City of Marshfield
Wastewater Utility
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MARSHFIELD
Wastewater Utility

Sam Warp Jr.
Wastewater Superintendent
(715) 486-2007
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Amanda:

I'm submitting these comments on behalf of the City of Marshfield in support of the proposed Multi-Discharger Variance (MDV) that the Wisconsin Department of Natural Resources is circulating.

The communities and industries in Wisconsin that I have talked with are pleased with the concept of the MDV. We are not as pleased with the latest round of revisions, but we are now at this point and still support the variance. We feel too many communities have been excluded to show the real impact that the program could have produced. Now the department and municipalities have set themselves up for future criticism when the variance doesn't clean up the water as much as initially hoped for. From here we still support the MDV and hope the department does as well.

Frustration looms when listening to the non-profit groups that feel this problem can be completely solved in less than 20 years by simply reducing point sources. The scale of the sources of phosphorus is huge and it's not realistic to reduce this in a short time window. Even Adaptive Management has a window of 20 years and yet these groups don't complain about that.

These groups also feel that Adaptive Management and/or Trading should always be used before the MDV. In the case of Marshfield, we have about two miles of upstream to work with because Mill Creek starts in the City. There is no farming as the stream flows through wooded and undeveloped lands so phosphorus credits seem very slim. We also have limited downstream areas to work with and stay within our HUC 12 because the neighboring community discharges about two miles downstream from us. Thus the trade ratios make that option cost prohibitive.

The DNR estimate for the City of Marshfield to add capital improvements is close to $13 million. I've had two engineering estimates that put it around $12 million in capital and $500,000 per year to operate. Over a 20 year life that's $1.3 million per year of an increase costs to the rate payers and we all know it will have no impact on the phosphorus levels in Wisconsin waters. This money would be better spent by using the MDV, sending the funds to the County Land and Water Division to improve the agricultural issues in the Mill Creek Watershed.

We fully support the proposed Multi-Discharger Variance and hope the WDNR sends the current package to the EPA for their approval.

Thank You:

Sam Warp Jr.

Sam Warp Jr.
Superintendent

OSHKOSH
ON THE WATER
PO Box 1130, 215 Church Ave.
Oshkosh WI 54902-1130

December 15, 2015
Attn: Phosphorus
Division of Intergovernmental Relations
Wisconsin Department of Administration
PO Box 8944
Madison, WI 53708-8944

RE: Comments re Multi-Discharger Variance for Phosphorus

Dear Sir or Madam,

Thank you for the opportunity to comment on the Multi-Discharger Variance for Phosphorus. I first want to express my appreciation to the Department of Administration and Wisconsin Department of Natural Resources (WDNR) for providing a very thoughtful and detailed evaluation in support of this variance. This variance provides a framework that will allow phosphorus reductions to occur over time and in a manageable fashion over all sectors, without creating an undue financial burden on any one sector, and still meet the long term goals of reducing phosphorus in the waters of Wisconsin.

As a point source discharger on the Upper Fox River the City of Oshkosh Wastewater Utility is committed to doing its part in reducing phosphorus discharges from its wastewater treatment facility. We have been complying with the state established technology based effluent limit of 1.0 mg/l for phosphorus since its adoption in 1992 and have achieved an average annual phosphorus reduction between 85% and 90%.

During our last WPDES Permit renewal the WDNR calculated our Water Quality Based Effluent Limit (WQBEL) at 0.75mg/l which is achievable with our current treatment processes. Unfortunately, in our renewed permit WDNR decided to use 0.04mg/l as our WQBEL which is the downstream water quality limit for Lake Winnebago and is not achievable with our current treatment processes. We are like other municipal regulated point source dischargers in that we are but a small portion of the phosphorus loading in our watershed. The largest portion of phosphorus discharge to the watershed is unregulated nonpoint sources.

We have begun evaluating the possibility of adaptive management and trading as options to assist with compliance for phosphorus. Unfortunately we are finding the complex requirements of these programs will make it difficult to manage and administer. The credits being made available do not appear to match the additional staffing required and costs necessary to pay for credits to offset the phosphorus reductions required in our permit.

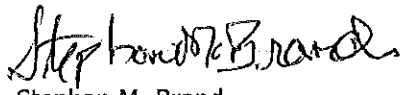
Our only viable option for compliance is construction of additional treatment processes to remove phosphorus. Our estimates for construction of facility improvements are based on our current phosphorus WQBEL permit number of 0.04mg/l and are estimated at 104 million dollars. The Preliminary Determination and Economic Report estimated compliance coats with a phosphorus effluent limit of 0.1mg/l, which is much higher than our current permit WQBEL of 0.04mg/l. This is the reason our costs for compliance are significantly more that than the estimated costs in the Preliminary Determination and Economic Report. We also have looked at estimates for meeting a 0.1mg/l effluent limit. Based on specific wastewater treatment plant conditions this estimates is

$72 million dollars. This estimate is also significantly higher than the estimates in the Preliminary Determination and Economic Report. This difference is primarily due to treatment of peak wet weather flows that will be required to meet the WQBEL for phosphorus.

The proposed variance does not stop the reduction of phosphorus in the watershed. The required targeted reductions in the variance will provide meaningful phosphorus reductions over time. The payment to the counties for phosphorus over 0.2mg/l at $50 a pound is a very effective way to allow us to help fund and leverage non-point source reduction programs already in place. This will speed up the process in reducing nonpoint source phosphorus which has been estimated to be 75% of the phosphorus loading to various watersheds. The additional time to meet restrictive phosphorus limits provided by the variance will allow lower cost technologies to develop and become an affordable option for point source facilities to use in meeting future phosphorus reductions.

Thank you again for the opportunity to comment. We would urge the agencies to move forward as quickly as possible on seeking approval for this variance. We would like to know with certainty if this is a viable compliance option for us.

Sincerely,



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The fact that the City has provided these comments to this draft variance report should not be construed as a waiver of the City's other potential legal options available to meet applicable phosphors requirements including, but not limited to, legal challenges to current or future terms and conditions contained in its WPDES permit.

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December 7, 2015

Amanda Minks
Water Resource Management Specialist
WI Department of Natural Resources
PO Box 7921
Madison, WI 53707-7921

Re: Multi-Discharger Variance (Act 378)

I am writing today to provide comments relating to the phosphorus multi-discharge variance. Specifically, how this may impact the City of Whitewater. Primarily due to age, the Wastewater Utility is in the midst of a major renovation. The $20-$21 million dollar project is currently in the bidding process. MHI in Whitewater is $29,784. With these project upgrades our rates will be approximately 1.7% of MHI. This project does not include construction costs to adapt our plant to meet the pending 0.075mg/L phosphorus limit. However, as part of the Facility Planning process we looked at the 20 year present worth cost of our phosphorus compliance options. Adaptive Management, though attractive, contains much uncertainty. Even with our best efforts the city could end up constructing "brick and mortar" solutions for phosphorus compliance. Nutrient Trading has the potential to have as many moving parts as an Adaptive Management approach along with a heavy administrative component that is difficult at best for smaller municipalities to handle internally. Therefore, our present worth analysis compared two construction solutions and the proposed multi-discharger variance. The lowest cost construction approach was $5,876,583 while the variance alternative was $4,286,403. The variance calculation did include a construction approach at year 15 as the variance is only valid for a 20 year term. Not only does this option come with a lower price tag but it also has the potential to remove a greater volume of phosphorus based on previous efforts by POTW's and the calculated % of non-point vs. point sources. Both of the compliance strategies mentioned above will push our rate structure very close to hardship levels. Any cost savings, especially those with the potential to perform a greater good, should be entertained by a community in our position. It is my hope that the multi-discharger variance will get approved with no further restrictions to allow for the possibility of positive work in the non-point sector. If you should have any questions or comments please feel free to contact me anytime.

Thank you,

Tim Reel
City of Whitewater

Ms. Amanda Minks
DNR water resources management specialist
Wisconsin Department of Natural Resources
Box 7921
Madison, WI 53707-7921
VIA EMAIL: DNRPhosphorus@Wisconsin.Gov

December 16, 2015

RE: Multi-discharger variance for phosphorus

Comments from: Clean Wisconsin, the Alliance for the Great Lakes, and the Great Lakes Environmental Law Center

Dear Ms. Minks,

On October 19, 2015, the Wisconsin Department of Natural Resources ("DNR") issued a final determination of substantial and widespread adverse social and economic impacts, a draft justification document, and draft guidance for the implementation of a statewide multi discharger variance ("MDV") for phosphorus.

These comments on the above-referenced documents are submitted by Clean Wisconsin, the Alliance for the Great Lakes, and the Great Lakes Environmental Law Center. Our organizations collectively represent tens of thousands of individuals in Wisconsin. We also submitted comments on the Department of Administration's ("DOA") economic analysis and preliminary determination in June of this year. To the extent that the issues identified in those comments have not been addressed through a substantial revision of the economic study, we hereby preserve our previously-identified issues and incorporate our previous comment document by reference here.

Our organizations would like to thank the Department of Natural Resources ("DNR") and DOA for the time and effort that has been spent preparing the final determination, the proposed guidance documents, and the proposed variance package that the department has prepared for submitting to the U.S. Environmental Protection Agency ("EPA") for approval. We appreciate the hard work that has gone into preparing these documents, and thank you for this opportunity to comment. Unfortunately, at this time, we do not believe that the variance package meets EPA's rigorous standards for what is required to justify a multi-discharger variance based on substantial and widespread social and economic impacts. Our organizations have the following remaining issues with the underlying analysis and eligibility requirements for the variance:

1. The final determination is based on a flawed economic study that does not incorporate benefits and improperly includes costs attributed to the power sector.

2. Wisconsin's variance legislation does not support the interim limits as the highest attainable condition.
3. DNR's proposal does not meet EPA requirements for eligibility.
4. DNR's guidance should be revised to ensure for more appropriate accountability measures for permittees, counties and third parties participating in the MDV.
5. DNR and DOA have failed to adequately consider economic justice impacts of the proposal.

I. The final determination is based on a flawed economic study.

The final variance justification documents indicate that Wisconsin concluded that there is not sufficient information to justify inclusion of power plants for eligibility for the variance. Our groups strongly support this change in the final variance recommendation. However, the economic study must be revised accordingly. The Economic Impact Analysis attributes over $1 billion in capital costs plus O&M to power plants.[1] To put this amount in perspective, it represents 27% of all capital and O&M costs considered in the study. To remove power plants due to insufficient economic data to support their conclusion, but not remove the faulty cost data relied upon in the initial economic impact analysis results in a faulty study of economic impacts. The economic impact study is the basis for the variance. It is therefore imperative that the state revise the study in order to justify the variance based on substantial and widespread economic and social impacts. The study costs are grossly inflated unless power plant costs are removed.

Second, we expressed in our last comment document on the economic impact study that water quality benefits must be considered in the study. Improvements in water clarity have been directly linked to increases in property values. The DNR has already quantified these benefits in its 2012 economic analysis on the impacts of the phosphorus rule. This has not been addressed with any of the revised documents and so we incorporate by reference our previous comments on this point here.

II. Wisconsin's variance legislation does not support the interim limits as the highest attainable condition.

New federal regulations at 40 C.F.R. 131.14 establish the requirements for EPA approval of a variance. The proposed justification document fails to meet the EPA criteria in a number of ways. First, 40 CFR 131.14(b)(1)(ii) requires that the terms of the variance "represent the highest attainable condition of the water body" throughout the term of the variance. This must include documentation that the water quality variance is only as long as necessary to achieve this condition, including activities identified through a pollutant minimization program.

There is no justification showing that the interim limits represent the "highest attainable condition." The interim limits in the proposed variance are legislatively set and there is no record to support whether they are the highest attainable condition for the relevant water bodies

[1] Draft Economic Impact Analysis, April 25, 2015, p.2.

pursuant to a pollutant minimization program. DNR does not have discretion under existing law to impose more restrictive limits, yet in its guidance it contemplates doing exactly that.[2] There may be an opportunity to remedy this problem through future legislation, but at present there is no legal authority for this approach. DNR should provide proper documentation (i.e. data regarding actual reductions achievable from pollutant minimization plans) to support its finding that the interim limits represent the highest attainable condition. Without such documentation, the variance is unapprovable.

Second, the need for an initial 10-year variance has not been adequately justified. For example, on p.8 of the justification document, it states that "[t]here is no evidence to suggest innovative technologies will become available over the next 10 years that would substantially lessen the economic burden…" However, there is no discussion of potential new technologies. For example, the Co-Mag process is emerging and is now in use by seven or eight facilities in New England/Chesapeake Bay. A pilot study conducted by Strand at Fond du Lac estimated the cost to comply at about $90 per pound of phosphorus.[3] The process is achieving discharge concentrations sufficient to comply with the vast majority of WQBELs, including the WQBEL for Fond du Lac. Other technologies may exist that are on the horizon or are about to become available. DNR must evaluate the feasibility of this process and any other emerging technologies as applied to Wisconsin facilities and substantiate its proposed 10-year timeline for the MDV accordingly.

III. The proposed variance does not meet EPA requirements for establishing eligibility.

The Wisconsin multidischarger variance is intended to apply only to dischargers that can "demonstrate that attaining the designated use would result in substantial and widespread economic and social impacts."[4] This demonstration is important because it ensures that those dischargers granted a variance are actually in need of leniency from state water quality standards. The eligibility criteria included in the State's final determination is over inclusive and does not create a threshold to effectively measure whether variance participants are experiencing substantial and widespread economic and social impacts. Moreover, the State does not adequately justify its eligibility criteria determination. Specifically, the State must improve on its eligibility criteria in the following ways:

- DNR should require more than 1-2 secondary screener(s) to determine eligibility;
- the primary screeners for privately owned dischargers used in the final determination are not adequately justified;
- The guidance does not define "major facility upgrade";

[2] See "Guidance for Implementing Wisconsin's Multi-Discharger Variance for Phosphorus," Section 5.01.2.b. at p. 46.
[3] http://fdlosg.com/media/41762/strand%20phosphorus%20presentation.pdf
[4] U.S. Envtl. Prot Agency, *Economic Guidance for Water Quality Standards* (Mar. 1995), available at http://water.epa.gov/scitech/swguidance/standards/upload/2007_06_18_standards_econworkbook_complete.pdf [hereinafter "*The Workbook"]*.

- Requiring facilities to certify compliance costs individually and provide justification/evidence for these numbers is essential to the success of the MDV;

These points will be discussed in more detail in the following sections.

i. DNR should require more than 1-2 secondary screener(s) to determine eligibility.

In the final determination, DOA and DNR used the following screeners to determine whether the phosphorus criteria create a substantial and widespread adverse social and economic impact on communities:

Primary screener for municipal waste water treatment facilities (WWTF):

- If the per customer costs per median household income (MHI) in the WWTF's county is less than 1%, a municipal WWTF does not pass the primary screener or qualify for a variance.[5] According to the DOA, almost every county in Wisconsin passes this threshold.[6]
- If the per customer costs per MHI are more than 1% but less than 2%, the facility must score at least three points in the secondary indicator section.[7]
- If the per customer costs per MHI are more than 2%, the facility must score at least two points in the secondary indicators section.[8]

The DOA's secondary screeners for municipal dischargers are as follows:

- Jobs per square mile: 1 point
- Job growth: 1 point
- Population change 2004-2014: 2 points
- Personal current transfer receipts as a percentage of total income: 1 point
- Net earnings by place of residence change: 1 point

The State's modified weighing system for secondary indicators in the final determination still fails to address concerns voiced by EPA in its comments on the preliminary determination.[9] While this framework for secondary indicators is slightly more restrictive, it remains over inclusive and does not effectively measure whether treatment upgrades would result in adverse social and economic impacts on communities.[10]

The EPA in its previous comments stated that for municipal dischargers with facility upgrade costs between 1-2% MHI, the eligibility determination should be corroborated by at

[5] The Final Determination, at p 28.
[6] The Preliminary Determination, at p 31.
[7] The Final Determination, at p 28.
[8] The Final Determination, at p 28.
[9] Environmental Protection Agency, *EPA Comments on Documents Pertaining to Wisconsin's Preliminary Determination for a Multiple Discharger Variance for Phosphorus,* p. 3.
[10] Id.

least 3 secondary screeners.[11] Under the indicator criteria in the final determination, however, a municipal WWTF located in a county with compliance costs between 1-2% MHI would be eligible if it meets just two other secondary screener criteria if the county meets the population change screener worth 2 points. Moreover, EPA has concluded that most of the secondary indicators tell the same story, so that passing two secondary indicators is extremely likely if a discharger can pass one secondary indicator.[12] Based on EPA's analysis, it can be deduced that corroboration by only 2 "similar" secondary screeners for municipal facilities with compliance costs between 1-2% MHI is not a stringent eligibility framework.

Overall, the State has not adequately addressed its low threshold for passing the secondary screener evaluation. EPA recommended developing a point system based on red, yellow, and orange indicator gradations, and setting a threshold to qualify on the basis of secondary indicators.[13] DOA and DNR did not follow this advice, and the final determination still fails to provide a realistic snapshot of the economic status of Wisconsin's counties. For example, a municipal WWTF with compliance costs over 2% MHI may be eligible for the variance by meeting the primary indicator and only the population change secondary indicator worth 2 points. Moreover, since a county can meet the population change screener with a positive population change over the past ten years, between +0.1-4.4%, it is currently possible for a municipal WWTF to be located in a county with a growing population and still automatically be eligible for the MDV.[14]

The selection and treatment of secondary indicators is important because it ultimately determines which dischargers will be eligible for the variance. While the State did make some changes from the preliminary determination, these changes fall short and the indicator application does not provide an adequate snapshot of counties' financial situations.

ii. <u>The primary screeners for privately owned dischargers used in the Final Determination are not adequately justified.</u>

In the Final Determination, the following primary screeners for industrial dischargers were used to determine whether the phosphorus criteria create a substantial and widespread adverse social and economic impact:

> The facility must be in the top 75% in terms of compliance costs OR must be in the top 75% of counties in terms of total compliance costs in a given industrial category. If the facility passes both primary screeners, it must also pass at least two secondary screeners. If the facility passes only one primary screener, it must pass at least three secondary screeners.

[11] Environmental Protection Agency, *EPA Comments on Documents Pertaining to Wisconsin's Preliminary Determination for a Multiple Discharger Variance for Phosphorus*, p. 3.
[12] Id.
[13] Id.
[14] The Final Determination, at p. 41.

The DOA and DNR, however, have failed to justify the current determination for primary screeners for industrial dischargers.

First, the State's determination that the sites with compliance costs in the top 75% of a category's permittees will be considered for MDV coverage is arbitrary and is not justified by the final determination. The EPA specifically asked in its comments on the preliminary determination for the State to "explain why the top 75% was chosen as the threshold for moving to the secondary indicator test."[15] However, the State's explanation in the final determination fails to justify how the State came to conclude that for "facilities in the top three clusters, these compliance costs may be substantial…"[16]

In its final determination, the State admits that it did not rely on any standard method or guidance "for determining what constitutes substantial impact for industrial discharges."[17] In doing so, the final determination attempts to justify its decision by comparing statistical tests, while ignoring EPA's guidance for determining primary indicators for industrial dischargers. Instead, the State based its determination on Montana's economic study.[18] Throughout its explanation, however, the State fails to address the consequential question; how it came to determine that the 75% threshold automatically determines that an industrial discharger will incur substantial impacts.

The State conceded that its own economic analysis fails in considering the possibility that "permittees with larger estimated compliance costs may sometimes have larger revenues to shoulder this burden."[19] By omitting this analysis, the State's eligibility determination fails to exclude facilities from the MDV that have the ability to attain water quality standards. Additionally, the State conceded in its final determination that its analysis "did not work as well for NCCW," but the State used the same 75% threshold for the NCCW category "for consistency across all categories."[20] The State's decision to create a 75% threshold is arbitrary, is not supported by the final determination, and does not have any significant correlation with a determination that a point source will incur actual substantial economic impacts.

Second, the State's determination that the sites with compliance costs in the top 75% of a category's permittees will be considered for MDV coverage fails to follow EPA's guidance and fails to adequately address whether the water quality standards are actually attainable for a discharger or a group of dischargers. The EPA recommends a two-part test to measure substantial impact on privately owned facilities. "The primary measure is profitability.[21] The secondary measures include indicators of liquidity, solvency, and leverage."[22] These factors

[15] *EPA Comments on Documents Pertaining to Wisconsin's Preliminary Determination for a Multiple Discharger Variance for Phosphorus*
[16] The Final Determination, at p 29.
[17] The Final Determination, at p 29.
[18] The Final Determination, at p 29.
[19] The Final Determination, at p 33.
[20] The Final Determination, at p 30.
[21] The Workbook, at p 3-1.
[22] The Workbook, at p 3-1.

focus on what will happen to "a discharger's earnings if additional pollution control is required" but also evaluate other aspects of the discharger's financial health. Notably, the EPA states that assessment of particular discharging facilities on an individual basis is necessary to determine substantial impact when there is a request for a variance.

The State does not look at a discharger's profitability, liquidity, solvency, or leverage when determining whether a point source may be eligible for the MDV. Instead, the State limited its analysis to compliance costs: "Selecting a threshold based on compliance costs within the category made intuitive sense because a facility paying more for phosphorus compliance is going to be at a competitive disadvantage compared to other companies that don't face these compliance costs."[23] By looking only at compliance costs, the State omits important information as to whether a discharger will be able to attain water quality standards. The State's determination takes no look at revenues or income, which are important factors when attempting to determine whether a discharger can carry the burden of implementing new pollution control technology, and whether a discharger is actually experiencing "a competitive disadvantage." By limiting its determination to compliance costs, the State's eligibility determination for groups of dischargers is inaccurate and is likely to include many point sources that have the ability to attain the water quality standards without a variance.

Finally, the State's primary indicator scheme allows the possibility of a discharger to be eligible for the MDV without any analysis of the discharger's individual economic indicators. In the final determination, a discharger may be eligible to move on to secondary screeners if it is located within the top 75% of counties in the category. This eligibility clearance is contrary to EPA's guidance for primary indicators for industrial dischargers. Specifically:

> "For facilities owned by the private sector, measuring substantial impacts requires estimating the financial impacts on the entities that will pay for the pollution controls…If the analysis shows that the entity will not incur any substantial impacts due to the cost of pollution control, then the analysis is completed. If, on the other hand, the analysis shows that there will be substantial impacts on the entity, then the resulting impacts on the surrounding community must be considered."[24]

EPA's Workbook lays out the above two-step test to determine whether a private discharger is eligible; (1) substantial impacts on the entity, and (2) substantial impacts on the surrounding community.[25]

The State circumvents this two-step eligibility requirement by allowing point sources located in the top 75% of counties in the category be eligible for the MDV with three secondary screeners. In doing so, many dischargers may be eligible for the MDV that should not be eligible for leniency from water quality standards. For example, a point source may not be in the

[23] The Final Determination, at p 29.
[24] The Workbook, at p 3-1.
[25] Id.

top 75% of compliance costs and it may be able to cover the costs of pollution control without a substantial impact, but it may still be eligible for the variance based on its location.

The State has failed in its final determination to justify its criteria for primary indicators for industrial dischargers. Its overall scheme fails to address whether water quality standards are actually attainable for certain dischargers, instead determining eligibility on factors that do not correlate. The State fails to explain its 75% threshold for moving to the secondary indicator test, and how it determines the level in which compliance costs would have a substantial impact.

iii. The guidance does not define "major facility upgrade."

For a facility to be eligible for the multi-discharger variance, it must be able to answer affirmatively to the question: "Is a major facility upgrade needed to comply with the final phosphorus limits?"[26] This is a fundamental feature of the eligibility structure of the multi-discharger variance; a point source must certify that it "cannot achieve compliance with the water quality based effluent limitation for phosphorus without a major facility upgrade."[27] The determination is extremely important because that is how permittees verify that compliance with the new limits would result in "a financial burden on the discharge and community." [28]

It is important for the State to make sure that only those facilities that will suffer an actual burden caused by the final phosphorus limits are eligible for the MDV. In order for the State to adequately implement this condition, the State must make two changes from its final determination: (1) strengthen its guidance as to when a major facility upgrade is "necessary"; and (2) redefine "major facility upgrade" more specifically than in the current Wisconsin statute.

The Implementation Guidance for Wisconsin's MDV states that the requirement of a major facility upgrade is an "important eligibility factor for the MDV."[29] To make this determination, "a point source needs to evaluate the cost of the MDV to the cost of the other compliance options to ensure that the MDV is a cost-savings and economically viable alternative."[30] The point source makes this important comparison by investigating the types of treatment that may need to be added to their facility and determining whether the technologies will result in consistent compliance with the phosphorus WQBELs.[31] The State should develop guidance as to what technologies can be considered and at what cost threshold the State or the point source can conclude that a major facility upgrade is necessary to comply with the final phosphorus limits.

[26] Wisconsin Department of Natural Resources, "Guidance for Implementing Wisconsin's Multi-Discharger Variance for Phosphorus," p. 15.
[27] S. 283.16(4)(a)(2), Wis. Stat.
[28] The Final Determination, at p 74.
[29] Wisconsin Department of Natural Resources, "Guidance for Implementing Wisconsin's Multi-Discharger Variance for Phosphorus," p. 15.
[30] *Id.*
[31] *See id.*

Currently, "major facility upgrade" is defined as "the addition of new treatment equipment and a new treatment process."[32] The Implementation Guidance provides the facility upgrade examples of filtration or equivalent technology,[33] but the current statutory definition is broad and creates uncertainty in enforcement and analysis of MDV eligibility. An adequate definition of "major facility upgrade" will have substantial impacts on the implementation of the MDV in Wisconsin. First, the definition would assist the State in implementing the MDV clearly and uniformly. Second, a clear definition is necessary to assist both the State and facilities in determining whether a major facility upgrade is necessary to comply with the phosphorus WQBELs in comparison to other compliance options. It is important that the State require point sources to show that options like watershed adaptive management and water quality trading are not available before DNR finds that a major facility upgrade is necessary, and in order to do this, an adequately defined term is crucial.

iv. Requiring facilities to certify compliance costs individually and provide justification/evidence for these numbers is essential to the success of the MDV.

In order to ensure that the MDV is working properly, it is necessary to improve on all eligibility criteria in the final determination, including the justification for primary screeners, the secondary screeners criteria, and the definition of "major facility upgrade." Additionally, in order to make sure that those determinations are sound, the State is correct in requiring facilities to certify compliance costs individually and provide justification for those cost numbers. The EPA Workbook repeatedly states that individual site-specific information is necessary to ensure that dischargers genuinely need to a variance. It is important to require every discharger to justify its application for the variance and to make sure that it cannot feasibly meet the water quality standards.

IV. DNR's guidance should be revised to ensure for more appropriate accountability measures for permittees, counties and third parties participating in the MDV.

DNR must ensure that point source utilization of the MDV for permit compliance does not undermine or slow water quality improvement efforts in Wisconsin. Interim limits must move point sources towards compliance with WQBEL's and watershed projects need to result in water quality improvements. DNR's proposal for implementation of the watershed project requirements of the variance is a good start towards providing accountability for the money

[32] S. 283.16(1)(e), Wis. Stat.
[33] Wisconsin Department of Natural Resources, "Guidance for Implementing Wisconsin's Multi-Discharger Variance for Phosphorus," p. 18.

invested in these projects, but changes could strengthen the effectiveness of the program and demand more demonstrable water quality improvements.

Wisconsin's county conservation departments play a critical role in cleaning up Wisconsin's waterways. We consider them our key partners in pollution control efforts and rely heavily on their advice and guidance in our efforts to implement the watershed adaptive management option. The variance puts county conservationists in a critical role for achieving water quality improvements throughout the state. This is a fine model, but more accountability is needed.

At a minimum, the payments to counties must produce a phosphorus load reduction equal to or greater than what otherwise would need to be controlled at the treatment plant. This is a requirement of "other watershed plans" and counties should be held to a similar standard. While on a year to year basis, project availability and type may cause variations the amount of phosphorus reduced, watershed plans should aim to reduce, over time, an amount phosphorus equal to the required reductions at the treatment plants counties receive money from.

With the use of HUC 8 basins and multiple counties receiving payments from individual permittees, the importance of the development of thorough watershed plans and subsequent reports that demonstrate funds distributed to counties from the MDV are making impactful improvements to water quality cannot be overstated. DNR has outlined requirements for annual plan and report submittal from counties, and these should be rigorously reviewed to assess the effectiveness of MDV funds at reducing phosphorus levels.

Currently, the guidance states that if a county chooses not to participate in the MDV program, those funds can be redistributed outside of a permittee's HUC 8 watershed. Sending the funding outside of a permittee's HUC 8 will lead to watersheds that don't receive the attention and funding they deserve to facilitate water quality improvements and will subsequently result in pollution hot spots. If a county decides not to participate in the MDV, point sources should have to choose one of the other watershed options, either carrying out a project to improve water quality themselves or working with another entity to do so. Further, point sources pursuing one of these other watershed options should first be required to explore project opportunities in their HUC 12 watershed. If they can demonstrate that project opportunities are limited or nonexistent in their HUC 12, they then may look for alternative project sites in the HUC 8, but at no point should funding generated by the MDV leave the HUC 8 watershed from which it originates.

We appreciate DNR's efforts to outline the monitoring and modeling requirements that counties will be responsible for implementing in order to receive MDV payments. For counties receiving smaller sums of money that might only fund a small number of projects, modeling will be an important way to predict and quantify reductions achieved. However, we are concerned that some large scale plans may not be required to conduct monitoring, because the variance statute does not explicitly require it. With such large sums of money devoted to nonpoint efforts, verifiable reductions in stream phosphorus levels should be achievable and should be supported with monitoring evidence. Monitoring should be required for all large scale plans. In addition,

DNR should require monitoring and reporting on phosphorus reductions for any large scale project that is conducted under the other options available under the MDV.

We also remain concerned that the $50/per pound payment point sources make to counties might be inadequate to achieve reductions comparable to the phosphorus load that otherwise would need to be controlled at the treatment plant. An engineering study done for the Yahara CLEAN Strategic plan for phosphorus reduction estimated clean-up costs to be $85/lb.[34] We think $50/lb is too low for the kind of targeted practices that will be needed to make effective reductions, especially when staffing costs are considered. DNR should require an analysis from counties in their annual reports on the $50/lb amount, what the cost per pound of reductions in that county is, and whether $50 is sufficient to achieve a one pound reduction of phosphorus into the waterway in that county or not. A similar analysis should be done for the other options available under the variance.

