



UNITED STATES ENVIRONMENTAL PROTECTION AGENCY

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

FEB 08 2019

REPLY TO THE ATTENTION OF

WN-15J

MEMORANDUM

SUBJECT: Wisconsin Legal Authority Review - Review and Recommendation of Resolution for Issue 12

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

TO: File

Issue 12 (Downstream Water Impacts)

In EPA's July 11, 2011 letter to the Wisconsin Department of Natural Resources (WDNR), concerning Wisconsin's National Pollutant Discharge Elimination System (NPDES) program, Issue 12 stated the following:

Federal regulations prohibit permit issuance when permit conditions do not ensure compliance with the applicable water quality requirements of all affected states. 40 C.F.R. § 122.4(d). Wisconsin appears to lack an equivalent provision. We note that Wis. Stat. § 283.31(3) provides that a permit may issue only when discharges will meet all effluent limitations, standards of performance for new sources, effluent standards, and any more stringent limitations necessary to comply with any applicable federal law or regulation, but this provision is silent as to how the State prohibits discharges that would violate applicable water quality standards of affected states. Wisconsin must explain how it will address the deficiency noted in this comment, either through statutory amendment or corrective rulemaking, including a schedule and milestones for completion, 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).

Analysis

In a January 19, 2012 letter from J.B. Van Hollen, Attorney General, to Matt Moroney, Deputy Secretary, WDNR, Wisconsin's then-Attorney General opined that the state has the necessary authority to address downstream state water quality, including standards of other states and authorized tribes, when issuing permits by virtue of Wis. Stat. § 283.13(5); Wis. Stat. § 283.31(3)(d); and Wis. Admin. Code NR

§§ 106.06(1)(b)1; 106.32(1)(b); 106.55(9); and 106.56(9), noting that “The term ‘downstream waters’ as used in these rules is not limited to intrastate waters. Downstream waters would include navigable waters of the United States that are protected by state and tribal water quality standards that have been adopted in compliance with and as required by the federal Clean Water Act. See 33 U.S.C. § 1312(a).” *Id.* at 7-8.

To formalize this understanding of the scope of Wisconsin authority, WDNR and EPA modified the EPA-Wisconsin NPDES Memorandum of Agreement (MOA) by addendum. U.S. EPA and Wisconsin NPDES Memorandum of Agreement Addendum, November 30, 2018 (on file with U.S. EPA). Specifically, in the MOA addendum WDNR agreed that, “Pursuant to Wis. Stat. § 283.31(3)(d) and (4), WDNR may not issue a WPDES [(Wisconsin Pollutant Discharge Elimination System)] permit if the permit conditions do not ensure compliance with applicable water quality standards of affected waters, including downstream waters within the State of Wisconsin and waters of all other affected States.” Emphasis added; *id.* Thus, WDNR’s authorities for the consideration of downstream water quality standards during permit issuance are not inconsistent with the federal regulations at 40 C.F.R. § 122.4(d).

Conclusion

Based on EPA’s review of Wisconsin’s provisions and the 2018 MOA Addendum, EPA concludes that Issue 12 is resolved.

Additional Notes

- To enhance regulatory clarity, EPA recommends that Wisconsin promulgate regulations consistent with 40 C.F.R. § 122.4(d).
- Additional background: Attorney General Van Hollen’s January 19, 2012 letter to WDNR addressed Issue 12 as follows:

[Question:]Does the Department have authority to impose permit conditions to assure compliance with the applicable water quality requirements of all affected states (including tribes)?

Response: In my view the answer is yes. Wisconsin Stat. § 283.13(5) provides that the Department “shall require compliance with. . . water quality based effluent limitations in any permit issued, reissued or modified if these limitations are necessary to meet applicable water quality standards, treatment standards, schedules of compliance or any other state or federal law, rule or regulation.” Under 40 C.F.R. § 131.8, the EPA may approve a federally recognized Indian tribe to administer a water quality standards program in the same manner as a state.

In addition, Wis. Stat. § 283.31(3)(d)1. and 2. allows the Department to issue a WPDES permit with more stringent limitations if “[n]ecessary to meet federal or state water quality

standards" or [n]ecessary to comply with any applicable federal law or regulation." Wisconsin Admin. Code §§ NR 106.06(1)(b)1., NR 106.32(1)(b), 106.55(9), and 106.56(9) all contain provisions allowing the Department to establish water quality based effluent limitations necessary to protect downstream waters. The term "downstream waters" as used in these rules is not limited to intrastate waters. Downstream waters would include navigable waters of the United States that are protected by state and tribal water quality standards that have been adopted in compliance with and as required by the federal Clean Water Act. See 33 U.S.C. § 1312(a).

Also, Wis. Stat § 283.41 and Wis. Admin. Code § NR 203.03 require the Department to provide notice of receipt of a completed permit application to other government agencies, which include "other states potentially affected by the proposed discharge." State and tribal government agencies are permitted to "obtain additional information, submit written comments, or request a public hearing with respect to issuance of a particular permit." Wis. Admin. Code § NR 203.03(1).

Letter from J.B. Van Hollen, Wisconsin Attorney General, to Matt Moroney, Deputy Secretary, WDNR (January 19, 2012) (on file with U.S. EPA).