MEETING MINUTES
SENATE BILL 325 RULEMAKING WORKGROUP
Thursday, October 12, 2017
3:00 pm
Metcalf Building
1520 E. Sixth Ave, Helena, MT 59620

PRESENT
Workgroup Members Present:
Brenda Lindlief-Hall
Dave Galt
Tammy Johnson
Peggy Trenk
Bud Clinch
Derf Johnson (phone)

Montana Department of Environmental Quality Staff Members Present:
Kirsten Bowers
Myla Kelly
Melissa Schaar (phone)
Amy Steinmetz
Eric Urban

Other:
Guy Alsentzer (phone)
Tonya Fish (phone)
Svein Newman (phone)

Ms. Myla Kelly called the meeting to order. The meeting commenced with introductions.

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)—response to comments
Ms. Amy Steinmetz summarized the comments that had been received on the draft SB325 variance rules and provided responses to those comments.

Comment: "So long as any permitted variance complies with EPA requirements under 40 C.F.R §131.14 and §131.20, and EPA reviews and approves such variance on a case-by-case basis," the commenter has no further comments.

DEQ appreciates the comment. DEQ will ensure that variances comply with 40 C.F.R §131.14 and §131.20. Also, EPA will review all variances to ensure compliance with these Clean Water Act regulations. Also, approval of a variance continuation or modification is also subject to participation.

Ms. Kelly clarified that DEQ went to the Board of Environmental Review (BER) with the part 2 rules in March and received some public comments as well as a procedural comment from the BER. In the March draft rules, variances would have been BER rules. The current draft of the rules include a DEQ review and approval, and an EPA review and approval, but no BER review and approval of individual variances.

Comment: "It should not be the goal of the State to find a way to allow pollution and consequently we are potentially concerned about variances." Rules should require the use of Best Available Technologies and require that discharges not contribute to a water body's degraded condition.

DEQ would like to point out that the rule does require that discharges not contribute to a water body's degraded condition. It is a condition of a variance that the discharge "would not materially contribute to the condition." Second, under (2)(e), the rule requires the permittee to meet a variance level that is the highest attainable interim standard based on the condition of the receiving water or pollutant reduction achievable. And DEQ will review the application to ensure that the permittee will in fact be 1) meeting the highest attainable standard, 2) achieving the condition that reflects the greatest pollutant reduction achievable, or 3), if no additional feasible pollutant control technology can be identified, meeting the condition that reflects the greatest pollutant reduction achievable with the technologies installed at the time the variance is submitted and subject to a pollutant minimization plan. Just because the specific term "Best Available Technologies" (BAT) (which is a term specific to effluent guidelines regulations and means wastewater treatment technologies that are economically achievable for specific industries) is not used, doesn't mean that the permittee is not held to attaining the best water quality that they possibly can. If a permittee can afford the BAT and it is available and attainable, they will be held to it. If not, they will have to demonstrate that they cannot afford it and they will have to do the next best thing as required in the draft rule and continually improve processes to reduce the pollutant load.

Ms. Kelly pointed out that EPA's new variance rules at 40 CFR 131.14, instead of using the term "best available technology," use the term "highest attainable condition," which means the lowest pollutant levels feasible given certain economic and technological restraints. The highest attainable condition is one of the foundational principles of the federal variance rules and Montana will be held to those.

Ms. Tammy Johnson stated that the new nutrient variance rules include this language and they did not when they were new two years ago. So the new nutrient variances talk about this and the pollutant minimization plan, and that's now been rolled into these rules too?

Ms. Kelly stated that that is correct. EPA's variance rules at 40 CFR 131.14 were adopted subsequent to the initial nutrient variance rules. The highest attainable condition and the pollutant minimization plan come from these new federal regulations on variances. Therefore they apply not just to the nutrient variances but to any general or individual variance. That's why we have addressed that in these draft rules.

Comment: If variances are granted, will DEQ require permittee to pay for monitoring to ensure the discharges are not materially contributing? Any variance issuance should include robust monitoring requirement of ambient conditions and discharge streams in order to better understand local conditions and to reassess the variance limits at renewal.

