**To:** Laidlaw, Tina[Laidlaw.Tina@epa.gov]
**From:** Guy Alsentzer
**Sent:** Wed 4/2/2014 4:39:44 PM
**Subject:** Re: MT Nutrient Rule Pkg FOIA
Comments.NumericNutrientRulePkg.FINAL (April 1, 2014).pdf
ATT00001.htm

Received the calendar invite - it says a call today vs next week @ the 9th. Assuming the 9th is what was intended, we're all set there.
I'd like to focus on the Rule Package, in particular the variance provisions and leave the TMDL discussion for another day. This is also prudent as my Board has not yet come to a decision regarding your suggestion to withdraw UMW's FOIA concerning the LG TPA TMDLs.

That said, and while it will undoubtably make its way to you in time, I've attached a copy of the comments Upper Missouri Waterkeeper submitted generally supporting but illuminating several critical issues within the Nutrient Rule Package; ideally I'd like to walk through the concerns noted in that letter and hear your / R8's thoughts. If you'd like to bring any of your colleagues in on that conversation after taking a peek at our comments just let me know.

□ð
□ð

April 1, 2014

*Submitted via electronic mail to deqwpadmin@mt.gov & ejohnson@mt.gov*

Carrie Greeley & Elois Johnson
Dept. of Environmental Quality
1520 E. Sixth Ave.
Helena, Montana 59620

Re: Combined Comments in Support of Montana's Proposed Numeric Nutrient Rule Package

On behalf of the Upper Missouri Waterkeeper, Guy Alsentzer, and the supporting water advocacy organization, Upper Missouri Waterkeeper, Inc., please accept the following combined comments addressing proposed rules from both the Board of Environmental Review ("BER") and Department of Environmental Quality ("DEQ"), commonly referred to as Montana's 'numeric nutrient rule package.' Public comments concerning the proposed rule package ("Rule Package") are due by April 1, 2014.

Upper Missouri Waterkeeper, Inc. ("UMW") is a non-profit membership organization dedicated exclusively to protecting and improving the ecological and aesthetic qualities of Southwest and West-central Montana's Upper Missouri River Basin. As part of its mission UMW engages in policy, science and rulemaking related to Montana's implementation of its Clean Water Act duties and citizens' guarantee to a clean and healthful environment under our constitution. We thank the BER and DEQ for the opportunity to comment on these proposals and participate in the lengthy public participation process associated with the proposed rulemaking.

**Executive Summary**

UMW supports the state of Montana's movement towards adopting more protective water quality standards. The proposed rulemakings are a needed update to Montana's oversight of water quality, and are particularly necessary in light of evolving land uses, population growth, and best available science. However, the proposed rulemakings also contain significant shortcomings and ambiguities that threaten Montana's implementation of its Clean Water Act duties and will potentially lead to unintended, adverse consequences for water quality and communities.

In these comments, we focus first on the BER's proposed numeric nutrient criteria, then on the DEQ's proposed nutrient standards variance rule. While these comments represent the majority of our concerns and suggested improvements, we also endorse comments written by the Clark Fork Coalition addressing the proposed rules and needed improvements that will better protect water quality and community health.

## Introduction

Over forty years ago, Congress made the promise to "restore and maintain the chemical, physical, and biological integrity of the Nation's waters.".[1] To that end, Congress established a national goal to *eliminate* discharges of pollutants into navigable waters by *1985*. Congress also set the national goal of achieving levels of water quality necessary to protect all human contact uses of the Nation's waters and quality necessary for the protection of fish, shellfish and wildlife by *1983*.[2]

Unfortunately, those promises and goals still await fulfillment. *See, e.g.,* EPA, *Nat'l Rivers and Streams Assessment* (Feb. 2013) where EPA reports that well over 50% of the waters assessed exhibited poor conditions and only 20% were classified as "good." The results by region were even more disappointing with 62% of the waters in the east classified as poor and 58% in the plains states. *See also*, EPA summary of states' reported water quality data at http://ofmpub.epa.gov/waters10/attains_nation_cy.control, showing that states have a poor record of assessment, but of the waters assessed, 53% of assessed rivers and streams, 68% of assessed lakes, and 66% of assessed bays/estuaries are *failing* to meet one or more water quality standards. Discharges of pollutants into our nation's water have not been eliminated. Almost thirty years after the stated deadline, the nation still uses its waters as disposal sites for a vast number of pollutants, and while there has been improvement, many waters still fail to meet basic requirements for being "fishable and swimmable."

Montana's proposed numeric nutrient rule package is a positive step in advancing the promises of the Clean Water Act in a few areas, but in others fall short of what is needed to address current problems with the development and implementation of water quality standards. There are some components of the proposed rules that are contrary to advancement of the goals and requirements of the Clean Water Act and we urge the BER and DEQ to reconsider those portions of the rule package and include stricter requirements.

## Comments Specific to Proposed Rules

The BER's notice of public hearing concerning its proposed adoption of base numeric nutrient standards laid out in Circular 12-A aptly describes the state of Montana's approach to its Rule Package:

> The nutrient criteria concentrations being proposed for adoption as standards are generally low, particularly in the western region of Montana. In many cases, the concentrations are below the limits of current wastewater treatment technology, particularly for nitrogen. Therefore, when little or no stream dilution is available, dischargers will find it difficult or impossible to meet the standards. Senate Bill 95 (2009 Legislature) and Senate Bill 367 (2011 Legislature), now codified at 75-5-313, MCA, addressed the high cost and technological difficulties associated with meeting the nutrient standards in the short term. Section 75-5-313, MCA, allows dischargers to be granted variances from numeric nutrient standards, once the criteria have been adopted as standards, in those cases where meeting the standards today would be an unreasonable economic burden or technologically infeasible. Variances from the standards may be

[1] 33 U.S.C. §1251(a)

[2] 33 U.S.C. § 1251(a)(1) and (2).

granted for up to twenty years. Thus, 75-5-313, MCA, allows for the nutrient standards to be met in a staged manner, over time, as alternative effluent management methods are considered, nutrient removal technologies become more cost-effective and efficient, and nonpoint sources of nutrients are addressed

MAR Notice No. 17-356

## I. THE BER'S PROPOSED BASE NUMERIC NUTRIENT STANDARDS

### A. Department Circular 12-A

Overall we support adoption of the BER's proposed numeric nutrient standards and provide the comments below concerning certain outstanding questions. We anticipate that the BER and DEQ will thoughtfully consider and implement some of the practical changes noted and, in so doing, protect water quality with a strong, scientifically-sound final rule.

