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## Senate Committee on Natural Resources and Energy

January 19, 2016

411 South - State Capitol

Testimony on SB 567 by Senator Cowles

Thank you for the opportunity to testify today on SB 567 relating to the statewide water quality variance for phosphorus. Last session, Representative Loudenberg and I authored Act 378 which creates a statewide mechanism for WPDES permittees to achieve compliance with water quality standards for phosphorus over time and provides an option to achieve greater environmental benefit by creating a formula to generate additional funding for the state's nonpoint source program.

Statewide 70-80% of the phosphorus loads to our waters are from nonpoint runoff. Current phosphorus effluent standards would require point sources to invest significant rate payer dollars on advanced filtration technology to clean up very little of the problem while nonpoint sources continue to contribute significant phosphorus loading to our waters.

Act 378 provided a mechanism for the state to receive approval from EPA for this innovative program that would clean up our waters by allowing point and nonpoint producers to work together to achieve greatest environmental benefit while also controlling costs for industry.

### STATEWIDE IMPLEMENTATION

Before the Statewide multi-discharge phosphorus variance can be made available for any point source discharger, DOA (in consultation with DNR) had to study the feasibility of affected sources meeting phosphorus discharge limits without causing substantial and widespread adverse social and economic impacts on a statewide basis. That report was completed on May 12, 2015 by DOA and DNR.

DNR then began to finalize conversations with EPA on the submittal of the statewide variance application to allow dischargers to begin to utilize this innovative procedure for meeting phosphorus standards and cleaning up nonpoint pollution.

In August 2015, the US EPA issued new guidance for how EPA analyzes statewide variances, including the multi-user discharge variance being sought by the State of Wisconsin. If Wisconsin would like to continue to pursue the statewide variance to offer industry flexibility and clean up nonpoint pollution, the state **MUST** modify the statutory language passed in 2013 Wisconsin Act 378.

### **Current Session - SB 567**

If Wisconsin has a chance of EPA approving our statewide multi-discharge variance request the following changes in SB 567 must be made.

#### **Three-year Review**

DNR is required to review, every 3 years, the water quality standards and variances to water quality standards including approvals under the statewide phosphorus variance. If upon review, DNR determines that a water quality standard is attainable, and the variance is no longer needed, DNR is required to modify the variance when the discharger's permit is reissued or modified.

#### **Five-year Review**

DNR is required to review, every 5 years, the interim effluent limitations under the statewide phosphorus variance to determine if they are consistent with the highest attainable condition of point sources regulated under the statewide variance.

If a point source is regulated under the statewide phosphorus variance, the DNR is required to review the applicable interim effluent limitations at the time of initial approval and for each permit term the discharger utilizes the statewide variance. The review is to determine that the interim effluent limitations are consistent with the highest attainable condition for the point source.

If DNR determines different effluent limitations are attainable, those limitations will be identified in any reissued permit.



**Senate Committee on Natural Resources and Energy**  
**SB 567 – Variances to Water Quality Standards**  
**January 19, 2016**

Good morning, Chairman Cowles and committee members. My name is Adrian Stocks and I am the Permits Section Chief in the DNR's Water Quality Bureau. Thank you for this opportunity to testify, for information only, on Senate Bill 567, clarifying the review and availability of water quality standards variances including the proposed statewide phosphorus variance. This legislation is needed to address concerns the U.S. Environmental Protection Agency (EPA) raised to the Department since the state enacted 2013 Act 378 in April 2014.

Under current law, DNR may approve a temporary variance from applicable water quality standards and effluent limitations in a Wisconsin Pollutant Discharge Elimination System (WPDES) permit issued to a point source. This allows point sources in Wisconsin to gain temporary financial relief from stringent water quality standards and limitations where compliance costs would cause substantial and widespread economic impacts. On August 21, 2015, the US EPA made changes to the federal Clean Water Act affecting *variance submittals*, *implementation requirements*, and *variance review requirements*. The primary purpose of SB 567 is to align Wisconsin's multi-discharger variance program with these new federal Clean Water Act requirements.

Specifically, the bill creates a procedure for when variances must be reviewed. It recognizes two types of review: a triennial standards review; and reviews of the highest attainable condition. Both of these reviews are required under federal law. In a triennial review, DNR collects and reviews information as to whether the published water quality standard is achievable based on new technology or new economic information. This review is required for all variances, including mercury, chloride, phosphorus, and other pollutants.

Additional review requirements are also necessary for the statewide phosphorus variance. At least every five years, DNR must review highest attainable condition. This type of review is a reevaluation of the *interim effluent limitations* established in subsection (6) of s. 283.16, Wis. Stats., to determine whether the limitations, in combination with the watershed or nonpoint source project reductions, reflect the "highest attainable condition." DNR must submit the results of this re-evaluation within 30 days of completion. If DNR fails to conduct a timely review, or fails to submit the results, the variance is no longer applicable.

Changes to the *implementation procedures* established in s. 283.16, Wis. Stats., for the statewide phosphorus variance are also necessary to conform to federal regulations. A variance condition must reflect the highest attainable condition. If the effluent limitations in subsection (6) does not reflect the highest attainable condition for a category of dischargers or for a specific permittee, then the Department must include an *interim limitation* in the permit that *does* reflect the highest attainable condition.

A December 16, 2015 letter from EPA to DNR indicated these changes are necessary for the multi-discharger variance to be consistent with the requirements of EPA's *new* variance regulation. ***Without these changes, it is unlikely EPA will approve the statewide phosphorus variance and that point sources in Wisconsin will not be able to use this tool to seek financial relief from phosphorus compliance costs.***

In addition to the changes driven by federal regulations, other changes are proposed to the statewide phosphorus variance program to clarify that rulemaking is not required to implement the statewide phosphorus variance, to allow the intended 10 year duration for this variance, and to make other minor changes.

Thank you, and I'd be happy to answer any questions you may have or provide further information to the committee.



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DEC 16 2015

REPLY TO THE ATTENTION OF:  
WQ-16J

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

Dear Ms. Minks:

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

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

"[a] statement providing that the requirements of the WQS variance are either the highest attainable condition identified at the time of the adoption of the WQS variance, or the highest attainable condition later identified during any reevaluation." (40 CFR 131.14(b)(1)(iii)); and

"[a] provision that the WQS variance will no longer be the applicable water quality standard for purposes of the [Clean Water] Act if the State does not conduct a reevaluation consistent with the frequency specified in the WQS variance or the results are not submitted to EPA as required by [40 CFR 131.14](b)(1)(v)." (40 CFR 131.14(b)(1)(vi)).

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

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

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

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

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

Sincerely,



Tinka G. Hyde  
Director, Water Division