



UNITED STATES ENVIRONMENTAL PROTECTION AGENCY

REGION 5
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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 15

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

TO: File

Issue 15 (General Compliance Schedule)

In EPA's July 11, 2011 letter to the Wisconsin Department of Natural Resources (WDNR), Issue 15 stated the following:

The federal rule at 40 C.F.R. § 122.47 pertains to compliance schedules in permits. Except for problematic provisions noted elsewhere in this enclosure, EPA did not find an equivalent Wisconsin statutory or rule provision to implement this federal requirement. EPA reviewed Wis. Admin. Code NR § 106.117, but this rule is inconsistent with the federal requirement for several reasons, including that it: (a) only applies to [water quality based effluent limitations or] WQBELs for toxic and organoleptic substances, (b) allows time to be added to a schedule so a permittee can perform work intended to justify a change in an effluent limitation, (c) does not include an "appropriateness" standard for the granting of a schedule, (d) does not require reports on progress toward meeting the final limitation, (e) does not mandate interim requirements, and (f) does not restrict schedules to statutory deadlines. In addition to establishing a compliance schedule rule with program-wide applicability, Wisconsin must amend Wis. Admin. Code NR § 106.117 to resolve the inconsistencies noted here. The response to this letter must include the State's plan for promulgating a rule equivalent to 40 C.F.R. § 122.47, and for correcting issues outlined in number 15 (a) — (f) above.

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

The table below compares the federal compliance schedule requirements of 40 C.F.R. § 122.47 and 40 C.F.R. § 132 Procedure 9 of Appendix F to Wisconsin's requirements set forth at the newly redrafted Wis. Admin. Code NR § 106.117 as well as Wis. Admin. Code NR § 205.14.

Table 1: Federal and Wisconsin Regulations on Compliance Schedules in Permits

Federal Regulations	Wisconsin Regulations
<p>40 C.F.R. § 122.47 provides:</p> <p>(a) <i>General (applicable to State programs, see § 123.25).</i> The permit may, when appropriate, specify a schedule of compliance leading to compliance with [the Clean Water Act or] CWA and regulations .</p> <p>(1) <i>Time for compliance.</i> 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) <i>Interim dates.</i> (...) [I]f 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,</p>	<p>Wis. Admin. Code NR § 106.117 was repealed and recreated to read:</p> <p>Schedules of compliance.</p> <p>(1) SCHEDULES FOR FIRST PERMIT ISSUANCE.</p> <p>(a) In this subsection, the following definitions apply:</p> <ol style="list-style-type: none"> 1. "New source" has the meaning given in 40 CFR 122.2. 2. "New discharger" has the meaning given in 40 CFR 122.2. 3. "Recommencing discharger" means a permitted source that recommences discharge after terminating its operations. <p>(b) The first permit issued by the department 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 state or federal limitations promulgated after commencement of construction but less than 3 years before commencement of the discharge.</p> <p>Note: The department recognizes pollution control equipment start-up problems may arise at the commencement of a new discharge. Enforcement discretion may be used in the 90 days following commencement of discharge, in such cases.</p> <p>(c) For recommending dischargers, a schedule of compliance shall be included in the permit only when necessary to allow a reasonable opportunity to attain</p>

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<p>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 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.</p> <p>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.</p> <p>(4) <i>Reporting.</i> 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.</p>	<p>compliance with limitations promulgated less than 3 years before recommencement of the discharge.</p> <p>(2) SCHEDULES FOR REISSUED OR MODIFIED PERMITS. A reissued or modified permit may, when appropriate, include a schedule for compliance with new or more stringent effluent limitations that are established by this chapter.</p> <p>(3) SCHEDULE REQUIREMENTS. A schedule of compliance included in a permit shall meet all of the following conditions:</p> <p>(a) Time for compliance. Any schedules of compliance under this section shall require compliance as soon as possible but may not extend beyond any applicable federal or state statutory deadlines. The schedule also may not extend beyond 5 years from the date that the permit is reissued or modified to include the new or more stringent effluent limitation, except as provided in par. (b) or as provided in other chapters.</p> <p>(b) Great Lakes dischargers. For an existing discharger to the Great Lakes system with a permit that was originally issued before March 23, 1997, if the effluent limitation is based on a secondary value under s. NR 105.03(25), the permit shall require compliance with the secondary value based limitation within a reasonable period of time, no later than 5 years after permit reissuance or modification to include the limitation. The compliance schedule may allow the permittee additional time to conduct studies for the purpose of revising the secondary value or to develop a criterion if requested by the permittee in accordance with s. NR 106.07 (8). The time period allowed for such studies may not exceed 2 years. In</p>

