BEFORE THE BOARD OF ENVIRONMENTAL REVIEW
OF THE STATE OF MONTANA

In the matter of the adoption of New Rule I under ARM Title 17, chapter 30, subchapter 6 pertaining to water quality standards	))))	NOTICE OF ADOPTION (WATER QUALITY)

TO: All Concerned Persons

1. On December 22, 2017, the Board of Environmental Review published MAR Notice No. 17-395, pertaining to the public hearing on the proposed adoption of the above-stated rules at page 2383 of the 2017 Montana Administrative Register, Issue No. 24.

2. The board has adopted New Rule I (ARM 17.30.661) as proposed, but with the following changes, stricken matter interlined, new matter underlined:

NEW RULE I (17.30.661) VARIANCE FROM STANDARD FOR WATER BODY CONDITIONS (1) The department may grant to a permittee a variance from a water quality standard if the department determines in writing that the following conditions are met:

(a) through (10) remain as proposed.

3. The following comments on the proposed rule were received and are summarized below with the board's responses:

COMMENT NO. 1: The proposed rule is too broadly applicable and a more limited scope is more appropriate. The original legislative purpose of SB 325 was focused on a narrow range of legacy mining wastes in which a variance from water quality standards is necessary because of significant long-term impairment from legacy human-caused pollutions. Therefore, the legislative history of SB 325 demonstrates that its focus is to address the problems that legacy mine pollution may create for smaller communities that need Montana Pollutant Discharge Elimination System (MPDES) permits for the publicly owned treatment works (POTW). The rules implementing this legislation must be crafted to reflect this narrow purpose.

RESPONSE: Per 75-5-222(2), MCA, the rule will apply to water bodies where the standard is more stringent than the condition of the water body, the condition cannot reasonably be expected to be remediated during the permit term for which the application for variance has been received, and the discharge to which the variance applies would not materially contribute to the condition. These conditions in statute limit the circumstances that may justify application of the variance, but do not specify or limit the type of permittee to which a variance issued under 75-5-222(2), MCA will apply. The draft rule reflects these limitations, but cannot pre-emptively exclude certain types of permittees. Upstream legacy mine pollution that may impact MPDES permit limits imposed on a downstream POTW is an example of

application of a variance issued under 75-5-222(2), MCA, but the language of the statute is not limited to this situation.

COMMENT NO. 2: DEQ has stated numerous times during discussions when SB 325 was introduced at the legislature, as well as during the working group meetings, that this variance process will rarely be used. This begs the question why we are spending time and resources on this rulemaking process.

RESPONSE: Per 75-5-222(2), MCA, "the board shall adopt rules consistent with comparable federal rules and guidelines providing criteria and procedures for the department to issue variances from standards." The board and the department are complying with state law by developing New Rule I.

COMMENT NO. 3: This bill was never intended to just be a narrowly crafted thing for Butte or other communities.

RESPONSE: See response to Comment No. 1. The board agrees and the draft rules reflect the requirements of 75-5-222(2), MCA.

COMMENT NO. 4: The proposed language needs to be revised to limit the overuse of variances.

RESPONSE: Sections (1)(a) through (e) and (2)(a) through (e) of proposed New Rule I limit the use of variances by specifying conditions and application requirements that a permittee must satisfy before the department may issue a variance. In addition, each variance application is subject to a public comment period, a public hearing, and submittal to the Environmental Protection Agency (EPA) for approval. The proposed rule sets forth a process that will limit variances to situations where need for the variance is established, there is no reasonable alternative, and the applicant can meet the highest attainable condition. All applications that meet these requirements will be approved and the board does not believe further limitation is necessary.

COMMENT NO. 5: The commenter is concerned that a variance under SB 325 is not available to an applicant/permittee that is in compliance with its MDPES permit.

RESPONSE: See response to Comment No. 4. The department will issue a variance, after conducting a hearing, when no reasonable alternative to a variance exists, the department determines the requirements of New Rule I(1) and (2) are met, and the highest attainable condition will be met. In situations where the applicant for a variance is meeting its permit limits and conditions, the department may determine there are other alternatives that obviate the need for a variance including a permit compliance schedule or other permit action. This does not limit the ability of a discharger to apply for a variance, but due consideration should be given to other options available to meet water quality goals that may be more effective and efficient.

