

DRAFT MEETING MINUTES
SENATE BILL 325 RULEMAKING COMMITTEE
Tuesday, February 23, 2016
2:00 pm to 4:00 pm
Metcalf Building
1520 E. Sixth Ave, Helena, MT 59620

PRESENT

Committee Members Present:

Barbara Chillcott

Jay Bodner

Jeff Tiberi

Tammy Johnson

Peggy Trenk

Dave Galt

Tim Burton

Bud Clinch

Derf Johnson

Art Hayes, Jr (by phone)

Ron Quinn (by phone)

Montana Department of Environmental Quality Staff Members Present:

Myla Kelly

Mike Suplee

Amy Steinmetz

Eric Urban

Adam McMahon

Peter Schade

Members of the Public Present:

Steve Gilbert

Alan Olson

Lisa Kusnierz

Matt Culp

Mark Staples

Tonya Fish (by phone)

Wade Steel?? (by phone)

Doug Parker (by phone)

Shane LaCasse (by phone)

Steve Wade (by phone)

John Clerk?? (by phone)

Ms. Myla Kelly called the meeting to order at 2:03 pm. She thanked everyone for attending the meeting and summarized the agenda.

The meeting commenced with introductions, followed by a re-cap of the January 21 meeting by Ms. Kelly, including clarification that all six of the factors that EPA considers legitimate justification for a variance from water quality standards may be considered through the rulemaking that the workgroup is

discussion. Mr. Mike Suplee simply pointed out on January 21 that the sixth factor (substantial and widespread economic harm) is the best fit and provides the most comfort to EPA.

Ms. Kelly then asked if anyone had any suggested corrections or additions to the agenda.

Mr. Dave Galt pointed out that the discussion between him and Mr. Suplee on nutrient variances with respect to substantial and widespread economic harm was left out of the minutes and he feels that the discussion needs to be included. He emphasized the importance because there seemed to be concurrence that the variance process justified by the substantial and widespread economic harm factor would work much better for a municipality and be much more difficult for private industry. Ms. Kelly agreed that that was an important part of the discussion, apologized for the omission, and stated that DEQ has the audio recording and will add that discussion to the minutes.

There were no further comments on the minutes. Ms. Kelly moved on to follow-up answers from the January 21 meeting.

Ms. Amy Steinmetz stated that there were three questions for which DEQ and EPA have prepared answers. Ms. Steinmetz took the first question which had been asked by Mr. Derf Johnson about the conversation between Mr. George Mathieus and Senator Keane regarding what Senator Keane wanted to see in the rules implementing the Montana Code Annotated (MCA) 75-5-222. Ms. Steinmetz had a conversation with Mr. Mathieus and he confirmed that in the conversation between himself and Senator Keane, Senator Keane expressed that the rules should convey the intent of the legislation, which was to ensure that dischargers would not be required to clean up Mother Nature or contamination from those upstream of the discharger. She mentioned that if there were further questions on the intent of the legislation, Mr. Eric Urban participated in many of the discussions during drafting of the legislation and would be much better able to answer specific questions on the intent of the legislation.

Ms. Tonya Fish next provided EPA's response to the workgroup's January 21 questions about natural provisions in other states and from EPA. Ms. Fish stated that she had been passed on three questions, one pertaining to permitting, and Lisa Kusnierz would answer the permitting question. Ms. Fish provided a handout pertaining to questions related to what EPA has put into writing before about natural conditions. There are two documents published by the EPA, both available from the same website. Both focus on the site specific criteria.

Next on the handout was a general statement about the 131.10(g) factors available to change a use or justify a variance. What is most applicable in any situation depends on the situation. EPA has the most experience with factors three and six. Ms. Fish suggested that if the workgroup were interested in further examples, it would be helpful to specify which parameters the workgroup were interested in.

