

FINAL MEETING MINUTES
SENATE BILL 325 RULEMAKING COMMITTEE
Tuesday, March 22, 2016
2:00 pm to 4:00 pm
Metcalf Building
1520 E. Sixth Ave, Helena, MT 59620

PRESENT

Committee Members Present:

Jay Bodner
Tim Burton
Barbara Chillcott
Bud Clinch
Dave Galt
Adam Haight
Art Hayes, Jr.
Derf Johnson
Tammy Johnson
Brenda Lindlief-Hall
Peggy Trenk

Montana Department of Environmental Quality Staff Members Present:

Kirsten Bowers
Myla Kelly
Kurt Moser
Peter Schade
Amy Steinmetz
Mike Suplee
Eric Urban

Members of the Public Present:

Tonya Fish (by phone)
Steve Gilbert
Jason Gildea
Tina Laidlaw
Doug Parker (by phone)

Ms. Myla Kelly called the meeting to order at 2:00 pm. She welcomed and thanked everyone for attending the meeting and summarized the agenda.

The meeting commenced with introductions, followed by a re-cap of the February 23 meeting by Ms. Kelly. Ms. Kelly then asked if anyone had any comments or concerns with the meeting minutes from either January 21 or February 23. There were no comments and the minutes were approved without opposition.

Ms. Kelly then addressed questions from the February 23 meeting. She summarized that the workgroup had demonstrated interest in knowing more about what would be required with regard to rulemaking and EPA approval for the current rulemaking process and for each individual variance that might follow.

She then summarized the Federal Register notice from August 21, 2015 regarding requirements for water quality standards variances. She stated that according to the Federal Register, states may adopt an administrative procedure for variances that fulfills the water quality standards submittal and review requirements, and the resulting procedure would be legally binding under state law and could be submitted to EPA as a water quality standard for review and approval. If the state then followed that procedure to develop individual variances, there would be no need for the state to do a separate rulemaking. However, the resulting water quality standard variance could be submitted with an Attorney General certification and EOPA could take action on it under the Clean Water Act.

Ms. Tonya Fish added that if this method was followed, it would save additional rulemaking, but the variance requirements of 40 CFR 131.4 would still need to be met, and EPA would still have to approve the variance. She stated that one of the states had recently submitted a successful procedure, and that EPA could highlight that case study at a future meeting.

Mr. Jay Bodner asked if the state were to develop the procedure, how long would the EPA approval process take. Ms. Fish replied that if the procedure was adopted in Montana rule, it would then be a part of Montana's water quality standards, and once a state submits water quality standards to EPA for approval, EPA then has 60 days to approve or 90 days to disapprove the standards. If the procedure was in place and a variance was developed from the procedure and submitted with Attorney General Certification to EPA, the timeframes would be the same—EPA would have 60 days to approve the variance or 90 days to disapprove the variance.

Ms. Kelly agreed that it might be helpful to highlight a case study at the next meeting, and moved on to the next question from the February 23 meeting. She stated that the group had been curious whether there are any case studies for factor 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). Ms. Fish stated that there have been national attempts, but none have been successful. She did get an indication from EPA headquarters that if someone is interested in pursuing a variance based on factor 3, they would be willing to work with them. Ms. Kelly asked if Ms. Fish could clarify what types of data are needed. Ms. Fish replied that it has to do with the circumstances of the case.

Next, Mr. Mike Suplee walked through the changes that had been made to the flow chart. Mr. Suplee had coded the flow chart to show things that might end up in guidance and things that might end up in rule. Box one asks if the condition is likely to be remediated in the next five years. Mr. Suplee stated that this should be in guidance because it may just involve an inquiry at the department, and would be outside of the rule. The guidance steps would be asked in advance of the "heavy work" that would occur per the rule.

Box 2 has to do with factor three, and if the water body can't be remediated, or remediation would cause more environmental damage to correct than to leave in place, the flow chart takes you to a box outside of the variance process. It states that if the waterbody can never get any better than it currently is, then it would be incumbent on the department to complete a UAA (use attainability analysis) and reclassify the waterbody. He emphasized that he is not aware of any instances where this particular scenario would apply in Montana.

If it is the case that the water body can be remediated, then there is another guidance step. The box asks if there's another permit-related action such as a TMDL in place that would preclude the need for a variance application.

Summarizing the first part of the flow chart, Mr. Suplee stated that boxes 1-3 are the labor-saving processes. They allow an applicant to learn from DEQ before getting to the next steps.