Sub (8) in the draft rule addresses monitoring requirements. DEQ has a lot of leeway in how we require monitoring in permits. DEQ permits will require stringent monitoring to provide all information necessary to demonstrate compliance with new rule (1) and (2) as required in sub (8), including sufficient data to understand the permittee's contribution to the condition, as well as to understand local and ambient conditions. We'll tailor our requirements to what makes the most sense for each permit. It will be on a case by case basis, but we'll make sure that all requirements

Ms. Johnsan clarified by asking if the monitoring will be required of the applicant? Ms. Steinmetz stated yes. Ms. Johnson then asked if the permittee will be required to monitor further downstream. Ms Steinmetz replied that they will need to monitor just far enough downstream to understand the permittee's contribution.

Mr. Dave Galt asked if DEQ currently has enough monitoring in place on all these water bodies now to know about the current condition up front. Ms. Steinmetz replied that it is one of the requirements of the applicant to provide the department with that info. In some cases DEQ might have sufficient data, but in most cases, we likely do not and that data would need to be collected by the applicant.

Mr. Guy Alsentzer asked while we're on the monitoring, can someone say where the term material contribution came from and how DEQ intends to define an applicant's material contribution? He stated that that phrase is not included in 40 CFR 131.14 and his organization has concerns that it could be potentially widened outside the federal regulations. Ms. Steinmetz stated that determination of material contribution is outlined in guidance, which is available on the SB325 website. She asked Mr. Eric Urban to elaborate on how material contribution came to be included in the statute.

Mr. Urban stated that during discussions on the bill, the idea of variances was out there, but it wasn't the state's intention to figure out how to give a significant contributor a variance—they would be expected to reduce pollutants. The real question was how to help small communities. The question was then—are they the cause of the problem? If not, and if the problem was from an upstream source, then the state wanted to ensure that the emphasis was put on the appropriate source of the pollutant. That's where the question of material contribution came from. Ms. Brenda Lindlief-Hall clarified that Mr. Urban was refereeing to POTWs. Mr. Urban confirmed this. He also reiterated that examples of how material contribution could be determined are available on the SB325 website.

Mr. Alsentzer asked if EPA would weigh in with feedback on the addition. His organization is more concerned about the definition jiving with the straight forward language in federal regulations at 40 CFR 131.14. Ms. Tonya Fish stated that EPA will evaluate all individual variances coming out of the process with 40 131.14 and all variances will need to comply with those regulations. Mr. Alsentzer questioned further whether EPA would indicate whether the term is acceptable in light of the federal regulations. Ms. Fish stated it is her understanding that the material contribution description in the state's documentation provides further narrowing of who would be eligible. Regardless, anything adopted as a result of the state's process has to be consistent with the regulations outlined in 131.14.

Comment: Implementing the part 2 rules will conflict with state and federal regulations, including the Clean Water Act, and also disincentivize pollution prevention and progress under pollution cleanup plans.

WQS variances are not a way around the Clean Water Act and will be consistent with federal regulations. The goal of the CWA is to restore and maintain the chemical, physical, and biological integrity of the Nation's waters. Water quality variances are allowed under the Clean Water Act, their purpose being to allow states and authorized tribes the ability to make incremental progress toward meeting designated uses that are not currently attainable but may be attainable in the future. All WQS variances must comply with the federal water quality variance regulations at 40 CFR § 131.14. Another important point to remember is that variances do not remove the requirement of the polluter to comply with other regulations such as RCRA, CECRA, SMCRA, etc.

Mr. Alsentzer wondered why the temporal limitation if the waterway can't be cleaned up in 5 years. It seems arbitrary. Also, it is mandatory for DEQ to review waterway designations and provide status reports on them. A variance seems like a serious disincentive to continue work and allocate resources to really ratchet down controls on upstream pollution. Additionally, remediation typically takes much longer than 5 years.

Ms. Steinmetz stated that this is another example of the narrowing that Ms. Fish alluded to on the last question. The five year term is not the basis for the variance; it's a condition for even considering the variance. If the waterbody could be remediated within five years, there would be absolutely no reason to apply for a variance. Ms. Kelly added that it wouldn't be an efficient process for the permittee to go through if the condition could be remediated within five years.