We strongly support the scientific basis for numeric nutrient criteria. Similarly, we support the decision to use ecoregion and geographic parameters in setting applicable WQS as these decisions reflect the best available science and a practical understanding of natural water quality conditions that should, and must, be protected.

### B. Proposed 17.30.516 – "Standard Mixing Zones for Surface Water"

We agree that mixing zones are sanctioned water quality control tools under the Clean Water Act and as such understand the amendments to this section. However, we are concerned that the movement from the 7Q10 flow standard to the 14Q5 standard is a poor policy choice, regardless of the fact that both measurements are utilized in water quality modeling. Put simply, a 14Q5 low flow standard for a mixing zone in effect measures pollutant loading using the entire flow of a receiving water, instead of a fraction thereof as in the 7Q10 approach. The BER's notice in MAR 17-356 explains this decision as reflective of the non-toxic nature of nutrients in concentrations within Circular 12-A. We do not agree that this standard is appropriate based on two troubling inconsistencies and urge the BER to consider reapplication of the 7Q10 standard.

First, at a policy level, we believe there is ample reason to keep the 7Q10 as it represents a sound, scientifically-based standard that is more protective of receiving water quality than the 14Q5. Insofar as the state of Montana is taking significant steps forward in protecting its waters from nutrient pollution, it should not in the substance of new rules take a step backwards by functionally relying on lesser flow standards. As the saying goes, a model – and results thereof – are only as good as the data it relies upon. Here we urge BER to take a firm stance in line with the precautionary principle and keep the 7Q10 flow standard for its mixing zone calculations.

Second, although the concentrations of nutrients anticipated as discharges under Circular 12-A may be non-toxic, higher nutrient concentrations can and do become toxic. Indeed, DEQ Circular-7 at page 51 recognizes that the three primary incarnations of nitrogen are in fact toxic at certain concentrations and sets appropriate aquatic life and human health criteria. Insofar as the context here is the adoption of more stringent numeric nutrient criteria, and the fact remains that using a 14Q5 flow standard in a mixing zone equates to a less-protective modeling and that nutrients can be toxic – particularly as they possess an accumulative nature in water columns – there is the possibility that using the 14Q5 standard may create unintended, adverse consequences for downstream water quality. Hypothetically, allowing greater discharges of

nutrients in this rule which result in nonattainment of downstream water quality triggers the Clean Water Act's antidegradation prohibition.

Indeed, EPA has described a mixing zone as "an allocated impact zone in the receiving water which may include a small area or volume where acute criteria can be exceeded provided there is no lethality (zone of initial dilution), and a larger area or volume where chronic water quality criteria can be exceeded if the designated use of the water segment as a whole is not impaired as a result of the mixing zone."[3] EPA policy "recommends that mixing zone characteristics be defined on a case-by-case basis after it has been determined that the assimilative capacity of the receiving system can safely accommodate the discharge."[4]

Moreover, emphasizing the site-specific nature of the evaluation, EPA states that the "assessment should take into consideration the physical, chemical, and biological characteristics of the discharge and the receiving system; the life history and behavior of organisms in the receiving system; and the desired uses of the waters."[5] Mixing zones should be authorized with care, according to EPA, "so as to not impede progress toward the Clean Water Act goals of maintaining and improving water quality."[6]

Here, the rule proposes uniform, relaxed mixing zone standards. Insofar as the rule only contemplates a revised, general nutrient mixing zone standard and refuses to consider site-specific mixing zones as per the EPA guidance noted above, we believe the 14Q5 is therefore too lax. Rather, the 7Q10 appears a well-traveled – if not adequately site-specific - path for modeling assimilative capacity within mixing zones while remaining reasonably protective of downstream water quality. Therefore we again urge BER to reconsider the propriety of movement towards the 14Q5 flow standard and instead stick with the proven, protective 7Q10 flow.

### C. Proposed 17.30.715 – "Criteria for Defining Non-Significant Changes in Water Quality"

We do not agree with the inclusion of inorganic nitrogen and inorganic phosphorus as pollutants that are per se deemed to not cause changes that exceed trigger values set in Circular 7. It is a fact that most new dischargers of nutrients are subdivisions. By establishing a non-significance criteria for the above types of nutrients the rule creates a means by which new subdivision contributions of nutrients escape substantive review and the adage 'death by a thousand cuts' can move from proverb to reality. E.g. if new discharges and their contributions of pollutant loading are continually deemed insignificant, yet cumulatively pollutant loading increases, the purposes of the Clean Water Act are defeated as waters are in fact receiving more pollution, not less, based on a statutory sleight of hand. We urge BER to amend its nonsignificance criteria to reflect the reality that additions of nutrients in quantity, time and strength do in fact constitute significant changes in water quality.

## II. THE DEQ'S PROPOSED NUMERIC NUTRIENT STANDARDS VARIANCES

[3] Memorandum from Robert Perciasepe, Assistant Administrator, to Water Program Directors, EPA Guidance on Application of State Mixing Zone Policies in EPA-Issued NPDES Permits, August 6, 1996.

[4] EPA, Water Quality Standards Handbook – Second Edition, 1993 at 5-1.

[5] *Id.*

[6] *Id.* at 5-2.

As stated previously, BER and DEQ have proposed a rule package that has some environmentally-protective attributes but also some provisions that meet its needs for administrative convenience and protection of permittees. In doing so, it has provided less protection for water quality than the law requires. As it is likely that many permittees will be seeking variances over the years to come, and likely for many permitting cycles into the future, this rule needs to be clear and ensure the highest level of public health protection.

### A. The Clean Water Act's Water Quality Standards Requirements

Development and implementation of water quality standards (WQS) are critical components of the Clean Water Act, with shared roles for states and EPA. The Clean Water Act imposes an initial obligation on states to develop water quality standards as necessary to protect designated uses of each state's waters. States must designate uses, which are the uses that existed in 1974 *or better* if waters have improved. Those standards are to be submitted to EPA for approval. If a state fails to develop adequately-protective standards, the Clean Water Act requires EPA to step in and develop the standards.[7] States are also required to adopt and implement meaningful antidegradation protections to ensure that waters that are meeting water quality standards are not allowed to degrade and that high quality waters (water quality that is better than standards) retain their high quality.[8]

A state must, not less than once every three years, hold public hearings for the purpose of reviewing applicable water quality standard and, where appropriate and necessary to meeting the requirements of the Clean Water Act, modify and adopt new standards.[9] ("Triennial Review"). Again, EPA is to review and approve water quality standards from a state as part of the Triennial Review. Where a state fails to modify or adopt standards that stay abreast of scientific and technical developments and as necessary to ensure protection of waters, EPA must and can step in and develop appropriately-protective standards for the state.[10] With these requirements, one sees the "forward motion" for water quality that is dictated by the Clean Water Act: set standards for quality that will dictate cleanup and set antidegradation requirements to preserve what is already clean.