2013 Act 378 also includes a $640,000 cap on payments a permittee must make under a variance. There are a handful of large permittees that would exceed that cap. The cap creates the potential where smaller point source contributors in a watershed with a capped source could end up subsidizing water cleanup. The cap also improperly rewards those sources that have done the least to limit their discharge, since sources with the highest amount of reductions to achieve would reach the cap more quickly than those who acted responsibly. We suggested during the legislative debate and suggest again that the cap be removed, and that optimization be required down to a level below the cap. Both the $50/lb payment amount and the $640,000 cap should be revisited in each triennial review of the variance.

The dwindling amount of money available to county conservation departments has us concerned about how ultimately effective this new variance option will be in adding value to the program. For several years, the state has been reducing its funding commitment to county conservation departments. We are concerned that with an influx of money from the variance, Wisconsin's legislature and Governor will use it as yet another excuse to reduce or end Wisconsin's commitment of resources to county conservation staffing. If that happens, there will be no benefit gained from the proposed variance. Even in the 2015-2017 budget debate, the potential influx of funding was mentioned as a potential reason to not fund county conservation staff. There is no doubt this will be an issue in the next budget debate in 2017. Also, 2013 Act 378 mandates that only 35% of the funds raised from the variance payments can be used for staff, the rest must be used for cost-sharing. This could seriously hamper county conservation departments in the future and jeopardize the staff capacity necessary for the departments to work with landowners. For the money provided to counties by the variance to result in additional water quality improvements, county conservation funding must not be cut below existing levels. EPA should pay close attention to this issue as the variance request moves forward and should put in place any safeguards that it deems reasonable and necessary against this potential for

[34] Yahara CLEAN Strategic Action Plan for Phosphorus Reduction, prepared for the Clean Lakes Alliance, p. 17, November 9, 2012. Available at: https://www.cleanlakesalliance.com/wp-content/uploads/2012/11/Strategic-Action-Plan-11092012.pdf

variance dollars to completely supplant existing county conservation funding. Phosphorus reductions through county programs must be shown to be additional and verifiable if this variance is going to be a viable approach for Wisconsin or other states.

V. DOA & DNR's Environmental Justice Analysis is Insufficient

The Wisconsin Department of Administration ("DOA") and the Wisconsin Department of Natural Resources ("DNR") have failed to fulfill their duty to adequately consider environmental justice concerns in relation to this proposed multi-discharger variance ("MDV"). Executive Order 12898 requires each federal agency to "make achieving environmental justice part of its mission by identifying and addressing, as appropriate, disproportionately high and adverse human health or environmental effects of its programs, policies, and activities on minority populations and low-income populations."[35]

> Based on the Executive Order, EPA's Environmental Appeals Board (EAB) has held that environmental justice issues must be considered in connection with the issuance of federal permits issued by EPA regional offices and states acting under delegations of Federal authority.[36] *In re Prairie State Gen. Co.*, 13 E.A.D. 1, 123 (EAB 2006) (citing *In re Knauf Fiber Glass, GmbH*, 8 E.A.D. 121, 174-75 (EAB 1999). *See also In re AES Puerto Rico, L.P.*, 8 E.A.D. 324, 351 (EAB 1999) (order denying review based in part on the thorough environmental justice analysis), aff'd sub nom *Sur Contra La Contaminacion v. EPA*, 202 F.3d 443 (1st Cir. 2000); *In re EcoEléctrica, L.P.*, 7 E.A.D. 56, 67-69 (EAB 1997); *In re Puerto Rico Elec. Power Auth.*, 6 E.A.D. 253, 254-58 (EAB 1995) (citing *In re Chem. Waste Mgmt. of Indiana*, 6 E.A.D. 66 (EAB 1995) (examining for the first time the general policy directive set out in Executive Order 12898 and the EAB's role in implementing it in the context of a RCRA permit).[37]

In addition to the above authority, DOA and DNR have chosen to address environmental justice in the Final Determination for the proposed MDV.[38] Consequently, DOA and DNR

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[35] Exec. Order No. 12898, 59 Fed. Reg. 7629 (Feb. 11, 1994).

[36] While DOA and DNR are not federal agencies, DNR exercises delegated authority to administer the requirements of the federal Clean Water Act in Wisconsin.

[37] *Environmental Justice Analysis in Support of the National Pollutant Discharge Elimination System (NPDES) Permits for the Chelsea River Bulk Petroleum Storage Facilities*, U.S. Envtl. Prot. Agency, p 4 (March 2014), available at http://www3.epa.gov/region1/npdes/chelseacreekfuelterminals/pdfs/ChelseaBulkTerminalEJA.pdf.

[38] *In re Knauf Fiber Glass*, GmbH, 8 E.A.D. 121, 174-75 (EAB 1999) (EAB did not need to address direct applicability of E.O. 12898 to particular regulatory program where regulatory authority took on responsibility for making an environmental justice determination) available at http://yosemite.epa.gov/oa/EAB_Web_Docket.nsf/Decision~Date/CD5A74206C381CBE85257069005F7CB3/$File/knauf.pdf. *See Response to Comments on Economic Determination pursuant to 283.16, Wis. Stat.*, Wis. Dep't of Admin. & Wis. Dep't of Nat. Res., p 13, (Oct. 8, 2015) available at http://dnr.wi.gov/topic/SurfaceWater/documents/Phosphorus/ResponsetoComments1082015.pdf (hereinafter "Response to Comments");
Substantial and Widespread Adverse Social and Economic Impacts of Wisconsin's Phosphorus Regulations: A Final Determination, Wis. Dep't of Admin. & Wis. Dep't of Nat. Res., p 62, (Oct. 6, 2015) available at http://dnr.wi.gov/topic/surfacewater/phosphorus/statewidevariance.html (hereinafter "Final Determination").

should be required to make a detailed and transparent evaluation of health, environmental, and economic outcomes for minority, low income, or indigenous populations as a factor in its determination of the economic feasibility of this program. This evaluation should constitute a "complete response," more than a "cursory denial" with details of the basis for the agencies' determination.[39]

Thus far, DOA and DNR have failed to appropriately analyze environmental justice impacts of the proposed multi-discharger variance program. In the agencies' initial Economic Impact Analysis published April 24, 2015, DOA and DNR completely neglect any discussion of environmental justice issues[40] – an omission noted by Commenters in the written comments submitted on June 11, 2015.[41] Responding to these comments on October 8, 2015, DOA and DNR stated that they had "added some additional content to the final determination specifically addressing the need to consider environmental justice."[42] However, the additional content included in the agencies' Final Determination of Substantial and Widespread Adverse Social and Economic Impacts of Wisconsin's Phosphorus Regulations (published October 6, 2015) in no way amounts to a meaningful inquiry into the environmental justice impacts of the MDV. In fact, the additional content constitutes a mere five sentences and one illustrative figure on a single page of the Final Determination.[43] This cursory addition to the Final Determination has a number of significant failings. First, it neglects any analysis of minority and indigenous populations – simply no information on these groups appears. The only group specifically mentioned in the Final Determination is the elderly population. Wisconsin has significant African American, Hispanic, and Hmong populations concentrated primarily in Milwaukee and Marathon counties.[44] Wisconsin is also home to multiple indigenous Native American populations who practice subsistence fishing.[45] Second, while DOA and DNR's abrupt analysis

[39] *In re Knauf, supra* note 38.
[40] *Economic Impact Analysis*, Wis. Dep't of Admin. & Wis. Dep't of Nat. Res., (Apr. 24, 2015) available at http://dnr.wi.gov/topic/surfaceWater/documents/phosphorus/PhosphorusEEIAreport.pdf.
[41] *Clean Wisconsin, Alliance for the Great Lakes and Great Lakes Environmental Law Center's Comments on Wisconsin's Preliminary Determination of Substantial and Widespread Adverse Social and Economic Impact and Economic Impact Analysis in support of a Statewide Multi-Discharger Variance for Phosphorus*, (June 11, 2015) (on file with authors).
[42] *Response to Comments, supra* note 38.
[43] *Final Determination, supra* note 38.
[44] *Hispanic/Latinos in Wisconsin – Overview*, Wis. Dept' of Health Services, https://www.dhs.wisconsin.gov/minority-health/population/hispanlatino-pop.htm (last updated Nov. 30, 2015); *African Americans in Wisconsin – Overview*, Wis. Dept' of Health Services, https://www.dhs.wisconsin.gov/minority-health/population/afriamer-pop.htm (last updated Nov. 30, 2015); *U.S. Census Quick Facts* (report comparing data from United States, Wisconsin and Milwaukee County), U.S. Census Bureau, http://www.census.gov/quickfacts/ (last visited Dec. 12, 2015) (on file with authors); *Wisconsin's Hmong Population*, Univ. of Wis. Extension & Applied Population Laboratory, p 2, (Aug. 1, 2003) available at http://www.apl.wisc.edu/publications/HmongChartbook.pdf.
[45] *See generally Treaty Rights and Subsistence Fishing in the U.S. Waters of the Great Lakes*, Upper Mississippi River, and Ohio River Basins, U.S. Army Corps of Engineers, (June 2012), available at http://glmris.anl.gov/documents/docs/Subsistence_Fishing_Report.pdf. Subsistence anglers have dramatically greater fish consumption compared with the general population. *Fish Consumption and Environmental Justice*, National Environmental Justice Advisory Council, (Nov. 2002) pp 24-34, available at http://www3.epa.gov/environmentaljustice/resources/publications/nejac/fish-consump-report_1102.pdf. Most subsistence anglers can also be characterized as low-income, minority, or indigenous. *See id.* pp 2-10; *see also* Matsumoto-Hervo et al., *Beneath the Surface: Urban Fishing and Environmental Justice*, University of Wisconsin, (Dec. 12, 2013) available at https://minds.wisconsin.edu/handle/1793/73417?show=full. Therefore, these groups

makes some attempt to address Wisconsin's low-income population, it does so only indirectly, and with no examination of the health and environmental impacts of the proposed MDV.[46] Finally, the agencies have presented no analysis of the health and environmental impacts of the proposed MDV in the context of environmental justice – again, this information is plainly absent from the Final Determination. Thus, on its face, DOA and DNR's palliative submission cannot be considered to meaningfully examine the important issue of environmental justice.

To make a thorough and meaningful environmental justice inquiry DOA and DNR need to define the affected area,[47] identify high-risk groups within Wisconsin including minority, indigenous, and low-income populations, and consider relevant data (scientific, medical, industry etc.) to determine if the proposed MDV program will cause any disproportionate and adverse health or environmental impacts on an environmental justice population. Without this kind of environmental justice inquiry, Wisconsin's proposed MDV for phosphorus should not be approved.

Respectfully submitted this 16th day of December, 2015:

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will be disproportionately affected by any adverse environmental effects of the MDV – for example, more frequent or more extensive fish kills as a result of eutrophication.

[46] *Final Determination, supra* note 38 at pp 62, 36-45, 86-89. 13.2% of people in Wisconsin live below the poverty line. *Census, supra* note 44.

[47] Presumably the affected area in this case would comprise the entire state as the proposed MDV would be available to dischargers statewide.

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Domtar

Via Electronic Submittal
DNRphosphorus@Wisconsin.gov

Amanda Minks
DNR Water Resources Management Specialist
Wisconsin Department of Natural Resources
P. O. Box 7921
Madison, WI 53707-7921

December 16, 2015

Dear Ms. Minks,

Subject: Public Comments on the Wisconsin Multi-Discharger Variance (MDV) for Phosphorus

Domtar owns and operates two industrial facilities that are impacted by the state of Wisconsin's water quality rules for phosphorus in Ch. NR 217, Wis. Admin. Code. As such, we appreciate the opportunity to comment on the implementation strategies to be employed for use of the MDV in the state.

In our comments provided in June of 2015 in response to the preliminary determination for the MDV rule, Domtar acknowledged that the compliance options available in Ch. NR 217 were extremely limited, and that the economic impacts on our facilities and statewide necessitated additional compliance approaches. While the MDV does provide an alternate compliance option, it does little in providing a fair and equitable solution for improving water quality on the Wisconsin River. It is clearly acknowledged that non-point source runoff is the primary source of excessive phosphorus in the Wisconsin River basin, and yet under the MDV rule, point sources are on the hook financially for creating water quality improvements. Domtar remains fundamentally opposed to this concept.

However, given the severity of potential impacts to our operations from NR 217 implementation, we recognize that the MDV may provide some degree of compliance flexibility in the short term, and is worthy of consideration as part of our long-term compliance program, if details of implementation are fair, equitable, reasonable and rational.

The MDV is intended to be a temporary option for point source dischargers until a permanent compliance option can be identified, developed and implemented. A discharger may qualify for the multi-discharger variance if a major facility upgrade is needed to comply with the future standard there by creating a financial burden for the discharger and the community. DOA/DNR developed the economic determinations that compliance with the standard results in adverse, significant widespread social and economic impacts in a number of Wisconsin counties. Since the DNR/DOA studies have already demonstrated that Wisconsin's phosphorus water quality-based effluent limitations causes substantial and widespread impact to the state, facilities that meet the eligibility criteria as defined in Section 283.16 Wis. Statutes should automatically be considered eligible for a variance.

Domtar has reviewed the draft MDV Justification Document, the draft Guidance for Implementing Wisconsin's MDV for Phosphorus, and the draft forms documents, and we provide the following comments.

General Comments:

1. The guidance documents provide a framework for implementing the MDV. Domtar is concerned about the Department's use of guidance documents in lieu of more formal rulemaking. There will likely be the need to make changes in the guidance documents as participants gain experience in the process. We encourage the Department to establish a formal review process for any MDV guidance changes, so that all potentially affected parties can provide comments prior to implementation.

2. At the December 9, 2015 public hearing in Wisconsin Dells, the Department shared some information on an overhead that implied that an additional EPA review and approval will be required for all variances after the second permit term. There is no mention of such a review approval in any of the provided MDV guidance material. The Department should provide rationale for this secondary review process.

Comments on the Draft Multi-Discharger Variance Justification Document:

1. Duration of the Variance and Interim Limits

   The Department provides considerable arguments in this document supporting a 10-year timeline for a MDV. This is in conflict with Section 283.16, Wis. Statutes and does not reflect language in the 10/16/15 MDV Guidance Document. The Department should be clear in its justification that the MDV duration should be 20 years, with improvement milestones as presented in the Statute. In addition, there is no mention of interim limits for the third and fourth permit cycles. These need to be included to maintain consistency with the Statute.

2. Optimization

   Department guidance on optimizing discharges of phosphorus generally assumes that there are slight operational changes (such as increasing chemical coagulant feed) that can be done to improve the control of phosphorus. This assumption is misguided for many industrial facilities, such as pulp and paper mills. Wastewaters from most pulp and paper mills contain very low amounts of phosphorus. Many of these plants operate biological wastewater treatment systems that require an adequate supply of nutrients in order to function properly. In such facilities, phosphorus must be added to the wastewater in order to assure that a viable biomass is available for degradation of organics in the wastewater. It is in the best interest of these plants to add only enough phosphorus to maintain good plant health – anything beyond this is wasteful and unnecessary. Pulp and paper mills are not typically equipped with any phosphorus control technologies, and therefore cannot "optimize" in the same manner as facilities that have high incoming phosphorus concentrations and utilize some level of treatment control. These facilities could simply reduce or eliminate the feed of phosphorus into the headworks of the wastewater treatment systems. However, this will lead to disastrous results in the performance of the treatment system, leading to elevated discharges of total suspended solids and biological oxygen demand. The impacts of such "optimization" efforts would be permit violations and overall degradation of water quality in the receiving stream. Optimization efforts at our facilities have included determining the minimum amount of phosphorus feed needed to maintain optimal biological performance. As each wastewater treatment system is unique in configuration, pollutant load, and optimal biological control characteristics, it is unwise to assume that what may work for one facility will also work for a different facility. The Department should recognize the

uniqueness of phosphorus-deficient wastewaters when developing guidance for application of the MDV. In addition, the Department should acknowledge that each biological treatment system is unique, and it is imperative that the over-all health and performance of these systems be maintained when considering phosphorus optimization activities.

Comments on Draft Guidance for Implementing Wisconsin's Multi-Discharges Variance for Phosphorus

1. Chapter 1 Water Shed Project Requirements
    a. Department guidance specifies that watershed projects must be applied to activities within each point source's HUC 8 basin. In some cases, this requirement limits the potential for maximizing the effectiveness of non-point source reductions for a facility. For example, the upper Wisconsin River basin is separated into three HUC 8 basins. The dividing line between the Lake Dubay basin and the Castle Rock basin is at the Lake Dubay dam. Directly upstream from the boundary is the Lake Eau Plaine sub-watershed. This sub-watershed has been demonstrated to be a substantial contributor to phosphorus concentrations in the Wisconsin River in the HUC 8-defined Castle Rock basin. As currently drafted, funds provided under the MDV program from dischargers in the Castle Rock basin may not be applied for phosphorus reduction projects in the Lake Dubay basin, even though that basin contributes heavily to the water quality improvement in the basin. It may be the most cost-effective opportunity to provide for non-point reductions from an upstream watershed, but that option is not presently allowed under the existing guidance. Department guidance should be revised to allow for upstream watershed improvement projects, regardless of HUC 8 boundaries. This will require cross-basin and cross county coordination efforts.

2. Chapter 2 Instructions
    a. When a facility provides monitoring data to assist in the determination of interim limits, there should be a mechanism by which specific data can be excluded from the data set for good cause. At industrial facilities that have phosphorus-deficient wastewaters, it is likely that phosphorus addition trials have been run to determine how low the phosphorus feed can go before biological treatment is impaired. Phosphorus discharge levels during these trial periods may have been much lower than normal; however, it is also possible that such levels were not sustainable from a biological health perspective.
    b. The guidance and application form for industrial facilities requires information on phosphorus content of internal waste streams. This requirement is not appropriate for phosphorus-deficient industrial waste streams. Facilities that add phosphorus to provide adequate nutrient supply for biological treatment should be exempted from this requirement.
    c. The guidance requests the submittal of the most recent three years of phosphorus bio solids testing. There is no clear indication of what this data would be used for, and what value it would provide. This information may not be useful for some industrial facilities, especially those with phosphorus-deficient wastewater. This data may not be available at many facilities. Where the data may be available, it may not be from certified laboratories. The submittal of this data should be optional, if it provides any particular value for the applicant.

3. Domtar supports efforts to make this process more fair and equitable. MDV funds should not be providing 100% of the costs for landowners to implement non-point source control projects. Individual landowners benefit from the installation of controls in the long-term, and should thus be required to share the costs for installation of the selected best management practices. Department guidance should clarify those participants that accept funds from this program

provide matching funds at some prescribed level. Likewise, phosphorus runoff from natural sources also contributes to water quality impairments. In order to address the contribution from these sources more equitably, there should be a requirement that public funds be made available, and that a designated amount goes into the county phosphorus control funds pool as well. These steps would at least reduce the unfair burden that ch. NR217 places on participating point source dischargers.

4. The guidance document requires that at least 65% of MDV funds collected by a county go towards actual improvements, and up to 35% can be used for administrative activities. There is no mechanism for assuring that counties are using this administrative allotment efficiently, nor making efforts to reduce the administrative load over time to ensure maximum benefit in the field. Once programs are set up, it is conceivable that administrative costs could be reduced. The percentage allowed for administrative use should be reviewed at a specified frequency, and adjusted as appropriate.

5. The guidance relies heavily on the development and application of 9 Key Element Plans for prioritizing watershed areas for improvements. While these plans are typically very thorough and detailed, they do not exist for many counties or watersheds in Wisconsin. Counties that do not have such plans available are at a disadvantage when it comes time to implementation of runoff controls, and the time needed to develop such a plan would preclude any actual improvements for the first year or two of MDV fund availability. There may be a need to provide more administrative money up front in these situations, and increase the spending in the field in later years. In such cases, it may be necessary to allow for an averaging period exceeding one year in order to meet the 65%/35% requirement.

6. The need for transparency between revenue contributors, revenue receivers, and county and state personnel cannot be stressed enough. Although the guidance documents lay out fairly straight-forward expectations for project reporting, there needs to be clear, consistent application, information sharing, and enforcement in order for this program to be effective in the long-term. As a potential contributor into this program, Domtar needs to know that its' contributions are being used effectively and efficiently, and we are not just being used to support a bureaucratic program that is not achieving expected water quality improvements. We suggest that facilities that contribute into a particular county's MDV fund be involved in the review of county MDV plans as they are developed, and also be included in the annual report review process, in order to provide feedback on the adequacy and efficiency of the efforts of the county and the effective use of the funds provided.

Thank you for your consideration of these comments.

Sincerely,

Mathew T. Fischer
General Manager
Domtar – Nekoosa Mill

Kathy Collins
General Manager
Domtar – Rothschild Mill

November 1, 2015

To:
Amanda Minks, DNR water resources management specialist
Susan Hedman, Regional Administrator, EPA
Cathy Stepp, Secretary of the Wisconsin Department of Natural Resources

CC:
Scott Walker, Wisconsin governor
Scott Neitzel, Secretary, Department of Administration
Representative Dana Wachs
Senator Kathleen Vinehout
Kimberly Wright, Midwest Environmental Advocates

Re:
Multi-discharge Variance Request for Phosphorus from the Wisconsin Department of Natural Resources to the EPA

This is a comment regarding the application to the EPA for variance to the Clean Water Act regarding phosphorus from the Wisconsin Department of Natural Resources. Please submit this comment as part of the hearing on December 9, 2015. The basic goal of the DNR is to extend the timeline for up to ten years for compliance with required regulations of the Clean Water Act when issuing Wisconsin Pollutant Discharge Elimination Systems permits.

In attempting to justify why the delay is needed, the Wisconsin Department of Administration compiled a multi-page document to discuss the economic costs to business, cities, and others if the regulations were employed at the present time. There is, however, a glaring omission in this report. It does not document the costs businesses, cities, and citizens are experiencing now due to Wisconsin's infamous green waters with increasing incidents of contaminated wells, e-coli, and other health issues. Vacationers do not stop near green waters, excluding communities from much needed economic support. When contaminated lakes reek, lake side home values sink leaving communities without needed tax support. Beaches close. Individuals pay dearly to clean up private wells. Cities are dredging surface water lakes and ponds to clean up algae (which always returns). Lake associations are installing aerators in attempts to entice fish back into dead zones. All this is costing citizens throughout the state. These costs will increase as a variance is used to delay cleanup.

My own experience in traveling the state tells me that the contamination by phosphorus of Wisconsin's waters has exploded in the past 5-7 years. It does not get better, only worse with each passing year. A listing of impaired Wisconsin waterways (draft format) posted on the DNR web site this month indicates persistent phosphorus pollution in most Wisconsin streams and lakes. To my knowledge only one small stream in Eau Claire County does not have phosphorus in it as its length is surrounded by county forest. Wisconsin cannot afford to wait 10 years for a questionable chemical to cure the ills of all discharges within

communities. It is also always questionable as to whether an additional chemical added to the already polluted water does more harm than good.

The document from the Department of Administration mentions assuring that public comment opportunities are provided “regarding the site-specific applicability of the MDV (multi-Discharge Variance) to an individual WPDES permit holder”. Having an opportunity to speak regarding a permit in no way means public comments will be genuinely considered. In cases involving CAFOs (Concentrated Animal Feeding Operations) citizens may have valid comments indicating need for changes in permits. However, too often the only way change will happen is through court action initiated by citizens at their cost or through costly scientific studies on the part of citizens.

In addition, the DOA document cites budget constraints and the lack of staff. However, it was the governor and legislature of Wisconsin that have chosen to create the constraints and lack of staff in the Department of Natural Resources. The DNR has lost 600 employees in the last few years due to legislative and governor action. Without a doubt the loss of personnel and money has contributed greatly to the present situation Wisconsin finds itself in—widely contaminated waters due to phosphorus. It is time elected officials are made to understand they must now support a DNR that can protect Wisconsin waters by working in the field to ensure compliance to permits that reflect federal law.

Asking for a variance in implementing phosphorus regulations is questionable due to the fact that the DNR has been told to make corrections to bring itself into compliance with EPA regulations since 2011, but has failed to do so. It has proven that EPA time lines are ignored by the Wisconsin Department of Natural Resources. Why should the EPA allow extended time to implement more regulations when the WDNR has ignored time limits in the past?

It is time for our elected officials, governor, and the Wisconsin Department of Natural Resources to comply with EPA regulations without delay. Our waters will only continue to deteriorate as delays put off action. Excuses for variances are simply not acceptable, especially when there is a blatant effort to ignore the price citizens are already paying.

Glory Adams
1216 S Farwell St
Eau Claire, WI 54701
715-834-8796

From: joe@nextstepenergy.com
Sent: Wednesday, November 18, 2015 4:07 PM
To: Minks, Amanda L - DNR
Subject: DNR EPA Pollution Variance

Hello Amanda,

We spoke today about the issue regarding Department of Administration and the DNR citing costs to businesses and municipalities of complying with Federal Clean Water Act standards. As I pointed out to you, this ignores the enormous costs to citizens, municipalities, or other businesses who bear the burden of dealing with pollution problems in the first place. Deeper wells, algae cleaners, upgraded water treatment facilities, and disrupted economies in various sectors are high prices to pay for our pollution problems.

I encourage the DNR to take the long view on the environment and business sustainability. Allowing companies to pollute for up to 10 more years makes no sense.

Thank you for logging my comment,

Joe Maurer
Eau Claire

Lakeland Sanitary District No. 1

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Fax

December 16, 2015

Amanda Minks
DNR Resource Management Specialist
Wisconsin Department of Natural Resources
Box 7921
Madison, WI 53707-7921

Re: Multi Discharger Phosphorus Variance

Thank you for accepting comments on the multi discharger phosphorus variance. I am writing in support of submitting the application to the EPA for consideration.

I am Water/Wastewater Superintendent for Lakeland Sanitary District. We serve the communities of Minocqua, Woodruff and Arbor Vitae.

Municipal wastewater treatment facilities have a long history of complying with environmental regulations and take pride in doing so. The phosphorus limits present a unique situation. Even as municipalities are forced to comply with the ultra-low phosphorus limits little positive effect will be seen. The research has shown the primary contributors are non-point sources.

Capital costs, for Lakeland Sanitary, as shown in the Economic Determination are estimated to be $472,969 with O&M costs being $44,496. We believe these numbers will be significantly higher. Our estimates for capital costs are $1.5 million. O&M costs are hard to forecast. Presently we feed alum to remove phosphorus. Increasing the amount of alum we feed will also lower our effluent pH. At the very least we will need to have chemical adjustment for pH. Potentially we may be looking at bio-P with denitrification to restore alkalinity. The solution would probably be a combination of the two followed by filtration.

The lower phosphorus limits will also affect contract waste we receive primarily septic and DNR campground vault (pit toilet). The testing we have done shows septic can vary wildly in mg/l phosphorus. Campground vault is consistently over 50 mg/l phosphorus. We currently take tens of thousands of gallons of vault alone.

The variance, while not perfect, will give us time to work through some of these issues. In the meantime hopefully technology will catch up with progressing effluent standards. In addition a system of bringing non-point sources into compliance can be sought.

I would ask the multi-discharger variance package be submitted to the EPA with the full backing of the WDNR.

Sincerely,

Ron Groth
Superintendent

From: Davy, Mark <msdavy@davyinc.com>
Sent: Tuesday, December 15, 2015 11:09 AM
To: DNR Phosphorus
Cc: Davy, Michael; Welte, Shawn; Mathews, Thomas; O'Connell, Caitlin; Jensen, Mark
Subject: Comments on Multi-Discharger Phosphorous Variance

Please consider the following comments in regards to the Proposed Multi-Discharger Phosphorous Variance:

1. The proposed legislation allows a request for a variance at any time during the permit term. May a permit holder request a variance without doing any evaluation of alternatives?

2. Currently, everyone assumes they will receive a variance and acts accordingly. That means doing nothing. How many permit holders does DNR believe will qualify for a variance? 90%? 10%? With the option to pay a fee becoming available as a result of this variance, communities are less willing to invest in investigating solutions as the variance seems like an easy answer. If it is expected to be difficult to qualify for a variance, more effort will need to be made during Facility Planning.

3. The point of the Facility Plan is to find the most cost-effective alternative for compliance. In order for us to determine this answer we need to have some guidance for the variance "cost". We were using sewer rates >2% of MHI as an 'unacceptable rate' and recommended pursuing a variance if the cost of treatment is above this limit. We noted the reference to the Economic Guidance for Water Quality Standards published by EPA. Although many of the items mentioned in this document are compiled when writing a Facility Plan, some are outside the scope of a 'normal' plan. At what point is the detailed cost justification required? What criteria constitutes a 'major' upgrade?

4. There is little incentive to seriously pursue treatment alternatives. For instance, some lagoon facilities could switch to land application and avoid phosphorus regulation. That can be a relatively low cost option (but still a major upgrade), especially if the lagoon already provides long detention times. The key to land application is the land, of course. In order to have a Facility Plan that addresses this solution, the following needs to be completed:

   Option to Purchase or lease the land
   Agreement with farmer if crops planned
   Soil testing
   Sizing calculations and application rates
   Cost estimates for pumps, grading and equipment

   With a variance perceived as the alternative, the simple choice for most lagoon owners is to say there isn't any land available without making any effort.

There isn't any incentive right now for anyone to 'solve' the problem. They save more money by simply postponing action. There are projects that have reasonable solutions but there is no motivation to even seriously investigate alternatives.

We need some guidance on how to screen projects to determine if a variance is the proper solution moving forward. Will variances be granted routinely? What criteria will be evaluated to determine if a variance will be approved? If a variance is determined to be the most cost effective solution in the beginning of a permit cycle, why prepare a Facility Plan at all?

Sincerely,

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Midwest Environmental Advocates

December 16, 2015

Amanda Minks
Wisconsin Department of Natural Resources
P.O. Box 7921
Madison, WI 53707-7921

Re: Comments on the Preliminary Determination Concerning the Water Quality Standards for Phosphorus

Dear Ms. Minks:

Please accept the enclosed comments on the Wisconsin Department of Natural Resources' proposed multiple variance discharger variance package. The comments are submitted on behalf of Milwaukee Riverkeeper, Sierra Club—John Muir Chapter and Midwest Environmental Advocates.

