

Water Pollution Control Advisory Council (WPCAC) Meeting
May 4, 2006 10:00 a.m. – 2:00 p.m.
Director's Conference Room 111 Metcalf Building

Call to Order

Chairman Terry McLaughlin called the Water Pollution Control Advisory Council meeting to order on May 4, 2006 at 10:00 a.m.

Roll Call

Director Richard Opper introduced himself, welcomed the members to the Council and thanked the members for participating in the Council. A round of introduction was performed.

Council Members Present: Terry McLaughlin (Chair) John Bengochea, Karen Sanchez, Matt Clifford, Roger Muggli, Stevie Newman, Earl Salley, Don Skaar, Dude Tyler, Michael Wendland, Kathleen Williams.

Department Personnel Present: Bob Bukantis (Council Secretary) Water Quality Planning Bureau (WQPB), Planning, Prevention and Assistance Division (PPAD); Richard Opper, Director, Bonnie Lovelace Water Protection Bureau (WPB) Permitting and Compliance Division (PCD); David Bowers, Hazardous Waste Site Cleanup Bureau (HWC), Remediation Division (REM); Chris Levine WQPB, PPAD; Cindy Brooks Legal (REM), Director's Office; Petrina Fisher (Administrative Support) WQPB, PPAD.

General Public Members Present: Bob Anderson, Hydrometrics.

Approval of [Agenda](#)

Terry McLaughlin asked for additions or changes to the agenda.

A motion to approve the agenda was made and seconded. The motion carried and the agenda was approved as written.

Briefing/Update Items

[Member Orientation](#)

Bob Bukantis and Bonnie Lovelace gave a Power Point presentation to help orientate the Council (see orientation presentation). Council members are encouraged to designate alternates by the next meeting. It was requested to have all the Council members provide email addresses if available to allow for ease of transferring minutes, agenda items and documents out to the Council. The Council requires a quorum (simple majority) for making motions or recommendations at any meeting; this can be done in person or via conference call.

Bonnie Lovelace reviewed the rulemaking process (see orientation Power Point presentation). The formal rulemaking process can be no more than six months between initiation and adoption without a new notice. The Board of Environmental Review (BER) can issue a new notice to extend rulemaking when necessary. The Department will change permits as needed when federal rules change but will not be more stringent than those standards without providing

specific proof to back up the more stringent standard. Montana is currently changing from technology based permits to water quality based permits because water quality based permits are more stringent, especially on the small receiving waters. DEQ is getting more appeals of permits because of the shift to water quality based effluent limits and Total Maximum Daily Loads (TMDL) to clean the impaired water bodies. DEQ does give permit holders two permit terms to come to terms with new permits.

Bob Bukantis reviewed water quality standards (see orientation Power Point presentation). Permits can be given to Outstanding Resource Waters (ORW) as long as they do not cause a permanent change or for a permanent discharge. When determining existing water quality for nondegradation calculation, permit writers use the newest existing data and define what monitoring is required. Data from USGS may also be used to help determine the permit limits.

Matt Clifford asked what the policy was on conflict of interest.

Bonnie Lovelace said that because this is council only acts in an advisory capacity and does not make final determinations, it is not necessary for Members to recuse themselves from an action item. DEQ would appreciate the Members open opinion as long as it is done in a professional manner. Members should be upfront about their involvement in an item but still express their opinions on the issue.

Terry McLaughlin said the make-up of the Council is designed to gather questions and information regarding issues to allow the Council to make informed recommendations. It would be a disservice to the Council if the Members did not express their views openly and honestly. This Council is only an advisory council to DEQ and not BER. DEQ does forward the Councils recommendations to BER and BER does query Council's view on particular issues that come up. The Council does have the option to take no action on an item and not submit a recommendation.

Action Items

Selection of New Chair

Terry McLaughlin said the Council has two options: to ask the current Chair to continue for the remainder of the year or to nominate and vote for a new Chair.