Ms. Fish also mentioned that EPA had added more meat to the section of the regulations fleshing out the variance provision at 131.14. She offered to provide more information on that if needed. She stated that in general, when considering which path to take, a state should first ask whether the designated uses can be attained. In general, a variance is appropriate where the designated uses should be able to be met, just not over the time for which the variance will be issued. If the designated uses cannot be attained, then the state should consider revising the designated uses in accordance with 131.10. Additionally, if the designated uses can be met, but criteria are too stringent, then site specific criteria are often considered.

The second question was whether other states have similar statutes or provisions. This is a broad subject and is not a new issue. There are two paths that could be taken: a use attainability analysis or site specific criteria. In general, EPA mostly sees site specific criteria and therefore has the most experience with and can most easily help with documentation for those. Ms. Fish specifically pointed out a situation in Oregon with relevant case law. Oregon had a narrative provision similar to statement in the first section in MCA 75-5-222 which states that where a standard is more stringent than the nonanthropogenic condition of a waterbody, that the nonanthropogenic condition becomes the water quality standard.

In the Oregon case, per the natural provision, the numeric criteria for temp were automatically being trumped by a TMDL (total maximum daily load) with no circling back to the water quality standards rulemaking process. The court ruled that this was violating the CWA, and that narrative provisions can't trump numeric criteria, that a state would have to go through the water quality standards rulemaking process if it doesn't have the right number. Ms. Fish's handout included the citation and specific page number of the case law where it addresses the natural condition provision. She believed that it would be helpful to understand the context of the natural conditions provision, and it's only two or three pages.

Ms. Fish had been assigned one other question from meeting notes. On January 21, Brenda Lindlief-Hall asked if there are states that don't administer their own water quality standards programs and therefore EPA has primacy. Ms. Fish stated that under the Clean Water Act and water quality standards, there is no application process or primacy process for states like there are for other programs such as drinking water. All states have the authority to run their own programs. There is a separate process for tribes. She offered more information if needed.

Ms. Lisa Kusnierz stated that she was responding to a question regarding how permit limits are derived where water quality standards are lower than background. She stated that permits always use either the water quality standards that are on the books, or variance from the water quality standards, which are adopted in rule and therefore are a part of the water quality standards, to derive permit limits.

Mr. Suplee went through his presentation, "Material Contribution to the Condition." This conversation pertained only to the second piece of MCA 75-5-222 regarding variances. The idea that was discussed regarding this concept on January 21 was legacy mining. Mr. Suplee focused on two points from MCA 75-5-222: variances are an option if 1) the condition cannot reasonably be expected to be remediated during the permit term for which the application for variance has been received; and 2) the discharge to which the variance applies would not materially contribute to the condition. He suggested that the first point is more straightforward, but the second needs discussion.

Mr. Suplee then moved on to a flow chart. He explained that the flow chart is currently DEQ's take on how the statute's decision framework would flow, and that the day's discussion would be on the first two boxes. He stated that outside the red box was still a work in progress. According to the flow chart (and statute), a variance could not be granted if the condition is likely to be remediated in the next five years. If it cannot be remediated in the next five years, you would move on to the next question, the second condition. The second condition states that if a discharge will materially contribute to the condition, a variance could not be allowed. If the discharge won't materially contribute to the condition, one would then move on to other questions as suggested in the flow chart.

Mr. Suplee suggested that determining what a material contribution is can get complicated and would therefore be the focus of the day's discussion. Mr. Suplee showed some hypothetical examples of a watershed with legacy mining pollution. He emphasized that the numbers aren't real, and the situations are hypothetical. In the first example, legacy mining alone existed as an anthropogenic source of a pollutant. The water quality standard was 25 mg/L, and the ambient water quality downstream of the legacy mining was 50 mg/L. Four tributaries entered the river before sufficient dilution was available to bring the water quality down to the water quality standard of 25 mg/L. This hypothetically occurred at river kilometer 36.

The next example included a point source in addition to the legacy mining. In this case the water quality standards was still 25 mg/L, background was still 50 mg/L, and the point source discharged at the standard of 25 mg/L. The water quality standard continued to be exceeded until river kilometer 36, but the situation was not exacerbated.

