From:	Rowlands, Mike
To:	DEQ WQP Admin
Subject:	Comments concerning proposed Nutrient Standards
Date:	Monday, March 31, 2014 12:47:08 PM
Attachments:	DOC308.PDF

Carrie:

Attached please find Otter Creek Coal's comment concerning the Proposed Nutrient Standards. Thank you for the opportunity to comment.

Mike

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March 31, 2014

Montana Department of Environmental Quality
Carrie Greeley
Montana Department of Environmental Quality
1520 E. Sixth Avenue
P.O. Box 200901
Helena, MT 59620-0901

Dear Ms. Greeley:

Otter Creek Coal appreciates the opportunity to comment on the proposed numeric nutrient standards, the proposed new variance rule, and the associated circulars. We hope you find these comments helpful. If you have questions or would like to discuss these comments, please let me know. Our team here at Otter Creek Coal would welcome the opportunity to further explain our concerns and work with you to solve some of the issues noted.

Numeric Nutrient Standards

By adopting the proposed rule amendments, Montana is committing industry and other dischargers to nutrient limits that cannot be attained with current or foreseeable technology. The large disparity between the numeric limits and the limits for a general variance show the severity of this issue. Adoption and implementation of numeric standards at levels below the level of viable treatment technology and in advance of numeric nutrient standards adoption by most other states is problematic for industry in Montana.

It is not clear how storm water permits could be affected by the numeric nutrient standards. Although the current general storm water permits and most individual storm water permits are based on BMP compliance, DEQ has not indicated how the seasonal nutrient standards will be applied to storm water discharges. It should be clarified that numeric standards will not be extended to storm water permits before finalizing this rule.

Further, the non-severability clauses, as written in the proposed rule amendments (Admin. R. Mont. 17.30.619(2) and 17.30.715(4)), are only focused on EPA action adverse to the state and do not address the situation an applicant may face if a variance is granted by the DEQ, then later rejected by the EPA. The non-severability clauses should be revised to correct this issue.

Guidance Document

The Board and Department Public Comment Notices do not reference the guidance document, *Base Numeric Nutrient Standards Implementation Guidance*, Draft 1.3 (December 2013), nor is the guidance document referenced by rule or in the circulars. This document is important in understanding how the standards will be interpreted and implemented; therefore, it is appropriate to include the guidance document and allow public review and comment on it in conjunction with the rule package. For example, the important term "Limits of technology" is only defined in the guidance document and not in the new rule, rule amendments, or circulars and therefore may not have been reviewed by the public.

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Downstream Compliance
Circular DEQ-12A, endnote 2 states that "base numeric nutrient standards of the downstream reaches or other downstream water bodies must continue to be maintained." However, the extent of downstream compliance that a discharger will be held accountable for is not defined. The guidance document reiterates this issue in section 6.2. The rule, circular and guidance document should be amended to clarify that the dischargers will only be accountable within the mixing zone or until the next source of nutrients –whether it be another point source, a non-point source, or natural source.

Variances
The legislative intent is that variances would be available to all dischargers; however, the proposed rule, rule amendments, and circulars are silent on the availability of the general variance to new and increased discharges that are private entities. DEQ has included a comment on this issue in the Guidance document, but this provides a lesser degree of certainty as to how this issue will be addressed in permitting.

Although the variances may be valid for up to twenty years, they require review through a public rulemaking process every three years. This adds too much uncertainty where industry and companies such as Arch Coal, need long term stability commensurate with their long term investment.

Proof of Economic Impact
Specific to the individual variance process based on economic impact, the proposed rule, DEQ-12B, and the guidance document should not rely on the 1995 EPA draft guidance. Instead, they should be amended to require a simpler showing of economic impact, perhaps a cost increase, for two reasons. First, this amendment would align more closely with the legislative intent behind the statute. In 2011, when the legislature passed Senate Bill 367 (codified as Montana Code Annotated § 75-5-313), discussion of the "substantial and widespread economic impacts" was in the context of a statewide basis – not an individual basis. The legislature established and the statute codifies the finding of economic impact on a statewide basis; therefore, there should be no need for an individual finding to qualify for a variance:

> The department, in consultation with the nutrient work group, shall develop guidelines for individual nutrient standard variances to **ensure that the economic impacts** from base numeric nutrient standards on **public and private** systems are **equally and adequately** addressed. In developing those guidelines, the department and the nutrient work group shall consider economic impacts appropriate for application within Montana, **acknowledging** that advanced treatment technologies for removing nutrients **will result in significant and widespread economic impacts.**

Mont. Code Ann. §75-5-313(2)(a) (emphasis added).

> Because the treatment of wastewater to base numeric nutrient standards **would result in substantial and widespread economic impacts on a statewide basis**, a permittee…may … apply for a general nutrient variance.

Mont. Code Ann. § 75-5-313(5)(a) (emphasis added).

See also Montana House of Representatives, Natural Resources Committee, Hearing on Senate Bill 367, Audio Record at 31:36 (March 21, 2011). Translating the discussion of substantial and widespread economic impacts from a statewide basis to a requirement that each individual applicant must show substantial and widespread economic impacts is

inappropriate. Certainly, the language of the statute and the legislative history show that the legislature did not intend for economically viable industries to be singled out for compliance with numeric standards that may not be attainable given current and immediately foreseeable technology.

The second reason to amend the economic requirement is based on Montana's liberal public disclosure of agency documents. Because Montana's Constitutional Right to Know is much broader than federal disclosure under the Freedom of Information Act, this issue was likely not considered in the EPA guidance but warrants special attention here in Montana. To show substantial and widespread economic impact, the new rule and the DEQ guidance rely on economic data from the applicant, specifically the applicant's cash flow to total debt ratio and their debt to equity ratio. While Montana Code Annotated § 75-5-314 provides some measure of assurance that the DEQ will protect trade secrets, there is no guarantee that the company's financial data will not be subject to public disclosure. Given Montana's strong Right to Know Constitutional provision, it is unlikely that non-trade secret information, such as financial data, would be protected once it is in the DEQ's possession. Therefore, a simpler showing should be required, based on cost increases.

Types of Variances

Montana Code Annotated § 75-5-313(2) requires a variance for "economic impacts, limits of technology, or both." However, the proposed rule and DEQ-12B do not clearly present a variance for the limits of technology and they do not address dischargers who qualify for a variance in both categories. The language in the guidance document articulates this better than DEQ-12B. Further, the language of DEQ-12B adds another layer to the qualification by referring to the "highest attainable condition within the receiving water." This verbiage is not necessary. Variances should be granted based on the elements of the statute without adding this requirement.

Additionally, the alternate variance required by Mont. Code Ann. § 75-5-313(10)(a) is not clearly defined in the proposed rule or in DEQ-12B. An addition or revision should be made to account for alternate variances. Section 3.2 of DEQ-12B seems to speak more to an alternate variance than an individual variance.

Again, thank you for the opportunity to outline our concerns to this proposed rule.

Sincerely,
OTTER CREEK COAL, LLC

William M. Rowlands

William M. Rowlands,
Director of Operations