REGION 8 ADMINISTRATOR
DENVER, CO 80202

SENT VIA EMAIL

Director Sonja Nowakowski
Montana Department of Environmental Quality
sonja.nowakowski@mt.gov

Subject: EPA's action on Montana's water quality standards in Sections 1, 2(1), and 5 of House Bill 664

Dear Director Nowakowski:

Thank you for your letter of May 7, 2025, submitting Montana House Bill 664 (HB 664), signed into law on May 1, 2025, to the U.S. Environmental Protection Agency (EPA) for review pursuant to Clean Water Act (CWA) section 303(c). HB 664 repealed the State of Montana's numeric criteria for nutrient water quality standards (WQS), leaving in place narrative criteria for nutrients. The submittal was accompanied by a certification letter from the Montana Department of Environmental Quality (MDEQ) Chief Legal Counsel, on designated authority from the Montana Attorney General, indicating that HB 664 was duly adopted into state law. This certification is in conformance with the minimum requirements for a WQS submission under EPA's regulations at 40 C.F.R. § 131.6(e).

HB 664 includes provisions that direct MDEQ to repeal MDEQ Circular DEQ-12A base numeric nutrient standards and to amend state regulations to remove all references to DEQ-12A, base numeric nutrient standards, and nutrient standards variances.[1] Separately, HB 664 also repeals the authorizing provision for nutrient standards variances contained in Administrative Rules of

[1] For purposes of today's action, the EPA interprets "nutrient standards variances" as articulated in Section 1 of HB 664 to refer to Montana's Circular DEQ-12B.

Montana (ARM) 17.30.660. While HB 664 is a legislative action directing MDEQ to make changes to its WQS regulations, and EPA would expect any corresponding regulatory changes to be submitted to EPA consistent with CWA section 303(c)(2), EPA acknowledges MDEQ's decision to submit the legislation as WQS for EPA's review.

This approval of HB 664 comes on the heels of EPA's 2022 disapproval of Montana's Senate Bill (SB) 358 which, among other things, established a transition from numeric to narrative criteria for nutrients. EPA disapproved SB 358 despite no submission to EPA as required by section 303 of the CWA. Instead, EPA acted in response to litigation brought by an environmental non-governmental organization alleging a mandatory duty for EPA to approve or disapprove of SB 358. This mandatory duty suit and EPA's subsequent disapproval of SB 358 was done prior to MDEQ's adoption of implementing regulations or any submission by the State of Montana, in a precedential action in contravention of the CWA's statutory scheme. *See* 33 U.S.C. 1313(c)(2)(A) ("Whenever the State revises or adopts a new standard, such revised or new standard shall be submitted to the Administrator."). Nothing in the CWA requires or permits EPA to examine state laws for what it determines to be WQS absent a submission to EPA by a state. To emphasize, such authority or mandatory duty on EPA's part is only triggered upon submission to EPA.

The CWA does not require states to adopt numeric nutrient criteria. In fact, EPA's regulations authorize states to adopt narrative criteria. *See* 40 C.F.R. § 131.11(a)-(b). Further, although laws that are not self-implementing are not typically WQS, EPA is acting to approve HB 664 since it was submitted as such. However, EPA will review Montana's regulations implementing HB 664 once those regulations are promulgated and sent to EPA in accordance with 40 C.F.R. § 131.6(e).

Therefore, as discussed below, EPA has reviewed the legislation and is approving the relevant provisions as consistent with the requirements of the CWA and 40 C.F.R. Part 131.

Clean Water Act Review Requirements

CWA section 303(c)(2) requires states and authorized Indian Tribes[2] to submit new or revised WQS to EPA for review. Following such a submission, EPA must approve or disapprove those submitted standards. CWA section 303(c)(3) requires EPA to determine whether the new or revised standards in state submissions are consistent with the applicable requirements of the Act.

