

## **NUTRIENT WORK GROUP MEETING SUMMARY**

**MARCH 25, 2021**

**9:00 a.m.**

**Zoom Meeting**

### **Present:**

Aaron Losing – City of Kalispell WWTP  
Alan Olson – Montana Petroleum Association  
Alex Leone – Clark Fork Coalition  
Amanda McInnis  
Amy Deitchler – Great West Engineering  
Andrew Gorder – Clark Fork Coalition  
Brian Heaston – City of Bozeman  
Carl Sundstrom  
Coralynn Revis – HDR  
David Clark – HDR  
Dorf Johnson – Montana Environmental Information Center  
Elena Evans – Missoula Valley Water Quality District  
Erin Wall  
Greg Bryce – Hydrometrics, Inc.  
Guy Alsentzer – Upper Missouri Waterkeeper  
Heather McDowell – Sibanye-Stillwater  
Heather Priest  
Helen Sladek  
Jennifer Reed  
Jim Kuipers – Kuipers & Association  
Julia Altemus – Montana Wood Products Association  
Kelly Lynch – Montana League of Cities and Towns  
Logan McInnis – City of Missoula  
Matt Wolfe – Sibanye Stillwater  
Mikindra Morin – Northern Plains Resource Council  
Paul Montgomery – AMCE  
Paul Yakawich  
Ricky Schultz – HDR Engineering  
Rika Lashley – Morrison-Maierle  
Ron Kuhler – ExxonMobil Billings Refinery  
Ryan Sudbury – City of Missoula  
Sam Carlson – Montana State University  
Scott Buecker – AE2S  
Susie Turner – City of Kalispell  
Tammy Johnson – Montana Mining Association  
Tina Laidlaw – U.S. EPA Region 8, Helena

### **Department of Environmental Quality (DEQ) Staff Present:**

Christopher Dorrington – DEQ Director  
Kurt Moser – Attorney Specialist

Katie Garcin-Forba – Acting Water Quality Division Administrator  
Jenny Chambers – Waste Management and Remediation Division Administrator  
Galen Steffens – Water Quality Planning Bureau Chief  
Eric Sivers – Acting Water Protection Bureau Chief  
Myla Kelly – Water Quality Standards and Modeling Section Supervisor  
Rainie DeVaney – Surface Water Permitting Section Supervisor  
Kristy Fortman – Watershed Protection Section Supervisor  
Michael Suplee – Water Quality Standards and Modeling Section  
Moirra Davin – Public Information Officer  
Amelia Flannery – Surface Water Permitting Section  
Christina Staten – Watershed Protection Section  
Christine Weaver – Surface Water Permitting Section  
Darryl Barton – Groundwater and Source Water Section  
Haley Sir – Surface Water Permitting Section  
Hannah New – Surface Water Permitting Section  
Hannah Riedl – Watershed Protection Section  
Heather Henry – Surface Water Permitting Section  
Jeff Blend – Energy Bureau  
Kayla Glossner – Surface Water Permitting Section  
Mark Ockey – Watershed Protection Section  
Maya Rao – Surface Water Permitting Section  
Melinda Horne – Surface Water Permitting Section

Christina Staten, the meeting facilitator, initiated the Zoom meeting at 9:03 a.m.

## **LEGAL UPDATE**

Kurt Moser, DEQ Attorney Specialist, gave an update on legal activities that have occurred since the December 2020 Nutrient Work Group meeting, and provided a recap on recent court rulings. Judge Morris of the Federal District Court in Montana issued an order on October 30, 2020 that consolidated a District Court case concerning an ongoing appeal in the Ninth Circuit with a newer District Court case litigating the application of Montana’s non-severability provisions. In that order, the judge found that the non-severability provisions had not been triggered and made it clear that in the interim, the 2017 version of Montana’s general nutrient standards variances remained applicable and effective for the 36 municipal dischargers. Judge Morris also reinstated the rulemaking requirement and ordered DEQ to revise the general variance in compliance with the previous order. The Court deferred ruling on EPA’s approval of the non-severability provisions, but also stated there seemed to be significant evidence to demonstrate that EPA may have acted unlawfully under the Clean Water Act in approving those provisions. DEQ then began the rulemaking process but also filed a motion in mid-December to stay that process, pending the results of the Ninth Circuit Court appeal. On February 9, 2021, the Court granted DEQ’s motion to stay rulemaking. As a result, DEQ stopped moving forward with rulemaking on Department Circular DEQ-12B, Nutrient Standards Variances. On March 4, the Ninth Circuit Court of Appeals held oral arguments on the appeal and that matter has been submitted for decision at the Ninth Circuit.