There was discussion by the Members on their support of keeping the existing Chair in position to help with the transition of the new Members. No other Members raised interest in taking the role of Chair. Terry McLaughlin indicated that his philosophy for being Chair is to not have the proceedings be too formal to allow the Members to be comfortable with each other so that the Council can discuss the difficult issues. The Chairman's job is just to run the meeting and keep the Members on track. A Chairman should still be able to ask questions without influencing other Members opinions. Terry McLaughlin indicated that he appreciates a lot of involvement, questions and recommendations because it is a means of getting better as a group. Terry McLaughlin indicated that he would be willing to remain Chairman for the remainder of this year with the expectation that another member takes over next year.

A motion was made and seconded to retain Terry McLaughlin as the Chairman for the Council for the remainder of 2006. The motion carried and Terry McLaughlin is the Chairman for the Council for the remainder of 2006.

Repeal of Upper Blackfoot Mining Complex Temporary Water Quality Standards

David Bowers gave a [Power Point presentation on the Upper Blackfoot Mining Complex](#) and passed out a handout (see presentation and handout). Two compelling facts: 1) most of the remaining work found in the current implementation plan is located on public lands and it is highly unlikely that the cleanups targeted on these lands will be completed under the temporary standards frame; and 2) most State and Federal agencies will proceed with the cleanup of the UBMC regardless of the temporary standards.

Don Skaar asked if it was safe to say that the standards could not be met at the treatment plant if the temporary standards were revoked. If this is so, would this lead to a fine situation?

David Bowers said that currently the discharge permit could not meet the B-1 standards. A fine could be one possibility but not necessarily occur. Generally if a liable party is moving forward and making the effort to research and develop the technology, making the effort to meet those standards and are proceeding at what is considered an acceptable pace, the Department has the discretionary authority to withhold those fines.

Kathleen Williams asked if the temporary standards are currently being met.

David Bowers said for the most part, the temporary standards are being met. Out of the discharge system there has been a few exceedences but within the percentage of allowed exceedences buffer. The point of having temporary standards is to have these standards temporarily to move forward with remediation to bring the water up to the desired quality. The temporary standards are less restrictive in the metals than they would be for a B-1 water body.

Matt Clifford said there are upstream tailings that are mostly on public lands that are the sources largely responsible for the high level of metals in the area. What is the difference between the temporary standards and the B-1 standards? If the temporary standards were rescinded, all further focus from Asarco will be on that point source permit and some of the funds that would have been used for the upstream removals may be shifted to the point source. With Asarco shifting focus it probably will not slow things down in the big picture because the FS was going to address these issues regardless of which option is chosen and the temporary standards plan was not addressing the issues on public land very well. Rescinding the standards will not necessary stop a lot of good work that was going forward as Asarco seems to feel will happen.

David Bowers said that from Asarco's point of view, they will focus on the waste water treatment plant and on their private lands. However, the Forest Service is heavily committed to the process of addressing the issues with the dam, the tailings behind the dam as well as all the contamination that is on public land that was under the AOC which was part of the temporary standards plan. The problem with the temporary standards plan is the timeline of implementation.

Bob Bukantis said an example, that as the magnitude of difference of the levels of protection for zinc ranges from 2,700 to 22,000 µ/L in temporary standards. Zinc is a variable standard that depends on the hardness of water. The most stringent standard for zinc on the books currently is 37 µ/L. There is a large difference between the B-1 standards and the temporary standards.

Dude Tyler asked how the change in parameters would accelerate the cleanup? Is the reason the Department wants to revoke the temporary standards because progress has not been achieved?

David Bowers said the State had originally wanted to have an order to proceed with a Remediation Investigation Feasibility Study (RIFS). Based on the decision made by the Director of DEQ in 1993, they allowed Asarco and Arco to proceed at their own risk with a voluntary interim action with the belief that Asarco could get it done quicker than the process could. In 2001/2002 the Department activated a lawsuit against Asarco and Arco to obtain the RIFS. The Department is currently moving forward towards the RIFS which would encompass the identified stream segments and other potential sources of contamination that would be in the area. The Department would then be given the capacity to further the cleanup regardless of the developer on site. This can be done through legal action if necessary. The Department is getting funding and authority to move forward with these cleanups at a pace that is more appropriate. FS has indicated that they have a commitment to move forward with the AOC.