[2] CWA section 518(e) specifically authorizes EPA to treat eligible Indian Tribes in the same manner as states for purposes of CWA section 303. *See also* 40 C.F.R. § 131.8.

Today's Action

EPA's review under the CWA is centered on whether the provisions are consistent with applicable requirements of the CWA and EPA's implementing regulations. EPA's review includes Section 1 of HB 664, Section 2(1) of HB 664, and Section 5 of HB 664 as it pertains to ARM 17.30.660.

Sections 1 and 2(1) of HB 664 serve to remove the applicable "base numeric nutrients standards," which EPA refers to as "numeric nutrient criteria" (NNC) in this document, and nutrient standards variances, leaving narrative criteria (ARM 17.30.637(1)) in place. EPA concludes that Montana's revised WQS meet requirements to protect designated uses (i.e., protection of aquatic life and recreation) under the CWA and its implementing regulations at 40 C.F.R. Part 131. EPA therefore approves Sections 1 and 2(1) of HB 664.

Section 5, pertaining to ARM 17.30.660 of HB 664, removes a previously approved WQS variance authorizing provision specifically for use with the NNC. EPA concludes this provision is consistent with the CWA and its implementing regulations because neither the CWA nor 40 C.F.R. Part 131 requires states to adopt authorizing provisions before being able to adopt WQS variances. EPA therefore approves Section 5 of HB 664 pertaining to ARM 17.30.660. To the extent that MDEQ prefers to have an authorizing provision before using WQS variances under state law, MDEQ has separate WQS variance authorizing provisions (ARM 17.30.661 and 662) that it could use to adopt a WQS variance for nutrients when implementing the narrative criteria. Any WQS variances must be submitted to EPA and obtain EPA approval to be effective for CWA purposes. *See* 40 C.F.R. § 131.14.

As a result of this determination, Sections 1, 2(1), and (5) of HB 664 pertaining to ARM 17.30.660 are effective for CWA purposes, including for implementation in the CWA Section 402 National Pollutant Discharge Elimination System (NPDES) permitting program (see 40 C.F.R. § 131.21(c)), as of the date of this letter. Other provisions of HB 664 do not constitute new or revised WQS requiring EPA action.

Endangered Species Act Requirements

In addition to EPA's review pursuant to section 303(c) of the CWA, section 7(a)(2) of the Endangered Species Act (ESA) requires federal agencies, in consultation with the National Marine Fisheries Service (NMFS) and/or the U.S. Fish and Wildlife Service (FWS), to ensure their discretionary actions are not likely to jeopardize the continued existence of federally listed species or result in the destruction or adverse modification of designated critical habitat of such species.

Regardless of whether or not EPA is required to consult on approvals of WQS, EPA nevertheless initiated informal consultation with FWS on May 29, 2025, and transmitted its Biological Evaluation to FWS on September 30, 2025.

EPA's approval of the portion of Section 1 that pertains to deletion of the NNC and Section 2(1) of HB 664 pending completion of consultation under ESA Section 7(a)(2) is consistent with Section 7(d) of the ESA because it does not foreclose the formulation or implementation of any reasonable and prudent alternatives that might be determined to be appropriate. *See* 50 C.F.R. § 402.09. MDEQ will be able to translate the narrative relying upon the available science to provide the same level of protection for federally-listed species as afforded by the NNC. Application of the narrative criteria based on current and site-specific information should prevent adverse effects to listed species and designated critical habitat by minimizing algal biomass, preventing significant changes in the aquatic community, and providing the water quality (pH and dissolved oxygen) necessary to support aquatic life. EPA retains options available under CWA Section 303(c) for ensuring WQS are environmentally protective, including the authority under CWA Section 303(c)(4)(B) to take action, when necessary, regarding WQS for Montana. EPA can also encourage the State to consider listed species and designated critical habitat when it revises WQS to ensure protection of listed species.

