

DRAFT MEETING MINUTES
SENATE BILL 325 RULEMAKING COMMITTEE
Tuesday, July 26th 2016
2:00pm to 4:00pm
Metcalf Building
1520 E. Sixth Ave, Helena, MT 59620

PRESENT

Committee Members Present:

Jay Bodner
Barbara Chillcott
Bud Clinch
Dave Galt
Adam Haight
Art Hayes
Tammy Johnson
Brenda Lindlief-Hall
Peggy Trenk

Montana Department of Environmental Quality Staff Members Present:

Kirsten Bowers
Myla Kelly
Erik Makus
Melissa Schaar
Timmie Smart
Mike Suplee

Members of the Public Present:

Tanya Fish (phone)
Jason Gildea
Another person called in but no name was given

Ms. Myla Kelly called the meeting to order at 2:02 pm. The meeting commenced with introductions followed by a re-cap of the June 21st meeting. Ms. Kelly explained how the workgroup continued discussions of the rule language and guidance, and that the group received comments for discussion later in the meeting. Also from the previous meeting there were a few requests for DEQ to illustrate some examples of ways DEQ has gone through the process of demonstrating natural and being able to separate non-anthropogenic vs. anthropogenic sources. Ms. Kelly said that DEQ has three different examples to run through: an arsenic mass balance loading, an EC/SAR modeling approach, and a reference stream approach used for iron. Ms. Kelly next asked for comments on the minutes from June's meeting. She said there were 2 corrections on the May meeting minutes that were made and sent out by Ms. Amy Steinmetz. There were no comments. Ms. Kelly approved the minutes for May and for June and they will be posted to the website.

Ms. Kelly continued, saying there have been some requests for showing how DEQ has thus far demonstrated non-anthropogenic and anthropogenic conditions. She said the following presentations are 3 ways in which DEQ has done this and that the group will see when we go through these that some

of the approaches are pretty data intensive, but that it's a good way to get our minds around what this process could look like. Ms. Kelly is confident that there will be situations where this level of data collection won't be required, but still wanted to give examples of ways it's been done.

The first presentation was given by Ms. Melissa Schaar from DEQ's Standards and Modeling section who has been working on the natural case for arsenic in the Yellowstone. She used the mass balance loading approach.

The second presentation was given by Mr. Erik Makus, also from DEQ's Standards and Modeling section. He explained the EC/SAR model approach used on Otter Creek for salinity. He said it's a runoff hydrologic model used to break down the anthropogenic and natural sources.

The next slideshow was given by Mr. Mike Suplee explaining the reference stream approach. The goal of this ongoing project is to gather data from streams and small rivers that have had as little human impact as possible. One of the ways the data is used, among many, is to explain natural background or natural condition in DEQ's narrative standards.

All 3 slideshows are being sent to the workgroup.

Ms. Kelly continued the meeting and discussed how within DEQ there has been discussion of this concept of natural and doing the work to quantify what that means for quite a long time. At this point our job as a workgroup is to create some rules around it. It's not a new concept, it's just trying to figure out how to get it down in words. Ms. Kelly said we'd be talking more and more about these strategies as we move forward. Ms. Kelly asked for questions for either of the presenters.

Mr. Dave Galt said that he understands how the first two presenters got anthropogenic and non-anthropogenic, but he didn't understand the conclusion off of Mr. Suplee's presentation. Mr. Suplee explained the conclusion was that these sites are as close a representation to non-anthropogenic as we're going to find on the landscape today. He said there has not been any exotic modeling, or they didn't do anything to pull out aspects of the landscape and change them mathematically in a modeling scenario like they did in Mr. Makus's work. Mr. Suplee explained that his group went out and said here are locations where we're seeing very few activities and limited effects on the stream, and by definition these reference sites are non-anthropogenic or very close to it. But they also represent the real world activities occurring on our landscape today, including any vegetation changes, and activities such as cattle grazing that occurs today, especially in eastern Montana and why they are predominantly tier 2 in eastern Montana.

