

From: Joe Carroll, Legislative Attorney
To: Water Policy Interim Committee
Date: January 7, 2022

Re: narrative nutrient standards and the Montana Administrative Procedure Act

Introduction

Section 75-5-321, MCA, states:

75-5-321. Transition for nutrient standards. (1) By March 1, 2022, the department of environmental quality shall adopt rules related to narrative nutrient standards in consultation with the nutrient work group.

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

- (a) reasonably balances all factors impacting a water body;
- (b) prioritizes the minimization of phosphorus, taking into account site-specific conditions; and
- (c) identifies the appropriate response variables affected by nutrients and associated impact thresholds in accordance with the beneficial uses of the water body. . .¹

On December 14, 2021, the Department of Environmental Quality (DEQ) filed Notice No. 17-420 with the Secretary of State, proposing rules that would define "adaptive management plan" and "adaptive management program," and that would establish "the basic elements of an adaptive management program" and provide:

a framework for the department to follow as it continues to meet and consult with the nutrient work group and work toward completion of [a] comprehensive rule package, to be adopted later in 2022.²

This memo will explain: (I) the timeline DEQ faces to adopt 17-420 and a subsequent comprehensive rules package under the Montana Administrative Procedures Act (MAPA) and 75-5-321 in 2022; (II) the duty of this committee (WPIC) in the MAPA process, including staff

¹ 75-5-321, MCA

² MAR Notice No. 17-420

review of proposed rules; and (III) the additional roles WPIC and its members may take in the MAPA process.

I. MAPA timeline

Many MAPA timelines start running with the submission of a notice proposing to adopt, amend, or repeal a rule in the Administrative Register (MAR). Such a proposal notice must provide at least 20 days' notice of a hearing and at least 28 days to submit written comments,³ and be published at least 30 days before the agency takes its proposed action.⁴ A proposal notice is effective for six months, which may be extended by filing an amended or supplemental notice of proposed rulemaking.⁵ "A rule is adopted on the date that the adoption notice is filed with the secretary of state."⁶ Unless exceptions apply, a rule becomes effective after publication.⁷ Rules may not be adopted from October 1 to December 31 of even years, unless certain exceptions apply not discussed in this memo.⁸ The Secretary of State's office has a schedule of filing deadlines for MAR publications.⁹ Because DEQ plans to adopt a comprehensive rule package in addition to 17-420, the timeline below includes dates that may be relevant to such a subsequent proposal.

2021-22 Timeline:

December 14: MAR Notice No. 17-420 filed with Secretary of State

December 23: publication of MAR Notice No. 17-420

January 18-19: WPIC meeting

February 8: hearing on MAR Notice No. 17-420 and deadline to submit comments

February 29: likely last day to file an adoption notice for 17-420 and meet March 1 deadline

³ 2-4-302(4), MCA

⁴ 2-4-302(2)(d), MCA

⁵ 2-4-305(7), MCA

⁶ 2-4-306(1), MCA

⁷ 2-4-306(4), MCA

⁸ 2-4-305(11)(a), MCA

⁹ See <https://sosmt.gov/arm/filing-deadlines/>

March 1: DEQ's deadline provided by 75-5-321, MCA
March 11: publication date for adoption notices filed by March 1

March 15-16: WPIC meeting
May 17-18: WPIC meeting

July 12-13: WPIC meeting

August 16: likely last day to file a proposal notice actionable in 2022
August 26: publication date for proposal notices filed by August 16

September 20-21: WPIC meeting

September 30: likely last day to file an adoption notice in 2022

October 1: rules may not be adopted until January 1, 2023
October 7: publication date for adoption notices filed by September 27
October 21: publication date for adoption notices filed September 28-30

II. WPIC's duty

(a) Committee duty

Section 5-5-231(e), MCA, states that WPIC shall, "for issues where the primary concern is the quality or quantity of water, perform the administrative rule review." Committee staff helps satisfy this duty by monitoring conformance of a proposed rule with MAPA.

(b) Staff review

On December 15, 2021, DEQ forwarded a copy of MAR Notice No. 17-420 to WPIC staff. The notice meets the time requirements for providing notice to the public of the hearing, the deadline for filing comments, and the date for proposed action. The notice includes statements of reasonable necessity for the proposed rules.¹⁰ WPIC staff confirmed with Senator Esp, sponsor of Senate Bill 358, the law that requires adoption of narrative nutrient standards, that the bill sponsor notice requirements have been met.¹¹ WPIC staff also confirmed with DEQ staff that the small business impact statement requirement has been met.¹² The proposal properly

¹⁰ Required by 2-4-302(1)(a), MCA

¹¹ Required by 2-4-302(1)(b), MCA

¹² Required by 2-4-111, MCA

includes a citation to grants of rulemaking authority.¹³ So far, staff review indicates that MAR Notice No. 17-420 conforms with MAPA.

III. WPIC's options

WPIC and its individual members have many options regarding a proposed rule. This section will describe: (a) the committee's options; and (b) legislator options.

(a) Committee options

WPIC may obtain an agency's rulemaking records, make recommendations to the agency for the adoption, amendment, or rejection of a rule, submit oral or written testimony at a rulemaking hearing, and initiate or join in litigation over MAPA.¹⁴ WPIC may poll the legislature to determine whether a proposed rule is consistent with the intent of the legislature—such a poll can impact litigation if the rule is adopted.¹⁵ Under 2-4-405, MCA, the committee can request the agency to prepare an economic impact statement.

WPIC may object to all or a portion of a proposed rule under 2-4-305(9), MCA. An objection can be initiated by a majority of the committee's members informing the chair that they have an objection. An objection can also be made by majority vote at a committee meeting. An objection made under 2-4-305(9), MCA, prevents an agency from adopting the proposed rule until the end of the six-month period that the proposal notice started. An objection will expire if the committee meets and does not renew the objection. In the case of MAR Notice No. 17-420, an objection made under 2-4-305(9), MCA, probably cannot last longer than May 31, 2022, at which time DEQ could file a notice of adoption or choose to let the proposal expire.

¹³ Required by 2-4-305(3), MCA

¹⁴ 2-4-402, MCA

¹⁵ 2-4-403, MCA; 2-4-404, MCA

WPIC may also object under 2-4-406, MCA, if the committee considers the rule not to have been proposed in substantial compliance with MAPA. An objection under 2-4-406, MCA, prevents the adoption of a proposed rule until the day after *sine die* of the next regular legislative session.¹⁶

(b) Legislator options

Twenty or more legislators may object to a proposed rule and require WPIC to poll the legislature to determine whether a proposed rule is consistent with the intent of the legislature.¹⁷ Fifteen or more legislators may request DEQ to prepare an economic impact statement.¹⁸

Individual legislators may also present their views at the rule hearing on February 8, 2022, or by submitting written testimony to DEQ by that same date.

¹⁶ 2-4-306(4)(c), MCA

¹⁷ 2-4-403(2), MCA

¹⁸ 2-4-405(1), MCA