

MEETING MINUTES
WATER POLLUTION CONTROL ADVISORY COUNCIL
July 26, 2019
METCALF BUILDING
1520 EAST SIXTH AVE., HELENA, MT

PRESENT

Councilmembers Present:

Trevor Selch
Bob Zimmer

Via Phone:

Earl Salley
Stevie Neuman
Michael Wendland
Craig Workman
Karen Bucklin Sanchez
Adam Sigler

Others Present:

Hannah Riedl, DEQ
Sandy Matule, DEQ
Kurt Moser, DEQ attorney
Eric Trum, DEQ

Via Phone:

Guy Alsentzer, P.E., Missouri Waterkeepers
Ricky Schultz, HDR Engineering
Tammy Johnson, Montana Mining Association
Peggy Trank, Treasure State Resources
Bill Mercer, Holland & Hart
Scott Schafer, AE2S
Kyna Christensen
Aaron Endel
Susie Turner, City of Kalispel
Scott Beuker

Councilmembers Absent:

Mary Ahmann Hibbard

CALL TO ORDER

Chair Selch called the meeting to order at 10:00 A.M.

APPROVAL OF AGENDA

Chair Selch brought forward the approval of the agenda.

Councilmember Zimmer moved to approve the agenda. Councilmember Salley seconded. The agenda was approved.

Action Item

Update to DEQ Circular 12B presented by Michael Suplee, Section Supervisor

Mr. Suplee gave the council background on the outline of events that led to Circular 12B and how DEQ got to the rulemaking process. (*See presentation materials*). Mr. Suplee recommends that WPCAC approve the action towards rulemaking on DEQ-12B.

Councilmember Workman reminded Mr. Suplee that there was a Nutrient Workgroup that was closely involved in the process of revising Circular 12B, both leading up to the 2015 product as well as the revised triennial review. Councilmember Workman suggested there had been a considerable amount of collaboration and insight that came from permittees and the Nutrient Workgroup within that timeline.

Mr. Suplee thanked Councilmember Workman for his comments. Mr. Suplee believed there had been 34 total meetings leading up to the adoption with the Nutrient Workgroup. Mr. Suplee reported to the council that there would be another Nutrient Workgroup meeting regarding this rulemaking; hopefully, before August 6, 2019. The meeting has not been scheduled as of this date as Mr. Suplee wanted to wait and see what the outcome of the WPCAC meeting would be.

Mr. Suplee pointed out the parts of the draft circular that DEQ has modified, and what hadn't been modified, which is equally important (*See presentation materials*).

Ms. Riedl reported that she had sent the proposed changes to council members, and members of the public can access them from DEQ's WPCAC website.

Mr. Suplee said the target date for adoption of these rules is November 2019. He defined "HAC" as the highest attainable condition, or interim treatment requirements; the HAC is not changing. The majority of the changes will be made to Section 2.1—Time to Achieve Treatment Requirements. DEQ is proposing that the permittees, predominantly the greater than 1 MGD and less than 1 MGD group, must meet those treatment requirements by July 1, 2027. DEQ's analysis found that of those 36 facilities that are eligible for this general variance, only nine of them are actual mechanical facilities, and among those nine, only four aren't meeting those treatment requirements. Of those four, three of them are already close to meeting the requirements. The fourth may take up to that time depending on the grant cycle application process. Once a permittee has met the interim treatment requirements, the same process will be repeated. DEQ will revisit those treatment requirements every three years to see if they are still reasonable and if DEQ needs to make them more stringent. DEQ will have permittees include their current list of PMPs (pollutant minimization program) in their permits so they can continue to make incremental progress towards the base numeric nutrient standards, so they can meet them by 2034 (20 years from the original adoption of the rules. Statues said we had 20 years for the variance to run under state law).

Mr. Suplee reported that the individual variance was not part of the lawsuit, only the general variance. Mr. Suplee reiterated that this is a draft, but close to the final version. There will be a Nutrient Workgroup meeting early August and EPA is also reviewing the draft from their perspective; so, there could be some changes, but, hopefully, this version is close to the final draft.

Mr. Suplee opened the floor for general questions.

Councilmember Zimmer asked what the council is accomplishing at this meeting ; is the council essentially asked to approve the draft presented? If so, what are the next steps – DEQ would continue to revise and then bring the revisions back to the council again for a final approval, or is the council just approving DEQ to move forward with rulemaking, and it is up to the court?

Mr. Suplee responded that this is basically the only opportunity the council will have to see it. DEQ has worked hard to make sure this draft is as close to final as possible. The BER will not see this rule as it is a department rule. Mr. Suplee pointed out that during the process there will be a 45-day public comment period, including for WPCAC , to comment on the final rule. There will and a response to comments as DEQ moves into official rulemaking after today's meeting. This is the council's opportunity to tell us yes or no on moving forward.