Mr. Galt wanted to confirm that they didn't necessarily transfer to the western side of the state. Mr. Suplee said that Mr. Galt was right and gave the example of making a decision about aquatic insect patterns. Mr. Suplee pointed out the areas on his map of the where they would focus, which was more of the western region. He said that the important thing to remember when using reference sites is to chop up the landscape in a way so that the ones that you're using for your point of comparison are similar to the stream that you are trying to make a decision about. Mr. Suplee continued with another example of trying to make a decision on iron in the Missouri river breaks; he wouldn't be pulling together iron data from the northern Rockies by Libby. They're not the same. Mr. Suplee added that he might pull data from that general region. There are different ways to do that which are part of a toolbox of techniques that one uses. Mr. Suplee said if the group remembers on the nutrient standard, they had

quite a lot of that upfront. There were different nutrient standards in different regions and eco regions, as well.

Ms. Peggy Trenk asked if these would be generally accepted techniques, when you're actually setting some standards, that the EPA would recognize and can be used as building blocks? Mr. Suplee said yes, DEQ has had conversations with EPA about that and they have so far not put up any road blocks and are very familiar with the reference approach and it is even talked about in EPA guidance documents. Mr. Suplee thought their questions will get into details if they are appropriately applied reference sites and if the sites have been restricted to the correct geology, region and watershed basin so that you're not mixing up ones that don't belong together to make your comparison. Mr. Suplee said that it is DEQ's understanding that EPA does not have any major issue with this (reference stream approach.) He referred back to recently adopting the nutrient standards 2 years ago and a big piece of what went into those standards was based on this exact type of data. The difference is that in that case, DEQ was using background concentrations of nitrogen and phosphorous in the process.

Mr. Jay Bodner asked if DEQ is always looking for additions to the list of reference sites. Mr. Suplee said yes, they are, that the network grew a lot through the 2000's because they needed more data from more sites to really get good representation. He said there are still some areas they would like to fill in more, and that they have a spreadsheet that Water Quality Planning Bureau staff uses every year when they are out doing other types of work so that if they have candidate sites they can put them on that list and then Mr. Suplee's group checks them out.

Ms. Trenk followed up from an earlier question about guidance as opposed to rule, and trying to be flexible. She said if, depending on what DEQ is requested to look at, they can pick the most appropriate modeling technique for what DEQ is doing and it's been recognized as part of the process. So as an applicant she would know that DEQ has this toolbox that they're going to pull from. Mr. Suplee said yes, this is the idea. He said that the guidance document, which might end up being a circular, would reference these different approaches and have enough detail so that DEQ and the applicant can figure out how to make it work in a particular situation that would arise.

Mr. Adam Haight asked if any examples would be provided where the reference approach was used. Mr. Suplee said one of the best places to look at Montana data would be to look at DEQ's technical support document for the development of numeric nutrient standards. Mr. Suplee referred to a slide in his slideshow (#7) and said what was done for each of the colored zones there is a break out of the background nutrient concentrations from these reference sites. The standard was chosen when considering other data, and then where that concentration that was picked as the standard fell within the reference distribution. Mr. Suplee said one of the valuable things about this is that they made sure that they didn't set standards that were unattainable because even the background streams don't get that. He said that, for example, you wouldn't want to set a total nitrogen standard in an eastern Montana stream of .1 when most of the reference streams are at 2. Mr. Suplee said this is one of the very valuable mechanisms they used to help make sure that the standards were realistic for what's out there on the landscape. He offered to send this information in an email for the group to look at.

Ms. Kelly hopes the slideshows were helpful as the workgroup works to develop the rule language and the circular for Part 1. She thought that everyone now has a common understanding of what a demonstration of natural is and now need to come up with the processes for what data is required for each parameter.

