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Ravalli County Commissioners

**BEFORE THE BOARD OF ENVIRONMENTAL REVIEW
OF THE STATE OF MONTANA**

In the matter of the adoption of New)
Rule I pertaining to nutrient trading)

**NOTICE OF PUBLIC HEARING ON
PROPOSED ADOPTION**

(WATER QUALITY)

TO: All Concerned Persons

1. On November 13, 2012, at 2:00 p.m., the Board of Environmental Review will hold a public hearing in Room 111, Metcalf Building, 1520 East Sixth Avenue, Helena, Montana, to consider the proposed adoption of the above-stated rule.

2. The board will make reasonable accommodations for persons with disabilities who wish to participate in this public hearing or need an alternative accessible format of this notice. If you require an accommodation, contact Elois Johnson, Paralegal, no later than 5:00 p.m., October 29, 2012, to advise us of the nature of the accommodation that you need. Please contact Elois Johnson at Department of Environmental Quality, P.O. Box 200901, Helena, Montana 59620-0901; phone (406) 444-2630; fax (406) 444-4386; or e-mail ejohnson@mt.gov.

3. The proposed new rule provides as follows:

NEW RULE I NUTRIENT TRADING (1) The board adopts and incorporates by reference Department Circular DEQ-13, entitled Montana's Policy for Nutrient Trading ([month and year of adoption] edition). Copies are available from the Department of Environmental Quality, Technical and Financial Assistance Bureau, P.O. Box 200901, Helena, MT 59620-0901.

(2) The department shall approve a nutrient trade that is consistent with the requirements and guidelines established in Montana's Policy for Nutrient Trading.

(3) An owner or operator of a point source discharge may submit an application for nutrient trading to the department prior to or concurrent with an application for a new or renewed MPDES permit. The application must include the information specified in Montana's Policy for Nutrient Trading and be consistent with the guidelines and requirements contained in that policy.

(4) An application to trade may be submitted for any of the following purposes:

(a) to comply with an approved total maximum daily load (TMDL) for nutrients;

(b) to offset a new or increased discharge of nutrients into a nutrient-impaired water;

(c) to comply with Montana's base numeric nutrient criteria or a variance from those criteria;

(d) to offset a new or increased discharge of nutrients into waters that are high quality for nutrients; or

(e) to comply with the nonsignificance criteria for nutrients in ARM 17.30.715.

(5) A trade proposed pursuant to (3) must be described in the draft permit and is subject to public comment. If approved, the trade must be described in the final permit and is not effective until the final permit is issued. The final permit must contain permit conditions that ensure that the terms of the trade are enforceable.

AUTH: 75-5-201, 75-5-401, MCA
IMP: 75-5-401, MCA

REASON: The board proposes adoption of New Rule I to establish clear guidelines and requirements for evaluating nutrient trading proposals. Rather than integrating the numerous and detailed trading requirements into the rule, New Rule I incorporates by reference Department Circular DEQ-13, entitled Montana's Policy for Nutrient Trading ([month and year of adoption] edition) (Trading Policy). The Trading Policy sets out a framework for evaluating prospective nutrient trades.

Although the current water quality standards for nutrients (nitrogen and phosphorus) are narrative rather than numeric, the department sometimes establishes numeric nutrient limits on a case-by-case basis in individual permits. In addition, the board may soon propose adoption of numeric water quality standards for nutrients in Montana surface waters. These numeric limits are designed to protect the beneficial uses of such surface waters. However, because of the limitations of available treatment technology and the potential economic harm resulting from immediate enforcement of the numeric standards, point source dischargers will be granted a temporary general variance from the base numeric limits. The department may employ general variances and subsequent variances to provide interim goals and a timeframe for point sources to begin reducing nutrient loading. The long-term goal is to reduce nutrient loading by an amount necessary to achieve compliance with the nutrient limits.

Nutrient trading is a tool to assist point source dischargers to meet their interim and long-term nutrient discharge limits. A point source discharger may buy "credits," in the form of an additional allocation of nutrient discharge, from another point source discharger that is discharging to the same water body and is discharging below its nutrient limit. A point source discharger may also obtain "credits" by entering into agreements with nonpoint source dischargers to employ nutrient management practices that reduce the nonpoint source's discharge of nutrients to a common water body.

