JAN 29 2020

LAW OFFICE OF
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January 23, 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

Mike Stoker, Regional Administrator
U.S. Environmental Protection Agency
Region 9
75 Hawthorne Street
San Francisco, CA 94105

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

Dear Administrator Wheeler and Mr. Stoker:

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 specific conductivity, total dissolved solids, nitrogen, and nitrate/nitrite in the East Fork of 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 1990 the East Fork of Armells Creek was first placed on Montana's 303(d) list

of impaired waterbodies for specific conductivity and total dissolved solids.[1] In 1996 the East Fork of Armells Creek was placed on Montana's 303(d) list of impaired waterbodies for nitrate/nitrite and nitrogen. *Id.* The East Fork of Armells Creek remains on Montana's latest 2018 303(d) list for each of these impairing pollutants. *Id.* As recently as 2018, the State of Montana continued to acknowledge that nitrate/nitrite, nitrogen, specific conductivity and total dissolved solids are causes of the stream's impairment.[2] Montana also admitted that one of the sources causing these impairments is coal mining.[3] With the exception of nitrate/nitrite, all of the pollutants currently have an "unassigned" TMDL project status.[4] Further, with the exception of nitrogen and nitrate/nitrite, all of the TMDLs are currently classified a low priority. *Id.* While nitrogen is ranked a "high" priority, its project status remains "unassigned." *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. Since 1990 and 1996 Montana has failed to develop and issue these TMDLs, and has failed to develop a schedule and credible plan for producing these 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. In the *Wheeler* decision the court found that the first TMDLs were due in June 1979. Thereafter, 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.* In the *Wheeler* case, the states of Washington and Oregon first listed the Columbia and Snake Rivers as impaired for temperature in the mid-1990s but as of 2018 neither of the states nor EPA had issued a final temperature TMDL for these watersheds.

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 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 fails over a long period of time to submit a TMDL; this prolonged failure 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 (9th Cir. 2005).

Violations of the CWA by EPA

The *Columbia Riverkeeper* decision has direct applicability to Montana's

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[1] Attachment 1 hereto (Montana's 2018 303(d) List, Appendix B, p. B-5, excerpt).
[2] Attachment 2 hereto (State of Montana 2018 303(d) list Appendix A, p. A-132, excerpt).
[3] *Id.*
[4] Attachment 1hereto.

prolonged failure to promulgate TMDLs for the East Fork of Armells Creek. Congress passed the Clean Water Act "to restore and maintain the chemical, physical, and biological integrity of the Nation's waters."[5] The Clean Water Act requires states to list water bodies that are not meeting water quality standards.[6] 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.[7] That plan is called a "total maximum daily load" or TMDL.[8] 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."[9]

Within 180 days of listing a waterway as not meeting a water quality standard, the state must submit its TMDL to EPA.[10] EPA must decide whether a state's TMDL is adequate within 30 days.[11] If the state's TMDL is inadequate, EPA has 30 additional days to write a substitute TMDL for the state.[12] If a state fails over a prolonged period of time 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.*

In 1990 the East Fork of Armells Creek was first listed on Montana's 303(d) list for specific conductivity and total dissolved solids. In 1996 the East Fork of Armells Creek was listed on Montana's 303(d) list of impaired waterbodies for nitrate/nitrite and nitrogen. The East Fork of Armells Creek remains on Montana's latest 2018 303(d) list. To date, the State of Montana has no credible plan to produce and implement a TMDL for any currently impairing pollutant.

Montana has failed over a long period of time to submit a TMDL for total dissolved solids, specific conductivity, nitrogen and nitrate/nitrite for the East Fork of Armells Creek. Montana's prolonged failure amounts to constructive submission of an inadequate TMDL. *Columbia Riverkeeper. See also, City of Arcadia v. U.S. EPA,* 411 F.3d 1103, 1005 (9th Cir. 2005). Montana's prolonged inaction triggers EPA's mandatory duties to: (1) disapprove Montana's constructive submissions for each 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:

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[5] 33 U.S.C. §1251(a).
[6] 33 U.S.C. §1313(d)(1).
[7] 33 U.S.C. §1313(d)(1)(C).
[8] *Id.*
[9] *Id.*
[10] 33 U.S.C. §1313(d)(2).
[11] *Id.*
[12] *Id.*

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P.O. Box 1184
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(406) 443-2520

Sierra Club
2101 Webster Street, Suite 1300
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
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Counsel for the Conservation Organizations

By USPS Certified Mail/Return Receipt Requested

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. 6th Avenue
P.O. Box 200901
Helena, MT 59620-0901

