**To:** Simek, Andrew J - DNR[Andrew.Simek@wisconsin.gov]
**Cc:** Compton, Mark[compton.mark@epa.gov]; Wester, Barbara[wester.barbara@epa.gov]
**From:** Bauer, Candice
**Sent:** Wed 7/5/2017 3:32:43 PM
**Subject:** FW: "Surface waters" issue in rule pack 5

Andrew… thanks for following up with us on the WQS question. Based upon Mark's email below, we did not catch the use of WQS as described below. As such, we believe the use of designated use would be more consistent with federal rules.

Mark or Barbara can correct me if I am wrong (but hopefully not).

As I am out for the rest of the day, please contact Mark or Barbara if you have questions or I am available to chat tomorrow.

Candice

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Candice R. Bauer, Ph.D.

Chief, Section 2

NPDES Branch, EPA Region 5, WN-15J

77 W. Jackson Blvd., Chicago, IL 60604

Office Phone: 312-353-2106, Fax: 312-697-2668

**From:** Compton, Mark
**Sent:** Wednesday, July 05, 2017 10:26 AM
**To:** Wester, Barbara <wester.barbara@epa.gov>; Bauer, Candice <bauer.candice@epa.gov>
**Subject:** RE: "Surface waters" issue in rule pack 5

Hello,

From below, this is the analysis that "designated use" was correct over "water quality standard" in Wis. Admin. Code NR § 207.12(3)(1(b).

1) Regarding antibacksilding as it is applied to impaired waters with an approved TMDL, proposed Wis. Admin. Code NR § 207.12(3)(1(b) provides for a less stringent water quality based effluent limit when a "designated use" that is not being attained is appropriately removed or revised. As initially proposed, Wis. Admin. Code NR § 207.12(3)(1(b) is in keeping with its federal analog 33 U.S.C. § 1313(d)(4)(A)(ii) as both provisions utilize the term "designated use."

Wisconsin suggests that in Wis. Admin. Code NR § 207.12(3)(1(b) the term "designated use" be replaced with "water quality standard." Water quality standards are based on both a water's designated use and water quality criteria. Wis. Stat. § 281.15. Notably, A "water quality standard" can be revised by changing a water's designated use or its water quality criteria, providing multiple avenues to a less stringent limit through the antibacksliding rules of Wis. Admin. Code NR § 207.12(3)(1(b). However, revising a "designated use" is the sole means to a less stringent limit through the corresponding antibacksliding rules of 33 U.S.C. § 1313(d)(4)(A)(ii). Thus, utilizing "water quality standard" in Wis. Admin. Code NR § 207.12(3)(1(b) would be less stringent than and inconsistent with 33 U.S.C. § 1313(d)(4)(A)(ii) which utilizes the term "designated use."

WDNR is utilizing the identical language of Wis. Admin. Code NR § 207.12(3)(1(b) in Wis. Admin. Code NR § 207.12(3)(1)(b) but with the "water quality standard" language, which we did not catch. "Designated use" would be more consistent here.

Thanks,

Mark

**From:** Simek, Andrew J - DNR [mailto:Andrew.Simek@wisconsin.gov]
**Sent:** Friday, June 30, 2017 3:56 PM
**To:** Bauer, Candice <bauer.candice@epa.gov>; Compton, Mark <compton.mark@epa.gov>; Wester, Barbara <wester.barbara@epa.gov>
**Subject:** RE: "Surface waters" issue in rule pack 5

Hello,

We are currently finishing up this rule package, and putting in the final edits. After reviewing your email, we noticed that in EPA's suggested change for Wis. Admin. Code NR § 207.12(3)(2) EPA left the term water quality standard, where in NR 207.12(3)(1)(b) EPA suggested changing the term back to "designated use." We were wondering if there was a reason for the use of the two different terms. I attempted to call Candice, but it appears that she is out of the office. Is there anyone at EPA that is familiar with this issue to speak with?

Thank you,

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Andrew J. Simek
Attorney —Bureau of Legal Services
Wisconsin Department of Natural Resources
Phone: (608) 264-6009
Andrew.Simek@wisconsin.gov

dnr.wi.gov

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**From:** Bauer, Candice [mailto:bauer.candice@epa.gov]
**Sent:** Tuesday, June 27, 2017 2:07 PM

**To:** Simek, Andrew J - DNR <Andrew.Simek@wisconsin.gov>; Nyffeler, Robin T - DNR <Robin.Nyffeler@wisconsin.gov>
**Cc:** Knutson, Jason R - DNR <Jason.Knutson@wisconsin.gov>; Stocks, Adrian G - DNR <Adrian.Stocks@wisconsin.gov>; Wester, Barbara <wester.barbara@epa.gov>; Compton, Mark <compton.mark@epa.gov>
**Subject:** RE: "Surface waters" issue in rule pack 5

Andrew- We have reviewed the proposed changes below and are providing our preliminary input below; however, we note that our review of this issue is strictly a side-by-side comparisons of the regulations without knowing the intent of the proposed revisions or whether the State has other rationale (other than stakeholder input) to request the changes. As such, please let us know if you would like to discuss this further if you think that our comments have not fully considered the issue as you understand it.

