UNINTENDED CONSEQUENCES:

MONTANA'S EXPERIENCE WITH REGULATION OF NUTRIENTS

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After more than a decade of analysis, debate, rulemaking, and litigation, Montana offers a cautionary tale on the regulation of phosphorous and nitrogen, which begs larger questions about whether engagement in collaborative policymaking makes sense when regulation is not required.

Although none of its neighboring states had developed numeric criteria for the regulation of nutrients (NNC), in its 2009 and 2011 legislative sessions, Montana enacted statutory language for the regulation of phosphorous and nitrogen.[1] In 2009, the Montana Legislature passed Senate Bill 95. Section 2 of the bill authorized Montana's Department of Environmental Quality (DEQ) to utilize "temporary nutrient criteria" in an MPDES permit if the permittee could not attain base numeric nutrient standards due to limits of technology or economic impacts. The bill also created the Nutrient Working Group (NWG), described as an "advisory work group, convened by the department, . . . that will advise the department on the base numeric nutrient standards, the development of nutrient standards variances, and the implementation of those standards and variances together with associated economic impacts", see 75-5-103(23), MCA, and required DEQ to "consult" with the NWG before recommending NNC to the Board of Environmental Review (BER). 75-5-313(2)(b), MCA. From 2009 through 2014, the NWG met more than twenty times to discuss the language for the NNC rule, the rule on variances enacted by the 2011 Legislature, and the related guidance documents. See www.deq.mt.gov/water/resources/nutrientworkgroup/agenda. Of significance to this article, EPA participated in the NWG, including attendance at meetings and feedback on the proposed rules.

DEQ and point source dischargers understood that immediate compliance with numeric criteria would be unattainable. On June 25, 2010, DEQ issued its Final Report to the Environmental Quality Council on Progress Toward Numeric Nutrient Standards for Montana's Surface Waters, which was required by subsection 4(c) of Section 2 of Senate Bill 95. DEQ made clear that limits of technology and excessive costs of compliance precluded the promulgation of NNC and enforcement of base numeric standards in the short-term. It concluded:

> *If all communities were made to meet the nutrient standards in one step, the costs would be too high and/or the technology might not be currently available. Therefore, the Department investigated options for implementing the standards in a staged manner. The idea was that if communities and other entities could begin working towards nutrient standards in steps, the standards could ultimately be achieved, given that technologies generally improve and become less expensive over time. It would also allow the Department time to address nonpoint sources of pollution. Report, p. 1; see also, Report, p. 3.*

The 2011 Legislature enacted Senate Bill 367, which created general, individual and alternative variances. See 75-5-313(5), MCA. The bill requires DEQ to approve a general variance for permittees meeting certain conditions. In describing the importance of granting DEQ the authority to include variances from NNC in MPDES permits, the Montana Petroleum Association noted:

> ***These base numeric criteria levels are extremely low. In fact, they are so low that there are only a handful of facilities in the state that even approach this level of treatment. Even these facilities cannot reliably meet the proposed new water quality standards for nitrogen and phosphorous. Quite simply, affordable technology does not exist at this time to meet these new proposed levels.***
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> *Economic analysis presented to NWG indicates that the cost to municipalities and the private sector, of even near-compliance with these numeric standards, would greatly exceed the suggested incremental benefits, even allowing for hard-to-define aesthetic benefits.*

On March 9, 2011, as the Legislature considered Senate Bill 367, DEQ Director Richard Opper wrote to James Martin, EPA's Regional Director for Region 8. He noted that the general variance authority in the bill "is a reasonable first step towards implementing strict numeric surface water standards for [nutrients] . . . and lays out a structured path forward for achieving the criteria over an approximately 20-year timeframe, a timeframe that is considered reasonable" given Region 8 policy. Director Opper went on to describe the "substantial and widespread economic harm" that Montana would incur with immediate compliance with NNC. He closed by noting that Montana "has substantial latitude to craft the process" to reduce nutrients and that the variance approach is preferable to alternatives.

