



**TREASURE STATE**  
**RESOURCES ASSOCIATION**  
OF MONTANA

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**TREASURE STATE RESOURCES ASSOCIATION NEWS**  
**September, 2021**

**DEQ Extends Informal Comment Period on Proposed Hazardous Waste Fee Increases – Formal Rulemaking Expected in 2022**

Earlier this summer the DEQ Hazardous Waste Program notified stakeholders of an upcoming rulemaking and proposed hazardous waste fee increase. They are interested in receiving input from stakeholders and the regulated community on the rulemaking and fee increase.

DEQ held public meetings in Billings and Helena on August 11 and 13, 2021. In response to requests by stakeholders, DEQ is extending the period for commenting to September 14, 2021. A fact sheet on the proposed rule changes is available on the DEQ website at <https://deq.mt.gov/public/publicmeetings>. Information on how to submit comments or questions is also included in the fact sheet.

Please note the public meetings and request for input are informal processes to obtain the viewpoints and advice of interested persons with respect to the contemplated rulemaking. A formal rulemaking process under the Montana Administrative Procedure Act, including a public hearing and the opportunity for public comment on the final proposed rules, will occur in 2022.

**DEQ Announces Approximately \$1 Million in Available Grants for Water Quality Projects** Source: MT Department of Environmental Quality

HELENA—The Montana Department of Environmental Quality (DEQ) is seeking applications for approximately \$1 million in funding for nonpoint source pollution reduction projects

available under the Federal Clean Water Act. Nonpoint source pollution is the single largest cause of water quality impairment in Montana's lakes and streams, and typically comes from diffuse sources that are not regulated under a discharge permit.

Nonpoint source water pollution is often associated with land uses such as agriculture, forestry, urban and suburban development, and runoff from abandoned mine sites. Common pollutants include sediment, nutrients, pathogens and toxic metals. In lakes, streams and wetlands, these pollutants can cause serious harm to aquatic life and can make the water unsafe for human recreation and consumption. DEQ monitors water quality in Montana's lakes and streams and also identifies water bodies that are impaired. These grants are one way that DEQ works to improve impaired waters across Montana. The projects funded under these grants must address water quality impairments identified on Montana's current List of Impaired Waters.

Providing funding to local organizations and agencies puts communities in the driver's seat and leverages local knowledge to improve Montana's water bodies. Nonprofit or government organizations can submit applications for proposed projects that help reduce nonpoint source pollution. Examples of past projects include planting native vegetation along streambanks or working with local ranchers to move pens and corrals out of floodplains. The recommended range for applications is \$10,000 to \$250,000 per project, and 40 percent of the total project cost must be matched with non-federal funds.

Approximately \$500,000 of the available funding will be focused on projects in the Bitterroot watershed. DEQ focuses funding on a specific watershed and rotates to a different watershed every two or three years. This targeted approach maximizes the cumulative impacts of water quality restoration projects within a watershed. The remaining \$500,000 is open to projects across Montana. DEQ does prioritize some of the funding to administer mini-grant programs for low-cost nonpoint source pollution prevention activities and local capacity building.

The application form and instructions can be downloaded from DEQ's website using the following hyperlinks:

- [2022 Call For Applications](#)
- [2022 Application Form Instructions](#)
- [2022 Application Form – General and Focus Watershed](#)
- [2022 Application Form – Supplemental Project Form](#)
- [2022 Application Form – Mini-Grant Programs](#)

All projects must address nonpoint source pollution and implement a DEQ-accepted Watershed Restoration Plan. DEQ staff will be available, upon request, to provide feedback on project applications. **The deadline for applications is 5 p.m., Friday, Oct. 29, 2021.**

For more information on eligibility and to see current and recent applications, visit the DEQ website at: [Nonpoint Source Program](#) and scroll down to view 319 project funding under the nonpoint source program tab.

## **Remainder of Nutrient Work Group Meetings Scheduled**

Work continues on the draft rules to implement SB 358, the bill to move the state away from numeric nutrient water quality standards. Stakeholders and DEQ staff have been meeting throughout the summer. In an effort to streamline the effort, the Technical Committee members have been added to the full Nutrient Work Group that will now be meeting more frequently.

Upcoming agendas also include opportunities for different interests to present their view of how the new regulatory process should work, particularly the application of adaptive management plans. DEQ has to complete the formal rule adoption process by March of next year.

The schedule for the upcoming meetings is outlined below. Of note, there is another “listening session” scheduled for September 23<sup>rd</sup>. That offers an opportunity for members of the public to share their perspective on how best to implement the bill as well as comment on what has been presented to day.

