



August 22, 2022

Darcy O'Connor, Director  
U.S. Environmental Protection Agency Water Division  
Region 8  
1595 Wynkoop Street  
Denver, CO 80202-1129

RE: Montana Department of Environmental Quality's response to U.S. EPA's Water Quality Standards action letter of May 10, 2022, disapproving portions of Senate Bill 358, 2021 Mont. Laws Ch. 342, §§ 2(1), 3, 4, and 7.

Dear Ms. O'Connor:

On April 30, 2021, Governor Gianforte signed Senate Bill 358 (SB 358), making this legislative action state law. In pertinent parts, SB 358: (1) directed the Montana Department of Environmental Quality (DEQ) to repeal, through administrative rulemaking, the numeric water quality criteria for total nitrogen and total phosphorus found in Circular DEQ-12A; (2) immediately repealed Administrative Rule of Montana (ARM) 17.30.660, which adopted Circular DEQ-12B by reference; (3) modified nondegradation criteria for determining nonsignificant changes in high-quality waters for discharges of total phosphorus and total nitrogen; (4) required DEQ to immediately administer the federally-delegated Montana Pollutant Discharge Elimination System surface water discharge permitting program consistent with ARM 17.30.637 and the intent of SB 358; and lastly (5) directed DEQ to, in collaboration with the Nutrient Work Group, adopt rules that provide an adaptive management program option to implement narrative nutrient standards.

The foremost intent of SB 358 is to use narrative nutrient standards for state waters formerly covered by Circular DEQ-12A (DEQ-12A) and to provide feasible nutrient regulatory options for the state and its dischargers. Notably, many Montana waters have never been subject to the numeric nutrient standards in DEQ-12A and continue to be regulated under Montana's existing narrative nutrient standards found at ARM 17.30.637(1)(d) and (e).

The concept of using narrative standards, with a departure from numeric standards in DEQ-12A, is not new, and EPA has favorably considered such an approach in the past. As EPA is aware, Montana's non-severability provisions contemplated a contingent return to narrative standards and were adopted at the same time DEQ-12A became law. *See* ARM 17.30.619(2) and ARM 17.30.715(4). These provisions were adopted because without feasible regulatory options, the very stringent numeric nutrient criteria contained in DEQ-12A were demonstrated to cause substantial and widespread economic and social harm across Montana. EPA understood the statewide impacts of DEQ-12A when it first approved general variances for Montana's public and private dischargers in 2015. In 2020, EPA agreed that Montana's contingent approach to use narrative standards was sound and in compliance with the federal

Clean Water Act. In its approval of this approach, EPA concluded “the language and structure of these provisions reflect that they are integral components of the [water quality standards] adopted by MDEQ and approved by EPA.” EPA Letter from Gregory Sopkin, Regional Administrator, EPA Region 8, to DEQ Director Shaun McGrath 11 (Feb. 24, 2020). EPA further acknowledged, “the provisions adopted by Montana are not isolated provisions, but rather are embedded within the substantive numeric nutrient criteria and nutrient general variance adopted by the state.” *Id.* at 11, n. 5.

During subsequent litigation concerning Montana's non-severability provisions, EPA also argued in support of a contingent return to narrative standards and concluded that Montana's use of its existing narrative standards, upon such contingency, “is not contrary to the [Clean Water] Act.” EPA noted that “[n]arrative criteria are expressly authorized by EPA's implementing regulations, have been cited in cases with approval, and are relied on by the majority of states to address nutrient pollution.” Def.s' Memorandum in Opposition to Pl.'s Mot. S.J. and in Support of Def.s' Mot. S.J. 4 (Doc.36, Case No. 4:20-cv-00027, July 21, 2020). EPA further stated, “[b]oth numeric and narrative criteria can be used in permits, impaired waters lists, and total maximum daily loads, informed by the science, to protect against the adverse effects of nutrient pollution.” *Id.*

Immediately following the enactment of SB 358, DEQ engaged Montana's Nutrient Work Group and began working on implementing the directives of state law, including the requirement to repeal DEQ-12A and to replace Montana's numeric nutrient standards with narrative standards. Among many other stakeholders, DEQ consistently included EPA in related meetings and sought out its input on a process to adopt protective narrative nutrient standards for DEQ-12A waters. During this ongoing process, EPA provided both written and oral input.

On May 10, 2022, over a year after SB 358 became state law (and over a year after DEQ represented to EPA it would not be submitting SB 358 to EPA for approval), EPA acted on several provisions of SB 358. After concluding Sections 2(1), 3, 4, and 7 of SB 358 constitute new or revised water quality standards, EPA disapproved the provisions and determined the provisions were inconsistent with the requirements of the federal Clean Water Act and related federal regulations. EPA Letter from Darcy O'Connor, Director, Water Division, EPA Region 8, to DEQ Director Christopher Dorrington 1 (May 10, 2022) (Action Letter). EPA stated that these provisions, and their accompanying directives, are not effective for federal Clean Water Act purposes and may not be implemented into state discharge permits. *Id.* In doing so, EPA cited to its obligation to review and act on new or revised water quality standards, pursuant to Section 303(c) of the federal Clean Water Act, 33 U.S.C. § 1313(c).

