



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 31

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

TO: File

Issue 31 (Ammonia, Data/Demonstrations)

In EPA's July 11, 2011 letter to the Wisconsin Department of Natural Resources (WDNR), Issue 31 stated the following:

Wisconsin rules at Wis. Admin. Code NR §§ 106.32(2)(b)2, 106.32(3)(a)4.a, and 106.37(2) provide that Wisconsin shall or may add time to a compliance schedule so a permittee can gather data or perform demonstrations to justify a change in effluent limits. Section 502(17) of the CWA, 33 U.S.C. § 1362(17), defines a compliance schedule as an "enforceable sequence of actions or operations leading to compliance with an effluent limitation." A demonstration or data collection that is intended to justify a change in an effluent limitation is not an action leading to compliance with a final effluent limitation under the CWA, and a schedule based solely on time needed to perform such a demonstration or collect such data is not appropriate under 40 C.F.R. § 122.47. Wisconsin must revise these provisions to make them consistent with federal requirements. The response to this letter needs to include the State's plan, with a schedule and milestones, for amending these rules so they conform to 40 C.F.R. § 122.47.

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 31, Wisconsin modified Wis. Admin. Code NR §§ 106.32(2)(b)2 and 106.32(3)(a)4.a, as shown in Table 1 below.

Table 1: Comparison between Federal Rules and Revised Wisconsin Rules on Ammonia, Data/Demonstrations¹

Federal Rules	Wisconsin Rules
<p>40 C.F.R. § 122.47 provides:</p> <p>(a) General (applicable to State programs, see § 123.25). The permit may, when appropriate, specify a schedule of compliance leading to compliance with CWA and regulations.</p> <p>(1) Time for compliance. Any schedules of compliance under this section shall require compliance as soon as possible, but not later than the applicable statutory deadline under the CWA.</p> <p>(2) The first NPDES permit issued to a new source or a new discharger shall contain a schedule of compliance only when necessary to allow a reasonable opportunity to attain compliance with requirements issued or revised after commencement of construction but less than three years before commencement of the relevant discharge. For recommending dischargers, a schedule of compliance shall be available only when necessary to allow a reasonable opportunity to attain compliance with requirements issued or revised less than three years before recommencement of discharge.</p> <p>(3) Interim dates. Except as provided in paragraph (b)(1)(ii) of this section, if a permit establishes a schedule of compliance which exceeds 1 year from the date of permit issuance, the schedule shall set forth interim requirements and the dates for their achievement.</p> <p>(i) The time between interim dates shall not exceed 1 year, except that in the case of a schedule for compliance with standards for sewage sludge use and disposal, the time between interim dates shall not exceed six months.</p> <p>(ii) If the time necessary for completion of any interim requirement (such as the construction of</p>	<p>Wis. Admin. Code NR § 106.32(2)(b)2 provides:</p> <p>2. If the permittee can demonstrate to the department through site specific information that the fish present in the receiving water are limited to those included in CW Category 2, CW Category 3, or CW Category 5, as described in ch. NR 105, Table 2C, then effluent limitations shall be established based on the criteria shown in ch. NR 105 Table 2C for the respective CW Category. If the permittee intends to make a site specific demonstration, the permittee shall notify the department prior to the end of the public comment period for permit reissuance. An additional period of time, not to exceed 6 months, shall be provided in the schedule of compliance under s. NR 106.37 to perform the demonstration. If the department grants approval for an alternative limitation based on CW Category 2, 3, or 5, the department shall propose a modification to the permit that <u>include the alternative limit in a modified or reissued permit provided antidegradation requirements in ch. NR 207 have been satisfied.</u></p> <p>Wis. Admin. Code NR § 106.32(3)(a)4.a provides:</p> <p>Whenever the department determines that early life stage present ammonia criteria are applicable under this subdivision, the permittee may make a demonstration that the early life stages of burbot are not present at the discharge location and will not be affected by the discharge during the months of January and February. If the permittee intends to perform the demonstration, the permittee shall notify the department prior to the end of the public comment period for</p>

¹ Language added to the original regulation is underlined while language removed is ~~struck out~~.

a control facility) is more than 1 year and is not readily divisible into stages for completion, the permit shall specify interim dates for the submission of reports of progress toward completion of the interim requirements and indicate a projected completion date.