Ms. Trenk asked a question about a conversation from the last meeting that she wanted to clarify. If she has picked the model that's going to work perfect for her situation and she gets to number x, she asked if you would still have to take x and go through a process of adopting that. Why, when you get to that number, isn't that just it? She knew it had something to do with the way the law is written. Ms. Kelly said the process that was talked about at the last meeting was the performance based process. She explained if there was enough detail provided so that EPA and the Board of Environmental Review (BER) could say this is a valid process to use for the specific parameter, then that number that gets spit out at the end does not need to go through an adoption process. That number would need to be made available to the public, whether online or however it was decided. Ms. Kelly said that if we get to a point where EPA and the BER are not completely comfortable with the performance based process and not willing to approve it as a performance-based standard, then each number has to go through its own approval demonstration.

Ms. Kelly continued the meeting by discussing updates made to the rule language for part 2 for the variance component. She said the Department would continue to make changes as they receive comments, which she encouraged the workgroup to do and thanked Mr. Haight for the comments he submitted. Ms. Kelly also asked the workgroup if they would like to work through the comments together and if the stakeholders would like DEQ to respond to the comments. She asked the workgroup if they had any opinion. Mr. Haight said it would be really helpful if he were to receive feedback from the workgroup. Ms. Kelly said that as the group got to the rule language and the final guidance documents that they would start to get more comments and that there will be a time at the next meeting to discuss DEQ's response to the comments.

Ms. Kelly continued by going over one of the primary changes that was made to the variance rule language for Part 2. As discussed extensively in previous meetings, if the anthropogenic conditions causing exceedances of water quality criteria can't be fixed in near-term, one of six factors must be demonstrated. Ms. Kelly said we've changed this section to include the two applicable factors of the six. They are taken verbatim from the federal regulation and were included from the six factors because they meet the intent of the statute. They are specific to waterbodies where the human caused conditions prevent the attainment of the use, or where the controls are more stringent and would result in widespread economic and social impacts.

Mr. Suplee said that there is one other change to the very last segment. DEQ added a few factors regarding what would be the basis for the department to either reject a variance or to not accept it or allow it to go forward. He said there is a little more detail about that in the rule now and explained how this whole rule is based on the idea that some remediation may eventually occur upstream. If nothing has happened in the watershed then the water quality characterization upstream of the discharging facility would kind of be the same as what was used for the initial variance basis. But if things are changing and the water quality is improving, then the rule wants to focus on that improved water quality. Mr. Suplee quoted text from the handout that says:

The proposal will solicit comments from the public on whether the variances should be: (1) extended without modification, (2) modified and extended, or (3) allowed to expire. Based on the review conclusions and the public comment, the department will draft final findings and conclusions and will initiate rulemaking if it determines that the variances should be extended, with or without modification.

Mr. Suplee said much of this language was lifted directly from the individual variances for nutrients, which are already in rule for nutrients. This was from internal comments where it was thought the

Department wasn't explicit enough on how the decisions were being made with this and how to know when DEQ won't accept a variance.

Mr. Suplee said that these were the two big changes relative to the earlier version. The Department clarified that factor 3 (labeled a on the handout) and factor 6 (labeled b on the handout) are the two principal ones by which this rule would be implemented, and more information on what DEQ would do to extend, not extend, or extend and modify a variance at the first checkpoint.

Mr. Galt asked when you get to the point about the proposals soliciting comments from the public, do you have to put a reason in there as to why it should be extended or modified or allowed to expire? He said there will be a lot of comments saying to let it cease. Mr. Suplee said the Department will look at those comments because allowing the public the ability to comment is important and also a requirement. Mr. Galt agreed but said there should be some reason. Ms. Tammy Johnson added there should be some kind of preferred alternative in a larger document, or what the agency is recommending. Mr. Suplee recommended that when the workgroup has had a little more time to look at this, to suggest a couple of sentences that may be a better fit and DEQ will include them.

Ms. Kelly said she would email this document to the workgroup and welcomed them to review and comment. The rule language will be revised based on these comments and internal comments for Part 1. For the next meeting DEQ will have a draft 2 and also a guidance document for Part 2.

The next meeting is Tuesday, August 16th at 2pm. The meeting adjourned at 3:38 pm.