



UNITED STATES ENVIRONMENTAL PROTECTION AGENCY
REGION 5
77 WEST JACKSON BOULEVARD
CHICAGO, IL 60604-3590


JAN 18 2017

REPLY TO THE ATTENTION OF:

WN-15J

MEMORANDUM

SUBJECT: Wisconsin Legal Authority Review - Review and Recommendation of Resolution for Issue 6

FROM: Kevin Pierard, Chief 
NPDES Permits Branch

TO: File

Issue 6 (Thermal Effluent Limitations)

In EPA's July 11, 2011 letter to the Wisconsin Department of Natural Resources (WDNR), Issue 6 stated the following:

Wisconsin law at Wis. Stat. § 283.17(2) provides a 10-year period of protection from the requirement to meet more stringent effluent limitations when modifications have been made to a facility to meet thermal effluent limits established on the basis of water quality standards or Wis. Stat. § 283.17(1). This provision is similar to CWA § 316(c), 33 U.S.C. § 1326(c). However, the Wisconsin provision appears broader in scope than the federal equivalent in that it includes in this exemption facilities with alternate thermal limitations (established under Wis. Stat. § 283.17(1)), not just facilities with water quality-based effluent limitations (WQBELs).

The basis for a period of protection in the Clean Water Act is a modification to a facility to meet thermal limitations. A facility to which an alternative thermal limit has been granted generally is not similarly situated to a facility which has made modifications to meet thermal effluent limits established on the basis of water quality standards. Alternative thermal limitations are premised on a demonstration that the current discharge is protective of the balanced and indigenous population (BIP) of shellfish, fish, and wildlife. See CWA § 316(a), 33 U.S.C. § 1326(a), and 40 C.F.R. part 125, Subpart H. Pursuant to this statutory provision, alternate thermal limitations require ongoing assessment, including data collection, to be able to demonstrate that a BIP is being protected. If studies indicate that a BIP is not being protected, then modifications to the facility may be required to meet protective limitations. Thus, the period of protection in CWA § 316(c) is not applicable to facilities with alternative thermal limitations. Under Wis. Stat. § 283.17(2), however, a facility with such alternative thermal limitations could claim an entitlement to a period of protection. The State must amend Wis. Stat. § 283.17(2) to eliminate coverage of dischargers with alternate thermal limitations, or explain the basis on which the

State will limit the period of protection consistent with the scope of the federal provision as described.

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

Comparison between the Federal and State Provisions

Section 316(c) of the Clean Water Act provides:

Notwithstanding any other provision of this chapter, any point source of a discharge having a thermal component, the modification of which point source is commenced after October 18, 1972, and which, as modified, meets effluent limitations established under section 1311 of this title or, if more stringent, effluent limitations established under section 1313 of this title and which effluent limitations will assure protection and propagation of a balanced, indigenous population of shellfish, fish, and wildlife in or on the water into which the discharge is made, shall not be subject to any more stringent effluent limitation with respect to the thermal component of its discharge during a ten year period beginning on the date of completion of such modification or during the period of depreciation or amortization of such facility for the purpose of section 167 or 169 (or both) of title 26, whichever period ends first.

33 U.S.C. § 1326(c). To align the federal and state provisions, the State of Wisconsin amended Wis. Stats. § 283.17 to make point source dischargers with alternative thermal limits ineligible for the 10-year period of protection from the requirement to meet more stringent effluent limitations following a point source modification.¹ Amended Wis. Stats. § 283.17(2) is set forth below:

If a point source with a discharge having a thermal component is modified, the point source shall not be subject to any more stringent effluent limitation with respect to the thermal component of its discharge during either the 10-year period beginning on the date of completion of the modification or the period of depreciation or amortization of the facility for the purpose of section 167 or 169 of the internal revenue code, whichever ends first, if all of the following apply:

- (a) The modification of the point source commenced after October 18, 1972.
- (b) The point source, as modified, meets the most stringent effluent limitation established under s. 283.13.
- (c) The limitation under par. (b) assures protection and propagation of a balanced indigenous population of shellfish, fish, and wildlife in and on the water into which the discharge is made.

¹ Section 316(a) of the Clean Water Act provides potential relief from thermal water quality standards upon a successful demonstration by a point source discharger that thermal limits based on water quality standards are more stringent than necessary to protect and propagate fish, shellfish, and wildlife both in and on the body of water into which the discharge is made. Limits based on 316(a) are "alternative thermal limits."

Conclusion

Based on EPA's review of Wisconsin's statutes above, EPA concludes that Issue 6 is resolved.

Additional Notes

In 1986, 33 U.S.C. § 1326(c) was amended to substitute "title 26" for "Internal Revenue Code of 1954." The references for depreciation and amortization in the current version of title 26 are 167 and 169. It appears that the substitution made to generally refer to the Internal Revenue Code as "title 26" is to reference the most current version without having to change with each amendment. Since the sections referenced for depreciation and amortization are unchanged and the Clean Water Act still references the Internal Revenue Code of 1954 there is no need to update Wis. Stats. § 283.17(2).