




UNITED STATES ENVIRONMENTAL PROTECTION AGENCY
REGION 5
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CHICAGO, IL 60604-3590

DEC 21 2017

REPLY TO THE ATTENTION OF:
WN-15J

MEMORANDUM

SUBJECT: Wisconsin Legal Authority Review - Review and Recommendation of Resolution for Issue 10

FROM: Candice Bauer, Chief 
NPDES Permits Branch Section 2

TO: File

Issue 10 (Pollutants in Intake Water)

In EPA's July 11, 2011 letter to the Wisconsin Department of Natural Resources (WDNR), Issue 10 stated the following:

The federal rule at 40 C.F.R. § 132.6 identifies provisions of 40 C.F.R. part 132, Appendix F, which apply to the Great Lakes States, including Wisconsin. These specifically include: Procedure 3 (pertaining to total maximum daily loads (TMDL), wasteload allocations (WLA) in the absence of a TMDL, and preliminary WLAs for purposes of determining the need for [water quality based effluent limitations or] WQBELs); Procedure 5, paragraphs D and E (pertaining to consideration of intake pollutants in determining "reasonable potential" and establishing WQBELs); and Procedure 6, paragraph D (pertaining to whole effluent toxicity). In 2000, EPA disapproved the corresponding Wisconsin rules and promulgated 40 C.F.R. § 132.6 for Wisconsin (see 65 Federal Register 66511 (November 6, 2000)). Wisconsin must amend the State rules as required to cure the disapproval.

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

Issue 10 contained references to three procedures included in Appendix F: Procedures 3, 5, and 6. These procedures include provisions that fall within the purview of three different CWA programs: CWA Section 303(c), water quality standards; CWA Section 303(d), total maximum daily loads; and CWA Section 402, national pollutant discharge elimination system (NPDES). EPA, *Identification of Approved and Disapproved Elements of the Great Lakes Guidance Submission from the State of Wisconsin, and Final Rule*, 65 Fed. Reg. 66502 (November 6, 2000). For purposes of EPA's legal authority review of

Wisconsin's authorized NPDES program, we are focusing only on those provisions of EPA's 2000 partial disapproval that fall within the scope of the NPDES program (see Appendix 1 for the list of issues addressed in EPA's disapproval). These are:

- Wisconsin's provisions governing the consideration of intake pollutants in determining reasonable potential and establishing water quality based effluent limitations, which were set forth in Wis. Admin. Code NR §§ 106.06(6) and 106.10(1) (the latter is separately addressed in the memorandum resolving Issue 17, which was approved in EPA's November 1, 2017 letter), for which the federal analogues are covered in paragraphs D and E of Procedure 5, in Appendix F to 40 C.F.R. Part 132,

and

- Wisconsin's provisions governing the determination for whole effluent toxicity that were set forth at Wis. Admin. Code NR § 106.08(5) and that are separately addressed in the memorandum resolving Issue 74, which was approved in EPA's November 1, 2017 letter.

Analysis

Wis. Admin. Code NR § 106.06(6) addresses the regulation of pollutant discharges when a pollutant is present in the intake water used as the water supply for industrial and municipal dischargers. EPA's 2000 partial disapproval noted differences between the State's rule and federal requirements at 40 C.F.R. Part 132 Appendix F Procedures 5 which would allow the discharge of a waste stream at or above background levels, as well as the discharge of pollutants from the facility itself or from different bodies of water at levels greater than the applicable water quality criteria. This led to the concern, among others, that permits authorizing such discharges would not satisfy the federal requirements to meet effluent limitations to ensure that discharges from regulated sources would comply with water quality standards as required by 40 C.F.R. § 122.44(d)(1)(vii)(A). 65 *Fed. Reg.* 66502, 66507. In response, Wisconsin modified its rules to address the identified issues. Additional notes, based upon our review, are included below.

