

## Response to Comments on Proposed Multi-Discharger Variance

March 9, 2016

### Public comment opportunities

**Jimmy Parra, Milwaukee Riverkeeper, Sierra Club- John Muir Chapter, Midwest Environmental Advocates**

The State has not given the public a meaningful opportunity to comment on key aspects of the proposed variance.... 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)... [T]he 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... 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.

#### **Response:**

Several opportunities were provided to the public to comment on various components of the MDV. Prior to Act 378 (Wis. Stat. s. 283.16) becoming effective, comments were received in Senate and Assembly committees from a variety of organizations including Wisconsin Land and Water Conservation Association, Wisconsin Rural Water Association, Wisconsin Counties Association, Wisconsin Manufacturers and Commerce, Municipal Environmental Group, Clean Wisconsin, Town & Country RC&D, The Red Cedar River Watersheds, Clean Lakes Alliance, Wisconsin Corn Growers Association, Wisconsin Association of Professional Agricultural Consultants, River Alliance of Wisconsin, Wisconsin Cheesemakers, Dairy Business Association, League of Wisconsin Municipalities, Midwest Food Processors Association, Dane County Cities & Villages Association, Wisconsin Paper Council, Wisconsin Lakes, Midwest Environmental Advocates, Wisconsin League of Conservation Voters, Wisconsin Nature Conservancy, Wisconsin Environment, Friends of the Little Plover River, and private citizens.

As a result of this legislation, the Department of Administration (DOA) and DNR investigated the impacts of costs associated with wastewater treatment to remove phosphorus on Wisconsin’s economy. Three consulting firms were also retained to aid in this evaluation: University of Massachusetts- Donahue Institute, Sycamore Advisors, and ARCADIS. Public comment on DOA’s preliminary determination and supporting consultant materials were solicited from May 5<sup>th</sup>- June 11<sup>th</sup>, 2015. Additionally, an informational hearing occurred on May 12, 2015 in Wausau, WI to provide stakeholders with an opportunity to learn more about the draft economic determination and to provide an opportunity for verbal comment on these materials. Email correspondence and press releases were utilized to inform stakeholders of this opportunity to comment. Specific materials that were made available during this comment period included:

- DOA’s Preliminary Determination (4/29/2015)
- Economic Impact Analysis (4/24/2015)
- Addendum to Economic Impact Analysis (4/24/2015)
- MDV factsheet (4/29/2015)

It is noted that open records requests were also received during this time pertaining to background information utilized in the preliminary determination. These open records requests were responded to in accordance with DNR's open records policies.

Once DOA provided DNR with a final determination, DNR set out to develop its draft variance package. A comment period was held on DNR's draft variance package from October 22<sup>nd</sup>-December 16<sup>th</sup>, 2015, and a hearing was held on December 9<sup>th</sup>, 2015. . Notice for this second public hearing on the entire variance package was provided in several newspapers throughout the state (Appleton Post-Crescent, Eau Claire Leader-Telegram, Fond du Lac Reporter, Green Bay Press-Gazette, La Crosse Tribune, Wisconsin State Journal, Manitowoc Herald- Times Reporter, Marshfield News- Herald, Milwaukee Journal Sentinel, Oshkosh Northwestern, Rhinelander Northwoods River News, Stevens Point Journal, Superior Telegram, Wausau Daily Herald and Wisconsin Rapids Daily Tribune) and electronically at (<http://dnr.wi.gov/topic/surfacewater/phosphorus/statewidevariance.html>) In addition, the Department sent individual notices to interested stake holders. The Department believes that all relevant materials were made publicly available on October 22<sup>nd</sup>, 2015, which included:

- DOA's Economic Determination (10/6/2015)
- MDV justification document (10/19/2015)
- MDV Implementation guidance (10/16/2015)
- Cover Letter to DOA's Economic Determination (10/7/2015)
- Response to Comments on DOA's Economic Determination (10/7/2015)
- Economic Impact Analysis (4/24/2015)
- Addendum to Economic Impact Analysis (4/24/2015)
- MDV factsheet (10/6/2015)
- Update to April 2015 Memorandum to WDOA on Interest Rate Assumptions (9/3/2015)
- Section 283.16, Wis. Stat.
- Draft DNR implementation forms

The formal 45-day comment period marks the second opportunity for the public to weigh in on the Economic Impact Analysis, Preliminary Determination and Addendum. 40 CFR 131.20(b) states "The proposed water quality standards revision and supporting analyses shall be made available to the public prior to the hearing." The Department satisfied this requirement.

Numerous comments were received on the above documents through these public comment opportunities. Changes were made to the DOA's Economic Determination and Analysis, MDV justification document, MDV Implementation guidance, DNR implementation forms, and s. 283.16, Wis. Stat based on these comments.

## **Transfer of authority**

### **Jimmy Parra, Milwaukee Riverkeeper, Sierra Club- John Muir Chapter, Midwest Environmental Advocates**

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.

**Response:**

The Department disagrees that 283.16, Wis. Stat., establishes a transfer of authority from the Department of Natural Resources to the Department of Administration. Economic expertise was needed about financial models, Wisconsin’s economic health and other factors to successfully complete the substantial and widespread determination. Because DOA has more expertise in these areas, DNR relied on DOA to aid in key portions of this analysis, and the consultant team that was hired (ARCADIS, University of Massachusetts – Donohue Institute, and Sycamore Advisors). The Department worked collaboratively with DOA throughout this determination, and finds that DOA’s Final Economic Determination sufficiently justifies the substantial and widespread impacts to Wisconsin’s economy to justify the MDV. Although the DNR concurs with DOA’s report, it completed a separate public hearing and developed a complete variance package that will be submitted to EPA.

### **Site-specific financial information for industries**

**Jimmy Parra, Milwaukee Riverkeeper, Sierra Club- John Muir Chapter, Midwest Environmental Advocates**

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.” EPA also states that facility profit rates “should be compared to those for facilities in similar lines of business.”... If the State’s current analytical approach does not allow for that sort of inquiry, then it should change its approach.... 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.

**Response:**

The Department has provided additional information in the MDV Justification document regarding the methodology for determining substantial and widespread impacts for industries, and why the Department feels this methodology is appropriate at this time.

### **Secondary indicators**

**Elizabeth Wheeler, Clean Wisconsin**

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

**Paul Kent**

**Vanessa Wishart**

**Municipal Environmental Group-Wastewater Division**

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.

**Matt Krueger, River Alliance of Wisconsin**

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.

**Lucas Vebber, WMC**

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.

**David Lawrence, Wisconsin Rural Water Association (WRWA)**

[W]e 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 multidischarger variance. It appears that 144 municipalities in 15 Wisconsin counties will now be ineligible to receive a variance.

**Response:**

The Department appreciates the concern raised by some stakeholders that the applicable substantial determination is either too narrow or not broad enough. The Department has provided additional information regarding the methodology used for assessing substantial impacts in the MDV Justification Document (see Steps 2, 2a, and 2b in the Justification Document). Insufficient technical justification was provided by stakeholders to warrant changes to this methodology at this time. The Department will solicit additional technical and economic information triennially to reevaluate the need for the MDV. If additional technical information is submitted to the Department to warrant changes to the substantial determination, an updated substantial determination can be developed through this process. The Department acknowledges that revisions to the substantial determination may require separate EPA approval prior to implementation.

