DRAFT MEETING MINUTES
SENATE BILL 325 RULEMAKING WORKGROUP
Tuesday, February 21st 2016
1:00pm to 3:00pm
Metcalf Building
1520 E. Sixth Ave, Helena, MT 59620

PRESENT
Workgroup Members Present:
Art Hayes
Tammy Johnson
Brenda Lindlief-Hall
Ella Smith (for Adam Haight)
Peggy Trenk

Montana Department of Environmental Quality Staff Members Present:
Myla Kelly
Adam McMahon
Melissa Schaar
Pete Schade
Timmie Smart
Amy Steinmetz
Mike Suplee
Eric Urban

Ms. Myla Kelly called the meeting to order at 1:07 pm. The meeting commenced with introductions followed by a re-cap of the January 17th meeting.

- Timeline deliverables
- Progress of Part 1
- Suggestions for criteria selection for the Madison River

The minutes from the previous meeting were approved and will be posted on the website.

Ms. Kelly started with the second part of the agenda, waiting for Dr. Mike Suplee's arrival for the first agenda topic.

MCA 75-5-222 part 1 (nonanthropogenic water quality criteria)
Ms. Amy Steinmetz reminded the workgroup that DEQ had to determine how to select the criteria in order to move forward with Part 1 of the Statute. She spoke about 3 areas specific to arsenic.

1. Highest Attainable Use
    - There will have to be a use change. There is only one, maybe two waterbody segments that would require an aquatic life use change. One of the waterbody segments would be from Yellowstone to Hebgen Lake. This would be a site-specific criterion.
    - The method that DEQ is developing will only apply when the drinking water use needs to be changed. The aquatic life change is more complicated and more limited. Drinking

water is an issue in many parts of the state so the method will be specific to the drinking water use. "Arsenic-limited drinking water use" means that the arsenic is above safe drinking water levels and treatment will be needed to bring it down.

Q: That's the status quo anyway, right?
A: Yes, that's correct. But this will help inform the public going forward.

- Site specific criterion for non-anthropogenic condition is now **Nonanthropogenic Standard (NAS)** – A numeric water quality standard established pursuant to 75-5-222(1) and [New Rule I] to protect the nonanthropogenic condition of a water body.

2. Proposed method of criteria selection
    - Seasonal determination – low flow and high flow season and use of statistics to determine if the arsenic concentration is significantly different during these two time periods. If they are, then use the seasonal criteria. If they aren't, take the year-round data to determine the criterion.
    - Dilution Test – Make sure the most sensitive time period is protected. If no shift in distribution is possible because of high volume in the river, use a higher concentration for a criterion (the arsenic concentration during the low flow period). DEQ will look at the very low flow time of year to see what the odds are of a discharger changing the concentration of arsenic during this most sensitive time period. What's the chance of the 7Q-10 changing by a discharge?
    - Criteria Selection – Important to represent the current distribution/median with the 50th percentile for arsenic specific.

3. Progress on demonstration of non-anthropogenic conditions document (Ms. Melissa Schaar)
    - This is complete, in draft form and going through internal review.
    - Moving on to the NAS method and taking Madison as the case study.

Ms. Steinmetz moved to the more general rule and guidance, which will also apply to arsenic.

1. Application of nondegradation – this is important because of anti-backsliding and new and increased discharges or sources. Ms. Steinmetz passed out what the proposed rule would be for this rule. These additions if implemented correctly, explain that these non-anthropogenic standards would be non-significant.

Q: So in other words, no non-deg?
A: Yes.
Q: This conforms with the EPA rule?
A: EPA has not reviewed this yet. DEQ has talked to them about this idea and the approach has been approved in other states. EPA's preliminary response to the concept was if the standard is derived appropriately, the nondeg concept should be fine. Again, this approach is something that EPA has approved in the past.

2. Protection of downstream water quality standards
    - Small discharge into large volume – minimal shift. An example is Yellowstone River near Billings or Laurel with a discharge of 1.5 cfs.

