August 7, 2025

VIA CERTIFIED U.S. MAIL
RETURN RECEIPT REQUESTED

Lee Zeldin, Administrator
U.S. Environmental Protection Agency
1200 Pennsylvania Avenue, N.W.
Washington, DC 20460

RE: Notice of Intent to Sue EPA for Failure, Under Clean Water Act Section 303(c), 33 U.S.C. 1313(c), to Approve or Disapprove State of Montana's Revised Water Quality Standards, House Bill 664, House Bill 685, and House Bill 736

Dear Administrator Zeldin:

This is a 60-day Notice under the Clean Water Act 33 U.S.C. § 1365(a)(2) on behalf of Upper Missouri Waterkeeper ("Waterkeeper"). The U.S. Environmental Protection Agency ("EPA") has failed to comply with its mandatory duty to review and approve or disapprove changes to a state's water quality standards under the Clean Water Act ("CWA") Section 303(c)(3), 33 U.S.C. § 1313(c)(3).

Montana House Bill 664 ("HB 664") attempts to eliminate the State's science-based numeric nutrient water quality criteria that are necessary to protect many Montana waters and their designated uses from the harmful effects of nutrient pollution. Montana House Bill 685 ("HB 685") attempts to revise the State's promulgated Nondegradation Policy, which implements antidegradation requirements of the CWA, to include less stringent protections for existing uses of water and the level of water quality necessary to protect those uses. Montana House Bill 736 ("HB 736") attempts to expand the use of nutrient credit trading and offsets policy in a manner that conflicts with antidegradation policy and impaired waters requirements of the CWA. EPA was provided written and/or constructive notice of these legislative revisions to Montana's water quality standards by letter from the Montana Department of Environmental Quality on or by May 6, 2025.

As of the date of this Notice, more than 90 days have elapsed since EPA's notice of revisions, and EPA has failed to act to approve or disapprove those standards and is therefore in violation of statutory deadlines.

The Clean Water Act requires EPA to review and approve water quality standards before they can be effective. EPA's decision to approve must be done within 60 days. 33 U.S.C. § 1313(c)(3). Where EPA disapproves a state standard, EPA must, within 90 days, inform the state

of how to correct the standard, direct the state to correct the standard within 60 days from the date EPA informs the state of how to correct the standard, and where the state does not, EPA must promulgate federal regulations where it finds that a state's water quality standards are not consistent with the Clean Water Act's requirements or in any case necessary to meet the goals of the Clean Water Act. 33 U.S.C. §§ 1313(c)(3) and (c)(4).

EPA is in violation of its nondiscretionary duty to review and either approve or disapprove Montana's change in water quality standards within the statutorily-mandated 90 days and this letter constitutes a 60-day notice of intent to file a citizen suit against EPA pursuant to Section 505(a)(2) of the Clean Water Act, 33 U.S.C. § 1365(a)(2) and EPA's implementing regulations, 40 C.F.R. § 135.1(a) and 135.3(b).

I. BACKGROUND

For over two decades, EPA has recognized the importance of developing numeric nutrient water quality criteria to protect designated uses of waterbodies (*e.g.*, drinking water, fishing, swimming) from nutrient pollution that is associated with increases in concentrations of nitrogen and phosphorus.[1] In 2015, Montana adopted protective numeric nutrient criteria, recognizing that existing narrative criteria had failed to protect designated uses of Montana waters from the effects of increasing nutrient pollution.[2] EPA approved Montana's nutrient water quality standards in 2015 as fully-supported by sound science and necessary to protect designated uses.[3] Montana had adopted and EPA had approved a combination of reference and stressor-response approaches to nutrient water quality standards embodied in numeric nutrient criteria for nitrogen and phosphorus, grounded in sound science.[4]

During its 2025 session, the Montana Legislature adopted HB 664, HB 685, and HB 736 as state law, wholly repealing Montana's numeric nutrient criteria[5], revises the EPA-approved antidegradation policy of the state, and expands categorical nonsignificance criteria under antidegradation policy, respectively.

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[1] EPA, "Nutrient Criteria Development; Notice of Nutrient Criteria Technical Guidance Manual: Rivers and Streams," 65 Fed. Reg. 46167 (July 27, 2000).