Thank you in advance for consideration of our comments,

Jimmy Parra
Staff Attorney
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Comments on Wisconsin Department of Natural Resources' Proposed Multiple Discharger Variance Package

Milwaukee Riverkeeper, Sierra Club—John Muir Chapter, Midwest Environmental Advocates

December 16, 2015

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I. INTRODUCTION

Milwaukee Riverkeeper, John Muir Chapter of the Sierra Club and Midwest Environmental Advocates submit these comments regarding the Wisconsin Department of Natural Resources' (DNR) proposed multiple discharger variance package. Wisconsin's phosphorus water quality standards, set out in Wisconsin NR 102.06, are achievable through cost-effective controls and will actually produce net economic benefits to the State—as the Wisconsin Department of Natural Resources (WDNR) itself concluded in 2012. No multiple discharger variance should be implemented, at least on this administrative record. In order to satisfy state and federal laws, the State must correct several fundamental procedural flaws and redo its economic attainability analysis to provide for a full consideration of relevant and available facts using a methodology that conforms to professional standards. Upon reconsideration of the economic analysis, the State must evaluate not just whether attainment of the standards is achievable, but it must identify the highest achievable condition in light of the factors the State uses to demonstrate the need for the variance. Furthermore, the State must modify the statutory framework for the variance to bring it into compliance with federal requirements and explicitly grant DNR the necessary authority to implement the variance consistent with those requirements.

A. A Brief History of Wisconsin's Phosphorus Standards

As early as 1998, the Environmental Protection Agency (EPA) recognized that nutrient pollution to our Nation's waters poses a significant risk to public health and the environment. It therefore instructed States to adopt numeric nutrient criteria by 2003 that

would satisfy the Clean Water Act's mandate to "protect the public health or welfare, enhance the quality of water and serve the other purposes of" the Act.[1] In 2010, Wisconsin set numeric standards for phosphorus and established flexible tools for implementation, including watershed adaptive management, water quality trading, and extended compliance schedules of up to seven years—or nine years if the permittee must construct filtration or a "similar phosphorus removal process."[2] EPA approved those provisions as consistent with the requirements of the Clean Water Act.[3]

In 2012, the Wisconsin Department of Natural Resources (DNR) analyzed the economic impact of those new phosphorus rules, as the Wisconsin Legislature had required it do to.[4] Based on DNR's analysis of the available data, it predicted that the phosphorus rules would yield $18.8 million in net benefits to the State. In other words, each pound of phosphorus reduced from our waters would bring "$23.56 in benefits to Wisconsin residents over and above the cost of reducing it."[5] DNR explained that because many of the real benefits from the rule are difficult to quantify, "this report likely underestimates … the monetary benefits of the new rules."[6]

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[1] 33 U.S.C. § 1313(c)(2)(A) (Clean Water Act § 303(c)(2)(A)). *See also* EPA, *Clean Water Action Plan: Restoring and Protecting America's Waters* (Feb. 1998); EPA, *National Strategy for the Development of Regional Nutrient Criteria* at 5–6 (June 25, 1998).
[2] *See* Wis. Admin. Code §§ NR 102.06, 217.
[3] *See* Letter from Tinka G. Hyde, EPA Director of the Water Division, to Bruce J. Baker, WDNR Administrator, Division of Water (Dec. 30, 2010); Letter from Susan Hedman, EPA Regional Administrator, to Cathy Stepp, DNR Secretary (July 25, 2012).
[4] See DNR, *Phosphorus Reduction in Wisconsin Water Bodies: An Economic Impact Analysis* (Aug. 13, 2012) (*2012 EIA*); 2011 Wisconsin Act 32.
[5] *2012 EIA* at i.
[6] *Id.*

Starting in 2011, DNR has included phosphorus water quality-based effluent limits (WQBEL) in reissued permits. Most reissued permits include compliance schedules of seven or nine years, which provides permittees ample time to evaluate and ultimately implement the most cost-effective compliance option. To help permittees assess their options, DNR has developed detailed guidance for the water quality trading and adaptive management programs.[7]

B. Act 378

In 2014, the Wisconsin Legislature enacted 2013 Wisconsin Act 378 (Act 378), which instructed the Wisconsin Department of Administration (DOA) to determine (after consulting with DNR)

> whether attaining the water quality standard for phosphorus …, through compliance with water quality based effluent limitations by point sources that cannot achieve compliance without major facility upgrades is not feasible because it would cause substantial and widespread adverse social and economic impacts on a statewide basis [or "for statewide categories of point sources"].[8]

Act 378 provides that if the Department of Administration determines that compliance is not feasible, then DNR must seek EPA approval for the variance procedure and standards established by the Wisconsin Legislature.[9]

Upon EPA approval, any existing permittee would become eligible for a variance by certifying that it cannot achieve compliance with the phosphorus standards without a "major facility upgrade"[10] and agreeing to comply with the program requirements.[11] The

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[7] dnr.wi.gov/topic/surfacewater/adaptivemanagement.html (Last visited June 11, 2015).
[8] 2013 Wisconsin Act 378, Wis. Stat. § 283.16(2)(a).
[9] *Id.* § 283.16(2)(em).
[10] The Act defines "major facility upgrade" as "the addition of new treatment equipment and a new treatment process." *Id.* § 283.16(1)(e).
[11] *Id.* § 283.16(4)(a).

statute requires DNR to approve a timely variance application unless it determines the permittee's certification is "substantially inaccurate";[12] and it deems a variance application automatically approved if DNR fails to act within 30 days after receiving it.[13] Furthermore, according to Act 378, a variance application automatically suspends any existing WQBEL, and the corresponding compliance schedule, until the period for seeking review of DNR's decision on the application has expired.[14]

The Wisconsin Legislature specified that the following interim limits (expressed as monthly averages) be included in variance permits: 0.8 mg/L to be achieved by the end of the first five-year permit term; 0.6 mg/L by the end of the second permit term; 0.5 mg/L by the end of the third permit term; and compliance with the actual effluent limit by the end of the fourth permit term.[15] If a permittee certifies that it cannot achieve even these interim limits, however, then DNR shall include a requirement "to achieve compliance with the most stringent achievable interim limit."[16]

In addition to meeting these interim limits, Act 378 requires a permittee with a variance to either (1) make payments to surrounding counties reflecting a fixed amount for each pound of phosphorus (starting at $50/lb, capped at $640,000 annually) the permittee discharges above a target value set by the State Legislature;[17] or (2) enter into

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[12] *Id.* § 283.16(4)(am)1.
[13] *Id.* § 283.16(4)(am)2., 3.
[14] *Id.* § 283.16(4)(c).
[15] *Id.* § 283.16(6)(a).
[16] *Id.* § 283.16(6)(am).
[17] The "target value" is the total pounds of phosphorus discharge permitted under a federally approved total maximum daily load (TMDL); or, if there is no federally approved TMDL, the total pounds of phosphorus discharge corresponding to a 0.2 mg/L average yearly concentration. *Id.* § 283.16(1)(h).

an agreement approved by DNR to offset a permittee's excess phosphorus discharges by reducing phosphorus pollution from other sources in the same water basin.[18]

C. The Clean Water Act and EPA Regulations

The Clean Water Act does not expressly provide a variance process. Nevertheless, EPA asserts authority to approve water quality standards variances based on Section 101(a)(2) of the Clean Water Act, which proclaims that one of the statutory goals is to achieve, "*wherever attainable,* an interim goal of water quality which provides for the protection and propagation of fish, shellfish, and wildlife and provides for recreation in and on the water." [19] As the EPA General Counsel held in a 1977 decision, "variances can be granted by States only when achieving the standards is 'unattainable.'"[20]

In recently finalized rules, EPA for the first time established an explicit framework to evaluate a proposed variance to water quality standards (WQS). Those rules define a WQS variance as "a time-limited designated use and criterion for a specific pollutant(s) or water quality parameter(s) that reflects the highest attainable condition during the term of the WQS variance."[21] They also establish specific elements that States must include in the variance provision itself and require States to provide documentation justifying the need for the variance, the length of the variance and the interim requirements that apply during the variance.[22] Further, States must "thoroughly reevaluate" variances at least every five years and submit the results of that reevaluation

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[18] *Id.* § 283.16(6)(b), (8).
[19] 33 U.S.C. § 1251(a)(2) (emphasis added).
[20] *See* Decision of the EPA General Counsel No. 58 (*In re Bethlehem Steel Corp.*) at 9 (Mar. 29, 1977) ("EPA Gen. Counsel Decision No. 58.").
[21] 40 C.F.R. 131.3(o).
[22] 40 C.F.R. 131.14(B).

to EPA within 30 days of completing the review.[23] Compliance with these requirements ensures that variances are used appropriately and "follow a transparent process that is guided by an accountable framework."[24] Once EPA approves the variance and the State implements it in a permit, the interim limits become the applicable standards for developing NPDES permit limits and requirements under section 301(b)(C) of the Clean Water Act.[25]

The new rules explicitly authorize the use of multi-discharger variances.[26] These types of variances "[m]ust meet the same 40 CFR 131 regulatory requirements as an individual discharger WQS variance,"[27] and the justification for the variance must "sufficiently account for as much individual permittee information as possible" to ensure that any permittee ineligible for an individual variance would not qualify for a multiple discharger variance.[28]

II. THE STATE HAS NOT FOLLOWED IMPORTANT PROCEDURAL RULES

A. The State Has Not Given the Public a Meaningful Opportunity to Comment on Key Aspects of the Proposed Variance

[23] 40 C.F.R 131.14(b)(v).
[24] 80 Fed. Reg. at 51035.
[25] 40 C.F.R 131.14(a)(3).
[26] *See* 40 C.F.R. 131.14(b)(ii)(a) (referencing "discharger(s) specific variances.); *see also* 80 FR 51036 (discussing requirements that apply to multiple discharger variances.).
[27] EPA, *Discharger-specific Variances on a Broader Scale: Developing Credible Rationales for Variances that Apply to Multiple Dischargers—Frequently Asked Questions*, EPA-820-F-13-012, at 5 (Mar. 2013) ("EPA FAQ"). The rule narrative explicitly references the *EPA FAQ* and suggests that states refer to it when developing a multiple discharger variance.
[28] 80 Fed. Reg. 51040.

EPA's water quality standards regulations explicitly require States to provide for public participation when adopting a WQS variance.[29] Pursuant to 40 C.F.R. Part 25, the State must hold a public hearing with at least 45 days advance notice and must make all "[r]eports, documents and data relevant to the discussion" available to the public at least 30 days before the hearing.[30] Compliance with these minimum requirements helps ensure that the public has the opportunity to fully understand the proposed actions and that the government fully considers the public's concerns as part of an open decision-making process.[31]

The State has failed to provide meaningful public participation with respect to two key components of the proposed variance—Wis. Stat 283.16, which sets forth all the key aspects of the variance, including the conditions for eligibility, the length of the variance, and the requirements that apply during the term of the variance; and DOA's Economic Impact Analysis and Final Determination, in which DOA purports to demonstrate the need for the variance (*i.e.*, that compliance with existing standards is unattainable). The State is not soliciting comments on the substantive provisions set forth in Wis. Stat. 283.16 as part of this public comment period, nor has it ever done so. DNR is seeking comment only on several documents that justify and provide the implementation strategy

[29] 40 C.F.R. 131.14 (stating "States may adopt WQS variances…Such a WQS variance is subject to the provisions of this section and public participation requirements at 131.20(b).") In turn, 40 C.F.R. § 131.20(b) requires that the public hearing be held "in accordance with" EPA's public participation regulations at Part 25.
[30] 40 C.F.R. § 25.5(b).
[31] 40 C.F.R. 25.3(c)(1).

for the multi-discharger variance (MDV), namely, DOA's Final Determination, DNR's MDV Justification, and DNR's MDV Implementation Guidance.[32]

DNR's solicitation of comments on DOA's Environmental Impact Analysis (EIA) and Final Determination falls short of federal requirements for two reasons. First, the EIA and Final Determination are "final" in both name and substance. The Wisconsin Legislature authorized DOA to conduct the EIA and make the determination as to whether compliance with the phosphorus water quality standards will have substantial and widespread economic and social impacts.[33] While the statutes instruct DOA to consult with DNR, the ultimate decision-making authority rests with DOA. DOA has exercised that authority here and issued its "Final Determination."[34] DNR has no authority under the statutes to make any changes to the EIA or Final Determination in response to comments that are submitted as a part of this process.[35] In other words, at least with respect to the use attainability assessment and the substantive provisions of the variance, this public comment process is meaningless.

Second, the State did not provide all "reports, documents and data relevant to" the EIA and Final Determination at least 30 days prior to the hearing, in fact, the State still has not provided such information despite several requests. Midwest Environmental

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[32] dnr.wi.gov/topic/surfacewater/ phosphorus/statewidevariance.html (last visited Dec.12, 2015).
[33] Wis. State. § 283.16(2)(a).
[34] *See* DOA, *Substantial and Widespread Adverse Social and Economic Impacts of Wisconsin's Phosphorus Regulations—A Final Determination* (Oct. 06, 2015) ("*Final Determination*).
[35] Prior to finalizing the EIA and Final Determination, DOA did solicit comments on a draft EIA and Preliminary Determination. That process, however, fell far short of meeting federal standards as DOA provided only 7 days advanced notice of the public hearing.

Advocates, Inc. (MEA) and Milwaukee Riverkeeper (MRK), along with other commenters, identified several reports, documents and data relevant to the EIA and Preliminary Determination that were not publicly available during the public comment period last May.[36] The State has yet to make that information available. These documents include:

- Underlying survey data from the November 2014 survey of Wisconsin businesses and the state's publicly owned treatment works.
- Any substantive information relied upon from third-party consultants or others. For example, the EIA references "appropriate economic inputs" that were entered in the REMI model. Those inputs, and the process used to convert the compliance costs into the inputs, have not been made available.
- At least one study relied on in the EIA, Strand Associates, Report for Municipal Environmental Group, "Opinions of Probable Cost for Achieving Lower Effluent Phosphorus Concentrations at Wastewater Treatment Plants in Wisconsin" (Aug. 2008).

Further, MEA submitted an open-records request in September asking for documents and other data relevant to the DOA's EIA and Final Determination and DNR's variance package. Neither DNR nor DOA have provided any formal response to the request.

Without the requested documents, the public cannot meaningfully review and critique DOA's EIA or Final Determination. For instance, without the raw data and inputs that were used to run the REMI analysis, there is no way for the public to analyze whether the model was developed and run appropriately. DOA relies on the outputs from the REMI model to establish that the economic and social impacts of complying with the phosphorus standards are widespread. It is a serious error for the State to move forward based on the EIA and the Final Determination without providing the public the necessary

[36] *See e.g.* Midwest Environmental Advocates and Milwaukee Riverkeeper, *Comments on the Preliminary Determination Concerning the Water Quality Standards for Phosphorus* at 9-10 (Jun. 11, 2015).

information to conduct a meaningful review of that analysis. Despite repeated requests for that information, the State has yet to make it public.

DOA and DNR argue that DOA's EIA and Final Determination are not subject to federal public participation requirements:

> "DOA and DNR find that the 45-day public hearing requirement applies to the variance package to be submitted to EPA only. This federal provision does not apply to the state-mandated economic determination completed by DOA in conjunction with DNR pursuant to s. 283.16, Wis. Adm. Code."[37]

Respectfully, the State is simply wrong on this point. The State is relying upon the EIA and Final Determination to establish that the phosphorus water quality standards are unattainable. EPA's regulations require a use attainability and highest attainable use analysis as part of any proposed variance package and, therefore, it must be subject to meaningful public review.[38]

B. The State Transferred Authority over Aspects of the Permit Program to DOA Without First Seeking EPA Approval

In 1974, EPA approved Wisconsin's request to administer its own permit program to carry out Clean Water Act Section 402 (establishing the National Discharge Pollution Elimination System (NPDES)). EPA specifically designated the Environmental Protection Division of DNRas the Administrator to carry out a program in accordance with federal rules and a Memorandum of Agreement between DNR and EPA.

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[37] DOA, *Response to Comments on DOA's Economic Determination* at 13 (Oct. 2015) ("DOA Response to Comments").

[38] Based on discussions with agency staff, it is our understanding that DNR intends to request statutory changes. The nature of those changes has not been made public. If the amendments to the statute result in any significant changes to the variance package that extend beyond the "logical outgrowth" of the current proposal, DNR must provide an additional opportunity for public comment on those changes. See *Fertilizer Institute v. EPA*, 935 F.2d 1303, 1311 (D.C.Cir.1991).

Under the program that EPA approved, DNR was designated as the agency responsible for administering all aspects of the permit program, including submitting a request for a variance or other revision to water quality standards—and making the findings to support it. With respect to this proposed variance, however, the Wisconsin Legislature instructed DOA, not DNR, to conduct the analysis and determine whether attainment of phosphorus standards is infeasible. Specifically, Act 378 ordered DOA, "in consultation with" DNR, to determine whether attaining the phosphorus standards is infeasible because it would cause "substantial and widespread economic impacts." The Act states that if DOA makes such a determination, then DNR "shall seek approval" from EPA for the variance.

EPA rules require federal approval before a State may revise its permit program, including transferring any part of the program to another agency. Specifically, 40 C.F.R. § 126.62(c) requires a State to notify EPA if it proposes to transfer all or part of the Clean Water Act program to any other agency, and the "new agency is not authorized to administer the program until" EPA approves the transfer. Under current Wisconsin law, DNR no longer retains authority to make its own determination of unattainability; its only role is consultant. Furthermore, as discussed in greater detail below, DNR has no authority to modify the critical terms of the variance, such as eligibility criteria, procedures for reviewing applications, and interim limits. DNR did not make the factual findings underlying this proposed variance, it did not make the final decision whether to pursue the variance, and it is not the agency responsible for any formal use attainability analyses done in later years of the variance program.

The State never sought EPA approval to transfer agency authority over these aspects of the permit program, as 40 C.F.R. § 126.62(c) requires. Therefore, DOA's Economic Impact Analysis and its Final Determination cannot satisfy the federal "use attainability analysis" requirement, because they were not performed by the program administrator (namely, DNR). The State must first seek EPA approval to transfer agency authority to DOA; only after EPA approves that request can DOA properly carry out the required use attainability analysis. Until then, EPA must reject this variance package because the designated Administrator—DNR— plainly does not have legal authority to carry out the program consistent with federal regulations.

III. THE STATE HAS NOT SHOWN EITHER THAT A VARIANCE IS WARRANTED OR THAT THE INTERIM STANDARDS ARE THE HIGHEST ATTAINBLE USE

According to EPA, its authority to approve a WQS variance (or, for that matter, any revision to designated uses) stems from Section 101(a)(2) of the Clean Water Act,[39] which provides that water quality standards should be set to protect fish and wildlife and providing recreational opportunities, "wherever attainable."[40] EPA construes that statutory provision to create a presumption that such uses *are* attainable; only if a State demonstrates otherwise through a "use attainability analysis" may the State impose less stringent standards than necessary to achieve those uses.[41] Further, when a State "adopts a new or revised water quality standard based on a required use attainability analysis," it

[39] 33 U.S.C. § 1251(a)(2).
[40] *See* Final Rule, 80 Fed. Reg. at 51,024.
[41] *See* 40 C.F.R. § 131.3(g) (defining "use attainability analysis"); § 131.10(j) (identifying circumstances when use attainability analysis required).

"shall also adopt the highest attainable use"[42] (HAU), defined as the use "that is both closest to the uses specified in Section 101(a)(2) of the Act and attainable, based on the evaluation of the factor(s) in § 131.10(g) that preclude(s) attainment of the use and any other information or analyses that were used to evaluate attainability."[43]

EPA rules make clear that a State must show the scientific basis supporting any proposed water quality standard or revision, including a proposed WQS variance. A "use attainability analysis" is defined in § 131.3(m) as a "structured scientific assessment of the factors affecting attainment."[44] Further, § 131.11(a) requires that States adopt water quality criteria "based on sound scientific rationale, and § 131.5(a)(7) provides that EPA must review proposed revisions that exclude Clean Water Act Section 101(a)(2) uses to determine whether they are "based upon appropriate technical and scientific data and analyses." These requirements apply to variances because they are time-limited designated uses and criteria. As EPA explained, "the level of rigor required for a WQS variance is no different than for a designated use change."[45]

Although the State retains considerable discretion to fashion its analysis, at a minimum it must "examine the relevant data and articulate a satisfactory explanation for its action, including a 'rational connection between the facts found and the choice

[42] 40 C.F.R. § 131.10(g).
[43] 40 C.F.R. § 131.3(m). In its FAQ, EPA similarly defined "highest attainable condition" as "the condition that is both feasible to attain and is closest to the protection afforded by the designated use and criteria." EPA, *Discharger-specific Variances on a Broader Scale: Developing Credible Rationales for Variances that Apply to Multiple Dischargers: Frequently Asked Questions*, EPA-820-F-13-012 at 2 n.2 (Mar. 2013).
[44] 40 C.F.R. § 131.3(m).
[45] Final Rule, 80 Fed. Reg. at 51,041.

made.'"[46] The State is "expected to identify relevant factual evidence, to explain the logic and the policies underlying any legislative choice, to state candidly any assumptions on which it relies, and to present its reasons for rejecting significant contrary evidence and argument."[47] And, of course, it must follow the rules.[48]

A. The State's Use Attainability Analysis fails to Demonstrate that a Variance is Justified

The State's finding of substantial and widespread economic harm is based on false or unsupported assumptions, an incomplete consideration of relevant facts, and a methodology that does not conform to professional standards. Real-world data should be used wherever it is practically available, and the State hasn't shown otherwise here.

1. The Economic Impact Analysis (EIA) assumes all permit holders would begin implementation in 2016.

The authors of the Economic Impact Analysis (EIA) recognized that the "specific dates for incurring capital investments are primarily driven by the Wisconsin Pollution Discharge Elimination System (WPDES) permit, and are site-specific."[49] Nevertheless,

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[46] *Motor Vehicle Mfrs. Ass'n v. State Farm Auto. Ins. Co.*, 463 U.S. 29, 43 (1983) (citing *Burlington Truck Lines, Inc. v. United States*, 371 U.S. 156, 168 (1962)). *See also, e.g., Adventist GlenOaks Hosp. v. Sebellius*, 663 F.3d 939, 942 (7th Cir. 2011) (applying *State Farm*).

[47] *Int'l Union, United Auto, Aerospace and Agr. Implement Workers of Am., UAW v. Pendergrass*, 878 F.2d 389 (D.C. Cir. 1989) (quoting *Bldg. & Constr. Trades Dept., AFL-CIO v. Brock*, 838 F.2d 1258, 1264 (D.C. Cir. 1988)).

[48] *See, e.g., Nat'l Env'tl Dev. Ass'n's Clean Air Project v. EPA*, 752 F.3d 999, 1009 (D.C. Cir. 2014) ("Although it is within the power of [an] agency to amend or repeal its own regulations, [an] agency is not free to ignore or violate its regulations while they remain in effect.") (quoting *U.S. Lines, Inc. v. Fed. Mar. Comm'n*, 584 F.2d 519, 526 n.20 (D.C. Cir. 1978)).

[49] ARCADIS *et al., Economic Impact Analysis Presented to the Wis. Dep't of Admin. and Wis. Dep't of Nat. Res.* at 10 (Apr. 24, 2015) ("EIA"). *See also id.* at 34 n.32 ("The timeframe for incurring costs is site-specific depending on the date of permit reissuance

for purposes of modeling economic impacts they assumed that every permittee would begin construction in 2016–2017 "as a representative range for most WPDES permittees based on permit issuance dates,"[50] which reflects "the soonest compliance costs could be expected to be incurred for WPDES permits granted an extended compliance schedule[] and issued December 1, 2010, the date phosphorus water quality standards were promulgated."[51]

That assumption that all dischargers would have to meet the earliest conceivable compliance date is contrary to reality and undermines the integrity of the entire analysis. Permits expire on a rolling basis; and the phosphorus water quality standards are implemented only after DNR reviews and reissues a permit. Even assuming DNR could have reissued all of its permits on December 1, 2010, the State did not reissue any permits with new phosphorus standards until 2011, and it has done so on a staggered basis since then. In fact, permit data available on DNR's website reveals that as of October 26, 2015, permits for at least 160 municipal facilities and 95 industrial facilities (nearly 25% of all WPDES permit holders) have not been reissued since EPA approved the numeric phosphorus criteria on December 30, 2010.[52] Even if DNR managed to reissue all of the remaining permits this year, the soonest those permit holders would

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following the promulgation of phosphorus water quality standards and the duration of the phosphorus compliance schedules in WPDES permits.").

[50] *Id.* at 10.

[51] *Id.* at 34 n.32. *See also id.* at 10 ("For the purposes of modeling the economic impacts, implementation is expected to begin in 2016, but in reality, most point sources are given extended compliance schedules (7 to 9 yrs.) to comply with permit limits.").

[52] *See* Letter from Tinka G. Hyde, EPA Director of the Water Division, to Bruce J. Baker, WDNR Administrator, Division of Water (Dec. 30, 2010). *See also* WDNR, *Current WPDES wastewater permit holders* (Mar. 6, 2015) http://dnr.wi.gov/topic/wastewater/PermitLists.html (Last visited Dec. 12, 2015).

have to comply would be 2022—or 2024 if construction of "filtration or other similar phosphorus removal process" is required,[53] as the State assumes will be the case for many of the 592 dischargers it evaluated.[54]

By ignoring facts and arbitrarily shortening the time over which dischargers have to implement phosphorous controls, the State compresses or intensifies their estimated economic impacts. The expressed purpose of a transition period—in this case seven to nine years—is to lessen the economic impacts of implementing phosphorous controls. By excluding consideration of the transition period, the analysis is biased in favor of exaggerating economic impacts. Such an approach fails to meet the "structured scientific assessment" requirement.

In response to comments on the draft EIA and Preliminary Determination, DOA argues that its assumption that all facilities will begin construction in 2016-2017 does not impact the ultimate conclusion that complying with the standards will cause significant and widespread economic and social impacts. Specifically, DOA states that "[p]ermittees who wait longer to undertake phosphorus related capital investment will face higher borrowing costs and cause more substantial impact."[55] In making this argument, DOA focuses only on the potential interest rate increases beyond 2016 and associated higher borrowing costs, ignoring several other impacts that would likely follow if projected

[53] Wis. Admin. Code. § NR 217.17(2).
[54] EIA at 4 ("This study evaluated 592 permittees, specifically those expected to need to add phosphorus treatment technologies to meet more stringent phosphorus discharge limits.").
[55] *DOA Response to Comments* at 18.

compliance dates more closely tracked reality, including employment, wages, and gross state product.

The State's model could indeed predict a dramatic impact to the economy if compliance costs were spread out over several years, but the public may never know whether that is the case. The State has not run the analysis with other assumptions such as staggered implementation dates, and it has not made any other effort to evaluate with scientific rigor what impact different assumptions might have. Making things worse, the State has made it impossible for the public to run its own analysis by refusing to share the reports, documents, and data on which its modeling depends.

The EIA states that "[a]s a statewide analysis, site-specific timeframes could not be accounted for,"[56] but DOA failed to identify exactly what in the model or analysis precludes using actual permit information instead of defective assumptions. There is no reason (and certainly none given) why those publicly available facts were not incorporated into DOA's modeling. Indeed, the analysis considered some individual factors, such as discharge flowrate, but failed to explain why it could not consider other factors that bear upon attainability. And absent their consideration, "there is simply no rational relationship between the model and the known behavior" of the situation being studied.[57]

[56] *Id.* at 34 n.32.
[57] *Chem. Mfr's Ass'n v. EPA*, 28 F.3d 1259, 1265 (D.C. Cir. 1994).

2. The EIA makes unsupportable assumptions about effluent TP levels instead of considering actual discharge data.

The EIA states that effluent total phosphorus levels for current facilities "were assumed to be at 1 mg/L."[58] The only two "site-specific" data points used in measuring economic impact were (1) the discharge flowrate and (2) the assumed new permit limit.[59] According to its authors, the "development of cost curves that can be applied to all sites did not allow for the incorporation of site specific TP discharge information."[60]

Again, the State's assumptions do not match reality. In part, DOA justifies its assumption on the basis that "[m]ost point sources have an existing technology based effluent limitation of 1 mg/L," and, therefore, it "is a reasonable starting point for many facilities because a facility can discharge up to 1 mg/L at any time and can be in compliance with existing limits."[61] Whether most facilities are permitted to discharge up to 1 mg/L is beside the point; as the State concedes, there are facilities currently discharging at much lower levels. Several commenters in this proceeding acknowledge as much. And an August 2008 study from Strand Associates (cited in the EIA appendix materials) apparently surveyed 39 facilities in Wisconsin to evaluate the level of phosphorus removal that is currently achieved, and found an average total phosphorus effluent limit of 0.6 mg/L "for all facilities regardless of system size, and type of

[58] EIA at 16 n.5.
[59] *Id.* at 22 ("No site specific information other than discharge flowrate and new permit limit were used for the estimate which would put the project definition and design level near 1%.").
[60] *Id.* at 16.
[61] *DOA Response to Comments* at 2.

treatment."[62] Furthermore, the State has actual discharge data for each regulated facility that would provide a much more reliable basis to evaluate whether a permittee (or group of permittees) can attain the water quality standards. The State has not reasonably explained why it could not consider such discharge data here.

The assumptions involving actual discharge are especially problematic when it comes to power plants and non-contact cooling water (NCCW) facilities, many of which contribute little, if any, phosphorus effluent into the State's waters. According to the Preliminary Determination, "DNR believes that some NCCW dischargers would be able to meet" the conditions for receiving intake credits, "thereby eliminating their need to have phosphorus WQBELs in WPDES permits."[63] Nevertheless, the State assumes in its analysis that all NCCW individual permit holders would "have reasonable potential to exceed their calculated phosphorus WQBEL," while conceding that "[t]his assumption may not necessarily be appropriate for each individual WPDES permit holder."[64] That assumption is irrational and fatal to the State's analysis, especially after EPA clarified that DNR "could appropriately determine for some dischargers of once-through non-contact cooling water from power plants that water quality based effluent limitations are not necessary for phosphorus, particularly where the facility utilizes a completely

[62] Strand Associates, *Opinion of Probable Cost for Achieving Lower Effluent Phosphorus Concentrations at Wastewater Treatment Plants in Wisconsin* (report for Municipal Environmental Group) (Aug. 2008), cited in EIA at 86, App. A. [NOTE: Copy unavailable at time of comment submission; please request copy from author if necessary.]
[63] *Preliminary Determination* at 20.
[64] *Id.* at 21.

'piped' cooling system."[65] The State committed similar error with respect to power plant outflows, where it assumed for purposes of its study that WQBELs were needed at all such facilities "unless clear evidence was available to demonstrate that these WQBELs were not necessary."[66] The State's assumptions are unsound. It should revise them and perform the analysis again incorporating actual discharge data from facilities. An analytical approach that cannot accommodate relevant, and in this case, site specific, data raises questions as to the method's analytical veracity and usefulness.

