



February 8, 2022

Submitted via electronic mail to: loryn.johnson2@mt.gov

Ms. Loryn Johnson
Montana Dept. of Environmental Quality
PO Box 200901
Helena, MT 59620-0901

Re: Comments Opposing Proposed Amendments to ARM 17.30.1304 & New Rule 1
for Narrative Nutrient Standards

Dear Ms. Johnson:

On behalf of Upper Missouri Waterkeeper, Montana Environmental Information Center, Montana Trout Unlimited and their respective members, please accept the following comments in opposition to proposed rule amendments at ARM 17.30.1304 and New Rule 1 for narrative nutrient standards. Public comments on this matter are due by close of business February 8, 2022. MAR Notice No. 17-420.

The undersigned organizations are not-for-profit conservation organizations dedicated to, among other issues, protecting clean water and healthy rivers and ensuring lawful governance in Montana. As part of their respective missions and programming the undersigned engage in policy, scientific research, and regulatory actions related to Montana's implementation of its duties pursuant to the federal Clean Water Act (CWA) and Montana citizens' constitutional guarantee to a clean and healthful environment. The undersigned have participated as stakeholders in the instant rulemaking process and Nutrient Work Group meetings, as well as the precursor rulemaking adopting Montana's numeric nutrient criteria in 2014.

Executive Summary

The undersigned oppose the Department's proposed new regulatory definitions and rule framework setting forth an adaptive management program (AMP) for addressing nutrient pollution of Montana's waterways (hereinafter 'New Rule 1'), and likewise oppose the corollary but segmented and 'soon-to-come' New Rule 2 concerning the applicability of Circular DEQ 12-A, revisions to nondegradation policy, and further implementation details for New Rule 1.

Both New Rule 1 and prospective New Rule 2 attempt to codify the unlawful and unscientific mandates of Senate Bill 358 from the 2021 Legislative Session. As a fundamental matter the undersigned disagree that the legislature or the Montana Department of Environmental Quality (hereinafter "DEQ") possess the authority to diminish substantive and procedural requirements of the Montana Water Quality Act (MWQA) or federal CWA and, because this rulemaking effort sets forth new rules for regulating pollution to waters of the state that conflict with the aforementioned statutes, the rulemaking is fatally flawed and should be abandoned by DEQ as unlawful.

New Rule 1 would supplant a mandatory, proven framework for controlling point source discharges of nutrient pollution with an amorphous and subjective new construct that is unscientific, contrary to plain requirements of the MWQA and federal CWA and wholly incapable of adequately protecting local waterway health. The proposed rule definitions and framework inappropriately and unlawfully interject cost-benefit considerations, relax or repeal mandatory pollution control requirements, lack a demonstrated scientific basis and are contrary to an exhaustive body of scientific literature showing the appropriateness and effectiveness of numeric nutrient criteria and MPDES permits, and fail to provide the transparency, accountability, or enforceability necessary to protect designated uses of water for present and future generations of Montanans. DEQ should withdraw proposed New Rule 1 and its accompanying definitional ARM.

Legal and Factual Background

Nutrient Pollution

The rulemaking effort at-hand concerns nutrient pollutants, specifically nitrogen and phosphorus. Nutrient pollutants act as fertilizer in water, causing and contributing to excessive plant growth, harmful algae blooms, and bacteria. Algal blooms, bacteria, and plant growth, in turn, cause and increase turbidity, fluctuations in dissolved oxygen, and in certain cases produce harmful toxins. These and related effects of nutrient pollution all adversely affect fish, aquatic invertebrates, wildlife, human health and recreation. *See* EPA, Nutrient Criteria Technical Guidance Manual: Rivers and Streams (2000). Nutrient pollution of surface water impairs designated uses by degrading fishing, wildlife habitat, human health and recreational contact.

Nutrient pollution can cause damage downstream from their source(s), sometimes for great distances, and can accumulate in aquatic systems over time, causing algal blooms and nuisance plant growth to increase and recur during both sediment mobilizing and plant life cycles. These relationships, in turn, cause new or repeated water quality degradation even after the original source of pollution is reduced or removed. Nutrients are often referred to as ‘cumulative’ pollutants because of their propensity to damage water quality far from a source and over extended periods of time.

