History of Montana Numeric Nutrient Standards Development

1998 - The Montana Department of Environmental Quality (MDEQ) had long been concerned about controlling the undesirable effects on water quality caused by the release of excess nutrients (nitrogen and phosphorus) in state waters. According to a document prepared by the MDEQ, in the mid 1970s and into the 1980s, citizen complaints about excessive algae growth in the Clark Fork River led to a 1998 voluntary agreement among discharges to reduce nutrient loading to that river.

An Environmental Protection Agency (EPA) plan, initiated in 1998, encouraged states to adopt numeric nutrient standards for all of their surface waters.

2000 - Narrative water quality standards were adopted for all state waters decades ago. Beginning in 2000, the MDEQ has worked actively to develop numeric nutrient standards for all state waters. Throughout the early 2000s, the MDEQ carried out a number of scientific studies and analyses.

2005 – It became apparent to the MDEQ that the scientifically-derived nutrient concentrations being developed were going to be very low, particularly in some regions of the state. It also became apparent that some of the nutrient concentrations the MDEQ was considering were at or below the levels that can be readily achieved by practical wastewater technologies of today. The MDEQ began investigating options for implementing the standards in a more staged manner. The studies, and consultation with EPA, revealed that a temporary variance process with discharger specific permit limits for a defined period of time could work effectively for implementing the standards under consideration.

2005-2008 – Consultation with MDEQ legal staff revealed that MDEQ did not have clear legal authority to allow the case-by-case, discharger-by-discharger variances it envisioned. During this time period, MDEQ envisioned a process for nutrient standards whereby the standards, once adopted, could remain the same along the stream so the public and stakeholders would clearly know what the standards are. However, individual dischargers could remain in compliance with their permits by applying for discharger-specific variances. The MDEQ also wanted to work with nonpoint source nutrient contributors while the technology and economics of meeting numeric limits caught up.

2008 – MDEQ began working with an informal stakeholder group (Nutrient Criteria Affordability Advisory Group) to address many of the cost-related issues. This informal group developed a detailed affordability assessment process for POTWs based on EPA guidance.

2009 – SB 95 was introduced to provide numeric nutrient standards for Montana's receiving waters and included a temporary nutrient standard process where nutrient criteria levels were not achievable. At the time, industrial dischargers were concerned that discharge permits would be difficult and likely impossible to comply with if numeric nutrient criteria were

codified. Various industry groups engaged in SB 95, including the MMA, and the final version required the formation of a nutrient advisory group to address numeric nutrient standards and complex variance process. SB 95 also allowed for nutrient trading. SB 95 final text is here: http://legmt.gov/bills/2009/billhtml/SB0095.htm.

The Nutrient Work Group (NWG) was formed and was comprised of members representing agriculture and livestock, conservation districts, environmental organizations, financing and state-level grant agencies, forestry, manufacturing, municipalities, oil and gas, railroads, real estate, wastewater engineering, and mining. The MMA is a member and participant in the NWG, has been since its inception.

It soon became apparent that the creation of a variance process would be difficult, if not impossible. One implementation hurdle was EPA guidance that dictated certain factors had to be met before a variance could be issued. The factor that fit industry was the requirement to prove that the standard would cause widespread economic harm, which is nearly an impossible threshold to meet.

2011 –SB 367 was introduced in the legislature. The bill resulted directly from meetings between the MDEQ and the NWG held from 2009-2011.

SB 367 added several key provisions including that in addition to the individual variances established in SB 95, the MDEQ was directed to grant "general" variances with permit limits establish in statute. The general variance is divided into three categories based on discharge flow. These limits were to sunset on May 31, 2016 and the MDEQ was instructed to adopt rules before that date.

SB 367 directed the MDEQ, in consultation with the NWG, to develop new categorical variance numbers in rule for dischargers to surface waters. SB 367 established that immediate compliance with numeric nutrient standards would result in a substantial and widespread economic impact to the State of Montana. This is a critical component of SB 367 and of the variance process.

SB 367 directed MDEQ to revisit the variance process on a 3-year interval, and update the concentration levels of the general variance in conjunction with the triennial review; which is currently in progress (2016).

SB 367 indicated that permittees receiving a variance shall evaluate current facility operations to optimize nutrient reduction with existing infrastructure and shall analyze cost-effective methods of reducing nutrient loading, including but not limited to nutrient trading without substantial investment in new infrastructure and the legislation included a confidentiality clause protecting proprietary information. SB 367 final text is here: http://leg.mt.gove/bills/2001/billpdf/SB0367.pdf.

2012 – The Board of Environmental Review adopted a nutrient trading policy.

2013 – MDEQ developed numeric nutrient standards for total phosphorous and total nitrogen based on numerous studies conducted by DEQ staff, led by Mike Suplee, PhD earlier in the timeline. The variance process took more time to develop. Mr. Jeff Blend, PhD did an economic analysis to support the statement in SB 367 that meeting the criteria would cause significant and widespread economic harm. The MDEQ continued to meet with the NWG to focus on (1) how site-specific nutrient standards might be established for specific streams, where needed, (2) defining upfront the nutrient reduction steps that would occur under the auspices of the general variance, to provide regulatory certainty to MPDES permit holders, (3) sorting out which text would be adopted as rules to address nutrient discharges, and (5) finalizing language in the draft rules, including the details of a non-severability clause. The clause would vacate the numeric nutrient standards if a court declared that portion of the statute invalid or if the EPA disapproved of the rule package.