The third example illustrated a common misconception. If the point source were to discharge at the same level as background, it is often assumed that the condition will not be made worse. This may or may not be true. In the third example, the point source discharged at 50 mg/L, and the water quality standard was exceeded further downstream. This is because the point source increased the volume of 50 mg/L water flowing downstream. This hypothetical example using a simple mass balance calculation showed the contamination extending an additional 15 km. In internal conversations, DEQ has concluded that this is a material contribution because it extended the water quality problem further downstream.

Mr. Bud Clinch asked if this phenomenon would vary seasonally. Mr. Suplee replied that it would be dependent on the time of year and the watershed. Mr. Clinch stated that it seems the greatest effect would occur during low flows. Mr. Suplee confirmed that the river may not be affected during high flow, and that it may just be affected during the couple of weeks of the year with the lowest flow.

Mr. Suplee stated that in the third example, either no variance from water quality standards would be allowed, or a variance requiring some intermediate value between 25 mg/L and 50 mg/L that doesn't extend the problem further downstream may be allowed.

Mr. Suplee asked for questions.

Mr. Derf Johnson asked what would happen if there were multiple point sources. He stated that he could envision a situation where one point source has been permitted to discharge up to 50 mg/L without material contribution, but the addition of more point sources may cause material impacts. He wondered how that would be weighed. Mr. Suplee replied that that situation is definitely more complicated and gets into our nondegradation laws. He stated that DEQ hasn't figured out how nondegradation will interface with the new rules for MCA 75-5-222. The river in this example is not a high quality water, and the answer is probably fairly involved. He stated that, while complicated, we can look at multiple existing point sources using this type of analysis to figure out how they're all discharging or may be asked to discharge in the future based on the evaluation.

Mr. Suplee then moved to the next example, which he stated is more complicated. Tributary 4 in this example is of such significant flow that almost anything could be added upstream and still be diluted to or below the standard at tributary 4. The question then becomes, "does there exist an increase above the existing exceedance that it could be considered material contribution even though there is no extension of the exceedance downstream?"

Mr. Suplee explained the question further in his last slide. He stated that determination of whether or not the increase is important enough to constitute material damage even though the condition has not been extended longitudinally depends on pollutant type and other factors. For example, with metals, increasing the exceedance may continue to cause further negative impacts, such as impacts on other life stages or other types of aquatic life. Other pollutants don't have the same type of effect, for example, nutrients. Adding to the exceedance may not matter because the water is already saturated and the negative effects won't increase. So answering this question becomes something of a case by case, pollutant by pollutant assessment.

Mr. Steve Gilbert asked if we should presume that these tributaries are measured (flow) on a real-time basis. Mr. Suplee replied this would be a situation where we would need thorough information on a multitude of things including concentration and flow year-round. Real-time flow data would be necessary at least during critical periods. If there were a lack of information there would be an inability to assess material contribution, and the missing information would need to be gathered.

Mr. Suplee re-stated that in DEQ's opinion, the determination of material contribution is black and white when an exceedance would be extended longitudinally, but that the issue gets less clear when there's an increase in concentration in a segment that already has an exceedance of a pollutant.

Mr. Tim Burton asked how DEQ envisions this concept applying in real situations. Mr. Suplee walked through the process explaining that if you look at a community and ask that community to meet a standard in a water body heavily polluted upstream of the community, then you might be able to focus on factors such as the time of year to see if a variance from a water quality standard or standards is appropriate. Often, a steady state simple model can be mocked up with existing data and in many cases they look okay. However, what usually happens if you want them to look better is that you would need to augment them with more information. Mr. Suplee pointed out that ultimately, this process will not happen overnight.

Mr. Burton added that usually it's not just mine sites contributing to heavy pollution, there are other factors. Mr. Suplee agreed and stated that this was just a simple scenario to show context. There may be cases where we have sufficient information to use a simple steady state model and we could use that information and determine if the modeling results will be enough to make a decision, given that they won't increase the longitudinal distance.