The Clean Water Act then dictates that permitting will serve an important role in implementation of these requirements and maintaining 'forward motion' by being the tool for eliminating discharges of pollutants. Discharges without a permit are prohibited. Permits must include limitations on discharges as necessary to ensure: they will not cause or contribute to a violation of water quality standards; that discharges conform to effluent limitation guidelines; and that discharges conform to any Total Maximum Daily Load (TMDL) requirement that sets pollutant limits in order to meet water quality standards.[11] Compliance plans may be utilized where necessary to ensure that new technologies that may be necessary to meet the ever more stringent limits can be designed, built, and implemented in a timely fashion.

[7] 33 U.S.C. § 1313(c)(3) and (4).

[8] 40 C.F.R. § 131.12.

[9] 33 U.S.C. §1313(c)(1).

[10] 33 U.S.C. § 1313(c)(4).

[11] 40 C.F.R. § 122.44.

As is plain from the structure of the Clean Water Act, efficient EPA oversight of Montana's role in this Rule Package is necessary to the full functioning of the Act. If Montana and EPA are not strong in their respective commitments to clean water, the entire structure of the Clean Water Act, and the promises that the Act is designed to fulfill, are in jeopardy. It is with that foundation, and those concerns, that we examine the Rule Package's heavy reliance on variances from its new, sound numeric standards.

### B. Montana's Proposed Variance Standard Rule Assumes the Necessity and Categorical Availability of Variances and, In So Doing, Fails to Address the Larger Problem With Variances Under the Clean Water Act

We support the state of Montana's proposal to enact strong, protective numeric nutrient water quality standards and recognize that, in extreme circumstances, variances may be appropriate to usher dischargers into compliance. However, the proposed widespread use of variances raises serious Clean Water Act implementation and incompatibility problems that Montana must address before finalizing this portion of the Rule Package.

#### 1. Department Circular 12-B

Proposed DEQ Circular 12-B contains information about variances from the base numeric nutrient standards. We oppose the widespread, categorical use of variances as a water quality tool in this rulemaking and urge the DEQ to instead consider the use of alternative means of securing compliance with WQS, particularly the use of compliance schedules.

##### i. Rationale: 131.10(g) Factors & Analysis

The state's demonstration of 131.10(g)(6) and the instant variance rule in large part is predicated on the assumption that the only way to achieve compliance with new numeric nutrient standards is by mandating reverse osmosis treatment on all wastewater dischargers of nutrients. In turn, the state has relied on studies – now approximately half a decade old, to show that it is economically infeasible to move all dischargers to reverse osmosis. However, those original studies of the feasibility of dischargers meeting proposed numeric criteria only contemplated treatment approximate to Level 2 in its analysis of impacts to private business. They did not entail analyses of hybrid approaches where the implementation of reasonable alternatives and other effluent management options may create a practical, legal means forward to creating compliance with WQS.

For instance, a recent EPA report shows that treatment of phosphorus at a state of the science facilities in the Puget Sounds region have routinely achieved total phosphorus concentrations of 0.02 mg/L, and total nitrogen concentrations of 2 to 3 mg/L.[12] While perhaps not applicable to all dischargers nor by itself capable of all necessary reductions, this recent science shows that technology – aside from reverse osmosis – is capable of approaching reductions contemplated under the Rule Package. Indeed, when contemplated alongside other alternative effluent management mechanisms there exists a realistic probability that technology has evolved significantly since the DEQ's initial study years past.

[12] Lubliner, B., M. Redding, and D. Ragsdale, 2010. Pharmaceuticals and Personal Care Products in Municipal Wastewater and Their Removal by Nutrient Treatment Technologies. Washington State Department of Ecology, Olympia, WA. Publication Number 10-03-004, at p. 25.

Similarly, the Rule Package's reliance on factor six of 131.10(g) is also incumbent on a showing of substantial and widespread economic impacts. Previous documentation by the DEQ has, to our understanding, grouped dischargers together by sector to fulfill such a showing. However, such demonstration towards receipt of a variance – in line with the spirit and intent of the CWA – should be made by each individual discharger, not aggregated by sector. Such site and facility-specific determinations conform best to existing EPA guidance and statutory factors.

The sixth factor at minimum requires acute attention to detail to avoid abuse. This factor can be used as a mechanism for a state to avoid applying controls necessary to meet water quality standards and to lessen protections for the water body. Again, at this point in the Clean Water Act's history, states should be employing controls necessary to meet water quality standards, at a minimum for point sources.[13] Presumably then, the sixth factor should be read to address only non-point sources of pollutants, primarily agriculture. Given that Montana does not regulate nonpoint agricultural pollution, it seems that the sixth factor should have no application here, in rulemaking concerning point-source dischargers of nutrient pollutants.

We find it extremely disconcerting that the sixth applicability factor for obtaining a variance has been broadened to a catch-all contemplated as acceptable for lessening protection for waters for nearly all point-source dischargers of nutrient pollutants. Instead, we believe there is a place for the state to incorporate a discussion of feasibility that is not defined in strictly monetary terms, but should include consideration of whether a technology or practice is actually available to address a water quality issue. If there is truly no available method, then perhaps attaining a water quality standard in three years is not "feasible" and a water will remain impaired until other adequate solutions are implemented aside from point source reductions.

### ii. General Variances Should Not Be Contemplated

75-5-313(5) provides in relevant part that:

> [A] permittee who meets the requirements established in subsection (5)(b) may, subject to subsection (6), apply for a general nutrient standards variance. (b) The department shall approve the use of a general nutrient standards variance for permittees with wastewater treatment facilities that discharge to surface water: (i) in an amount greater than or equal to 1 million gallons per day of effluent if the permittee treats the discharge to, at a minimum, 1 milligram total phosphorus per liter and 10 milligrams total nitrogen per liter, calculated as a monthly average during the period in which the base numeric nutrient standards apply; (ii) in an amount less than 1 million gallons per day of effluent if the permittee treats the discharge to, at a minimum, 2 milligrams total phosphorus per liter and 15 milligrams total nitrogen per liter, calculated as a monthly average during the period in which the base numeric nutrient standards apply; or (iii) from lagoons that were not designed to actively remove nutrients if the permittee maintains the performance of the lagoon at a level equal to the performance of the lagoon on October 1, 2011.

