

May 9, 2022

Director Dorrington
Montana Dept. of Environmental Quality
1520 E 6th Avenue
Helena, MT 59601

Dear Director Dorrington:

The undersigned organizations are both stakeholders in the Nutrient Working Group's Senate Bill 358 rulemaking process and Montana conservation organizations with direct interests in science-based water policy that protects designated uses of state water and provides our communities - and ratepayers - with regulatory clarity and clear water pollution control expectations.

We are sending you this letter to express our grave concerns with the current status and development of New Rule 2 and its associated Adaptive Management Program (AMP) pursuant to Senate Bill 358 (SB 358) and to request that you, as the Director, exercise your authority to address two critical, outstanding issues of this rulemaking.

First, we request that you immediately submit SB 358 and New Rule 1 to the Environmental Protection Agency (EPA) as revisions to Montana's water quality standards.

Second, we request that you direct your staff to develop the necessary scientific basis for a nutrient Best Management Practices (BMP) manual and associated verification procedures capable of informing and guiding a transparent, defensible, and practicable Adaptive Management Program.

The undersigned have participated, in good faith, for the past 9 months as stakeholders of the Nutrient Working Group (NWG) and invested significant time and resources into DEQ's development of a lawful, pragmatic, and effective rule package for controlling and reducing nutrient pollution that is and continues to negatively affect Montana waterways. However diligently expressed, our concerns and suggestions to the rulemaking have not led to actions that will help ensure the development of a lawful rule that could maintain and improve Montana's water quality or create progress addressing nutrient pollution, despite the fact that our concerns address fundamental requirements of SB 358 and New Rule 2.

We are mindful of the upcoming October 2022 deadline for concluding the nutrient rulemaking and acknowledge that time still remains to change course and make sure the rulemaking is lawful, 'done right,' and results in a framework capable of protecting Montana's waters and providing clear goal posts to all stakeholders. The best way for the Department to build a meaningful nutrient control program through New Rule 2 begins with resolving the two cornerstone issues discussed below.

Pending New Rule 2 Relies on SB 358's Revisions to Montana's Water Quality Standards, Yet Those Revisions Have Not Been Approved or Denied by the EPA, Creating Unnecessary Confusion and Undermining the Rulemaking Process

Our first concern regards the Nutrient Working Group's failure to agree to a conceptual, lawful framework for nutrient pollution reduction. In short, there is no consensus between NWG stakeholders, and no assurances from DEQ staff, that the proposed requirements of New Rule 2 and its Adaptive Management Planning component comply with baseline requirements of the federal Clean Water Act. As you know, this obligation is non-discretionary: the Montana Water Quality Act requires the Department to faithfully implement the Clean Water Act.

SB 358's plain language requires an effective immediate date for (a) revocation of numeric nutrient criteria and (b) expansion of new nonsignificance criteria applicable to nutrient discharges. It also requires DEQ to promulgate new rules and an adaptive management program for nutrient pollution to state waters reliant on several concepts untethered to CWA requirements or EPA regulations. The undersigned have repeatedly asked DEQ to clarify how it can move forward with a rulemaking process that must live within the four corners of federal law, but which does not yet have a stamp of approval from the EPA.

Although no party disputes the applicability of the CWA and EPA regulations to both the process of setting water quality standards or to the MPDES permit program, neither clarity nor consensus exists at the Nutrient Working Group that the intent of SB 358, or requirements of New Rule 2 as currently proposed, pass muster under federal law. This fundamental disconnect is creating serious uncertainty for the entire rulemaking process and, to the extent no party seeks to resolve this preliminary determination, is undermining the credibility of DEQ's rulemaking.

EPA is also expressing the same fundamental concerns to DEQ. The EPA's October 15, 2021 Letter and April 2022 Letter to DEQ both identify fundamental legal flaws in the proposed rulemaking concept, including but not limited to:

- The inadequacy of narrative nutrient criteria to protect designated uses of water;
- The unscientific mandate to prioritize phosphorus reductions;
- The inadequacy of DEQ's proposed 'reasonable potential analysis' threshold and process for MPDES nutrient pollution permits under New Rule 2.

At their most basic level, EPA's concerns mirror the conservation community's concerns with a new rule framework that may fail to comply, at the outset, with requirements of federal law. It is in no one's best interest (let alone the interest of water quality, our fisheries, or taxpayers) to needlessly prolong confusion as to applicable pollution control requirements at law. Indeed, a practicable and legal path forward is both reasonable and desirable.

For this reason the undersigned respectfully request that you, as Director of the Department of Environmental Quality, submit SB 358 and New Rule 1 to the EPA for consideration as revisions

of state water quality standards. Doing so is contemplated by the plain language of 33 U.S.C. § 1313(c)(2)(A): “[w]henver the State revises or adopts a new standard, such revised or new standard shall be submitted to the [EPA] Administrator.”

SB 358 and New Rule 1 are clear on their face as to the predetermined conceptual outcomes of the ongoing nutrient rulemaking, and the statute itself explicitly states the Legislature’s intent that the bill be self-executing and effective immediately upon Governor Gianforte’s signature last April 30, 2021. Thus it is both timely and appropriate for DEQ to submit these revisions of water quality standards to EPA for consideration.

