

Proposed Revisions to Water Quality Rules and Regulations Chapter 1

Analysis of Comments for Comment Period Ending February 2, 2018

February 2018

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



WYOMING

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Recommended Citation: WDEQ/WQD. 2018. Proposed Revisions to Water Quality Rules and Regulations, Chapter 1. Response to Comments for Comment Period Ending February 2, 2018. February 2018. Wyoming Department of Environmental Quality, Water Quality Division, Cheyenne, Wyoming.

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 evaluation, the proposed rule already included examples of what nutrients are within proposed Section 37(a) and thus it was determined that the addition of the definition was not necessary.

On December 18, 2017, in advance of the February 21, 2018 Environmental Quality Council hearing, WDEQ/WQD released revised rule documents along with a response to comments document. Written comments on the proposed rule were accepted until February 2, 2018. This document provides responses to the written comments received during that comment period. The full text of the written comments can be found in Appendix A.

WDEQ/WQD has made minor revisions to the proposed rule text that was released in December 2017 to address the comments received. WDEQ/WQD is providing the revised rule language along with this analysis of comments document in advance of the February 21, 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

United States Environmental Protection Agency, Region 8	3, 5
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3.0 COMMENTS AND RESPONSES

United States Environmental Protection Agency, Region 8: 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; June 22, 2017; and September 14, 2017. Two concerns remain.

“90-day effective date”

The first concern is 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 Clean Water Act (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.” Generally, a state’s water quality standards only become effective for CWA purposes upon EPA approval (40 CFR § 131.21(c)(2)). Therefore, a state water quality standards variances in effect under state law that is not approved by EPA is not effective for CWA purposes, including for purposes of developing National Pollutant Discharge Elimination System (NPDES) permit limitations under CWA Section 301(b)(1)(C). At three locations, the CWA implementing regulations describe the need for EPA approval for a variance to be effective for CWA purposes. 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. However, these deadlines do not render EPA approval unnecessary, automatic, or moot after the relevant statutory timeframe has elapsed (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.

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 for the rule 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.

Timely action on variances is necessary so that permitted entities can make decisions regarding potential planning efforts, capital improvements, grant and/or loan applications, rate increases, etc. Timely action on variances is also important so that WDEQ can make decisions regarding permit compliance, permit revisions, and/or potential enforcement actions.

Although WDEQ does recognize that EPA strives to meet its statutory deadlines by early review and engagement in WQS development processes, WDEQ has experienced significant and frequent delays in EPA action on surface water quality standards submissions. These delays have occurred despite WDEQ's responsiveness to EPA's comments and recommendations. That said, to help address EPA's concerns, WDEQ/WQD has proposed additional language that would allow the director of WDEQ to grant EPA's Regional Administrator an extension. The proposed language reads as follows:

(g) Following administrator approval and opportunity for appeal, the variance shall be submitted to EPA pursuant to 33 U.S.C. § 1313 and become effective either upon EPA approval or 90 days after submittal, whichever comes first.

(i) The director may grant an extension upon request by EPA’s Regional Administrator.

(ii) If the director grants an extension, the variance shall become effective upon either EPA approval or expiration of the extension, whichever comes first.

The proposed rule therefore seeks to help ensure that EPA complies with the timeframes outlined in the Clean Water Act and if the timeframes are not met, there is discussion between EPA’s Regional Administrator and WDEQ’s director regarding potential delays. This discussion is important as it will allow WDEQ’s director to communicate with the permittee and determine any potential implications should EPA’s action be delayed.

United States Environmental Protection Agency, Region 8:

Section 37(h)(ii)

The EPA’s second concern is regarding the language at Section 37(h)(ii). The language states:

In circumstances where the reevaluation concludes that a modification to the interim effluent condition is necessary, the department shall modify the discharge permit accordingly.

The Preamble to the Final Rule for the EPA’s 2015 WQS Regulatory Revisions regarding WQS variances (Preamble) states:

Upon permit reissuance, the permitting authority will base the WQBEL on the more stringent interim WQS consistent with the NPDES permit regulation at 122.44(d)(vii)(A). Where the reevaluation identifies a condition less stringent than the highest attainable condition, the state or authorized tribe must revise the WQS variance consistent with the CWA requirements and obtain EPA approval of the WQS variance before the permitting authority can derive a WQBEL based on that newly identified highest attainable condition. 80 Fed. Reg. 51020, 51037 (Aug. 21, 2015)

Additionally, the Preamble states:

To ensure that a WQS variance reflects the highest attainable condition throughout the WQS variance term, states and authorized tribes must adopt a provision specifying that the applicable interim WQS shall be either the highest attainable condition initially adopted, or a higher attainable condition later identified during any reevaluation. 80 Fed. Reg. at 51037.

