



Municipal Environmental Group

P.O. Box 927
Madison, WI 53701-0927
Telephone (608) 283-1788
Facsimile (609) 283-1709

October 27, 2010

Comments Submitted Via E-mail & U.S. Mail

Ms. Kristy Rogers Kristy.Rogers@wisconsin.gov
Wisconsin Department of Natural Resources
P.O. Box 7921
Madison, WI 53707

RE: Comments on Proposed NR 860

Dear Ms. Rogers:

These comments are filed on behalf of the Municipal Environmental Group - Water Division (MEG-Water). MEG-Water is an association of 54 municipal water utilities who have joined together to provide input on proposed laws and regulations that affect municipal water utilities.

MEG-Water appreciates the work the Department and the Drinking Water and Groundwater staff have put into these water use permitting rules. MEG-Water offers the following comments in order to assist the Department in creating a rule that is understandable and workable for regulated entities.

MEG-Water's comments are organized based upon the proposed regulatory provision commented on. Because the Department is working under a tight timeframe in promulgating these rules, MEG-Water not only provides comments on the proposed regulatory section, in some cases it also suggests revised language to address its comments. MEG-Water offers this language with the hope that this will assist the Department as it considers comments and makes revisions to the proposal.

NR 860.11. Definitions.

a. Add a definition of "baseline." The use of the term is often confusing, and a definition in the rule would help regulated entities understand who the term applies to, and how it is determined. MEG-Water suggests the following definition.

(XX) "Baseline" means the baseline for a preexisting withdrawal determined by the department pursuant to s. 281.346(4e).

b. Add a definition of "preexisting withdrawal." This term is relevant for purposes of determining the baseline, automatic coverage under general permits, and automatic coverage under individual permits.

(XX) "Preexisting withdrawal" means a withdrawal prior to December 8, 2008.

c. Add a definition of "public water supply system." This term is used throughout the rule and it is not defined.

d. Add a definition of "withdrawal amount." This term is used throughout the rule. A definition would assist regulated entities in understanding what the term means, and how it relates to the baseline.

(XX) "Withdrawal amount" means the amount of water a permittee is permitted to withdraw. For a pre-existing withdrawal, the withdrawal amount shall not be less than the baseline.

NR 860.15(1). Required Permit Conditions.

a. Subsection (1)(a) provides that any permit noncompliance is a violation of the permit and could be grounds for permit suspension or revocation. This is inconsistent with the statute which provides that a permit may be suspended or revoked for cause, including "substantially violating the terms of the permit." (§§ 281.346(4s)(h) and 281.346(5)(p)). I believe the intent of the statute was to limit permit suspension or revocation to those situations where there is a significant violation. The rule should contain comparable language.

b. Subsection (1)(f) requires a permit holder to notify the DNR of any changes to the information submitted in the application. This requirement seems too broad given the variety of information included in NR 860.31(2). MEG-Water suggests that subsection (1)(f) only apply to certain specifically identified changes, or to material changes to the information in the application.

c. Subsection (1)(g) requires a modification to the permit or notice of coverage to increase the established withdrawal amount. MEG-Water would like the rule to be clear that the established withdrawal amount will not be less than the baseline amount.

d. Subsection (1)(h) requires the permittee to implement the applicable water conservation and water efficiency requirements of an approved conservation plan. Under NR 852, a water conservation plan is only required for entities seeking a new or increased withdrawal. Therefore, MEG-Water's understanding of this subsection (1)(h) is that there would be no applicable water conservation and water use efficiency requirements under this subsection for an existing entity that is not seeking a new or increased withdrawal.

e. Subsection (1)(i) provides that the permitted withdrawal shall not injure public rights in navigable waters. MEG-Water is concerned about including this condition in the permit because it would be unclear to a permit holder when and how this condition would be violated. Presumably a permit holder could be acting in accordance with the permit, and an allegation could still be made that the permit holder is acting in a way that injures public rights in navigable waters. This vagueness about what is a violation of a permit condition would likely lead to litigation over whether a permit holder's action rise to the level of a permit violation. MEG-Water believes the better approach is to have the DNR establish specific conditions on the withdrawal

to protect against injury to public rights in navigable water, and to retain the authority to revise these conditions if necessary. If that is done, subsection (1)(i) could be deleted.

f. Subsection (1)(j) requires a withdrawal by a public water supply system that serves a population of 10,000 or more to be consistent with an approved water supply service area plan. For existing withdrawers not seeking an increase, a plan is not required until 2025. It should be clear that this subsection does not require existing withdrawers to prepare a plan sooner - although they may choose to do so.

