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## CRITICAL TIME FOR MONTANA WATER QUALITY STANDARDS

On June 3, 2016 at 9:00 AM, as part of its regularly scheduled triennial review process, the Montana Board of Environmental Review (BER) will hold a public hearing at the Metcalf Building in Helena to receive comments regarding Montana's water quality standards. This hearing and any resulting rulemaking may impact your business and industry, as it is likely to change the standards applicable to water discharge (MPDES) permits, including stormwater permits.

In Montana, the classification of a water body is the fundamental basis from which the standards that are imposed through discharge permits are derived. The BER is charged by the Legislature to establish classifications of all state waters in accordance with their present and future most beneficial uses, and to formulate and adopt water quality standards. The available classifications, their accompanying standards, and tables of how each watershed is classified are provided in Administrative Rules of Montana Title 17, Chapter 30, Subchapter 6, which is open for comment at the June 3rd hearing. All of the rules are available online at <http://www.mtrules.org/>.

Changes to classifications generally must be supported by a technical analysis called a Use Attainability Analysis (UAA); however, recent federal and state regulatory changes provide authority for the BER to remove or revise certain uses, including public water supply, agriculture, and industry, without a performing a UAA. The regulations and the lack of a supporting UAA allows creation of classification sub-categories that may have more or less stringent standards; for example, agriculture without consumption by livestock or agriculture without irrigation. The BER will have wide latitude to modify, create, or remove classifications and standards, and it is likely that Comments submitted at the June 3, 2016 hearing will attempt to take full advantage of this opportunity. Comments could also suggest sub-categories for consideration state-wide or region-wide.

Specific water quality standards are provided in Administrative Rules of Montana Title 17, Chapter 30, Subchapters 6 and 10. DEQ circular 7 provides numeric water quality standards

and DEQ Circulars 12A and 12B contain Montana's nutrient standards. The DEQ Circulars, implementation guidance, and other relevant documents are available online at <http://deq.mt.gov/Water/WQPB/standards>. All of these standards, as well as their implementation and variance procedures are on the table for comment at the June 3rd hearing.

Montana's nondegradation policy is of particular importance. By statute and rule, nondegradation provides that the state may not issue a water quality discharge permit that degrades "high quality waters." However, Montana (unlike other states) takes a broad approach to nondegradation review of new or increased sources of pollution, which includes permitted discharges. While the federal counterpart provides review of just those water bodies that exceed water quality criteria necessary to support aquatic life, wildlife and recreation uses, Montana's nondegradation review applies to all water bodies that meet water quality standards. Furthermore, nondegradation review is likely to impose stringent limits on water discharge permits, unless the discharge meets statutory or regulatory nonsignificance criteria. However, some nonsignificance criteria have been legally challenged and may not be dependable avenues out of nondegradation review.

While the BER has no authority to change the statutory nondegradation framework, it does have authority to change the procedures for water quality standard review as well as some of the nondegradation nonsignificance criteria. These provisions are found in Administrative Rules of Montana Title 17, Chapter 30, Subchapter 7 and are also open for comment at the June 3rd hearing. Examples of exemptions from nondegradation review from other states include allowance of certain naturally occurring non-toxic parameters up to the numeric standard and allowance of short term degradation that leads to long-term environmental benefits. Such exemptions may also be relevant in Montana and would be appropriate to raise as potential new nonsignificance criteria at the June 3rd hearing.

Montana is also unique in its application of salinity standards in watersheds where the water and soil are naturally highly saline. These rules are found at Administrative Rules of Montana 17.30.670. Changes or clarifications to the rules that would account for the naturally elevated background levels without penalizing or preventing permitted water discharges and revisions that would allow discharges of water with lower salinity than the receiving water body may also be appropriate to voice at the June 3rd hearing.

Montana's mixing zone regulations, which are crucial to some permitted water discharges, are also open for public comment. These regulations are found in Administrative Rules of Montana Title 17, Chapter 30, Subchapter 5. Mixing zones are very important to permit holders in certain circumstances, and past experience indicates this may be another area of focus for some interested parties.

As part of this triennial review, Montana DEQ has already indicated that they will be asking the BER to initiate rulemaking on several water quality rules, possibly as early as this fall. To ensure proper, predictable, and useful regulation of Montana's water bodies, stakeholders should engage legal and technical consultants in a review of the applicable rules, provide comments at the June 3rd hearing, and remain vigorously engaged throughout any resulting rulemaking process.

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