



**UNITED STATES ENVIRONMENTAL PROTECTION AGENCY
REGION 8**

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Richard Opper, Director
Montana Department of Environmental Quality
1520 E. Sixth Avenue
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Helena, MT 59620-0901

Dear Richard:

I am writing in response to your March 10, 2011 letter regarding Senate Bill 367 (SB 367). We agree that Montana is a leader in development of numeric nutrient criteria, and acknowledge the implementation challenges faced by states in this effort. The Environmental Protection Agency (EPA) supports flexibility, tailored state-specific approaches, and near-term reductions in nutrient loadings, as expressed in EPA's recent memorandum titled "Working in Partnership with States to Address Phosphorus and Nitrogen Pollution through Use of a Framework for State Nutrient Reductions." However, EPA is concerned that SB 367, as currently drafted, is not consistent with the federal water quality standards regulation. We offer the following clarification on the legal requirements for variances and an alternative approach for how Montana could develop variances consistent with these requirements.

As EPA understands it, the variance proposal reflected in SB 367 requires the Montana Department of Environmental Quality (MDEQ) to approve several types of variances from numeric nutrient criteria (which the State has not yet adopted). States may adopt variances, time-limited revisions to water quality standards, as discussed in 40 CFR Section 131.13. EPA's longstanding legal interpretation has been that variances may be granted in situations where removal of the designated use is justified pursuant to regulation (Decision of the General Counsel No. 58, March 29, 1977, published in part at 44 Fed. Reg. 39508 (July 6, 1979)). Therefore, in order to grant variances for nutrients, the State must demonstrate that attaining the numeric nutrient criteria that are protective of Montana's designated uses is not feasible based on one of the six factors listed in 40 CFR Section 131.10(g).

Our first concern with SB 367 is that it appears to exempt the State and all dischargers from the federal requirement to demonstrate that attaining the designated use is not feasible due to one of the factors in 40 CFR Section 131.10(g), specifically the factor based on "substantial and widespread economic and social impact" in 40 CFR Section 131.10(g)(6). The bill says MDEQ "shall" approve individual and general variances based upon adequate justifications, however the bill explicitly states that "advanced treatment technologies for removing nutrients *will* result in significant and widespread economic impacts." EPA views this language as

removing MDEQ's discretion to determine, on a case-by-case basis, whether a variance justification sufficiently meets the federal requirements at 40 CFR §131.10(g) and whether such variances should be granted. States have discretion in what type of variances it may grant, however each discharger must be able to demonstrate how it meets the requirements for the variance. For individual discharger variances, the State must have a record basis to demonstrate that it is infeasible for a discharger to meet its water quality-based effluent limits derived from the applicable designated use and associated criteria based on one of the factors at 40 CFR Section 131.10(g). If the State chooses to develop a technical rationale based on the 131.10(g) factors to apply to multiple dischargers, the State must have a record basis that demonstrates how the technical rationale applies to each individual discharger. We recognize and support the State's efforts to strive for incremental progress to advance reduction of nutrients. However, the legal basis for a variance is limited to the factors provided in 40 CFR Section 131.10(g). EPA is not aware of such a demonstration supporting the effluent limits currently included in SB 367.

Second, SB 367 allows the state to approve an "alternative" variance where a "permittee demonstrates that achieving nutrient concentrations established for an individual or general nutrient standards variance would result in an insignificant reduction of instream nutrient loading." None of the six factors in 40 CFR Section 131.10(g) allow for the consideration of *de minimis* contributions. States may address *de minimus* situations in the development of total maximum daily load allocations pursuant to CWA Section 303(d), which the State can use to allocate necessary load reductions among different sources within a watershed.

EPA welcomes insight from the State as to whether our understanding of the legislation is accurate, and we suggest that we continue working together to carefully consider the ramifications of the proposed legislation. If SB 367 becomes law as currently drafted, the Region may not be able to approve several provisions based on the concerns expressed above. To facilitate EPA approval, EPA strongly encourages the State to revisit these issues to either delete the provisions of concern or revise them in a manner consistent with federal requirements.

Montana could adopt general language allowing individual and general variances for nutrients that are consistent with the CWA and EPA's implementing regulations, if any specific effluent limits would be based on variances supported by a demonstration pursuant to 40 CFR Section 131.10(g). EPA is willing to work collaboratively with MDEQ on developing defensible demonstrations that can support variances for individual dischargers and multiple dischargers with specified common characteristics.

We commend MDEQ for all of the hard work and commitment to adopting numeric nutrient criteria. EPA will continue to support MDEQ's efforts to advance our mutual goal of protecting and improving Montana's surface waters.

Sincerely,

James B. Martin
Regional Administrator