MDEQ made it clear that it intended to propose the rules for adoption in late 2013 or early 2014. At the NWG meeting in November of 2013, not every member of the group felt that all issues were completely resolved but others felt that their concerns were sufficiently addressed. The final draft rule package was provided to NWG members in December of 2013.

2014 – The MDEQ requested initiation of rule adoption before the Board of Environmental Review (BER) in January. A public hearing was held in in March. The MDEQ briefed the BER in May and said they would be back in July to request adoption of the rules.

The rules, in the form of two Circulars labeled 12A and 12B, were adopted by the BER in July. DEQ Circular 12A contains the numeric criteria and DEQ Circular 12B includes the general and individual variance process. You can find the Circulars here:

Circular 12A:
https://deq.mt.gov/Portals/112/Water/WQPB/Standards/NutrientWorkGroup/PDFs/NutrientRules/CircularDEQ12A_July2014_FINAL.pdf

Circular 12B:
https://deq.mt.gov/Portals/112/Water/WQPB/Standards/NutrientWorkGroup/PDFs/NutrientRules/CircularDEQ12B_July2014_FINAL.pdf

A Guidance Document was also developed along with the Circulars. The document provides guidance pertaining to the implementation of Montana's base numeric nutrient standards and variances from those standards. The final Guidance Document can be found here: https://deq.mt.gov/Portals/112/Water/WQPB/Standards/NutrientWorkGroup/PDFs/NutrientRules/NutrientStandardGuidance_July2014.pdf

During the adoption of Circulars 12A and 12B, contingency language was also promulgated. The language is contained in 17.30.619(2) found here: http://www.mtrules.org/gateway/ruleno.asp?RN=17%2E30%2E619

2015 – HB 270 was introduced and passed. HB 270 states that: If the United States Environmental Protection Agency vetoes or objects to a discharge permit because of a nutrient standards variance provided for in 75-5-313 and the environmental protection agency determines that no variance may be granted for the permits, the department shall modify the discharge permit to contain nutrient limits based on the base numeric nutrient standards and a compliance schedule for meeting these nutrient limits. The compliance schedule may not extend for more than 20 years. The department may review and modify the compliance schedule every 3 years. You can find the final text of HB 270 here: http://leg.mt.gov/bills/2015/billpdf/HB0270.pdf

2016 – The US EPA completed its review of Montana's new and revised water quality standards for nutrients and approved the same.

A lawsuit was filed on May 31, 2016 in US District Court in Great Falls. Upper Missouri Waterkeeper –v- United States EPA ("Waterkeepers I") requested the following relief:

1. A declaration that EPA acted in violation of the Clean Water Act and applicable regulation in approving Montana's variance water quality standard for nutrients;
2. A declaration that EPA's approval of Montana's variance water quality standard for nutrients is arbitrary and capricious and an abuse of discretion;
3. Vacatur of EPA's approval of that portion of Montana's water quality standards that is the variance water quality stand for nutrients found in DEQ Circular 12B;
4. An award of Upper Missouri Waterkeeper's costs and attorneys' fees as determined appropriate under the Equal Access to Justice Act; and
5. Such other and further relief as the Court deems just and equitable.

2017 – After the 3-year triennial review process, DEQ adopts and EPA approves revisions to the variance rules in June 2017. The parties submit amended briefs and motions for summary judgment to the Court.

2019 – On March 25, 2019, the District Court issued a decision upholding most of Montana's variance to its adopted numeric nutrient criteria. The Court recognized the EPA's variance regulations allow for consideration of economic and social impacts and that this variance process is authorized under the Clean Water Act. However, the Court faulted the timeline for

meeting the numeric nutrient criteria under the Montana variance, holding that the Clean Water Act and implementing regulations require parties to start the variance period meeting the "highest attainable standard" and meet the base numeric standards by the end of the variance period. The Court also holds that the 20-year period adopted by DEQ is too long. The Court asks the parties to confer and submit a proposed timeline to the Court.

The parties failed to agree on a proposed timeline and submitted separate briefs proposing an appropriate timeline. The plaintiffs submit a report written by an individual not licensed to practice professional engineering in Montana and without any Montana data points for completing wastewater projects in Montana. Nevertheless, the Court relies on this extra-record evidence to issue a order requiring DEQ to amend its variance timeframe to require compliance with the base numeric standards "in the range proposed by Plaintiffs."

In the fall of 2019, DEQ proposed amended rules to comply with the District Court order. All parties submit objections to the proposed rules during the rulemaking process. DEQ adopts the proposed rules in November 2019. Concurrently, the National Association of Clean Water Agencies, the Montana League of Cities and Towns, and the Treasure State Resources Association appeal the District Court order.

2020 – In February, the EPA rejects the DEQ proposed amended rules, triggering the self-executing non-severability clause of the Montana variance. This reverts Montana to narrative nutrient criteria.

In March, the Upper Missouri Waterkeepers files suit against the EPA's action in federal district court ("Waterkeepers II"), challenging the ability of the EPA to approve the state's non-severability clause.

In May, the Montana League of Cities and Towns successfully moves to intervene in the case. DEQ reconvenes Nutrient Work Group to discuss how to move forward with narrative nutrient standards.

In June, the plaintiffs move for summary judgment in Waterkeepers II. Concurrently, the National Association of Clean Water Agencies, the Montana League of Cities and Towns, and the Treasure State Resources Association file their opening briefs in the Ninth Circuit appeal of Waterkeepers I decision.