

**TELECONFERENCE MEETING MINUTES  
WATER POLLUTION CONTROL ADVISORY COUNCIL  
Monday, June 30, 2014  
10:00 AM – 11:30 PM  
Metcalf Building  
1520 E. Sixth Ave, Helena, MT 59620**

**ATTENDANCE**

*Council Members Present:*

*Barbara Chillcott (by phone)  
Mack Cole (by phone)  
Stevie Neuman  
Earl Salley (by phone)  
Karen Bucklin Sanchez (by phone)  
Trevor Selch  
Keith Smith (by phone)  
Michael Wendland (by phone)  
Kathleen Williams (by phone)*

*Council Members Absent:*

*Mitchell Leu  
Dude Tyler*

*Montana Department of Environmental Quality Staff Members:*

*Mark Bostrom  
Kirsten Bowers  
Bob Habeck  
Jon Kenning  
Sarah Norman  
Tom Reid  
Amy Steinmetz  
Eric Urban*

**Call to Order -**

Chairperson Trevor Selch called the meeting to order at 10:01 a.m.

**Approval of Agenda -**

Ms. Stevie Neuman moved to approve the agenda as written. There was no opposition; the motion carried.

**Approval of Minutes -**

Mr. Earl Salley moved to approve the May 2, 2014 meeting minutes as written; Ms. Neuman and Mr. Mack Cole seconded the motion. There was no opposition; the motion carried.

**ACTION ITEMS**

**Amendment and Repeal of Permitting Rules -**

Mr. Tom Reid began his presentation by explaining that he is seeking a recommendation from the Water Pollution Control Advisory Council (WPCAC) to proceed to the July 25, 2014, Board of Environmental Review (BER) meeting with this Montana pollutant discharge elimination system (MPDES) rule package. He then gave the history of these Administrative Rules of Montana, explaining that Montana's original

rule package was adopted in 1974. This became the MPDES program in the state. The rules were in effect until 1989, when the rules were repealed and replaced with 51 entirely new rules. These rules came about mainly as a result of 1987 amendments to the Federal Clean Water Act (CWA). Most of the MPDES rules on the books today have been in place since 1989. There are two exceptions: concentrated animal feeding operation (CAFO) and stormwater rules, which Mr. Reid said are wet weather flow priorities. Other than those exceptions, the state rules have not kept pace with changes to the federal rules.

State rules that are equivalent to federal rules are one of the mandated elements of state delegated programs. So, in 2009, when the Environmental Protection Agency (EPA) looked at the MPDES rules, they requested that the MPDES rules be updated. They have decided to tie in the federal rules where applicable.

Subchapters 11, 12, 13, and 14 make up the MPDES rules for Montana. This is the fourth MPDES rule package that has been brought to WPCAC and BER within the last two years. About 75% of the federal rules are incorporated by reference into the state rules. Mr. Reid said that where the state has its own rules, which are equivalent to federal rules, is in the administrative elements.

When resubmitting to the Secretary of State's Office, the rules must be in current formatting. In large part, the rules had not been updated since 1989, so Mr. Reid explained that there are a lot of formatting changes in proposed Subchapters 11 and 13. State rules are also required to meet the minimum requirements of the federal rules. Additionally, Montana statute says that state rules cannot be more stringent than the federal rules. This makes it so that the state must adopt something similar to the federal rules, which Mr. Reid said is reflected in the proposed rule amendment.

These rules were sent to EPA on May 9, 2014. Montana Department of Environmental Quality (DEQ) has not heard back from EPA yet. Mr. Reid says that EPA may not comment on these now; preferring to wait until the updates are all pulled together. On June 4, 2014, this package of rules was mailed to stakeholders. There has not been a lot of significant feedback, said Mr. Reid. Last week, on June 25, DEQ held a public meeting but had no attendees.

Chairperson Selch asked what would happen if EPA gave comments after the rule package had gone to BER. Mr. Reid explained that the comments would be evaluated and, if necessary, they would make changes to the rule package and go through the rulemaking process again.

