

BEFORE THE DEPARTMENT OF ENVIRONMENTAL QUALITY
OF THE STATE OF MONTANA

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

TO: All Concerned Persons

1. On August 18, 2022, at 10:00 a.m., the Department of Environmental Quality (department) will hold a public hearing in Room 111 of the Metcalf Building, 1520 East Sixth Avenue, Helena, Montana, to consider the proposed adoption of the above-stated rule.

DEQ is committed to preventing the spread of COVID-19 and promoting the health and wellness of others. Members of the public may participate either in-person or virtually. For in-person meetings, while face masks are not required, meeting attendees are welcome to wear masks. If you are not feeling well, please do not attend the in-person meeting. Registration with Zoom may be made at the following link: [Join Zoom Meeting](#)

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Or an H.323/SIP room system:

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SIP: 88417327091@zoomcrc.com

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Please contact Loryn Johnson, paralegal, at the Department of Environmental Quality at (406) 444-1388 or Loryn.Johnson2@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 Loryn Johnson, paralegal, no later than 5:00 p.m. on August 12, 2022, to advise us of the nature of the accommodation that you need. Please contact Loryn Johnson at the Department of Environmental Quality, P.O. Box 200901, Helena, Montana 59620-0901; phone (406) 444-1388; fax (406) 444-4386; or e-mail Loryn.Johnson2@mt.gov.

3. The rule proposed to be adopted provides as follows:

NEW RULE I TEMPORARY WATER QUALITY STANDARDS VARIANCES

(1) The department may issue a temporary variance from a water quality standard in compliance with this rule and 40 CFR 131.14.

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

- (a) identifies the pollutant(s) for which the variance is sought;
- (b) identifies the applicable variance factor(s) under 40 CFR 131.14(b)(2)(i)(A)(1);
- (c) identifies the permittee by name, address, and telephone number;
- (d) identifies the permitted activity;
- (e) identifies the receiving water body;
- (f) demonstrates to the department's satisfaction that the requirements of (1) are met;
- (g) demonstrates that the variance will not result in a lowering of currently attained, ambient water quality;
- (h) demonstrates that the permittee cannot reasonably expect to meet a water quality standard during the permit term for which the variance is requested;
- (i) demonstrates that a permit compliance schedule is not feasible to preclude the need for a variance during the permit term for which the variance is requested;
- (j) includes an optimization study evaluating facility operations and infrastructure that maximize pollutant reduction; and
- (k) proposes, with supporting documentation, the term of the variance and a variance level that is:
 - (i) the highest attainable interim standard in the receiving water body;
 - (ii) the interim effluent condition that reflects the greatest pollutant reduction achievable; or
 - (iii) if no additional feasible pollutant control technology can be identified, the interim standard or effluent condition that reflects the greatest pollutant reduction achievable with the pollutant control technologies installed at the time the variance is submitted. For a variance under this subsection, 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 available that would eliminate the need for the variance. Reasonable alternatives include:

- (a) a permit compliance schedule;
- (b) reuse, trading, recharge, or land application of the pollutant;
- (c) a TMDL for the pollutant requiring the permittee to meet an established waste load allocation; or
- (d) other department or permittee 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 decision regarding the variance.

(5) If 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 makes a preliminary finding that the requirements of (1) and (2) are met, the department shall conduct a hearing following no less than 45 days' notice to the public. All written or oral public comments related to the variance shall be presented to the department during this public comment period. Following the public comment period, the department shall deny, approve, or approve with conditions the requested variance. An approved variance shall require the implementation of optimization study actions identified in (2)(j) as terms and conditions of the MPDES discharge permit.

(6) Within 30 days after approval of the variance, the department shall submit the variance and any supporting documentation and analysis to EPA. For new approvals or modifications, the variance is not approved for federal Clean Water Act purposes until EPA notifies the department that the variance complies with the federal Clean Water Act, 33 USC 1251, et seq.

(7) The variance may be used to develop MPDES permit limits. A permit incorporating a variance issued by the department under this rule is subject to ARM Title 17, chapter 30, subchapter 13.

