DRAFT MEETING MINUTES
SENATE BILL 325 RULEMAKING COMMITTEE
Tuesday, April 20th 2016
9:00 am to 11:00 am
Metcalf Building
1520 E. Sixth Ave, Helena, MT 59620

PRESENT

Committee Members Present:
Jay Bodner
Barbara Chillcott
Bud Clinch
Art Hayes, Jr. (by phone)
Tammy Johnson
Brenda Lindlief-Hall (by phone)
Peggy Trenk

Montana Department of Environmental Quality Staff Members Present:
Kirsten Bowers
Rainie DeVaney
Myla Kelly
Adam McMahon
Kurt Moser
Peter Schade
Timmie Smart
Amy Steinmetz
Mike Suplee
Eric Urban

Members of the Public Present:
Tonya Fish (by phone)
Jason Gildea
Tina Laidlaw
Doug Parker (by phone)
Mark Staples

Ms. Myla Kelly called the meeting to order at 9:05 am. 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 March 22nd meeting by Ms. Kelly where the group focused on the variance piece and draft rule language and potential supporting pieces for that rule. Also introduced were the concepts of guidance and circulars and the nuances between them. Circulars are legally binding while guidance is just guidance. March's meeting also addressed questions about the variance process. It was discussed that if enough specificity is written into this rule and the Board of Environmental Review (BER) and the Environmental Protection Agency (EPA) approve it, then individual variance applicants would need approval from EPA but not the BER. Ms. Kelly asked if anyone had any changes to the March 22nd minutes. No one did so the minutes were approved and are to be posted on DEQ website.

Ms. Kelly then addressed questions from the March 22nd meeting. First being: How do SB 325 and SB 97 interact? Ms. Amy Steinmetz explained:

Doug Parker had asked how SB 325 (now MCA 75-5-222) interacts with MCA 75-5-302, which was changed through SB 97. SB 97 states that if a water body is not properly classified in accordance with existing, present, and future most beneficial uses, the department must reclassify within 90 days. Mr. Parker stated that if a water body is not meeting a water quality standard it seemed to him it was not meeting a beneficial use and therefore what DEQ was stating was in conflict with the requirement to reconsider classification. Ms. Steinmetz proceeded to go through both of the statutes:
Mr. Parker referred to 75-5-302 which was changed after the last legislative session per SB 97. It states that when the board (BER) or Dept. (DEQ) is presented with facts indicating that a body of water is not properly classified in accordance with existing, present, and future most beneficial uses, the Dept. shall within 90 days evaluate the facts and advise the board whether the body of water is not properly classified. If the board determines the body of water is not properly classified, the board shall initiate rulemaking to properly classify the water body in accordance with those existing, present and future most beneficial uses.

MCA 75-5-222 talks about variances. This statute and 75-5-302 have some specific language that sets them apart from each other. The language in 302 is "future most beneficial uses" and in 222 is "the condition cannot be reasonably expected to be remediated during the present term". This phrase in 222 implies that the condition may someday be remediated; therefore it's assumed that the designated uses of the water body can be considered future most beneficial uses. They may someday be met if the condition upstream of the discharge is remediated; it's not unreasonable that those uses may be met. A reclassification under 302 removes uses that do not exist and are not expected to be attained in the future. A variance under 222 would be issued with the understanding that the use is attainable either now or some point in the future. Ms. Steinmetz also pointed out that just because a water quality criterion is not being met doesn't necessarily mean that the uses aren't being met. It may mean that the water body is not in its optimal state but the use is still being met. Or it may be met at some point in the future.

MCA 75-5-222 addresses more temporary situations where we hope to see the water body eventually meeting all of the designated uses—that they are potentially attainable. 302 addresses those water bodies where the designated uses just are not correct. They need to be addressed. In these cases, a use attainability analysis is necessary and the water body needs to be reclassified in accordance with the existing, present and future most beneficial uses. It all comes down to attainability.