Indian Country and Lands of Exclusive Federal Jurisdiction

EPA's approval of Montana's WQS does not extend to Indian country as defined in 18 U.S.C. § 1151, or to lands of exclusive federal jurisdiction. Indian country in Montana generally includes (1) lands within the exterior boundaries of the following Indian reservations located within Montana: the Blackfeet Indian Reservation, the Crow Indian Reservation, the Flathead Reservation, the Fort Belknap Reservation, the Fort Peck Indian Reservation, the Northern Cheyenne Indian Reservation, and the Rocky Boy's Reservation; (2) any land held in trust by the United States for an Indian Tribe (including but not limited to the Little Shell Tribe of Chippewa Indians); and (3) any other areas that are "Indian country" within the meaning of 18 U.S.C. § 1151. EPA does not maintain a map or list delineating all lands of exclusive Federal jurisdiction. However, EPA is currently aware of the following lands of exclusive federal jurisdiction located within Montana: Glacier National Park, 16 U.S.C. § 163, Yellowstone National Park, 16 U.S.C. § 24, and the Little Bighorn Battlefield on the Crow Reservation, 46 Stat. 168. EPA, or EPA-authorized Indian Tribes, as appropriate, retain responsibilities under CWA section 303 in Indian country and in lands of exclusive federal jurisdiction. Today's action is not intended as an action to approve or disapprove WQS for waters within Indian country and in lands of exclusive federal jurisdiction.

Conclusion

EPA is pleased to support Montana in its work to implement the Clean Water Act and protect state waters.

Sincerely,

CYRUS WESTERN

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Cyrus M. Western
Regional Administrator

Enclosure

cc: Lindsey Krywaruchka, Administrator, Water Quality Division

Rationale for the EPA's Approval of Montana's Nutrient Provisions in Sections 1, 2(1), and 5 of House Bill 664

I. Background

A. Relevant Clean Water Act (CWA) Requirements

CWA section 303(c)(2)(A) specifies that water quality standards "shall be such as to protect the public health or welfare, enhance the quality of water and serve the purposes of this chapter. Such standards shall be established taking into consideration their use and value for public water supplies, propagation of fish and wildlife, recreational purposes, and agricultural, industrial, and other purposes, and also taking into consideration their use and value for navigation." Additionally, CWA section 303(c)(1) and (2)(A) provide that states review and, as appropriate, modify and adopt WQS, and submit such revised or new WQS to the EPA for review. CWA section 303(c)(2)(A) provides that such standards shall consist of the designated uses (e.g., protection of aquatic life, recreation in and on the water) of the navigable waters involved and the water quality criteria for such waters based upon such uses. Numeric criteria specify precise, measurable levels of pollutants, while narrative criteria describe desired water quality conditions in a qualitative way.

CWA Section 303(c)(2)(B) requires states to adopt numeric criteria for parameters listed as "priority pollutants" (toxic pollutants listed pursuant to CWA section 307(a)) for which the EPA has published recommended criteria under CWA Section 304(a)), where their discharge or presence in the affected waters could reasonably be expected to interfere with designated uses. Nutrients have not been identified as priority pollutants. Thus, there is no specific CWA requirement to adopt or retain numeric criteria for nutrients.

The EPA's implementing regulation requires states to adopt water quality criteria that protect the designated use and specifies that such criteria must be based on sound scientific rationale and must contain sufficient parameters or constituents to protect the designated use. 40 C.F.R. § 131.11(a)(1). The portion of the regulation that implements CWA section 303(c)(2)(B), regarding priority pollutants, contains mandatory language. 40 C.F.R. § 131.11(a)(2). In contrast, the portion of the regulation that is not specific to priority pollutants uses the word "should." The latter portion provides that states should 1) establish numeric criteria based on CWA section 304(a) guidance, such guidance modified to reflect site-specific conditions, or other scientifically defensible methods, and 2) establish narrative criteria or criteria based upon biomonitoring methods where numerical criteria cannot be established or to supplement numerical criteria. 40 C.F.R. § 131.11(b). Thus, for non-priority pollutants such as nutrients, the regulation shows a preference for numeric criteria over narrative criteria but does not require numeric criteria.