Wyoming’s draft rules require the highest attainable condition to include both the “interim effluent condition that represents the great[est] pollutant reduction achievable” and “developing and implementing a pollutant minimization program.” It may be that a reevaluation identifies not only modifications to the interim effluent condition but also the pollutant minimization program as necessary. In order to be consistent with the federal regulations as described above, the EPA recommends the phrase “more stringent highest attainable condition” replace the phrase “modification to the interim effluent condition” and “attainable” replace “necessary.” In red/line strikeout format, this language would be:

[In circumstances where the reevaluation concludes that a **modification to the interim effluent more stringent highest attainable condition is necessary attainable**, the department shall modify the discharge permit accordingly.](#)

Department Response: WDEQ has modified the proposed rule language based on EPA’s feedback. The revised rule language recognizes that both the pollutant minimization program and the effluent condition may need to be modified as a result of a reevaluation. The revised rule language also recognizes that a reevaluation may only result in a more stringent highest attainable condition, otherwise a new discharger specific variance would be necessary.

The proposed rule language now reads:

[\(ii\) **In circumstances where the reevaluation concludes that a more stringent highest attainable condition is justified, the department shall modify the discharge permit accordingly. In circumstances where the reevaluation concludes that a more lenient highest attainable condition is justified, a new variance must be developed.**](#)

Wyoming Game and Fish Department:

Page 1-5 Lines 186 and 187

Page 1026 Line 1177

“substantial and widespread economic and social impacts”

In reviewing Chapter 1, we did not find a definition for substantial and widespread economic and social impacts. Without a definition, substantial and widespread economic and social impacts could be interpreted differently. We recommend that a definition and/or sideboards be developed.

Department Response: WDEQ/WQD plans to develop guidance on discharger specific variances that will provide additional information on ways entities may be able to demonstrate “substantial and widespread economic and social impacts.” WDEQ/WQD plans to finalize the guidance after the final rule language has been adopted by the Environmental Quality Council and approved by the governor. WDEQ plans to bring the guidance before the Water and Waste Advisory Board for review.

It is important to note that this portion of WDEQ/WQD’s proposed rule language is derived from the federal regulations at 40 CFR § 131.10(g)(6). Similar to WDEQ/WQD’s proposed rules, the federal regulations do not provide a definition of the term. Rather, EPA developed guidance, [Interim Economic Guidance for Water Quality Standards](#) (EPA-823-B-95-002), in 1995 to assist states and other entities in determining what constitutes “substantial and widespread economic and social impact.”

The guidance states that it should “...be implemented as reference points and used as guides by the States and Regions. The measures outlined in the guidance are not intended to be applied as absolute decision points. States may use other economically defensible approaches in lieu of those suggested in the interim guidance” (see page 1 of the introductory memo). As identified by EPA, demonstrating “substantial and widespread economic and social impact” depends on a number of different factors that may necessitate modification on a site-specific basis. As such, guidance is the appropriate place to provide additional details.

Wyoming Game and Fish Department: Along with the comprehensive economic and social impacts analysis, an environmental analysis is also completed to determine the potential impacts to aquatic resources. A component of the variance should include a monitoring program of the aquatic resources to

ensure that the aquatic resources are not being affected by the increased discharge of the pollutant. Monitoring will be the responsibility of the proponent and be made available to the public yearly. If monitoring of the aquatic resources indicates that impacts are occurring, reevaluation of the variance must occur immediately.

Department Response: The Wyoming Game and Fish Department provided a similar comment during the comment period that ended on March 27, 2017. In response to that comment, WDEQ/WQD noted that “WDEQ/WQD has proposed modifications to the proposed rule language to clarify that a discharger specific variance shall not be granted if it will result in an increase in the discharge of the pollutant. Discharger specific variances are intended to allow permittees additional time to meet water quality based effluent limits, not increase the discharge of pollutants. A condition of the variance, as identified in proposed Section 37(c)(ii) is that the permittee implement activities to achieve the highest attainable condition of the receiving water, essentially doing what is feasible to reduce pollutant loadings.

