STATE OF MISSOURI
Jeremiah W. (Jay) Nixon, Governor • Sara Parker Pauley, Director
DEPARTMENT OF NATURAL RESOURCES
www.dnr.mo.gov

MEMORANDUM

DATE: September 12, 2011

TO: Refaat H. Mefrakis, Chief
Permits and Engineering Section

Kevin Mohammadi, Chief
Compliance and Enforcement Section

Regional Directors

FROM: John Madras, Director JM
Water Protection Program

SUBJECT: Interim Procedure on Affordability

The Interim Nature of this Procedure

Pursuant to new requirements enacted with the passage of House Bill 89 (2011), specifically Section 644.145 RSMo, the Department of Natural Resources must make a determination regarding the affordability of certain permitting and enforcement decisions by the Department related to combined or separate sanitary sewer systems or publicly owned treatment works (POTWs).

Additionally, the Department is required to issue or renew permits within statutory timeframes, provided complete information is submitted to the Department. The Department will assess all available information and proceed with issuance of a permit consistent with required time frames.

In the past, the Department has had no established formal procedure for making affordability determinations during the permitting or enforcement processes, although such considerations are present in some permit and enforcement matters, such as Combined Sewer Overflow (CSO) communities, use attainability analyses and enforcement negotiations. It is likely that the procedures needed to carry out these new requirements will ultimately be further addressed by a future rulemaking. However, given the need to continue issuing timely permits and conducting enforcement actions, an interim policy is necessary for the orderly conduct of business and to ensure consistency in the application of these new requirements.

An affordability analysis can be a complex topic and subject to much discussion and many expectations. Therefore this interim procedure is intended to allow Department staff to proceed with permitting and enforcement actions while a larger discussion regarding affordability takes place. We anticipate discussions with a variety of interested parties, including participants in the Water Protection Forum, the Missouri Clean Water Commission, and the Environmental Protection Agency (EPA). These discussions will undoubtedly help refine the procedure. Consequently, this procedure by necessity will be a living document for a period of time as the Department and our stakeholders use the process and gather information.

In general, and consistent with Section 644.145, the question involved in an affordability finding will typically involve the schedule or manner in which an improvement or upgrade required by the permit will be carried out, rather than whether or not an improvement or upgrade will be required at all.

Application of Affordability Provisions in Permitting Actions

To a large degree, performance of wastewater treatment is determined by technology-based requirements or water quality-based requirements. Technology based requirements are determined at the federal level by EPA in most cases. These are national expectations, and permits must reflect these requirements with little or no delay. Water-quality based requirements are determined by the establishment of site specific limits designed to protect the quality of the water receiving the discharge. These limits are based on water quality standards prescribed by rules of the Missouri Clean Water Commission (Commission). The staff prepares fiscal notes for all rules that are promulgated by the Commission. Cost estimates involved in upgrading following rule changes are included in information presented as part of the rulemaking process, and the Department welcomes input from the public in developing these estimates so that a true picture can be presented. Similarly, the Commission can specify time frames for achieving water quality standards. While permit holders may await and respond to specific provisions being included in their permits, the preferred time to be involved in many decisions is when requirements are considered in state rulemaking.

In construction and operating permits subject to section 644.145, the permit writer will solicit information relevant to an affordability determination from the applicant in the initial letter confirming receipt of application (see template letter attached). Subsequently, the Department will provide a preliminary affordability determination with the pre-public notice version of the permit delivered to the applicant. The Department will then give the applicant time to informally contest the preliminary finding by providing whatever additional information the applicant believes is relevant to the Department's finding. Preliminary affordability findings will also be included with permits as they are public noticed. After evaluating any additional relevant information provided by the applicant or others, the Department will issue its final affordability determination along with the permit, and include any permit adjustments deemed lawful and necessary in accordance with the finding.

If an applicant applies for a permit renewal and the resulting permit is issued without substantive modifications from the previous permit, the Department will assume the applicant can afford continued status quo operation of their facilities. The pre-public notice permit will contain a preliminary finding to this effect.