Kathleen Williams asked if this is an eight year plan, why is the Department doing this now and not waiting two more years until the standards expires? Is the timeline so irretrievable that two more years would not make a difference?

David Bowers said the last two years of the implementation plan called for monitoring to assess how effective the work was. At this point the work may be completed but the monitoring would not be done.

Jon Bengochea said the ability to come up with a realistic time line by allowing the Federal and State process to go at their own rate is not very realistic because it is at a pace out of the Departments control. The Department does not have the authority to enforce a specific timeline.

David Bowers said the from the perspective of temporary standards and the way the implementation plan was set, it does not have the kind of controls necessary for the public lands. Choosing option 2 could lead to having the plan modified or a schedule could be developed that would only address Asarco lands. The State Super Fund program does not separate public from private land and works with Federal and private entities to clean up the pollution.

Don Skaar asked what is Asarco's defense for their tardiness of meeting the conditions of the implementation plan?

David Bowers said it is the same reasons presented today which includes the buyout, the bankruptcy, and the AOC negotiations which were all extremely disruptive to the implementation plan.

Bob Anderson said one of the main issues Asarco sees that caused the tardiness is that before work could proceed on public lands, the AOC needed to be completed. This took years to negotiate. A second reason progress has been slow is because of financial reasons, which includes financial hardships that lead to bankruptcy. Reclamation has occurred and ~\$200,000-\$300,000/year has been spent in this area. The AOC has now been signed and is no longer a road block and Asarco is beginning to make money as the price of copper has increased. Asarco was hoping to get things back on track now that they could do it. Rescinding the temporary standards at this time does not make a lot of sense. A better option would be to monitor the situation for the next year or two. If things do not get back on track at that point, then rescind the temporary standards. The schedule David Bowers presented is from the original implementation plan. There was a provision in the temporary standards regulations that indicated that the schedule will be extended automatically for a period of two years if the negotiation of the AOC takes longer than two years to get the order signed. The schedule should be extended two years. There have been problems in the past but if the Department put some pressure on them it would help them get back on track and stay on track. The pressure may come from modifying the schedule using option two and putting milestone in it that Asarco must meet or the temporary standards will be rescinded. The temporary standards requires Asarco to do work and without them Asarco may choose to do nothing in the area to clean it up. The discharge permit would be out of compliance if the standards go down and may lead the money that could go to on the ground work to go to legal issues.

Matt Clifford said the State could use the Clean Water Act and Super Fund programs to work on a compliance schedule or negotiations to get the area cleaned up and have the backing of fines. If you have more leverage on the company, how do you anticipate getting less work done?

David Bowers said that using the Super Fund program would have a scenario in which the Department could issue fines if Asarco was not moving forward with cleanup at an appropriate pace. In the rule change proposal where the Board is proposing to rescind the standards, there is a very important section that says "to rescind the standard, or alternately the Board could modify the implementation plan if there were convincing evidence that the plan needs modification." Since there is no evidence that a modified plan would assure continued progress in implementing the plan, the Board is proposing to terminate the temporary standards to return the streams to B-1 standards.

Chris Levine said that Asarco was not given the two year extension so the original schedule is the one the State legally has to use. The way the temporary standards were written did allow for an automatic extension of the temporary standards if the AOC negotiations took over two years. However, through a series of miscommunications, this extension is a rule change and does need to go through the rule change process to make this happen. Asarco needed to come to the Department and ask for the extension and change the rule. Until Asarco asks for the extension, the end date is May 31, 2008.

Terry McLaughlin said that it is troublesome that this was originally negotiated in good faith and now Asarco, regardless of their level of performance to date, appears as if they are going to have that time frame pulled away from them without being given an opportunity to demonstrate success at that 2008 deadline. What is the upside of pulling these temporary standards out in terms of making things happen in a better manner?

David Bowers said that the issue is complex. Based on the directive from the Governor and the Forest Services commitment to move on this, the temporary standards do not act as much of a rudder for public lands to go through this process.

Dude Tyler asked what was the rationale behind issuing the temporary standards in the first place?

