

BEFORE THE DEPARTMENT OF ENVIRONMENTAL QUALITY
OF THE STATE OF MONTANA

In the matter of the amendment of ARM)
17.30.660 pertaining to nutrient standard)
variances)
)

NOTICE OF PUBLIC HEARING
ON PROPOSED AMENDMENT

(WATER QUALITY)

TO: All Concerned Persons

1. On October 22, 2019, at 1:00 p.m., the Department of Environmental Quality (department) will hold a public hearing in Room 111 of the Metcalf Building, 1520 E. Sixth Avenue, Helena, Montana, to consider the proposed amendment of the above-stated rule.

2. The department will make reasonable accommodations for persons with disabilities who wish to participate in this rulemaking process or need an alternative accessible format of this notice. If you require an accommodation, contact Sandy Scherer no later than 5:00 p.m., October 15, 2019, to advise us of the nature of the accommodation that you need. Please contact Sandy Scherer at the Department of Environmental Quality, P.O. Box 200901, Helena, Montana 59620-0901; phone (406) 444-2630; fax (406) 444-4386; or e-mail sscherer@mt.gov.

3. The rule proposed to be amended provides as follows, stricken matter interlined, new matter underlined:

17.30.660 NUTRIENT STANDARDS VARIANCES (1) A person may apply to the department for a nutrient standards variance at any time following the board's adoption of base numeric nutrient standards. In addition to this rule, variances are subject to the procedures and requirements contained in Department Circular DEQ-12B (~~May 2018~~ November 2019 edition).

(2) An application for a general variance must provide information demonstrating that the wastewater treatment facility meets the requirements of Department Circular DEQ-12B (~~May 2018~~ November 2019 edition). The decision to grant the general variance must be reflected in the permit that is made available for public comment.

(3) remains the same.

(4) The department may approve the adoption of an individual variance that specifies interim effluent limits different from those contained in general variance limits contained in Department Circular DEQ-12B (~~May 2018~~ November 2019 edition), if water quality modeling demonstrates that greater emphasis on the reduction of one nutrient may achieve similar water quality and biological improvements as would the equal reduction of both nitrogen and phosphorus. The variance must provide effluent limits that reflect the lowest effluent concentration that is feasible based on achieving the highest attainable condition for the receiving water. A person shall submit the proposed effluent limits and supporting data in an application for an individual nutrient variance under (3). A person who has an

individual variance with effluent limits that are based on this section shall, in each subsequent triennial review of those limits conducted pursuant to 75-5-313(7), MCA, collect and submit water quality data to demonstrate whether the biological status of the receiving water continues to justify those effluent limits.

(5) through (7) remain the same.

(8) The department adopts and incorporates by reference Department Circular DEQ-12B, entitled "Nutrient Standards Variances" (~~May 2018~~ November 2019 edition), which provides procedures and requirements for nutrient standards variances. Copies of Department Circular DEQ-12B are available at the Department of Environmental Quality, 1520 East 6th Avenue, P.O. Box 200901, Helena, MT 59620-0901.

AUTH: 75-5-201, 75-5-301, MCA

IMP: 75-5-313, MCA

REASON: The department is proposing to revise Department Circular DEQ-12B to respond to the U.S. District Court for the District of Montana's Order in *Upper Missouri Waterkeeper v. U.S. EPA*, Case No. CV-16-52-GF-BMM (July 16, 2019). While the Court found significant portions of the general nutrients standards variance to be lawful and supported by the record, the Court partially vacated and remanded a portion of EPA's approval of the general variance found in Department Circular DEQ-12B. The Court then stayed this vacatur and provided the department 120 days from the date of the Order to adopt a revised general variance timeline, and provided U.S. EPA 90 days to complete its review of these changes. The Court did not vacate EPA's approval of the department's findings concerning widespread economic and social impacts, nor did it vacate approval of the treatment requirements found in Table 12B-1 of Department Circular DEQ-12B (what the Court refers to as the "Current Variance Standard" or "highest attainable condition"). This rulemaking is only intended to address the specific concerns of the Court related to (a) the timeline necessary to meet the Table 12B-1 treatment requirements and (b) the timeline and process necessary to meet the base numeric nutrient standards contained in Department Circular DEQ-12A. The rulemaking will allow continued use and application of the general variance for eligible dischargers and will prevent the related economic and social harm from requiring immediate compliance with the base numeric nutrient standards.

The economic and social justification for the Table 12B-1 treatment requirements, as well as the treatment requirements themselves, are not subject to the proposed amendments to Department Circular DEQ-12B. The Court found the justifications and treatment requirements to be reasonable and did not vacate these portions of EPA's approval. Because EPA's approval was limited to only 36 municipal facilities, this proposed rulemaking is also, thereby, limited to those 36 facilities.

