

Proposed Revisions to Water Quality Rules and Regulations Chapter 1

Response to Comments for Comment Period Ending September 22, 2017

December 2017

Prepared by:
Wyoming Department of Environmental Quality
Water Quality Division
Watershed Protection Program



WYOMING

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1.0 SUMMARY

The Wyoming Department of Environmental Quality/Water Quality Division (WDEQ/WQD) is proposing changes to the Water Quality Rules and Regulations, Chapter 1, that would allow the Administrator of the Water Quality Division to grant a temporary modification to a designated use and water quality criteria in circumstances where meeting a water quality-based effluent limit for ammonia and/or nutrients would result in substantial and widespread economic and social impact. The process is intended to provide a mechanism for point sources to make incremental progress toward meeting water quality criteria in circumstances where it is currently infeasible to meet the criteria.

WDEQ/WQD originally released the proposed revisions to Chapter 1 for public scoping on February 17th and accepted comments until 5 PM on Monday, March 27th. WDEQ/WQD revised the proposed rule based on comments received during scoping and released revised rule documents along with a response to comment document on May 23, 2017 to be considered in advance of a June 23, 2017 Water and Waste Advisory Board meeting. WDEQ/WQD received additional comments prior to and at the June 23, 2017 Water and Waste Advisory Board meeting. WDEQ/WQD made additional changes to the proposed rule based on these comments and on August 11, 2017, in advance of the September 22, 2017 Water and Waste Advisory Board meeting, released revised rule documents along with a response to comments document. WDEQ/WQD received additional comments prior to and at the September 22, 2017 Water and Waste Advisory Board meeting. Considering these comments, the Waste Advisory Board recommended advancing the proposed rule to the Environmental Quality Council with the addition of a definition of “nutrients.” However, upon further evaluation, the proposed rule already included examples of what nutrients are within proposed Section 37(a) and thus the addition of a definition is not necessary. This document provides written responses to the written comment received prior to the September 22, 2017 Water and Waste Advisory Board meeting and a subset of comments received at the September 22, 2017 Water and Waste Advisory Board meeting. The full text of the written comment and subset of the verbal comments can be found in Appendix A.

WDEQ/WQD has not made any changes to the proposed rule from the version considered by the Water and Waste Advisory Board on September 22, 2017. WDEQ/WQD is releasing the proposed rule along with this response to comments document in advance of the February 2018 Environmental Quality Council hearing. WDEQ/WQD would like to thank all the individuals and organizations who provided comments for their interest and involvement in surface water quality issues. Public engagement is an integral part of surface water quality standards development. WDEQ/WQD will continue to work with interested stakeholders to address any outstanding issues related to discharger specific variances.

2.0 COMMENTERS

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3.0 COMMENTS AND RESPONSES

United States Environmental Protection Agency, Region 8: An outstanding concern remains regarding the following proposed language at Section 37(g):

[\(g\) Following administrator approval and opportunity for appeal, the variance shall be submitted to EPA pursuant to the Clean Water Act. The variance shall become effective either upon EPA approval or 90 days after submittal, whichever comes first.](#)

To ensure consistency with the CWA and the EPA's implementing regulations at 40 CFR § 131, the EPA continues to recommend deleting the portion of Section 37(g) that states "The variance shall become effective either upon EPA approval or 90 day after submittal, whichever comes first." Adoption into state rules without approval by the EPA creates a situation where the state rules are not effective for CWA purposes and cannot be used for CWA Section 303(d) list development or Wyoming Pollutant Discharge Elimination System (WYPDES) permitting. The CWA implementing regulations describe the need for EPA approval for a variance to be effective for CWA purposes at three locations. The first is 40 CFR §131.14, which states:

A WQS variances is a water quality standard subject to EPA review and approval or disapproval.

The second is 40 CFR § 141.14(a)(3), which states:

A WQS variance, once adopted by the State and approved by EPA, shall be the applicable standard for purposes of the [Clean Water] Act under 40 CFR § 131.21(d)-(e).

