



UNITED STATES ENVIRONMENTAL PROTECTION AGENCY

REGION 5

77 WEST JACKSON BOULEVARD

CHICAGO, IL 60604-3590


NOV 09 2017

REPLY TO THE ATTENTION OF:

WN-15J

MEMORANDUM

SUBJECT: Wisconsin Legal Authority Review - Review and Recommendation of Resolution for Issue 42

FROM: Candice Bauer, Chief 
NPDES Permits Branch Section 2

TO: File

Issue 42 (Chlorides, WET)

In EPA's July 11, 2011 letter to the Wisconsin Department of Natural Resources (WDNR), Issue 42 stated the following:

The Wisconsin rules at Wis. Admin. Code NR §§ 106.89(2) and (3), provide that where WQBELs for chloride are deemed necessary pursuant to Wis. Admin. Code NR § 106.87(1), whole effluent toxicity limitations (WET) may be held in abeyance during a source reduction period if chloride exceeds a threshold of 2,500 mg/L, or if the effluent concentration is less than 2,500 mg/L but exceeds the calculated acute WQBEL, where chloride is the sole source of acute toxicity. 40 C.F.R. § 122.44(d)(1)(v) provides, in part, that limitations on WET are not necessary when the permit-issuing agency demonstrates in the fact sheet or statement of basis for the permit, using the procedures in 40 C.F.R. § 122.44(d)(1)(ii), that chemical-specific limitations are sufficient to attain and maintain the applicable numeric and narrative water quality standards. During discussions between EPA and WDNR, Wisconsin explained that it implements Wis. Admin. Code NR §§ 106.89(2) and (3) in accordance with 40 C.F.R. § 122.44(d)(1)(v) with respect to permits that contain a chemical-specific WQBEL for chloride. Please confirm that this is the State's approach. If corrective rulemaking is required to address a deficiency in the rule, the State must explain in its response to this letter what timetable the State will follow to address the deficiency.

EPA's review suggests that Wis. Admin. Code NR §§ 106.89(2) and (3) do not conform to the CWA § 301(b)(1)(C) and 40 C.F.R. § 122.44(d) (requiring a WQBEL when a discharge will cause, have a reasonable potential to cause, or contribute to an excursion beyond an applicable water quality criterion expressed in terms of toxicity) when Wisconsin holds a WET limit in abeyance because chloride exceeds a threshold but the permit does not contain a chemical-specific WQBEL for chloride. Another interpretation would be that the State could implement "held in abeyance" such that the permit includes the WET limit but compliance with the limit is not

required until the end of a compliance schedule. Therefore, in response to this letter, please explain how Wisconsin implements Wis. Admin. Code NR §§ 106.89(2) and (3) when chloride exceeds one or more of the specified thresholds, and provide the State's explanation of how these provisions are consistent with the federal requirement, or provide the State's plan to correct these provisions to make them consistent with the federal requirement.

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

Prior to the August 2016 revision of Wis. Admin. Code NR § 106.89, Wisconsin did not require WET limits or chloride limits in NPDES permits when the effluent chloride concentrations exceeded certain threshold levels. Wisconsin provided in Wis. Admin. Code NR § 106.89(2) that WET limits could not be attained if the effluent quality exceeded those thresholds. In such circumstances, however, 40 C.F.R. § 122.44(d)(1)(v) would require either WET limits or chloride limits to be included in NPDES permits.

In August 2016, Wisconsin repealed and recreated Wis. Admin. Code NR § 106.89 to address this issue, as follows:

Alternative whole effluent toxicity monitoring and limitations for dischargers of chloride.

(1) GENERAL. In addition to interim, target, and calculated water quality-based effluent limitations and target values for chloride, the department may establish whole effluent toxicity testing requirements and limitations under ss. NR 106.08 and 106.09.

(2) FINDINGS. The department finds all of the following:

- (a) Acute whole effluent toxicity limitations cannot be attained if the effluent concentration of chloride exceeds 2,500 mg/L.
- (b) Chronic whole effluent toxicity limitations cannot be attained if the effluent concentration of chloride exceeds 2 times the calculated chronic water quality-based effluent limitation.
- (c) If chloride is the sole source of acute or chronic whole effluent toxicity it is appropriate that chloride limitations be used instead of WET limitations to attain and maintain narrative criteria in ss. NR 102.04 (1) (d) and 102.04 (4) (d).

(3) CHLORIDE LIMITS IN LIEU OF ACUTE WET LIMITS. Chloride limitations shall be included in the permit in lieu of acute whole effluent toxicity testing requirements and acute whole effluent toxicity limitations until source reduction actions are completed if any of the following apply:

- (a) The permittee can demonstrate to the satisfaction of the department that the effluent concentration of chloride exceeds 2,500 mg/L.

(b) The permittee can demonstrate to the satisfaction of the department that the effluent concentration of chloride is less than 2,500 mg/L, but in excess of the calculated acute water quality based effluent limitation, and additional data are submitted that demonstrate that chloride is the sole source of acute toxicity.

(4) CHLORIDE LIMITS IN LIEU OF CHRONIC WET LIMITS. Chloride limitations shall be included in the permit in lieu of chronic whole effluent toxicity testing requirements and chronic whole effluent toxicity limitations until source reduction actions are completed if either of the following applies:

(a) The permittee can demonstrate to the satisfaction of the department that the effluent concentration of chloride exceeds 2 times the calculated chronic water quality-based effluent limitation.

(b) The permittee can demonstrate to the satisfaction of the department that the effluent concentration of chloride is less than 2 times the calculated chronic water quality-based effluent limitation, but in excess of the calculated chronic water quality-based effluent limitation, and additional data are submitted which demonstrate that chloride is the sole source of chronic toxicity.

(5) DECISION DOCUMENTATION. The department shall specify the decision to include chloride limitations instead of whole effluent toxicity limitations in the permit fact sheet.

(6) REEVALUATION. The department shall reevaluate the need for whole effluent toxicity and chloride monitoring or limitations upon permit reissuance.

As shown above, Wisconsin set forth chloride thresholds that would trigger not including WET limits in WPDES permits. More importantly, Wisconsin also amended Wis. Admin. Code NR § 106.89 to specifically *require* the inclusion of chloride limits in WPDES permits if chloride is the only toxicant contributing to toxicity, and the applicable chloride threshold contained in this rule is exceeded.

If chloride limits are included in WPDES permits and achieve lowering effluent chloride concentrations to below the thresholds set forth in Wis. Admin. Code NR § 106.89, the amended rule allows the removal the chloride limits. Email from Adrian Stocks, WDNR, to Candice Bauer, EPA (August 9, 2017). Additionally, State WET guidance directs WDNR staff to evaluate the need to re-establish WET monitoring or to develop effluent limits for WET in order to assure that all toxicity has been eliminated. Chapter 2.10 ("Chlorides and WET Testing") of the Wisconsin WET Guidance Document.

Given WDNR's August 2016 amendment of Wis. Admin. Code NR § 106.89, the rule now conforms with the federal provisions at CWA § 301(b)(1)(C) and 40 C.F.R. § 122.44(d) regarding WET limitations.

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 42 is resolved.