
Nutrient Workgroup Meeting

August 6, 2019 at 10:00 AM

Lee Metcalf Building – Room 111

PRESENT:

Mike Abrahamson – MT DEQ

Jim Jensen – MEIC

Susie Turner – City of Kalispell

Aaron Losing – City of Kalispell

Guy Alsentzer – Upper Mission Waterkeeper

Dave Aune – Great West Engineering

Jason Mercer – Morrison-Maievle

Craig Pozega – Great West Engineering

Tina Laidlaw – EPA

Eric Urban – City of Helena

Tim Davis – DEQ

Myla Kelly – DEQ

Rainie DeVaney – DEQ

Jon Kenning – DEQ

Ryan Weiss - DEQ

Mike Suplee - DEQ

Mike Suplee called the meeting to order. Everyone introduced themselves. There were a few people on the phone.

There was no formal agenda. Mike Suplee gave a brief outline of why the Nutrient Workgroup Meeting was called at the last minute.

Mike Suplee explained that essentially there was a court order that came down on July 16th and that court order gave the Department 120 days to complete Rulemaking to update Department Circular DEQ-12B. This is the circular that addresses variances from Numeric Nutrient Standards. In order to meet that timeline, we had to address it immediately. The Water Pollution Control Advisory Council meeting has already taken place and they approved moving forward on the rule as it was showed to them and the draft DEQ-12B. Following this meeting, we will proceed into the more formal aspects of the rulemaking, including publishing the draft notice, hold a 45-day public comment period, respond to any public comments and then publish the new rule by November 8th and according to the court order, the deadline is November 13th.

Mike Suplee directed everyone's attention to the screen and discussed the document titled:

"Outline of Key Events Leading to Today's Rulemaking Request"

2014: Adoption of Department Circulars DEQ-12A (numeric nutrient standards) and DEQ-12B

2015: EPA approves Circular DEQ-12A and -12B in February

2015: EPA adopts its water quality variance regulations at 40 CFR 131.14 in August

2016: EPA sued by *Upper Missouri WaterKeeper* for having approved DEQ's nutrient variance rules (i.e., 12B). Suit is primarily based upon challenge to the use of economic and social factors to grant a WQS variance.

2017: DEQ's 1st triennial review of 12A and 12B; No changes or additions were made to 12A, however 12B was rewritten considering EPA's updated regulations. EPA's updated regulations require the term of the variance be based upon the time necessary to meet the interim treatment requirements, not the underlying standards.

2019: Court finds EPA's use of economic and social factors to approve a WQS variance to be consistent with the Clean Water Act. Court upholds the Current Variance Standard (Table 12B-1 treatment requirements) and EPA's approval of Montana's economic and social impacts analysis results. However, Court also finds EPA's regulations contradicted themselves, and specifically finds EPA's approval allowing time to achieve merely the interim treatment requirements to be unreasonable (March).

2019: Per Court order, parties conferred in good faith to find a resolution, but did not come to a common accord; individual briefs filed (July 1)

2019: July 16: Court orders DEQ to address the timeline to meet (a) interim treatment requirements and (b) base numeric nutrient standards, within 120 days, leading to this rulemaking. Court partially vacates the approval related to these issues, and then stays that vacatur, to allow time for DEQ and EPA to address its concerns. Because the Court stayed its partial vacatur, EPA's approval of Montana's general variance is still in place, however, time is of the essence to address the Court's concerns.

Mike Suplee asked if there were any immediate questions following the summary of this document. There were none.

He then directed the groups attention to the screen where the Department Circular DEQ-12B was shown. Mike Suplee pointed out and explained the various modifications in the document (see remarks in red in the document).

Major changes:

- **Date:** May of 2018 to November 2019
- **2.0 General Nutrient Standards Variances:** *“A compliance schedule to meet the treatment requirements shown in Table 12B-1 may also be granted on a case-by-case basis, **provided that permittees are not immediately able to achieve the HAC. If the Department determines a compliance schedule is necessary, it will be granted upon permit renewal.**”*

Mike Suplee stated that the Circular still requires DEQ to revisit, every 3-years, the cost and technology analysis to see if these should to be lowered for the general variance group. Currently, these stand as the treatment level requirements.

- **2.1 Time to Achieve the Treatment Requirements in Table 12B-1:** there were numerous modifications, primarily, per the court order, it is proposed that the time to achieve these treatment requirements in Table 12B-1 has essentially been moved up to July 1, 2027.

It was already outlined in this document (see Table 12B-2) a suggested series of steps to achieve the Table 12B-1 treatment requirements. Steps 6 through 9 were found to be redundant, so they were removed.

- **2.2 Wastewater Facility Optimization Study:** Pollutant Minimization Program: Mike Suplee stated that very little was changed other than in 2.2.1.2, *Pollutant Minimization Requirements for Wastewater Lagoons* – the date for conducting and completing a statewide review of lagoon performance to evaluate effective operational methods and identifying those lagoons that require additional improvements has been moved up two years to **2020**.
- **2.3 Progress Toward the Base Numeric Nutrient Standards:** New insert discussing what will be occurring as we go from having achieved Table 12B-1 values towards achieving the numeric nutrient standards by August 2034.

