



UNITED STATES ENVIRONMENTAL PROTECTION AGENCY

REGION 5
77 WEST JACKSON BOULEVARD
CHICAGO, IL 60604-3590


AUG 29 2018

REPLY TO THE ATTENTION OF

WN-15J

MEMORANDUM

SUBJECT: Wisconsin Legal Authority Review - Review and Recommendation of Resolution for Issue 46

FROM: Candice Bauer, Chief 
NPDES Permits Branch Section 2

TO: File

Issue 46 (Expedited Variance)

In EPA's July 11, 2011 letter to the Wisconsin Department of Natural Resources (WDNR), Issue 46 stated the following:

The federal regulation at 40 C.F.R. § 122.21(o) contains a provision for expedited variance procedures or time extensions for filing requests for variances. The Wisconsin rules do not contain this provision. Is this an instance where Wisconsin wishes to implement a more stringent authorized program, or is this an oversight? In its response to this letter, Wisconsin should explain that it implements a more stringent program or how it will address this comment, either through corrective rulemaking or by citing existing, specific authority in a written explanation from the State's Attorney General.

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

To address Issue 46, WDNR created Wis. Admin. Code NR § 200.21(2). Table 1, below, presents Wisconsin's regulation for expedited variances side-by-side with the federal regulation for expedited variances and time extensions.

Table 1: Wisconsin and Federal Variance Request Timing and Expedited Variance Procedures

Wisconsin Regulation	Federal Regulation
<p>Wis. Admin Code NR § 200.21(2):</p> <p>(2) EXPEDITED VARIANCE. As an alternative to sub. (1), a permittee may apply for a variance as part of the application for permit reissuance under s. 283.15 (2) (a), Stats. Any application for a variance under s. 283.15, Stats., shall comply with application requirements of s. NR 200.20. <u>The department may notify a permit applicant before the permit application for reissuance is submitted that the permittee may apply for a variance to the water quality based effluent limitations that are likely to be included in the final permit or may seek renewal of a variance that has already been granted. [Emphasis added.]</u></p> <p>Note: Submittal of a variance application with the application for permit reissuance is the preferred method for submittal.</p>	<p>40 C.F.R. § 122.21(o):</p> <p>Expedited variance procedures and time extensions.</p> <p>(1) Notwithstanding the time requirements in paragraphs (m) and (n) of this section, <u>the Director may notify a permit applicant before a draft permit is issued under §124.6 that the draft permit will likely contain limitations which are eligible for variances.</u> In the notice the Director may require the applicant as a condition of consideration of any potential variance request to submit a request explaining how the requirements of part 125 applicable to the variance have been met and may require its submission within a specified reasonable time after receipt of the notice. <u>The notice may be sent before the permit application has been submitted.</u> The draft or final permit may contain the alternative limitations which may become effective upon final grant of the variance. [Emphasis added.]</p> <p>(2) A discharger who cannot file a timely complete request required under paragraph (m)(2)(i)(B) or (m)(2)(ii) of this section may request an extension. The extension may be granted or denied at the discretion of the Director. Extensions shall be no more than 6 months in duration.</p>

As can be seen in the table—by comparing the underlined text—Wisconsin added the federal expedited variance language concerning the notification of permit applicants about potential variances prior to application submittal. 40 C.F.R. § 122.21(o)(1). Wisconsin did not adopt all the federal expedited variance language, which is not required because it is discretionary. Additionally, Wisconsin did not adopt the federal variance time extension language of 40 C.F.R. § 122.21(o)(2). This is acceptable because Wisconsin’s program is more stringent than the federal requirements when extensions of time to file variances are not provided. Overall, Wisconsin appropriately added regulations for the expedited submittal of variances, and maintains a more stringent program by not adopting regulations for time extensions of variance requests.