Ms. Steinmetz asked Mr. Parker if that answered his question. He said he was not sure he understood the logic of a standard being exceeded and the use not being met. He thought it was through the TMDL process that whenever there was a standard exceedance that automatically meant the use was not being met. Mr. Mike Suplee said the key thing is that this is not properly classified. What you're talking about is a water body that is properly classified but has recognizable pollution problems that people are working to fix. 75-5-302 and its predecessor are all about never getting it right to begin with. It was never really correctly classified- it never really could support trout- it was really a warm water fishery, for example. Mr. Parker said he understood.

Ms. Steinmetz summarized the primary differences between the two as being timing and attainability. With 302 we are looking at a waterbody for which DEQ has information that leads us to believe that the waterbody's uses designated in subchapter 6 will not be met at any time in the foreseeable future. The uses that are designated for that water body are incorrect. But with the variance in 222, the uses may be correct but the water is polluted and it's not going to be cleaned up at any point in the near future. So it makes sense to have a short-term variance that would give a reprieve to those water quality standards.

Ms. Kelly asked if there was any follow up on this topic. No follow up.

She then addressed the next question from the last meeting. The workgroup had requested feedback on why attempts to use Factor 3 for variances have been unsuccessful so far. Ms. Tonya Fish explained that in her experience, Factor 6 is the only one that EPA has provided specific guidance on. There isn't any guidance on Factor 3. Most people who have done variances have gravitated toward Factor 6 because it's fairly clear what the EPA is looking for in a demonstration. Another piece that has prevented people from going toward Factor 3 is that you have to demonstrate that there isn't treatment technology for that parameter. For most parameters there is treatment technology available and it's just a matter of whether it's affordable or not, so people shift to Factor 6 because of economics.

The other piece that people struggle with is that under Factor 3 you have to evaluate whether or not you're causing more environmental damage by addressing the environmental issue rather than leaving it in place. For example, EPA is working with Colorado on a situation where they have some temperature exceedances and the discussion is whether to install cooling tanks to deal with the problem. They have to evaluate the impact of greenhouse gases and energy costs and the environmental impacts. It is difficult to quantify these factors both environmentally and economically. No one is prevented from using one or more of the six factors, but these are the reasons that most people don't go down the Factor 3 route, and why most variances have been based on Factor 6.

Ms. Tammy Johnson wanted to clarify: If treatment is possible than you need to move to Factor 6 and prove economic harm? Ms. Fish said yes.

Ms. Kelly asked for clarification of "treatment is possible." Ms. Fish said it was a case by case basis. If there is an argument about whether or not there is a treatment technology, for example if a technology is experimental and it's effectiveness is unclear, then EPA will discuss it with the state. But she's never been part of any type of an analysis like that for a variance.

Mr. Suplee spoke about the Nutrient Criteria variance that he worked on. He said some of the engineers pointed out that the nutrient standards are very stringent and most likely achievable down the road as technology improves. But in today's world one of the technologies that can get to those end-of-pipe numbers can produce a lot of waste in terms of greenhouse gas emissions and require a lot of power and electricity to treat water to that level of purity, so you're trading off one point of pollution for another. You're getting a river or stream into a clean state but you're adding to another problem with the greenhouse gases. Discussion of whether Factor 3 would come into play at this stage and what was concluded is that we weren't going to push that at this time because we're too far away from that level of technology. We ended up building up our argument for the variances from the state and shareholders perspective around Factor 6 in the short term. Down the road somewhere there may be a point of diminishing returns takes us to Factor 3, but we're not there yet.

Ms. Tina Laidlaw added that they did explore the use of Factor 3 with the state when addressing the total nitrogen criteria question of whether reverse osmosis treatment could achieve the low concentrations, especially in the western part of the state, and then weighing that against what the impacts would be in terms of environmental damages like greenhouse gas emissions and brine disposal. EPA did explore this option with headquarters, Ms. Laidlaw agrees with Ms. Fish that there is not really good guidance. EPA has never approved a variance based on Factor 3, and because of the cost associated with reverse osmosis, Factor 6 was used for the nutrients variance.