The Department recognizes the need to curb nonpoint source pollution in addition to point source pollution to improve water quality and meet phosphorus goals for many surface waters throughout Wisconsin. Although this is a known need, the MDV is not the only available tool. MDV dollars can and will be used in combination with existing funding sources and programs to achieve lasting and meaningful water quality improvements. Pursuant to ss. 283.16(2) and 283.16(4)(a)(1), Wis. Stats., MDV eligibility is based on a demonstration that compliance with phosphorus water quality standards within a statewide category of discharge has substantial and widespread impacts to the state's economy, and that this demonstration applies to an individual facility. The Department finds that the existing MDV eligibility criteria specified in the MDV Justification Document as well as Final Economic Determination are consistent with these applicable state regulations.

**Primary indicators for industries**

**Elizabeth Wheeler, Clean Wisconsin**

[T]he primary screeners for privately owned dischargers used in the final determination are not adequately justified;

**Jimmy Parra, Milwaukee Riverkeeper, Sierra Club- John Muir Chapter, Midwest Environmental Advocates**

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.... 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."

**Henry Probst, The Probst Group**

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.

**Lucas Vebber, WMC**

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.

**Response:**

In selecting primary screeners and secondary indicators, DOA and DNR consulted with economists and analysts in the Department of Workforce Development, the Department of Revenue, and the Department of Health Services, as well as consultants at the University of Massachusetts Donahue Institute. Those experts concurred that there is no standard array of data sets used for these types of analyses. They concurred that individual arrays of data sets are selected for specific questions. When presented with the specific questions underlying this determination, they settled on the consensus indicators used in the determination. The MDV Justification document has been amended to include additional information about the methodology used to make this substantial and widespread determination. Using a two-step approach for making the substantial determination provided a clear methodology for facilities to demonstrate that phosphorus compliance costs are not attainable at the facility and community level.

The Department and DOA recognize the importance of minimizing uncertainties that dischargers face. The Department believes that the proposed methodology provides a clear and transparent approach for determining MDV eligibility. Additionally, permittees as well as the public will have an opportunity to weigh-in on facility-specific eligibility determinations through the permit reissuance process. These opportunities will ensure that permittees and stakeholders have opportunity to provide comment, and reduce uncertainty regarding the MDV process moving forward.

Revisions to DOA's Economic Determination were also made to clarify portions of this methodology in response to stakeholder comments and questions. Specifically, language was added to justify and clarify the use of the primary screener for the "other" category. This additional language acknowledges that discharges in the "other" category do not necessarily all compete directly against one another, but do

face competition and scarce public resources. Ranking members of the “other” category with one another is not as direct a comparison as will be seen in other categories, but it still helps identify dischargers whose need for variance may be greater. As a two-step process, the Department believes that the screening associated with both indicators is sufficient to ensure that eligible point sources will be incurring substantial impacts as a result of phosphorus compliance.

## Primary indicator for municipalities

**Paul Kent**

**Vanessa Wishart**

### **Municipal Environmental Group-Wastewater Division**

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... 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.

#### **Response:**

The Department appreciates the concern raised by stakeholders that the proposed methodology limits the MDV eligibility for some municipal WWTFs. However, this methodology is consistent with EPA recommendations, as articulated in “Step 2” of the MDV Justification Document. The Department finds that insufficient technical justification was provided by stakeholders to warrant changes to this methodology at this time.

## Compliance date assumed in the EIA

**Jimmy Parra, Milwaukee Riverkeeper, Sierra Club- John Muir Chapter, Midwest Environmental Advocates**

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....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.... DOA states that “[p]ermittees who wait longer to undertake phosphorus related capital investment will face higher borrowing costs and cause more substantial impact.” 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 compliance dates more closely tracked reality, including employment, wages, and gross state product.

#### **Response:**

In order to approximate compliance costs, reasonable assumptions needed to be made that would reflect the majority of facilities. The Department acknowledges that some of these assumptions may not be representative of site-specific concerns or unique facility characteristics. As mentioned in the EIA, using cost curves is a straight-forward method to approximate compliance costs and has been widely used in other similar studies, both within and outside Wisconsin. This method has been demonstrated to be an effective way to approximate substantial and widespread impacts of compliance costs on a large

scale. This included when WPDES permits will be expired with phosphorus limitations, and when facilities will be expected to comply with those limits. The compliance date is a site-specific date depending on the length of the phosphorus compliance schedule, and the restrictiveness of the limit in question. There are three key drivers to approximating compliance costs using the cost curve method: the restrictiveness of the WQBEL, the projected actual/design flow at the facility, and the accumulated interest over the projected period of time. The WQBEL and actual/design flows were not influenced by the start time, so this does not seem to be a meaningful difference for those variables.

Forecasters may differ in predicting when the Federal Reserve will raise interest rates, but almost uniformly expect further increases in 2016. Permittees who wait longer to undertake phosphorus-related capital investments will face higher borrowing costs, which will cause more substantial economic impact. The fact that some permittees will start later than others suggests that costs may exceed original estimates. This appears to strengthen, not weaken, the case for the MDV.

### **Assumed effluent phosphorus concentration for NCCW and Power**

**Jimmy Parra, Milwaukee Riverkeeper, Sierra Club- John Muir Chapter, Midwest Environmental Advocates**

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." 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." 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."

#### **Response:**

The Department believes that projected compliance costs for the NCCW category are grossly underestimated at this time. This is because the majority of NCCW discharges (approximately 340 permittees) are covered under general permit WI-0044938, and insufficient information was available to determine if phosphorus limitations were necessary at the time this determination was completed. The need for phosphorus limitations will depend on a facility's water supply source as well as the concentration of phosphorus within their water supply. Each of these water supplies and their potential impacts on phosphorus requirements in this general permit is summarized below:

- Ground water supply: For facilities that use groundwater as their water supply, phosphorus concentrations are anticipated to be below the criteria, so restrictive phosphorus limitations are not anticipated for these discharges.
- Intake structures: Discharges that operate an intake structure receive their source water from surface water. In a letter from EPA to the DNR dated April 1, 2015, it was articulated that facilities that do not significantly increase the concentration of phosphorus within their treatment process could receive intake credits, which would preclude their need for phosphorus limitations. Because NCCW discharges are not believed to significantly increase the concentration of phosphorus within their process, beyond some marginal increases due to evaporation, the Department believes that many facilities with intake structures will not require

restrictive phosphorus limitations at this time.

- Municipal water supply: Several facilities covered the NCCW general permit use municipal water for their cooling water supply. Many municipal water supplies across Wisconsin add polyphosphates to change water quality characteristics within the municipal water. Changing water quality characteristics in municipal water supplies can have significant human health benefits by controlling lead and copper entering drinking water from household plumbing materials such as pipes, lead solder and faucets containing brass or bronze. Phosphorus concentrations in these systems can be as high as 2-3 mg/L, so NCCW that use these water supplies as a water source, and discharge to a surface water, have the potential to contribute to a phosphorus impairment and will, therefore, require restrictive phosphorus limitations to be included in their WPDES permit. For NCCW discharges that use a municipal water supply that does not add polyphosphates, restrictive phosphorus limitations are less likely unless the permittee directly adds polyphosphates to their effluent stream.

The Department projects that almost 75 NCCW general permit holders will require restrictive phosphorus limitations for the reasons specified above. Given the cursory nature of this estimation, however, the Department did not project phosphorus compliance costs for this group of permittees at this time. This means that the number of NCCW discharges that incur phosphorus compliance costs could be much higher. The original determination only evaluated the costs for 83 individual permit holders.