COMMENT NO. 6: It takes decades to remediate mining pollution. The polluter could continually qualify for a variance based on this provision with no incentive for the state to ensure the legacy pollution is addressed.

RESPONSE: The board understands and agrees that mining remediation most often takes longer than five years. However, the board does not believe that MPDES permit conditions imposed on a downstream permittee, whether those conditions include limits implementing a variance or not, play a direct role in the pace at which upstream legacy pollution is addressed. The proposed rule allows an MPDES permit holder to qualify for a variance that may provide the basis for permit effluent limits and conditions, so long as the conditions in New Rule I are met. The variance is reviewed every five years and may be modified to reflect the highest attainable condition as progress is made toward meeting water quality standards. The proposed rule is not intended to regulate or impact remediation of legacy pollution.

COMMENT NO. 7: We ask DEQ to provide an example of where mining has been remediated within a five-year period.

RESPONSE: This comment is outside the scope of this rulemaking. The five-year review period pertains to review of a variance issued under New Rule I and not to remediation of upstream conditions impacting the receiving water. See response to Comment No. 6.

COMMENT NO. 8: The commenter requests that DEQ go on the record in response to these comments and state that variances under these rules would not be appropriate for Coalbed Methane (CBM) pollution.

RESPONSE: A variance is not appropriate under the proposed rule for any discharges that would materially contribute to a water body's degraded condition. It is a condition of the statute that the discharge "would not materially contribute to the condition." In addition, under (2)(e), the rule requires the permittee to meet a variance level that is the highest attainable interim standard based on condition of the receiving water or pollutant reduction achievable. In accordance with New Rule I(2)(e), the department will review each variance application to ensure that the permittee will (1) meet the highest attainable standard, (2) achieve the condition that reflects the greatest pollutant reduction achievable, or (3), if no additional feasible pollutant control technology can be identified, meet the condition that reflects the greatest pollutant reduction achievable with the technologies installed at the time the variance is submitted and subject to a pollutant minimization plan.

COMMENT NO. 9: The commenter requests that DEQ go on the record to assure irrigators that Best Available Technology (BAT) will continue to be required for CBM dischargers for variances under these rules.

RESPONSE: There are no state or federal Effluent Limit Guidelines (ELGs) for CBM dischargers. Permittees will be held to federal ELGs once available. DEQ will require CBM permittees be held to the highest attainable condition and any approved variance would reflect those limits.

COMMENT NO. 10: Of specific concern is that coal mines that would discharge into the Tongue River and its tributaries, including Otter Creek, would attempt to use the variance procedures in renewing and obtaining MPDES permits.

RESPONSE: Sections (1)(a) through (e) of New Rule I limit the use of variances by specifying five conditions that a permittee must satisfy before the department may issue a variance. Additionally, for a discharger to obtain a variance, a public hearing must be held and the variance must then be submitted to the EPA for approval, which will include a determination of whether it is compliant with the Clean Water Act (CWA). A variance issued under New Rule I would require the permittee to achieve the highest attainable condition and not further degrade the existing water quality.

COMMENT NO. 11: Subsection (1)(c) of the proposed rule contains vague language, stating that a variance may be appropriate where the overall impaired condition of the receiving waterway "cannot reasonably be expected to be remediated" in the next five-year permit term.

RESPONSE: Regarding "…cannot reasonably be expected to be remediated…", the rule reflects the language in 75-5-222(2)(a)(i), MCA, which sets forth conditions under which a variance may be appropriate. The board does not agree that the statutory or proposed rule language is unreasonably vague. The department will have to conclude for each application for variance whether the condition is likely to be remediated in the next five years. If the condition will be, or is expected to be, remediated in the next five years, the department would not grant the variance.

COMMENT NO. 12: There is no provision of the CWA that allows weaker standards and permit terms when man-made pollution cannot be fixed within a permit term.

