

Oregon's Water Quality Standards Project
Rulemaking Work Group: NPDES Source Issues, Meeting #17

Tuesday, August 17, 2010
EPA 5th Floor Conference Room
805 SW Broadway Street, Suite 500
Portland, OR 97209

List of Attendees – PM Session

Workgroup Members (present for all or part of the day):

Michael Campbell, (Stoel Rives) Rich Garber (Boise, Inc.), Lauren Goldberg (Columbia River Keeper), Ryan Sudbury (Confederated Tribes of the Umatilla Reservation), Kathryn Van Natta (Northwest Pulp and Paper Association),

Other Representatives (present for all or part of the day):

Spencer Bohaboy (DEQ), Kim Cox (City of Portland), Jannine Jennings (EPA), Andrea Matzke (DEQ), Neil Mullane (DEQ), Mary Lou Soscia (EPA), Debra Sturdevant (DEQ), Jennifer Wigal (DEQ)

Also Present:

Donna Silverberg, DS Consulting, facilitator, Michele Thompson (DEQ, note-taker)

List of Handouts and Presentation Notes Available

- ❖ Events Related to Oregon Toxics WQ Standards Rulemaking
- ❖ Outline of Fiscal and Economic Impact
- ❖ Statement of Need and Fiscal and Economic Impact
- ❖ Proposed Rule Language Package - Draft
- ❖ Divisions 41 and 42 Proposed Rule Changes
- ❖ Divisions 41 and 42 Proposed Rule Changes to Clarify Regulation Around Nonpoint Sources of Pollution
- ❖ Implementation-Ready TMDL Compliance Scenario

1:45 Meeting Commencement

NOTE: This meeting was a continuation of the morning's Water Quality Standards Non-NPDES meeting. Initial background information related to DEQ's Fiscal and Economic Impact outline was presented at that earlier meeting. This meeting focused on the issues related to NPDES only.

Jennifer Wigal – Fiscal and Economic Impact

Jennifer began by walking through, specifically, how DEQ would approach analyzing the fiscal and economic impact for NPDES permit holders and to articulate the difference between baseline and revised criteria. She included a graphic on the board to express what she was saying.

Jennifer noted that what is included in the water quality standards regulation is very broad. The rulemaking for iron, arsenic, and manganese is a separate rule now (the baseline for iron, arsenic, and manganese is on Table 20). The delta that we will describe in our fiscal analysis is the new criteria that we're proposing under the rule. What we will be talking about is related to all of the other Human Health Criteria that we are revising that are becoming more stringent and the implementation tools that we have developed to support/mitigate the rules. The baseline is 6.5 grams per day and the revised is 175 grams per day. Again, the analysis will not include arsenic, iron, and manganese.

SAIC, who did DEQ's initial analysis in 2008, identified 6 primary pollutants (including Arsenic) that will have an impact. DEQ will identify which pollutants are most likely to impact sources and which methods for addressing them will be adding costs. A lot of it's going to be qualitative, unless we get real good numbers from somewhere I don't know about.

Comment: The problem with this analysis is if you just rely on the APA Fiscal Impact Statement requirements, then you will miss the different atmosphere in which these changes are occurring. DEQ will be paying attention to these issues in a way you have not before and that alone will have a fiscal impact on our businesses. This analysis may give the EQC a false sense of what the real impacts would be.

Some background on DEQ's proposed analysis: To date, DEQ has explained to the EQC that the rule, with its changed HHC, will be exacerbating existing problems. Because of this, we have proposed that there will be two parts:

The first part will sort out which of our criteria are more stringent and which are of concern. The current belief is that all of them will become more stringent one way or another. There is no new science which results in them becoming less stringent.

The second part will be to include an "Other Discussion of Realities" portion that will address some of the issues about the different atmosphere you mention.

Questions/Comments

Q. Are the QL automatically incorporated by reference in the Oregon Rules or do you actually have to adopt new QLs?

A. They're not in regulation. Those are spelled out in the RPA IMD. [From Spencer Bohaboy] Also, those in the future will be in the Schedule D language in the permits.

Q. The compliance point or limit will be the QL?

A. Yes. And that's how it is today.

Q. If EPA promulgates a new method in the middle of a permit, do you have until your next permit application before you have to go out and measure?

