



December 16, 2014

Via Certified Mail – Return Receipt Requested

Administrator Gina McCarthy
United States Environmental Protection Agency
Office of the Administrator
1200 Pennsylvania Avenue, N.W.
Washington, DC 20460

Via Certified Mail – Return Receipt Requested

Regional Administrator Shaun McGrath
Environmental Protection Agency
Region 8
1595 Wynkoop St.
Denver, CO 80202-1129

Re: **60-Day Notice of Intent to Sue for Violation of the Clean Water Act Regarding
EPA's Failure to Act On Montana's Numeric Nutrient Water Quality Standards**

Dear Administrator McCarthy and Regional Administrator McGrath,

This letter provides notice that Upper Missouri Waterkeeper, Inc. intends to sue the Environmental Protection Agency (EPA) in federal court under § 505(a) of the Clean Water Act, 33 U.S.C. § 1365(a)(2), for violation of nondiscretionary duties imposed by this Act and its implementing regulations.

Section 505(a)(2) authorizes citizen suit against the Administrator of EPA when that individual has failed to perform any act or duty under the CWA that is not discretionary. 33 USC § 1365(a)(2). Section 303(c) of the CWA, 33 USC § 1313(c), requires the Administrator to act within a specified time period when a state submits to EPA a new or revised water quality standard. Specifically, Section 303(c)(3), 33 USC § 1313(c)(3), requires the Administrator to determine within sixty days of the state's submission whether such new or revised standard meets the requirements of the Clean Water Act. If the Administrator determines that such new or revised standard is not consistent with the applicable sections of the CWA, this section requires notification of the state of such determination and specification of changes necessary to meet these requirements. Such notification of a non-consistency determination and specification of necessary changes must be made no later than the ninetieth day after the date of the state's submission. 33 USC § 1313(c)(3).

EPA regulations further explain these duties:

After the State submits its officially adopted revisions, the Regional Administrator shall either:

- (1) Notify the State within 60 days after the revisions are approved; or
- (2) Notify the State within 90 days that the revisions are disapproved. Such Notification of disapproval shall specify the changes needed to assure compliance with the requirements of the Act and this regulation, and shall explain why the state standard is not in compliance with such requirements. ...

40 CFR § 131.21(a).

The regulations also define “water quality standards”:

Water quality standards are provisions of State or Federal law which consist of a designated use or uses for the waters of the United States and water quality criteria for such waters based upon such uses. Water quality standards are to protect the public health and welfare, enhance the quality of water and serve the purposes of the Act.

40 CFR § 131.3(i).

States’ general policies about application and implementation of the water quality standards are also subject to review under Section 303(c):

States may, at their discretion, include in their State standards, policies Generally affecting their application and implementation, such as mixing zones, Low flows and variances. Such policies are subject to EPA review and approval.

40 CFR § 131.13.

On or about August 11, 2014, the Montana Department of Environmental Quality submitted to EPA revisions to the state’s water quality standards, 75-5-313 MCA, for EPA review under 40 CFR § 131. The revisions concern new regulations addressing numeric standards for nitrogen and phosphorus concentrations in surface waters as well as additional implementation criteria. These revisions constitute new or revised water quality standards, requiring your approval or disapproval and appropriate notification to the state. To date, 126 days since Montana’s submission, EPA has taken no action to approve or disapprove Montana’s revisions, or to provide the required notification to the state, or to specify any changes necessary for approval. You and EPA have thus failed to perform the nondiscretionary duty required by Section 303(c), 33 USC § 1313(c), and 40 CFR § 131.21(a).

Upper Missouri Waterkeeper is concerned about the harm caused by the EPA’s failure to take action on Montana’s numeric nutrient water quality standards and implementing criteria, in particular impacts to waterways now subject to Montana’s new standards and that receive nutrient discharges, many of which are already impaired. It is essential that EPA take action on Montana’s new standards and in so doing provide regulatory clarity moving forward, particularly as Montana begins to incorporate these new standards in permitting decisions that affect local water quality. EPA’s failure to take action per its mandatory duties under the Clean Water Act also harms Upper Missouri Waterkeeper and its members’ interests by undermining the procedural requirements of the Clean Water Act, which insure that agencies, such as EPA, confirm that state’s water quality standards are adequate and do not unlawfully deviate from requirements of the Act.

Upper Missouri Waterkeeper believes that this NOTICE OF INTENT TO SUE sufficiently states grounds for filing suit. We intend, at the close of the 60-day notice period, or shortly thereafter, to file a citizen suit against you and EPA under Section 505(a) of the Clean Water Act for the failure to perform the duties described herein and set forth in Section 303 of the Act and 40 CFR § 131.

During the 60-day notice period, we would be willing to discuss effective remedies for the failures described in this letter and settlement terms. If you wish to pursue such discussions in the absence of litigation, we suggest that you initiate those discussions within 10 days of receiving this notice so that a meeting can be arranged and so that negotiations may be completed before the end of the 60-day notice period. We do not intend to delay the filing of a complaint if discussions are continuing when the notice period ends.