- Minimal shift locally, but a shift in downstream distribution – downstream there may be a tributary running into a larger stream causing a shift in downstream distribution. Ms. Steinmetz gave an example of a tributary with higher concentrations flowing into a river with lower concentrations. If DEQ allows a discharge into the tributary, the standard is met at this point. But there is the possibility it exceeds the standard downstream once it flows into another river. A permit writer would take this into account.

Q: Previously for arsenic you were looking for a criterion selection in the 50th percentile. Has there been any consideration of what it would be for salinity? Previously it was the 87th percentile.
A: There has been a lot of internal discussion about where the use lies. We wouldn't always be picking the 50th percentile. If a use exists even part of the year at a lower percentile at that natural distribution, that would need to be protected. We would need to understand both the use and the distribution.

- Minimal shift locally, but water quality exceedance extended further downstream – this is the material contribution discussion. When a point source is added and discharges at the natural level, it has the potential to extend the exceedance further downstream.

3. Progress of guidance – Ms. Steinmetz has been working on options for how to come up with criteria and would like to send it to EPA and the workgroup members soon. Ms. Steinmetz will get the draft out before the April meeting after more internal review.

Ms. Steinmetz asked for questions. There were none.

Before moving to the next item on the agenda, Ms. Kelly reviewed the draft timeline for rulemaking.

- To expedite the process, the tracks for Part 1 and Part 2 have been separated. The variance piece (Part 2) has been drafted and is further along than Part 1.
- DEQ requested additional review from legal on rule language and guidance and some changes have been made, which Dr. Mike Suplee will address.

The draft timeline will be posted to the website.

Ms. Kelly moved to the next item on the agenda.

1:15 MCA 75-5-222 part 2 (variances) rulemaking
Dr. Suplee explained that legal restructured this document to make it look like a rule, but it is basically the same. He reminded the work group of the 6 factors that have to be satisfied at the federal level in order to grant a variance.

1. Naturally occurring pollutants;
2. Naturally low-flows (i.e., ephemeral) prevent attainment of the use;
3. Human-caused pollution prevents attainment of use and source cannot be remedied or would cause more environmental damage to correct than leave in place;
4. Dams or other hydrological modifications prevent attainment of the use;
5. Natural physical conditions of the waterbody that preclude attainment of aquatic life protection uses; and

6. Meeting a water quality standard (e.g., DEQ-7) would cause substantial and widespread economic harm.

Dr. Suplee said all the factors could work from the way the rule is written, but factors 3 and 6 are most likely. But one of them has to be accepted in order for the rule to work and the variance granted.

Dr. Suplee moved onto Part 2. He explained that if it's (2)(a)(i), highest attainable interim standard, it would probably be a factor 6 demonstration. And if it's (2)(a)(ii), the interim effluent condition that reflects the greatest pollutant reduction that is achievable, that would be a factor 3 demonstration.

Dr. Suplee continued with (2)(b)(iii), which Ms. Kelly pointed out was included because it includes pollutant minimization plan language which is a new requirement under the federal variance regulations.

Dr. Suplee moved to (3) that explains reasons the variance isn't needed. This doesn't make it an exclusion, but there really isn't a reason to pursue it. This language has not changed from the previous version.

Dr. Suplee explained that this is a case by case rulemaking that goes before the board because each scenario will be unique. The board would want to look at each, and EPA will approve case by case.

Dr. Suplee spoke of DEQ legal simplifying the language at the end of the rule (5).

- The rule is good for 5 years. DEQ then has to review it and submit to the board what the conditions are of the receiving waterbodies.
- DEQ will submit an extension to the board if nothing has changed in the waterbodies. EPA also has the right to review this extension.
- If remedial activities show improvement in the waterbody, DEQ will propose to the board amendments that would require the permittee to treat the pollutant to concentrations no higher than what has been occurring upstream over the last two years.

Q: I have a question on subsection (4), the part where it says "the variance becomes effective and must be incorporated into the applicant's permit.." But that doesn't happen until after adoption by the board.
A: Right.
Q: So it should read "after adoption by the board in a formal rulemaking proceeding and EPA approval, the variance becomes effective."
A: It says "after" so it's conditional. All of this will happen after adoption so we should be ok.
Comment: It's a little bit confusing the way it's written.