Councilmember Zimmer responded that he had no prepared remarks but his concern for DEQ is twofold – one is that DEQ is going to meet legally what is required by the court? And based on his background in environmental consulting and compliance, Councilmember Zimmer believes there are some really big gaps in implementation of this process – how is DEQ going to get permittees to compliance in essentially 15 years and would like to see that piece in the rulemaking process. Councilmember Zimmer didn't know if he would be a no vote on this particular piece due to the timeline, but his advice to DEQ is to get a solid implementation schedule for this. Is that correct when you said there were 36 facilities and 9 of them more mechanical, so 20+ lagoons need work?

Mr. Suplee responded yes. DEQ has asked them to at least maintain their current nitrogen/phosphorous levels, but at the same time there is a recognition that there needs to be refinement issues that they may have as a facility. When those deficiencies are addressed, their N and P will drop.

Councilmember Zimmer responded that he and Mr. Suplee could continue this conversation at another time so as to not waste other council member's time. He believes the department should look at themselves as a technical resource to help these facilities to get in compliance.

Mr. Suplee responded that DEQ will review the HAC requirements more frequent than the EPA requires, and will lay out in a technical support document why we did or did not make the treatment requirements more stringent or not. If we did make it more stringent, why, and it will be based on the same fundamental processes of cost and economic impacts that DEQ looked at in 2017, before, and on a case-by-case basis. All the details will be captured in the permitting process in the fact sheets. The permitting process will lay out what a permittee will do and what the requirements are.

Councilmember Zimmer commented that he believes it is important that DEQ not giving permanent variances for some of the permittees. Councilmember Zimmer also believes that an individual variance might be a way to avoid compliance and those variances should be rare and site-specific.

Councilmember Workman asked Mr. Suplee to clarify – in terms of WPCAC – this is the only look the council will have at these draft rules. Mr. Suplee responded that was correct. Mr. Suplee did say that if the changes were so large that what the council saw today looked nothing like the final draft – he didn't know what they would do, but DEQ would stick to their guns to not make major changes. Anyone can make comment during the public comment period or during the public hearing.

Mr. Suplee summarized the short timeline DEQ has to complete the process. The court order was July 16, 2019, giving DEQ 120 days to comply – which would be November 13, 2019. DEQ will have two filings and two publications – a filing to propose a rule and then a publication comment period for a public hearing, and then another response to comments and then a public second filing. The closest publication in the Secretary of State's Montana Administrative Register is November 8, 2019. As DEQ must have this completed before November 13, which becomes the date that everything backs up from; so, as a result that pushed DEQ to identify the need for this WPCAC meeting today July 26, 2019. The next meeting will be a Water Nutrient Workgroup Meeting, which Mr. Suplee said he would schedule first thing Monday, July 29, 2019 to, hopefully, schedule August 5 or 6. It is required under statute whenever DEQ modifies these two circulars or the rules then we can file on the 27th. DEQ will publish on September 6 which begins a 45-day public comment period in all the major newspapers. The public hearing will be the 18th, 2019 in Helena. Then DEQ will respond to all public comments. The final rule will be published on the 8th.

Councilmember Workman responded that he doesn't understand how a rule of this magnitude is being completed in 120 days by court order. There is really only six weeks to revise the rule – essentially the court order was July 16 and by August 27 – six weeks later, we need to have a rule that we are advertising. When you look at the years of effort that it took to come up with the first draft and frustration caused by the triennial review– here we go again with another rewrite. Six weeks is just not even close to the amount of time, in my opinion, that a rule of this magnitude needs for proper input and scrutiny. It is frustrating yet again that this rule takes another attack.

Councilmember Zimmer asked Councilmember Workman if his concerns were similar to his in terms of implementing progress toward water quality standards under the rule, or because the rule itself as being very basic. How is DEQ going to either facilitate or alternatively hold to compliance – curious about Councilmember Workman's thoughts are on that and the results of this 120-day process and what could be packed into the rulemaking.

Councilmember Workman's concern revolves around the exponential cost increase that permittees need to go through in order to reach the base numeric – they are not obtainable. There are grave economical consequences or the potential to create very grave economical consequences for a significant percentage of the state.

Michael Suplee responded the Department worked through what the current treatment requirements are, they were not easy to meet, but not impossible to meet by any means. They were based on an economic analysis that looked at whether the majority of the people could affordably meet them, based on criteria that no one is arguing with so far. Most of the facilities are already meeting treatment requirements. The treatment requirements could stay static for a while, depending on technological change or cost reductions associated with technology, or those numbers could come down. Any changes would follow the same process that you and others participated in earlier.

