



April 23, 2024

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 Water Quality Rulemaking,
MAR17-439 (March 8, 2024)

DEQ:

Please accept this comment letter on behalf of Upper Missouri Waterkeeper and its members concerning the Department's proposed revisions to its water quality rules, including in particular new categorical exclusions from Nondegradation for nutrient groundwater discharges.

As described herein the proposed rulemaking is contrary to the Water Quality Act's purposes and express mandates insofar as it creates categorical and unsupported new exemptions from nondegradation review and generally reflects speculative and unscientific presumptions that wastewater discharges constitute insignificant impacts on local water quality. While we understand the Legislature's directives created through Senate Bill 285 direct certain actions, the Department must still faithfully implement mandatory imperatives of the Constitution, which is to implement a system of pollution control capable of protecting a 'clean and healthful environment,' and reflecting agency processes that are 'anticipatory and preventative' in controlling and abating unreasonable pollution of the environment. As described below this rulemaking is counter to those constitutional imperatives and should be abandoned.

We request the Department forgo finalizing the proposed rule and, instead, re-evaluate the scientific basis for its proposed changes. Doing anything otherwise opens the Department to

unnecessary litigation and certainly will not achieve the desired ends of improving the regulation of nutrient-laden wastewater discharges based on sound science, or the protection and maintenance of local water quality and beneficial uses.

Proposed 17.30.508 - Specific Restrictions for Ground Water Mixing Zones

We support the addition of the qualifier "or proposed" drinking water supply well. Ensuring the Department has clear authority to consider the impacts of permitting and/or licensure of groundwater pollution discharges on both existing and proposed drinking water supplies equips the agency with unambiguous authority to protect sensitive beneficial uses of water.

Proposed 17.30.517 - Standard Mixing Zones for Ground Water

517(1)(b) We object to changing the term "drainfield" in the ARMs to reflect the use of "absorption systems" as used in Circulars. The term drainfield is a correct denotation of the subject-matter: a subsurface waste disposal technique using a drainfield.

Absorption system, despite already in use in related Circulars, carries unhelpful connotations related to groundwater "absorbing" pollutants, which is simply not true as regards many pollutants of concern in subsurface waste disposal system, including but not limited to nitrogenous compounds and e.Coli. These pollutants are not "absorbed" as the term is scientifically understood. Rather, these and other pollutants of concern can become diluted in their concentrations, or chemically transformed in certain circumstances. Further, use of the term "absorption" will not improve public understanding or engagement in Dept. decision-making, and may in fact create more confusion. For all these reasons we oppose the proposed diction

change and instead suggest the Dept. correct the circulars with the broader, and more accurate, vernacular of "drainfields."

517(vi) We oppose the addition of this subsection. The MEANNs approach is not a peer-reviewed approach based on accurate assumptions, and is not appropriate to developing a defensible basis for determining new groundwater discharges of nutrient pollution will, or will not, individually or in the aggregate, cause or contribute to violations of water quality standards or degrade high-quality water, the explicit purposes of Nondegradation Policy. Neither the USGS nor the EPA have approved of MEANNs or its suitability or accuracy in any formal document. *See also* discussion of flaws within MEANNs, *infra*.

517(1)(ix)(A) The proposed language would broaden allowable mixing zones from 100' under existing rules, up to 500'. There is no scientific basis provided for why allowing a 5-fold increase in an allowable mixing zone - which itself represents an ongoing violation of high-quality state waters - is appropriate, how it adequately protects beneficial uses, or how it may create unintended consequences in terms of drainfield pollution discharging in unlawful volumes/concentrations onto other private property, or the potential for such new mixing zones to exacerbate cumulative pollutant loading to downgradient surface waters, and thereby cumulatively or synergistically with other pollution sources, cause degradation.

Further, the Dept. cannot delegate its authority on the appropriateness of a drainfield size to an applicant, as that determination is solely the province of DEQ and must be based on sound scientific rationale that implements DEQ's anticipatory and preventative public trust duties under Art. II, and Art. IX, of the Montana Constitution. The proposed language allows the applicant to select the drainfield size and provides scant sideboards for DEQ to limit and/or deny foreseeable

requests for maximum 500' drainfield lengths time and again. To the extent DEQ seeks to allow flexibility for drainfield dimensions respective to particular conditions, it should codify the conditions appropriate for a particular drainfield as opposed to allowing applicant's to proposed drainfields based upon a to-be-determined set of criteria, all of which is also not subject to mandatory public notice or participation.