Ms. Fish then clarified her response to the question Ms. Johnson asked about treatment technology automatically being considered under Factor 6. She said that there are 2 pieces to Factor 3. There is the "human caused conditions or sources of pollution prevent attainment of the use and cannot be remedied" piece. The question whether it's affordable leads you to Factor 6. The second piece of Factor 3 is the "or would cause more environmental damage to correct rather than to leave in place". Ms. Fish referred to the Colorado example where they contemplated installing cooling tanks to remedy water temperature issues. The permittee can afford the available technology; it's just a matter of whether it's the best environmental choice in that instance. The group understood.

Ms. Kelly asked if there was any follow up. Ms. Peggy Trenk asked if the EPA anticipated developing more guidance for Factor 3 in the future. Ms. Fish said she didn't believe Factor 3 is on the current list for developing guidance. Ms. Kelly asked about guidance development for the other Factors. Ms. Fish said she was not aware of any in the works.

Ms. Kelly next talked about the timeline for this group. She referred to the timeline that was put together to have the rule making package for SB 325 completed or substantially completed by the end of the calendar year. Ms. Kelly is confident in this goal. She pointed out the May goal for a presentation of revised rule language for Part 2 in support of that rule making package and initiating an open discussion of some of the concepts of Part I. Part I of the bill is more complicated and there's going to be more information needed in the circular and guidance. Ms. Kelly explained that by starting with the easier Part II, the workgroup was able to ease into the rulemaking process. The timeline that Ms. Kelly presented allowed for quite a few meetings for substantial discussion of the meatier parts of Part I.

If the workgroup wants to reach the goal of a rule-making package by the end of the year, it doesn't necessarily mean that it will go to the Board this year, but that the workgroup would have the substantial pieces together. The workgroup agreed to keep the process rolling to meet the end of the year goal. Ms. Kelly added that Water Quality Planning (Bureau) is heading into a busy time of year with field work so she proposed setting concrete dates for meetings through the summer at the end of the meeting.

Ms. Kelly asked for comments and suggestions. Mr. Jay Bodner asked what the timing to approach the board would be and wondered if they would be informed about the pieces of the rule before initiation of rulemaking is requested. Ms. Steinmetz answered that with an issue as big as this, it would be beneficial to give a briefing or two to the BER. It may be best to brief the BER on Parts I and II separately as they're ready. The BER can have a lot of questions when you go to them with something new and that can delay their decisions, so it often makes sense to brief them on new issues prior to requesting initiation of rulemaking..

Mr. Suplee added that their nutrient variance process was much the same, with a couple of briefings before the board and it was about a year between the briefing and request of initiation of rulemaking, so they knew what was coming. Ms. Kelly said that DEQ will keep the timeline updated.

Ms. Trenk asked about briefings for WPCAC (Water Pollution Control Advisory Council) as well. Ms. Steinmetz said that WPCAC would get frequent informal briefings.

Ms. Kelly moved on to a discussion of the options for part II of the rulemaking process. The workgroup had discussed in March that a general variance would not be applicable to this bill because each variance application may be very unique. The group also discussed whether each individual variance would need approval both from the BER and EPA. EPA has revised rules from 2015 which allow for a streamlined process that, if approved by the BER, would eliminate the need for each individual variance to be approved by the BER but not EPA. At the March meeting, the workgroup was leaning toward the streamlined approach, but DEQ wanted to discuss this with the workgroup again. Using the streamlined approach would initially entail a lot of work to create a detailed administrative procedure to provide certainty to EPA, stakeholders and BER that Montana's water quality was being protected.

DEQ doesn't expect to see many cases where an existing discharger is discharging to a water body that already has elevated concentrations of a difficult-to-treat water quality effluent. Nutrients are outside of this discussion because an entire variance process has been created around that, but we don't think there will be very many situations where there are existing high levels of concentration of a difficult-to-treat water quality parameter.

Additionally, because approval of a streamlined variance process is new to EPA, there will be a lot of upfront time and investment assuring EPA that this will stay within the bounds of the Clean Water Act.

Ms. Kelly said the workgroup needs to decide if it's worth our time and effort to develop this administrative procedure, or if we should pursue the process we have in place for individual variances that we are familiar with, and each variance will be addressed by the BER on a case by case basis. DEQ put together a summary of both the "case by case" and the "streamlined" processes and outlined the characteristics of both paths to help decide how to move forward.