There may also be a misunderstanding about the analysis that was done for the 83 individual permit holders within the NCCW category. As stated in DOA's Economic Determination, phosphorus limitations were assumed to be necessary only when site-specific information was not available. The vast majority of individual NCCW permit holders had sufficient information to conduct a site-specific reasonable potential procedure. In fact, of the 83 individual permit holders within the NCCW category, only 59 permittees were projected to incur phosphorus compliance costs. The Department concluded that there was no reasonable potential to exceed the projected phosphorus limits for 24 of these facilities.

Discharges from power plants are similar to NCCW discharges. The need for phosphorus limitations stems from additive usage at the plant, their ability to receive intake credits, and/or their water supply. The standard protocols for establishing the need for power plants was followed as described in Sections 3.A. and 3.B. for the power sector. This means that the Department relied on site-specific phosphorus WQBELs to derive phosphorus compliance costs for the power sector. A unique characteristic among the power sector is that many power plants have multiple outfalls. In these cases, the protocols in Section 3.C.2. were utilized. As described in this section, Department staff conducted a reasonable potential analysis for each outfall location to ensure that projected phosphorus compliance costs were only based on the flow from those outfalls actually in need of treatment. Phosphorus limitations were assumed to be necessary only when site-specific information was not available or was unclear. The vast majority of power plants had sufficient information to conduct a site-specific reasonable potential procedure for each outfall in question. This analysis indicated that 85% of power plants needed to treat a very small portion of their total effluent. This small portion of the effluent was typically process wastewater including municipal wastewater generated at the facility. The Department believes that these protocols are valid and reasonable based on currently available information. The Department also notes that the power sector is not currently eligible for the MDV at this time.



## Assumed effluent phosphorus concentration for other discharges

**Jimmy Parra, Milwaukee Riverkeeper, Sierra Club- John Muir Chapter, Midwest Environmental Advocates**

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." 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.

### **Response:**

The Department believes that the methods used in the EIA are defensible and reasonable to approximate costs on a statewide basis. The Department believes the 1 mg/L assumption is representative of the vast majority of point source discharges for several reasons:

1. Most point sources have an existing technology-based effluent limitation of 1 mg/L. Therefore, this 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. Phosphorus concentrations in the effluent tend to be highly variable, and are very sensitive to wet-weather events, changes in biological processes with the treatment process, changes to the influent, and plant upsets. For this reason, existing effluent concentrations are highly variable and site-specific.
2. Point sources with existing technology-based effluent limitations likely achieve a better effluent quality in order to ensure compliance with the 1 mg/L limit. This "compliance buffer" is also true for more restrictive phosphorus WQBELs- facilities will need to discharge well below 0.075 mg/L limit in order to ensure compliance with that limit. Therefore, the Department recommended that that compliance costs be based on existing permit limits compared to future permit limits because this should represent the range between actual effluent qualities now and in the future.

The Department agrees that it is important that compliance costs be reflective of actual costs for individual facilities requesting coverage under the MDV. This is why Individual facilities will be responsible to provide site-specific compliance cost information to the Department during the MDV request process. Site-specific compliance costs must be adequately justified, and will be made publicly available through the permit reissuance process. No substantial changes were made based on this comment.

## Widespread Impacts

**Jimmy Parra, Milwaukee Riverkeeper, Sierra Club- John Muir Chapter, Midwest Environmental Advocates**

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. 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.

### **Response:**

As stated in s. 283.16(2)(a), Wis. Stats., a multi-discharger phosphorus variance is appropriate if phosphorus compliance for point sources or categories of point sources would result in "...substantial and widespread adverse social and economic impacts". This statutory authority provides DOA and DNR

with the ability to evaluate each statewide category of point source across the state, and determine if that category has substantial and widespread impacts to the state's economy. If substantial and widespread impacts are not justified for a category of discharge, then the MDV is not a viable option for point sources within that category.

The Department, DOA, and consultant team discussed how best to perform this type of analysis. To determine substantial impacts, it was clear that a categorical approach would be most consistent with federal requirements and guidance. For widespread impacts, however, it seemed most appropriate to utilize a statewide perspective. This approach allows financial impacts to be aggregated to demonstrate the full range of potential impacts a community and the state would be incurring as a result of phosphorus compliance. Abt consulting was also engaged in this portion of the analysis, and provided recommendations to perform the widespread analysis on a statewide basis. The benefits of this approach is that it safeguards against double counting economic impacts. Additionally, this approach considered the potential combined effects of impacts to a given community. The Department finds that this approach is justified and within the scope of state and federal requirements and recommendations.

## Consider the economic benefits

### Glory Adams

[I]t 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.

### Elizabeth Wheeler, Clean Wisconsin

[W]e 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.

### Joe Maurer

[T]his 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.

### Jimmy Parra, Milwaukee Riverkeeper, Sierra Club- John Muir Chapter, Midwest Environmental Advocates

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

### **Response:**

The Department appreciates the concerns raised by some commenters to consider additional economic benefits beyond those benefits that have already been accounted for. As discussed in the "Addendum to Economic Impact Analysis" (April 24, 2015), the widespread determination included: (1) the increase

in costs accruing to industry and municipalities to meet the water regulations; and (2) the new economic activity projected to be generated in Wisconsin as industries and municipalities increase their spending on construction. The Department recognizes that there are some economic benefits that were not specifically quantified in the “widespread test”; mainly, increases in tourism and recreation. Additional analyses were performed to reevaluate the decision to not include these benefits, and are described in Step 3 “Widespread Test” in the MDV Justification Document. The conclusion of this analysis was that the MDV has little potential to delay improvements to water quality. Therefore, the MDV does not have a significant impact to delay the economic gains associated with improved water quality improvements. For this reason, the Department believes that the widespread determination is appropriate.

## **Power sector**

### **Elizabeth Wheeler, Clean Wisconsin**

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.

### **Jimmy Parra, Milwaukee Riverkeeper, Sierra Club- John Muir Chapter, Midwest Environmental Advocates**

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.

### **Lucas Vebber, WMC**

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.

### **Bruce Ramme, Wisconsin Electric Power Company and Wisconsin Gas LLC (d.b.a. We Energies) and Wisconsin Public Service Corporation (WPS)**

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.

### **Response:**

As stated in s. 283.16(2)(a), Wis. Stats., a multi-discharger phosphorus variance is appropriate if phosphorus compliance for point sources or categories of point sources would result in “...*substantial*

and *widespread* adverse social and economic impacts". This statutory authority provides DOA and DNR with the ability to evaluate each statewide category of point source across the state, and determine if that category has substantial and widespread impacts to the state's economy. If substantial and widespread impacts are not justified for a category of discharge, then the MDV is not a viable option for point sources within that category.

The Department, DOA, and EPA discussed how best to perform this type of analysis. To determine substantial impacts, it was clear that a categorical approach would be most consistent with federal requirements and guidance. For widespread impacts, however, EPA recommended that a statewide perspective be utilized. This approach allows financial impacts to be aggregated to demonstrate the full range of potential impacts a community and the state would be incurring as a result of phosphorus compliance. Given this recommendation, the Department conducted a statewide widespread determination as specified in Section 6 of the Final Economic Determination. Because separating the widespread determination would have resulted in either double-counting impacts or missing the combined effects of impacts to a given community, the Department finds that this approach is justified and within the scope of state and federal requirements and recommendations.

