of EPA's May 10, 2022 Letters to DEQ and the plain instruction that the passage of Senate Bill 358 from the 2021 Legislative Session was disapproved, and therefore void for all Clean Water Act decisions, in all relevant respects to the purpose of eliminating numeric nutrient criteria. *See* Ex. B to Complaint. The CWA unambiguously requires states to apply EPA-approved water quality standards in relevant CWA decisions, thus there was no discretion for DEQ to not apply numeric nutrient criteria to Plaintiff's Big Hole nutrient impairment petition.

Last, DEQ argues that the passage of House Bill 664, which Governor Gianforte signed on May 1, 2025, sanctions its earlier decision-making refusing to apply numeric nutrient criteria to the Big Hole Petition, rendered on April 14, 2025. This assertion is legal error, and a logical fallacy. First and as discussed above and in Plaintiff's opening brief, federal law mandates that EPA-approved water quality standards must be applied for any relevant Clean Water Act decision. The Clean Water Act preempts any conflicting state law. Second, a legislative bill signed into law *after* an agency action cannot lawfully be the basis for said earlier action.

For all these reasons DEQ violated its clear legal duty to apply duly-promulgated and EPA-approved numeric nutrient water quality standards to its Clean Water Act decision-making under 75-5-702, MCA.

II. No Speedy and Adequate Remedy Exists in the Ordinary Course of Law

"Mandamus [.] should be reserved for those instances where other remedies will not accomplish the parties' needs due to specific concerns regarding timeliness or particular reticence of the governmental body [.]" *MEIC et al v. Office of the Governor of Montana*, 2024 MT 112, ¶ 24. "A writ of mandamus remains appropriate only in clear-cut cases where no genuine countervailing interests preclude finding a clear legal duty and alternative remedies [.] are inadequate." *Id.* at ¶ 25.

The gravamen of DEQ's Motion to Dismiss is its allegation that first, exhaustion is required, and second, its factual allegations about the adequacy of the alleged exhaustion. As an initial matter, the standard of review for a motion to dismiss requires taking the non-movant's factual allegations as true, and viewing pleadings in the light most favorable to the non-movant. *Woods v. Shannon*, 2015 MT 76, ¶ 9, 378 Mont. 365, 344 P.3d 413.

Turning to DEQ's first point, mandamus allows judicial review without exhaustion when there is both violation of a clear legal duty and no other speedy or adequate remedy available at law. Further, in *Keller v. Dept. of Revenue*, the Montana Supreme Court established an exception to the exhaustion doctrine for purely legal questions: “We hold that the particular Department of Revenue ruling was an interpretation of law that must be made by the judiciary, and thus, the exhaustion doctrine is inapplicable.” 182 Mont. 478, 597 P.2d 736 (1979).

DEQ's procedural, and purely legal, error entails a failure to implement a mandatory, science based decision-making process providing remedies to the ongoing degradation of

Montana's Big Hole River. Thus, this case isn't about DEQ's exercise of discretion weighing evidence of nutrient impairment presented by the Big Hole petition: rather, this case is about DEQ's failure to implement binding numeric nutrient criteria to a Clean Water Act decision.

DEQ has a duty to "maintain and improve a clean and healthful environment," and to exercise its authority to afford protections to waterways that are both anticipatory and preventative. Mont. Const. Art. II, sec 3, Art. IX, Sec. 1; *MEIC v. DEQ*, 1999 MT 248 (1999). The WQA's purpose is to provide adequate remedies for protection of the environmental life support system from degradation. 75-5-102(1), MCA. Degradation means a change in water quality that lowers the quality of high-quality waters for a parameter. 75-5-102(6). Chronic exceedances of numeric nutrient criteria presented in the Petition provide a prima facie case of the very degradation the WQA is intended to address.