<u>Case by Case Basis</u>
Rules that are less specific and individual variances would go to the BER and EPA.

- Process we are most familiar with for any variance process not covered under a general variance
- Rules are less specific
- Can put technical suggestions in guidance, rather than in circulars
- Process is faster
- Guidance is easier to change than a circular after rule adoption, if it's necessary
- Less certainty going into variance process- some may not be comfortable with that
- Requires case by case approval from BER

<u>Streamlined Process</u>
Rules would contain a very specific process, but wouldn't have to be approved by the BER, only the EPA.

- Save some time for each variance
- More certainty of the process because it's laid out in the circular
- More onerous process on the outset for rule writing and development of the circular

- More challenging EPA approval for initial process as it's new for EPA
- As actual variance situations arise and unanticipated challenges are outside of the adopted process, would have the burden of rule changes to modify the circular and the rules

Ms. Kelly asked for any additions. There were no suggestions for additions. Ms. Kelly said DEQ is requesting guidance from the workgroup on which option to pursue.

Ms. Trenk asked if in the streamlined process, after everything is approved and someone still wants to challenge it that it would end up in front of the BER.

Ms. Bowers answered that if the variance is implemented in the discharge permit, than yes the variance can be appealed. Ms. Trenk said that under the streamlined process you could still end up before the BER. Ms. Bowers clarified that the permit can be challenged in district court and could bring the whole variance process into challenge.

Ms. Johnson wondered if the case by case process would take a year to get through if there is no controversy. Mr. Supplee said he thought that was correct. The BER process is never shorter than 6 months, and then the EPA has a 90-day turnaround, which can often be a little longer. Six months to a year for a variance that is not problematic is a realistic timeline.

Mr. Bodner asked about the streamlined variance process and if EPA would have to sign off on both the process and the individual applicant? Ms. Kelly said yes, the individual variances would still have to get approved by EPA. Ms. Fish concurred.

Mr. Bodner wanted to clarify EPA's role in the circular development. He asked if EPA would have to approve the circular. Ms. Steinmetz said yes as long as it's part of the rule package. Ms. Kelly asked if that was true also for the guidance documents. Ms. Steinmetz said that the EPA strongly advises having implementation guidance along with the rule package. She is not sure if it would be part of the approval since it's not a part of the rule itself. Ms. Laidlaw said EPA would review it but they wouldn't approve it. Mr. Supplee said this was the case with the nutrients standard. They had a fairly developed guidance document which the EPA did not comment on.

Ms. Fish pointed out that EPA has FAQ's that lay out the process for how they determine whether a provision is a water quality standard. They look at the information in the circular and whether it meets their definition of a water quality standard. If yes, they take action.

Ms. Kelly then clarified that EPA provides comments on guidance documents and approves circulars.

Ms. Johnson requested clarification that under both scenarios EPA would approve the rule package and DEQ-18 and they would comment on guidance whether it's the case by case or the streamlined process. Ms. Kelly said that there would be no DEQ-18 for the case by case basis. The supporting documents behind the rule would be laid out in guidance for the variance piece. Mr. Supplee said that EPA would have to approve the new rules regardless of which pathway we follow. Ms. Johnson asked for clarification that some rule is required by the statute, but that the rulemaking would be much less specific and not accompanied by a circular if the group decides to move forward with the case by case basis, and that it would be the rule and the guidance that would go to the BER and the EPA for approval. Mr. Supplee concurred and said that resulting individual variances would be documented somewhere, possibly in rule, as water quality variances.

Ms. Trenk asked for clarification that the rule language that was adopted for case by case would also be approved by EPA. Ms. Kelly said yes, in all cases the rule would have to be approved by EPA. The guidance document is open for comment but not approval. Additionally, for the case by case scenario each individual variance would have to be approved by the BER.

Ms. Chillcott asked if the streamlined approach were used and there was a situation that was not anticipated and included in the process, would you have to go through separate rulemaking later for that situation. Mr. Suplee said this would greatly delay everything which is why we need to have a very clear understanding of what we may run into in this process.