Chris Levine said the temporary standards gave Asarco relief on their treatment system permit and it gave, with the implementation plan, all the engineering plans that were required under the schedule. This allowed them to not deal with a lot of legal issues and put more money on the ground faster. Their intent was to do work on the Forest Service lands using corporate or other money as it became available.

Cindy Brooks said the State Super Fund program recommends the temporary standards be revoked. Temporary standards should be considered as a gift from the Department as a reprieve from water quality violations. In return the applicant agrees to follow an implementation plan and a schedule in exchange of not being subject to penalties for water quality violations. In this case Asarco asked for the temporary standards and has failed to comply with the plan and schedule. This is the third time Asarco had been brought before the Board and warned to get back on schedule and back on track. The temporary standards statute says that if the applicant is not complying with the temporary standards and the plan, the Board shall revoke the temporary standards; it is mandatory. The Department wants Asarco to put their money into their treatment plant to meet B-1 standards rather than doing monitoring and maintenance of the system which is all that has been done up to this point. There is a recognition that the system needs to be assessed and enhanced and it is unlikely that the plant was designed to meet B-1 standards when it was built.

Roger Muggli asked if Asarco was given the chance, could they get close to getting back on track and get close to meeting the requirements laid out in the implementation plan? The amount of money Asarco would be willing to put in to cleanup would decrease the amount the tax payers have to pay.

David Bowers said that the cleanup of Mike Horse, the Beartrap and the Upper Blackfoot will go a long ways in getting the waters close to B-1 standards. The waste water treatment plant is undersized by half of what was proposed because Asarco could not secure enough land to provide enough surface area to provide effective removal of zinc in that system. Asarco, as bound by their Chapter 11 bankruptcy, cannot proceed with work on public lands so their focus can only be on their private holdings.

Terry McLaughlin asked what percent of completion is Asarco at in the complex?

David Bowers said Asarco is at 90% completion for monitoring and 20% completion for reclamation.

Roger Muggli asked what scenario would end up closer to being cleaned up in May 2008?

David Bowers said DEQ and FS are going to proceed with the public lands. DEQ is going to proceed with the lawsuit to Asarco and Arco to work on all other lands including public lands that is not included in FS land. Asarco is going to continue to financially look after its own holdings.

Kathleen Williams asked if the Forest Service supports the DEQ proposal?

David Bowers said that the Forest Service does not oppose the proposal.

Kathleen Williams commented that she would like to know what it would take the FS to support the proposal, not just have no opinion about it; agencies need to actively be working together on these issues.

Matt Clifford said that the company has been in financial trouble for at least five years. Grupo Mexico took a lot of very valuable assets, including some large copper deposits, and transferred them to Grupo Mexico. They took a lot of sites like this one of Asarco's that were big liabilities from across America and transferred them to Asarco, creating an entity that for financial reasons would be completely gone if it was not for the copper. Everyone knew that Asarco was going to go bankrupt. It seems like this was part of Grupo Mexico's plan all along.

A motion was made and seconded to recommend to DEQ and to forward the recommendation to BER that the Council agrees that option #3 is the appropriate response to take and that the Council supports DEQ. Nine approved and two disapproved this motion. The motion carried as submitted.

Kathleen Williams said it would be useful to put the old standards in the notice so the public can compare them with the temporary standards. To create incentives to get the company to step up and cleanup, the language may need to be altered to say the goal is to cleanup to B-1 standards and the company is welcome to provide alternate proposals so that it is not so regulatory.

Stevie Neuman said that it seems that even though the documentation and the presentation have indicated that Asarco has been a little late it isn't like they ignored the situation. Does the dam hold useful water or only sediment dirt? Moisture comes from top down and with the contaminated soil being taken to the top of the mountain, is this really the proper thing to do? Asarco did do some work and should be allowed to continue with their cleanup efforts until the 2008 deadline.

General Public Comment on Water Pollution Control Issues

There were no additional comments from the public.

Agenda Items for Next Meeting

There was no agenda items suggested for the next meeting.

Terry McLaughlin adjourned the meeting at 2:00 p.m.