These same concerns are present in proposed 517(ix)(B), which would sanction applicant's unilaterally determining the appropriateness of, again, a potentially exponentially larger drainfield. The reference to 800gpd in discharge volume is arbitrary and lacks any scientific basis.

Proposed 517(1)(ix)(C) is equally problematic as it lacks a scientific basis for determining commercial, multiple-user, or public wastewater disposal systems discharging residential strength wastewater at or below 800 gpd can have an exponentially larger drainfield.

517(1)(x) - The Department should revise this section to clarify that groundwater monitoring downgradient of a mixing zone should be mandatory, as opposed to discretionary on a case-case basis. The penultimate purpose of Nondegradation Policy is that of assuring the maintenance and protection of existing, high-quality state waters, and so too the prohibition against authorizing discharges of pollution that could degrade high-quality water. The agency cannot faithfully implement those imperatives without requiring representative monitoring of polluting activities, those requiring a discharge permit and those potentially determined nonsignificant. Put another way, without understanding the ecological baseline and synergistic impacts - offsite and downgradient - of pollution discharges, the agency cannot assure protection and maintenance of high-quality water, nor can it make an informed decision as to whether a proposed activity will or will not cause or contribute to unlawful degradation. For all these reasons the Department

should amend its rule language to require as a baseline representative monitoring of pollution discharges at the point of discharge and downgradient of any mixing zone.

517(2) - We oppose the adoption and incorporation of Circular DEQ-13, Policy for Nutrient Trading (2013). Among other issues DEQ-13 does not contain a working model for estimating nutrient pollution attenuation; rather, it presents a generalized table with gross estimates for alleged denitrification, and does not account for variability in oxygen within different substrate; changes in soil pH (necessary for denitrification); or reconcile the lack of carbon content in many soils, including clay, and how the lack of carbon also affects denitrification; or changes in temperature, or how temperature variability also affects denitrification.

Furthermore, neither the undersigned, or the general public, have been shown the scientific basis or any explanation of why that circular's table is appropriate for the purposes of understanding nutrient pollution discharge off a project site and their impact(s) on downgradient surface water, or in terms of their ability to violate numeric nutrient criteria in hydrologically connected surface water, or how its methods are capable - or not - of assessing cumulative impacts or synergistic effects of other nutrient pollution sources within the same hydrologic unit. The undersigned's review of MEANNs as a stakeholder in the Subdivision Task Force indicates that DEQ believes its in-house, non-peer reviewed estimate process is appropriate, but that so too the process lacks critical review and verification, and relies on several fallacies undermining its efficacy. As such we object to the incorporation of MEANNs as an appropriate tool for understanding and controlling pollution sources that can cause or contribute to violations of water quality standards and/or constitute prohibited degradation except as allowed under 75-5-303.

Proposed 17.30.715 - Criteria for Determining Nonsignificant Changes in Water Quality

Generally we object to the proposed expansion of new categorical exclusions for entire types of subsurface wastewater pollution as these new exclusions are not narrowly tailored to a compelling state interest, congruent with unambiguous statutory imperatives, nor defensible based on substantial evidence. Further, we object to the proposed expansion of new nonsignificant categories of pollution discharges that would, as per se nonsignificant discharges, apparently not be subject to public participation requirements. DEQ is required by the Public Participation in Government Act and the imperatives of the Montana Constitution to afford the public both knowledge of its decision-making, and an opportunity to provide meaningful comment in that decision-making process before a decision is rendered. The proposed rules here would remove an entire subsector of polluting activities from public notice or comment despite their potential to potentially cause or contribute to violations of water quality standards or degradation of high-quality waters, and as such these new proposed categorical exclusions violate not only citizens' rights to a clean and healthful environment and to adequate remedies at law, but also their fundamental rights to know and to participate in agency decision-making.