In 2000, the Environmental Protection Agency (EPA), in recognition of the problems caused by nutrient pollution, issued direction and guidance to states to develop numeric nutrient criteria to protect designated uses of water. EPA, Nutrient Criteria Development; Notice of Nutrient Criteria Technical Guidance Manual: Rivers and Streams, 65 Fed. Reg. 46167-46169 (July 27, 2000). EPA directed the states to develop standards by 2003, and provided states with guidance on standards development and a set of standards, developed by ecoregion, that states could adopt if they chose not to develop their own or until they developed their own. *Id.*

The state of Montana has long acknowledged that nitrogen and phosphorus are two of the most problematic types of pollution in Montana's waters. Excess nutrient pollution accounts for approximately 20 percent of all stream miles impaired by any form of pollution in Montana. *See* Montana 2020 Integrated Report. Unhealthy nutrient pollution levels, in combination with the challenges presented by chronic dewatering, climate change, and new land use patterns are cumulatively degrading surface waters across Montana, rendering them unfishable, unswimmable, and/or unsuitable for their designated uses.

Requirements of the Clean Water Act and Montana Water Quality Act

Both the Montana Constitution and the federal CWA direct the state to develop laws prohibiting the degradation of state waters. *See* Mont. Const. Article IX, § 1(3); 40 CFR § 131.12; *see also* PUD No. 1 v. Washington Dept. of Ecology, 511 U.S. 700 705 (1994). Simply stated, the purpose of the CWA is “to restore and maintain the chemical, physical, and biological integrity of the Nation’s waters.” 33 U.S.C. § 1251. Congress intended the CWA not merely to reduce pollution, but to “eliminate pollution from the nation’s waters by 1985.” *U.S. v Earth Sciences*, 599 F.2d 368, 373 (10th Cir. 1979). This ambitious goal is reflected in the very name of the Montana Pollutant Discharge *Elimination* System (emphasis added). The goal of the program is not merely to eliminate the discharge of “pollution” – defined as levels of pollutants that exceed standards (*see* MCA §75-5-103(25)) – but rather to eliminate the discharge of pollutants altogether, as opposed to permitting them on a routine basis.

States are required to adopt an EPA-approved program implementing the CWA. DEQ and the EPA have also executed an MOU that requires DEQ to faithfully apply requirements of the CWA and satisfy baseline clean water protection requirements. The CWA provides a two-pronged approach to address pollution. First, pollution is to be controlled at the source. The National Pollution Discharge Elimination System (NPDES) permitting process is the *only* means by which a discharger may lawfully discharge pollutants into waters of the United States from a

point source. 33 U.S.C. § 1342; *EPA v. State Water Resources Control*, 426 U.S. 200, 205 (1976). In Montana, the NPDES program (i.e., the MPDES system) is administered by DEQ under the MWQA and the regulations found at ARM § 17.30.601 *et seq.*, which EPA has approved as a delegated program meeting requirements of the CWA.

The second prong of the CWA's pollution prevention strategy requires that states adopt water quality standards that fully protect all designated uses and prevent any deterioration of water quality for each water body. *See PUD No. 1 v. Washington Dept. of Ecology*, 511 U.S. 700 (1994); 33 U.S.C. §§ 1251(a), 1313(c)(2)(A). Required parts of a state's water quality standards are use designations and water quality criteria necessary to protect those designated uses. *Id.*, *see also* 40 CFR § 131.10. Water quality criteria must ensure that designated uses of waters such as protection of fish and wildlife, consumption of fish, and recreational uses such as fishing, swimming, and boating are achieved and maintained. *Id.*, 40 CFR §§ 131.12, 131.3(i). Criteria must protect the most sensitive use. *Id.* § 131.11(a).

Whenever a state adopts new or revised water quality standards, it must submit it to the EPA for review and disapproval or approval. 33 U.S.C. § 1313(c)(2). The standard becomes applicable only if EPA determines that the standard meets all requirements of the CWA, including that criteria are adequate to protect designated uses and that the criteria are based on sound scientific rationale. 33 U.S.C. § 1313(c)(3), 40 CFR § 131.11(a). Montana promulgated numeric water quality criteria for phosphorus and nitrogen based on years of scientific analysis and development, including EPA ecoregional nutrient criteria. Nutrient Criteria Development, Notice of Ecoregional Nutrient Criteria, 68 Fed.Reg. 557-560 (Jan 6, 2003).