Box 4 transitions into rule. This box asks if the discharge will materially contribute to the condition, based on procedures in DEQ circular. Mr. Suplee explained that a circular is adopted in rule. If the pollutant would materially contribute to the problem, per statute, no variance is allowed. If it will not, then the flow chart moves on to the factors, if one of the factors does not apply, no variance will be allowed, if one does, then a variance may be applied for. If the workgroup decides to go for the streamlined process, then the variance would not need to go before the board, but it would still require EPA approval.

Mr. Suplee stated that the flow chart is still draft, but DEQ is pretty sure that it is close to the final process that should be followed. Part of the requirements from EPA is that the process has to be legally binding and carry weight of law. That is why there are pieces of the process that must be in rule or adopted in rule through a circular, as denoted in the flow chart.

Ms. Tammy Johnson asked if site specific standards would go into the box with the UAA. Mr. Suplee replied yes but he also stated that there are different kinds of site specific standards. One example of a site specific standard is a temporary water quality standard. The New World Mine has temporary standards. The unique case in the flow chart concludes that a reclassification needs to be done because nothing else can be done with the site, as it links to factor three.

Ms. Johnson followed up by stating that it's feasible that for some waterbodies, there are anthropogenic and nonanthropogenic sources of pollutants. She asked is there is a process for determining that, or if that will be developed as part of the rules for part one of the statute. Mr. Suplee replied that there are two types of variances. There are discharger-specific variances and waterbody-specific variances. Waterbody-specific variances may be issued for a stream reach under the presumption that it will get cleaned up. In this case, nonpoint sources must use best management practices. That is not the case if a discharger-specific variance is issued. In that case, it just falls on discharger to match the water quality.

Mr. Doug Parker asked about situations such as the Upper Clark Fork River or the Blackfoot or Belt Creek, where the stream will eventually be cleaned up, but it will be decades or more down the road. He stated that the UAA box appears to be a simplification how the decision will be made. He acknowledged that it won't be easy, but that it probably needs a little work to outline how that will happen, and how it will be determined whether variances will be a feasible pathway or not.

Mr. Suplee replied that during development of the federal register for the new federal rule in 2015, there was discussion from commenters on how long variances should go. It was determined that there would be no time limit, but that reviews of the variance would be required. Reviews must occur during water quality standards triennial reviews, and at a minimum, they need to occur every five years to make sure that the variances are still justified. Therefore there is no time clock to say when a UAA would be necessary.

Ms. Fish agreed that there is no maximum time limit on a variance, but added that the discharger must justify the term of variance.

Mr. Dave Galt asked if you make the decision about factor 3 in box 2, then you don't have to make the same decision again in Box 5? Mr. Suplee replied that one of the other six factors could still apply. Mr. Galt clarified that a decision about factor three is made in box 2. Mr. Suplee agreed that factor three is explored in box 2 and that factor six is explored in box 6, but explained that those are explored as part of the informal guidance process that would lead a discharger to ask questions that would save them the significant cost of getting into the more detailed questions. If all of the questions from guidance indicate that a variance may be feasible, then a discharger may feel more comfortable getting the water quality data to do the modeling and other steps necessary to determine material contribution and applicability of EPA's six factors.

Ms. Johnson went back to box one, and asked if there would ever be a case where a discharge permit would be granted during the five years that a stream would be remediated, or would the discharger need to wait until the remediation was complete to know what standard would apply?

Mr. Suplee stated that in his experience, permits are staggered out. He stated that if a permit writer were to implement a stringent metals standard into a water with high metals, at that point, in accordance with the point of this law, the discharger could ask if they're eligible for a variance. Then they would ask if someone is going to remediate in the next five years, and if remediation were to be undertaken, the discharger could possibly get something different in their permit.

Ms. Johnson asked for clarification. She asked if someone's discharge permit came up for renewal during year two of a five year remediation, would they not be eligible for a variance because remediation would be expected to be completed within three years. Mr. Suplee agreed that the way that the law reads, in that situation, then the discharger would not be eligible for the variance. He further stated that in DEQ's experience, remediation is not that quick so the situation is unlikely.

Mr. Parker asked how this law interacts with MCA 75-5-302 with the changes put into place by SB97, which says that if a waterbody is not properly classified in accordance with existing, present, and future most beneficial uses, then the department must reclassify within 90 days. He stated that if a water body is not meeting a water quality standard, then it's not meeting a beneficial use, and therefore it seems to him that what DEQ is saying is in conflict with that requirement to consider reclassification.