The only speedy and adequate remedy in this case is seeking judicial review of the narrow question of whether the Department may refuse to apply promulgated water quality standards in a Clean Water Act decision. The issue becomes more ripe - and the need for the speedy and adequate remedy offered by mandamus the only meaningful option - when considered against the DEQ's failure to even submit impaired waters lists to EPA for the past two triennial cycles. While the affidavit of Mr. Ulven alleges the agency retains discretion to submit impaired waters to EPA at any time, the same agency's failure to routinely submit such lists under his leadership undermines any credibility such statement affords. Regardless, the issue in this case is that DEQ's failure to apply the binding scientific criteria to reach a lawful decision allows degradation and harm to continue, unabated for an indefinite time, making any other legal remedy incapable of affording speedy and adequate relief.

Second, DEQ argues that 75-5-702 requires mandatory exhaustion before the Board of Environmental Review. Assuming *arguendo* that mandamus does not lie, the statutory exhaustion language is ambiguous and does not provide another plain remedy. First, the plain language is permissive, not mandatory. It is a textual canon that "may" is permissive, while "shall" is mandatory. *See Mallard v. United States Dist. Court*, 490 U.S. 296, 302 (1989). The statement that "[a] person aggrieved by the department's decision to grant or deny the request *may* appeal the department's decision to the board" denotes permissive status, and stands in contrast to 75-5-403, MCA, which provides that a *permit applicant or holder* may appeal a DEQ permitting decision to the Board. The public however appeals a Department decision directly to state court. These related sections of the Water Quality Act demonstrate first, a permissive remedy, and second, a colorable distinction about whom is required to perform administrative exhaustion. If the Legislature sought to explicitly require all appeals of all DEQ Water Quality Act decisions to exhaust remedies through the Board of Environmental Review it could do so, but it has not, and courts do not presume a requirement contrary to a statute's plain language. However this Court need not even address this argument as mandamus is appropriate and so too the purpose and need for associated declaratory relief.

Third, assuming *arguendo* exhaustion is appropriate, it still would not provide an adequate remedy. The WQA implements Plaintiff's constitutional rights to a clean and healthful environment. DEQ omits any reference to the length of Board of Environmental Review proceedings, which this counsel personally understands contemplate *years*, before allegedly becoming ripe for judicial review, which again this counsel personally understands contemplates additional *years*. Following DEQ's logic to its conclusion, during this pendant time-period the Big Hole would be allowed to suffer from continued, seasonal exceedances of nutrient standards

and experience recurrent harmful water quality conditions that harm beneficial uses of water, without any actions being taken to address harm on the ground. Moreover, the Petition provided, and DEQ did not rebut, the Petition's inclusion of macroinvertebrate data demonstrating the present-day loss of diverse bug communities on the Big Hole in the same river segments experiencing violations of nutrient standards. Nor did DEQ rebut the data provided regarding the Montana Fish, Wild and Parks' biological surveys indicating wild trout populations on the Big Hole are at unprecedented, 40-year historic lows, including the fluvial arctic grayling, a candidate species under the Endangered Species Act that only persists in the Big Hole River and whose habitat requirements explicitly require clean, cold water. Delaying resolution of the simple, singular question concerning DEQ's clear legal duty to apply binding, scientific metrics for determining river impairment cannot be adequately satisfied through another process entailing years of delay for a single, purely legal question.

75-5-102(1), MCA provides that "[i]t is the legislature's intent that the requirements of this chapter provide adequate remedies for the protection of the environmental life support system from degradation and provide adequate remedies to prevent unreasonable depletion and degradation of natural resources. A purpose of this chapter is to provide additional and cumulative remedies to prevent, abate, and control the pollution of state waters." At the same time, the Act specifies that "[e]xisting uses of state waters and the level of water quality necessary to protect those uses must be maintained and protected." 75-5-303(1), MCA. Where, as here, best available science demonstrates that the Big Hole is experiencing chronic exceedances of nutrient standards, that biological metrics demonstrate harm to the aquatic life uses, and there is clear and convincing evidence that the waterway is impaired, the burden lies on DEQ to make an assessment of impairment via application of its promulgated rules. "We [must]

reject the argument that the delegates - intending the strongest, all-encompassing environmental protections in the nation, both anticipatory and preventative, for future generations - would grant the State a free pass to [ignore science demonstrating harm to waterway health] just because the [Legislature] insisted on doing so." *Held v. State*, 2024 MT 312, ¶ 30.