Timeline Necessary to Meet Table 12B-1 Requirements: In its July 16, 2019 Order, the Court reiterated the conclusion that the adoption of a 17-year timeline to merely reach the Table 12B-1 values violated the direction of the Federal Clean Water Act

and that the general variance must instead begin with the Table 12B-1 treatment requirements. In doing so, the Court also recognized "the reality that discharges throughout the State of Montana currently stand at different levels of attainment." In response to this direction, the department is proposing that mechanical dischargers (≥ 1.0 million gallons per day and < 1.0 million gallons per day) and lagoon dischargers must attain the Table 12B-1 treatment requirements as soon as possible. Because the general variance is implemented through MPDES permitting process, the department will be able to ensure that facilities are achieving the Table 12B-1 treatment requirements as soon as possible.

Several mechanical facilities are currently achieving the Table 12B-1 treatment requirements and 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. For the mechanical facilities that are not yet able to attain the Table 12B-1 treatment requirements, i.e., the Cities of Butte, Helena, Kalispell, and Manhattan, the department anticipates it will be able to publicly-notice draft MPDES permits to incorporate the Table 12B-1 treatment requirements, or a compliance schedule to achieve the same, no later than July 31, 2020. This rulemaking clarifies that a compliance schedule may be used to ensure the Table 12B-1 treatment requirements will be met as soon as possible.

Because Table 12B-1 already requires that lagoon facilities maintain long-term average effluent concentrations for TP and TN, lagoon facilities, in the short-term, must focus on implementing pollutant minimization programs as soon as possible. In section 2.2.1.2. of the amended Circular DEQ-12B, the department is now required to complete its statewide lagoon performance evaluations no later than 2020 (instead of 2022). Because of this change, lagoon facilities will be required to complete reviews of operational methods two years sooner, leading to earlier attainment of PMP requirements.

Timeline and Process Necessary to Meet the Base Numeric Nutrient Standards: To address the Court's concerns about demonstrating progress toward meeting the base numeric nutrient standards, the department amended Circular DEQ-12B to include section 2.3. This section describes the process for reviewing and amending the Table 12B-1 treatment requirements and how the department and eligible facilities will proceed as the treatment requirements are modified through the triennial review procedure. In the event the Table 12B-1 treatment requirements are not modified during a triennial review, the proposed changes to Circular DEQ-12B also require the submission and implementation of a revised optimization/pollutant minimization program for those facilities that are currently achieving the Table 12B-1 treatment requirements. This change will ensure all facilities will continue to make progress toward attaining the base numeric nutrient standards.

Section 2.3 also addresses the specific timeline to achieve the base numeric nutrient standards and is consistent with the Court's adoption of Plaintiff's proposed timeline

of 2035. Under the terms of 75-5-313(8), MCA, the general variance may be established for a period not to exceed 20 years. Because the original version of the general nutrient standards variance became effective for state law purposes on August 8, 2014, the term of the general variance may not extend beyond August 7, 2034.

4. Concerned persons may submit their data, views, or arguments, either orally or in writing, at the hearing. Written data, views, or arguments may also be submitted to Sandy Scherer, Legal Secretary, Department of Environmental Quality, 1520 E. Sixth Avenue, P.O. Box 200901, Helena, Montana 59620-0901; faxed to (406) 444-4386; or e-mailed to sscherer@mt.gov, no later than 5:00 p.m., October 22, 2019. To be guaranteed consideration, mailed comments must be postmarked on or before that date. A copy of proposed Department Circular DEQ-12B (November 2019) may be viewed at the department's website: <http://deq.mt.gov/water/drinkingwater/standards/#menu4>. Copies may also be obtained by contacting Mike Suplee at (406) 444-0831 or msuplee@mt.gov.

5. The department maintains a list of interested persons who wish to receive notices of rulemaking actions proposed by this agency. Persons who wish to have their name added to the list shall make a written request that includes the name, e-mail, and mailing address of the person to receive notices and specifies that the person wishes to receive notices regarding: air quality; hazardous waste/waste oil; asbestos control; water/wastewater treatment plant operator certification; solid waste; junk vehicles; infectious waste; public water supply; public sewage systems regulation; hard rock (metal) mine reclamation; major facility siting; opencut mine reclamation; strip mine reclamation; subdivisions; renewable energy grants/loans; wind energy bonding, wastewater treatment or safe drinking water revolving grants and loans; water quality; CECRA; underground/above ground storage tanks; MEPA; or general procedural rules other than MEPA. Notices will be sent by e-mail unless a mailing preference is noted in the request. Such written request may be mailed or delivered to Sandy Scherer, Legal Secretary, Department of Environmental Quality, 1520 E. Sixth Ave., P.O. Box 200901, Helena, Montana 59620-0901, faxed to the office at (406) 444-4386, e-mailed to Sandy Scherer at sscherer@mt.gov, or may be made by completing a request form at any rules hearing held by the department.

6. Kurt Moser, attorney for the department, has been designated to preside over and conduct the hearing.

7. The bill sponsor contact requirements of 2-4-302, MCA, do not apply.

8. With regard to the requirements of 2-4-111, MCA, the department has determined that the amendment of the above-referenced rule will not significantly and directly impact small businesses.

Reviewed by:

DEPARTMENT OF ENVIRONMENTAL
QUALITY

/s/ Edward Hayes
EDWARD HAYES
Rule Reviewer

BY: /s/ Shaun McGrath
SHAUN McGRATH
Director

Certified to the Secretary of State, August 27, 2019.