Mr. Suplee said that he'd look at that and report back next meeting. One of the things he's noticed in general is that there's overlap with this and other laws, and so one of the challenges in rule development is to figure out to ensure that the rules implementing MCA 75-5-222 are not redundant or overlap with other state regulations.

Ms. Kelly added that DEQ's thinking in adding dead end box (UAA) is that if there's another avenue that might be taken such as reclassifying a stream that it's considered in the process and addressed properly, and that a variance may not necessarily be the best course of action.

Mr. Suplee reminded everyone that the key to the guidance steps is for a discharger not to have to put a lot of resources and energy into compiling data, only to find out that they didn't need to put the work in because they wouldn't get a variance anyway. That's the whole point of having the guidance and up front questions.

Ms. Kelly asked the workgroup to feel free to consider the flow chart and get DEQ any comments that they have over the next month. She then introduced the draft rule language and gave the workgroup

the opportunity to read through the draft rule language, and emphasized that it is simply draft language, and that it follows the logic of the flow chart.

Mr. Suplee pointed out that in part (2) of the draft rule, a circular is referenced. He stated that by adopting the circular in rule, it holds the weight of law. Part (3) is very similar to the variance language from the nutrient rules and came from legal staff during that rulemaking process. He stated that the applicant may have already checked to see if reasonable alternatives to a variance are already in place per the guidance steps in the flow chart, but that it needs to be included in the rule because it's part of DEQ's internal process of reviewing the variance application.

Mr. Tim Burton asked if Mr. Suplee knows what the changes to the language are from what is included in the nutrient variance language. Mr. Suplee replied that the main change is after the word reuse, "other department actions already in place" such as a TMDL. That's new because if a TMDL has been completed and the TMDL writer concluded that the contribution from a discharger is minimal, the load allocation may be such that the discharger already doesn't have to do anything. That's why the new language was included.

Mr. Suplee continued on to part (4), which says that if DEQ approves the variance, the highest attainable water quality condition must be met. It further states that the variance is effective only after approval by EPA.

Mr. Adam Haight asked about determination of the natural state of the water body. Mr. Suplee agreed that that concept could use work. He stated that as a first stab, the highest attainable condition must at least match the average concentration of the pollutant. He further stated that the workgroup and DEQ may decide to detail that concept at a much higher level in the circular.

Mr. Suplee stated that the rest of the draft rule is standard language. There is no specific time frame for a variance, but a five-year review would be required in rule. Also, as cleanup occurs, the applicant would need to come in parallel with that as time passes.

Mr. Bud Clinch asked about part (4) with regard to average concentration. He asked if that refers to a number of samples at a single point in time, or a temporal range of samples, etc. Mr. Suplee replied that those are questions that can be fleshed out in the circular. The circular should say what it means, how many samples are needed, how many sites should be sampled, etc. He added that one of the benefits of the workgroup is that it can help craft guidelines that make sense. He stated that the workgroup may decide to remove the specific language from the rule and refer back to the circular.

Mr. Parker agreed that it is important to discuss the issue at this time. He sees some problems with average. In theory, half the time the discharger would not be in compliance. Mr. Suplee agreed and reiterated that it makes sense to point back at circular to determine how to come up with that number. He stated that it's best to try to keep rule language brief and put details in the circular and incorporate by the circular by reference.

Ms. Johnson stated that regarding Part (5), if remediation activities are going to improve water quality and a discharger is required to parallel those improvements, that is very difficult from an economic aspect. It's difficult when designing treatment facilities to have to anticipate constant changes in treatment values.

Mr. Suplee stated that that is an excellent point and that he understands her concerns, and worked with those concerns when developing the nutrient standards and variance rules. When he was developing those standards, he talked to engineers about what could reasonably be done to come to a solution. He believes that in these types of situations where remediation is occurring, there will be anticipated endpoints that the variance recipient could then work toward meeting.

Mr. Suplee stated that another avenue may be to use what the federal government has already come up with in this regard. He stated that he needs to check the Federal Register again but he can check to see how they couch highest attainable use to see how we might be able to further develop this 5th part based on their recommendations.

Mr. Burton stated that when the Nutrient Workgroup worked through the nutrient variance, they had a horizon of 20 years with five year reviews. He asked if that would still be applicable here.

