

**BOARD OF ENVIRONMENTAL REVIEW
AGENDA ITEM
EXECUTIVE SUMMARY FOR PROPOSED NEW RULE**

Agenda Item #

Agenda Item Summary – The Department requests that the Board initiate rulemaking to adopt New Rule I, which implements MCA 75-5-222(2), describing conditions under which variances from water quality standards may be issued.

List of Affected Board Rules –New Rule I would not affect any current Board rules.

List of Affected Department Rules – New Rule I would not affect any Department rules.

Affected Parties Summary – These proposed changes may affect parties applying for discharge permits to state waters where chronic, human-caused pollution exists upstream of the proposed discharge.

Background – The 2015 Montana Legislature passed Senate Bill 325. The bill was codified as [Montana Code Annotated \(MCA\) 75-5-222](#), and requires rulemaking to implement the statute. In January 2016, the Department of Environmental Quality (DEQ) began meeting with the [SB 325 Rulemaking Workgroup](#), which is made up of individuals from Montana representing widely varying interests (environmental, industrial, agricultural, etc.). The purpose of the monthly workgroup meetings is collaboration between DEQ and stakeholders to draft rules that implement MCA 75-5-222 in accordance with other state and federal regulations.

MCA 75-5-222 consists of two parts. The first portion of the statute provides that DEQ cannot apply water quality standards that are more stringent than the nonanthropogenic -- i.e., natural -- condition of a water body. The second portion of the statute provides that if pollution upstream of a discharger is due to anthropogenic sources, a variance from the applicable standards may be appropriate under certain conditions. Long term, historic pollution sources, such as might result from historic mining in a watershed, and that may eventually be remediated, are the primary type of water quality condition contemplated by the second part of the bill. DEQ and the SB325 workgroup are continuing to work on drafting rules for the first portion of the statute. However, a draft rule has been written for the second portion —the variance piece.

The new rule that DEQ is proposing sets forth the conditions under which a person may apply for a variance from water quality criteria and specifies that the person applying for the variance cannot materially contribute to the condition of the receiving water body. It also requires the highest attainable condition of the water body be met under the variance and outlines requirements for DEQ approval and periodic review of the variance.

Hearing Information – The Department recommends that the Board appoint a hearing officer and conduct a public hearing to take comment on the proposed new rule.

Board Options – The Board may:

1. Initiate rulemaking and issue the attached notice of public hearing on the proposed new rule;

2. Determine that the new rule is not appropriate and decline to initiate rulemaking, or;
3. Modify the notice and initiate rulemaking.

DEQ Recommendation – The Department recommends that the Board initiate rulemaking, as proposed in the attached notice of public hearing, and appoint a hearing officer.

Enclosures –

1. Draft Administrative Register Notice of Public Hearing on Proposed New Rule I