Montana found, and EPA agreed, that the numeric nutrient water quality criteria adopted effective with EPA's 2015 approval letter are necessary to protect designated uses of Montana's wadable streams and certain additional waters. *See* Circular DEQ 12-A and accompanying technical scientific appendices from the 2014 Numeric Nutrient Rulemaking. These criteria are based on EPA's original ecoregional criteria guidance, years of sampling and research by DEQ,

and dozens of scientific studies showing the necessary numeric criteria for nutrients in streams adequate to protect aquatic life and designated uses from the adverse effects of nutrient pollution.

In addition to the baseline requirements of the CWA as described above, the Montana Constitution requires that DEQ exercise a specific duty of care in performing its responsibilities, including but not limited to setting water quality standards, assessing waterway health, and implementing the MPDES permit program. Article II, section 3 states that “[a]ll persons are born free and have certain inalienable rights. They include the right to a clean and healthful environment...” Article IX, section 1 states that [t]he State and each person shall maintain and improve a clean and healthful environment in Montana for present and future generations...The legislature shall provide for the administration and enforcement of this duty...[and] provide adequate remedies for the protection of the environmental life support system from degradation and provide adequate remedies to prevent the unreasonable depletion and degradation of natural resources.”

These are fundamental, constitutional rights of Montana citizens, and are anticipatory and preventative in nature. These provisions impose affirmative obligations on Montana decisionmakers to implement these public health and environmental protections and to preserve Montana’s priceless natural heritage. DEQ’s administration of water pollution control programs under the MWQA must implement the environmental imperatives of Art. II, sec. 3 and Art. IX, sec. 1 of the Montana constitution. *See* MCA § 75-5-103(1).

SB 358’s Mandates Are Contrary to Requirements of the CWA & MWQA

Senate Bill 358 (SB 358) is a blatant attempt to eliminate a well-documented, effective, and science-based approach to protecting designated uses of most Montana waterways through the use of numeric nutrient criteria. We are unaware of a single instance across the Nation where a State has regressed so badly in water pollution control and removed a numeric nutrient criteria approach in favor of a narrative nutrient criteria approach. As EPA stated in its

original Action Letter Approving Montana’s Numeric Nutrient Criteria in 2015, “[t]he adopted water quality criteria...that are the subject of today’s action are scientifically defensible, well supported by the record and consistent with CWA requirements.”¹ Montana was previously a leader in adopting science-based standards to address nutrient pollution: SB 358 means Montana will also be a leader in backsliding and known for its ignominious failure to protect some of the last intact river ecosystems in the Lower 48.

In SB 358, Section 1, ‘Transition for nutrient standards,’ the bill clearly eliminates Montana’s duly-adopted and EPA-approved numeric nutrient criteria and implementing rules and requires the DEQ to adopt new nutrient pollution control rules framed as a so-called “adaptive management program.”² Further, SB 358 defines what the new adaptive management program for nutrient pollution control must include:

(2) The rules shall provide for the development of an adaptive management program which 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 waterbody.

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

This language is wholly divorced from requirements of the CWA, EPA regulations, or requirements of the MWQA. Congress directed states to establish water quality standards that “consist of the designated uses of the navigable waters involved and the water quality criteria for such waters based upon such uses.” 33 U.S.C. § 1313(c)(2)(A); 40 C.F.R. § 131.2. EPA

¹ See EPA Action Letter on Montana’s Numeric Nutrient Criteria and Variance Rules, Feb 26, 2015, pp 2.

² SB 358, Section 1.

regulations specify that “[s]uch criteria must be based on sound scientific rationale and must contain sufficient parameters or constituents to protect the designated use.” 40 C.F.R. § 131.11(a)(1). Because water quality criteria must be set at a level that protect the designated uses, a scientific determination, economic factors “are irrelevant” and states should not take them into account. *Miss. Comm’n on Natural Res. v. Costle*, 625 F.2d 1269, 1277 (5th Cir. 1980).

In short, water quality standards under § 1313 are purely science-based, ambient standards for protecting waterway health and designated uses. Science-based and protective water quality standards are foundational to sound implementation of the CWA and MWQA affecting, in particular, the second primary method of restoring and protecting our waterways: pollutant discharge elimination permits. Congress prohibited all pollutant discharges to waterways absent a permit, and water quality standards are a primary driver of those permit requirements. 33 U.S.C. §§ 1311(b)(1)(c) and 1342 (a)(1). *See also*, 40 C.F.R. § 122.44(d).

