



March 28, 2018

**David Ross, Assistant Administrator, EPA
C/O Roger Gorke, Senior Policy Advisor
EPA, Office of Water
600 Wilshire Blvd, Suite 1460
Los Angeles, CA 90017**

RE: Request – private sector economic variance

Dear Assistant Administrator Ross:

It was good to meet you when you spoke to the Western States Water Council and ICWP in Washington D.C. a few weeks ago. As I mentioned at the time, Montana Department of Environmental Quality (DEQ) has requested that U.S. Environmental Protection Agency (EPA) develop and provide us with new national or regional guidance on economic impacts for private sector discharger variances.

Montana has worked closely with all of our stakeholders to develop and adopt numeric nutrient standards and nutrient variances. We have also worked closely with Region 8 staff and management. We proposed and adopted new nutrient variance rules last fall. In an October 31, 2017 Action Letter EPA approved the use of the nutrient variances for a list of public-sector dischargers, but determined that private-sector discharger variances were out of scope. The 2017 nutrient variance rules were designed to replace existing nutrient variance rules adopted by DEQ and approved by EPA in 2015. The 2015 nutrient variance was approved for both public and private-sector dischargers. The October 31, 2017 EPA decision leaves DEQ—and more importantly our private-sector dischargers—at a loss for how to proceed with nutrient variances for those cases where private sector dischargers need time to meet the numeric nutrient standards.

The heart of the matter is not DEQ's rules or its economic analyses, but rather the shortfalls in EPA's 1995 guidance document¹ and EPA's continued failure to provide any additional guidance. The 1995 EPA document provides reasonably good guidance and cost ranges (% of Monthly Household Income) to determine cost thresholds (the "remedy", **Figure 1**) for the public sector. But for the private sector, EPA (1995 guidance) only states that "...if substantial and widespread economic and social impacts have

¹ U.S. Environmental Protection Agency, 1995. Interim Economic Guidance for Water Quality Standards Workbook. Office of Water, EPA-823-B-95-002.

been demonstrated, then the discharger will not have to meet the water quality standards. The discharger will, however, be expected to undertake some additional pollution control.” As a result, the 1995 guidance provides very little useful guidance that we can use to guide our future development of private-sector variances. If EPA had provided more concrete assessment tools, such as they did for the public-sector analysis, DEQ would have long since implemented and refined them, which DEQ did for the public-sector cost threshold methods.

