

**WATER POLLUTION CONTROL ADVISORY  
COUNCIL**

**10:00 am, June 24, 2022**

**Room 111 DEQ**

**Zoom Meeting**

**FINAL MEETING MINUTES**

**PRESENT(Online)**

DEQ Communications  
Meagan Gilmore (x2)  
Adam Pummill  
Dennis Teske  
Eric Campbell  
Lee Bruner  
Ron Pifer  
Teri Polumsky  
Michael Suplee  
Mike Koopal  
Ron Pifer  
Amy Steinmetz

**CALL TO ORDER**

Ron Pifer (standing in for Amanda Knuteson) called the meeting to order and roll call.

**APPROVAL OF AGENDA**

Ron Pifer (standing in for Amanda Knuteson) moved to approve the agenda.

**APPROVAL OF MINUTES**

No approval of minutes.

**BRIEFING ITEMS**

1. Review of the Highest Attainable Condition and the Economic Affordability Process
2. Recap feedback from June 16th informational webinar and June 22nd NWG meeting

**WPCAC: Ongoing Discussion of NEW RULE 1. Temporary Water Quality Standards Variances– Michael Suplee, Water Quality Standards Specialist and Myla Kelly, Standards and Modeling Section Supervisor**

Meeting Goal: Provide WPCAC another opportunity to discuss with DEQ the temporary water quality standards variance rules

- Variances
  - Variance Rule Overview
  - Follow-ups to questions Received at 6/16 Webinar
- Water Quality Standards
  - Beneficial uses such as recreation, aquatic life, drinking water, agriculture

- Water quality criteria (numeric and narrative)
- Non degradation=protection of high-quality waters
- What is Temporary Water Quality Standards Variances
  - CWA tool-regulations found in 40 CFR 131.14
  - A time limited, customized water quality standard that identifies the highest attainable condition applicable throughout the term of the variance
    - A tool to be used of a WQS can't be met due to specific factors
    - Preferable to permanent removal and downgrade of a waterbody's beneficial uses
    - Allows time for treatment technology to advance and become less cost prohibitive
  - Variances are designed to encourage compliance with the Montana Water Quality Act and federal Clean Water Act within a reasonable timeframe.
- What Factors can be Used to Justify a Variance?
  - 1. Naturally occurring pollutant concentrations prevent that attainment of the use or
  - 2. Natural, ephemeral, intermittent or low flow conditions or water levels prevent the attainment of the use,
  - 3. Human caused conditions or sources of pollution prevent the attainment of the use and cannot be remedied or would cause more environmental damage to correct than to leave in place; or
  - 4. Dams, diversions or other types of hydraulic modifications preclude the attainment of the use,
  - 5. Physical conditions related to the natural features of the water body, such as the lack of a paper substrate, cover, flow, depth, pools, riffles, and the like; unrelated to water quality, preclude attainment of aquatic life protection uses;
  - 6. Controls more stringent than those required by sections 301(b) and 306 of the Act would result in substantial and widespread economic and social impact.
- New Rule I: Temporary Water Quality Standards and Variances
  - Implementing rules for 2019 legislation (75-5-320,MCA)
    - Department may adopt rules providing criteria and procedures for the department to issue a temporary variance to water quality standards if: (certain conditions are met)
  - These rules require conformance with 40 CFR 131.14
  - Applicable to all pollutants and available variance factors under CFR 131.14
  - Modeled closely after variance rules in 17.30.661 which are specific to upstream anthropogenic sources (adopted and approved by EPA in 2018)
- Elevating Reasonable Alternatives to a Variance
  - NEW RULE| Sections 3 and 4: Describe instances where an alternative to a variance may be applicable and eliminate need for a variance
  - Examples: a permit compliance schedule, reuse, trading, or land application opportunities or a TMDL where the permittee is meeting the waste load allocation
  - DEQ will work with the permittee to determine if there are alternatives; important because the development of a variance is a commitment of effort and time for both the permittee and DEQ
- How is Highest Attainable Condition (HAC) Defined?
  - In federal regulations, the highest attainable interim criterion or the interim effluent condition that reflects the greatest pollutant reduction achievable