Likewise, Table 12B-1 in Circular 12-B reiterates those same standards by which an applicant may secure a general variance, specifically through use of their discharge permit.

We oppose the legislative creation and the nutrient variance rule's use of general variances because: (1) as discussed throughout this comment letter variances – particularly

[13] 40 C.F.R. § 122.44(d).

general variances - are antithetical to the CWA's intent of eliminating discharges of pollutants; (2) there is insufficient technical or analytical records justifying commonalities across sectors; and (3) waterbody-specific baselines and ecological needs differ across the state. EPA's 1998 Advanced Notice of Proposed Rulemaking discusses the exacting elements required for a variance, none of which support the categorical grouping of dischargers and waterbodies across a state under a general variance.

Further, there is serious doubt as to whether general variances will assure that dischargers meet the highest attainable limit. Logically, the broader and less specific a general variance becomes – e.g. more inclusive of a sector across the state – the less assurance that the variance has certainty of bringing a discharger closer to meeting WQS as so mandated by the CWA. The state has yet to demonstrate that compliance with general variance performance levels assures that the highest use attainable for one discharger within a sector is the same as another.

Similarly, there has been no explicit demonstration that proposed variances are protective of the aquatic life community that is expected in the receiving stream, vis-à-vis recognition of the role that antidegradation policy plays in implementation of WQS. We have not seen such an affirmative recognition expressed in the Rule Package. We also note that the emphasis on economic impracticability in this process appears to have stunted discussion of treatment more advanced than that required by Sections 303(c)(2)(A) and (B) of the CWA, and discussion of alternative effluent control strategies. For instance, non-point source controls have largely been ignored in the rulemaking although they continue to be a proportionally significant contributor to compliance with WQS. In fact, instead of addressing an alternative pollution control strategy like state based non-point source controls the Rule Package only contemplates protecting economic interests.

We believe ample EPA guidance, statutory authority and caselaw stands for the proposition that the scope of a variance must be both discharger and water body specific, and that a variance should also be pollutant-specific; it should extend for the shortest distance possible in the water body[14] and must be decided and supported with a full record, on a case by case basis. Montana should not entertain the use of the purported "general variance" that are allowed for an entire water body or an entire region or state for a nutrient pollutant.

### iii. Reliance Upon Individual Variances Is Permissible If Done In A Judicious, Sparing Manner

We accept that, in certain circumstances, implementation of the proposed numeric nutrient criteria will create incredible economic hardship for small towns in Montana. These limited, rare circumstances are places where we believe that variances may have a specific, temporally-short role in moving a discharging facility towards compliance with WQS. As such we do not oppose the use of individual variances in the Rule Package with the caveat that all the other related indicia showing movement towards technological improvement and attainment of WQS are present. On the whole the mechanisms provided in Circular 12-B provide an adequate starting point for use of individual variances and support the continued ability to "re-open" and amend variances and water quality standards during triennial reviews.

[14] This is basically consistent with EPA guidance now, but it is abused and Montana will be well-served to make that clear in this rule. This also points up the fact that variances aren't really necessary—mixing zones do the same thing. One or the other of these "anti -Clean Water Act" concepts should be eliminated.

However we still believe that, generally, variances appear to be a water quality tool that has outlived its usefulness. We believe there is scant justification for the use(s) of variances as their use is, per se, inconsistent with the basic structure and requirements of the Clean Water Act. Variances appear to be nothing more than an off-ramp away from steadily improving water quality and meeting standards. Contrary to the oft-heard yet unsupported claim, variances are rarely an "aid" to states to meeting water quality standards but, more often, an excuse to avoid them. A discussion of water quality standards implementation and impaired waters – a hypothetical directly applicable to Montana - illuminates our concerns.

### iv. Implementation Issues

Montana's Rule Package intends to use variances broadly to "temporarily" avoid compliance with water quality standards; however, doing so threatens to exacerbate (or possibly create) impairment situations by allowing more pollution over time making ultimate attainment of WQS lengthier and more difficult. It is a potentially self-defeating path that is the precise opposite of the Clean Water Act's goals and requirements. If dischargers need time to employ new technologies or methods to meet stricter permit limits, the use of compliance plans and schedules ensures they use that time to install aggressive pollution controls, without weakening standards.

In fact, variances can work against the very things many stakeholders in Montana claim might require time. For example, Montana's nutrient loading pollution problem is significantly related to non-point source loading and, therefore, providing point source dischargers with variances – which weakens water quality - provides a disincentive to moving quickly and aggressively to deal with water quality problems. Application of a 'safety valve' like variances simply derails the statutory process of identifying troubled bodies of water and getting to work on a plan for clean up. We urge the DEQ to rethink providing a broad array of variance uses in its Rule Package, and instead revise its variance rule to narrow their availability to very limited circumstances.

#### 1. Variances & Discharging to Impaired Waters

As aforementioned, states must set water quality standards to protect designated uses. Montana's movement towards incorporating the best available science and, in turn, more protective numeric water quality standards for nutrients is a positive step forward! However, in some instances standards are plainly not being met. Where water quality standards are not attained, a state must report this fact to EPA and the water is added to a § 303(d) or impaired water list.[15] Once on the list, the water body is in the queue for preparation of a clean-up plan--a Total Maximum Daily Load ("TMDL") plan. States have a significant amount of time to prepare and finalize TMDLs. A TMDL sets a Waste Load Allocation ("WLA") which assigns specific load limits to specific point source discharges. In setting the WLA, a state has determined that these are the discharge limits necessary to return the water to meeting water quality standards (along with whatever reductions have been assigned to the Load Allocation ("LA")). If the WLA's do not meet that definition, then the TMDL is deficient and must be redone.

Similarly, if the WLA and LA reductions are expected to take an extremely long time it could be argued that the TMDL is deficient because it is impossible to say with any reasonable assurance that the reductions will actually occur, a requirement in EPA's TMDL guidance.

[15] 33 U.S.C. § 1313(d).

Rather, as work on a water body progresses, states reassess and readjust a TMDL as necessary. The water body remains "impaired" in status (and thereby subject to the TMDL clean up plan) until it achieves water quality standards. This is the straightforward way that waters are to be cleaned up under the Clean Water Act procedures adopted by Congress. Water quality standards serve as the goal and guiding principle toward which the TMDL and it implementation must always be geared.