The third is 40 CFR § 131.21(c)(2), which answers the question "How do I determine which water quality standards are applicable for purposes of the Act?" with the following:

If a State or authorized Tribe adopts a water quality standard that goes into effect under State or Tribal law on or after May 30, 2000...then...once EPA approves that water quality standard, it becomes the applicable water quality standard for purposes of the Act...unless...EPA has promulgated a more stringent water quality standard for the State or Tribe that is in effect...in which case...the EPA promulgated water quality standard is the applicable water quality standard for purposes of the Act until EPA withdraws the Federal water quality standard (emphasis added).

As acknowledged in WDEQ's August 2017 Response to Comments document, CWA Section 303(c)(3) establishes a 60-day deadline for EPA to approve state WQS submissions that are consistent with the CWA and a 90-day deadline for EPA to disapprove state WQS submissions that are not consistent with the CWA. These deadlines do not, however, render EPA approval unnecessary or moot after either 60 or 90 days (CWA Section 303(c), 40 CFR § 131.21(c)(2), 40 CFR § 131.14(a)). The EPA strives to meet its statutory deadlines by early review and engagement in WQS development processes such as this one.

Department Response: As noted in previous response to comments, WDEQ/WQD is proposing Section 37(g) to be consistent with the federal Clean Water Act at 303(c)(3) which states that the Administrator must approve of standards within 60-days or notify the State within 90-days of the changes that are necessary to be consistent with the Clean Water Act. "If the Administrator, within sixty days after the date of submission of the revised or new standard, determines that such standard meets the requirements of this Act, such standard shall thereafter be the water quality standard for the applicable

waters of that State. If the Administrator determines that any such revised or new standard is not consistent with the applicable requirements of this Act, he shall not later than the ninetieth day after the date of submission of such standard notify the State and specify the changes to meet such requirements. If such changes are not adopted by the State within ninety days after the date of notification, the Administrator shall promulgate such standard pursuant to paragraph (4) of this subsection.”

WDEQ/WQD is also proposing 37(g) to be consistent with 40 CFR § 131.21(a) which identifies that the Regional Administrator must notify the State within 60-days that the revisions are approved or within 90 days that the revisions are disapproved. “After the State submits its officially adopted revisions, the Regional Administrator shall either: (1) Notify the State within 60 days that the revisions are approved, or (2) Notify the State within 90 days that the revisions are disapproved. Such notification of disapproval shall specify the changes needed to assure compliance with the requirements of the Act and this regulation, and shall explain why the State standard is not in compliance with such requirements. Any new or revised State standard must be accompanied by some type of supporting analysis.”

The proposed language is also consistent with Wyoming’s existing surface water quality standards, Chapter 1, Section 34(a), which outlines that changes to designated uses shall become effective either upon EPA approval or 90 days after submittal, whichever comes first. This process has been used successfully to implement changes to designated uses since 2001 when the provision was first adopted into Chapter 1.

Water and Waste Advisory Board Member Hanson: I just looked at the list of definitions. I’m, again, in over my head. I was going to find out what nutrients really are.

Water and Waste Advisory Board Member Hanson: There’s no definition here. Maybe you should add that as a term.

Water and Waste Advisory Board Member Hanson: But let me suggest to add it as a term here.

Water and Waste Advisory Board Member Cahn: With the additional definition of nutrients added. So recommend moving this chapter to the EQC.

Department Response: Although it was not discussed at the Advisory Board meeting, the proposed rule at Section 37 (a) does include examples of what may be considered nutrients: “Following public notice and opportunity for comment, including at least one public hearing with a minimum of 45-day notice, the administrator may grant a permittee a variance to a designated use and water quality criteria and/or nutrients (e.g., total nitrogen, total phosphorus).” WDEQ/WQD is therefore not proposing to add a definition of nutrients within the definitions of Chapter 1, since this may conflict with the proposed rule language.

17-0801

**APPENDIX A. COMMENTS RECEIVED DURING THE COMMENT PERIOD
ENDING SEPTEMBER 22, 2017**

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Figure A-1. Subset of Verbal Comments from September 22, 2017 Water and Waste Advisory Board Meeting (4 pages).

In Re: Water Quality Division

50

1 conditions. And so most states have not adopted those
2 criteria. And EPA is allowing states to kind of use those
3 as a starting point for criteria development. And so the
4 state is working on that ourselves. And that will be
5 looking -- primarily we started with the Wyoming basin
6 lakes, since there's not a lot of discharger to those. And
7 we have the most available data on those lakes, kind of the
8 south central part of Wyoming.