Director Opper, on behalf of the Environmental Council of States, testified before Congress about Montana's plan to reduce nutrient loading and the state's interactions with EPA in attempting to finalize the plan. See Richard H. Opper, Running Roughshod Over States and Stakeholders: EPA's Nutrients Policies, Hearing Before the Subcommittee on Water Resources and Environment, Committee on Transportation and Infrastructure, U.S. House of Representatives, 112th Congress, June 24, 2011. Director Opper told Congress that Montana had not yet developed NNC because ". . . they can't be achieved. They are too stringent. At this point, the limits of technology and the expense

1 Terry J. Satterlee et al., Nutrients in the Heartland: Regulatory and Legal Issues Surrounding the Mighty Mississippi, NAT. RESOURCES & ENV'T., Spring 2013, at 12-13 ("As of August 2012—no state had adopted numeric nutrient criteria for all water bodies, and fewer than ten states had adopted numeric nutrient criteria for one or more classes of water bodes. See U.S. Environmental Protection Agency, Progress Toward Clean Water Act Adopted Numeric Nutrient Criteria (Aug. 2012)).

that would be required, they are not achievable." Id. at 72-73, 138. He noted that NNC are not required by the Clean Water Act and stated that Montana would not implement NNC without the ability to utilize the variance process authorized by Senate Bill 367. Id. at 138-39.

On January 3, 2012, Regional Director Martin confirmed in a letter to Director Opper that "the issuance of variances would be consistent with the Clean Water Act" based upon DEQ's analysis and assumptions.

On February 3, 2014, DEQ issued a Notice of Public Hearing on Proposed Adoption. 2014 Montana Administrative Register 275–279 (Issue No. 3, February 12, 2014). In the Notice, in describing the reason for the rule, DEQ explained:

> *Senate Bill 95 and Senate Bill 367 . . . addressed the high cost and technological difficulties associated with meeting the nutrient standards in the short term. [75-5-313, MCA] allows dischargers to be granted variances from base numeric nutrient standards in those cases where meeting the standards today would be an unreasonable economic burned or technologically infeasible. Variances from the standards may be granted for up to 20 years. Thus, 75-5-313, MCA, allows for the base numeric 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. Id. at 276-77.*

BER adopted the NNC rule in its Notice of Amendment and responded to public comment on the draft rule. 2014 Montana Administrative Register 17–356 (Issue No. 15, August 7, 2014). In response to a comment that unachievable standards should not be promulgated, BER noted the Legislature knew the standards were not "immediately achievable", but it provided variances to "meet legal requirements and a process that alleviates negative impacts on dischargers by providing variances for up to 20 years to achieve compliance with those standards." Id. at Response to Comment No. 19.

DEQ forwarded the NNC and the variance rules to EPA for approval pursuant to 40 CFR 131.20. On February 26, 2015, Region 8 sent a 4 page letter and a 30 page "rationale" for its approval of the rules to DEQ. Specifically, EPA noted[2]:

> *The EPA has reviewed this provision and determined that it is consistent with the EPA's requirements. The EPA's water quality standards regulation (40 CFR § 131.13) provides that variance policies may be adopted at state discretion, and that such general policies are subject to review and approval by the EPA. The EPA approves ARM 17.30.660(1).*

> *The EPA reviewed Montana's basis for determining that it is reasonable to grant multiple public and multiple private dischargers throughout the state with general variances of up to 20 years based on a demonstration that it is infeasible to meet water quality-based effluent limits based on the NNC (and by extension infeasible to attain the designated use for that limited time) "end-of-pipe" because meeting such limits would cause substantial and widespread economic and social impacts (see 40 CFR § 131.10(g)(6)) on a statewide basis.*

> *As foreshadowed in its approval letter six months earlier, on August 21, 2015, EPA issued a new rule on its variance authority. See 40 CFR § 131.14. The new federal rule had an immediate impact on the viability of the variance statute enacted by the Legislature in 2011 and the variance rules promulgated by DEQ in 2014. The assurances received from EPA were integral to the foundation upon which the variances were built by the NWG. As a result, no expectations have been met.*

The lack of vitality of the variance authority in statute and rule has been further magnified by on-going litigation. Upper Missouri Waterkeeper (UMW) sued EPA for its 2015 approval of the variance authority in the rule package in UMW v. EPA, CV 16-52-GF-BMM (D. Mont.) and received partial relief. EPA and intervenors, including DEQ, have appealed the decision to the U.S. Court of Appeals for the Ninth Circuit and a decision is expected in 2021.

The deliberative, collaborative process to address nutrient discharges led to new statutes and regulations, but two participants in the process, EPA and UMW, have undermined the end product. After getting what they wanted - - NNC - - they worked to undercut the variance authority.

2 In footnote 30 of its Rationale, for the first time in the deliberations on Montana's variance package, EPA disclosed the existence of a pending rulemaking to modify its authority to grant variances. EPA stated, "On September 4, 2013, the Agency proposed revisions to its WQS regulation that include new requirements addressing WQS variances. The comment period on the proposed rule closed on January 2, 2014."