Because the express constitutional environmental protection imperatives for waterways are implemented through the WQA; because 75-5-702, MCA is a means for maintaining and restoring water quality to support uses of water; because any other remedy at law entails significant years of delay and continued but avoidable harm for the Big Hole; and because the facts of this case demonstrate no legal - much less reasonable - basis for DEQ failing to perform its clear legal duty to simply apply the scientific measuring stick for nutrient pollution to a Clean Water Act impairment petition, but for mandamus there exists no other adequate or speedy remedy.

III. Administrative Exhaustion is Not Applicable

DEQ exhorts this Court to determine that exhaustion bars both of Plaintiff's causes of action. However, as noted above mandamus is an exception to exhaustion, and applies in this case. Second, in *Keller v. Dept. of Revenue*, the Montana Supreme Court also established an exception to the exhaustion doctrine for purely legal questions: "We hold that the particular Department of Revenue ruling was an interpretation of law that must be made by the judiciary, and thus, the exhaustion doctrine is inapplicable." 182 Mont. 478, 597 P.2d 736 (1979). This case turns on the purely legal question of whether DEQ may circumvent express requirements of the federal Clean Water Act. Answer: it cannot.

Third, the exhaustion doctrine does not apply to constitutional issues. *Mitchell v. Town of West Yellowstone,* 765 P.2d 745, 235 Mont. 104, 110, (Mont. 1988). The WQA implements

Plaintiffs' constitutional right to a clean and healthful environment, and to adequate remedies at law. The WQA also implements requirements of the federal Clean Water Act, which requires at minimum, agency decision-making that applies duly promulgated water quality standards. Indeed, "“[c]onstitutional questions are properly decided by a judicial body, not an administrative official, under the constitutional principle of separation of powers.” *Hoffman v. State*, 2014 MT 90, ¶ 9, 374 Mont. 405, 328 P.3d 604 (*quoting Mitchell v. Town of W. Yellowstone*, 235 Mont. 104, 109, 765 P.2d 745, 748 (1988)). “Thus, when a party raises a bona fide constitutional claim, he has a right to resort to declaratory judgment, rather than submitting himself to an ordinance or rule he deems unconstitutional.” *Brisendine v. Dep’t of Commerce*, 253 Mont. 361,365,833 P.2d 1019, 1022 (1992) (*citing Mitchell*, 235 Mont. at 108, 765 P.2d at 748)." *Flowers v. Board of Personnel Appeals*, 400 Mont. 238, ¶ 15, 2020 MT 150, 465 P.3d 210.

Here, Plaintiff's Complaint explicitly cited the singular legal question at-hand, and the constitutional imperatives underlying the DEQ's exercise of authority in the WQA. Likewise, Plaintiff's Petition to DEQ seeking the agency determine whether best-available science requires an impairment determination outlined the agency's duty to act in an anticipatory and preventative fashion. "The first business of courts is to provide a forum in which the constitutional rights of citizens may be protected." *Mitchell*, 235 Mont. at 110. Numeric nutrient criteria represent best available science capable of protecting and maintaining healthy rivers and water quality necessary to support beneficial uses in the Big Hole River. Plaintiff jointly submitted years of water quality data collected pursuant to DEQ's own standards and approvals. The Board of Environmental Review has no power to adjudicate the constitutionality of DEQ's failure to act in

an anticipatory and preventative manner that applies the nation's strongest environmental protections.