3. The State assumes that every facility (including both municipal and industrial facilities) will adopt the same treatment technology regardless of actual discharge data and phosphorus WQBELs.

DOA asserts that "[g]iven the number of point sources in Wisconsin, it was not possible to estimate compliance costs on a facility-by-facility basis, and still receive the benefit of the [multiple discharger variance]."[67] According to the authors of the EIA, "[t]he development of cost curves that can be applied to all sites did not allow for the incorporation of site specific TP discharge information."[68] Instead of looking at individual facility data, the EIA arrived at cost curves by assuming that

(1) all facilities would elect to use chemical phosphorus removal;[69]

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[65] With respect to NCCW dischargers that are currently subject only to a general permit, the State asserts that "data limitations" make it impossible "to determine with a sufficient degree of certainty which point sources … would need phosphorus WQBELs at the time this study was completed," but it cites a DNR survey (the details of which have not been disclosed) that estimated half of the general permit holders would need water quality standards and thus, presumably, treatment technology to meet that standard. *Id.* at 20–21. This treatment of general permit holders does not bear any reasonable relationship to the facts.

[66] *Id.* at 22–23.

[67] *Final Determination* at 22.

[68] EIA at 16.

[69] *Id.* at 17.

(2) all mechanical wastewater treatment plants are "conventional activated sludge plants with primary and secondary clarifiers";[70]
(3) all lagoon systems "would require secondary clarifiers to remove the added solids generated from the chemical addition for phosphorus removal";[71]
(4) all "industrial dischargers can achieve the same technologies as municipal facilities with some industries requiring significantly higher chemical dosages";[72]
(5) all "paper mills would need new sludge dewatering facilities to process the significantly higher sludge load";[73] and
(6) all NCCW dischargers have the same cost curves as lagoon systems.[74]

The State does not offer adequate data or analysis to support these assumptions, nor does it examine those assumptions against the actual data. There is nothing reflected in the Final Determination, the Economic Impact Analysis, or any other aspect of the record to explain why it is reasonable for the State to rely on a model that purportedly cannot take into account site-specific facts. While the State undoubtedly has discretion to use modeling in support of its determination, it "must 'explain the assumptions and methodology used in preparing the model' and 'provide a complete analytic defense' should the model be challenged."[75] It cannot be enough for the State simply to assert that a more refined cost analysis is impossible—particularly when other state studies have evaluated phosphorus removal costs using methodology that accounted for individual facility and discharge data, including an analysis performed for DNR in 2012.[76]

[70] *Id.* at 17.
[71] *Id.* at 18.
[72] *Id.* at 20.
[73] *Id.* at 20.
[74] *Id.* at 20.
[75] *Appalachian Power Co. v. EPA*, 251 F.3d 1026, 1035 (D.C. Cir. 2001).
[76] *See, e.g.*, Mark Williams, *Cost of Phosphorus Removal at Wisconsin Publicly Owned Treatment Works* (Dec. 2012) (cited in EIA at App. A).

4. *The State assumes substantial economic harm for any industrial facility that is in the top 75% of those incurring costs within each category and located in the top 75% of counties incurring costs.*

Apart from the concerns discussed above as to how the authors of the EIA arrived at the inputs for its economic analysis, there are equally serious concerns about how the State then used that data to find that phosphorus water quality standards would cause substantial and widespread economic harm. To determine which industrial facilities will face substantial impacts from the phosphorus rules, the State ranked all permitted facilities by expected compliance costs within each category (including facilities in the "Other" category) and ranked all counties based on total expected compliance costs within each category. It then found that

> "an industrial permittee may be eligible for coverage under the MDV if the permittee meets either of two conditions: 1) their site-specific compliance costs are greater than the specific cost threshold..for determining if a specific [discharger] is in the top 75% of dischargers incurring costs within the discharger's category; or 2) the discharge is located in a county that is within the top 75% of counties incurring costs for that category of discharge. Permittees that meet either test may have a substantial impact, which will be confirmed using the secondary indicators."[77]

With respect to the first criterion, the State explained that "[s]electing a threshold based on compliance costs within the category made intuitive sense because a facility paying more for phosphorus compliance is going to be at a competitive disadvantage compared to other companies that don't face these compliance costs.."[78] As for the second criterion, the State expressed a concern that "an individual community may have multiple permittees in the same category and the cumulative compliance costs may have

[77] *Final Determination* at 35.
[78] *Id.* at 29.

a substantial impact on the individual community."[79] To address that concern, the State determined that "[i]f a permittee with positive estimated compliance costs is in a county in [the top 75% of counties in the category], the permittee meets the second primary screener."[80]

It was arbitrary for the State to assume that any industrial facility within the top three quarters of facilities in each category facing compliance costs (or within the top three quarters of counties incurring compliance costs) will experience significant financial harm simply because it may be competitively disadvantaged when compared against facilities in the bottom quartile of costs. The State's finding is completely divorced from the critical question it is supposed to address—namely, whether the water quality standards are actually *attainable* for a particular discharger or group of dischargers. The State's determination considers only the cost of compliance and does not assess any facility characteristics that speak to affordability (including revenue, other operating costs, profits, retained cash, projected sales, creditworthiness, debt-to-equity ratio, or any other factor that might reflect ability to absorb the costs).

A good illustration of the arbitrary nature of the State's approach is its treatment of the "Other" category, which includes almost 40 facilities that do not belong anywhere else. According to the Final Determination, "facilities in the 'other' category include metal finishing, airports, fire products manufacturing, greenhouses, and quarries, among others."[81] The State never explains why it believes any of these facilities are likely to

[79] *Id.* at 33.
[80] *Id.*
[81] *Final Determination* at 11.

have similar discharges, similar treatment requirements, or other similar characteristics such that it would make sense to group them all together. Yet the State proceeds as though "Other" is somehow a meaningful category of its own. It applies the same screening mechanism to facilities in the "Other" category. That does not show reasoned decision-making.

The State has not only failed to justify its chosen benchmarks, it also fails to explain how it would implement those benchmarks in the variance process. Because the State did not rely upon any site-specific data in preparing its rankings, it will have to collect such information along with the variance application. The variance process the Wisconsin Legislature established in Act 378, however, does not contemplate the collection of information apart from the applicant's certification that it cannot achieve compliance without a "major facility upgrade" and that it will comply with the program requirements.[82] Nor does the statute afford DNR sufficient time to review any information it does collect before it must act on the permit application. The statute gives DNR only 30 days to determine whether the permittee's certification is "substantially inaccurate"[83]; otherwise, the variance application is deemed approved.[84]

5. The State should consider all site-specific information necessary to evaluate the most cost-effective treatment for each discharger or group.

As the State acknowledges, EPA guidance requires it to collect sufficient information "for each individual permittee, including engineering analyses and financial information, to adequately support the specification of permittee groups for each

[82] Wis. Stat. § 283.16(4)(a).
[83] *Id.* § 283.16(4)(am)1.
[84] *Id.* § 283.16(4)(am)2., 3.

individual permittee to be covered by the variance." But the State did not collect or analyze permittee-specific information apart from discharge flowrate and anticipated permit limit. The State maintains that because of the high number of point sources in Wisconsin, it is impossible "to estimate compliance costs a facility-by-facility basis, and still receive the benefit of the MDV."[85] As noted above, however, other studies evaluating compliance costs (including other studies of Wisconsin facilities) have considered facility-specific facts.[86] In its response to comments, DOA explained that "[o]ther studies including Wisconsin specific studies were also considered to determine if projected costs from these studies could be used instead of generating new ones. Unfortunately, these studies were determined insufficient for the needs."[87] DOA's response misses the mark. The studies were not identified to suggest that DOA rely on them instead of conducting its own analysis; Rather, the studies show that others have able to account for some site-specific information when estimating costs, and DOA still hasn't explained why it can't do so here.

In response to public comments urging the State to consider more site-specific information in its analysis, DOA contends that using cost curves "has been demonstrated to be an effective way to approximate substantial and widespread impacts on a large scale"[88] While this may be true, a cost curve is only as good as the assumptions that go into it. And here, the assumptions that DOA used are not supportable. Considering site-specific information is the only way the State can reasonably ensure the variance is

[85] *Preliminary Determination* at 24.
[86] *See, e.g.*, EIA, App. A.
[87] Response to Comments at 19.
[88] Response to comments at 19.

justified for all dischargers who are eligible for it, as EPA instructs in its guidance.[89] If the State's approach to modeling does in fact preclude the consideration of site-specific information, that is not a valid reason to ignore the data. Instead, it is a clear and inescapable signal that the State's model is a poor fit for the inquiry it is supposed to perform.[90]

To illustrate how the State's refusal to consider facility-specific facts will lead to an unreliable (and arbitrary) determination, consider municipal wastewater treatment facilities (WWTFs). The State identified only two different categories of WWTFs: (1) "conventional activated sludge" plants with primary and secondary clarifiers already installed; (2) and lagoon systems.[91] In reality, however, there are many other WWTF types, [92] and facilities "may use a combination of physical, biological and chemical treatment technologies in tanks or other structures."[93] It appears the State simply ignores those differences in making cost assumptions. According to the State, it is unnecessary

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[89] *See EPA FAQ* ("A permittee that could not qualify for an individual WQS variance should not qualify for a multiple discharger variance.").
[90] *See, e.g.*, *U.S. Air Tour Ass'n v. FAA*, 298 F.3d 997, 1008 (D.C. Cir. 2002) ("When an agency uses a computer model, it must 'explain the assumptions and methodology used in preparing the model.'") (quoting *Small Refiner Lead Phase-Down Task Force v. EPA*, 705 F.2d 506, 535 (D.C. Cir. 1983)); *Owner-Operator Independent Drivers Ass'n Inc. v. Federal Motor Carrier Safety Admin.*, 494 F.3d 188, 205 (D.C. Cir. 2007) ("Although we apply a deferential standard of review to an agency's use of a statistical model, we cannot uphold a rule based on such a model when an important aspect of its methodology was wholly unexplained.").
[91] EIA at 71.
[92] *See, e.g.*, Tetra Tech, Report for Washington Dep't of Ecology, *Technical and Economic Evaluation of Nitrogen and Phosphorus Removal and Municipal Wastewater Treatment Facilities* (June 2011) (cited at App. A) (evaluating other types of facilities, including extended aeration, sequencing batch reaction, trickling filter, membrane bioreaction, and high purity oxygen).
[93] *Final Determination* at 10.

"to further divide the municipal WWTFs into additional financial categories," because "EPA applies the same economic primary and secondary indicators to all municipal WWTFs, they have the same mechanisms for financing facility upgrades, and they all serve a community function rather than being profit seeking."[94] Given the obvious fact that different treatment facilities will have different costs and may have different abilities to attain the phosphorus standards that response simply does not suffice.

6. The State did not consider discharger- and industry-specific financial information when assessing significant economic impacts.

In a March 2013 *Frequently Asked Questions* bulletin, the EPA emphasized that a multiple discharger variance and the justification supporting it "(1) [m]ust meet the same 40 CFR 131 regulatory requirements as an individual discharger variance, and should consider any EPA guidance"; (2) "[s]hould ensure that any overall demonstration is conducted in a manner that accounts for as much individual permittee information as possible"; and (3) [s]hould consider an individual variance for a particular permittee if it does not fit with any of the group characteristics."[95] The State has failed to heed EPA's instructions by ignoring critical permittee information in its analysis, including financial data necessary to evaluate the anticipated impact on the discharger.

EPA looks to the *Interim Economic Guidance for Water Quality Standards* to provide some framework for reviewing state determinations of substantial and widespread economic impact.[96] There, EPA states that the analysis for privately owned facilities "should consider factors such as the entity's ability to secure financing and the

[94] *Id.* at 10.
[95] *EPA FAQ* at 5–6.
[96] EPA, *Interim Economic Guidance for Water Quality Standards*, EPA-823-B-95-002 (Mar. 1995) ("Interim Economic Guidance").

degree to which it will be able to pass the cost of pollution control onto its customers in the form of higher prices."[97] According to EPA, it is important to calculate profit and solvency ratios "both with and without the additional compliance costs," because the comparison of "these two ratios to each other and to industry benchmarks provides a measure of the impact on the entity."[98] EPA also states that facility profit rates "should be compared to those for facilities in similar lines of business."[99]

The State acknowledges that it reviewed the *Interim Economic Guidance* and that "industrial variance requests rely on profitability and other factors" to demonstrate significant economic impact.[100] But the State never considers profitability or other permittee-specific financial factors. The State claims that it "considered the possibility that dischargers with larger estimated compliance costs may sometimes have larger revenues to shoulder this burden," but concluded that the possibility "cannot play a prominent role in this determination for at least four reasons"; namely—

1. Analyzing data for individual dischargers quickly descends into individual point source applications, an outcome that runs contrary the very essence of multi-discharger variances;
2. Neither DOA nor DNR has revenue or profit data for individual dischargers;
3. Analyzing the financial position of each individual discharger would require resources that are not available from DOA or from DNR or from EPA; and
4. Dischargers with greater revenues or greater profits may be more likely to forego Wisconsin expansion or shift production to other states or shift production to other countries.[101]

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[97] *Id.*, § 1.3 at 1-5.
[98] *Id.*, § 3.2 at 3-4. It is important to consider profits without controls in place because a discharger that is already not profitable "may not claim that substantial impacts would occur due to compliance with water quality standards." *Id.*, § 3.2.a at 3-6.
[99] *Id.*, § 3.2a at 3-6–3-7.
[100] *Final Determination* at 9.
[101] *Id.* at 31.

These are no reasons at all. First, EPA policies require the State to provide sufficient permittee-specific data and analysis to show that the dischargers eligible for a variance under the proposed program will suffer significant and widespread economic harm,[102] and the only way to do that is by evaluating profit and other financial data. If the State's current analytical approach does not allow for that sort of inquiry, then it should change its approach. Second, if the State does not have the revenue or profit data necessary to perform a reasonable analysis, then it should collect the information, incorporate that data into its assessment, and revise its determination accordingly. Third, while it may be true that the State has provided inadequate funding to implement clean water standards, that cannot be a legitimate basis to avoid federal obligations. If this were the case, federal supremacy would lose all meaning. Fourth, the State does not provide evidence or support for its concern about industry flight, and it ignores that all States are required under federal law to adopt phosphorus water quality standards.

If the State will not consider individual financial information (or even industry-level data) concerning profitability or other factors reflecting the financial health of a particular discharger, then the State needs to explain how it can reliably assess economic impact without that information. The State's rough assumptions are not good enough, as they do not reflect reality. For example, the State assumes that all municipalities will finance 90% of their costs, and all industrial facilities will finance 100% of their costs,

[102] *See Interim Economic Guidance*, § 3.2 at 3-5 ("It is EPA policy … that applications based on economic considerations must be accompanied by data that demonstrate the impacts."). *See also* EPA Gen. Counsel Opinion No. 58 **("**EPA Regional Administrators should not accept State variance determinations unless they are accompanied with an adequate record to support the determinations.").

with 20-year debt at standardized interest rates.[103] While that assumption could prove true for some of the facilities, it is untenable to assume *all facilities* will approach financing that way. As the authors of the EIA recognize, "[a]ctual borrowing costs could vary dramatically,"[104] because financing terms "will be driven by individual corporate credit ratings, cashflow and internal financial models."[105]

7. The State did not consider biological phosphorus removal and all other potentially viable treatment options.

The EPA has extensive guidance regarding available treatment options (and associated costs) for removing nutrients including phosphorus from the waters.[106] There are also many academic and industry materials summarizing the state of technology and costs. The State acknowledges that "on a case-by-case basis other less costly treatment alternatives may be preferable to the" treatment technology that the State assumed all facilities would use, and it specifically points to biological phosphorus removal and "package plants" as two potential alternatives that some facilities might consider.[107] But the State disregarded them in its analysis, because "[t]hese alternatives vary widely in effectiveness as well as cost, making it inappropriate to assume that these treatment alternatives will work for statewide categories of point sources in Wisconsin."[108]

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[103] *See, e.g.*, EIA at 10 ("The study assumed that most or all of the capital costs would be financed with long-term, 20 year maturity debt.").
[104] *Id.* at 29.
[105] *Id.* at 10.
[106] *See, e.g.*, EPA, *Nutrient Control Design Manual*, EPA/600/R-10/100 (Aug. 2010); EPA, *Nutrient Control Design Manual State of Technology Review Report*, EPA/600/R-09/012 (Jan. 2009).
[107] *Final Determination* at 23.
[108] *Id.*

The State's refusal to consider plausible alternatives is clear administrative error.[109] It starts with the incorrect premise that treatment alternatives should be considered only if every discharger could implement them. The State asserts that selecting generic treatment technology for all facilities "provides a practical approach to estimating costs for purposes of this study, and ensures that the majority of point sources in each category are adequately represented."[110] The State's approach is arbitrary—particularly without explanation as to why its model cannot recognize that different facilities might adopt different treatment options. The State notes that "if facility-specific data becomes available at a later time, adjustments can be made to the compliance costs,"[111] but that does not explain its refusal to consider facility-specific data that is already available, including actual discharge data and other site-specific information in permits.

In its approval of a Montana variance procedure, the EPA recently observed that "[e]ffluent concentrations associated with enhanced biological nutrient removal technology are the best currently being achieved anywhere in the U.S. at full-scale wastewater treatment options."[112] EPA nevertheless approved Montana's variance because there were no existing treatment options (including BPR) to attain both the

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[109] *See, e.g.*, *Motor Vehicle Ass'n of U.S., Inc. v. State Farm Mut. Auto Ins. Co.*, 463 U.S. 29, 48 (1983) ("At the very least this alternative way of achieving the objectives of the Act should have been addressed and adequate reasons given for its abandonment.").
[110] *Final Determination* at 24.
[111] *Id.*
[112] EPA Letter Approving Montana Nutrient Standards at 15 (Feb. 28, 2015) ("effluent concentrations using enhanced nutrient biological removal ranged from…[.05-.07 mg/l].).

phosphorus and the nitrogen standards that Montana set. Wisconsin has set only phosphorus standards. So far, however, the extent of the State's consideration of that technology (or, for that matter, any treatment alternative) is to observe that "some facilities may wish to explore" it "in lieu of chemical filtration,"[113] and to note that "implementing BPR would increase capital costs, but could significantly decrease the operations and maintenance costs when compared to chemical precipitation alone due to the lower chemical requirements as well as generating less sludge for disposal."[114] The State apparently concluded it did not need to do further analysis of BPR because it "cannot consistently reduce phosphorus to levels less than 0.5 mg/L at all of the facilities."[115] But that is not a reasonable answer when many facilities may have phosphorus effluent limits equal to or less restrictive than 0.5 mg/L. The State should give plausible treatment alternatives much more consideration.

8. The State should consider alternative compliance options, including watershed adaptive management and water quality trading.

The State developed water quality trading and the watershed adaptive management options as flexible compliance alternatives for permittees to meet their phosphorus effluent limits. The State recognizes that these compliance options "may be effective for some point sources," but it nonetheless excludes the two alternative compliance methods from the EIA. DOA argues that consideration of water quality trading and adaptive management is not necessary because "there is no guidance or federal requirement that mandates water quality trading be considered prior to variance

[113] *Preliminary Determination* at 25.
[114] EIA at 17.
[115] *Id.* at 16.

approval." Further DOA notes that state law authorizes, but does not mandate that permittees use these compliance methods.

While federal law does not explicitly require consideration of water quality trading and adaptive management when granting a variance, EPA's regulations require that States demonstrate that compliance with the water quality standard is infeasible. The State cannot arbitrarily limit its feasibility analysis to only one of the compliance methods available to permittees. If there are compliance options that are available, and those compliance options can be cost effectively implemented by a permittee to meet its effluent limit, then attainment of the standard is by definition feasible.

9. The State should consider all anticipated effects from existing water quality standards, including avoided costs, environmental impacts, and other quantifiable benefits.

The State acknowledges that its analysis "did not consider longer-term benefits to Wisconsin's economy," such as "increases in tourism and recreation due to improved water quality."[116] It offers two reasons why it chose not to consider benefits in its analysis and both come up short. First, according to the State, the multiple-discharger variances "support improvements to water quality, but try to achieve this goal at a lower cost burden."[117] That misses the point. While the interim limits established by the Wisconsin Legislature may be better than nothing (environmentally speaking), plainly they are less protective than the standards facilities must meet without the variance. Second, the State argues it need not consider benefits because "the implementation

[116] *Final Determination* at 51.
[117] *Id.*

timeframe for the MDV is no more than 20 years."[118] But that argument does not recognize the potential benefits that may accrue during that 20-year timeframe if no variance were granted.

The State asserts that EPA guidance does "not require the completion of environmental benefits in order to justify an individual variance or MDV."[119] If the State means to suggest that EPA's review of the variance proposal will not involve consideration of both costs and benefits, that is not accurate. Assessing both costs and benefits is a fundamental component of modern administrative decision-making. In fact, by Executive Order most agencies must assess both the costs and benefits of proposed regulatory action.[120] EPA "considers costs and benefits in making its decisions," and indeed considers the practice a "matter of good government."[121] As the EPA General Counsel explained in 1977, a variance is justified only if the State shows existing water quality standards "will result in substantial and widespread economic and social impact *which exceeds the positive economic and social impact of enhanced water quality*."[122] More recently, EPA noted that "consideration of costs and benefits was an integral part of the deliberations involving the States, environmental interests, the regulated community, and EPA in the development of the Great Lakes Water Quality Guidance."[123]

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[118] *Final Determination* at 51.
[119] *Id.*
[120] Executive Order 12866 (Sept. 30, 1993), published at 58 Fed. Reg. 51735 (Oct. 4, 1993).
[121] EPA, *Water Quality Guidance for the Great Lakes System – Supplementary Information Document*, Section IX.A., EPA-820-B-95-001 (Mar. 1995) ("*Great Lakes SID*").
[122] EPA Gen. Counsel Decision No. 58 at 9–10 (emphasis added).
[123] *Great Lakes SID*, Section IX.A.

DOA notes that EPA's *Interim Economic Guidance* states that "Benefit Cost analysis is not required to demonstrate substantial and widespread effects."[124] However, the Guidance goes on to state that "[a]t a minimum, however, the analysis must…evaluate how the proposed project will affect the socioeconomic well-being of the community."[125] Evaluating the benefits of compliance with the phosphorus standards is a necessary component of evaluating the impact to the community. While the guidance does not require a Benefit-Cost Analysis per se, it does indicate that states should take into account the benefits of complying with the water quality standards: "The types of economic benefits that might be realized will depend on both the characteristics of the polluting entity and characteristics of the affected community, and *should be considered* on a case by case basis."[126]

The State cannot reasonably determine that the phosphorus limits would cause "significant and widespread economic harm" by considering costs alone and ignoring the other side of the coin. As the Supreme Court observed in *Michigan v. EPA*, "[c]onsideration of cost reflects the understanding that reasonable regulation ordinarily requires paying attention to the advantages and the disadvantages of agency decisions." Where the State has available data reflecting anticipated effects of the phosphorus limits, it should consider that data in forming its analysis.[127]

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[124] Response to Comments at 16.
[125] *Interim Economic Guidance* at 4-6.
[126] *Id.*
[127] 576 U.S. ___ (2015), Slip Op. at 7; *See also Entergy Corp. v. Riverkeeper, Inc.*, 556 U.S. 208, 232 (2009) ("every real choice requires a decisionmaker to weigh advantages against disadvantages, and disadvantages can be seen in terms of (often quantifiable) costs."); Cass R. Sunstein, *Cost-Benefit Default Principles*, 99 Mich. L. Rev. 1651, 1694

One source of information the State has so far failed to adequately address in its analysis is an economic impact analysis that DNR prepared in 2012 at the instruction of the Wisconsin Legislature.[128] In it, DNR considered capital costs along with operating and maintenance costs to comply with the phosphorus limits over the 20-year period beginning in 2012. It also evaluated costs associated with the State's Watershed Adaptive Management Program. It then quantified some of the benefits that will accrue over that same time period, including "[i]ncreased property values," "[i]mproved recreational opportunities," and "[a]voided lake cleanup/management costs."[129] Based on its evaluation of the data considered in its report, WDNR predicted "that implementing [the phosphorus rules] would have total net benefits of $18.8 million dollars to the State of WI over the 20 year time period."[130]

In its response to comments on the draft EIA and Preliminary Determination, DOA identifies several reasons why it believes that the benefits DNR quantified in 2012 cannot be used here. In part, DOA claims that the Study overestimated the popularity and cost-effectiveness of water quality trading and adaptive management.[131] That contention, however, is unsupported. The overwhelming majority of permittees have not yet had to comply with their stringent WQBELs because they are subject to extended

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(2001) ("[A]ny reasonable judgment will ordinarily be based on some kind of weighing of costs and benefits, not on an inquiry into benefits alone. … If the costs would be high and the benefits low, on what rationale should … the EPA refuse even to consider the former? There appears to be no good answer. If there is not, the agency's interpretations should be declared unreasonable.").

[128] DNR, *Phosphorus Reduction in Wisconsin Water Bodies: An Economic Impact Analysis* (Aug. 13, 2012) ("2012 EIA").

[129] *Id.* at ii, 8, 20–24.

[130] *Id.* at 34.

[131] *Id*. at 17.

compliance schedules. It is simply too early to judge the popularity of programs such as water quality trading or adaptive management because there are very few permittees who need those compliance tools up to this point. And perhaps most important, even assuming the earlier study may have overstated the popularity of these programs, it is arbitrary and capricious for DOA to ignore them completely.

DOA also asserts that DNR's 2012 Economic Impact Analysis cannot be relied on because the study focused on benefits of achieving compliance with the water quality standards, and even if point sources meet their WQBELs, that does not necessarily mean the standards will be achieved.[132] The State is incorrect on this point—DNR calculated benefits based upon the expected reduction to phosphorus loading that would result from implementation of WQBELs—not on attainment of the water quality standard, as DOA asserts. DNR's analysis compared each permitee's "average effluent concentration reported to and recorded by DNR" to each permittee's "estimated average effluent after implementing the regulations."[133] DNR then used the difference between the two figures to model estimated changes in overall phosphorus loading within specific watersheds. And the estimated change in water quality was then used to quantify the expected benefits of implementing the State's phosphorus regulations.[134]

Although the State can certainly reassess the facts and even adopt a different approach to calculating the costs and benefits of the rule, it should provide a reasoned

[132] *Id*.
[133] 2012 EIA at 42.
[134] *Id*. at 42-43.

analysis for any change in approach.[135] It is not enough for the state to argue (unsuccessfully) that the previous study is inadequate and ignore altogether any benefits of compliance with the phosphorus water quality standards. The State must consider all quantifiable benefits and other impacts of implementing the phosphorus limits.

10. The State should evaluate "widespread impacts" on sector-by-sector basis.

DOA calculated the direct and indirect impacts to the state's economy for each category of permittees. It did this, it says, because EPA recommends that the State conduct a separate attainability analysis for each category of dischargers.[136] However, DOA never took the next step and made a separate determination for each category. Instead, DOA based its finding of widespread impacts on the overall impacts to the State's economy that the REMI model predicted.[137]

A close look at the sector-by-sector numbers reveals that the paper and power industries are responsible for an overwhelming majority of the state-wide impacts. For example, the paper and power industries alone account for over $300 million of the estimated $600 million reduction in Wisconsin's GSP by 2025.[138] Similarly, the paper and power industries account for over half (2,509) of the overall expected job loss (4,517).[139] The other categories of dischargers are estimated to have a much smaller impact on the State's economy. The Cheese and Dairy industry, for example, is estimated

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[135] *See, e.g., Nat'l Cable & Telecommc'ns Ass'n v. Brand X Internet Servs.*, 545 U.S. 967, 981 (2005).
[136] *Final Determination* at 52.
[137] *See id*. at 67.
[138] EIA at 29-30.
[139] EIA at 37, 50, 53.

to account for the loss of 49 jobs in an industry that employs over 16,500 people.[140] Given the vast differences in impacts between categories of permittees, it is inappropriate for the state to lump them all together when making its widespread impacts determination.

The State's inclusion of the power industry in its determination of widespread effects is particularly problematic. The estimated capital and operating and management costs for the power sector alone represent close to one-third of the overall costs of compliance statewide predicted by the EIA. However, the power sector is not eligible for coverage under the variance.[141] By including the power sector's cost of compliance in its determination of widespread impacts, DOA is, in effect, using the compliance costs for an entire sector of ineligible permittees to justify the need for the variance for other facilities.

B. The State Has Failed to Demonstrate that the Proposed Variance Terms Achieve the "Highest Attainable Use"

If a State's use attainability analysis shows that a designated use is unattainable, then the State may modify the use (or provide a time-limited variance)—but it must nevertheless impose criteria that protect designated uses to the maximum attainable extent.[142] The highest attainable use (or condition) requirement "is fundamental to the WQS program" because it ensures water quality standards serve the underlying purposes of the Act by achieving the highest water quality that can be had under the

[140] EIA at 43.
[141] *Final Determination* at 50.
[142] Final Rule, 80 Fed. Reg. at 51,025. As EPA noted, 40 C.F.R. §§ 131.5(a)(2), 131.6, and 131.11(a) "explicitly require states … to adopt water quality criteria that protect designated uses." Final Rule, 80 Fed. Reg. at 51,025.

circumstances.[143] As EPA explained, determining the "highest attainable use" is a corollary of the use attainability analysis, in that HAU "is the attainable use that results from the process of determining what is not attainable."[144]

DNR and DOA have acknowledged in this proceeding that "a highest attainable use analysis is an important component in a variance package."[145] The HAU analysis the State has performed so far, however, fails to meet EPA's standards. To begin with, the State's proposed interim limits (0.8 mg/L for the first term, 0.6 mg/L for the second term) are not "based on the evaluation of the factor[] in § 131.10(g) that preclude[s] attainment of the use and any other information or analyses that were used to evaluate attainabilty," as 40 C.F.R. § 131.3(m) requires. Instead, those limits were determined in advance by the Wisconsin Legislature. DOA did not evaluate the cost and impact of those interim limits as part of its Final Determination, and DNR has not explained how the Final Determination supports them.[146] Even ignoring the fundamental flaws with the Final Determination identified in Section III.A., above, that analysis considered only whether the cost of complying with the State's existing phosphorus standards would cause substantial and widespread economic harm. At no point in this proceeding has the State considered the amount of financial burden that dischargers could actually bare.

