

**DEQ Nutrient Work Group
23rd Meeting Summary
October 16, 2013**

Introductions

A list of the members of the Nutrient Work Group (NWG) and others in attendance or participating in the meeting via telephone is attached below as Appendix 1.

Agenda

The meeting participants reviewed and approved the following agenda items.

- Review of the September 5, 2013 Meeting Summary
- Overview of Activities Leading Towards Completion of Nutrient Standards Implementation Process
- Next Steps towards Nutrient Standards Rule Making
- Public Comment
- Next Meeting

Review of the September 5, 2013 Meeting Summary

Comment - The group did not reach a consensus about including chlorophyll a as a standard. Chlorophyll a is not a pollutant so it would not be appropriate for a water quality standard.

Response by Mike Suplee - Chlorophyll *a* is the direct result of pollutants. Its levels would be addressed in the assessment methodology. Whether subject to a standard or the assessment methodology, chlorophyll *a* would not be included in discharge permits.

Comment - I am wary that regardless of the intentions of the permitting staff, DEQ may be forced into including chlorophyll a in a permit if it is subject to a water quality standard. While I agree that DEQ has adequately vetted the science regarding chlorophyll a, I prefer that it not be subject to a standard.

Response by Bob Habeck - Discharge permits regulate what is in the discharge effluent. Chlorophyll *a* is not in the effluent.

Comment - The main argument is whether chlorophyll a is put on equal footing with nitrogen (N) and phosphorus (P) as a standard. The state should wait until EPA pushes to include chlorophyll a in standards. Now, we should just include N and P in the numeric nutrient standards.

Response by Mike Suplee - I don't have strong feelings either way. Chlorophyll *a* would be resolved by other mechanisms. Functionally, how chlorophyll *a* would be addressed would not change if it was in a standard.

Response by George Mathieus - I will discuss this with John North, DEQ's Chief Legal Counsel, but I am leaning towards not including chlorophyll *a* in the numeric nutrient standard.

Comment by Mike Suplee - The situation is different for lakes, as we do not have an assessment methodology addressing chlorophyll a for them. For Flathead Lake, DEQ will have chlorophyll a, N, P, and secchi depth in the standards. Chlorophyll a should be addressed in standards for lakes.

Overview of Activities Leading Towards Completion of Nutrient Standards Implementation Process

Mike Suplee reviewed the latest versions of three documents, highlighting the changes made by DEQ to each of them. The three documents were entitled, respectively: Nutrient Standards Rules (Version 7.8) and Statements of Reasonable Necessity; Department Circular DEQ-12, Parts A and B; and DRAFT 1.2 Base Numeric Nutrient Standards Implementation Guidance. Highlights of the discussion of each document follows.

Nutrient Standards Rules (Version 7.8) and Statements of Reasonable Necessity

New Rule 1, paragraph (3) was added to clarify that DEQ may use a model to show that control of either N or P rather than both N and P would reach the water quality and biological improvements.

Question - Has the language of this section changed from the previous version?

Answer - The words “biological status” were added in (3)(a).

Question - Can you email the current and previous versions of this rule?

Answer - The previous versions are available now on the NWG web page. The latest version, 7.8, will be posted on the web page after this meeting.

Comment - Posting track changes in the most recent version would be helpful to identify the changes from the previous version.

Response - We will do so going forward.

Question - The applicant is responsible for collecting and submitting water quality data to demonstrate what needs to be done. Do you have guidance for the data collection and submittals?

Answer - Yes, we have detailed guidance. We did not reference the guidance in the rule to maintain flexibility.

Comment - Paragraph (3) uses the language “equivalent water quality and biological improvements.” “Equivalent” should be changed to “similar.”

Response - OK.

Two other changes made in Version 7.8 were: in paragraph (6), the word “deleted” was changed to “terminated;” and non-severability clauses drafted by DEQ legal staff were included in 17.30.619(4) and 17.30.715(4).

Question - The last line of New Rule 1 (5) is “Like any variance, such variances must be adopted as revisions to Montana standards, reviewed on a triennial basis, and submitted to EPA for approval.” Does EPA approve each variance, or does it have an opportunity to object to the issuance of each variance?