Mr. Alsentzer stated that he understands that part of it, but hopes to highlight the conflict between the TMDL program and the variance. Rather than seeing the five year time limit as a narrowing, he sees it as a broadening because of the nature of many of the different impairments. Ms. Johnson pointed out that the five year basis was not a determination by DEQ, it was a condition in the statute. Ms. Kelly added that DEQ does recognize that most of our remediation and restoration efforts take longer than five years. Ms. Johnson also added that the five years was added because that's the length of a permit term.

Mr. Urban stated that he understands where Mr. Alsentzer is coming from, but as the five year term is a part of the statute and not something that DEQ is proposing in the rules, for the good of the group, we need to honor the statute in the rulemaking effort.

Comment: The part 2 rules weaken pollution permit standards. They will allow more pollution from dischargers as long as they are not the primary cause.

A variance will not weaken currently applicable standards. If a discharger is currently meeting an effluent limit based on state water quality standards, a water quality variance would be subject to antibacksliding requirements. Additionally, during the variance process, remediation should be occurring, and because of the required review process, cleanup progress will be reflected in the interim standards as they are updated. Permittees will see incremental progress from the initial variance date until the standards can be reached and the designated use can be attained.

Comment: Federal rules on variances are more narrowly tailored than DEQ's draft rule.

Per MCA 75-5-222(2), "the board shall adopt rules consistent with comparable federal rules and guidelines providing criteria and procedures for the department to issue variances from standards." The

draft rules contain many provisions identical to the federal rules. Additionally, the draft rules state that a variance will not be approved for Clean Water Act (CWA) purposes until EPA notifies DEQ that it complies with the CWA.

Comment: How does DEQ intend to ensure that antibacksliding laws will not be violated?

The Montana Pollutant Discharge Elimination System (MPDES) program reviews permits upon renewal. Permits with effluent limits based on state water quality standards will be subject to antibacksliding requirements. Ms. Kirsten Bowers added that it would be fact-specific.

Mr. Peggy Trenk asked what would happen if water quality upstream gets worse. Ms. Steinmetz thought that the permittee would still have to meet the achievable levels that they were already meeting. Mr. Urban added that the permittee would be protected to their current performance, or highest interim effluent condition. We wouldn't seek additional performance from that permittee. But likely other regulations would kick in. Ms. Lindlief-Hall asked if Ms. Trenk is concerned that the permittee would be expected to raise the bar. Ms. Trenk replied that she would be concerned with a permittee having all the infrastructure in place to meet required levels, and then something upstream happens outside their control, and then having to do extra to meet their limits even though they had no part in the upstream pollution.

MCA 75-5-222 part 2 (variances)—next steps and anticipated timeline

Ms. Kelly stated that the process was helpful for us, and we hope that we were able to address some concerns, but it was not a formal comment request. Additionally, based on the comments we received and reviewed, we are not proposing any further changes to the draft variance rules. We plan to take the draft rules forward to the Water Pollution Control Advisory Council (WPCAC) November 3 and the BER December 9, at which time we would request initiation of rulemaking. If BER initiates rulemaking, then the Montana Administrative Register (MAR) notice would be published and would trigger the public comment period. There would then have to be a minimum of 45 days from notification before we could hold a public hearing and close the public comment period. That would put us in early February. We could then go to the March BER meeting and request adoption. We would then have 30 days to submit to EPA.

Ms. Bowers stated that we have 6 months from publication of the MAR notice of initiation of rulemaking to adopt the rules.

Ms. Kelly stated that BER was briefed on part one and two at the September BER meeting, and they expect to see part two in December. Ms. Johnson asked if realistically, the part 2 will not be final until summer 2018. Ms. Steinmetz stated that they could be effective as state law in April. At that time DEQ could draft rules. However, both the new rules and any individual variance would need to be reviewed and approved by EPA, effectively pushing the final dates out further.

Ms. Lindlief-Hall stated that she remembered DEQ stating that not many dischargers would fit all the requirements of the variance rules and asked for confirmation on that. Ms. Kelly agreed that DEQ does not anticipate that the variance rules will apply to many dischargers.

Ms. Kelly then encouraged all participants to submit comments during the formal comment period if they still have concerns. There are still three opportunities to comment: during the WPCAC meeting, during the BER meeting, and during the formal public comment period, either in writing or at the public hearing. DEQ will send out confirmation that part two is an agenda item for the WPCAC and BER meetings.