DNR attempts an after-the-fact rationalization of the Wisconsin Legislature's interim limits by asserting that they "are typically reflective of the greatest pollution

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[143] *Id.*, 80 Fed. Reg. at 51,024–25.
[144] *Id.*, 80 Fed. Reg. at 51,025.
[145] DOA & DNR, Response to Comments on Economic Determination at 11 (Oct. 8, 2015).
[146] In fact, the interim limits are not even mentioned in the Final Determination until Appendix B.

reduction achievable based on existing on-site treatment of wastewater treatment facilities, and taking into account nonpoint reductions in many watersheds."[147] We cannot adequately test that assertion here, however, because DNR has provided no data or analysis whatsoever to support it.

EPA cannot approve this proposed variance as consistent with its rules unless DNR first justifies the interim limits based on appropriate technical and scientific data and analysis. At a minimum, DNR should go back and consider (and make publicly available) actual effluent and financial data of dischargers, along with all available pollution control technologies, to determine whether some dischargers eligible for the variance could attain a water quality standard better than 0.8 mg/L for the first permit term and 0.6 mg/L for the second permit term. Further, DNR should separately consider the various components of the program when assessing whether they reflect the highest attainable use. Specifically, DNR should identify the best reductions it anticipates can be attained through existing on-site treatment options (supported with evidence), as well as the potential nonpoint reductions it expects are possible from watershed projects carried out as part of the variance (supported with evidence). DNR's conclusory assertion that the combination of variance terms together reflects the highest attainable use surely does not meet the scientific rigor that EPA demands.

DNR recognizes that "more restrictive interim limitations" than the limits set by statute may "be warranted for some facilities already achieving these interim limitations,"

[147] DNR, Draft Multi-Discharger Variance Justification at 8 (Oct. 19, 2015). *See also id.* at 10 (finding that "a numeric limitation of 0.8 mg/L represents the highest attainable condition for most permittees at this time").

and it contends that using a statistical value reflecting the monthly average effluent concentration (the 30-day P99) "will help ensure that effluent limitations reflect the highest attainable condition with existing treatment options."[148] According to DNR, "[e]ffluent phosphorus concentrations for mechanical treatment plants vary widely, but may be as a low as 0.3 mg/L for certain treatment systems."[149] DNR assumes a monthly sampling frequency and coefficient of variation of 0.6 to decide that "a monthly average limitation of 0.5 mg/L is justified for these facilities that can achieve these effluent concentrations …"[150] DNR maintains that its statistical approach will "more commonly" justify a 0.8 mg/L limit, however, "based on the fact that many mechanical treatment facilities will be producing a consistent effluent quality in the 0.8–0.4 mg/L range after optimization." DNR then concludes that any interim limit below 0.5 mg/L is inappropriate and that the 0.8 mg/L "represents the highest attainable condition for most permittees at this time."[151]

Setting aside DNR lack of authority to impose a more restrictive interim standard than the limits set by statute, discussed below at Section V.D., there are several other glaring problems with DNR's purported justification. First among them, DNR has failed to support any of its findings with evidence. Second, EPA rules permit a State to express the highest attainable condition as criteria "that reflects the greatest pollution reduction achievable with the pollution control technologies installed at the time the State adopts the WQS variance, and the adoption and implementation of a Pollutant Minimization

[148] *Id.* at 9.
[149] DNR, Draft Multi-Discharger Variance Justification at 10 (Oct. 19, 2015).
[150] *Id.*
[151] *Id.*

Program;" but that option is available only after the State demonstrates there are no additional feasible pollutant control technologies.[152] So far, the State has not made that showing here. It cannot limit the highest attainable use analysis to pollution controls that are already installed; it must consider all viable alternatives, including biological phosphorus removal, package plants, and water quality trading. Third, DNR's determination that the interim limits "represent the highest attainable condition for most permittees at this time" improperly relies on untested assumptions instead of considering site-specific factors of attainability for each discharger as appropriate.[153]

Apart from the interim effluent limits themselves, DNR does not analyze whether other proposed variance terms reflect the highest attainable condition. For example, DNR does not explain or offer evidence to support why it believes 0.2 mg/L is the best attainable target limit during the variance period, or that $50 per pound of phosphorus is an appropriate amount, or that an annual cap of $640,000 reflects the highest attainable condition. These provisions did not result from DNR's (or DOA's) analysis of the available science and data; the Wisconsin Legislature set them in advance, and DNR has no statutory authority to modify them. Without more careful scrutiny of available technical and scientific data to determine what pollution reductions are truly attainable, this proposed variance does not meet EPA's requirements.

IV. THE VARIANCE DOES NOT MEET SEVERAL OTHER FEDERAL REQUIREMENTS

A. The Variance is not Time-Limited

[152] 40 C.F.R. § 131.14(b)(1)(ii)(A)(3).
[153] Draft MDV Justification at 10.

EPA rules require that "[a] WQS variance must include… The term of the WQS variance, expressed as an interval of time from the date of EPA approval or a specific date." Identifying a specific date on which the WQS variance will terminate is necessary to ensure that the variance is time-limited.

DNR refers to the MDV as a 10 year variance, but Wis. Stat. 283.16 establishes a variance framework that applies for 4 permit terms, or at least 20 years. And the DNR does not have express authority to change the length of the program. Moreover, there is a presumption that the variance will remain in effect unless and until DOA reverses its finding of economic hardship. See Wis. Stat. 283.16(2)(f) ("stating that once DOA determines that attaining the water quality standard for phosphorus is not feasible, "the determination remains in effect until the department of administration finds under sub. (3)(c) that the determination is no longer accurate.").

To be sure, the statute does require DOA to reevaluate its determination in 2024 and, if DOA finds that the determination is still accurate, then DOA must seek EPA reapproval. In order to be consistent with the language and intent of EPA's rules, however, the statute must include a provision stating that the variance will expire if DOA fails to obtain EPA reapproval. As currently written, the variance program would remain in effect even if DOA does not complete the 2024 reevaluation on a timely basis.

B. The State Has Not Justified the Length of the Variance

Regardless of whether the proposed variance is a 10- or 20-year variance, the State has not justified its length. EPA's regulations require that the State provide "documentation demonstrating that the term of the WQS variance is only as long as

necessary to achieve the highest attainable condition."[154] That demonstration must be made "on the basis of the information and factors evaluated to justify the need for the WQS variance."[155]

Just like the interim requirements that apply during the term of the variance, the length of the variance was established in advance by the Wisconsin Legislature.[156] There is nothing in the record showing that the State Legislature's determination was made "on the basis of the information and factors evaluated to justify the need for the WQS variance."[157] In fact, that would have been impossible. DOA's analysis justifying the need for the variance was not started, much less completed, until after the Wisconsin Legislature established the variance timeline by statute.

DNR attempts an after-the-fact justification for the length of the variance, but it is problematic in several respects. First, DNR relies on the length of time that it takes to implement non-point source control measures and difficulties in addressing legacy pollutants.[158] But the State fails to demonstrate that existing tools (such as extended compliance deadlines) are inadequate. Even more problematic, DNR fails to consider how duration affects the social and economic impacts that formed the basis for DOA's unattainability determination, as EPA rules require.[159]

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[154] 40 CFR 131.14(b)(2)(ii).
[155] 80 FR 51038.
[156] *See* Wis. Stat. § 283.16
[157] 80 Fed. Reg, 51,038.
[158] Draft MDV Justification at 4 and 5.
[159] *See* 80 Fed. Reg. 51,038.

Second, DNR argues the duration of the variance is necessary because some dischargers may have difficulty or face high costs in meeting their limits.[160] For example, the DNR asserts that until a viable chemical alternative to polyphosphate additives is developed "[a] large number of industrial dischargers" that use municipal water containing polyphosphates will not be able to comply with the phosphorus standards in an economically viable manner.[161] Apart from the fact that DNR provides absolutely no evidence or analysis to support its conclusion that treatment is not economically viable, DNR has not determined how many dischargers are likely to encounter such challenges. DNR cannot justify a 10- or 20-year variance program for all participants just because some dischargers may need that long to comply.[162]

Third, DNR has not provided any analysis or documentation to support its claim that alternative pollution control technologies are unlikely to become available over the next 10 years.[163] To the contrary, EPA has observed that existing technologies can reliably achieve ultra-low phosphorus effluent concentrations. DNR cannot, without explanation, dismiss the possibility that the already-existing technology may become more affordable as its use becomes more wide-spread. Furthermore, pursuant to EPA regulations, the relevant question in determining whether the length of the variance is

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[160] *See* Draft MDV Justification at 5-7.
[161] *Id*. at 5.
[162] DNR similarly attempts to justify the length of the variance on the grounds that in certain areas of the state background phosphorus concentrations in groundwater may exceed surface water quality standards, and that some dischargers may have difficulty achieving low effluent concentration because of relatively high concentrations of soluble non-reactive phosphorus. DNR has not made any attempt to define how many dischargers may be impacted by these challenges. *See* Draft MDV Justification at 6-7.
[163] Draft MDV Justification at 8.

justified is how long it will take to achieve the *highest attainable condition*—not how long it will take to achieve the underlying designated use and criterion.[164] The State has identified the 0.8/0.6/0.5 mg/l limits as the highest attainable conditions. Thus, the justification for the length of the variance must be based on whether there are economically viable technologies that can achieve those levels of pollutant control.

C. The Reevaluation Procedures are Inadequate

EPA rules require that states regularly reevaluate the highest attainable condition that applies during the term of the variance. For variances that last longer than 5 years, the State's variance provision must include "a specified frequency to reevaluate the highest attainable condition using all existing and readily available information and a provision specifying how the State intends to obtain public input on the reevaluation." 40 C.F.R. §131.14(b)(1)(v). These reevaluations must occur at least every five years and the State must submit the results of the reevaluation to the EPA within 30 days of completing the reevaluation.

The State's variance provision must also indicate that "the WQS variance will no longer be the applicable water quality standard for purposes of the Act if the State does not conduct a reevaluation consistent with the frequency specified in the WQS variance or the results are not submitted to EPA."[165] Thus, where the State fails to either conduct the reevaluation or submit the results to EPA, "the underlying designated use and criterion become the applicable WQS for the permittee(s) or water body specified in the

[164] 40 C.F.R. § 131.14(b)(2)(ii).
[165] 40 C.F.R. § 131.14(b)(1)(vi)

WQS variance without EPA, states or authorized tribes taking an additional WQS action."[166]

Wisconsin's variance provision, Wis. Stat. 283.16, does not require a reevaluation of the highest attainable condition at least every five years. The statute requires DNR to determine every 3 years as part of the triennial standards review *whether* "formal review" of the variance is necessary.[167] However, there is no requirement that DNR actually conduct the review. The only review that is mandated by statute is the 2024 review.[168]

The statute also does not require that DNR submit the results of the reevaluation to the EPA. DNR is required only to "seek approval… for renewal of the variance" when it conducts a formal review and determines that a renewal of the variance is appropriate.[169] There is no requirement to submit the results of a reevaluation if the State does not intend to seek a renewal. The federal requirement is more expansive, requiring States to submit the results of their reevaluation to the EPA within 30 days of completing the evaluation, regardless of the outcome.

Lastly, there is no provision in the statute specifying that the WQS variance will cease to be the applicable water quality standard if the required review and/or submission of results to EPA do not occur. As discussed above, the statute establishes just the

[166] 80 FR 51038
[167] Wis. Stat. § 283.16(2m)
[168] *See* Wis. Stat. § 283.16(3)(a)-(cm)
[169] Wis. Stat. 283.16(2)(g) (stating in full "If the department of administration decides under par. (c) that the determination described in that paragraph remains accurate, the department of natural resources shall seek aproval1 from the federal environmental protection agency under 40 CFR 131.21 for renewal of the variance under this section.").

opposite—the variance will remain in effect unless the DOA undertakes the review and reverses its determination.[170]

D. Statutory Provisions Suspending Permit Limits and Requiring Automatic Approval of Variance Applications Violate Federal Requirements

Under Wis. Stat. § 283.16, a permittee's phosphorus limits and corresponding permit requirements are automatically suspended once the permittee applies for coverage under the variance—regardless of whether the permittee is eligible for the variance.[171] Further, the statute automatically grants a permitee's request for coverage under the variance if DNR fails to act on the permitee's application within 30 days.[172] These statutory provisions violate federal law because they remove permit requirements based on the underlying phosphorus water quality standards before DNR has determined whether the variance water quality standard should apply to the permittee.[173] Unless and until EPA has approves the variance and DNR determines that the variance applies to a particular permittee, a discharger's WPDES permits must be in compliance with underlying water quality standards at all times and all permits must include effluent limitations necessary to meet underlying water quality standards.[174] These requirements leave no room for States to automatically suspend effluent limitations or approve variance requests.

V. DNR HAS NO AUTHORITY TO IMPLEMENT THE PROCEDURES AND REQUIREMENTS SET FORTH IN THE GUIDANCE

[170] *See* Wis. Stat. 283.16(2)(f).
[171] Wis. Stat. § 283.16(4)(c).
[172] Wis. Stat. § 283.16(4)(am)3.1
[173] *See* EPA, *NPDES Permit Writers' Manual*, EPA/833/K-10/001 at 6-1 (Sep. 2010)
[174] *See* 40 C.F.R. 131.14(a)(2); N*PDES Permit Writers' Manual* at 6-1.

Apart from the specific concerns about the substantive provisions of the proposed multiple discharger variance, it is important to address separately the collapse of DNR's authority to operate its NPDES permitting program in compliance with federal law. This discussion is necessary because DNR attempts to resolve serious deficiencies in the program by adopting new requirements through non-binding implementation guidance documents. DNR's authority to implement and enforce such requirements, however, has been withdrawn. Moreover, in light of DNR's repeated broken promises, it would be unreasonable for EPA or the public to rely on DNR's assurances as to how the agency will implement state law absent clear statutory or regulatory requirements. These circumstances require that EPA review DNR's variance proposal with a particularly critical eye. EPA must not accept the State's assurances that it will implement the variance according to the procedures established through implementation guidance or procedures that have not otherwise adopted by state statute or agency regulation. Instead, EPA should contain its review to state statutes and regulations that have been adopted pursuant to state law.

A. DNR Narrowly Interprets its Authority to Implement Standards and Requirements that are not Explicitly Authorized by Statute or Rule.

2011 Wisconsin Act 21 narrowed the scope of a state administrative agency's authority to interpret implement state statutes and regulations by providing that:

> "No agency may implement or enforce any standard, requirement, or threshold, including as a term or condition of any license issued by the agency, unless that standard, requirement, or threshold is explicitly required or explicitly permitted by statute or by a rule that has been promulgated in accordance with this subchapter."[175]

[175] Wis. Stat. § 227.10(2m)

The impact of this provision on an agency's decision making authority has not been fully realized. However, the Wisconsin Attorney General and DNR recently adopted an interpretation of the provision that severely limits DNR authority.

In September, DNR refused to comply with an Administrative Law Judge's order requiring DNR to include certain monitoring requirements and other permit terms in a WPDES permit for a Concentrated Animal Feeding Operation (CAFO) on the ground that the DNR did not have authority to impose the permit terms under 227.10(2m).[176] The permit terms at issue were a requirement to conduct groundwater monitoring near fields at which the CAFO spread its manure, and a cap on the number of animals that the CAFO could have at its facility.[177] The ALJ had found that DNR had authority to impose these terms pursuant to Wis. Stat § 283.31(3) and (4), which grant DNR authority to include conditions in permits "to assure compliance with "effluent limitations," and "groundwater protection standards."[178]

In refusing to comply with the ALJ's order, DNR adopted an extremely narrow interpretation of Wis. Stat. § 227.10(2m) offered by the Wisconsin Department of

[176] DNR's Findings of Fact, Conclusions of Law and Order, *In the Matter of the Wisconsin Pollutant Discharge Elimination System Permit No. WI-0059536-03-0 (WPDES Permit) Issued To Kinnard Farms, Inc., Town of Lincoln, Kewaunee County*, DHA Case No. lH-12-071 (Sep. 11, 2015) ("DNR Kinnard Order").
[177] DNR Kinnard Order, Conclusions of Law 5 and 6.
[178] DHA's Findings of Fact, Conclusions of Law and Order, *In the Matter of the Wisconsin Pollutant Discharge Elimination System Permit No. WI-0059536-03-0 (WPDES Permit) Issued To Kinnard Farms, Inc., Town of Lincoln, Kewaunee County*, DHA Case No. lH-12-071 (Oct. 9, 2014) ("DHA Kinnard Order").

Justice.[179] Specifically, DOJ ruled that because the two requirements identified above were not "explicitly required or explicitly permitted by a statute or by a rule," DNR lacked authority to impose those conditions—but DNR ordered that the permit be issued anyway.[180] DNR's construction of section 227.10(2m) has the potential to render meaningless all statutes and rules that provide general authority to agencies to tailor permits to the specific action being authorized, given site-specific conditions.

B. DNR Does not Administer the WPDES Program Consistent with Commitments it has made to EPA

Equally concerning, DNR has repeatedly taken legal positions before state courts that directly contradict the Department's commitments to EPA on how it will administer the NPDES permitting program. Each case involved the EPA's 2012 letter identifying 75 areas where Wisconsin law is inconsistent with federal CWA requirements. Despite assurances to EPA that the State would correct the identified deficiencies, DNR continued to issue permits in violation of federal requirements and spent significant resources defending their actions in state court.

For example, despite its commitment to amend provisions of the Wisconsin Administrative Code to meet minimum Clean Water Act requirements, the DNR spent years arguing before the Wisconsin judiciary that its existing rules were still valid.[181] DNR argued that its rules should not be deemed invalid for a variety of reasons, including: that the rules were no longer of consequence; that is was improbable that the

[179] *See* Letter from Daniel P. Lennington, Assistant Attorney General, DOJ, to Timothy A. Andryk, Chief Legal Counsel, DNR (Aug. 18, 2015) ("DOJ Kinnard Letter")
[180] DOJ Kinnard Letter at 1.
[181] *See, e.g.*, *Midwest Envtl. Def. Ctr. v. Wis. Dep't of Natural Res.*, Case No. 12CV3654, Decision on Plaintiff's Motion for Summary Judgment (July 1, 2014) ("MEDC v. DNR Decision").

rule would be applied in the future; that the DNR had committed not to apply the rule in the future; or that the DNR does not implement the rules as written.[182] The DNR even argued that some of these rules did not violate the Clean Water Act, despite its commitment to EPA to revise the rules to bring them in line with Clean Water Act requirements.[183]

The Wisconsin Circuit Court issued a decision finding specified portions of the Wisconsin's regulations invalid insofar as they were inconsistent with federal law.[184] Particularly relevant here, the Court noted that DNR's commitment to implement a rule differently from how that rule is codified could mean that the DNR would "violate state law if it deliberately failed to implement its promulgated rules as written" because "an administrative agency must abide by its own rules."[185] Finally, the Court stated that "[i]t may be that the current staff at WDNR are implementing the rule according to the federal standards. However, the situation may change when the current staff who are implementing the rule depart WDNR. The guidance for the new employees would be the rule itself . . . the implementation of the rule is immaterial."[186] The DNR, in essence, cannot rely upon rule implementation practices as a replacement for properly adopted rules and regulations.

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[182] MEDC v. DNR Decision at 6, 7, 8, 17.
[183]Letter from Tinka Hyde, Water Div. Director, EPA Region 5, to Kenneth G. Johnson, Administrator, DNR Division of Water, encl. 1 at 4 (Dec. 5, 2012) (Hyde to Johnson"); *see also* MEDC v. DNR Decision at 13-14.
[184] *See generally* MEDC v. DNR Decision
[185] MEDC v. DNR Decision at 8.
[186] *Id.* at 17.

Similarly, DNR has taken a legal position that is in direct conflict with its commitment to the EPA to impose limits to protect downstream waters in compliance with federal law. Assistant Attorneys General representing the DNR before the circuit court and Court of Appeals have interpreted Wis. Stat. §§ 283.15 and 283.31 to provide the DNR the discretion ***not*** to impose limits necessary to protect downstream waters where the DNR has determined that the discharge will cause or contribute to a violation of the downstream water quality standards.[187] The Wisconsin Court of Appeals has since affirmed that state law grants DNR discretion not to protect downstream waters when establishing WQBELS for phosphorus.[188]

In yet another recent set of cases, the DNR and the Wisconsin DOJ failed to defend the Attorney General's statement to the EPA that state statutes provide individuals the opportunity to challenge WPDES permit in a judicial review proceeding.[189] The DNR has, at best, weakly supported the Attorney General's interpretation in WPDES permit challenges. In the *MEDC v. WDNR* Appeal, the Assistant Attorney General provided the court with the Attorney General's letter, noting that the DNR "does not necessarily agree with the argument . . . that petitioners do not have a right to seek judicial review, but must first exhaust its administrative remedies by requesting an administrative review."[190] In another WPDES permit challenge, the DNR

[187] *See generally*, DNR's Response Brief in *MEDC v. WDNR*, Case No. 12-CV-3352; *see also* DNR's Response Brief in *PACRS v. WDNR*, Appeal No. 2014AP2465.
[188] *See* Decision and Order, *Petenwell and Castle Rock Stewards v. Dep't of Natural Res.*, Case No. 2014AP2465 (Nov. 19, 2015).
[189] *See* 2012 AG Statement at 2-3.
[190] *See* Letter from Lorraine Stoltzfus, Wisconsin Department of Justice, to Hon. Frank Remington, Dane County Circuit Court (Dec. 17, 2012).

failed to provide ***any*** statements to the circuit court, leading the court to conclude that individual petitioners had no right to seek judicial review of WPDES permits.[191] The Wisconsin Court of Appeals has since ruled in a published opinion that individual citizens or organizations do not have any right to review WPDES permits in Wisconsin.[192]

C. The Public Has no Legal Remedy if DNR Fails to Comply With Federal Law.

In 2011, the Wisconsin Supreme Court considered the relationship between NPDES requirements and Wisconsin's permitting authority under the WPDES Program.[193] In *Andersen*, the court held that concerned citizens could not challenge a WPDES permit in a contested case hearing on the basis that the permit does not comply with the federal Clean Water Act.[194] As a result of *Andersen* and subsequent judicial decisions, no remedy exists in Wisconsin law to force the DNR to issue permits in compliance with federal Clean Water Act standards. The decision in *Andersen* resulted in two significant outcomes that altered the state-federal balance of Clean Water Act oversight and severely limited citizen participation in WPDES permit challenges.

First, the *Andersen* court eliminated the only legal venue for citizens to challenge state-issued permits—an administrative contested case hearing—on the grounds that a permit violates federal law. According to the court, the EPA is the agency with the

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[191] *See* Decision on Appleton Coated LLC's Motion to Dismiss, Case No. 12CV2197 (July 31, 2013).
[192] *See generally CWAC*, 2014 WI App 61.
[193] *See Andersen v. Wis. Dep't of Natural Res.,* 2011 WI 19, 332 Wis. 2d 41, 796 N.W.2d 1.
[194] *Id*. at ¶ 8.

authority to determine whether a WPDES permit complies with the Clean Water Act.[195] Specifically, the court opined that "requiring the DNR to . . . determine whether the permit complies with . . . federal regulations . . . would be to empower the DNR to undercut the EPA's determination [and] . . . the legislature could not have intended for the DNR to have the final say on a permit's compliance with federal law." *Id.* With one decision, Wisconsin courts therefore all but abolished the ability of citizens to enforce the terms and conditions of a WPDES permit at the state level when compliance with federal law is in dispute.[196]

Second, the *Andersen* court established a presumption that a permit complies with federal law so long as the EPA does not disapprove or object to a particular permit. The court noted that in approving the WPDES Program, the EPA found that Wisconsin has adequate statutory and regulatory authority to issue permits in compliance with the Clean Water Act.[197] The court also acknowledged that "any substantial revisions to the WPDES permit program have been, and will continue to be, subject to the EPA's approval."[198] Because the EPA approved the WPDES Program and did not specifically object to the permit at issue in *Andersen*, the court found that the EPA effectively determined that the permit complied with the Clean Water Act.[199]

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[195] *Andersen*, 2011 WI 19, ¶ 63.
[196] The United States Court of Appeals for the Seventh Circuit ruled that citizen suits are not available where the discharger is complying with the terms of the permit (even if those terms violate federal law). *Wisconsin Resources Protection Council, et al. v. Flambeau Mining Company*, No. 12-2969, 2013 U.S. App. LEXIS 16990 (7th Cir. Aug. 15, 2013).
[197] *Id*. at ¶¶ 36-37, 60.
[198] *Id*. ¶ 61.
[199] *Id.* ¶ 63.

D. DNR Cannot Rely on Implementation Guidance to Demonstrate the Variance Meets Federal Requirements.

The preceding discussion is particularly important in the context of the proposed variance. As is discussed in the comments above, the State has not demonstrated the need for the variance or justified the interim requirements; and the variance framework itself fails to include several federally required elements. DNR attempts to compensate for these deficiencies by establishing various review procedures and other requirements through non-binding implementation guidance. Several of these procedures and requirements go beyond the authority granted to DNR by statute, at times directly conflicting with statutory language.

For example, DNR's draft MDV Implementation Guidance indicates that it will establish interim limits for permittees covered under the variance on a case by case basis.[200] Wisconsin Stat. 283.16 clearly does not provide DNR with this authority. The Legislature has established the interim limits that apply to permittees in their first, second, third and fourth permits once they are granted coverage under the variance.[201] DNR has the authority to establish a *less* stringent interim limit on a case by case basis, but may only develop more stringent interim limits as part of a formal review of the variance.[202]

Similarly, because the State did not rely upon any site-specific data in preparing its rankings, it will have to collect such information along with the variance application. The variance process the Legislature established in Act 378, however, does not

[200] *See* Draft MDV Implementation Guidance at 20.
[201] Wis. Stat. § 283.16(6)(a).
[202] *Compare* § Wis. Stat. 283.16(6)(am) *with* Wis. Stat. § 283.16(7).

contemplate the collection of information apart from the applicant's certification that it cannot achieve compliance without a "major facility upgrade" and that it will comply with the program requirements.[203] Nor does the statute afford WDNR sufficient time to review any information it does collect before it must act on the permit application. The statute gives WDNR only 30 days to determine whether the permittee's certification is "substantially inaccurate"[204]; otherwise, the variance application is deemed approved.[205]

Given the DNR's increasingly narrow tailoring of its authority, its pattern and practice of failing to implement state law as promised, and the lack of any remedy for the public to challenge DNR action when it fails to implement the law in accordance with the Clean Water Act, it would be a serious administrative error for EPA to rely on the implementation guidance as grounds for approving the proposed variance.

[203] Wis. Stat. § 283.16(4)(a).
[204] *Id.* § 283.16(4)(am)1.
[205] *Id.* § 283.16(4)(am)2., 3.

Nick George
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December 16, 2015

Ms. Amanda Minks
DNR water resources management specialist
Wisconsin Department of Natural Resources
Box 7921
Madison, WI 53707-7921

Re: MWFPA Comments on Documents and Findings Related to the Multi-Discharger Variance for Phosphorus

The Midwest Food processors Association (MWFPA) represents the vast majority of the fruit and vegetable processing industry in Illinois, Minnesota and Wisconsin as well as a number of non-vegetable food processors. Wisconsin leads the nation in the production and processing of fruits and vegetables and is a leader in dairy, meat, and poultry processing.

Complying with Wisconsin's phosphorus rule is extremely expensive for the food industry and will diminish its ability to compete with food processors in other states and countries. Therefore the provision in the documents to allow a multi-discharge phosphorus variance (MDV) is critical if the industry is to be competitive.

MWFPA supports the work of DNR and DOA on the multi-discharge variance concept detailed in these reports. We urge US-EPA to approve the reports and allow point source dischargers to move forward on their attempts to comply with the rule. Approval of these reports will give some certainty to the industry.

Wisconsin's phosphorus rule is a financial and regulatory burden that food processers in other states do not have to shoulder. This puts Wisconsin food processors at an economic disadvantage. The goal of reducing phosphorus in surface water is admirable if not misguided, since it focuses on point sources only; is technologically impossible to attain in some cases; and too expensive for some companies to implement.

When Wisconsin's phosphorus rules were being drafted, the regulated industries and the DNR realized that the P levels were impossible to meet for some industries for various technological and financial reasons and therefore adaptive management was rolled into the rule. Adaptive management was created to give those facilities an alternative way to meet the requirements.

It soon became apparent however, that adaptive management wasn't working and the interested parties began to work on another alternative which resulted in the passage of WI Act 378. The act required WI DNR and DOA to find other ways for point source dischargers to comply with the P rule without going out of business thus creating the multi-discharge variance (MDV) and the reason we are making these comments.

Simply put, the multi-discharger variance is designed to ensure that some point source dischargers are given P limits with which they can actually comply. Our members tell us that the MDV could give them "breathing room" while they work to lower P levels and technology catches up with the regulations.

WI Act 378 was motivated by the fact that many companies are already utilizing robust treatment technologies and are consistently discharging P at concentrations levels well below 1.0 mg/L. Unfortunately, the P standard is so restrictive – especially if discharging to impaired waters – that dischargers would have to consistently be below .1 mg/L (on rivers) or 0.075 mg/L (on streams) in order to comply with the permit limit. These levels are very costly to attain.

It is important to note that the MDV is not a pass or "get out of jail card" to the rule requirement. It simply gives the facility time to try to comply. It will be costly and challenging for most companies. Under the variance, dischargers are required to meet levels established by the variance itself over the next 3 permit cycles. These higher levels provide the ability to comply with discharge limits, and avoid enforcement, fines, and citizen suits while technology catches up to the rule…or come up with an alternative.

But that comes at a cost –there is a fee-in-lieu component that requires companies to either pay the counties $50 per pound or work with a third party or non-point source to lower P output elsewhere. Either way the point discharger is paying.

The food industry is highly competitive and in some cases mobile. The vegetable industry however, is not very mobile and tends to be located near the raw product. Even so most of our members have operations in other states and there is constant competition within companies for the capital to expand plants and purchase new equipment.

These types of decisions are very real and we have seen more than once where additions have been canceled and production decreased due to the cost of regulatory compliance. As the report states, "Businesses signaled that they are more likely to decrease investment (47%) and/or postpone expansion (37%) at their Wisconsin facility due to the higher costs of water quality compliance. A significant percentage of companies (42%) also indicated that they would be more likely to shift production to another state. Almost a third of all companies expected to pass higher costs onto their customers."

The Wisconsin food processing industry needs the MDV recommended in these reports in order to comply with the P rule. The MDV will be costly and time consuming to implement but it will give them a tool and the time to meet Wisconsin's phosphorus limits.

