

BEFORE THE DEPARTMENT OF ENVIRONMENTAL QUALITY
OF THE STATE OF MONTANA

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

TO: All Concerned Persons

1. On July 8, 2022, the Department of Environmental Quality (department) published MAR Notice No. 17-427, pertaining to the public hearing on the proposed adoption of the above-stated rule at page 1171 of the 2022 Montana Administrative Register, Issue No. 13.

2. The department has adopted New Rule I (17.30.662) as proposed, but with the following changes, stricken matter interlined, new matter underlined:

NEW RULE I (17.30.662) TEMPORARY WATER QUALITY STANDARDS VARIANCES (1) and (2) remain as proposed.

(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; or
- ~~(c) a TMDL for the pollutant requiring the permittee to meet an established waste load allocation; or~~

~~(d)~~(c) other department or permittee actions.

(4) through (6) remain as proposed.

(7) ~~The variance may be used to develop MPDES permit limits.~~ The variance must be used to develop MPDES permit limits, unless another lawful permitting option is chosen by the permittee and approved by the department. A permit incorporating a variance issued by the department under this rule is subject to ARM Title 17, chapter 30, subchapter 13.

(8) through (12) remain as proposed.

AUTH: 75-5-201, 75-5-320, MCA

IMP: 75-5-320, MCA

3. The department has thoroughly considered the comments made. A summary of the comments and the department's responses are as follows:

COMMENT NO. 1: Any new or renewed variance for nutrients should rely on updated economic data to justify economic hardship.

RESPONSE: The department agrees. Water quality standards variances, when issued based upon economic and social impacts, will be developed using current economic information.

COMMENT NO. 2: The proposed NEW RULE I fails to require a variance term to be for the shortest period necessary to achieve the highest attainable condition.

RESPONSE: The department does not agree with the comment. NEW RULE I and any variances developed under it must be consistent with federal rules at 40 CFR 131.14; the federal rules, adopted by reference in NEW RULE I, require that the variance term must only be as long as necessary to achieve the highest attainable condition. See 40 CFR 131.14(b)(1)(iv).

COMMENT NO. 3: NEW RULE I fails to require a thorough pollution control plan describing activities necessary to achieve the highest attainable condition, or how a discharger will make consistent progress improvements towards water pollution control.

RESPONSE: A permittee operating under an approved variance is required to implement optimization study actions to maximize pollution reductions; this requirement must be incorporated as terms and conditions of a discharge permit, pursuant to 75-5-320(2), MCA. It is not necessary to repeat the corresponding statutory language in rule. The submittal of an optimization study is required as part of the variance application process pursuant to NEW RULE I(2)(j). When no additional feasible pollution control technology can be identified, pursuant to NEW RULE I(2)(k), permittees must also 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.

COMMENT NO. 4: The U.S. Environmental Protection Agency finds that the rule does not appear to be inconsistent with the requirements of 40 CFR 131.14.

RESPONSE: The department acknowledges the comment.

COMMENT NO. 5: Sections (2) and (3) lack coherency in terms of requirements for obtaining a variance and mandatory pollution control activities necessary during a variance term.

RESPONSE: The department does not agree with the comment. NEW RULE I contains the requirements necessary for the application submittal process (see NEW RULE I(2)(a) through (k)). If the variance is ultimately granted, the steps and procedures in the facility's optimization study must be implemented. These steps and procedures will be facility-specific and need to be defined on a case-by-case basis. See also response to COMMENT NO. 3.

COMMENT NO. 6: DEQ should revise the optimization study (NEW RULE I(2)(j)) to include a comparison between an applicant's maximum treatment potential vs. existing operations.

RESPONSE: The rule already includes this requirement. For example, in cases where a variance is based on substantial and widespread economic impacts, a community's economic capability defines the maximum treatment potential for that term of the variance. NEW RULE I requires applicants to identify and justify the highest attainable condition (HAC) when applying for a variance, and the HAC must be reviewed by the department before any application is granted. An updated HAC

must also be provided at subsequent variance renewals. See also response to COMMENT NO. 3.

COMMENT NO. 7: We are concerned that the alternatives to a variance found in NEW RULE I(3) are not grounded in clear requirements under federal or state law.

RESPONSE: The department does not agree with the comment. The purpose of NEW RULE I(3) is to provide the department a nonexclusive list of alternatives it should consider that may preclude the need for a variance. This is consistent with 75-5-320(1)(c), MCA, which requires the department to consider whether a variance is reasonably necessary. See also response to COMMENT NO. 8.

COMMENT NO. 8: We oppose inclusion of (3)(c)'s language regarding the existence of a TMDL as potential grounds for precluding the need for a variance; the TMDL cannot be the basis for assuming an applicant is adequately protecting local water quality.

