



## 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 14

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

**TO:** File

### Issue 14 (Antibacksliding)

In EPA's July 11, 2011 letter to the Wisconsin Department of Natural Resources (WDNR), Issue 14 stated the following:

The federal rule at 40 C.F.R. § 122.44(l) generally provides that the interim effluent limitations, standards, and conditions in a reissued or renewed permit must be at least as stringent as the final limitations, standards, and conditions in the previous permit [generally referred to as the antibacksliding rules]. EPA did not find an equivalent Wisconsin statutory or rule provision. The response to this letter needs to include the State's plan, with a schedule and milestones, for promulgating a rule equivalent to 40 C.F.R. § 122.44(l).

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

Through rulemaking, Wisconsin created Wis. Admin. Code NR 207 Subchapter II, which is consistent with applicable federal Clean Water Act regulations and statutes. Regarding Issue 14 specifically, Table 1 (below) compares the federal regulation at issue, 40 C.F.R. § 122.44(l), in its entirety, with Wisconsin's equivalent antibacksliding regulations at Wis. Admin. Code NR § 207.12.

Table 1: Comparison of Federal and Wisconsin Antibacksliding Regulations

Federal Regulations	Wisconsin Regulations	Analysis
<p><b>40 C.F.R. § 122.44(l)(1) Reissued permits:</b></p>	<p><b>Wis. Admin. Code NR § 207.12(1):</b></p>	<p><b>Satisfactory</b></p>
<p>(1) Except as provided in paragraph (l)(2) of this section when a permit is renewed or reissued, interim effluent limitations, standards or conditions must be at least as stringent as the final effluent limitations, standards, or conditions in the previous permit. . .</p>	<p>(1) GENERAL. Except as provided in this section, effluent limitations or standards in a reissued, revoked and reissued, or modified permit shall be at least as stringent as the effective effluent limitations or standards in the previous permit. If one of the exceptions in subs. (2) to (4) is satisfied to relax or backslide a limitation, the limitation may only be made less stringent if both of the following apply:</p> <p>(a) The less stringent limitation is at least as stringent as required by the effluent limitation guideline in effect at the time the permit is reissued, revoked and reissued, or modified.</p> <p>(b) The less stringent limitation complies with state water quality standards, including the antidegradation requirements in subch. I.</p> <p>Note: The requirements in sub. (1) is commonly referred to as the "safety clause" provision of the antibacksliding requirements in the Clean Water Act, and these requirements apply to any relaxation of any limitation. See 33 USC 1342(o)(3).</p>	<p>Wis. Admin. Code NR § 207.12(1) satisfactorily incorporates the introductory language of 40 C.F.R. § 122.44(l)(1). Additionally, Wis. Admin. Code NR § 207.12(1)(a) and (b) are consistent with 40 C.F.R. § 122.44(l)(2)(ii), below.</p>
<p><b>40 C.F.R. § 122.44(l)(1) (Continued):</b></p>	<p><b>Wis. Admin. Code NR § 207.12(4):</b></p>	<p><b>Satisfactory</b></p>
<p>. . . (unless the circumstances on which the previous permit was based have [a] materially and substantially changed since the time the permit was issued and [b] would constitute cause for permit modification or revocation and reissuance under § 122.62.)</p>	<p>(4) RELAXING AN INTERIM EFFLUENT LIMITATION OR AN ELG-BASED LIMITATION OR STANDARD. Interim effluent limitations, standards, and conditions and ELG-based effluent limitations and standards that have taken effect in a permit may be relaxed in a reissued, revoked and reissued, or modified permit if the requirements in</p>	<p>Wis. Admin. Code NR § 207.12(4) satisfactorily incorporates the concluding language of 40 C.F.R. § 122.44(l)(1).</p>

Federal Regulations	Wisconsin Regulations	Analysis
	<p>sub. (1) (a) and (b) are met and both of the following are met:</p> <p>(a) Circumstances upon which the previous permit was based have materially and substantially changed since the time the permit was issued.</p> <p>(b) Changes have occurred that would constitute cause for a permit modification or revocation and reissuance under ch. NR 203.</p> <p>Note: Subsection (4) addresses the requirements in 40 CFR 122.44(l)(1)</p>	
<b>40 C.F.R. § 122.44(l)(2):</b>	<b>Wisconsin equivalent language incorporated elsewhere</b>	<b>Satisfactory</b>
(2) In the case of effluent limitations established on the basis of Section 402(a)(1)(B) [best professional judgement (BPJ)] of the CWA, a permit may not be renewed, reissued, or modified on the basis of effluent guidelines promulgated under section 304(b) subsequent to the original issuance of such permit, to contain effluent limitations which are less stringent than the comparable effluent limitations in the previous permit.		Wis. Admin. Code NR § 207.12(1), above, satisfactorily fulfills the language of 40 C.F.R. § 122.44(l)(2).
<b>40 C.F.R. § 122.44(l)(2)(i):</b>	<b>Wis. Admin. Code NR § 207.12(2):</b>	<b>Satisfactory</b>
(i) Exceptions - A permit with respect to which paragraph (l)(2) of this section applies may be renewed, reissued, or modified to contain a less stringent effluent limitation applicable to a pollutant, if -  (A) Material and substantial alterations or additions to the permitted facility occurred after permit issuance which	(2) RELAXING A BEST PROFESSIONAL JUDGMENT LIMITATION. Best professional judgment limitations established under s. NR 220.21 (1) that have taken effect in a permit may be made less stringent in a reissued, revoked and reissued, or modified permit if the requirements of sub. (1) (a) and (b) are satisfied and one or more of the following apply: (a) Material and substantial alterations or additions to the permitted facility occurred after the best professional judgment limitation was initially	Wis. Admin. Code NR § 207.12(2) satisfactorily incorporates the language of 40 C.F.R. § 122.44(l)(2)(i).

