DRAFT MEETING MINUTES
SENATE BILL 325 RULEMAKING WORKGROUP
Tuesday, April 18th, 2017
1:00pm to 3:00pm
Metcalf Building
1520 E. Sixth Ave, Helena, MT 59620

PRESENT
Workgroup Members Present:
Chris Brick (phone)
Tammy Johnson (phone)
Brenda Lindlief-Hall
Ella Smith
Peggy Trenk

Montana Department of Environmental Quality Staff Members Present:
Kirsten Bowers
Rainey DeVaney
Myla Kelly
Jeff May
Melissa Schaar
Timmie Smart
Amy Steinmetz
Mike Suplee
Eric Urban

Other:
Guy Alsentzer (phone)
Tonya Fish (phone)
Joe Griffin (phone)

Ms. Myla Kelly called the meeting to order at 1:03 pm. The meeting commenced with introductions followed by a re-cap of the March 21st meeting.

- Arsenic standards selection process example for the Madison River.
- Proposed method of criterion selection including the dilution test, seasonality determination and criterion selection.
- SB 325 and Part 2- proceeding to the BER at the end of March to request rulemaking.

The minutes from the previous meeting were approved and will be posted on the website. Ms. Kelly moved the meeting to the first agenda item.

MCA 75-5-222 part 2 (variances) rulemaking – March 31 Board of Environmental Review Meeting
Ms. Kirsten Bowers from DEQ legal explained comments from one of the board members at the March 31st meeting where the board decided to not initiate rulemaking to implement MCA 75-5-222.

- The board expressed concerns that an individual variance under MCA 75-5-222, sub 2 is not appropriate for rulemaking because the variance would apply to a specific discharger through their MPDES permit, and it's not defined as a rule under the Montana Administrative Procedures Act – a standard or statement of general applicability.
- The board asked if this variance would be more suitable as a contested case procedure.
- DEQ explained that Part 2 requires the board to adopt rules that provide criteria for the board to issue variances consistent with federal rules and guidelines and EPA views variances as water quality standards that must be adopted through rulemaking.
- The board decided to put off action on rulemaking until the next meeting on June 2nd.

Ms. Bowers reviewed how the workgroup has considered two processes.

1. A really detailed process with each individual variance not going through rulemaking.
2. Adopting individual variances through rulemaking which is what EPA is familiar with and was the preferred option.

She thinks at the next meeting the Department could again request the rulemaking and explain that EPA requires rulemaking because it's a water quality standard. Or DEQ could go through option 1 which would be a very detailed rulemaking and a very involved process with EPA.

Ms. Kelly reviewed the workgroup's and DEQ's decision process. The first one would have required determining all the different scenarios up front because that would give EPA only one opportunity to decide. She explained that DEQ thought there would be relative few permittees using this variance and not worth trying to create such a detailed process.

Ms. Tonya Fish agreed that they not pursue a performance based process. It would take a lot of time without a guaranteed outcome that would be approvable in every situation. She agrees with going to the board to get across the point that EPA's regulations define variances as water quality standards that require the rulemaking process.

Ms. Bowers said there will be legal discussions with management to decide how to approach the board. A good point to make is that there will be very few of these variances.

Comment: *It would be good to explain the two options and the reason the one was chosen because the other doesn't work.*
Comment: *I will say that when I left the BER meeting I didn't understand the answer to the question, but the way it was described today was very clear. It might have just been the process of how questions were asked, who knew the answer and in what form. I left feeling nobody really knew what was going on. I didn't think the question had been answered.*

Ms. Kelly asked the workgroup if they were comfortable with requesting the individual rulemaking for each variance. The workgroup said yes.

Comment: *I found it interesting that Mr. Tweeten raised the issue that if this isn't appropriate to rulemaking under MAPA, and you issue a variance, could someone challenge that legally because it wasn't established properly under MAPA.*
A: Yes, and under rulemaking we'd still address public comment and the rule could be challenged.

Ms. Kelly said there were also comments from the Tongue River Water Users and Northern Plains Resource Council. Ms. Ella Smith listed the Northern Plains concerns.

- Concerns this is a way around the Clean Water Act- ignoring the cleanup, pollution and source and instead drafting a variance to get around the problem.
- Nondegradation and if the discharger is increasing the flow in the stream it will push pollutants downstream more quickly and further.
- Would like language regarding the best available technology.

Ms. Kelly asked regarding the best available technology and if that was referring to the permittee's side. Ms. Smith said yes. Mr. Mike Suplee asked about the nondegradation concern because it applies to high quality waters which these are not. Ms. Smith thinks there was a misunderstanding on her group's end. Ms. Kelly acknowledged that it's complex in how they are applied. She offered summary statements on nondegradation. Ms. Fish clarified that it's not that nondegradation doesn't apply, but that tier 2 doesn't apply. Tier 1 still applies which is protection of existing uses. Ms. Fish will put together some clarification to address this concern.