## **Discussion**

There was none.

## SENATE BILL 358

Kelly Lynch, Deputy Director and General Counsel for the Montana League of Cities and Towns, reviewed the contents of **Attachment A**, draft amendments to Senate Bill 358, a bill to repeal Montana's numeric nutrient water quality standards. The League of Cities and Towns, along with the Montana Mining Association, Treasure State Resources Association, and the Montana Petroleum Association are proponents of Senate Bill (SB) 358 and worked to draft these amendments. The draft version of SB 358 to which these amendments apply can be found here: <https://leg.mt.gov/bills/2021/billpdf/SB0358.pdf>.

Kelly stated that they wanted to focus on an adaptive management plan approach to use as a model and looked to other states to see what has been done and what works. A few plans that were used as examples have since been posted to the Nutrient Work Group website, here: <http://deq.mt.gov/Water/Resources/nutrientworkgroup>.

Myla Kelly, DEQ Section Supervisor of the Water Quality Standards and Modeling Section, provided DEQ's perspective of the bill, stating that the Department was in opposition to this bill when it was introduced in February and testified against the bill. Since then, DEQ has been working with the bill's proponents to ensure they were aware of and understood DEQ's concerns, particularly with the challenges DEQ anticipates with implementing the bill.

Myla stated that DEQ stands strongly by its statutory obligations. With respect to nutrients, DEQ remains committed to three fundamental principles, the first being nutrient reductions across the state using the underlying science that DEQ spent over a decade developing, and applying Department resources to that end – across multiple related programs, from 319 grant funds to volunteer monitoring, to assessment methods, technical assistance, and permitting. The second fundamental principle is working with DEQ's permitted community to achieve reductions, while also balancing the costs and the needs for treatment technologies to improve and advance. Myla also stated that DEQ has faced challenges implementing variances under Circular DEQ-12B and in many cases, both for POTWs and the private sector, it is not functioning in an effective manner. DEQ is therefore asking how to better accomplish this. The third key fundamental principle is continuing and enhancing DEQ's engagement with the Nutrient Work Group to achieve these goals. Myla further stated that DEQ feels its Clean Water Act programs can work within SB 358's framework while still meeting the three fundamental principles.

Myla stated that the timeframe presented in Section 1 of **Attachment A** is key, and DEQ commits to prioritizing the development of rules by March of 2022 and doing so in conjunction with the Nutrient Work Group.

## Discussion

The Missoula Valley Water Quality District asked how this plan allows for certainty for individual landowners to ensure that things such as nitrates don't get to dangerous levels, especially if they're downgradient. Tammy Johnson with the Montana Mining Association responded that this is designed to make sure our water is still protected and beneficial uses are supported. Tammy stated that the bill proponents think there are better ways to do this that they have investigated in numerous other states, including taking a look at all the variables in the water and developing something that is protective of the water and beneficial uses, as it pertains to the discharge of nitrogen and/or phosphorus. Tammy further stated that there is a lot of meat on the bone that has yet to be developed and this is just a guideline. However, she thinks that there will be protections for landowners and for the water that

they're concerned about. She also made a reminder that the bill only applies to direct dischargers and does not apply to nonpoint sources.

The EPA asked what states the bill proponents have looked at for examples. Tammy responded that they reviewed approximately 10 other states, particularly Colorado, Utah, and Wisconsin. Amanda McInnis, who is assisting the League of Cities and Towns on this issue, added that a few things they saw that they liked was a focus on phosphorus rather than nitrogen. Both Colorado and Utah prioritized phosphorus, and Wisconsin and Ohio have an adaptive management plan that is incorporated into their discharge permits.

