

In The Matter Of:

*In the Matter of the Adoption of New Rule I
Pertaining to Temporary Water Quality Standards*

*Transcript of Public Hearing
August 18, 2022*

*Lesofski Court Reporting & Video Conferencing
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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.)

TRANSCRIPT OF THE PUBLIC HEARING

On August 18, 2022, beginning at 10:01 a.m., a
public hearing noticed by the Montana Department of
Environmental Quality was heard at 1520 East Sixth Avenue,
Room 111, Helena, Montana, and via Zoom, before
Kurt R. Moser, Presiding Officer, and Cheryl Romsa,
Court Reporter, Notary Public.

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1 WHEREUPON, the following proceedings were had:

2 MR. MOSER: Okay. This hearing is called to
3 order. Let the record show that it is 10:01 on
4 August 18th, 2022. This hearing is taking place both in
5 person at DEQ's Metcalf office in Helena and virtually on
6 the Zoom meeting platform. The meeting will be recorded
7 and transcribed.

8 This is the time set for the rulemaking hearing in the
9 matter of the proposed adoption of New Rule I pertaining
10 to temporary water quality standards variances. This
11 proposal was originally published in the Montana
12 Administrative Register, MAR Notice No. 17-427, at
13 pages 1171 to 1175, on July 8th, 2022.

14 My name is Kurt Moser. I'm an attorney with the
15 Montana Department of Environmental Quality, and I will
16 preside over the hearing.

17 Section 2-4-302(7), MCA, and Administrative Rule of
18 Montana 1.3.311 require me to read the Notice of Function
19 of the Administrative Rule Review Committee. It is as
20 follows:

21 NOTICE OF FUNCTION OF ADMINISTRATIVE RULE REVIEW COMMITTEE

22 Interim Committees and Environmental Quality Council

23 Administrative rule review is a function of interim
24 committees and the Environmental Quality Council or EQC.

25 These interim committees and the EQC have administrative

1 rule review, program evaluation, and monitoring functions
2 for the following executive branch agencies and the
3 entities attached to the agencies for administrative
4 purposes:

5 For the Economic Affairs Interim Committee: The
6 Department of Agriculture, the Department of Commerce,
7 Department of Labor and Industry, Department of Livestock,
8 Office of the State Auditor and Insurance Commissioner,
9 and Office of Economic Development.

10 For the Education and Local Government Interim
11 Committee: State Board of Education, Board of Public
12 Education, Board of Regents of Higher Education, and
13 Office of Public Instruction.

14 For the Children, Families, Health, and Human Services
15 Interim Committee: The Department of Public Health and
16 Human Services.

17 For the Law and Justice Interim Committee:
18 Department of Corrections and Department of Justice.

19 For the Energy and Telecommunications Interim
20 Committee: The Department of Public Service Regulation.

21 For the Revenue and Transportation Interim Committee:
22 The Department of Revenue and Department of
23 Transportation.

24 State Administration and Veterans' Affairs Interim
25 Committee: Department of Administration, Department of

1 Military Affairs, and Office of the Secretary of State.

2 For the Environmental Quality Council: The Department
3 of Environmental Quality, the Department of Fish, Wildlife
4 & Parks, and the Department of Natural Resources and
5 Conservation.

6 These interim committees and the EQC have the
7 authority to make recommendations to an agency regarding
8 the adoption, amendment, or repeal of a rule or to request
9 that the agency prepare a statement of the estimated
10 economic impact of a proposal. They also may poll the
11 members of the Legislature to determine if a proposed rule
12 is consistent with the intent of the Legislature or,
13 during a legislative session, introduce a bill repealing a
14 rule, or directing an agency to adopt or amend a rule, or
15 a Joint Resolution recommending that an agency adopt,
16 amend, or repeal a rule.

17 The interim committees and the EQC welcome comments
18 and invite members of the public to appear before them or
19 to send a written statement in order to bring to their
20 attention any difficulties with the existing or proposed
21 rules. The mailing address is P.O. Box 201706, Helena,
22 Montana 59620-1706.

23 I'm also advising everyone present today of the
24 requirement in Montana law that agencies of state
25 government create and maintain a list of persons who are

1 interested in that agency's rulemaking proceedings. An
2 agency's interested persons list must indicate the subject
3 or subjects in which each person on the list is
4 interested. Persons whose names are on the list will
5 receive notice by mail of all agency rulemaking notices in
6 the subjects indicated.

7 Anyone attending today who would like to have his or
8 her name placed on the Department and Board of
9 Environmental Review's interested person list may do so by
10 filling out one of the forms available by the door today
11 or by making a written request to Loryn Johnson,
12 Paralegal, Department of Environmental Quality,
13 1520 East Sixth Avenue, P.O. Box 200901, Helena, Montana
14 59620; or may fax a request to the Department's offices at
15 (406) 444-4386; or e-mail a request to Loryn Johnson at
16 Loryn.Johnson2, that's the number 2, @mt.gov. Please
17 indicate which area of rulemaking interests you so that
18 the Department can notify you of a future rulemaking
19 hearing in that area.

