

## **NUTRIENT WORK GROUP MEETING SUMMARY**

**NOVEMBER 20, 2020**

**1:30 p.m.**

**Zoom Meeting**

**Present:**

Aaron Losing  
Alan Olson  
Amanda McInnis  
Brian Heaston  
Chad Hanson  
Coralynn Revis  
Craig Workman  
David Clark  
Doug Parker  
Erik Makus  
Greg Bryce  
Jason Mercer  
Karen Sanchez  
Katelyn Cameron  
Kelly Lynch  
Lisa Boettcher  
Joe Lierow  
Mitch Reister  
Paul Skubinna  
Jennifer Reed  
Melissa Downing  
Rebecca Boslough  
Rika Lashley  
Ryan Leland  
Ricky Schultz  
Ryan Sudbury  
Sarah Zuzulock  
Tammy Johnson  
Tina Laidlaw  
Susie Turner  
Shawn Kohtz  
Scott Buecker  
Paul Montgomery

**Department of Environmental Quality (DEQ) Staff Present:**

Tim Davis – Water Quality Division Administrator  
Kurt Moser – Attorney Specialist  
Galen Steffens – Water Quality Planning Bureau Chief  
Jon Kenning – Water Protection Bureau Chief  
Kristy Fortman – Watershed Protection Section Supervisor

Myla Kelly – Water Quality Standards and Modeling Section Supervisor  
Rainie DeVaney – Surface Water Permitting Section Supervisor  
Michael Suplee – Water Quality Standards and Modeling Section  
Christina Staten – Watershed Protection Section  
Amelia Flannery – Surface Water Permitting Section  
Christine Weaver – Surface Water Permitting Section  
Christy Meredith – Watershed Protection Section  
Darryl Barton – Source Water Protection Program  
Hannah New – Surface Water Permitting Section  
Hannah Riedl – Watershed Protection Section  
Heather Henry – Surface Water Permitting Section  
Joanna McLaughlin – Surface Water Permitting Section  
Kayla Glossner – Surface Water Permitting Section  
Maya Rao – Surface Water Permitting Section

Christina Staten, the meeting facilitator, initiated the Zoom meeting at 1:30 p.m.

## **RECENT COURT CONSOLIDATION ORDER AND NUTRIENT STANDARDS VARIANCES LEGISLATION**

A court order was issued on October 30 of this year that consolidated two cases before the U.S. District Court regarding Montana’s nutrient standard variances and associated “poison pill” which voids the base numeric nutrient water quality standards upon invalidation, disapproval, or unavailability of the general variance. A copy of the order was provided to the Nutrient Work Group email listserv prior to the meeting and can also be found on the work group website at: <http://deq.mt.gov/Water/Resources/nutrientworkgroup>.

Tim Davis summarized the Department’s interpretation of the Order and the steps the Department will take going forward related to nutrient variances. Page 17 of the Order states that the Court is not lifting a stay on the first Order until EPA and DEQ can reach general variance timelines that meet the following Clean Water Act requirements: (1) begin with a program that complies with the relaxed criteria of the general variance water quality standard, (2) work toward ultimate attainment of Montana’s stringent base numeric nutrient water quality standards in order to demonstrate progress toward attainment, and (3) adopt a timeline for which attainment of Montana’s base numeric nutrient water quality standards would be feasible. The Order also directs DEQ to initiate rulemaking and gives DEQ 120 days from the date of the Order to adopt revised general variance timelines that comply with the Clean Water Act. The Order also gives EPA 90 days to complete its review of DEQ’s submission to them based on the rulemaking.

Based on this Order, DEQ is moving forward with initiating rulemaking, using the 2019 version of Department Circular DEQ-12B, “Nutrient Standards Variances.” The schedule for this is discussed below. DEQ has not made any other decisions related to the Order.

## **NUTRIENT STANDARDS VARIANCES LEGISLATION**

At the previous Nutrient Work Group meeting, proposed legislation was discussed that would repeal the nutrient standards variances statutes (75-5-313, 314, and 319, MCA, and cross-references to those statutes), and transition any rules that were adopted under the nutrient variance statute, so that they

are covered and authorized under the new variance statute that was passed in 2019 (75-5-320, MCA). Based upon Judge Morris' Consolidated Order, DEQ has decided not to move forward this bill for the upcoming 2021 legislative session.

## **2019 CIRCULAR DEQ-12B AND SCHEDULE FOR RULEMAKING**

The 2019 version of Circular DEQ-12B, Nutrient Standards Variances, will be the starting point for rulemaking. A copy can be found on the Nutrient Work Group website here: <http://deq.mt.gov/Water/Resources/nutrientworkgroup>. Michael Suplee highlighted a few key points of this circular: It has general variance values for discharges greater than one million gallons per day (MGD) of 0.3 mg/L total phosphorus (TP) and 6 mg/L total nitrogen (TN), 1 mg/L TP and 10 mg/L TN for dischargers of less than 1 MGD, and for lagoons to maintain current conditions while implementing improvements. The 2019 version also added timelines going forward.

Prior to the 2019 version of DEQ-12B, EPA only approved a subset of facilities to be eligible for the general variance. DEQ has since looked at other facilities that were not included, and is now considering rolling in another approximately 15 to the list and having that be part of this rulemaking.

**Attachment A** provides a schedule for rulemaking that Michael discussed during the meeting. EPA will then have 90 days to conduct their review and make an approval determination.