Federal Regulations	Wisconsin Regulations	Analysis
<p>justify the application of a less stringent effluent limitation;</p> <p>(B)(1) Information is available which was not available at the time of permit issuance (other than revised regulations, guidance, or test methods) and which would have justified the application of a less stringent effluent limitation at the time of permit issuance; or</p> <p>(2) The Administrator determines that technical mistakes or mistaken interpretations of law were made in issuing the permit under section 402(a)(1)(b);</p> <p>(C) A less stringent effluent limitation is necessary because of events over which the permittee has no control and for which there is no reasonably available remedy;</p> <p>(D) The permittee has received a permit modification under [CWA] section 301(c), 301(g), 301(h), 301(i), 301(k), 301(n), or 316(a); or</p>	<p>imposed in the permit, which justify the application of a less stringent effluent limitation.</p> <p>(b) New information is available that was not available at the time of permit issuance and that would have justified the application of a less stringent effluent limitation at the time of permit issuance. New information under this paragraph does not include revised regulations, guidance, or test methods.</p> <p>(c) The department determines that technical mistakes or mistaken interpretations of law were made when the best professional judgment limitation was initially imposed in the permit.</p> <p>(d) A less stringent effluent limitation is necessary because of events over which the permittee has no control and for which there is no reasonably available remedy.</p> <p>(e) The permittee has received department approval for any of the following:</p> <ol style="list-style-type: none"> <li>1. A modified technology based limitation under s. 283.13 (3), Stats. [CWA 301(c) equivalent]</li> <li>2. An extended compliance schedule under s. 283.13 (6), Stats. [CWA 301(i) equivalent]</li> <li>3. A modified technology based limitation under a fundamentally different factors variance under ss. NR 220.30 to 220.33. [CWA 301(n) equivalent]</li> <li>4. An alternative thermal effluent limitation under s. 283.17 (1), Stats. [CWA 316(a) equivalent].</li> </ol>	<p>The State rules do not appear to have an equivalent exception for 301(g) and 301(h), which results in Wisconsin having a more stringent program because there are less ways to backslide on a limit.</p>

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(E) The permittee has installed the treatment facilities required to meet the effluent limitations in the previous permit and has properly operated and maintained the facilities but has nevertheless been unable to achieve the previous effluent limitations, in which case the limitations in the reviewed, reissued, or modified permit may reflect the level of pollutant control actually achieved (but shall not be less stringent than required by effluent guidelines in effect at the time of permit renewal, reissuance, or modification).	(f) The permittee has installed the treatment facilities required to meet the effluent limitations in the previous permit and has properly operated and maintained the facilities, but has nevertheless been unable to achieve the best professional judgment limitations. In such a case, the effluent limitation in the reissued, revoked and reissued, or modified permit may be relaxed to reflect the level of pollutant control actually achieved. However, in no case may the limitation be less stringent than applicable effluent guidelines in effect at the time of reissuance or modification.	
<b>40 C.F.R. § 122.44(l)(2)(ii):</b>	<b>Wisconsin equivalent language incorporated elsewhere</b>	<b>Satisfactory</b>
(ii) Limitations. In no event may a permit with respect to which paragraph (l)(2) of this section applies be renewed, reissued, or modified to contain an effluent limitation which is less stringent than required by effluent guidelines in effect at the time the permit is renewed, reissued, or modified. In no event may such a permit to discharge into waters be renewed, issued, or modified to contain a less stringent effluent limitation if the implementation of such limitation would result in a violation of a water quality standard under section 303 applicable to such waters.		Wisconsin incorporated these federal requirements in Wis. Admin. Code NR § 207.12(1)(a) and (b) above.

Table 1, above, demonstrates that the state rules are consistent with their federal counterparts. Where Wisconsin does not include some federal language, under 40 C.F.R. § 122.44(l)(2)(i)(D), the result is a more stringent NPDES program because the omission results in fewer ways to backslide on a limit.

## 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 14 is resolved.

## Additional Notes

- The federal rules allow the application of the antibacksliding exceptions found at 40 C.F.R. § 122.44(l)(2)(i) only to BPJ limits revised to be less stringent based on a later promulgated effluent limitation guideline (ELG). In Wisconsin Admin. Code NR § 207.12(2), the State appears to allow the application of the 40 C.F.R. § 122.44(l)(2)(i) antibacksliding exceptions to all BPJ limits (i.e. "Best professional judgment limitations established under s. NR 220.21 (1) that have taken effect in a permit. . ."), not just those where there is a subsequent ELG. This is different than the federal rules where BPJ limits not affected by subsequent ELGs need to meet the requirements in 40 C.F.R. § 122.44(l)(1)—see ending parenthetical—to allow backsliding. However, backsliding is permitted in more situations under 40 C.F.R. § 122.44(l)(1)<sup>1</sup> than 40 C.F.R. § 122.44(l)(2)(i). Thus, imposing the 40 C.F.R. § 122.44(l)(2)(i) requirements on all BPJ limits appears to provide fewer opportunities to backslide, resulting in Wisconsin having a more stringent program. EPA does not believe that Wisconsin's regulations are inconsistent with the federal regulations or the Clean Water Act.

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<sup>1</sup> To backslide under 40 C.F.R. § 122.44(l)(1) the circumstance needs to match one of the modification scenarios in 40 C.F.R. § 122.62, which are more numerous than the six backsliding exceptions under 40 C.F.R. § 122.44(l)(2)(i).

- EPA believes that the citation to 33 U.S.C. § 1313(b), related to water quality standards, in Wis. Admin. Code NR § 207.11(2), is incorrect because Wisconsin's regulation concerns the definition of effluent limitation guidelines based on technology based effluent limitations.