RESPONSE: The board does not agree. Federal regulations specify six factors which may be used to demonstrate that a variance is appropriate. One of these factors is factor 3 at 40 CFR 131(10)(g), which specifically addresses situations where human-caused pollution prevents the attainment of water quality standards (WQS). So long as the permittee meets the conditions in New Rule I, which include meeting conditions in 40 CFR 131.14 "water quality standards variances," the permittee will comply with the CWA.

COMMENT NO. 13: Several commenters requested that "may" be stricken and replaced with "shall" in (1) under the New Rule I; this change would make the rule more definitive.

RESPONSE: The board expects the department to carry out its regulatory role and complete a thorough review of each variance application and decide whether it will be approved or not. The department will exercise its judgment and its technical expertise in determining that there is no reasonable alternative to a variance and the requirements in (1) and (2) are met. See (5) of New Rule I, if the department finds that the requirements of (1) and (2) are met and a variance is needed, the department shall approve the variance after conducting a hearing. No change is made in response to this comment.

COMMENT NO. 14: During the 2015 legislative discussions on SB 325 (2015), amendment 0325.02 was presented, including verbiage that the permitting

agency "has to allow a variance." The intent of legislative work on SB 325, including amendments, was to treat the variance process as an inevitability, if certain conditions were met by the permittee.

RESPONSE: See response to Comment No. 13. Senate Bill 325 (2015) was adopted and codified as 75-5-222(2), MCA. The plain language of 75-5-222(2), MCA and SB 325, including version SB0325.02, requires the board to adopt rules consistent with comparable federal rules and guidelines providing criteria and procedures for the department to issue variances from standards if the conditions set forth in 75-2-222(2)(a)(i) through (ii), MCA are met. The board believes it has met this obligation in the proposed rule, which sets forth criteria and a process whereby the department will review each variance application and determine whether a variance is appropriate. The department's decisions under the proposed rule will be subject to public comment, a hearing, and EPA review. No change is made in response to this comment.

COMMENT NO. 15: Several commenters suggested that under (9) on review conducted under (8) that "may" be stricken and replaced with "shall."

RESPONSE: See response to Comments No. 13 and 14. Under (8) of the proposed rule, the department must review a variance issued under the rule every five years and decide to terminate, continue, or modify the variance. Under (9) of the proposed rule, the department may approve continuation or modification of the variance after public comment and public hearing, consistent with the process set forth in (5) of the proposed rule. The department must continue, modify, or terminate the variance after taking any information received from the permittee, the public and the EPA into consideration. The board believes it is necessary to leave (9) as "may" to indicate department discretion to review and consider all the information submitted and make a professional judgment regarding the renewal, modification, or termination of the variance. The board would generally expect that if the conditions pertaining to the original variance are unchanged, the department would continue or renew the variance to the next review period. No change is made in response to this comment.

COMMENT NO. 16: The department should address what happens on review conducted under (8) of the rule if the upstream conditions improve.

RESPONSE: See response to Comment No. 25. The department will review the variance level and water quality conditions every five years. If the permittee is meeting the variance level established under (2)(e) and all or most of the circumstances in (1) and (2) that justified the need for the variance no longer exist, the variance may be modified or terminated. On the other hand, if the department determines the circumstances in (1) and (2) still exist and justify the need for the variance, the variance may be continued and the permittee must continue to make progress toward meeting water quality limits.

COMMENT NO. 17: Montana must support any subsequent variance adopted with a demonstration that it meets all the requirements of 40 CFR 131.14 and a showing of one of the factors described in 40 CFR 131.10(g).

RESPONSE: The board agrees and believes the proposed rule is consistent with 40 CFR 131.14.

COMMENT NO. 18: The terminology of "materially contribute" in (1)(d) should be eliminated because it is unclear from the language of the rule how exactly the department will determine what constitutes a material contribution to an impaired waterway. Adding this term without further clarification could lead to violations of EPA's anti-backsliding mandate because even minor, supposedly non-material, increases in pollution could lead to further degradation, especially given the length of time that these permits may be in place.