NR 860.21. General Water Use Permits.

a. Subsection (4) contains a reference to NR 860.52, which should be NR 860.42. MEG-Water also questions whether the hearing referred to in NR 860.52 is sufficient if an entity's coverage under a general permit is to be suspended or revoked. MEG-Water suggests that Wis. Stat. § 281.93, which provides that a permit holder may seek a contested case hearing to challenge a DNR decision under § 281.346, also be referred to in the rule.

b. Subsection (4) provides that a general permit issued by the DNR may be modified, suspended or revoked. The standards for modifying, suspending, or revoking a general permit should be set out. Wisconsin Stat. § 281.346(4s)(h) allows the DNR to suspend or revoke coverage under a general permit for cause, including obtaining coverage under the permit by misrepresentation or failure to disclose material facts or substantially violating the terms of the permit. MEG-Water suggests that these statutory standards for suspension or revocation be incorporated into the rule.

c. Subsection (5) provides that the general water use permit shall contain any additional conditions necessary to meet the requirements of ch. 281, Stats., or the Great Lakes - St. Lawrence River Basin Water Resources Compact. Are there any such requirements? If there are, those requirements should be identified. This broad reference is too vague here to give regulated entities reasonable notice of what may be included.

NR 860.22. Application and Review Process for Notice of Coverage.

a. Subsection (1)(b) should be clarified. Currently it is unclear whether DNR's notification is to occur by August 1, 2011, or the water withdrawer is to provide additional information by August 1, 2011.

b. Subsection (2) identifies the information that a water withdrawer is to submit to the DNR in order to obtain coverage under a general water use permit. The information identified seems to be more focused on existing withdrawals as opposed to new withdrawals. MEG-Water recommends this subsection be revised to also include new proposed withdrawals that are not yet constructed.

c. Based upon the information submitted under subsection (2), will the DNR be able to tell whether an applicant is entitled to a general permit - as opposed to needing an individual permit? How will the DNR know whether the applicant will be likely to withdraw at least 1,000,000 gallons per day for any 30 consecutive days?

d. Subsection (2)(b)-(d) refers to the dismissal of an application. The term "dismissal" seems to suggest that no action was taken. In order for an applicant to challenge DNR action (Wis. Stat. § 281.93), there needs to be a decision or determination by the DNR. MEG-Water suggests the term "dismiss" be replaced with another term that better reflects that a DNR decision has been made on the application. This same comment applies to other sections where the term "dismiss" is used.

e. Subsection (2)(d) refers to the DNR determining if a withdrawal qualifies for coverage under a general water use permit. What are the grounds for qualifying for coverage under a general water use permit? Is the volume criteria - more than 100,000 gpd for any 30 consecutive days, and less than 1,000,000 gallons for 30 days -- the only criteria, or are there other criteria that would apply? MEG-Water would like this subsection to be more specific on the criteria to be applied.

NR 860.23. Notice of Coverage Decision.

a. After automatic coverage under a general permit ends, how is subsequent coverage handled? Subsection (1) begins with the phrase that the "department shall issue notice of coverage, other than an automatic notice of coverage, only when all of the following have been completed." Does subsequent coverage have to following the requirements of subsection (1), or is subsequent coverage treated as an automatic notice of coverage? If subsequent coverage is not treated as an automatic notice of coverage, and instead is subject to the same requirements as new withdrawals, MEG-Water believes this would be inconsistent with Wis. Stats. § 281.346(4s)(g).