Kurt Moser responded it is important to remember that those economic and social factors that go into determining what HACs is (Table 12B1) still come into play. The base water quality standards cannot be met until, essentially, the current HACs and the base water quality standards line up, for lack of a better analogy. The base water quality standards can't be met due to the economic and social factors. That's been established and supported by the court, so the process is laid out. We go through the triennial review process and then the numbers can lower, but they are not going to lower if the economic and social impact factor hasn't been relieved. We are looking for technology and economic factors to change. That is why you wait every three years to see how those things have changed.

Councilmember Bob Zimmer added that one of the things that came through the court order is that Waterkeeper recommended that it was a 5-year piece to get some of the facilities to compliance. He appreciates the date movement to accommodate one of the economically challenged permittees.

Kurt Moser responded that it will be implemented through the compliance schedule through the use of a permit. So, if a facility can meet it, they will have to meet it through their permit. Everybody is not guaranteed through 2027.

Councilmember Bob Zimmer suggested that in the interest of time for the council and other folks on the phone, moved that the council move forward and accept the DEQ recommendation to move forward with this rule making it as stated in the draft Circular 12B.

Chair Selch asked for a second. Chair Selch seconded the motion. Chair Selch opened the meeting to council comment.

Councilmember Zimmer encouraged DEQ as they move forward with the process to make sure that it is a reasonable to get permittees off the general variance and into compliance with water quality standards in the timeframe given. He believes it is important to not rely on the HAC to be incrementally moved up. He believes the technology and the cost piece pieces of this, to be accomplished by 2034, is pretty huge. Hopefully the Department can help make that progress to get folks off the general variance.

Councilmember Workman had a point of order question – this meeting isn't advertised as a public hearing. The following agenda item is for General Public Comment, but it would be possible to hear any public comments before voting on the motion?

Chair Selch responded that he was just leaving this piece for council discussion and then open it for public comments. Chair Selch opened it for public comment.

Guy Alsentzer of Missouri Waterkeepers applauds DEQ on quickly moving forward on trying to get a draft in front of WPCAC and move forward with the court order. We have some concerns with the interpretation of when compliance plans will be put on the books. Will DEQ wait for permits to come up for renewal or immediately opening them. Again, this is within the context and making sure you know again discrete accountable measures are being taken to move forward with progress here. I will echo Councilmember Zimmer's concern with the eye on the prize for making progress and moving forward. A whole part of the technology forcing mandate of federal law under the Clean Water Act is to incentivize new ideas and that happens when you have hard back stops. I think it is important to remind ourselves that the back stops are here because they are protecting clean water. This is the foundation of Montana's outdoor economy. It is important to make progress here and you know we have got to balance that and in our policy discussions so looking forward to seeing a draft and offering technical comments at that time. Thank you.

Bill Mercer commented that it would be very helpful if the rule had citations to the court order to allow the public to understand what it is in the order or in the briefing that DEQ has relied upon for the amended language. It is somewhat unclear to me why we have got certain dates in here based upon what I think the court order says. As an example, if you are relying upon Waterkeepers brief to establish when certain things need to happen, I am having trouble reconciling the 2027 number with page 5 of the Waterkeeper brief indicating completion for mechanical plants by January 1, 2023, to construct and start meeting the 12B HAC. Also, on page 2 of the amended rule it doesn't look like the amended rule contemplates doing anything in the immediate term with lagoons. I don't see any language – just that the department intends to establish short-term time frames for lagoons to enhanced performance. Perhaps that is consistent with the court order, but obviously there was a lot of ink spilled in terms of what happened with respect to lagoons. I know there is language on page 7, but that is only speaking to a long-term goal. It is not speaking to anything before 2034; so, it would be helpful to understand what the department relied upon to reach that. I also think it would be very helpful for you to do the equivalent of a fiscal note, because I am not sure that there would be agreement on the assessment that this only going to affect 36 local governments and that the cost will be minimal in either the short-term or the longer term. I think to guide the discussion it would be very useful to understand that the department believes the cost of local governments would be whether they are running mechanical plants or lagoons. I think it would also help commenters and decision-makers in terms of whether these amendments are good ideas. Thank you.

Susie Turner asked how, during the triennial HAC reviews, that is going to be affected and how will the community be required to implement those by 2027. For the city of Kalispell, for example, we are talking the difference between \$3M and \$30M in implementation, and to change our plan is not going to be reasonable by 2027. I want to make sure that considerations on the actual practicality of implementing and meeting some of these by that time and what that means when it changes in the interim between now and 2027. I don't know if anyone can speak to that, or if it should be discussed at the later Nutrient Workgroup meetings, but are huge concerns for the citizens of Kalispell.