1. 40 C.F.R. Part 132, Appendix F, Procedure 5, Section D.2.e defines an intake pollutant as the amount of a pollutant that is present in waters of the United States at the time it is withdrawn from such waters by the discharger or other facility supplying the discharger with intake water. In an email to EPA, WDNR confirmed that "intake pollutant" is not defined in the State's regulations. Email from Adrian Stocks, WDNR, to Candice Bauer, EPA (August 9, 2017) (on file with U.S. EPA). WDNR further explained that it requires influent monitoring to establish intake pollutant concentrations. Characterizing the intake pollutants based on a specific monitoring point is consistent with the way "intake pollutant" is defined in the federal regulations.
2. Upon a finding under 40 C.F.R. Part 132, Appendix F, Procedure 5, Section D.3.b, the permitting authority is not required to include a WQBEL for the identified intake pollutant in the facility's permit as long as (i) the NPDES permit fact sheet or statement of basis includes a specific determination that there is no reasonable potential to cause or contribute to an excursion above a water quality criterion and references appropriate supporting documentation included in the

administrative record; (ii) the NPDES permit requires all influent, effluent, and ambient monitoring necessary to demonstrate that the conditions of Section D.3.b are maintained during the permit term; and (iii) the NPDES permit contains a reopener clause. 40 C.F.R. Part 132, Appendix F, Procedure 5, Section D.3.c. Although the State regulations at Chap. 106 do not include the same requirements, WDNR explained that the federal requirements are satisfied through the State's permit drafting procedures. Email from Adrian Stocks, WDNR, to Candice Bauer, EPA (August 9, 2017). WDNR stated that rationale for limits and monitoring would be provided in the WQBEL memo which is part of the fact sheet. WDNR also includes standard language in its permits authorizing the department to revoke and reissue a permit if new information regarding the discharge from a facility becomes available. Lastly, WDNR explained that state statutes provide WDNR with authority to modify a permit for cause. WDNR's procedures for establishing limits and its statutory authority to modify a permit for cause are consistent with the federal requirements.

3. 40 C.F.R. Part 132, Appendix F, Procedure 5, Section E.3.c provides that the concentration of the intake pollutant shall be determined at the point where the raw water supply is removed from the same body of water, except that it shall be the point where the water enters the water supplier's distribution system and where the water treatment system removes any of the identified pollutants from the raw water supply. The State regulations do not include a similar requirement, but WDNR explained that influent streams are characterized with specific monitoring points, which is consistent with the federal requirements. Email from Adrian Stocks, WDNR, to Candice Bauer, EPA (August 9, 2017).
4. We note that the State regulations refer to reasonable potential but do not specifically provide for how reasonable potential is determined. WDNR confirmed during a September 13, 2017 meeting that the reference to reasonable potential refers to their procedures at Wis. Admin. Code NR § 106.05, which is consistent with federal requirements.

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 10 is resolved.

Additional Note

Wis. Admin. Code NR § 106.06(6)(b)(4) includes the word "statically" which given the context of the paragraph appears to be a typo and should be revised to read "statistically."

Appendix 1

Table 1 below analyzes Wisconsin provisions that EPA disapproved as part of EPA's Water Quality Guidance for the Great Lakes System in 65 *Fed. Reg.* 66502 (November 6, 2000).

Table 1

Federal GLRI Requirement	Disapproved State Rule	Federal Program to Address Corrective Action
Acute and chronic aquatic life criteria for copper and nickel	Goes to Wis. Admin. Code NR § 105, Tables 2 and 6	CWA Section 303(c)
Chronic aquatic life criteria for endrin and selenium	Goes to Wis. Admin. Code NR § 105, Table 5	CWA Section 303(c)
Chronic aquatic life criterion for selenium	No equivalent state provision	CWA Section 303(c)
Provisions governing TMDLs in Procedure 3 in Appendix F to 40 C.F.R. Part 132	No detailed provisions governing development of TMDLs for pollutants that are subject to EPA's Water Quality Guidance for the Great Lakes System (the Guidance) (1995); Wisconsin had adopted Wis. Adm. Code NR § 212 for pollutants not subject to the Guidance ¹	CWA Section 303(d)
NPDES provisions governing consideration of intake pollutants in determining reasonable potential (RP) and establishing WQBELs in paragraph D and E of Procedure 5, in Appendix F to 40 C.F.R. Part 132	Goes to Wis. Adm. Code NR § 106.06(06). EPA stated the following when disapproving the rule: "Wisconsin's procedure. . . effectively allows any facility covered by its provision to discharge its entire waste stream at background levels (and potentially even higher in accordance with Wis. Adm. Code NR 106.06(d)), regardless of whether the pollutant originated from the same body of water, a different body of water, or the facility generated the pollutant itself. Indeed, Wisconsin's procedure would even allow the permit writer to not include	CWA Section 402, LAR Issue 10

