



UNITED STATES ENVIRONMENTAL PROTECTION AGENCY

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FEB 24 2020

REF: 8WD-CWW

Shaun McGrath, Director
Montana Department of Environmental Quality
P.O. Box 200901
Helena, Montana 59620-0901

Re: EPA Action in Response to Court Order in *Upper Missouri Waterkeeper v. EPA* (D. Mont. No. 4:16-cv-00052-BMM)

Dear Mr. McGrath,

Enclosed please find the U.S. Environmental Protection Agency (EPA)'s Clean Water Act (CWA) section 303(c) action on the Montana Department of Environmental Quality (MDEQ)'s revision to its nutrients general variance at DEQ 12B. The EPA is taking this action in response to and in compliance with the U.S. District Court for the District of Montana's orders¹ in *Upper Missouri Waterkeeper v. EPA*, No. 4:16-cv-00052-BMM. This action does not affect the state's authority to issue individual nutrients variances for any discharger, including mechanical plants and lagoons.

In its July 16, 2019 order, the district court directed MDEQ "to adopt a timeline in accordance with" the court's order within 120 days of the order and the EPA to complete its review within 90 days of MDEQ's submission. The EPA received MDEQ's submission on November 26, 2019. The submission included: (1) a copy of the adopted revised nutrients general variance at DEQ 12B (referenced in ARM § 17.30.660) and supporting documentation; (2) notice of final adoption of the variance rules with the state's response to comments; and (3) a letter certifying that the changes were adopted in accordance with state law.

While the EPA respectfully disagrees with various aspects of the district court's orders and has filed a notice of appeal of the district court's orders, the EPA must comply with those orders so long as they remain in effect. Accordingly, the EPA has reviewed MDEQ's submission and today is disapproving the submission as not complying with the district court's orders directing "the parties... to set forth a reasonable timeline that begins with the relaxed criteria of the Current Variance Standard and leads to compliance with MDEQ's Base WQS [numeric nutrient criteria] in the time range proposed by the Plaintiffs." July 2019 Order at 5. The rationale

¹ The district court issued multiple orders in this case that are relevant to this action: March 25, 2019 Order on Summary Judgment (*Upper Missouri Waterkeeper v. U.S. Environmental Protection Agency*, 377 F. Supp.3d 1156 (D. Mont. 2019)); July 16, 2019 Order on Remedy; September 20, 2019 Final Order; and December 20, 2019 Order on Motion to Alter or Amend the Judgment.

supporting the EPA's decision is enclosed.

The EPA is also taking action to approve ARM § 17.30.660(9) submitted in November 2019 as well as a provision of MDEQ's 2014 submittal that the EPA declined to act on in 2015. The rationale supporting this decision is also enclosed.

The EPA's actions on Montana's submitted water quality standards does not extend to Indian country as defined in 18 U.S.C. Section 1151. Indian country in Montana generally includes (1) lands within the exterior boundaries of the following Indian reservations located within Montana: the Crow Indian Reservation, the Blackfeet Indian Reservation, the Flathead Reservation, the Fort Belknap Reservation, the Fort Peck Indian Reservation, the Rocky Boy's Reservation, and the Northern Cheyenne Indian Reservation; (2) any land held in trust by the United States for an Indian tribe; and (3) any other areas that are "Indian country" within the meaning of 18 U.S.C. Section 1151. The EPA, or eligible Indian tribes, as appropriate, will retain responsibilities under Clean Water Act Section 303 in Indian country. Today's action is not intended as an action to approve or disapprove water quality standards applying to waters within Indian country.

If you have any questions regarding this matter, please contact me or have your staff contact Tina Laidlaw at (406) 457-5016.

Sincerely,



Gregory Sopkin
Regional Administrator

Enclosure

Cc: George Mathieus, Division Administrator
Montana Department of Environmental Quality (via email)

Connie Howe, Crow Tribe (via email)

Charlene Alden, Northern Cheyenne Tribe (via email)

Daryl Wright and Thomas Limberhand, Chippewa Cree (via email)

Ina Nez Perce, Fort Belknap Indian Community (via email)

Gerald Wagner, Blackfeet (via email)

Martina Wilson, Fort Peck Tribes (via email)

Willie Keenan, Confederated Salish and Kootenai Tribe (via email)

Decision and Rationale
Disapproval of Terms for Montana's General Variance for Nutrients
in Response to District Court Order

