

PART 201 Technical Advisory Group 4 – Legal: *Meeting 2 Summary*

Monday, September 22, 2014 | 8:30–10:00AM
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

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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REVIEW OF SUMMARY OF MEETING 1

Technical Advisory Group (TAG) members reviewed the draft summary of the first meeting. Coscarelli indicated that he had received comments from TAG members and that the revisions would be incorporated into the final version of the summary.

DISCUSSION

Cumings circulated a draft memo prepared by his office that summarized relevant case law regarding the Administrative Procedures Act (APA) rulemaking process. The memo indicated that courts have concluded that the rulemaking process is to be read broadly, while any exceptions are to be read narrowly. The TAG discussed the memo, members noted that prior court decisions may not provide a clear answer regarding whether updates to the inputs to an algorithm would need to be promulgated through a rule and agreed that additional review of the case law may be necessary.

One member suggested that the approach of promulgating a rule that would establish the algorithm and a process for future updates would meet APA requirements while another member suggested that future changes to the inputs would be subjective and would need to go through the rulemaking process. Another member suggested that regardless of what process is used to determine the inputs, the MDEQ has the decision-making authority on the matter, which will include some subjectivity, and that the use of the APA rulemaking process would be equally subjective as the proposed alternative approach.

One member suggested that if future changes to the inputs would need to go through the rulemaking process, then all site-specific criteria should also be required to go through the rulemaking process because they have the potential to establish a precedent or standard for other properties and may include an evaluation of newer science than when the generic criteria were developed.

The TAG discussed the statute that requires the MDEQ to establish generic cleanup criteria. One member noted that the statute requires the MDEQ to establish generic criteria rather than an algorithm that would be used to develop the criteria. Another member noted that there is some tension within the statute language, because it requires the establishment of criteria and references promulgation in some sections but also requires the MDEQ to review the best available science and make updates to the criteria from time to time. Some language in the statute suggests that those updates may fall outside of the APA rulemaking process but it is ambiguous. The member suggested that prior court decisions may not provide enough clarity to determine whether the MDEQ could update inputs to an algorithm without promulgating a rule. It was noted that other divisions (e.g., Air Quality Division) within the MDEQ follow an update process similar to what is being proposed and that, to date, no challenges have emerged.

TAG members discussed underlying reasons why the APA rulemaking or an alternative process may or may not be desirable. All TAG members agreed that the process to update criteria needs to include opportunities for meaningful stakeholder input. TAG members also agreed that some current APA requirements such as the cost-benefit analysis may not add value to the rulemaking process, nor is the MDEQ best positioned to prepare such studies. It was also noted that the economic impact of a proposed rule would arise during the stakeholder engagement or public comment period. Another member suggested that the proposed approach would include more opportunities for public comment than the APA rulemaking process and that, while carried out independently of the APA, could meet APA requirements. The TAG discussed a potential policy recommendation to revise the APA statute to allow for the criteria to be updated through an alternative means to the APA rulemaking process.

TAG members agreed that at a minimum the algorithm would need to be established through the rulemaking process but noted that the question regarding updates to the inputs remained. TAG members agreed to review the case law further.

The TAG reached consensus that a four-year update process was too long, suggesting that a one to two year process would be feasible, but concluded that required time frames or schedules for promulgation are not legally required and may not serve a beneficial purpose. Clift prepared a proposed alternative review process that was provided to members and discussed.

NEXT STEPS

- TAG members will continue their review of case law
- PSC will circulate the TAG 2 process
- Cumings will attempt to clarify questions about case law prior to the Criteria Stakeholder Advisory Group (CSA) meeting on September 23, 2014
- PSC will provide an update to TAG 4 members following the September 23, 2014 meeting
- October 1:** The next Legal TAG 4 meeting will be held at PSC from 10:30 a.m. to 12:00 p.m.