Nutrient Work Group	September 7, 2021	1:30 – 4:30 p.m.
Nutrient Work Group	September 14, 2021	1:30 – 3:30 p.m.
Nutrient Work Group	September 22, 2021	9 – 11 a.m.
Listening Session	September 23, 2021	1 – 3 p.m.
Nutrient Work Group	October 5, 2021	1:30 – 3:30 p.m.
Nutrient Work Group	October 12, 2021	1:30 – 3:30 p.m.
Nutrient Work Group	October 27, 2021	9 – 11 a.m.
Nutrient Work Group	November 3, 2021	9 – 11 a.m.

The agenda for the September Meeting can be found here: [NWG Agenda 7Sept2021.pdf](#)

The DEQ website is in the process of being updated with the above information: <https://deq.mt.gov/water/Councils>

Please contact Christina Staten with any questions: [CStaten@mt.gov](mailto:CStaten@mt.gov), (406) 444-2836

## **Biden Administration Upholds Delisting of Gray Wolves**

August 21, 2021 By Matthew Brown and John Flesher, Associated Press (Ira Samuels contributed from Helena)

President Joe Biden's administration is sticking by former President Donald Trump's decision to lift protections for gray wolves across most of the U.S. But a top federal wildlife official on Friday told The Associated Press there is growing concern over aggressive hunting and trapping for the animals in the Great Lakes and northern Rocky Mountains.

Wolves under federal protection made a remarkable rebound in parts of the U.S. over the past several decades, after being driven from the landscape by excessive hunting and trapping in the early 1900s.

States took over wolf management last decade in the Northern Rockies and in January for the remainder of the Lower 48 states, including the Great Lakes and Pacific Northwest.

The removal of Endangered Species Act protections had been in the works for years and was the right thing to do when finalized in Trump's last days, U.S. Fish and Wildlife Service Assistant Director for Ecological Services Gary Frazer told AP.

Attorneys for the administration asked a federal judge in [California](#) to reject a lawsuit from wildlife advocates that seeks to restore protections, signaling the conclusion of Biden's promise on his first day in office to review the Trump move.

But wolf management policies in place at the state level have shifted dramatically since protections were lifted, and Frazer suggested the federal government could take steps to restore protections if population declines put wolves back on the path to extinction...

(Referencing recent actions taken by state legislatures including Montana) Frazer said the different states showed a common approach: legislatures and politically appointed wildlife commissions taking determined steps to reduce populations.

"We're aware that circumstances have changed and we'll be watching closely to see how the population responds," he added.

The lead attorney in the lawsuit to restore protections for wolves outside of the Northern Rockies said he was disappointed in the Biden administration for not responding immediately to the push by states to cull more packs...

Defenders of the move to lift federal protections noted efforts to put wolves under state management enjoyed bipartisan support in Washington going back to President Barack Obama...

There's been growing frustration in recent years among livestock producers and hunters over attacks on cattle and big game...

Hundreds of wolves are now killed annually by hunters and trappers in Montana, Idaho and Wyoming. The Northern Rockies' population has remained strong — more than 3,000 animals, according to wildlife officials — because wolves breed so successfully and can roam huge areas of wild land in the sparsely populated region.

Some state officials are intent on reducing those numbers to curb livestock attacks and protect the big game herds that wolves prey upon. Supporters of restoring protections warn that will tip the scales and reduce wolf numbers to unsustainable levels, while also threatening packs in nearby states that have interconnected populations.

An indication of how deeply federal officials are worried about the states' wolf policies is expected in the next several weeks, when they respond to petitions filed in June to again put wolves in the U.S. West under federal protections

## **What's next for WOTUS after Judge Jettisons Trump Rule**

Source: Greenwire, 8.31.21

By: Hannah Northey & Pamela King

The Biden administration may get some breathing room after a federal court ruling in Arizona yesterday effectively wiped out a controversial Trump-era Clean Water Act rule that pulled back federal protection for streams and wetlands across the country.

Judge Rosemary Márquez of the U.S. District Court for the District of Arizona [ruled](#) the Trump administration's Navigable Waters Protection Rule (NWPR) was too flawed to keep in place ([Greenwire](#), Aug. 30).

That decision effectively scraps the Trump-era rule across the nation, rolling back one of the prior administration's biggest and most controversial regulatory wins for developers and farmers. And it gives EPA a bit of a reprieve as the agency moves forward with crafting a replacement for the NWPR.

EPA earlier this year announced it would pursue a double-pronged approach of conducting rulemakings to both remove the Trump rule and craft a replacement.

