



**UNITED STATES ENVIRONMENTAL PROTECTION AGENCY
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**SENT VIA EMAIL
DIGITAL READ RECEIPT REQUESTED**

Jon Kenning, Chief
Water Protection Bureau
Montana Department of Environmental Quality
jkenning@mt.gov

RE: Feedback on the proposed permitting process associated with the Nutrient Workgroup meetings

Dear Mr. Kenning:

The Environmental Protection Agency (EPA) has actively participated in Montana's Nutrient Workgroup meetings hosted by Montana Department of Environmental Quality (MDEQ) since Senate Bill 358 (SB 358) was signed on April 30, 2021. While EPA understands the draft permitting guidance is still being developed by MDEQ, we would like to share some concerns with MDEQ based on Nutrient Workgroup meeting materials provided prior to release of the draft rule package to the workgroup. These comments are preliminary and we will have more comments based on the draft rule package that will be shared with the workgroup on October 18.

1. Protection of the narrative criteria

MDEQ's proposed permitting implementation methodology does not appear to protect the narrative criteria and meet NPDES permitting regulations. 40 C.F.R. § 122.44(d)(1) requires that NPDES permits shall include any requirements necessary to "[a]chieve water quality standards established under section 303 of the CWA, including State narrative criteria for water quality." Such limitations must control all pollutants or pollutant parameters which are or may be discharged at a level which will cause, have the reasonable potential to cause, or contribute to an excursion above State narrative criteria for water quality. 40 C.F.R. § 122.44(d)(1)(i). As EPA explained when promulgating this regulation, "Effluent limitations must *attain and maintain* water quality standards in order to be consistent with the requirements of the Clean Water Act." 54 Fed. Reg. 23868, 23873 (June 2, 1989) (emphasis added).

MDEQ's proposed methodology does not appear to effectively attain or maintain the applicable narrative water quality criteria. Under the proposed methodology, MDEQ would use an in-stream response variable (e.g., chlorophyll *a*, dissolved oxygen fluctuation, etc.) to interpret the narrative criteria. Per MDEQ's proposed method, when an exceedance of the response variable is observed in the receiving water for an NPDES-permitted discharge, an effluent limitation for the response variable may be required in that permit. However, the proposed response variable appears to be linked directly to the narrative criteria such that an exceedance of the response

variable is an exceedance of the narrative criteria. Thus, the methodology appears to allow the narrative criteria to be exceeded prior to any ‘protections’ (i.e., effluent limitations) being put into place, and thus fails to attain or maintain the narrative criteria and fails to comply with 40 C.F.R. § 122.44(d)(1). This approach also fails to control the discharge of pollutants (i.e., total nitrogen and total phosphorus) that will cause, have the reasonable potential to cause, or contribute to an excursion above the narrative criteria. As discussed in #2 below, MDEQ has previously demonstrated that TN and TP are primary drivers of exceedances of the narrative criteria. The regulations require that where a pollutant has the reasonable potential to cause or contribute to an excursion of the narrative criteria, the permit must establish “effluent limits” for that pollutant. 40 C.F.R. § 122.44(d)(1)(vi). A trigger for potential regulation of that pollutant after an exceedance is not an “effluent limit” within the meaning of the CWA, as it does not itself restrict the discharge of any pollutant. *See* CWA Section 502(1) (defining “effluent limit” as a “restriction...on quantities, rates and concentrations” of pollutants discharged from point sources).

2. Total Nitrogen (TN) and Total Phosphorus (TP) Effluent Limits

Based on EPA’s current understanding, MDEQ’s approach has not clearly defined when TN and TP limits would be included in permits, or how those values would be determined. Because MDEQ is removing numeric criteria that are still scientifically defensible and protective, EPA expects an adequate level of assurance that MDEQ can identify protective levels of both TN and TP for implementation in CWA programs, including NPDES permitting. One way to provide such assurance would be to adopt a numeric translator for the narrative criterion in rule or to incorporate a numeric translator by reference. For example, MDEQ could adopt protective thresholds for response variables, that are scientifically defensible and protective of the applicable designated uses, in rule and incorporate by reference the technical documents that provide a reliable and consistent process for deriving TN and TP levels associated with response variable thresholds.

If MDEQ chooses another approach, it should include a procedure that establishes a transparent, reliable, and consistent mechanism for evaluating discharges for reasonable potential to cause or contribute to exceedances of translated nutrient levels and developing water-quality based effluent limitations for those permits where they’re needed to protect the designated use.

3. Protection of Downstream Uses

Because MDEQ must demonstrate that pollutants that not only cause, but also have “the reasonable potential to cause, or contribute to an excursion above . . . State narrative criteria for water quality,” are limited in the permit, the stream monitoring locations are critical. Nutrients can often have near-field effects on the receiving stream, but certain stream conditions could inhibit near-field effects while allowing effects further downstream. Because MDEQ is suggesting a response variable that is reactive to the nutrient loading, the process for choosing downstream monitoring location(s) and whether they will adequately protect downstream uses will be important.

4. Accountability/Enforceability

The proposed methodology appears to allow for in-stream response variables to eventually be implemented as permit limits. It is unclear how attainment of an in-stream response indicator would be enforced based on the information presented. The Adaptive Management Plan appears to be a permit requirement that requires the point source to itself control non-point sources. Neither the federal NPDES program or the state's regulatory authority allow for regulation of non-point sources – conflating the two in an NPDES permit potentially weakens the enforceability of the permit.

EPA is aware of the time and effort that MDEQ has put into the process required by SB 358. The intent of this letter is to highlight EPA's initial concerns and provide feedback on the process presented to the Nutrients Workgroup. EPA is happy to discuss options MDEQ could consider to address our concerns. If you have any questions or need further clarification, please contact Erik Makus at (406) 457-5017 or Makus.Erik@epa.gov.

Sincerely,

Judy Bloom, Manager
Clean Water Branch

cc: Amy Steinmetz, MDEQ Water Quality Division Administrator
Rainie DeVaney, MDEQ Permitting Section Supervisor
Myla Kelly, MDEQ Water Quality Standards Section Supervisor