RESPONSE: The department agrees that the inclusion of a total maximum daily load (TMDL) in the context of an alternative to a variance is not necessary. In situations where a TMDL establishes a waste load allocation and a variance is granted, the permit should include effluent limits derived from the variance, including any interim effluent limits approved in the variance. In situations where the permittee is already meeting the waste load allocation defined in an approved TMDL, a variance is not needed. A waste load allocation must, by definition, be derived such that it meets water quality standards. Where a permittee is already meeting the underlying water quality standards, through the imposition of a TMDL-based waste load allocation, a variance is also not available under 75-5-320(1)(c)(i), MCA. The department will delete the TMDL alternative at proposed NEW RULE I(3)(c) and renumber subsections accordingly.

COMMENT NO. 9: Section (7) does not comply with EPA's mandatory variance rule in 131.14(c); the first sentence should be reworded from "may" to "shall."

RESPONSE: The department agrees with the comment, in part, and will change the first sentence of NEW RULE I(7) as follows, "The variance must be used to develop MPDES permit limits, unless another lawful permitting option is chosen by the permittee and approved by the department." The rule language is added because the department foresees a scenario where a permittee is covered under a multi-discharger variance but wishes to pursue another lawful permitting option.

COMMENT NO. 10: The term "variance" should, throughout NEW RULE I, be changed to "temporary variance."

RESPONSE: The recommend edit adds unnecessary length to the rule; the rule title and (1) are clear that variances under NEW RULE I are temporary. All water quality standards variances are limited by their term and are therefore temporary. No changes were made to the rule in response to this comment.

COMMENT NO. 11: Prior to issuing a permit renewal, the department should notify a permittee of pending effluent limitation modifications and provide the permittee an opportunity to request a variance.

RESPONSE: The department already informs permittees of any pending changes to existing effluent limitations during the permitting renewal process. Permittees are also familiar with the water quality parameters they are having difficulty meeting in their permits, and NEW RULE I provides that a permittee can apply for a variance at any time. There is significant process within the department's permitting rules, such that communication about the need for a potential variance should reasonably occur prior to the issuance of any draft permit. The department does not believe that additional rule language changes are necessary.

COMMENT NO. 12: The department should modify NEW RULE I(2) to include reference to a guidance document which will be available from the department to help permittees understand the specific requirements of a variance application.

RESPONSE: The department does not have a guidance document developed at this time and believes that the basic requirements for a variance are sufficiently clear in the proposed rule and federal regulations. However, if it proves necessary, the department may develop a guidance document providing additional detail on how to apply for a variance.

COMMENT NO. 13: In NEW RULE I(2)(h), it should be made clear that a variance may be based on any of the six factors, or a combination of those factors, found in 40 CFR 131.10(g).

RESPONSE: The department finds the rule is sufficiently clear that a variance issued under NEW RULE I may be based on any of the federal factors listed at 40 CFR 131.10(g), or a combination thereof. Pursuant to NEW RULE I(2)(b), as part of necessary application materials, a permittee must identify the applicable factor or factors referenced at 40 CFR 131.14(b)(2)(i)(A)(1). Consistency with 40 CFR 131.14 is required by 75-5-320, MCA; the federal rule is adopted by reference in NEW RULE I and specifically contains a reference to the factors at 40 CFR 131.10(g).

COMMENT NO. 14: NEW RULE I(2)(j) should be rewritten to include the optimization study as a permit renewal condition once the permittee is operating under a variance, not as a precondition for applying for a variance.

RESPONSE: In order to receive a variance, a permittee must evaluate facility operations and infrastructure to maximize pollution reduction through an optimization study, and the variance must require the implementation of optimization study actions as terms and conditions of the discharge permit. See 75-5-320(2), MCA. No changes were made to the rule in response to this comment.

COMMENT NO. 15: NEW RULE I(2)(k)(iii) should be a subsection of (ii), not a stand-alone component.

RESPONSE: The department disagrees that the change is needed. The language of NEW RULE I and its structure mirrors federal rule language at 40 CFR

131.14(b)(1)(ii)(A), where three different types of discharger-specific variances are described.

COMMENT NO. 16: NEW RULE I(2)(k)(iii) should be rewritten to allow the pollutant minimization plan as a permit renewal condition once the permittee is operating under a variance, not as a precondition for applying for a variance.

RESPONSE: The pollutant minimization plan is an important component for evaluating a variance application and is a necessary component for discharger-specific variances that have already achieved the interim standards or effluent conditions set forth at NEW RULE I(2)(k)(i) and (2)(k)(ii), respectively. This approach is also consistent with the federal regulations where a "pollutant minimization program" must be part of any variance application operating under the subsection at 40 CFR 131.14(b)(1)(ii)(A)(3).