Likewise, point sources must have permits to discharge and those permits are to include effluent limitations and other provisions (for example compliance plans) to ensure that the permit is designed to not cause or contribute to violations of water quality standards. In a TMDL situation, a point source will have been assigned a wasteload allocation, a part of the TMDL with which point sources must comply. The point source's permit must include limits as necessary to comply with the wasteload allocation. Again, compliance plans are a method to help point sources reach compliance over the course of a permit. *See also below.* We are concerned, however, by language in Circular 12-B proposing that a general variance's terms take precedence over permit limits determined pursuant to a TMDL. Assuming that such a situation would essentially permit increased pollution greater than the permitted under the WLA, the proposed rule thus runs afoul of TMDL caselaw prohibiting discharges that would cause or contribute to a violation of WQS and the variance would be incompatible with the CWA.

Given the Clean Water Act's structure, there is no need to countenance "variances" from water quality standards. We do not see why variances are seen as necessary to provide time to make progress towards attaining WQS. This implies, incorrectly, that the Clean Water Act imposes some sort of penalty on a state for failing to achieve water quality standards by a certain date. Regrettably, it does not. A variance does not "create" additional time; whatever time is genuinely needed to meet water quality standards, that time will be taken regardless whether the state adopts a variance.

The purported "time" issue is not a genuine problem. When a water body is added to a state impaired water list, it has likely been already impaired for some time. Once a water is on the list, states have ample time to prepare a TMDL for EPA approval. This is not the timeline for completing the TMDL and bringing the water into compliance with standards. This is just the period of time a state has to propose and finalize the cleanup plan. During that time, states should be working aggressively with point sources, at a minimum, to ensure that permits are meeting the requirements of 40 C.F.R. § 122.44(d) which will make the TMDL process easier. Once the TMDL is approved by EPA, there is nothing in the Clean Water Act requiring that the TMDL goals be met in some set period of "time."

While it is true that a water body may not yet attain water quality standards even when the point sources implement their reductions, it simply means that the water will remain listed under 303(d) as impaired until standards are attained. That is how the law works. The claim that "long term" strategies necessitate variances to come into compliance is unfounded. The "long term strategy" is a TMDL - the clean up plan to meet water quality standards, not weaken them. There is no need to weaken protections with variances, even temporarily, for Montana's waters under the existing structure.

### v. Preferred Alternative – Compliance Schedules

Generally a compliance schedule is necessary when a new effluent limit is included in a permit either because of new effluent limit guidelines from EPA associated with new technologies or where a water quality based effluent limit requires stricter controls that had

previously been imposed. It is understandable that a discharger will need some time to design, build, and pilot whatever new technology or processes might be necessary to meet stricter permit limits. However, five years should be adequate for any new technology or process. After all, the Clean Water Act dictates that discharges of pollutants should have been eliminated decades ago, a goal that is still very far away. Except in the most egregious of economic circumstances we do not see any reason for allowing the continued discharges of pollutants without work toward compliance with at least the latest control technologies or techniques within a permit term.

There is no right to pollute the nation's waters. Five years is ample and consistent with the five year structure for permits. EPA should be absolutely clear in this regard and we urge Montana to revise its proposed variance rule to (a) rely primarily on compliance schedules in lieu of variances as a mechanism for bringing dischargers into compliance with numeric nutrient standards, and (b) to include a five year limitation on compliance schedules. Here, DEQ is proposing variances for as long as twenty years. This time frame is wholly unacceptable because it is contrary to the concept of WQBELs and TMDLs.

### C. DEQ's Proposed Variance Rule for Numeric Nutrient Criteria Should be Significantly Narrowed and Circumscribed to Ensure Their Use Does Not Defeat Proper Functioning of the Clean Water Act

Variances to water quality standards are currently allowed, and while the rule is plain they must be used sparingly, Montana should use this rulemaking effort to further limit their application, not broaden it.[16] We are greatly concerned by the proposed widespread use and the state of Montana's near exclusive reliance thereon in its Rule Package. Variances are water quality standards in their own right and as such, must be approved by EPA.[17] Variances must also be reviewed every three years in the required triennial review and the state must report to EPA on whether a variance is being retained and must justify its retention.[18] Variances are required to be as short as possible and during the course of the variance, the discharger must regularly demonstrate that reasonable progress is being made to attain water quality standards.[19] Variances are not appropriate for anything other than portions (generally small) of water bodies and they pertain only to a single discharge or possibly a small group of discharges into that reach. As with Use Attainability Analyses (UAAs), some conditions for a variance are more prone to abuse (such as where there is a stiff economic price to pay to return water to meeting WQS). It is *never* appropriate to grant a variance where standards can be attained with reductions on point and nonpoint sources, including elimination of discharges. Montana's proposed Rule Package entails many of these safeguards and for those that are included we are grateful and in turn support those sections. However, as discussed below there are still significant gray areas in the proposed Rule Package that need further work.

#### 1. Variance Term

Montana's final variance rule must be clear that variances have a specific expiration date and that they are water quality standards and as such are subject to review every three years. We

[16] 40 C.F.R. § 131.10.

[17] 33 U.S.C. § 1313(c) and 40 C.F.R. § 131.10(g) and (h). *See also* EPA Water Quality Standards Handbook, parts 2.7 and 2.8.

[18] *Id.*

[19] *Id.*

do not agree with the proposal of twenty-year terms, regardless of the alleged surety of review of variances alongside triennial reviews. Variances should in most instances not extend beyond three years—at most, they might extend for the length of a single permit term with a review at the three-year mark.[20] Renewal of a variance should be fully-justified at each three-year mark as again, they are highly contrary to Clean Water Act requirements and purposes and should be carefully monitored and generally disfavored.

Further, Montana should specify in its variance rule that a variance absolutely cannot be obtained if the water quality criterion can be achieved with either or a combination of technology-based requirements *and* aggressive permit requirements for best management practices such as low impact development for new development and retrofits. Montana should not promulgate rules that are a disincentive to consistent forward progress on improving water quality and meeting water quality standards.

### 2. Variances Cannot Be Allowed for New Sources

DEQ's proposed variance rule is silent as to whether variances will be allowed for new sources. As a matter of policy, the state should want new sources to either comply at the date of initial discharge or be subject to compliance schedules. With a compliance schedule, a permittee is held to a date certain to meet an effluent limit certain. Surely this is the standard to which Montana would want to hold new pollution sources.