B. History of Nutrient Criteria in Montana

Nutrients such as nitrogen and phosphorus are necessary to support the health and diversity of lakes and streams. Although nutrients are generally not considered to have toxic effects, elevated and sustained nutrient concentrations (nutrient enrichment) can lead to excess algae growth or other impacts to the biological community. Until 2014, Montana relied on a general narrative provision (ARM 17.30.637(1)) [1] as the sole basis to address nutrient enrichment.

In 2014, Montana Department of Environmental Quality (MDEQ) adopted WQS for nutrients and submitted the package to the EPA for action under CWA section 303(c). The standards included numeric nutrient criteria (NNC) for total nitrogen (TN) and total phosphorus (TP) to protect the designated uses of wadeable streams[2] and the Yellowstone River from the confluence of the Bighorn River to the state line with North Dakota, WQS variances[3] for nutrients justified based on the economic impacts of attaining the NNC for facilities discharging to these waters, and non-severability provisions linking the applicability of NNC to the availability of WQS variances for nutrients. MDEQ also retained the narrative criteria, which are the only WQS that have ever been in effect for nutrients for CWA purposes for lakes/reservoirs and all non-wadeable streams and rivers within Montana (except certain segments of the Yellowstone River). The EPA approved the NNC and WQS variances pursuant to CWA section 303(c) in 2015. In 2017, the EPA approved Montana's revised WQS variance for a subset of dischargers. The EPA subsequently approved the non-severability provisions in 2020.[4]

MDEQ considered multiple lines of evidence in establishing the 2014 NNC, including: (a) nutrient concentrations from reference distributions; (b) nitrogen to phosphorus (N:P) ratios observed at reference sites; and (c) thresholds identified in scientific studies derived from stressor-response

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[1] ARM 17.30.637 GENERAL PROHIBITIONS (1) State surface waters must be free from substances attributable to municipal, industrial, agricultural practices or other discharges that will:… (d) create concentrations or combinations of materials which are toxic or harmful to human, animal, plant, or aquatic life; and (e) create conditions which produce undesirable aquatic life.

[2] A wadeable stream means a perennial or intermittent stream in which most of the wetted channel is safely wadeable by a person during baseflow conditions. Montana Department of Environmental Quality, Department Circular DEQ-12A, Montana Base Numeric Nutrient Standards, July 2014 edition.

[3] A WQS variance, as defined by the EPA, is a time-limited tool that states, territories, and authorized Tribes can use to improve water quality over time. 40 C.F.R. § 131.3(o). It allows for a temporary adjustment to the applicable designated use and criterion for a specific pollutant or water body, reflecting the highest attainable condition achievable during the variance period. 40 C.F.R. § 131.14. This approach provides flexibility while ensuring progress towards meeting water quality goals.

[4] Litigation occurred from 2016-2021 regarding the EPA's actions on Montana's nutrient WQS. On October 6, 2021, the U.S. Court of Appeals for the Ninth Circuit issued an opinion upholding the EPA's 2017 approval of Montana's WQS variance. *Upper Missouri Waterkeeper v. U.S. Environmental Protection Agency*, 15 F.4th 966 (9th Cir. 2021). Under a district court order issued on October 30, 2020, Montana's WQS variance approved by the EPA on October 31, 2017, and the state's numeric nutrient criteria approved by the EPA on February 26, 2015, remained in effect for CWA purposes until today's action. *Upper Missouri Waterkeeper v. U.S. Environmental Protection Agency*, No. CV16-52-GF-BMM, CV-20-27-BMM (D. Mont. Oct. 30, 2020).