Rule Package 5, Public Notice, Hearing, and Comment

WDNR published a public hearing notice on proposed revisions to Wis. Admin. Code chapters NR 106, 200, 205, 207, 210, 220, 221, 225, 228, 231, 236, 239, 240, 245, 247, 250, 258, 261, 268, 269, 275, 276, 277, 280, 281, 284, 286, 290, 294, 295, and 296 on January 9, 2017 in the Wisconsin Administrative Register. 733A2 Wis. Admin. Reg. CR 17-002 (January 9, 2017). The public comment period was open through March 1, 2017, and public hearings were held in Green Bay, Wisconsin on February 6, 2017 and Madison, Wisconsin on February 7, 2017. Wis. Nat. Res. Bd., Agenda Item No. 2.A.1, July 10, 2017, Correspondence/Memorandum Attachment to Order WT-12-12. At the Green Bay hearing no one appeared in person. *Id.* Two members of the public attended the Madison hearing without providing oral comments. *Id.* Four entities, other than the Wisconsin Legislative Council Rules Clearing House, provided written comments: US EPA, Wisconsin Manufacturers & Commerce, WE Energies, and Midwest Environmental Advocates. Wis. Nat. Res. Bd., Agenda Item No. 2.A.1, July 10, 2017, Response to Comments on Rule Package 5, Attachment to Order WT-12-12. WDNR responded to the written comments in a written response summary, which adequately explained why certain rule changes were made in response to the comments received, and why other comments did not warrant changes. *Id.* After Wisconsin completed rulemaking, the revised regulations were published in the Wisconsin Administrative Register on April 30, 2018. 748B Wis. Admin. Reg. CR 17-002 (April 30, 2018).

Conclusion

Based on EPA's review of Wisconsin's provisions above, EPA concludes that Issue 46 is resolved.

Additional Notes

During rulemaking, independent of any legal authority review issue, Wisconsin modified its regulation for the timing of variance requests for water quality based effluent limitations. Table 2, below, compares Wisconsin's variance timing regulation that applies to all facilities with the federal variance timing regulations that are divided between non-POTW [publicly operated treatment works] and POTW facilities.

Table 2: Wisconsin and Federal Variance Request Timing Procedures

Wisconsin Regulation	Federal Regulation
Wis. Admin Code NR § 200.21: ¹	40 C.F.R. §§ 122.21(m)(5) and (n)(3):
Time deadline for filing variance requests.	40 C.F.R. § 122.21(m):
(1) APPLICATIONS. A permittee who wishes to apply for a variance <u>from a water quality based effluent limitation</u> shall submit an application for	Variance requests by non-POTWs. A discharger which is not a publicly owned treatment works (POTW) may request a variance from otherwise applicable effluent limitations under any of the

¹ Wis. Admin. Code NR § 200.21(1) was created by renumbering and amending Wis. Admin. Code NR § 200.21. The language added to Wis. Admin. Code NR § 200.21 is underlined and language removed is ~~struck out~~.

Wisconsin Regulation	Federal Regulation
<p>a variance within the time period specified in s. 283.15 (2) (am) (1), Stats60 days after the department issues, reissues, or modifies the permit.</p>	<p>following statutory or regulatory provisions within the times specified in this paragraph:</p> <p>...</p> <p>(5) <i>Water quality related effluent limitations.</i> A modification under section 302(b)(2) of requirements under section 302(a) for achieving water quality related effluent limitations may be requested no later than the close of the public comment period under § 124.10 on the permit from which the modification is sought.</p> <p>...</p> <p>40 C.F.R. § 122.21(n): <i>Variance requests by POTWs.</i> A discharger which is a publicly owned treatment works (POTW) may request a variance from otherwise applicable effluent limitations under any of the following statutory provisions as specified in this paragraph:</p> <p>...</p> <p>(3) <i>Water quality based effluent limitation.</i> A modification under CWA section 302(b)(2) of the requirements under section 302(a) for achieving water quality based effluent limitations shall be requested no later than the close of the public comment period under § 124.10 on the permit from which the modification is sought.</p>

As can be seen in Table 2 above, Wis. Admin Code NR § 200.21(1) previously explicitly allowed for variance submittals for up to 60 days after permit issuance, reissuance, or modification. Wisconsin’s deadline was in conflict with the federal regulations that provided for variance submittals no later than the public comment period on the permit, which occurs before permit issuance, reissuance, or modification. However, Wisconsin’s regulation still does not align with its federal counterpart because Wisconsin’s 60 day post issuance deadline has a statutory basis, Wis. Stat. § 283.15(2)(am)(1).² Therefore, legislative action will be necessary to cure this issue that is outside the scope of the legal authority review.

² Wis. Stat. § 283.15(2)(am)(1) says, “Within 60 days after the department reissues or modifies a permit to include a water quality based effluent limitation under s. 283.13 (5), the permittee may apply to the department for a variance from the water quality standard used to derive the limitation.”