***Submitted electronically to: MAR17-433rulemaking@mt.gov***

Montana Dept. of Environmental Quality
Water Protection Bureau
1520 E. Sixth Ave
Helena MT 59620

RE: Comments In Opposition to Proposed Revisions to Montana Ground Water Pollution Control System Permits, MAR17-433

Dear DEQ:

Please accept this comment letter on behalf of Upper Missouri Waterkeeper and its membership concerning the Department's proposed revisions to its groundwater discharge permitting rules.

As described herein the proposed rulemaking is contrary to the Water Quality Act's purposes and express mandates, violate mandatory public participation requirements, attempt to sanction new categorical exclusions from Nondegradation Policy for types of septic treatment systems, and generally reflect unlawful and unscientific presumptions that residential wastewater discharges constitute insignificant impacts affecting local water quality.

We request the Department forgo finalizing the rule and, instead, re-evaluate the scientific and legal basis for its proposed changes through a stakeholder working group. Doing anything otherwise opens the Department to unnecessary litigation and certainly will not achieve the desired ends of improving the groundwater permitting system in terms of efficiency, clarity, or assuring the protection and maintenance of local water quality and beneficial uses.

**New Rule 1: Continuation of Expiring Permits**

We strenuously object to adding language to groundwater permitting rules allowing for indefinite pollution permit extensions. As written the proposed rule would allow the Department to short-circuit the periodic permit renewal periods mandated under ARM 17.30.1032, resulting in continuation of potentially inadequate pollution control requirements for polluting activities, no chance to re-evaluate conditions in receiving or downgradient waters, and giving short shrift to meaningful public participation.

Across Montana's river valleys there is a striking trend of increased nutrient pollution of groundwater, and so too a corollary and consistent increase in violations of water quality standards and impairment determinations for surface waters. The Montana Supreme Court, much less the state's resource agencies, have long understood that shallow groundwater receiving wastewater discharges is usually hydrologically connected to surface waters. The proposed rule

ignores the policy and scientific implications of sanctioning existing groundwater discharges, or future groundwater permits, with inadequate effluent limits despite potentially degraded conditions in receiving or downgradient waters in favor of alleged administrative convenience and parity with MPDES permitting requirements.

Put simply, Montanan's inalienable right to a clean and healthful environment and adequate remedies at law does not allow DEQ the discretion to impose indefinite administrative continuance procedures for polluting activities. Adding explicit administrative continuance procedures to groundwater discharge rules will unlawfully deprive the public of its legal right to review, comment, and request public hearings on the renewal of such permits.

**Proposed 17.30.1001 "Definitions"**

The agency has proposed a new definition of "cumulative" to mean "the total nitrogen load from the public sewage systems reviewed and approved by the department under a common design plan or serving a common development." There are several problems with this proposed definition:

1. The proposed denotation of 'cumulative' is a narrowed interpretation of how the word is commonly understood within environmental and water resource law, much less by the dictionary. DEQ's definition would limit the term's scope to solely entail nitrogen pollutant loads from public sewage systems. Under this definition, the term would limit "cumulative" groundwater discharge permit evaluation impacts to one pollutant (despite wastewater containing several, if not dozens, of potentially harmful pollutants) and limited review to only one sector's discharge (the new 'public sewage system' definition under the Public Water Supply, Distribution, Treatment Act).

   This definition does not faithfully apply mandates of the Montana Water Quality Act (MWQA) in assuring the protection and maintenance of high-quality water and uses thereof. By narrowing the scope of review for a pollution permit decision, this 'cumulative' definition would create a self-fulfilling prophecy where most pollution discharge permits from development will only look at direct wastewater impacts on local water quality on a given parcel of land. Because nutrient pollution standards in groundwater are far less stringent than those for surface water, limiting the scope of review to wastewater impacts solely on a given land parcel means most discharges would be deemed legally nonsignificant, exempting them from further review using a standardized level of treatment, without examining true cumulative impacts offsite.