analyses. The record accompanying MDEQ's 2014 adoption of the NNC and the EPA's 2015 CWA section 303(c) approval of the NNC documents the NNC are based on sound science and protective of designated uses, and that both TN and TP need to be addressed and limited to protect the applicable designated uses. The EPA is not aware of any information demonstrating that the science has changed to alter these conclusions, and the EPA continues to support dual nutrient control (TP and TN) as a general matter for purposes of developing NNC or translating narrative criteria.[5]

In 2021, Montana enacted state legislation (Senate Bill 358 or SB 358) directing MDEQ to write permits "in a manner consistent with" the narrative criteria; "delete all references to" the NNC and nutrient standards variances; and adopt rules related to Montana's existing narrative criteria that provide for the development of an adaptive management program. On May 10, 2022, the EPA acted on a subset of provisions in SB 358 that it found to be new or revised WQS. The EPA disapproved removal of the NNC because there was inadequate information at the time to demonstrate that narrative criteria alone protect the designated uses. The EPA concluded that the narrative criteria alone did not contain sufficient parameters or constituents to protect the designated use consistent with 40 C.F.R. § 131.11(a)(1), and cited the state's permitting record from July 2020 to March 2022 as evidence of the deficiency.[6,7] The provisions of SB 358 that the EPA disapproved in 2022 are very similar to the provisions of HB 664 that the EPA is approving today. However, the major difference in the approach taken by Montana's legislature between SB 358 and HB 664 is that SB 358 mandated MDEQ to develop rules governing how the state would implement the narrative criteria for nutrients, whereas HB 664 includes no such mandate.

Between the EPA's disapproval action on SB 358 and the state's 2025 legislative session, MDEQ worked on developing rules for an adaptive management program to provide an incremental, watershed approach for protecting and maintaining water quality but suspended rulemaking in 2024 due to stakeholder concerns. With respect to interpreting narrative criteria for nutrients, MDEQ's efforts focused on using available response parameters, such as biological indicators, plant growth, and dissolved oxygen, in conjunction with ranges of nutrient concentrations ("causal" parameters) by geographic region (western versus eastern Montana) and stream slope.[8] These efforts generated a wealth of new information that the state could use to translate the narrative criteria for CWA

[5] USEPA. Preventing Eutrophication: Scientific Support for Dual Nutrient Criteria. February 2015. Available at: www.epa.gov/sites/default/files/documents/nandpfactsheet.pdf.

[6] During much of 2020, MDEQ considered the NNC to be unavailable because it believed the non-severability clause had been triggered, with the effect of eliminating the NNC. In April 2021, the Montana legislature passed SB 358. Throughout this time, MDEQ generally applied the narrative criteria rather than the NNC for the purposes of NPDES permitting in determining whether a discharge had the reasonable potential to cause or contribute to an excursion of WQS.

[7] 40 C.F.R. § 131.11(a)(1) requires that criteria must be "based on sound scientific rationale and must contain sufficient parameters or constituents to protect the designated use."

[8] The EPA has endorsed such a combined approach to integrate causal and response parameters to address nutrient enrichment in streams, producing guiding principles in 2013 (Guiding Principles on an Optional Approach for Developing and Implementing a Numeric Nutrient Criterion that Integrates Causal and Response Parameters. 2013. EPA-820-F-13-039. https://www.epa.gov/sites/production/files/2013-09/documents/guiding-principles.pdf).

implementation purposes, such as NPDES permitting. The EPA provided MDEQ with a comprehensive set of comments and recommendations on its proposed approach in June 2024.[9] Overall, the EPA supported the approach of using response variables in conjunction with nutrient concentrations but questioned whether some of the proposed response parameter thresholds were protective of the aquatic life use. This collaboration between MDEQ and the EPA highlighted the extent to which site-specific assessments could be valuable in tailoring an appropriate level of protection.