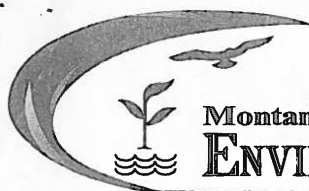
Very truly yours,

By: 

Guy Alsentzer, Esq.
Executive Director
Upper Missouri Waterkeeper, Inc.

cc: Attorney General Eric H. Holder Jr., U.S. Attorney General, United States Department of Justice, 950 Pennsylvania Ave., N.W., Washington, DC 20530-0001

EXHIBIT A – Montana’s submission of its nutrient water quality standards on Aug. 11, 2014



Montana Department of
ENVIRONMENTAL QUALITY

Steve Bullock, Governor
Tracy Stone-Manning, Director

P. O. Box 200901 • Helena, MT 59620-0901 • (406) 444-2544 • Website: www.deq.mt.gov

August 8, 2014

Mr. Shaun McGrath, Administrator
U.S. Environmental Protection Agency (EPA) Region VIII
1595 Wynkoop Street
Denver, CO 80202-1129

**ENVIRONMENTAL
PROTECTION AGENCY**

AUG 11 2014

Re: Montana’s Submittal of Numeric Nutrient Standards for Surface Waters

MONTANA OFFICE

Dear Mr. McGrath;

On July 25, 2014, Department of Environmental Quality director Tracy Stone-Manning and the Montana Board of Environmental Review (BER) each approved new regulations for addressing nitrogen and phosphorus concentrations in surface waters. These new rules and rule amendments implement Montana statute at 75-5-313, MCA, and are collectively referred to as the “nutrient standards package” herein. The nutrient standards package provides (via the BER’s rules) numeric nutrient criteria in almost all streams in Montana as well as specific segments of the Yellowstone River, new mixing-zone rules including a low-flow design flow specific to nutrient discharges, and modifications to the state’s nondegradation policy. The Department’s component of the nutrient standards package details a standards variance process which will allow for steady, gradual attainment of the criteria over time. The Department rules and the BER-approved rules were designed to work together and we are therefore submitting them to you together, for your review.

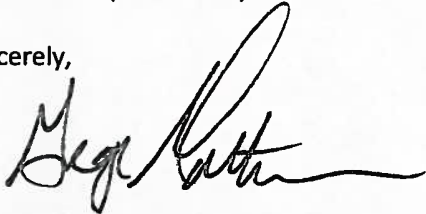
Accompanying this cover letter is a CD rom which contains the key components of the nutrient standards package. The CD rom is organized into folders whose contents are outlined below.

1. **Comments:** Public comments (written, most received electronically) received during the public comment period (February 13 to April 1, 2014) on the Department and the BER rulemakings.
2. **Hearings_testimony:** Written testimony provided at the Department rulemaking public hearing and the BER rulemaking public hearing, each of which were held on March 24, 2014.
3. **NutrientStandardsRulesandCirculars:** The primary component of our submission to EPA. Montana Administrative Rule (MAR) Notice 17-355, the Department’s variance rules, are provided; you will find both the proposal and adoption notices. MAR notice 17-356 is the BER’s numeric nutrient standards and amendments (again, included are both the proposal and adoption notices). Two new Department circulars referenced in the rules are also included: Circular DEQ-12A, which contains the numeric nutrient standards, and Circular DEQ-12B, which addresses implementation of variances from the numeric nutrient standards.

4. **OtherPublicNotice:** The Department's cover letter to all persons on our interested parties list regarding the rulemaking. This was mailed in advance of the public hearings.
5. **SigninSheets:** Copies of the sign-in sheets from the two rulemaking public hearings.
6. **TechnicalSupportDocsForTheNutrientStandards:** This folder contains all of the technical and scientific documents which support the numeric nutrient standards, the new low-flow design flow, and methods used to assess ambient surface waters for compliance with the numeric nutrient standards.
7. **Transcripts:** Oral transcripts recorded at each of the public hearings as well as the transcript for the BER meeting on 7/25/2014 at which time the numeric nutrient standards were adopted.

Also enclosed is a letter certifying that the nutrient standards package was duly adopted pursuant to state law. As you are aware, the Department has worked long on these standards and their implementation; they would not have been completed without a great deal of input from affected communities, industries, environmental interests, and EPA. We look forward to your review.

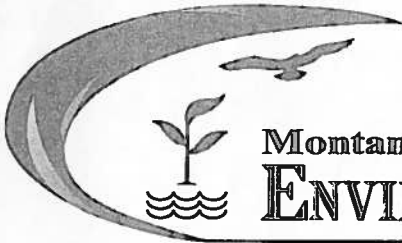
Sincerely,



George Mathieus, Division Administrator
Planning, Prevention, and Assistance Division
Montana Department of Environmental Quality

Cc: Tina Laidlaw, EPA
Tracy Stone-Manning, DEQ
Mike Suplee, DEQ
John North, DEQ
Julie Dalsoglio, EPA

Encl: CD rom, certification letter



Montana Department of
ENVIRONMENTAL QUALITY

Steve Bullock, Governor
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August 8, 2014

Mr. Shaun L. McGrath
Regional Administrator
U.S. EPA Region VIII
80C ESIC
1595 Wynkoop Street
Denver, CO 80202-1129

Dear Mr. McGrath:

As Chief Legal Counsel of the Department of Environmental Quality and as a Special Assistant Attorney General assigned to the Department of Environmental Quality, I hereby certify that the rule amendments adopted by the Montana Board of Environmental Review in Montana Administrative Register Notice 17-356 were duly adopted pursuant to and in accordance with Montana law. Included in this notice were numeric nutrient standards and amendments to various water quality rules to implement the numeric nutrient standards and variances. Also included in this rulemaking was Department Circular DEQ-12A, which contains the actual numeric nutrient standards.

I also certify that that the rule adopted by the Montana Department of Environmental Quality in Montana Administrative Register Notice 17-355 was duly adopted pursuant to and in accordance with Montana law. Included in this notice are New Rule I and Department Circular DEQ-12B, which is incorporated by reference in New Rule I. This rulemaking established procedures and limits to implement variances from numeric nutrient standards.

Sincerely,

John F. North
Chief Legal Counsel

c: Mike Suplee

JFN/ej