715(1)(g) The Department provides no explanation of the appropriateness of removing a mathematical analysis for finding nutrient concentrations outside a mixing zone significant and such discharge being subject to nondegradation review under 75-5-303. The existing language is analogous to implementing rules from the federal Clean Water Act's Antidegradation Policy and NPDES Permit Writers Manual, which stand for the proposition that there must be an evaluative process for determining how individual discharges can, based on assimilative capacity of receiving waters, become significant and cause degradation and/or harm, and therefore are

properly subject to Nondegradation Policy analysis. Here, DEQ proposes to remove such an evaluative process with no replacement. Doing so would in effect remove a scientific, criteria based process for determining the appropriateness of a proposed discharge based on measured effects offsite, and based on baseline conditions. Removing this language would limit the agency's ability to be preemptive or anticipatory in its wastewater discharge consideration process, and removes a scientific means for limiting "exceptions to the rule." We oppose the removal of this language particularly given DEQ has no analogous replacement.

715(4) We oppose this rule section. First, revised 715(1)(g) would require the exceedance of criteria in Circular DEQ-7 to occur before determining a subsurface wastewater discharge "significant". This inverts the regulatory process of controlling unreasonable degradation and depletion of the environment, and allows potential degradation to occur before any meaningful permitting or regulatory review. By definition if a discharge causes or contributes to exceedance of a criteria under DEQ-7, it is contributing to unlawful degradation and is also significant, and should be subject to MCA 75-5-303 and nondegradation review. The proposed rule amendments reflect an unscientific and purely reactive approach that is 180 degree opposed from the constitutional imperatives of the Water Quality Act, which do not require our waters experience degradation before DEQ take action to restrict and control pollution.

715(4)(a)(i)-(ii) - There is no scientific basis for exempting wastewater discharges that lie 1/4 mi to 1/2 mi from a surface water as nonsignificant and not subject to Nondegradation Policy. The proposed rules also fail to provide a peer-reviewed, evidentiary basis for demonstrating that a wastewater disposal system satisfying criteria in 715(4)(a)(ii)(A)-(C) mean, in fact, that such a discharge will not cause or contribute to violation of standards or harmful pollution events in hydrologically-connected, downgradient surface water. As such the proposed

criteria are arbitrary and capricious. The vast majority of soils proximate to Montana surface waters possess hydrology that is connected to shallow groundwater, whether directly or indirectly. Shallow groundwater may quickly move toward the surface water, or the surface water may lose in certain reaches and buttress shallow groundwater, only to return to the surface water farther downgradient. The arbitrary setbacks placed in DEQ's rules are untethered to hydrologic evidence or demonstrations of how such criteria can fulfill the plain purposes of MCA 75-5-301, 303.

715(4)(b) - The rule lacks any scientific basis for determining wastewater disposal systems located < 1/2mi from a state surface water, or systems with an absorption trench lower in elevation than all downgradient surface water within 1/2 mi of the system, will not cause or contribute to violations of water quality standards or cause degradation in hydrologically-connected surface waters. DEQ and the Legislature may not adopt rules that contravene the purposes of the Montanans right to a clean and healthful environment, nor ignore the unambiguous mandate that adequate remedies exist to prevent unreasonable degradation and harm to the environment.

Under the proposed rules and depending on the load of a septic system, distance from a hydrologically connected surface water does nothing to assure that pollutant fate and transport will not cause or contribute to violations of standards. Even assuming the rudimentary assumptions of DEQ-13 tables are correct, a fact we dispute, those tables indicate that up to 50% denitrification occurs in approximately one mile of subsurface travel. Under DEQ's proposed rules, a Level 4 system discharging 7 mg/L total nitrogen would then be capable of contributing chronic nitrogenous discharges to a connected surface water at approximately 3.5 mg/L. The numeric nutrient criteria for most wadeable streams in Montana remains at or near .3 mg/L TN.

Thus under this simplistic hypothetical, DEQ's rules would sanction the addition of dozens, if not hundreds, of subsurface waste disposal systems each contributing discharges that do not exceed DEQ-7 criteria, and being 1/2 mi or more removed from a hydrologically-connected water would be deemed nonsignificant and exempt from discharge permitting or nondegradation review, and yet in-fact would all be contributing nutrient pollution loads capable of violating water quality standards in receiving waters.