1) Regarding antibacksilding as it is applied to impaired waters with an approved TMDL, proposed Wis. Admin. Code NR § 207.12(3)(1(b) provides for a less stringent water quality based effluent limit when a "designated use" that is not being attained is appropriately removed or revised. As initially proposed, Wis. Admin. Code NR § 207.12(3)(1(b) is in keeping with its federal analog 33 U.S.C. § 1313(d)(4)(A)(ii) as both provisions utilize the term "designated use."

Your email below suggests that in Wis. Admin. Code NR § 207.12(3)(1(b) the term "designated use" instead be replaced with "water quality standard." However, EPA notes that water quality standards are based on both a water's designated use and water quality criteria in both Wisconsin (Wis. Stat. § 281.15) and EPA rules (40CFR131). Specifically, a "water quality standard" can be revised by changing a water's designated use or its water quality criteria, providing multiple avenues to a less stringent limit through the antibacksliding rules of Wis. Admin. Code NR § 207.12(3)(1(b). However, revising a "designated use" is the sole means to a less stringent limit through the corresponding antibacksliding rules of 33 U.S.C. § 1313(d)(4)(A)(ii). Thus, utilizing "water quality standard" in Wis. Admin. Code NR § 207.12(3)(1(b) appears to be less stringent than and, thus, inconsistent with 33 U.S.C. § 1313(d)(4)(A)(ii), which utilizes the term "designated use."

2) Wis. Admin. Code NR § 207.12(3)(2) provides for a less stringent water quality based effluent limitation for impaired waters that lack a federally approved TMDL in certain situations. One such situation is under Wis. Admin. Code NR § 207.12(3)(2)(b), which provides, "The water quality standard that is not being attained has been removed or revised in

accordance with state regulatory procedures and approved by the EPA." Because antidegradation and other considerations would apply to the less stringent limit, EPA suggests the following changes to the proposed rule:

The water quality standard that is not being attained has been removed or revised in accordance with state regulatory procedures and approved by the EPA, and the resulting less stringent limit would be subject to Wis. Admin. Code NR § 207.12(3)(3).

I hope this input is helpful. Please let me know if you have questions or would like to discuss further.

Candice

**********

Candice R. Bauer, Ph.D.

Chief, Section 2

NPDES Branch, EPA Region 5, WN-15J

77 W. Jackson Blvd., Chicago, IL 60604

Office Phone: 312-353-2106, Fax: 312-697-2668

**From:** Simek, Andrew J - DNR [mailto:Andrew.Simek@wisconsin.gov]
**Sent:** Wednesday, June 21, 2017 5:08 PM
**To:** Bauer, Candice <bauer.candice@epa.gov>; Nyffeler, Robin T - DNR <Robin.Nyffeler@wisconsin.gov>
**Cc:** Knutson, Jason R - DNR <Jason.Knutson@wisconsin.gov>; Stocks, Adrian G - DNR <Adrian.Stocks@wisconsin.gov>; Wester, Barbara <wester.barbara@epa.gov>; Compton, Mark <compton.mark@epa.gov>
**Subject:** RE: "Surface waters" issue in rule pack 5

Candice,

Thank you for your response to our other questions. We appreciate your help with this rule package. Today, we met with some stakeholders to discuss their comments regarding the antibacksliding section of the rule, and they suggested the following edits, in blue, to NR 207.12(3). I have attached the proposed edits as well for your review. This proposed change replaces the term "designated use" with "water quality standards." S. 281.15, Wis. Stats. states in pertinent part that "[w]ater quality shall consist of the designated uses of the waters or portions thereof and the water quality criteria for those waters based upon the designated use." Please let me know if EPA has any comments or questions on these proposed edits.