The Action Letter and its attachments also included an evaluation of Montana Pollutant Discharge Elimination System (MPDES) permits DEQ publicly noticed or issued since May of 2020 to determine if DEQ's application of its narrative standards was protective of beneficial uses. In summarizing its analysis of DEQ's permitting activities, EPA argues, among other things, that DEQ did not use the supporting science to interpret its narrative criteria and that DEQ's implementation was therefore flawed. EPA used this assessment to further conclude that DEQ's narrative criteria were not protective of beneficial uses.

Here, EPA confuses the implementation of water quality standards in permits with the adequacy of the standards themselves. Even assuming, for the sake of argument, DEQ did not adequately use the supporting science when issuing several permits and applying its narrative standards, such error does not

indicate the narrative standards are not protective. Furthermore, EPA's review here is limited to whether Montana has adopted criteria "based on sound scientific rationale," *see* 40 C.F.R. § 131.5(a)(2), and should not be based upon EPA's belief it lacks adequate "assurance" Montana will interpret its standard correctly. *See* Action Letter, attached Rationale for EPA's Disapproval at 9. If EPA believes DEQ is not adequately interpreting its narrative standard or failing to use the supporting science, it may object to the issuance of such permits under 40 C.F.R. § 123.44.

In its Action Letter, EPA evaluated a total of 19 MPDES permits and disagreed with the nutrient conclusions for seven of those permits. Of those seven permits, three were never issued by DEQ. Of the four remaining permits EPA now questions, EPA has previously concurred with the respective nutrient conclusions by not objecting to the permits. Under the terms of Montana's 1974 Memorandum of Agreement with EPA to administer Section 402 of the Clean Water Act, if EPA does not object to the issuance of an MPDES permit within the established period, EPA concurs in the issuance of the permit. *See* Memorandum of Agreement 6-7 (March 1974), <<https://www.epa.gov/sites/default/files/2013-09/documents/mt-moa-npdes.pdf>> (accessed August 11, 2022). DEQ respectfully disagrees with EPA's conclusions regarding these four permits and contends it appropriately interpreted its narrative standards.

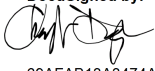
Regardless, DEQ remains committed to following the directives of state law and to adopt a narrative nutrient standards approach for all DEQ-12A waters. DEQ is developing a rule package that includes a repeal of DEQ-12A and replaces these numeric criteria with our existing narrative water quality standards. The rule package will also include rules for interpreting our narrative nutrient standards and an adaptive management option that gives the regulated community opportunities to look at a watershed scale to reduce nutrient concentrations. These rules will protect beneficial uses of state waters and allow for nutrient reductions to be phosphorus-focused, meaningful, affordable, and incremental.

Upon submittal, DEQ expects EPA to approve this comprehensive rule package. DEQ expects this because despite a transition to narrative standards, beneficial uses of Montana's surface water bodies will be protected. Narrative water quality standards are descriptions of desired conditions in surface water bodies. By contrast, numeric water quality standards are a prescribed number that must be achieved. Both approaches are proven to protect beneficial uses of surface water bodies. DEQ and EPA have recognized that narrative water quality standards can be equally as protective as numeric standards.

In 2014, DEQ submitted for EPA's review and approval numeric water quality standards for total nitrogen and total phosphorus (as contained in DEQ-12A). The water quality standards package and proposed numeric nutrient criteria included a scientific record supporting those values. This scientific record included response variables and associated thresholds which demonstrated the numeric criteria were protective of surface water quality and ensured that specific levels of TN and TP would not create undesirable aquatic life. In the new comprehensive rule package, DEQ proposes using these same response variables (dissolved oxygen, percent algae cover, chlorophyll-a, etc.) to support conclusions regarding how a surface water body under the interpretation of the narrative standards and the Adaptive Management Program will be protected. Under each adaptive management plan, these response variables and associated thresholds create site-specific datasets documenting how the surface water body is responding to nutrient loading and reductions, best management practices, changes in land use, and different operational strategies. Each site-specific continuous dataset will augment the scientific information already established at the ecoregional scale and has the potential—over time—to allow for a better understanding of response variable behavior on a watershed-by watershed, case-by-case basis.

EPA's Action Letter makes it clear EPA finds DEQ-12A to be "scientifically-defensible and protective of designated uses." Action Letter, attached Rationale for EPA's Disapproval at 1. However, Montana is now on a legislatively driven path to use narrative standards. DEQ looks forward to continued collaboration with EPA to address any outstanding concerns regarding Montana's transition from numeric to narrative water quality standards and the development of a dynamic and protective adaptive management program.

Sincerely,

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Christopher Dorrington, Director  
Montana Department of Environmental Quality