

PART 201 Technical Advisory Group 4 – Legal: *Meeting 1 Summary*

Thursday, September 11, 2014 | 11:30 AM–1:00 PM

Public Sector Consultants, Lansing, Michigan

Attendees

TAG Members

James Clift	Michigan Environmental Council
Troy Cumings	Warner, Norcross & Judd LLP
Polly Synk	Michigan Attorney General's Office
Anna Maiuri	Dickinson Wright

MDEQ Staff

Anne Couture	Michigan Department of Environmental Quality
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Project Staff

Mark Coscarelli	Public Sector Consultants
Jon Beard	Public Sector Consultants

Others Present

Lauren Reid	Michigan Attorney General's Office
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INTRODUCTION

The Legal Technical Advisory Group (TAG) held its first meeting on Thursday, September 11, 2014 at the office of Public Sector Consultants, Inc. (PSC). Mark Coscarelli welcomed TAG members and reviewed the group's charge, which is to provide input on legal questions that have been raised during the course of the project. Anne Couture from the Michigan Department of Environmental Quality (MDEQ) also thanked the members for participating in the TAG.

Synk noted that she was representing the MDEQ on the TAG, but she was not serving as a representative of the Attorney General and would not be speaking on his behalf.

Coscarelli provided a brief overview of the project. A Criteria Stakeholder Advisory Group (CSA) comprised of 13 members representing government, non-governmental organizations, industry, and academia was formed to review information and make recommendations to the Director of the MDEQ, based upon input from four technical advisory groups, regarding the

state's generic cleanup criteria. Four technical advisory groups (TAGs) were formed to address technical matters identified in a series of white papers.

These groups are:

- TAG 1: Chemical/physical Parameters and Toxicity Data Sources
- TAG 2: Generic Exposure Pathway Assumptions and Data Sources
- TAG 3: Vapor Intrusion Pathways
- TAG 4: Legal

Each TAG will prepare a report that summarizes its discussion and includes recommendations for consideration by the CSA. TAG 1 completed its report and presented its recommendations to the CSA at its August 5 meeting. Coscarelli referenced the Chemical-physical Value, and the Toxicity Value Decision Frameworks developed by the TAG, which were included in meeting materials as an example of the type of information being developed by the TAGs. TAGs 2 and 3 are expected to complete their final reports by mid-September. PSC will prepare a final report that synthesizes the discussion of TAGs and CSA, which will be provided to the Director of the MDEQ.

LEGAL TAG QUESTIONS

The TAG discussed questions included in meeting materials.

Question 1

The Administrative Procedures Act (APA) requires any agency regulation, statement, standard, or policy to follow the rule-promulgation process if they have the force and effect of law and bind persons other than the agency. Part 201 authorizes the DEQ to establish cleanup criteria and requires a person to take certain actions if the concentration of a hazardous substance on that person's property exceeds a cleanup criterion established by the DEQ. Must the DEQ follow the rule-promulgation process when establishing new or revised cleanup criteria?

TAG members agreed that Question 1 was the most important question they would evaluate and the answer would inform the response to other questions. TAG members drew a distinction between questions of a legal and policy nature. The TAG decided that it could provide an opinion regarding legal matters and help evaluate policy alternatives from a legal perspective for consideration by the CSA.

TAG 1 recommended a process by which an algorithm or decision framework would be developed that includes multiple inputs to determine criteria levels. The process developed by TAG 1 would establish a procedure to review inputs to the algorithm in a predictable manner. TAG 1 and the Legal TAG noted that the term 'update' lacked a clear definition. As one Legal TAG member suggested, one person's update is another person's policy shift.

Essentially, the question for consideration by the Legal TAG is whether or not the algorithm alone can be established through promulgation of a rule; if the inputs to the algorithm or the results also need to be established through rule promulgation; and if future changes to the inputs would also need to go through rule promulgation.

TAG members reviewed the APA definition of a rule and discussed whether promulgation of some parts of the criteria development process, but not all, would meet the APA requirements. Members shared varying points of view on the matter some suggesting that TAG 1's approach of promulgating only the algorithms in rule would meet the requirements while others suggested that it may not. One member suggested that if the algorithm and update process was clear and transparent that individual inputs and future changes to the inputs would not need to go through the rulemaking process to result in enforceable and reliable criteria. Another member suggested that there would be subjectivity associated with determination of, or changes to, the inputs that would require review through the rulemaking process. It was noted that criteria should be enforceable and withstand challenge. One member noted that the process designed by TAG 1 would include opportunities for stakeholder input when the DEQ would revise inputs to the algorithm, which should decrease the risk of challenge.

The group concluded that it would be helpful to review applicable case law on the subject. Cummins volunteered to develop a memo on the subject, which he will provide to the TAG at the next meeting.

The group also noted that it would be helpful to review how other divisions within the DEQ address similar questions. Synk volunteered to look into the subject further.

Question 2

The Administrative Procedures Act authorizes an agency to incorporate—by reference in a rule—any part of a code, standard, or regulation that has been adopted by an agency of the U.S., or by a nationally recognized organization or association. The reference must fully identify the adopted matter, including the date, and the reference cannot cover any later amendments or editions of the adopted matter. Rather, the agency must amend the rule or promulgate a new rule to incorporate the adopted matter. May a rule establishing cleanup criteria incorporate changes to referenced codes, standards, or regulations automatically without following the process to promulgate a revised rule?

TAG members reached consensus that a rule establishing cleanup criteria **may not** incorporate changes to referenced codes, standards, or regulations automatically without following the process to promulgate a revised rule. TAG members noted that the incorporation by reference of a standard results in that standard being “frozen in time” at the time of the rule publication.

TAG members noted that the algorithm developed by TAG 1 would not directly reference a federal standard but outlines a process for selecting inputs to the algorithm.

The TAG discussed the four year review schedule developed by TAG 1. Members expressed reservation about the timeline and suggested that the review process could be completed in a faster timeframe. TAG members suggested that it may be more appropriate to reevaluate the criteria as new science emerges rather than on a periodic basis. Coscarelli noted that the intent of TAG 1 was to address this concern by developing a process for the next round of a comprehensive update, which has not been completed in 12 years.

Question 3

What legal options are available to create a process whereby stakeholders may oversee the DEQ's process to establish new or revised cleanup criteria.

TAG members noted that, within the context of their discussion, the answer to Question 1 would inform the answer to Question 3. It was noted that both the APA rulemaking process and the process recommended by TAG 1 include opportunities for stakeholder input. The group discussed standing stakeholder committees established in other states that review criteria updates. TAG members discussed whether such an approach would be desirable for Michigan.

NEXT STEPS

- Cumings will prepare a summary of applicable case law regarding the rulemaking process to inform the TAG's discussion.
- Synk will review how other divisions within the MDEQ approach similar update processes.
- Clift will review the TAG 1 recommended update process and develop a memo regarding possible methods of enhancing flexibility with regard to the update timeline.
- PSC will distribute the TAG 1 report to members of the Legal TAG.
- **September 19:** TAG members will share relevant materials with the group. Please email all TAG members when circulating documents for consideration by the TAG.
- **September 22:** The next Legal TAG meeting will be held at PSC from 8:30 to 10:00 am.