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<p>40 C.F.R. § 132 Procedure 9 of Appendix F provides: The Great Lakes States and Tribes shall adopt provisions consistent with (as protective as) procedure 9 of appendix F of part 132.</p> <p><i>A. Limitations for New Great Lakes Dischargers.</i> When a permit issued on or after March 23, 1997 to a new Great Lakes discharger (defined in Part 132.2) contains a water quality-based effluent limitation (WQBEL), the permittee shall comply with such a limitation upon the commencement of the discharge.</p> <p><i>B. Limitations for Existing Great Lakes Dischargers.</i></p> <ol style="list-style-type: none"> 1. Any existing permit that is reissued or modified on or after March 23, 1997 to contain a new or more restrictive WQBEL may allow a reasonable period of time, up to five years from the date of permit issuance or modification, for the permittee to comply with that limit, provided that the Tier I criterion or whole effluent toxicity (WET) criterion was adopted (or, in the case of a narrative criterion, Tier II value, or Tier I criterion derived pursuant to the methodology in appendix A of part 132, was newly derived) after July 1, 1977. 2. When the compliance schedule established under paragraph 1 goes beyond the term of the permit, an interim permit limit effective upon the expiration date shall be included in the permit and addressed in the permit's fact sheet or statement of basis. The administrative record for the permit shall reflect the final limit and its compliance date. 3. If a permit establishes a schedule of compliance under paragraph 1 which exceeds one year from the date of permit issuance or modification, the schedule 	<p>cases where the permittee wishes to conduct a study on the secondary value, the permit also shall contain a reopener clause, requiring a permit modification if the department determines the specified studies demonstrate that a revised limitation is appropriate. Any revised limitation shall be incorporated through a permit modification and a reasonable time period, up to 5 years, may be allowed for compliance, but in no case may the compliance schedule for the revised limitation extend beyond 7 years from the date the secondary value based limitation was initially included in the permit.</p> <p>(c) Interim dates. If a permit establishes a schedule of compliance that exceeds one year from the date of permit reissuance or modification, the schedule shall set forth interim requirements and the dates for their achievement as follows:</p> <ol style="list-style-type: none"> 1. The time between dates for the achievement of interim requirements shall not exceed one year, except in the case of a schedule for compliance with standards for sewage sludge use and disposal, the time between dates for the achievement of interim requirements shall not exceed 6 months. 2. If the time necessary for completion of any interim requirement is more than one year and is not readily divisible into stages for completion, the permit shall specify dates for the submission of reports of progress toward completion of the interim requirements and