Mr. Burton asked if this was assuming dilution. Mr. Suplee confirmed that this situation assumes dilution, and clarified that there are cases with a tiny point source and upstream water quality better than the standard. In these cases, mixing clean water with the discharge in a mixing zone brings the water down cleaner than the standard. That is the typical situation. However, in the examples discussed in the meeting, the upstream water quality value was already over the standard by a large margin, and the point source was being asked to treat to a quality much cleaner than the water coming in when they were asked to treat to the water quality standard.

Ms. Barbara Chillcott asked if we would specify what approach would be taken based on the type of pollutant. Mr. Suplee stated that we haven't gotten that far yet, but that DEQ would take a stab at what we would expect and what concerns we would have by type of pollutant.

Mr. Wade Steer(?) observed that these situations seem to be geared toward perennial or intermittent streams with base flow, and asked how ephemeral streams would be treated. Mr. Suplee stated that DEQ generally does not apply DEQ-7 or mixing zone standards to ephemeral channels. Certain narrative standards apply, but DEQ-7 does not apply unless there is a case where the discharger makes the water perennial. If not, and the water is truly ephemeral, then he doesn't believe that they would have to meet the standards to begin with, and therefore a variance would not be necessary.

Mr. Art Hayes, Jr. asked what would happen if more pollutant was being added from downstream tributaries, and a point source discharger upstream was putting the water over the water quality standard. Mr. Suplee replied that all pieces are considered in his examples.

Mr. Bud Clinch stated that there is some confusion from Mr. Suplee's last graph because of the lines connecting the sampling points. Mr. Suplee agreed that it would be clearer to take the lines away and just look at the points.

Mr. Jay Bodner stated that some tributaries don't have enough data and that it seems like it could take a considerable amount of time to come up with the data required for modeling. He wondered how the data gaps would be filled in. Mr. Suplee stated that DEQ has done that with modeling, for example to develop nutrient water quality standards for the Yellowstone River, and he stated that you can get the information you need to fill in gaps in one summer and fall. Even with more specific data models, two years of data would be sufficient—one to validate the model and one to calibrate it.

Ms. Kelly stated that she had had the same question, and that DEQ has discussed that the onus for data collection would be on the permittee.

Mr. Burton asked if this process aligns with the new structure of the agency, with the newly developed water division. Mr. Suplee replied that it doesn't counter any of it. He added that there will be a feedback loop if there is a variance. If a permit is written and incorporates a variance, and then it is later determined that the permittee then could do better, then the variance could be adjusted and the permit writer would incorporate that new variance water quality standard into the permit.

Mr. Suplee continued by saying that the feedback loop also applies to other programs. For example, if we know some work has already occurred and some of the things discussed during the meeting have been done, for example through a TMDL, we would ask if it precludes the need for a variance. A TMDL may have already determined that, even though a discharger would be discharging above the standard, they would contribute an insignificant amount of a pollutant to a water body. A permit would use the recommendations from the TMDL, and therefore, no variance from water quality standards would be necessary. Mr. Suplee pointed out that this question forms a part of the flow chart in his presentation, although the order of the questions may need to be changed.

Mr. Gilbert stated that he could see a problem with the one size fits all approach. If you were to use the average annual flow to set your dilution factor, how would you accommodate a need for users like irrigators whose property could be destroyed by EC and SAR? Mr. Suplee didn't feel that he could come up with a good answer off the top of his head, but stated that presumably anyone who is already permitted should be meeting standards now.

Mr. Doug Parker stated that he sees a need to address the importance of the change in concentration above the standard. He could see it coming down to a "one more molecule" issue and suggested that it

would be better to discuss and resolve the issue as a workgroup developing rules rather than waiting for the issue to be decided in court. He asked how Mr. Suplee sees that process moving forward. Mr. Suplee agreed that there's no reason why the workgroup can't tackle the issue, but believes that decisions will have to be based on pollutant groups if it does.