Answer - EPA reviews all temporary standards. However, the rule sentence may be confusing and will be deleted.

Comment - The non-severability clauses should include adverse action by EPA as well as a court.

Response - We will look at language clarifying that the non-severability clause applies to any legal ruling. In the case of the Clark Fork River, we specifically want to maintain the Clark Fork standards if the new numeric nutrient standards are struck down. For this reason, the Clark Fork River nutrient rules are being left as-is and not being incorporated into DEQ-12 Part A at this time.

Question - Do the rules specify a 14Q5, i.e. 14-day, 5-year hydrologically based flow, for the July through October months?

Answer - The 14Q5 flow is referenced directly in DEQ-12. The reference is to a USGS document which is readily available.

Question by George Mathieus - Are there other concerns or comments on the rule document?

Answer - I remain concerned about the variance widespread test criteria and how they would be accepted or denied.

Department Circular DEQ-12, Parts A

The introductory paragraph to section 2 of Part A was rewritten.

Question - Under this new version of the Circular, would large rivers still be subject to the narrative standard?

Yes, except for the lower Yellowstone River for which we are proposing standards and the Clark Fork River which has existing numeric standards.

Assuming that DEQ does not opt to include chlorophyll *a* in the standards, the column labeled "Other Standards" in Table 12A-1 would be dropped.

A number of streams in the upper Clark Fork River basin have high levels of P naturally because of volcanic soils. The criteria for these streams are now listed in Table 12A-1 and therefore have higher values of P and slightly lower values of N. This is covered in detail in addendum A to the main technical document which supports the criteria in DEQ-12.

Question - If the streamlined approach for developing site specific standards is used, would additional stream reaches be added to Table 12A-1?

Answer - Yes.

Question - Flint Creek has special circumstances because of discharges from Georgetown Lake. Will these circumstances have implications for the criteria for the upper and lower canyon areas below Philipsburg?

Answer - Yes. We chose the ecoregion boundary to reflect these circumstances because it conveniently landed near the location where the effect of the reservoir appeared to disappear.

Table 12A-2 addresses lakes and reservoirs. Currently, only Flathead Lake would have numeric criteria. As a result of the TMDL work and meetings throughout the 1990s, we have criteria for N, P, chlorophyll *a* and secchi depth for Flathead Lake.

Question - Would these numbers change with final adoption of the Flathead Lake TMDL?

Answer - No, the final TMDL values will be driven by the nutrient standards.

Question - The Flathead Lake Biological Station recently released data for the trend in TMDL parameters. Could the criteria be changed as a result of these data?

Answer - I have had conversations with the Biological Station staff, and the data do not indicate that the criteria should be changed.

Question - Are the N and P and chlorophyll a data taken at the same location as the secchi depth data, the Mid Lake Deep Site?

Answer - Yes.

Department Circular DEQ-12, Part B

The changes to Part B were primarily editing changes resulting from stakeholder and DEQ legal staff comments. The definition of limits of technology was dropped and moved to the guidance document. The permit shop will use the numbers in statute for the general variance as long-term averages. Section 3, Individual Nutrient Standards Variances, was reorganized so that 3.1 addresses the substantial and widespread economic impact tests for individual variance and 3.2 addresses water quality modeling for an individual variance.

Question - Is long-term average defined?

Answer - Yes, in DEQ-12 part B.

Question - Was the widespread economic impact test changed?

Answer by Jeff Blend - It is basically the same.

Question - Will the DEQ rule making be concurrent with the Board of Environmental Review (BER) rule making?

Answer by George Mathieus - I assume so. The plan is to hold a joint DEQ/BER hearing.