A. If the EPA were to promulgate a new method in the middle of your permit, which is rare, then at your next permit renewal, the future monitoring requirements would be at the QL and for the compliance point, theoretically, that would also become the QL.

The SAIC identified six pollutants, including arsenic, in which they felt facilities would have to do more under the baseline. Three of those six pollutants would require that more be done under revised criteria based on a higher fish consumption rate.

The other things that we'll be identifying here are which criteria are becoming more stringent, identifying whether the QL has an impact on or not, and identifying which waters we listings for.

Comment: When the FIIAC report was done, we were first trying to quantify numbers about 17.5 and then up and then in the middle of it, we got the 175 number. Then we had a target we were shooting at. The way we look at it is you will have more stringent water quality effluent limits to comply with. The question is how are you going to legally comply with those? What implementation measure or what technology, what pollutant minimization plan will you use to do that? And what will be the associated cost? If you treat, there's an associated cost. We believe, through our work back in 2008, that we've captured what we know about treatment technologies and we can trot that out and supply that again and that's just the "we're gonna treat it" option, but we don't know if it works. No one knows if you can do that kind of work for pulp and paper mills, which might make it prohibitive. In most cases, the treatment technology is worth more than the book value of our mills here in the Northwest. We've worked long and hard to get some implementation measures that can work for us, which we're still working on.

The question is, how do those implementation measures allow us to not only minimize pollutants that we have in our effluent, but also legally comply with the Clean Water Act? Will those implementation measures work on the ground? We are still trying to figure out which implementation measures will allow us to meet the CWA and mitigate the costs of straight out treatment (which is cost prohibitive). We're trying to think about this, yet the implementation measures aren't quite done. We still feel that some of them still need more work. If there are only two implementation tools available, this will have a big fiscal impact on industry.

Q. Do you also have to analyze the fiscal impacts of the 303(d) list under the new revised water quality standards?

A. No. The 303(d) list will not reflect these standards until they're adopted and approved by EPA. The soonest that these water quality standards that we're talking about today would be included in a 303(d) list would be the 2012 list. We're working on the 2010 list which was always based on the 6.5 grams per day.

Debra Sturdevant – Update on Background Pollutant Allowance

Deb refreshed the group's memory by noting that revisions were made to this portion of the rule based on discussion at the last meeting. The revisions were sent out and DEQ received comments from several people. Those revisions were further refined internally. Last week, the latest revision was sent out.

Debra stated that this essentially the final form, but does not want to close the book on further revision. This will be revisited later. DEQ is still working with EPA, which may result in more changes to the language because DEQ wants to ensure that EPA reads and approves it as a standard.

Comment from Jannine Jennings: After discussion with both the Director and Associate Directors at Region 10, we have decided that the best thing to do is to sit down with Neil Mullane, Jennifer Wigal, and Debra Sturdevant and walk through the document so that Region 10 fully understands what's here (which they've agreed to do). Then we can make a final call and let everyone know where we come out on this. This rule is new, innovative, a bit on the

cutting edge of what DEQ was asked to work with and it has done a good job of considering the principles that are out there and this will allow us to take the next step forward with DEQ and call this a standard and approve this. We've been targeting late September to get something on our calendars to have that discussion.

Q. Can that meeting schedule be accelerated?

A. Not likely as this has to do with multiple schedules.

From Neil: Are there any specifics that EPA can relate to us about what you might want changed? Will it be a few word changes and you think it might move forward or is it a major rewrite?

A. There is discomfort about allowing an exceedance above the numeric criteria that we have put forward. There are some in our office who have expressed discomfort with the .3 temperature allowance. As some would say, it is a way around things and a loophole, and a big benefit to folks. There's concern that this may be letting people off the hook. So that needs to be explained. What is it? What are the limitations? Why is it still protective of human health? You've also played around words so that you're addressing it as a water body value so that you can say it's a standard, but really it's a permit thing and should be evaluated on a permit basis, not as a water quality standards basis. It's those two things that have people asking questions. Are there really controls so that this isn't open to everybody and everything and a wide open blanket of allowances? Going through and explaining the sideboards within this rule will help deal with that.