20 Again, notice of this hearing was published on
21 July 8th, 2022, in the 2022 Montana Administrative
22 Register beginning on page 1171 of issue No. 13, and under
23 MAR Notice No. 17-427.

24 As required by ARM 1.3.311 of the Secretary of State's
25 Model Rules, which have been adopted by the Department, I

1 am required to summarize the major provisions of the
2 hearing notice.

3 Paragraph 3 of the hearing notice sets forth the text
4 of the proposed New Rule I and the legal authority and
5 rationale for its adoption. Because of the length of the
6 New Rule, as well as its rationale, I will not read the
7 rule into the record. The rationale for the adoption of
8 New Rule I is presented in the Hearing Notice. A complete
9 copy of the Hearing Notice will be included in the
10 official record of this hearing, and copies are available
11 here today.

12 Paragraph 4 of the Hearing Notice notifies the public
13 that interested persons may submit their data, view, or
14 arguments, either orally or in writing, at this hearing.
15 The notice also indicated that individuals may submit
16 written data, views, or arguments to the Department of
17 Environmental Quality no later than 5:00 p.m. Monday,
18 August 22nd, 2022. To be guaranteed consideration, mailed
19 comments must be postmarked on or before that date.

20 Paragraph 5 gives notice that the Department maintains
21 rulemaking interested persons lists and indicates how
22 persons may have their names placed on a list to receive
23 notification from the Department regarding rulemaking
24 matters. The Department is required by Montana Code
25 Annotated 2-4-302(7)(b) to send a copy of each proposed

1 notice of rulemaking to interested persons who have
2 requested to be informed of the Department's rulemaking
3 proceedings, or, if a person has consented, electronic
4 notification that the proposal notice is available on the
5 Department's website, with a link that contains the notice

6 The order of presentation of testimony today will be
7 as follows: I will ask a representative of the Department
8 to provide an introductory statement about this proposed
9 rulemaking; I will ask -- then ask to hear the testimony
10 of proponents, first those appearing in person and then
11 those online; then we will hear the testimony of
12 opponents, first in person and then online; and then we'll
13 hear the statements of anyone else wishing to be heard in
14 person and then online. And finally, I will then ask for
15 any written comments that any person who has not submitted
16 oral testimony may wish to provide.

17 If you wish to present data, views, arguments, or
18 other testimony either orally or in writing, please write
19 your name, address, and affiliation on the sign-up sheets
20 that are available near the back of the room today.
21 Please also indicate whether you support or oppose the
22 proposed rule.

23 If you are appearing online via the Zoom platform and
24 wish to present data, views, arguments, or other
25 testimony, please write your name, address, and

1 affiliation in the Chat feature of the Zoom platform.
2 Please also indicate whether you support or oppose the
3 proposed rule, or take no position, in the Chat feature.
4 If you are appearing online and wish to present written
5 testimony, please postmark mail no later than Monday
6 August 22nd, 2022, fax, or e-mail the Department at the
7 numbers and addresses as I have previously indicated.

8 This is an informational hearing, the purpose of which
9 is to hear any and all relevant comments regarding the
10 proposed rule. Formal rules of evidence will not be
11 observed. Your testimony must be relevant to the matter
12 at issue in this hearing; that is, the proposed adoption
13 of New Rule I pertaining to temporary water quality
14 standards variances. Copies of New Rule I are available
15 here today. As the presiding officer, I may also examine
16 any witnesses making a statement here today.

17 If you are appearing virtually, please use the
18 Raise Hand feature in the Zoom application to indicate you
19 would like to speak; when you are called upon to speak,
20 DEQ will unmute you. If you are appearing by phone, press
21 star 9 to raise your hand; press star 6 to mute or unmute
22 yourself.

23 Prior to giving any testimony here today, please
24 identify yourself by name, address, and affiliation, if
25 any.

1 I now ask the representative from the Department to
2 present an introductory statement.

3 DR. SUPLEE: Good morning. My name is
4 Dr. Mike Suplee, and I'm in the Water Quality Standards
5 and Modeling Section of the Department of Environmental
6 Quality.

7 Today we are here to consider the adoption of
8 New Rule I, which provides criteria and procedures for the
9 Department to issue temporary variances from water quality
10 standards under certain conditions. The proposed rule
11 does not adopt or establish any variances, but simply
12 provides the procedural mechanism for doing so.

13 Section 75-5-320, MCA, the statute which gives the
14 Department authority to adopt the variance rules, was
15 enacted during the 2019 Regular Session of the Montana
16 Legislature and provides the means for dischargers to
17 qualify for water quality standards variances under state
18 law and as provided in federal law at 40 CFR 131.14, which
19 is the federal regulation for water quality standards
20 variances. For purposes of consistency with federal law,
21 and to ensure compliance with 75-5-320, MCA, New Rule I
22 adopts 40 CFR 131.14 by reference.

