

February 10, 2021

VIA EMAIL
Matthew.Claucherty@wisconsin.gov

Wisconsin Department of Natural Resources
Attn: Matthew Claucherty
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RE: Comments of the Municipal Environmental Group – Wastewater Division
MDV Guidance, 3400-2021-XX

Mr. Claucherty:

I am submitting these comments on behalf of the Municipal Environmental Group–Wastewater Division (MEG Wastewater). MEG Wastewater is an organization of approximately 100 municipalities statewide who own and operate wastewater treatment plants. MEG represents facilities ranging in size from small sanitary districts to larger utilities. MEG appreciates the opportunity to comment on the program guidance for implementing the Multi-Discharger Variance (“MDV”).

MEG was instrumental in passage of the MDV, which was designed to simultaneously provide municipalities with options for permit compliance and focus resources on nonpoint sources to achieve phosphorus reductions in our waterbodies. While MEG appreciates the work the department has put into development of this guidance, MEG is concerned that the types of restrictions being proposed in this guidance will individually and collectively undermine the efficacy of this program. MEG’s specific concerns are detailed below.

1. County Payment Option

On page 18, the draft guidance states as follows: “Facilities that discharge below target value, and would not make a payment [to the County], do not meet watershed offset/county payment requirements in statute, and the county payment is not a valid option for fulfilling watershed offset requirements.”

This statement is problematic for a few reasons. First, MEG disagrees with the department’s conclusion that if a permittee discharged below the target value, the county payment would not be a valid option for fulfilling its watershed offset requirements. This statement is based on an apparent misunderstanding of the statutory requirements in Wis. Stat. § 283.16(8). Section 283.16(8)(a)1. requires a permittee to “make a total payment by March 1 of each calendar year in the amount equal to the per pound amount under subd. 2. times the number of pounds by which the amount of phosphorus

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discharged by the point source during the previous year exceeded the point source's target value ...” Nothing in this statute requires any particular payment amount to the county, it simply imposes a formula the permittee follows in calculating the payment amount. If a permittee discharges below the target value in a particular year, then the “amount” referenced in § 283.16(8)(a)1. is \$0, and for that year, the permittee would pay the county \$0. The statute cannot reasonably be read to disqualify a permittee from the county payment option on the ground that the payment, as calculated by the prescribed formula, is \$0.

Second, while it is not at all clear from the guidance what the remedy would be if a permittee's discharge was below the target value in any given year of a permit term, the suggestion inherent in this section of the guidance is that a permittee would have to choose another of the available MDV compliance options for that year. It would be entirely impractical and unreasonable to require the permittee to take the steps necessary to implement a watershed project or contract for implementation of a project with a third party for compliance with the MDV in that one year.

Because it is contrary to the law and entirely impractical, the department should exclude or significantly revise the last paragraph on page 18 of the guidance document. Similarly, the statement on page 30 that “the point source discharge will be responsible for providing financial resources to participating counties...” and the other references to “financial resources” should be revised to reference the specific language in Wis. Stat. § 283.16(8)(a)1. for accuracy and clarity.

2. Economic Impact Analysis

Section 2.01 contains somewhat misleading statements regarding eligibility for an MDV versus an individual phosphorus variance (“IPV”). For example, at page 19, the guidance states that conditions that may make a permittee ineligible for the MDV and potentially eligible for an IPV include: “The facility is unable to achieve the offset required per s. 283.16(6)(b) Wis. Stats. without resulting in widespread substantial adverse social/economic impacts.” This language implies that a facility could *only* evaluate the costs of MDV compliance in assessing eligibility for an IPV versus an MDV. To the contrary, however, the economic impact analysis is intended to holistically assess the economic status of the community in which the facility operates. Thus, the economic impact analysis includes all of the costs the facility will face in the near term for permit compliance, all of which may result in higher sewer rates, not just the costs of MDV compliance. The guidance should be revised to reflect the full range of economic impacts that should be considered in assessing eligibility for an MDV versus an IPV.

3. Alternative Compliance Options

In Section 2.01, page 19, and again beginning on page 26, the department provides that “trading and adaptive management should also be considered when determining phosphorus compliance options and potential costs of compliance.” MEG does not object to this statement in and of itself but wishes to reiterate comments made on the Water Quality Trading Guidance that a permittee is not required to evaluate and reject WQT and AM as compliance options in order to be eligible for the MDV. MEG requests that the department add language at pages 19 and 26 clarifying this point.

4. Calculation of Interim Limitations

MEG appreciates the department's statement in Section 2.02, pages 23-24, that while 0.8 mg/L is the default interim limitation, the department will calculate interim limitations on a case-by-case basis. As the department acknowledges, phosphorus concentrations in effluent can vary significantly over time due to wet weather events, among other environmental factors. While this guidance document offers a few approaches for evaluating appropriate interim limitations, these approaches may not always fully account for a permittee's ability to meet certain interim limitations consistently over the permit term. MEG requests that the department revise the following sentence on page 25 to allow the necessary flexibility in calculating interim limitations:

"Using any of the approaches specified above, **or any other scientifically supportable approach**, limits can be calculated on a case-by-case basis to represent the interim limit supporting highest attainable condition for a specific facility."

5. Blended Watershed Options

At pages 31-32, the department states that "watershed projects may only be blended on an annual basis" and, thus, the "full offset quantity ... must be obtained through a single means in a given year." The department cites to Wis. Stat. § 283.16(6)(b) to support this conclusion. MEG disagrees that § 283.16(6)(b) mandates this limited approach. This statutory provision does not use the term "or" between options for compliance and instead simply lays out the watershed options. The department should incorporate this flexibility into this guidance document to allow a permittee to achieve the necessary offset in any given year through a blended implementation of watershed options.

6. Geographic Extent of the Project Area

In Section 4.02, subsection 2, the department states: "It is preferred that projects occur upstream of the point source discharge and/or on the same receiving water as the discharge is located." However, as the department acknowledges in the next sentence, projects may be located anywhere within the HUC 8. The department should remove the language regarding the preferred location of projects to avoid confusion as to the statutory requirements of this option under the MDV.

Thank you for consideration of these comments.

Sincerely,

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