¹ "EPA notes that this promulgation has no effect on the chemical-specific reasonable potential procedures at Wis. Adm. Code NR 106.05 and 106.06(1), (3)-(5), & (7)-(10) which EPA approves as being consistent with the reasonable potential procedures in paragraphs A through C and F of procedure 5 in appendix F to 40 CFR part 132. These State procedures, therefore, apply in the Great Lakes System in the State of Wisconsin for purposes of developing wasteload allocations in the absence of a TMDL and developing preliminary effluent limitations in making chemical-specific reasonable potential determinations." 65 *Fed. Reg.* 66502, 66505-66506 (Nov. 6, 2000).

	<p>effluent limitations at all. Because Wisconsin's procedure allows the permitting authority to adopt less stringent effluent limitations than would be allowed by the Guidance, and even allows the permitting authority to not include any effluent limitations in situations where the Guidance would require one, the State's procedure is inconsistent with the Guidance</p> <p>Wisconsin's approach allows facilities to discharge pollutants that were not previously in the waterbody (pollutants either generated by the facility itself or intake pollutants from a different body of water), and to do so at levels greater than the applicable water quality criteria. Since the receiving waterbody is already exceeding applicable water quality criteria, such discharges have the strong potential to exacerbate the water's non-compliance with standards, and permits authorizing such discharges would not meet the underlying requirement to establish effluent limitations that ensure water quality achieved by point sources derives from and complies with water quality standards. 40 CFR 122.44(d)(1)(vii)(A) This conclusion is not changed by the fact that Wisconsin's procedures provide for limitations to be set at levels below background based on practicability considerations, as provided in Wis. Adm. Code NR 106.06(6)(b) and (c)2. The CWA does not contain an exception to the requirement to meet water quality standards based on considerations of technical feasibility. To the contrary, the Act requires discharges to meet technology-based requirements and " <i>any more stringent</i> limitations, including those necessary to meet water quality standards." CWA section 301(b)(1)(C) (emphasis added)." 65 <i>Fed. Reg.</i> 66502, 66507 (Nov. 6, 2000).</p>	
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	<p>Goes to Wis. Admin. Code NR § 106.10(1). EPA stated the following when disapproving the rule:</p> <p>“EPA also finds Wisconsin's cooling-water exemption at Wis. Adm. Code NR 106.10(1) to be inconsistent with the intake pollutant procedures of the Guidance. That provision prohibits the NPDES permitting authority from imposing WQBELs on discharges of non-contact cooling waters, which do not contain additives. Even when additives are used, Wis. Adm. Code NR 106.10(1) categorically prohibits the permitting authority from imposing WQBELs for "compounds at a rate and quantity necessary to provide a safe drinking water supply, or the addition of substances in similar type and amount to those substances typically added to a public drinking water supply." Wisconsin's rules do not contain any of the limitations set forth in the Guidance at paragraph 5.3.b of appendix F discussed above, which ensure that all potential environmental effects are considered in regulating the discharge of intake pollutants.” 65 <i>Fed. Reg.</i> 66502, 66507 (Nov. 6, 2000).</p>	<p>CWA Section 402, LAR Issue 17</p>
<p>NPDES Provisions for determining RP for whole effluent toxicity in paragraph D of Procedure 6 in Appendix F to 40 C.F.R. Part 132</p>	<p>Goes to Wis. Admin. Code NR § 106.08(5)</p>	<p>CWA Section 402, LAR issue 74.</p>