Note:

Examples of interim requirements include: (a) Submit a complete Step 1 construction grant (for POTWs); (b) let a contract for construction of required facilities; (c) commence construction of required facilities; (d) complete construction of required facilities.

(4) Reporting. The permit shall be written to require that no later than 14 days following each interim date and the final date of compliance, the permittee shall notify the Director in writing of its compliance or noncompliance with the interim or final requirements, or submit progress reports if paragraph (a)(3)(ii) is applicable.

(b) Alternative schedules of compliance. An NPDES permit applicant or permittee may cease conducting regulated activities (by terminating of direct discharge for NPDES sources) rather than continuing to operate and meet permit requirements as follows:

(1) If the permittee decides to cease conducting regulated activities at a given time within the term of a permit which has already been issued: (i) The permit may be modified to contain a new or additional schedule leading to timely cessation of activities; or

(ii) The permittee shall cease conducting permitted activities before non-compliance with any interim or final compliance schedule requirement already specified in the permit.

(2) If the decision to cease conducting regulated activities is made before issuance of a permit whose term will include the termination date, the permit shall contain a schedule leading to termination which will ensure timely compliance with applicable requirements no later than the statutory deadline.

~~permit reissuance. The department shall allow an extended compliance schedule in the permit not to exceed one year for the permittee to provide the demonstration. If the department grants approval for an alternative limitation based on results of this study, the department shall include the alternative limitation in a permit modification or reissuance provided antidegradation requirements in ch. NR 207 have been satisfied.~~

Wis. Admin. Code NR § 106.37(2) provides:

If the department modifies or reissues the permit to adjust ammonia limitations based on an approval of demonstrations made under either ss. NR 106.32 (2) (b) 2. or 106.32 (3) (a) 4. The department may adjust the compliance schedule if necessary and appropriate.

<p>(3) If the permittee is undecided whether to cease conducting regulated activities, the Director may issue or modify a permit to contain two schedules as follows:</p> <p>(i) Both schedules shall contain an identical interim deadline requiring a final decision on whether to cease conducting regulated activities no later than a date which ensures sufficient time to comply with applicable requirements in a timely manner if the decision is to continue conducting regulated activities;</p> <p>(ii) One schedule shall lead to timely compliance with applicable requirements, no later than the statutory deadline;</p> <p>(iii) The second schedule shall lead to cessation of regulated activities by a date which will ensure timely compliance with applicable requirements no later than the statutory deadline.</p> <p>(iv) Each permit containing two schedules shall include a requirement that after the permittee has made a final decision under paragraph (b)(3)(i) of this section it shall follow the schedule leading to compliance if the decision is to continue conducting regulated activities, and follow the schedule leading to termination if the decision is to cease conducting regulated activities.</p> <p>(4) The applicant's or permittee's decision to cease conducting regulated activities shall be evidenced by a firm public commitment satisfactory to the Director, such as a resolution of the board of directors of a corporation.</p>	
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Wisconsin's rule changes at Wis. Admin. Code NR §§ 106.32(2)(b)2 and 106.32(3)(a)4.a effectively remove the language allowing compliance schedules based solely on the time needed for demonstration or data collection. The rules instead require a permit modification once the demonstration or data collection is complete. If a permit modification based on a demonstration or data collection leads to a change in a limit, the compliance schedule may then be changed. Overall, Wisconsin's modification to Wis. Admin. Code NR §§ 106.32(2)(b)2 and 106.32(3)(a)4.a satisfactorily align them with their federal counterparts regarding compliance schedules.

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 31 is resolved.