

JUL 15 2020

RA's Office

LAW OFFICE OF  
JOHN M. BARTH

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July 10, 2020

**By USPS Certified Mail/Return Receipt Requested**

Andrew Wheeler, Administrator  
U.S. Environmental Protection Agency  
1200 Pennsylvania Avenue, N.W.  
Mail Code 1101A  
Washington D.C. 20460

Gregory Sopkin, Regional Administrator  
U.S. Environmental Protection Agency  
Region 8  
1595 Wynkoop St.  
Denver, CO 80202

**Re: 60-Day Notice of Intent to File a Citizen Suit under Clean Water Act Section 505(a)(2)**

Dear Administrator Wheeler and Mr. Sopkin:

Montana Environmental Information Center (MEIC) and Sierra Club (herein after the "Conservation Organizations") are writing to notify you of our intent to file suit against the Administrator of the U.S. Environmental Protection Agency ("U.S. EPA" or "Agency") in the United States District Court pursuant to Section 505 of the Clean Water Act, 33 U.S.C. § 1365, and 40 C.F.R. Part 135. The basis for this notice of intent to sue is the U.S. EPA's failure to perform its nondiscretionary duty to promulgate a pollution budget, known as a Total Maximum Daily Load ("TMDL"), for aluminum and iron in the East Fork of Armells Creek, the West Fork of Armells Creek, and Armells Creek located in Rosebud County, Montana.

Unless EPA remedies these violations, the Conservation Organizations intend to file suit in U.S. District Court under the citizen suit provision of the Clean Water Act seeking injunctive and declaratory relief as well as reasonable attorney fees and litigation expenses following expiration of the sixty-day notice period.

***Factual Background***

In 2018 the East Fork of Armells Creek, the West Fork of Amells Creek, and Armells Creek were placed on Montana's 303(d) list of impaired waterbodies for

aluminum and iron.<sup>1</sup> These watersheds remain on Montana’s latest 2018 303(d) list for each of these impairing pollutants. *Id.* All of the pollutants and respective watersheds currently have an “unassigned” TMDL project status.<sup>2</sup> Further, all of the TMDLs are currently classified a low priority. *Id.*

Since their initial date of placement on the 303(d) list, there has been no credible plan by Montana to produce and implement a TMDL for any currently impairing pollutant. The Montana Legislature created the Statewide TMDL Advisory Group (“STAG”) to prioritize watersheds for TMDL development.<sup>3</sup> On January 3, 2019 the Montana Statewide TMDL Advisory Group (“STAG”) “dropped the Armells Creek Watershed from the state’s TMDL priorities.”<sup>4</sup>

Further, on or about April 22, 2020 the State of Montana issued a Final NPDES Permit MT0031828 to Western Energy Company authorizing a new discharge of aluminum and iron into tributaries of the West Fork of Armells Creek, which is tributary to Armells Creek.<sup>5</sup> Montana issued this new individual NPDES permit authorizing discharges of aluminum and iron into these impaired watersheds despite the fact that MCA § 75-5-702(9)(a) requires DEQ to start development of a TMDL, and complete development of the TMDL, within 30 and 180 days respectively of receiving a new individual permit application for discharge of impairing pollutants into a 303(d) listed stream without a TMDL. Montana also issued this new individual NPDES permit despite the federal regulatory prohibition on authorizing new discharges of impairing pollutants into impaired watersheds. *See*, 40 C.F.R. § 122.4(i). *See also*, *Friends of Pinto Creek v. EPA*, 504 F.3d 1007 (9<sup>th</sup> Cir. 2007).

For the reasons stated above, Montana has clearly and unambiguously demonstrated its unwillingness to promulgate TMDLs for aluminum and iron in the East Fork of Armells Creek, the West Fork of Armells Creek, and Armells Creek requiring U.S. EPA to promulgate such TMDLs.

### ***Legal Background***

On December 20, 2019 the Ninth Circuit Court of Appeals issued an opinion in *Columbia Riverkeeper, et al, v. Wheeler*, No. 18-35982. States are required to update and submit additional TMDLs “from time to time.” 33 U.S.C. §1313(d)(2). If EPA disapproves a TMDL, the agency ***shall*** produce and issue its own TMDL within 30 days. *Id.*

The *Wheeler* court found that states have a nondiscretionary duty to submit to the EPA a TMDL for each of the waters identified on its §303(d) list. The court also found

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<sup>1</sup> Attachment 1 hereto (Montana’s 2018 303(d) List, Appendix B, p. B-5, excerpt).

<sup>2</sup> Attachment 1 hereto.

<sup>3</sup> Attachment 2, p. 21 hereto (Response to Comments MT0031828).