Because the variance will require the permittee to implement activities to reduce pollutant loadings, effluent quality and aquatic resources should improve over time. As such, WDEQ/WQD does not consider it is necessary to monitor aquatic resources or to conduct an environmental analysis to determine potential impacts to aquatic resources.

WDEQ/WQD has also proposed additional language at 37(h) to clarify that the department may initiate a reevaluation any time. In such cases, WDEQ/WQD or another entity may identify a concern with a variance and WDEQ/WQD would determine whether to initiate a reevaluation.”

18-0081

**APPENDIX A. COMMENTS RECEIVED DURING THE COMMENT PERIOD
ENDING FEBRUARY 2, 2018**

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Figure A-1. United States Environmental Protection Agency (3 pages).



UNITED STATES ENVIRONMENTAL PROTECTION AGENCY

REGION 8

1595 Wynkoop Street
Denver, CO 80202-1129
Phone 800-227-8917
www.epa.gov/region08

February 2, 2018

Ref: 8WP-CWQ

SUBMITTED VIA WDEQ COMMENT PORTAL

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

Re: EQC 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 notice of the proposal on December 18, 2017. The proposed Section 37 provisions and definitions at Section 2(b)(x), (xxiii) and (xlili) specify WDEQ's considerations when deciding whether 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 as any WQS variance must be consistent with 40 CFR §131.14.

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; June 22, 2017; and September 14, 2017. Two concerns remain.

"90-day effective date"

The first concern is regarding the following proposed language at Section 37(g):

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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. However, these deadlines do not render EPA approval unnecessary, automatic, or moot after the relevant statutory timeframe has elapsed (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.

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Additionally, the Preamble states:

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In circumstances where the reevaluation concludes that a ~~modification to the interim effluent~~ more stringent highest attainable condition is ~~necessary~~-attainable, the department shall modify the discharge permit accordingly.

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

Figure A-2. Wyoming Game and Fish Department (2 pages).



WYOMING GAME AND FISH DEPARTMENT

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January 31, 2018

WER 8859.06c
Wyoming Department of Environmental Quality
Water Quality Division
Revisions to Water Quality Rules and Regulations
Chapter 1 – Wyoming Surface Water Quality Standards

Wyoming Department of Environmental Quality
Water Quality Division
200 West 17th street
Cheyenne, WY 82002

To Whom it May Concern,

The staff of the Wyoming Game and Fish Department (Department) has reviewed the proposed Revisions to Water Quality Rules and Regulations, Chapter 1 – Wyoming Surface Water Quality Standards. We offer the following comments for your consideration.

Page 1-5 Lines 186 and 187

Page 1-26 Line 1177

“substantial and widespread economic and social impacts”

In reviewing Chapter 1, we did not find a definition for substantial and widespread economic and social impacts. Without a definition, substantial and widespread economic and social impacts could be interpreted differently. We recommend that a definition and/or sideboards be developed. Along with the comprehensive economic and social impact analysis, an environmental analysis is also completed to determine the potential impacts to the aquatic resources.

A component of the variance should include a monitoring program of the aquatic resources to ensure that the aquatic resources are not being affected by the increased discharge of the pollutant. Monitoring will be the responsibility of the proponent and be made available to the public yearly. If monitoring of the aquatic resources indicates that impacts are occurring, reevaluation of the variance must occur immediately.

“Conserving Wildlife - Serving People”

To Whom it May Concern
January 31, 2018
Page 2 of 2 – WER 8859.06c

Thank you for the opportunity to comment. If you have any questions or concerns please contact Rick Huber, Staff Aquatic Biologist, at 307-777-4558.

Sincerely,



Angi Bruce
Habitat Protection Supervisor

AB/rh/ml

cc: U.S. Fish and Wildlife Service
Rob Gipson, Wyoming Game and Fish Department
Sam Hochhalter, Wyoming Game and Fish Department
Paul Mavrakis, Wyoming Game and Fish Department
Robb Keith, Wyoming Game and Fish Department
Hilda Sexauer, Wyoming Game and Fish Department
Bobby Compton, Wyoming Game and Fish Department
Craig Amadio, Wyoming Game and Fish Department
Matt Hahn, Wyoming Game and Fish Department
Chris Wichmann, Wyoming Department of Agriculture, Cheyenne