

BEFORE THE BOARD OF ENVIRONMENTAL REVIEW
OF THE STATE OF MONTANA

In the matter of the adoption of New) NOTICE OF PUBLIC HEARING
Rule I under Title 17, chapter 30,) ON PROPOSED ADOPTION
subchapter 6 pertaining to water quality)
standards) (WATER QUALITY)

TO: All Concerned Persons

1. On January 26, 2018, at 10:00 a.m., the Board of Environmental Review will hold a public hearing in Room 111, Metcalf Building, 1520 East Sixth Avenue, Helena, Montana, to consider the proposed adoption of the above-stated rule.

2. The board will make reasonable accommodations for persons with disabilities who wish to participate in this public hearing or need an alternative accessible format of this notice. If you require an accommodation, contact Sandy Scherer, Legal Secretary, no later than 5:00 p.m., January 19, 2018, to advise us of the nature of the accommodation that you need. Please contact Sandy Scherer at Department of Environmental Quality, P.O. Box 200901, Helena, Montana 59620-0901; phone (406) 444-2630; fax (406) 444-4386; or e-mail sscherer@mt.gov.

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

NEW RULE I Variance from Standard for Water Body Conditions (1) The department may grant to a permittee a variance from a water quality standard if the department determines in writing that:

- (a) the standard is more stringent than the quality of the receiving water;
 - (b) the condition in (a) exists because of anthropogenic contributions of the pollutant to the water body;
 - (c) the condition in (a) cannot reasonably be expected to be remediated during the permit term for which the variance is sought;
 - (d) the discharge to which the variance would apply would not materially contribute to the condition in (a); and
 - (e) one of the demonstrations provided at 40 CFR 131.14(b)(2)(i)(A)(1), which is by this reference adopted and incorporated into this rule, applies.
- (2) To obtain a variance, a permittee shall submit to the department an application that:
- (a) identifies the pollutant for which the variance is sought;
 - (b) identifies the permittee by name, address, and telephone number;
 - (c) identifies the receiving water body;
 - (d) demonstrates to the department's satisfaction that the requirements of (1) are met; and
 - (e) proposes, with supporting documentation, a variance level that is:
 - (i) the highest attainable interim standard in the receiving stream;
 - (ii) the interim effluent condition that reflects the greatest pollutant reduction that is 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 paragraph (2)(e)(iii), 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 in place that would eliminate the need for the variance, including:

- (a) a permit compliance schedule;
- (b) reuse;
- (c) a TMDL for the pollutant where the permittee is meeting the established waste load allocation; or
- (d) other department 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 finds that the requirements of (1) and (2) are met, and that a variance is needed, the department shall approve the variance after conducting 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.

(6) Within 30 days after approval of the variance, the department shall submit the variance and any supporting documentation and 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.

(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. The department shall review the variance five years from the date the department issues a final discharge permit incorporating the variance.

(8) The variance must be reviewed by the department every five years to reevaluate the conditions in (2)(e). Based on this review, the department may terminate, continue, or modify the variance. In order to continue or modify the variance, the permittee shall provide information demonstrating compliance with (1) and (2). In cases where water quality in the receiving stream has improved during the term of the variance, DEQ shall consider the ambient upstream condition of the waterbody, as characterized for the previous two years, in determining an appropriate variance level under (2)(e).

(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) A copy of 40 CFR 131.14(b)(2)(i)(A)(1) may be obtained from the Department of Environmental Quality, P.O. Box 200901, Helena, MT 59601-0901.

AUTH: 75-5-222, MCA

IMP: 75-5-222, MCA

REASON: The New Rule is necessary to fulfill the requirements of Montana Code Annotated (MCA) 75-5-222(2). This statute provides that if pollution upstream of a discharger is due to anthropogenic sources, a variance from the applicable standards may be appropriate under certain conditions. It also requires rulemaking to implement the statute. The statute codifies Senate Bill 325, introduced in the 2015 Montana Legislature. This statute was directed at focusing water quality remediation efforts toward the primary pollution contributors, often historic mining, instead of less significant Montana Pollutant Discharge Elimination System dischargers, such as publicly owned treatment works, until the upstream source is remediated and water conditions improve.

The New Rule sets forth the conditions under which a permittee may apply for a variance from water quality standards. The first and second sections of the rule highlight specific requirements of the statute and federal regulations, which provide criteria and procedures for the department to issue variances from water quality standards. The federal regulations for variances from water quality standards are at 40 CFR 131.14. Section 75-5-222(2), MCA, requires the board to adopt standards that are consistent with comparable federal regulations. It is necessary to include these details in the rule to provide transparency and clear direction to potential variance applicants.

Sections (3) and (4) of New Rule I direct the department to review applications for variances to ensure that other mechanisms (such as total maximum daily loads) are not already in place that would preclude the need for a variance. These alternative mechanisms would not limit the ability of a permittee to apply for a variance; however, due to the time and expense necessary to establish and implement a variance, the board wants to ensure applicants are aware of other available options that may more effectively and efficiently satisfy the need for the variance.

Section (5) of New Rule I is necessary to ensure consistency in the department's review and approval of variances issued under this rule. Because variances are exceptions to water quality standards, section (6) clarifies that each individual variance must be approved by the EPA before it may be implemented for Clean Water Act purposes. In order to be consistent with 75-5-222(2)(b), MCA, section (7) specifies that variances will be reviewed after five years.

Section (8) outlines requirements for periodic review of the variance. The five year review period aligns with requirements in 75-5-222(2)(b), MCA. The specific guidelines for renewal and modification are necessary to provide transparency to permittees and consistency in the department's review. Another important aspect of Section (8) is that the permittee's variance must, through time, align with improving water quality. As water quality improves as a result of upstream remediation, the treatment requirements under the variance become more stringent in consideration

of the improved water quality upstream of the permittee. This is necessary to meet the requirements of the Water Quality Act to maintain and improve water quality.

Section (9) states that renewals and modifications of the variance are subject to the same review and approval as the initial variance. This requirement is included for consistency and transparency.

5. 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 Sandy Scherer, Legal Secretary, 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 sscherer@mt.gov, no later than 5:00 p.m., February 9, 2018. To be guaranteed consideration, mailed comments must be postmarked on or before that date.

6. Sarah Clerget, attorney for the board, or another attorney for the Agency Legal Services Bureau, has been designated to preside over and conduct the hearing.

7. 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; 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 Sandy Scherer, Legal Secretary, 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 Sandy Scherer at sscherer@mt.gov, or may be made by completing a request form at any rules hearing held by the department.

8. The bill sponsor contact requirements of 2-4-302, MCA, apply and have been fulfilled. The primary bill sponsor was contacted by the department in person on March 7, 2017.

9. With regard to the requirements of 2-4-111, MCA, the board has determined that the adoption of the above-referenced rule will not significantly and directly impact small businesses.

Reviewed by:

BOARD OF ENVIRONMENTAL REVIEW

/s/ John F. North

BY: /s/ Christine Deveny

JOHN F. NORTH
Rule Reviewer

CHRISTINE DEVENY
Chairman

Certified to the Secretary of State, December 11, 2017.