UNITED STATES ENVIRONMENTAL PROTECTION AGENCY
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FEB 28 2017

REPLY TO THE ATTENTION OF:
WN-15J

Sharon Gayan, Bureau Director
Bureau of Water Quality-Environmental Management Division
Wisconsin Department of Natural Resources
101 South Webster Street, Box 7921
Madison, Wisconsin 53707-7921

RE: EPA Comments on Wisconsin Department Natural Resources Draft Rule WT-12-12

Dear Ms. Gayan,

Thank you for the opportunity to review the draft rule WT-12-12 (Rule Package 5) forwarded by your office to the United States Environmental Protection Agency (EPA) by email on January 10, 2017. Rule Package 5 addresses 10 of the 75 issues—specifically 7, 11, 13, 14, 15, 20, 29, 44, 46, and 61—outlined in EPA's July 18, 2011 letter to Secretary Cathy Stepp. Enclosed are EPA's comments regarding the proposed rule.

We appreciate the continued effort of your staff in working with us to resolve the issues addressed in this Rule Package. Questions concerning these comments may be addressed to Mr. Quintin White of my staff, at (312) 886-0135.

Sincerely,

Kevin M. Pierard
Chief, NPDES Branch

Enclosure

CC: Adrian Stocks, WDNR
Jason Knutson, WDNR
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**EPA Comments on Wisconsin Department of Natural Resources Rulemaking, WT-12-12**

• Wis. Admin. Code NR § 200.21 is titled, "APPLICATIONS FOLLOWING PERMIT REISSUANCE." However, the rule's language concerns variance requests when a department issues, reissues, or modifies a permit. For clarity, EPA recommends a different title given the content of the rule.

• Wis. Admin. Code NR § 200.21(1) provides for a variance request deadline, "60 days after the department issues, reissues, or modifies the permit to include a water quality based effluent limitation." The federal rules provide that a water quality based variance be, ". . .requested no later than the close of the public comment period under § 124.10. . ." 40 C.F.R. §§ 122.21(m)(5) and (n)(3). Because permit issuance comes after the public comment period, Wisconsin's variance request deadline is inconsistent with federal requirements. Further, Wisconsin's 60 day deadline has a statutory basis (Wis. Stat. § 283.15(2)(am)(1)) and cannot be corrected by a rule change alone. One way that WDNR could provisionally address this inconsistency in its rule, while awaiting the statutory change, is to edit Wis. Admin. Code NR § 200.21 as follows:

> A permittee who wishes to apply for a variance <u>from a water quality based effluent limitation</u> shall submit an application for a variance within <u>the time period set out in Wis. Stat. 283.15(2)(am)(1)</u> ~~60 days after the department issues, reissues, or modifies the permit to include a water quality based effluent limitation~~.

With the above rule change, the necessary legislative modification of Wis. Stat. 283.15(2)(am)(1) — setting the variance deadline at the end of the public comment period — will simultaneously correct this rule. Until the statutory correction can be completed, Wisconsin should clarify that permits issued under this statutory or regulatory provision will contain final limits based on the federally effective water quality standard or that permits issued with effluent limitations based on a variance will not be effective until the variance is approved.

• Wis. Admin. Code NR § 200.21(2) provides "The department may notify a permit applicant *before the permit application* for reissuance is submitted that the permittee may apply for a variance to the water quality based effluent limitations *proposed in the permit*. . ." [emphasis added.] EPA recommends Wisconsin edit the language as follows: "The department may notify a permit applicant before the permit application for reissuance is submitted that the permittee may apply for a variance to the water quality based effluent limitations <u>that are likely to be included in the final permit</u>~~proposed in the permit~~. . ."

• Wis. Admin. Code NR § 205.067(5) requires the maintenance of existing water quality based effluent limits in reissued permits with certain conditions. However, this provision does not take into consideration situations where a new more stringent water quality based effluent limitation is required compared to the previous permit's limit. Wisconsin should add language to address this situation such as adding the following condition as subsection (c) of Wis. Admin. Code NR

§ 205.067(5): "A new more stringent water quality based effluent limitation is not required under this section or the procedures in another chapter."

• Read alone, Wis. Admin. Code NR § 205.067(5) could also suggest that it is the only means to maintain a water quality based effluent limitation in reissued permits. However, the Wisconsin's proposed antibacksliding rules, Wis. Admin. Code NR §§ 207.10 and 207.12, provide additional means to maintain the limits. Wisconsin should add the note suggested below:

> Note: For additional rules that require the continuance of water quality based effluent limitations in reissued permits, see Wis. Admin. Code NR §§ 207.10 and 207.12 (antibacksliding).

• Wis. Admin. Code NR § 205.067(6) provides an exception to the rules at Wis. Admin. Code NR §§ 205.067(1-4) that require water quality based regulations for toxic substances, organoleptic substances, and phosphorus. EPA recommends removing the exception and adding the following note:

> Note: Detailed procedures for developing water quality based limits for certain toxic substances, certain organoleptic substances, and phosphorus can be found at chs. NR 106 and 217.

• Wis. Admin. Code NR § 200.065 at Table 1 provides permit application monitoring requirements. The federal regulations at 40 C.F.R. §§ 122.21(j)(4)(iv), (vi) and (vii) state that publically owned treatment works with a design flow > 1 million gallons a day (major municipal dischargers) must include a minimum of three samples of effluent data for certain parameters taken within 4.5 years prior to the date of the permit application. Unlike the federal regulations, Wis. Admin. Code NR § 200.065 at Table 1 (column 2, row 2) only requires one such sample. Wisconsin must revise Table 1 to include the federal application requirement to report 3 samples within 4.5 years prior to the date of the permit application. Additionally, EPA did not find total phenolic compounds in the list of pollutants required to be monitored in major municipal discharges. 40 C.F.R. §§ 122.21(j)(4)(vi) Appendix J, Table 2. Therefore, Wisconsin must add total phenolic compounds to the monitored chemicals (Table 1, column 3, row 2).