Furthermore, the criteria of proposed 17.30.715(4)(a)-(d) do not reflect a scientific basis demonstrated to fulfill the statutory imperatives of the WQA per 75-5-301 or 75-5-303. Ironically, DEQ's notice states that the proposed criteria " consider soil type, mixing, nitrogen attenuation, the distance between the subsurface discharge and downgradient surface water, and the comparative elevation of the discharge and downgradient state surface water within 1/2 mile of the absorption system," yet fail to provide any evidentiary basis for demonstrating how those criteria are capable of preventing degradation of high-quality state water, the exact purpose of the WQA's nondegradation policy. While proposed (4)(b) provides criteria considering elevation and distance between a discharge and surface water, there is no evidence that the 1/2 mi distance reflects any scientific evaluation of the degradation potential of a proposed discharge. Without an evidentiary basis for determining setbacks as capable of protecting and maintaining water quality per 75-5-303, the proposed rule section is unlawful and would conflict with citizens' right to a clean and healthful environment, and to adequate remedies capable of preventing unreasonable depletion and degradation.

Similarly, proposed 4(c) may well create "consistency in determining whether surface water nonsignificance assessments are required for wastewater systems", yet here again this criteria does not reflect a scientific basis for exempting a particular subset of polluting discharges

from otherwise mandatory requirements to protect high-quality water. Last but not least, new 4(d) creates a system for determining mixing zone dilution and nitrogen attenuation. The rule explains that this section provides a method for estimating a reduction in phosphorus or nitrogen loads from a groundwater discharge using site-specific data and modeling. Ironically, this section does provide consistent metrics, but the appropriateness of those metrics as capable of fulfilling the plain statutory mandates of 75-5-301/303 and the constitutional imperatives they implement is highly specious. Put simply, the proposed rules carve out new categorical exemptions from nondegradation policy without science demonstrating that these new pollution inputs will not cause or contribute to degradation or violations of water quality standards either alone, or cumulatively or synergistically with other sources of pollution.

Problems with reliance on the MEANNS "model" and Circular DEQ-13

- Reliance on MEANNS is inappropriate, unscientific, and lacks any demonstration of such procedures' ability to accurately assess nutrient pollution fate and transport subsurface to surface waters.
 - It relies on NRCS soil class types that are applicable to stormwater management design and soil compaction reference points, not assimilative capacity of nutrients. Indeed, the four HSG categories are relevant to runoff, percolation potential, and soil saturation during long-duration storms, not specific to subsurface waste disposal.¹
- Field studies cited by MEANNS show at least 3 orders of magnitude variation in denitrification rates, meaning the values produced under MEANNS for denitrification could be incorrect by more than 3 orders of magnitude. See MEANNS, p.4
- MEANNS makes a number of categorical assumptions regarding soil, vadose zone, and aquifer denitrification that, when contrasted to differing field conditions in Montana, undermine the validity of MEANNS as an accurate tool for estimating denitrification of

¹ See "Cornell University, "Hydrologic Soil Group for Phosphorus Index 2.0 and Nitrate Leaching Index Determination," Fact Sheet #115, available online at: <http://nmsp.cals.cornell.edu/publications/factsheets/factsheet115.pdf> ; USDA, definitions of soil type groups, available online at: <https://efotg.sc.egov.usda.gov/references/Delete/2017-11-11/hydrogroups.htm>

subsurface wastewater discharges, much less capable of informing an agency conclusion as to whether a proposed discharge will cause or contribute to degradation or violations of water quality standards offsite alone, or cumulatively or synergistically with other pollution sources.

- MEANNS assumes fully nitrified wastewater effluent, whereas most septic systems - including those proposed for classification by DEQ as Levels 1-4, do not nitrify effluent.
- Further, nitrification is pH dependent, reliant on a narrow range of pH values. MEANNS does not account for soil pH in any way, and thus cannot accurately assess denitrification and attenuation.
- MEANNS also ignores soil and aquifer alkalinity. Nitrification requires sufficient alkalinity to maintain certain ranges of pH. MEANNS does not account for the fact that, over time, soil alkalinity is depleted by subsurface wastewater disposal, and nitrification efficacy decreases with variability in receiving soils' alkalinity and pH.
- MEANNS does not account for the method of wastewater discharge to soil. This is important because nitrification is dependent on wastewater application rates and types to the soil. Most subsurface disposal systems point-load to the soil rather than distributing wastewater in a uniform dispersion. MEANNS does not account for variability in application types, but instead presumes all methods are equivalent.
- The MEANNS handbook p.6 actually notes some, if not all, condition precedents for denitrification and a "suitable drainfield", including but not limited to soil temperature, adequate carbon, anoxic environment, and correct bacteria. MEANNS allegedly accounts for carbon content by using site-specific soil characteristics. However, MEANNS assumes soil clay is an organic compound that provides a necessary organic carbon source. Prototypical clay in Montana soils is not organic; clay is inorganic and is not a carbon source for denitrification. Clay is comprised of hydrogen, oxygen, aluminum, and silica.
 - Further, MEANNS relies on NRCS hydrologic soil groups as alleged corroboration of assuring proper soil types are present for subsurface waste disposal. However, NRCS hydrologic soil groups do not provide organic carbon content per soil type. Thus, MEANNS provides no mechanism for evaluating soil carbon content or availability, rendering its purported denitrification assessment specious.
- MEANNS also assumes denitrification in a receiving shallow aquifer. However, what is not examined is the reality that if an aquifer has sufficient organic carbon to denitrify wastewater, the aquifer is likely already exceeding other Circular DEQ-7 criteria and not fit for human consumption. Put simply, aquifers do not normally contain available organic carbon. Other publications by DEQ provide technical guidance on determining subsurface pollutant fate and transport, and involve several investigations aimed at determining carbon content of soils and aquifers.² Notably, such DEQ technical guidance is separate and distinct from any of the analyses of considerations presented in MEANNS, which again relies solely on NRCS hydrologic soil groups to allegedly determine organic