[2] Suplee, Watson, Nov. 2008. "Scientific and Technical Basis of the Numeric Nutrient Criteria for Montana's Wadeable Streams and Rivers" (hereinafter "Technical Basis NNC 2008"); Suplee, M.W., and V. Watson, 2013. "Scientific and Technical Basis of the Numeric Nutrient Criteria for Montana's Wadeable Streams and Rivers—Update 1. Helena, MT: Montana Dept. of Environmental Quality," (hereinafter "Technical Basis NNC 2013); Montana DEQ Circular 12-A, "Numeric Nutrient Criteria in Montana," July 2014 Final Edition (2014) (hereinafter "Circular 12-A"); DEQ, "Notice of Public Hearing on Proposed Amendment (Water Quality), MAR Notice No. 17-356 281," February 3, 2014.

[3] EPA Region 8, "EPA Action on Montana's Numeric Nutrient Criteria and Variance Rules," February 26, 2015 (hereinafter "EPA 2015 Action").

[4] Technical Basis NNC 2013; EPA 2015 Action.

[5] Circular 12-A.

As the Agency may recall, the Montana Legislature in 2021 passed Senate Bill 358, seeking to eliminate numeric nutrient criteria and effectuate new narrative nutrient standards. There, as here, EPA failed to take its mandatory action on revisions within 90 days, resulting a lawsuit from Waterkeeper. Ultimately, EPA issued three Action Letters on Montana's SB358 in May 2022, disapproving the purported repeal of numeric nutrient standards for CWA purposes and reaffirming the validity of numeric nutrient criteria for all CWA purposes.

Unfortunately, since May 2022, the Montana DEQ has refused to implement numeric nutrient criteria in its CWA decision-making, contrary to EPA's express directive and the plain requirements of the CWA. This refusal is embodied in the growing backlog of administratively continued NPDES permits with nutrient effluent limits, by the DEQ's failure to issue biannual Integrated Reports since 2020, and most recently by the DEQ's pointed refusal to apply numeric nutrient criteria in decision-making on a petition seeking a nutrient impairment determination for portions of Montana's Big Hole River. This latest action explicitly rejects EPA's 2022 Action Letters affirming the validity of numeric nutrient criteria despite the unambiguous authority of EPA over Montana's administration of its CWA programs.

Waterkeeper notified EPA in writing of Montana's legislation on April 30, 2025[6], and filed a rulemaking petition with EPA to act on Montana's legislation on June 4, 2025.[7]

II. LEGAL FRAMEWORK

Whenever a state revises its water quality standards, it is required to submit them to the EPA Administrator. 33 U.S.C. § 1313(c)(1), (c)(2). EPA's regulations require that states submit revised standards "within 30 days of the final state action to adopt and certify the revised standard." 40 C.F.R. § 131.20(c). EPA shall either approve the revised standards within 60 days or deny them within 90 days. *Id.* § 131.21(a). EPA must base its decision on the requirements of the Clean Water Act, as described in EPA's regulations. *Id.* §§ 131.5 and 131.6. EPA must promulgate federal regulations for a state where a state fails to comply with EPA's disapproval of a change or if the Administrator determines that the state's revised standards are inconsistent with the Clean Water Act or in any case where the Administrator determines a revised standard is necessary to meet the requirements of the Clean Water Act. 33 U.S.C. § 1313(c)(4). Failure of a state to submit revised standards to EPA for approval is not an excuse for EPA's failure to act. *See*, analogous case in *Columbia Riverkeeper v. Wheeler*, 944 F.3d 1204, 1208-1211 (9th Cir. 2019) (failure by states to submit TMDLs was constructive submission that triggered EPA's duty to approve or disapprove TMDL).

