

**BOARD OF ENVIRONMENTAL REVIEW
AGENDA ITEM
EXECUTIVE SUMMARY FOR PROPOSED NEW RULE**

Agenda Item # III.D.1

Agenda Item Summary – The Department requests that the Board initiate rulemaking to adopt New Rule 1, which implements MCA 75-5-222 describing conditions under which variances from water quality standards may be issued.

List of Affected Board Rules –New Rule 1 would not affect any current Board rules.

List of Affected Department Rules – New Rule 1 would not affect any Department rules.

Affected Parties Summary – The proposed rule may affect parties applying for discharge permits to state waters where chronic, human-caused pollution exists upstream of the proposed discharge.

Background – The 2015 Montana Legislature passed Senate Bill 325, which is intended to provide tools to protect Montana Pollutant Discharge Elimination System permittees from having to clean up pollution that they did not cause. The new language from the bill was codified as [Montana Code Annotated \(MCA\) 75-5-222](#), and requires rulemaking to implement the statute. In January 2016, the Department of Environmental Quality (DEQ) began meeting with the [SB 325 Rulemaking Workgroup](#), which is made up of individuals from Montana representing widely varying interests (environmental, industrial, agricultural, etc.). The purpose of the monthly workgroup meetings is collaboration between DEQ and stakeholders to draft rules that implement MCA 75-5-222 in accordance with other state and federal regulations.

MCA 75-5-222 consists of two pieces. Subsection (1) of the statute provides that DEQ cannot apply water quality standards that are more stringent than the nonanthropogenic -- i.e., natural -- condition of a water body. Subsection (2) piece of the statute states that if pollution upstream of a discharger is due to anthropogenic sources, a variance from the applicable standards may be appropriate under certain conditions. Long term, historic pollution sources, such as might result from historic mining in a watershed, and that may eventually be remediated, are the primary type of pollution the second part of the bill sought to address. DEQ and the SB325 workgroup are continuing to work on drafting rules for the Subsection (1) of the statute.

The new rule that sets forth the conditions under which a person may apply for a variance from water quality criteria and specifies that the person applying for the variance cannot materially contribute to the condition of the receiving water body. It also describes how the highest attainable condition of the water body must be met under the variance, and outlines requirements for DEQ approval and periodic review of the variance.

Hearing Information – The Department recommends that the Board appoint a hearing officer and conduct a public hearing to take comment on the proposed new rule.

Board Options – The Board may:

1. Initiate rulemaking and issue the attached notice of public hearing on the proposed new rule;
2. Determine that the new rule is not appropriate and decline to initiate rulemaking, or;

3. Modify the notice and initiate rulemaking.

DEQ Recommendation – The Department recommends that the Board initiate rulemaking, as proposed in the attached notice of public hearing, and appoint a hearings officer.

Enclosures –

1. Draft Administrative Register Notice of Public Hearing on Proposed New Rule

BEFORE THE BOARD OF ENVIRONMENTAL REVIEW
OF THE STATE OF MONTANA

In the matter of the adoption of New)	NOTICE OF PUBLIC HEARING
Rule I pertaining to water quality)	ON PROPOSED ADOPTION
standards variances)	
)	(WATER QUALITY)
)	

TO: All Concerned Persons

1. On _____, at _____ a.m., the Board of Environmental Review will hold a public hearing in Room 111, Metcalf Building, 1520 East Sixth Avenue, Helena, Montana, to consider the proposed adoption of the above-stated rule.

2. The board will make reasonable accommodations for persons with disabilities who wish to participate in this public hearing or need an alternative accessible format of this notice. If you require an accommodation, contact Denise Hartman, Administrative Rules Coordinator, no later than 5:00 p.m., _____, 2017, to advise us of the nature of the accommodation that you need. Please contact Denise Hartman at Department of Environmental Quality, P.O. Box 200901, Helena, Montana 59620-0901; phone (406) 444-2630; fax (406) 444-4386; or e-mail dhartman2@mt.gov.

3. The new rule proposed to be adopted provide as follows:

NEW RULE I Variance from Standard Based on Anthropogenic Contributions

(1) The department may grant to a permittee a variance from a water quality standard if the department determines in writing that:

- (a) the standard is more stringent than the quality of the receiving water;
- (b) the condition in (a) exists because of anthropogenic contributions of the pollutant to the water body;
- (c) the condition in (a) cannot reasonably be expected to be remediated during the permit term for which the variance is sought;
- (d) the discharge to which the variance would apply would not materially contribute to the condition in (a); and
- (e) one of the demonstrations provided at 40 CFR 131.14(b)(2)(i) (A)(1), which is by this reference adopted and incorporated into this rule, applies.