Ms. Karen Bucklin Sanchez asked if she heard correctly that state rules must meet the equivalent of the federal rules, but that there is a state statute that does not allow state rules to be more stringent than federal rules. Mr. Reid confirmed that this is correct. Ms. Kathleen Williams asked if the state statute said that rules cannot be more stringent unless they are justified. Mr. Reid confirmed this. He said that they have made some state-specific conditions in the state rules, but they provided justification explaining why that was necessary. Ms. Williams asked if Mr. Reid could explain where the state rules are more stringent than the federal rules. Mr. Reid replied that the MDPES application rules identify the pollutants for which an applicant must analyze and then disclose in their permit application. In some cases, the state has adopted water quality standards for pollutants that are not identified in the federal rules. Reference is made to these state adopted pollutant standards, so this is one instance where the state rules are perhaps more stringent than the federal rules. Overall, however, Mr. Reid said that it is uncommon that state rules are more stringent than federal rules.

Mr. Cole asked if the MPDES rules apply to agricultural waste runoff. Mr. Reid said that agricultural runoff is generally not regulated under the CWA. Agricultural runoff is nonpoint source pollution, and the rules being presented only apply to point source pollution. The one exception to this is CAFOs. When CAFOs reach a certain size, they become regulated.

Mr. Reid said that they started with updating Subchapter 13, which pertains to general permits. As stormwater, which is in Subchapter 11, depends heavily on general permits, they could not update Subchapter 13 without also updating Subchapter 11.

Mr. Reid then discussed the main proposed amendments to the rules. He began with 17.30.1101, explaining that they changed the language so that it is parallel throughout the MPDES rules. They removed 17.30.1101(2), as it had qualifications that were not found in the federal rule. The definitions in 17.30.1102 were revised to eliminate definitions that were no longer necessary in the rules after removal of three rules in Subchapter 11. He also explained that when EPA adopted the rules in 1989, they had a definition of industrial activity that included mining, oil, and gas activities as well as large construction activities. When DEQ wrote their stormwater rules in 2003, they took mining, oil, and gas out of the industrial activity definition. They also defined construction activities to include both small and large construction. Large construction is an activity greater than five acres, which has been considered an industrial activity at the federal level since 1989. DEQ is trying to return to the federal definition now, and Mr. Reid said that he believes this will greatly cleanup Subchapter 11. Also, they have deleted the definition of surface water in 11.30.1102(32), as they found it inconsistent with statute. They are trying to refer back to the statutory definition and not to qualify that definition beyond the extent of statute.

Ms. Williams asked if she is correct in thinking that they have combined categories with the same requirements, so the requirements will remain unchanged. Mr. Reid said that this is correct. The main change in these definitions takes mining, oil, and gas activities and large construction activities and puts them back into the definition of industrial activity. By doing so, they are able to be consistent throughout their rules in different subchapters as well as with federal rule. Mr. Reid said this change will not affect who is regulated under the rule. Ms. Williams said that, as these definitions were separated at some point, there must have been some difference. She asked if combining these definitions would create any kind of change for those regulated under the rule. Mr. Reid said that it would not. He explained that it is primarily a cosmetic change that allows for cleanup of the rules. Now they can just refer to industrial activities, which include mining, oil, and gas and large construction because all of the regulations in the remainder of the chapter apply to industrial activities, but not to small construction activities. This change does not affect regulation. Ms. Williams asked if Mr. Reid knew why these definitions were separated in the first place. Mr. Reid replied that at some point the committee developing these rules thought that mining, as well as oil and gas, should be broken out and there should be a general permit specific to these categories. Now there is a general permit that includes both those categories, so it is logical to combine these in rule too.

Moving to 17.30.1105, Mr. Reid discussed permit requirements. He explained that the Federal CWA says that it is unlawful to discharge point source pollutants into waters of the United States. So, this rule is written as an exception. It defines who needs a stormwater permit. This includes Phase II activities that are comprised of small construction activities, which are between one and five acres, as well as small municipal separate storm sewer systems (MS4s). According to Mr. Reid, 17.30.1105(6) deals with discharges occurring prior to October 1, 1994. This was the cutoff date after which Phase II activities

required a permit. The only other changes to 17.30.1105 were primarily cleanup oriented rather than substantive.