² See DEQ, "Technical Guidance General Field Data Needs for Fate and Transport Modeling", (Sept 2008), Remediation Division Site Response Section, pp. 5. (Qualitative Methods for the Determination of Organic Carbon).

carbon content. As discussed above, this is a fallacy and not supported by empirical data, and thus the MEANNs model is likely inaccurate in predicting denitrification.

- MEANNs also assumes an aquifer is suitably anoxic. Several peer reviewed studies of western Montana shallow aquifers, which received groundwater discharges of wastes, found that dissolved oxygen to be above 2 mg/L in concentration (i.e., not anoxic).³ Specifically, the USGS defines "anoxic" groundwater as those with dissolved oxygen concentrations of < .5 mg/L.
 - MEANNs cites to a masters thesis by Brian Boer, 2002, to validate its MEANNs approach to anoxic conditions. Notably, the data provided by Boer shows that of several hundred groundwater wells studied, most groundwater temperatures were below the temperature range universally recognized as necessary for denitrification. An examination of MEANNs' reference to Boer's thesis shows that actual Montana field data of dissolved oxygen concentrations in 116 groundwater wells indicates only five (5x) wells had a dissolved oxygen concentration of < 1 mg/L, and none met the < .5mg/L concentration as defined by USGS for anoxic conditions.
 - MEANNs also sites the Rosen, Kropf, and Thomas study⁴ to assert the basis for its quantification of nitrogen from septic to groundwater. Ironically, that study stands for the proposition that any nitrogen losses due to either denitrification or volatilization are complete within 6' below the drainfield. I.e., there is no additional removal of nitrogenous compounds in the aquifer along a flow-path as assumed by MEANNs. In other words, MEANNs' "distance to surface water" parameter incorrectly assumes that denitrification will occur along the flow path, when according to the USGS authors noted above it will not, resulting in MEANNs over-predicting nitrogen removal.

Plainly, shallow Montana aquifers are not suitable environments for denitrification based on their pH, alkalinity, temperatures, and dissolved oxygen concentrations. Further, neither the instant rulemaking nor the tiered reference to MEANNs and supporting documents mentions any of the authors', their expertise, education, or experience as it relates to nitrification/denitrification in unsaturated and/or saturated porous media, or in the area of vadose/denitrification zone hydrology. If DEQ's proposed rules and/or its tiered incorporation by reference of MEANNs is allegedly supported by academic, peer-reviewed science, why has the proposed approaches not

³ See "Hydrology and Water Chemistry of Shallow Aquifers Along the Upper Clark Fork, Western Montana", Nimick, David A, U.S.G.S., Water-Resources Investigations Report 93-4052, available online at:

<https://pubs.usgs.gov/publication/wri934052>

⁴ Rosen, Michael R, Christian Kropf, and Karen A. Thomas. (2006). Quantification of the Contribution of Nitrogen from Septic Tanks to Ground Water in Spanish Springs Valley, Nevada. *United States Geological Survey Scientific Investigation Report 2006-5206*, available online at: <https://pubs.usgs.gov/sir/2006/5206/SIR2006-5206.pdf>

been published in any peer-reviewed journal?