IV. Plaintiffs Have Standing

A plaintiff has legal standing to assert a claim if (1) the claim is based on an alleged wrong or illegality that has caused, or is likely to cause, the plaintiff to suffer a past, present, or threatened injury to person, property, or exercise of civil or constitutional right and (2) the harm is of a type that legal relief can effectively alleviate, remedy, or prevent. Justiciability requires only one plaintiff to have standing to seek the same equitable relief as another plaintiff. *Held v. State*, 2024 MT 312, ¶ 32 (internal citations omitted). Here, Plaintiff has alleged facts that agency action has violated legal obligations enshrined in statute and which protect constitutional rights, and "seeking to vindicate those constitutional rights confers standing." *Id*. ¶ 33. *See generally Schoof* v. Nesbit, 2014 MT 6, ¶¶ 17-23, 373 Mont. 226, 316 P.3d 831; *see also Gazelka v. St. Peter's Hosp.*, 2015 MT 127, ¶ 15, 379 Mont. 142, 347 P.3d 1287; *Weems v. State*, 2019 MT 98, ¶ 9, 395 Mont. 350, 440 P.3d 4 ("'A plaintiff's standing may arise from an alleged violation of a constitutional or statutory right.'" (*quoting Mitchell*, ¶ 11)); *Advocs. for Sch. Trust Lands v. State*, 2022 MT 46, ¶ 28, 408 Mont. 39, 505 P.3d 825. Further, Plaintiff and its members recreational, aesthetic, pecuniary, and social interests in a clean and healthful Big Hole are not being fulfilled, and the organization's petitioning of the State to act on best-available science that it helped sponsor and collect, only to be ignored at decision time, reflects past, present and threatened future injury to protected interests.

The pleadings demonstrate a sufficient personal stake in Plaintiff's organizational and associational standing rights, including but not limited to its and its members' right to a clean and healthful environment. The pleadings also demonstrate that Plaintiff was in-fact a petitioner

seeking action from DEQ, and thus has unique injury distinguishable from the public as a party injured by DEQ's refusal to perform its mandatory duty to apply science-based water quality standards to evaluate an impairment petition. Similarly, Plaintiff's Complaint alleged that DEQ's unlawful action was delaying meaningful action capable of helping restore and protect uses in the Big Hole River and water quality necessary to support those uses, and in so doing DEQ was acting contrary to its affirmative duty to take active steps to realize the right to a clean and healthful environment vis-a-vis science based decision-making on an impairment petition. Doing so was in accord with *MEIC* 1999, ¶ 21, 45 (holding plaintiffs had "standing to challenge conduct which has an arguable adverse impact" on the river). "This was sufficient for standing purposes." *Held v. State*, ¶ 36. Last, the requested relief is notably narrow, and appropriate in that is would vindicate Plaintiff's rights to a science-based decision. Presently, there was no such lawful, science-based decision. DEQ's April 14, 2025 Letter was simply a rejection of law.

DEQ last argues Plaintiff has no standing to seek declaratory relief, yet its grave abuse of authority gives rise to the very need for a determination and declaration by this court. In the case of *Reichert v. State ex rel. McCulloch*, 2012 MT 111, ¶ 22, 365 Mont. 92, 101, 278 P.3d 455, 462–63, (2012), the Court found that its most discrete inquiry for standing is on whether the plaintiffs allege a real – not speculative – past, present, or threatened injury. The Court explained:

> The judicial power of Montana's courts is limited to justiciable controversies— meaning that our courts do not resolve abstract differences of opinion or advise what the law would be upon a hypothetical state of facts. *Id.* citing, *Plan Helena, Inc. v. Helena Regl. Airport Auth. Bd.,* 2010 MT 26, ¶¶ 6, 9, 355 Mont. 142, 226 P.3d 567. Hence, issues of justiciability—such as whether the plaintiff has standing and whether the dispute is ripe or moot—are antecedent, as well, to any discussion of the substantive merits of the parties' claims. *Id.* citing *Plan Helena,* ¶ 11; *Heffernan v. Missoula City Council,* 2011 MT 91, ¶ 29, 360 Mont. 207, 255 P.3d 80; *Havre Daily News, LLC v. City of Havre,* 2006 MT 215, ¶¶ 18, 31, 333 Mont. 331, 142 P.3d 864.

Here, the pleadings establish Plaintiff's and its member's interests, and their injuries resulting from DEQ's decision-making. *See* Complaint, ¶¶ 5-10. When DEQ failed to apply binding metrics for determining impairment on the Big Hole, the agency allowed the alleged harms to water quality and beneficial uses to continue, unabated, despite statutory and constitutional mandates otherwise. The pleadings also establish that DEQ violated the federal law by refusing to apply protective, EPA-approved, numeric nutrient criteria to a petition seeking a formal recognition of pollution in the Big Hole River. The Petition, which is part of this case's pleadings, lastly establishes the harm to water quality and beneficial uses that occurs when violations of nutrient criteria occur.