23 A water quality standards variance is a time-limited
24 water quality standard for a specific pollutant or
25 pollutants or water quality parameter or parameters that

1 reflects the highest attainable condition during the term
2 of the variance. When a variance is approved, the goal
3 remains a full attainment of the underlying beneficial use
4 and criterion from which the variance is sought, and all
5 other applicable standards not specifically addressed by
6 the water quality variance will remain applicable.

7 New Rule I may be used to seek a temporary variance
8 from a variety of different Montana water quality
9 standards, both narrative and numeric, and including those
10 found in Department Circular DEQ-7. Under New Rule I, a
11 variance may be granted for one of the six factors
12 referenced at 40 CFR 131.14(b)(2)(i)(A)(1).

13 The Department continues to see a critical need to use
14 variances to regulate discharges of pollutants, whether
15 such variances are from narrative or numeric standards.
16 For example, the requirement to meet water quality
17 standards can result in substantial and widespread
18 economic and social impacts on an affected community.
19 Temporary water quality standards variances under
20 New Rule I provide a means to preclude these economic and
21 social impacts because a variance can be based on
22 affordability.

23 The affordability evaluation ensures that dollars
24 expended for the purposes of meeting a water quality
25 standard are kept to a feasible level for a community.

1 Water quality standards variances can provide a valuable
2 tool to meet the requirements of state and federal water
3 quality laws.

4 When the Department approves a variance, it must also
5 be submitted to the U.S. Environmental Protection Agency
6 or EPA for their approval under the federal Clean Water
7 Act. Once approved, the water quality standards variance
8 will apply for purposes of developing permit limits in
9 discharge permits.

10 New Rule I also requires the Department to conduct a
11 hearing and provide no less than 45 days' notice to the
12 public prior to approving a variance.

13 Finally, under New Rule I, the Department must also
14 review any issued variance every five years to determine
15 if the variance should continue, be modified, or if the
16 variance is no longer necessary.

17 This concludes the Department's statement on
18 New Rule I. I'm now going to provide the Department's
19 Takings and Stringency Analysis for New Rule I.

20 Thank you.

21 MR. MOSER: Thank you, Dr. Suplee.

22 Okay. There is no one present in the room that wishes
23 to provide testimony at this point.

24 Are there any proponents, those in favor of the
25 rulemaking, who wish to testify that are online right now?

1 Please raise your hand in the Chat feature if you are
2 wishing to testify in favor of the rulemaking at this
3 time.

4 There is no one online that's indicating they want to
5 testify in favor of the rulemaking at this time.

6 Is there anyone online that wishes to testify as an
7 opponent of the rulemaking at this time? Please indicate
8 or raise your hand.

9 Okay. We are -- no one is raising their hand
10 indicating they wish to testify.

11 Does anyone else wish to testify just as a -- in
12 general about the rule without indicating a position?

13 MS. JOHNSON: Vicki Watson has her hand raised.

14 I will unmute you. If you could state and spell your
15 name for the record.

16 MR. MOSER: Ms. Watson, go ahead.

17 MS. WATSON: Hi. This is Vicki Watson. My name
18 is spelled V-I-C-K-I, W-A-T-S-O-N. And I'm still learning
19 enough about this to make some written comments by
20 April 22nd [verbatim], so I just had a question.

21 And my question was if the analysis included some sort
22 of a cost-benefit analysis of the variance. Because while
23 it may be considered difficult for a given community to
24 afford, then them not meeting the standard may create cost
25 for downstream communities. So I, I wondered if there was

1 a kind of cost-benefit analysis to determine the impacts
2 to downstream communities of this particular community not
3 meeting water standards.

4 MR. MOSER: Okay. Thank you for your comment.
5 Do you have any further comments?

6 MS. WATSON: No. No. Just that question.

7 MR. MOSER: Okay. Thank you for your comments,
8 then. The Department responds to comments in the formal
9 manner when it issues its notice of adoption if it, if it
10 proceeds with the rule.

11 Is there anyone else that wishes to testify that's
12 online?

13 And no one here in the room -- there is still no one
14 here in the room indicating they wish to testify. So
15 again, if there is any person who wishes to submit written
16 comments, please provide those by 5:00 p.m. on Monday,
17 August 22nd, through the means I already indicated today.

18 And for the record, I'm taking the stringency memo
19 from Mike Suplee into the hearing record at this time.

20 And thank you all for your attendance and testimony.
21 I just wanted to double check one last time. No further
22 comments?

23 Okay. Thank you again. The hearing is now adjourned.

24 (The proceedings concluded at 10:22 a.m.)
25

COURT REPORTER'S CERTIFICATE

STATE OF MONTANA)
) ss.
COUNTY OF LEWIS AND CLARK)

I, CHERYL ROMSA, Court Reporter, residing in Helena, Montana, do hereby certify:

That the foregoing proceedings were reported by me in shorthand and later transcribed into typewriting; and that the foregoing -14- pages constitute a true and accurate transcription of my stenotype notes of the proceedings.

DATED this the 18th day of August, 2022.

/s/Cheryl A. Romsa
CHERYL A. ROMSA

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