Regarding the inclusion of power costs, the Department finds that there are several power plants across Wisconsin will be incurring phosphorus compliance costs. Through direct conversation with power point stakeholders as well as a business survey conducted (see Economic Impacts Analysis), it was concluded that the primary avenue for power companies to counteract these costs would be to increase power rates to ratepayers. Increasing energy rates means that Wisconsin residence will have fewer dollars to make local purchases for retail, real estate, restaurants, etc., and has the potential to decrease the profitability of Wisconsin's industries and lower wage levels in response to the production cost increases. The Department believes that these are important deleterious impacts to business and communities, and finds that these impacts are appropriate to consider in the widespread determination.

As previously mentioned, however, in order for a category of point source to be eligible for the MDV, that category must demonstrate substantial and widespread impacts. The Department recognizes that on a case-by-case basis some power plants may be incurring substantial impacts due to the phosphorus rule. However, when considering the entire category as a whole, compliance costs within the category are highly variable. The majority of compliance costs calculated for the power sector were based on a very small portion of the effluent flow leaving the plant, which resulted in the compliance costs estimates for many power plants to be modest. Given the nature of these low-volume outfalls, these compliance costs are likely representative of actual compliance costs. Additionally, the primary mechanism for companies to address increased compliance costs is by increasing energy rates. This indicates that the predominant burden of the compliance costs will be born on ratepayers, rather than on the companies themselves. Although the Department appreciates the approaches proposed by WE Energies and others to quantify the economic burden of increased energy rates to specific ratepayers, the Department finds that there is insufficient information currently available regarding the financial health of ratepayers for individual power companies to make a substantial determination for power plants across the state at this time.

Given a lack of available financial information for ratepayers, and the site-specific nature of compliance costs within the power sector, the Department finds that an individual variance process is most appropriate for power companies at this time. An individual variance process would allow the permittee and Department to work collaboratively to develop a substantial determination based on specific indicators for the power plant in question. This could include profitability of the company in question,

increases in energy rates, and/or the economic distress of ratepayers incurring rate increases, among other things.

For the reasons specified above, significant changes were not made to either the substantial or widespread determination to justify the MDV.

### **Alternative power sector secondary screener**

#### **Bruce Ramme, Wisconsin Electric Power Company and Wisconsin Gas LLC (d.b.a. We Energies) and Wisconsin Public Service Corporation (WPS)**

[W]e 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.

#### **Response:**

In order for a category of point source to be eligible for the MDV, that category must demonstrate substantial and widespread impacts. The Department recognizes that on a case-by-case basis some power plants may be incurring substantial impacts due to the phosphorus rule. However, when considering the entire category as a whole, compliance costs within the category are highly variable. The majority of compliance costs calculated for the power sector were based on a very small portion of the effluent flow leaving the plant, which resulted in the compliance costs estimates for many power plants to be modest. Additionally, the primary mechanism for companies to address increased compliance costs is by increasing energy rates. This indicates that the predominant burden of the compliance costs will be born on ratepayers, rather than on the companies themselves. Although the Department appreciates the creative approaches proposed by WE Energies and others to quantify the economic burden of increased energy rates to specific ratepayers, the Department finds that there is insufficient information currently available regarding the financial health of ratepayers for individual power companies to make a substantial determination for power plants across the state at this time. The Department believes that an individual variance approach would be more appropriate for individual power generators.

### **Environmental justice analysis**

#### **Elizabeth Wheeler, Clean Wisconsin**

Thus far, DOA and DNR have failed to appropriately analyze environmental justice impacts of the proposed multi-discharger variance program.

#### **Response:**

The Department in collaboration with DOA has provided additional analyses and justification in Section 6.A.5. of the Final Economic Determination to address this concern.

### **MDV 10-year duration not adequately justified**

#### **Elizabeth Wheeler, Clean Wisconsin**

[T]he need for an initial 10-year variance has not been adequately justified.

**Mathew Fischer, Domtar-Nekoosa Mill**

**Kathy Collings, Domtar-Rothschild Mill**

The Department provides considerable arguments in this document supporting a 10-year timeline for a MDV. This conflicts 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.

**Linda Holst, U.S. Environmental Protection Agency**

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.

**Sam Warp, Marshfield Wastewater Utility**

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.

**Jimmy Parra, Milwaukee Riverkeeper, Sierra Club- John Muir Chapter, Midwest Environmental Advocates**

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.... First, DNR relies on the length of time that it takes to implement non-point source control measures and difficulties in addressing legacy pollutants. 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..... 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.

**Lucas Vebber, WMC**

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.

**Response:**

The Department has updated the MDV Justification document to provide additional documentation to support the 10-year duration of the MDV. The Department continues to believe that a 10-year duration is appropriate. Section 5.04 of the MDV implementation guidance has also been updated to clarify MDV

review requirements including the highest attainable condition review and triennial standards review. Section 283.16 states that permittees are eligible for the EPA approved variance. If EPA approves a maximum 10 year term, then that is the maximum time of the variance. There would be no EPA approved variance after 10 years unless the Department submits another variance determination and gets EPA approval for an extended time period ten years from now.

## **Interim limitations**

### **Elizabeth Wheeler, Clean Wisconsin**

There is no justification showing that the interim limits represent the “highest attainable condition.”

### **Jimmy Parra, Milwaukee Riverkeeper, Sierra Club- John Muir Chapter, Midwest Environmental Advocates**

[T]he 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 attainability,” as 40 C.F.R. § 131.3(m) requires.... At no point in this proceeding has the State considered the amount of financial burden that dischargers could actually bare.

EPA rules permit a State to express the highest attainable condition as criteria “that reflect 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 Program.” However, the State has not made a showing that there are no additional feasible pollutant control technologies. It cannot limit the highest attainable use analysis to pollution controls that are already installed. DNR’s determination of the interim limits improperly relies on untested assumptions instead of considering site-specific factors of attainability for each discharger as appropriate.

### **Paul Kent**

### **Vanessa Wishart**

### **Municipal Environmental Group-Wastewater Division**

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.

### **Response:**

At the time Act 378 was originally adopted, the federal variance procedures at 40 CFR 131.14 was not yet available. The Department agrees that additional statutory flexibility was needed to ensure that the proposed interim limitations represent the highest attainable condition for specific facilities covered under the MDV. Therefore, statutory changes were made to s. 283.16(7), Wis. Stat., to address this discrepancy as well as these comments.

Section 283.16(6) and (7), Wis. Stats., specify the requirements that apply during the term of the permit when MDV coverage is approved for a permittee. These statutory provisions require that the interim limitations reflect the highest attainable condition, and they will be reviewed every five years and at permit reissuance (s. 283.16(3m) and (7), Wis. Stats.). This revised statutory language provides the Department with the authority to adjust the default interim limitations on a facility-by-facility basis to ensure that the specific interim limitations included in a WPDES permit represent the highest attainable

condition for the permittee in question. The methods for calculating site-specific interim limitations are provided in Section 2.02 of the MDV Implementation Guidance. As recommended in the guidance document, site-specific interim limitations should be calculated on an individual basis using representative effluent data available for the facility in question.