## **Discussion**

It was asked how a facility can get rolled-in as one of the newly considered variance facilities. Michael replied that DEQ follows what the EPA said would be their requirements to be added: 1) there would have to be adopted numeric nutrient criteria for the waterbody to which the facility discharges, 2) the facility would have to have a reasonable potential to exceed one of those standards, and 3) the facility would have to have a demonstration undertaken that shows that trying to meet those standards would cause substantial and widespread economic harm to the community (this usually comes back to the facility having to use reverse osmosis treatment). Of the facilities that DEQ looked at, about 15 of them fall into the category of meeting these requirements.

It was also asked what additional facilities are being considered. Michael replied mainly communities with lagoons and a few mechanical facilities.

More detail was requested on what DEQ is considering adding to DEQ-12B. Michael responded that minor changes will be made to the text; there may be possible changes to the dates it takes to achieve the highest attainable condition – the date of five years from now will be revisited; and DEQ is also considering taking the original list of 36 facilities that were listed by EPA as approved for the general variance, adding in about 15 facilities, and incorporating them directly into DEQ-12B as an appendix so that it is clear which facilities fall under the general variance. Tim Davis added that if anyone has changes they would like the Department to consider, to please share them with DEQ by the end of next week.

Clarification was requested on what types of changes may be made to the text of DEQ-12B. Michael responded that mostly what DEQ is discussing thus far is date changes within the text, including the timelines to achieve the highest attainable condition (HAC). The text also includes dates for when DEQ should have completed the next water quality standards triennial review; those dates have passed and will have to be updated. Updates to the text is open to input from others as well.

It was asked whether private dischargers will be considered for inclusion. Michael did not want to give a final answer on this, but stated that DEQ probably would not consider them because EPA was clear that those were outside the rulemaking scope. Private facilities basically fall under the individual variances component of Circular DEQ-12B. More detail on why EPA feels private dischargers are not eligible for the general variance was then requested. Michael responded that their main reason has been that the economic impact analysis (which is one of the foundations for being eligible) has not been undertaken for all of them and is more complex and would require information that DEQ never received or does not have from private dischargers. Whereas, all the information needed to carry out this analysis is publicly available in the case of public treatment works.

It was also asked whether it is possible to make changes to how non-degradation is applied to the standard in this rulemaking. Michael responded that it is extremely unlikely. The Court ordered DEQ to focus on DEQ-12B specifically, which is a Department rule, and the Board of Environmental Review (BER) is not involved in this rulemaking. In contrast, non-degradation rules are part of the overall rule package that is reviewed by the BER – DEQ would not be able to include non-degradation rules if we want to meet the Court-ordered timeline.

It was asked whether there will be any changes to Section 3.0 of DEQ-12B in this rulemaking (Individual Nutrient Standards Variances). Michael responded that DEQ does not have plans to make changes to this section. It was also asked whether any individual variances would be affected from the revisions. Michael replied there would not be.

It was asked whether the general variance highest attainable conditions are being revisited under the proposed rulemaking. Michael responded that they are not being revisited, as there is not enough time.

Clarification was requested on the recent Court ruling's impact to the severability of the numeric nutrient criteria from the nutrient standard variances. Tim Davis replied that the Court has not made a final decision on the "poison pill" case (Waterkeeper II). A follow-up question was asked to clarify what the nutrient standards are at this time, since the Judge did not rule on the severability language. Tim responded that DEQ is focused on the clear direction the Order provided to DEQ: to proceed with rulemaking. The Department has not made other decisions at this time, but promises an answer to this question soon.

It was asked if DEQ wanted to speculate on the consequences of not meeting the 120-day timeframe. Tim Davis replied that the Court could potentially hold the Department in contempt.

It was asked when a draft of the DEQ-12B revisions will be available for review. Michael responded that a revised draft will be produced after the WPCAC meeting is held next week. All comments on the revised DEQ-12B will need to be received prior to December 15, 2020, if they are to be addressed prior to public comment. Comments may also be submitted during the formal 45-day public comment period (see **Attachment A** for a timeline).

## **NEXT NUTRIENT WORK GROUP MEETING**

DEQ intends to schedule another Nutrient Work Group meeting for the first week of December, or the following Monday, to go through a revised version of Circular DEQ-12B so that the Department's proposed changes can be discussed before it goes out for public comment.

The meeting was ended at 2:20 p.m.

## **ATTACHMENT A: TIMELINE FOR RULEMAKING**

## **November 5, 2020: Court Ordered Review of Circular DEQ-12B**

***“DEQ shall be given 120 days from the date of this Order to adopt revised general variance timelines...”***

**Start Date: October 30, 2020**

**Must Complete By: Saturday, February 27, 2020** *(Calendars are attached at the end for convenience)*

Besides the basic MAPA requirements, special things to include:

1. A Nutrient Work Group Meeting (or two)
2. 30 days between WPCAC (a specially-called meeting) and MAR publication

### **Proposed Timeline:**

November 4 to November 23, 2020:

- Complete a Nutrient Work Group Meeting (or two if possible)
- Consultations with EPA, League, Water Keepers, Other Stakeholders

November 23, 2020:

- Specially-held WPCAC meeting, ≥30 days prior to MAR publication on 12/24/2020

December 15, 2020:

- File Notice of Proposed Rulemaking for DEQ-12B

December 24, 2020:

- Publish Notice of Proposed Rulemaking for DEQ-12B

December 25, 2020 to February 8, 2021:

- 45-day public comment period
- Hold public hearing on Monday, February 8, 2021

**No later than** February 26, 2021:

- Gives DEQ up to 18 days (to Friday 2/26/2020) for Response to Comments/Legal Review
- Signed by Dept. Head, file Adoption Notice in MAR for DEQ-12B no later than Feb 26<sup>th</sup>

Adoption Filing and Publication

- If filed 2/26, Adoption Notice will publish in MAR on March 12, 2021

# 2020

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