**(3)** RELAXING A WATER QUALITY BASED LIMITATION OR A LIMITATION BASED ON A STATE TECHNOLOGY BASED TREATMENT STANDARD. (a) *General.* Any effective water quality based effluent limitations, including those based upon a total maximum daily load or other wasteload allocation, or a limitation based on a state technology based treatment standard may be relaxed in a reissued, revoked and reissued, or modified permit if the requirements of sub. (1) (a) and (b) are met and, for an increased water quality based effluent limitation, one of the following requirements is satisfied:

1. 'Impaired waters and TMDL based limitations.' For discharges of a pollutant to a receiving water or downstream water that is listed as an impaired water for the pollutant, any water quality based effluent limitation that is based upon a federally approved total maximum daily load for the pollutant may be made less stringent, provided at least one of the following applies:

a. Other wasteload allocated limitations for one or more dischargers to the impaired receiving water or downstream water are also adjusted so, cumulatively, the total maximum daily load allocations will still assure the attainment of water quality standards.

b. The water quality standard ~~designated use~~ that is not being attained has been removed or revised in accordance with state regulatory procedures and approved by the U.S. environmental protection agency (EPA).

2. 'Impaired water and no federally approved TMDL developed'. For discharges of a pollutant to a receiving water or downstream water that is listed as an impaired water for the pollutant but where a total maximum daily load has not yet been developed and approved by the EPA for the pollutant, a water quality based effluent limitation for the pollutant may be made less stringent, provided at least one of the following applies:

a. The increased discharge will be offset through a trade or other means with another discharge of the same pollutant to the impaired water. The offset must be approved by the department and implemented prior to the increase.

b. The water quality standard that is not being attained has been removed or revised in accordance with state regulatory procedures and approved by the EPA.

3. 'Other waters that attain the water quality standard.' For discharges of a pollutant to a surface water where neither the immediate receiving water or downstream water is an impaired water for the pollutant, any water quality based effluent limit, including a limitation based upon a total maximum daily load or other wasteload allocation, may be made less stringent provided water quality standards, including designated uses and antidegradation, are met.

Thank you,

Andrew Simek

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Andrew J. Simek
Attorney —Bureau of Legal Services
Wisconsin Department of Natural Resources
Phone: (608) 264-6009
Andrew.Simek@wisconsin.gov

dnr.wi.gov

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**From:** Bauer, Candice [mailto:bauer.candice@epa.gov]
**Sent:** Wednesday, June 21, 2017 10:03 AM
**To:** Nyffeler, Robin T - DNR <Robin.Nyffeler@wisconsin.gov>
**Cc:** Knutson, Jason R - DNR <Jason.Knutson@wisconsin.gov>; Simek, Andrew J - DNR <Andrew.Simek@wisconsin.gov>; Stocks, Adrian G - DNR <Adrian.Stocks@wisconsin.gov>; Wester, Barbara <wester.barbara@epa.gov>; Compton, Mark <compton.mark@epa.gov>
**Subject:** RE: "Surface waters" issue in rule pack 5

Hi Robin and others. After talking further with my staff, we have the following input on the two questions you have sent as follow-up to our call this week.

First, you raised the additional question in red below in response to our response to your first question on antibacksliding…

Stakeholders suggested that mistaken information cannot be used to justify relaxation of a WQBEL and cites EPA's permit writer manual. WDNR would like to know if EPA is aware of such a provision. The relevant provision is 402(o)(2)(B)(ii). While technical mistakes can be a rationale for relaxing a limit under 402(o)(2) for the types of limits specified in 402(o)(1), the fact that 402(o)(2)(B)(ii) on technical mistakes provides that this exception can be used only in the case of limits established under 402(a)(1)(B), which does NOT include WQBELS, means that technical mistakes cannot be used as a basis for modifying a WQBEL. Can you please describe or identify the types of limits that are established under 33 USC 1342(a)(1)(B)? Is it only BPJ limitations? Note that the language in 33 USC 1342(o)(2) that begins as follows: "*Subparagraph (B) shall not apply to any revised wasteload allocation or alternative grounds for translating water quality standards into effluent limitations….*" seems to indicate that 33 USC 1342(o)(2)(B)(ii) could also apply to relaxation of wqbels, but the allowance to relax based on technical mistakes is very limited. Our response to your question "is it only BPJ limitation" is yes (as 33 USC 1342(a)(1)(B) only relates to BPJ limitations).

Second, while the changes below to sections NR 220.15 address our comment that the term "surface water of the state" is not defined, we note that the definition of surface water, similar to the definition of water of the state, is not consistent with the term "waters of the US" as outlined in issue 58 of the LAR. While our LAR issues did not note inconsistencies between the term surface water and water of the US previously, Wisconsin's incorporation of this definition into the NPDES regulations would raise concerns on the definition of surface water, like we raised in Issue 58. As such, we believe that the recommendation we provided earlier would ensure that, when issue 58 is resolved, this provision would be fully consistent with the federal regulations and not add to the list of issues that need to be resolved in the future.