The numeric interim limitations, optimization requirements and watershed projects specified in s. 283.16(6), Wis. Stat., are the interim effluent conditions that reflect the greatest pollutant reduction achievable and satisfy the requirement in 40 CFR 131.14(b)(1)(ii)(A)(2)) because these conditions achieve both stepped point source reductions, and nonpoint source phosphorus reductions that would not otherwise be achieved in waterbodies. Nonpoint sources contribute phosphorus to all surface waters in the state. In the vast majority of watersheds, nonpoint sources contribute most of the phosphorus load. The required nonpoint source reductions that will be achieved as a condition of the variance, in combination with gradual point source reductions over time, will result in greater overall phosphorus reductions in a waterbody.

Although only one of the provisions under 40 CFR 131.14(b)(1)(ii)(A) must be met, the Department believes that the optimization requirements, interim effluent limitations and nonpoint watershed project requirements established in s. 283.16(6) and (7) Stats., also satisfy the highest attainable condition requirement in 40 CFR 131.14(b)(1)(ii)(A)(3). Once the Department approves MDV coverage for a permittee, mandating installation of additional costly pollutant control technology during the term of the variance is not feasible. Installation of additional pollutant control technology (e.g. biological phosphorus removal or package plants) is not feasible during the term of the variance when the conditions of the variance also require interim limitations based on optimization and implementation of a nonpoint watershed project. Put another way, the watershed project costs will be significant for permittees and will result in significant nonpoint phosphorus load reductions in a waterbody, but it isn't feasible to also require, as a condition of the variance, that permittees install additional costly treatment plant control technologies to further reduce phosphorus loads. There would be no reason for any permittee to seek coverage for the variance if installation of additional pollutant control technologies was required. These capital expenditures on top of the costs for watershed projects would not be economically viable for a permittee. It could also be a wasted expenditure if a new technology is developed in the future that will actually achieve compliance with the final water quality based effluent limitation.

It should be noted that many facilities have already optimized their existing treatment technology pursuant to s. NR 217.17(3)(b)1, Wis. Code. Both the numeric interim limitations and optimization requirement will ensure that permittees continue to operate at or above existing operating conditions throughout the MDV, and there will not be a lowering of water quality. The most up-to-date optimization guidance will be used when making these determinations. See Section 4.03 of the Phosphorus Implementation Guidance for details.

In summary, all of these requirements, the interim effluent limitations and optimization requirement in s. 283.16(6) and (7), and the nonpoint source reduction projects in s. 283.16 (6)(b), represent the highest attainable condition.

## **Define major facility upgrade**

**Elizabeth Wheeler, Clean Wisconsin**

The guidance does not define “major facility upgrade”.



**Mark Davy, Davy Engineering Co.**

What criteria constitutes a 'major' upgrade?

**Response:** Section 283.16(4), Wis. Stat. specifies that only facilities that require a "major facility upgrade" to meet their final water quality effluent phosphorus limits are eligible for applying for the Multi-Discharger Variance. The draft implementation guidance includes the definition of a "major facility upgrade" in Section 2.02. A "major facility upgrade" is defined as installing new equipment and a new process such as filtration or equivalent technology. This is consistent with the assumptions made within the Economic Impact Analysis. In addition, the definition is included within the application under question 8.

### **Site-specific compliance costs**

**Elizabeth Wheeler, Clean Wisconsin**

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

**Mark Davy, Davy Engineering Co.**

At what point is the detailed cost justification required?

**Ron Groth, Lakeland Sanitary District No. 1**

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.

**Jimmy Parra, Milwaukee Riverkeeper, Sierra Club- John Muir Chapter, Midwest Environmental Advocates**

Considering site-specific information is the only way the State can reasonably ensure the variance is justified for all dischargers who are eligible for it, as EPA instructs in its guidance. 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.

**Stephan Brand, City of Oshkosh**

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 0.04 mg/L and are estimated at 104 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.

**Henry Probst, The Probst Group**

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.

**Rich Boden, Wisconsin River Discharger Group and Plover Wastewater Utility**

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.

**Response:**

The estimated costs that were listed in the Addendum to the Economic Impact Analysis were based on the following assumptions; Chemical precipitation followed by filtration is the preferred technology, not biological phosphorus removal or other treatment technologies; effluent total phosphorus concentrations are greater than 0.6 mg/L; and facilities are operating at their design flow. These estimated costs were only intended to be used for determining substantial and widespread adverse social and economic impacts and not site-specific eligibility. Both the guidance and the applications request facilities to submit site-specific construction costs. However, section 2.02 of the guidance has been updated to include more detail. "It is anticipated that facilities who are submitting a MDV application during their phosphorus compliance schedule, or with a permit application for their second permit with phosphorus WQBELs, will have site-specific costs that were developed as part of the Year 3 Preliminary Compliance Alternatives Plan. If this is the case, the facility should submit the cost estimates of that plan; otherwise, a facility should generate site-specific costs prior to submittal of the application. These engineered site-specific cost estimates can be submitted instead of a full Year 3 Preliminary Compliance Alternatives Plan. These costs should be updated for each subsequent MDV application."

## **Environmental concern lies with agricultural runoff**

### **Jim Sysko, Village Trustee for the City of Benton**

If every Municipal discharger, in the entire state of Wisconsin, were able to achieve these new proposed limits the state would still not meet the statewide requirements, for water quality, set by the EPA. The DNR and the State of Wisconsin know this. Also known is that it will be less expensive for Municipal dischargers to pay Nonpoint Source dischargers to reduce their Phosphorus through adaptive management, trading etc., rather than pay for the necessary upgrades to achieve its own new ultra low limits. Allowing the state to reach the statewide water quality requirements set forth by the EPA. This is a good thing but should not be done on the backs of the Municipal rate payers. The root of the problem is that the DNR has no authority over smaller Agricultural operations and cannot compel them to apply best practices and is using the Municipalities, who they do have authority over, to bear the costs and do the work necessary to get agricultural community to help with the Phosphorus problem. Our state officials could help with this if they were not afraid of upsetting the farming community and compel them to apply best practices farming.

### **Mathew Fischer, Domtar-Nekoosa Mill**

### **Kathy Collings, Domtar-Rothschild Mill**

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 excess phosphorus in the Wisconsin River basin, and yet under the MDV rule, point sources are on the hook financially for creating water quality improvements.

### **Lucas Vebber, WMC**

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.

### **Rich Boden, Wisconsin River Discharger Group and Plover Wastewater Utility**

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.

#### **Response:**

The MDV is a tool to provide permittees with an extended timetable for coming into compliance with their phosphorus requirements. There is no requirement for potentially eligible point sources to participate in this program. Additionally, this program is not the only opportunity for flexibility to achieve water quality goals in watersheds that are dominated by nonpoint source phosphorus loadings. Nonpoint performance standards and prohibitions, 9-key element plans, and other programs also help curb nonpoint source phosphorus pollution and provide a more equitable approach to meet water quality objectives. The Department finds that the MDV eligibility criteria and implementation strategy are consistent with applicable state and federal regulations for this program. For this reason, no changes were made based on these comments.

### **Updates to proposed guidance**

**Mathew Fischer, Domtar-Nekoosa Mill**

**Kathy Collings, Domtar-Rothschild Mill**

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.

