



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 71

**FROM:** Candice Bauer, Chief *Candice Bauer*  
NPDES Permits Branch Section 2

**TO:** File

**Issue 71 (BCC Mixing Zone Phase Out)**

In EPA's July 11, 2011 letter to the Wisconsin Department of Natural Resources (WDNR), Issue 71 stated the following:

Wis. Admin. Code NR § 106.06(2) contains a note expressing the State's intent to develop a rule to phase-out mixing zones for existing dischargers of bioaccumulative chemicals of concern (BCC). Wisconsin must establish such a rule for discharges within the Great Lakes basin. Under 40 C.F.R. Part 132, such mixing zones for Great Lakes dischargers are being phased out beginning in November 2010. In its response to this letter, Wisconsin needs to provide a plan, with a schedule and milestones, for revising the rule to phase out mixing zones for BCCs.

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**

WDNR repealed Wis. Admin. Code NR §§ 106.06(2)(a), (b) and (Note) and added Wis. Admin. Code NR §§ 106.06(2)(am), (bg), (br) and (Note) to address Issue 71. The corresponding federal regulations are found at 40 C.F.R. Part 132, more specifically Appendix F, Procedure 3.C – Mixing Zones for Bioaccumulative Chemicals of Concern (BCCs).

40 C.F.R. Part 132, Appendix F, Procedure 3, Section C(2)(2) includes in the federal definition of new discharges "a new discharge from an existing Great Lakes discharger. . ." Although this category is not explicitly included in the State's regulations, WDNR's definition of "new discharge" set forth at Wis. Admin. Code NR § 106.06(2)(am)(1) includes "any discharge from a point source. . ." which is broad

enough to include new discharges from existing Great Lakes dischargers as identified in the federal regulations.

40 C.F.R. Part 132, Appendix F, Procedure 3, Section C(2)(3) includes in the federal definition of new discharges “an expanded discharge from an existing Great Lakes discharger. . .” and provides a number of exceptions that are not included in the State definition at Wis. Admin. Code NR § 106.06(2)(am)(2). Therefore, the State’s definition for expanded discharges from existing dischargers appears to be more restrictive than the federal definition.

40 C.F.R. Part 132, Appendix F, Procedure 3, Section C(5) allows mixing zones for existing discharges of BCCs to the Great Lakes System beyond November 15, 2010, if it can be demonstrated on a case-by-case basis that failure to grant a mixing zone would preclude water conservation measures that would lead to overall load reductions in BCCs so long as the mixing zones are consistent with 40 C.F.R. Part 132, Appendix F, Procedure 3, Sections D and E (setting conditions to derive total maximum daily loads (TMDLs) for the Open Waters of the Great Lakes and for tributaries and connecting channels of the Great Lakes System). Wis. Admin. Code NR § 106.06(2)(br)(1) also provides a water conservation exception but does not include the same TMDLs conditions. WDNR revised Wis. Admin. Code NR 212 to address this issue. Specifically, Wis. Admin. Code NR § 212.76(3) states that “[water quality based effluent limitations or] WQBELs derived from TMDL wasteload allocations for BCCs shall be consistent with and no less stringent than the mixing zone provisions under s. NR 106.06(2)”, which addresses the difference between the federal and state regulations.

40 C.F.R. Part 132, Appendix F, Procedure 3, Sections C(6)(b)(iii) and (iv) require that mixing zones granted after November 15, 2010 be consistent with applicable TMDLs, assessment and remediation plans or such other strategy authorized under 40 C.F.R. Part 132, Appendix F, Procedure 3, Section A. The corresponding State regulations at Wis. Admin. Code NR §§ 106.06(2)(br)(3)(b) and (e) provide that mixing zones be consistent with applicable TMDLs but do not include a requirement for these mixing zones to be consistent with assessment and remediation plans or other strategies. However, this omission does not make the State’s regulations less stringent as these assessment and remediation plans and other strategies serve as other means to address impairments in water bodies and are intended to achieve results comparable to those obtained with implementation of TMDLs.

### **Rule Package 3, Public Notice, Hearing, and Comment**

WDNR published a public hearing notice on proposed revisions to Wis. Admin. Code chapter NR 106 on November 9, 2015 in the Wisconsin Administrative Register. 719A2 Wis. Admin. Register CR15-084 (November 9, 2015). The public comment period was open from November 10 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.2 at 3, Dec. 15, 2015, Correspondence/Memorandum, Attachment to Order WT-31-10. At the December 7, 2015 public hearing, two members of the public attended but did not provide comments. Id. During the public comment period, written comments were received from the Wisconsin Legislative Council Rules Clearing House, Wisconsin Manufacturers Commerce, and EPA. Wis.

Nat. Res. Bd., Agenda Item No. 3.A.2 at 1, Dec. 15, 2015, Response to Comments on Rule Package 3, Attachment to Order WT-31-10. 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 71 is resolved.

## Additional Comments

40 C.F.R. Part 132, Appendix F, Procedure 3, Section C(6)(a)(i) states: "The discharger is in compliance with and will continue to implement, for the BCC in question, all applicable requirements of Clean Water Act section 118, 301, 302, 303, 304, 306, 307, 401 and 402, including existing National Pollutant Discharge Elimination System (NPDES) water quality based effluent limitations." The State regulations do not contain similar language, but EPA considers this issue resolved based on WDNR's August 9, 2017 email to EPA that compares Wis. Admin. Code NR § 106.06(2)(br)2.a. and 40 C.F.R. Part 132, Appendix F, Procedure 3, Section C(6)(a)(i). Email from Adrian Stocks, WDNR, to Candice Bauer, EPA (August 9, 2017).

40 C.F.R. Part 132, Appendix F, Procedure 3, Section C(6)(c) states "For each draft NPDES permit that would allow a mixing zone for one or more BCCs after November 15, 2010, the fact sheet or statement of basis for the draft permit that is required to be made available through public notice under 40 C.F.R. § 124.6(e) shall: (i) Specify the mixing provision used in calculating the permit limits; and (ii) Identify each BCC for which a mixing zone is proposed." The State regulations at Wis. Admin. Code NR § 106.06(2)(br)3.g refer to "approved mixing zone" rather than "draft NPDES permit." In its August 9, 2017 email to EPA, WDNR clarified that approval of a mixing zone is defined in Wis. Admin. Code NR § 106.06(2)(br)3 and is also documented in the WQBEL memo, fact sheet and in the permit itself. Email from Adrian Stocks, WDNR, to Candice Bauer, EPA (August 9, 2017). Since the fact sheet and permit are available during public notice, the State rules are consistent with the federal regulations.