An affordability finding may be required for facilities that are receiving grants or loans and seeking construction/operating permits for proposed modification or upgrade. These communities have generally gone through the process of determining for themselves they will be able to complete the upgrades involved within budget, and in the case of loan recipients pay back the lending agency. The Department's affordability finding may rely on such conclusions, unless information to the contrary is provided during the permitting process.

The Department will generally deem a permit affordable when it is a permit for an action that is taken at the discretion of the system itself (e.g., sewer extension construction permits, or the relocation of an outfall in lieu of otherwise upgrading a system in order to comply with a permit issued prior to July 11, 2011). However, any community may contest this conclusion during the permitting process.

For projects that undergo antidegradation review, affordability concerns should be raised and addressed in a manner consistent with the Antidegradation Implementation Procedure.

For site-specific permits where the affordability of system upgrades is in question, the Department will estimate the technology that may be involved and consider the potential costs of the upgrading. Good estimates of the costs are not known until specific engineering and a bidding process is completed for a project, so any estimate by the Department is preliminary at best. Where an engineering report is required as part of an upgrade, the engineering report prepared by a consulting engineer would advise the permit holder of alternative actions and the relative costs of each alternative considered. While the Department can estimate costs at the time of permit issuance, cost estimates will improve when the detailed work is completed later. The Department will consider readily available information related to a community's financial capability to complete an upgrade, as well as affordability for individual customers. This will consist of median household income, any other ongoing projects of which the Department has knowledge, and other information the community may provide as contemplated by section 644.145.3.

In the event the Department concludes that required modifications are not affordable even with a tailored compliance schedule, the Department may consider alternatives such as denying the permit, or suggesting the applicant to pursue a variance or a Factor 6 of Use Attainability Analysis (UAA) for Department and EPA review and approval.

The Department will strive to inform communities about upcoming requirements that are expected to be implemented through permits. A major component of the affordability analysis is determining the appropriate technology to be utilized at a POTW, and whether technology is a retrofit or a new treatment. Capital and annual operating costs will be estimated based on the design of the selected treatment. The Permits and Engineering Section, in coordination with Watershed Protection Section, will review the information at the time the permit application is submitted or an upgrade is indicated by the need to implement a technology or water quality based upgrade. To the extent foreseeable, to avoid delay of an issuance of a permit, the Department will notify permit holders of significant new or changing upcoming requirements and the level of effluent limitations prior to expiration of the present permit. Watershed-based management will facilitate communication of and compliance with future permit requirements, as all permits in a watershed will be on the same schedule and have similar requirements reflecting the local water quality needs. Early notification should allow the applicant time to explore available options, such as conducting a Use Attainability Analysis.

How the Process Will Work for Enforcement

The Compliance and Enforcement Section will coordinate with the Permits and Engineering Section on technology-based requirements when an enforcement action is planned. Staff will strive to inform parties in enforcement of any new upgrades expected to be necessary in order to achieve compliance, and work with the parties to establish schedules that reflect their capabilities.

Enforcement staff is responsible for making an affordability finding when a settlement document is executed, when a unilateral order is issued, and when a subsequent submittal involves a Department approval or disapproval that results in a significant legal obligation being placed on the owner/operator of a combined or separate sanitary sewer system or publicly owned treatment works. Enforcement actions settled by consent will recognize the applicability of the affordability requirement and include a finding that the agreed-upon resolution is affordable. Final settlement documents may address whether or not any future affordability findings are necessary in connection with any post-settlement decisions by Department staff. Affordability may be contested in matters that proceed to trial, and staff will seek economically achievable environmental results in those cases.

A finding of affordability will be issued with each permit or enforcement decision as appropriate. Such findings and permits are subject to appeal to the extent allowed by law.

Attachment

c: Division of Environmental Quality

Finding of Affordability

Pursuant to Section 644.145, RSMo., the Department is required to determine whether a permit or decision is affordable and make a finding of affordability for certain permitting and enforcement decisions. This requirement applies to discharges from combined or separate sanitary sewer systems or publicly-owned treatment works.

☐ **Not Applicable**;
The Department is not required to determine findings of affordability because the facility is not a **combined or separate sanitary sewer system or a publicly-owned treatment works**.