I. INTRODUCTION

On September 20, 2019, the U.S. District Court for the District of Montana issued its final judgment and order in the challenge by Upper Missouri Waterkeeper to the EPA's 2017 approval of the Montana Department of Environmental Quality ("MDEQ")'s water quality standards ("WQS") general variance for total nitrogen and total phosphorus. This final judgment was entered in accordance with the district court's March 25, 2019 order on summary judgment and July 16, 2019 order on remedy.²

The EPA respectfully disagrees with various aspects of the district court's orders and has filed a notice of appeal of the district court's orders in the U.S. Court of Appeals for the Ninth Circuit. The EPA may reconsider this action, particularly if there is a judicial decision that overturns one or more aspects of the district court's orders with which the EPA disagrees.

At the time of this action, the EPA's appeal is pending and the district court's orders remain in effect. Accordingly, the EPA must comply with the orders, despite its disagreement with various aspects of the district court's decision and orders, including the court's interpretation of 40 C.F.R. § 131.14. In compliance with the district court's orders, based on the administrative record before the Agency, and for the reasons set forth below, the EPA disapproves MDEQ's submission of the revised terms for mechanical plants and lagoons for its nutrient general variance at DEQ 12B.

II. REGULATORY BACKGROUND FOR THIS DECISION

The EPA's regulations define a water quality standards variance as a "time-limited designated use and criterion for a specific pollutant(s) or water quality parameter(s) that reflect the highest attainable condition during the term of the WQS variance." 40 C.F.R. § 131.3(o). A WQS variance must have a term that is only "as long as necessary to achieve the highest attainable condition." 40 C.F.R. § 131.14(b)(1)(iv). The state must submit documentation "demonstrating that the term of the WQS variance is only as long as necessary to achieve the highest attainable condition. Such documentation must justify the term of the WQS variance by describing the pollutant control activities to achieve the highest attainable condition, including those activities identified through a Pollutant Minimization Program, which serve as milestones for the WQS variance." 40 C.F.R. § 131.14(b)(2)(ii).

² The EPA filed a Motion to Alter or Amend the Court's Final Judgment arguing the district court committed clear error in the court's interpretation of the EPA's regulation at 40 C.F.R. § 131.14. On December 20, 2019, the district court denied the EPA's motion.

III. BACKGROUND

On February 26, 2015, in accordance with Clean Water Act Section 303(c), and 40 C.F.R. Part 131, EPA Region 8 approved both MDEQ's Circular DEQ-12A, which sets forth the numeric nutrient criteria (NNC) for wadeable streams and certain segments of the Yellowstone River, and Circular DEQ-12B (DEQ-12B), which included a general water quality standards variance from the NNC. The EPA's approval of the 2015 version of DEQ-12B included the approval of certain general variance treatment requirements that expired on July 1, 2017. After the EPA approved DEQ-12B in February 2015, the EPA published its final rule establishing new variance regulations at 40 C.F.R. § 131.14 in August 2015. In May 2016, Upper Missouri Waterkeeper challenged the EPA's 2015 approval of MDEQ's nutrient general variance. The State of Montana, as well as other parties, intervened in the litigation as defendants.

During the course of the litigation, MDEQ adopted revised variance provisions in June 2017. Among the changes made by MDEQ, were changes made to comply with the new requirements of the revised 40 C.F.R. § 131.14. The EPA approved the revised variance submission on October 31, 2017. The EPA approved two distinct Highest Attainable Conditions (HAC) that applied to mechanical plants: (1) the numeric values listed in Table 12B-1; or (2) if the mechanical plant is already meeting the Table 12B-1 values, then the numeric value that will reflect the facility's current effluent concentration and implementation of the adopted Pollutant Minimization Program (PMP) as required by Table 12B-1, endnote 3. (EPA 2017 Action Letter, pages 22-23). The EPA also approved "up to 17 years" as the term of the general variance for mechanical plants based on MDEQ's rule language: "the time for the general variance must only be as long as necessary to meet the treatment requirements in Table 12B-1 but could take up to 17 years from the date of approval of the general variance in this circular." (2017 Version of DEQ-12B Section 2.1). The EPA determined that MDEQ justified 17 years as the maximum term of the variance for mechanical plants if a discharger needed to implement all nine steps outlined by MDEQ to meet the Table 12B-1 values. (EPA Oct. 31, 2017 Approval Letter, page 39). For lagoons, the EPA approved the HAC as maintaining long-term average TN and TP concentrations and implementing the PMP with a variance term until July 1, 2027 (EPA 2017 Action Letter, page 38).

