



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


REPLY TO THE ATTENTION OF:

NOV 09 2017

WN-15J

MEMORANDUM

SUBJECT: Wisconsin Legal Authority Review - Review and Recommendation of Resolution for Issue 40

FROM: Candice Bauer, Chief 
NPDES Permits Branch Section 2

TO: File

Issue 40 (Chlorides, WQBEL)

In EPA's July 11, 2011 letter to the Wisconsin Department of Natural Resources (WDNR), Issue 40 stated the following:

Wis. Admin. Code NR § 106.88(1) provides, in part, that Wisconsin may include a WQBEL for chloride in a permit if such a limitation is deemed necessary in accordance with Wis. Admin. Code NR § 106.85. Use of the word "may" in this provision appears to make the establishment of a WQBEL discretionary. 40 C.F.R. § 122.44(d) mandates WQBELs whenever the permit issuing agency determines that a pollutant is present in a discharge at a level which will cause, have a reasonable potential to cause, or contribute to an excursion beyond a water quality criterion. Wisconsin must revise the rule to provide that a WQBEL shall be established when such a limit is deemed necessary.

The same rule allows Wisconsin to include a compliance schedule in a permit even when a discharger can meet a chloride WQBEL. 40 C.F.R. § 122.47 allows compliance schedules in permits when appropriate. It is not appropriate to include a compliance schedule in a permit when a discharger can meet an effluent limitation upon issuance of the permit. Therefore, the State provision must be modified to remove the possibility that a compliance schedule can be used when a discharger can meet an effluent limitation upon issuance of the permit, or the State should explain how its implementation of this provision is consistent with the described limitation set out in the federal program requirement.

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

Analysis

WDNR satisfactorily addressed Issue 40 through rulemaking. For background, the original language of concern in Wis. Admin. Code NR § 106.88(1) (2000), is provided below:

(1) If chloride water quality-based effluent limitations are deemed to be necessary in accordance with s. NR 106.85 and the permittee's representative effluent data indicate that the permittee can consistently meet the calculated limitation, the *department may include* the calculated limitations in the permit with an appropriate compliance schedule. . .

Emphasis added. EPA raised two points of concern. First, as outlined in the issue statement, the inclusion of necessary water quality-based effluent limits is not discretionary. Therefore, when Wisconsin's regulation provides that the department may include (see italicized language above) necessary chloride water quality-based limitations, it is not consistent with the federal regulations. Second, according to federal regulations, if a permittee can meet a limitation it would not be appropriate to grant a compliance schedule that delays implementation of the limitation. However, the language of Wis. Admin. Code NR § 106.88(1) (2000)—see underlined language above—provides for such compliance schedules when permittees can meet limitations.

To address both points raised in Issue 40, WDNR repealed and recreated Wis. Admin. Code NR § 106.88(1) (2016) to read:

(1) CHLORIDE LIMITATIONS IN PERMITS. If chloride water quality-based effluent limitations are deemed to be necessary under s. NR 106.85, the *department shall* use all of the following procedures to include the calculated limitations in the permit with an appropriate compliance schedule as necessary and appropriate:

- (a) Effluent limitations based on an acute criterion shall be expressed in permits as daily maximum limitations, and effluent limitations based on a chronic criterion shall be expressed in permits as weekly average limitations.
- (b) Effluent Limitations shall be expressed in a permit consistent with the protocols in s. NR 106.07 (3) to (5).
- (c) Mass limitations calculated under s. NR 106.07 (2) and (9) shall be included in the permit in addition to concentration based effluent limitations whenever water quality-based effluent limitations are determined to be necessary.
- (d) A compliance schedule for a water quality-based effluent for chloride may be granted in a permit if necessary and appropriate and shall be consistent with the requirements under s. NR 106.117.

Emphasis added. To address EPA's first point, concerning the authority to include limits, WDNR makes the inclusion of necessary chloride water quality-based effluent limitations mandatory by utilization of "shall" rather than "may" language (see italicized language above). To address EPA's second point, concerning compliance schedules, the recreated regulation eliminates the language referring to

permittees meeting limits and only allows compliance schedules when necessary and appropriate (see underlined language above). Additionally, WDNR added compliance schedule language in Wis. Admin. Code NR § 106.88(d) that is consistent with the federal regulations. Overall, WDNR's recreation of Wis. Admin. Code NR § 106.88 satisfactorily addresses both of EPA's concerns with Issue 40 while not raising any new challenges.

Rule Package 4, Public Notice, Hearing, and Comment

WDNR published a public hearing notice on proposed revisions to Wis. Admin. Code chapters NR 106, 205, and 212 on November 16, 2015 in the Wisconsin Administrative Register. 719A3 Wis. Admin. Register CR15-85 (November 16, 2015). The public comment period was open from November 17 through December 18, 2015, and a public hearing was held in Madison, Wisconsin on December 7, 2015. Wis. Nat. Res. Bd., Agenda Item No. 3.A.3 at 5, Jan. 4 2016, Correspondence/Memorandum, Attachment to Order WT-11-12. At the December 7, 2015 public hearing, two members of the public attended, one providing verbal testimony. *Id.* Additionally, during the comment period, written comments were received from the Wisconsin Legislative Council Rules Clearing House, EPA, Marshfield Wastewater Utility, Municipal Environmental Group – Wastewater Division, and Wisconsin Manufacturers and Commerce. Wis. Nat. Res. Bd., Agenda Item No. 3.A.3 at 1, Jan. 4 2016, Response to Comments on Rule Package WT-11-12 [Rule Package 4], Attachment to Order WT-14-12. WDNR responded to the written comments in a written response summary, which adequately explained the reasons why certain rule changes were made in response to comments received and why other comments did not warrant changes. *Id.*

Conclusion

Based on EPA's review of Wisconsin's provisions above, EPA concludes that Issue 40 is resolved.