

BEFORE THE DEPARTMENT OF ENVIRONMENTAL QUALITY
OF THE STATE OF MONTANA

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

TO: All Concerned Persons

1. On February 8, 2021, at 1:00 p.m., the Department of Environmental Quality (department) will hold a virtual public hearing via Zoom, to consider the proposed amendment of the above-stated rule.

Due to the guidance issued by the Governor of the State of Montana on March 26, 2020, regarding the COVID-19 public health situation, the public hearing will be held virtually via the Zoom meeting platform and will be recorded. Persons wishing to attend the public hearing need to register in advance with Zoom. Registration with Zoom may be made at the following link: Join Zoom Meeting <https://mt-gov.zoom.us/j/98621930251?pwd=SDE0anVtb21xcGFDeXpqNldPdDBKUT09>

Meeting ID: 986 2193 0251
Password: 440231

Dial by Telephone
+1 646 558 8656 or +1 406 444 9999
Meeting ID: 986 2193 0251
Password: 440231
Find your local number: <https://mt-gov.zoom.us/j/98621930251>

Join by SIP
98621930251@zoomcrc.com

Join by H.323 (Polycom)
162.255.37.11##98621930251

After registering, you will receive a confirmation email containing information about joining the hearing. Please contact Sandy Scherer at the Department of Environmental Quality at (406) 444-2630 or sscherer@mt.gov should you encounter any difficulties.

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., February 1, 2021, 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 (~~November 2019~~ March 2021 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 (~~November 2019~~ March 2021 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 (~~November 2019~~ March 2021 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" (~~November 2019~~ March 2021 edition), which provides procedures and requirements for nutrient standards variances. Copies of Department Circular DEQ-12B (March 2021 edition) are available at the Department of Environmental Quality, 1520 East 6th Avenue, P.O. Box 200901, Helena, MT 59620-0901.

(9) If a court of competent jurisdiction determines that the United States Environmental Protection Agency's October 31, 2017 approval of the general variance is valid and lawful, then the incorporations by reference of the ~~November 2019~~ March 2021 edition of Department Circular DEQ-12B contained in this rule shall be void, and the May 2018 edition of Department Circular DEQ-12B shall contain the applicable general variance. If such contingency occurs, all references to the ~~November 2019~~ March 2021 edition of Department Circular DEQ-12B contained in this rule shall be stricken and shall be considered as replaced with the May 2018 edition.

AUTH: 75-5-313, MCA
IMP: 75-5-313, MCA

REASON: The department is proposing to revise Department Circular DEQ-12B in response to the U.S. District Court for the District of Montana's Consolidated Order (October 30, 2020) for cases CV-16-52-GF-BMM and CV-20-27-GF-BMM.

In 2019, the department revised Department Circular DEQ-12B to respond to orders issued by the U.S. District Court in Case No. CV-16-52-GF-BMM. See MAR Notice No. 17-408, pertaining to the amendment of ARM 17.30.660 at page 2100 of the 2019 Montana Administrative Register, Issue No. 22 (November 22, 2019). The revised circular (November 2019 version) was provided to EPA for review; EPA disapproved it on February 24, 2020 as inconsistent with the District Court's 2019 orders. In its disapproval, EPA noted it respectfully disagreed with the District Court's Orders and that it had filed an appeal. The State of Montana has also filed an appeal of certain aspects of the District Court's 2019 Orders. See *Upper Mo. Waterkeeper v. EPA*, No. 20-35135 (9th Cir.) Those appeals are pending.

In 2019, while the District Court found significant portions of the general nutrient standards variance to be lawful and supported by the record, the Court partially vacated and remanded a portion of EPA's October 31, 2017 approval of the general variance found in Department Circular DEQ-12B. The Court then stayed this vacatur and ordered the department to revise the effective variance and adopt a revised general variance timeline. The Court's action allowed the general variance to remain in place, pending EPA's approval of a revised variance. 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.

In its 2020 Consolidated Order, the Court directed that its stay of the partial vacatur of the general variance timelines would remain in place until EPA approves a replacement general variance timeline. The Court directed the department reach general variance timelines that (1) begin with a program that complies with the relaxed criteria of the general variance; (2) work toward ultimate attainment of Montana's stringent base numeric nutrient standards in order to demonstrate progress toward attainment; and (3) adopt a timeline for which attainment of Montana's base numeric nutrient standards would be feasible.

This proposed rulemaking is necessary in order to comply with the Consolidated Order and the 2019 orders issued by the Court. The department was given 120 days from the date of the Consolidated Order to complete the rulemaking and then submit it to EPA for their review (EPA has 90 days to complete its review). This rulemaking is focused only on the requirements of the orders issued by the Court. The rulemaking will allow continued use and application of the general variance for eligible dischargers and will prevent the related economic and social harm that would result from requiring immediate compliance with the base numeric nutrient

standards. Because the Court previously found the justifications and treatment requirements to be reasonable and did not vacate these portions of EPA's approval, the department is not addressing these matters in this rulemaking. Because EPA's approval was limited to only 36 municipal facilities, this proposed rulemaking is also limited to those 36 facilities.

Program that Complies with the Relaxed Criteria of the General Variance: In its July 16, 2019 Remedy Order in Case No. CV-16-52-GF-BMM, the Court reiterated that the adoption of a 17-year timeline to reach the Table 12B-1 values violated 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 recognized "the reality that discharges throughout the State of Montana currently stand at different levels of attainment." In response, the department proposes 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; the list of 36 facilities eligible for the general variance are in Appendix A of the circular. The general variance is implemented through MPDES permitting, and through permitting the department will be able to ensure 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, this rulemaking clarifies that a compliance schedule may be used to ensure the Table 12B-1 treatment requirements are 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 revised Circular DEQ-12B, the department is required to complete its statewide lagoon performance evaluations no later than 2022 (2020 travel restrictions due to the coronavirus pandemic slowed the department's progress and the revised date reflects this).

Work toward Ultimate Attainment of Montana's Stringent Base Numeric Nutrient Standards in Order to Demonstrate Progress Toward Attainment: The department revised 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. If Table 12B-1 treatment requirements are not modified during a triennial review, the proposed revisions to Circular DEQ-12B also require the submission and implementation of a revised pollutant minimization program for those facilities currently achieving the Table 12B-

1 treatment requirements. This ensures all facilities will continue to make progress toward attaining the base numeric nutrient standards.

Adopt a Timeline for which Attainment of Montana's Base Numeric Nutrient Standards would be Feasible: Section 2.3 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. Section 2.3 also addresses circumstances in which the general variance has ended but base nutrient standards have not been attained. The department may recommend that the board revise designated uses or, if substantial and widespread economic and social impacts are no longer demonstrated, the department may implement a compliance schedule to meet the standards.

To incorporate the amended version of Department Circular DEQ-12B, the amendment of ARM 17.30.660 is also necessary to change references from the November 2019 Edition to the March 2021 Edition of Department Circular DEQ-12B.

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, Paralegal, 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., February 8, 2021. To be guaranteed consideration, mailed comments must be postmarked on or before that date. A copy of proposed Department Circular DEQ-12B (March 2021) may be viewed at the department's website: <http://deq.mt.gov/water/drinkingwater/standards>. 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, Paralegal, 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 December 15, 2020.