Ms. Chillcott asked for an example of other rules that DEQ has developed with that level of foresight. Mr. Suplee said the nutrient standards general variance is the closest. With the economic analysis that was done up front, DEQ concluded that the vast majority of dischargers would have difficulty meeting the nutrient standards, and the general variance process was developed for those dischargers. The type of standard and the state of treatment were far enough apart that they could anticipate the outcome. That is different than this situation. Ms. Johnson pointed out that the list of constituents to be addressed was clearly defined. This one is much more wide open. Mr. Suplee agreed.

Ms. Fish said that in her experience in working with Montana, there are multiple opportunities for rulemaking. There is not much time in between rulemaking because of the Montana Agricultural Chemical Groundwater Protection Act that requires DEQ to regularly update DEQ-7 to adopt new criteria for new detects in the pesticide realm. Because of this there is usually a rulemaking every year. What this administrative variance process gets the states is the ability to not have to do separate rulemaking for each individual variance. However, in Montana's case, there are a lot of regular opportunities for rulemakings so if there was an individual variance, you could piggyback on that rulemaking. Ms. Fish gave the example of doing a DEQ-7 update for pesticides; you could also roll in an individual variance to that same rulemaking to take advantage of doing both of those. She was not sure how much would be saved in upfront investment in figuring out with EPA how to make this work in Montana. If Montana wants to pursue this administrative process, than the legal staff from both DEQ and EPA need to discuss whether this is even allowed under Montana law. Just because it's allowable under federal, doesn't mean it's allowed under state. Ms. Kirsten Bowers stated that she didn't know why it wouldn't be allowed, but stated that DEQ's legal department would look into it.

Mr. Clinch believes he is getting the perspective that the EPA isn't too hot on the streamlined process. He stated that it also seems like DEQ thinks that the only gain is the 6 months rulemaking process for an individual variance, but that there is a lot of time upfront and that both agencies don't think this is a good way to go. Ms. Kelly agreed that the onerous upfront cost was a factor and DEQ wonders if the streamlined process is really of enough value to make the process move quickly. Mr. Clinch is surprised that the legal question came from EPA and not DEQ legal staff. Ms. Bowers agreed. Ms. Kelly said the administrative variance process is new so everyone is still getting up to speed on it. Ms. Fish said EPA is happy to have more conversation on the details and is not trying to dissuade the group from the streamlined process. There are a lot of legal intricacies such as the public participation process that need to be incorporated. The rules would need to be set up under state and federal law and meet all requirements, so the workgroup just needs to understand there are a lot of questions that need to be answered.

Ms. Johnson asked if the following is correct: If a treatment technology is available and you can't demonstrate widespread economic harm using the worksheets, then you're not moving forward with a

variance under Factor 3 if it's possible to treat, other than if it's not going to cause more harm. In other words, if there is human-caused pollution and there is treatment technology that is consistent and available, you need to demonstrate economic harm in order to get a variance. Mr. Suplee said yes. Ms. Johnson then said that under part II of this statute if we were to go with the case by case rules, we wouldn't have a definitive process in place so the answer won't be clear up front. Mr. Suplee said that if necessary, we could have very detailed information in guidance, like we do for the nutrient standards. The nutrient guidance document clearly lays out what you would need to carry out the widespread economic demonstration. It's particularly detailed for the public sector, or towns and communities. We could have a very definitive process like that that we could go back to and see what part of the process you are in and where to go next in order to get the variance. An argument against that approach might be that it's not strictly binding and DEQ could do something else, but DEQ generally follows the guidance we've developed to help in these situations. Ms. Laidlaw pointed out that this is all Factor 6 that we have guidance on. Mr. Suplee agreed and said that Montana doesn't have guidance for Factor 3.

Ms. Kelly stated that she would love to come out of today's meeting with a decision on which path to take. But she understands they need to discuss with others. However, she would like their decision before the next meeting.

Ms. Trenk pointed out that the effort on the first individual variance may very well be as onerous as the rulemaking process for the streamlined version, in which case the question would be, which one is really better? Ms. Kelly agreed that she also has been questioning which scenario really has the most certainty.