Mr. Steer(?) stated that he had brought up the ephemeral question before because they (Western Energy Corporation) are dealing with issues from coalbed methane standards. In these situations, there's a question what happens when they are discharging to an ephemeral stream which eventually empties into a perennial or intermittent stream further downstream. He asked how Mr. Suplee sees this rulemaking working with respect to that issue. Mr. Suplee stated that would have to be assessed as part of the material contribution language in the statute. Part one of the statute has specific language pertaining to water quality standards of downstream waters (read by Ms. Fish), but downstream water quality standards will have to be protected through the "materially contribute" language from the variance piece of the statute.

Ms. Tammy Johnson asked if there is a definition of "materially contribute." Mr. Suplee replied that according to DEQ's legal department, there is not.

Ms. Kelly stated that the goal of this meeting is to see if we can start to come to some agreements on creating and crafting this rule, and asked if there is interest in discussion on that.

Mr. Burton asked for a copy of the presentation. Mr. Suplee stated that all presentations will go on the website.

Ms. Kelly and Mr. Suplee discussed next steps and asked if there were further questions on the flow chart that was in Mr. Suplee's presentation.

Mr. Gilbert asked who will determine whether the contamination may be remediated. Mr. Suplee stated that that's not clear in the statute, all is clear is that it has to occur. He stated that areas where active remediation is occurring will have timelines, so the associated programs within DEQ will weigh in on those decisions. Mr. Gilbert asked if there needs to be more in the flow chart about remediation (for example, in five years what if it really is remediated?) Mr. Suplee agreed that DEQ would look at that, and that maybe the question needs to be expanded to include more of the feedback loops with other programs within DEQ to find out what remediation is occurring, timelines, leads, etc.

Mr. Burton mentioned grandfathered permits or cost shifts to point source dischargers as something that the workgroup will need to deal with. He provided the Lake Helena watershed as an example. He stated that there are 20,000 tons of nitrates discharged by Helena and East Helena septic tanks. In the 2010 Lake Helena watershed TMDL, septic tank owners were asked to reduce their contribution of nitrates by 1%, while the treatment plants were required to reduce their contribution of nitrates by 90%. He wondered if there's another permit-related action in place, even if it's not directly related to a permit, as in the case of a watershed plan, how the pieces would interact and how a variance would work. He emphasized that there are a lot of individual different sources of pollution in the watershed.

Mr. Peter Schade stated that in the evaluation of remediation schemes, TMDLs, watershed plans, etc., it's important to remember that DEQ is among many entities that have funding available for improving water quality conditions. Additionally, it's impossible to know from year to year who will have funding and who will not, so you may see improvements that are not expected or anticipated over a number of

years, even if it's only partial. He then asked, in light of ongoing watershed restoration projects, how we would define what we expected to see in five years. Mr. Suplee replied that if there's a 20-year watershed restoration project, then the answer will probably be no, water quality standards will not be met within five years. It may not always be perfectly clear, but it's a judgment call that may be made.

Mr. Gilbert then asked if it's not true that remediation is a process rather than a final product. Mr. Suplee agreed that it is but that it does result in a final product. He stated that as written in the statute, the intent appears to be that water quality standards will be met by the end of a five-year period.

Mr. Jeff Tiberi asked if a box should be included in the flow chart that shows that impacts may only be seen 2-3 weeks out of the year, or if that is implied by some of the other boxes. Mr. Suplee replied that he thinks it's implied and that it's a breakout detail. He stated that we'll re-visit the flow chart, and in the meantime, send out a draft. Ms. Kelly agreed that DEQ will send out the draft, and asked for other comments in the span between this meeting and the next. Mr. Suplee stated that what is often the case is that behind each of the boxes is a lot of work, and guidance documents and details that aren't apparent on first glance.

