

BEFORE THE DEPARTMENT OF ENVIRONMENTAL QUALITY
OF THE STATE OF MONTANA

In the matter of the amendment of ARM) NOTICE OF PUBLIC HEARING
17.30.660 pertaining to nutrient) ON PROPOSED AMENDMENT
standard variances)
) (WATER QUALITY)

TO: All Concerned Persons

1. On May 31, 2017, at 9:00 a.m., the Department of Environmental Quality will hold a public hearing in Room 111 of the Metcalf Building, 1520 East 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 Myla Kelly no later than 5:00 p.m., May 24, 2017, to advise us of the nature of the accommodation that you need. Please contact Myla Kelly at Department of Environmental Quality, P.O. Box 200901, Helena, Montana 59620-0901; phone (406) 444-3639; fax (406) 444-4386; or e-mail MKelly2@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 (July 2014 June 2017 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 (July 2014 June 2017 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 (~~July 2014 June 2017~~ 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" (July 2014 June 2017 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: Department Circular DEQ-12B contains details on how to implement variances from base numeric nutrient standards, and the current version of the circular expires on July 1, 2017. Section 75-5-313(7), MCA, requires the department to revisit and update key aspects of Circular DEQ-12B every three years. The department is proposing to modify Department Circular DEQ-12B itself in several important aspects. Those modifications are explained below. The proposed rule amendments would incorporate by reference the updated version of Circular DEQ-12B (June 2017).

Changes applicable to both general and individual variances: The proposed circular would include detailed instructions on how variances for permittees in two discharger categories ($\geq 1\text{MGD}$, $< 1\text{MGD}$) are to be permitted. Specifically, a fixed coefficient of variation (CV; that is, the standard deviation/mean) of 0.6 would be used when deriving a permittee's average monthly permit limit. Currently, the department uses a variable CV computed from samples collected over the past few years from a permittee's discharge. Analysis revealed that the current approach may lead to future permit limits with an increasing likelihood of non-compliance, even though the permittee's discharge concentrations are in fact lower (i.e., better) because the CV of effluent nutrient samples is likely to increase as lower nutrient concentrations are achieved. The proposed change should alleviate the problem because it would institute a CV that is realistic for the point in time in the future when permittees achieve low nutrient concentrations in their effluent.

Changes applicable to general variances: The circular contains Table 12B-1, which presents the nutrient concentrations a permittee receiving a general variance is required to achieve as a monthly average, end-of-pipe. The total nitrogen and phosphorus concentrations in the July 2014 version of the circular came from 75-5-313(5)(b), MCA. This statute required the department to adopt the concentrations by May 2016 and revisit and update them every 3 years. This is the department's first review of the treatment requirements in Table 12B-1. In August 2015, the U.S. Environmental Protection Agency modified its regulations regarding variances. One of the most important changes to the federal rules was that a "highest attainable condition" (HAC) must now be identified when a variance is granted. Montana's nutrient variances are based on economic impact considerations, so in order to

comply with federal requirements, the requirements in Section 2.0 and Table 12B-1 of Circular DEQ-12B must reflect the HAC. The department and the nutrient work group evaluated a considerable amount of cost, economic, and other technical material in order to determine what the HAC might be for each discharger group. The concentrations shown in the proposed June 2017 version of the circular reflect those findings. The proposed concentrations are, for permittees that discharge $\geq 1\text{MGD}$, 300 $\mu\text{g/L}$ for total phosphorus and 6,000 $\mu\text{g/L}$ for total nitrogen. For permittees that discharge $< 1\text{MGD}$, the proposed concentrations are 1,000 $\mu\text{g/L}$ for total phosphorus and 10,000 $\mu\text{g/L}$ for total nitrogen. No change is proposed for lagoons. The rationale for these numbers is contained in a technical support document entitled "First Triennial Review of Base Numeric Nutrient Standards and Variances." A copy of this document is available as described in paragraph 5 in this notice.