DRAFT 1.2 Base Numeric Nutrient Standards Implementation Guidance

Section 2 has numbers for phased values for the general variance for mechanical treatment systems. DEQ is aware that additional discussion of these values is needed. For lagoon systems, there are two phases. Through 2016, lagoon systems would be required to maintain the current performance and within one or two permit cycles after 2016, they would be required to implement best performance standards (BMPs) that are yet to be developed. Importantly, the guidance document includes the following language:

However, the Department will only supersede the reduction steps defined here if substantial cost reductions for existing technology have occurred, or technological innovations have allowed for nutrient reductions well beyond the defined steps and those technologies can be readily implemented on facilities in Montana.

Comment - The phased general variance values should be available for everybody and used by the majority. We should build in flexibility now so that after two permit cycles, everyone does not have to pursue an individual variance.

Response - The phased in values are in guidance, not the rules. Assuming they represent treatment levels that are technically available and affordable, the values may be put in the rules in 2016 or later. DEQ seeks a way to provide regulatory certainty without kicking everyone into the individual variance.

Comment - We will likely see many individual variances.

Comment - While certainty is good, I am concerned that the rules narrow the choices too quickly.

Comment - Local governments want predictability; however, we disagree with DEQ about the final numbers.

Response by George Mathieus - We are still discussing the numbers with the League of Cities. A glide path leading to standard levels is important. We are trying to hit a “sweet spot” to provide certainty for planning.

Comment - We should not be forcing 30-40% of the small communities into the individual variance. If we are, then the general variance phases should be revised.

Question - What about the anti-backsliding provisions?

Answer - The anti-backsliding provisions are meant to ensure that discharges do not exceed current discharge requirements.

Answer by Bob Habeck - Permits are written only to levels in the law and rules, not guidance.

Jeff Blend reviewed section 3.0 of the Guidance Document which sets forth the evaluation process for individual variances and adds a remedy. If no alternative to discharge limitations, such as trading or ground application, exists, then the secondary score of the substantial impact test sets a cost cap for additional treatment. Dr. Blend referenced a spread sheet that will be posted on the NWG web page for the calculation of the cost cap, which is set by subtracting 0.5 from the secondary score.

Question - Is the point of reference for the individual variance test the base numeric standard rather than the general variance levels?

Answer by Jeff Blend - Yes.

Comment - I am concerned that the widespread economic test is subjective. I do not know who will make the widespread decision.

Response by Jeff Blend - My understanding is that the concern is whether my town will pass the widespread test. The test as currently formulated includes six primary economic questions and twelve or thirteen others that a variance applicant can choose to answer. I do not know how to make the widespread test objective.

Comment - We should not move ahead on the widespread test until we have more comfort with how it will be applied and who will apply it.

Response by Jeff Blend - My assumption is that most towns will pass this test.

Comment - Targeting the base criteria rather than the general variance levels is an encouraging clarification.

Comment - A community has to consider more than treatment in deciding how to expend its waste water dollars. Pumps and lift stations are examples of other expenditures that must be made.

Response by Jeff Blend - We would discuss waste water system costs with a variance applicant. If they are waste water related, then they would be included. We will consider adding language to the remedy section of this section of the guidance document to clarify this.

Question - Is there a definition of process review?

Answer - Yes, see paragraph (4) of the New Rule. We will also look at clarifying the process in the guidance document.

Question - Will the applicant or the NWG be involved with deciding on the passage of the widespread test?

Answer - More than one person in DEQ will be involved with the decision. We will add language to the guidance document to spell out who in DEQ will be involved.

Question - Are there evaluation criteria for the widespread test?

Answer - Yes.

Comment - I am glad that clarity will be added to the widespread test. The significant economic impact test is objective. The widespread test is not and may be the \$1 million question. The widespread test as currently formulated involves a showing if unemployment will increase as a result of sewer rate increases and if other employment opportunities exist to offset the sewer rate caused unemployment. I am concerned that someone in DEQ will be deciding if ample job opportunities exist in a given town.

Question - Is there an appeal process if DEQ decides that an applicant does not pass the widespread test?

Answer - I am sure there would be one.

Comment - It is difficult just to trust DEQ. The widespread questions should be simpler and fewer in number.

Question by George Mathieus - Are there any major subjects that are not addressed in the guidance document?

Comment - Downstream beneficial use protection is not addressed.