We strongly maintain that DEQ's variance rule specify variances can never be an option for new or expanding discharges as such a concept is completely contrary to the requirements of the Clean Water Act and existing EPA regulation. EPA's regulations prohibit the issuance of an NPDES permit "when the conditions of the permit do not provide for compliance with the applicable requirements of the CWA, or regulations promulgated under the CWA" or "when the imposition of conditions cannot ensure compliance with the applicable water quality requirements of all affected states."[21] Specifically, EPA's regulations prohibit the issuance of an NPDES permit for a new discharge where the discharge may "cause or contribute to the violation of water quality standards."[22] In order for a discharge of the pollutant at issue to be allowed, the regulations require strict assurances that the receiving water can handle the new discharge and meet water quality standards and that specific plans are in place to ensure that it will be restored from its condition of impairment.

Specifically, EPA regulations require that:

> The owner or operator of a new source or new discharger proposing to discharge into a water segment which does not meet applicable water quality standards or is not expected to meet those standards even after the application of effluent limitations required by 301(b)(1)(A) and 301(b)(1)(B) of CWA and for which the State or interstate agency has performed a pollutants load allocation for the pollutant to be discharged, must demonstrate before the close of the [NPDES permit] public comment period that:

[20] Here too, the facts demonstrate that this very same thing can be readily accomplished with compliance plans in permits. Variances don't really make sense andare just a duplicative off-ramp from compliance.

[21] 40 C.F.R. § 122.4(a), (d).

[22] 40 C.F.R. § 122.4(i).

(1) There are sufficient remaining pollutant load allocations to allow for the discharge; and

(2) The existing dischargers into that segment are subject to compliance schedules designed to bring the segment into compliance with applicable water quality standards.[23]

In *Friends of Pinto Creek v. U.S. E.P.A.*, 504 F.3d 1007 (9th Cir. 2007), *cert. denied*, 129 S. Ct. 896 (2009), the Ninth Circuit Court of Appeals held that without a plan to achieve water quality standards, a permitting agency cannot allow new discharges that will exacerbate the existing water quality standards violations. The court held that all existing dischargers must be subject to compliance schedules[24] and that "[i]f there are no adequate point sources to do so, then a permit cannot be issued unless the state or the [discharge permit applicant] agrees to establish a schedule to limit pollution from a nonpoint source or sources sufficient to achieve water quality standards."[25]

In other words, a TMDL is a necessary condition for a source to use the exception provided in EPA rules to the general prohibition on new sources into impaired waters but a TMDL by itself is not sufficient. Sources under compliance schedules are also necessary. Instructively, EPA's Great Lakes Initiative rules *prohibit* the application for variances to new or recommencing sources.[26]

### 3. Variances Must Comply With Antidegradation Policy

Tier I of the antidegradation policy, as framed by federal rules, applies to all water bodies regardless of their quality and requires a level of protection to assure that "[e]xisting instream water uses and the level of water quality necessary to protect the existing uses shall be maintained and protected."[27] Existing uses are defined as "those uses actually attained in the waterbody on or after November 28, 1975, whether or not they are included in the water quality standards."[28]

Existing provisions at ARM 17.30.705(2)(a) appear to provide that existing uses and the water quality necessary to protect those uses must be maintained and protected. If accurate, this is consistent with the "Tier 1" existing use provisions of 40 CFR131.12(a)(1) which provide that "[e]xisting in-stream water uses and the level of water necessary to protect the existing uses shall be maintained and protected."

With regard to Tier II high-quality waters, agency guidance makes it clear that variances are limited-term exemption from otherwise applicable water quality standards intended to support incremental movement toward attainment of those standards. Any variance that would authorize degradation of high quality water below a currently attained designated use is inconsistent with antidegradation and the requirements of the CWA.

[23] *Id.*

[24] *Pinto Creek* at 1012-13.

[25] *Id.* at 1014.

[26] Great Lakes Initiative [hereinafter "GLI"] Pt. 132, App F, Procedure 2 §A.1.

[27] 40 C.F.R. § 131.12(a)(1).

[28] 40 C.F.R. § 131.3(e).

Likewise, under §75-5-303, DEQ may not authorize any degradation of Tier II high-quality waters - through an MPDES permit or otherwise - unless the prospective polluter has affirmatively demonstrated by a preponderance of the evidence that: (a) degradation *is* necessary because there are no economically, environmentally, and technologically feasible modifications to the proposed -project that would result in no degradation; (b) the proposed project will result in important economic or social development and that the benefit of the development exceeds the costs to society of allowing degradation of high-quality waters; (c) existing and anticipated uses of states waters will be fully protected; and (d) the least degrading water quality protection practices determined by the department to be economically, environmentally and technologically feasible will be fully implemented by the applicant prior to and during the proposed activity.[29] This process imposes a high burden on a polluter and DEQ: to override the nondegradation requirement they must demonstrate that there "are no feasible modifications that would result in no degradation" and that the "least degrading water quality practices" are implemented.

**i. Variances Must Include a Requirement to Maintain and Protect Existing Uses and the Water Quality Necessary to Support Them**

The proposed variance rule found in DEQ Circular 12-B does not discuss protection of existing uses. This omission falls short of what is necessary to meet EPA's implementing regulations because: (1) there is no requirement for variances to meet the antidegradation policy, and therefore it falls short of the protection of existing uses that is required, (2) even if DEQ does have a requirement that our review missed, there is no implementation methods for Tier I of the antidegradation policy which it could use to ensure that any such provision is followed and to demonstrate precisely what provision is provided, and (3) the Department is unlikely to enforce any existing use protection requirement without explicit language here to do so because it has failed to acknowledge that existing use protection is a required aspect of water quality standards in its TMDLs, its NPDES permits, its 303(d) lists of impaired waters, and its 401 certifications.

EPA has stated repeatedly that variances are subject to the "same substantive and procedural requirements as removing a designated use."[30] The requirement to protect existing uses in the issuance of variances derives from several sources. First, existing use protection is the "floor" of water quality, below which State standards may not go.[31] Because variances are changes to water quality standards they too may not go below that floor. This is encoded in the requirement to classify existing uses[32] as well as the antidegradation provisions to protect those uses,[33] which must be read together.[34] Existing use protection is specifically noted – *twice* – in EPA regulations concerning the removal of designated uses, the same provision that is used for variances.[35] EPA notes that the protection of existing uses is a site-specific exercise, which is

[29] Mont. Code Ann. 75-5-303(3).