Ms. Kelly summarized some of the key points from the meeting. Regarding the question about remediation, there seemed to be agreement that until water quality standards are met, the watershed is not remediated. Additionally, there must be an understanding that there may be other work occurring in the watershed, or some important condition that would occur prior to determination of material contribution.

She stated that the next phase will be to re-adjust the flow chart and put the concept down into draft rule language.

Mr. Trenk asked if other states have definitions of materially contribute. Ms. Kelly replied that DEQ did not find any definitions that were environmentally-based.

Ms. Johnson asked when the website will be ready. Ms. Kelly replied that it should be available within a few weeks.

Mr. Suplee offered to send a Word version of the flow chart to the group so that it could be manipulated when workgroup members consider questions or comments.

Mr. Clinch asked if this has any bearing on permits that will come up for renewal before this rulemaking is complete. Mr. Suplee replied that he doesn't believe so, because even when statutes are in place, while rulemaking is in process, permitting can operate under the old rules and statutes.

Ms. Fish added that any variance has to be approved by EPA before it can be implemented in a permit. Ms. Kelly asked if Montana's variance process would have to be approved. Ms. Fish replied that states don't need to have a variance authorizing provision, but whatever variance is adopted in rule would have to be approved by EPA prior to their use in permits.

Mr. Galt asked if EPA will approve this process that the workgroup is developing, or if they have to approve individual variances. Ms. Fish assumes based on the wording of the statute that whatever comes out of this process will be submitted to EPA for approval as a water quality standard.

Mr. Derf Johnson asked “Will EPA have to approve individual permits or just the rule?” Ms. Fish replied that any variance adopted in state rule has to be approved by EPA. There are different ways to go about getting variances, they can be individual, or some states have used multiple discharger variances, and the procedures are different.

Mr. Tiberi stated that the workgroup should be informed about this, that it seems critical to the outcome of the workgroup efforts. Ms. Kelly agreed and asked for clarification on the process. Ms. Fish stated that what she thinks would be helpful would be to get some examples of how multiple discharge variances work. She believes that there is a selection of the 131.10(g) factor up front and that would be adopted and approved by EPA, and that individual variances would fall under that and not require approval, but that if other dischargers came in, that they wouldn’t automatically fall under the multiple discharger variance.

Mr. Suplee stated that he isn’t entirely clear, but it appears that this statute is largely targeted to individual variances. What he finds most confusing is the language requiring Montana rules to be consistent with federal guidelines. He can’t determine if the workgroup is developing a process for the Board [of Environmental Review], or if DEQ would have to go back before the Board every time a variance is needed. Ms. Kelly agreed, stating that she believes the intent of the statute is for individual variances.

Ms. Fish stated that she is not clear what is coming out of the work group and if the specificity will result in all the requirements necessary for EPA to approve individual variances. She stated that she needs to know what will come out of process in order to know if it will be an actual water quality standard.

Mr. Suplee asked if, depending on detail, is it possible that EPA may look at what comes out of the process and determine that it’s an approvable variance process? Ms. Fish confirmed that that would be possible, and that it would be similar to performance-based criteria, which are used for criteria, not variances.

She explained that a performance-based criterion is a process or an equation that results in a specific criterion when the required inputs are used. In order for EPA to approve performance-based criteria, they must be transparent, repeatable, and detailed. Then it wouldn’t be necessary for EPA to approve individual criteria that come out of using the approved process or equation. Therefore, in order to do something similar for variances, she needs to know what kind of specificity will come out of the workgroup efforts. She stated that it would be helpful to first know what parameters are being considered.

Ms. Kelly stated that the workgroup could discuss the specificity and needs at the next meeting.

Ms. Fish offered to search for examples if the workgroup can clarify what parameters are of interest.

Tuesday, March 22 from 2:00 until 4:00 was selected as the date and time for the next SB 325 workgroup meeting.

Mr. Galt asked for a copy of Mr. Suplee’s presentation. Ms. Kelly agreed, and Mr. Suplee added that the Word version of the flow chart would be sent out soon.

The meeting was adjourned at 3:42 pm.