Please let us know if you would like to follow-up further on these or other issues.

Candice

**********

Candice R. Bauer, Ph.D.

Chief, Section 2

NPDES Branch, EPA Region 5, WN-15J

77 W. Jackson Blvd., Chicago, IL 60604

Office Phone: 312-353-2106, Fax: 312-697-2668

**From:** Nyffeler, Robin T - DNR [mailto:Robin.Nyffeler@wisconsin.gov]
**Sent:** Tuesday, June 20, 2017 9:38 AM
**To:** Bauer, Candice <bauer.candice@epa.gov>
**Cc:** Knutson, Jason R - DNR <Jason.Knutson@wisconsin.gov>; Simek, Andrew J - DNR <Andrew.Simek@wisconsin.gov>; Stocks, Adrian G - DNR <Adrian.Stocks@wisconsin.gov>
**Subject:** "Surface waters" issue in rule pack 5

Does the edited language below address EPA's concern regarding use of the term "surface water"? See changes in red and highlighted yellow. At the bottom of the email, the definition of surface waters that is contained in s. NR 101.03(12) is included. Also, after today, if you have questions on rule package 5, please contact Andrew Simek or Jason Knutson. I will be out of the office beginning on June 22 and won't return until July 10.

SECTION 21. NR 220.15 is repealed and recreated to read:

**NR 220.15 Disposal of pollutants into publicly owned treatment works, land treatment systems, or land application of wastewater. (1)** In this section, " surface water" has the meaning in s. NR 101.03(12).

(2) When part of a discharger's process wastewater is not being discharged into surface waters of the state because it is disposed into a POTW, into a land treatment system, or via land

application of wastewater, thereby reducing the flow or level of pollutants being discharged into a surface water ~~of the state~~, applicable effluent standards and limitations for the discharge in a WPDES permit shall be adjusted to reflect the reduced raw waste resulting from such disposal. Effluent limitations and standards in the permit shall be calculated by one of the following methods:

(a) If none of the waste from a particular process is discharged into surface waters ~~of the state~~, and effluent limitations guidelines provide separate allocation for wastes from that process, all allocations for the process shall be eliminated from calculation of permit effluent limitations or standards.

(b) In all cases other than those described in par. (a), effluent limitations shall be adjusted by multiplying the effluent limitation derived by applying effluent limitation guidelines to the total waste stream by the amount of wastewater flow to be treated and discharged into surface waters ~~of the state~~, and dividing the result by the total wastewater flow. This method is expressed algebraically as:

$$P = \frac{E \times N}{T}$$

Where:

P is the final, adjusted permit effluent limitation,

E is the limitation derived by applying effluent guidelines to the total wastestream,

N is the wastewater flow to be treated and discharged to surface waters, and

T is the total wastewater flow.

(c) In addition to the adjustment in par. (b), effluent limitations and standards may be further adjusted under a fundamentally different factors variance under s. NR 220.20 to make them more or less stringent if discharges to POTWs or land treatment systems change the character or treatability of the pollutants being discharged.

**Note:** "Land treatment system" is defined in s. NR 214.03 (24). Wells as defined in s. NR 812.05 (1) (b) are not land treatment systems. Disposal of pollutants into wells is prohibited by s. NR 812.05.

**(2)** Sub. (1) does not apply to the extent that effluent limitations guidelines do any of the following:

(a) Control concentrations of pollutants discharged but not mass.

(b) Specify a different specific technique for adjusting effluent limitations to account for land application or disposal into POTWs.

**(3)** This section does not alter a permittee's obligation to meet any more stringent limitations or requirements established under other WPDES permit program regulations, including those under chs. NR 204 and 214.

Here is the definition of surface water in s. NR 101.03(12). It is almost identical to our state definition of "waters of the state" except "groundwater" and "wells" have been removed.

**(12)** "Surface water" means those portions of Lake Michigan and Lake Superior within the boundaries of Wisconsin, all lakes, bays, rivers, streams, springs, ponds, impounding reservoirs, marshes, water courses, drainage systems and other surface water, natural or artificial, public or private within the state or under its jurisdiction, except those waters which are entirely confined and completely retained upon the property of a facility.

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Robin T. Nyffeler
Attorney – Bureau of Legal Services
Wisconsin Department of Natural Resources
Phone: (608) 266-0024

Fax: (608) 266-6983
robin.nyffeler@wisconsin.gov

dnr.wi.gov

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