MEG-Water suggests that subsection (1) be revised to state:

(1) The department shall issue notice of coverage under NR 860.22(2) only when all of the following have been completed:

b. Subsection (1)(c) refers to water quality standards. MEG-Water is unclear on how these provisions apply. The rule should provide more guidance on what water quality standards are applicable to this chapter.

c. Subsection (2) should indicate that the withdrawal amount for an automatically issued notice of coverage shall not be less than the baseline.

d. Subsection (4) appears to repeat some of what is in NR 860.21(4). This subsection (4), however, follows the language of Wis. Stat. § 281.346(4s)(h) more closely and MEG-Water would recommend that this section be retained. One suggested addition, however, is a reference to Wis. Stat. § 281.93, which provides that a permit holder may seek a contested case hearing to challenge a DNR decision under § 281.346.

NR 860.24. Modifications to the Withdrawal Amount - Notice of Coverage.

a. Subsection (3) provides that if the DNR determines that a requested modification does not qualify for continued coverage under a general permit, the DNR shall dismiss the request. What would be the grounds for determining a requested modification does not qualify for continued coverage under a general permit? Would the volume criteria -- 1,000,000 gallons for 30 days -- be the only criteria, or are there other criteria that would apply? MEG-Water would like this subsection to be more specific on the criteria to be applied.

NR 860.25. Redetermination of Coverage.

a. From a logistically point of view, how will the DNR handle having almost all general permits expiring at the same time?

b. In subsection (2), should a reference to the applicant withdrawing less than 1 mgd for 30 consecutive days be included here?

c. Subsection (3) provides that the owner applying for redetermination needs to qualify for coverage under the new general permit. What will the criteria be to qualify for coverage? Will these criteria be different than what was required under the prior general permit? Could the DNR determine that an owner who has been in compliance with a prior permit is no longer qualified to be covered under the new general permit?

d. A subsection should be added to this section to make it clear that the DNR will not reduce a permit holder's withdrawal amount in a subsequent permit - unless the permit holder requests such a reduction.

NR 860.30. Applicability.

a. Subsection (2) authorizes the DNR to require an entity located within a groundwater protection area or a groundwater management, who is otherwise eligible for a general permit, to obtain an individual permit. If an entity is initially covered by a general permit, can the DNR require that entity switch to an individual permit during the term of the general term - even if there has been no violation of the terms of the general permit?

NR 860.31. Application and Review Process for Individual Water Use Permits.

a. In subsection (1)(a), the phrase "all of the information in sub. (2)(a)," should be revised to state "the information required by sub. (2)(a)." It should be clear that an applicant does not need to submit all the information listed in sub. (2)(a) if certain provisions in sub. (2)(a) are inapplicable.

b. Subsection (1)(b) should be clarified. Currently it is unclear whether DNR's notification is to occur by August 1, 2011, or the water withdrawer is to provide additional information by August 1, 2011.

c. For subsection (1)(c), MEG-Water has the same comment as that provided for subsection (1)(a).

d. Subsection (2) identifies the information that a water withdrawer is to submit to the DNR in order to obtain coverage under an individual water use permit. The information identified seems to be more focused on existing withdrawals as opposed to new withdrawals. MEG-Water recommends this subsection be revised to also include new proposed withdrawals that are not yet constructed.

e. Subsection (2)(a)12 requires additional information for certain withdrawals. This subsection should be revised in several ways. First, it should be clear that this subsection only applies to new or expanded withdrawals, and not continuing withdrawals. Second, withdrawals covered by the state decision-making standard should be handled separately from withdrawals covered by the compact decision-making standard. The compact decision-making standard is more onerous and should only be applied to those withdrawals that trigger that standard. Third, the information required should be tied to the applicable decision-making standard. The information required from entities seeking a new or increased withdrawal covered by the state decision-making standard should only be required to provide the information needed to make a decision under Wis. Stats. § 281.346(5m). Similarly, the information required from entities seeking a new or increased withdrawal covered by the compact decision-making standard should be required to provide the information needed to make a decision under Wis. Stats. § 281.346(6). The two sections should not be handled as one.