#### **Response:**

The Department has an established process for involving stakeholders about guidance updates. This process will be followed whenever the MDV implementation guidance is updated. For convenience, key steps of this process are highlighted below:

- Updates to the MDV guidance document will be available for comment for at least 21 days unless modified for cause.
- Notice of proposed guidance will be posted on this site <http://dnr.wi.gov/news/input/guidance.html#open>. Stakeholders may [sign up to be automatically notified](#) when guidance updates are posted on this site.
- All comments received will be considered and a comment response summary will be shared on this page. Please be aware that the comment response summary will include all of the submitted comments in the format they were received.
- Final guidance will be posted on this page for 21 days once it is completed.

Section 5.04 of the MDV Implementation Guidance has been updated to clarify this process.

## EPA review

**Mathew Fischer, Domtar-Nekoosa Mill**

**Kathy Collings, Domtar-Rothschild Mill**

[T]he 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.

### **Response:**

Pursuant to federal regulations at 40 CFR 131.14(b)(2)(ii) the term of the MDV must be justified and no longer than necessary to achieve the highest attainable condition. For the reasons specified in the “Duration of the Variance” section in the MDV Justification Document, the Department believes that a 10-year variance is appropriate and justified at this time.

## Optimization

**Mathew Fischer, Domtar-Nekoosa Mill**

**Kathy Collings, Domtar-Rothschild Mill**

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, pollution 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.

**Henry Probst, Probst Group**

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.

### **Response:**

It is noted that all WPDES permits that contain a phosphorus compliance schedule already require the permittee to develop and implement a phosphorus discharge optimization plan during the first year. Each optimization plan is reviewed and approved on a case-by-case basis by the assigned DNR Compliance Staff. The WPDES permit will require that a facility continue to implement their optimization plan or will include the requirements to develop and implement an optimization plan during the first permit term. More details regarding the optimization plan are included in sections 2.02 and 2.03 of the MDV guidance.

## Accountability of watershed projects

**Jim Vandenbrook, Wisconsin Land+Water Conservation Association**

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.

**Response:**

Sections 283.16(8) and (8m), Wis. Stats., contains clear accountability measures for counties who receive MDV funds and for WPDES permittee's who conduct a MDV project or plan. Upon comparison, the Department finds that these accountability measures are equivalent. Additionally, annual reporting requirements as outlined in Section 3.05 of the MDV Implementation Guidance are consistent regardless of the watershed project selected, which further supports consistency and accountability. Table 3 in Section 1.03 of the MDV Implementation Guidance was added to provide a clearer comparison of the watershed project options and their accompanying accountability measures.

## **Projects within HUC 8 watersheds**

**Mathew Fischer, Domtar-Nekoosa Mill**

**Kathy Collings, Domtar-Rothschild Mill**

Department guidance should be revised to allow for upstream watershed improvement projects, regardless of HUC 8 boundaries.

**Shannon Haydin, Walworth County Land and Water Conservation Department**

It is not clear if funding 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.... Walworth County would like to express an 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.

**Response:**

As discussed in Section 1.03 of the MDV implementation guidance, and pursuant to ss. 283.16(8) and 283.16(8m), Wis. Stats., three watershed project options are available for permittees to select: the county payment option, the self-directed option, and the third-party option. Nothing precludes MDV projects from occurring directly upstream of the point source discharge if the point source selects either the self-directed option or third-party option. In fact, Section 4.02 of the MDV Implementation Guidance states: "[i]t is preferred that projects occur upstream of the point source discharge and/or on the same receiving water as the discharge is located." Although this is preferred, it is not always possible to work directly upstream of the point source discharge. In some cases, point sources discharge to headwater systems that have little, if any, contributing drainage area to work in. In other cases, upstream landowners may be unwilling to work with the permittee to achieve the annual reduction target. For these reasons, the Department finds it inappropriate to mandate that watershed projects occur upstream of the point source discharge. It is also noted that the Department also lacks the statutory authority to make such a requirements.

In the county payment option, s. 283.16(8)(b)2m.a., Wis. Stat. requires that projects occur within the portion of the county that has the greatest potential to reduce the amount of phosphorus per acre entering the waters of the states. The key benefit of the county payment option is that MDV funds are pooled together and targeted toward an area with the greatest need to improve water quality within that area. Isolating MDV funds would limit the amount of boots-on-the-ground projects that are implemented in the watershed. Therefore, segregating MDV funds by point source location would make the program less effective at achieving actual water quality improvements, less likely to achieve the

highest attainable condition for the overall watershed, and more administratively complicated. For these reasons, the Department does not believe it is appropriate to segregate MDV funds by point source location at this time. The Department has acknowledged, however, that the location of MDV participants in the county should be a factor counties consider when determining which area has the greatest potential to reduce the amount of phosphorus per acre entering waters of the state (see Section 3.04 of the MDV implementation guidance). No significant changes were made based on these comments.

### **Representative effluent data**

**Mathew Fischer, Domtar-Nekoosa Mill**

**Kathy Collings, Domtar-Rothschild Mill**

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.

**Response:**

The Department agrees that it is appropriate to utilize representative effluent data when calculating site-specific interim limitations. Additional guidance was provided in Section 2.02 of the MDV Implementation Guidance to confirm this intent.

### **Internal waste streams**

**Mathew Fischer, Domtar-Nekoosa Mill**

**Kathy Collings, Domtar-Rothschild Mill**

Facilities that add phosphorus to provide adequate nutrient supply for biological treatment should be exempt from the [internal waste streams review] requirement.

**Response:**

The Department agrees that not all industrial point sources will need to evaluate internal waste streams as part of the MDV submittal package. For this reason, a “not applicable” option is available on the draft industrial MDV application. No changes were made based on this comment.

### **Biosolid testing results**

**Mathew Fischer, Domtar-Nekoosa Mill**

**Kathy Collings, Domtar-Rothschild Mill**

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.

**Response:**

Originally, the purpose of this question was to provide a comprehensive and complete review of phosphorus throughout the treatment process. The Department has reconsidered the need for this type of information and has concluded that this information is already available, and does not need to be replicated on the MDV application to make an eligibility determination. Therefore, this question was removed from both draft municipal and industrial applications.

## Matching funds

**Mathew Fischer, Domtar-Nekoosa Mill**

**Kathy Collings, Domtar-Rothschild Mill**

Department guidance should clarify those participants that accept funds from this program and provide matching funds at some prescribed level.

### **Response:**

There is insufficient statutory authority to mandate a funding match. Additionally, the Department believes that additional state and/or federal funding would need to be made available prior to this type of program being viable. For these reasons, no changes were made to the existing MDV program.

## Funds generated from the county payment option

**Mathew Fischer, Domtar-Nekoosa Mill**

**Kathy Collings, Domtar-Rothschild Mill**

The percentage allowed for administrative use should be reviewed at a specified frequency, and adjusted as appropriate.... 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.

**Nickolas George, Midwest Food Processors Association (MWFPA)**

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.

**Jimmy Parra, Milwaukee Riverkeeper, Sierra Club- John Muir Chapter, Midwest Environmental Advocates**

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.

### **Response:**

There is a range of costs for nonpoint projects. Soft projects such as nutrient management and tillage practices can cost between \$25 and \$50 per pound. Hard practices can cost more. In the two adaptive management pilots in Dane County the range of nonpoint practices was between \$25 to \$85 per pound. Since funds generated by this program will not be bonded money as is the case with Clean Water Fund loans, they can be used for soft practices where the largest reductions in nonpoint can be reached. Therefore \$50 per pound, which is a midrange number and at the high end of soft practices, is appropriate, and reflects a reasonable highest attainable condition for the MDV. The \$50 per pound value will be increased annually to account for inflation pursuant to s. 283.16(8)(a)2., Wis. Stat.