   DEQ's proposed 'cumulative' definition thus conflicts with the MWQA, which requires that each new or increased source of pollution be evaluated and conditioned as necessary to protect local water quality and ensure no degradation, including examination of combinations of pollutants from several sources within the same general area. See MCA 75-5-301(5), 75-5-303. Conversely, the 'cumulative' definition as proposed would undermine that mandate by moving the goal-post of discharge permitting to ignore impacts outside the project area when those types of impacts are expressly part of the mandatory permitting analysis.

Examples from other environmental laws show DEQ's proposed definition of 'cumulative' is both scientifically incorrect and improper as a matter of law. For example, under the Montana Environmental Policy Act (MEPA) 'cumulative' refers to the proposed action's collective impacts on the human environment within the borders of Montana when considered in conjunction with other past, present, and future actions related to the proposed action by location or generic type. MCA 75-1-220(4). The MWQA requires protection and maintenance of high-quality water and uses of water, and implementing rules require the evaluation of "cumulative impacts or synergistic effects," analyses that necessarily evaluate the surrounding environment and other similar activities that, in conjunction with the proposed permit, could cause degradation. See MCA 75-5-303, ARM 17.30.715(2). DEQ's proposed definition of "cumulative" is untethered to either of these longstanding definitions and uses of the phrase "cumulative."

Similarly, the Army Corps of Engineers 404(b)(1) Guidelines for issuing permits to dredge or fill waters of the U.S. under the federal Clean Water Act contemplate cumulative impacts as focused on "the changes in an aquatic ecosystem that are attributable to the collective effect of a number of individual discharges of dredged or fill material." 40 CFR § 230.11(g). This denotation implicates considering impacts outside the project boundaries. Likewise, in evaluating permits for Underground Injection Control EPA considers "the cumulative effects of drilling and operation of additional injection wells . . . during evaluation of the area permit application," and EPA is authorized to deny injection permits on the basis of cumulative impacts under 40 C.F.R. § 144.33(c)(3). Again, the thrust of agency analysis is not confined to the project area but necessarily includes evaluation of the surrounding environment and consideration of the proposed action in conjunction with existing other sources of harm.

2. The proposed definition of "wastewater" continues the flawed approach of attempting to shoehorn groundwater discharge permitting rules into the open-ended and less-stringent permitting process under the Public Water Supply, Distribution, and Treatment Act, as opposed to separate – and more stringent, broader scope – requirements under MWQA. Instead of narrowing the definition and attempting to relegate groundwater discharge permitting to consider evaluations under the Treatment Act, any rule amendments should include a suitably broad definition of "wastewater" that unambiguously ensures equal agency consideration of pollutant discharges to state waters under the MWQA.

3. The agency's proposed rationale for "why" these changes are necessary actually illuminates a better, alternative means of fulfilling the ostensible goal. The agency argues that a primary goal in its new "cumulative" definition is ensuring appropriate determination of " cumulative nitrogen load for purposes of permitting requirements, making nonsignificance determinations, and applying the State of Montana's nondegradation policy."

   However, there are less invasive, and more scientifically and legally defensible means, of accomplishing that goal. Specifically, if the primary concern is ensuring that no project's

wastewater discharges escape permitting by virtue of their volumetric size, or based on several distinct discharges relevant to the same plan of design being captured within a permitting decision, the agency could easily use the term "aggregate" instead of "cumulative."

Black's Law Dictionary defines "aggregate" as "formed by combining into a single whole or total, an assemblage of particulars." As-applied to proposed 17.30.1022(1)(d), the agency could accomplish the desired outcome by stating "wastewater discharges under a common design plan or serving a common development that, in the aggregate, discharge less than one pound of total nitrogen per day…" (proposed language underlined.) Similarly, 17.30.1022(2) would be amended to state "Aggregate total nitrogen loads for permit exclusion." This alternative term achieves the agency's expressed purpose without running afoul of contrary application of the term "cumulative" under the WQA, MEPA, NEPA, the CWA, the UIC rules, or persuasive case law authority from the Montana Supreme Court and several federal appellate courts.