Response: This makes it difficult for everyone to do a fiscal impact. We may have to do one fiscal analysis with the background pollutant allowance, and one without to be safe.

Comment: While this is a novel approach, if there is a discharge that is insignificant and it's a mathematical exercise that determines a water body is over the criterion, we don't really have a tool for anything other than discharging at the criterion. My pitch would be: if you don't think you can approve this, don't come back and say "No we can't approve this". What I would ask is that you say, "Here's how we think you could do it. It's not EPA's job, it's a discretionary call on the state's part, it's not our job to tell you how to it, but here's a way we think we could say yes or come back and say there's just no way to do this.

Response: [From EPA] I hear what you're saying and why this is needed. What was discussed within EPA was that we're not seeing this in other parts of the country because no one else is doing the monitoring and don't have the environmental oversight and environmental groups scrutinizing the permits as you do here in Oregon. But when they do and when we start to do water quality monitoring of the receiving water, this is going to come up all over the country. It's not an issue unique to Oregon, it's not an issue that is only here because we have this criteria increase. I'm going to do everything I can to sell that. It's going to be hard, and I think we will be successful. I have told EPA that this is a make or break aspect of the rule.

One member noted that we are here, at the end of the day of this long process, only knowing for sure what two of our tools will be. We will have to do the cost analysis two ways, which will drive up the costs of compliance numbers. If there's anything that we can do to facilitate this we would be happy to, including going with DEQ to the tribes.

Comment: One thing to reiterate to EPA is that this is not a large door. We're looking at this more as a little hole in the attic. When an industrial discharger that is going to have trouble getting a variance to deal with a background pollutant issue and when an intake credit won't work as we've defined the other intake credit, we need this to work. And we also need it to work in such a way isn't so narrowed down that it doesn't work at all. It still has to be a road, not a goat trail.

Comment: There was discussion on this and I thought there was going to be more flexibility on the intake water issue. We've talked about this a dozen times. The one that was discussed on the 10th is extremely narrow in terms of the intake water and the discharge to the receiving water.

Response: That has been changed. We're saying that it doesn't matter where you get your intake water; it matters that sources not increase the mass load of the pollutant in the receiving water body. You can increase the concentration, but not the mass.

After some discussion for clarity about intake and discharge: Debra felt that this is as far as DEQ can take this. If you are increasing load and concentration, it would be very difficult because we are already on waterbodies that exceed the criteria. So it's not just that they're using this water and reducing flow, they are actually adding mass to a water body that already exceeds the criteria. Part of DEQ's rationale and justification for this provision is that the incremental *de minimis* increase in concentration is insignificant from a human health risk point of view. The other point is that the facility isn't exacerbating the existing pollution problem by contributing additional pollutant load to the water body. Because the water body already exceeds the criteria, a TMDL needs to be developed to reduce the total pollutant load. The TMDL will look at the total load, and the sources of those loads and will develop a strategy for how to reduce the total load and meet the water quality criteria by allocating allowable loads to each contributing source. If we allow an increase in load, this part of our justification and rationale for why the provision is okay and protects human health is weakened.

From Neil: We are setting up how you're going to calculate this by what the surface water intake mass is. [Example used was a surface water intake mass of 10]. In addition to that, you may have some city water, you may have brown water coming in, or other sources of water that you use in your process, and you can add that. But when it discharges, it can't be over the 10. The concentration can go up by three percent, but you can not exceed the 10. You can add groundwater, and that groundwater may be higher than 10, but when it discharges, it can't be above 10.

Response from commenter: My conception of the problem is a little different: it's ubiquitous background pollutants. If it's a background pollutant that's unique to the Willamette caused by some source that's one thing. But just like arsenic, I think our next candidate is going to be PCBs. It's things that are ubiquitous that will be difficult, so changing your source is not going to really help you. If your source is groundwater, it's going to be in groundwater; if your source is Bull Run, then you're putting it in the Willamette, it's going to be there. That's the problem we're trying to solve. I guess this is one area where I'd like to have more conversation.

Facilitator: I thought I just heard Jannine say that, from EPA's standpoint, this pushes right at the edge. She's not sure she is going to get what is proposed, but she is hopeful that she will. Now I hear you suggesting pushing beyond that edge. Am I hearing that right? I've also heard people say that this is really important, so how far do you want to push this or are you trying to see if you've pushed it far enough?