Mr. Suplee stated that this is a little different situation because this rule and the federal laws under which this rule operates have been changed. He stated that he doesn't have a good feel for the applicability of the 20-year maximum.

Mr. Burton asked that the workgroup keep it on the table. He stated that the need to keep in mind the practical ability to fund these types of treatment facilities is critically important. Mr. Suplee agreed that it's not reasonable to ask someone to treat to a specific metals standard, for example, and then as improvement occurs, change and ask them to meet something better. He stated that there may need to be some sort of implementation strategy to implement improvements fairly.

Mr. Galt asked about the nutrient general variance. He wondered if the 20 years applies to the individual variances. Mr. Suplee stated that that's right and that it's written into statute. This statute is silent on the timeframe, and the 2015 EPA rule does not have time limits either except for the review periods.

Mr. Suplee summarized that there seems to be concern about the average water quality in part (4). He stated that there seems to be a need to work out details and put them in a circular. Additionally, in part (5) there is a need to define how to require better water quality of dischargers to reflect improvements in water quality as a result of remediation activities.

Ms. Kelly asked that the group continue to consider the draft rule language and provide feedback prior to the next meeting.

Ms. Amy Steinmetz gave a PowerPoint presentation titled "Guidance Documents and Department Circulars." She defined a guidance document as a publication that contains a set of instructions, and a department circular is a standalone document adopted in rule that gives clarity to and detail about a rule. She stated that circulars have the weight of law exactly like adopted rules because they are referenced in rule. She emphasized that it's important to understand that rules need to be succinct, but also clear. It can be difficult to provide enough detail in the rule to make specific instructions clear so accompanying documents are sometimes used to help provide clarity. Circulars and guidance documents allow the department to be succinct in the rule while also providing enough detail to be clear.

Ms. Steinmetz continued by explaining that guidance documents convey instructions and direction, provide clarity, and they can save time and money. Department circulars also convey instructions and direction, provide clarity, and can save time and money, but they can also be used to establish

expectations and explain objectives or interpretations of a vague or nonspecific law or requirement because they are adopted in rule. Guidance documents may fulfill many of the same roles as circulars but they cannot be relied on as part of the rule.

She stated that guidance documents provide guidance only. They do not set policy or regulation, and cannot be used as such. Department circulars, on the other hand, are adopted in rule, and they set policy or regulation when a rule needs detail that exceeds what can reasonably be written in the rule itself.

Mr. Clinch asked what the process for developing a circular is. Ms. Steinmetz replied that it follows the same procedure as the development of a rule. Mr. Clinch asked if it would have to go before the Board. Ms. Steinmetz stated that the rule and the circular would both go before the Board together. Mr. Clinch asked if the Circular 18 that is referred to in the draft rules would be discussed within the workgroup. Ms. Steinmetz and Ms. Kelly both replied that it would.

Ms. Steinmetz next gave some examples of DEQ guidance documents and department circulars. The next department circular in sequence is Circular 18, which is why Circular 18 was included in the draft rule.

More specific to the variance discussion, the guidance document referred to in the draft flow chart would be a tool and decision making process for applying for a variance. The workgroup would be a part of developing the guidance document, or at least reviewing it. It could help save time and money by answering some of the easier questions up front. She reminded the workgroup of the questions that Mr. Suplee had already addressed, such as “can the waterbody be remediated in the next five years,” and “can the waterbody be remediated at all,” and “is there another permit-related action in place that would preclude the need for a variance.” These are all questions that are simple and relatively cheap to answer, and could save a discharger time and money if a variance is not an appropriate option for their facility.

Ms. Steinmetz stated that some of the things that would be required in the department circular would be what steps to take and what data to collect to determine the applicability of the 40 CFR factors. The circular should also outline the technical information required to determine material contribution, including how much and what kind of data would be necessary to determine if an exceedance would be extended longitudinally and how to determine if an increase of a pollutant in a waterbody that already has an exceedance is acceptable or not. Another thing that will likely be necessary based on the day’s discussion is a discussion of highest attainable use, or average water quality.

Ms. Steinmetz stated that DEQ thought it might be helpful to discuss how the workgroup might be able to categorize or group parameters for a material contribution discussion. First she stated that determination of material contribution would not be tied to uses. It would be based on changes to water quality.

