



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 7

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

TO: File

Issue 7 (New Source Performance Standards)

In EPA's July 11, 2011 letter to the Wisconsin Department of Natural Resources (WDNR), Issue 7 stated the following:

Wis. Stat § 283.19 requires the Wisconsin Department of Natural Resources (WDNR) to establish New Source Performance Standards (NSPS) by rule. EPA's review found that Wisconsin has not consistently updated Wis. Admin. Code NR §§ 221 through 299 to incorporate new or revised federal NSPS. Accordingly, please explain:

- (a) Under what authority does Wisconsin incorporate federal NSPS into permits where Wisconsin omits a federal NSPS from Wis. Admin. Code NR §§ 221 through 299?
- (b) Under what authority does Wisconsin incorporate the federal NSPS into permits where a NSPS in Wis. Admin. Code NR §§ 221 through 229 is less stringent than the federal NSPS?

Additionally, EPA reviewed Wis. Stat. § 283.31(3)(d) 2 and Wis. Admin. Code NR § 220.13. These provisions appear to authorize the establishment of effluent limitations based on federal effluent limitations guidelines (ELG) even when Wisconsin omits a federal ELG from Wis. Admin. Code NR §§ 221 to 299, or includes in those chapters an ELG that is less stringent than the federal counterpart.

- (c) To the extent that Wisconsin cites to Wis. Stat. § 283.31(3)(d) 2 and Wis. Admin. Code NR § 220.13 in answering either question (7)(a) or 7(b) above, please explain how the provision operates for NSPS in light of the specificity provided in Wis. Admin. Code NR §§ 221 to 299. For issues 7 (a) — (c), if Wisconsin does not have authority to implement federal NSPS and ELG into permits, then the response to this letter must

include the State's plan, with a schedule and milestones, for establishing the necessary authority.

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WDNR repealed and recreated Wis. Admin. Code NR § 220.13 to address Issue 7. EPA has completed its review of Wis. Admin. Code NR § 220.13 (2018), and the results of the review are provided in Table 1, below.

Table 1: EPA's Comments on Wis. Admin. Code NR § 220.13 (2018)

Wis. Admin. Code NR § 220.13 (2018):	EPA Comment
<p>Establishment of limitations based upon federal regulations.</p> <p>(1) LISTED INDUSTRIAL CATEGORIES. In the event that the EPA promulgates an effluent limitation guideline for a category or class of point sources listed in s. NR 220.02 that is more stringent than the promulgated effluent limitation guideline for that category or class, the department shall include an effluent limitation based on the EPA-promulgated effluent limitation guideline in an issued, reissued, or modified WPDES [Wisconsin Pollutant Discharge Elimination System] permit for a point source that belongs to the federal category or class of point sources in accordance with the federally required compliance date.</p> <p>(2) INDUSTRIAL CATEGORIES NOT SPECIFICALLY LISTED. In the event that the EPA promulgates an effluent limitation guideline for a category or class of point sources not listed in s. NR 220.02, the department shall include an effluent limitation based on the EPA-promulgated effluent limitation guideline in an issued, reissued, or modified WPDES permit for a point source that belongs to the federal category or class of point sources in accordance with the federally required compliance date.</p> <p>(3) LESS STRINGENT LIMITATIONS. If a promulgated federal effluent limitation guideline results in an effluent limitation that is less stringent than an</p>	<p>(1) Addressing question (b) outlined in Issue 7 above, Wis. Admin. Code NR § 220.13(3) (2018) resolves EPA's concern about WDNR's authority to incorporate federal NSPS into WPDES permits where a NSPS in Wis. Admin. Code NR §§ 221 through 229 is less stringent than the federal NSPS.</p> <p>(2) Addressing question (a) outlined in Issue 7 above, Wis. Admin. Code NR § 220.13(2) (2018) resolves EPA's concern about incorporating NSPS into WPDES permits where Wisconsin omits a federal NSPS from Wis. Admin. Code NR §§ 221 through 299.</p> <p>(3) Addressing an issue somewhat related to question (b) outlined in Issue 7 above, Wis. Admin. Code NR § 220.13(3) (2018) correctly</p>

Wis. Admin. Code NR § 220.13 (2018):	EPA Comment
<p>existing applicable technology based limitation contained in a WPDES permit, the department may only include the less stringent limitation if the antibacksliding requirements in ch. NR 207 are satisfied.</p> <p>(4) COMPLIANCE. Prior to any permit modification, revocation and reissuance, or reissuance to incorporate a limitation for a toxic substance based on a revised federal effluent guideline promulgated under 33 USC 1317, the permittee shall comply with the federally promulgated guideline by the required compliance date even if the permit has not yet been modified, revoked and reissued, or reissued to include a limitation based on the revised guideline.</p>	<p>ensures that if a promulgated federal limitation guideline is less stringent than a technology based limitation in a permit, the less stringent federal limit will only be applied if the requirements of antibacksliding are fulfilled.</p> <p>(4) This regulation is not required to resolve Issue 7. However, it is consistent with the federal regulation at 40 C.F.R. § 122.41(a)(1).</p>

As can be seen by EPA Comments (1) and (2) in Table 1 above, Wisconsin addressed the two main questions (a) and (b) raised in Issue 7 through repealing and recreating Wis. Admin. Code NR § 220.13. Regarding the final question (c) raised in Issue 7, it is moot because Wisconsin did not cite to Wis. Stat. § 283.31(3)(d) 2 or the previous version of Wis. Admin. Code NR § 220.13 (1988) to resolve the issue. Outside of Issue 7, Wis. Admin. Code NR § 220.13(3) (2018) correctly makes it clear that promulgated federal effluent limitation guidelines that are less stringent than existing permit limits can only be included in permits if antibacksliding requirements are met, and Wis. Admin. Code NR § 220.13(4) (2018) is consistent with federal Clean Water Act regulations.

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 7 is resolved.