Ms. Fish offered to get the EPA and DEQ lawyers together before the next meeting so that some of the important questions could be answered. Ms. Kelly said yes, that would be great. Ms. Johnson believes that the legal information is important. If there is something in Montana law that precludes the streamlined approach, it will be important information. Ms. Bowers asked for a contact person. Ms. Fish stated that DEQ legal will work with Erin Perkins at EPA.

The workgroup agreed to do a conference call after the legal groups have their discussion.

Mr. Bodner asked if there was an opportunity to put timeframes on both options. The inclusion of EPA approval would be beneficial and may help the workgroup make decisions.

Mr. Clinch pointed out that Mr. Suplee said the case by case process takes about a year. With the other option you might save 6 months of time. Mr. Suplee agreed that those timeframes are roughly correct, but said that if we do pursue the streamlined approach we will never meet the end of year deadline, and Mr. Clinch added that that's assuming there is no appeal or litigation.

Ms. Kelly laid out the path forward:

1) DEQ and EPA legal teams will discuss the legal authority
2) Ms. Kelly will then set up a conference call prior to the May in-person meeting to inform every one of the outcome of the legal discussion
3) Workgroup members can speak to their groups about the different approaches as needed
4) The workgroup will come to a decision at the May meeting

All agreed on the process. Ms. Kelly stated that DEQ will send the case by case matrix to the workgroup after the meeting.

Next was the guidance outline presentation and discussion. Ms. Steinmetz handed out a new version of the draft guidance document outline and said the group received an earlier version of the handout a week ago. She stated that additions to the document have been highlighted. She also emphasized that anything that is being distributed right now is in draft form, and that DEQ expects a lot of discussion on any of the draft documents.

This outline was written with the assumption that all of the pieces might go in guidance. If the streamlined approach were taken then some of the pieces in the outline would go into a circular instead and would contain a lot more specificity. Even if they stay in guidance though, more specificity can be added if that's what the workgroup wants.

The first part of the outline contains the evaluation steps previously talked about and seen in the flowchart. The logical place for those is in guidance. These are the pre-questions that a discharger can ask to determine if it makes sense to take the variance route. The pieces highlighted in yellow were added to clarify that these are evaluation steps for a discharger. She noted that answering yes to 1.b., which asks if there is another permit-related action in place like a TMDL, would not preclude a discharger from pursuing a variance, but that it's helpful information for the discharger to have. It may help the discharger decide if a variance is really necessary or not. 1.a., on the other hand, is directly from statute, and if the condition is likely to be remediated in the next 5 years, the discharger would be precluded from pursuing a variance.

The next section contains the six factors and some requirements that might help answer the questions. If the workgroup decides to move forward with the streamlined process, this section would be moved to the circular. Many of the factors don't have bullets yet, but some guidelines will need to be added for each. We don't want to eliminate any of the factors so they're all included in the guidance, and whether or not they apply in a specific circumstance will be determined on a case by case basis.

The last piece includes some requirements for material contribution determination. Ms. Steinmetz stated that there seemed to be a level of comfort with the longitudinal increase, but we still need more discussion on part 3.b., which talks about an additional increase in a pollutant where water quality criteria are already exceeded. Mr. Suplee pointed out that in 3.a. DEQ thought it made more sense to be less absolute. Ms. Steinmetz explained that if the exceedance is extended 5 feet or 10 feet downstream longitudinally, it might be ok, that common sense would be applied in the determination. This is assuming that it would go into guidance. If this were to go into a circular there would be a lot more specificity.

Ms. Kelly said that the specificity that we need to add will be determined after we determine which path we're going to pursue.

Ms. Johnson asked about an earlier discussion on the "average" language and if DEQ has been able to clear that up or be more specific. Mr. Suplee said we haven't put a lot of work into that because it depends on which of the 2 processes we decide to go with. He stated that DEQ will dig into it more in the future.

The workgroup then set meeting dates through September:
May 17
June 21
July 26
August 23
September 27

All meetings will be held at 2:00 in Metcalf room 111.

The meeting adjourned at 10:36 am.

Relevant documents:

Agenda

Power Point 75-5-222 vs 302

Timeline

Case by Case vs Streamlined Approach Matrix

Guidance Document Outline