<sup>4</sup> *Id.*

<sup>5</sup> Attachment 3 hereto, p. 4 (Fact Sheet for MT0031828).

that EPA likewise had a nondiscretionary duty to approve or disapprove this submission within 30 days and if it disapproves must develop and issue its own TMDL within 30 days. The court also adopted the constructive submission doctrine that provides when a state clearly and unambiguously demonstrates an unwillingness to adopt TMDLs, this unwillingness can amount to constructive submission of an inadequate TMDL, thus triggering EPA's duty to issue its own. *See also, City of Arcadia v. U.S. EPA*, 411 F.3d 1103, 1005 (9<sup>th</sup> Cir. 2005).

### ***Violations of the CWA by EPA***

The *Columbia Riverkeeper* decision has direct applicability to Montana's clear and unambiguous failure to promulgate TMDLs for iron and aluminum for the East Fork of Armells Creek, the West Fork of Armells Creek, and Armells Creek. Congress passed the Clean Water Act "to restore and maintain the chemical, physical, and biological integrity of the Nation's waters."<sup>6</sup> The Clean Water Act requires states to list water bodies that are not meeting water quality standards.<sup>7</sup> When a state lists a waterway as not meeting a water quality standard, the state must write a plan to fix the water quality problem.<sup>8</sup> That plan is called a "total maximum daily load" or TMDL.<sup>9</sup> A TMDL works like a pollution budget, restricting each source of pollution to "a level necessary to [meet] the applicable water quality standards with seasonal variations and a margin of safety."<sup>10</sup>

Within 180 days of listing a waterway as not meeting a water quality standard, the state must submit its TMDL to EPA.<sup>11</sup> EPA must decide whether a state's TMDL is adequate within 30 days.<sup>12</sup> If the state's TMDL is inadequate, EPA has 30 additional days to write a substitute TMDL for the state.<sup>13</sup> If a state displays a clear unwillingness to submit a required TMDL to EPA, it is as though the state submitted an inadequate TMDL, and EPA must write a substitute TMDL. *Columbia Riverkeeper*.

Montana has dropped the Armells Creek watershed from its priority list. Montana issued a new individual NPDES permit authorizing the discharge of aluminum and iron into these impaired streams in violation of state and federal law. Collectively, Montana's actions have displayed a clear and unambiguous unwillingness to promulgate TMDLs for these watersheds. Montana's actions amount to constructive submission of an inadequate TMDL. *Columbia Riverkeeper*. *See also, City of Arcadia v. U.S. EPA*, 411 F.3d at 1005.

Montana's constructive submission of an inadequate TMDL triggers EPA's mandatory duties to: (1) disapprove Montana's constructive submissions for each

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<sup>6</sup> 33 U.S.C. §1251(a).

<sup>7</sup> 33 U.S.C. §1313(d)(1).

<sup>8</sup> 33 U.S.C. §1313(d)(1)(C).

<sup>9</sup> *Id.*

<sup>10</sup> *Id.*

<sup>11</sup> 33 U.S.C. §1313(d)(2).

<sup>12</sup> *Id.*

<sup>13</sup> *Id.*

impairing pollutants; and, (2) prepare a TMDL in 30 days for each impairing pollutant. 33 U.S.C. §1313(d)(2); 40 C.F.R. §130.7(d)(2). In the alternative, EPA's conduct amounts to unreasonable delay under the Administrative Procedures Act and Clean Water Act. 5 U.S.C. §§ 551(13); 706(1).

The full names, addresses, and telephone numbers of the parties providing this notice are:

Montana Environmental Information Center  
107 W Lawrence Street  
P.O. Box 1184  
Helena, Montana 59624  
(406) 443-2520

Sierra Club  
2101 Webster St  
Oakland, CA 94612  
(415) 977-5500

The Conservation Organizations plan to file suit sixty days from the date of this notice in federal district court. Any correspondence related to this matter should be directed to me. If you wish to discuss these allegations, or potential settlement of this matter, please contact me at the address listed above.