☒ **Applicable**; The Department is required to determine findings of affordability because the permit applies to a **combined or separate sanitary sewer system or a publicly-owned treatment works**.

Finding of affordability. The department has made a reasonable search for empirical data indicating the permit is affordable. The search consisted of a review of department records that might contain economic data on the community, a review of information provided by the applicant as part of the application, and public comments received in response to public notices of this draft permit. If the empirical cost data was used by the permit writer, this data may consist of median household income, any other ongoing projects that the Department has knowledge, and other demographic and financial information that the community provided as contemplated by Section 644.145.3.

The department is hereby making a finding based from the following facts:

☐ 1) The applicant states that the terms and conditions are affordable for the community:
☐ 2) The permit action is taken at the discretion of the system itself (e.g., sewer extension construction permits, or the relocation of an outfall in lieu of otherwise upgrading a system in order to comply with a permit issued prior to July 11, 2011);
☐ 3) (For renewals) this permit contains no new or expanded terms and conditions;
☐ 4) he department is not aware of any significant economic impacts this permit would cause on distressed populations;
☐ 5) No comments indicating such impact were received during the public comment period on the draft permit;
☐ 6) The department is not aware of any other more cost effective wastewater treatment options that would achieve the required effluent quality,

☐ 7) The Facility Plan on the construction permit contained an affordability finding;
☐ 8) The applicant provided increased effluent discharge monitoring costs due to expanded monitoring frequency for certain permit parameters;
☐ 9) An affordability analysis was performed as part of the Long Term Control Plan on Combined Sewer Overflows;
☐ 10) An affordability analysis was performed as part of an Antidegradation Review Determination;
☐ 11) Others: explain.

Note: The City or Municipality has low utility rates as compared to other communities with similar types of facilities; therefore, the department considers this permit affordable based on this information.

(INSERT APPLICABLE INFORMATION HERE) Example language below:

Section 644.145 of HB 89 as signed by the Governor on July 11, 2011 requires the Department to make a finding of affordability, with respect to the community and its residents, in connection with the issuance of certain permits under the Missouri Clean Water Law. In the XXXXX facility plan submitted to the Department, the City of XXXXX conducted a financial analysis that addresses elements of Section 644.145 for the construction and operation of a new facility. As evidence of the City's ability to meet its financial obligation, the City submitted information pertaining to service rates to Rural Development as part of the grant/loan application for which the City is seeking a construction permit for the upgrade. The Department has reviewed this submittal and hereby finds that the installation of the proposed upgrade is an affordable option for the City of XXXXX and its community to meet the requirements established by the City's Missouri State Operating Permit.

Below is an estimation of cost to individual users of the system from the engineering report:

Insert excerpt from the City's Engineering Report.

[Date]

[Owner Name]
[Owner Address 1]
[Owner Address 2]
[Owner City], [Owner State]
[Owner Zip Code]

Dear [Owner Name]:

The Department of Natural Resources [Regional Office/Water Protection Program] received your application for a [type of permit] on [date.] Your application has been assigned to me for review. If you would like to meet in person or via conference call to discuss your application please contact me by phone or email. Applications are processed in the order they are received. Because you applied for your permit renewal six months in advance of your current permit's expiration date, your existing permit is valid until superseded by the new permit; even if your new permit is not issued until after the expiration date of your current permit. My contact information is below.

Phone:
Email:
Fax:

Under Section 644.145, the Department is required to make a finding of affordability with this permitting action. Should you provide any information, in regards to affordability, I will consider this information in the affordability determination. Information needed to comply with the requirements of Section 644.145 can be found online at http://www.moga.mo.gov/STATUTES/C644.HTM. A preliminary affordability determination will be provided with the pre-public notice version of the permit for your review.

If you have any questions about this letter or the anticipated timing of the process, or would like to schedule a meeting to discuss the permit, please feel free to contact me by phone at [phone number].

Sincerely,

[WATER PROTECTION SECTION or REGIONAL OFFICE]

[Permit Writer]
Environmental Specialist/Engineer