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<p>shall set forth interim requirements and dates for their achievement. The time between such interim dates may not exceed one year. If the time necessary for completion of any interim requirement is more than one year and is not readily divisible into stages for completion, the permit shall require, at a minimum, specified dates for annual submission of progress reports on the status of any interim requirements.</p> <p><i>C. Delayed Effectiveness of Tier II Limitations for Existing Great Lakes Discharges.</i></p> <p>1. Whenever a limit (calculated in accordance with Procedure 3) based upon a Tier II value is included in a reissued or modified permit for an existing Great Lakes discharger, the permit may provide a reasonable period of time, up to two years, in which to provide additional studies necessary to develop a Tier I criterion or to modify the Tier II value. In such cases, the permit shall require compliance with the Tier II limitation within a reasonable period of time, no later than five years after permit issuance or modification, and contain a reopener clause.</p> <p>2. The reopener clause shall authorize permit modifications if specified studies have been completed by the permittee or provided by a third-party during the time allowed to conduct the specified studies, and the permittee or a third-party demonstrates, through such studies, that a revised limit is appropriate. Such a revised limit shall be incorporated through a permit modification and a reasonable time period, up to five years, shall be allowed for compliance. If incorporated prior to the compliance date of the original Tier II</p>	<p>indicate a projected completion date.</p> <p>(d) Pollution and waste minimization measures. The schedule of compliance may require the permittee to evaluate pollution and waste minimization measures as a means for complying with the effluent limitation.</p> <p>(e) Extension beyond permit expiration; If a permit is modified to include a limitation, the schedule of compliance may extend beyond the expiration date of the permit if an interim permit limit that is effective upon the permit's expiration date is included in the permit. In such cases, the department shall also specify in the permit the final water quality based effluent limit and its effective date.</p> <p>(f) Reporting. No later than 14 days following each interim date and the final date of compliance, the permittee shall notify the department in writing of its compliance or noncompliance with the interim or final requirements or, if par. (c) 2. is applicable, submit progress reports.</p> <p>Note: An interim permit requirement is not necessarily a numerical effluent limitation. Note: Compliance schedule provisions for TMDL-based limits, technology-based limits, and phosphorus limits may differ from the requirements of this section. These provisions can be found in ss. NR 212.75 (5), 205.14, and 217.17, respectively.</p>

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<p>limitation, any such revised limit shall not be considered less-stringent for purposes of the anti-backsliding provisions of section 402(o) of the Clean Water Act.</p> <p>3. If the specified studies have been completed and do not demonstrate that a revised limit is appropriate, the permitting authority may provide a reasonable additional period of time, not to exceed five years with which to achieve compliance with the original effluent limitation.¹</p> <p>4. Where a permit is modified to include new or more stringent limitations, on a date within five years of the permit expiration date, such compliance schedules may extend beyond the term of a permit consistent with section B.2 of this procedure.</p> <p>5. If future studies (other than those conducted under paragraphs 1, 2, or 3 above) result in a Tier II value being changed to a less stringent Tier II value or Tier I criterion, after the effective date of a Tier II-based limit, the existing Tier II-based limit may be revised to be less stringent if: (a) It complies with sections 402(o) (2) and (3) of the CWA; or, (b) In non-attainment waters, where the existing Tier II limit was based on procedure 3, the cumulative effect of revised effluent limitation based on procedure 3 of this appendix will assure compliance with water quality standards; or, (c) In attained waters, the revised</p>	<p>Wis. Admin. Code NR § 205.14 provides: Schedules of compliance.</p> <p>A WPDES permit may, when appropriate, include a schedule of compliance leading to compliance with permit limitations. Any schedule of compliance for water quality based effluent limitations for phosphorus shall be consistent with all of the requirements in s. NR 217.17. Any other schedule of compliance included in a permit shall be consistent with all of the requirements in s. NR 106.117.</p>

¹ Wisconsin's provisions do not include the equivalent of 40 C.F.R. § 132 Procedure 9 of Appendix F (C)(3) and (5). However, Wisconsin's program is made more stringent by omitting these provisions because they provide for additional time for compliance or less stringent requirements.

Federal Regulations	Wisconsin Regulations
effluent limitation complies with the State or Tribes' antidegradation policy and procedures.	

As can be seen above, Wis. Admin. Code NR § 106.117 and Wis. Admin. Code NR § 205.14 now address the use of compliance schedules in permits as the previous Wis. Admin. Code NR § 106.117 was repealed and recreated. Wis. Admin. Code NR § 106.117 no longer only applies to WQBELs for toxic and organoleptic substances and no longer allows time to be added to a schedule so a permittee can perform work intended to justify a change in an effluent limitation. Wisconsin regulations now include an "appropriateness" standard for the granting of a schedule (Wis. Admin. Code NR § 106.117(2)), require reports on progress toward meeting the final limitation (Wis. Admin. Code NR § 106.117(3)(f)), mandate interim requirements (Wis. Admin. Code NR § 106.117(3)(c)), and restrict schedules to statutory deadlines (Wis. Admin. Code NR § 106.117(3)(a)). Thus, WDNR's rule modifications satisfactorily align the Wisconsin regulations concerning compliance schedules with their federal counterparts.

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 15 is resolved.