Specific Comments Regarding the Reports:

- Can Cooling - Many of our members have can-cooling water outfalls. Based on discussions with WI-DNR it is understood that can-cooling water outfalls are classified as non-contact cooling water (NCCW) under the Multi-Discharger Phosphorus Variance. Therefore, if a county listed in

Appendix H has the check for NCCW, a facility with a can cooling water outfall would be eligible for the variance.

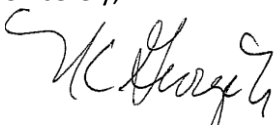
- Tile Line Discharges - Some members also have tile line discharges from wastewater spray irrigation fields. In some cases, these may be surface water outfalls and in other cases these may be discharges to wetlands or groundwater. Where discharged to surface water, these tile line discharges should also be eligible for the variance. There appears to be an error in Appendix H for Dodge County. The check for food processors should be included for Dodge County due to the presence of a tile line discharge to surface water at a food processing facility.

- Use of Fees – The $50 fee-in-lieu component may raise significant funds that are to be used for non-point projects. The department should do everything in its power to ensure that these fees go to specific non-point projects and not to environmental or consumer advocacy organizations to be used for environmental activism.

We believe it is imperative that the department remain flexible as this program unfolds. There are many cases where the MDV will be the only way a point source is able to comply and survive Wisconsin's P rule. Flexibility and a willingness to work with the point source may allow the company to survive and eventually comply with the P rule.

Thank you for this opportunity to comments on these documents.

Sincerely,



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December 16, 2015

VIA EMAIL AND U.S. MAIL

Ms. Amanda Minks
Wisconsin Department of Natural Resources
101 South Webster Street
Madison, WI 53703-3474

RE: Comments re Multi-Discharger Variance for Phosphorus

Dear Ms. Minks:

These comments on the multi-discharger variance are being submitted on behalf of the Municipal Environmental Group–Wastewater Division (MEG). MEG is an organization of over 100 municipalities statewide who own and operate wastewater treatment plants. We were one of the principal supporters of the multi-discharger variance legislation and have a long history of supporting efforts to remove phosphorus from our state's waters. Given that history, we are in a unique position to underscore the context and intent of this legislation before commenting on the multi-discharger variance package.

Background

Wisconsin was a leader in establishing technology based effluent limits on phosphorus back in 1992 at 1.0 mg/L. As a result, Wisconsin municipalities have already removed approximately 90% of the phosphorus in their discharges, and many have removed upwards of 97%. It is thus not surprising that most of the phosphorus impairments in Wisconsin's waters do not come from municipal treatment plants, but from nonpoint sources.

Nevertheless, MEG has continued to support measures to further reduce phosphorus from all sources. We supported the phosphorus water quality standards and the nonpoint performance standards back in 2010. We were among the organizations who advocated for including the provisions of adaptive management into the rule. We were also a major supporter of the trading legislation 2011 Act 151. And as noted above we were a key supporter of the multi-discharger variance in 2013 Act 378. The common theme to our efforts is that we all need to help reduce phosphorus, but we need to find cost effective ways to accomplish the biggest water quality improvement for the cost.

To spend tens or hundreds of millions of dollars on municipal and industrial treatment that reduces only a small percent of the phosphorus in Wisconsin's waters is not cost effective and produces little water quality improvement. Because municipalities have already removed 90%

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or more of the phosphorus in their discharges, treating that last few percent often requires advanced filtration technologies at enormous cost.

As noted above, there are existing alternatives that allow point sources to work with nonpoint sources on more cost effective phosphorus reduction options. MEG has supported and continues to support trading and adaptive management. The problem with these programs, however, is that they are not available or practical for many communities, especially small communities. Trading is not available to those communities at the wrong end of a watershed, and it also involves various trade ratios and administrative issues that have proved to be difficult to work through. There are very few areas where trades are being actively pursued. Adaptive management is limited by rule to certain stream segments. It also requires staff resources, data, cooperative partners and a willingness to take on risk. It is a comprehensive collaborative effort between point and nonpoint sources. For many communities, especially those outside major urban areas, they lack the data, staff, or administrative capability to effectively undertake adaptive management or trades. These communities need another option.

The answer to addressing phosphorus is finding mechanisms that require reasonable reductions from point sources over time and focuses resources on nonpoint programs. That is what the MDV was designed to do.

The Department of Natural Resources has done an admirable job developing guidance on the multi-discharger variance, and we commend them on their efforts. There are, however, a few areas in which we have remaining concerns as this variance now goes forward to review by the Environmental Protection Agency (EPA).

Eligibility Criteria

First, we continue to be concerned with the methodology used to develop screening criteria for municipal facilities. Those criteria now exclude even more municipal facilities from eligibility for the multi-discharger variance. In the original documents six counties were either ineligible or required sewer charges to exceed 2% median household income (MHI). Many communities, particularly larger communities will have costs in the 1% to 2% range within those counties, are effectively eliminated from using the MDV.

The number of counties that are ineligible or require a 2% MHI has now grown to 15 counties: Brown, Calumet, Chippewa, Dane, Dunn, Eau Claire, Green, La Crosse, Lafayette, Monroe, Outagamie, St. Croix, Trempealeau, Washington, and Waukesha. Communities in these counties account for 41 facilities with a design capacity over one million gallons per day (mgd). Facilities at 1 mgd or more would generate the most income under the variance if they were otherwise eligible. The 41 facilities in these counties constitute approximately 40% of the facilities *statewide* that have design capacities of 1 mgd or more. These 15 counties also account for a total of 144 communities out of a total of 649 communities statewide, or nearly 25% of the total communities in the state.

The more facilities excluded from the MDV, the smaller the amount of dollars will be available for nonpoint source phosphorus reduction efforts. And, as we explained earlier, facilities

excluded from the variance will face steep costs to attain only a minimal amount of further phosphorus reduction. The criteria adopted by DNR has already substantially undercut the value that the MDV program can provide to addressing nonpoint sources and has limited the relief intended to be provided to POTWs. As this proposal moves forward to review by the EPA we would strongly object to further limitations on eligibility that would further erode the value of this program.

Highest Attainable Condition Implementation

We are also concerned about implementation of the "highest attainable condition" requirement with respect to more restrictive interim limits. Phosphorus is susceptible to fluctuations during rainfall events or from slight operational changes which necessitates a flexible approach to setting interim limits. While we believe that the Department is taking an approach that accounts for phosphorus variability in setting interim limits, we want to reiterate the importance maintaining such flexibility.

Timing and Next Steps

Finally, we urge the Department and EPA to continue to move forward quickly with respect to approval and implementation of this variance. Hundreds of municipal permittees are already "on the clock" because they have permits that require them to make a choice on compliance options within the next year or two. They need to know whether the multi-discharger variance is a viable option for them. If the only option is for those communities to build additional treatment, the window of opportunity to channel funds to nonpoint efforts will be closed. We therefore encourage prompt EPA review of the variance that does not further constrain the communities that can participate in this effort.

For more information or any questions, please contact Paul Kent at the address listed at the top of this letter.

Very truly yours,

Vanessa Wishart

Paul G. Kent
Vanessa D. Wishart

PGK:mai
VDW:mai
cc: MEG Steering Committee

From: Piotrowski, John <JPiotrowski@packagingcorp.com>
Sent: Tuesday, December 15, 2015 9:20 AM
To: DNR Phosphorus
Subject: Comments on phosphorus multi-discharge variance.

Re: Packaging Corporation of America Comments on the Preliminary Findings Study on the Widespread Economic and Social Harm Related to Wisconsin's Total Phosphorus Numeric Water Quality Criterion

John S Piotrowski
Corporate Senior Director – Environmental Operations
Packaging Corporation of America

Packaging Corporation of America (PCA) agrees with the broad findings of the preliminary Findings Study on wide-spread economic and social harm related to the phosphorus numeric water quality criterion and support a multi-discharger variance for the state of Wisconsin.

- PCA is the fourth largest producer of containerboard in the United States, and the third largest producer of uncoated freesheet paper in North America with over 13,000 employees and 2014 net sales of $5.9 billion.
- We operate five containerboard mills located in five states: Georgia, Michigan, Louisiana, Tennessee and Wisconsin plus 94 box and sheet plant operations scattered across the U.S. We also operate three white paper mills located in Alabama, Minnesota and Washington.

The number of wastewater treatment plant configurations in the Wisconsin pulp and paper industry are nearly as numerous as the number of mills in the State due to both product variation and process-specific complexity. PCA's Tomahawk mill employs anaerobic treatment as the primary technology to remove oxygen-demanding substances from its wastewater. Due to the low phosphorus demand of our process, our system does not require the addition of supplemental phosphorus to maintain a healthy system. In fact, the amount of phosphorus released by our pulping process is greater than the demand exerted by our wastewater system.

If the allowable concentration of phosphorus in our wastewater discharge requires further reductions than what has been achieved to-date, end-of-pipe chemical precipitation and filtration will be necessitated. Effective phosphorus removal is complicated by our success at reducing fresh water use which not only increases the concentration of phosphorus, it also concentrates ions and color bodies that substantially increase the chemical demand of chemical precipitants. Due to the location and footprint of our wastewater treatment plant, we lack the real estate necessary to construct additional end-of-pipe controls. In composite, these constraints add significantly to the cost of any system upgrade that might be contemplated or required.

Importantly, PCA will be required to treat its NCCW due to the addition of a phosphorus-containing corrosion inhibitor that maintains the integrity of the mill's process piping infrastructure. This obligation only adds to the aforementioned complications, would dramatically increase the hydraulic load to our wastewater plant and substantially increase the capital and operation and maintenance costs.

Recently, the Tomahawk mill reconfigured its fleet of steam-generating boilers to comply with EPA's industrial boiler maximum achievable control technology rule (BMACT) – the most expensive environmental expenditure in the mill's history. PCA estimates that cost of compliance with the phosphorus water quality criterion on a "per unit of production" basis using end-of-pipe control is an 8-fold cost multiple over BMACT.

Businesses must make strategic, pragmatic capital investment decisions based on the performance and competitiveness of its facilities – in our case, pulp mills and paper machines. Economics dictate that capital is allocated to achieve the best return on investment. Since PCA's containerboard mill footprint extends to jurisdictions beyond Wisconsin, capital – and production – will logically flow into the most cost-competitive and profitable locations. The implementation of the phosphorous numeric criterion puts the Tomahawk mill at a clear competitive disadvantage compared to its sister mills (i.e., in LA and MI) as well as its competitors since Wisconsin is the only State with this unique and costly regulatory requirement. We are the only mill in our product line that discharges to State surface waters subject to this rule. The installation and operation of end-of-pipe controls will take our Tomahawk facility from being one of the lowest-cost producers to a high-cost –if not the highest cost – producer in our industry sector.

PCA supports a multi-discharger variance for the state of Wisconsin.

December 15, 2015

RE: Comments on Statewide Multi-Discharger Phosphorus Variance

Amanda Minks
Wisconsin Department of Natural Resources
Box 7921
Madison, WI 53707

Dear Ms. Minks:

Thank you for the opportunity to provide input on the Statewide Multi-Discharger Phosphorus Variance (MDV).

The River Alliance of Wisconsin supports policies that will legitimately and substantively curb the phosphorus pollution epidemic plaguing Wisconsin's waterways. To that end, we supported from the very beginning the water-quality-based effluent limits and the phosphorus regulatory program as developed in 2010, including the trading and adaptive management options.

In our previous comments on the Preliminary Determination, we expressed hope that the MDV could be a good step toward meaningful phosphorus reduction in Wisconsin, by making it possible for municipalities to fund conservation on agricultural landscapes. However, what has surfaced as the MDV policy has taken shape seems to be an opportunity missed, due to the limited pool of municipal permittees that are eligible for the MDV.

MDV economic eligibility screeners appear to eliminate the largest municipalities as well as multiple counties from participation—a substantial portion of would-be participants who could fund on-farm conservation. Though participant numbers will not be entirely clear until the MDV is approved and implemented, participation will be considerably more limited than if eligibility were written more broadly to include more counties and larger municipalities.

For many of the smaller municipalities, the MDV isn't an option because it is cost-prohibitive. Many will balk at the prospect of investing in short-term phosphorus compliance options like the MDV, when they will still be on the hook for phosphorus upgrades to meet water-quality-

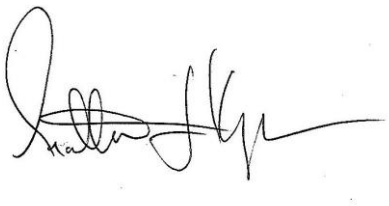
based effluent limits at the end of the MDV permit term. Others will simply not opt in without the guarantee of water quality improvement tied to their investment of public funds.

The net effect of this is a reduced participant pool in the MDV, which translates to less conservation on the landscape, and therefore unrealized improvements in water quality. As we said previously, the success of this policy tool should only be judged by whether or not it actually results in water quality improvement, per the original intent of the phosphorus rules developed in 2010. If the MDV is not widely adopted, it is hard to see how it will be a success.

We'll continue to watch with interest the implementation of the MDV, and future policies that attempt to curb the phosphorus problem in the state of Wisconsin.

Thank you for your consideration of our comments.

Sincerely,



Matt Krueger
River Restoration Director

From: Roger Rohe <roger.rohe@yahoo.com>
Sent: Monday, November 02, 2015 8:11 PM
To: DNR Phosphorus
Subject: multi-discharger variance

Wi. has been putting off stopping phosphorus discharge violations for many years. Now I read either 6 or 16 billion $ impact over a 20 year period. That is either less than 1 or 1/3rd of a billion per year. When spread out over the many violators, cheap to keep from polluting the water & keeping Wisconsinites healthy. Seems to me, here comes another I'll scratch your back for high dollar donations to whomever is pushing this. This has been a low priority for way too long. It's way, way past time to do SOMETHING.

17035 W. Wisconsin Avenue, Suite 120
Brookfield, WI 53005
Phone: (262) 264-5665
Web: probstgroup.com

December 16, 2015

Amanda Minks
DNR Water Resources Management Specialist
Wisconsin Department of Natural Resources
Box 7921
Madison, WI 53707-7921

Re: Guidance for Implementing Wisconsin's Multi-Discharger Variance for Phosphorus Written Comments Submittal

Dear Ms. Minks,

The Probst Group, LLC (TPG) offers these comments on behalf of industrial dischargers, and specifically those that are cheese manufacturers. We appreciate the effort by the Department of Administration and the Department of Natural Resources that has led to the Guidance for Implementing Wisconsin's Multi-Discharger Variance for Phosphorus (MDV) draft dated October 16, 2015, currently under public comment.

In the draft guidance there are several items in question that have been described below:

- There is some concern regarding the interim limitations schedule (which is based on the permit term) shown in Chapter 1.
  - There is no clear detail to indicate by which permit term an optimization plan is required to be developed and implemented. Likewise, it is unclear regarding who will be responsible for inspecting the optimization actions and how it will be confirmed that these actions are functioning successfully so that they should remain in place.
  - With the MDV requiring reapplication every permit term, there is some concern with regard to the accuracy of the capital and operating cost impacts considered for individual industrial dischargers and whether or not the necessary major facility upgrade is financially achievable, even with a potential compliance extension of four permit terms.

- In Chapter 2, a number of questions are offered for consideration when determining whether a point source qualifies for the MDV.
    - Item 1. There is concern that the data utilized in the evaluation of various dischargers, including the stated phosphorus limits as well as the capital and operating costs of compliance, may have led to an inaccurate ranking for many dischargers. Please provide a more detailed explanation of how the primary screener thresholds (Appendix G) and county eligibility (Appendix H) were determined.
    - Item 2. This item indicates that, in order to apply for the MDV, a major process upgrade must be needed for compliance with the future P concentration of 0.075 mg/L. As with item 1 above, the unknown capital and operating costs is of concern, but there is also a concern with the implementation of an upgrade regarding the unknown environmental impacts due to the potential toxicity of the significant increase in metal salts needed to meet the WQBEL. The increased chemical additions and the unknown full impact of chemicals such as ferric chloride, aluminum sulfate, aluminum chlorohydrate, sodium aluminate, and cerium chloride.

We support the MDV and believe it will allow the state to more effectively meet the overall water quality objective by providing a source of funding for non-point source improvements while allowing point source dischargers to develop cost-effective and reliable phosphorus removal. Given the additional time extension afforded by the variance when final approved, we can collectively better understand the potential impacts of the chemicals and other process changes required to meet these more stringent limits.

We appreciate the opportunity to provide our commentary and look forward to an approved guidance for Wisconsin's MDV.

Best regards,

Henry J. Probst | President
Direct: (262) 402-6072 | Cell: (262) 349-1930
Email: hprobst@probstgroup.com

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY
REGION 5
77 WEST JACKSON BOULEVARD
CHICAGO, IL 60604-3590

DEC 16 2015

REPLY TO THE ATTENTION OF:
WQ-16J

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DEC 18 2015

WT/3 - WY/3 - OGL/3

Amanda Minks
DNR Water Resources Management Specialist
Wisconsin Department of Natural Resources
P.O. Box 7921
Madison, WI 53707-7921

Dear Ms. Minks:

On October 22, the Wisconsin Department of Natural Resources (WDNR) began a public comment period on a proposed multi-discharger variance (MDV) for phosphorus. The U.S. Environmental Protection Agency offers the following comments, which reflect EPA's preliminary review of the materials available as part of the public notice of the MDV for phosphorus. This does not constitute a final EPA action under section 303(c) of the Clean Water Act.

EPA understands that Wisconsin is considering amending the state's MDV statute at s.283.16, Wis. Stats., to address the requirements of EPA's new variance regulation at 40 CFR 131.14 that variances longer than five years must include:

> "[a] statement providing that the requirements of the WQS variance are either the highest attainable condition identified at the time of the adoption of the WQS variance, or the highest attainable condition later identified during any reevaluation." (40 CFR 131.14(b)(1)(iii)); and
>
> "[a] provision that the WQS variance will no longer be the applicable water quality standard for purposes of the [Clean Water] Act if the State does not conduct a reevaluation consistent with the frequency specified in the WQS variance or the results are not submitted to EPA as required by [40 CFR 131.14](b)(1)(v)." (40 CFR 131.14(b)(1)(vi)).

EPA agrees that such changes are necessary to ensure that any variance that Wisconsin ultimately adopts that is longer than five years will be consistent with the requirements of EPA's new variance regulation.

A key aspect of the proposed variance is the requirement that National Pollutant Discharge Elimination System (NPDES) permitting decisions regarding whether individual permittees will be eligible for coverage under the variance will be based on accurate, up-to-date, site-specific

information regarding the individual permittee's compliance costs rather than any assumed compliance costs that were developed as part of the Wisconsin Department of Administration's (WDOA's) Determination. WDNR's *Guidance for Implementing Wisconsin's Multi-Discharger Variance for Phosphorus* sets forth an excellent process that will go a long way toward ensuring that permittees will provide sufficient information to enable WDNR, the public and EPA in its NPDES permit review capacity to meaningfully review the accuracy of the permittee's compliance cost estimates. However, EPA encourages WDNR to include more specific provisions pertaining to alternative cost estimates provided by permittees to ensure that they do not simply present the costliest control option, without also evaluating potential lower costs options. For instance, WDNR could specify that permittees need to provide an evaluation of at least two other possible compliance alternatives, in addition to any alternative based on use of any technology that the WDOA assumed would be necessary for purposes of generating compliance cost estimates in making the Determination.

WDNR's *Draft: Multi-discharger Variance Justification* speaks to the basis of the duration of the variance beginning on page 4. WDNR's *Guidance for Implementing Wisconsin's Multi-Discharger Variance for Phosphorus*, included in WDNR's public notice of the variance, provides additional detail about the actions permittees will be expected to undertake as part of the variance. Providing a summary of the information contained in both documents that relates the process or processes that a permittee would follow for achieving the highest attainable condition over the course of the variance to the duration of the variance would further clarify how the duration of the variance derives from the actions required by the variance to achieve the highest attainable condition.

If you have any questions regarding these comments, please contact Linda Holst, Chief of the Water Quality Branch, at (312) 886-6758 or at holst.linda@epa.gov.

Sincerely,

Tinka G. Hyde
Director, Water Division

From: Randy Kerkman <bristoladmin@wi.rr.com>
Sent: Thursday, October 22, 2015 2:04 PM
To: DNR Phosphorus
Subject: written comments

Hi Amanda,
I really think the DNR should look into various options for phosphorus reduction. It does not make sense to make a small community such as ours and many around the state to spend estimated 4 million dollars for our waste water plant when we already meet the limit roughly 70% or more of the time. We did a fish habitat study many years ago and the fish and aquatic life were health and vibrant. This money would be better spent working with farmers and others to reduce run off etc. The problem is even if we do this it only delays the large investment for our treatment plant. I believe that if there is a reduction the plant should not have to ever invest the large sum. This would give incentive for plants that qualify to get a bigger bang for the buck and make the waters cleaner than just micro cleaning a point source. I believe we all want cleaner waters we just need to do it efficiently!
Thank you,

Randy Kerkman CPM
Village of Bristol
Administrator/Public Works Dir.

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The Village of
BRISTOL
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December 11, 2015

Ms. Amanda Minks
DNR Water Resources Management Specialist
Wisconsin Department of Natural Resources
Box 7921
Madison, WI 53707-7921

Re: Statewide Phosphorus Multi-Discharger Variance Comments

Dear Ms. Minks:

We are writing this letter to express our support for the statewide phosphorus multi-discharger variance (MDV). We believe the MDV is an important tool for wastewater utilities to have available to provide more economically viable solutions for permit compliance.

Recent changes to Wisconsin's phosphorus discharge regulations have resulted in effluent limits at many wastewater treatment plants below 0.1 mg/L. We will be required to meet a limit of 0.075 mg/L which, without considering watershed solutions or the MDV, requires tertiary filtration to successfully meet the limit. Nearly 60 percent of permit holders have Water Quality Based Effluent Limits (WQBELs) set equal to the criterion and another 20 percent have more restrictive WQBELs than what is in their current permits. The estimated cost burden to the state is $6 billion to construct and pay for these improvements. These costs are substantial enough to cause major consequences to the state in terms of significant job loss, loss of gross state product, a reduction of wages, and a loss of residences. These widespread and substantial negative effects to the state justify the need for the MDV.

The overall goal of meeting the water quality standards set forth cannot be met by reducing municipal point sources alone. There are many streams where 80 percent of the loading is from nonpoint sources. Point source reductions and goals involve a relative straightforward process of WPDES permitting and effluent reporting. Nonpoint source reductions are much more complicated and lack the direct regulatory path; however, the overall goals cannot be met without achieving significant reductions in nonpoint phosphorus loading. The MDV is a streamlined approach toward targeting nonpoint reductions more effectively, particularly when compared to individual permittees developing nonpoint actions on an individual basis.

Some have expressed concern that the MDV would allow point source dischargers to get out of meeting their permitted compliance requirements. The MDV requires dischargers to complete their planning process to prove that they need to complete a major facility upgrade, they must meet interim limits, they must optimize their plant, and they must complete a watershed project. These tasks will require effort on the part of the discharger and they will result in water quality improvements.

Thank you for your time and effort in developing this important tool for our dischargers. We support the MDV and would like to see it become available to dischargers as soon as possible.

Sincerely,

Village of Bristol

Administrator/Public Works Director

Randy Kerkman

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PO. Box 189 • 210 Commercial Street • Brooklyn, Wisconsin 53521
(608) 455-4201 • Fax: (608) 455-1385 • E-mail:: clerk@brooklynwi.gov

December 14, 2015

Amanda Minks
WDNR
101 S Webster St
Madison, WI 53703-3474

We are writing this letter to express our support of the statewide phosphorus multi-discharger variance (MDV). We believe that this alternative offers a holistic method that can allow the most phosphorus to be removed from receiving streams for a given cost. We feel that this is the most important aspect of the MDV, and we are disappointed that our facility would not be able to participate simply based on our location. We are disappointed that economic indicators were so broadly applied.

We understand that other variances are still an option, however we feel that original intent of the MDV provided the best mix of environmental protection and wise spending. We feel that the overarching county by county eligibility requirements are too restrictive. For this to have been truly a statewide variance, we feel like more avenues for participation need to be available for communities like ours. We are concerned that economies of scale for our small community will create additional financial stress, limiting our ability to compete for users (residential and industrial) within our region of this great State.

Sincerely,

Pat Hawkey

Pat Hawkey
Village President

Cc: Mark Langer, PW Director
Leif Spilde, Utility Supt.
Troy Larson, Strand Engineering
Carol Strause, Village Clerk-Treas.

Village of Brooklyn
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December 14, 2015

WT/3 - WY/3 - OGL/3

Amanda Minks
WDNR
101 S Webster St
Madison, WI 53703-3474

We are writing this letter to express our support of the statewide phosphorus multi-discharger variance (MDV). We believe that this alternative offers a holistic method that can allow the most phosphorus to be removed from receiving streams for a given cost. We feel that this is the most important aspect of the MDV, and we are disappointed that our facility would not be able to participate simply based on our location. We are disappointed that economic indicators were so broadly applied.

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Sincerely,

Pat Hawkey

Pat Hawkey
Village President

Cc: Mark Langer, PW Director
Leif Spilde, Utility Supt.
Troy Larson, Strand Engineering
Carol Strause, Village Clerk-Treas.

From: Andy Kurtz <AKurtz@marathoncity.org>
Sent: Tuesday, December 15, 2015 12:13 PM
To: DNR Phosphorus
Subject: Multi-Discharger Variance

Importance: High

Good Morning,

As a member of the Wisconsin River Dischargers Group and as a community that is one of the first in the state to face the ultralow phosphorus levels in our WPDES permit renewal, the Village of Marathon City supports the submission of the Multi-Discharger Variance (MDV) to EPA. The MDV may provide the Village with additional flexibility to address the ultralow phosphorus limits anticipated in our WPDES renewal in January 2017. Without the MDV as an option, the Village of Marathon City, which contributes less than 1% of the total phosphorus load annually to the Rib River, will be faced with a multi-million dollar investment in our facility, an exponential rate increase to pay for the facility modifications and a negative impact on our community.

We request that the Multi-Discharger Variance be approved for submittal to the EPA and pursued as quickly as possible enabling Marathon City the opportunity to consider the MDV as a tool to address our WPDES renewal requirements and planning.

Thank you.

Andrew R. Kurtz
Administrator
Village of Marathon City
P: 715-443-2221
M: 715-470-3903
akurtz@marathoncity.org

December 9, 2015

Amanda Minks
DNR Water Resources Management Specialist
Wisconsin Department of Natural Resources
Box 7921
Madison, WI 53707-7921

Comments on the Multi-Discharger Variance Submittal Package

Thank you for the opportunity to testify at today's public hearing. I am submitting expanded comments for your review.

I am the Wastewater System Manager for the Village of Plover. I am also the President of the Wisconsin River Discharger Group. The WRDG is a group of 20 municipalities in the Wisconsin River watershed that have joined together to monitor and address the impacts of the extremely low phosphorus discharge limits that will be imposed in the next few years.

Our member communities include Baraboo, Elroy, Lakeland Sanitary District in Minocqua, Marathon City, Marshfield, Mauston, Necedah, Nekoosa, New Lisbon, Plover, Port Edwards, Portage, Rhinelander, the Rib Mountain Metropolitan Sewerage District, Stevens Point, Tomah, Tomahawk, Wausau, Whiting and Wisconsin Dells/Lake Delton. These communities represent over 182,000 residents in the Wisconsin River basin.

I summarized my comments in favor of the Multi-Discharger Variance at the public hearing in Wisconsin Dells. Following are my full comments on the variance.

Point sources have achieved significant reductions in the amount of phosphorus delivered to Wisconsin River system since 1992. Currently point sources contribute about 20% of the total P load to the Wisconsin River. The remaining phosphorus is delivered by non-point sources.

Our members are committed to reducing their discharge level and meeting their obligations under current and upcoming dictates. Unfortunately, this will come at a great financial burden for our communities and result in little or no improvement of the water quality in the Wisconsin River basin.

The Economic Determination estimated the costs to meet the proposed limits for POTW's at $ $7B, statewide. The capital costs used in the variance request are very conservative and underestimate the financial burden for municipal dischargers. The actual financial impact will be higher. As I commented in May, The capital costs attributed to several of our communities in the Economic Determination are unrealistically low according to those communities.

A review of the costs listed in the Addendum to Economic Impact Analysis, finds that capital costs attributed to more than 60% of our member communities appear to be underestimated. For example, Plover is anticipating costs in the $4M - $5M range in our long range plan. The Economic Determination lists our capital costs at $714,352. Two other member communities, Wausau and Portage, are listed as having no capital costs and no increased operating costs to meet anticipated limits, which is not realistic.

Unlike industrial dischargers, our communities cannot close or move out of state seeking a better economic environment.

The sources of 80% of the phosphorus in the Wisconsin River System are beyond the reach of the enforcement mechanisms applied to point source dischargers.

The most effective strategies for improving water quality will involve engaging non-point sources and implementing effective controls to reduce the phosphorus load.

DNR's existing implementation options allow for and encourage this strategy. Unfortunately our members may not be able to use these strategies due to inherent limitations and restrictions. Many communities that might take advantage of these strategies simply do not have the manpower resources to implement them.

This variance creates a streamlined framework that channels funds for pollution prevention to sites where it can most effectively reduce phosphorus discharge and improve water quality while easing the disproportionate burden on point sources. The framework still requires real and substantial reductions by point sources over the course of the variance.

I strongly encourage you to move quickly to submit this request and obtain approval from EPA. Many of our communities are rapidly approaching the point of no return in their decision making process. They will have to make decisions committing large sums of money to addressing their phosphorus issue. Further delays will only serve to eliminate this option which could greatly benefit the water quality of the Wisconsin River and its tributaries from consideration.

It would be unfortunate to look back and realize that those funds could have been more effectively spent to improve water quality, but were not, due to delays in gaining approval for the Multi-Discharger Variance.

On behalf of the Village of Plover, the Wisconsin River Discharger Group, and the 182,000 residents we serve, thank you for the opportunity to testify today.

Submitted by Rich Boden
Plover Wastewater Utility
PO Box 37
Plover WI 54467
rboden@ploverwi.gov

WALWORTH COUNTY
Est. 1839
WISCONSIN

Land Use and Resource
Management Department

December 14, 2015

Amanda Minks
DNR Water Resources Management Specialist
Wisconsin Department of Natural Resources
Box 7921
Madison, WI 53707-7921

RE: Wisconsin Multi-Discharger Variance for Phosphorous

Ms. Minks,

Thank you for the opportunity to comment on the State of Wisconsin's request to the US Environmental Protection Agency for a variance to the state rules for Phosphorus limits for point source dischargers. The Walworth County Land Use and Resource Management Department has had a chance to review the proposed rules and supporting documents.