9 And so what we've been working on is primarily an
10 aquatic life end point, looking at shifts in the algal
11 communities that are in the lakes, so you weren't getting
12 too many like blue-green algae, for example. And so in
13 addition to that, if there's drinking water supplies, we'll
14 want to take that into consideration when we're developing
15 criteria, and EPA's been working on recommended cyanotoxin
16 criteria, which relates indirectly to nutrients, because
17 when you have these algae blooms they can produce
18 cyanotoxins, which can get into drinking water supplies.
19 It can affect use of the waters for recreation, also
20 aquatic life. And so nutrients potentially has multiple
21 endpoints. Ammonia is really an aquatic life end point.

22 CHAIRMAN BEDESSEM: Thank you.

23 BOARD MEMBER HANSON: I just looked at the
24 list of definitions. I'm, again, in over my head. I was
25 going to find out what nutrients really are.

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1 MS. PATTERSON: Oh, sure.
2 BOARD MEMBER HANSON: There's no definition
3 here. Maybe you should add that as a term.
4 MS. PATTERSON: Sure. Yeah.
5 BOARD MEMBER HANSON: What are nutrients?
6 MS. PATTERSON: Total nitrogen and total
7 phosphorus is typically what we refer to as nutrients or
8 nutrient pollution.
9 BOARD MEMBER HANSON: Okay. So it's
10 nothing that nurtures us, but rather --
11 MS. PATTERSON: Well, you have to have them
12 in order for --
13 BOARD MEMBER HANSON: Okay.
14 MS. PATTERSON: -- you know, all organisms
15 to live. It's just when you get too much of them, you can
16 get a lot of algae growing or a lot of plants and it sort
17 of gets out of control pretty quickly.
18 BOARD MEMBER HANSON: But let me suggest to
19 add it as a term here.
20 MS. PATTERSON: Yeah. Uh-huh.
21 BOARD MEMBER HANSON: Thank you.
22 I was going to educate myself but couldn't.
23 CHAIRMAN BEDESSEM: Okay. Any more
24 comments from the board? Additional discussion?
25 Okay. So now these revisions to Chapter 1

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1 have -- this is the second time it's been to the board, and
2 comment period is over, and so we're at the point of
3 determining whether there are any suggested changes other
4 than what has been mentioned.

5 Are there any on the board's perspective?

6 Then we're in a position to entertain a motion to
7 move this on to the EQC. Do I hear a --

8 BOARD MEMBER CAHN: I move -- actually, do
9 you have a --

10 MS. THOMPSON: Madam Chair. Are you --
11 Ms. Cahn, are you looking for the language that you need to
12 make the proper motion?

13 I believe that the statute lays out that your
14 role as the board is to make a motion to recommend approval
15 to the Environmental Quality Council. So I believe that
16 when you're putting that motion forward, if we could use
17 the words "recommend" and "adoption."

18 And for the folks in the room who may not be
19 familiar with rulemaking, when -- when they recommend
20 approval, if they vote to do that, it doesn't mean the rule
21 is effective. It just means that now we have permission to
22 ask for more permission to move forward. So I will just
23 outline that.

24 But I believe the words that we need to use in
25 the motion are, you know, a motion to recommend approval of

1 adoption.

2 BOARD MEMBER CAHN: I want to say so moved.

3 CHAIRMAN BEDESSEM: But is this as
4 presented, but with the additional requests that --

5 BOARD MEMBER CAHN: With the additional
6 definition of nutrients added. So recommend moving this
7 chapter to EQC.

8 BOARD MEMBER HANSON: I'll second.

9 CHAIRMAN BEDESSEM: So we have a motion and
10 a second to -- to approve --

11 MS. THOMPSON: Recommend approval.

12 CHAIRMAN BEDESSEM: -- recommend
13 approval --

14 MS. THOMPSON: Yeah.

15 CHAIRMAN BEDESSEM: -- for adoption by the
16 EQC. Okay.

17 All those in favor say aye.

18 BOARD MEMBER KIRKBRIDE: Aye.

19 BOARD MEMBER CAHN: Aye.

20 CHAIRMAN BEDESSEM: Aye.

21 BOARD MEMBER HANSON: I was going to ask a
22 question before.

23 CHAIRMAN BEDESSEM: Oh. Okay. Sorry.

24 BOARD MEMBER HANSON: We had a discussion
25 before about definitions of exceedance, et cetera, et

Figure A-2. United States Environmental Protection Agency (2 pages).