II. EPA Action on Section 1, Section 2(1), and Section 5 of HB 664 that Repeals ARM 17.30.660

A. Approval of Section 1 and 2(1) Removal of NNC and Nutrient Standards Variances

The EPA is approving the provisions of HB 664 that constitute revised WQS for the following three reasons: 1) there is no statutory or regulatory requirement for states or authorized Tribes to adopt numeric nutrient criteria or WQS variances; 2) Montana has a wealth of scientific information, including new information since the EPA's 2022 disapproval of NNC removal, to support translating general narrative criteria to site-specific, protective TN and TP levels to protect applicable designated uses; and 3) given that the state is now better positioned to effectively implement the narrative criteria, approval is consistent with the cooperative federalism principles embedded in the CWA.[10] Each one of these is discussed in more detail below.

Regarding requirements to adopt or retain numeric criteria, as described in the background section, neither the CWA nor EPA's implementing regulations require states or authorized Tribes to adopt numeric criteria for nutrients.

MDEQ's narrative criteria state: "State surface waters must be free from substances attributable to municipal, industrial, agricultural practices or other discharges that will: …(d) create concentrations or combinations of materials which are toxic or harmful to human, animal, plant, or aquatic life; and (e) create conditions which produce undesirable aquatic life." (Administrative Rules of Montana 17.30.637(1)). This narrative is comprehensive in identifying the potential adverse effects that are caused by nutrient enrichment and does not preclude consideration of any nutrient-related parameters or constituents that may need to be addressed to ensure protection of designated uses. Many states have adopted narrative criteria in their WQS regulations and rely solely on narrative criteria to address nutrient enrichment.[11] The EPA recently reiterated the flexibility states have to

[9] June 10, 2024, letter from Stephanie DeJong, EPA Region 8 Clean Water Branch Manager to Andy Ulven, MDEQ Water Quality Planning Bureau Chief.

[10] Cooperative federalism is a system where the federal and state governments collaborate and share power to implement policies and programs, emphasizing shared responsibility, mutual accountability, and flexibility. The CWA is a prime example of cooperative federalism in action, where the federal government and state governments share responsibility for protecting and restoring the nation's water quality.

[11] www.epa.gov/wqs-tech/state-specific-water-quality-stand ards-effective-under-clean-water-act-cwa

translate narrative criteria when advising states how to use the EPA's recommended models for deriving nutrient criteria for lakes, saying states "may rely on the recommended criteria as one approach to derive protective numeric targets to implement narrative criteria (i.e., both general, "free from" and nutrient specific narrative criteria) for CWA purposes."[12]

Additionally, states have the discretion to adopt WQS variances[13] when and where the designated use and associated criterion are shown to be unattainable for a period of time, consistent with 40 C.F.R. 131.14. WQS variances serve the national goal in Section 101(a)(2) of the CWA and the ultimate objective of the Act to "restore and maintain the chemical, physical, and biological integrity of the Nation's waters" by providing a mechanism to incrementally improve water quality in a transparent and accountable manner. 40 C.F.R. 131.14 serves to explicitly authorize states and authorized Tribes to use WQS variances where appropriate and consistent with the CWA and implementing regulation.[14] However, no state or authorized Tribe is required to use WQS variances. Therefore, MDEQ has the discretion to remove applicable WQS variances as it sees fit. As such, the EPA is approving the state's removal of the "nutrient standards variances" as specified in Section 1 of HB 664 and doing so means any nutrient WQS variance authorized in DEQ-12B is no longer applicable for CWA purposes. This action, however, does not preclude the state from adopting WQS variances that comply with the CWA and the federal regulation at 40 C.F.R. § 131.14, in the future.