For withdrawals covered by the state decision-making standard, the provisions of Wis. Stat. § 281.346(5m) apply. Subsection (2)(a)12.a. & e. are relevant to these state decision-making standards. The other provisions in subsection (2)(a)12 do not appear to be relevant to the state decision-making standard.

In Wis. Stat. § 281.346(5m)(e), the state decision-making standard requires compliance with one of four criteria listed in the statute. One of the listed criteria is the receipt of an approval to install a new well under Wis. Stat. § 281.34. Another listed criteria is receipt of an approval to install a new water intake under Wis. Stat. § 30.12. Since the receipt of these approvals or permits is specifically required under NR 860.31(2)9, there is no need to require separate documentation on the receipt of these approvals for purposes of subsection (2)(a)(12). Furthermore, since receipt of these approvals will satisfy the requirement of Wis. Stat. § 281.346(5m)(e), there is no need for subsection (2)(a)(12) to reference the other two criteria in Wis. Stat. § 281.346(5m) -- one of which is the "no significant adverse environmental impacts" criteria.

For withdrawals covered by the compact decision-making standard, the provisions of Wis. Stat. § 281.346(6) apply. The provisions currently set out in Subsection (2)(a)12 generally appear to be relevant to these compact decision-making standards. MEG-Water is concerned, however, with the provision in Subsection (2)(a)12.c. which provides that the department may require modeling to document the anticipated hydrologic impacts of the proposed withdrawal. A model would likely cover a relatively large area with many withdrawals. One applicant should not be required to fund a hydrologic model which has regional benefits and which would cover many other withdrawals.

Taking all these comments together, MEG-Water recommends that subsection (2)(a)12 be revised as follows:

12. For new or expanded withdrawals that require compliance with the state decision-making standard under s. 281.346(5m), Stats., the following information is required:

- a. Documentation that the proposed withdrawal amount is needed to meet the applicant's projected needs.
- b. Documentation of compliance with applicable conservation provisions required by ch. NR 852.
- c. An alternatives analysis comparing other potential water sources for cost-effectiveness and environmental effects.

13. For new or expanded withdrawals that require compliance with the compact decision-making standard under s. 281.346(6), Stats., the following information is required:

- a. The information submitted under subd.12.
- b. A description of the baseline conditions including hydrologic flow, water quality, and habitat.
- c. An assessment of the potential impacts of the withdrawal on the waters of the state and water dependent natural resources including wetlands.
- d. An assessment of the impacts of the withdrawal on economic development, social development, and environmental protection taking into consideration other existing and planned withdrawals from the same source.
- e. Documentation of compliance with all applicable local, state, and federal laws, and interstate and international agreements, including the Boundary Waters Treaty of 1909.
- f. An analysis of the efficiency of the proposed water use, and if there is an expected increase in water loss, an analysis of the efficiency of the use of existing water supplies.
- g. The supply potential of the water source including quality, quantity, and reliability taking into consideration interconnected water sources and water dependent natural resources.
- h. A description of mitigation measures that will be implemented to prevent or eliminate significant impacts.

f. For subsection (2)(b), MEG-Water suggests the first sentence be revised to read as stated below. This revision is suggested in order to avoid the implication that the DNR is to determine whether the state decision-making standard, or compact decision-making standard is met at this stage.

(b) If the application does not include the information required by par. (a), it may be deemed incomplete.

g. Subsection (2)(c) refers to the dismissal of an application. For the reasons discussed previously, MEG-Water suggests the terms "dismiss" be replaced with another term which better reflects that the DNR has taken action on the application.

h. Subsection (2)(f) refers to the DNR determining if a withdrawal meets the standards of an individual permit. Are the applicable standards the state decision-making standards, the compact decision-making standards, or compliance with an approved water supply plan? MEG-Water would like it to be clear what the applicable standards are at this stage.