• Wisconsin created Wis. Admin. Code NR § 200.07(5) to establish permit application requirements—consistent with the federal rules—for existing manufacturing, commercial, mining, and silvicultural dischargers (40 C.F.R. § 122.21(g)); aquatic animal production facilities (40 C.F.R. § 122.21(i)); and new sources and dischargers (40 C.F.R. § 122.21(k)). However, Wisconsin must also establish permit application requirements for facilities with cooling water intake structures consistent with 40 C.F.R. § 122.21(r). While EPA understands that Wisconsin will include these requirements in a separate cooling water intake rule package that is currently under development, EPA recommends adding a note to Wis. Admin. Code NR § 200.07(5) that references the location of Wisconsin's 40 C.F.R. § 122.21(r) analog.

40 C.F.R. § 122.44(k)(4) refers to the purposes and intent of the Clean Water Act (CWA). However, Wisconsin's analogous rule at Wis. Admin. Code NR § 205.10(3) only mentions the "purposes and intent of ch. 283, Stats.". As Wisconsin's statute Chapter 283 only covers "Pollution Discharge Elimination", i.e., WPDES permits, Wisconsin should revise the rule to provide for a similar level of protection.

• EPA recommends that Wisconsin edit Wis. Admin. Code NR § 207.11(2) for improved clarity and consistency with the federal regulations as follows:

> **(2)** "Effluent limitation guidelines" or "effluent guideline standard" or "ELGs" means guidelines for establishing technology based effluent limitations under 33 USC 1313(b) including, but not limited to, guidelines for best practicable control technology currently achievable, best conventional pollutant control technology, best available technology currently available, and new source performance standard.

• EPA recommends that Wisconsin edit the note at Wis. Admin. Code NR § 207.12(2) to clarify that new effluent limitation guidelines (ELGs) apply regardless of whether the facility's operation is existing production or future expansion. One way that Wisconsin could edit this note is as follows:

> **Note:** If ~~a~~ the initial permit contains ~~limits based on~~BPJ limitations and subsequent to permit issuance an applicable effluent limitation guideline is ~~s are subsequently~~ promulgated, limitations in the permit reissuance or modification may not be less stringent than the comparable effluent limitation guideline limitation or the BPJ limitation, whichever is more stringent. ~~for future production expansions will be based on the effluent guide~~

• EPA recommends that Wisconsin define the term "initial permit" or "previous permit" and use consistent language throughout the section to describe the permit immediately preceding the version being reissued, revoked and reissued, or modified throughout the antibacksliding subchapter. To the extent that earlier permits have more stringent limits, this recommended change will remove any doubt that the rule intends the discharger to apply antibacksliding to the most current effective permit. For example, Wisconsin could address this comment by editing the rule at Wis. Admin. Code NR § 207.12(1)(a) as follows:

> 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~~initial permit (i.e. the permit being reissued, revoked and reissued, or modified). 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:

(a) The less stringent limitation is at least as stringent as that required by the ~~applicable~~effluent limitation guideline in effect at the time the permit is reissued, revoked and resissued, or modified.

Similar changes could also be made in Wis. Admin. Code NR §§ 207.12(2)(a), 207.12(2)(c), 207.12(3)(a)(1), 207.12(3)(a)(3).

• CWA § 402(o) includes language referring to:

> . . .*any revised waste load allocations* or any alternative grounds for translating water quality standards into effluent limitations, except where the cumulative effect of such revised allocations results in a decrease in the amount of pollutants discharged into the concerned waters, and such revised allocations are not the result of a discharger eliminating or substantially reducing its discharge of pollutants due to complying with the requirements of this Act or for reasons otherwise unrelated to water quality [*emphasis* added].

It appears that Wis. Admin. Code NR §§ 207.12(3)(b) and 207.12(3)(c) were modified to provide an analog to these federal requirements. However, EPA questions whether the terms "attainment" and "nonattainment" waters are consistent with the federal requirements. As such, EPA strongly recommends that Wisconsin further analyze this section for consistency with the federal requirements. This review should include, but should not be limited to, ensuring that the rule only allows relaxation of a water quality-based effluent limit derived from a waste load allocation in a total maximum daily load consistent with the provisions in the antibacksliding rule.

• Wis. Admin. Code NR § 220.15(1)(b) defines the variable 'N' as the wastewater flow to be treated and discharged to "surface waters" whereas the federal regulations at 40 C.F.R. § 122.50(a)(1) defines the same variable as the wastewater flow to be treated and discharged to "waters of the United States." Wisconsin's "waters of the State" defined at Wis. Admin. Code NR § 103.2(4), not "surface waters," is the analog of the federal "waters of the United States." WDNR must revise "surface waters" in the State rule to "waters of the State" so that it is consistent with the federal regulation.

**Additional considerations**:

• Wis. Admin. Code NR § 106.117(3)(d) provides that schedules of compliance may require the permittee to evaluate pollution and waste minimization measures as a means for complying with the effluent limitation. EPA recommends that Wisconsin also ensure implementation of the pollution and waste minimization measures.

• Wis. Admin. Code NR § 106.117(3)(e) allows schedules of compliance to go beyond the expiration date of the permit. In situations like this, Wisconsin should show the need and reasonableness of the schedule and include the final effluent limit in the permit with its effective date tied to the final date in the schedule.