Regarding the large volume of data and information Montana has available to translate narrative criteria, Montana has conducted studies to better evaluate the potential effects of nutrient enrichment.[15] MDEQ has studied the effects of nutrients on aquatic life and recreation in wadeable streams and large rivers: assembling existing data collected at high quality reference sites, conducting site-specific stressor-response studies, collecting data required to run mechanistic models to evaluate impacts of nutrient enrichment, and assembling relevant scientific literature. *Id.* More recently, as part of their follow up efforts after passage of SB 358, MDEQ produced several analyses that integrated physical and biological responses with levels of nutrient enrichment. For example, MDEQ produced an analysis of daily patterns of dissolved oxygen change in flowing waters of Montana (December 4, 2023)[16] and an identification of eutrophication thresholds associated with benthic macroinvertebrate condition in Montana streams (October 5, 2023).[17] The methods MDEQ explored reflected a new

[12] U.S. Environmental Protection Agency, October 2023. "Frequently Asked Questions: Implementing the 2021 Recommended Clean Water Act Section 304(a) Ambient Water Quality Criteria to Address Nutrient Pollution in Lakes and Reservoirs". EPA-820-R-23-008. https://www.epa.gov/system/files/documents/2023-10/faqs-implementing-lakes-reservoirs.pdf

[13] 40 C.F.R. § 131.14.

[14] *Water Quality Standards Regulatory Revisions*, 80 Fed. Reg. 51035 (August 21, 2015).

[15] *See e.g.*, MDEQ 2021. "Annotated Bibliography of the Principal DEQ Technical Reports Related to Nutrients, and a Bibliography of Peer-Reviewed Scientific Papers from the Department Related to Nutrients."

[16] Suplee, M., 2023. "An Analysis of Daily Patterns of Dissolved Oxygen Change in Flowing Waters of Montana. Prepared by the Montana Department of Environmental Quality, December 4, 2023.

[17] Schulte, N.O. and Craine, J.M., 2023. "Eutrophication thresholds associated with benthic macroinvertebrate condition in Montana streams". Prepared for the Montana Department of Environmental Quality, October 5, 2023.

approach for Montana that could be modified and adapted on a site-specific basis. Additionally, MDEQ has worked with watershed groups, dischargers and other organizations to collect watershed scale nutrient and biological information. MDEQ has ongoing plans to collect data during future permit cycles where data gaps exist. These recent studies and more localized datasets enable MDEQ to translate its narrative criteria on a more site-specific basis.[18]

In its submittal of HB 664, MDEQ stated it will implement the narrative criteria using the best available science. MDEQ also recently shared information with the EPA on its initial thoughts for implementing the narrative standard for NPDES permitting. The "checklist" MDEQ shared includes consideration of ecoregional ranges of protective TN and TP concentrations (which encompass the NNC values), stream reach-specific TN and TP criteria, consultation with staff with local waterbody expertise, and site-specific characteristics of the waterbody (including flow, substrate, continuously monitored dissolved oxygen, benthic algae quantification, expected extent of vascular aquatic plants, benthic aquatic insect indices, and diatom metrics). This site-specific information allows potential changes to the aquatic community to be evaluated using a robust set of indicators, in addition to TN or TP concentrations.

As a result, use of narrative criteria enables Montana to use the latest science and information, including the option to consider the ecoregional ranges used to develop the NNC and then tailor identification of protection needs to reflect localized stream characteristics. For nutrients, the physical setting and sensitivity of the water to adverse effects of enrichment often play a large role. Taking this tailored approach to interpreting the narrative criteria allows MDEQ to more specifically address protection of near-stream and downstream[19] waters.

Regarding cooperative federalism, the EPA recognizes the shared responsibilities it has with the state. In 2020, the EPA addressed the future effect of Montana removing the NNC and associated nutrient standards variances and reverting to the general narrative criteria. At that time, the EPA noted that it would be premature to predict how the state would implement its narrative criteria to address nutrients in the future and that the EPA could not reasonably assume Montana's implementation of its narrative criteria would prove inadequate given that the state had, even at that time, developed a much more robust understanding of the science of nutrient pollution and was thereby better equipped