Sincerely,

s/ John Barth

John Barth  
Attorney at Law  
P.O. Box 409  
Hygiene, CO 80533  
(303) 774-8868  
barthlawoffice@gmail.com

William Barr  
Attorney General of the United States  
U.S. Department of Justice  
950 Pennsylvania Avenue, N.W.  
Washington, D.C. 20530

Shaun McGrath, Director  
State of Montana  
Department of Environmental Quality  
1520 E. 6<sup>th</sup> Avenue  
P.O. Box 200901  
Helena, MT 59620-0901



**Appendix B: Waters in Need of TMDLs [303(d) List] and TMDL Priority Schedule**

Watershed	TMDL Planning Area	HUC No	ID305B	Waterbody Name and Location	Probable Cause of Impairment	CFL	TMDL Project Status	TMDL Priority
Yellowstone	Tributaries			Porcupine Creek)				
Lower Yellowstone	Middle Yellowstone	10100001	MT42K002_070	STELLAR CREEK, headwaters to mouth (Little Porcupine Creek)	pH	2006	Scheduled	L
Lower Yellowstone	Middle Yellowstone	10100001	MT42K002_080	NORTH FORK SUNDAY CREEK, Custer/Rosebud County border to mouth (Sunday Creek)	Sedimentation/Siltation	1994	Unassigned	L
Lower Yellowstone	Middle Yellowstone	10100001	MT42K002_080	NORTH FORK SUNDAY CREEK, Custer/Rosebud County border to mouth (Sunday Creek)	Sodium	1994	Unassigned	L
Lower Yellowstone	Middle Yellowstone	10100001	MT42K002_080	NORTH FORK SUNDAY CREEK, Custer/Rosebud County border to mouth (Sunday Creek)	Specific Conductivity	1994	Unassigned	L
Lower Yellowstone	Middle Yellowstone	10100001	MT42K002_080	NORTH FORK SUNDAY CREEK, Custer/Rosebud County border to mouth (Sunday Creek)	Total Dissolved Solids (TDS)	1994	Unassigned	L
Lower Yellowstone	Middle Yellowstone	10100001	MT42K002_090	SARPY CREEK, Crow Indian Reservation Boundary to mouth (Yellowstone River)	Nitrate/Nitrite (Nitrite + Nitrate as N)	2006	Scheduled	L
Lower Yellowstone	Middle Yellowstone	10100001	MT42K002_090	SARPY CREEK, Crow Indian Reservation Boundary to mouth (Yellowstone River)	Nitrogen, Total	2006	Scheduled	L
Lower Yellowstone	Middle Yellowstone	10100001	MT42K002_090	SARPY CREEK, Crow Indian Reservation Boundary to mouth (Yellowstone River)	Phosphorus, Total	2006	Scheduled	L
Lower Yellowstone	Middle Yellowstone	10100001	MT42K002_110	EAST FORK ARMELLS CREEK, mine shops area (45.866, -106.638) to mouth (Armells Creek)	Aluminum	2018	Unassigned	L
Lower Yellowstone	Middle Yellowstone	10100001	MT42K002_110	EAST FORK ARMELLS CREEK, mine shops area (45.866, -106.638) to mouth (Armells Creek)	Iron	2018	Unassigned	L
Lower Yellowstone	Middle Yellowstone	10100001	MT42K002_110	EAST FORK ARMELLS CREEK, mine shops area (45.866, -106.638) to mouth (Armells Creek)	Nitrate/Nitrite (Nitrite + Nitrate as N)	1994	Scheduled	H
Lower Yellowstone	Middle Yellowstone	10100001	MT42K002_110	EAST FORK ARMELLS CREEK, mine shops area (45.866, -106.638) to mouth (Armells Creek)	Nitrogen, Total	1994	Unassigned	H
Lower Yellowstone	Middle Yellowstone	10100001	MT42K002_110	EAST FORK ARMELLS CREEK, mine shops area (45.866, -106.638) to mouth (Armells Creek)	Phosphorus, Total	2018	Unassigned	H
Lower Yellowstone	Middle Yellowstone	10100001	MT42K002_110	EAST FORK ARMELLS CREEK, mine shops area (45.866, -106.638) to mouth (Armells Creek)	Specific Conductivity	1990	Unassigned	L
Lower Yellowstone	Middle Yellowstone	10100001	MT42K002_110	EAST FORK ARMELLS CREEK, mine shops area (45.866, -106.638) to mouth (Armells Creek)	Total Dissolved Solids (TDS)	1990	Unassigned	L
Lower Yellowstone	Middle Yellowstone	10100001	MT42K002_120	WEST FORK ARMELLS CREEK, headwaters to mouth (Armells Creek)	Aluminum	2018	Unassigned	L
Lower Yellowstone	Middle Yellowstone	10100001	MT42K002_120	WEST FORK ARMELLS CREEK, headwaters to mouth (Armells Creek)	Iron	2018	Unassigned	L
Lower Yellowstone	Middle Yellowstone	10100001	MT42K002_160	LITTLE PORCUPINE CREEK, headwaters to mouth (Yellowstone River)	Nitrate/Nitrite (Nitrite + Nitrate as N)	1990	Scheduled	L
Lower Yellowstone	Middle Yellowstone	10100001	MT42K002_160	LITTLE PORCUPINE CREEK, headwaters to mouth (Yellowstone River)	Nitrogen, Total	1990	Unassigned	L
Lower Yellowstone	Middle Yellowstone	10100001	MT42K002_160	LITTLE PORCUPINE CREEK, headwaters to mouth (Yellowstone River)	Phosphorus, Total	1990	Scheduled	L
Lower Yellowstone	Middle Yellowstone	10100001	MT42K002_160	LITTLE PORCUPINE CREEK, headwaters to mouth (Yellowstone River)	Total Dissolved Solids (TDS)	1990	Scheduled	L
Lower Yellowstone	Middle Yellowstone	10100001	MT42K002_180	ARMELLS CREEK, confluence of East and West Forks to mouth (Yellowstone River)	Aluminum	2018	Unassigned	L
Lower Yellowstone	Middle Yellowstone	10100001	MT42K002_180	ARMELLS CREEK, confluence of East and West Forks to mouth (Yellowstone River)	Iron	2018	Unassigned	L
Lower Yellowstone	O'Fallon	10100005	MT42L001_010	PENNEL CREEK, headwaters to mouth (O'Fallon Creek)	Total Dissolved Solids (TDS)	1988	Scheduled	L
Lower Yellowstone	O'Fallon	10100005	MT42L001_020	SANDSTONE CREEK, headwaters to mouth	Nitrate/Nitrite (Nitrite + Nitrate as N)	2006	Scheduled	L