Ms. Williams mentioned 17.30.1105(4)(c). She asked if there was ever a situation where the EPA regional administrator determined a discharge was contributing to a violation of a water quality standard. Mr. Reid said that there have been cases where EPA has initiated enforcement action. There have also been times when, upon inspection, EPA has determined that a general permit is inappropriate and an individual permit is needed. However, Mr. Reid said that he does not know of a situation when the regional administrator has made the determination that a discharge was contributing to a violation of a water quality standard. Typically, if there is an issue, EPA sends a letter. Complaints are usually handled at the state level, but EPA reserves the right to enforce these rules in Montana.

Mr. Reid then turned to 17.30.1106, which deals with exclusions. He said that the changes to this material are substantive. Montana adopted their rules in 2003. In 2005, Congress passed the Surface Transportation Extension Act that amended the Federal CWA. It provided exemptions and encouraged domestic production of oil and gas. Referring to 17.30.1106(1)(c), Mr. Reid said that oil and gas exploration, production, processing, treatment operations or transmission facilities have always been exempt from the requirement to get stormwater permits if they do not have contaminated runoff. In 2005, Congress amended the definition to include construction activities that are related to oil and gas exploration, production, processing, treatment operations or transmission facilities. Montana rules, however, required a construction permit. Montana left their rules on the books as they were. The Federal CWA says that neither EPA nor a state may require a construction permit for these activities unless they have separate authority. Montana does not have separate authority to regulate these facilities, so this needed to change. Mining, oil, and gas facilities can still elect to get a construction permit, but they are not required to do so.

Ms. Williams said that the 2005 CWA exemptions included things like re-injection and fracking. She explained that it seemed to her that some of these exemptions could lead to pollution of state waters. She asked for Mr. Reid's opinion of whether the state changes, made per the federal changes, will potentially lead to increased pollution of state waters. Mr. Reid responded that fracking is not addressed at all under the CWA. It is regulated by Underground Injection Control, which is under the Safe Drinking Water Act. The state definition of state waters includes both ground and surface water. So, the state does have authority in state regulation, and none of that is being affected by this rule. This exclusion would not apply if there was a reportable quantity of pollutants being discharged as a result of oil and gas activity. The exclusion also would not apply if the facility had a violation of a water quality standard. Mr. Reid said pollution is defined as a violation of water quality standards, which is a state definition.

Ms. Williams said that she would appreciate it if, as he went through the rule package, Mr. Reid would comment on any of the federal cases that might decrease the quality of Montana's water. She said that exceptions in the Federal CWA can have real impacts on the waters of the state. Mr. Reid said that he believes that this this is the only one that may affect some on the ground activities.

Mr. Cole noted that 17.30.1106(1)(c)(i) used the wording "all field activities or operations." He asked whether this would include fracking. Mr. Reid explained that these rules only apply to instances of discharge of pollutants to surface water, so this does not address fracking. The context is broad, and Mr. Reid said that he believes Congress intended it to be broad to provide a blanket exception to the stormwater rules for mining and oil and gas activities. He added that fracking operations, or any activity regulated by the Montana Board of Oil and Gas Conservation (MBOGC), are exempt from the

groundwater permit requirements. As MBOGC is delegated to administer the underground injection control program for the state, they are exempt from DEQ groundwater permit requirements.

Moving to 17.30.111, Mr. Reid said that the only change here is that if a small MS4 does not want to be covered under the general permit, they can apply for an individual permit. This rule clarifies that to apply for an individual permit, the information that would need to be submitted is the same as a medium MS4, and these requirements are incorporated by reference from federal rule.

Mr. Reid next discussed general permits as listed in 17.30.13.41. He said that unlike individual permits, which apply to a single facility, general permits cover all similar categories of activities. The general permit rule was, in Mr. Reid's opinion, the furthest from the federal rule. Previously, this section had a lot of requirements listed beyond those in the federal rule, and so the focus has been on making this section equivalent to the federal rule. Cleanup included striking specifically identified categories, and replacing those with 17.30.1341(1)(a), which is very similar to the federal language in the EPA general permit rule. Most of the changes are aimed at allowing flexibility to administer the general permit in a way that is consistent with the EPA and with other states.