Upper Missouri Waterkeeper amended its 2016 complaint to challenge the EPA's 2017 approval action. The district court issued an order on summary judgment on March 25, 2019. In its decision, the court focused on two regulatory provisions and concluded in its order that the EPA's regulations are contradictory. *Upper Missouri Waterkeeper v. U.S. Environmental Protection Agency*, 377 F. Supp.3d 1156, 1169 (D. Mont. 2019). The court explained its reasoning that a WQS variance is defined in 40 C.F.R. § 131.3(o) as "a time-limited designated use and criterion for a specific pollutant(s) or water quality parameters(s) that reflect the highest attainable condition during the term of the WQS variance," and must have a term that is only "as long as necessary to achieve the highest attainable condition," 40 C.F.R. § 131.14(b)(1)(iv). *Id.* The court then interpreted "highest attainable condition" to mean "a condition that presently can be attained," *id.* at 1169, or "could be attained now," *id.* at 1171. The court concluded that "EPA's regulations contradict themselves and purposes of the CWA by establishing time to 'achieve' merely the 'highest attainable condition.'" *Id.* at 1169. The court then concluded that such a contradiction "does not comport with the purposes of the CWA." *Id.* To resolve the

identified contradiction, the court interpreted the EPA’s regulations as requiring a timeline that “begin[s] with compliance with Current Variance Standard” and “leads to compliance with Base WQS.” *Id.* at 1171. As a result, the court held that “EPA’s approval of the current seventeen-year timeline to allow dischargers to meet the relaxed Current Variance Standard runs counter to the CWA’s requirements and cannot stand.” *Id.* at 1171.

The district court issued its remedy order on July 16, 2019 and issued its final order and judgment on September 20, 2019. In its July 16, 2019 Order, the court directed the parties to “set forth a reasonable timeline that begins with the relaxed criteria of the Current Variance Standard and leads to compliance with Montana’s Base WQS [numeric nutrient criteria] in the time range proposed by the Plaintiffs.” Order at 5. The district court vacated the term of the variance but stayed vacatur until the “EPA approves a replacement general variance in accordance with the Court’s order.” July 16, 2019 Order at 5-6.

The EPA reviewed MDEQ’s submission to determine compliance with the court’s interpretation and the requirements as ordered by the district court. The EPA’s action today reflects its reading of the district court’s orders. The EPA acknowledges that the parties to the litigation may interpret the district court’s orders differently. The EPA acknowledges that the court’s orders include varying language such as “[t]he [c]ourt recognizes that economic factors may constrain immediate compliance with the Current Variance Standard for certain dischargers” (*Upper Missouri Waterkeeper*, 377 F. Supp. 3d at 1172) and “the variance timeline must serve to allow a discharger to make progress toward achieving Montana’s Base WQS within a reasonable time” (July 16, 2019 Order at 6). The EPA’s action is based on the more prescriptive language in the court’s various orders, including the court’s December 20, 2019 denial of the EPA’s Motion to Alter or Amend the Judgment (which was issued after MDEQ’s development and adoption of the revised rule) that the EPA is bound to follow.

IV. MDEQ’S REVISIONS TO THE GENERAL NUTRIENT VARIANCE IN RESPONSE TO THE DISTRICT COURT’S ORDERS

In response to the district court’s orders, MDEQ conducted rulemaking to amend the general variance at DEQ 12B (referenced in ARM § 17.30.660). The amended general variance was adopted by the state on November 23, 2019 and the EPA received MDEQ’s submission on November 26, 2019. The submission included: (1) a copy of the adopted revised nutrients general variance and supporting documentation; (2) notice of final adoption of the variance rules with the state’s response to comments; and (3) a letter certifying that the changes were adopted in accordance with state law.

