UNITED STATES ENVIRONMENTAL PROTECTION AGENCY
REGION 5
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CHICAGO, IL 60604-3590

SEP 0 1 2016

REPLY TO THE ATTENTION OF

WN-16J

MEMORANDUM

SUBJECT: Wisconsin Legal Authority Review - Review and Recommendation of Resolution for Issue 72

FROM: Kevin Pierard, Chief
NPDES Permits Branch

TO: File

Issue 72 (Mixing Zone Language)

In EPA's July 11, 2011 letter to the Wisconsin Department of Natural Resources (WDNR), Issue 72 stated the following:

> When calculating effluent limitations, Wis. Admin. Code NR §§ 106.06(4)(c)(5), (8), and (10) mandate that the State allow the discharge to be diluted with a defined quantity of the receiving water. These provisions appear to allow continued violations of water quality standards when the receiving waters are impaired for a pollutant that is present in a discharge. In addition, it is unclear whether the dilution mandate is subject to, and constrained by, the mixing zone provisions in Wis. Admin. Code NR § 102.05(3). In its response to this letter, Wisconsin needs to explain how it will address the deficiency noted in this comment, either through corrective rulemaking or in a written explanation from the State's Attorney General. A written opinion of the State Attorney General must include an identification of the authority under which the State will set effluent limitation which are derived from and comply with water quality standards, as required by § 301(b)(1)(C) of the CWA and 40 C.F.R. § 122.44(d), the provisions of §§ 106.06(4)(c), (5), and (8) notwithstanding.

Letter from Susan Hedman, Regional Administrator, U.S. EPA, to Cathy Stepp, Secretary, WDNR (July 11, 2011) (on file with U.S. EPA).

Analysis of Supplemental Information Provided by WDNR

The Clean Water Act (CWA) and its implementing regulations require that the permitting authority establish, among other things, any requirements in addition to or more stringent than promulgated effluent limitations guidelines or standards necessary to achieve water quality standards established under Section 303. CWA § 301(b)(1)(C), 40 C.F.R. § 122.44(d).

In its October 14, 2011 letter, WDNR responded to Issue 72 in Attachment C as follows:

> Section NR 106.06(4) (c) 6., 8., and 10. specify values of Qs [stream-flow above the discharge point (volume/time)] to be used in the mass balance equation in NR 106.06 (4) (b) 1. However, note that if the receiving stream is impaired (background concentration, Cs [background in-stream pollutant concentration], exceeds the criterion for a pollutant) applying the equation results in a negative (less than zero) dilutional capacity. That translates to the limitation be[ing] set equal to the criterion (if well water is the water supply source) or up to the background concentration (if 100% of the water supply is from intake water from the same water body). Also see NR 106.06(6).

Letter from Matt Moroney, Deputy Secretary, WDNR, to Susan Hedman, Regional Administrator, U.S. EPA (Oct. 14, 2011) (on file with U.S. EPA).

The State's response is adequate for the following reasons. The issue is that Wis. Admin. Code NR §§ 106.06(4)(c)(5), (8), and (10) appear to require the use of dilution to establish water quality-based effluent limits even in cases where the receiving water is in nonattainment. EPA notes that under Wis. Admin. Code NR § 106.06(4)(b), the allowed dilution is also restricted to that allowed under Wis. Admin. Code NR §§ 106.06(5) through (11) and 106.11. Wis. Admin. Code NR § 106.06(6)(a) requires effluent limits be set to the applicable water quality criterion (WQC) when background exceeds the WQC (EPA notes intake credits are allowed). Further, WDNR states that even if dilution is considered, the resulting waste load allocation would be less than zero, mandating the WQC be met at end-of-pipe.

Conclusion

Based on EPA's above review of the State's submission of supplemental information, EPA concludes that Issue 72 has been resolved as previously communicated in EPA's December 5, 2012 letter to WDNR. Letter from Tinka G. Hyde, Water Division Director, U.S. EPA, to Kenneth G. Johnson, Administrator Division of Water, WDNR (Dec. 5, 2012) (on file with U.S. EPA).