Ms. Smith explained that it may sound like her group is compromising, but during the public hearings they need to voice their goals from working on this subject.

Ms. Kelly said that Ms. Fish's clarification will be run by the group at the next meeting on May 16th.

Ms. Kelly moved to the next item agenda.

EPA's Comments on Arsenic Non-Anthropogenic Standard (NAS) selection document

Ms. Steinmetz summarized the few comments received from EPA.

- EPA has 101(a)(2) uses which are swimmable and fishable uses and have to be assigned to every waterbody unless there is justification not to. States also have use attainability analyses (UAAs) which are required under the Clean Water Act if a state wants to remove a 101(a)(2) use. If DEQ wants to specify a different drinking water use they could do a use and value demonstration and don't have to go through a detailed UAA process.
- Wanted additional information and clarification on the 1% for the dilution test and if the nonanthropogenic condition is at least 95% of the ambient condition. The 1% comes from the surface water mixing zone rules and the ratio was originally taken from EPA's mixing zone guidance.
- Under section *Application of Nondegradation*, EPA asked if this NAS approach is being considered for pollutants other than arsenic. This was specific to the section that states *assimilative capacity does not exist for pollutants in water bodies with NAS*. DEQ has not yet shared the draft rule change for the non-significance rule. She clarified that right now this method is specific for arsenic, but the nondegradation rule changes, if adopted by the Board and approved by EPA, would apply to any parameter with a NAS.
- Under section *Protection of Downstream Water Quality Standards* - Inclusion of "tribe" to the first paragraph.
- Under the same section it was asked how far down from the source is downstream? In the past, EPA has recommended including a general narrative statement that addresses the protection of downstream water quality standards. DEQ has been hesitant to do this without EPA's guidance answering these types of questions. However, in this situation, because DEQ is going for no

change from non-anthropogenic, DEQ can conservatively say they'll be modeling as far downstream as impacts could possibly be seen, and look at other states for guidance on what they have done. Ms. Fish said she will work with others at EPA to find good examples.

Q: *When you make changes, do you have to go back to WPCAC before you go back to the board?*
A: If there are substantive changes. There is a meeting next Friday, April 28th. And the next one is not until July.

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

Yellowstone River Nonanthropogenic Standard (NAS) Example
Ms. Melissa Schaar gave an explanation of the standard similar to the one concerning the Madison River. But with the Yellowstone there are a lot more dischargers. DEQ is still collecting data; they don't have the historical data like they did with the Madison. Ms. Schaar chose Corwin Springs for this demonstration/example.

- The nonanthropogenic loads have not been calculated- used the ambient concentrations for this example.
- Run the dilution test first and choose the annual standard or if the 7Q10 is > 0 and the discharge volume is insignificant, you perform a seasonality determination.
- There are 2 permitted discharges at Corwin Springs – a wastewater treatment plant and a mine.
- 20 years of data used to determine the low flow season (September 1st to March 30th) and the high flow season (April 1st to August 30th).
- The high flow data is in blue, low flow is in red – slide 19.
- Did a Mann Whitney test that revealed significant differences in the high flow concentration compared to the low flow.
- The NAS is based on the 9-months of the low-flow concentrations, which resulted in a 33 ug/L.

Ms. Kelly asked for questions.
Q: *If you don't receive your confidence number and a significant difference, you average the entire year?*
A: If the concentrations aren't significantly different between the high and low flow period, like with the Madison, then the annual standard applies for all months.

Ms. Kelly asked for any additional questions.

Q: *For the formal rulemaking, it will just focus on the model for arsenic. Will there be this process for other parameters?*
A: Other parameters will come later. The rulemaking will be a general authorization for these kinds of processes. We'll also have the amendment to the non-degradation rule. We need to look at the permitting rules to see if there are any needed amendments. If there are there will be general guidance ready for it. DEQ wants to have a parameter ready to go with it so the board understands how it works.

Q: *This lays out the over-arching process. Then for different waterbodies you'll have to go by parameter, right?*
A: Yes, for each parameter. But the goal is for this to apply to every waterbody for arsenic, unless there is a site-specific situation where it just wouldn't apply.

Ms. Kelly stated actions for the May 16th meeting:

- DEQ will send the arsenic criteria selection for review from the work group before the meeting.
- Ms. Kelly will determine if DEQ will begin rulemaking process for Part 2 and when that's going to happen.
- Ms. Fish will provide clarification on nondegradation.

The meeting adjourned at 1:57 pm.

DRAFT