**Proposed 17.30.1022 "Exclusions from Permit Requirements"**

We object to the proposed change of evaluating discharges in concentration form, to a mass load form. First, Nondegradation Policy relies upon evaluations of pollutant concentrations, and so too numeric nutrient criteria for downgradient surface waters remains best available science incorporating clear, conservative metrics for evaluating discharge potential for degradation and violations of water quality standards. Moving to a mass-based evaluation would, under DEQ's corollary new definitions of conventional and advanced treatment systems and based on its past practice, operate to create new wastewater discharger classes per se excluded from Nondegradation Review. This approach exceeds DEQ's discretion by exempting new categories of activities with the potential to cause or contribute to violations of water quality standards or cause degradation of high-quality water from otherwise mandatory evaluation under 75-5-303 and ARM 17.30.705, 17.30.715.

While DEQ can and should consider the aggregate pollutant discharges from a common plan of development in determining whether a permit is required, switching to a mass based approach will promote new exempt classes of discharges without monitoring, without knowledge of baseline water quality health, and without any enforcement or oversight by the Department, and certainly will not promote a science-based approach to ensuring the protection and maintenance of high-quality waters or ensuring wastewater discharges from development do not cause or contribute to violations of water quality standards.

**Proposed 17.30.1024 "Review Procedures" & 17.30.1040 "Public Notice"**

We vigorously object to DEQ's proposed removal of 17.30.1024(5)-(9). As proposed the draft rules would only allow for a limited time frame for considering a hearing request, and potentially an online-only two week notice regarding proposed. We are unsure whether DEQ is intending to wholesale remove any mandatory 30-day public comment period for a proposed discharge permit - the traditional approach, whether it intends to shorten a comment period to solely two weeks (a

proposal we also object to as undermining effective comments from the public or experts), or whether it intends to only provide for requests of public hearings.

Removing, or limiting, explicit public participation rules and timeframes on draft groundwater discharge permits, runs afoul of constitutional rights to know and participate in any non-ministerial agency action. DEQ is without authority to eliminate meaningful opportunities for public participation on the consideration or issuance of groundwater discharge permits. See MCA 2-3-103, Art. II, Sec. 8-9, Mont. Const. Moreover, the rules lack any cross reference to supplemental MEPA reviews, also mandatory components of the agency review for any proposed discharge permit.

Because the proposed amendments to review and public notice are incoherent at-best, we strongly encourage DEQ to stop its rulemaking, reconsider those provisions, and ensure explicit and meaningful public participation opportunities are made clear in rule.

**Lastly**, we object to DEQ stopping the practice of informing sister federal agencies of its groundwater permitting practices. Limiting the knowledge or opportunity of sister agencies to know about a proposal, review its contents, and provide unique feedback on how said proposal may affect resources, activities, or plans within its jurisdiction is short-sighted and represents a myopic approach to watershed management. DEQ should retain its commitment to providing notice and opportunities to comment on proposed groundwater discharge permits to sister agencies, particularly given the default presumption in most Montana river valleys of groundwater-surface water connectivity, the vast array of public lands within the state, the ongoing and sadly increasing rate of degradation and impairment of surface waters, and those sister agencies' unique and valuable understanding of how new groundwater discharges could result in harm or unintended consequences for public health, planning, or the environment.

**Conclusion**

For all the foregoing reasons we object to DEQ's proposed revisions to its groundwater discharge permit rules and request the agency shelve this proposal, open a formal stakeholder group on this endeavor, and reconsider the validity and need for the offending proposals based on their lack of scientific, public policy, and/or legal foundations.

Respectfully submitted-

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