



November 23, 2020

TO: Members of the Water Pollution Control Advisory Council & the public

FROM: Darryl Barton, DEQ WPCAC Liaison

MEETING DATE: November 23, 2020

SUBJECT: Initiation of Department Rulemaking on Circular DEQ-12B (Nutrient Standards Variances)

ACTION REQUIRED BY COUNCIL:

*Initiation of a department rulemaking (NOTE: rule will not go before BER).*

BACKGROUND:

*Numeric nutrient standards and variances—and specifically, Department Circular DEQ-12B (“12B”)—have been the subject of ongoing litigation which began in 2016. Judge Morris of the U.S. Federal District Court (Great Falls) ordered the department to develop a version of 12B that would do three things: (1) begin with a program to meet the relaxed criteria of the general variance, (2) work towards attainment of MT’s base numeric nutrient standards, and (3) adopt a timeline for which attainment of the base numeric nutrient standards would be feasible. The department complied with that order in 2019, it was submitted to EPA, but in February 2020 EPA disapproved 12B while simultaneously approving the states non-severability provisions (which had been submitted to EPA in 2014). The department (and others) interpreted this to mean that Circular DEQ-12A (the numeric nutrient standards) was no longer applicable in state law and, as a result, nutrient standards reverted back to the narrative standard.*

*Litigation continued and Judge Morris ruled again on October 30, 2020 after consolidating two of the cases. He ordered the department and EPA to again work together to meet the three conditions in the previous paragraph and gave the department 120 days to complete its rulemaking. After that, EPA has (again) 90 days to review and approve the updated 12B.*

*This rulemaking is being undertaken to comply the Judge Morris’s Order.*

RECOMMENDATION:

*The department recommends that the council move to approve initiation of rulemaking for Circular DEQ-12B.*

Please contact us with any questions (*Michael Suplee, DEQ – Metcalf Building P.O. Box 200901, Helena, MT 59620; msuplee@mt.gov*)

Attachments:

*Court Order of October 30, 2020*

*120 day rulemaking timeline*