- In Montana, this has translated as the highest cost for effluent treatment a community would be asked to pay based on the state's economic affordability process
  - Process well defined for publicly owned systems
- Economic Affordability Process
  - Developed by DEQ with municipalities, wastewater engineers, environmental advocates, other MT stakeholders in late 2000s
    - Accepted by EPA
  - Step 1: Estimate project cost that would occur from meeting the water quality standard; calculate its annual cost
  - Step 2: Calculate total annualized pollution control cost per household, including existing water fees, and new pollution control project (as an increase in the household wastewater bill)
  - Step 3: Calculate Municipal Preliminary Screener score based on the new wastewater fees and the community's Median Household Income. This step identifies communities that can readily pay for the pollution control; project vs. those that cannot.
- Economic Affordability Process, continued
  - Step 4: Carry out Secondary Test, derive Secondary Score. Test characterizes the socio-economic and financial well-being of households in the community and comprises five evaluation parameters which are compared against state averages:
    - Poverty rate
    - Percent low to medium income in community
    - Unemployment rate
    - Median household income (MHI)
    - Property tax, fees, and revenues divided by MHI and indexed by population
  - Step 5: Assess where the community falls in the substantial impacts' matrix. The matrix evaluates whether a community is expected to incur substantial economic impacts due to the implementation of the pollution control costs. If the applicant demonstrates substantial impacts, the applicant moves to the widespread test.
  - Step 6: The widespread test comprises questions asking the applicant about current economic, social, and population trends in the affected area
  - Step 7: If widespread impacts are shown, an applicant is eligible for an individual variance after demonstrating to DEQ they also considered alternatives to discharging (e.g., land application, permit compliance schedule).
- The Process Defines the Affordability Cap
  - If substantial and widespread impacts were demonstrated
    - See Graph
    - Example: Secondary score for community=2, affordability cap would be 1.5% of MHI (including \$ currently spent on sewer bill). If the community is currently paying > 1.5% of MHI for wastewater, the community would not have to upgrade its wastewater treatment due to the water quality standard
    - Example 2: Secondary score for a community=2, affordability cap 1.5% of MHI (including \$ currently spent on sewer bill). If the community is currently paying 1.0% of MHI for wastewater, the facility would be required to upgrade wastewater treatment with the dollar value differential between 1% and .5%, as annualized O&M.
- Optimization Requirement
  - Permittees applying for a variance must carry out an optimization study that:
    - Address facility operations and maintenance of existing infrastructure

- Not generally result in rate increases or major investment
- Benefits of Facility Optimization
  - See Graph
- Approved variances require that the actions identified in the optimization study are implemented at the facility as part of their MPDES permit (NEW RULE I (5))
- Pollutant Minimization Program (PMP)
  - PMPs are required under a type of variance at NEW RULE I (2) (k) (iii) and its federal equivalent at 40 CFR 131.14(b)(1)(ii) ((A)(3)). Often referred to as “HAC 3.”
    - Applicable to well maintained and optimized facilities
  - PMP comprises activities beyond facility optimization and the achievement of the highest attainable condition
  - Example activities to examine include
    - Breweries/distilleries-what is in their cleaning compounds. How do they dispose of the cleaning waters? Drain, recycle, any treatment?
    - Laundries-what is in their cleaning compounds?
    - Trucked pollutants
    - Restaurants or hospitals: potential nutrient sources related to the discharge of food waste, soaps, and detergents
    - Illicit or non-illicit connections to sewers
  - And any actions to help address any of the above
- Variances Developed by DEQ
  - Per NEW RULE I (10)
  - In many cases permittees will lead the work to support their application for an individual variance; DEQ will work closely with permittee and EPA in this process
  - Situations may arise for which DEQ itself may develop variances
  - DEQ has indicated to the Nutrient Work Group that a multi-discharge variance for nutrients for small community wastewater lagoons is a good approach
    - There is sufficient commonality among systems to do this
    - DEQ would lead this effort
- Variance Rule: Procedural Overview
  - (1) Application
    - Key Components
      - The pollutant
      - Applicable variance factor(s)
      - Variance will not lower current water quality
      - WQ standard cannot be met
      - Facility optimization study
      - Proposed highest attainable condition and term of variance
  - (2) DEQ Review
  - (3) 45-day public comment period and hearing (assuming DEQ accepts variance application)
  - (4) DEQ approval, approval with conditions, or denial
  - (5) DEQ submittal to EPA
    - Within 30 days
  - (6) EPA Review
    - Approval or disapproval
  - (7) Approved variance can be used in MPDES permits\*

- \*Variances require a reevaluation every 5 years
- Pre-Rulemaking Opportunities to Comment and Learn about the Rule
  - This webinar
  - Nutrient Work Group meeting June 22, 2011(9-11am)
    - Open to public, see DEQ website “Advisory Councils and Work Groups”
  - Water Pollution Control Advisory Committee meeting June 24,2022(10-11am)
    - Open to public, see DEQ website “Advisory Councils and Work Groups”
- Rulemaking Timeline for Variance Rule
  - 45-day public comment period starts July 8,2022
    - Following publication of notice in MT administrative register (MAR)
    - Public hearing: August 18, 2022
    - Department response to comments
    - Department Head signs rule no later than September 27, 2022, rule filed no later than September 27,2022
  - Publishes by October 7, 2022
- Follow-Ups from 6/16 Webinar
  - Will the EPA 2022 financial capability assessment affect this variance?
  - What is the status of variances under DEQ Circular 12-B?
- EPA Proposed Financial Capability Assessment (2022)
  - EPA is contemplating adding two new economic factors to the process of assessing affordability
    - Lowest Quintile Income Indicator (LQII)
    - Poverty Indicator (PI)
  - These factors could be integrated into DEQ’s existing economic affordability process
  - DEQ has asked EPA to reaffirm the basic tenets of the process we have in place for economic-based variances