(2) To obtain a variance, a permittee shall submit to the department an application that:

- (a) demonstrates to the department's satisfaction that the requirements of (1) are met;
- (b) proposes, with supporting documentation, a variance level that is:
 - (i) the highest attainable interim standard in the receiving stream;
 - (ii) the interim effluent condition that reflects the greatest pollutant reduction that is achievable; or
 - (iii) if no additional feasible pollutant control technology can be identified, the

interim standard or effluent condition that reflects the pollutant reduction achievable with the pollutant control technologies installed at the time the variance is submitted. For a variance under this paragraph (2)(b)(iii), the permittee shall prepare and implement a pollutant minimization plan that contains a structured set of activities to improve processes and pollutant controls that will prevent and reduce pollutant loading.

(3) The department shall review each application to determine whether a reasonable alternative is in place that would eliminate the need for the variance, including:

- (a) a permit compliance schedule;
- (b) reuse;
- (c) a TMDL; or
- (d) other department actions.

(4) If the department makes a preliminary finding that a reasonable alternative to approving a variance is available, the department shall consult with the applicant prior to making a final decision to approve or deny the variance.

(5) If, after consultation with the applicant, the department determines that no reasonable alternative to a variance exists, the department shall determine whether the information provided by the applicant meets the requirements of (1) and (2). If the department finds that the requirements of (1) and (2) are met and that a variance is needed, the department shall propose board approval of the variance. The variance becomes effective and must be incorporated into the applicant's permit requirements after adoption by the board in a formal rulemaking proceeding. The rule must provide that the variance will be reviewed five years from its effective date.

(6) The variance must be reviewed by the department every five years. Based on the review, the department shall submit to the board findings and conclusions regarding the receiving water body. If the department finds that during the previous five years the quality of the receiving water has not improved, the permittee may apply for a subsequent variance. If the department finds that during the previous five years remedial activities have resulted in improved water quality in the receiving waterbody, but has not resulted in compliance with the standard, the permittee may apply for a subsequent variance. The permittee must provide information demonstrating compliance with (1) and (2), and the permittee shall treat the pollutant to concentrations no higher than the ambient upstream condition of the waterbody as characterized for the previous two years.

(7) A copy of 40 CFR 131.14(b)(2)(i) (A)(1) may be obtained from the Department of Environmental Quality, P.O. Box 200901, Helena, MT 59601-0901.

AUTH: 75-5-222, MCA

IMP: 75-5-222, MCA

REASON: The New Rule is necessary to fulfill the requirements of Montana Code Annotated (MCA) 75-5-222(2). This statute provides that if pollution upstream of a discharger is due to anthropogenic sources, a variance from the applicable standards may be appropriate under certain conditions. It also requires rulemaking to implement the statute. The statute codifies Senate Bill 325, introduced in the 2015 Montana Legislature. This statute was directed at focusing water quality

remediation efforts toward the primary pollution contributors, often historic mining, instead of less significant Montana Pollutant Discharge Elimination System dischargers such as publicly owned treatment works, until such time that their contributions were significant.

The New Rule sets forth the conditions under which a permittee may apply for a variance from water quality standards. The first and second sections of the rule highlight specific requirements of the statute and federal regulations, which provide criteria and procedures for the department to issue variances from water quality standards. Section 75-5-222(2), MCA, requires the board to adopt variances that are consistent with comparable federal regulations. It is necessary to include these details in the rule to provide transparency and clear direction to potential variance applicants.

Sections (3) and (4) of New Rule 1 direct applicants for variances to ensure that other mechanisms (such as total maximum daily loads) are not already in place that would preclude the need for a variance. These mechanisms would not limit the ability of a permittee to apply for a variance; however, considerable time and expense may be necessary for an application for a variance, therefore, the board wants to ensure that applicants are fully aware of any other options that may satisfy the need for the variance.

Section (5) of New Rule 1 is necessary to ensure consistency in the department's review and approval of variances issued under this rule. Because variances are exceptions to water quality standards, section (5) also clarifies that each individual variance must be adopted by the board and approved by the EPA before it may be implemented in a permit. In order to be consistent with 75-5-222(2)(b), MCA, the rule also specifies that variances will be reviewed after five years.

Section (6) outlines requirements for periodic review of the variance. The five year review period aligns with requirements in 75-5-222(2)(b), MCA. The specific guidelines for renewal and modification are necessary to provide transparency to permittees and consistency in the department's review. Another important aspect of Section (6) is that the permittee's variance must, through time, align with improving water quality. As water quality improves as a result of remediation, the treatment requirements under the variance become more stringent and must match the improved water quality upstream of the permittee.

Section (7) is proposed to allow applicants to view incorporated federal requirements.

5. 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., _____, 2017. To be guaranteed consideration, mailed comments must be postmarked on or before that date.

6. Andres Haladay, attorney for the board, or another attorney for the Agency Legal Services Bureau, has been designated to preside over and conduct the

hearing.

7. The board 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; 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 board.

8. The bill sponsor contact requirements of 2-4-302, MCA, apply and have been fulfilled. The primary bill sponsor was contacted by the department in person on March 7, 2017.

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

Reviewed by:

DEPARTMENT OF ENVIRONMENTAL
QUALITY

/s/
JOHN F. NORTH

BY: /s/
JOAN MILES, CHAIRMAN

Certified to the Secretary of State, _____, 2017.