NR 860.32. Individual Water Use Permit Decisions.

a. After an automatically issued individual permit expires, how is subsequent reissuance handled? Subsection (1) begins with the phrase that the "department shall issue an individual water use permit, other than an automatic issuance of an individual water use permit under NR 860.31(1), only when all of the following have been completed." Does subsequent issuance have to follow the requirements of subsection (1), or is subsequent reissuance treated as an automatic issuance of a permit? If subsequent issuance is not treated as an automatic issuance of a permit, and instead is subjected to the same requirements as a new withdrawal, MEG-Water believes this would be inconsistent with Wis. Stats. § 281.346(5)(j).

MEG-Water suggests that subsection (1) be revised to state:

(1) The department shall issue an individual water use permit under NR 860.31 only when all of the following have been completed:

b. In subsection (1)(a), the phrase "all of the information in s. NR 860.31(2)(a)" should be revised to state "the information required by s. NR 860.31(2)(a)." It should be clear that an applicant does not need to submit all the information listed in NR 860.31(2)(a) if certain provisions in sub. (2)(a) are inapplicable. This change goes along with the immediately preceding change requested by MEG-Water.

c. Subsection (1)(d) refers to the applicant having "complied" with the state decision-making standard or the compact decision-making standard. MEG-Water believes it is more accurate to say that the department determines the applicant's proposed withdrawal meets the state decision-making standard or compact decision-making standard, if applicable.

d. Subsection (2) provides that the individual water use permit shall contain any additional conditions "necessary" to meet the requirements of ch. 281, Stats., the Great Lakes - St. Lawrence River Basin Water Resources Compact, and the state or compact decision-making standard. This subsection should be clarified. First, what are the requirements of ch. 281, Stats., and the Compact that are to be included in the permit? Those requirements should be identified either specifically or by cross-reference in this rule. Second, the rule should be revised to clarify those conditions necessary to meet the state or compact decision-making standards will only be included in permits for permittees subject to those standards.

e. Subsection (3) should indicate that the withdrawal amount for an automatically issued individual water use permit shall not be less than the baseline.

f. Subsection (4) refers to the DNR modifying an individual permit to ensure compliance with the state or compact decision-making standard. MEG-Water is unclear on how this subsection would work. It was our understanding that the DNR would make a determination on whether a proposed withdrawal subject to the state or compact decision-making standards met those standards, and then would include permit conditions to ensure those standards are met. MEG-Water is concerned that this subsection (4) suggests that the DNR could revise those permit conditions after the permit was issued. This would be difficult and unfair to a withdrawer who invested the capital in the withdrawal facilities, and was operating in compliance with the permit based upon the DNR's determination that the proposal and the permit conditions would fulfill the decision-making standards.

g. In subsection (4), MEG-Water also believes it would be appropriate to refer to a contested case hearing under Wis. Stat. § 281.93. The type of hearing referred to in s. NR 860.42 does not seem sufficient for a situation where a permit may be modified.

h. In subsection (5), MEG-Water suggests that a reference to Wis. Stat. § 281.93, be added. This statute provides that a permit holder may seek a contested case hearing to challenge a DNR decision under § 281.346.

NR 860.33. Modification to the Withdrawal Amount - Individual Water Use Permits.

a. In subsection (3), MEG-Water recommends the language be revised to be more specific with regard to the standards for issuance of an individual permit. MEG-Water suggests language similar to subsection (2) be used:

If the department determines that the requested modification does not meet the requirements of s. NR 860.31(2), the department shall deny the application in writing and state the reasons for the denial.

NR 860.34. Individual Water Use Permit Reissuance.

a. How will permit reissuance be handled when almost all individual permits will be expiring 10 years from December 8, 2011?

b. In subsection (3), should the reference be to s. 281.346(5)(j) instead of (5)(g)?