“The immediate effect is a nationwide vacature of the 2020 rule,” Mark Ryan, a former EPA Office of Water attorney, said in an email. “There will be an appeal. Assuming the judge’s order is not stayed on appeal, then EPA will not have to go to the trouble of repealing the 2020 rule, and can move straight to drafting the new rule (which is almost certainly underway already).”

The ruling means EPA and the Army Corps of Engineers revert to implementing a 1986 regulation as interpreted by the 2008 guidance written by the George W. Bush administration to determine what qualifies for federal protection as “waters of the United States” under the Clean Water Act, according to legal experts.

The Trump administration’s NWPR significantly narrowed the reach of the Clean Water Act, pulling back what wetlands and streams were jurisdictional by about 51% and 18%, respectively ([Greenwire](#), Jan. 23, 2020).

EPA can now channel its resources toward recrafting the definition of what constitutes a “water of the U.S.,” instead of working to repeal the prior regulation, said Ryan.

“I think this relieves a bit of the pressure,” he said. “Now they have one, not two big rulemakings to deal with.”

EPA spokesperson Timothy Carroll said the agency is reviewing the ruling and had no further comment on the decision. The Army Corps referred questions about the court decision to EPA.

### **A return to the Obama rule?**

Márquez’s [order](#) left open the possibility that the Obama administration’s 2015 Clean Water Rule could eventually be revived.

While her decision focused on striking down the NWPR, Marquez asked the parties in the case to submit additional briefing on whether the court should also toss out the Trump administration’s 2019 Repeal Rule, which scrapped the Obama rule and made way for the NWPR in 2020.

The judge, an Obama appointee, also rebuked the Trump administration for ignoring science that underpinned the Obama rule, such as the 2015 Connectivity report on the links between small water bodies and larger resources.

In announcing the NWPR last year, the Trump administration said it was focusing on legal interpretations of the Clean Water Act, including Justice Antonin Scalia's narrow view of the statute in the famously muddled 4-1-4 ruling in the 2006 Supreme Court case *Rapanos v. United States*.

Federal courts have generally favored Justice Anthony Kennedy's competing "significant nexus" test that takes a broader view of the Clean Water Act's scope.

Márquez noted that under the NWPR, the Army Corps had assessed more than 40,000 water resources and found that 76% were not subject to federal protections.

In New Mexico and Arizona, the agency found that nearly every one of the 1,500 streams it assessed were nonjurisdictional, marking a "significant shift" from how waterways were treated under the Obama rule and the 1986 regulations, she said.

The concerns that a group of federally recognized tribes raised against the NWPR in the Arizona district court lawsuit were not "mere procedural errors or problems that could be remedied through further explanation," Márquez wrote.

They were instead "fundamental, substantive flaws that cannot be cured without revising or replacing the NWPR's definition of 'waters of the United States,'" she continued.

The Obama rule also faced its own stumbles in court before the Trump administration replaced it with the NWPR.

Legal action on Clean Water Act issues is notoriously slow-paced, after the Supreme Court determined in the 2018 case *National Association of Manufacturers v. Department of Defense* that federal district courts should have the first say in legal disputes related to the statute.

Clean Air Act cases, by contrast, go straight to the U.S. Court of Appeals for the District of Columbia Circuit.

The Biden team has said it is working to craft a WOTUS definition that can endure multiple legal challenges and administration changes.

## Scope of the ruling

Larry Liebesman, a former Department of Justice trial attorney and senior adviser at Dawson & Associates, a consulting firm that specializes in permitting, said the court's ruling can be read as a nationwide freeze on Trump's Clean Water Act rule.

But he also said that could change going forward given myriad pressures, from the farming and business community to environmental interests.

The business community, for example, could pressure the Biden administration and Department of Justice to apply the ruling only in New Mexico, where the tribal challengers are located, and may argue it's too disruptive to apply pre-2015 regulations across the nation, said Liebesman.

Businesses could make their case in the name of infrastructure and argue that permitting could be slowed without the Trump-era rule in place, he added.

"In my view, that's going to be an uphill argument," he said.

On the flip side, Liebesman said he could also potentially see environmental groups pushing the Biden administration not to appeal the ruling or limit the pre-2015 guidance, an argument that would draw support from the state of New Mexico and Interior Secretary Deb Haaland, who's been outspoken about the need to protect ephemeral waters.

"There will be pressures from different directions on what position the Biden administration might take in court in respect to this ruling," said Liebesman.