It is not clear if funds paid by entities such as Walworth County Metropolitan Sewerage District, for example, could be used anywhere in the Rock River Basin at the HUC-8 level. Could these funds be collected then given to any entity in the HUC-8, which includes portions of Rock, Waukesha, Columbia, Jefferson and Dane Counties? Walworth County would like to express the opinion that dollars paid by a discharger should stay in the watershed where the discharge occurs to provide the greatest benefit to the receiving waterway.

Walworth County has worked diligently for decades with local farmers to implement conservation programs countywide. The County would like the opportunity to further this work on behalf of its residents and the rate payers of the sanitary districts seeking a variance if they choose to pursue that avenue for compliance with their permits.

Sincerely,

Shannon K. Haydin

Shannon K. Haydin
Deputy Director/County Conservationist

CC: Nancy Russell, Chair, County Land Conservation Committee
Michael Cotter, Director, Land Use & Resource Management/Deputy Corporation Counsel

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Bruce W. Ramme, Ph.D., P.E.
Vice President - Environmental
333 W. Everett St.
Milwaukee, WI 53203
bruce.ramme@we-energies.com

December 16, 2015

Submitted Electronically
DNRphosphorus@wisconsin.gov

Amanda Minks
Wisconsin Department of Natural Resources

RE: Comments on Proposed Multi-Discharger Phosphorus Variance

Dear Ms. Minks:

Wisconsin Electric Power Company and Wisconsin Gas LLC (d.b.a. We Energies) and Wisconsin Public Service Corporation (WPS), subsidiaries of WEC Energy Group, Inc., submit these comments in response to the Proposed Multi-Discharger Phosphorus Variance and related documents, including the Department of Administration's ("DOA") Final Determination Regarding Substantial and Widespread Adverse Social and Economic Impacts of Wisconsin's Phosphorus Regulations ("Final Determination") and the Response to Comments on DOA's Economic Impact Analysis ("Response to Comments"). These documents were prepared as a result of 2013 Act 378.

2013 Act 378 requires that the DOA, in consultation with the Wisconsin Department of Natural Resources ("DNR"), make the following determination:

> [W]hether attaining the water quality standard for phosphorus…through compliance with water quality based effluent limitations by point sources that cannot achieve compliance without major facility upgrades is not feasible because it would cause substantial and widespread adverse social and economic impacts on a statewide basis.

Based on that Determination, 2013 Act 378 also requires that the DNR take the following action:

> [T]he department of natural resources shall seek approval under 40 CFR Part 131 from the federal environmental protection agency for the variance under this section.

This action is the basis for the current public comment period, in which we are providing the following comments.

We Energies and WPS serve more than 1.5 million electric customers in Wisconsin and Michigan's Upper Peninsula and 1.4 million natural gas customers in Wisconsin. We are the largest electricity and gas provider in the state of Wisconsin, and our generation facilities provide half of the

electricity to the residents of Wisconsin. From an economic perspective, We Energies customer base includes a significant proportion of large commercial and industrial energy users. These large customers support the state's manufacturing and business economy, and over 40% of the company's retail electric revenues are collected from them.

The new phosphorus limits are currently incorporated into six of the companies' existing Wisconsin Pollution Discharge Elimination System (WPDES) permits. Additional and/or more stringent phosphorus permit limits may be required for our facilities in the future as a Total Maximum Daily Load ("TMDL") is finalized for the Milwaukee and Wisconsin River basins; as the whole lake model for Lake Michigan is finalized; and as the new water-quality based phosphorus standards are implemented as part of reissuing WPDES permits.

We Energies commented earlier during the public comment period on the Preliminary Determination and related materials (*See* We Energies Comments Letter dated June 11, 2015, attached). Our comments provided information to demonstrate that the findings in the Final Determination should apply to the power sector, and that utility facilities should be eligible for potential coverage under any future phosphorus multi-discharger variance. We are commenting again due to our interest in managing future phosphorus treatment costs and resulting customer electricity rate impacts.

We agree with the DOA finding that implementation of the Wisconsin water quality standards for phosphorus will cause substantial and widespread adverse social and economic impacts to the state, and with the agency's directive to the DNR to move forward in requesting United States Environmental Protection Agency (EPA) approval of a multi-discharger variance. We do not agree, however, with the DOA decision to exclude power sector utilities from the opportunity to apply for a variance under this streamlined mechanism.

The Final Determination concludes that, "it was not possible to collect sufficient data regarding whether power plants' phosphorus compliance costs would have a substantial impact on Wisconsin's economy." (Final Determination, p. 54). This finding, however, is inconsistent with information provided by the Public Service Commission of Wisconsin (PSCW).

The PSCW calculated the estimated annual revenue requirement impact for power sector facilities regulated by the Commission (see attached PSCW memo). The analysis found that, using the cost-curve methodology provided in the Economic Impact Analysis, the estimated capital and annual operation and maintenance expenditures that would be needed for Wisconsin Electric Power Company to meet the phosphorus water quality standard would result in annual revenue requirement increase of over $50 million, representing an overall rate increase of 1.75%. These are significant costs having significant customer rate implications.

This evidence, combined with a proposed power sector secondary screener that considers the aggregate economic burden to all of the communities in a utility's entire service territory (We Energies provided this alternative in its original comments), provides adequate justification for demonstrating that the phosphorus standard results in substantial impacts to the power sector. In addition, the power sector impact was incorporated into the statewide economic modeling analysis

that supported the Final Determination. The modeling analysis concluded that statewide compliance with the phosphorus standard causes widespread adverse social and economic impacts. Therefore, both the substantial and widespread adverse social and economic tests have been met for the power sector.

Excluding the power sector is also contrary to the intent of the development of a multi-discharger variance. It would prevent implementing the phosphorus rule in the most economical and efficient manner possible. This is because utilities would likely be major supporters and funders of the "county payment option" (s. 283.16(6)(b)1., Wis. Stats.), which is a component of watershed projects that are required for sources that are covered under the multi-discharger variance. Excluding the power sector potentially undermines the funding and therefore the success of this fee-in-lieu watershed component.

Importantly, the county payment option is intended to reduce phosphorus from agricultural nonpoint sources. The power sector would likely have found this $50 per pound compliance alternative much more economical in terms of cost per ton of phosphorus removal than costly incremental technology investments at utility facilities. An unintended consequence of excluding the power sector is that funding available to communities for this feature of the state's phosphorus reduction strategy may be greatly reduced. This is unfortunate since locally managed non-point source projects arguably offer the most effective way to reduce phosphorus, and the most environmental benefit.

Utilities will now be left with the following options for complying with existing or future phosphorus limits in WPDES permits:

- Attempting to utilize new and untested programmatic alternatives such as water quality trading or adaptive management

  See p. 7 of the Final Determination, "In Wisconsin, regulatory flexibilities were built into the phosphorus rule to account for this financial burden including water quality trading (WQT) and adaptive management (AM), and extended phosphorus schedules. Although these compliance options may be effective for some point sources, barriers prohibit implementation of one or more of these compliance options to be effective for all point sources especially when they rely on involvement and interaction with nonpoint sources." On April 26, 2013, We Energies commented on key policy-driven aspects of two proposed WDNR Guidance Documents for Implementing WQ Trading. While some changes were incorporated into these implementation-related documents, the trade ratios and treatment of interim credits in the final guidance are still likely to impede the viability of a phosphorus WQT program.

- Seeking rate recovery for the significant costs of add-on equipment to treat very low phosphorus concentrations in high volumes of non-contact cooling water

  Treatment will be especially costly for sites with low level phosphorus - high volume wastewater streams, especially where background concentrations of phosphorus affect

the ability to meet the new phosphorus water quality standards. For example, using the cost-curve methodology provided in the Economic Impact Analysis, the cost of installing new treatment technology at one of the company's facilities would be over $23,000 per pound of phosphorus removed.

- Pursuing an individual phosphorus variance from DNR and EPA

  See p. 8 of the Final Determination, "There are several factors that can be used to demonstrate the need for an individual variance (s. 283.15, Wis. Stat.; 40 CFR 131), but an economic determination is the most commonly used. …Although this option is available, individual variances can be a time consuming process for point sources, DNR, and EPA staff, and can lead to delays in the permit reissuance process." Significant utility and agency staff time will be needed to develop and process individual variances. In addition, utilities will likely still have difficultly satisfying an economic variance justification simply because the utility cost recovery structure does not conform to EPA's localized economic test.

We Energies would like to re-emphasize a few key points that were made in our earlier comments on the Preliminary Determination. We are repeating these comments since electric ratepayers may have to bear substantial and widespread adverse economic impacts as a result of the phosphorus multi-discharger variance not being available to the power sector.

First, the exclusion of utility facilities from qualifying for the variance seems to be based on a specific demonstration that is not required by the governing statute. It appears that, in order to be eligible for the multi-discharger variance, a utility would have to somehow disaggregate its phosphorus compliance costs across its customer rate base, by county, so that county-based socioeconomic impact criteria could be applied. The simple misalignment of the public sector analytical factors with the utility cost recovery structure seems to disqualify utilities from being eligible. This is not consistent with the variance applicability guidelines in the underlying statue.

Second, we proposed an alternative power sector secondary screener that would have considered the aggregate economic burden to all of the communities in a utility's entire service territory. There was no recognition of this alternative in the Response to Comments document, however. The apparent implication is that distributing power sector phosphorus compliance costs across a large base of customers makes those costs acceptable, without regard to the magnitude of costs or as measured in cost per pound phosphorus removed. We don't agree. Moreover, for We Energies, the irony is that nearly all of the counties within the We Energies electric service territory are the same as those identified in the Final Determination as having socioeconomic susceptibility.

Finally, in the event that the multi-discharger variance was not made available to utilities, we asked that there be a representation made that individual phosphorus variances would be based on similar terms and conditions as those contained in the multi-discharger variance. This would include extended compliance schedules and alternative compliance options, such as payments to reduce phosphorus discharges from nonpoint sources. We do not see this provision in the current application package, however, and request that this type of flexibility be incorporated into it.

Thank you for the opportunity to comment once again, and to convey the economic interests of our company and our customers. For additional information, please contact Kathleen Standen, Manager Environmental Regulatory, by telephone at (608)283-3009, or by e-mail at kathleen.standen@we-energies.com.

Sincerely,

Bruce W. Ramme, Ph.D., P.E.
Vice President - Environmental

Copy: Ed Eberle, Wisconsin Department of Natural Resources
Pat Stevens, Wisconsin Department of Natural Resources
Jeff Ripp, Public Service Commission of Wisconsin
Stacy Schumacher, Public Service Commission of Wisconsin

Attachments

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333 W. Everett St.
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Bruce W. Ramme, Ph.D., P.E.
Vice President – Environmental

June 11, 2015

Submitted Electronically
phosphorus@wisconsin.gov

Ed Eberle
Administrator - Division of Intergovernmental Relations
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Michael Bruhn
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RE: Comments on Proposed Multi-Discharger Phosphorus Variance – Draft Economic Impact Analysis and Preliminary Determination Regarding Substantial and Widespread Adverse Social and Economic Impacts of Wisconsin's Phosphorus Regulations

Dear Mr. Eberle and Mr. Bruhn:

Wisconsin Electric Power Company, doing business as We Energies, submits these comments regarding the Proposed Multi-Discharger Phosphorus Variance and related Draft Economic Impact Analysis ("EIA") and Preliminary Determination Regarding Substantial and Widespread Adverse Social and Economic Impacts of Wisconsin's Phosphorus Regulations ("Preliminary Determination"). These documents were prepared in response to 2013 Act 378 which requires that the Wisconsin Department of Administration ("DOA"), in consultation with the Wisconsin Department of Natural Resources ("DNR"), make the following determination:

> "Whether attaining the water quality standard for phosphorus…through compliance with water quality based effluent limitations by point sources that cannot achieve compliance without major facility upgrades is not feasible because it would cause substantial and widespread adverse social and economic impacts on a statewide basis."

We Energies is providing information to demonstrate that the findings in the Preliminary Determination apply to the power sector, and utility facilities should be eligible for potential coverage under any future phosphorus multi-discharger variance.

We Energies is an investor-owned electric and gas utility that serves more than 1.1 million electric customers in Wisconsin and Michigan's Upper Peninsula and 1.1 million natural gas customers in Wisconsin. We Energies has nine facilities operating under Wisconsin Pollution Discharge Elimination System ("WPDES") permits. Four of those permits include phosphorus limits, three require phosphorus monitoring, and two have no specific limits or monitoring requirements at this time. Additional and/or more stringent phosphorus permit limits may be required in the future as a Total Maximum Daily Load ("TMDL") is finalized for the Milwaukee River basin, including the Menomonee River watershed; as the whole lake model for Lake Michigan is finalized; and as the new water-quality based phosphorus standards are implemented as part of reissuing WPDES permits.

The availability of a multi-discharger variance is important for We Energies facilities and electric ratepayers. Technology assessments conducted for company facilities have shown that add-on equipment to treat very low phosphorus concentrations in high volumes of non-contact cooling water is not cost-effective, especially for sites where the background concentrations of phosphorus affect the ability to meet the new phosphorus water quality standards. Using the methodology included in the EIA, at one We Energies facility, the cost of installing new treatment technology would be over $23,000 per pound of phosphorus removed. Wastewater system projects such as this are not cost-effective and would not be a reasonable and prudent expense to incorporate into our customer electric rates.

If the multi-discharger variance is not available for We Energies facilities, then site specific variances may be needed. Unfortunately such variances can be expensive to obtain, time-consuming to implement, and have an uncertain outcome. The administrative benefits of coverage under a multi-discharger variance would eliminate regulatory redundancy for utilities as well as for DNR and for the U.S. Environmental Protection Agency ("EPA"), who must process and act on site-specific variance applications.

We Energies would like to emphasize the following comments on the draft EIA and Preliminary Determination:

- Using the methodology included in the EIA, We Energies' customers may incur significant costs—perhaps as much as $240 million in capital costs—as a result of the phosphorus regulations.
- Despite these costs, the structure of the demonstration required by the draft Preliminary Determination effectively excludes utility facilities from qualifying for the variance and is not required by the governing statute.
- The EIA and Preliminary Determination should account for the substantial economic impacts that would occur through electric rate increases if the multi-discharger variance were not available to the power sector.

- Instead of the demonstration required by the Preliminary Determination, which is based on individual county-level socioeconomic data, the demonstration with respect to utilities should consider the burden to the communities in the utility's entire service territory. This can be accomplished by adding a recommended secondary indicator threshold applicable to the power sector.
- The utility facility-specific data review reveals that the costs in the Preliminary Determination may be significantly underestimated.

These comments are discussed in more detail below.

I. Using the methodology included in the EIA, We Energies' customers may incur costs in the hundreds of millions to comply with the phosphorus regulations.

The EIA prepared by DOA and DNR predicts that the power sector will incur significant economic and jobs impacts as a result of the phosphorus regulations. Using the methodology included in the EIA, We Energies has evaluated the compliance costs expected to be incurred at each of its facilities. Using the cost curves developed as part of the EIA, more accurate design flow rates, and assuming a more stringent future phosphorus limit, We Energies estimates that the capital cost to install phosphorus treatment technology at company facilities could be as much as $240 million – an amount almost double that estimated in the EIA.

II. If the variance is unavailable to the utility sector, We Energies ratepayers in economically "susceptible" counties will bear the burden of rate increases resulting from phosphorus compliance costs.

As the EIA recognized, phosphorus compliance costs will be passed on to ratepayers including residents and businesses, just as other industries incorporate costs in their products. EIA at 7. Here, where We Energies compliance costs could reach on the order of $240 million in capital costs, the resulting ratepayer impact would be an electric rate increase of close to 1.2%. This cost would be passed through to residential customers and to businesses striving to manage costs and remain competitive in the local, regional, national and potentially global economies. Many of these ratepayers are located in counties[1] that have particular susceptibility to the costs necessitated by the phosphorus standards, as detailed in the EIA and the Preliminary Determination.

Electricity rates are comprised of several components including operations expenses, fuel costs, infrastructure investments (maintenance, repair, replacement and expansion), environmental improvements, electric transmission charges, and renewable and energy conservation expenditures. Over the period 2000-2014, the average annual increase in electric rates, excluding fuel costs, has been approximately 3.65%. Rate changes over this period of time reflected a comprehensive

[1] Exhibit A to these comments is a map showing the We Energies electric service territory.

electric system investment to address electricity supply and reliability issues, and included significant environmental improvements.[2]

For a more current perspective, in We Energies most recent rate case, the Public Service Commission of Wisconsin approved a 0.39% decrease in 2015 electric rates and a 0.92% increase in 2016 electric rates[3]. Access to the multi-discharger variance would ameliorate the potential rate impacts of non-cost effective marginal reductions in already low utility phosphorus discharges.

Electric rate increases also impact We Energies' industrial customers. In the most recent rate case, the Wisconsin Industrial Energy Group, Inc. ("WIEG"), an association of large industrial and manufacturing businesses, many of which are customers of We Energies, provided testimony describing the importance of electric costs relative the economic viability of Wisconsin manufacturers.

> For WIEG's energy intensive members, the cost of electricity is a major component of their cost of production. Because a large energy customer's energy costs may represent as much as 30 percent or more of its entire annual operating budget, the effect an increase in energy prices has on such a business is much greater to it, proportionally, than the same percentage increase is to a residential or small business customer for which energy is but one of many small annual costs. WIEG members must compete in national and international markets and must remain cost competitive. Therefore, it is important that the rates they pay for electricity be reasonable and based on the cost to serve.[4]

The EIA and Preliminary Determination should account for the substantial economic impacts that would occur through electric rate increases if the multi-discharger variance were not available to the power sector.

III. Despite these economic impacts, the structure of the demonstration required by the draft Preliminary Determination effectively excludes utility facilities from qualifying for the variance and is not required by the governing statute.

Under the draft Preliminary Determination, affected sources must satisfy a two-step test to show that the Preliminary Determination applies to the existing source. *See* Preliminary Determination at 32. The first step, identified as an analysis of "primary indicators," requires affected sources to demonstrate either that they are within the top 75% of permittees incurring costs, or located in a county within the top 75% of counties incurring costs. The second step, identified as "secondary indicators," requires a demonstration of particular socioeconomic impacts caused at the county

[2] We Energies Power the Future was a ~$6 billion plan to meet Wisconsin's growing energy needs and improve environmental performance. It included the addition of 1,200 MW of new advance technology baseload units, retiring/repowering older coal units with natural gas, adding emission controls at existing units, and increasing renewable generation. System-wide emissions were reduced by more 80% while adding 50% more generation capacity.
[3] Docket 05-UR-017, PSWC order issued 12/23/14.
[4] Docket No. 05-UR-107. Direct Testimony of Mr. Richard Baudino, testifying on behalf of the Wisconsin Industrial Energy Group, Inc., p. 18.

level. The second step potentially has the effect of foreclosing utility sources from making the required showing, and qualifying for the variance, simply because of utilities' cost recovery mechanism. As explained below, that structure grafts additional requirements on to the governing statute, which mandates only that an affected source show that "[t]he determination applies to the existing source." Wis. Stat. § 283.16(4)(a)1.

Wisconsin Stat. § 283.16, which authorized the creation of the proposed statewide variance, requires individual sources to make three demonstrations to qualify for the variance: first, that "the [DOA] determination applies to the existing source"; second, that the "source cannot achieve compliance with the water quality effluent limitation for phosphorus without a major facility upgrade"; and third, that the source will comply with one of the payment or project implementation requirements of § 283.16(6)(b). *See* Wis. Stat. § 283.16(4)(a)1-3. The second and third requirements are well-defined in the statute and are not controversial.

The requirement that an affected source demonstrate that the DOA determination applies to it is not explained in the statute. The Preliminary Determination defines the requirement as follows:

> In summary, industrial dischargers may be considered for MDVs if they meet two conditions: 1) they are within the top 75% of permittees incurring costs); and 2) the discharge is located in a county that is within the top 75% of counties incurring costs. Permittees that meet both tests are believed to have a substantial impact, but must meet at least one secondary indicator in order to confirm this determination (see part B of this section, p. 33). Permittees that meet only one primary indicator must meet at least two secondary indicators in order to qualify for MDVs. Permittees do not meet the substantial test if they meet neither primary indicator.[5]

The referenced "secondary indicators" are all socioeconomic impacts evaluated at the county level: median household income, personal current transfer receipts as a share of total income, jobs per square mile, population change, change in net earnings by place of residence, job growth, and capital costs as a share of total wages.[6] Preliminary Determination at 33. The Preliminary Determination provides an analysis of secondary indicators for all sectors except the power sector. Without concluding whether secondary indicators can be met for the power sector, the Preliminary Determination creates ambiguity as to whether a utility could qualify for the multi-discharger variance.

It is our understanding that the county-based socioeconomic secondary indicators are used as a gauge to determine whether implementation of the phosphorus regulations would be burdensome to

[5] Preliminary Determination at 32.

[6] These indicators are very similar to those identified by EPA to evaluate whether *public* sector entities are entitled to a variance from water quality standards. See USEPA, *Interim Economic Guidance for Water Quality Standards* (1995). The EIA and Preliminary Determination apply these indicators to both public and private entities; however a unique analysis should be applied to the public utility sector because it exhibits some of the characteristics of both public and private sector entities. This concept will be explained in more detail in the next section of these comments.

local households where the private entity is located. In some cases, private sector entities may be able to satisfy the "substantial" test using those indicators because the effects of compliance are concentrated within the community where the source is located. But costs incurred at utility facilities are spread among ratepayers in multiple counties. It will be impossible, or nearly so, to demonstrate the share of utility costs impacting ratepayers in a single county, as the Preliminary Determination appears to require. Nothing in the statute requires such an inequitable result. Utility sector costs are substantial, even though they are spread out across customers being served in multiple counties. Said another way, utility phosphorus compliance costs don't become cost-effective just because they are distributed across all electric customers.

The power sector should have the same opportunity as other sectors to satisfy a two-step test to show that the determination applies. Other affected entities in the state will approach phosphorus compliance in a more cost-effective manner and will generate more environmentally effective outcomes. Utility sources should have the same opportunity.

The misalignment of the public sector analytical factors with the utility cost recovery structure serves to mask the significant costs that utility ratepayers will bear, even at the county level. The average consumer may be affected by changes in non-discretionary energy costs as much or more than by increases in the costs of discretionary products from smaller industries. Moreover, ratepayers within a single county will bear some share of the aggregate costs from *all* affected utility facilities.

Nearly all of the counties within the We Energies electric service territory are the same as those identified using the secondary indicators in the Preliminary Determination as having particular susceptibility to the costs imposed by the phosphorus standards. *See* Preliminary Determination at 78-80. This is evident from the We Energies Service Territory Map attached to these comments as Exhibit A.[7]

In short, utility variance coverage should not be conditioned on a demonstration on an individual county basis. Instead, DOA and DNR should examine the utility's service territory to determine whether rate increases would be burdensome to local households.

IV. A Secondary Indicator threshold for the power sector should be added to the Preliminary Determination in order to recognize substantial costs to the power sector – and more importantly, to the costs that would be passed on to electric ratepayers.

DOA and DNR have already assessed six of the seven secondary indicators for each county to determine the general economic health of the communities and whether implementation of the phosphorus regulations will be burdensome to local households. Because a public utility recovers its costs from all ratepayers in its service territory, and it does not single out the individual county where a facility is located, a reasonable framework would be for DOA and DNR to review the

[7] *See* Exhibit A.

counties located in a utility's service territory to determine whether the communities served by the utility would be burdened by the phosphorus regulations.

Specifically, We Energies suggests the following procedure be used to determine whether the Determination applies to power utilities:

> ***In order to meet the secondary indicator test for the publicly-owned electric utilities within the power sector[8], a utility must demonstrate that at least 75% of the counties within its service territory meet one or more of the secondary indicators.***

The primary indicators should still serve as the first-level screeners to determine whether installation of phosphorus wastewater treatment equipment will cause a substantial impact. The proposed secondary indicator evaluation over the company's entire service territory will confirm this determination.

Ultimately, if the Multi-Discharger Variance is not available to utilities and DOA and DNR instead intend to require utilities to apply for individual variances, DNR's application to EPA for approval of the statewide variance should include a representation that individual phosphorus variances would be based on similar terms and conditions as those applicable to the multi-discharger variance including extended compliance schedules and alternative compliance options, such as payments to reduce phosphorus discharges from nonpoint sources.

V. Facility-specific data review reveals that the costs in the Preliminary Determination may be significantly underestimated.

We Energies evaluated the cost curves and Capital and O&M Cost Tables presented in the EIA, as well as the individual compliance costs projected for each of our power plants, presented in Attachment 7 in the EIA Addendum. We believe that the general process for development of the projected facility costs is accurate; however, the costs may be underestimated based on a number of factors, as detailed next.

First, Table 2-4 in the EIA indicates that for Lagoon Systems, a "clarification feed pump station" and "clarifier, mechanisms, and pumps" will be included in the cost estimate; however it is not clear whether those costs are included in the capital cost estimates presented in Appendix D of the EIA. Further, site-specific costs were excluded from the scope of the assessment, as specified in the EIA:

> Site Specific costs were not included in this cost estimate but would affect the cost of implementation for individual facilities. Land acquisition need and associated costs can vary for each site and are not accounted for in this analysis. This analysis also assumed that point source discharges that currently have multiple outfall locations will be able to reconfigure their treatment processes so all effluent will be treated at one treatment facility. Reconfiguring costs

[8] As defined under §196.01(5)(a) Wis. Stats. For other types of ownership structures and cost-recovery mechanisms used within the power sector, other secondary indicator tests may be more appropriate.

> are site-specific and, therefore, not part of this analysis. It is acknowledged that these costs may be significant in some cases.

EIA at 22. Contingency costs of 35% were built into the capital cost assumptions, which may cover a portion of the site-specific conditions. Yet, for some facilities, the site-specific conditions will cause the capital and O&M cost projections to be much higher than those specified in the EIA and EIA Addendum.

Also, for some of our facilities (i.e., Paris Generating Station, WPDES Permit Number 0049131, and Germantown Generating Station, WPDES Permit Number 0042757), the "mechanical" wastewater treatment technology cost curves appear to have been used to estimate the capital and O&M costs, yet these facilities do not have any wastewater treatment equipment installed except oil/water separators. Therefore, the lagoon cost curve should have been used and the cost estimates should be higher, as costs for adding clarifiers, mechanisms, and pumps must be accounted for.

Costs for two of our permitted discharges, Milwaukee County Power Plant and Steam Services, were not included in the EIA, as both of these facilities discharge under the authority of General Permit WI-0044938-5, Noncontact Cooling Water or Condensate and Boiler Water. As described in the Preliminary Determination:

> A gap of this analysis is that TP WQBELs were only available for existing individual WPDES permit holders at this time. This data gap precluded a cost analysis for *general* WPDES permit holders and new dischargers…

Preliminary Determination at 12. The Preliminary Determination further elaborated this data gap for the Noncontact Cooling Water (NCCW) category:

> There are over 500 facilities that are currently covered under the general NCCW permit… Phosphorus WQBELs may need to be included in WPDES permits if these limitations have the potential to be exceeded by the NCCW discharge. Based on available data from municipal water supplies and NCCW effluent streams, effluent phosphorus concentrations have a reasonable potential to exceed 1.5 mg/L, which means that phosphorus WQBELs will likely need to be included upon reissuance of the general permit. These WQBELs would be the first phosphorus limitation imposed on many of these discharges since TBELs were not previously triggered due to the small phosphorus loadings coming from these operations.

Id at 17-18. In summary, the Preliminary Determination concluded that the costs of up to 250 permittees who discharge under the authority of the NCCW general permit have not been included in this analysis. As such, the total cost for the NCCW category has been underestimated.

Finally, it appears that the cost curve technology was assessed based on the current limit in the existing WPDES permit or the impending phosphorus WQBEL anticipated to be placed in the next reissued WPDES permit. For our facilities that discharge to Lake Michigan (Pleasant Prairie Power Plant, WPDES Permit Number 0043583, Oak Creek Power Plant, WPDES Permit Number 0000914, and Port Washington Generating Station, WPDES Permit Number 0000922), our assumption is that the interim limit of 0.6 mg/L (based on s. NR 217.13(4), Wis. Adm. Code) was

used to estimate Capital and O&M costs. For both Oak Creek Power Plant and Port Washington Generating Station, the compliance cost estimate was $0, which we surmise indicates that no technology needs to be installed because our discharges are below the 0.6 mg/L interim limit.

However, this is an interim limit. The final WQBEL will be determined based on the whole lake model for Lake Michigan, consistent with s. NR 217.13(4), Wis. Adm. Code. The Lake Michigan phosphorus criterion is 7 µg/L, which is considerably lower than the criterion for rivers (100 µg/L) and streams (75 µg/L). While we cannot predict what the final WQBEL will be for Lake Michigan dischargers, it is possible that the limit could be <0.1 mg/L (< 100 µg/L). If this is the case, then the cost curves for the TP < 0.1 mg/L technology would be used to approximate the costs, which would be significantly larger than the costs provided on Attachment 7 of the EIA Addendum.

In summary, the costs developed as part of the EIA for the power sector may be underestimated as they:

- May not account for all process components required for Phosphorus Removal in Lagoon Systems;
- Exclude site specific costs;
- In some cases, apply the wrong cost curve based on the existing treatment system (or lack of treatment system) at a facility;
- Fail to estimate the costs for the 250 permittees discharging under the NCCW General Permit that would likely have Phosphorous WQBELs applied; and
- Do not reflect the final WQBEL for Great Lakes dischargers.

The Preliminary Determination concluded that "implementation of the Wisconsin water quality standards for phosphorus will cause substantial and widespread adverse social and economic impacts to the state." Preliminary Determination at 68. We Energies agrees. Considering that the aggregate cost used to make this determination may have been underestimated, the likely higher costs would only serve to further strengthen the conclusion.

Thank you for your consideration of these comments. If you should have any questions or require further information regarding these comments, please contact Kathleen Standen, Manager Environmental Regulatory, by telephone at (608)283-3009, or by e-mail at kathleen.standen@we-energies.com.