If the proposed (June 2017) edition of Circular DEQ-12B is adopted, there will be a change in the way permitting is undertaken in the $\geq 1\text{MGD}$ and $< 1\text{MGD}$ discharge categories when a facility's discharge is better (i.e., at lower concentrations) than the concentrations in the updated Table 12B-1. Prior to the adoption of nutrient standards and variances in 2014, there were a number of permittees in these two discharger categories whose effluent quality was better than the concentrations now in Table 12B-1. Since most of them were able to achieve those concentrations before the nutrient standards were adopted, and presumably without incurring substantial and widespread economic harm, the department has been establishing their general variance permit limits at their existing discharge quality. With this triennial review, the treatment levels in Table 12B-1 now reflect the category HACs, established at Montana-specific acceptable economic thresholds. Therefore, going forward, for permittees whose effluent concentrations were, before July 1, 2017, lower than the concentrations in Table 12B-1, the general variance would be based on the actual total N and/or total P concentrations of their effluent. For permittees who, after July 1, 2017, attain or do better than the Table 12B-1 values, the Table 12B-1 values would be the permit limits. The HAC analysis utilized site specific engineering data and represents performance levels that reflect current technology. It is also presumed that as influent loading increases, effluent quality may be more variable and less certain at concentration levels less than HAC values.

For those permittees who are not in compliance with the concentrations in Table 12B-1, the modified circular also contains a list of nine steps, which are contained in proposed Table 12B-2, that are designed to bring the permittee into compliance with the concentrations. The proposed circular would require the department in the discharge permit to require completion of the steps that the department deems necessary for the permittee to achieve the concentrations and to establish a schedule for their completion.

Another significant change to the circular, in order to comply with the new federal rules, is the requirement for permittees to include a pollutant minimization program (PMP). This program is to be submitted by a permittee at the time the permittee achieves the HAC (that is, when the permittee actually achieves the concentrations in Table 12B-1). The time it will take different permittees to achieve the concentrations in Table 12B-1 is expected to vary. Through the permitting

process and the specific details of each facility, the time required would generally be as short as possible. But when a permittee does achieve the concentrations in Table 12B-1, the permittee would be required to submit to the department a PMP plan, which is a structured set of activities to improve processes and pollutant controls that will prevent and reduce pollutant loadings. A PMP might, for example, be working with an upstream nonpoint agriculture source to implement best management practices to reduce nutrient runoff from their fields.

Finally, the department is proposing to add to the circular language indicating that if the general variance for one category of dischargers is invalidated by a court or disapproved by EPA, the general variance for the other categories remains in effect. This is proposed in order to provide that general variances that have not been disapproved will not be affected by disapproval of the variance for another category.

Changes applicable to individual variances: By going through the process of applying for an individual variance, a permittee will have identified a treatment level that is the highest attainable condition, tailored to their specific economic and social situation. Whether the permittee will achieve the HAC in the near term (e.g., within the next permit cycle) or beyond will depend on various factors; these factors will be documented in the variance and the permit. As part of individual variance, the permittee will have to identify the time it will take to achieve the HAC; this requirement is reflected in the proposed modified circular. When the permittee does achieve the HAC, the permittee would be required to submit a PMP (as permittees under the general variance are required to do). This requirement is reflected in the proposed amended circular.

4. As stated above, the proposed modified DEQ Circular-12B contains modified numeric concentrations and a fixed numeric coefficient of variation for deriving a permittee's average monthly permit limit. While the department is generally requesting comments on every proposed modification to the circular, the department is specifically requesting comment on whether these numbers should be lower or higher.

5. A copy of proposed Department Circular DEQ-12B (June 2017) and the technical support document entitled "First Triennial Review of Base Numeric Nutrient Standards and Variances" may be viewed at the department's website using the following path: <http://deq.mt.gov/Water/WQINFO/nutrientworkgroup>. Copies may also be obtained by calling Myla Kelly at (406) 444-3639 or e-mailing her at MKelly2@mt.gov.

6. 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 Denise Hartman, Administrative Rules Coordinator, 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 dhartman2@mt.gov, no later than 5:00 p.m., May 12, 2017. To be guaranteed consideration, mailed comments must be postmarked on or before that date.

7. 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 supplies; public sewage systems regulation; hard rock (metal) mine reclamation; major facility siting; opencut mine reclamation; strip mine reclamation; subdivisions; renewable energy grants/loans; 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 Denise Hartman, Administrative Rules Coordinator, 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 Denise Hartman at dhartman2@mt.gov; or may be made by completing a request form at any rules hearing held by the department.

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

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

10. With regard to the requirements of 2-4-111, MCA, the department has determined that the amendment of the above-referenced rule will significantly and directly impact small businesses.

Reviewed by:

DEPARTMENT OF ENVIRONMENTAL
QUALITY

/s/ John F. North

JOHN F. NORTH
Rule Reviewer

BY: /s/ Tom Livers

TOM LIVERS
Director

Certified to the Secretary of State, April 3, 2017.