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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 Tributaries	10100001	MT42K002_070	STELLAR CREEK, headwaters to mouth (Little Porcupine Creek)	pH	2006	Scheduled	L
Lower Yellowstone	Middle Yellowstone Tributaries	10100001	MT42K002_080	NORTH FORK SUNDAY CREEK, Custer/Rosebud County border to mouth (Sunday Creek)	Sedimentation/Siltation	1994	Unassigned	L
Lower Yellowstone	Middle Yellowstone Tributaries	10100001	MT42K002_080	NORTH FORK SUNDAY CREEK, Custer/Rosebud County border to mouth (Sunday Creek)	Sodium	1994	Unassigned	L
Lower Yellowstone	Middle Yellowstone Tributaries	10100001	MT42K002_080	NORTH FORK SUNDAY CREEK, Custer/Rosebud County border to mouth (Sunday Creek)	Specific Conductivity	1994	Unassigned	L
Lower Yellowstone	Middle Yellowstone Tributaries	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 Tributaries	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 Tributaries	10100001	MT42K002_090	SARPY CREEK, Crow Indian Reservation Boundary to mouth (Yellowstone River)	Nitrogen, Total	2006	Scheduled	L
Lower Yellowstone	Middle Yellowstone Tributaries	10100001	MT42K002_090	SARPY CREEK, Crow Indian Reservation Boundary to mouth (Yellowstone River)	Phosphorus, Total	2006	Scheduled	L
Lower Yellowstone	Middle Yellowstone Tributaries	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 Tributaries	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 Tributaries	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 Tributaries	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 Tributaries	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 Tributaries	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 Tributaries	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 Tributaries	10100001	MT42K002_120	WEST FORK ARMELLS CREEK, headwaters to mouth (Armells Creek)	Aluminum	2018	Unassigned	L
Lower Yellowstone	Middle Yellowstone Tributaries	10100001	MT42K002_120	WEST FORK ARMELLS CREEK, headwaters to mouth (Armells Creek)	Iron	2018	Unassigned	L
Lower Yellowstone	Middle Yellowstone Tributaries	10100001	MT42K002_160	LITTLE PORCUPINE CREEK, headwaters to mouth (Yellowstone River)	Nitrate/Nitrite (Nitrite + Nitrate as N)	1990	Scheduled	L
Lower Yellowstone	Middle Yellowstone Tributaries	10100001	MT42K002_160	LITTLE PORCUPINE CREEK, headwaters to mouth (Yellowstone River)	Nitrogen, Total	1990	Unassigned	L
Lower Yellowstone	Middle Yellowstone Tributaries	10100001	MT42K002_160	LITTLE PORCUPINE CREEK, headwaters to mouth (Yellowstone River)	Phosphorus, Total	1990	Scheduled	L
Lower Yellowstone	Middle Yellowstone Tributaries	10100001	MT42K002_160	LITTLE PORCUPINE CREEK, headwaters to mouth (Yellowstone River)	Total Dissolved Solids (TDS)	1990	Scheduled	L
Lower Yellowstone	Middle Yellowstone Tributaries	10100001	MT42K002_180	ARMELLS CREEK, confluence of East and West Forks to mouth (Yellowstone River)	Aluminum	2018	Unassigned	L
Lower Yellowstone	Middle Yellowstone Tributaries	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	O'Fallon	10100005	MT42L001_020	SANDSTONE CREEK, headwaters to mouth	Nitrate/Nitrite (Nitrite + Nitrate as N)	2006	Scheduled	L

ATTACHMENT 1

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Appendix A: Impaired Waters

HUC: 10100001 Lower Yellowstone-Sunday **Watershed:** Lower Yellowstone

TMDL Planning Area	ID305B	Waterbody Name/Location	Category	Size	Units	Use Class	Beneficial Use AqL	Ag	DW	Rec	Cause Name *	Source Name *
Middle Yellowstone Tributaries	MT42K002_060	DEADMAN CREEK, headwaters to mouth (North Fork Sunday Creek)	5	17.28	MILES	C-3	N	-	-	F	Phosphorus, Total	
Middle Yellowstone Tributaries	MT42K002_070	STELLAR CREEK, headwaters to mouth (Little Porcupine Creek)	5	42.96	MILES	C-3	N	-	-	N	Cadmium	Rangeland Grazing
											Chlorophyll-a	Source Unknown
											Phosphorus, Total	
											pH	
Middle Yellowstone Tributaries	MT42K002_080	NORTH FORK SUNDAY CREEK, Custer/Rosebud County border to mouth (Sunday Creek)	5	33.76	MILES	C-3	N	-	-	F	Sedimentation/Siltation	Channelization
											Sodium	Crop Production (Crop Land or Dry Land)
											Specific Conductivity	Natural Sources
											Total Dissolved Solids (TDS)	
Middle Yellowstone Tributaries	MT42K002_090	SARPY CREEK, Crow Indian Reservation Boundary to mouth (Yellowstone River)	5	89.35	MILES	C-3	N	-	-	F	Nitrate/Nitrite (Nitrite + Nitrate as N)	Crop Production (Non-Irrigated)
											Nitrogen, Total	Grazing in Riparian or Shoreline Zones
											Phosphorus, Total	
Middle Yellowstone Tributaries	MT42K002_110	EAST FORK ARMELLS CREEK, mine shops area (45.866, -106.638) to mouth (Armells Creek)	5	35.38	MILES	C-3	N	-	-	F	Alteration in stream-side or littoral vegetative covers	Agriculture
											Aluminum	Coal Mining
											Habitat Alterations	Grazing in Riparian or Shoreline Zones
											Iron	Natural Sources
											Nitrate/Nitrite (Nitrite + Nitrate as N)	Source Unknown
											Nitrogen, Total	Transfer of Water from an Outside Watershed
											Phosphorus, Total	
											Specific Conductivity	
											Total Dissolved Solids (TDS)	
Middle Yellowstone Tributaries	MT42K002_120	WEST FORK ARMELLS CREEK, headwaters to mouth (Armells Creek)	5	33.99	MILES	C-3	N	-	-	F	Aluminum	Natural Sources
											Iron	Source Unknown
Middle Yellowstone Tributaries	MT42K002_160	LITTLE PORCUPINE CREEK, headwaters to mouth (Yellowstone River)	5	118.8	MILES	C-3	N	-	-	N	Chlorophyll-a	Rangeland Grazing
											Nitrate/Nitrite (Nitrite + Nitrate as N)	Source Unknown
											Nitrogen, Total	

AqL=Aquatic Life; Ag=Agriculture; DW=Drinking Water; Rec=Primary Contact Recreation
F=Fully Supporting; T=Threatened; N=Not Fully Supporting; I=Insufficient Information; X=Not Assessed; - = Beneficial Use Not Assigned
* The impairment cause and source names in this appendix are listed alphabetically. There is no implied relationship between the listed causes and sources. See individual assessment reports for details.

ATTACHMENT 2