Conversely, SB 358 removes science-based goal posts for controlling nutrient pollution and cleaning up waterways degraded by nutrients, and seeks to adopt an ambiguous new regulatory program with a series of novel metrics that are both unproven and unrelated to ensuring protection of local water quality or attainment of designated uses.

First, we are greatly concerned that DEQ is actually carrying forward the proposed “adaptive management program.” In our experience this phrase signals an open-ended and purposefully ambiguous regulatory scheme that benefits the regulated community and externalizes the costs of major polluting sectors on the human environment. The proposed rule language, without necessary details, tells no different story. As discussed below, proposed New Rule 1’s AMP is completely detached from the CWA and MWQA and lacks any qualification(s) or certainty that such an effort could in fact adequately protect local water quality.

Second, we are concerned by the bizarre mandates SB 358 provided and which DEQ is bringing forward in its New Rule 1. Enshrining a balancing act of non-scientific factors in setting nutrient pollution controls is wholly inappropriate; point source pollution must be

controlled at levels necessary to satisfy applicable criteria and to ensure discharges do not cause or contribute to violations of water quality standards. A requirement to prioritize phosphorus reductions over nitrogen reductions is repugnant to a well-established body of expert science and will incentivize more harm to waterways - ample evidence proves that most Montana waterways are nitrogen-limited and nitrogen reductions from point sources are a leading cause of impairment (*see* citations appendix *infra*). Finally, creation and/or use of novel response variables under a purely narrative nutrient standard throws out the State's existing, proactive approach to nutrient pollution control in favor of a crisis management regime where attempts to address site-specific pollution problems occur only after excessive nutrient pollution has degraded a waterbody and imperiled attainment of its designated uses. This makes little scientific or economic sense as it is far more efficient – and cheaper – to prevent nutrient pollution problems than to try and fix them after they occur.

Proposed ARM 17.30.1304 “Definitions” Undermine Requirements of the MWQA & CWA

Below we discuss, line-by-line, proposed rule language. As a practical matter we are particularly concerned that DEQ has failed to provide a practicable approach to identifying, much less qualifying and quantifying, nutrient pollution on the watershed scale, and that the enormity of the AMP approach and corollary relaxation of otherwise required point source pollution permit limits will result in little or no progress in reducing nutrient pollutant discharges or adequately assuring attainment of designated uses as required by law. The suggested “incremental” approach does nothing but reinforce this dystopian prospectus. In addition, DEQ's bifurcated rulemaking approach - proposing broad brush strokes in New Rule 1 without corollary implementation specifics - makes it inefficient at-best, and disingenuous at worst, to provide effective public comment.

Proposed 17.30.1304(2)-(3) contains the definition of “adaptive management plan” and explicitly ties it to the mandates of an adaptive management program under Senate Bill 358. As

noted above, the proposed adaptive management program is predicated on unscientific and unlawful mandates and related directly to DEQ's attempt to eliminate its numeric nutrient criteria. We oppose these efforts individually and collectively as an effort to remove clear, proven, and effective goal posts for waterway protection based on best available science while simultaneously offering point source polluters relaxed, or potentially no, requirement(s) to control their respective pollutant discharges as necessary to ensure no violations of standards within receiving waters.

We also oppose the prioritization and emphasis on phosphorus reduction by rule. Readily available scientific literature, including the administrative record supporting adoption of Circular DEQ 12-A, show that nitrogen, not phosphorus, is the more common limiting nutrient of concern in Montana surface waters and therefore controlling both nutrient discharges should be a primary focus. Similarly, engineering literature shows that controlling phosphorus is achievable with currently available technology, but that such techniques are ineffective and/or unsuited to addressing nitrogen pollution. Thus, prioritizing phosphorus reduction without a commensurate and equal focus on nitrogen reductions will incentive the expenditure of finite public and private sector resources on technology incapable of addressing violations of water quality standards due to eutrophication, despite a body of evidence showing the need to control both nutrients in the overwhelming majority of cases. Such an approach is unscientific and an enormous disservice to the regulated community, much less taxpayers, who will bear the increased pollution burdens of this politicized rule priority.