EPA must approve or disapprove a state's water quality standards by determining, among other things, whether the state has adopted designated water uses consistent with the Clean Water Act, whether the state has adopted criteria that protect the designated water uses based on

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[6] Letter from Guy Alsentzer, Executive Director, Upper Missouri Waterkeeper, to Stephanie DeJong, Clean Water Branch Manager, Region 8 EPA, April 30, 2025 (Attachment 1).
[7] Letter from Guy Alsentzer, Executive Director, Upper Missouri Waterkeeper, to Lee Zeldin, EPA Administrator, "Petition for Rulemaking on Water Quality Standards in the State of Montana," June 4, 2025 (Attachment 2).

sound scientific rationale, whether the state has adopted an antidegradation policy consistent with EPA's regulations, whether the state standards are based on appropriate technical and scientific data and analyses, and whether the state has followed the applicable legal procedures for revising or adopting standards. 33 U.S.C. § 1313(c)(2)(a); 40 C.F.R. § 131.21(b), 131.5, and 131.6. Water quality standards must protect the public health or welfare, enhance the quality of water and wherever attainable, provide water quality for the protection and propagation of fish, shellfish and wildlife and for recreation in and on the water, taking into account their use and value of public water supplies, and agricultural, industrial, and other purposes including navigation. 33 U.S.C. § 1313(c)(2)(A).

III. EPA'S VIOLATION

EPA is in violation of its nondiscretionary duty under the Clean Water Act to approve or disapprove Montana's revised water quality standards within 60 or 90 days, in compliance with the statute and the deadlines in its own implementing regulations. 33 U.S.C. § 1313(c)(3) and (c)(4); 40 C.F.R. § 131.21(a).

Montana's revised water quality standards became immediately effective under Montana state law when Governor Gianforte signed the aforementioned bills, in early May 2025.

Under the express direction of the Clean Water Act as well as EPA's regulations, EPA had 60 days to approve or 90 days to disapprove (August 5, 2025) Montana's revised standards. 33 U.S.C. § 1313(c)(3); 40 C.F.R. § 131.21(a). By letter dated April 30, 2025, Waterkeeper advised EPA of the pending legislation and the likelihood the bills would pass. By letter dated June 4, 2025, Waterkeeper provided EPA with the finalized legislative action, and requested EPA take action to disapprove.

While EPA regulations purport to create a backstop that makes Montana's existing water quality standards applicable until EPA itself approves a change to that water quality standard, 40 C.F.R. § 131.21(c)-(e), Montana's actions demonstrate that DEQ will not apply existing numeric nutrient water quality standards. Since 2022, Montana has refused to apply numeric nutrient criteria. EPA has actual knowledge of the revision to and weakening of water quality standards pursuant to Montana state law. EPA cannot stand by and watch Montana implement revised water quality standards that do not comply with the Clean Water Act and EPA's regulations. EPA is ultimately responsible for the administration of the Clean Water Act and cannot avoid its mandatory duty. 33 U.S.C. §§ 1313(c), 1251(d).

In exercising its mandatory duty to act on Montana's revised water quality standards, EPA should disapprove the state's revised water quality standards and promulgate its own regulations setting water quality standards pursuant to Clean Water Act Section 303(c)(3) and (c)(4) because the state's revised standards violate the Clean Water Act. Montana's revised water quality standards reverse critical protections for designated uses under the CWA and are indefensible. There is no record or science-based findings accompanying any of the aforementioned bills to support Montana's revised water quality standards, to demonstrate compliance with the CWA's direction to protect existing or designated uses, to justify repeal of

numeric water quality criteria, to weaken antidegradation policy, or supporting new nonsignificance exemptions for nutrient offsets and credit trading.

IV. IDENTITY AND ADDRESSES OF WATERKEEPER

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V. CONCLUSION

EPA is in continuing violation of its nondiscretionary duty under the CWA and this letter constitutes a 60-day notice of intent to file a citizen suit against EPA pursuant to Section 505(a)(2) of the CWA, 33 U.S.C. § 1365(a)(2) and EPA's implementing regulations, 40 C.F.R. § 135.1(a) and 135.3(b).

It is urgent that EPA immediately disapprove Montana's revised water quality standards because Montana DEQ has refused to perform its CWA duties regarding implementation of EPA approved numeric nutrient criteria since May 2022 and EPA's last Action Letters, and because the 2025 legislative revisions are contrary to requirements of the CWA. Waterkeeper believes that this issue can be resolved without litigation and without diverting resources to court proceedings. We stand ready to work with you in good faith to resolve these violations. However, unless this violation is cured within sixty days, we reserve the right to take appropriate legal action to compel EPA to comply with the CWA to protect Montana's waters.

Sincerely,
/s/ Guy Alsentzer

CC: VIA FIRST CLASS MAIL AND EMAIL WHERE AVAILABLE

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