According to Mr. Reid, 17.30.1341(2) deals with the administrative aspects of general permits, which are being amended to be equivalent to the federal rule. This portion refers back to other parts of Subchapter 13, as actions that can be taken on a general permit are the same as for an individual permit. Looking at 17.30.1341(3), Mr. Reid pointed out that 17.30.1341(3)(b) is different from the federal rule in that it provides notice of general permits to WPCAC.

Mr. Reid said that 17.30.1341(4) has been amended to change how folks get general permit coverage. The old rule required a MPDES permit application. Now, general permit coverage is obtained by submitting notice of intent (NOI). The contents of the NOI are required to be in the general permit, not in the rule.

17.30.1341(5) addresses the minimum elements that are required to be in the NOI. CAFOs are treated differently. For CAFOs, there is no exception, and they must give all the information that is required of CAFOs. This differs from other facilities, for which it is up to the department and permit writer to determine the minimum elements that are required in a NOI. Ms. Neuman asked if discretion for NOI requirements is left to the department and permit writer. Mr. Reid replied that it is. He added that EPA provides greater scrutiny for general permits than for other permits. EPA has oversight of state programs, so the idea is that the conditions in the general permit are more specific than for individual permits. The general permit goes out for public review, and the permits do not go out until the department has looked them over.

17.30.1341(7) describes what the department does once they receive a NOI to be covered under the general permit. Mr. Reid said that (a) or (d) are typically the routes taken by the department.

Mr. Reid said that the remainder of 17.30.1341 deals with the process of changing from a general permit to an individual permit, or vice versa. Essentially, once a general permit is authorized, an individual permit may be terminated.

Turning to 17.30.1341(11), Mr. Reid said that this describes what occurs when the department determines that a general permit should not be used.

Ms. Williams mentioned a spelling error on page 14 of the rule package in 17.31.1341(1)(a)(i). Mr. Reid made note of the error. Ms. Williams then asked for a description of the review process that general permits undergo. Mr. Reid said that all permits are only good for five years. The idea behind that is to incorporate new technologies, standards, and regulations into the permit upon renewal, which keeps it updated. So, general permits have to be updated and reissued every five years. All permits go through a public noticing procedure, which is described in Subchapter 13. A copy of this goes to EPA for their review as well. The public can comment during the minimum 30-day public comment period. Also, a public hearing is held for new general permits. Ms. Williams asked about where general permits are in their five year span. Mr. Reid answered that there are 17 different general permits, and those are all on different cycles. General permits are listed on the DEQ website under the water permits section.

Ms. Williams asked if the rules control when a new category of general permits can be made. Mr. Reid answered that DEQ could create a new general permit category at any time without amending these rules. Ms. Williams asked if the rules specify when DEQ has the authority to define when they need a new general permit. Mr. Reid responded that this is up to the Water Protection Bureau. If these new rules go through, they will not have to come to rulemaking to issue a new category of general permit.

Moving to 17.30.1342, Mr. Reid discussed the conditions applicable to all permits. Mr. Reid said that this whole rule goes into each discharge permit issued. These include all MPDES permits, as well as groundwater permits. This rule differs slightly from the federal rule. EPA has the same rule, but their penalty amounts and administrative penalties are different from the state rule. The Montana state legislature has determined the penalty amounts. Mr. Reid said that these go into each permit almost exactly as they come out from this rule. He noted that this rule had not been amended since 1989 so reformatting was a big portion of the changes made. They also included information that was put in at the federal level, having to do with Section 307 and 405.

Mr. Cole asked if these penalties have ever been used. Mr. Reid answered that they are used often. What is listed in the rule are the statutory maximums, and Mr. Reid said that the state typically does not seek those maximum penalties.

Mr. Reid said that they have also added penalties for falsifying information. This is in federal regulations as well as statute, but it was never before included in these rules.

Mr. Reid then pointed out the three rules that are up for repeal. These are rules 17.30.1110, 17.30.1115, and 17.30.1117. When DEQ adopted their stormwater rules in 2003 they did not have a good general permit rule, so they wrote general permit rules into the stormwater rules. Now, by amending 17.30.1341, there will be a uniform process for all general permits. Following the amendments to 17.30.1341, these three rules will no longer be necessary.