The undersigned was the sole conservation stakeholder on the Subdivision Advisory Task Force for the past 6 years and saw, first-hand, that engineers with vested conflicts in the Montana building sector were directly influencing the framing and approach of the proposed rulemaking. Neither the MEANNs document, DEQ-13, or the proposed rulemaking reflect any cohesive or accurate scientific framework for understanding nutrient fate and transport in shallow alluvium, nor is there any sound science documenting how the proposed rulemaking criteria is capable of proving that wastewater discharges determined nonsignificant will not, nonetheless, cause or contribute to degradation or violations of water quality standards in hydrologically-connected, downgradient surface water.

Moreover, despite requests for corroboration, peer-review, or expert literature citations supporting the MEANNs model and its outcomes, DEQ produced none. Instead, a Ms. Madison Foster apparently performed an informal review of the MEANNs approach, but that review was not on USGS letterhead, did not hold itself out as a scope of review intended as confirming the MEANNs approach, and neither is there any communication from the USGS showing it performed a peer-review of the MEANNs approach. A second informal review of MEANNs was conducted by a Mr. Craig Brown, a research hydrologist. Mr. Brown's correspondence to DEQ identifies his letter not as a peer review, but as a colleague review. If DEQ considers Mr. Brown to be an expert it must follow that he is aware of the difference between a peer review and a colleague review, the latter not being a technical review of the accuracy of the manuscripts' findings.

A peer review of a manuscript typically involves experts in the same field as the authors of the manuscript. These reviewers are external to the author's institution and provide feedback

on the scientific quality, methodology, significance, and originality of research. They also assess the manuscript's suitability for publication in a scholarly journal or conference proceeding. Peer review is a crucial step in ensuring the integrity and quality of scientific research. On the other hand, a colleague review involves feedback from individuals who may or may not be experts in the specific field of study but are typically familiar with the authors' work. Colleague reviews provide input on the clarity of the manuscript, the effectiveness of the writing style, the coherence of the arguments, and any potential improvements that could enhance overall quality. While colleague review can be valuable for refining the presentation of research, they may not provide the same level of technical scrutiny as peer reviews from experts in the field.

In sum, the proposed rules incentivize death by a thousand cuts of cumulative nutrient pollution discharges into receiving groundwater, despite the reality that much if not all their nitrogenous wastes end up in downgradient surface water in concentrations that, synergistically, are capable of violating standards and causing harmful water conditions. The incorporation by reference of MEANNs does nothing to provide scientific integrity or substantial evidence supporting a determination that new categorical exclusions of groundwater discharges are, by their nature and concentrations, in fact insignificant and will not cause or contribute to violations of water quality standards or degradation in state waters. Rather, the proposed rules, referenced MEANNs model, and purported elimination of 17.30.715(2) criteria reflect unscientific, unprotective rule changes more likely to create harm to the environment, than to prohibit as much. Moreover, the proposed rule changes remove particular means for citizens to participate in agency decision-making, and means for the agency to provide adequate remedies preventing unreasonable depletion and degradation, and as such the proposed rules are unlawful and unconstitutional.

17.30.715(4)(e) This new rule section proposes to eliminate the Department's authority to determine a proposed discharge satisfying criteria under 715(1) constitutes degradation based upon certain unscientific criteria derived from Senate Bill 285. For a variety of reasons the proposed rule and Senate Bill 285's directives are unlawful and unconstitutional.

Art. IX, section 1 of the Montana Constitution provides that the state and each person shall maintain and improve a clean and healthful environment for present and future generations, that the legislature provide for the administration and enforcement of this duty, and that the legislature shall provide adequate remedies for the protection of the environmental life support system from degradation and adequate remedies to prevent unreasonable depletion and degradation of natural resources. In carrying out the mandate set forth in Art. IX, Sec. 1 the Montana Legislature has enacted statutory provisions such as the WQA and MEPA to provide for administration, enforcement, and adequate remedies to implement the right to a clean and healthful environment. With regard to water quality, it is Montana's stated statutory goal that existing uses of state waters and the level of water quality necessary to protect those uses must be maintained and protected. MCA 75-5-303(21).