MCA 75-5-222 part 1 (nonanthropogenic)—EPA recommendation and next steps
Ms. Kelly thanked everyone for their comments on part one. She then gave a summary of what a performance-based process entails and our efforts over the past year. EPA has reviewed the draft rules and Circular DEQ-14. While EPA is supportive of the process that we used, they feel that the process feels short of a performance-based approach. One of the suggestions was to use the standards tools that we know and that EPA is comfortable with, e.g. site specific standards.

Ms. Fish added that as the performance-based approach is currently written, EPA would have to approve the criteria derivation process without EPA or the public being able to first evaluate the determination of natural for the geographic area. She stated that EPA is supportive of the work in the Madison. If wanted to go forward with site specific criteria (SSC) for the Madison based on this work, EPA would be supportive. Their concern is that for the performance-based approach, they would be preapproving the criteria derivation process for the pollutant combination and the primary source without getting to see the documentation of natural, for example, for the Yellowstone River. To approve a performance-based approach, the demonstration of nonanthropogenic would need to be available to evaluate prior to or concurrent with the performance-based approach. The rationale and data are case-specific and need to be available to EPA and the public for review. There is not a lot of specific information on EPA and public review in DEQ-14 or the draft rules. Also, there are not a lot of situations where this is going to be applicable so it makes more sense to use SSC. Since we've gone through the process on the Madison, the Yellowstone should be pretty straightforward. It would be more efficient to do SSC rather than trying to figure out a performance-based approach. That would require a lot of effort and would be a very high bar.

Ms. Lindlief-Hall asked if the process is not defined well enough. Ms. Fish replied that because the demonstration would be different in different geographic areas, they just can't approve it without being able to see each demonstration of nonanthropogenic condition. They're not comfortable with the criteria derivation process without seeing the demonstration.

Ms. Kelly stated that although we are not sure yet how to move forward with regard to the performance-based approach, we are charging forward with the process on the Yellowstone as we speak.

Mr. Urban added that we are at a disconnect because DEQ sees there being hundreds of waterbodies that could use the process (assessments) and therefore we will still look for an approach that can be used on a widespread basis. The next step will be to talk to EPA and determine a path forward. If it's not performance-based, what's out there? But since we've done so much work on it, we will keep moving forward with the Yellowstone. He stated that there will be more information in the following weeks.

Ms. Johnson asked if Circular DEQ-14 is not okay. Ms. Kelly stated that we may need to find a compromise or another approach to work through the issue. It will take some figuring out.

Ms. Fish added that the conversation will be very geographic specific. EPA is comfortable with the demonstration of nonanthropogenic condition on the Madison, so they are comfortable with the data and background for the process to work for any permittee who might need SSC. But their comfort level doesn't go beyond the Madison to the Yellowstone. The performance-based approach is about criteria derivation with specific waterbodies. They are comfortable with the Madison and SSC that might be derived for the Madison based on the DON and the NAS. However, a performance-based approach is a different animal. If there is to be one derivation process for arsenic for an isolated primary source, the state still has to line up the demonstration of natural for any new geographic area to which a standard would be applied.

Mr. Urban stated that because high levels of arsenic are widespread across the state, it is not just an issue for permittees—if so this would be a fairly simple problem. The monitoring and assessment workload makes it a much larger issue.

Ms. Kelly asked how the workgroup would like to interact with next steps for part one. We are committed to figuring out a path forward, working with EPA, and presenting options to workgroup. She asked if those sounded like logical next steps?

Mr. Urban reminded the group that the statute does not require rules for part one. However, we do need to work with EPA on a solution to natural contamination. The other part that needs consideration is giving consideration to site specific standards where permittees have needs. He stated that DEQ will get feedback to the group on these three issues.

Ms. Johnson asked if there aren't a lot of examples of performance-based approaches, how we know that what we proposed falls short. Ms. Fish replied that EPA only has for reference the 2000 Alaska rule, which focuses on the criteria derivation process. Meshing in the demonstration of natural is what complicates the issue.

Ms. Kelly suggested that at a minimum, we have a phone meeting in a month. In the meantime, we'll converse with EPA. Mr. Dave Galt suggested meeting between WPCAC and BER so that we can touch base again on the part two rules as well. DEQ will send a doodle poll for mid-November.

Meeting adjourned at 4:10 pm.