Mr. Cole asked what will happen to the rules if they are approved by WPCAC. Mr. Reid explained that they would then go to BER. They are scheduled to be on the board's July 25 agenda to initiate rulemaking. If rulemaking is initiated, the board would then appoint a hearings examiner. Afterward, public hearings would be held. The process would need to be completed within six months after July 25. A final decision would be made on the rule package sometime in November, after reviewing public comments and the hearings officer's report. They would then decide whether to adopt the rules and the rules would become effective two weeks after adoption or publication.

Ms. Bucklin Sanchez congratulated Mr. Reid on his achievement of putting the rule package together. Chairperson Selch said that Mr. Reid did an excellent job of explaining the material in the rule package, and he thanked the WPCAC members for their questions.

Chairperson Selch moved to accept the proposed changes to the MPDES rules, sending the rules to BER to initiate rulemaking. Ms. Neuman and Mr. Cole seconded the motion. There were no public comments. All were in favor; the motion carried.

### **BRIEFING ITEMS**

#### **Public Comment -**

There were no public comments.

#### **Agenda Items for Next Meeting -**

The next WPCAC meeting will be on August 29, 2014. Chairperson Selch mentioned that Mr. George Mathieus will be presenting an update on DEQ's position on the state water rule package. This presentation was suggested in the May WPCAC meeting by Ms. Williams. Ms. Amy Steinmetz explained that this item was not presented at the June meeting in order to keep the meeting focused on the action item, as well as to allow time for DEQ to meet their July schedule for developing comments on the subject.

Chairperson Selch said that Mr. Dean Yashan may speak about total maximum daily loads at the upcoming meeting. Ms. Steinmetz mentioned that Mr. Salley had expressed interest in hearing someone from DEQ speak about the potential for water in the Berkley Pit contaminating well and surface waters in that area.

Mr. Cole suggested the Montana Water Supply Initiative, and its four Basin Advisory Councils (BACs), as a possible topic for the next meeting. Ms. Williams agreed with Mr. Cole that there are water quality elements to the state water planning process. Mr. Mark Bostrom, bureau chief of the Water Quality Planning Bureau, spoke on the subject. Mr. Bostrom said that there has been a lot of coordination between DEQ and the Department of Natural Resources and Conservation's (DNRC) Water Resources Division in development of the state water plan. That plan is broken up into four sub-basins. He said that he believes DNRC is working on rolling up those four plans for presentation to the legislature. Mr. Bostrom said that these plans present a recognized nexus between water quality and quantity, but the intention of that state water plan is primarily driven by Title 85, and it is mainly a water quantity inventory being created. He suggested that perhaps Paul Azevedo or Tim Davis could come to speak at the next WPCAC meeting. Ms. Williams added that Michael Downey is working on this as well. Ms. Steinmetz said that she would follow up to find a speaker to present on this topic.

#### **Adjournment -**

Chairperson Selch moved to adjourn the meeting and Mr. Cole seconded the motion. All were in favor; the meeting adjourned at 11:39 a.m.

**REFERENCED LINKS FOR MEETING MATERIALS**

(Sites last updated 6/30/2014)

**June 30, 2014 Agenda -**

<http://deq.mt.gov/wqinfo/WPCAC/agendasMinutes/2014/June30/AGENDA6-30-14.pdf>

**Agenda Links:**

Approved Minutes from May 2, 2014 -

<http://deq.mt.gov/wqinfo/WPCAC/agendasMinutes/2014/June30/5-2-2014ApprovedMinutes.pdf>

MPDES Memo -

[http://deq.mt.gov/wqinfo/WPCAC/agendasMinutes/2014/June30/AgendaForm\(MPDES\).pdf](http://deq.mt.gov/wqinfo/WPCAC/agendasMinutes/2014/June30/AgendaForm(MPDES).pdf)

Draft MPDES Rules – Subchapter 11 and 13 -

<http://deq.mt.gov/wqinfo/WPCAC/agendasMinutes/2014/June30/WQMPDES2014pro.pdf>

Submitted by,

Sarah Norman 7/3/2014