**UNITED STATES ENVIRONMENTAL PROTECTION AGENCY
REGION 8**

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September 14, 2017

Ref: 8WP-CWQ

SENT VIA EMAIL

Gina Thompson
Wyoming Department of Environmental Quality
200 West 17th Street, Suite 400
Cheyenne, Wyoming 82002

Re: Public Notice, Proposed Rules, Water Quality Rules and Regulations, Chapter 1:
Discharger-Specific Variance Provisions

Dear Ms. Thompson:

Thank you for the opportunity to review and provide comments on the Wyoming Department of Environmental Quality's (WDEQ's) proposal to add water quality standards (WQS) variance authorizing provisions to Chapter 1. The U.S. Environmental Protection Agency Region 8 Water Quality Unit received public notice regarding the current version's proposal on August 11, 2017. The proposed Section 37 provisions and definitions at Section 2(b)(x), (xxiii) and (xliii) specify WDEQ's expectations to grant discharger-specific variances for ammonia and/or nutrients in situations where meeting a water quality-based effluent limit (WQBEL) derived from the underlying designated use and criteria would result in substantial widespread social and economic impacts.

The EPA supports Wyoming's adoption of WQS variance authorizing provisions if the state considers such provisions necessary under state law. Federal regulations do not require WQS variance authorizing provisions for a state to adopt a WQS variance (40 CFR § 131.14); however, the EPA has review and approval/disapproval authority when such general policies are adopted (40 CFR § 131.13). The EPA notes that its action on such authorizing provisions does not guarantee EPA approval of subsequent WQS variances adopted by the state pursuant to such provisions.

The EPA appreciates WDEQ's revisions to its proposed rules in response to our comments and its thoughtful consideration of submitted comments as reflected in the response to comments documents. The EPA provided comments on earlier drafts of the proposed rule on March 27, 2017 and June 22, 2017. Most EPA concerns have been addressed. An outstanding concern remains regarding the following proposed language at Section 37(g):

(g) Following administrator approval and opportunity for appeal, the variance shall be submitted to EPA pursuant to the Clean Water Act. The variance shall become effective either upon EPA approval or 90 days after submittal, whichever comes first.

To ensure consistency with the CWA and the EPA's implementing regulations at 40 CFR § 131, the EPA continues to recommend deleting the portion of Section 37(g) that states "The variance shall become effective either upon EPA approval or 90 days after submittal, whichever comes first." Adoption into state rules without approval by the EPA creates a situation where the state rules are not effective for CWA purposes and cannot be used for CWA Section 303(d) list development or Wyoming Pollutant Discharge Elimination System (WYPDES) permitting. The CWA implementing regulations describe the need for EPA approval for a variance to be effective for CWA purposes at three locations. The first is 40 CFR § 131.14, which states:

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The second is 40 CFR § 131.14(a)(3), which states:

A WQS variance, once adopted by the State and approved by EPA, shall be the applicable standard for purposes of the [Clean Water] Act under 40 CFR § 131.21(d)-(e).

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As acknowledged in WDEQ's August 2017 Response to Comments document, CWA Section 303(c)(3) establishes a 60-day deadline for EPA to approve state WQS submissions that are consistent with the CWA and a 90-day deadline for EPA to disapprove state WQS submissions that are not consistent with the CWA. These deadlines do not, however, render EPA approval unnecessary or moot after either 60 or 90 days (CWA Section 303(c), 40 CFR § 131.21(c)(2), 40 CFR § 131.14(a)). The EPA strives to meet its statutory deadlines by early review and engagement in WQS development processes such as this one.

The EPA hopes that these comments are useful to you. Please contact Maggie Pierce at 303-312-6550 or pierce.maggie@epa.gov with any questions.

Sincerely,



Sandra D. Spence, Chief
Water Quality Unit