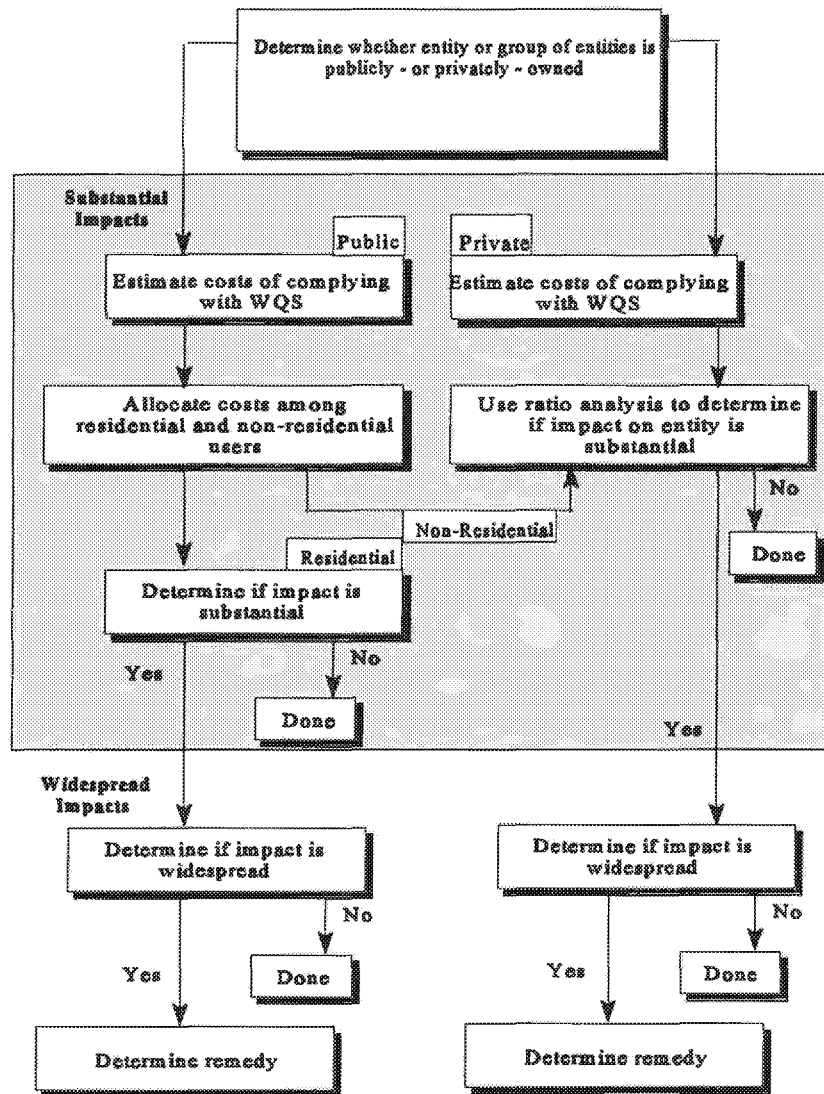


Figure 1. Steps in the economic analysis, from EPA (1995). Methods for determining the remedy (last step in the process) for the public sector are well defined by EPA and have been further refined (and implemented) by DEQ. In contrast, the remedy for the private sector has not been developed by EPA at all.

DEQ has had to rely on more general economic analyses to determine the likely impacts of meeting numeric nutrient standards on the state’s private-sector dischargers. DEQ’s most detailed work on this

matter (with EPA assistance) was carried out in 2012², and similar work was provided to EPA in 2017³. DEQ's economic analyses were considered adequate in 2015, at the initial adoption of numeric nutrient standards and variances, but not considered adequate in 2017 even though no new EPA guidance on economic impacts has been forthcoming. By rejecting DEQ's 2017 economic analyses rationalizing the general variance for the private sector, EPA is asking DEQ to carry out case-by-case analyses on each private company. In order to craft individual variances, or to contribute to a general-variance highest attainable condition analysis, DEQ needs better guidance from EPA as to how to calculate a "substantial and widespread" impact on a private entity including but not limited to, "the effect of decreased tax revenues if the private-sector entity were to go out of business, income losses to the community if workers lose their jobs, and indirect effects on other businesses." DEQ also needs better guidance from EPA as to what the remedy should be when a company (or companies) has demonstrated "substantial and widespread" economic impacts.

EPA's lack of approval of Montana's proposed private-sector general variance has placed DEQ and EPA in a legal conundrum. Montana state law, under 75-5-313, MCA, states that "the department shall approve the use of a general nutrient standards variance for permittees with wastewater treatment facilities that discharge to surface water." However, EPA's action could mean that if a private discharger requests a general variance then DEQ would have to approve it under Montana state law only to have it potentially denied by EPA. This is not a situation that I believe either DEQ or EPA would like to be in and that potentially leaves a private discharger in limbo if they cannot afford, at this time, to meet the numeric nutrient standards.

DEQ requests that EPA provide either national or regional guidance on the economic impacts for private-sector variances as quickly as feasible. It is our hope that you would be able to direct additional resources to Region 8 so they can hire a contractor to expedite the development of the guidance. I appreciate your willingness to consider this request. Please let me know if you or your staff need additional information.

Sincerely,



Tim Davis, Administrator
Water Quality Division

² Water Quality Planning Bureau, 2012. Demonstration of Substantial and Widespread Economic Impacts to Montana that would Result if Base Numeric Nutrient Standards had to be met by Entities in the Private Sector in 2011/2012. Helena, MT: Montana Dept. of Environmental Quality.

³ Energy Bureau and Water Quality Planning Bureau. 2017. Economic Analysis of Meeting Base Numeric Nutrient Standards: Supplement to *First Triennial Review of Base Numeric Nutrient Standards and Variances*. Helena, MT: Montana Dept. of Environmental Quality.

CC:
Doug Benevento, Regional Administrator, Region 8
Darcy O'Connor, Assistant Regional Administrator, Region 8

Steve Bullock, Governor | Tom Livers, Director | P.O. Box 200901 | Helena, MT 59620-0901

Ex. 6

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