A. Mechanical Plants

MDEQ modified DEQ-12B to address mechanical plants not yet meeting the relaxed criteria of the Current Variance Standard (CVS).³ Specifically, MDEQ revised Section 2.1 of DEQ-12B to require facilities to meet the CVS “as soon as possible but in no case later than July 1, 2027.” MDEQ’s Notice of Public Hearing on Proposed Amendment identifies four mechanical facilities not yet meeting the CVS. MDEQ’s record further explains that three of the four facilities are

³ In its orders, the district court refers to DEQ-12B as the “Current Variance Standard.”

anticipated to meet the CVS well before 2027, but one facility may need up to 2027 to achieve those effluent concentrations:

“most of the remaining mechanical facilities should be able to attain the treatment requirements well before July 1, 2027. However, the department has identified one mechanical facility, the Town of Manhattan, that may require up to July 1, 2027 to achieve the Table 12B-1 treatment requirements.” (MAR Notice No. 17-408; page 1445).

MDEQ indicates that “the department anticipates it will be able to publicly-notice draft [Montana Pollutant Discharge Elimination System] MPDES permits to incorporate the Table 12B-1 treatment requirements, or a compliance schedule to achieve the same, no later than July 31, 2020.” (MAR Notice No. 17-408; page 1445).

MDEQ based the 2027 deadline for mechanical plants on five steps (implementation of advanced operational strategies, engineering studies, financing, design and construction) a facility may need to take to get to the CVS (DEQ-12B, Section 2.1, page 4). DEQ-12B Section 2.1 (page 3) establishes that the five steps “provide an outline of potential steps needed to achieve the Table 12B-1 treatment requirements (“CVS”), noting that “the actual time period for individual steps may vary between each facility.” MDEQ also submitted a three-page HAC Compliance Schedule Memo explaining that it could take six to eight years to implement a major modification at a plant to meet the CVS.

MDEQ’s rule provides that the new term of the variance is “up to but no longer than, August 7, 2034.” MDEQ’s rule describes a process of re-evaluating the CVS and implementing a pollutant minimization program (PMP) for those facilities that meet the CVS, stating: “The combination of either a revised HAC or a revised optimization/pollutant minimization program will ensure that any permittee receiving a general variance will be required to make all reasonable progress toward attainment of the base numeric nutrient standards.” MDEQ’s Implementation Guidance further explains:

“The Department envisions an iterative process of planning PMP activities, implementing PMP activities, and evaluating PMP activities, with approximately three cycles of five-year duration (corresponding with five-year permit terms). The Department anticipates further progress in improving water quality during each cycle as knowledge and experience is gained and transferred.” (MDEQ Implementation Guidance; Section 2.2.1, page 11).

B. Lagoons

As approved in 2017, lagoons must maintain long-term average TN and TP levels (current conditions) and identify activities to implement the adopted PMP at the time of permitting that would be implemented during the term of the variance. The term of the approved 2017 variance was until 2027. MDEQ’s revised rule provides that the new term of the variance is “up to but no longer than, August 7, 2034.” DEQ-12B Section 2.3.2. Similar to the long-term goal for mechanical plants, MDEQ’s revised rule states that the combination of either a revised HAC or a revised optimization/pollutant minimization program “will ensure that any permittee receiving a general variance will be required to make progress toward attainment of the base numeric

nutrient standards.” DEQ 12-B Section 2.3.2. MDEQ’s basis for the extension of the term to 2034 relies on its implementation guidance that discusses three five-year permit cycles to plan, implement and evaluate PMP activities. MDEQ’s Implementation Guidance (page 11) states that: “the Department envisions an iterative process of planning PMP activities, implementing PMP activities, and evaluating results of PMP activities, with approximately three cycles of five-year duration (corresponding with five-year permit terms).”

C. Attainment of the NNC

MDEQ’s rule (DEQ-12 Section 2.3) identifies the NNC as the “ultimate goal” but does not include a timeline to meet the NNC. Instead, MDEQ’s rule indicates that economic and social impacts prevent attaining the NNC but that the variance “is designed to make measurable progress towards achieving” the NNC through review of the CVS and implementation of PMPs. DEQ-12B Section 2.3 provides that:

Through continued review and evaluation of the HAC, as well as the implementation of optimization/pollutant minimization activities, *the general variance is designed to make measurable progress towards achieving the base numeric nutrient standards* (emphasis added).

Pursuant to Mont. Code Ann. § 75-5-313(7), the Department reviews the HAC every three years and updates Table 12B-1 as necessary and in accordance with that review. Over time, treatment requirements will become more stringent if the Department’s review of technology and affordability support additional stringency. Mont. Code Ann. § 75-5-313(7)(b). *The ultimate goal is that the base numeric nutrient standards become attainable. This will occur when the HAC and the base numeric nutrient standards are essentially equivalent and there is no corresponding need for the general variance* (emphasis added).