RESPONSE: The term "materially contribute" reflects the language in 75-5-222(2)(a)(ii), MCA, which sets forth conditions under which a variance may be appropriate. The board views the condition in 75-5-222(2)(a)(ii), MCA that the discharge not materially contribute to the condition of the water body as an additional state requirement beyond the minimum federal requirements for granting a variance. All variances issued under the proposed rule and the department's findings and analysis will be publicly noticed for 45 days, providing opportunity for those concerned to dispute the department's findings regarding material contribution. No change is made in response to this comment.

COMMENT NO. 19: DEQ is silent on how it will determine materiality.

RESPONSE: See response to Comment No. 18. The board recognizes materially contribute is not defined in the statute or the proposed rule. After review of the potential circumstances in which a variance could be applicable, it was determined that such a definition is not advisable as environmental conditions and interactions with discharges are too diverse and site specific. In order for a variance application to be complete the department will require the applicant to provide all information necessary to determine materiality. All findings and analysis will be publicly noticed for 45 days, providing opportunity for those concerned to dispute the department's findings on material contribution.

COMMENT NO. 20: If the department views harmful parameters like salts in a less stringent manner, it may view their contributions as less "material" to the water quality and therefore, permit variances that result in harm to farmers and ranchers.

RESPONSE: See responses to Comments No. 18 and 19. The board is concerned about salts and all other types of pollution that impact water quality and affect ranchers, farmers, and others who use the water.

COMMENT NO. 21: Granting a variance for a year-round discharge containing salts would not protect the beneficial uses to irrigation.

RESPONSE: The board understands the commenter's concern. The seasonality of a variance in which salts are the pollutant of concern would be given close scrutiny by the department.

COMMENT NO. 22: The cumulative effect any variance has on downstream users should be considered.

RESPONSE: Cumulative effects on downstream reaches that are meeting standards will be addressed through assessment of material contribution (New Rule I(1)(d)). If the department's material contribution analysis determines pollutant contributions from the applicant point source will substantially extend the length of stream that is non-compliant with standards, the department will not grant a variance to the applicant under proposed New Rule I. Cumulative effects within a downstream reach that exceed standards will also be addressed in the department's review of material contribution (New Rule I(1)(d)) and through the requirement in New Rule I(2)(e). In (2)(e), the applicant must propose a variance that reflects the highest attainable interim standard or greatest pollution reduction achievable.

COMMENT NO. 23: Any variance that DEQ grants should, at a minimum, be reviewed every three years, rather than the currently proposed five years.

RESPONSE: In 2015 the EPA updated its rules pertaining to variances, now found at 40 CFR 131.14. With the 2015 changes, the EPA made clear that the term of any water quality standards variance must be only as long as necessary to achieve the highest attainable condition (40 CFR 131.14(b)(1)(iv)). If the variance term is more than five years, it must be reviewed at least every five years (40 CFR 131.14(b)(1)(v)). The language in 75-5-222(2), MCA requires review of the variance every five years, consistent with the federal five-year review requirement. No change is made in response to this comment.

COMMENT NO. 24: DEQ's rules impose a five-year review for variances. DEQ frequently misses the five-year renewal deadline for MPDES permits. Some permits are administratively extended for many years. DEQ must address why the variance rule will spark a new level of scrutiny and performance by the agency.

RESPONSE: Under 75-5-222(2), MCA and the new rule, the department is required to review the variance five years from its issuance in the permit and once every five years that the variance is in effect. The department's rules allow MPDES permits to be administratively extended beyond the five-year term when the permittee timely applies for permit renewal. There is no similar provision allowing extension of the five-year review period.

COMMENT NO. 25: Several commenters requested that under (8), the time period should be lengthened to consider upstream conditions during a variance renewal review from two years to five years. A five-year period may provide a more accurate review, taking into greater account extreme changes to water levels from year-to-year.

RESPONSE: The board believes it is important for variance rules to work towards the improvement of water quality, and as such does not believe a five-year window is appropriate. The board finds New Rule I(8) reasonably interprets "currently attained ambient water quality" to be reflected by the previous two years of data in situations where the water quality in the receiving stream has improved during the variance term. If upstream improvements are occurring, presumably from remediation, the variance must be modified to reflect these improvements. As conditions change, data that is four or five years old may not accurately reflect

current ambient upstream conditions. No change is made in response to this comment.

