




UNITED STATES ENVIRONMENTAL PROTECTION AGENCY
REGION 5
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JAN 18 2017

REPLY TO THE ATTENTION OF:
WN-15J

MEMORANDUM

SUBJECT: Wisconsin Legal Authority Review - Review and Recommendation of Resolution for Issue 27

FROM: Kevin Pierard, Chief 
NPDES Permits Branch

TO: File

Issue 27 (New Source Definition)

In EPA's July 11, 2011 letter to the Wisconsin Department of Natural Resources (WDNR), Issue 27 stated the following:

Wisconsin law at Wis. Stat. § 283.19(2) (b) defines the term "new source" to mean "any source, the construction of which commenced after the adoption of the standard of performance applicable to the category of sources of which it is a member." The definition appears in a section that requires WDNR to promulgate, by rule, standards of performance for classes and categories of point sources. Given its placement, the definition appears to have the effect of establishing that a source is a new source if construction commenced after WDNR promulgated applicable standards of performance by rule. The federal regulation at 40 C.F.R. § 122.2 defining "new source" defines such sources as those constructed after the adoption of standards of performance applicable to such source under CWA § 306, 33 U.S.C. § 1316. The State definition of new source, therefore, appears to provide an exemption from new source performance standards between the date of federal promulgation and the date of State adoption. In its response to this letter, Wisconsin must explain how it will address the deficiency noted in this comment, either through an amendment to the statute or corrective rulemaking (and associated milestones and timetables).

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

This memo documents EPA's review of action by WDNR to resolve Issue 27, which consists of statutory revisions amending Wis. Stat. § 283 (Pollution Discharge Elimination System). 2015 Wis. Laws 307, §8. WDNR informed EPA about this new rule promulgation on April 11, 2016.

Comparison between the Revised State and Federal Provisions

Table 1 identifies the State's statutory corrections and compares them with the federal analogues.

Table 1. Wisconsin Corrections to Wis. Stat. § 283 (Pollution Discharge Elimination System)

2015 Wisconsin Laws 307	Statutory Change	Effect of the Change	Federal Requirement
<p>Added at: § 8</p> <p>§ 9</p>	<p>283.01 Definitions (8) (a) "New source" means, <u>except as provided in par. (b), any point source the construction of which commenced after the effective date of applicable effluent limitations or standards a standard of performance under 33 USC 1316 that is applicable to the point source.</u></p> <p>283.01 (8) (b) <u>If the federal environmental protection agency proposes a standard of performance under 33 USC 1316 that is applicable to a point source and if the standard of performance takes effect within 120 days of the publication of that proposed standard of performance, "new source" means a point source the construction of which commenced after the date of publication of that proposed standard of performance</u></p> <p><i>Conclusion: This addition to the State's rules incorporates federal standards of performance into the State's "new source" definition. The statutory change therefore addresses Issue 27 by establishing that new source is keyed into the date a Federal standard is published even if that date is prior to the State's adoption of the standard of performance.</i></p>	<p>By adding a reference to the National standards of performance at 33 U.S.C. Sec. 1316, the revised statutory language clarifies that "standard of performance" refers not only to state standards but also to Federal standards enacted under CWA Sec. 306(a) and Effluent Guidelines and standards in 40 C.F.R. Chapter I, Subchapter N.</p> <p>This change adds language from the New Source definition in 40 C.F.R. § 122.2, that a proposed standard of performance must take effect within 120 days of publication of the proposed standard for the "new source" definition to apply.</p>	<p>The federal regulation at 40 C.F.R. § 122. 2 defines "new source" as one constructed after the adoption of standards of performance applicable to such source under CWA § 306, 33 U.S.C. § 1316.</p>
<p>§ 15</p>	<p>Section 283.19 Standards of performance (2)(b) is repealed. The term "new source" means any source, the construction of which commenced after the adoption of the standard of performance</p>	<p><i>The repealed language removes the "new source" definition from the section on state-promulgated standards of performance.</i></p>	

	applicable to the category of sources for which it is a member.		
	<i>Conclusion: Removal of the "new source" definition from this section removes an apparent limitation on the "new source" definition.</i>		
§ 16	<p>Section 283.19 Standards of Performance</p> <p>(5) After the effective date of any standard of performance promulgated by the department under this section, no owner or operator of any new source may operate such source in violation of any standard of performance applicable to such a source.</p>	<p><i>The deletion expands the scope of standard of performance to one promulgated by the State and by U.S. EPA.</i></p>	
	<i>Conclusion: The deletion clarifies that a standard of performance is any standard of performance, whether Federal or State.</i>		

The legislative changes adopted by Wisconsin satisfactorily address Issue 27. These changes remove the apparent exemption for sources from federal new source performance standards between the date of federal promulgation and date of state adoption of a standard of performance. The changes revise Wis. Stat. § 238.19 to remove a qualifying statement limiting applicable standards to those of the State. Finally, the changes expand the definition of "new source" in Wis. Stat. § 283.01 to include federal performance standards. These changes adequately resolve the issues identified by EPA in Issue 27.

Conclusion

Based on EPA's review of Wisconsin's provisions above, EPA concludes that Issue 27 is resolved.

Additional Notes

EPA requested clarification regarding the State's reference to "point sources" in Wis. Stat. § 283.01 which is different from the reference to "source" used in the federal definition found at 40 C.F.R. § 122.2. We noted that in 33 U.S.C. Sec. 1316 (a) (3), "source" refers to any building, structure, facility or installation from which there is or may be the discharge of pollutants. "Point source" as defined in 40 C.F.R. § 122.2 refers to any discernible, confined and discrete conveyance. . . from which pollutants may be discharged."

In response to these concerns, the State provided the following clarification, which provides in pertinent part:

. . . Wisconsin's definition of "new source" cross references the federal requirements in 33 USC 1316, and refers to EPA's promulgation of performance standards. Consequently, this definition must be read in harmony with the federal requirements and the applicability of the new source performance standards to sources. Specifically, section 283.01(8)(a) states

that a new source is a point source that is constructed after the effective date of the standard of performance under 33 USC 1316 that is applicable to a point source. The only way to determine if the new source performance standard is **applicable** to the point source **under 33 USC 1316** is to refer to the federal regulations. Paragraph (b) of Wis. Stat. s. 283.01 is also consistent with federal regulations and addresses the federal requirement that states if construction occurs after the publication date of a proposed federal standard and the standard takes effect within 120 days of the publication date, the source is a new source and is subject to the new source performance standards. The clear intent of the legislature is to be consistent with the federal regulations. Also see s. 283.001[.] [Emphasis in original.] Email from Robin Nyffeler to Quintin White, September 19, 2016, enclosing "Questions/Comments for WDNR Regarding Selected WI LAR Issues 09.06.2016."

While we believe that the State has adequately addressed Issue 27, we recommend that in future rulemaking, the State revise the language in Wis. Stat. §§ 283.01(8)(a)-(b) to clarify the relationship between "point source" and "new source."