Montana Department of
ENVIRONMENTAL QUALITY MEMO

TO: Board of Environmental Review
Tracy Stone-Manning, Director

FROM: John F. North, Chief Legal Counsel

DATE: March 24, 2014

SUBJECT: HB 521 Stringency and SB 311Takings Analyses for MAR Notices No. 17-355 and 356

HB 521, which is codified at 75-5-203, MCA, requires that the Department make certain findings before it may adopt water quality rules that are more stringent than comparable federal regulations that address the same circumstances. Section 75-5-309, MCA, contains a similar requirement.

In MAR Notice No. 17-355, the Board is proposing to adopt numeric nutrient standards. In MAR Notice No. 17-356, the Department is proposing to adopt procedures for variances from the numberic nutrient standards and to place in rule numeric nutrient general variance effluent limits that, purusnat to 75-5-313, MCA, will go into effect upon adoption of the numeric nutreint standards. Because the general variances and numeric nutrient standards will substantively take effect at the same time, I am analyzing them together in this memorandum.

The EPA has not adopted regulations imposing numeric nutrient standards. However, it has adopted guidance for states to use to set numeric nutrient standards. Using the formulas in the guidance, the Department has calculated numeric nutrient standards for Montana. Those calculations result in standards that are more stringent than standards proposed in MAR Notice 17-356, except for the proposed standards for Flathead Lake, which are more stringent than EPA guidance for phosphorus, chlorophyl A, and secchi depth. Findings pursuant to 75-5-203 and 308 would be necessary for the Flathead Lake. EPA has no regulations setting criteria for variances. The varienacc creiteria and procedures proposed in MAR Notice No. 17-356 are no more stringent than EPA.

SB 311 is codified as Title 2, Chapter 10, MCA. That chapter requires an agency to conduct a takings impact assessment for actions, including adoption of rules, with taking or damaging implications. It directs that the Attorney General provide a checklist for agencies to use in determining whether actions have taking or damaging implications. Enclosed is a

checklist for these rule amendments. It indicates that adoption of these rule amendments does not have taking or damaging implications.

Enclosure

Attachment

PRIVATE PROPERTY ASSESSMENT ACT CHECKLIST: MAR Notices No. 17-355 and 17-356

DOES THE PROPOSED AGENCY ACTION HAVE TAKINGS IMPLICATIONS UNDER THE PRIVATE PROPERTY ASSESSMENT ACT?

Yes	No	
X		1. Does the action pertain to land or water management or environmental regulation affecting private real property or water rights?
	X	2. Does the action result in either a permanent or indefinite physical occupation of private property?
	X	3. Does the action deprive the owner of all economically viable uses of the property?
	X	4. Does the action deny a fundamental attribute of ownership?
	X	5. Does the action require a property owner to dedicate a portion of property or to grant an easement? [If the answer is NO, skip questions 5a and 5b and continue with question 6.]
		5a. Is there a reasonable, specific connection between the government requirement and legitimate state interests?
		5b. Is the government requirement roughly proportional to the impact of the proposed use of the property?
	X	6. Does the action have a severe impact on the value of the property?
	X	7. Does the action damage the property by causing some physical disturbance with respect to the property in excess of that sustained by the public generally? [If the

answer is NO, do not answer questions 7a through 7c.]

_____ _____ 7a. Is the impact of government action direct, peculiar, and significant?

_____ _____ 7b. Has government action resulted in the property becoming practically inaccessible, waterlogged, or flooded?

_____ _____ 7c. Has government action diminished property values by more than 30% and necessitated the physical taking of adjacent property or property across a public way from the property in question?

Taking or damaging implication exist if YES is checked in response to question 1 and also to any one or more of the following questions: 2, 3, 4, 6, 7a, 7b, 7c; or if NO is checked in response to questions 5a or 5b.

_____ March 24, 2014