COMMENT NO. 26: The proposed rule is interpreting "currently attained ambient water quality" to mean the previous two years of data in situations where the water quality in the receiving stream has improved during the term of the variance. This is appropriate for the limited scenarios addressed by this rule (historic mining) where using five years of data would result in a less stringent HAC and would not preserve the water quality improvements toward the ultimate objective for the water body.

RESPONSE: The board agrees with the comment.

COMMENT NO. 27: The term feasible pollutant control technology is undefined, and there is no sense of how "feasibility" is determined or quantified.

RESPONSE: The board interprets feasible, as it is used in proposed New Rule I(2)(e)(iii), similarly to the way that term is used in the Federal Register at 40 CFR 131.14 (b)(1)(ii)(A)(3); that is, as the "highest attainable condition using the greatest pollutant reduction achievable with optimization of currently installed pollutant control technologies and adoption and implementation of a Pollutant Minimization Program (PMP)."

COMMENT NO. 28: The cumulative effect of the draft variance rule will be to create a new regulatory framework representing a self-fulfilling prophecy of continual waterway pollution.

RESPONSE: New Rule I does not create a new regulatory framework; rather, it is consistent with federal and state water quality standards variance rules and guidelines. New Rule I provides a tool that allows limited relief from water quality standards when the applicant demonstrates to the department's satisfaction that a variance is appropriate and necessary and will meet the highest attainable condition. The variance is in effect for a limited term to allow continued progress toward meeting water quality standards.

COMMENT NO. 29: The draft rule posits that man-made pollution causing waterway impairment is somehow eligible for special leniency as compared to natural-based pollution.

RESPONSE: See response to Comment No. 28. Water quality standards variances are explicitly authorized under 40 CFR 131.14 as a tool that can be used prior to pursuing a permanent revision of the designated use and criteria in situations where the applicable designated uses are not attainable in the near-term, but may be attainable in the future. Some of the potential applications for these variances may be suited for more permanent use revisions. However, the board prefers to establish variances as an additional tool as opposed to revising designated uses which may limit potential remediation activities over the long term. WQS variances allow for incremental progress toward the ultimate water quality objective for the water body.

COMMENT NO. 30: Department staff has worked hard in coordination with the SB 325 workgroup to complete New Rule I.
RESPONSE: The board appreciates the comment.

COMMENT NO. 31: The variance process is a fair and equitable standard.
RESPONSE: The board appreciates the comment.

COMMENT NO. 32: The variance process is necessary to promote growth in Montana's cities.
RESPONSE: The rules do consider economics under one of the applicable variance justifications. How variances may or may not affect the economics of a municipality has not been directly assessed in this rulemaking.

COMMENT NO. 33: The variance process relieves city taxpayers from expensive, perhaps unnecessary wastewater treatment plant upgrades.
RESPONSE: See response to Comment No. 32.

COMMENT NO. 34: The EPA has no concerns with New Rule I asking permittees to provide information to the department regarding the highest attainable condition (HAC) for consideration before the state determines the appropriate HAC to adopt.
RESPONSE: The HAC adopted by the state along with the variance will be consistent with 40 CFR 131.14.

COMMENT NO. 35: We strongly encourage the board to exercise its lawful discretion and remand this rulemaking to DEQ for reconsideration and amendments in light of conflicts with federal pollution control requirements.
RESPONSE: The board believes New Rule I is consistent with applicable federal regulations.

COMMENT NO. 36: We oppose the draft variance New Rule I because it does not conform to the federal Clean Water Act or its implementing regulations, and because it fundamentally misconstrues - and threatens to undermine - the longstanding system of water pollution control in the state of Montana.
RESPONSE: See response to Comment No. 35. Federal and state law specifically authorize variances from water quality standards in limited circumstances.