The long-term goal is for all dischargers to comply with the base numeric nutrient standards. Through triennial reviews, the Department will continue to evaluate the feasibility of achieving the underlying base numeric nutrient standards.

DEQ-12B Section 2.3.1 further specifies the actions for mechanical plants that will lead to progress to meet the NNC and Section 2.3.2. includes similar language for lagoons.

Dischargers continue to meet the treatment requirements in Table 12B-1. When these requirements are achieved, permittees must identify and implement an optimization/pollutant minimization program. These requirements must then be incorporated into their respective MPDES permits...*The combination of either a revised HAC or a revised optimization/pollutant minimization program will ensure that any permittee receiving a general variance will be required to make all reasonable progress toward attainment of the base numeric nutrient standards.* The incorporation of any revised HAC or revised optimization/pollutant minimization program into an MPDES permit must undergo the required public participation process under Title 17, Chapter 30, Subchapter 13, ARM. The term of the general variance for mechanical facilities is up to, but no longer than, August 7, 2034. *See* Mont. Code Ann. § 75-5-313(8) (establishing

that variance terms may not be longer than 20 years) (emphasis added). DEQ-12B Section 2.3.1. See also DEQ-12B Section 2.3.2.

V. THE EPA'S ACTION ON MDEQ'S REVISED VARIANCE

The EPA is disapproving MDEQ's revisions to the general nutrient variance for both mechanical plants and lagoons because the revisions do not meet the requirements of the Act as interpreted by the district court's orders. The district court's orders require a reasonable timeline that "begins with the relaxed criteria of the Current Variance Standard and leads to compliance with Montana's Base WQS." July 16, 2019 Order at 5. Although the EPA does not agree with this interpretation of the Act, it nonetheless is required to apply the district court's interpretation in this instance.

MDEQ's new variance term for mechanical plants does not "begin with" the relaxed criteria of the CVS but instead gives dischargers up to 2027 to meet the relaxed criteria of the CVS. While MDEQ states in its Notice of Public Hearing on Proposed Amendment that it anticipates it will public notice MPDES permits for the four remaining mechanical plants not meeting the CVS with the Table 12B-1 treatment requirements, or a compliance schedule to achieve the requirements, no later than July 31, 2020, the variance term giving dischargers until 2027 to meet the relaxed criteria of the CVS does not comply with the district court's interpretation of the EPA's regulations that the highest attainable condition is the condition that "can presently be attained" (*Upper Missouri Waterkeeper*, 377 F.Supp.3d at 1169) or the "'highest attainable condition' *right now*, not attainable at some future date," (December 2019 Order at 7-8 (emphasis added)) nor does it comply with the district court's requirement that the term of the variance begins with the relaxed criteria of the CVS.

Additionally, the district court directed the defendants in its July 2019 Order "to set forth a reasonable timeline to *reach* Montana's Base WQS in the range proposed by Plaintiffs." July 2019 Order at 4 (emphasis added) and directed the parties "to set forth a reasonable timeline that... *leads to compliance* with Montana's Base WQS in the time range proposed by the Plaintiffs." July 2019 Order at 5 (emphasis added). See also *Upper Missouri Waterkeeper*, 377 F.Supp.3d at 1170 ("Defendants must adopt a timeline for which attainment of Montana's Base WQS would be feasible. To hold otherwise would render meaningless Montana's Base WQS."). MDEQ's variance term for both mechanical plants and lagoons does not include a timeline to attain the Base WQS as required by the district court's orders and only indicates that the variance must make progress towards the Base WQS (NNC). The EPA does not concede that the actions that would be required to meet the Base WQS at the end of the variance term are feasible or attainable by permittees. However, because the district court's orders construe the EPA's regulations as requiring the variance to achieve compliance with the WQS and because MDEQ's revised variance will not achieve compliance with the WQS, the EPA is disapproving MDEQ's submission.