The aforementioned Montana precedent establishes that injury to economic, aesthetic, constitutional and due process interests are in-fact justiciable. *See also, Flathead Lakers Inc. v. Montana Dep't of Nat. Res. & Conservation*, 2023 MT 85, ¶ 12, 412 Mont. 225, 530 P.3d 769. Plaintiff's injuries are neither speculative nor hypothetical. Applying the 12(b) standard of review, if the Court accepts the allegations in the pleadings as true, which it must in this present posture, it is undeniable that Plaintiff presents a real, ripe, and justiciable controversy which is appropriately brought pursuant to specific subject-matter jurisdiction provided this court by 27-26-101 MCA, et seq., and 27-8-202, MCA ("Any person interested . . . whose rights, status, or other legal relations are affected by a statute . . . may have determined any question of construction or validity arising under the . . . statute . . . and obtain a declaration of rights, status, or other legal relations thereunder." *See Held v. State*, ¶ 35, n.4 (internal citations omitted).

Furthermore, the Complaint's Request for Relief, paragraph B, entailing a request for declaratory judgment, flows directly from DEQ's egregious misconduct and unlawful behavior in this case. DEQ's refusal to apply promulgated numeric nutrient criteria to a science-based

determination of river impairment displays either a profound ignorance of legal requirements, or a morally bankrupt decision prioritizing gamesmanship and seeking delay over the State's public trust in clean & healthful environment. Neither is acceptable. Besides, the requested declaration is necessary and proper to vindicate Plaintiff's rights, and to assure DEQ understands the binding legal status of numeric nutrient criteria for Clean Water Act purposes and its obligations under the state constitution and federal law as regards water quality standards implementation. The Court also has before it three letters from EPA to DEQ dated May 10, 2022, the third of which is entitled a Memoranda on Implementation, and in Part IV details EPA's review of DEQ's lacking implementation of nutrient standards. *See* Exhibit B to Complaint. Notable in this case are EPA's conclusions:

> In May 2020, DEQ concluded that the NNC were no longer in effect due to the state's view that the non-severability clause had been triggered. Since that time, MDEQ has generally not implemented the NNC as the applicable WQS. Following the district court's October 2020 order the state public noticed numerous permits in which it identified TN or TP as a pollutant of concern, but for which the state did not conduct an RP analysis using the NNC or include effluent limits for TN or TP based on the NNC. EPA provided written and verbal comments notifying MDEQ that the NNC were still in effect for CWA purposes and that the state was required to utilize the NNC as the basis for WQBELs in relevant permits.

pp.9-10.

Thus, according to EPA three years ago, DEQ was already refusing to perform the clear legal duty placed on it by law. Today, one of Montana's most cherished waterways is exhibiting undisputed violations of scientific standards that, during their adoption in 2014, DEQ's top scientists lauded as capable of protecting beneficial uses and preventing waterway harm. As petitioners with specific injuries flowing from DEQ's action in this case, Plaintiff has clear standing, and so too the singular, urgent legal question in this case is both justiciable and ripe for action by this Court.

CONCLUSION

The Court should deny DEQ's Motion to Dismiss on all counts, issue a writ of mandate requiring DEQ to reconsider Waterkeeper's Petition in light of and after application of numeric nutrient criteria within two weeks of an order, and determine and declare that DEQ must apply numeric nutrient criteria in all CWA decision-making unless and until EPA approves a revision of water quality standards altering criteria under Circular DEQ 12-A.

Respectfully submitted on this _2nd_ day of June 2025.

/s/ Guy Alsentzer
Attorney for Plaintiff

CERTIFICATE OF SERVICE

I, the undersigned hereby certify that this 2nd day of June 2025, I caused to be served a true and correct copy of the foregoing document and any attachments to all parties or their counsel of record as set forth below:

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