“Incrementalism” is a hallmark of SB 358 and New Rule 1, yet it is a temporal concept completely absent from requirements of the CWA or MWQA. Point source nutrient discharges must obtain a MPDES permit which, among other items, must contain effluent limits, effective at the time of discharge, to ensure the discharge does not cause or contribute to violations of water quality standards. Compliance must be determined at the time of permitting, not at some future date. Polluted waters failing to attain designated uses must be designated as impaired and

TMDLs must be created and wasteload allocations implemented for point sources. The CWA and MWQA contemplate consistent monitoring and assessment of waterway health, of point source discharger compliance with respective permit terms, and discrete, targeted, and immediate actions as necessary to protect or restore local water quality. To the extent that a point source requires more time to comply with effluent limits, DEQ has the authority to impose a compliance plan. New Rule 1 would upend this thoughtful approach to protecting and restoring water quality. Indeed, the language of proposed 17.30.1304(3)(b) could be better interpreted as a race to the bottom where DEQ is proposing to remove stringent, proven, science-based goal posts for pollution permit decisions and, in their place, allow promises to work on other nutrient pollution sources at some to-be-determined time in the future through an unproven AMP. Doing so will allow more – not less – nutrient pollution to Montana’s waters, and is antithetical to the intent or requirements of the CWA and MWQA.

We also oppose 17.30.1304(3)(c)-(e) as contrary to requirements of the CWA and MWQA and lacking a proven scientific basis. Subjective assessments of “reasonableness” or “feasibility” and the interjection of new cost-benefit analyses on the basis of to-be-determined metrics do not satisfy requirements for MPDES permitting or the use of existing water quality data supporting existing pollution control requirements. These undefined regulatory concepts will lend themselves to being unenforceable due to vagueness. The promised arrival of New Rule 2, at some to-be-determined future date does not cure the fatal flaws of New Rule 1 or those of its originating statute SB 358.

Finally, subsection (e) fails to provide any compliance mechanism, essentially writing into law an aspirational “goal” of protecting and achieving beneficial uses of water without any corresponding enforcement backdrop. As discussed above, the AMP definition and corollary rulemaking language presumes the sole applicability of narrative nutrient criteria, which have been demonstrated by DEQ and EPA to be fundamentally incapable of adequately protecting designated uses of Montana’s waters. The specious, imprecise, and subjective nature of a

regression to narrative nutrient criteria will be exacerbated by the presence of unenforceable and aspirational “goals,” as opposed to objective compliance metrics for demonstrating adequate pollution control for a discharger or, conversely, clear metrics for assessing waterway health and/or restoration as required by the MWQA and CWA’s Integrated Reports and TMDL program.

In short, promises, good intentions, and regulatory ‘flexibility’ taking into account future regulatory paradigms and to-be-determined baselines do not satisfy mandatory MPDES permit requirements nor water quality criteria requirements, and will result in the backsliding of existing pollution controls for point source dischargers and sanction more, not less, pollution to local waters. These outcomes are contrary to the rule of law and offensive to management of Montana’s water pollution control programs in an anticipatory and preventative manner as necessary to protect vital water resources for future generations.

Adaptive Management is Not a Water Quality Standard Meeting the Requirements of 33 USC § 1313(c) or the Montana Constitution’s Guarantee to a Clean and Healthful Environment

New Rule 1 proposes an Adaptive Management Program through which existing point source dischargers may obtain relaxed nutrient discharge effluent limitations and, theoretically, non-point source nutrient pollution will be reduced. The proposed AMP lacks transparency, accountability, or enforceability and does not possess any clear connection to MPDES permitting or TMDL requirements. The majority of the AMP appears to emphasize ongoing monitoring, but fails to include specific details, especially regarding enforcement mechanisms, on how usage of an AMP through a MPDES permit will assure compliance with water quality standards, particularly when each section of New Rule 1 is rife with subjective and discretionary language.

We oppose section (1)(a)(i), requiring an AMP for every MPDES permit and, presumably, supplanting existing effluent limits. We also specifically object to DEQ requiring a monitoring – but not necessarily an implementation – plan. Monitoring is a means to an end –

not the end itself – and every action within a MPDES permit must be aimed at ensuring discharges from the point source do not cause or contribute to violations of water quality standards. Without an implementation plan requirement describing best management practices capable of demonstrating a discharges’ compliance, monitoring – much less a MPDES permit – is an empty vessel incapable of protecting local water quality.