Through implementation of the MDV, point sources are expected to achieve compliance with the highest attainable condition for a watershed. For the MDV program to be economically viable, MDV implementation costs need to be less than the costs of installing treatment to comply with the final phosphorus limitations. If this is not the case the MDV would provide no financial relief to the participating permittee. The legislature, therefore, included a funding cap on MDV funds generated through the county payment option set at \$640,000 per year (s. 283.16(8)(a)1, Wis. Stat.). This means that over the 10-year term of the MDV, a single point source at this financial cap could contribute up to \$6.4 million toward nonpoint source projects, with additional funding potential if an extension to the



MDV is justified and approved by EPA. For reference, the state targeted runoff management (TRM) grant program is a competitive grant program that allocates state dollars to local governments for controlling nonpoint source (NPS) pollution. Typically, \$4 million are reserved annually for this program. This means that a single point source participating in the MDV program has the potential to increase the amount of funding for nonpoint source projects by over 1.5% per year using the TRM program as baseline. The Department finds that these contributions represent a significant increase to the amount of funding available for NPS improvement projects, will result in attaining the highest attainable condition, and represents a significant financial commitment from participating point source discharges. It is also noted that these funds must be targeted to the areas with the greatest potential to reduce the amount of phosphorus, which will further support achieving the highest attainable condition. For these reasons, the Department does not believe changes to the payment cap are necessary or appropriate at this time.

The Department recognizes the importance of maximizing these financial resources to achieve the greatest water quality benefit possible. As specified in Section 3.05, counties will be responsible to report how MDV funds were used from the previous year. These reports will be carefully monitored to ensure that MDV funds are being appropriately used. For transparency, these reports will also be made publically available. It is noted that the Department is currently working to develop a robust tracking system to aid in this oversight as well. MDV Implementation Guidance will be updated as this tool becomes available for use.

Based on comments received, there appears to be some misunderstanding of how the 0.2 mg/L target value is used pursuant to s. 283.16(1)(h), Wis. Stat. The applicability of the 0.2 mg/L target value is specified in Section 1.03 of the MDV Implementation Guidance. As stated in this guidance as well as s. 283.16(1)(h), Wis. Stat., the 0.2 mg/L target value is only used outside of TMDL areas for the purposes of calculating annual payments in the county payment option, or annual offsets in the other watershed project options. As stated above, in order for the MDV program to be economically viable, MDV implementation costs need to be less than the costs of installing treatment to comply with the final phosphorus limitations. If this is not the case the MDV would provide no financial relief to the participating permittee. The same is true for annual offsets; if a point source is responsible to offset their full phosphorus contribution, there is very little, if any, difference between the MDV and the existing water quality trading and adaptive management programs. The legislature, therefore, found it appropriate to use a slightly higher target value in non-TMDL scenarios. The Department does not believe changes to the target value are necessary or appropriate at this time.

## Review of watershed projects

**Mathew Fischer, Domtar-Nekoosa Mill**

**Kathy Collings, Domtar-Rothschild Mill**

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.

### **Response:**

As specified in Section 3.05 and 5.02, annual reports and county plans will be carefully monitored to ensure that MDV funds are being appropriately used. For transparency, reports and plans will be made publically available and also sent to participating point source discharges. The Department is currently



working to develop a robust tracking system to aid in this oversight as well. MDV Implementation Guidance will be updated as this tool becomes available for use. The Department finds that this level of oversight is appropriate at this time. No changes were made based on this comment.

### Individual variance conditions

#### **Bruce Ramme, Wisconsin Electric Power Company and Wisconsin Gas LLC (d.b.a. We Energies) and Wisconsin Public Service Corporation (WPS)**

[I]n 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.

#### **Response:**

Pursuant to 40 CFR 131.14, all individual, discharger-specific variances will include provisions in the WPDES permit that reflect the highest attainable condition for the discharger in question. The Department agrees that it may be appropriate to include similar highest attainable condition provisions specified in the MDV in some individual variances, but the interim terms will be based on the requirements in s. 283.15, not 283.16. However, this is outside of the scope of this project. Therefore, no changes were made based on these comments.

### Potential impacts to whole effluent toxicity

#### **Henry Probst, The Probst Group**

[T]here 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.

#### **Response:**

DNR recognizes that there is a potential to have WET toxicity violations if facilities add substantial chemicals in order to treat phosphorus in the variance package. There is insufficient information available to quantify these impacts at this time. Given this lack of available data, no changes were made to the final determination. However, DNR is working with partners to gather these data so this issue can be reevaluated later on.

### Eligibility for can cooling

#### **Nickolas George, Midwest Food Processors Association (MWFPA)**

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.

#### **Response:**

DOA's economic determination was amended to clarify that in some cases dischargers may exhibit technical and economic characteristics that would allow them to be appropriately grouped in more than

one category; such situations will require DNR to exercise professional expertise and judgment in determining which category is most appropriate for a particular discharger. Can-cooling water is an example of these scenarios. Many can cooling water discharges were placed in the “NCCW” discharge category because their effluent characteristics more closely align with NCCW, COW, or other low-strength wastewater streams. In such cases, discharges of can cooling water should seek MDV eligibility through the NCCW category of discharge.

### Eligibility for tile line discharges

#### **Nickolas George, Midwest Food Processors Association (MWFPA)**

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.

#### **Response:**

Thank you for making us aware of this situation. Updates to Appendix H have been made based on the comment provided.

### Considering trading and adaptive management

#### **Jimmy Parra, Milwaukee Riverkeeper, Sierra Club- John Muir Chapter, Midwest Environmental Advocates**

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.

#### **Tim Reel, City of Whitewater**

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.

#### **John Umhoefer, Wisconsin Cheesemakers Association**

WCMA believes industrial permit holders may need clarification on question 23 on the MDV application: “Is the facility eligible for adaptive management and water quality trading?” Eligibility for the program could be describe in the MDV Implementation Guidance Document to allow industrial permit holders to properly asses eligibility as defined by the department.

#### **Rich Boden, Wisconsin River Discharger Group and Plover Wastewater Utility**

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.

**Response:**

The Department strongly supports water quality trading and adaptive management as permit compliance options, and has dedicated significant staff resources to help implement these programs. This being said, these are optional programs. Water quality trading has been a compliance option for several decades for all non-bioaccumulating contaminant of concerns (BCCs). EPA has never required that permittees consider water quality trading prior to approving a variance for these pollutants. This is in part because there is no guidance or federal requirement that mandates water quality trading be considered prior to variance approval or be included in as part of a demonstration that compliance with the water quality standards are infeasible. Likewise, there is no state requirement to consider water quality trading or adaptive management be evaluated prior to seeking an individual variance, or MDV. In fact, NR 217.18, Wis. Adm. Code, and s. 283.84, Wis. Stat. are clear that a permittee *may* utilize these compliance options.