Specification of Necessary Changes

CWA section 303(c)(3) states that "[i]f the Administrator determines that any such revised or new standard is not consistent with the applicable requirements of this chapter, he shall not later

than the ninetieth day after the date of submission of such standard notify the State and specify the changes to meet such requirements.” A state is not required to adopt a WQS variance and thus, there are no changes that the EPA must specify to meet the requirements of the Act when disapproving a WQS variance.⁴ However, if MDEQ chooses to adopt a new or revised WQS variance upon the EPA’s disapproval, the EPA specifies that to meet the CWA requirements as interpreted in the court’s orders, the state must adopt “a reasonable timeline that begins with the relaxed criteria of the Current Variance Standard and leads to compliance with MDEQ’s Base WQS.” July 16, 2019 Order at 5.

VI. THE EPA’S ACTION ON APPLICABILITY PROVISIONS

ARM § 17.30.660(9)

In November 2019, MDEQ adopted and submitted to the EPA under CWA section 303(c) a revised version of ARM § 17.30.660 that incorporates by reference the November 2019 version of Circular 12-B and the following provision:

(9) If a court of competent jurisdiction determines that the United States Environmental Protection Agency’s October 31, 2017 approval of the general variance is valid and lawful, then the incorporations by reference of the November 2019 edition of Department Circular DEQ-12B contained in this rule shall be void, and the May 2018 edition of Department Circular DEQ-12B shall contain the applicable general variance. If such contingency occurs, all references to the November 2019 edition of Department Circular DEQ-12B contained in this rule shall be stricken and shall be considered as replaced with the May 2018 edition.

The EPA approved the state’s general variance on October 31, 2017. The EPA approved a May 2018 version of Circular 12-B on August 24, 2018. This version did not change the general variance that the EPA approved on October 31, 2017. Instead, the 2018 revision added to Circular 12-B an individual variance for Whitefish and other provisions specific to individual variances.

Similar to the provisions discussed above, ARM § 17.30.660(9) was adopted in state regulations that are WQS. In addition, ARM § 17.30.660(9) addresses the applicability of MDEQ’s WQS if certain subsequent events occur after submission and qualifies for review under 40 C.F.R. § 131.13. The EPA understands this provision to mean that if a court issues a final judgment determining that EPA’s October 31, 2017 approval of the general variance is valid and lawful, that the May 2018 approved version of Circular 12-B will be the applicable WQS for CWA purposes by operation of law. As a result, this provision is specifying the desired condition or level of protection for the waters subject to both the numeric nutrient criteria and nutrient general

⁴ The EPA disagrees with the court’s decision on this issue in *Miccosukee Tribe of Indians v. U.S.*, Nos. 04-21448 et al., (S.D. Fla April 14, 2010). Furthermore, the basis for the EPA’s position as stated in this action is distinguishable from the EPA’s basis in the *Miccosukee* matter. The basis for the EPA’s position as discussed in today’s action derives from the statutory language in 303(c)(3) as applied to a WQS variance, which is not a required WQS under the CWA.

variance that were addressed by the EPA's October 17, 2017 approval. For these reasons, the EPA is acting on this provision today.

The EPA is approving ARM § 17.30.660(9) because as described above, states are not prohibited from adopting as part of their WQS provisions a provision such as ARM § 17.30.660(9), which simply provides that applicable water quality standards which were duly adopted by a state and approved by the EPA, shall, at the conclusion of litigation upholding the EPA's approval, be the applicable CWA standards in the state. Therefore, the EPA has determined that MDEQ's adoption of 17.30.660(9) reflect the state's reasonable exercise of its discretion to address the applicability of their nutrient general variance under the specified circumstances. The EPA's approval of ARM § 17.30.660(9) does not change the scope or content of the EPA's approval of the general variance on October 31, 2017.

ARM §§ 17.30.619(2) and 17.30.715(4)

On August 15, 2014, the EPA received from MDEQ ARM §§ 17.30.619(2) and 17.30.715(4) together with other provisions addressing its adopted numeric nutrient criteria and general variance. ARM § 17.30.619(2) provides that:

“If a court of competent jurisdiction declares 75-5-313, MCA, or any portion of that statute invalid, or if the United States Environmental Protection Agency disapproves 75-5-313, MCA, or any portion of that statute, under 30 CFR 131.21, or if rules adopted pursuant to 75-5-313(6) or (7), MCA, expire and general variances are not available, then (1)(e) and all references to DEQ-12A, base numeric nutrient standards and nutrient standards variances in ARM 17.30.201, 17.30.507, 17.30.516, 17.30.602, 17.30.622 through 17.30.629, 17.30.635, 17.30.702, and 17.30.715 are void, and the narrative water quality standards contained in ARM 17.30.637 are the standards for total nitrogen and total phosphorus in surface water, except for the Clark Fork River, for which the standards are the numeric standards in ARM 17.30.631.”