Attachment 1



April 22, 2020

John M. Barth  
P.O. Box 409  
Hygiene, CO 80533

Dear Commenter:

The Montana Department of Environmental Quality (DEQ) issued Rosebud Mine Area F's final Montana Pollutant Discharge Elimination (MPDES) permit to Western Energy Company.

Enclosed please find the Response to Comments document that addresses all substantive comments DEQ received during the public comment period and during the public hearing. In formulating the final permit DEQ made no changes in response to comments.

The final permit is effective as of June 1, 2020. The Western Energy Company may appeal this decision within 30 days. Other persons may challenge this decision in state district court. In addition, EPA may object to or make recommendations to this permit.

If you have questions, please contact me at (406) 444-0420 or by email at [jkenning@mt.gov](mailto:jkenning@mt.gov).

Sincerely,

A handwritten signature in black ink, appearing to read "Jon Kenning", is written over a light blue horizontal line.

Jon Kenning, Chief  
Water Protection Bureau  
Water Quality Division

Enclosure:      Response to Comments

***Response to Comment 10***

See Response to Comments 8 and 9. TMDL development is a multi-year, data intensive process. The Montana Legislature understood that Montana could not write TMDLs for every watershed simultaneously given the size of Montana and the numerous impaired stream segments. As a result, the Montana Legislature created the Statewide TMDL Advisory Group (STAG) to prioritize watersheds for TMDL development (75-5-702(10) MCA). On January 3, 2019, STAG dropped the Armells Creek Watershed from the state's TMDL priorities.

[http://deq.mt.gov/Portals/112/Water/WQPB/TMDL/STAG/STAGMtgSummary\\_Jan2019.pdf](http://deq.mt.gov/Portals/112/Water/WQPB/TMDL/STAG/STAGMtgSummary_Jan2019.pdf)). The West Fork Armells TMDL for iron and aluminum are currently low priority and have not been assigned for completion.

No changes were made to the permit in response to this comment.

**11. Comment 11; DEQ's finding that the source of aluminum is 'natural' has no support in the record**

In an apparent attempt to avoid properly regulating the discharges from Area F, DEQ states that "[t]he source of aluminum is thought to be natural" in the West Fork of Armells Creek. Draft Permit Fact Sheet, p. 14. In their December 13, 2019 open records request, the Conservation Organizations requested "all data and documents relied upon by DEQ" for this finding.<sup>34</sup> In response, DEQ stated, "DEQ relied on the following documents for its findings on page 14 of the Draft Permit Fact Sheet that the source of aluminum in West Fork Armells is thought to be natural and the source of iron is unknown:

<http://deq.mt.gov/Water/Resources/report>." The link provided by DEQ takes the reader to the State of Montana's 303(d) lists and Integrated Reports over the time period from 1996-2018. The Conservation Organizations were unable to find any data, documents, or scientific analysis in the web link supporting a finding that the source of aluminum in the West Fork of Armells Creek is natural.