The feasibility of implementing trading and adaptive management is extremely site-specific. Point sources must meet specific eligibility requirements (s. 217.18, Wis. Adm. Code, and ss. 283.13(7) and 283.84, Wis. Stats.) to qualify for these programs. Additionally, the Department recognizes that several technical barriers exist that make it difficult to evaluate the feasibility and costs of these options, including: the costs for water quality trading and adaptive management are unknown at this time; there is also no prescribed list of the number of farms that could be potential trading partners, the types of practices, etc. that would need to be considered before a cost determination could be made; and, trading and adaptive management costs will vary significantly from project to project. It is also unclear if effective partnerships can be built to generate and maintain sufficient reductions to ensure point source compliance through time. These technical barriers make it infeasible for the Department to predict trading and adaptive management participation and costs on an aggregate scale. Rather, the Department believes that trading and adaptive management should be evaluated on a facility-by-facility basis through the facility planning process. This will allow point source discharges to consider the local feasibility and potential costs of these options. Section 2.02 of the MDV implementation guidance has been updated to provide applicants with additional information about how to effectively evaluate their phosphorus compliance options, including trading and adaptive management, as well as DNR's expectations regarding the trading and adaptive management questions on the forms.

## **Compliance alternatives**

### **Linda Holst, U.S. Environmental Protection Agency**

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.

### **Mark Davy, Davy Engineering Co.**

There are projects that have reasonable solutions but there is no motivation to even seriously investigate alternatives.

**Jimmy Parra, Milwaukee Riverkeeper, Sierra Club- John Muir Chapter, Midwest Environmental Advocates**

The State should give plausible treatment alternatives much more consideration.

**Response:**

The Department has created an approval and implementation process to ensure permittees are evaluating multiple alternative compliance options. Permittees are currently required to submit a Preliminary Facilities Report or Preliminary Engineering Report (industrials). These reports are submitted by each permittee that has a phosphorus compliance schedule at the third year of the permit term. The Department expects that many facilities should have this completed prior to applying for the multi-discharge variance. Also, the Department is requiring applicants to submit their facilities plan with the multi-discharge variance application. The Department has created a facilities plan/engineering report checklist to evaluate the plan submittal completeness. This checklist includes a section to complete that verifies that multiple treatment options, such as biological and chemical phosphorus treatment, have been evaluated and that new treatment technologies have also been considered. The application for the multi-discharge variance provides that permittees should have evaluated adaptive management or water quality trading as a compliance option, as well. Additionally, the department intends to evaluate estimated compliance costs on MDV applications submitted by facilities against a report generated on a software program. These costs curves for nutrient removal, including phosphorus and nitrogen removal, were developed by the USEPA using available software called CAPDEWorks. CAPDEWorks is a planning software which allows rapid cost estimates and comparisons of various treatment trains when planning for new or upgraded treatment works. The software allows the designer to construct a treatment facility schematic showing individual treatment units. It also allows input of influent and effluent flow characteristics, unit operating parameters, and selection of equipment, cost, and financial indices. This evaluation process should provide adequate review and verification of reasonable compliance cost estimates. The Department has clarified the need for site-specific compliance costs in Section 2.02 of the MDV Implementation Guidance and finds these methods sufficient to ensure that site-specific costs submitted with the MDV implementation guidance are reasonable.

**Other concerns regarding Wisconsin's WPDES permitting program**

**Glory Adams**

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?

**Jimmy Parra, Milwaukee Riverkeeper, Sierra Club- John Muir Chapter, Midwest Environmental Advocates**

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.

**Response:**

The Department is working diligently to address EPA’s concerns regarding its WPDES permitting program. At this time, the Department has addressed over half of these comments, and is making substantial progress towards addressing the remainder of these concerns through rulemaking, guidance, and statutory changes. No changes were made based on these comments.

### Use attainability analysis

**Jimmy Parra, Milwaukee Riverkeeper, Sierra Club- John Muir Chapter, Midwest Environmental Advocates**

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. 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.”

**Response:**

The Department finds that the materials provided in the MDV variance submittal sufficiently justify a temporary change to phosphorus water quality standards for some WPDES permit holders based on substantial and widespread social and economic impacts. The Department does not believe further use attainability analyses are required to make this demonstration, or is required by state or federal law. Therefore, no changes were made based on these comments.

### Insufficient time for review

**Jimmy Parra, Milwaukee Riverkeeper, Sierra Club- John Muir Chapter, Midwest Environmental Advocates**

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. 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”; otherwise, the variance application is deemed approved.

**Response:**

It is the responsibility of the MDV applicant to provide all necessary information to the Department to make an informed decision. The Department does not have sufficient staff time and resources to gather supporting information for the permittee. The Department also finds that it is within the statutory authority to deny a MDV application if sufficient information is not provided to adequately justify the MDV, or to request additional information if the application is incomplete. For this reason, the Department finds that the timeline provided in 283.16(4)(am)2., Wis. Stat., to be reasonable. Section 5.03 of the MDV Implementation Guidance discusses this process as well as public participation procedures in more detail.

## Reevaluation Process

### Linda Holst, U.S. Environmental Protection Agency

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)(l)(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)(l)(v)." (40CFR131.14(b)(l)(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.

### Jimmy Parra, Milwaukee Riverkeeper, Sierra Club- John Muir Chapter, Midwest Environmental Advocates

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 also does not require that DNR submit the results of the reevaluation to the EPA.... [T]here 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.

#### **Response:**

Statutory revisions were made to s. 283.16, Wis. Stat., to clarify DNR's highest attainable condition review and submittal requirements to EPA. These statutory changes are reflected in the MDV Justification Document and Implementation Guidance.

## Suspending permit limits

### Jimmy Parra, Milwaukee Riverkeeper, Sierra Club- John Muir Chapter, Midwest Environmental Advocates

[T]he statute automatically grants a permittee's request for coverage under the variance if DNR fails to act on the permittee's application within 30 days. 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.

#### **Response:**

The Department will act on applications in a timely manner. EPA has the ability to object to a variance approval when the variance is incorporated into the permit. EPA did not submit comments to the Department identifying this statutory provision as a provision in violation of federal law.

## Authority to implement standards and requirements that are not explicitly authorized by statute or rule

**Jimmy Parra, Milwaukee Riverkeeper, Sierra Club- John Muir Chapter, Midwest Environmental Advocates**

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 Justice. 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. 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.

### **Response:**

There is clear statutory authority in s. 283.16, Wis. Stat. to implement the variance and to establish interim permit terms and conditions if a variance is approved for a permittee. As for rule making, statutory changes have been made to s. 227.01, Wis. Stat., to clarify that implementing, interpreting, or administering the eligibility and application requirements of the MDV do not require separate rule making. It is noted that specific rule making authority was not provided originally in Act 378 so these statutory changes seek to reflect the intent of the original statute.

## Implementation through guidance

**Jimmy Parra, Milwaukee Riverkeeper, Sierra Club- John Muir Chapter, Midwest Environmental Advocates**

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.... 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.

### **Response:**

Statutory changes have been made to s. 227.01, Wis. Stat., to clarify that implementing, interpreting, or administering the eligibility and application requirements of the MDV do not require separate rule making. It is noted that specific rule making authority was not provided originally in Act 378 so these statutory changes seek to reflect the intent of the original statute.

## Limited legal remedy for public

**Jimmy Parra, Milwaukee Riverkeeper, Sierra Club- John Muir Chapter, Midwest Environmental Advocates**

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.<sup>193</sup> 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.<sup>194</sup> 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.

**Response:**

The Department can't implement the variance unless EPA approves the variance. So, if there is a concern as to whether the variance satisfies federal regulations, comments should be submitted to EPA prior to any approval. EPA will only approve the variance if it complies with federal regulations for variances.

**General letters of support**

6

**General letters of opposition**

1