One member stated that he felt that there are ways that this could be rewritten to be more protective and that there could be more discussion on this one issue, rather than the whole thing.

Response: From the conversations we've had over the past year and a half, it was expressed that adding increases of mass would seriously compromise DEQs ability to explain to the EPA that this is a protective provision. When we're talking about adding mass to a water body, I think it's one thing if we can say that what came in and what goes out is the same. Not adding mass to a water body is a really critical argument for us in order to make this successful.

Q. What if you maintained the same concentration?

A. There still remains some challenges with that since you are effectively adding pollutant to the waterbody and for some of these bioaccumulative pollutants, that becomes a very real issue. I know there situations throughout the country where added water, water with pollutants in it that are added to a waterbody presented some very real, very serious issues. So just at the outset when we are talking about permitting facilities to add pollutants and water from other places beyond upstream and then don't about putting a cap on mass, I think we start wandering and bells start ringing in EPA's head. How does this relate to produced water in coal bed methane areas? That is a very serious, very political issue in EPA that they've been dealing with for years...I think it's key for us to continue to have limitations that we have in the provision the way it's written and we've given it a lot of thought and had many hours of conversation about it and we thought of many many permutations, both in this room and internal to DEQ and in conversations with Jannine. I think what we've put together over all these conversations we've had in the past year and a half represents the best package in terms of scope, outcome, and environmental protection that we can put together and still stand a reasonable chance of having EPA approve this as a provision.

From Jannine: And I would just echo what Jennifer said. When we start talking about the water that's coming in from another source, groundwater or offsite, it will be looked at from our permitting program very differently than water taken in from the same water and put back out. That's a stretch for them. Going outside of that waterbody, in every other situation that we address that in, and that they're involved with, and where we're permitting in, that's looked at as a source of that pollutant into the receiving waterbody. I would have much more difficulty selling them on that concept because that is not how we're treating mines in Alaska, and other facilities.

Q. Can you include the hydrologically connected concepts?

A. That was in here when it was written as a source, but since we changed it to be the load, that was lost, so we can look at how to put that back in.

Comment: The percentage above background is not the approach that prevails. There are other ways of rationalizing this. I would like to keep the conversation going on this topic, but feel it is time to send it to EPA.

Returning to the Fiscal Analysis.

Q. What are the monitoring requirements that the DEQ mentions under permit implementation on page three?

A. Whatever the current requirements are to monitor for any particular type of pollutant, that's the baseline that sums up how we're going forward. We are saying that the requirements are already established.

From Kim Cox (City of Portland): It seems to me that the implementation methods that we would be looking at would be a variance, a potential variance, and/or a pollution minimization plan, which I would assume would mimic what we're doing on the 737. Without any additional guidance or direction, to that limit in terms of what we can do with pollution prevention, we can try certain things. The analysis that would go into this, e.g. what you have, what the source is, what you can do, certain aspects, I don't think it would be much different from our 737 work.

Response [from Jennifer Wigal] ... I tend to think of it in terms of concentric circles that one might be more entailed than the other, but 737 would probably be a good subset of the things we might consider in our analysis. I think when you are talking about meeting water quality based effluent limitations, there's a little more push under the Clean Water Act about what you can achieve technologically than what we've set up to occur under 737.

DEQ requested that group members get any cost analyses information to DEQ in three weeks, Friday the 10th of September. DEQ will get their work to the group on September 30th or October 1st for a meeting on October 4, 5 or 6.

Q. On page 7 and 8, on the air source group, you say that you welcome input. How much work do you want us to do on this?

A. Right now the way we see the air source play out is through the TMDL process. Any subsequent response would require DEQ to do some kind of rulemaking to then be able to limit those pollutants. That subsequent rulemaking would need to include its own fiscal analysis. DEQ would start from describing that process and saying a fiscal would be done at that time.

Q: Will the municipalities be updating the analysis they did during the FIIAC review?

A: Unknown at this time

THE next meeting (scheduled for September 22) will be rescheduled for the first week of October. A doodle will follow.

NOTE: IT has been rescheduled for October 4, 2010.
October 27 will be held for any final wrap up needed.

Meeting adjourned: 3:30