While degradation of state waters may be allowed in certain circumstances, the overarching goals of 75-5-303 must be met. Indeed, 75-5-303(2) sets for the process for when degradation may be authorized. Further, the legislature has directed and DEQ implemented administrative rules towards maintaining water quality, including those implementing 75-5-301(5). As noted above DEQ proposes to amend and eliminate 17.30.715(2), which sets forth circumstances and authority to determine certain discharges that otherwise qualify as nonsignificant as capable of causing degradation and requiring review under 75-5-303.

In *Clark Fork Coalition* (2008) the Supreme Court analyzed the applicability of 17.30.715(2) to a proposed copper and silver mine's proposed discharges. The Court struck down DEQ's discharge approval that ignored the authority provided the agency under 17.30.715(2), holding that the purpose of the rule is recognizing situations could arise in which other discharges otherwise compliant with 17.30.715 would be inadequate to protect against degradation. The application of 17.30.715(2) was intended that "DEQ exercise its discretion granted by sub-division (2) to re-evaluate a decision made under sub-division (1) in order to fulfill the goal of preventing degradation in every instance." *Clark Fork* (2008), ¶ 42.

Furthermore, as several courts have held including the Supreme Court, 17.30.715(2) is the mechanism through which DEQ takes a "hard look" at the environmental impacts of a proposed water pollution discharge. Here, DEQ proposes to eliminate the mechanism affording the agency a tool to re-evaluate the propriety of a new pollution discharge, despite potentially significant impacts on water quality, and despite the fact that the proposed discharge could incite prohibited degradation in downgradient state waters. The effect of DEQ eliminating 17.30.715(2) is that of removing a regulatory means for the agency to provide adequate remedies for protecting the environment from unreasonable depletion and degradation, and to accomplishing the statutory purpose of preventing degradation in every instance.

Specifically, among the most egregious ramifications of eliminating 17.30.715(2) is the effect of stripping the agency of regulatory authority to assess the cumulative impacts of synergistic effects, or to evaluate information provided by the public. The proposed rule not only seeks to eliminate agency authority to determine, on the basis of science, an entire category of polluting discharges as capable of causing or contributing to unlawful degradation of high-quality water (itself an anathema to the purposes and intent of the WQA and Montana

Constitution), but also would infringe on the public's ability to meaningfully engage in agency "deliberations" by virtue of stripping the public of any ability to know the agency was considering a proposed groundwater discharge, or the findings supporting such a decision, and therefore also conflicts with the public's right to know and right to participate under the Montana Constitution.

DEQ is without authority to implement an imperative that seeks to carve out and exempt a particular sector of polluting land use from otherwise applicable public participation requirements. As noted supra, ARM 17.30.715(2) is an existing means for DEQ to determine, based on science and public participation, whether a proposed activity could cause or contribute to degradation and must undergo nondegradation review per 75-5-303. Eliminating this section infringes on citizens' right to a clean and healthful environment, infringes on and conflicts with the concept of adequate remedies to prevent unreasonable depletion and degradation, and conflicts with the public's mandatory right to know and to participate in agency decisions before they are rendered, including proposed agency determinations of nonsignificance.

Proposed ARM 17.30.716

The proposed amendments to 17.30.716 suffer from many of the same flaws enumerated above in regard to proposed revisions to 17.30.715, including in particular lacking a scientific basis for demonstrating that categorically excluding particular wastewater discharges from review as nonsignificant, on the basis of setbacks and allegedly relevant NRCS soil type classification, satisfies the plain statutory mandate of protecting a clean and healthful environment, of protecting and maintaining existing uses and high-quality waters, and preventing degradation except as authorized under 75-5-303.

The proposed setback criteria in 716(3)(a) is arbitrary, capricious, and lacks an evidentiary basis showing it fulfills statutory intent or constitutional imperatives underlying the WQA. As such, it represent regressive new rules that would diminish DEQ's ability to reasonably condition polluting activities as necessary to implement the intent of 75-5-301/303.

The proposed volumetric limits in 716(3)(b) are likewise arbitrary and lack a scientific basis demonstrating their relationship or ability to prevent degradation or violations of water quality standards, the penultimate purpose of Nondegradation Policy.

Conclusion

For all the foregoing reasons we object to DEQ's proposed revisions to nondegradation rules for subsurface groundwater discharges and request the agency reconsider the validity and need for the offending proposals based on their lack of scientific, public policy, and/or legal foundations.

Respectfully submitted-

/s/ Guy Alsentzer

Executive Director
Guy@UpperMissouriWaterkeeper.org
T: 406.570.2202