Rika Lashley with Morrison-Maierle asked whether this framework provides the option to involve others such as groundwater dischargers and nonpoint sources. Amanda McInnis responded yes, that is the idea behind the adaptive management plan to look more broadly at what impacts a river, including groundwater and nonpoint sources. Myla Kelly asked if Amanda could discuss the language in 2A of SB 358 that is trying to get at that concept. Amanda stated that adaptive management plans are much like a total maximum daily load (TMDL) but are a little more focused around often a subset of a waterbody. She gave the example of a chronically dewatered stream due to irrigation as a broader issue that affects a waterbody that isn't easily recognized in the current discharge permitting framework. The idea, based on looking at other state's adaptive management plans, is to allow us to look more broadly at the issues impacting our rivers.

The Upper Missouri Waterkeeper stated they strongly oppose this bill and feel this is a step backwards that will not solve the problems of point source nutrient pollution. The Waterkeeper further stated that Montana has a proven system of regulating point source pollution that takes into account both near-term and long-term pollution control mechanisms, we have technology available to make significant progress, and that the offices of the nutrient variance program could be made to work if it was bound underneath the Clean Water Act and was done in a transparent and enforceable manner. The Waterkeeper also stated that Montana DEQ and the regulated community have given that short shrift and never truly tried to work towards those goals in a discreet, tangible, and enforceable manner. The Waterkeeper stated that this legislation does not work within the framework of Montana's delegated Clean Water Act authority and would be acting in a way that is contrary to EPA approval of water quality standards.

It was asked when this bill could be finalized and what are the steps in doing so. Tammy Johnson stated that following Monday's (March 29) hearing, the bill belongs to the House Natural Resources Committee and they will have a certain amount of time to take executive action on the bill, considering amendments being brought, etc. The only thing that determines the timeframe is the transmittal date to the Senate, which is a ways out. If the committee were to pass this legislation, it would go to the floor of the House for a vote. Because of the amendments being placed on the bill, if the House approves the bill, it would then go back to the Senate floor for a vote for the Senate to concur with the amendments.

The Missoula Valley Water Quality District asked how this bill is envisioned to go into place. The District stated that through the Clark Fork Voluntary Nutrient Reduction Plan (VNRP) there were a lot of infrastructure upgrades for point sources. However, the District asked what this new setup looks like. Amanda McInnis responded that adaptive management plans are a lot like the VNRP that did drive some treatment plan upgrades in the early 1990s, so we are talking about a very similar process to the VNRP process.

The Clark Fork Coalition asked whether under this adaptive management framework if numeric nutrient standards would continue to apply or if it would only be narrative nutrient water quality standards going forward. Amanda McInnis responded that the idea is that the numeric standards are put in a broader context of the other things going on in a waterbody and that judgements aren't made solely on the numeric standards. The numeric standards are a component and go away from being the only thing that is considered when making decisions about how to manage nutrients in a waterbody. Tammy Johnson also responded that the first approach is adaptive management: understanding the waterbody and making sure that a discharge will maintain and preserve all of the beneficial uses of the waterbody. Tammy further stated that where she thinks numeric standards come into play is in actual permit writing. For example, after going through adaptive management and determining what the discharger needs to do to take care of the waterbody, that will then be spelled out in individual permits that could contain numeric limits. Amanda agreed and added that other broader watershed-type things may also be brought forward into a discharge permit. Tammy also clarified that Montana's numeric standards (Circular DEQ 12-A) would go away with this legislation, which is necessary to create a new system. Michael Suplee added and clarified that in the Clark Fork River basin, the numeric nutrient standards and algae limits that were adopted in 2002 would remain in place because they were never part of the Circular DEQ 12-A and 12-B construct.

Paul Montgomery with AMCE asked if Amanda could expand on what types of other things in a watershed will be taken into account – does this include seasonal fluctuations in flow or economic imperatives for each discharger? Amanda responded that adaptive management plans don't typically include economic considerations, but the plans typically take a broader look which could include seasonal fluctuations in flow, but also include big nonpoint sources, potentials for offsets, and things like stream shading. Myla Kelly added that there is a lot of work to do to answer and address all of these questions between now and the timeline that is laid out in the bill (March 1, 2022), as far as how things will be implemented and how the concept of adaptive management will be used.