The intent of the Trading Policy is to encourage cooperation between point and nonpoint sources as a means to reduce nutrient loading into surface waters. Given that nutrient discharges from nonpoint dischargers presently are not regulated, the best potential for reduction of nutrient discharges to a water body lies in cooperation between point source and nonpoint source dischargers. The Trading Policy would allow point source to point source trading and point source to nonpoint source trading. In addition, it would provide guidance that could be used for nonpoint source to nonpoint source trading, although the department has no regulatory authority over these trades.

The Trading Policy provides flexibility, yet also establishes firm criteria that must be met by either a point or a nonpoint source before credits can be generated and sold for use in a trade. The Trading Policy establishes baseline requirements

from which trading credits will be calculated. Other requirements in the Trading Policy include a limit on the duration of credits, restrictions on the boundaries of a trade, limitations on banking credits, and a requirement that all trades will be enforced through an applicable MPDES permit. The boundary restrictions for trades are necessary to ensure that the transfer of nutrient discharge occurs between dischargers in the same watershed. The credit duration and banking restrictions will ensure that the decrease in nutrient discharge from the source selling the credit and the increase in nutrient discharge from the source purchasing the credit occur contemporaneously. Enforcement of trades through the MPDES permit system will allow the department to monitor nutrient trades and ensure compliance with this policy.

In addition, the Trading Policy provides for adjustments in the trading credits received by a discharger, referred to as trading ratios, designed to: (1) account for the reduction of the nutrient load from a nonpoint source that would have occurred naturally prior to discharge to the applicable water body (delivery ratio); (2) provide for reduction of the overall nutrient load for a water body (water quality ratio); and (3) provide a margin of error (uncertainty ratio). Together, these requirements ensure that trading will not adversely affect water quality in the short term and will improve water quality in the long term.

For the reasons given above, the board finds it reasonable and necessary to adopt the Trading Policy.

4. The proposed Montana Policy for Nutrient Trading can be viewed at <http://deq.mt.gov/wqinfo/NutrientWorkGroup/default.mcp>.

5. Concerned persons may submit their data, views, or arguments, either orally or in writing, at the hearing. Written data, views, or arguments may also be submitted to Elois Johnson, Paralegal, Department of Environmental Quality, 1520 E. Sixth Avenue, P.O. Box 200901, Helena, Montana 59620-0901; faxed to (406) 444-4386; or e-mailed to ejohnson@mt.gov, no later than 5:00 p.m., November 14, 2012. To be guaranteed consideration, mailed comments must be postmarked on or before that date.

6. Katherine Orr, attorney for the board, or another attorney for the Agency Legal Services Bureau, has been designated to preside over and conduct the hearing.

7. The board maintains a list of interested persons who wish to receive notices of rulemaking actions proposed by this agency. Persons who wish to have their name added to the list shall make a written request that includes the name, e-mail, and mailing address of the person to receive notices and specifies that the person wishes to receive notices regarding: air quality; hazardous waste/waste oil; asbestos control; water/wastewater treatment plant operator certification; solid waste; junk vehicles; infectious waste; public water supply; public sewage systems regulation; hard rock (metal) mine reclamation; major facility siting; opencut mine reclamation; strip mine reclamation; subdivisions; renewable energy grants/loans; wastewater treatment or safe drinking water revolving grants and loans; water

quality; CECRA; underground/above ground storage tanks; MEPA; or general procedural rules other than MEPA. Notices will be sent by e-mail unless a mailing preference is noted in the request. Such written request may be mailed or delivered to Elois Johnson, Paralegal, Department of Environmental Quality, 1520 E. Sixth Ave., P.O. Box 200901, Helena, Montana 59620-0901, faxed to the office at (406) 444-4386, e-mailed to Elois Johnson at ejohnson@mt.gov, or may be made by completing a request form at any rules hearing held by the board.

8. The bill sponsor contact requirements of 2-4-302, MCA, do not apply.

Reviewed by:

BOARD OF ENVIRONMENTAL REVIEW

/s/ John F. North

JOHN F. NORTH
Rule Reviewer

BY: /s/ Joseph W. Russell

JOSEPH W. RUSSELL, M.P.H.,
Chairman

Certified to the Secretary of State, October 1, 2012.