Kevin Minoli, a partner at the law firm Alston & Bird, said the decision before the Biden administration is whether to treat the district court's decision as vacating the rule nationwide or only within the district of Arizona.

The Obama administration, he said, fought the courts on nationwide injunctions against its own rule, which led to a messy regulatory patchwork in which the scope of the Clean Water Act varied from state to state.

When a federal district court in Colorado blocked the Trump rule, the injunction only applied in the Centennial State. It was later reversed by a federal appeals court.



“While the Administration may be comfortable with a nationwide vacatur of the Navigable Waters Protection Rule, the Department of Justice will be reluctant to concede that a single district court judge has the authority to change the rules across the entire country because of the implications that position would have on other cases where the government is defending the regulation being challenged,” Minoli wrote in an email.

Randy Serraglio, a Southwest conservation advocate at the Center for Biological Diversity, said lawmakers need to step in.

“This situation with the Clean Water Act is crying out for legislation to clarify the law,” he said. “The courts have signaled that. You have administrations that see this gray area and they veer too far in one direction and the courts slap it down. It really needs to be clarified by Congress. We need a stronger Clean Water Act that actually protects waters of the U.S.”

*Reporter James Marshall contributed.*

## **Upcoming Legislative Committee Meetings**

Many of the interim legislative committees will be meeting in September. They are expected to adopt their final work plans for the interim as well as begin working on their assigned studies. Not all of the agendas are yet available so please check the committee’s website for updated information as the meeting date approaches.

### **Environmental Quality Council – September 14-15, 2021**

EQC has a full agenda for their upcoming two-day meeting. The various agencies over which the committee has oversight will provide report. A topic of interest for many TSRA members is an update on the Sage Grouse Conservation Program. MSGOT is planning to hold a workshop on how the Habitat Quantification Tool works. MSGOT will also be looking for input from stakeholders and the public about how to improve the program with an eye to the potential for the Sage Grouse to be listed as endangered.

[Agenda](#)

[Draft plan](#)

[Draft decision matrix](#)

This meeting is open to the public. For those attending in person the committee will be meeting in Room 137 in the State Capitol. The meeting will be streamed live on [www.leg.mt.gov](http://www.leg.mt.gov) and

broadcast on the Montana Public Affairs Network (MPAN) if you wish to view only. An archived recording of the meeting will also be made immediately available on [leg.mt.gov](http://leg.mt.gov).

Members of the public who wish to participate via Zoom may do so. Please email [jkolman@mt.gov](mailto:jkolman@mt.gov) with your name and a request and you will be sent instructions for joining and participating by 5 p.m. the day before. During times set aside for public comment on the agenda, members of the public who have joined by Zoom may "raise their hand" and participate after being recognized by the presiding officer or Zoom manager. Comments will be taken in order. Written public comment may be sent via email in advance of the meeting to [jkolman@mt.gov](mailto:jkolman@mt.gov) and will be provided to committee members.

Please find more information and materials at:

<https://leg.mt.gov/committees/interim/eqc/meeting-info/>

### **Economic Affairs Interim Committee Meets September 22, 2021 at 9 am.**

The [Economic Affairs Interim Committee](#) will adopt its final work plan, conduct administrative rule review, and determine the scope of each of its assigned studies. Members will also hear from the Alcoholic Beverage Control Division, the Cannabis Control Division, the Montana State Fund, and the State Auditor's Office. The meeting will be held in Room 102 in the State Capitol.

The [preliminary agenda](#) contains instructions for people who wish to [provide public comment by Zoom](#) during the meeting or to [provide written public comment](#) before the meeting.

Additional meeting materials will be posted to the [committee's website](#) by the end of next week.

### **Energy and Telecommunications Committee Meets September 23, 2021 – 9 am.**

ETIC will be finalizing its work plan at their September 23<sup>rd</sup> meeting, but has planned an agenda item that launches their effort to study Montana's grid capacity by focusing on energy markets and RTO's in the West. The committee will also take public input concerning the scope of the study of advanced nuclear reactors.

#### [Agenda](#)

For more information and meeting materials, please check the committee's web site:

<https://leg.mt.gov/committees/interim/etic/meeting-info/>

## Revenue Interim Committee to Meet September 23-24, 2021

The agenda and meeting materials will be available mid-month. Check the committee website for more information:

<https://leg.mt.gov/committees/interim/ric/meeting-info/>

### Upcoming Events/Dates:

September 9, 2021                      Montana Wood Products Association Annual Meeting

January 3, 2023                      TSRA Legislative Showcase  
Delta Colonial Hotel, Helena, MT

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