EPA asked whether this will be a Department or Board of Environmental Review rulemaking and a timeframe for this. Myla Kelly responded that it is not clear whether it would be a Department or a Board rulemaking, but stated that if the goal is to finalize rules by the beginning of March, we need to begin the rulemaking process, following the Montana Administrative Procedures Act, about three months in advance (about the first of the year) to ensure we have time to work through the Department's advisory councils (i.e., Water Pollution Control Advisory Council), and also allow time for public comment and to respond to public comments.

The Missoula Valley Water Quality District asked if additional funding will be made available for monitoring. Myla Kelly responded that this bill does not come with specific direct appropriations for monitoring, so there is not a good answer for that at this time.

Kelly Lynch asked the group if there were any specific language changes that should be made; however, there were no responses to this request.

Sam Carlson with Montana State University stated he thinks there is value in a broader and more inclusive approach but wonders if there are sufficient resources to support developing a more complex and holistic understanding of these nutrient dynamics across the state, especially in smaller communities that are away from economic engines and community groups like the Clark Fork Coalition that drive the science. Kelly Lynch responded that that League of Cities and Towns represents all the communities across Montana, and they have all been a part of this discussion. She thinks the idea is that

a lot of the bigger communities can take on this work themselves, which will allow DEQ to help out the smaller communities. Kelly further stated that approximately \$2 billion dollars of economic stimulus funding is coming into Montana and it may be prudent to discuss with legislators about appropriating some of this funding to Montana DEQ to help with this proposal. Rika Lashley added that the idea with this approach is to find potentially more effective methods to reduce nutrients in the stream that are not as costly as treatment plant upgrades because smaller communities can't afford them, as they would have been required to implement under the old system.

The meeting was ended at approximately 10:00 a.m.

**ATTACHMENT A: DRAFT AMENDMENTS TO SENATE BILL 358 (REPEAL  
NUMERIC NUTRIENT STANDARDS FOR WATER QUALITY)**

**Replace Section 1 in its entirety with the following:**

**NEW SECTION. Section 1. Transition for nutrient standards--rulemaking.** (1) The department shall adopt rules related to narrative nutrient standards in consultation with the nutrient work group by March 1, 2022.

(2) The rules shall provide for the development of an adaptive management program which provides an incremental, watershed approach for protecting and maintaining water quality and that:

(a) reasonably balances all factors impacting a waterbody;

(b) prioritizes the minimization of phosphorus, taking into account site-specific conditions;

(c) identifies the appropriate response variables affected by nutrients and associated impact thresholds in accordance with the beneficial uses of the waterbody.

(3) In developing the rules in (2), the department shall consider options pertaining to whether the point source is new or existing and whether the receiving waterbody is considered impaired or unimpaired.

**Replace Section 2 in its entirety with the following:**

**Section 2. Transition.** (1) Until final rules are adopted pursuant to [section 1], the department shall administer the discharge permitting program under 75-5-402 in a manner consistent with ARM 17.30.637 and the intent of [this act].

(2) Any nutrient standards variances currently authorized and effective under 75-5-313 are hereby authorized and effective under 75-5-320 until otherwise amended or repealed.

**Section 3 remains as written.**

**Revised Section 4.** The department of environmental quality shall repeal ARM 17.30.660 and amend ARM 17.30.602 and ~~ARM 17.30.660~~ to delete all references to department circular DEQ-12A, department circular DEQ-12B, base numeric nutrient standards, and nutrient standards variances.

**Same proposed amendments to sections 5, 6**

**Remove section 7.**

**Section 8. [Revised NEW SECTION 8]**

**75-5-317(2)(u) (insert this and change existing (u) to new (v)) discharges of total phosphorus or total nitrogen that do not:**

(a) create conditions which are toxic or harmful to human, animal, plant, and aquatic life; or

(b) create conditions which produce undesirable aquatic life.

**Same new sections 9, 10, 11**

**NEW SECTION. Savings Clause.** [This act] does not affect nutrient standards variances granted before [the effective date of this act].

**NEW SECTION. Effective Date.** [This act] is effective on passage and approval.