Ms. Steinmetz stated that one of the ideas that DEQ has discussed with regard to categorization of pollutants is based on categories used in DEQ-7. Those categories are carcinogens, toxics, and harmful parameters. One of those categories may be easier than the others to address. Generally, carcinogens do not have a safe level. If the carcinogen is present, there is an increased risk of cancer. Toxics are generally different in that there is typically a safe level of the pollutant. So with the one molecule conversation, we might be able to say it’s safest not to allow any increase in the concentration of a

carcinogen because any increase in the parameter would mean an increased risk of getting cancer. Toxics and harmful parameters may be more difficult to address and might require a lot more conversations on how to group and address them. Ms. Steinmetz asked if there were any questions or thoughts on this concept.

Mr. Peter Schade asked if DEQ had considered how to address parameters that bioaccumulate. Ms. Steinmetz acknowledged that that's a good point but that they had not considered it, that they had only considered carcinogens, toxics, and harmful parameters as general categories.

Ms. Peggy Trenk recalled a risk tolerance with other programs that is 10^{-5} or 10^{-6} and asked if that would mean that there not an absolute line in the sand? Ms. Steinmetz replied that the allowable cancer risk is specified in state statute and is 10^{-5} for all carcinogens except for arsenic, which is 10^{-3} . She stated that that just means that that the allowable risk is established in statute. Ms. Trenk asked why that couldn't be applied for an increase in a carcinogen in this situation. Ms. Steinmetz replied that the criteria are based on those allowable risk tolerances, so the cancer risk factors are already built into all the human health criteria.

Ms. Steinmetz asked for any other questions on circulars, guidance documents, or any other part of her presentation.

Mr. Art Hayes Jr. asked what DEQ does when a whole stream exceeds numeric water quality criteria. Ms. Steinmetz replied that those situations are addressed through water quality assessments and TMDLs (total maximum daily load). Mr. Hayes then asked what if just part of the stream is in exceedance. Ms. Steinmetz replied that it's the same. An assessment would determine that the stream is impaired and a TMDL would be calculated to bring the stream back to the appropriate water quality standards. Then the TMDLs could be tied back into permits.

Mr. Hayes asked what happens if there's not a TMDL for an impaired stream. Ms. Steinmetz replied that one would need to be done. Mr. Hayes stated that the Tongue River is in exceedance and the irrigators can't use the water. Ms. Steinmetz stated that the TMDL is being done and she believes that it's pretty close to being written. She added that a TMDL looks at any potential sources of a pollutant. This could include natural sources, point sources, and nonpoint sources. The sources are then looked at together and it is determined what can be reduced to get the water body closer to water quality standards. Natural contributions can't be reduced, but point and nonpoint sources can. This can be a really involved process, as it has been for the Tongue River.

Ms. Johnson asked how material contributions aren't tied to beneficial uses when everything from classification to water law are tied to uses. Ms. Fish stated that this requirement comes from 40 CFR 131.14 under requirements for submission. One had to do with requirements for term of variance. It states that the term shall not result in any lowering of ambient water quality. The requirement compares the highest attainable condition to ambient water quality.

Ms. Kelly asked for clarification about where that is written. Ms. Fish replied that it's at 131.14(a) (4)(b). Ms. Kelly stated that DEQ will send the link to the 2015 Federal Register to the workgroup and note specific sections that had been talked about during the meeting.

Ms. Kelly re-capped the meeting.

Ms. Johnson asked if DEQ-18 would address parts one and two of the statute. Mr. Suplee stated that yes, there would be a lot of details to hash out for part one.

Mr. Galt asked if DEQ could develop a timeline to lay out what needs to be done to get to the finish line—an outline/timeline of where are we in the process. Ms. Kelly stated that DEQ could develop it and send it two weeks in advance of the next meeting.

The next meeting will be scheduled for the 18th or 19th of April if room 111 is available.

Ms. Kelly re-iterated that DEQ would send the timeline and any revised rule language, and would put some meat in the guidance document and circular, and get those all to the group two weeks in advance of the next meeting.

The meeting was adjourned at 3:23 pm.

Relevant documents:

Agenda

Draft February 23 Meeting Minutes

PowerPoint: Excerpt from 80 FR 51040

Draft Flow Chart

Draft Rule Language

PowerPoint Presentation: “Guidance Documents and Department Circulars”

Friday, August 21, 2015 Federal Register 40 CFR 131

40 CFR 131.14

EPA Checklist for Evaluating Discharger-Specific Variances