DEQ regulations refine "naturally occurring" as "conditions or material present from runoff or percolation over which man has no control or from developed land where all reasonable land, soil and water conservation practices have been applied." ARM § 17.30.602(17). Under the Montana law and the federal Clean Water Act, a Use Attainability Analysis is the proper methodology for determining whether pollution in a watershed is "natural." ARM § 17.30.602(38); 40 C.F.R. §§131.10(g), (h), and (j). In their December 13, 2019 open records request, the Conservation Organizations requested "[a]ll Use Attainability Analyses by the DEQ related to aluminum and/or iron in West Armells Creek." In response, DEQ stated, "[t]here are no documents maintained by DEQ responsive to this request." This response makes clear that DEQ's did not follow the required methodology in reaching its factually unsupported finding that the source of aluminum in the West Fork of Armells Creek is natural. DEQ's failure to follow its own methodology renders its finding arbitrary, capricious, and scientifically unreliable.

***Response to Comment 11:***

**MONTANA DEPARTMENT OF  
ENVIRONMENTAL QUALITY**

**Water Quality Division**

**MONTANA POLLUTANT DISCHARGE ELIMINATION SYSTEM  
(MPDES)**

**Permit Fact Sheet**

**Permittee:** Western Energy Company  
Castle Rock Road  
Colstrip, MT 59323

**County:** Rosebud

**Permit No.:** MT0031828

**Receiving Waters:** Black Hank Creek and unnamed ephemeral tributaries to Black Hank Creek; Donley Creek and unnamed ephemeral tributaries to Donley Creek; Robbie Creek and unnamed ephemeral tributaries to Robbie Creek; McClure Creek and unnamed ephemeral tributaries to McClure Creek; and an unnamed ephemeral tributary to Trail Creek

**Facility Information:**

**Name:** Rosebud Mine Area F

**Contact:** Wade Steere, PE. Environmental Engineer

**Fee Information:**

**Type:** Privately Owned Treatment Works – Minor  
(SIC 1221)

**Number of Outfalls:** 5 (for fee determination only)  
Group A: Outfalls F1-F12  
Group B: Outfalls F13-F32  
Group C: Outfalls F33-F50  
Group D: Outfalls F51-F53  
Group E: Outfall F54

### 3. Discharge Points and Receiving Waters

The Facility discharges wastewater to the following state surface waters: Black Hank Creek and unnamed ephemeral tributaries of Black Hank Creek, Donley Creek and unnamed ephemeral tributaries of Donley Creek; Robbie Creek and unnamed ephemeral tributaries of Robbie Creek, McClure Creek and unnamed ephemeral tributaries of McClure Creek, and an unnamed ephemeral tributary of Trail Creek. All receiving waters fall within the West Fork Armells Creek drainage before entering Armells Creek, and are received by the Yellowstone River near river mile 243.0 approximately 7 miles upstream of Forsyth, MT. DEQ also estimated, using information from the Cumulative Hydrologic Impact Assessment (CHIA) prepared for the surface mine permit, the distance in each watershed from the furthest downstream outfall on each tributary to the downstream confluences with one or more named tributaries and then to the first assessed waterbody. In all cases the first assessed waterbody is West Fork Armells Creek (MT42K002\_120). Table 2 below shows the distances to West Fork Armells from the furthest downstream outfalls associated with each tributary.

**Table 2. Approximate Distances from Downstream Outfalls to West Fork Armells Creek**

Outfall	Feature	Drainage	Latitude	Longitude	Approximate Distance to Assessment ID
F10	TC-F4	Black Hank Creek	45.8947	-106.8878	5.2 Miles
F14	TB-F13	Donley Creek	45.9025	-106.9028	5.25 Miles
F36	TA-F36	Robbie Creek	45.9136	-106.9450	6.07 Miles
F52	Pond F-26	McClure Creek	45.9269	-106.9433	7.43 Miles
F54	Pond F-30	Trail Creek	45.9336	-106.9467	7.41 Miles

The waters immediately receiving discharges from the Facility are hydrologically ephemeral. An ephemeral stream is a stream or part of a stream which flows only in direct response to precipitation in the immediate watershed, or in response to the melting of a cover of snow and ice and whose channel bottom is always above the local water table, ARM 17.30.602(10). The determination that the receiving waters are hydrologically ephemeral is supported by the Environmental Impact Statement (EIS) for the Facility. All surface waters of the state are considered “high-quality waters” except waters which are not capable of supporting any one of their designated uses for their classification; or have zero flow or surface expression for more than 270 days during most years. Baseline data collected for Area F indicates that receiving streams are above local water table elevations, flow only in response to precipitation events, and are considered hydrologically ephemeral. Western Energy submitted baseline monitoring flow data compiled to support the surface Mining Permit Application. The submitted data indicate flow rates are in response to intense precipitation events or snowmelt. The Army