We also object to the discretion afforded DEQ in determining, on any apparent basis, whether an implementation plan will be required. Language purporting to describe an implementation plan lacks clarity or any connection to MPDES permitting rules or requirements of the TMDL program, such as means for incorporating wasteload allocations into permit effluent limits. We are gravely concerned that subsection (1)(a)(iii), again, improperly prioritizes phosphorus reduction without a scientific basis and fails to provide specificity in how response variables are capable of assessing a permittee’s propensity to cause or contribute to violations of water quality standards. Similarly, we oppose affording a permittee discretion in selecting how or where they may hypothetically work on nutrient pollution in a watershed. Doing so is akin to the fox guarding the hen house and an unconstitutional and unlawful delegation of authority. DEQ must oversee and make final decisions on pollution control limits and afford meaningful opportunities for public participation and review as required by law. These keynote elements of informed decisionmaking are not addressed and are apparently abandoned by New Rule 1. “When no standards or guidelines are present, the exercise of the delegated power may result in “arbitrary and capricious” actions, “”dependent wholly on the will and whim”” of others.” *Williams v. Bd. Of County Com’rs.*, 2013 MT 243, 45, 308 P.3d 88, 97 (citing *Shannon v. City of Forsyth*, 205 Mont. 111, 114, 666 P.2d 750, 752 (1983).

New Rules 1 & 2 Will Not Comply with MPDES Permit Requirements

First, sanctioning an AMP that allows a point source to do less pollution control at its point of discharge in return for theoretical pollution reductions elsewhere is likely to incite local

“hot spot” pollution effects on receiving waters. In essence, allowing sacrifice zones in receiving waters in return for unverified pollution reductions elsewhere is a violation of the CWA and MWQA. The AMP concept of allowing watershed scale ‘offsets’ as proposed is contrary to EPA’s rules at 40 CFR 122.44(d), the intent of the MWQA and CWA in protecting “chemical, physical, and biological integrity,” Montana citizens’ rights to prevent unreasonable depletion of our environment, and DEQ’s duties to be preventative in managing water pollution control programs. It is undisputed that effective technology exists to control nutrient pollution discharges; allowing dischargers to avoid their duty to protect local water quality on the basis of participation in a specious, unproven new management paradigm when available science demonstrates existing, pervasive nutrient degradation of Montana’s waters is the height of folly.

Second, allowing a ‘trade-off’ with another nutrient source, without enforceable caps on the total amount of nutrient pollution loading, is nonsensical to achieving demonstrated local water quality improvement and contrary to the established monitoring, assessment and pollution clean-up programs of the CWA. Further, zero details or context exists on how such trade-offs comply with nondegradation policy; we can only assume that the New Rule 1 would incorporate and rely upon SB 358’s new nutrient categorical exemptions to nondegradation policy, in effect precluding the exercise of a fundamental component of water pollution control law. We categorically oppose this approach. Furthermore, we are also concerned by and oppose the concept of new pollution discharges being able to utilize an AMP, and the usage of AMPs within impaired waters in manners that would violate the prohibition of new discharges of pollutants of concern into impaired waters lacking a TMDL pursuant to *Friends of Pinto Creek v. EPA*, 504 F.3d 1007 (9th Cir. 2007).

Third, a recurrent theme in these comments, much less DEQ’s proposed rulemaking, is the imprecise and subjective nature of the new AMP, which is complicated by the regression to narrative nutrient standards and lack of adequate response variables. In short, MPDES permits are enforceable, with clear metrics for determining violations. No details are provided, and may

not be provided, on how non-point source nutrient pollution reductions can be counted, verified, or assessed. How is this process enforceable, much less transparent to the public, and how will we be able to demonstrate that water quality and designated uses are in fact protected? These critical questions remain unresolved and demonstrate that, at a minimum, New Rule 1 and its definitional ARM amendments should be withdrawn and reconsidered.

Conclusion

In summary, the only thing clear about proposed New Rule 1 and its corollary definitional ARMs is that DEQ is moving ahead, full-steam, in regressing to the use of narrative nutrient criteria, regardless of its legality or efficacy. It's also abundantly clear that DEQ will rely on and use new categorical exemptions for point source pollution discharges, and that it will attempt to launch a specious new adaptive management program sanctioning what is in essence unverified nutrient trading between point and nonpoint sources, without any accountability, enforceability, or transparency.

Doing so is counter to requirements of state and federal law and will result in subjective and weakened effluent limits for point source dischargers across the state, resulting in increased degradation of Montana's waters. DEQ cannot lawfully adopt a rule framework that fails to establish critical water pollution control elements compliant with requirements of the MWQA and CWA and therefore should abandon the proposed rule.

Respectfully submitted,

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Citations to Sources Relied Upon in Comments

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