### **Questions/Comments/Discussion**

1. Lee Bruner Commented-Question on AMP and narrative standards Question-What’s the next milestone we are going to see on that? Question- What’s the approximate timeline? Michael Suplee responded: throughout June and July they were not meeting as often as before. Department put out a proposal in the fall. The proposal had a lot of questions and concerns. We revisited it and put out a new proposal, a new rule, and a new circular with more detail in late April early May. There was another action the EPA took where they acted on parts of a statute that led to senate bill 358 and the AMP process. He goes on to say they are waiting for more clarity from EPA on what they feel about the proposal they put out. Letting the stakeholder group have time to look at it and begin having biweekly meetings starting in August. At which point they will have more clarity to bring to the table regarding EPA’s perspective on the proposal and any modifications from their perspective. Division administrator has stated their goal is to complete the AMP process by the end of the calendar year, but they have set no hard deadline being aware that the process takes time.

2. Mike Koopal Commented- Question related to 12a and 12b process, Question-was there a fiscal note or any funding attached to SP358 to assist DEQ? Question- Do you think DEQ has the staffing and financial bandwidth to administer these once and if they are adopted? Myla Kelly responds- having a very clear process that they can follow, keeping in mind there is always different financial information, and each water body is different. From a variance perspective, having that process in a template laid out very clearly for the DEQ to move to a variance request and an application through a department

approval to EPA approval, is the key to not expending valuable time. Getting it right from the variance perspective at the beginning and getting that template is critical to the process of approving and moving variances forward. Variances are always going to be an important tool under the Clean Water Act, so we need to put in that time to get that process right. Myla Kelly goes on to say- on the AMP side there was fiscal funds set aside in order to hire an AMP Scientist Coordinator position.

3. Amy Steinmetz commented- she is the former WQD administrator. She agrees with Myla Kelly that there are some funds for AMP Scientist Coordinator position, but they are short term. Over the long term they do not have funding for that position. As they work through the Adaptive Management Program (AMP) it is highly likely they will need to find further funding for that position. While they did the fiscal note they did not get long term funds for that, and it will be a role the DEQ will need in the future. Michael Suplee responded one aspect of the new variance position regulation at are somewhat different from the ones operated under 12b (although there is a 45-day public comment period and then there is a hearing) the rules that before you now will go through the official rule adoption process publication in the Montana administrative registrar etc... The early rules that were adopted required that this occurs for every single variant. The new rules will not require this process for every variant they only require the opportunity for public comment and response to comment. They will not require each to be brought through the mar-notice process. Mike Koopal responded- it would be important as a future topic item to look at the long-term funding question with DEQ to provide advice and potentially action on behalf of WPCAC.

4. Lee Bruner Commented-Question on DEQ Circular 12a, does it still exist in law or in rule? Question-What role does DEQ Circular 12a play at this point? Kurt Moser responded he is legal counsel for the department, 12a is American nutrient criteria for the state of Montana, those are adopted by the Board of Environmental Review in 2014 approval by EPA for the Clean Water Act purposes in 2015. SP358, when it was passed, it directed to agency to repeal those. DEQ didn't act to do that because they were going to act repeal when we went forward with adaptive management rules. However, SP358 immediately directed the agency to start using narrative standards instead of numeric for purposes of permitting. EPA ultimately acted on the statute for purposes of the Clean Water Act and disapproved that provision that required us to use narratives for all waters and related dischargers that used to be subject to 12a. For purposes of the Clean Water Act DEQ 12a is still in place, at present time DEQ 12a is still in effect. For purposes of federal law and DEQ had recognized that, however DEQ is still moving forward with the objective of SP358 to remove those standards and to move to a narrative approach for 12a waters. That is the relevance of 12a at this point.

#### Public Comment:

1. Amanda McInnis representing the Montana League of Cities and Towns. Sent an email to WPCAC to request, for the committee to delay moving forward with the new rule package until the adaptive management package can go along with it. She disagrees that they are independent. She thinks that the variance needs to be a piece of the pathway to compliance, but we need to understand better how that variance works with this adaptive management framework. None of this has been discussed, our concern now that moving this rule forward now independent of the AMP package returns us to the pathway before senate bill 358. We need the process to continue to mature and to understand how the variance works within the adaptive management framework. Requesting delay that this not go forward right now.

The meeting was adjourned at 11:03 AM.