ARM § 17.30.715(4) states that:

“If a court of competent jurisdiction declares 75-5-313, MCA, or any portion of that statute invalid, or if the United States Environmental Protection Agency disapproves 75-5-313, MCA, or any portion of that statute under 30 CFR 131.21, or if rules adopted pursuant to 75-5-313(6) or (7), MCA, expire and general variances are not available, then the significance criteria contained in (1)(g) are the significance criteria for total nitrogen and total phosphorus in surface water.”

In the EPA's February 26, 2015 decision approving MDEQ's numeric nutrient criteria and 2014 adopted variance, the EPA acknowledged but did not take action on ARM §§ 17.30.619(2) and 17.30.715(4)). The EPA's action letter commented that:

“Montana included in its regulations (ARM 17.30.619(2) and 17.30.715(4)) a provision that calls for the voiding of *all* adopted NNC and all variances should one of three triggering events occur [emphasis in EPA's 2015 action letter]. The EPA is committed to

continuing its collaboration with the state to implement this nutrient rule approach consistent with CWA requirements, including the adoption of variances established by and consistent with ARM 17.30.660 and Montana Circular DEQ-12B. Thus, the EPA believes it was inadvisable for the state to include such a provision. The EPA is not acting on this provision today.” (EPA February 25, 2016 Action Letter, Enclosure page 3.)

The EPA now believes that it was not inadvisable for the state to include such provisions and instead was lawful and permissible and that the Agency should have acted on these two provisions. The provisions were clearly submitted to the EPA under CWA section 303(c) for review together with other provisions, as part of the State’s WQS. First, these provisions are subsections that were adopted in state regulations that are WQS. Second, the EPA’s regulations recognize that “states may, at their discretion, include in their State standards, policies generally affecting their *application* and implementation” and that such policies are “subject to EPA review and approval.” 40 C.F.R. § 131.13 (emphasis added). ARM §§ 17.30.619(2) and 17.30.715(4) address the applicability of MDEQ’s WQS if certain subsequent events occur after submission and those provisions should have been considered as integral components of the state’s overall numeric nutrient criteria and nutrient general variance. And as such, ARM §§ 17.30.619(2) and 17.30.715(4)), together with the other submitted provisions, express, in totality, the desired condition or level of protection for the waters subject to both the numeric nutrient criteria and nutrient general variance. For these reasons, the EPA is acting on these provisions today.

The EPA is approving ARM §§ 17.30.619(2) and 17.30.715(4)), recognizing that the language and structure of these provisions reflect that they are integral components of the WQS adopted by MDEQ and approved by the EPA.⁵ Although the EPA’s regulations address when WQS provisions become applicable under the CWA and how long an approved WQS remains the applicable WQS for CWA purposes, 40 C.F.R. § 131.21(e), the regulations do not prohibit states from adopting as part of their WQS provisions such as ARM §§ 17.30.619(2) and 17.30.715(4)), that address the applicability of inter-related components of a state’s standards (in this case, numeric nutrient criteria and variances from those criteria) in the event the applicability of one of such components is altered by future events. The EPA expresses no view at this time as to the specific circumstances, including today’s disapproval action, that could trigger ARM §§ 17.30.619(2) and 17.30.715(4), or as to any additional state processes that might be required to effectuate such a change. The EPA has determined that MDEQ’s adoption of ARM §§ 17.30.619(2) and 17.30.715(4)) reflect the state’s reasonable exercise of its discretion to address the applicability of their numeric nutrient criteria and nutrient general variance under certain prescribed circumstances and are approving them as part of these WQS.

⁵ The EPA acknowledges that its decision today differs from its previous decision in 2012 relating to a similar provision adopted by the State of Florida. *Decision Document of United State Environmental Protection Agency Determination Under § 303(c) of the Clean Water Act Review of Amendments to Florida’s Rule 62-302 and 62-303*, November 30, 2012, page 53. Upon reconsideration, the EPA has determined that the provisions adopted by MDEQ are not isolated provisions, but rather are embedded within the substantive numeric nutrient criteria and nutrient general variance adopted by the state.