[18] September 9, 2025, Memo to the File from Stephanie DeJong, Clean Water Branch Manager, EPA Region 8 re. Documentation of July 1, 2025, Meeting with MDEQ; July 1, 2025, Email and Attachments from Andy Ulven, Water Quality Planning Bureau Chief, MDEQ Water Quality Division, re. Implementation Documents, to Cyrus Western, Regional Administrator, EPA Region 8, et. al.; September 30, 2025, Memo to the File from Stephanie DeJong, Clean Water Branch Manager, EPA Region 8 re. Documentation of September 18, 2025, Meeting with MDEQ; October 2, 2025, Memo to the File from Stephanie DeJong, Clean Water Branch Manager, EPA Region 8 re. Documentation of September 30, 2025, Meeting with MDEQ and FWS.

[19] The EPA's implementing regulation at 40 C.F.R. § 131.10(b) requires states to ensure their WQS provide for the attainment and maintenance of the WQS of downstream waters. See also 40 C.F.R. § 122.44(d)(1): "each NPDES permit shall include...any requirements...necessary to achieve WQS established under section 303 of the CWA, including state narrative criteria for water quality."

than in the past to translate and implement the narrative criteria in NPDES permits.[20] In its 2022 disapproval of SB 358 removal of NNC, the EPA cited MDEQ's record of poor implementation in permits when relying solely on narrative protections. Since this time, as cited above, MDEQ has developed ways to incorporate response parameters information directly into the process of translating narrative criteria and plans to implement some of these concepts moving forward. With today's action, the EPA views the state as now better positioned to effectively implement the narrative criteria, as noted above, given the recent studies and more localized datasets that provide site-specific information collected on individual waterbodies, as well as information from MDEQ regarding plans for implementing the narrative.

The EPA retains oversight of state implementation programs and could, for example, object to permits where the water quality-based effluent limits do not appropriately derive from and comply with applicable WQS (including narrative criteria) using CWA section 402 authority or add waters to the state's list of impaired waters where existing and readily available information indicates that those waters are not meeting applicable WQS using CWA section 303(d) authority. In summary, under the cooperative federalism approach embedded in the CWA it is appropriate for the EPA to recognize the work Montana has done to improve its ability to implement the narrative criteria and, given that, allow Montana to use its preferred approach to setting criteria in WQS, while retaining the EPA's oversight responsibilities for programs that implement those WQS.

B. Approval of a Portion of Section 5 - Removal of Nutrient Standard Variances Authorizing Provision (ARM 17.30.660)

The EPA is approving the portion of Section 5 in HB 664 that repeals ARM 17.30.660. ARM 17.30.660 contains Montana's EPA-approved 2015 authorizing provision for individual and general nutrient WQS variances. A WQS variance authorizing provision is considered a general policy subject to the EPA's review and approval (40 C.F.R. 131.13). States are not required to adopt their own WQS variance authorizing provisions before adopting WQS variances (80 Fed. Reg. 51020, 51040 (Aug. 21, 2015)); however, some states have chosen to do so to clarify what information is necessary for the state to adopt WQS variances. The EPA's approval of this portion of Section 5 will result in the repeal of ARM 17.30.660, and thus, the removal of the state's 2015 authorizing provision for individual and general nutrient WQS variances. EPA's regulations do not require states to authorize WQS variances before adopting them. However, to the extent that MDEQ prefers to have an authorizing provision before using WQS variances under state law, MDEQ has separate WQS variance authorizing provisions (ARM 17.30.661 and 662) that it could use to adopt a WQS variance for the narrative nutrient criteria. Any WQS variance ultimately adopted by the state must comply with the federal regulation at 40 C.F.R. § 131.14 and is not effective for CWA purposes until the EPA approves the WQS variance (40 C.F.R. § 131.21(c)(2)).

[20] *Upper Missouri Waterkeeper v. U.S. Environmental Protection Agency,* No. 4:20-cv-000027-BMM (D. Mont.), Defendants' Reply Memorandum in Support of Defendants' Cross-Motion for Summary Judgment at page 7 (Sept. 9, 2020).