Q: Say during another 5-year permit you get another discharge permit in another state upstream and that changes the water quality, making the concentration higher, what happens then?
A: Under (5) you should be alright. "The variance must be reviewed by the department every five years. Based on the review, the department shall submit to the board findings and conclusions regarding the receiving water body." That would be a change in the receiving waterbody that has

occurred. That could mean there would not be a recommendation that they carry forward, or that they modify. It's all a function of what the condition of the waterbody is. "If the department finds that during the previous five years remedial activities have resulted in improved water quality in the receiving waterbody but has not resulted in compliance with the standard", or that it has actually gotten worse or could potentially get worse, that would be another consideration.

Mr. Pete Schade asked about section (1) a and b:

(a) the standard is more stringent than the quality of the receiving water;
(b) the condition in (a) exists because of anthropogenic contributions of the pollutant to the water body

He wondered if this presumes the waterbody has been evaluated to allow a calculation of what the anthropogenic vs. the non-anthropogenic loading to that waterbody might be. He thinks there would have to be a fair amount of assessment to the waterbody to determine if (b) is met. He asked what provisions this allowed for the evaluation of that condition in terms of natural conditions vs. anthropogenic. Dr. Suplee believes the cases where this will be used are where remediation is likely, which suggests there is something that has happened in that waterbody that needs to be dealt with. Mr. Schade gave the example of discharging onto a tributary where there is not any data on, and how to determine if the existing conditions are based on anthropogenic contributions. He wondered how someone requesting a variance would go about meeting the condition on (1)b. Dr. Suplee repeated the remediation provision and that it is one of the conditions. Ms. Steinmetz pointed out that under (2)a the permittee has to demonstrate to the Department the condition exists because of anthropogenic conditions. She believes even if an assessment hasn't been done, they will have to prove it's anthropogenic. Dr. Suplee agreed, that this is a fact-finding requirement.

Dr. Suplee continued, explaining the rule language was taken to WPCAC (Water Pollution Control Advisory Council), which is a requirement before it's taken to the board. WPCAC reviewed both the rule and guidance and agreed to it as written. Ms. Kelly suggested showing the workgroup the guidance again, which has not been changed since the last review. Dr. Suplee pulled up the flowchart, and pointed out a change to box 3 so that it meshed with the rules and included the six federal factors that could potentially be drawn from the statute as rationale. But it's also stated that it will most likely be factor 3 or 6.

Dr. Suplee summarized: If you're not going to be extending the pollutant problem downstream, that doesn't necessarily mean that it's not materially contributing. He explained that DEQ can't give more specifics because they need an actual case study and will weigh them as they come in.

Q: Is there a representative of municipalities on WPCAC?
A: There is a POTW director.

Ms. Steinmetz mentioned that Mr. Craig Workman of WPCAC spoke about going to the board and initiating rulemaking, and that this opens up the whole public process and the final rule could look very different in the end. Ms. Steinmetz also noted that Ms. Karen Sanchez asked how this variance rule would pertain to the nutrient variances, which is a very separate rule and process.

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Q: Can you envision where an applicant might request a variance under nutrients and a variance under SB325?
A: It's unlikely. Under the nutrient standards the highest degree of any water quality standard developed in the state has taken natural background into consideration. What the natural background of what the nutrients look like have already been built into the standard. There might be an occasional stream or river where the natural background is naturally higher than the standard set for the region, but it will be rare.

Q: What will the meetings entail going forward, since we have already discussed Part 2?
A: We will continue to brief the group on how the rulemaking initiation is going, what kind of public comments are received and how to address them with any changes. Primarily though, we will be discussing Part 1—completion of the rule language and the circular and the supporting technical documentation.

Ms. Kelly asked if everyone supported going ahead with initiating rulemaking for Part 2. There was no opposition.

The next meeting is Tuesday, March 21st 1pm to 3pm. The meeting concluded at 2:18 pm.

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