



UNITED STATES ENVIRONMENTAL PROTECTION AGENCY
REGION 5
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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 74

FROM: Candice Bauer, Chief 
NPDES Permits Branch Section 2

TO: File

Issue 74 (WET Testing)

In EPA's July 11, 2011 letter to the Wisconsin Department of Natural Resources (WDNR), Issue 74 stated the following:

Wis. Admin. Code NR §§ 106.08 and 106.09 mandate that the State include effluent limitations for whole effluent toxicity (WET) when it determines that such limits are necessary based on an evaluation of five or more samples. The rule includes a procedure for assessing effluent variability in this circumstance. The rule allows limitations for WET when fewer than five samples are available, but it does not include procedures that the State will use to assess variability in this circumstance. Wisconsin needs to revise the rule to mandate limitations when it determines, based on four or fewer samples, that a discharge will cause, have a reasonable potential to cause, or contribute to an excursion above a WET criterion. In addition, the State needs procedures for assessing effluent variability when four or fewer samples exist. See 40 C.F.R. § 122.44(d). If corrective rulemaking is required to address this deficiency, the State must explain in its response to this letter what timetable the State will follow to address this deficiency.

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

Analysis

Prior to the August 2016 revision of Wis. Admin. Code NR §§ 106.08 and 106.09, the State implemented reasonable potential determinations for whole effluent toxicity differently whether there were four or fewer results, or five or more results. If there were four or fewer results, the State employed a failure

rate in its calculations that did not consider effluent variability, which was inconsistent with 40 C.F.R. § 122.44(d)(1)(ii) that provides:

(ii) When determining whether a discharge causes, has the reasonable potential to cause, or contributes to an in-stream excursion above a narrative or numeric criteria within a State water quality standard, the permitting authority shall use procedures which account for existing controls on point and nonpoint sources of pollution, the variability of the pollutant or pollutant parameter in the effluent, the sensitivity of the species to toxicity testing (when evaluating whole effluent toxicity), and where appropriate, the dilution of the effluent in the receiving water.

Emphasis added. Wisconsin revised Wis. Admin. Code NR §§ 106.08 and 106.09 to require the use of effluent variability for determining reasonable potential on data sets as small as one result. Specifically, WDNR revised Wis. Admin. Code NR § 106.08(6)(c)(1) and (2) as follows:

(c) Reasonable potential multiplication factor. The department shall use the reasonable potential multiplication factor in par. (b) to convert the calculated effluent toxicity value to the estimated 95th percentile toxicity value. The department shall use all of the following methods to select a reasonable potential multiplication factor:

1. When there are less than 10 individual toxicity detects, the multiplication factor shall be taken from Table 4 and based on a coefficient of variation of 0.6.
2. When there are 10 or more individual toxicity detects, the multiplication factor shall be taken from Table 4 and based on coefficient of variation calculated as the standard deviation of the WET test endpoints, IC25, IC50, or LC50, divided by the arithmetic mean of the WET tests.

Emphasis added. As demonstrated, in cases where there are less than 10 results, the State employs a coefficient of variation (a measure of effluent variability) of 0.6 which is consistent with EPA guidance for small effluent data sets. See EPA's 1991 Technical Support Document for Water Quality-based Toxics Control, EPA/505/2-90-001. For effluent data sets with 10 or more results, Wis. Admin. Code NR §§ 106.08 and 106.09 are consistent with 40 C.F.R. § 122.44(d)(1)(ii).

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 74 is resolved.

Additional Notes

Pursuant to 40 C.F.R. § 132.5, EPA reviewed Wis. Admin. Code NR §§ 106.08 and 106.09 for consistency with 40 C.F.R. Part 132. On November 6, 2011, EPA found that Wis. Admin. Code NR §§ 106.08 and 106.09 were not consistent with 40 C.F.R. Part 132, appendix F, procedure 6.D, and over-promulgated those requirements (40 C.F.R. § 132.6(j)). As stated above, the State revised Wis. Admin. Code NR §§ 106.08 and 106.09 to address Issue 74 and to be consistent with 40 C.F.R. § 122.44(d)(1)(ii). In doing so, the State also made Wis. Admin. Code NR §§ 106.08 and 106.09 consistent with 40 C.F.R. Part 132, Appendix F, procedure 6.D.