Mike Suplee addressed Ms. Turner's concerns. The 2027 date applies to the numbers with the court order – what the judge called the current variance standard, or I call the table values, what other people call HAC. The 2027 date applies to this and if that were to be challenged and be lowered then that 2027 date is not at play. What would be at play would be compliance schedules which would be looked at on a case-by-case basis. The possibility of going out on an individual variance for the permit fees depending on where they land relative to how difficult it would be for them to meet the upgraded table values and again those table values always will be looking at the fundamental impact to the group of facilities.

Guy Alsentzer responded that he wanted to reinforce Bill Mercer's comments about getting citations to the court order – they would be very helpful. Guy also brought up an addendum to Ms. Turner's point that a really clear tension exhibited here is the big difference between building a facility capable of meeting 6 TN and 1TP and a facility able to meet 3 TN and 0.3 TP, which is a national EPA value for best available conventional pollutant control technology. So, again, more discussion about what are the steps that this rule will lay out to give people and permittees a clear path forward and not make it some abstract game trying to guess. The Waterkeeper brief laid out suggestions of how to do that, starting with individualized PERs. The summary here is more details that are discrete about those steps – perhaps more prescriptive -- would be informative in a next draft iteration. Thank you.

Mike Suplee responded that as a rule writer, he is not familiar with the process of incorporating reference to court cases. He will talk to Kurt Moser, DEQ legal counsel to figure out that can be done. Councilmember Zimmer commented that it seems comments today have been about getting plans in place to act on these Table 12B1 requirements. So, it perhaps appropriate to move the minimization requirement up from 2027 to a sooner date to get plans in place. It doesn't mean they have to be in compliance, sooner but to give them a basis for completing those compliance goals sooner – get a BMP or something like that in the process.

Mr. Suplee responded, if a facility is already meeting the table values upon permit renewal, then they would be asked to wait until 2027 but in that permit renewal to work on implementing the BMP. So, it is all a function of where people are in the process. If they are already at their table values and the permit renewal is coming up, then they will be expected to recommend what their PMPs are going to look like. That will be incorporated in a permit and then expect it to implement that process over the course of that permit. The 2027 date is the date for all the 36 facilities to meet the table values. So, if the permittee is already there, they will be asked to move more quickly on the next step. That will be documented in the permit and the permit fact sheet for each facility.

Scott Bueker with A2S commented that everyone should consider that as you push for expedition of meeting these standards, pushing up timelines, and ratcheting down on HACs, you are potentially pushing development outside the cities and into the counties and septic issues. Can that be a social and economic impacts?

Mr. Suplee responded that DEQ does look at that issue and will continue to look at it in the future. DEQ looks at what it costs to install and maintain a Level 1 or Level 2 treatment system for septic, relative to the cost of being on the main sewer system. I know our division administrator has a fundamental point of view and philosophy that we want to work towards getting people to hook up, not to go out on their own septic. So far, DEQ's data suggests that people are not fleeing the interior of the cities to go out and build on the exterior because of the cost of wastewater.

Mr. Mercer asked what data set are you relying upon for this data?

Mr. Suplee responded that DEQ has looked at median average wastewater fees per household and it varies from community to community. Some places it is high - \$100 per month and other \$30 to \$40 per month. We know what the numbers look like relative installing and maintaining your own septic on your property and keep it maintained, which is something many people don't do very well. The state has not seen evidence of people leaving the urban areas to get away from these costs. In fact, if anything what we are seeing is net movement towards the cities for the purpose of employment.

Mr. Mercer asked if that analysis could be posted on the nutrient workgroup website; so, we had access to what data was relied upon and what the analysis has been built on that was included in 2017.

Chair Selch if there were any other comments. Hearing none, Chair Selch asked Hannah Riedl to read the motion that is on the table.

Hannah Riedl responded, "Does the council advise the department to move forward with this rulemaking?"

Chair Selch asked for the vote – there were 7 ayes, 0 nays, and 0 abstained. The motion carried.

Agenda Items for Upcoming Meetings

No changes from July 7, 2019, agenda item suggestions for September. Ms. Riedl is still planning on inviting staff from the Department of Commerce and DNRC to talk about different funding opportunities.

Chair Selch asked for a motion to adjourn the meeting. Councilmember Zimmer made a motion to adjourn. Council Chair Selch seconded the motion. Motion carried. Meeting adjourned.