(8) For a variance with a term greater than five years, the variance must be reviewed by the department every five years after EPA approval to reevaluate the conditions in (2)(k). Based on this review, the department may terminate, continue, or modify the variance. To continue or modify the variance, the permittee shall provide information demonstrating compliance with (1) and (2).

(9) Based on the review conducted under (8), the department may approve the variance with any modifications after public comment and public hearing under (5). Within 30 days after department approval of the variance, the department shall submit the variance and any supporting analysis to EPA. The variance is not approved for federal Clean Water Act purposes until EPA notifies the department that the variance complies with the federal Clean Water Act, 33 USC 1251, et seq.

(10) The department may decide of its own volition to issue a temporary water quality standards variance that is applicable to individual or multiple dischargers, pursuant to the procedures and requirements of this rule.

(11) The department adopts and incorporates by reference 40 CFR 131.14 (July 1, 2021).

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

AUTH: 75-5-320, MCA
IMP: 75-5-320, MCA

REASON: Section 75-5-320, MCA, gives the department authority to adopt rules providing criteria and procedures for the department to issue temporary variances to water quality standards, under certain conditions. NEW RULE I sets forth these criteria and procedures. Section 75-5-320, MCA, was enacted during the 2019 regular session of the Montana Legislature and provides the means for dischargers to qualify for water quality standards variances under state law and as provided in federal law at 40 CFR 131.14 (the federal regulation for water quality standards variances). For purposes of consistency with federal law, NEW RULE I adopts 40 CFR 131.14 by reference.

A water quality standards variance is a time-limited water quality standard for a specific pollutant(s) or water quality parameter(s) that reflects the highest attainable condition during the term of the variance. When a variance is approved, the goal remains full attainment of the underlying beneficial use and criterion from which the variance is sought, and all other applicable standards not specifically addressed by the water quality standards variance remain applicable.

Under NEW RULE I, a variance may be granted for one of the six factors referenced at 40 CFR 131.14(b)(2)(i)(A)(1). Under 75-5-313, MCA (now repealed), the department has approved water quality standards variances for nutrients under the variance factor providing relief from permit limits based on substantial and widespread economic and social impacts. The department continues to see a critical need to use variances to regulate the discharges of nutrients, whether such variances are from narrative or numeric nutrient standards. The requirement to meet water quality standards can result in substantial and widespread economic and social impacts on an affected community. Temporary water quality standards variances under NEW RULE I provide a means to preclude these economic and social impacts because a variance can be based on affordability. The affordability evaluation ensures that dollars expended for purposes of meeting a water quality standard are kept to a feasible level for a community.

When the department approves a variance, it must also be submitted to the U.S. Environmental Protection Agency (EPA) for their approval under the federal Clean Water Act. Once approved, the water quality standards variance will apply for purposes of developing permit limits in discharge permits. NEW RULE I also requires the department to conduct a hearing and provide no less than 45 days' notice to the public prior to approving a variance. Finally, under NEW RULE I, the department must also review any issued variance every five years to determine if the variance should continue, be modified, or if the variance is no longer necessary.

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 Loryn Johnson, 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 loryn.johnson2@mt.gov, no later than 5:00 p.m.,

August 22, 2022. To be guaranteed consideration, mailed comments must be postmarked on or before that date.

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; solar and 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 Loryn Johnson, 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 Loryn Johnson at Loryn.Johnson2@mt.gov, or may be made by completing a request form at any rules hearing held by the board.

6. Kurt R. Moser, attorney for the department, or another department attorney, has been designated to preside over and conduct the hearing.

7. The bill sponsor contact requirements of 2-4-302, MCA, apply. An attempt to contact the bill sponsor was made on June 8, 2022. The department contacted the Legislative Services Division via email and was informed the legislator is deceased. To the extent possible, the department has complied with the bill sponsor contact requirements.

8. With regard to the requirements of 2-4-111, MCA, the department has determined that the proposed adoption of the above-stated rule will not significantly and directly impact small businesses.

/s/ Edward Hayes
EDWARD HAYES
Rule Reviewer

BY: /s/ Christopher Dorrington
CHRISTOPHER DORRINGTON
Director
Department of Environmental Quality

Certified to the Secretary of State June 28, 2022.