DEQ has the ability to assure all stakeholders receive the desired regulatory clarity, in sixty days or less, should it simply submit SB 358 and New Rule 1 to EPA for consideration as a revision of state water quality standards. The undersigned urge you to take the initiative and submit those sections of state code and rule to EPA for consideration and action as soon as possible to avert further delay, confusion, and the unnecessary use of state resources in conducting a stakeholder process and set of rulemakings that lack clear goalposts. If the Department acts quickly, it could submit these revisions and receive clear direction from EPA *before* its rulemaking deadline this Fall 2022. We urge you to do so.

As Proposed, New Rule Two’s Adaptive Management Program Does Not Satisfy Requirements of State or Federal Law

Second, we write this letter to express our conceptual support for an Adaptive Management Planning (AMP) rule that addresses diverse sources of nonpoint source nutrient pollution to Montana’s waterways, but also to express our serious concerns that, as proposed, New Rule 2 fails to include the requisite science-based vetting of Best Management Practices, watershed modeling, and verification procedures necessary for a practical or lawful AMP framework.

Senate Bill 358 directs DEQ to develop an Adaptive Management Program for addressing nutrient pollution from point and nonpoint sources. On April 13th the Department shared a draft version of New Rule 2, including how it foresaw implementation of the AMP component. The NWG discussed this draft rule version at both the April 13th and April 27th meetings, with stakeholders from both the regulated community and conservation community expressing serious reservations about the draft language. Many of the concerns related to the still-ambiguous and undefined expectations of the AMP, and the extent to which the AMP must comply with state and federal pollution control law.

For context in discussing the problematic nature of the AMP, it is important to consider how DEQ has crafted the proposed New Rule 2 language. Under draft New Rule 2’s flow chart presented to the Nutrient Working Group, if a point source has reasonable potential to cause or contribute to violation(s) of nutrient water quality standards, it has the discretion to choose one of three means of compliance. A discharger may elect to pursue a traditional compliance plan, may elect to pursue an individual variance, or may elect to implement a nutrient adaptive management plan. And here lies the rub. The ability of a MPDES point-source discharger with

reasonable potential to violate nutrient standards to utilize an adaptive management plan for compliance (e.g., a requirement to, otherwise, reduce its pollution contributions to receiving waters) means that any terms of the adaptive management plan are, *de facto*, effluent limits subject to requirements of the CWA and EPA regulation.

It is well-established that Best Management Practices (BMPs) can constitute effluent limitations under a MPDES permit. However, to pass muster at law those BMPs must possess sufficient transparency, accountability, and enforceability capable of assuring that nutrient pollution reductions in-fact occur and local water quality is protected. These core requirements cannot be determined “down the road,” but must be determined up-front within the rulemaking.

Draft New Rule 2’s language and scant discussion of the AMP or ‘to-be-determined’ guidance do not provide any such reasonable assurances. The lack of detail concerning how AMPs will be implemented, much less the scarcity of detail concerning how/when/where nutrient reductions from non point-sources will be achieved or measured, undermine the AMP program as a lawful MPDES permit compliance tool. At a minimum an AMP should include an initial scope of work that includes (a) establishing nutrient pollutant loading baselines on the watershed scale through modeling; (b) development of a nutrient BMP manual and corresponding BMP verification procedures; and (c) a science-based offsets policy for point to nonpoint trading.

In short, DEQ must front-load New Rule 2 and its AMP sections with the development of verified Best Management Practices (BMPs), baseline assessment through robust modeling and data collection efforts, and develop a priority process for nonpoint source reduction activities to assure its AMP remains compliant with requirements of the CWA and the Montana Water Quality Act. It is wholly inappropriate to launch a nutrient pollution control program aimed at addressing non point-source pollution without any level of detail about how this laudable goal can be accomplished. Further, we offer that because New Rule 2 contemplates using an AMP as a compliance tool for MPDES permittees, a program bound to apply requirements of the federal Clean Water Act, DEQ does not have the discretion to figure out these details at some undetermined future date.

We urge you as Director to immediately discuss these concerns with your staff and assure necessary resources are allocated to build a practical, transparent, and lawful AMP capable of protecting local water quality.

Conclusion

We appreciate your careful consideration of our concerns and again urge you to (a) submit SB 358 and New Rule 1 to EPA as revisions of state water quality standards, and (b) direct your staff to focus on developing the body of science and procedures essential to supporting a practical, transparent, and effective nutrient Adaptive Management Program for nonpoint source pollution.

Continuing to ignore the basic steps outlined above unnecessarily puts our water quality at risk and is a disservice to the NWG participants and, ultimately, Montana citizens. We respectfully request a response to this letter on or before the NWG meeting of May 25, 2022.

Sincerely,

Guy Alsentzer
Executive Director
Upper Missouri Waterkeeper

Derf Johnson
Clean Water Program Director
Montana Environmental Information Center

David Brooks
Executive Director
Montana Trout Unlimited

Andrew Gorder
Legal Director
Clark Fork Coalition

Kristin Gardner
Chief Executive and Science Officer
Gallatin River Task Force

Wade Fellin
Owner, Big Hole Lodge
Fishing Business Representative, NWG

CC:

Region 8 EPA, Montana Office