[30] Handbook at 5.3; EPA Interim Economic Guidance Workbook, EPA-823-B- 95-002; March 1995 [hereinafter "Economic Guidance"] at 1-3.

[31] Handbook; EPA Questions & Answers on Antidegradation, August 1985 [hereinafter "Questions and Answers"]; 48 Fed. Reg. 51402 (November 8, 1983)

[32] 40 C.F.R. § 131.10.

[33] 40 C.F.R. § 131.12.

[34] Water Quality Standards Regulation Proposed Rule, Advance Notice of Proposed Rulemaking, 63 Fed. Reg. 36741, July 7, 1998 [hereinafter "ANPRM"] at 36752.

[35] 40 C.F.R. §§ 131.10(g) & (h)(1).

wholly consistent with the issuance of variances.[36]

EPA considers protection of existing uses as essential in issuing variances.[37] EPA notes that it is the necessity of preserving existing uses, as well as making reasonable progress towards ultimate attainment, that requires the conditions of a variance to be set as close as possible to the designated uses and "always retained at the level needed to preserve the existing use."[38] These conditions include various prohibitions, control requirements, monitoring, and evaluation.[39] The requirement to protect existing uses pursuant to the antidegradation policy applies during triennial reviews and water quality standards revisions, of which a variance is one, as well as the issuance of NPDES permits.

The six factors of 40 C.F.R. § 131.10(g) cannot be read outside the context of the text of 40 C.F.R. § 131.10(g), of § 131.10(h), and of the antidegradation policy, all of which specify the protection of existing uses. Similarly, the GLI rules explicitly require that in addition to the six factors governing use attainability, the variance seeker show the antidegradation requirements have been met.[40] Consistent with these policies, EPA has also held that permits issued pursuant to variances must still comply with antidegradation requirements, including existing use protection.[41] A variance applies to the applicable criterion and does not modify the application of the existing use and designated use provisions of the water quality standard.[42]

In addition, the antidegradation policy, of which the Tier I protections for existing uses and level of water quality necessary to protect them is one, require a state to "identify the methods for implementing such policy."[43] In contrast to EPA's regulations, guidance, and policies, DEQ's proposed rule in Circular 12-B only references assessment of downstream, which we assume to be an implicit recognition of the applicability of the state's nondegradation policy, but does not set out how this end will be achieved. EPA's regulations require much more than this. The existing use protection in EPA regulations does more than prohibit elimination or impairment of existing uses. It states that "[e]xisting instream water uses and the level of water quality necessary to protect the existing uses shall be maintained and protected."[44] In other words, on the continuum between eliminating existing uses and full support of existing uses, the language "shall be maintained and protected" requires full support. There is no legal or policy reason to countenance anything less than full support of those uses that constitute the floor of water quality in this nation. Merely not entirely eliminating or impairing existing uses is inadequate protection.

[36] ANPRM at 36752.

[37] 40 C.F.R. § 131.10(h)(1); ANPRM at 36759, 36760.

[38] EPA, Guidance: Coordinating CSO Long Term Planning with Water Quality Standards Reviews, EPA-833-R-01-002, July 31, 2001 [hereinafter "CSO Guidance"] at 34.

[39] *Id*. at 35.

[40] GLI Pt. 132, App F, Procedure 2 §C.2.a; GLI Supplementary Information Document, EPA-820-B-95-001, March 1995 [hereinafter "GLI SID"] Sec. VIII.B.3.c.

[41] EPA, Guidance for State Implementation of Water Quality Standards for CWA Section 303(C)(2)(B), December 1988 [hereinafter "Guidance for Implementation"] at 6.

[42] EPA Memorandum, from Kenneth Mackenthun to Regional WQS Coordinators, Re: Definition of WQS Terms, July 3 1979 at 1.

[43] 40 C.F.R. § 131.12(a).

[44] 40 C.F.R. § 131.12(a)(1).

### ii. The Proposed Variance Rule is Incorrectly Limited in its Requirement for All Cost-Effective and Reasonable Nonpoint Source Controls

EPA has stated repeatedly that variances are subject to the "same substantive and procedural requirements as removing a designated use."[45] This use provision applies to issuance of a variance as a temporary removal of designated uses governed by the same EPA regulations.[46]

In the GLI rules, this requirement was changed to mean that BMPs must be implemented (1) *by the discharger (2) before* a variance is granted, two requirements that are specific to the GLI, one of which is arguably less stringent (the scope) and one of which is arguably more stringent (the timing). In contrast, the national regulations that apply to Montana are consistent with, and identical to, the Tier II antidegradation protection language which requires all "cost-effective and reasonable nonpoint source controls" for nonpoint sources.[47] Because the use removal provisions apply to water bodies and variances apply only to the specific discharger seeking the temporary suspension of one or more standards, DEQ cannot suspend requirements of the water quality standards on other sources – point or nonpoint – as an outcome of the variance. Therefore, the BMP requirements of 40 C.F.R. §131.10(h)(2) apply to all nonpoint sources in the consideration of a variance application. EPA has supported this position by noting that in issuing variances, the economic impacts that can be considered are only those that result from treatment beyond that required by technology-based regulations. This includes both technology-based limits on point source discharges as well as BMPs to nonpoint sources.[48]

In addition, while the GLI's more limited BMP requirements for permittees seeking variances must be met *prior* to issuance of the variance, the clear language of the non-GLI language that applies to Montana discusses the State's finding that designated uses "*will be* attained . . . by implementing [nonpoint source controls],"[49] a finding related to *future* attainability. To the extent Montana has enforceable controls on nonpoint sources, they must be implemented as part of the Tier II protections. Likewise, to the extent that Montana has enforceable controls on nonpoint sources, they must be implemented when the Department or a source seeks to remove designated uses through the provisions of 40 C.F.R. § 131.10, including a temporary removal in a variance.

---

[45] Handbook at 5.3; EPA Interim Economic Guidance Workbook, EPA-823-B- 95-002; March 1995 [hereinafter "Economic Guidance"] at 1-3; CSO Guidance at 34.

[46] ANPRM at 36760.

[47] EPA Memorandum from Tudor Davies, EPA, to Water Management Division Directors, February 22, 1994, Re: Interpretation of Federal Antidegradation Regulatory Requirement [hereinafter "Interpretation"] at 2.

[48] Economic Guidance at 1-1. ("This workbook provides guidance for those seeking to . . . obtain a variance based on economic considerations, or to lower water quality in a high -quality water. In addition, it provides guidance to States and EPA regions responsible for reviewing requests for variances and modifications to designated uses, and for approval of antidegradation analyses.