COMMENT NO. 17: The department should include adaptive management plans among the list of alternatives which would preclude the need for a variance, per NEW RULE I(3).

RESPONSE: In addressing stringent water quality standards, permittees must maintain flexibility to use the regulatory options available under state and federal law. Once the corresponding rules are adopted, adaptive management plans will be one of several options a permittee may pursue when working toward meeting nutrient standards. However, the department does not find it necessary to specifically exclude a permittee from receiving a nutrient standards variance, should the permittee choose to pursue a variance instead of an adaptive management plan.

COMMENT NO. 18: Section (10) should be rewritten to indicate the department will abide by the requirements found in other sections of the rule (specifically, (2), (3), (4), (5), (6), and (7)).

RESPONSE: As proposed, (10) already indicates that the department is subject to the procedures and requirements of NEW RULE I when issuing a variance upon its own volition.

COMMENT NO. 19: NEW RULE I(2)(k)(i) should provide a definition for the "highest attainable interim standard" so that it is consistent with federal language.

RESPONSE: The federal rule at 40 CFR 131.14(b)(1)(ii)(A)(1), adopted by reference in NEW RULE I, uses the term "highest attainable interim criterion." As used here, criterion and standard are interchangeable in meaning and therefore no additional state-level definition is needed.

COMMENT NO. 20: The proposed rule should specifically describe how economic and technical feasibility will be determined and evaluated by the department to justify the need for a temporary variance and associated interim permit limit.

RESPONSE: The department does not agree with the comment. Economic and technical feasibility/capability analyses associated with water quality standards variances are complicated analyses that do not readily lend themselves to description in rule. The intent of NEW RULE I is to set forth the criteria and

procedures for allowing temporary water quality standards variances for several recognized variance factors. For variances sought using the economic and social impact factor under NEW RULE I and 40 CFR 131.14, such impacts must be demonstrated during the application process, prior to the issuance of any variance. Following department approval, any variance must also be approved by EPA for federal Clean Water Act purposes. This subsection does not impair or otherwise limit the right of the permittee to assert the confidentiality of the information requested by the department, as provided in 75-2-105 , MCA.

COMMENT NO. 21: The rule requires that the variance will not lower water quality further, so the rule should require the assessment of water quality impacts downstream particularly on waterbodies that are not meeting their beneficial uses now.

RESPONSE: The rule will protect water quality because variances are allowed from yet-to-be-attained water quality standards and do not allow discharges that cause a lowering of currently attained ambient water quality (see 75-5-320(1)(a), MCA). The department also routinely assesses state surface waters, including waters where variances may be implemented. Once approved, a variance functions as a temporary water quality standard, without permanently removing the goal of attaining the underlying water quality standard, both near field and further downstream. The important aspects of a variance are that it is justified under one of the six authorized federal factors (see also, response to COMMENT NO. 13), it is temporary, and it must undergo periodic department and EPA review as to its justification.

COMMENT NO. 22: Properly evaluating many variance applications will be a lot of work for DEQ.

RESPONSE: Thank you for the comment. The department has considered and intends to meet the workload required to review and approve variance applications.

COMMENT NO. 23: Is there a review/decision deadline for DEQ after it receives a variance application? Timelines for department review of an application should be incorporated into the rule.

RESPONSE: There is no specific time requirement for the variance application review to be completed by the department. The department foresees some variances may be straightforward while other variances may require more time for review and approval. The department disagrees that a time limit for the preliminary approval process is appropriate. The rule already contains timelines for public review and comment as well as submission to EPA following final department approval. EPA is then subject to federal approval or disapproval periods for purposes of the federal Clean Water Act. To be finally effective, a variance must be incorporated into an MPDES permit. An MPDES permit is also subject to permitting review and public comment procedures at ARM Title 17, chapter 30, subchapter 13, including all related timelines.

COMMENT NO. 24: NEW RULE I(2)(i) should be re-written in clearer, less

confusing English, and the word "feasible: should be defined.

RESPONSE: The department does not find it necessary to define "feasible" at NEW RULE I(2)(i). The purpose of a definition is to achieve clarity without needless repetition. Feasible is an ordinary word and, as used in NEW RULE I, is intended to be understood in its ordinarily accepted meaning. The department also does not find it necessary to re-write the subsection; the wording contained at NEW RULE I(2)(i) is nearly verbatim from 75-5-320(1)(c)(ii), MCA, and best reflects statutory direction.

/s/ Angela Colamaria
ANGELA COLAMARIA
Rule Reviewer

/s/ Christopher Dorrington
CHRISTOPHER DORRINGTON
Director
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Certified to the Secretary of State September 27, 2022.