COMMENT NO. 37: The variance provides a broad set of circumstances for nearly every type of discharger, in nearly every type of polluted waterway, to receive relief and an off ramp from having to do their part to use technology-based standards to reduce and control pollution.
RESPONSE: A variance issued under 75-5-222(2), MCA and the proposed new rule is not a general variance, but would be issued to an individual applicant/discharger for a specific parameter associated with a specific water quality standard. The variance would only provide relief from the water quality-based effluent limit associated with the parameter to which the variance applies and the

discharger would have to comply with all other conditions and limitations in their permit including technology-based effluent limits and water quality based effluent limits based on water quality standards that are not subject to the variance.

COMMENT NO. 38: The draft rule conflicts with the intent of the Montana Water Quality Act (MWQA) enshrined in the Montana Constitution's guarantee of a "clean and healthful environment."

RESPONSE: New Rule I is adopted to implement MWQA 75-5-222(2), MCA, which authorizes a variance from water quality standards in limited circumstances where the condition of the receiving water cannot reasonably be expected to be remediated during the permit term and the discharge to which the variance applies would not materially contribute to the condition. A variance issued under 75-5-222(2), MCA and the proposed rule will be reviewed and may be adjusted every five years with the goal of meeting water quality standards and meeting the Montana Constitution's guarantee of a "clean and healthful environment."

COMMENT NO. 39: The draft rule misunderstands and misapplies one narrow regulatory basis for issuance of variances, specifically 40 CFR 131.10(g)(3) and conflates it with the procedural time frame under which MPDES permits must regularly be reviewed, justified, and if appropriate, renewed.

RESPONSE: Proposed New Rule I is consistent with the federal variance requirements at 40 CFR 131.14, including the requirement that one of the six factors at 40 CFR 131.14(b)(2)(i)(A)(1) must be met. This requires the department to determine the existence of one of the factors set forth in 40 CFR 131.10(g). These factors include 40 CFR 131.10(g)(3), human-caused conditions or sources of pollution prevent the attainment of the use and cannot be remedied or would cause more environmental damage to correct or leave in place. The five-year time frame is consistent with a permit term and with federal regulations at 40 CFR 131.14, which require the term of the variance to be no longer than necessary to achieve the highest attainable condition, but if the variance term is more than five years, it must be reviewed at least every five years (40 CFR 131.14(b)(1)(v)). See response to Comment No. 23.

COMMENT NO. 40: The concept of a discharger's "materiality" to receiving waterway impairments is not a lawful rationale supporting issuance of a variance.

RESPONSE: See response to Comment No. 18.

COMMENT NO. 41: The phrase "interim effluent condition" is not a phrase or condition used or approved for use in issuance of variances under the CWA or its implementing regulations.

RESPONSE: The term is found in 40 CFR 131.14 "water quality standards variances," specifically in 40 CFR 131.14(b)(1)(ii)(A)(2).

COMMENT NO. 42: The phrase "highest attainable interim standard" is not recognized anywhere in federal law.

RESPONSE: An analogous term is found in 40 CFR 131.14(b)(1)(ii)(A)(1), specifically "highest attainable interim criterion." In this context, "criterion" is equivalent to "standard."

COMMENT NO. 43: The CWA and implementing regulations do not recognize an "attainable standard" concept, nor do they recognize an "interim standard" concept.

RESPONSE: See response to Comment No. 42.

COMMENT NO. 44: The commenter requests clarification from Montana that any subsequent variance adopted by the state must meet all the requirements of 40 CFR 131.14.

RESPONSE: Any variance adopted by the state will be consistent with federal rules including 40 CFR 131.14.

COMMENT NO. 45: Under (1) of the New Rule we propose adding "the following conditions are met" to remove ambiguity and further align the rule with legislative intent.

RESPONSE: See response to Comment No. 13. The board agrees with the commenter that the department may issue a variance if the conditions in (1) are met. Therefore, (1) is changed in response to this comment.

Reviewed by: BOARD OF ENVIRONMENTAL REVIEW

/s/ Edward Hayes BY: */s/ Christine Deveny*
EDWARD HAYES CHRISTINE DEVENY
Rule Reviewer Chairman

Certified to the Secretary of State, April 17, 2018.