…

The economic impacts considered are those that result from treatment beyond that required by technology-based regulations. Since water quality cannot be lower than that resulting fromtechnology-based limits applied to direct and indirect point source discharges and reasonable Best Management Practices (BMP) applied to nonpoint sources, these are considered to be the baseline.")

[49] 40 C.F.R. §131.10(h)(2) (emphasis added).

The Rule Package's language is at best ambiguous as to the timing of such controls and could be read to be concurrent or in the future. The variance rule proposed appears to be less protective than either the GLI or the nationally-applicable regulations by narrowing the scope of nonpoint sources to be controlled and by allowing those controls to happen concurrently or in the future. Given the absence of any discussion of non-point source controls, let alone discussion as to what types of management practices are cost-effective or reasonable for nonpoint sources, one can only come to the reluctant conclusion that DEQ intends to ignore this provision.

As demonstrated above, EPA regulations link the fate of point and nonpoint sources together. When DEQ proposes to separate their fate, it can be sure that the result will be a continuation of the existing ineffective and nonexistent nonpoint source practices and the dirty water those sources create. The perpetuation of the same approach used by DEQ in its TMDLs – the unfounded belief that nonpoint sources are or will reduce loads – is now proposed to be incorporated into variance rules, from which no good will come.

### 4. Variances Must Include Substantive Requirements for Reasonable Progress Towards Attainment and Variance Renewal Must be Based On Substantial Information

EPA believes that variances can be used to implement water protection actions, assess their results, and study the water quality problem to better understand it.[50] We believe DEQ understands the only difference between a source with a compliance schedule and a source with a variance should be that the latter is not able to commit to a date certain by which it can meet waste load allocations. We support this general policy.

In order that this policy may be carried out, however, conditions for pollution control and monitoring must be included in a variance and incorporated into the applicable NPDES permit. This gives meaning to the stated notion that variances are "short-term" exemptions from meeting standards. Likewise, this approach ensures that renewal is not automatic but, rather, requires a new affirmative showing by the applicant.[51] We agree that the required triennial review is a time when the public should be able to evaluate whether the conditions of the variance have been met and the conditions the variance was based upon still apply.[52]

We are troubled that DEQ's rule fails to contain an explicit requirement that permittees seeking variances must submit a type of pollutant reduction plan that includes any actions to be taken by the permitee that would result in reasonable progress toward meeting the underlying water quality standard. Nor does DEQ's proposed variance rule require a clause that establishes and incorporates into the discharger's NPDES permit all condition necessary to implement an approved variance and associated pollution reduction plan. The proposed variance should should be amended to include these items.

The key importance of such a "reasonable progress" requirement is ensuring that variances are, indeed, temporary. Required studies and monitoring should not be limited to ensuring compliance with the variance conditions but also so that DEQ, and the public, can determine in the likely event of an application for renewal whether the water quality is improving or

[50] Handbook at 5.3; ANPRM at 36758-60.

[51] ANPRM at 36759; *see also* GLI.

[52] ANPRM at 36759.

deteriorating and whether any reasonable progress has been achieved. The reality is that DEQ permit writers will be under significant pressure to agree to as little as permittees want to do. This is particularly true in the case of asking permittees to do in-stream monitoring. The only way to strengthen the position of those permit writers is to make the requirements for measuring any reasonable progress or lack thereof more clear and certainly mandatory.

In addition, with regard to municipal sources, it is clear that there are some significant ways in which source control can be achieved – through controls on discharges to municipal sewage collection systems from un- and under-regulated industries beyond federal pretreatment requirements, unregulated commercial sources, and from runoff that could be controlled by municipal ordinances. Without clear direction from DEQ concerning the degree to which these unpopular restrictions would need to be taken by municipal NPDES permittees, they will likely seek to avoid them as much as possible for political and budgetary reasons.

Respectfully submitted,

Guy Alsentzer

The Upper Missouri Waterkeeper and Executive Director
Upper Missouri Waterkeeper, Inc.
PO Box 128
Bozeman, MT 59771
guy@uppermissouriwaterkeeper.org

On Apr 2, 2014, at 10:17 AM, Laidlaw, Tina wrote:

Sounds good. I'll send you a calendar invitation. Do you just want to chat with me about the variance and criteria stuff? Or do you want me to invite my TMDL folks? Just let me what you prefer.

**From:** Guy Alsentzer [mailto:guy@uppermissouriwaterkeeper.org]
**Sent:** Wednesday, April 02, 2014 10:10 AM
**To:** Laidlaw, Tina
**Subject:** Re: MT Nutrient Rule Pkg FOIA

Tina - How about next Weds the 9th, 11am?

On Mar 31, 2014, at 3:22 PM, Laidlaw, Tina wrote:

Hi Guy,

Thanks very much for the update. I'm pretty open this Wednesday or Thursday afternoon (2 ish) if you want to talk about the rule package. I'm also open much of the week of April 7th (except for Tuesday).

Just let me know what works best for you. Look forward to talking.

Tina

Tina Laidlaw
U.S. EPA, Montana Office
10 West 15th St., Suite 3200
Helena, MT 59626
phone: (406) 457-5016

**From:** Guy Alsentzer [mailto:guy@uppermissouriwaterkeeper.org]
**Sent:** Friday, March 28, 2014 3:52 PM
**To:** Laidlaw, Tina
**Subject:** MT Nutrient Rule Pkg FOIA

Hi Tina -

As per our conversations earlier this week I have withdrawn my FOIA of discussions and documents pertaining to R8-DEQ discussions and conclusions relating to the pending numeric nutrient rule package. I have not yet discussed with my Board the potential for withdrawing the Lower

Gallatin TMDLs FOIA but will next week, although I've got a green light - and feel confident - that we can start an open discussion about the rule pkg now.

I'd like to set up a time to chat with you about certain outstanding questions on the rule pkg sometime in the near future. I'm pretty open next Weds and Thurs (2nd and 3rd); alternatively, the week after is likewise fairly open.

Cheers - GA

**Guy Alsentzer, Esq.**
Upper Missouri WATERKEEPER® | Executive Director
Upper Missouri Waterkeeper, Inc. | P.O. Box 128, Bozeman, Montana 59771
406.570.2202 | Guy@uppermissouriwaterkeeper.org
www.uppermissouriwaterkeeper.org

<image001.jpg>

***If you are not the intended recipient of this email, you must delete it and notify the sender. This email may contain attorney work-product and privileged information.***