Sincerely,

Bruce W. Ramme

Bruce W. Ramme, Ph.D., P.E.
Vice President - Environmental

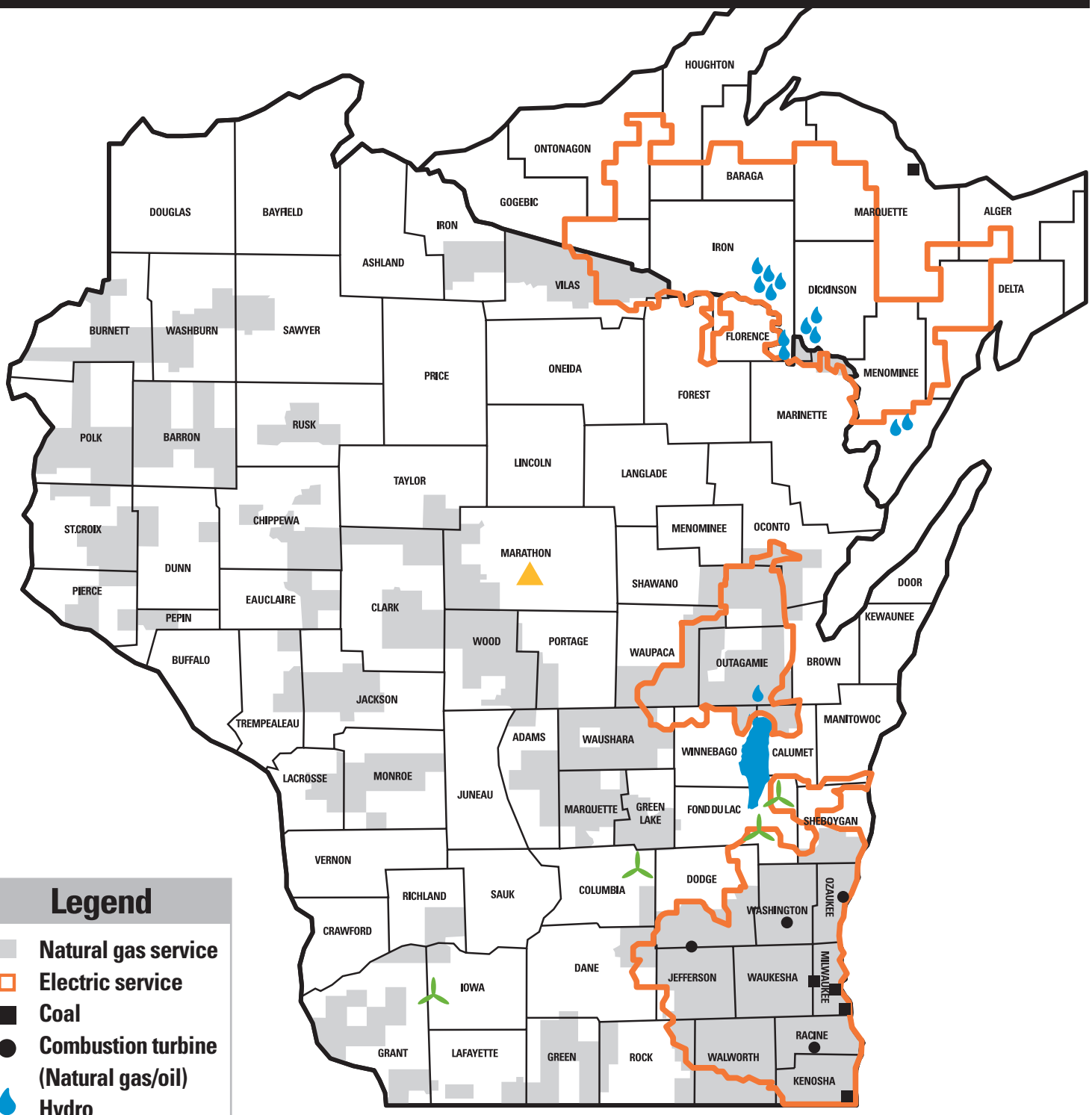
Copy: Amanda Minks, Wisconsin Department of Natural Resources

Attachment

[#309066]

We Energies service area map

January 2013



Legend

- Natural gas service
- Electric service
- Coal
- Combustion turbine (Natural gas/oil)
- Hydro
- Wind turbine
- Biomass

Electric emergency 800-662-4797

Natural gas emergency 800-261-5325

We Energies – Energy You Can Depend On

2K11021-JN-IN

Public Service Commission of Wisconsin

Ellen Nowak, Chairperson
Phil Montgomery, Commissioner
Mike Huebsch, Commissioner

610 North Whitney Way
P.O. Box 7854
Madison, WI 53707-7854

DNR

AUG 3 2015

OFFICE OF THE SECRETARY

July 30, 2015

Mr. Mike Bruhn, Assistant Deputy Secretary
Wisconsin Department of Natural Resources
101 South Webster Street
P.O. Box 7921
Madison, WI 53703

Re: Estimated Impacts to Electric Rate Payers Related to the Cost of Compliance with Phosphorus Limits

Dear Mr. Bruhn:

This letter is in response to your request for assistance from the Public Service Commission (Commission) on the impact to electric utility rate payers related to the implementation of phosphorus standards. Department of Natural Resources staff provided us with the estimated capital and annual operation and maintenance expenditures that would be needed to meet water quality standards under Wis. Admin. Code ch. NR 217 for 19 power generation facilities. It is my understanding that these estimates were developed by ARCADIS as part of the evaluation of a possible multi-discharger variance pursuant to Wis. Stat. § 283.16. Commission staff did not independently verify the reasonableness of the estimated costs.

Based on the information provided, Commission staff estimated the annual revenue requirement impact for those facilities owned by utilities that are regulated by the Commission, as shown in Table 1. These percentages represent the annualized increase in revenue that each utility would need to collect from its electric customers to pay for the additional capital and operation and maintenance expenses related to phosphorus compliance. Please note that the percentage increase does not necessarily correlate to the rates that would be paid by any particular customer, because the actual rates would be determined by the Commission as part of a rate case.

Utility	Estimated Annual Revenue Requirement Increase	Percentage Increase
Wisconsin Electric Power Company	$50,372,000	1.75
Wisconsin Power and Light Company	$6,933,996	0.69
Northern States Power Company-Wisconsin	$1,511,064	0.23
Wisconsin Public Service Corporation	$2,495,501	0.25
Madison Gas and Electric Company	$855,573	0.20

Commission staff did not include the estimated costs associated with those facilities that are scheduled to retire within the near future, including Pulliam, Nelson Dewey, and Edgewater. Further, Commission staff were unable to determine the potential rate impacts for facilities which are owned by non-regulated entities, such as co-ops and independent power producers, because the Commission does not maintain the information necessary for such a calculation.

Telephone: (608) 266-5481 Fax: (608) 266-3957 Home Page: http://psc.wi.gov
TTY/TextNet: In Wisconsin (800) 251-8345, Elsewhere (608) 267-1479 E-mail: PSCRecordsMail@wisconsin.gov

8/7/15 cc: Amanda Minks

Finally, one of the facilities on the list is an ethanol production plant, not an electricity generating facility, and therefore would not have an impact on electric ratepayers.

I have an included an attachment which demonstrates how the estimated costs were allocated by plant and by utility. For those facilities that are owned by multiple utilities, the estimated costs were apportioned to each of the utility owners.

If you would like additional information, please contact me at (608) 267-9813 or Jeffrey.Ripp@wisconsin.gov.

Sincerely,

Jeffrey J. Ripp
Administrator
Gas and Energy Division

JJR:jlt:DL:00984282

Attachment
1. Summary of Estimated Costs, by Utility

cc: Ed Eberle, DOA
Bob Seitz, PSC

Attachment
Estimated Revenue Requirement Impacts of Phosphorus Compliance

Facility	Plant Capacity (MW)	Percentage of Plant Capacity	Percentage of Unit Ownership	Estimated Capital Costs for Compliance	Annual Estimated Operating and Maintenance Expenses	Annual Estimated Return on Undepreciated Plant	Annual Simple Straight-Line Depreciation	Estimated Annual Cost	Apportioned Annual Cost of Project, by Plant	2015 Revenue Requirement	% of Revenue Requirement
WEPCO/We Energies											
VALLEY POWER PLANT			100%	$122,316,391	$7,829,278	$12,843,221	$3,057,910	$23,730,409	$23,730,409	$2,883,388,000	0.82%
OAK CREEK POWER PLANT	2,594.15			$28,154,295	$5,061,504	$2,956,201	$703,857	$8,721,562	$7,935,978	$2,883,388,000	0.28%
South Oak Creek -- total cost apportioned by % of capacity	*1,191.60*	*45.93%*	*100%*	*$12,932,428*	*$2,324,957*	*$1,357,905*	*$323,311*	*$4,006,173*	*$4,006,173*	*$2,883,388,000*	*0.14%*
Elm Road -- total cost apportioned by % of capacity	*1,402.55*	*54.07%*	*83.34%*	*$15,221,867*	*$2,736,547*	*$1,598,296*	*$380,547*	*$4,715,389*	*$3,929,805*	*$2,883,388,000*	*0.14%*
PORT WASHINGTON GENERATING STATION			100%	$42,612,993	$12,138,938	$4,474,364	$1,065,325	$17,678,627	$17,678,627	$2,883,388,000	0.61%
GERMANTOWN			100%	$3,112,197	$707	$326,781	$77,805	$405,293	$405,293	$2,883,388,000	0.01%
PLEASANT PRAIRIE POWER PLANT			100%	$966,107	$202,068	$101,441	$24,153	$327,662	$327,662	$2,883,388,000	0.01%
TOWN OF PARIS			100%	$1,829,794	$56,569	$192,128	$45,745	$294,442	$294,442	$2,883,388,000	0.01%
TOTAL WEPCO/We Energies Cost				**$198,991,777**				**$51,157,995**	**$50,372,411**	**$2,883,388,000**	**1.75%**
WPL/Alliant											
EDGEWATER GEN. STATION	770			$21,709,742	$3,592,672	$2,279,523	$542,744	$6,414,938	$5,540,674	$1,001,610,358	0.55%
Edgewater 4 -- total cost apportioned by % of capacity	*330*	*42.86%*	*68.2%*	*$9,304,175.14*	*$1,539,716.57*	*$976,938*	*$232,604*	*$2,749,259*	*$1,874,995*	*$1,001,610,358*	*0.19%*
Edgewater 3 and 5 -- total cost apportioned by % of capacity	*440*	*57.14%*	*100%*	*$12,405,566.86*	*$2,052,955.43*	*$1,302,585*	*$310,139*	*$3,665,679*	*$3,665,679*	*$1,001,610,358*	*0.37%*
COLUMBIA (1 and 2)			*46.2%*	$12,428,925	$487,788	$1,305,037	$310,723	$2,103,548	$971,839	$1,001,610,358	0.10%
RIVERSIDE ENERGY CENTER LLC			*100%*	$2,559,272	$88,777	$268,724	$63,982	$421,482	$421,482	$1,001,610,358	0.04%
TOTAL WPL/Alliant Cost				**$36,697,939**				**$8,939,969**	**$6,933,996**	**$1,001,610,358**	**0.69%**
NSP/Xcel											
BAYFRONT			*100%*	$5,076,816	$851,078	$533,066	$126,920	$1,511,064	$1,511,064	$661,931,432	0.228%
TOTAL NSP/Xcel Cost				**$5,076,816**				**$1,511,064**	**$1,511,064**	**$661,931,432**	**0.228%**
WPS											
FOX ENERGY CO LLC - FOX ENERGY CENTER			*100%*	$3,898,800	$225,400	$409,374	$97,470	$732,244	$732,244	$1,001,713,402	0.073%
COLUMBIA (1 and 2)			*31.8%*	$12,428,925	$487,788	$1,305,037	$310,723	$2,103,548	$668,928	$1,001,713,402	0.067%
WESTON (3 & 4 ONLY)	945.5			$1,133,818	$123,882	$119,051	$28,345	$271,278	$220,064	$1,001,713,402	0.022%
Weston 3	*350.5*	*37.07%*	*100.0%*	*$420,310.11*	*$45,923.47*	*$44,133*	*$10,508*	*$100,564*	*$100,564*	*$1,001,713,402*	*0.010%*
Weston 4	*595*	*62.93%*	*70.0%*	*$713,507.89*	*$77,958.53*	*$74,918*	*$17,838*	*$170,715*	*$119,500*	*$1,001,713,402*	*0.012%*
EDGEWATER GEN. STATION	770			$21,709,742	$3,592,672	$2,279,523	$542,744	$6,414,938	$874,264	$1,001,713,402	0.087%
Edgewater 4 -- total cost apportioned by % of capacity	*330*	*42.86%*	*31.80%*	*$9,304,175.14*	*$1,539,716.57*	$976,938	$232,604	$2,749,259	*$874,264*	*$1,001,713,402*	*0.087%*
TOTAL WPS Cost				**$39,171,285**				**$12,271,268**	**$2,495,501**	**$1,001,713,402**	**0.249%**
MG&E											
COLUMBIA (1 and 2)			*22.0%*	$12,428,925	$487,788	$1,305,037	$310,723	$2,103,548	$462,781	$425,754,563	0.109%
OAK CREEK POWER PLANT	2,594.15			$28,154,295	$5,061,504	$2,956,201	$703,857	$8,721,562	$392,792	$425,754,563	0.092%
Elm Road -- total cost apportioned by % of capacity	*1402.55*	*54.07%*	*8.33%*	*$15,221,867*	*$2,736,547*	*$1,598,296*	*$380,547*	*$4,715,389*	*$392,792*	*$425,754,563*	*0.092%*
TOTAL MG&E Cost				**$40,583,220**				**$10,825,111**	**$855,573**	**$425,754,563**	**0.201%**

Non-Utility or Co-op Ownership											
WPPI											
OAK CREEK POWER PLANT	2,594.15			$28,154,295	$5,061,504	$2,956,201	$703,857	$8,721,562	$392,792		
Elm Road -- total cost apportioned by % of capacity	*1402.55*	54.07%	*8.33%*	*$15,221,867*	*$2,736,547*	*$1,598,296*	*$380,547*	*$4,715,389*	*$392,792*		
DPC											
WESTON	945.5			$1,133,818	$123,882	$119,051	$28,345	$271,278	$51,214		
Weston 4	*595*	*62.93%*	*30.0%*	*$713,508*	*$77,959*	*$74,918*	*$17,838*	*$170,715*	*$51,214*		

NOTE: These annual cost estimates were calculated based on the estimated, first full year of costs. No present value assumptions were used. As a proxy for taxes, the estimated return on plant was grossed up. In reality, many tax credits and depreciation variables would be at play, where calculations would be more precise. For depreciation, an average straight line rate of 2.5% was used, after analyzing steam production depreciation of the specific utilities.

WISCONSIN CHEESE MAKERS ASSOCIATION
EST. 1891

December 15, 2015

Amanda Minks
DNR water resources management specialist
Wisconsin Department of Natural Resources
Box 7921
Madison, WI 53707-7921

Re: WCMA Comments on Documents and Findings Related to the Multi-Discharger Variance for Phosphorus

Wisconsin Cheese Makers Association (WCMA) represents Grade A and non-Grade A dairy manufacturing organizations in Wisconsin as well as significant dairy manufacturing out of state. In addition, WCMA represents many organizations that further process and market dairy products (such as makers of whey products, pasteurized process cheese, cold pack cheese, cheese cut and wrapped for sale and cheese used in foods). In all, WCMA represents 82 dairy manufacturing sites in Wisconsin and 40 outside of the state as well as 41 sites that further process and market dairy products.

Regarding the Department of Administration and Department of Natural Resources Final Determination Document: "Substantial and Widespread Adverse Social and Economic Impacts of Wisconsin's Phosphorus Regulations"

The economic impact analysis from the agencies notes a $72.5 million cost to the state dairy industry to install technology to remove the last fraction of phosphorus in dairy plant wastewater and annual operating costs in excess of $3 million. This is an extraordinary cost for an industry that is already, due to previous technology-based limits for phosphorus, removing more than 98 percent of the phosphorus in our dairy plants wastewater. The recently-enacted water quality based phosphorus regulations will stifle growth and hiring in the dairy industry, reduce dollars for research and development, and possibly shift plant expansions and new start-ups to other states, all in the interest of filtering out a tiny, final fraction of phosphorus.

It is important to note that these costs are not being imposed on manufacturers in competing dairy states.

(more)

WCMA would like to highlight the business survey results in the report, noting:
"Businesses signaled that they are more likely to decrease investment (47%) and/or postpone expansion (37%) at their Wisconsin facility due to the higher costs of water quality compliance. A significant percentage of companies (42%) also indicated that they would be more likely to shift production to another state. Almost a third of all companies expected to pass higher costs onto their customers."

The dairy industry is unique among manufacturing businesses in that its raw material (milk) must be processed within hours after production, and processing capacity must be sufficient to handle the highest production level during the year for this highly perishable commodity. That means that dairy infrastructure is more permanently grounded and less "nimble" than other industries. Dairy processors must produce storable commodities in addition to value-added products in order to handle unexpected volumes of milk, and face price swings to due variables such as weather that drive up price risk and drive down margins.

In other words, dairy isn't a "virtual" industry nor is it making a single, repeatable widget on a processing line – there are high capital costs sunk into dairy infrastructure, and a supply of raw material that varies daily in volume and price. Wisconsin's dairy industry has fended off inherent low margins with innovation in specialty cheese production and the transformation of dairy whey from a waste product to an internationally traded food ingredient.

But Wisconsin is not alone in dairy production. Growing competition from non-traditional dairy states including California, Idaho, New Mexico, Colorado, Texas and Kansas points to the need for fair regulation that, the case of DNR's mandate, protects the environment while allowing Wisconsin dairy processors to compete and thrive. Wisconsin Cheese Makers Association believes that balance was struck by Wisconsin Act 378. The Act provides for compliance with water quality based effluent limits for phosphorus with a time table that allows for engineering innovations to improve wastewater technology with, presumably, reduced cost over time.

It is important to note that requirements in the Act do not create a "free pass" for municipalities or industries to delay implementation of phosphorus reductions. On the contrary, in Act 378 phosphorus limits are ratcheted down in each WPDES permit cycle until reaching the new, scrupulous limits required in state regulation. And, in addition, the Act requires permit holders to work with non-point sources to reduce their contribution of phosphorus to Wisconsin waters or requires permit holders to pay Wisconsin counties to create or enhance non-point programs to reduce phosphorus runoff.

One Wisconsin engineering firm, in consultation with a cheese manufacturer in the state, recently estimated that if this cheese plant earned the new multi-discharger variance, their cost of compliance with the variance would amount to 76 percent of their cost to comply with state phosphorus regulations with no variance at all**. Even with this new variance, the dairy industry in Wisconsin will spend millions of dollars on technology and trades to lower phosphorus levels**. But these costs are less than industry would face with immediate compliance with new phosphorus limits. That difference buffers the impact of compliance and will allow companies to reinvest in their physical infrastructure, innovate, expand and provide jobs for Wisconsin families into the future.

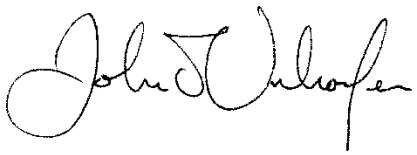
Regarding the MDV Application for Industrial Facilities

WCMA believes industrial permit holders may need clarification on question 23 on the MDV application: "Is the facility eligible for adaptive management or water quality trading?"

Eligibility for the program could be described in the MDV Implementation Guidance Document to allow industrial permit holders to properly assess eligibility as defined by the department.

Thank you for this opportunity to provide these comments on documents and findings related to the Multi-Discharger Variance for phosphorus.

Regards,
WISCONSIN CHEESEMAKERS ASSOCIATION



John T. Umhoefer
Executive Director

Wisconsin Land+Water Conservation Association

131 W. Wilson St. Suite #601 · Madison, Wisconsin 53703
(608) 441-2677 · Fax: (608) 441-2676 · www.wisconsinlandwater.org

December 16, 2015

Amanda Minks
DNR water resources management specialist
Wisconsin Department of Natural Resources
Box 7921
Madison, WI 53707-7921

Subject: Comments on the proposed multi-discharger phosphorus variance

The Wisconsin Land and Water Conservation Association (WI Land+Water) wishes to thank the Department for conducting the hearing December 9th and providing an opportunity for comment. WI Land+Water represents the county conservation staff and their land and water conservation committee supervisors who will be instrumental in the implementation of the non-point source reductions that are at the heart of the Multi Discharger Variance (MDV) concept. We also thank the department for its outreach efforts to our membership and others as this option for NPS control has moved forward.

We are supportive of the MDV as well as the Adaptive Management and Trading options that WPDES permittees are pursuing. We hope to work with the Department, WPDES permittees, and farmers to address the phosphorus problems that are really a broad community responsibility. We look forward to working directly with farmers in a new partnership with urban and suburban communities.

Regarding MDV implementation we are pleased to see the Department's emphasis on the role of the State's NR 151 agricultural performance standards. These standards are of course the primary mechanism that counties have used for the last 15 years to implement the Department's NPS program. We also appreciate the need to target funds that counties may receive to achieve the greatest environmental benefit at least cost, and to do so in an accountable and open manner. That is good governance and sound public policy.

We are concerned that it is not completely clear that these same accountability measures will apply to those entities, other than counties, that the permittee might engage to reduce phosphorus runoff. Clear and consistent accountability measures must apply to all that are funded to reduce non-point source runoff as part of an MDV.

Lastly, it must be recognized that while MDV investments in non-point source reductions of phosphorus can be more cost-effective than increased point source reductions, the $9 million statewide annual estimate of funds available to counties from dischargers is completely inadequate to address the phosphorus problem in surface waters across the state. In short, the MDV is not the complete answer to phosphorus problems to our lakes, streams and rivers. However, significant progress can be made in select, small watersheds. Despite the financial limitations of the MDV program our membership remains committed to working with the agricultural and non-agricultural communities to improve water quality.

Thank you and we appreciate your consideration of our comments.

Sincerely,

Jim VandenBrook
Executive Director

WMC
WISCONSIN MANUFACTURERS & COMMERCE

December 16, 2015

Ms. Amanda Minks
Water Resources Management Specialist
Wisconsin Department of Natural Resources
P.O. Box 7921
Madison, WI 53707-7921

Via electronic mail only to:
DNRPhosphorous@wisconsin.gov

RE: Comments on Phosphorous Multi-Discharger Variance

Dear Ms. Minks:

On behalf of Wisconsin Manufacturers and Commerce (WMC), thank you for the opportunity to provide comments on the Wisconsin Department of Natural Resources' (WDNR) proposed Phosphorous Multi-Discharger Variance (MDV).

Introduction

WMC is the state's chamber of commerce and manufacturers' association. We have nearly 4,000 member businesses of all sizes and across all sectors of Wisconsin's economy. One in four private sector employees in our state works for a WMC member company. WMC's goal is to make Wisconsin the most competitive state in the nation. WMC agrees with the Department of Administration (DOA) finding that implementation of the Wisconsin water quality standards for phosphorus will have widespread adverse social and economic impacts in our state, and with the efforts that have been made regarding the MDV.

WMC members support efforts to maintain a clean and healthy environment while allowing for robust economic growth. The MDV would provide our members with an additional compliance option as they look for ways to reduce phosphorous outputs in economically viable ways. These comments today will highlight a few of the key areas of the MDV that WMC especially agrees with, as well as a few areas where we believe it could be improved. We sincerely appreciate the work that WDNR staff has done to date on this important issue, and appreciate your consideration of these comments.

Comments

I. Economic Impact

WDNR's phosphorous regulations apply to point source dischargers, primarily: municipal wastewater treatment facilities, paper mills, food processors, dairy processors, and cheese makers. All of these industries are facing significant economic cost increases as a result of the

phosphorous standards. WMC member companies agree with the state's determination that these regulations will have widespread adverse social and economic impacts, and that statewide we will see "lower Gross State Product ("GSP"), reduced wages, fewer jobs and a smaller statewide population." (Economic Impact Analysis, DOA, Page 4).

According to the economic impact analysis (EIA), the total estimated cost of implementation is $7 billion (including financing costs), with more than 3,300 jobs lost throughout the state. Implementation of the phosphorous standard will make Wisconsin a major regulatory outlier vis-à-vis our surrounding states, making us less competitive and driving jobs and families to our neighboring states. Although it is always difficult to estimate, the models used to conduct the EIA by DOA are advanced scientific models that can be relied on. WMC agrees with these estimates as a baseline for the economic impact of the phosphorous rule, and notes that the actual impact without the MDV may be even costlier, especially since the power sector is being excluded from the MDV (discussed below).

Discussions with our member companies have yielded similar results to those that were presented in the EIA. As a result of the phosphorous standards, companies are likely to decrease investment, postpone expansion, or even move production facilities to other states that do not have such stringent standards. The availability of the MDV as a compliance option will absolutely help mitigate these negative impacts.

These economic impacts are absolutely substantial, and will cripple our state's economy. Phosphorous from point-sources accounts for about 20% of the total phosphorous discharged in our state. The overwhelming majority, 80%, comes from non-point sources which are not subject to this regulation. Point sources have already been able to remove up to 90% of the phosphorous from discharges under the previous standard. Thus the implementation of the new water quality standards will have limited environmental benefit, with significant economic cost.

Weighing all factors, there is a clear need for the MDV as a compliance option to help deal with these costs, and for these reasons we agree with the EIA and the determination of widespread adverse social and economic impacts.

II. Exclusion of Power Sector

Excluding the power sector from the MDV goes against the underlying purpose of creating the MDV in the first place – to help alleviate the widespread adverse social and economic impacts of the phosphorous water quality standards. Not allowing the power sector to utilize the MDV means higher electricity rates for consumers, which in turn will exacerbate the widespread adverse social and economic impacts of the phosphorous water quality standards. Therefore we would ask that the decision to exclude the power sector from the MDV be reconsidered.

The Public Service Commission of Wisconsin underscored this potential negative impact in an analysis they conducted of the potential impacts on the power sector. Implementation of the phosphorous water quality standards would force one major power company in our state to raise rates by 1.75%, which represents an increase in electric bills of about $50 million. These rate

increases will be felt across the economy by anyone who pays an electric bill, and the impact will be substantial.

Failure to include the power sector in the MDV will leave that sector with limited options to comply with the phosphorous standards. The result will be higher rates which will be felt throughout the state, and which will increase the adverse social and economic impacts of the phosphorous standards.

III. Timeframe

There has been some discussion about what the actual time frame of the variance availability is. While technically there could be a 20-year period, it appears that only 10-years will be allowed initially, with the possibility of an extension thereafter.

Given the significant investments and long-term planning that needs to be conducted in order to comply with the new standards, a longer time period would be beneficial. WMC asks the Department to consider extending the initial 10-year period to better allow our members to plan for future investment and compliance.

IV. Primary/Secondary Screeners

Industrial dischargers need to show that they are in the top 75% of estimated costs for dischargers in the category, or that the dischargers county is in the top 75% of counties with positive estimated costs and that the discharger has positive estimated costs. Further, industrial dischargers must show that they need one of the secondary screening criteria as well – looking at things like median household income, population growth, jobs per square mile, and county discharger's capital costs.

These primary/secondary screeners do provide some flexibility; however, they do not provide enough long-term certainty for our members who will be making significant economic investments in our state. A discharger could meet the MDV standards, operate for several years, and then through something completely out of their control lose the ability to use the MDV, while still having to deal with the significant compliance costs.

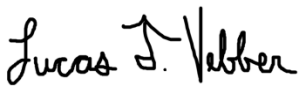
We ask the Department consider lowering the thresholds and requirements to apply for the MDV, and also to provide certainty to our members and other businesses in the state that once they qualify, they will continue to have access to the MDV.

Conclusion

The MDV is an important compliance option that will help Wisconsin companies comply with these more stringent water quality standards while easing the devastating economic impacts the standard would otherwise have caused. As businesses look for ways to protect and enhance our environment while continuing to grow our state's economy, the MDV will be of substantial benefit.

Again, thank you for the opportunity to provide comments on the proposed MDV. WMC appreciates the efforts of the Department to provide our members with this additional compliance option. We look forward to continuing to work with the department to find ways in which we can continue improving our state's environment while continuing to allow for robust economic growth.

Sincerely,



LUCAS VEBBER
Director, Environmental and Energy Policy

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December 14, 2015

To: Wisconsin Department of Natural Resources

Re: Multi-Discharger Phosphorus Variance

The Wisconsin Rural Water Association (WRWA) is an organization of 680 municipal systems providing water & wastewater services statewide to over 4 million Wisconsin residents. We are writing in support of the proposed Multi-Discharger Phosphorus Variance (MDV) and ask that the Wisconsin Department of Natural Resources (DNR) and the U.S. Environmental Protection Agency (EPA) approve it as a means to reduce phosphorus discharges into Wisconsin's waterways in a cost effective manner.

Since enactment of phosphorus reduction regulations in 1992, municipal wastewater treatment plants have removed over 90% of the phosphorus from their discharges. As a result, most of the phosphorus currently being discharged to Wisconsin's waters does not come from municipal treatment plants, it comes from nonpoint sources. This is why WRWA worked with other stakeholders in support of legislation which provided another option systems could use to meet state & federal requirements on phosphorus discharges.

WRWA supports the MDV concept due to the fact that it makes little sense to spend billions of dollars on point source treatment that reduces only a small amount of the phosphorus in Wisconsin's waters. Instead, we feel it makes far more sense for the DNR and EPA to allow for reasonable and cost effective phosphorus reductions from point sources over time and concentrate your resources on nonpoint programs. Although we support the MDV concept, we do, however, have a few areas of concern.

As we indicated in our comments last June, we still disagree with the screening criteria for municipal facilities that was developed to determine substantial economic impact. That criteria excludes many municipal facilities from being eligible for the multi-discharger variance. It appears that 144 municipalities in 15 Wisconsin counties will now be ineligible to receive a variance. This not only removes a cost-effective option for them to reduce their phosphorus discharges, it also substantially reduces the money that would have been available in those counties, and statewide, to address non-point sources.

We are also concerned over any additional requirements that may serve as further impediments to many smaller communities participating in the variance program. Extensive & complicated application forms, costly facility studies, economic impact analysis and "highest attainable condition" reviews will only serve to deter communities from utilizing the variance program. This is similar to how many of the same types of requirements are currently deterring most communities from utilizing the trading and adaptive management compliance options.

In closing, we urge the DNR and EPA to continue to move forward in a timely manner with approval and implementation of the MDV. There are currently hundreds of municipal systems with permits that require them to make a choice on compliance options within the next year or two. These systems need to know as soon as possible if the multi-discharger variance is an option for them. If not, the only other viable option is to build costly additional treatment at their wastewater treatment plants. And unfortunately, this will lead to significant adverse economic impact in their communities with minimal environmental improvement.

Thank you for consideration of our comments,

Sincerely,

David Lawrence
WRWA Executive Director