Kurt Moser commented that the individual variance rule is not being revised. They are **only** revising those portions that the Judge addressed. He stated that it is important to remember that because the EPA only approved 36 facilities, for use under the approval of the 2017 portion of the general variance, this effectively only deals with those 36 facilities. We are still functioning under the EPA’s original approval.

Mike Suplee opened it up to questions/comments/debate:

Tim Davis commented that this is not the draft that will be proposed for public comment, this is a work in progress and there will be additional edits, but we wanted to show what type of revisions we are working on and be able to solicit feedback and questions.

Tim Davis was asked if he knows what else will be considered and Tim said that there won't be anything "dramatic" or very substantial.

Guy Alsentzer commented that he is confused by how the timeframes that are being proposed for mechanicals and the lack of discrete timeframes for the lagoons comply with the judge's order. The waterkeeper brief and the proposed timeframes which the court adopted, the mechanical HAC compliance date should not be 2027, it should be 2023. He went on to say he believes there is a discrepancy, based on his interpretation, of the court order and he is red-flagging it.

Tim Davis replied, that the general framework laid out is that the 2027 date is based on the lagging facility that needs the longest amount of time, based on our expert opinion. The key is not all will get 2027, the others will have to meet that as soon as possible, based on their compliance schedules and next permit cycles. We will be looking at one facility, and based on our engineers' expert opinion, how long will they need to comply. The 2027, is based on the lagging facility and the justification for "why" will be documented and it will be open to comments.

Guy Alsentzer stated that he wanted to note his concern that letting the exception to the rule guide how the rule is framed, seems backwards to him. It seems to him that it would be set for the majority and then deal with special circumstances on an individual basis. His organization would like to see clarity on how the department will use its discretion.

Jim Jensen commented that he wanted to point out there are other potential solutions that are not talked about on reducing the source reduction side of the systems and those could include new building codes, etc., that could be more cost effective than these expenditures on the mechanical treatment farms. He pointed out referring to 2.0 – in Optimization, that it never mentions specifically the idea of reducing inflow in the systems. He believes that the operators are the first step, and the engineers are the second step, in the way we look at this problem.

Susie Turner, City of Kalispell, commented on how this will affect the City of Kalispell. She stated that they did have a game plan to meet the variance and to meet the numeric water quality standards based off what was already in place, so they always had an end-goal. She asked what does Table 12B-2 mean and asked for more clarification and an understanding of how that would be applied to them.

Mike Suplee explained that when this was originally set up, it was proposed that several things would happen over time that would potentially lead to improvements for water quality. He went on to say that these steps in Table 12B-2 basically outline the classic process, whereby being aware that the treatment requirements for Table 12B-1 possibly cannot be met by optimization for the facility that the town currently has. Mike Suplee further explained that steps 2 through 5, outline steps that one goes through to upgrade a wastewater facility.

Susie Turner expressed concern that the timetables are difficult to meet.

Guy Alsentzer commented that the concern of the judge's order is, how do you show measurable accountability towards *moving* towards ultimate water quality standard criteria. He agreed with Susie Turner, in that he is concerned with the timetables and he doesn't want to see communities set up to fail.

Mike Suplee added that we, in the Department, have the most sophisticated evaluation process that he has ever come across to determine what is or is not affordable for the communities in Montana, and that was not disputed by the judge.

Guy Alsentzer replied that he thinks there is a big tension between what the court order, and the judge's concerns, about how do you show a transparent path to meet that water quality criteria and not allowing people to be left behind and in violation. He further went on to say that staying with the current HAC may be a disservice based on the judge's order.

Mike Suplee stated that we aren't saying we will be staying with the current HAC, but we will change it using the processes that are set up and when it's appropriate to change it.

Tim Davis commented that we have 120 days to do a full rulemaking process and we're just targeting specifically on what the judge told us to do.

Mike Suplee directed everyone's attention to the **2019 Meeting Schedule** and stated that we will be continuing to make some small modifications with feedback.

There are two filings:

1. File on August 27th and that will publish on September 6th, which will start the public comment period for 45 days, which will include 3 legal ads in the State's main newspapers. Public comment period will proceed up to the Public Hearing, which is on October 18, 2019 and that will be published in the Notice. The public comment officially ends on October 21st. They are allowing a week to respond to comments.
2. File again on the 29th which will be the final rule in its final form and it will be published on the 8th of November and it becomes State law the following day.

Bill Mercer (on the phone) stated it would be constructive and helpful for the public and the nutrient working group to understand the dates and the contents of the amendments to 12B with citations to the court order, so people can understand what it is in the court order and the district court file that has driven the Department to make these changes. In other words, what authority are you relying upon for what you have included in the rule.

Respectfully submitted:

Theresa Froehlich-duToit