NR 860.40. Applicability (Public Participation Requirements).

a. Regarding subsection (1)(a), does the public participation requirement apply to permit reissuances where no change in the withdrawal amount is requested? MEG-Water's position is that the public participation requirements should not apply where there is no change in the withdrawal amount, provided the withdrawer has complied with the terms of the prior permit. If this is not result, there will be a large number of public notices issued when the first round of individual permits expire in ten years.

b. It is assumed that subsection (1)(a) is intended to cover requests for modifications that will trigger the state decision-making standard or compact decision-making standard. MEG-Water recommends that this be made more explicit in this section.

c. For subsection (1)(b), how does the public participation requirement apply to general water use permits? Is the intent for the DNR to develop a "form" general permit, and then cover entities under that form permit? Will the public participation requirements only apply to the development of the form permit, and not to the issuance of the general permit to specific entities -- or will the public participation requirements apply to the actual issuance of the general permit to specific entities? This should be clarified.

d. For subsection (2), is the development of a form general permit a DNR "decision"? It does not appear that this would be a decision that would trigger an entity's right to challenge a DNR action.

NR 860.41. Public Notice and Comment.

a. Subsection (1) provides that the DNR will draft and issue a public notice regarding each "permit application" under s. NR 860.40(1). Based upon this language, it appears that each application for coverage under a general permit will go through this public notice process, is that correct?

Subsection (1) also provides that "For general permits, the department shall issue a public notice when a draft general permit has been completed." What is the draft general permit referred to? Is this the "form" permit, or the general permit to be issued to a specific user? If this applies to a "form" general permit, how does this fit with the comment in the immediately preceding paragraph?

b. Subsection (2)(a) requires the public notice to be published in the counties "impacted by" the activity. It is unclear what "impacted" means. MEG-Water suggests this be replaced with a more definite description of the counties in which the notice must be published. MEG-Water suggests the following:

Be published by the applicant as a class 1 notice under ch. 985, Stats., in all counties within which water from the proposed new or expanded withdrawal will be used, and in all counties within five (5) miles of the location of the proposed new or expanded withdrawal.

c. Subsection (2)(b) and (c) should be revised to make it clear when the department is responsible for providing notice, and when the applicant is responsible for providing notice. MEG-Water suggests the following:

(b) Be delivered by the department to any person, group, local governmental unit, or state agency upon request to the department. Be delivered by the applicant to any person, group, local governmental unit, or state agency upon request to the applicant. The applicant shall provide proof of delivery in the form of an affidavit or documentation from the delivery method or person.

(c) Be delivered by the department to persons or groups on a formal department water use permit application mailing list.

d. Subsection (3)(c) provides that for general permits, the public notice is to include a description of the types of withdrawals and the waters of the state or areas of the state covered by the general permit. This seems to indicate the notice is for a permit "form," and not related to an application filed for coverage by the general permit. This does not seem consistent with subsection (1) which refers to the department drafting and issuing a notice regarding "each permit application".

NR 860.42. Public Hearings.

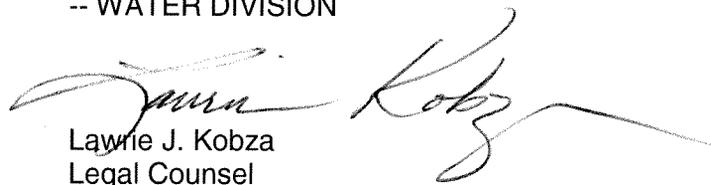
a. Subsection (3) provides that the DNR shall schedule a public hearing if the hearing request complies with sub. (2) and the DNR determines that there is a significant public interest in holding a hearing. MEG-Water's position is that for a permit renewal, there is no significant public interest in holding a hearing if no change in the withdrawal amount is requested, and the withdrawer is in compliance with the terms of the prior permit.

b. Subsections (9)(e) and (g) appear to be duplicative.

MEG - Water appreciates the work the Department has put into these water use permitting rules, and this opportunity to submit these comments on the proposed rules. If the Department would like to discuss these comments further, we would be happy to do so.

Thank you for your consideration.

MUNICIPAL ENVIRONMENTAL GROUP
-- WATER DIVISION


Lawrie J. Kobza
Legal Counsel

cc: MEG-Water Members