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VIA EMAIL

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**RE: Comments of the Municipal Environmental Group – Wastewater Division on the Draft Guidance for Development and Implementation of Water Quality Standards Variances
Guidance Number: 3400-2022-00**

Dear Ms. Dietrich:

I am submitting these comments on behalf of the Municipal Environmental Group–Wastewater Division (MEG Wastewater). MEG Wastewater is an organization of over 100 municipalities statewide who own and operate wastewater treatment plants. We represent facilities ranging in size from small sanitary districts to larger utilities.

MEG Wastewater appreciates the opportunity to comment on the draft guidance for Development and Implementation of Water Quality Standards Variances (“Guidance”). MEG also appreciates the effort the department clearly invested in development of this Guidance. However, MEG Wastewater is concerned that at a number of points throughout the Guidance, the department misinterprets regulatory requirements regarding variances and imposes prescriptive requirements that exceed the scope of the department’s authority under statutes and regulations. These concerns are explained further below.

1. The Department Misinterprets and Exceeds Its Authority in its Interpretation of 40 CFR 131.14.

At page 9 of the Guidance, the department discusses certain federal requirements for implementation of variances. In particular, the department points to the requirements under 40 CFR § 131.14(b)(1)(ii), which provides that the requirements that apply throughout the term of a variance “shall not result in any lowering of the currently attained ambient water quality” *See* § 131.14(b)(1)(ii).

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The department asserts that this provision means a variance is not approvable if it would result in the lowering of currently attained ambient water quality. However, that is not what the plain language of § 131.14(b)(1)(ii) states. Rather, this section provides the following. A variance “must include ... [t]he requirements that apply throughout the term of the ... variance.” Those “*requirements* shall not result in any lowering of the currently attained ambient water quality.” *Id.* (emphasis added.) The plain language of this regulatory section pertains to the requirements that apply throughout the term of a variance; it does not impose a prohibition on approval of a variance. The department misinterprets this section of code and should revise this portion of the Guidance to align with the regulatory requirements cited.

In addition to misinterpreting § 131.1(b)(1)(ii), the department exceeds the scope of its authority in adding additional standards to this regulatory requirement that are not authorized under the federal code. At the bottom of page 9, the department adds a number of standards to be applied in the application of § 131.14(b)(1)(ii). The inclusion of these standards goes beyond what the department is authorized to address through guidance. A guidance document is intended only to provide guidance on implementation of statutes and regulations. A guidance document cannot add standards to a statute or rule; such standards must be promulgated as rules. The department may not “implement or enforce any standard, requirement, or threshold, including as a term or condition of any license issued by the agency, unless that standard, requirement, or threshold is explicitly required or explicitly permitted by statute or by a rule that has been promulgated in accordance with this subchapter ...” Wis. Stat. § 227.10(2m). By imposing standards beyond those contained in current state and federal code, the department exceeds the scope of its authority in this portion of the guidance.

We respectfully request that the department revise this portion of the Guidance to align with the regulatory provisions cited and to remove the unauthorized standards stated at the bottom of page 9.

2. The Department Misinterprets Economic Requirements for Variance Eligibility.

Beginning at page 12 of the guidance, DNR discusses economic justifications for variances. This discussion focuses on eligibility for municipalities where the municipality demonstrates that treatment alternatives for complying with a water quality standard would raise sewer rates to greater than 2% of the Median Household Income (“MHI”). The department states that the “‘2% threshold’ is generally used to demonstrate substantial and widespread economic impacts for a variance.”

However, as the department acknowledges, this 2% threshold requirement is “not explicitly listed in either state or federal code” relating to variances. While we agree that the 2% threshold indicator is one manner in which a municipality could show substantial and widespread economic impacts, a municipality is not prohibited from obtaining a variance under state or federal statute or code if it does not meet this 2% threshold standard. In fact, the EPA guidance to which the department cites provides for “jointly considering” two tests to determine whether the costs of a proposed project will likely result in substantial and widespread economic impacts. EPA, *Economic Guidance for Water Quality Standards* (1995) at 2-6. The first screener is an MHI calculation. If the MHI calculation shows costs incurred would be 1-2% of MHI or greater than 2% MHI, then secondary factors should be considered to determine substantial impacts. Pursuant to this EPA guidance, communities scoring in the 1-2% MHI

range could, therefore, still be determined to face substantial and widespread economic impacts based on a secondary impact evaluation.

As currently written, the Guidance suggests that a municipality would not be eligible for a variance if it does not meet the 2% threshold standard. This is not a requirement under state or federal statute or code and conflicts with EPA guidance on this topic. The Guidance should be revised to clarify that the 2% MHI threshold referenced is not dispositive in assessing eligibility for a variance.

3. The Department's Requirements for Source Reduction Measures and Pollutant Minimization Plans are Overly Prescriptive.

Throughout Chapter 4 of the Guidance, and more generally on pages 26-29, the department provides examples for actions that might be included in an SRM or PMP. At times, the department appropriately acknowledges that SRMs and PMPs are not one-size-fits-all and must be tailored to the unique situations of each POTW. However, the tables of SRM and PMP actions in Chapter 4 and some of the language included in that Chapter suggests that these action items should be included in all SRMs and PMPs. When SRM or PMP measures are required that are not appropriately tailored to a POTW, that results in wasted resources for the POTW and DNR, unnecessary costs to customers, and less than optimal benefits to the environment. We request that the department include an introductory paragraph to Chapter 4 explaining that SRMs and PMPs must always be tailored to the unique factors of each POTW implementing a variance and clarify that the tables provide examples only of possible action items for consideration in development of SRMs and PMPs.

Thank you for consideration of these comments. We greatly appreciate the opportunity to participate in this process.

Sincerely,

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