Response by Mike Suplee - We may need a definition for the extent needed to protect downstream beneficial uses.

Comment - Non-degradation is also not addressed in the guidance document.

Next Steps towards Nutrient Standards Rule Making

George Mathieus stated that the next steps are first to post the documents reviewed at this meeting on the NWG web page and then to have a November meeting of the NWG to review them. The documents with updates reflecting discussions at this meeting will be posted by Monday, October 21. DEQ recognizes that two issues have not been addressed to the satisfaction of all NWG members, downstream effects and non-degradation. DEQ may have a proposal for addressing these issues for the November meeting. DEQ plans to present a rule package to the BER at its December meeting.

Question - Could you describe DEQ rule making authority?

Answer by John North - It is the same as the authority of the BER, except for the final signature. For DEQ rules, the department director is the decision maker and signs the rules adopting them.

Question - What is the process for BER and DEQ rule making?

Answer by John North - The BER agenda noting that the DEQ proposes that the board adopt a new or revised rule is released to the public two weeks prior to the BER meeting. After hearing from the public, the BER decides at its meeting whether to proceed with rule making. The BER decision to go forward with rule making initiates a six month process which begins with formal notice to the Secretary of State that rule making has begun. After this notice, a twenty-eight day comment period follows during which a notice is sent by DEQ to a list of interested stakeholders. After the comment period closes, DEQ issues a response to the public comment along with changes to rule proposal in light of the comments. The BER then decides at a subsequent meeting whether to adopt the rules. The process is the same for DEQ rules, except that the department director rather than the board decides whether to initiate and adopt the rules.

Question - What would be the time frame for the nutrient rules?

Answer by John North - Rule making will begin in late December 2013 or early January 2014 with adoption in either May or June, 2014.

Question - What could cause an extension beyond the six month period?

Answer by John North - An extension could occur if the public comment requires additional work on or substantial revision to the rule proposal. An extension beyond six months is not uncommon in complicated rule making.

Public Comment

Tom Hopgood, the representative for the Montana Mining Organization, stated that his organization feels strongly about not going forward with rule making for numeric nutrient standards without addressing new or expanded dischargers in the non-degradation context.

Next Meeting

The next meeting of the NWG is scheduled for Friday, November 8, 2013 from 1:00-5:00 p.m. at a location in Helena to be announced.

Appendix 1
NWG Attendance List
October 16, 2013

Members

Tom Hopgood	Montana Mining Association
Scott Murphey	Morrison Maierle
Craig Woolerd	City of Bozeman
Mark Lambert	Treasure State Resource Industry Association
Jay Bodner	Montana Stockgrowers
Brian Sugden	Plum Creek
John Wilson	City of Whitefish

Alternate Members

Doug Parker	Hydrometrics (alternate for Tom Hopgood)
Bill Mercer	Holland & Hart (alternate for Dave Galt)
Craig Pozega	Great Western Engineering (alternate for Dave Aune)
Alan Stine	Olympas Technical (alternate for Michael J. Perrodin)

Non-Voting Members

George Mathieus	DEQ Planning, Prevention and Assistance Division Administrator
Dr. Jeff Blend	DEQ Economist
Dr. Mike Suplee	DEQ, Water Quality Standards Section, Water Quality Specialist

Other Meeting Participants

Bob Habeck	DEQ, Water Protection Bureau Chief
Paul Lammers	Revett Minerals
Paul LaVigne	DEQ Technical and Financial Assistance Bureau, Water Pollution Control Revolving Fund, Section Supervisor
Mike Jacobson	City of Great Falls
Amanda McInnis	HDR/Montana League of Cities and Towns
Rebecca Bodnar	City of Kalispell
Susan Elayng	Browning, Kaleczyc, Berry & Hoven
John North	DEQ Attorney
Paul Skubinna	DEQ Water Protection Bureau, Water Quality Discharge Permits, Section Supervisor
Abigail St. Lawrence	Montana Association of Realtors
Scott Anderson	Anderson-Montgomery Engineering

NWG Facilitator

Gerald Mueller	Consensus Associates
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